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June 30, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: June 5, 2003

Case No.: TIA-0025

XXXXXXXXXXXXX (the applicant) 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 (or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, we are remanding the application to the DOE Office of Worker Advocacy for further consideration.

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

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

panel issues a determination favorable to the employee, the DOE Office of Worker Advocacy accepts the determination and 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. 52841 (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.

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. In his appeal, the applicant contests the Physician Panel's determination.

II. Analysis

A. Standard of Review for Physician Panel

A key issue on appeal is whether the Physician Panel applied the correct standard in making its determination in this case.

As stated above, Part D of the Act provides that a Physician Panel will consider whether employee illnesses were caused by exposure to toxic substances at DOE facilities. Specifically, the Act states that a "panel shall review an application . . . and determine under guidelines established by the Secretary [of Energy] whether the illness or death that is the subject of the application arose out of and in the course of employment by the Department of Energy and exposure to a toxic substance at a Department of Energy facility." 42 U.S.C. § 7385o(d)(3). The relevant regulation amplifies this standard, providing that a Physician Panel must determine "whether it is at least 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 (emphasis added).

The Panel in the present case stated its conclusion using the following standard: "None of the exposures were considered by any of the panelists to be related in any more-probable-than-not causative manner to any of [the applicant's] diagnoses." (Emphasis added) The standard adopted by the DOE is more favorable to applicants than the standard applied by the Panel. As an initial matter, the DOE standard requires that the exposure be "a significant factor in aggravating, contributing to or causing the illness or death." Thus, it is not necessary that the exposure be "causative," which was the Panel's standard. The Panel could find in favor of an applicant if it believed that the exposure aggravated or contributed to an applicant's illness or death.

Secondly, the Panel's use of the "more probable than not" standard is incorrect. As the DOE has stated, it is the applicant's burden to present evidence to establish that it is "at least as likely as not" that the exposure was such a factor. This, too, is a standard more favorable to the applicant than the one applied by the Panel. See 67 Fed. Reg. 52841, 52847-48 (August 14, 2002). Accordingly, we find that this matter should be remanded to the Office of Worker Advocacy for a Physician Panel determination using the appropriate "as least as likely as not" standard, as well as an evaluation of

whether the exposures experienced by the applicant aggravated, contributed or caused his illnesses.

B. Substantive Consideration of Applicant's Condition

The applicant also states that the Panel's review of his medical condition was incomplete. For example, the applicant alleges that the Panel relied only on reported levels of radiation exposures submitted to it by the DOE contractor. The applicant contends that it is well-known that contractor records are incomplete and understated. The applicant alleges that the Panel failed to take this fact and his own experiences into consideration. The applicant gives several examples of instances in which he believes he was subject to additional radiation exposures and has provided some additional material on this point. The Panel should give specific consideration to this claim, as set out in more detail in Item 2 of the applicant's appeal.

The applicant has provided a list of the diseases or conditions that he alleges were caused by exposure to toxic substances at a DOE facility. He names seven conditions that he claims the panel did not consider. He has provided exhibits documenting those conditions. The regulations provide that the Panel's findings must include "[e]ach illness . . . that is the subject of the application." Further, the Panel's findings must state for each illness whether it arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility. 10 C.F.R. § 852.12(a),(b)(4). We find that in failing to discuss all the illnesses, the Panel did not fully satisfy this requirement. If the Panel views the omitted illnesses as not warranting full consideration, the Panel should explain the basis for that view.

The applicant also alleges that some of the Panel's conclusions were simply incorrect, and not based on available evidence. In this regard, he cites the Panel's finding that there was a "lack of credible diagnoses related medically to the exposures claims." The applicant objects to that finding, and points to a November 19, 1999 diagnosis stating that his radiation exposure to plutonium and other radionuclides "may have been absorbed up into his bone and be responsible for his overall joint and degenerative diseases." He included that diagnosis in the additional material as Attachment 9. In this regard, the Physician Panel rule provides that the Panel must provide the Program Office with any evidence contrary to its determination, and state why the panel finds this evidence not persuasive. 10 C.F.R. § 852.12(c)(1). Thus, the Panel is required

to consider and include in its findings a discussion of evidence that conflicts with its ultimate determination.

Moreover, 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.

In sum, on remand, the Panel should consider the areas in which the applicant claims that the review was incomplete and in error. In performing its new review, the Panel should consider the additional information submitted by the applicant.

We have provided the Office of Worker Advocacy with a copy of the additional information provided by the applicant. This includes the applicant's Notice of Appeal, dated June 5, 2003, and the applicant's Amended Appeal, dated June 19, 2003. The Panel should give full consideration to this additional information as part of the remand we are ordering.

C. Signatures of Panel Members on the Determination Document

Section 852.12 states that the determination and findings must be signed by all panel members. The applicant claims that the Panel's determination document was signed by only one of the three members. After reviewing the complete file in this matter, we found copies of the Panel's determination showing that each of the Panel members signed identical, but separate, versions of the determination. This is reasonable, inasmuch as the Panel members apparently reached their determination not in the presence of each other, but via telephone. See 10 C.F.R. § 852.11(b). Accordingly, we see no error here.

D. Interview of Applicant

The applicant contends that he was never personally interviewed by the Panel. The regulations provide the Panel may make a determination as to whether it needs additional information that can only be provided by an applicant through an interview. 10 C.F.R. § 852.10(a). However, an applicant is not entitled to such an interview. This is clearly a matter left to the Panel's discretion. Thus, there is no error in the fact that the Panel decided not interview the applicant in this case.

The applicant also contends that the Office of Worker Advocacy's (OWA) Procedure Manual provides that the Case Manager should conduct an interview lasting one to one and one-half hours with an applicant. The applicant here states that such an interview was never conducted with him. As the OWA Procedure Manual makes clear, this interview is called for when the Case Manager concludes that an occupational history is not included in the file. OWA Procedure Manual 16(a)(1). In this case, the Case Manager apparently did not reach that conclusion. That decision was well within the Case Manager's discretion. Further, based on our own review of the file in this case, we believe that there was significant development of the applicant's occupational history, and therefore no obvious reason to conduct the in-depth interview described in the OWA Procedure Manual. Accordingly, we see no error on this point. The applicant in this case was simply not entitled to an interview.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0025 be, and hereby is, granted as set forth in Paragraph 2 below.
- (2) The application is remanded to the DOE Office of Worker Advocacy for further action in accordance with the above determination.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: June 30, 2003