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March 12, 2004  
DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal  
Date of Filing: February 27, 2004  
Case No.: TIA-0055

XXXXXXXXXXXXXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Worker Advocacy Office for DOE assistance in filing for state workers' compensation benefits based on the employment of her late father, XXXXXXXXXXXXXXXX. The DOE Worker Advocacy Office determined that the applicant was not a DOE contractor employee and, therefore, was not eligible for DOE assistance. The applicant appeals that determination. As explained below, we have concluded that the determination is correct.

*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. The Act creates two programs for workers.

The Department of Labor (DOL) administers the first EEOICPA program, which provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. See 42 U.S.C. § 7384l(1). The DOL program also provides federal monetary 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.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, the DOE program provides for an independent physician panel assessment of whether a "Department of Energy contractor employee" has an illness related to exposure to a toxic substance at a DOE facility. 42 U.S.C. § 7385o. 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).

The DOE program is specifically limited to DOE contractor employees who worked at DOE facilities. The reason is that the DOE would not be involved in state workers' compensation proceedings involving other employers.

The regulations for the DOE program are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The DOE Worker Advocacy Office is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Pursuant to an Executive Order, 2/ the DOE has published a list of facilities covered by the DOL and DOE programs, and the DOE has designated next to each facility whether it falls within the EEOICPA's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 68 Fed. Reg. 43,095 (July 21, 2003) (current list of facilities). The DOE's published list also refers readers to the DOE Worker Advocacy Office web site for additional information about the facilities. 68 Fed. Reg. 43,095.

This case involves the DOE program, i.e., the program through which DOE contractor employees may obtain independent physician panel determinations that their illness is related to their exposure to a toxic substance during their employment at a DOE facility. The applicant states that the worker was employed by Bethlehem Steel

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1/ See [www.eh.doe.gov/advocacy](http://www.eh.doe.gov/advocacy).

2/ See Executive Order No. 13,179 (December 7, 2000).

from approximately 1936 to 1978, and that the worker became ill as a result of that employment.

The DOE Office of Worker Advocacy determined that the worker was not employed by a DOE contractor at a DOE facility. Instead, the DOE Office of Worker Advocacy indicated that the worker was employed at an atomic weapons employer facility. See January 9, 2004 letter from DOE Office of Worker Advocacy to the applicant. Accordingly, the DOE Office of Worker Advocacy determined that the worker was not eligible for the physician panel process. In the appeal, the applicant disagrees with that determination.

## *II. Analysis*

### *A. Worker Programs*

As an initial matter, we emphasize that the DOE physician panel process is separate from state workers' compensation proceedings. A DOE decision that an applicant is not eligible for the DOE physician panel process does not affect (i) an applicant's right to file for state workers' compensation benefits or (ii) whether the applicant is eligible for those benefits under applicable state law.

Similarly, we emphasize that the DOE physician panel process is separate from any claims made under other statutory provisions. Thus, a DOE decision concerning the physician panel process does not affect any claims made under other statutory provisions, such as programs administered by DOL and DOJ.

We now turn to whether the applicant in this case is eligible for the physician panel process.

### *B. Whether the Applicant is Eligible for the DOE Physician Panel Process*

As explained above, the DOE physician panel process is limited to DOE contractor employees. In order to be a DOE contractor employee, a worker must be employed by a firm that manages or provides other specified services at a DOE facility, and the worker must actually be employed at the DOE facility. As explained below, the Bethlehem

Steel plant was not a DOE facility and, therefore, the worker was not a DOE contractor employee.

The DOE facility list indicates that the Bethlehem Steel plant was not a DOE facility. The DOE facility list includes the plant but identifies the plant as an "atomic weapons employer facility" (AWE) from 1949 to 1952. The DOE description states that in 1949 the plant developed rolling mill pass schedules to be used in the planned uranium milling operation at DOE's Fernald facility. The description also states that the plant performed uranium rolling experiments to help design the Fernald rolling mill. 3/ This description is consistent with DOE's report on the plant under the Formerly Utilized Sites Remedial Action Program (FUSRAP). See FUSRAP Considered Sites Database Report, [www.em.doe.gov](http://www.em.doe.gov) (searchable database) (accessed April 7, 2003).

In prior decisions, we have held that the Bethlehem Steel plant was not a DOE facility. See *Worker Appeal*, Case No. TIA-0010, 28 DOE ¶ 80,261 (2003). In that case, we noted that under the EEOICPA and the Physician Panel Rule, a DOE facility is a facility (i) where DOE or its predecessors 4/ conducted operations and (ii) where DOE had a proprietary interest or contracted with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services. 42 U.S.C. § 7380 (1)(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). We concluded that the DOE description of the work at the plant did not indicate that DOE conducted operations at the plant, had a proprietary interest in the plant, or had a contract with the entity to provide management and operation, management and integration, environmental remediation services, construction or maintenance services. Accordingly, we concluded that the plant did not fall within the definition of a DOE facility. *Worker Appeal*, 28 DOE at 80, 841, slip op. at 4. This same analysis applies to the instant appeal. Thus, the Bethlehem Steel plant was not a DOE

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3/ The Fernald rolling mill began operations in 1952. The DOE's web site contains a report describing DOE facility operations, including Fernald. See [www.eh.doe.gov/legacy](http://www.eh.doe.gov/legacy).

4/ DOE predecessors include the Manhattan Engineering District, the Atomic Energy Commission, and the Energy Research and Development Administration. See 10 C.F.R. § 852.2 (a definition of DOE).

facility and its workers are not eligible for the DOE physician panel process. This makes sense because DOE would not be involved in any state workers' compensation proceeding involving the plant and its workers.

As the foregoing indicates, the worker was not employed at a DOE facility and, therefore, the applicant is not eligible for DOE assistance in filing for state workers' compensation benefits. Again, we emphasize that this determination does not affect whether the applicant is eligible for (i) state workers' compensation benefits or (ii) federal monetary and medical benefits available under other statutory provisions.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0055 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: March 12, 2004

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