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June 28, 2004  
DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

*Appeal*

Name of Case: Worker Appeal

Date of Filing: May 7, 2004

Case No.: TIA-0097

XXXXXXXXXX (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. 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 appealed that determination. After reviewing that appeal, we determined that the application should be remanded to the DOE Office of Worker Advocacy for further consideration. *Worker Appeal*, (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003)(hereinafter TIA-0025). The OWA returned the application to the Panel for additional review and the Panel issued another determination. The applicant appeals this second determination. As explained below, this 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 toxic substances 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 employee illnesses were caused by exposure to toxic substances at DOE facilities. Generally, if a physician panel issues a determination favorable to 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. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. See 67 Fed. Reg. 52841 (August 13, 2002). 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).

In his application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted that he was a machinist for Rockwell International at the DOE's Rocky Flats site in Golden, Colorado. He further indicated that he has contracted numerous illnesses as a result of exposure to plutonium, uranium, other radioactive materials and beryllium. He also claimed he was involved in a workplace accident involving beryllium. He requested that the Office of Worker Advocacy refer his claim to a Physician Panel for review. The Physician Panel issued a negative determination on this claim, and the Panel's decision was adopted by the Office of Worker Advocacy. See April 11, 2003 Physician Panel Case Review and May 13, 2003 Letter from DOE to the applicant. Accordingly, the DOE Office of Worker Advocacy determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits.

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1/ See [www.eh.doe.gov/advocacy](http://www.eh.doe.gov/advocacy).

The applicant contested the Physician Panel's determination in his first appeal. In TIA-0025, we found that the Panel had used an incorrect standard for considering the worker's application. The applicable standard in Part D cases is whether it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in causing, aggravating or contributing to employee illness. In its first report, the Panel used the standard of "whether it was more probable than not" that an illness was "caused" by exposure to a toxic substance. We indicated that on remand the Panel should reconsider the worker's illnesses using the correct standard.

In his first appeal, the applicant also claimed that the Panel failed to consider seven conditions that he listed in his application, and which he believes were related to toxic exposure at the DOE site. We indicated in TIA-0025 that in its review the Panel should consider, using the correct standard, all diseases noted in the application. Moreover, we indicated that in reaching its determination, the Panel should evaluate not only the individual diseases and conditions that the applicant is suffering from, but also, if possible, whether it is as likely as not that he would have suffered from all of these conditions simultaneously in the absence of his exposure to radioactive materials or other toxic substances. Finally, we stated that the Panel should consider the applicant's claim that the contractor's reported radiation exposure levels for him were incomplete and that he was exposed to additional radiation.

Based on our directive, the Panel issued a second report. In that determination, the Panel explicitly addressed 28 illnesses claimed by the applicant. The Panel found that the worker's chronic atrophic gastritis was related to his exposure to radiation at the DOE site, and therefore issued a positive determination regarding this illness. The Panel reached a negative conclusion with respect to the remaining illnesses. Thereafter, the applicant filed his second appeal.

## *II. Appeal*

The bases for the instant appeal are as follows. First, the applicant objects to the Panel's determination with respect to all 27 conditions regarding which it reached a negative determination. In support of his position, the applicant points to information in the record which he believes contradicts the Panel's determination, and which he alleges the Panel did not consider. The applicant further alleges that in some instances the Panel again applied the

wrong standard in its consideration of his illnesses. Moreover, the applicant notes one condition, myoclonus, which the Panel did not include in its report. The applicant also claims that the Panel failed to address in its report whether it is as likely as not that he would have suffered from all of these conditions simultaneously in the absence of his exposure to radioactive materials or other toxic substances. Finally, the applicant contends that the report did not consider his claimed illnesses in light of the additional radiation to which he believes he was exposed at the DOE site.

### *III. Analysis*

As discussed below, I cannot sustain any of these objections to the Panel's determination.

