

\* 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 XXXXXXXX's.

May 14, 2004  
DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

*Appeal*

Name of Case:            Worker Appeal  
Date of Filing:         April 2, 2004  
Case No.:                TIA-0076

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 two DOE facilities. 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 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.

---

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

Generally, if a physician panel issues a determination favorable to 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 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 form "Employment History for Claim Under EEOICPA" that he worked at the DOE's New Brunswick Laboratory in New Brunswick, New Jersey, from 1957 through 1977, and at the DOE facility in Idaho Falls, Idaho, from 1977 through 1987. Record at 10. During that time he was a scientific aide, working in a laboratory. He indicates that he performed analyses on uranium and other toxic materials including hydrochloric, hydrofluoric, perchloric, nitric, sulphuric, and other hazardous laboratory acids. He also indicates that he worked with elements such as "Gallium metal, Vanadium compounds and other exotic materials where the toxicity levels are not known." Record at 18. He was diagnosed with colon cancer in 1999. He believes that exposure to toxic materials at the DOE sites caused this illness.

The Physician Panel issued a negative determination on this claim. The Panel unanimously 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." The Panel determined that the applicant did develop colon cancer. The Panel cited the known risk factors for colon cancer as heredity, diet and inflammatory bowel disease. The Panel stated that radiation is not a high risk factor. The Panel further found that a "NIOSH radiation dose reconstruction allotted him a total dose to the colon of just over 12 rem as a worst case overestimate. This does not approach the 50 % causation threshold." The Panel therefore issued a negative determination with respect to the claim. The Panel did not specifically address the applicant's claim concerning his exposure to toxic materials other than uranium. See February 17, 2004 Physician Panel Report.

The Panel's decision was adopted by the Office of Worker Advocacy. Accordingly, the DOE Office of Worker Advocacy determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits. March 12, 2004 Letter from DOE to the applicant. The applicant appeals that determination.

## II. Analysis

In his appeal, the applicant contests the Physician Panel's determination that his colon cancer is not related to exposure to toxic materials during his work at the DOE sites.

### A. Exposure to Radiation

The applicant first claims that the Panel's determination that he was exposed "as a worst case" to just over 12 rem is incorrect. He believes that he was exposed to much higher doses of radiation. He contends that the NIOSH dose reconstruction was too low.

I see no basis for remanding this issue to the Panel for further consideration. The applicant's assertions regarding his alleged exposure to higher levels of radiation do not establish any Panel error. In its determination, the Panel stated "known risk factors for colon cancer include heredity, diet and inflammatory bowel disease. Radiation is not considered a high risk factor. Even large radiation therapy doses to the pelvis only result in a very small statistical increase in colon cancer." Thus, the Panel rejected the claim that it is at least as likely as not that the applicant's colon cancer was related to radiation exposure, even in large doses. See *Worker Appeal* (Case No. TIA-0063), 28 DOE ¶ \_\_\_\_ (April 6, 2004). The Panel cited the scientific treatises it used in reaching its determination. OWA Physician Panel Report, Section B: References. The applicant has pointed to no data in the record

showing that this determination is incorrect, nor has he provided any additional scientific data refuting the Panel's conclusion as to the risk factors for colon cancer. Accordingly, I must reject this aspect of the worker's appeal.

B. Exposure to Other Toxic Substances

The applicant also contends that he was exposed to many toxic substances in addition to uranium during his employment at the New Brunswick Laboratory. These substances were enumerated in his Attachment A, which was attached to his form EE-3, "Employment History for Claim Under EEOICPA." Record at 10, 18, 19. The substances included laboratory acids and "exotic" materials. The applicant believes that the development of his cancer was also related to exposure to these other substances.

The Panel did not specifically address the applicant's claim that exposure to the additional materials named in Attachment A caused his colon cancer. However, there is no reason to presume that the Panel therefore overlooked this issue. As stated above, the Panel indicated that the known risk factors for colon cancer include heredity, diet and inflammatory bowel disease. I believe that the Panel thereby implicitly considered and rejected the applicant's contention that his colon cancer was caused by exposure to laboratory acids and "exotic" materials. As noted above, the applicant has neither pointed to any information in the record suggesting that this conclusion is erroneous, nor provided any scientific information indicating that the Panel's medical determination is in error. Accordingly, I see no basis for remanding this matter to the OWA for an explicit finding on this issue.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0076 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: May 14, 2004