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June 25, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal
Date of Filing: February 6, 2004
Case No.: TIA-0048

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. An independent physician panel (the Physician Panel or the Panel) found that the Applicant did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

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 illnesses include beryllium disease and specified cancers associated with radiation exposure. 42 U.S.C. § 73411(9). 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 itself provide any 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/

B. Factual Background

The Applicant has been diagnosed with sarcoidosis. The record contains a report on that illness by the National Heart, Blood, and Lung Institute of the National Institute of Health. Record at 1006-19. The report describes the disease as causing inflammation that produces small lumps (also called nodules or granulomas) in the tissues. Record at 1006-07. The report states that the cause of the disease is not known. Record at 1008. Finally, the report states that some other diseases produce sarcoidosis-like reactions:

The doctor confirms the diagnosis of sarcoidosis by eliminating other diseases with similar features. These include berylliosis (a disease resulting from exposure to beryllium metal), tuberculosis, farmer's lung disease (hypersensitivity pneumonitis), fungal infections, rheumatoid arthritis, rheumatic fever, and cancer of the lymph nodes (lymphoma).

1/ See www.dol.gov/esa.

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

Record at 1010. Accordingly, if a patient with sarcoidosis-like lung symptoms tested positive for beryllium sensitivity, the patient would have a diagnosis of beryllium disease.

The Applicant was employed as a laborer and clerk by DOE contractors at the X-10 plant at the DOE's Oak Ridge facility. The Applicant began working at the site in 1974 at the age of 18; his employment ended in 1988 at the age of 32. When his employment ended, he applied for disability benefits. Record at 12, 28, 976-77. See also Record at 974, 1109. He also filed for state workers' compensation benefits, based on a back injury and on a diagnosis of sarcoidosis. Record at 980-84. With respect to the sarcoidosis, he maintained that his work included planting pine trees and he was exposed to fungus in pine pollen. Record at 982-83.

In his application to the DOE, the Applicant listed sarcoidosis as his claimed illness. Record at 2. With respect to his exposures, the Applicant stated that he "worked [at] burial grounds, worked around asbestos, worked in hot cells (bldg. 3017)." Record at 9. The file includes extensive medical documentation concerning the diagnosis of sarcoidosis. The file also contains the results of a beryllium sensitivity test, which was negative. Record at 861-62.

In addition to his DOE application, the Applicant filed a claim at DOL based on sarcoidosis. Record at 5. The record contains information on the case development phase of that proceeding. Record 951, 962-64. During that phase, the DOL noted that sarcoidosis was not a covered disease under its program, but stated that it would consider whether the Applicant had chronic beryllium disease. The most recent DOL document in the record indicates that DOL furnished the Applicant's records to a physician for review. Although no further DOL information is in the record, the Applicant, on appeal, states that DOL did find that he has chronic beryllium disease.

In considering the DOE application, the Physician Panel found that the Applicant had sarcoidosis, but the Panel did not render a positive determination. Instead, the Panel found that the sarcoidosis was not related to a toxic exposure at DOE. The Panel specifically considered whether the Applicant might have beryllium disease. The Panel stated:

Patient worked in a DOE facility (Oak Ridge) where beryllium was used prior to developing disease, and he reported personal

exposure to beryllium. Records obtained from OWA indicate that beryllium had been used at the facility where he was employed.

He had a biopsy-proven diagnosis of sarcoidosis. He was treated for sarcoidosis with prednisone, which can lead to aseptic necrosis of the femoral head. He did develop this condition, requiring hip surgery.

His medical records indicate one beryllium test which appears to be a blood lymphocyte transformation test for beryllium. The test would be expected to be positive for beryllium disease - which is clinically very similar to sarcoidosis. In his medical record, this test is reported as negative.

Based on this available information, the patient's sarcoidosis does not appear to have been caused by occupational exposures. However, if he has further testing for beryllium sensitization, either blood or broncho-alveolar lavage, which is positive, then his case should be re-reviewed.

Report at 1. The OWA accepted the Physician Panel's determination. See OWA February 2, 2004 Letter. The Applicant then filed the instant appeal.

In his appeal, the Applicant maintains that the Physician Panel determination is not correct. His arguments are considered below.

II. *Analysis*

The Applicant argues that the Physician Panel determination is inconsistent with a court decision on his state workers' compensation claim. As we understand his appeal, he maintains that a lower court granted his claim, but that a higher court reversed on statute of limitations grounds. He also argues that the Panel determination is inconsistent with a DOL determination that he has chronic beryllium disease.

As an initial matter, we note that the record does not contain the court decision on the Applicant's state workers' compensation claim or the DOL determination on his DOL application. Accordingly, the Panel did not have the opportunity to review those records.

More importantly, positive determinations or medical opinions in other contexts do not, themselves, indicate Panel error. The Physician Panel Rule requires that the independent physicians, who are panel members, render an opinion. 10 C.F.R. § 852.10. Because the physicians are rendering an opinion, the existence of contrary opinions or determinations do not, themselves, indicate Panel error.

In this case, we see no basis for finding Panel error. The Panel agreed that the Applicant had the claimed illness - sarcoidosis - so the only remaining issue is whether that illness is related to a toxic exposure at DOE. The Panel brought its expertise to bear on that issue, and we find no basis for concluding that it erred.

The Applicant originally attributed his sarcoidosis to planting pine trees - specifically exposure to a fungus in pine pollen. The record indicates that the cause of sarcoidosis is unknown, Record at 1008, and the record does not have a more specific diagnosis linking his illness to a fungus in pine pollen.

The Applicant now attributes his condition to beryllium exposure. As indicated above, the cause of sarcoidosis is unknown, and the Panel relied on the Applicant's negative test result for beryllium sensitivity in concluding that the record did not indicate that he had beryllium disease. The Panel specifically stated that if a future test was positive, the case should be re-reviewed. The Panel's reliance on the Applicant's negative beryllium sensitivity test is consistent with statutory and regulatory recognition of the probative value of the test. See 42 U.S.C. § 73841(13); 64 Fed. Reg. 68,854, 68,856 (1999) (DOE Chronic Beryllium Disease Prevention Program).

In sum, we see no basis for finding the Panel's determination was in error or was arbitrary and capricious. If the Applicant has addition information about his condition, or if he obtains a positive beryllium sensitivity test in the future, he may request further panel review based on that information.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0048 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: June 25, 2004