#### **A. Radiation**

I will not remand this matter to the OWA for further consideration of the radiation exposure issue. In reaching a positive conclusion with respect to the applicant's chronic gastritis, the Panel specifically noted the applicant's claimed radiation exposure as a key factor in its decision. I therefore find that the Panel gave consideration to the issue of whether the applicant was exposed to additional radiation as he claimed. The fact that the Panel did not repeat this statement in its consideration of each illness does not mean that the Panel did not review this issue on remand. I find that the Panel implicitly considered and rejected the applicant's claim that his remaining illnesses were related to additional radiation exposure beyond that recorded by the DOE. I see no reason to require the Panel to make a further, more explicit determination on this issue.

The applicant also believes that the DOE may prepare a site profile which will provide some additional information about radiation exposure. He suggests that further consideration of his claim could be delayed until such a site plan is developed. As discussed below, this decision finds no Panel error and therefore no basis for remanding the application. If additional relevant information regarding his exposure becomes available, the worker may request that OWA give further consideration to his application.

#### **B. Inadequate Consideration of Specific Diseases**

The worker raises a number of objections to the manner in which the Panel considered the illnesses about which it reached a negative

conclusion. 2/ First, the applicant states that in several instances the Panel failed to consider additional information that he provided to support his claim that his illness was caused by toxic exposures. For example, he points out that the Panel considered his colon polyp "benign," while his pathologist's report concerning the polyp included the notation, "precancer." The applicant also included as a reference two articles. One states that exposure effects of radiation include benign tumors. The other article indicates that "the period between 'normal' and 'full blown cancer' is called the 'precancerous stage' of disease." See Attachments 22 and 24. The applicant believes that the Panel should have made explicit reference to these articles and to the stated "precancer" diagnosis. He contends that in its report the Panel should have explained why it did not find this evidence persuasive. I see no evidence of Panel error. First, there is no evidence or diagnosis of cancer. "Precancer" is not cancer. In this regard, there is no evidence that the polyp is related to toxic exposure at a DOE site. Second, neither of the enclosed articles suggests to me that the Panel failed to consider any important evidence relating to this worker, or reached an incorrect conclusion. The record in this case contains hundreds of pages. It is not reasonable to expect the Panel to provide a written response to every one of those pages. Some, such as Attachments 22 and 24, are merely general articles that the worker appears to have retrieved from the Internet. I do not believe the Panel is required to give a written response to every piece of information that an applicant submits, no matter how general, trivial or unpersuasive. The fact that this applicant was able to locate some broad statements about "precancer" and radiation exposure does not indicate that the Panel erred or that it failed to consider important information relevant to this particular applicant. I therefore will not sustain the applicant's claim that the Panel did not consider fully the relevant evidence.

The worker points out that in some instances the Panel reached a negative determination with respect to an illness on the grounds

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2/ It would be impracticable in this decision to examine in full detail every objection to each disease noted by the applicant. Further, such an approach would serve little purpose. I am confident that I am reaching a fair determination in this case, and that I can demonstrate this by discussing the more important examples of the applicant's contentions, thereby explaining why, as a whole, I believe that there is no Panel error.

that there was insufficient specificity in the record. The worker objects to these determinations. For example, the Panel reached this type of conclusion concerning the worker's brain lesion. The Panel stated "There was insufficient information presented on the nature of the brain lesion." The worker cites Attachment 10 to his first appeal as support for his contention that he has submitted sufficient information about the brain lesion to allow the Panel to conclude that it is at least as likely as not that it was related to toxic exposure at a DOE site. Attachment 10 includes the following observation: "Lesion of the anterior left external capsule. This most likely represents an infarct." I see nothing here on which the Panel could base a reasoned judgment that this condition, under the applicable standard, is related to toxic exposure. This is simply a statement that there was a brain lesion and that it most likely represents an infarct (or obstruction of local circulation). While the applicant has pointed to a condition that he has, there is certainly no evidence that it is an "illness" or that it has any occupational relationship.

The applicant states that, using similar reasoning citing insufficient information, the Panel incorrectly reached a negative conclusion regarding his claim of osteoporosis. In this instance, the worker's physician noted that "pt had mild osteopenia in OR when we did the fusion." Attachment K. This is simply a passing reference to a "mild" thinning of the bones, which is not severe enough to label osteoporosis. Without any other information about the osteopenia as it applies to the worker, I find that the Panel was correct in its assessment that there is not sufficient information for it to make a judgment about whether the osteopenia bears any relationship to toxic exposure at a DOE site.

