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September 17, 2004

OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: April 15, 2004

Case No.: TIA-0082

XXXXXX XXXXXX (the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' benefits. The Applicant had worked as an employee at a DOE facility for approximately one year in the 1940's. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illnesses were not related to her work at DOE. The OWA accepted the Panel's determination, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination.

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. The Act creates two programs for workers.

The Department of Labor (DOL) administers the first EEOICPA program, which provides \$150,000 and medical benefits to certain workers with specified illnesses, including radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees and DOE contractor employees who worked at DOE facilities and contracted specified cancers associated with radiation exposure. 42 U.S.C. § 73411 (9). In general, a worker in that group is eligible for an award if the worker was a "member of the Special Exposure Cohort" or if it is determined that the

worker sustained the cancer in the performance of duty. *Id.* Membership in the Special Exposure Cohort includes DOE employees and DOE contractor employees who were employed prior to February 1, 1992, at a gaseous diffusion plant in Oak Ridge, Tennessee; Paducah, Kentucky; or Portsmouth, Ohio. 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 Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. See 42 U.S.C. § 7384u.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, the DOE program is intended to aid qualified individuals in obtaining workers' compensation benefits under state law. The program provides for an independent physician panel assessment of whether a "Department of Energy contractor employee" has an illness related to exposure to a toxic substance during employment at a DOE facility. 42 U.S.C. § 7385o. 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).

The DOE program is specifically limited to DOE contractor employees who worked at DOE facilities. This limitation exists because DOE would not be involved in state workers' compensation proceedings involving other employers. Pursuant to an Executive Order,^{1/} the DOE has published a list of facilities covered by the DOL and DOE programs, and the DOE has designated next to each facility whether it falls within the EEOICPA's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 68 Fed. Reg. 43,095 (July 21, 2003) (current list of facilities). The DOE's published list also refers readers to the DOE Worker Advocacy Office web site for additional information about the facilities. *Id.* In her application, the Applicant stated that she was employed at what is now the DOE's Oak Ridge,

^{1/} See Executive Order No. 13,179 (December 7, 2000).

Tennessee facility for approximately one year in the 1940's. She stated that in the 1960's she was diagnosed with Meniere's Syndrome, a condition that eventually resulted in severe hearing loss, and that in 2003 she was diagnosed with a malignant lymphoma of the bilateral lacrimal glands and nose.

The regulations for the DOE program are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The DOE Worker Advocacy Office is responsible for this program and has a web site that provides extensive information concerning the program .^{2/} This case involves the DOE program, i.e., the program through which DOE contractor employees may obtain independent physician panel determinations that their illness is related to their exposure to a toxic substance during their employment at a DOE facility. The Panel reviewed the application and issued a report. See OWA Physician Panel Report (February 11, 2004) (Report). The Panel unanimously determined that the Applicant's medical records did not support her claim that she had illnesses that arose from her exposure to a toxic substance at a DOE facility. With respect to Meniere's Disease (syndrome), the panel found that the cause is uncertain but is believed to be related to a build-up of excessive fluid in the inner ear. It found that there is "no established connection of this condition to radiation or toxic exposure." Panel Report at 1.

With respect to "Lacrimal Duct and Nose Lymphomas," the panel found that the Applicant's record

does not contain any pathological evidence of lymphoma. There is no description of the type of lymphoma or any authoritative report in the record of this Applicant confirming a diagnosis of lymphoma.

Panel Report at 5.

In her Appeal, the Applicant disagrees with that determination, alleging that pathologic evidence of lymphoma had been submitted

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

for review by the Panel. She also asserts that the DOL "ruled that the lymphoma was caused by work and awarded compensation." She believes that the DOE should make a similar ruling.

II. Analysis

The Physician Panel Rule specifies what a physician panel must include in its determination. A 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.

With respect to the Applicant's claim concerning lymphoma, the Panel noted the absence of any pathological evidence of lymphoma in the record before it, while the Applicant asserts that such evidence "was submitted for review." Appeal letter at 1. Attached to her Appeal letter is a copy of the evidence that she states was submitted. It includes a Radiology Consultation Report dated October 2002 concerning the condition of the Applicant's lacrimal glands revealed by an MRI (the 2002 MRI Report). It also contains numerous physician reports dating from April 2003 through July 2003 which indicate a medical diagnosis of lymphoma of the lacrimal glands. Our review of the Applicant's record indicates that none of these 2003 reports were included in the materials sent to the Panel for review. Our conclusion is supported by the Applicant's "History" which appears at pages 25 and 26 of Applicant's record. The Applicant's DOE case worker notes that on July 11, 2003 she sent the Applicant a letter asking for additional medical records and that on July 21, 2003 the Applicant had stated to another DOE employee that she would send the DOE oncology records concerning her diagnosis of bilateral malignant lymphoma of the lacrimal glands. However, the case worker notes that when additional medical records were received from the Applicant on August 5, 2003, there was only one new document, the 2002 MRI Report.

Received from Applicant additional medical documentation received at OWA on 8/5/03. Review of file finds Former Program information has been previously submitted by Applicant. The one additional document submitted was MRI Brain & Stem with & without Contrast [referred to above as the 2002 MRI Report] No further medical documentation was submitted by Applicant (due back 8/11/03) for Meniere's syndrome or lacrimal duct & nose lymphomas since 30 day application letter sent. Will submit case to OWA MD for review. All available site and personal medical in file at this time.

Applicant's "History" at p. 25 of the Applicant's record. We therefore conclude that of the documents submitted by the Applicant with her Appeal letter, only the 2002 MRI Report was included in the administrative record submitted to the Panel for review.

We agree with the Panel's conclusion that this document is not sufficient to support the Applicant's claim of lymphoma. The 2002 MRI Report states that

The [Applicant's] lacrimal glands are enlarged bilaterally. There is no focal mass, but the diffuse enlargement can be seen with collagen vascular diseases or sarcoidosis. Please correlate with history.

2002 MRI Report at 1. There is no description of lymphoma or diagnosis of lymphoma in this document. Accordingly, the Applicant has not shown that the Panel erred in its conclusion based on the medical evidence before it.

Nor do we find any merit in the Applicant's contention that the Panel failed to give proper consideration to the DOL award that she received in September 2003 on the basis of lymphoma. DOL Notice of Final Decision, administrative record at 388. The Panel could not rely on the DOL's determination. As discussed above, the Panel is required to address each claimed illness, and to make an independent finding whether that illness arose out of and in the course of the Worker's DOE employment. 10 C.F.R. § 852.12(a)(5). In this instance, the Panel concluded that it did not have

sufficient medical information before it to conclude that the Applicant had been properly diagnosed with lymphoma. We therefore conclude that the Applicant's Appeal does not establish any deficiency or error in the Panel's determination. Accordingly, the Appeal will be denied.

Finally, we note that the Panel's Report indicates that further information on the claimed lymphomas might result in a different determination. Report at 5. Accordingly, we are forwarding the information supplied by the applicant in her Appeal to the OWA so that it can arrange for further panel review based on this information.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, OHA Case No. TIA-0082 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 17, 2004

