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August 5, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: April 1, 2004

Case No.: TIA-0073

XXXXXXX (the applicant), a former DOE contractor employee at a DOE facility, applied to the Department of Energy's (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. Based on a negative determination from an independent Physician Panel, OWA determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, the appeal is granted and the application remanded to OWA.

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) provides various forms of assistance or relief to workers currently or formerly employed by the nation's atomic weapons programs. See 42 U.S.C. §§ 7384, 7385. This case concerns Part D of the Act, which provides for a program to assist DOE 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. 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. The DOE has issued regulations to implement Part D of the Act, which are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The DOE's program implementing Part D is administered by OWA.

Generally, if a physician panel issues a determination favorable to the employee, OWA accepts the determination and instructs the contractor not to oppose the claim unless required by law to do so. For those applicants who receive an unfavorable determination, the Physician Panel Rule provides an appeal process. Under this process, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain OWA decisions. 10 C.F.R. § 852.18. The present appeal seeks

review of a negative determination by a Physician Panel that was accepted by OWA. 10 C.F.R. §852.18(a)(2). 10 C.F.R. § 852.18(c) mandates that an appeal is governed by the OHA procedural regulations set forth at 10 C.F.R. Part 1003. The applicable standard of review is set forth at 10 C.F.R. § 1003.36(c), which provides that “OHA may deny any appeal if the appellant does not establish that – (1) the appeal was filed by a person aggrieved by a DOE action; (2) the DOE’s action was erroneous in fact or law; or (3) the DOE’s action was arbitrary or capricious.” 10 C.F.R. § 1003.36(c).

B. Factual Background

The applicant was employed by various DOE contractors at the Portsmouth Gaseous Diffusion Plant in Piketon, Ohio from 1954 through 1983. Record at 4. The applicant submitted a claim to the OWA. As part of the application process, the applicant completed an OWA Form entitled “Request for Review by Medical Panels.” Question 7 of that form asks “What illness(es) do you have that you believe is caused by your work at a DOE facility(s)?” Record at 1. The applicant responded: “asbestosis.” *Id.* However, the medical records supplied by the applicant’s did not contain any evidence that he has asbestosis or any other asbestos related disease. Instead, those records included a letter written to the applicant by Dr. Steven Markowitz, a board-certified specialist in both occupational and internal medicine. In this letter, Dr. Markowitz opines that the applicant had a different chronic lung condition, specifically chronic obstructive lung disease (COLD). Dr. Markowitz’s letter further opines that “[the applicant’s] history of exposure to toxic agents, especially acids and bases, at the gaseous diffusion plant, contributed to the development of chronic obstructive lung disease.” Record at 31. The OWA caseworker reviewed and prepared the case file and then forwarded it to the Physician’s Panel. The cover sheet to the case file identified one claimed illness: asbestosis. The Physician Panel reviewed the case file and issued a report in which it found

[The applicant’s] case file do not substantiate a diagnosis of asbestosis. There are no physician reports with that diagnosis. The reports of chest x-rays, chest CTs and PFTs do not support a diagnosis of asbestosis. [The applicant] did work in a job position/location assessed to have high risk of asbestos exposure in building X-705 and area E, from 1975-1983, but there is no evidence in the file of asbestos related disease being present.

* * *

Asbestosis is characterized by shortness of breath, rales heard over the lungs on physical exams, radiologic findings of pulmonary fibrosis and/or asbestos exposure (e.g., pleural plaques), pulmonary function tests showing restrictive changes . . . [The applicant] did not have the physical, radiologic or pulmonary function findings of asbestosis.

Physician Panel’s Report at 1. On this basis, apparently, the Physician Panel issued a negative determination on his claim that was subsequently accepted by OWA. Accordingly, OWA determined that the applicant was not eligible for DOE assistance in filing for state workers’ compensation benefits. March 12, 2004 Letter from DOE to the applicant. On April 1, 2004, the applicant appealed that determination.

II. Analysis

Under Part 852, “[w]hether a positive or favorable determination is rendered is to be based solely on the standard set forth [at 10 C.F.R.] § 852.8.” 67 Fed. Reg. 52850 (August 14, 2002). That regulation states:

A Physician Panel must determine whether the illness or death arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility on the basis of whether it is as least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker at issue.

10 C.F.R. § 852.8. The preamble to Part 852 states “[t]he DOE intends that, as used in this context, the word ‘significant’ should have its normal dictionary definition and meaning –that is, ‘meaningful’ and/or ‘important’.” 67 Fed. Reg. 52847 (August 14, 2002).

The Physician Panel’s finding that the applicant has not shown that he has asbestosis or any other asbestos related disease is well supported by the Record, which does not contain any documentation of asbestosis. Accordingly, the finding is neither erroneous nor arbitrary or capricious.

However, the case file contains evidence that the applicant has a different lung disease, chronic obstructive lung disease (COLD), the development of which may have been caused in part by the applicant’s exposure to toxic substances during his employment at a DOE facility. Dr. Markowitz’s report unambiguously states his conclusion that “[the applicant’s] history of exposure to toxic agents, especially acids and bases, at the gaseous diffusion plant, contributed to the development of chronic obstructive lung disease.” Record at 31. The Physician Panel reviewed Dr. Markowitz’s letter. The Physician Panel Report states in pertinent part,

A comprehensive occupational medical evaluation by Dr. Steven Markowitz, report dated September 13, 1999, indicates [the applicant] has chronic obstructive lung disease, and not asbestosis. Chronic obstructive lung disease is caused by cigarette smoking, well documented in the case file. Occupational exposures to workplace chemicals, especially acids and bases, may have contributed to the lung disease, as noted by Dr. Markowitz.

Physician Panel’s Report at 1. Although the Physician Panel’s Report cites Dr. Markowitz’s opinion that the Applicant has COLD, it does not contain an actual determination on that illness. The Physician Panel Rule requires that a Physician Panel make findings concerning “[e]ach illness or cause of death that is the *subject of the application*.” 10 C.F.R. § 852.12(a) (emphasis supplied). In the present case, an applicant identified his chronic lung condition as asbestosis while supplying medical records indicating that an examining physician diagnosed the applicant with a different chronic lung condition, chronic obstructive lung disease. In such circumstances, the diagnosis claimed by the applicant and the diagnosis appearing in the medical records should have both been considered as the “subject[s]

of the application.” Therefore both illnesses should have been included in the Physician Panel’s determination under § 852.12.

III. Conclusion

As the foregoing indicates, I have identified an error in the OWA’s determination in the case. Accordingly, the appeal should be granted and remanded to the Office of Worker Advocacy. On remand, the Office of Worker Advocacy should consider the applicant’s chronic obstructive lung disease in accordance with § 852.8, and then issue a new determination clearly explaining its findings in accordance with 10 C.F.R. § 852.12.

It Is Therefore Ordered That:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0079 is hereby granted as set forth in Paragraph (2) and is denied in all other aspects.
- (2) The application that is the subject of Case No. TIA-0079 is remanded to the Office of Worker Advocacy for further consideration consistent with this Decision and Order.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: August 5, 2004