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JULY 22, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: March 19, 2004

Case No.: TIA-0064

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, and she claims that she has seven illnesses that are a result of exposure to toxic substances at a DOE facility. An independent physician panel (the Physician Panel or the Panel) rendered positive determinations on two illnesses and negative determinations on the other five. The OWA accepted the Panel's determination, and the Applicant appealed to 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 Applicable Statute and Regulations

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, one of which is administered by the DOE. 1/

The DOE program 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

1/ The Department of Labor administers the other program. See 10 C.F.R. Part 30; www.dol.gov/esa.

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). As the foregoing indicates, the DOE program itself does not provide any monetary or medical benefits.

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. The Application

The Applicant was employed as XXXXXXXXXXXX at XXXXXXXXXXXX. The Applicant was born in XXXX. She worked on the site from approximately XXXX to XXXX and from XXXX to XXXX. The Applicant sought physician panel review of illnesses that she attributes to exposure to radiation and other hazardous substances.

The OWA referred the application to a physician panel, and the Panel's determinations are reflected in an October 2003 report. The Panel report specifically discussed the Applicant's exposures to cleaning agents such as trichloroethylene or 1,1,1,-trichloroethane, radiation, industrial fluoride, and polychlorinated biphenyls (PCBs). The Panel's determinations on the illnesses were unanimous.

The Panel rendered positive determinations on chronic bronchitis and depression. The Panel found that it was at least as likely as not that the Applicant's chronic bronchitis was related to her exposure to cleaning agents such as trichloroethylene or 1,1,1,-trichloroethane, radiation, and contaminated dust. Similarly, the Panel found that it was at least as likely as not that the Applicant's depression was related to her exposure to trichloroethylene or 1,1,1,-trichloroethane.

The Panel rendered negative determinations on hypothyroidism, multiple leiomyomata (uterine tumors), osteoarthritis, fibromyalgia, and post traumatic stress disorder. The Panel found

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

that the etiology of the illness was unknown and/or that the illnesses were not related to the Applicant's exposures. The Panel found that the Applicant's monitoring data for radiation, fluoride, and PCBs were within acceptable limits.

The following is an overview of the panel's findings. 1) For hypothyroidism, the Panel discussed the common causes, referred to the possibility of a relationship between the illness and PCB exposure as a theory, and cited the Applicant's PCB results as being within acceptable limits. 2) For multiple leiomyomata, the Panel stated that one in four women were affected, and the Panel explained why it did not accept the opinion of the Applicant's physician that multiple exposures caused the illness. 3) For osteoarthritis, the Panel stated that the "cause is unknown but trauma, heredity and age are factors." The Panel again explained why it did not accept the physician's opinion that multiple exposures caused the illness. The Panel also cited the Applicant's radiation and fluoride monitoring data as being well within applicable limits. 4) For fibromyalgia, the Panel stated that the "etiology is at present unknown" and, therefore, that the Panel could not find that the illness was related to toxic exposures at DOE. 5) Finally, for Post Traumatic Stress Disorder, the Panel stated that the disorder is defined as being caused by an event, rather than by the effect of a toxic exposure.

The OWA accepted the Physician Panel's determinations. Specifically, the OWA accepted the positive determinations on chronic bronchitis and depression and the negative determinations on the other five illnesses.

The Applicant appeals OWA's acceptance of the negative determinations. The Applicant's challenges to the panel determinations are discussed below. Because of the large number of documents, our docket room numbered the record reviewed by the panel (pages 1 to 568) and the Applicant's April 15, 2004 appeal submission (pages 569 to 1012).

II. Analysis

Under the Physician Panel Rule, independent physicians render an opinion whether a claimed illness is related to a toxic exposure during employment at DOE. The Rule requires that the panel (i) make a finding whether that illness was related to a toxic exposure at DOE and (ii) state the basis for that finding. 10 C.F.R. § 852.12.

We have not hesitated to remand an application where we find panel error. For example, we have remanded applications where the Panel report did not address all the claimed illnesses, 3/ applied the wrong standard, 4/ or failed to explain the basis of its determination. 5/ On the other hand, mere disagreements with the panel's opinion do not indicate panel error. 6/

The Applicant argues that the Panel decision is incorrect. She provides a list of exposures and states that they were provided to the panel. 7/ She also states she was not monitored frequently enough to capture all her exposures and that PCB tests of coworkers workers showed elevated levels. 8/ Finally, she states that the Panel's negative determinations are inconsistent with (i) prior workers' compensation decisions approving claims for her illnesses and (ii) her physicians' opinions.

The Applicant has not identified panel error. The Panel report indicates that the Panel considered the record thoroughly. The report discussed the Applicant's exposure to cleaning solvents, radiation, fluoride, and PCBs. The report's detail indicates that the Panel brought its medical judgment to bear on the specifics of the Applicant's case. Although the Applicant argues that the panel's judgment is inconsistent with workers' compensation

3/ *Worker Appeal*, Case No. TIA-0030, 28 DOE ¶ 80,310 (2003).

4/ *Worker Appeal*, Case No. TIA-0032, 28 DOE ¶ 80,322 (2004).

5/ *Id.*

6/ *Worker Appeal*, Case No. TIA-0066, 28 DOE ¶ _____ (2004).

7/ We note that the Appeal refers to "PCB results 1/24/84." We could not find any such reference in the record sent to the Panel or in the documents submitted on Appeal. Accordingly, the cited results cannot be a basis for finding Panel error. We also note that the Appeal refers to above normal "PCB readings" in "GOODYEAR document GAT 365-83-150." We did not see any such readings, Record at 696, and other records state that the tests were normal, See Summary, DOE Occupational Safety or Healthy Complaint at GAT Regarding Employee Exposure to Polychlorinated Biphenyls (PCB) at 2, Record at 505.

8/ See discussion in footnote 7 above.

decisions on her illnesses 9/ and other medical opinions, the alleged inconsistencies are merely differing opinions on medical issues. As such, they do not provide a basis for finding panel error. Accordingly, the Appeal should be denied.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0064 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: July 22, 2004

9/ In this regard, we accept, for the sake of argument, the Applicant's assertions that she was approved for workers' compensation for the five denied illnesses.