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October 13, 2004

**DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS**

Appeal

Name of Case: Worker Appeal

Date of Filing: April 13, 2004

Case No.: TIA-0106

XXXXXX XXXXXXX (the Applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant was a contractor employee at a DOE facility for many years. An independent Physician Panel (the Physician Panel or the Panel) determined that the Applicant's illnesses were not related to his work at the DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals. As explained below, we have concluded that 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 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. See www.eh.doe.gov/advocacy.

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. 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. 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 for approximately 22 years he was an employee at the DOE's facility in Oak Ridge, Tennessee. He stated that he was exposed to radioactive materials, toxic chemicals and asbestos in the workplace. He claimed that his exposure to these substances resulted in the following illnesses or conditions: (I) multiple myeloma which was diagnosed in 2000; and (ii) asbestosis beginning in 1987.

In its determination, the Physician Panel considered the medical information concerning the Worker's illnesses that had been submitted by the Applicant. With respect to the multiple myeloma, it concluded that this condition did not, on an as least as likely as not basis, arise out of exposure to a toxic substance at a DOE facility. Specifically, it found that a review of the Applicant's dosimetry records revealed that the applicant's documented radiation received over the course of his DOE career was "next to nothing". It also found that these records appeared to be reasonably complete. Finally, it found that there was insufficient evidence that exposure to other toxic substances significantly contributed to the Applicant's multiple myeloma. Panel Report at 2.

With respect to the Applicant's other claimed illness, the Panel concludes that

The applicant does not have any disease related to his claimed illness, asbestosis. Nor does he have asbestos related pleural disease.

Panel Report at 3. It finds that there is no record of interstitial fibrosis in the Applicant's lungs, which would be expected if he had asbestosis. It also finds that there is insufficient medical evidence to support the Applicant's assertion that a calcified plaque in the Applicant's right lung that developed prior to 1993 is an asbestos-related plaque. The Panel finds that it is unlikely that such a plaque would develop no more than ten years from the beginning of DOE exposure to asbestos and that other causes of pleural calcification, such as infectious granulomatous disease, are plausible and probably more likely. *Id.*

The OWA accepted the Physician Panel's determination. Accordingly, the OWA determined that the Applicant was not eligible for DOE assistance in filing for state workers' compensation benefits.

In his appeal, the Applicant contends that the Physician Panel determination is erroneous. With respect to his multiple myeloma, he states that the Panel relied on dosimetry readings

that were low because employees were told to place the dosimeters inside plastic bags inside their clothing so they would not get dirty. He states that the Panel did not consider “the actual work area that I spent 7 years in or my chemical exposures.” He states that two or three of his co-workers also developed multiple myeloma and that he used to eat lunch in an area that now requires full protective equipment and clothing. He states that he used a chemical called “Tap-Magic” to wash down equipment that was extremely toxic. With respect to his claimed asbestosis, he attaches an interoffice memo to his appeal as evidence of his exposure. He also states that his doctor has told him that his asbestosis has gotten worse.

II. Analysis

The Physician Panel Rule specifies what a physician panel must include in its determination. The panel must address each claimed illness, make a finding whether that illness arose out of and in the course of the Worker’s DOE employment, and state the basis for that finding. 10 C.F.R. § 852.12(a)(5). Although the rule does not specify the level of detail to be provided, the basis for the finding should indicate, in a manner appropriate to the specific case, that the panel considered the claimed exposures.

Although the Applicant maintains that the Panel’s analysis of his risk factors omits important information, the record indicates that the Panel fully considered the information before it. With respect to the multiple myeloma, the Panel stated that the record gave no indication of significant exposure by the Applicant to radiation or to specific toxic substances that would be likely to cause this form of cancer. The Applicant does not identify any information in the record that contradicts the Panel’s finding. Because the Applicant has not identified a deficiency or error in the Panel’s determination, there is no basis for an order remanding the matter to OWA for a second Panel determination. If the Applicant has new evidence of radiation exposure in a DOE workplace or new medical information linking a specific toxic exposure to multiple myeloma, he should submit that information to the OWA so that it can determine whether physician panel review of that information is warranted.

With respect to the Applicant’s claim that he suffers from asbestosis, the Physician Panel concluded that this diagnosis was not supported by the medical evidence in the record. Contrary to the Applicant’s assertion, the Panel did not find that his work at the DOE facility could not have resulted in exposure to asbestos. Rather, it found that the current medical evidence in the record before it did not adequately support a diagnosis of asbestosis or asbestos related pleural disease. The Applicant does not identify any medical information in the record that was overlooked by the Panel. The Panel notes, however, that if the Applicant worked in an environment in which asbestos was widely present, he should continue to be monitored for the medical complications of asbestos exposure. The Applicant states that he recently was told by his doctor that his lung condition is deteriorating due to asbestos exposure. If this is the case, he should document this condition and submit the new information to the OWA so that it can determine whether physician panel review of the information is warranted.

As discussed above, the Panel determination fully addressed the Applicant's claims that he suffered from multiple myeloma and asbestosis. Therefore the appeal will be denied.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0106 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: October 13, 2004