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February 23, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal
Date of Filing: December 1, 2003
Case No.: TIA-0037

XXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The applicant's late husband, XXXXXXXXXXX (the worker), was a DOE contractor employee at a DOE facility from 1944 to 1976. 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. § 73411(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. 1/

The DOE administers the second program, which does not itself provide any 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). 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. 2/

The worker was employed at a DOE facility from 1944 to 1976. The worker was a process operator and chemical operator. In 1976, at the age of 56 years, the worker retired based on disability attributable to chronic obstructive pulmonary disease (COPD/emphysema). 3/ The worker died in 1992, at the age of 71 years.

The applicant applied to DOL for a \$150,000 payment based on beryllium disease. The issue at DOL was whether the COPD was beryllium disease. DOL referred the issue to a physician who specializes in occupational medicine at the National Jewish Medical and Research Center and is a professor of pulmonary sciences at the University of Colorado School of Medicine. 4/ The physician opined

1/ See www.dol.gov/esa.

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

3/ See July 12, 1976 memorandum from Gino Zanolli, M.D., Union Carbide.

4/ See October 3, 2002 Request for Medical Evidence Consultation from DOL to Lee S. Newman, M.D., M.A., F.C.C.P., Head, Division of Environmental and Occupational Health Sciences, National Jewish Medical Research Center.

that there was insufficient medical evidence to conclude that the worker met the applicable criteria for diagnosis of beryllium disease set forth in EEOICPA. 5/ Accordingly, the applicant's DOL claim was denied. 6/

The applicant also filed an application with DOE, the application at issue in this case. The applicant identified the illnesses on which she sought physician panel review and attributed those diseases to exposure to toxic substances, including beryllium, radiation, and mercury.

The physician panel reviewed the application and issued a report. The panel addressed four illnesses: chronic obstructive pulmonary disease (COPD), coronary artery disease, cardiopulmonary edema, and hypertension. The panel found that the worker had the claimed illnesses, but found that they were not related to exposure to a toxic substance at DOE. The panel addressed each of the illnesses separately and stated the basis for its determination. With respect to COPD, the panel found that the documentation did not indicate beryllium disease but rather COPD/emphysema. The panel cited a long standing history of smoking and asthmatic bronchitis. With respect to coronary artery disease, cardiopulmonary edema, and hypertension, the panel found that there was insufficient information to find that the illnesses were related to toxic exposures at DOE. For coronary artery disease and cardiopulmonary edema, the panel cited various risk factors for the worker, including smoking, diabetes, and hypertension. With respect to hypertension, the panel stated that the condition was common in the population, and the panel listed various general risk factors, one of which was smoking.

5/ See November 4, 2002 Letter from Lee S. Newman, M.D., M.A., F.C.C.P., Head, Division of Environmental and Occupational Health Sciences, National Jewish Medical Research Center, and Professor, Department of Medicine and Department of Preventive Medicine and Biometrics, Division of Pulmonary Sciences and Critical Care Medicine, University of Colorado School of Medicine, to DOL.

6/ See May 7, 2003 DOL Notice of Final Decision.

The OWA accepted the physician panel's determination. See October 28, 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 her appeal, the applicant contends that the physician panel determination is wrong. In response to her appeal, the OHA contacted the applicant to ascertain if she disagreed with specific parts of the determination. She identified a number of disagreements, which are addressed below.

II. Analysis

A. The Worker's Health Status When He Began Work at DOE

The applicant maintains that the worker was healthy when he started work at DOE in 1944 and, therefore, his illnesses must be attributable to work at DOE.

The applicant is correct in describing the worker's health as good when he began work at DOE. Nonetheless, the decline in the worker's health over the years does not establish that the decline was related to work, as opposed to age, genetic factors, or other non-work related causes.

B. The Worker's COPD

The applicant maintains that the panel erred when it did not diagnose the worker's COPD as beryllium disease. She states that the worker was sick before the diagnostic tests for beryllium disease were used, that most of his medical records are no longer available, and that there was no reason for his treating physician to pursue the cause of his COPD at the time he was hospitalized just before his death. She has submitted a letter from a physician from the worker's home town, stating that the physician believes that the worker had beryllium disease.

