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September 24, 2004

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

*Appeal*

Name of Case: Worker Appeal

Date of Filing: May 26, 2004

Case No.: TIA-0101

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant's late husband (the Worker) was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Worker did not have an illness related to a toxic exposure 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). As explained below, we have concluded that the appeal should be denied.

*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) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. The Act provides for two programs, one of which is administered by the DOE.<sup>1</sup>

The DOE program is intended to aid DOE contractor employees in obtaining workers' compensation benefits under state law. Under the DOE program, an independent physician panel assesses whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385(d)(3). 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

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<sup>1</sup>The Department of Labor administers the other program. See 10 C.F.R. Part 30; www.dol.gov.esa.

reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3). As the foregoing indicates, the DOE program itself does not provide any monetary or medical benefits.

To implement the program, the DOE has issued regulations, which are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The OWA is responsible for this program and has a web site that provides extensive information concerning the program.<sup>2</sup>

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request that the DOE's Office of Hearings and Appeals review certain OWA decisions. An applicant may appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the OWA, and a final decision by the OWA 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 OWA. 10 C.F.R. § 852.18(a)(2).

#### B. Procedural Background

The Worker was employed at DOE's Hanford site. He worked at the site as a patrolman from 1956 to 1971 and as a laborer in 1989 and from 1991 to 1996.

The Applicant filed an application with OWA, requesting physician panel review of one illness, lung cancer. The Applicant claimed that her late husband's illness was a result of his duties as a laborer, which led to exposure to paints, asbestos, radiation, welding and iron fumes, various solvents and dusts, and insulation.

The Physician Panel rendered a negative determination on the claimed lung cancer. The Panel agreed that the Worker had lung cancer, but stated that the disease was not caused by occupational exposures.

The OWA accepted the Physician Panel's negative determination on the lung cancer. The Applicant filed the instant appeal.

#### *II. Analysis*

Under the Physician Panel Rule, independent physicians render an opinion whether a claimed illness is related to a toxic exposure during employment at DOE. The Rule requires that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12.

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<sup>2</sup> See [www.eh.doe.gov/advocacy](http://www.eh.doe.gov/advocacy).

We have not hesitated to remand an application where the Panel report did not address all the claimed illnesses,<sup>3</sup> applied the wrong standard,<sup>4</sup> or failed to explain the basis of its determination.<sup>5</sup> On the other hand, mere disagreements with the Panel's opinion are not a basis for finding Panel error.

In her appeal, the Applicant supplies additional information. First, she supplies a copy of a pathology report. Second, she supplies a 1999 physician letter stating that the tests indicated that the Worker's breathing tests and chest x-ray were consistent with asbestosis.

This additional information does not indicate panel error. A physician panel bases its consideration on the record presented to it. Accordingly, the existence of additional information, not included in the record, does not support a finding of panel error. In any event, we doubt that the additional information would have changed the panel result. Our understanding of the pathology report is that it indicates that the Worker had lung cancer as opposed to cancer of another organ that had spread to the lung. Although the Panel noted the absence of the pathology report as leaving open the question of the original cancer site, the Panel's analysis assumed that the lung was the primary site. Accordingly, we do not believe that the inclusion of the pathology report would have changed the Panel's analysis. Similarly, we doubt that the physician's statement concerning asbestosis would have affected the Panel determination. The Panel report agreed that the Worker's 1999 chest x-ray suggested asbestosis, but the Panel found that the asbestosis was not related to exposures at DOE.<sup>6</sup> Accordingly, we do not believe that the inclusion of the physician's statement would have affected the Panel's analysis.

As the foregoing indicates, the appeal does not provide a basis for finding panel error and, therefore, should be denied.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0101 be, and hereby is, denied.

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<sup>3</sup>Worker Appeal, Case No. TIA-0030, 28 DOE ¶ 80,310 (2003).

<sup>4</sup>Worker Appeal, Case No. TIA-0032, 28 DOE ¶ 80,322 (2004).

<sup>5</sup>Id.

<sup>6</sup>For the Worker's period of employment as a patrolman, the Panel noted the absence of any evidence of asbestos exposure. For the Worker's period of employment as a laborer, the Panel acknowledged the possibility of asbestos exposure but found that the amount of exposure and the latency period of asbestosis indicated that the Worker's asbestosis was not attributable to any such exposures.

(2) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: September 24, 2004

