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May 5, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal
Date of Filing: February 3, 2004
Case No.: TIA-0045

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, XXXXXXXXXXXX (the Worker), was a DOE contractor employee at a DOE facility for many years. An independent physician panel (the Physician Panel or the Panel) determined that the Worker's illness was 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). As explained below, we have concluded that the appeal should be granted in part.

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/

B. Factual Background

The Worker was a DOE contractor employee at the DOE's Oak Ridge Y-12 facility. The Worker was a laborer and material handler. He began working at the site in 1952 at the age of 39; he stopped working in 1972 at the age of 59, when he received a disability termination based on arthritis. Record at 17, 159, 236-37. In 2001, the Worker died at the age of 88. *Id.* at 27. The death certificate listed pneumonia as the immediate cause of death and "CHF" (chronic heart failure) and diabetes as conditions leading to the immediate cause. *Id.*

In her application for physician panel review, the Applicant listed two conditions: "basal cell carcinoma" and "skin disease." The Physician Panel issued a report limited to basal cell carcinoma of a nasolacrimal duct. The Panel agreed that the worker had the illness, but concluded that it was not related to his employment at DOE. Report at 1. The Panel noted that basal cell carcinoma was common in the general population, that the Worker's carcinoma was located on a sun-exposed area, and that the Panel did not see

1/ See www.dol.gov/esa.

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

evidence of an acute radiation exposure or other exposure that might have been a factor. *Id.*

The OWA accepted the Physician Panel's determination. See OWA January 9, 2004 Letter. The Applicant then filed the instant appeal.

In her appeal, the Applicant maintains that the Physician Panel determination is not correct. The Applicant argues that the Worker had "extensive skin cancers" that were related to radiation exposure at DOE.

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.

The Physician Panel identified basal cell carcinoma of the nasolacrimal duct as a claimed illness, and the Physician Panel addressed the matters required by the Rule. The Panel concluded that the illness was "most likely *not* related" to exposures at DOE. The Panel explained:

Particular note was the fact that this lesion was in a sun-exposed area and occurred many years after his medical termination from Oak Ridge in 1972.

. . . [B]asal cell carcinomas are very common in the population in general. Finally, there were no dose reconstruction records to suggest any acute radiation exposure, which could have been a risk factor. Other occupational causes of basal cell carcinomas, such as working in tar, or with pesticides or herbicides, or arsenic ingestion were not found in the records.

Report at 1. As the foregoing indicates, the Panel addressed the illness, made a determination, and explained the basis for its determination. Accordingly, for basal cell carcinoma of the nasolacrimal duct, the Panel determination complies with the requirements of the Rule.

Moreover, there is nothing in the record to indicate that the Physician Panel made a substantive error. The Panel correctly noted the absence of a dose reconstruction in the record, and the record contains no other exposure information - the site reported that it had no industrial hygiene records for the Worker, and the site clinic records for the Worker do not reference exposures. Record at 29, 124. Furthermore, the Panel explained its opinion, and there is no contrary medical opinion in the record. Accordingly, for basal cell carcinoma of the nasolacrimal duct, the Panel determination is consistent with the record.

The Applicant's argument on appeal is that the Worker was exposed to radiation, despite the absence of exposure data. This argument is not a basis for concluding that the Panel determination is incorrect. Moreover, the Applicant will be receiving new information concerning the Worker's radiation exposure. The DOL has referred the Applicant's DOL claim to the National Institute of Occupational Safety and Health (NIOSH) for a dose reconstruction. Record at 29. If the Applicant receives a dose reconstruction that she believes is significant new information, the Applicant may request further panel review.

Although we find no error with respect to the Physician Panel determination on the basal cell carcinoma of the nasolacrimal duct, the Panel did err in its failure to consider a second claimed illness: skin disease. Record at 2. The record indicates that the skin disease claim refers to a basal cell carcinoma of the scalp. Record at 40. The Panel did not consider this claim separately or in conjunction with the eyelid claim. Although it appears that the Panel's analysis on the eyelid claim would apply equally to the scalp claim, we remand the application to OWA for their consideration of that issue.

III. Summary and Conclusion

As the foregoing discussion indicates, we have not identified any Panel error concerning the claim of basal cell carcinoma of the nasolacrimal duct. As the foregoing discussion also indicates, the Applicant's claim of basal cell carcinoma of the scalp should be remanded to OWA for further consideration.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0045 be, and hereby is, granted as set forth in paragraph 2 below.
- (2) The application that is the subject of the Appeal should be remanded to the Office of Worker Advocacy for further consideration of the Applicant's claim.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 5, 2004

