

**\* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

**December 16, 2003  
DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS**

*Appeal*

**Name of Case: Worker Appeal**

**Date of Filing: November 26, 2003**

**Case No.: TIA-0036**

**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 website that provides extensive information concerning the program.<sup>1/</sup>**

**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**

---

**<sup>1/</sup> See [www.eh.doe.gov/advocacy](http://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 has worked at the DOE's Rocky Flats Plant in Golden, Colorado since 1970, and is still presently employed there. During that time, he has worked as a radiological control technician. In connection with his employment he claims exposure to radioactive, hazardous and toxic materials on a routine basis. He has stated that as a result of his employment, he suffers from fibromyalgia, including chest pains during deep breathing, and beryllium sensitivity.

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 specifically stated that laboratory testing did not show positive Beryllium lymphocyte proliferation tests. 2/ The Panel

---

2/ The Panel did note that the applicant had one beryllium  
(continued...)

further determined that “with a reasonable degree of medical certainty [the applicant’s] diagnosis of Fibromyalgia is not causally related to or aggravated by [his] work exposures or work activities.”

## *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 believes that this determination was incomplete. He claims that the Panel failed to consider that his health problems were caused by the combined effects of exposure to radionuclides and other toxic materials such as carbon tetrachloride, trichlorethylene, nitric acid, sulfuric acid, beryllium, asbestos, fluorine gas, tritium catalyzed paints, lead, toluene, hydrogen peroxide and cyanide. The applicant states that these materials were present in his work area, but that there was no industrial hygiene monitoring at his work site from 1970 to 1985.

The applicant’s claims do not establish any deficiency or error in the Panel’s determination. The exposures cited by the applicant are included in the record reviewed by the Panel. There is no evidence indicating that the Panel failed to consider the combined effects of these exposures in reaching its determination that the applicant’s condition was not caused by any work related 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.

---

2/ (...continued)  
lymphocyte proliferation test (Be-LTT) panel that was considered borderline, and determined that “testing does not conclusively indicate positive Be-LTT blood testing.”

**IT IS THEREFORE ORDERED THAT:**

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0036 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 16, 2003**