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December 15, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: November 25, 2003

Case No.: TIA-0035

XXXXXXXXXXXXXXXXX (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. The applicant's late husband (the worker) was a DOE contractor employee at a DOE facility. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, 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.^{1/}

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.

^{1/} See www.eh.doe.gov/advocacy.

Generally, if a physician 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). *See Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

The present application for DOE assistance in filing for state workers' compensation benefits indicated that the worker was employed as a laboratory analyst and a radiographer at the DOE's Y-12 Plant in Oak Ridge, Tennessee from December 27, 1950 through February 13, 1974. The application claimed that the worker was exposed to radiation, lithium and cobalt 60. The worker was diagnosed with heart problems in July 1997 and emphysema and lung scarring in July 2001.

The Physician Panel issued a negative determination on this claim. The Panel found as follows: "[the worker's] conditions did not arise out of and in the course of employment by a DOE employer and exposure to a toxic material at a DOE facility." In this regard the Panel stated in its report that "none of the claimed conditions could be linked to any exposure at the Oak Ridge facility and the over-riding etiology of the conditions is most likely the 50 year pack [a day] history of cigarette smoking." The Panel's decision was adopted by the Office of Worker Advocacy. Accordingly, the DOE Office of Worker Advocacy determined that the worker was not

eligible for DOE assistance in filing for state workers' compensation benefits. October 28, 2003 Letter from DOE to the applicant. In her appeal, the applicant contests the Physician Panel's determination that the worker's conditions were not related to his work at the Y-12 facility.

II. Analysis

As noted above, the Physician Panel found that "[the worker's] conditions did not arise out of and in the course of employment by a DOE employer and exposure to a toxic material at a DOE facility." Specifically, the Panel indicated that it considered whether it was 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. The Panel responded to this issue in the negative. The Panel further indicated that there was no link between the named exposures and the three conditions claimed by the applicant. In the Panel's opinion, the conditions were most likely to have been caused by the worker's 50 year habit of smoking a pack of cigarettes a day.

The applicant believes that this determination was incorrect. First she refers to another lung disease, pneumoconiosis, which is caused by inhalation of mineral dusts from substances such as coal and beryllium. The applicant claims that the worker was exposed to many toxic substances during his employment at the Y-12 Plant, but that the exposures were not documented. The applicant believes that the exposures could have caused pneumoconiosis. She also claims that the worker did not smoke for the entire 50 year period noted by the Panel. She maintains that the worker stopped smoking "several times."

The applicant's claim that the worker may have suffered from pneumoconiosis does not establish any deficiency or error in the Panel's determination. As an initial matter, there is no evidence in the record in this case suggesting that the worker may have suffered from this disease. Moreover, as the applicant acknowledges, there is no evidence in the record that the worker was exposed to a variety of toxic substances at the Y-12 Plant. Thus, the claim that the worker was exposed to toxic substances that were not considered by the Panel is speculative, as is the contention that these alleged exposures caused pneumoconiosis.

Furthermore, the Panel is required to review all of the records provided and to address certain matters in its determination. 10

C.F.R. §§ 852.9, 852.12. This the panel did. The applicant did not raise the pneumoconiosis claim prior to the filing of the instant appeal. Therefore, the Panel could not have considered it. Accordingly, there is no error by the Panel with respect to this issue.

I reach the same conclusion with respect to the applicant's claim that the worker stopped smoking several times. There are repeated references in the file to the worker's 50 year smoking habit. There is no corroborative evidence in the file that the worker did in fact stop smoking. Further, the applicant did not object to the references to the worker's 50-year smoking habit prior to the issuance of the Panel's report. Thus, even if it were true that the individual did stop smoking "several times," there was no error by the Panel with respect to this issue.

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. *See, Worker Appeal* (Case No. TIA-0028), November 21, 2003. Accordingly, the appeal should be denied.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0035 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: December 15, 2003