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September 8, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: April 1, 2004

Case No.: TIA-0074

XXXXXXXX XXXXXXXX (the Applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant's late husband, XXXXXXXX XXXXXXXX (the Worker) was a contractor employee at a DOE facility for many years. An independent Physician Panel (the Physician Panel or the Panel) determined that the Worker's illnesses were not related to his work at the DOE. The OWA accepted the Panel's determination, and the Applicant's counsel, XXXXXXXX XXXXXXXX, Esq., filed an appeal with the DOE's Office of Hearings and Appeals. As explained below, we have concluded that 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

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

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 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 her application for DOE assistance in filing for state workers' compensation benefits, the Applicant asserted that for approximately 22 years the Worker was an employee at a DOE facility where he worked as a machinist in the "Beryllium Shop." Previous to this employment, he had worked as a guard at another building at the DOE facility for three years. DOE Record at 2, 3, and 9. She stated that he was exposed to "hot", i.e., radioactive materials in the workplace. She claimed that his exposure to these materials resulted in the Worker being diagnosed with testicular cancer. The application also states that at the time of his death, the individual suffered from lung adhesion due to cobalt treatments for the cancer. *Id.* at 6.

In its determination, the Physician Panel considered the medical information concerning the Worker's illnesses that had been submitted by the Applicant. It rejected the Applicant's contention that the Worker's exposure to radioactive materials at a DOE facility caused, contributed to, or aggravated the Worker's testicular cancer. Specifically, it made the following findings:

The information provided by OWA revealed that the employee was treated with surgery and cobalt radiation for a right seminoma. It was the opinion of the panel that Testicular

Seminoma's have not been associated with exposure to radiation. Exposure to radiation was considered as his major exposure.

Panel Report at 1. The Panel also found that the Worker's exposure to radioactive materials at a DOE facility had not caused, contributed to, or aggravated the Worker's lung condition.

It was felt by the panel that the lung problem referred to was a "Postop right open thoractomy, decortication of middle and lower lobe with decortication of the parietal pleura" (page 202 in the OWA records). This was done for bilateral pleural effusions which were related to either metastatic testicular cancer and/or cobalt treatment for this testicular cancer (page 84 in OWA records).

Panel Report at 2.

The OWA accepted the Panel's determination. Accordingly, the OWA determined that the Applicant was not eligible for DOE assistance in filing for state workers' compensation benefits.

In her appeal, the Applicant contends that the Panel determination is erroneous because the Worker had significant radiation exposure during the course and scope of his employment at the DOE facility for approximately 25 years. Additionally, the Applicant states that the determination is deficient because it does not evaluate the Worker's beryllium exposure history and its relationship to his extensive lung problems which he suffered through the date of his death.

II. Analysis

The Physician Panel Rule specifies what a physician panel must include in its determination. The panel must address each claimed illness, make a finding whether that illness arose out of and in the course of the Worker's DOE employment, and state the basis for that finding. 10 C.F.R. § 852.12(a)(5). Although the rule does not specify the level of detail to be provided, the basis for the finding should indicate, in a manner appropriate to the specific case, that the panel considered the claimed exposures.

As discussed above, the Panel determination addressed the two illnesses or conditions listed in the Applicant's claim: (i) testicular cancer; and (ii) lung adhesion (due to cobalt treatment). With respect to the Worker's cancer, the Panel specifically

considered and rejected the Worker's exposure to radiation as a contributing factor in the Worker's testicular cancer. In this regard, the Panel stated its professional opinion that "Testicular Seminoma's have not been associated with exposure to radiation." The Applicant has pointed to no data in the record showing that this determination is incorrect. Accordingly, I must reject this aspect of the Applicant's appeal.

In the claim that she submitted to the DOE, the Applicant *did not assert* that the Worker was exposed to beryllium at a DOE facility or that he suffered from Chronic Beryllium Disease (CBD). While her application stated that the Worker was employed "in the Beryllium Shop", she does not list beryllium as a possible factor contributing to the development of the claimed illnesses. OWA Record at 9. On her application, she stated only that he was exposed to "hot", *i.e.*, radioactive materials in the workplace. The Panel did not err in confining its analysis to the effects of radiation exposure on the Worker.

I note that an internal DOE document in the OWA Record that was forwarded to the Panel does refer to potential beryllium exposure regarding the Worker. This is a one page document bearing the date of December 12, 2002 and entitled "Preliminary Site Assignment of Legacy Workers' Compensation Claims." OWA Record at 2. Under the heading "Description of Injury" on this document is written the following: "Lung/respiratory; Beryllium exposure." However, the Panel is not required to discuss every hazardous material that is mentioned in the record. Rather, whether the Panel mentions a particular exposure depends on the facts of the case. In this case, the Panel had no reason to discuss beryllium exposure. The application described the lung condition as lung adhesions caused by the cobalt treatments for testicular cancer. The Panel agreed that the lung adhesions were related to the testicular cancer, stating that they were the result of surgery for pleural effusions related to "either metastatic testicular cancer and/or cobalt treatment for this testicular cancer." The Applicant has not alleged that beryllium exposure could cause testicular cancer, and we know of no such association. Instead, our understanding is that the only illness associated with beryllium exposure is CBD, a granulomatous lung disease caused by the body's immune response (or sensitization) to beryllium. See *Chronic Beryllium Disease Prevention Program*, 64 Fed. Reg. 68854,68856 (1999). Accordingly, the Panel's failure to consider beryllium exposure or CBD was not a deficiency or error.

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. Therefore the appeal will be denied.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0074 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: September 8, 2004