

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

July 8, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal
Date of Filing: March 26, 2004
Case No.: TIA-0085

XXXXXXXXXXXXXXXXXX (the applicant or the worker) 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 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. As explained below, 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 a toxic substance 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 a toxic substance at DOE facilities caused, aggravated or contributed to employee illnesses. Generally, if a Physician Panel issues a determination favorable to

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

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 worker asserted that from 1970 until 1985, she was a graphic artist at the K-25 plant at the DOE site in Oak Ridge, Tennessee. She indicates that from 1985 through 1994, she worked as a senior printer for the engineering department in Building 9102-1 at the Oak Ridge Y-12 plant. She claims that in 1988, she was diagnosed with asthma. The material prepared by OWA states that the applicant claimed she developed chronic obstructive pulmonary disease (COPD) in 1986. The applicant states that Building 9102-1 was a "sick" building, with "water running down the walls" and the presence of mold. She claims that these conditions, along with exposure to photo chemicals in the building, caused these illnesses.

The Physician Panel issued a negative determination on this claim. The Panel found that the worker's illnesses 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."

In considering the worker's claim, the Physician Panel unanimously found that the applicant did not have COPD. The Panel found that the applicant "probably has asthma." However, the Panel determined that the applicant probably developed the asthma prior to 1972, before she began working at Building 9102-1. The Panel further found no evidence that her asthma was aggravated by her work at that building. Accordingly, it issued a negative determination with respect to her claim.

II. Analysis

The applicant seeks review of the Panel's determination with respect to her asthma claim. 2/ She contends that she did not have asthma prior to working at Building 9102-1. She claims that she developed asthma in 1988, after working in that building.

As evidence for its conclusion that the applicant had asthmatic symptoms before her move to Building 9102-1, the Panel cited her reduced pulmonary function test results of 1985. The applicant has cited no evidence that contradicts that determination. In fact the record shows that the applicant had consistently low pulmonary function tests beginning in 1979 through 1983, years before her 1985 move to Building 9102-1. Record at 303.

The Panel also concluded that the applicant's asthma was not aggravated or contributed to by her work in Building 9102-1. The Panel cited her pulmonary function test of 1988, which showed lung functions at higher levels than in 1985. Record at 303. Moreover, the applicant's medical records show that her lung function tests for 1988 and 1994 are at similar levels. Record at 304. Thus, even after she had worked a number of years in Building 9102-1, the applicant's pulmonary function test results were better than those during the period 1979 through 1983, before she worked in Building 9102-1. Accordingly, the record supports the Panel's conclusion that her asthma was not aggravated or contributed to by her working in Building 9102-1. The applicant has pointed to nothing in the record that suggests that the Panel's determination was incorrect.

In sum, the applicant has not demonstrated any deficiency or error in the Panel's determination. Consequently, there is no basis for an

2/ She does not contest the Panel's negative finding regarding COPD. I will therefore give no further consideration to that aspect of the Panel determination.

order remanding the matter to OWA for a second Panel determination. Accordingly, the appeal should be denied.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0085 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: July 8, 2004