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

*Appeal*

Name of Case:            Worker Appeal  
Date of Filing:         March 26, 2004  
Case No.:                TIA-0069

XXXXXXXX (the applicant or the worker) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The applicant was a DOE contractor employee at a DOE facility. 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, the appeal should be denied.

*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 a toxic substance 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 a toxic substance at DOE facilities caused, aggravated or contributed to employee illnesses. Generally, if a Physician Panel issues a determination favorable to

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

the employee, the DOE Office of Worker Advocacy accepts the determination and instructs the contractor not to oppose the claim unless required by law to do so. The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. See 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 worker asserted that from 1954 through 1985, he was a machinist in the Y-12 plant at the DOE site in Oak Ridge, Tennessee. He was diagnosed with "lung problems" in 2002. The applicant believes that exposure to radiation and other contaminants in the workplace caused this illness.

The Physician Panel issued a negative determination on this claim. The Panel found that the worker's illness did not arise "out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility." The Panel based this conclusion on the standard of whether it believed that "it was at least as likely as not that exposure to a toxic substance at a DOE facility during the course of the worker's employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the worker's illness or death."

In considering the worker's claim, the Physician Panel unanimously found that the applicant "has evidence of lung disease." However, after reviewing the occupational toxic exposures in the record, the Panel concluded that the results of a CT scan "indicate non-specific findings and thus cannot be attributed to a specific environmental exposure or environmental/occupational cause."

## II. Analysis

The applicant seeks review of the Panel's determination. The applicant claims that the medical reports do not indicate "all the conditions that I have worked in while at Union Carbide." He emphasizes that he was exposed to radiation. Moreover, he states that his pulmonary specialist indicated that his "lung condition is due to exposure to chemicals/substances which I was exposed to while working, rather than smoking." The worker further asserts that "in order to make a definite diagnosis, [the pulmonary specialist] would have to do a lung biopsy which he would rather not do due to the seriousness of a major operation."

As stated above, the Panel found "evidence of lung disease" in this case. The Panel cited the findings of the applicant's physician that the applicant has interstitial lung disease and emphysema. The Panel then considered whether DOE-related occupational exposures to beryllium, asbestos, and radiation caused, contributed to or aggravated those conditions. Based on beryllium sensitivity tests, the Panel concluded that the applicant showed no evidence of beryllium sensitization. The Panel noted the applicant's claim of asbestos exposures, but also noted that details of the exposure were not provided. The Panel therefore rejected asbestos exposure as a factor for the applicant's lung disease. Similarly, the Panel found no reports of involvement in any major radiation accidents or of high levels of airborne exposure to radiation. Thus, overall, the Panel determined that there was not sufficient evidence to link the applicant's lung disease to any toxic exposure at a DOE site.

As discussed above, the standard to be applied in these cases is whether it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to or causing the worker's illness or death. The Panel applied that standard here, and there is no basis for concluding that the Panel's determination was incorrect. The applicant has not pointed to any information in the file indicating that the Panel's conclusion was erroneous. The applicant states that he was exposed to "conditions" not set out in the record. The applicant had the opportunity to provide this information for the Panel's consideration, but failed to supplement the record. Record at 318. The applicant's assertion that his own physician believed his disease was due to occupational exposures does not demonstrate Panel error. The record contains notations by the applicant's physician to the effect that the worker's abnormal X-ray was "likely occupational," and "consistent with occupational lung disease." Record at 25, 26, 27. I believe that such passing references to a

possible cause were implicitly rejected by the Panel. I see no reason to conclude that the Panel erred, and should have automatically accepted this rather general observation by the applicant's physician. The worker states that his doctor believed that a lung biopsy would be necessary to reach a definite diagnosis. This assertion tends to support the position of the Panel that information was lacking to substantiate the claim that it was at least as likely as not that exposure to a toxic substance at a DOE site caused, aggravated or contributed to the applicant's lung disease.

In sum, the applicant has not demonstrated any deficiency or error in the Panel's determination. Consequently, there is no basis for an order remanding the matter to OWA for a second Panel determination. Accordingly, the appeal should be denied.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0069 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