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February 6, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal
Date of Filing: January 16, 2004
Case No.: TIA-0042

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. 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, we are remanding the application to the OWA 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 exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. Generally, if a physician panel issues a determination favorable to

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

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).

In his application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted on his "Employment History Claim Form" that he worked at the DOE's Hanford facility in Richland, Washington "off and on some time during the 1980's; 1991-1993; and 1995-1996." Record at 7. ^{2/} During that time, he was a laborer and worked with insulation. His medical evaluation dated November 20, 2000, indicated that he suffers from pleural plaques and asbestos-related disease. This diagnosis was made by a physician, as part of a health screening program offered by the applicant's trade union. Record at 29-30.

The Physician Panel issued a negative determination on this claim. The Panel found as follows: "It was not felt that the . . . asbestos related pleural disease was as least as likely as not . . . due to his on and off employment from 1991-1993 and employment from 1995-1996 in his capacity as a laborer at Hanford. It was the opinion of

^{2/} The actual number on this page of the record was obscured by text, but the page itself was located between pages 6 and 8.

the group that his exposure to asbestos during this time period was relatively small and the asbestos related pleural disease found on his chest radiograph in 2000 did not allow a latency period long enough for the pleural disease to be associated with his work at a DOE facility because it is common for this to occur 15 or more years following exposure."

The Panel's decision was adopted by the Office of Worker Advocacy. See November 10, 2003 Physician Panel Report. Accordingly, the DOE Office of Worker Advocacy determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits. December 30, 2003 Letter from DOE to the applicant. In his appeal, the applicant contests the Physician Panel's determination that his lung-related condition is not related to his work at the Hanford facility.

II. Analysis

As indicated above, the Panel's negative determination in this case is based on its belief that there was at most a nine-year latency period for the development of the individual's pleural plaques, whereas the Panel considered a 15 year latency period to be necessary. However, as stated above, the applicant indicated in his "Employment History Claim Form" that he worked at Hanford not only during the 1991-1993 and 1995-1996 periods considered by the Panel, but also "off and on in the 1980's." If this is true, then the 15 year latency period referred to by the Panel could well have been achieved.

There is no clear indication that OWA asked Hanford to provide employment information for the applicant regarding the earlier dates, that Hanford ever specifically considered whether the applicant worked at the site during the 1980s, or that Hanford rejected as unsubstantiated the applicant's claim that he worked at the site during the 1980s. It is not clear why the OWA did not ask Hanford whether the applicant worked there during the 1980s, as he claimed. There is also no indication that OWA asked the Panel to consider the employment dates cited by the applicant, and the Panel did not state that it rejected consideration of the earlier period.

This matter is therefore remanded to the OWA for a determination as to whether the applicant was employed by Hanford during the 1980s. If so, the Physician Panel should consider in light of the additional information whether it is at least as likely as not that asbestos exposure at Hanford was a significant factor in causing,

aggravating or contributing to the formation of the applicant's pleural plaques.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0042 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: February 6, 2004

