

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

*Appeal*

Name of Case: Worker Appeal  
Date of Filing: April 30, 2004  
Case No.: TIA-0094

XXXXXXXXXXXXXXXXXXXXX (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 aggravated, contributed to or caused employee illnesses. Generally, if a Physician Panel issues a determination favorable to

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1/ See [www.eh.doe.gov/advocacy](http://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 his application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted that from December 1953 through March 1989 he was an electrical instruments maintenance mechanic at the DOE Savannah River site (SRS) in Aiken, South Carolina. From June 1989 through December 1991, he was an electrical instruments supervisor at that site. He claims he is suffering from the following conditions: lung abnormalities; heart failure; and prostate cancer. The applicant believes that exposure to radiation and toxic chemicals in the DOE workplace caused these illnesses.

The Physician Panel issued a unanimous negative determination on this application. The Panel 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."

In considering the worker's lung abnormalities, the Physician Panel found no indication in the record that this worker had "specific exposures to chemicals." The Panel also found that although the record shows "lung tissue abnormalities" in a 2000 chest X-ray, "no

diagnosis of the kind of lung condition has been provided." The Panel therefore reached a negative conclusion regarding this claimed illness.

With respect to the worker's claim of "heart failure," the Panel found that a "physical examination done on 3/15/2000 revealed no abnormal findings with his cardiovascular exam." The Panel noted that the worker has had elevated cholesterol levels for many years, a positive family history for heart disease, a history of abnormal EKGs, and smoked/chewed tobacco for many years. The Panel also noted that the worker developed congestive cardiomyopathy ten years after retirement. The Panel concluded that this condition did not arise out of and in the course of employment by a DOE contractor, but was "due to life style habits and family traits."

In considering the applicant's prostate cancer, the Panel found that at the time he retired, he did not have prostate cancer and that he developed it about ten years later, when he was 72 years old. The Panel noted that prostate cancer is a disease of "aging men. . . . He developed it as do so many other men in the expected age range." The Panel concluded that the applicant's prostate cancer was not related to his employment by a DOE contractor.

## *II. Analysis*

In his appeal, the applicant objects specifically to the Panel's conclusion that his heart failure can be attributed to family traits and to his life style. 2/ He disagrees with the Panel's statement that he has a history of high cholesterol and that his father had heart disease. He further states that he smoked tobacco very little, although he admits that he chewed tobacco. In addition, the worker has included with his appeal a one-page submission dated March 11, 2004, which notes his assertions that he worked with mercury, a chemical known as "Spot Check," transformer oil, and triclene. 3/ He claims that the Panel failed to consider specifically his exposure to these toxic substances. Finally, he contends that his own doctor told him that the cause of congestive

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2/ The applicant raises no specific objections to the Panel's negative determination with respect to his lung abnormalities and his prostate cancer. Accordingly, I will not review these aspects of the Panel's decision.

3/ The document is numbered page 7 of 10. It is not clear from this single page to what larger document it belongs.

heart failure is unknown and that it might be due to heredity, virus or environment. The worker therefore argues that the Panel improperly concluded that work at the SRS did not cause his heart failure.

Although the applicant maintains that the Panel's discussion of his risk factors contains some errors, the record indicates that any such errors, if they do exist, would not have affected the Panel's ultimate negative determination. The Panel stated that the record gave no indication of "specific exposures to chemicals" and the applicant has not pointed to anything in the record to the contrary. The applicant cites a March 11 document in which he referred to exposures. However, the document is not in the record and postdates the Panel report. Accordingly, the Panel did not err in failing to consider it.

The opinion of the applicant's physician is also not part of the record, and therefore there was no Panel error in its failure to address it. In any event, I find the physician's opinion supports, rather than contradicts, the Panel determination. As indicated above, the Panel can issue a positive determination only if it finds that "it is at least as likely as not" that a toxic exposure at a DOE work site was a significant factor in aggravating, contributing to or causing the claimed illness. The physician's opinion that the cause of the applicant's heart failure is unknown but could be heredity, virus or environment falls short of meeting that standard.

In sum, even if the Panel was incorrect in its analysis of the likely underlying causes of the worker's heart condition, this does not mean that it was incorrect in its determination that the condition is unrelated to toxic exposure at a DOE site. I therefore find that the applicant has not demonstrated any deficiency or error in the Panel's determination. Consequently, there is no basis for an 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-0094 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: