

December 18, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal
Date of Filing: October 16, 2003
Case No.: TIA-0033

XXXXXXXXXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, the appeal should be denied.

I. Background

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

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. Generally, if a physician panel issues a determination favorable to

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

the employee, the DOE Office of Worker Advocacy accepts the determination and assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. See 67 Fed. Reg. 52841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). As stated above, the DOE Office of Worker Advocacy is responsible for this program.

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office not to accept a Physician Panel determination in favor of an applicant. The instant appeal is filed pursuant to that Section. Specifically, the applicant seeks review of a negative determination by a Physician Panel that was accepted by the Program Office. 10 C.F.R. § 852.18(a)(2). See *Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In his application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted that he worked at the DOE's Los Alamos National Laboratory in Los Alamos, New Mexico from 1974 through 1994. During that time, he worked as a mechanical welder. In connection with his employment he claims exposure to "toxic odors." He stated that as a result of his employment, he suffers from chronic obstructive pulmonary disease and beryllium exposure.

The Physician Panel issued a negative determination on this claim. The Panel found as follows: "[the applicant's] conditions did not arise out of and in the course of employment by a DOE employer and exposure to a toxic material at a DOE facility." In this regard the Panel stated that there was no evidence of either beryllium sensitivity or berylliosis. The Panel links the individual's chronic obstructive pulmonary disease to his habit of smoking a pack of cigarettes a day.

II. Analysis

As noted above, the Physician Panel found that "[the applicant's] conditions did not arise out of and in the course of employment by a DOE employer and exposure to a toxic material at a DOE facility." Specifically, the Panel indicated that it considered whether it was at least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker. The Panel responded to this issue in the negative.

The applicant seeks review of this determination. He believes that his chronic obstructive pulmonary disease was caused by inhaling fumes from the exhaust fans throughout his work site. Other than stating his belief, he provides no support for this contention.

The applicant's belief, with nothing more, is not convincing. It does not establish any deficiency or error in the Panel's determination. While the record here indicates that the applicant was exposed to some toxic substances during his employment, there is no indication that the Panel failed to consider these exposures in reaching its determination that the applicant's condition was not caused by any work related toxic exposures at a DOE facility.

Because the applicant has not identified a deficiency or error in the Panel's determination, there is no basis for an order remanding the matter to OWA for a second Panel determination. Accordingly, the appeal should be denied.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0033 be, and hereby is, denied.
- (2) This is a final Order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: December