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September 29, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: April 21, 2004

Case No.: TIA-0086

XXXXXXXXX (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 in part 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 Los Alamos National Laboratory (LANL). The Applicant submitted a claim to OWA asserting that he was intermittently employed by various contractors at LANL as an insulator and asbestos worker from 1976 to 1991. During this period, the Applicant claims, he frequently installed or removed asbestos-containing insulation while working at LANL. The Applicant contends that his alleged asbestosis has resulted from exposure to asbestos that occurred in part during his employment at LANL. The Applicant also claims that he has a Beryllium Sensitivity.

On March 12, 2004, OWA issued a letter in which it accepted a negative determination by the Physician Panel. The determination is contained in the Physician Panel Report (the Report). The Report indicates that the Physician Panel found that the applicant’s contention that he has a beryllium sensitivity is not supported by the available laboratory records.

The Report also sets forth the Physician Panel’s conclusions concerning the Applicant’s asbestosis claim, stating in pertinent part:

The panel’s conclusion is that claimant does not have asbestosis. He may have some pleural abnormalities indicative of asbestos exposure which is most likely to have occurred during employment not on a DOE site.

Id. On April 21, 2004, the applicant appealed OWA’s 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).

A. Beryllium Sensitivity

The panel concluded that the Record does not support the Applicant’s claim that he has a Beryllium Sensitivity. The Report notes that “a diagnosis of beryllium sensitivity requires 2 sequential positive tests.” Physician Panel’s Report at 2. The Report further notes that only one of four beryllium sensitivity tests administered to the Applicant indicated potential Beryllium Sensitivity. *Id.* The only basis provided by the Applicant’s appeal of OWA’s determination that he does not have a Beryllium Sensitivity is his claim that he only had three Beryllium Sensitivity tests as opposed to the four tests claimed by the physician’s panel. However, even if we assume that the Applicant did in fact have only 3 Beryllium Sensitivity tests, the Physician Panel’s findings would still be appropriate, since the record would still lack the information necessary to conclude the applicant has Beryllium Sensitivity, i.e. two sequential positive Beryllium Sensitivity tests. Consequently, I find no error by the Panel on this point.

B. Asbestos Related Disease

1. Diagnosis

The Physician Panel denied the Applicant’s claim that he has asbestosis, instead finding that the applicant has “pleural abnormalities indicative of asbestos exposure.” The Physician Panel reached this conclusion even though the Record indicates that at least one physician concluded that the applicant has asbestosis and another physician concluded that his findings suggests asbestosis.

On June 10, 1999, Dr. Alan S. Glann, a pulmonary physician, wrote that the Applicant has “asbestosis identified radiographically.” Record at 98. On June 23, 1999, Dr. Glann wrote that a CT scan of the Applicant conducted on June 7, 1999 indicated that the Applicant has asbestosis. Record at 59, 60, 74. On August 30, 1999, Dr. Glann again wrote a letter in which he concluded that the Applicant has asbestosis. Record at 72-73. On December 4, 2000, the applicant was examined by Dr. Richard A. Brown, a colleague of Dr. Glann’s. Noting “calcific pleural plaquing” and “very mild . . . basilar fibrosis,” Dr. Brown opined that “these findings would then suggest asbestosis.” Record at 60, 88-90.

On the other hand, two physicians have concluded that the Applicant does not have asbestosis. The Record contains a report in which Dr. Bob Gayler of the Johns Hopkins Bayview Medical Center states his impressions of a July 25, 2000 chest x-ray. Specifically, Dr. Gayler states: “The findings suggest prior pneumonia with pleural scarring or pleural infection. This is not a typical appearance of asbestosis.” Record at 158. On December 6, 1989, Dr. William I. Christensen, the Medical

Director of the Presbyterian Occupational Medicine Clinic, wrote LANL's X-Ray department to inform it of his conclusion that the applicant did not have any asbestos related disease. Record at 185. On March 2001, Dr. Christensen wrote a nine page letter in which he opined that the Applicant had "asbestos related pleural disease without asbestosis." Record at 62. Interestingly, Dr. Christensen found that the Applicant's pleural abnormalities were *not consistent with pneumoconiosis*. Record at 164.

The Report does not explain why the Panel concluded that the Applicant does not have asbestosis - specifically, why it rejected the diagnoses of Drs. Glann and Brown, which were based on a CT scan. The Physician Panel Rule requires that a Physician Panel must explain why any evidence contrary to its determination is not persuasive. 10 C.F.R. § 852.12(c)(1). Accordingly, I am remanding this matter to the OWA for an explanation of why the Physician Panel found Dr. Glann and Dr. Brown's findings unpersuasive.

