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February 25, 2004

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

*Appeal*

Name of Case:            Worker Appeal  
Date of Filing:        December 9, 2003  
Case No.:                TIA-0039

xxxxxxxxxxx (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 has been a DOE contractor employee at a DOE facility for many years. The OWA referred the application to an independent physician panel, which determined that two of the applicant's illnesses were related to his work at DOE but that the rest were not. The OWA accepted the panel's determination, and the applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the panel's negative determination, particularly with respect to bone pain and peripheral neuropathy.

*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 has been employed at a DOE facility for many years - from 1963 to 1988 and from 1992 to the present. The worker is a technical specialist and has worked with toxic substances, including beryllium, radiation, and cadmium. The applicant requested physician panel review concerning whether his illnesses and symptoms are related to his exposures at DOE.

The physician panel reviewed the application and issued a report. The panel identified the following illnesses or symptoms: prostate cancer, peripheral neuropathy, chronic lung disease, osteomalacia, bone pain, nephrosis, and hypothyroidism. The panel found that cadmium exposure likely caused the prostate cancer and nephrosis. The panel rejected the applicant's claim for the other illnesses, stating that "[t]here is no convincing objective evidence that the other conditions claimed are related to [the worker's] employment." Report at 1.

The OWA accepted the physician panel's determination, and the OWA advised the applicant that he had received a positive

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

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

determination. See May 22, 2003 Letter from the DOE to the applicant. Because the OWA letter characterized the panel determination as positive, the letter did not mention the right to an appeal. Sometime thereafter, the applicant filed this appeal on the negative part of the determination. The applicant is particularly interested in a determination concerning bone pain and peripheral neuropathy; the applicant states that he has significant medical expenses associated with those problems and, therefore, seeks workers' compensation benefits that includes those problems.

## II. Analysis

As stated above, the negative part of the determination consists of a finding that there is "no convincing objective evidence" that the remaining illnesses were related to the applicant's employment at DOE. As explained below, that part of the determination did not meet the requirement of the rule in two respects.

First, the determination's reference to "no convincing objective evidence" indicates that the panel applied an overly stringent standard of proof. The Physician Panel Rule does not require "convincing objective evidence." Rather, it requires that the evidence indicate that it is "at least as likely as not" that an exposure to a toxic substance at DOE was a significant factor in aggravating, contributing to or causing the illness or death. 10 C.F.R. § 852.8. The "at least as likely as not" standard is a standard of proof more favorable to the applicant. See 67 Fed. Reg. 52841, 52847-48 (August 14, 2002) (preamble to the Physician Panel Rule explaining Section 852.8). Accordingly, the determination should be remanded for a determination using the appropriate "as least as likely as not" standard.

Second, the determination's failure to provide any further explanation of its negative finding is, in the context of this case, insufficient. The Physician Panel Rule requires that the panel explain "the basis of its determination" of whether the illness arose out of exposure to a toxic substance at DOE. 10 C.F.R. § 852.12(b)(5). Although a summary statement may satisfy this requirement in some cases, a summary statement does not satisfy this requirement in a case such as this, which contains evidence of exposures and multiple illnesses or symptoms potentially related to those exposures. See *Worker Appeal, TIA-0025* (June 30, 2003), [www.oha.doe.gov/cases/wa/tia0025.pdf](http://www.oha.doe.gov/cases/wa/tia0025.pdf). For this reason, the "basis for the determination" should indicate how the panel evaluated each illness or symptom, and how the panel

viewed the illnesses and symptoms in their totality, i.e., the likelihood that an individual would have suffered from all of the illnesses or conditions in the absence of exposure to toxic substances.

### *III. Summary and Conclusion*

As the foregoing discussion indicates, the determination should be remanded for a determination that applies the correct standard and explains the basis for the determination. See 10 C.F.R. §§ 852.8, 852.12(b)(5). The determination should address all of illnesses or symptoms on which the applicant received a negative determination, unless OWA obtains a statement from the applicant limiting the remand to a subset of those illnesses or symptoms.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-00379 be, and hereby is, granted as set forth in paragraph 2 below.
- (2) The application that is the subject of Appeal No. TIA-0039 should be remanded to the Office of Worker Advocacy for further consideration.
- (3) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: February 25, 2004

