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January 28, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal
Date of Filing: October 11, 2002
Case No.: TIA-0002

XXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for assistance in filing for state workers' compensation benefits. The DOE Office of Worker Advocacy determined that the applicant, a uranium miner, was not a "DOE contractor employee" and, therefore, was not eligible for the assistance program. The applicant appeals that determination. As explained below, we have concluded that the determination is correct.

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. Parts A and D of the Act provide benefits to certain workers.

Part A of the Act provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. See 42 U.S.C. § 73841(1).

Part D of the Act provides for a DOE program to assist "Department of Energy contractor employee[s]" 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/

Pursuant to an Executive Order, the DOE has published a list of facilities covered by the Act and has designated next to each facility whether it falls within the Act's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 67 Fed. Reg. 79,068 (December 27, 2002) (current list of facilities). 2/ The DOE's published list also refers readers to the DOE Office of Worker Advocacy web site for additional information about the facilities. 67 Fed. Reg. 79,069 (citing www.eh.doe.gov/advocacy).

This case concerns Part D of the Act, the portion of the Act that provides for DOE assistance to DOE contractor employees in filing for state workers' compensation benefits. 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. If a physician panel issues a determination favorable to the employee, the DOE assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 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. See 67 Fed. Reg. 52,841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). As stated above, the DOE Office of Worker Advocacy is responsible for this program.

In his application for assistance, the applicant states that he worked as a uranium miner for Kerr-McGee in Grants, New Mexico, from approximately 1960 to 1966. The applicant states that since that time he has worked "on and off" as a cement finisher.

1/ See www.eh.doe.gov/advocacy.

2/ See Executive Order No. 13,179 (December 7, 2000). The DOE first published a list in January 2001, 66 Fed. Reg. 4003 (January 17, 2001), and a revised list in June 2001, 66 Fed. Reg. 31218 (June 11, 2001).

The applicant states that in 1990 he became ill with chronic bronchitis and calluses on his larynx, which he believes resulted from his work as a uranium miner for Kerr-McGee.

The DOE Office of Worker Advocacy determined that the applicant was not a DOE contractor employee. See September 16, 2002 Letter from the Office of Worker Advocacy 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.

In his appeal, the applicant does not address the determination's finding that he was not employed at a DOE facility. Instead, the applicant states that he hopes to submit more information about his illness.

II. Analysis

A. Worker Programs

As an initial matter, we emphasize that an application for DOE assistance in filing for state workers' compensation benefits is separate from an application for such benefits. A DOE decision that an applicant is not eligible for DOE assistance does not affect (i) an applicant's right to file for state workers' compensation benefits without DOE assistance or (ii) whether the applicant is eligible for state workers' compensation benefits under applicable state law.

Similarly, we emphasize that an application for DOE assistance in filing for state workers' compensation benefits is separate from any claims made under other statutory provisions. Thus, a DOE decision concerning DOE assistance in filing for state workers' compensation benefits does not affect any claims made under other statutory provisions.

We now turn to whether the applicant in this case is eligible for DOE assistance in filing for state workers' compensation benefits.

B. Whether the Applicant is Eligible for DOE Assistance
in Filing for State Workers' Compensation Benefits

As explained below, we have concluded that the applicant was not a "DOE contractor employee" and, therefore, is not eligible for DOE assistance in filing for state workers' compensation benefits. Our conclusion is based on our understanding of the uranium mining and milling industry in general, and our conclusion is consistent with the applicant's employment by Kerr-McGee in particular.

1. The Uranium Mining and Milling Industry

A 1982 DOE report describes the history of the uranium industry in the United States. See "Commingled Uranium-Tailings Study," DOE/DP-0011, vol. II (June 30, 1982), App. D ("History of the [Atomic Energy Commission] Domestic Uranium Concentrate Procurement Program") (hereinafter the 1982 DOE Report). The report concerned the fact that uranium mills sold uranium concentrate to both the federal government and other entities, and that the federal government was responsible for paying a share of the clean up costs based on the amount of its purchases. By way of background, the report describes the development of the nation's uranium mining and milling industry.