2. Extent of Exposure

The Physician Panel concluded that the Applicant's exposure at LANL occurred sporadically between 1986 and 1990, with fewer than 2 years total of work at LANL. The Appeal claims that the claimant was sporadically employed at LANL for a much longer time, from 1975 until 1990. The Record shows that during the application process, the Applicant repeatedly indicated that he had worked off and on at LANL for a period of 25 years, beginning in 1975 and concluding in 1990. Record at 6, 16, 19, 24 and 56. The Act requires that the DOE assist DOE applicants in obtaining information in DOE's control concerning their employment history and exposures. See 42 U.S.C. §§ 7384v(a), 7385o(e); 67 Fed. Reg. 52841, 52848 (2002) (preamble to the Physician Panel Rule). The Applicant claimed the he worked for three employers sporadically over the period 1975 to 1990. The OWA requested site records concerning the Applicant's employment, and the site responded with records documenting employment during the period 1986 to 1990 for two different contractors. We believe that, in conjunction with the remand discussed in Part II.B.1 above, further effort should be made to assist the Applicant in documenting his claimed earlier employment. The extent of the Applicant's employment at LANL is critical to this application for assistance, since the length of employment appears to have affected the Physician Panel's assessment of his claim. The site did not indicate whether the third employer identified by the Applicant performed work at the site during the claimed period of employment. OWA should request this information from the site and give the Applicant an opportunity to provide records to document the claimed employment. Possible records include social security records showing the Applicant's employer, union dispatch records, and co-worker affidavits.

3. Causation

The Physician Panel Rule requires that the Physician Panel's finding must include a determination of "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." 10 C.F.R. § 852.12(b)(4). This determination must be made "on the basis of whether is it 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 (emphasis supplied). The Report, by attributing the injury to asbestos exposures outside of LANL suggests that the Panel either concluded that the Applicant was not exposed to asbestos while employed at LANL, or concluded that any asbestos exposure incurred by the Applicant at LANL was not a significant factor in aggravating, contributing to, or causing the applicant’s plural abnormalities or asbestosis.

The Report states that LANL records show that the Applicant was not exposed to asbestos while working at LANL. I find this statement rather puzzling. The Record clearly shows that the Applicant was employed at LANL as an “asbestos worker” and “insulator.” Record at 14, 19, 24, 283, and 284. Both occupations typically involve significant exposure to airborne asbestos fibers. The Applicant also reports regular exposure to asbestos while employed at LANL.

The only information in the record to the contrary is a handwritten note appearing on a typed internal LANL memo dated December 6, 2002. The memo appears as page 263 in the Record. The handwritten note states: “While an insulator has the potential to work with Asbestos, [the applicant] was never assigned to a job where asbestos was identified in pre-job analysis. No IH exposure records were found in LANL or Johnson Control records.” The handwritten portion of the memo is signed by Helena Whyte and dated December 13, 2002.

The Report fails to explain why the Panel chose to rely on the handwritten note instead of the other evidence suggesting that the applicant was exposed to asbestos while working at LANL. Since the Report fails to explain why the Panel did not find the evidence in the Record suggesting the Applicant was exposed to asbestos while working at LANL persuasive, the Rule’s requirement set forth at 10 C.F.R. § 852.12(c)(1) has not been met. Accordingly, on remand, OWA should provide a full and complete explanation of why the Applicant’s occupation and recollection of asbestos exposure did not persuade it that the Applicant was exposed to asbestos while employed at LANL.

The Report further cites a number of factors which allegedly limited the Applicant’s asbestos exposure at LANL. Specifically, the Report notes: (1) the Applicant spent less than two years working at LANL, and (2) “by the applicant’s own admission, he used better personal protective equipment during the years he did any work on the LANL site than while he was working for private employers.” Assuming that both of these contentions are accurate, the Report still does not explain why they persuaded the Panel that any asbestos exposure incurred by the Applicant at LANL would “not as likely as not” have been a significant factor in aggravating, contributing to, or causing the Applicant’s illness. Accordingly, on remand the panel should provide a more thorough explanation of its reasoning.

The Report also notes that two facts indicate the Applicant was most likely exposed to more asbestos during his employment outside of LANL than during his employment at LANL. Specifically, the Report notes that (1) the Applicant used better protective gear while working at LANL than while working outside of LANL, and (2) the vast majority of the applicant’s 25 year history of working

with asbestos occurred outside of LANL. While it is clear that the Applicant's significant history of asbestos exposure outside of LANL would, by itself, account for the Applicant's asbestos related disease, the fact that a significant majority of the Applicant's exposure to asbestos occurred outside of LANL does not show that the Applicant's exposure to asbestos at LANL was unlikely to have been a significant factor in aggravating, contributing to or causing the Applicant's asbestos related disease. Accordingly, on remand the Panel should explain why it concluded that the Applicant's exposure to asbestos at LANL was not a significant factor in aggravating, contributing to or causing the Applicant's pleural abnormalities or asbestosis.

III. Conclusion

As the foregoing indicates, the Panel did not provide an explanation of its determination sufficient to satisfy the requirement in 10 C.F.R. § 852.12. On remand, the Office of Worker Advocacy should provide the Applicant with an opportunity to document his claimed employment, and then refer the Applicant's claims of asbestosis and pleural abnormalities to the Panel for 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-0086 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-0086 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: September 29, 2004