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September 23, 2004

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

Appeal

Name of Case: **Worker Appeal**

Case Number: **TIA-0108**

Date of Filing: **June 9, 2004**

XXXXX (the worker or the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. 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's illnesses were not related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the worker 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, and the worker encouraged to request further review based on any additional information that was not available when the Panel made its initial determination.

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, hereinafter 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) states 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 worker was employed by DOE contractors at the K-25 Plant in Oak Ridge, Tennessee, from 1944 through 1986. Record at 8. The applicant submitted a claim to the OWA. As part of the application process, the applicant completed OWA Forms entitled "Request for Review by Physician Panel." Question 7 of those forms asks "What illness(es) do you have that you believe is caused by your work at a DOE facility?" Record at 1, 3. The applicant responded: "severe heart problems 1988, extremely low blood count 1988 contributed to heart attack," and he also claimed that his skin cancer was caused by his work at the DOE facility. *Id.* at 1-3,12.*

The OWA reviewed and prepared the case file and then forwarded it to the Physician Panel. The cover sheet to the case file identified three claimed illnesses: "severe heart problems 1988, extremely low blood count 1988, skin cancer." The Physician Panel reviewed the case file and issued a report in which it described the worker's serious heart attack in April 1988, and found

He had a past history syncopal (fainting spells) episodes of ventricular fibrillation or complete heart block. The root cause of his coronary problems was probably his high cholesterol with elevated low-density lipoproteins and depressed high-density lipoproteins.

The Panel referred to a table showing the worker's historical total cholesterol, LDL, and HDL levels, and noted further that

Smoking may have contributed to his heart disease, but it is not likely, given the remote history.

* * *

With respect to the worker's low blood count, the Panel found

* The worker claimed he suffered hearing loss as a result of exposure to noise at the DOE facility. However, noise is not considered a "toxic substance" for purposes of this program, and the Panel did not consider this claim.

He developed mild, not severe, anemia in 1987-1988; the root cause was not determined but it was suspected that multiple blood donations with a decrease in the red meat in his diet contributed. He was started on Feragon which is an iron supplement, and hemoglobin and hemocrit increased then stabilized, and he has not had further problems. [The worker's personal physician's] letter of 11/6/87 summarizes this....

The Panel referred to a table showing the worker's hemoglobin and hemocrit levels during the period 1986-1987, and found the worker was "just below the reference range [for adult males], not severely low."

* * *

Addressing the skin cancer, the Panel noted that in over 40 years of employment at Oak Ridge, the worker was "routinely monitored for uranium, fluorides, mercury, and alpha emitters. All exposures were well below the action points...." *Id.* at 3. The panel discussed the worker's seven skin cancers (all basal cell carcinomas), noting the years when they were diagnosed, where they occurred, and the nature of the disease:

1-4-88	Back of left ear
6-7-90	Superior nasal crease
7-24-90	Superior nasal crease
3-27-92	Left ear
11-13-95	Left ear
12-17-95	Left ear
4-18-02	Left nasal crease

Basal Cell Carcinomas are the most commonly diagnosed skin cancers, with the great majority being found on the sun-exposed portions of the face and neck. Age and ultraviolet radiation in the form of sunlight exposure are the most common risk factors, although ionizing radiation and arsenic exposure are also risks.

Given that [the worker] was 64 years old when the first basal cell carcinoma was excised, along with a life-long exposure to ultraviolet radiation in a sunny area of the country, with work on his father's farm during his younger years, the panel concluded that non-occupational factors were much more likely causative of these particular basal cell cancers.

Determination at 1-4. On June 9, 2004, the applicant appealed that 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 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).

The record supports the Physician Panel’s finding that the applicant has not shown he had any exposure to a toxic substance while working at the K-25 Plant that was a significant factor in aggravating, contributing to or causing his heart attack, his low blood count, or his skin cancer. In connection with his appeal, the worker stated that he believes exposure to a toxic substance, trichloroethylene (TCE), damaged his liver and caused his high cholesterol and heart problems. Memorandum of July 6, 2004 telephone call from the worker to Janet N. Freimuth, OHA. He also believes that toxic exposure caused his low blood count and that iron he took for it precipitated his heart attack. The record notes that the worker was exposed to toxic substances. However, there is no evidence that any work-related exposures caused his heart attack, his low blood count, or his skin cancer. High cholesterol is a common condition, whose cause is often unknown, and there is no evidence that exposure to TCE caused it in this individual. The worker’s blood count was barely below the normal range for a very short period. Skin cancer is another common condition, and as the Panel observed, it can be caused by sun exposure. Accordingly, the Panel’s finding under 10 C.F.R. § 852.8 that there is no link established between the worker’s exposure at Oak Ridge his three medical problems is neither erroneous nor arbitrary or capricious.

On appeal, the worker asserts that the record is incomplete on skin cancer. He claims he had skin cancer a few times before the ones noted by the Panel, which began when he was 64 years old, and that all of the cancers were not in sun-exposed areas, namely, the crevice of the nose and ear, and close to the hairline, and other cancers were not on his face. However, the worker was unable to get the records of his earliest skin cancers from the treating physicians because the records were no longer available. Disagreeing with the Panel’s conclusion that sun exposure caused all of his skin cancers, the worker’s appeal letter stated

As the panel noted, I was very young (age 20) when I went to work at K-25 in Oak Ridge. Prior to that time, I was in school (inside). In the late afternoon after school, I helped some on the farm.

I did not get overexposed to the sun as the panel rationalized. When I worked at K-25 for almost 42 years, my work was inside (out of the sun).

Under the circumstances of this case, even if the Panel was wrong to surmise that all of the worker's skin cancers were attributable to sun exposure, this factual error in and of itself does not mean the Panel's determination should be reversed under the legal standard in 10 C.F.R. § 852.8. The Panel found that there was no evidence of exposures in the record that could have caused the worker's skin cancers, and I see none.

However, the worker claims that the exposure history report he received from K-25 did not contain any records from two periods, e.g., 1945 to 1948, and 1962 to 1975, and that "some of these missing years were my worst years of exposure to dangerous chemicals." According to the worker, he was a glass blower for about 9 years during the period 1962 to 1975, working on different equipment contaminated with radiation. He also states that he worked on several experimental projects, including one making xenon light tubes from quartz glass:

During fabrication, when melting the quartz with a hydrogen torch, the light given off was very bright and the same frequency as sunlight, this along with the high heat and close range was very hard on the skin on my face and arm.

Record at 527. There is no indication that the Panel considered evidence of this specific exposure, or any other exposure data from the two missing periods. Nor is there evidence that the Panel considered any skin cancers the worker contracted before the age of 64. This does not amount to a showing of error in the Panel determination that is the subject of the present appeal, but it may warrant further Panel review of additional information, as explained below.

We suggest that the worker have a medical professional examine him and document all of the sites of skin cancer surgery. He can also try anew to obtain exposure data from DOE for the two missing periods. The worker should provide any additional information not considered in the initial determination to the OWA and request further Panel review.

III. Conclusion

The applicant has not demonstrated any error in the Panel's determinations regarding his heart attack, his low blood count, or his skin cancer. 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-0108 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: September 23, 2004