The applicant has not demonstrated that the panel erred. The panel explained why it did not diagnose the worker's COPD as beryllium disease. The panel stated:

There is no supporting documentation for berylliosis seen on multiple chest x-rays and no supporting documentation of immunological studies, abnormal chest CT scan, or lung

pathology specimens. Instead, the medical records document x-ray, pulmonary function tests, and lab studies consistent with chronic obstructive pulmonary disease/emphysema.

Report at 2. The panel finding is consistent with the physician opinion obtained by DOL, a two-page opinion that discussed the worker's medical records. Thus, four physicians, who are specialists in occupational medicine, have found that the evidence is insufficient to diagnose berylliosis, and they have explained the basis for their determination. The only contrary medical opinion is from a physician who is not a specialist in the area and has not provided an explanation of his differing view. 7/ Based on the foregoing, the weight of the evidence supports the panel determination.

C. The Panel's Reference to Smoking as a Risk Factor for the Worker's Illnesses

The applicant maintains that the worker quit smoking 15 years ago and, therefore, she objects to the panel's mention of smoking as a risk factor for the worker's illnesses. The applicant's contention concerning when the worker quit smoking is consistent with the worker's medical records. The report of a January 7, 1990 cardiology consultation states that the worker stopped smoking "two years ago." 8/ The worker's cessation of smoking would not, however, affect the accuracy of the panel's reference to the worker's smoking as a risk factor. The panel referred to the worker's "long standing history of smoking," and "heavy smoking," and the worker's medical records support those characterizations. The records indicate that the worker smoked for at least 38 years - from the age of 16 years to about the age of 54 years, that the worker was smoking at the time of his disability retirement in 1976 at the age of 56 years, and that he continued to smoke for sometime thereafter. 9/ Accordingly, a cessation of smoking in the late

7/ See 2002 Memorandum from Louis C. Battista, M.D., F.A.C.F.P.

8/ See January 7, 1990 Cardiology Consultation (Attending Physician: Dr. Page).

9/ See February 3, 1962 Letter from William K. Rogers, M.D. (diagnosis of bronchitis, reference to worker's "description of his father's case which sounds like pulmonary emphysema and bronchitis" and advice to worker that "he very definitely should stop smoking"); March 6, 1974 Medical History by Laurence Dry, M.D. ("patient has been a heavy smoker for many, many years"); July 22, 1974 Health Evaluation (page 2, smoking); January 30, 1975 Summary by T.J. Grause, M.D. (patient told by his private doctor that he had to give up smoking and he has done so); January 7, 1990 Cardiology Consultation (Attending Physician: Dr. Page) (worker quit "two years ago").

1980's does not negate the panel's finding that the worker had a long smoking history leading up to his disability retirement.

D. The Panel's Reference to Family History as a Risk Factor for Coronary Artery Disease, Cardiopulmonary Edema, and Hypertension

The applicant objects to the panel's reference to family history in its discussion of the worker's coronary artery disease, cardiopulmonary edema, and hypertension. The applicant maintains that the worker did not have a family history of those conditions.

The panel's references to family history do not constitute errors in the determination. The panel referred to the worker's family history as one of his risk factors for coronary artery disease and cardiopulmonary edema, and the worker's medical records support those references. The file contains (i) a 1962 physician letter noting that the worker reported that his father had pulmonary problems and (ii) a 1974 health evaluation in which the worker reported a family history of heart disease and diabetes. 10/ The panel did not refer to the worker's family history as a risk factor for hypertension. Instead, the panel referred to general risk factors for hypertension and specifically identified smoking as a risk factor specific to the worker. Accordingly, the panel's references to family history as risk factors do not constitute errors in the determination.

III. Summary and Conclusion

As the foregoing discussion indicates, the applicant has not demonstrated error in the physician panel determination. Accordingly, the appeal should be denied.

10/ See note 9.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0037 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: February 23, 2004

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