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December 1, 2003  
DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

*Appeal*

Name of Case: Worker Appeal

Date of Filing: August 26, 2003

Case No.: TIA-0030

XXXXXXXXXXXX (the worker) 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. The OWA referred the application to an independent physician panel, which determined that the worker's illnesses were not related to his work 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).

*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.

The Department of Labor (DOL) administers the first program, which provides \$150,000 and medical benefits to certain workers with specified illnesses. Those illnesses include beryllium disease and specified cancers associated with radiation exposure. 42 U.S.C. § 7341i(9). The DOL program also provides \$50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. See 42 U.S.C. § 7384u. To implement the program, the DOL has

issued regulations, 20 C.F.R. Part 30, and has a web site that provides extensive information concerning the program.<sup>1/</sup>

The DOE administers the second program, which does not provide for monetary or medical benefits. Instead, it 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. § 7385o(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 reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3). The DOE program is limited to DOE contractor employees because DOE and DOE contractors would not be involved in state workers' compensation proceedings involving other employers. 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 worker in this case filed a DOE application, claiming two illnesses - chronic obstructive pulmonary disease (COPD) and basal cell carcinoma - and exposures to beryllium and ionizing radiation. During the application process, the worker claimed two additional illnesses - heart disease and hypertension - and exposures to cadmium, mercury, and toluene.

In its determination, the physician panel considered the illnesses claimed in the original application: COPD and basal cell carcinoma. The panel stated that the claimant attributed his COPD to beryllium exposure, and the panel unanimously determined that the COPD was unrelated to beryllium exposure. The panel cited negative test results for beryllium sensitivity and negative biopsy results for beryllium disease. In addition, the panel noted long-standing pulmonary complaints dating back to when the worker was in his 40's and cigarette use dating back to the worker's teenage years. The panel then considered whether the worker's basal cell carcinoma was attributable to radiation exposure. A majority of the panel

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<sup>1/</sup> See [www.dol.gov/esa](http://www.dol.gov/esa).

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

concluded that it was not, stating that the worker's exposure was too small. In addition, the panel cited other factors that indicated that the cancer was related to ultraviolet light exposure, including evidence of solar changes on the worker's skin and the location of the lesions in sun exposed areas.

The OWA accepted the physician panel's determination. *See* July 3, 2003 Letter from the DOE to the applicant. 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 wrong.

## *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.

The panel determination addressed the two illnesses listed in the application. The panel determination explained why it found that the COPD was unrelated to exposures to beryllium, and why it found that the basal cell carcinoma was unrelated to exposure to ionizing radiation. The panel determination concluded that the COPD was not beryllium disease and, therefore, was not related to beryllium exposure. For the basal cell carcinoma, the panel determination addressed the level of the worker's exposures, the general risk factors for the diseases, and the presence of risk factors for the worker. As explained below, however, the panel determination did not address all of the matters required by the rule.

The panel determination did not address the two additional illnesses claimed during the application process, i.e., heart disease and hypertension. The apparent oversight was likely attributable to the fact that these two additional illnesses were not listed in the application. In any event, the worker claimed these illnesses, and the rule requires their consideration.

In addition, for the worker's COPD and basal cell carcinoma claims, the panel determination did not address all of the claimed

exposures. Although the panel determination explained why it found that the worker's COPD was not related to beryllium exposure, the panel determination did not address whether the worker's COPD was related to exposure to ionizing radiation or the other identified toxic substances. In this regard, we note that in September 6, 2001, and October 18, 2001 evaluations, a physician characterized the worker as having "possible occupational asthma" and "occupational asthma," respectively. The panel determination should have stated whether the ionizing radiation or other claimed exposures were a significant factor in aggravating or contributing to the worker's COPD and state the basis for those findings. Similarly, although the panel determination explained why it found that the worker's basal cell carcinoma was not related to exposure to ionizing radiation, the panel did not address the other claimed toxic exposures. The panel determination should have stated whether the other claimed exposures were a significant factor in aggravating or contributing to the illnesses and explain the basis for those findings.

Based on the foregoing, the physician panel determination should be remanded for further consideration. We note that, during the course of this appeal, the applicant has been diagnosed with prostate cancer and has requested that any remand to the physician panel consider that illness. We suggest that prior to OWA referral to a physician panel, OWA confirm with the applicant the illnesses and exposures claimed and identify them for the physician panel.

Finally, we note that the worker objects to the panel determination's description of his smoking history; he states that the determination overstates his smoking history. The panel's description is consistent with the worker's medical records, which indicate a long history of smoking. If the worker wishes to claim that there were intermittent periods when he smoked less or not at all, the worker should identify those periods and the level of consumption in detail in an affidavit and submit it to OWA. Whether any such submission is consistent with his medical records and indicates a reduction that is significant from a medical standpoint is a matter for the physician panel.

**IT IS THEREFORE ORDERED THAT:**

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0030 be, and hereby is, granted as set forth in paragraph (2) below.

- (2) **The application that is the subject of Case No. TIA-0030 is remanded to the Office of Worker Advocacy for further consideration consistent with this Decision and Order.**
- (3) **This is a final order of the Department of Energy.**

**George B. Breznay  
Director  
Office of Hearings and Appeals**

**Date: December 1, 2003**

