

* 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.

April 26, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: March 2, 2004

Case No.: TIA-0056

XXXXXXXX XXXXXXX (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. The applicant was a DOE contractor employee at a DOE facility. Based on a negative determination from an independent Physician Panel (the 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 the employee, the DOE Office of Worker Advocacy accepts the

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

determination and instructs the contractor not to oppose the claim unless required by law to do so. The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. See 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 that the DOE's Office of Hearings and Appeals (OHA) 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 for twenty five years his work involved the inspection, testing and management of special nuclear materials at the DOE's Y-12 Plant in Oak Ridge, Tennessee. For an additional six years he worked at the Y-12 Plant as a Lab Supervisor, where he managed the nondestructive testing of metallic, nonmetallic and special nuclear materials. He was diagnosed with muscular fasciculations, chronic obstructive pulmonary disease (COPD), renal disease (kidney stones) and mild restrictive physiology. He also has reported symptoms of Central Nervous System disease including memory loss, loss of smell, muscular loss/deterioration, ringing sensation in the ears, and headache. The applicant believes that exposure to contaminants in the workplace, particularly lithium, caused these diseases.

The Panel issued a negative determination on each of the diseases listed in his claim. In each instance, the Panel concluded that the worker's illness did not arise "out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility." The Panel based this conclusion on the standard of whether it believed that "it was at least as likely as not that exposure to a toxic substance at a DOE facility during the course of the worker's employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the worker's illness or death." Physician Panel Determination.

In considering the worker's claims concerning his neurological symptoms, the Panel unanimously rejected his assertion that exposure

to lithium dust in the workplace was the cause of his symptoms. It indicated that these symptoms have a variety of causes and "there is no evidence now of a work-related cause" for those symptoms. However, it suggested that the applicant's neurologist order tests for "heavy metal poisoning."

With respect to the applicant's COPD, the Panel reviewed the submitted medical information and found "he does not seem to have COPD and has shown no evidence at all that would lead us to the conclusion that he had some other work-related lung disease." In this regard, it noted that there is no evidence in the record that the applicant has been tested for beryllium sensitivity. It also noted that although asbestos could cause a restrictive lung condition, "there are no x-ray reports suggesting stigmata of asbestosis." With respect to his kidney stones, the Panel concluded that

the information at hand does not support an occupational link with the stones. We would need information on the type of stone passed to comment further on the possibilities.

Id. at 2.

II. Analysis

The applicant seeks review of the Panel's determination. In his appeal letter, the applicant asserts that "my loss of smell was not addressed as far as I can tell in the Physicians Panel Report." He also states that he was exposed to cadmium vapors in the workplace for 15 years and believes that this could have resulted in a loss of smell. He also asserts that his loss of breathing function was caused by his exposure to perchloroethylene and other chemicals used in the cleaning process he worked in for many years with poor ventilation. He continues to assert that his central nervous system damage may have been caused by the "numerous solvents, epoxies, mercury, uranium dust, PCBs, and other toxic substances during my 31 years working at the Oak Ridge facilities. . ." He believes that his exposure to lithium hydride caused several of these symptoms. Finally, he questions why the Panel noted that he declined a termination physical when he left his employment at the DOE's Oak Ridge facility.

The individual's assertions in his Appeal letter concerning his exposure to toxic materials in the workplace do not indicate Panel error. The Panel addressed the exposures identified in the record. In the work history section of his original application, which was

reviewed by the Panel, the applicant stated that he was routinely exposed to ionizing radiation, and worked with highly enriched uranium, low-enriched uranium, transuranic lithium, deuterium and unknown toxic materials, often without personal protective equipment. In the portion of his application entitled "Facility Data: Incident/Accident Report", which was also reviewed by the Panel, there is a medical incident report dated November 30, 2000 in which Dr. N. Allen Baines reports that the applicant feels that his neurological symptoms might be secondary to his workplace exposures to asbestos, beryllium, cadmium, epoxies, lasers, lead, mercury, nickel, plutonium, ionizing radiation and uranium. The Panel refers to these exposures at page 5 of its report. As noted above, the Panel concludes that in the absence of any medical tests indicating that the applicant has heavy metal poisoning, beryllium sensitivity or stigmata of asbestosis, there is no evidence that any of the applicant's medical symptoms are related to his exposure to toxic materials in the workplace.

Nor did the Panel neglect to consider his loss of smell. It specifically lists this symptom on pages one and two of the Report, and notes that it should be considered along with other symptoms as part of a single neurological disorder. Report at 1. Finally, the Physician Panel Report's summary of Dr. Baines' November 2000 incident report also contains the statement: "Findings: patient declined termination physical, has SOB [shortness of breath] and muscle fasciculations." This merely quotes what Dr. Baines had listed in his report under "Findings" and is no indication that the Panel attached any adverse inference to the applicant's decision to forego the termination physical.

As discussed above, the standard to be applied in these cases is whether it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to or causing the worker's illness or death. The Panel applied that standard here, and the applicant has not pointed to any data in the record either contradicting the Panel's determination or suggesting that the Panel's overall decision was in error. The applicant's beliefs, with nothing more, that his workplace exposures caused his symptoms do not establish any deficiency or error in the Panel's determination. 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/

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0056 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: April 26, 2004

2/ If the applicant receives new information to support his claims, the applicant may request a second physician panel review.