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May 20, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: April 2, 2004

Case No.: TIA-0079

XXXXXXX (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's late husband (the worker) 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. 1/ As explained below, 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.

The Department of Labor (DOL) administers the first program, which provides \$150,000 and medical benefits to certain workers with specified illnesses. Those illnesses include beryllium disease and specified cancers associated with radiation exposure. 42 U.S.C. § 73411(9). The DOL program also provides \$50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation

1/ The appeal was filed by the daughter of the applicant on behalf of her mother.

Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. See 42 U.S.C. § 7384u. To implement the program, the DOL has issued regulations, 20 C.F.R. Part 30, and has a web site that provides extensive information concerning the program. 2/

The DOE administers the second program, which does not itself provide any monetary or medical benefits. Instead, it 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 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). To implement the program, the DOE has issued regulations, which are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. 3/

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).

B. Factual Background

In the application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted that the worker was

2/ See www.dol.gov/esa.

3/ The OWA is responsible for this program and has a web site that provides extensive information concerning the program. See www.eh.doe.gov/advocacy.

employed from 1943 through 1944 as a truck driver at the DOE site in Hanford, Washington. Record at 34. In October 1948, he was diagnosed with polycythemia vera, a form of bone cancer. He died from this disease in December 1948. The applicant contends that exposure to radiation at the DOE site caused this illness.

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

The Panel determined that the applicant did develop bone cancer. However, the Panel pointed out that there are no occupational records indicating the level of radiation to which the worker was exposed, and no National Institute of Occupational Safety and Health (NIOSH) radiation dose reconstruction has been completed. The Panel therefore concluded that there was no evidence supporting the contention that the illness was caused by exposure to radiation.

In further support of its negative determination, the Panel stated that the course of polycythemia vera is usually slow and the median survival period is 11-15 years. Since the worker died in 1948, the Panel concluded that it was more likely than not that the worker developed the disease prior to beginning his employment at Hanford in 1943. Based on these factors, the Panel issued a negative determination with respect to the claim. See January 30, 2004 Physician Panel Report.

The Panel's decision was adopted by the OWA. Accordingly, that Office determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits. March 10, 2004 Letter from DOE to the applicant. The applicant appeals that determination.

II. Analysis

In her appeal, the applicant generally contests the Physician Panel's determination that the worker's polycythemia vera is not related to radiation exposure during his employment at the DOE site. The applicant has provided a statement that she gave to NIOSH to the effect that the worker lived on the Hanford site (with his family)

and therefore was exposed to more radiation than if he simply worked at the site. May 17, 2004 Post Panel Submission by Applicant at 9.

There is nothing in the record to indicate Physician Panel error. The Panel correctly noted the absence of a dose reconstruction in the record, and the record contains no exposure information. The site reported that it had no industrial hygiene records for the Worker. Record at 21, 26. Furthermore, the Panel explained its opinion, and there is no contrary medical opinion in the record.

The applicant's argument on appeal, that because the worker lived on the Hanford site, he was exposed to greater levels of radiation than workers who lived off-site, does not establish Panel error. The applicant raised this argument after the issuance of the Panel determination. Thus, the Panel did not have an opportunity to address this matter. Consequently, I find no error by the Panel on this point.

In any event, the applicant will be receiving new information concerning the worker's radiation exposure. The DOL has referred the applicant's DOL claim to NIOSH for a dose reconstruction. Record at 33, 34; May 17, 2004 Post Panel Submission by Applicant at 2-11. If the applicant receives a dose reconstruction that she believes is significant new information, she may request further panel review. See *Worker Appeal* (Case No. TIA-0045), 28 DOE ¶ _____ (May 5, 2004).

In performing a further review of this case, the Panel may wish to give direct consideration to the unusually young age at which the worker contracted the polycythemia vera. ^{4/} The Panel may also wish to explicitly consider whether the cited median survival period of 11-15 years is applicable in this case, since the worker received virtually no treatment for the polycythemia vera.

III. Conclusion

As the foregoing indicates, I have identified no error in the Panel's determination in the case. Accordingly, the appeal should be denied.

^{4/} Polycythemia vera occurs "rarely in patients under 40 years old." *Headline Plus Medical Encyclopedia: Polycythemia Vera*. See www.nlm.nih.gov. The worker was diagnosed with polycythemia vera when he was 36 years old.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0079 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: May 20, 2004