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August 6, 2004

**DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS**

Appeal

Name of Case: Worker Appeal

Date of Filing: March 25, 2004

Case No.: TIA-0067

XXXXXXXXXXXXXXXXX (the Applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for assistance in filing for state workers' compensation benefits on behalf of his late father, XXXXXX (the Worker). The Applicant was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that most of the chemicals that the Worker was exposed to are not carcinogenic and those that are carcinogenic are not associated with prostate cancer. 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, 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 panel issues a determination favorable

^{1/}The Department of Labor administers the other program. See 20 C.F.R. Part 30; www.dol.gov/esa.

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. Procedural Background

The Worker was employed as a chemical operator and clerk at DOE's Oak Ridge K-25 and Y-12 sites. The Applicant filed an application with OWA, requesting physician panel review of the Worker's prostate cancer. The Applicant claimed that the Worker had been exposed to all chemicals at the Oak Ridge site. The Applicant stated that he specifically remembered that the Worker cleaned up mercury spills in Y-12.

The Physician Panel rendered a negative determination on the prostate cancer. The Panel stated that most of the chemicals that the Worker was exposed to are not carcinogenic. The Panel further stated that the chemicals that are carcinogenic are not associated with malignancies of the prostate gland. Finally, the Panel noted that the Worker was at the site for less than five years, during the period 1954 to 1959.

The OWA accepted the Physician Panel's determination. See OWA March 1, 2004 Letter. The Applicant filed the instant appeal. In his appeal, the Applicant maintains that the negative determination is not correct. The Applicant claims that although the Panel stated that most of the chemicals are not carcinogenic, some are, and he states that his father was the first person on his side of the family to be diagnosed with cancer. Further, the Applicant states that the Panel did not take into consideration that the Worker was assigned to the Y-12 site by the local labor union from 1957 to 1965.^{3/}

^{2/}See www.eh.doe.gov/advocacy.

^{3/}In his Appeal, the Applicant claims that the Worker was assigned by the local labor union to Y-12 from 1957 to 1965. In a submission accompanying his Appeal, he claimed that his father worked for the local labor union at K-25 from 1960 to 1980.

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 address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12.

We have not hesitated to remand an application where the Panel report did not address all the claimed illnesses,^{4/} applied the wrong standard,^{5/} or failed to explain the basis of its determination.^{6/} On the other hand, mere disagreements with the panel's opinion are not a basis for finding panel error.^{7/}

In this case, the Applicant's arguments about the Worker's exposures and risk factors are not bases for finding panel error. As mentioned above, the Physician Panel addressed the prostate cancer and considered whether the chemicals were carcinogenic. It found that those chemicals that are carcinogenic are not associated with malignancies of the prostate gland. Thus the Applicant's arguments are merely disagreements with the panel's medical judgment, rather than indications of panel error.^{8/}

Similarly, the Applicant's contention that the Worker was assigned to Y-12 for an additional period not considered by the Panel is not a basis for finding Panel error. The Oak Ridge site did not have records of employment after 1959 and, therefore, the Panel did not consider any employment beyond that period. Moreover, consideration of any additional period of employment is unlikely to affect the Panel determination unless it involves exposures not previously considered. As indicated above, the Panel found that the Worker's exposures were not associated with prostate cancer. If the Applicant believes that the additional claimed employment may have an impact on the Panel's determination, the Applicant should contact the OWA to provide documentation of that employment and to request further panel review based on that documentation.

^{4/} *Worker Appeal*, Case No. TIA-0030, 28 DOE ¶ 80,310 (2003).

^{5/} *Worker Appeal*, Case No. TIA-0032, 28 DOE ¶ 80,322 (2004).

^{6/} *Id.*

^{7/} *Worker Appeal*, Case No. TIA-0066, 29 DOE ¶ _____ (2004).

^{8/} *See Id.*

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0067 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: August 6, 2004