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February 6, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal
Date of Filing: October 14, 2003
Case No.: TIA-0032

XXXXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The applicant was a DOE contractor employee at a DOE facility from 1970 to 1997. The OWA referred the application to an independent physician panel, which determined that the applicant did not have illnesses related to his work at DOE. The OWA accepted the panel's determination. The applicant filed the instant appeal.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. The Act provides for two programs.

The Department of Labor (DOL) administers the first program, which provides \$150,000 and medical benefits to certain workers with specified illnesses. Those workers include DOE and DOE contractor employees who worked at DOE facilities and contracted specified cancers associated with radiation exposure. 42 U.S.C. § 73411(9). A worker is eligible for an award if the worker was a "member of the Special Exposure Cohort" or if DOL determines that the worker sustained the cancer in the performance of duty. *Id.* The DOL program also provides \$50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure

Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. See 42 U.S.C. § 7384u. To implement the program, the DOL has issued regulations, 20 C.F.R. Part 30, and has a web site that provides extensive information concerning the program. 1/

The DOE administers the second program, which does not provide for monetary or medical benefits. Instead, it is intended to aid DOE contractor employees in obtaining workers' compensation benefits under state law. Under the DOE program, an independent physician panel assesses whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3). In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3). To implement the program, the DOE has issued regulations, which are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The OWA is responsible for this program and has a web site that provides extensive information concerning the program. 2/

The applicant was employed at a DOE facility as a janitor and structural group tradesman from 1970 to 1997. In 1997, the applicant retired on disability. In his application, he identified a number of claimed illnesses, which he attributed to working around toxic dusts and chemicals at DOE, and he specifically mentioned a December 1985 incident involving exposure to fumes.

In its report, the physician panel identified a number of claimed illnesses. They are dyspnea, multiple chemical sensitivities and exposures associated with toxic encephalopathy, chronic sinusitis, induced food intolerance, gastrointestinal symptoms, difficulty concentrating, fibromyalgia, chronic fatigue syndrome, pulmonary fibrosis, obstructive sleep apnea, and depression.

The panel found that the applicant did not have an illness that arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility. The panel explained the basis for its determination as follows.

1/ See www.dol.gov/esa.

2/ See www.eh.doe.gov/advocacy.

Two panelists thought there was insufficient documentation to support any work relatedness to the claims. [The applicant] was very thoroughly evaluated by multiple specialists from the mid 1980's to the mid 1990's none of whom could arrive at any definitive association between work conditions and his symptoms, nor could they substantiate his claimed illnesses.

One panelist thought there were "at least as likely as not" work related conditions that could have caused the lung disease as well as the psychological impairment. This was based upon [the applicant's] premorbid state of health, the temporal relationship of the progression of his symptoms while working at [DOE], neuropsychological testing possibly consistent with toxic induced brain dysfunction, and possible chronic dust exposure that might have contributed to this pulmonary and sinus conditions. No association was found between work and the remainder of his claims and diagnosis.

Report at 1. The panel described the split in the panel as follows:

Drs. Kramer and Stein voted NO. Dr. Green voted YES as per the above arguments. Therefore, the majority opinion is that [the worker's] claims/illnesses did not arise from conditions at (DOE) because his claims were mostly unilateral and with insufficient support from independent expert sources.

Id. Finally, in response to the request to provide "any evidence presented that is contrary to the final panel decision, and why the panel finds it not to be persuasive" the panel answered "NA" or not applicable. *Id.*

The OWA accepted the physician panel's determination. See September 12, 2003 Letter from the DOE to the applicant. Accordingly, the OWA determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits.

In his appeal, the applicant contends that the determination states an erroneous standard of review and is contrary to the medical records submitted in conjunction with the application. These arguments are addressed below.

II. Analysis

A. The Standard of Review

The panel did not clearly apply the correct standard. The panel is to determine whether it is at least as likely as not that exposure to toxic substances at DOE was a significant factor in causing, contributing to, or aggravating an illness. 10 C.F.R. § 852.8. The panel stated:

Two panelists thought there was insufficient documentation to support any work relatedness to the claims. [The applicant] was very thoroughly evaluated by multiple specialists from the mid 1980's to the mid 1990's none of whom could arrive at any definitive association between work conditions and his symptoms, nor could they substantiate his claimed illnesses.

. . . . Therefore, the majority opinion is that [the applicant's] claims/illnesses did not arise from conditions at (DOE) because his claims were mostly unilateral and with insufficient support from independent expert sources.

Report at 1. This wording is problematic in two ways. First, the way in which the panel referred to the worker's evaluation by medical specialists suggests that the panel relied on those evaluations rather than making its own independent determination. Second, the panel's reference to the lack of a "definitive" association between the worker's symptoms and his work reflects a different, and arguably higher, standard than the "at least as likely as not" standard. 10 C.F.R. § 852.8. Accordingly, it is not clear that the panel applied the correct standard.

B. The Panel's Findings

The panel did not adequately state the basis for its determination, 10 C.F.R. § 852.12. In general, where a panel makes inaccurate statements about significant evidence, the basis for the ultimate determination is unclear. In this case, the panel stated that "none" of the specialists who saw the worker could substantiate an illness or its work-relatedness, but that statement is incorrect. Some of the specialists found evidence of brain dysfunction, pulmonary disease, and multiple chemical sensitivities. In 1989, a neurotoxicologist found "organic brain dysfunction, suspect hypoxia" and stated that, "[i]n the absence of additional information to the contrary, the presumed cause was: an incident

on or about December 1985 to January 1986." 3/ In 1991, a radiology report on chest studies gave its impression as follows:

1. Extensive volume loss consistent with restrictive lung disease and if the history is positive for asbestos exposure, the exam would be positive for asbestosis.
 2. Evidence of cor pulmonale.
- 4/

In 1993, a neurotoxicologist stated that he administered the Neurotoxicity Screening Survey, and that the results were consistent with the symptoms reported by people with diagnosed neurotoxicity. 5/ During 1996 and 1998, a physician, board-certified in environmental medicine, diagnosed the worker as suffering from multiple chemical sensitivities as the result of toxic exposures at work. 6/ The panel's inaccurate characterization of the foregoing raises the question of how it would have viewed the evidence, particularly in light of an industrial hygiene report identifying a number of toxic substances to which the worker may have been exposed. 7/

III. Summary and Conclusion

As the foregoing indicates, the panel did not clearly apply the correct standard, and the panel incorrectly characterized significant evidence. Accordingly, the determination should be

3/ See Lawrence F. Wilson, Ph.D (Clinical Neuropsychologist) Psychology Consultation Report: Neuropsychological Evaluation dated August 25, 1989, at 4.

4/ See National Jewish Center Radiology Report dated May 20, 1991; see also National Jewish Center Occupational/ Environmental Medicine Clinic Summary dated May 21, 1991, at 7.

5/ See Letter by Raymond Singer, Ph.D ABPN (Neuropsychology) and Neurotoxicologist dated April 18, 1993.

6/ See Letter by Dr. William A. Shrader dated August 21, 1996, at 1; see also Letters by Dr. William A. Shrader dated March 19, 1996, July 31, 1996, November 27, 1996, and April 21, 1998.

7/ See Industrial Hygiene Services Investigation Report dated May 16, 1990.

remanded to the physician panel for a new determination that clearly applies the correct standard and that addresses the evidence identified above.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0032 be, and hereby is granted as set forth in paragraph 2 below.
- (2) The application that is the subject of this appeal is hereby remanded to the Office of Worker Advocacy for resubmission to the physician panel and a new determination.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 6, 2004