The 1982 DOE report describes the period 1947 to 1970, when the DOE's predecessor, the Atomic Energy Commission (AEC), purchased uranium ore and concentrate from private firms. The report indicates that, with the exception of a mill in Utah, the mines and mills were privately operated. ^{3/} In 1962, the AEC stopped purchasing uranium ore. 1982 DOE Report at D-4. Aside from the uranium procurement program, the AEC leased federal lands to private firms in exchange for a royalty share of any production. In 1962, the AEC discontinued the leasing program. 1982 DOE Report at D-7.

The 1982 DOE report discusses some of the AEC's specific purchase contracts, including the one with the applicant's

^{3/} The AEC purchased a Monticello, Utah mill in 1948. 1982 DOE Report at D-6.

employer - Kerr-McGee, which mined and milled uranium in Grants, New Mexico. The report provides in relevant part:

On May 3, 1957, Kermac Nuclear Fuels [Kerr-McGee's predecessor] and the U.S. Atomic Energy commission signed . . . a purchase contract . . . for the delivery of U_3O_8 concentrate to the AEC. There were three modifications to the original contract. The first (November 28, 1960) changed the pricing formula, amended the AEC option to a firm commitment, and broadened the ore source for U_3O_8 . The second (August 28, 1964) was the "stretch-out" contract, which reduced deliveries through 1966 and added 1967-through-1970 deliveries according to a detailed cost formula. The third (April 23, 1966) had no effect on quantity, prices, or schedules. The AEC contract was for purchase of U_3O_3 concentrate with no separate amount stated as a milling fee.

1982 Report at A-67 (emphasis added). Thus, the 1982 Report indicates that the AEC contract with Kerr-McGee provided for the sale of uranium concentrate, and that the sales occurred over the period 1957 to 1970.

2. Whether the Applicant is Eligible for DOE Assistance in Filing for State Workers' Compensation Benefits

In order to be eligible for DOE assistance in filing for state workers' compensation benefits, the worker must be a "Department of Energy contractor employee." 42 U.S.C. § 7385o(b). The term "Department of Energy contractor employee" is defined in relevant part as:

An individual who is or was employed at a Department of Energy facility by -

- (i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or

(ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

42 U.S.C. § 73841(11)(B); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). A "Department of Energy facility" is defined in relevant part as:

[A]ny building, structure, or premise, including the grounds upon which such building, structure, or premise is located -

(A) in which operations are, or have been, conducted by, or on behalf of, the Department of Energy ... and

(B) with regard to which the Department of Energy has or had -

(i) a proprietary interest; or

(ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction or maintenance services.

42 U.S.C. § 73841(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). Although the DOE's published list of DOE facilities does not include any uranium mining or milling sites, 67 Fed. Reg. 79,069-79,074, those sites would be DOE facilities if they met the statutory and regulatory definition.

The 1982 DOE Report indicates that, with the possible exception of employees at the AEC's Utah mill, uranium mine and mill workers were not "DOE contractor employees." In order to be a DOE contractor employee, the employee must work for a firm that has a contract to provide "management and operating, management and integration, environmental remediation," or other "services" at a DOE facility. Neither the AEC procurement contracts nor the AEC mine leases required the contractor to provide services. Under the AEC procurement contracts, the contractor sold product to the AEC. Under the mine leases, the contractor paid a royalty-in-kind on ore production in exchange for a leasehold

interest. Since the AEC procurement contracts and the leases were not contracts for services, the firms that entered into those contracts did not have the type of contracts that would make them DOE contractors, let alone contractors performing work at a DOE facility. Accordingly, their workers, including the worker in this case, do not meet the definition of a "DOE contractor employee."

The 1982 DOE Report's description of the Kerr-McGee, Grants, New Mexico operation during the period 1957 to 1970 is consistent with our understanding that the nation's uranium industry was privately operated during the 1947 to 1970 period of the AEC procurement program. As stated above, the 1982 DOE Report describes the Kerr-McGee contract as providing for the sale of uranium concentrate, and there is nothing in the contract calling for Kerr-McGee to provide services at a DOE facility.

As the foregoing indicates, the applicant was not a DOE contractor employee and, therefore, is not eligible for DOE assistance in filing for state workers' compensation benefits. Again, we emphasize that this determination does not affect whether the applicant is eligible for (i) state workers' compensation benefits or (ii) federal monetary and medical benefits available under other statutory provisions.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0002 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: January 28, 2003