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April 21, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal
Date of Filing: February 10, 2004
Case No.: TIA-0051

XXXXXXXXXXXX (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 the Applicant'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), challenging the panel's determination.

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. § 7341(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/

1/ See www.dol.gov/esa.

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 Applicant has been employed at a DOE facility for many years - from 1967 to 1986. He is a machinist and has claimed to have worked with toxic substances, including beryllium, uranium, and asbestos. The Applicant requested physician panel review concerning whether his asthma and his "asbestos related lung disease" (pleural plaques - a scarring of the lining of the lungs) are related to his exposures at DOE.

The physician panel reviewed the application and issued a report. *See* OWA Physician Panel Report (November 11, 2003) (Report). The panel found that with regard to the "asbestos related pleural plaques" there was no evidence in the record (other than the Applicant's own self-reporting) to confirm that the Applicant had actually been exposed to asbestos during his employment at DOE. The Report went on to state that the pleural scarring could be legitimately ascribed to the Applicant's other current lung diseases - chronic bronchitis, asthma and chronic obstructive pulmonary disease (COPD). Report at 1. Consequently, the physician panel did not find "any causal relationship between his occupational exposures and illnesses." Report at 1.

The OWA accepted the physician panel's determination, and the OWA advised the Applicant that he had received a negative determination. *See* February 10, 2004 Letter from the Applicant to OHA. On February 10, 2004, the Applicant filed this appeal concerning the determination. While the Applicant has not identified specific grounds for his appeal, he believes that his breathing problems were caused by his exposures to toxic materials at DOE.

II. Analysis

With regard to the physician's panel determination concerning the Applicant's asbestos related pleural plaques, we find that there is no basis to remand this decision. Our review of the record supports the panel's finding that there was no documentary evidence indicating that the Applicant was exposed to

^{2/} *See* www.eh.doe.gov/advocacy.

asbestos. In the Applicant's request for a review he states that he was exposed to asbestos in the form of machining, insulation and fabrication. February 10, 2004 Letter from the Applicant to OHA at 1. However, none of the additional records he submitted with his request indicates any specific incidents of exposure or evidence of monitoring for asbestos. 3/ Accordingly, we find no error in the panel's decision concerning the asbestos related pleural plaques.

However, in his November 15, 2002 request for review by a physician panel, the Applicant stated that he believed that his *asthma* had been caused by his work at a DOE facility. *See* Case No. TIA-0051 Record at 1. 4/ The physician panel does not appear to have issued an opinion as to whether the Applicant's claimed asthma is related to his exposure to toxic substances at DOE. 5/ Consequently we will remand this case to the physician panel so that the panel may issue an opinion as to whether the Applicant's claimed asthma is related to his alleged exposure to toxic substances. *See* 10 C.F.R. § 852.12(b); *Worker Appeal, TIA-0039* (February 25, 2004), www.oha.doe.gov/cases/wa/tia0039.pdf ("the 'basis for the determination' should indicate how the panel evaluated *each* illness or symptom" (emphasis added)).

III. Summary and Conclusion

As the foregoing discussion indicates, the determination should be remanded for a determination concerning the Applicant's claimed asthma. *See* 10 C.F.R. §§ 852.8, 852.12(b)(5).

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0051 be, and hereby is, granted as set forth in paragraph 2 below.

3/ These records do show that he was monitored for Beryllium exposure. February 10, 2004 Letter from the Applicant to OHA.

4/ The record in this case indicates that on November 2, 2002, "asthma & hearing loss" claimed in a state proceeding "was added." *See* Case No. TIA-0051 Record at 23 (CMS View History entry for November 1, 2002).

5/ The physician panel report did not find "any causal relationship between his occupational exposures and illnesses." However, it is unclear as to what diseases the word "illnesses" refers to. In addition, the panel may wish to consider whether his hearing loss was related to exposure to toxic substances while an employee at DOE.

- (2) The application that is the subject of Appeal No. TIA-0051 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: April 21, 2004