The applicant also points out that the Panel report failed to address his claim of "myoclonus." <sup>3/</sup> The worker has provided a statement from a physician that includes the notation: "I believe he does likely have mild myoclonus." Attachment G. He also has provided a description of this condition which he retrieved from the Internet. Attachment H.

This issue warrants no further Panel review. There is no indication whatsoever that myoclonus is an illness, or that it bears any relationship to an occupational exposure. In fact, the description of myoclonus in Attachment H, provided by the worker, does not

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<sup>3/</sup> Myoclonus refers to sudden, involuntary jerking of a muscle or a group of muscles. Attachment H.

provide any support for the contention that myoclonus is considered a disease caused by toxic exposure. That Attachment states that "myoclonus describes a symptom and generally is not a diagnosis of a disease." Thus, myoclonus does not appear to fall within the purview of Part D, which requires that the worker submit evidence of an "illness". 10 C.F.R. § 852.4. I therefore find that there is no reason on this score to return this matter to the Panel for additional evaluation.

The applicant states that the Panel reached an incorrect determination with regard to his renal disease because it did not have complete information at the time of their review. He indicates that he "was aware of the problem only a few weeks before their decision was rendered." He has attached some additional information on this point. Since the Panel admittedly did not have adequate information in front of it regarding this illness at the time it ruled, there is no Panel error which must be corrected. If the worker wishes to pursue this issue, he may request panel review of this illness.

#### C. Use of Incorrect Standard

The applicant also claims that the Panel applied the wrong standard in its consideration of some of the claimed illnesses. The applicant cites, for example, the Panel's treatment of his arthritis. The Panel stated the following as the key factors in rendering its decision: "Arthritis is a very common disease that has no known specific relationship to occupational substances, nonetheless some solvents have been associated with contributing to arthritis, however, we feel that the amount of exposure he had was, more likely than not, not a significant amount of exposure." The worker claims that the correct standard is "'at least as likely as not' that the exposures caused, aggravated or contributed to the disease or conditions." The applicant therefore asserts an error by the Panel that must be corrected.

This objection does not persuade me that an error was made. As an initial matter, the Panel's report clearly sets out the correct standard for considering whether the arthritis was related to toxic exposure at a DOE site. The report cites the standard as follows: "Did this illness arise out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility based on whether it is 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?" With respect to the worker's arthritis, the Panel unanimously answered the question in the negative. Thus, there can be no doubt that the Panel applied the correct standard in considering the relationship between the claimed illness and toxic exposure.

The Panel went on to discuss the factors it used in reaching its determination, including information about the level of exposure experienced by the applicant. It noted that the amount of exposure he had to solvents was, more likely than not, not significant. This is just another way of saying that the exposures were not a significant factor in aggravating, contributing to or causing the illness. The applicant has not shown that he was exposed to significant amount of solvents, or established, based on DOE site records, that the Panel's assertion regarding that exposure was incorrect. I therefore conclude that the Panel applied the correct standard in considering the worker's arthritis. I see no reason to return this issue to the Panel for additional review.

#### D. Consideration of Illnesses as a Whole

I also see no usefulness in remanding this matter to the Panel for an express statement of whether the applicant would have suffered from all of the named conditions simultaneously in the absence of his exposure to radioactive materials or other toxic substances. The Panel's report indicates that it responded to the OHA remand order. It reversed its determination on one of the illnesses and specifically addressed the other claimed illnesses. Some of these were too general in nature to make a judgment on. As a matter of common sense, unless there is a pattern to the diseases which is not evident here, or some linkage among the diseases which increases the probability that toxic exposure caused the diseases, I see no reason to believe that even though all but one of the named illnesses were unrelated to toxic exposure at a DOE site, it is nevertheless at least as likely as not that the combination of the named illnesses was related to such exposure. Given the results of the second Panel report, I believe that requiring a written statement on the issue of the combined diseases would simply be a matter of speculation from the Panel. I therefore find that this issue does not merit further consideration in this case.

#### *IV. Conclusion*

As discussed above, 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 again to OWA for a third Panel determination.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0097 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: June 28, 2004