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April 6, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: March 18, 2004

Case No.: TIA-0063

XXXXXXXXXXXXXXXX (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 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 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 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 from 1991 through 1996, he worked as a designer and drafter in the engineering department at the DOE site in Oak Ridge, Tennessee. The applicant stated that he worked in the Y-12, K-25 and X-10 plants. He was diagnosed with rectal cancer in 2002. The applicant believes that exposure to radiation and other contaminants in the workplace caused this disease.

The Physician Panel issued a negative determination on this claim. The Panel found 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."

In considering the worker's disease, the Physician Panel unanimously found that "rectal cancer, is not compatible with causation by any toxic agents to which the applicant may have been exposed in the work environment."

II. Analysis

The applicant seeks review of the Panel's determination. The applicant claims that as part of his work routine he was expected to enter areas that may have been contaminated not only by radiation, but also with mercury, beryllium, or other toxic substances. He states that he was never told he was entering a hazardous environment. He believes that his cancer was caused by this exposure.

As the Panel's determination states, "the factors responsible for causing rectal cancer are uncertain. . . . There is no significant evidence to point to environmental factors other than possibly tobacco smoke and ethanol consumption as etiologic agents of rectal cancer. . . . Radiation is not known to be a causal factor in rectal cancer."

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 there is simply no evidence in the record to suggest that the Panel's conclusion was incorrect. In this regard, the applicant has not provided any information to indicate that the Panel's determination was incorrect. For example, he has not provided an assessment by his own physician indicating that the cause of his disease was exposure to toxic materials. He has not submitted any medical or scientific literature indicating that exposure to radiation, beryllium, mercury or other contaminants bears a causal relationship to the development of rectal cancer. The applicant has not pointed to any data in the record or elsewhere either contradicting the Panel's determination or suggesting that the Panel's overall decision was in error.

In sum, the applicant's beliefs, with nothing more, are not convincing. They 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.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0063 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 6, 2004