

\* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

April 29, 2004  
DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal  
Date of Filing: February 4, 2004  
Case No.: TIA-0046

XXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Worker Advocacy Office for DOE assistance in filing for state workers' compensation benefits based on the employment of his late father, XXXXXXXXXXX (the worker). The DOE Office of Worker Advocacy (OWA) determined that the applicant was not a DOE contractor employee and, therefore, was not eligible for DOE assistance. The applicant appeals that determination. As explained below, we have concluded that the determination is correct.

*I. Background*

A. The Energy Employees Occupational Illness Compensation Program Act

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. The Act creates two programs for workers.

The Department of Labor (DOL) administers the first EEOICPA program, which provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. See 42 U.S.C. § 7384l(1). The DOL program also provides federal monetary 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.

The DOE administers the second EEOICPA program, which does not directly provide for monetary or medical benefits. Instead, the DOE program provides for an independent physician panel assessment of whether a "Department of Energy contractor employee" has an illness related to exposure to a toxic substance at a DOE facility. 42 U.S.C. § 7385o. 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. 42 U.S.C. § 7385o(e)(3). The DOE program is specifically limited to DOE contractor employees, because the DOE would not be involved in state workers' compensation proceedings involving the employees of other firms.

The regulations for the DOE program 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. 1/

Pursuant to an Executive Order, 2/ the DOE has published a list of facilities covered by the EEOICPA, and the DOE has designated next to each facility whether it falls within the EEOICPA's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 68 Fed. Reg. 43,095 (July 21, 2003) (current list of facilities). The DOE's published list also refers readers to the OWA web site for additional information about the facilities. 68 Fed. Reg. 43,095.

This case concerns the DOE program. The applicant also applied to the DOL program for the \$150,000 benefit and is awaiting a decision. The decision in this case does not affect the DOL proceeding.

---

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

2/ See Executive Order No. 13,179 (December 7, 2000).

## B. Procedural History

In his application, the applicant states that his father was employed by Bethlehem Steel, at its Lackawanna, New York plant, from approximately 1934 to 1975. The applicant states that his father became ill as the result of toxic exposures during that employment.

The OWA determined that the worker was not a DOE contractor employee. Instead, the OWA indicated that the worker was employed by an atomic weapons employer. See January 9, 2004 letter from OWA to the applicant. Accordingly, the OWA determined that the applicant was not eligible for the physician panel process.

In his appeal, the applicant disagrees with the OWA determination. The applicant maintains that Bethlehem Steel did atomic weapons work for the DOE and, therefore, DOE should compensate the applicant for the worker's illness.

## II. Analysis

The DOE physician panel process is designed to eliminate an impediment to state workers' compensation claims filed by DOE contractor employees. See 67 Fed. Reg. 52841, 52842. Specifically, the process is designed to eliminate DOE opposition to claims based on illnesses that arose from toxic exposures during employment at DOE facilities. *Id.* The purpose of the process is to "ensure that DOE will assist, rather than hinder," the claims that receive a positive physician panel determination. 67 Fed. Reg. 52841, 52842 (August 14, 2002).

The Act and the implementing rule define DOE contractor employees as those employed at a DOE facility by a firm that manages or provides other specified services at the facility. 42 U.S.C. § 7384; 10 C.F.R. 852.2. The rule does not apply to atomic weapons employers because DOE would not be involved in state workers' compensation claims filed by their employees.

The DOE list of EEOICPA facilities does not identify the Bethlehem plant as a DOE facility. Instead, the list designates the Bethlehem Steel plant as an "atomic weapons employer facility." The Act defines an "atomic weapons employer" as

an entity, other than the United States, that -

(A) processed or produced, for use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining and milling; and

(B) is designated by the Secretary of Energy as an atomic weapons employer for purposes of the compensation program.

42 U.S.C. 7384; 10 C.F.R. § 852.2. The DOE web site description states that the plant developed rolling mill pass schedules to be used in the planned uranium milling operation at DOE's Fernald facility. The description also states that the plant performed uranium rolling experiments to help design the Fernald rolling mill. <sup>3/</sup> This description is consistent with DOE's report on the plant under the Formerly Utilized Sites Remedial Action Program (FUSRAP). See FUSRAP Considered Sites Database Report, [www.em.doe.gov](http://www.em.doe.gov) (searchable database under the word "resources") (accessed April 19, 2004).

In prior decisions, we have held that the Bethlehem Steel plant was not a DOE facility. See *Worker Appeal*, Case No. TIA-0055, 28 DOE ¶ 80,331 (2004); *Worker Appeal*, Case No. TIA-0010, 28 DOE ¶ 80,261 (2003). In those cases, we noted that under the EEOICPA and the Physician Panel Rule, a DOE facility is a facility (i) where DOE or its predecessors <sup>4/</sup> conducted operations and (ii) where DOE had a proprietary interest or contracted with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services. 42 U.S.C. § 7384; 10 C.F.R. 852.2. We concluded that the DOE description of the work at the plant did not indicate that DOE conducted operations at the plant, had a proprietary interest in the plant, or had a contract with the

---

<sup>3/</sup> The Fernald rolling mill began operations in 1952. The DOE's web site contains a report describing DOE facility operations, including Fernald. See [www.eh.doe.gov/legacy](http://www.eh.doe.gov/legacy).

<sup>4/</sup> DOE predecessors include the Manhattan Engineering District, the Atomic Energy Commission, and the Energy Research and Development Administration. See 10 C.F.R. § 852.2 (a definition of DOE).

entity to provide management and operation, management and integration, environmental remediation services, or construction or maintenance services. Accordingly, we concluded that the plant did not fall within the definition of a DOE facility.

The same analysis applies to the instant appeal. The fact that a facility performed atomic weapons work does not render the plant a DOE facility: the Act provides a specific definition of DOE facility, which distinguishes it from other facilities that performed atomic weapons work for the DOE. Again, this makes sense because DOE would not be involved in any state workers' compensation proceeding involving atomic weapons employer facilities. Accordingly, the benefit of the process - that DOE not oppose the claim directly or indirectly through its contractor - would have no value to a worker at an atomic weapons employer facility.

As the foregoing indicates, the worker was not employed at a DOE facility and, therefore, the applicant is not eligible for the physician panel process. This determination does not affect whether the applicant is eligible for (i) a DOL award or (ii) state workers' compensation benefits.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0046 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: April 29, 2004

