* 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.

August 12, 2004
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: April 6, 2004

Case No.: TIA-0078

XXXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' 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 her 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

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 $150,000 and medical benefits to certain workers with specified illnesses, including radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees and DOE contractor employees who worked at DOE facilities and contracted specified cancers associated with radiation exposure. 42 U.S.C. § 73411 (9). In general, a worker in that group is eligible for an award if the worker was a "member of the Special Exposure Cohort" or if it is determined that the worker sustained the cancer in the performance of duty. *Id.* Membership in the Special Exposure Cohort includes DOE employees and DOE contractor employees who were employed prior to February 1, 1992, at a gaseous diffusion plant in Oak Ridge, Tennessee; Paducah, Kentucky; or Portsmouth, Ohio. 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.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, the DOE program is intended to aid qualified individuals in obtaining workers' compensation benefits under state law. The 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 during employment 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, 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).

The DOE program is specifically limited to DOE contractor employees who worked at DOE facilities. This limitation exists because DOE would not be involved in state workers' compensation proceedings involving other employers. Pursuant to an Executive Order, 1/ the DOE has published a list of facilities covered by the DOL and DOE programs, 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 DOE Worker Advocacy Office web site for additional information about the facilities. *Id.* The applicant states that she was employed by the Oak Ridge, Tennessee K-25 plant from January 1984 to May 1996, and that she contracted breast cancer in 1995 as a result of that employment. Oak Ridge is a DOE facility.

The regulations for the DOE program are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The DOE Worker Advocacy Office is responsible for this program and has a web site that provides extensive information concerning the program . 2/ This case involves the DOE program, i.e., the program through which DOE contractor employees may obtain independent physician panel determinations that their illness is related to their exposure to a toxic substance during their employment at a DOE facility. The Physician Panel reviewed the application and issued a report. *See* OWA Physician Panel Report (February 4, 2004) (Report). The panel found that the illness did not arise out of the applicant's employment. According to the panel, even though no dosimetry data was available for the period 1984-1989, the applicant's occupational radiation exposure reports from 1989 to 1995 reflected an annual effective dose equivalent of zero (0) millirems from external and internal radiation. In 2003, the applicant received a DOL award as a member of the Special Exposure Cohort. Nonetheless, the Panel unanimously determined that the applicant's illness did not arise from exposure to a toxic substance at a DOE facility.

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

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

In the appeal, the applicant disagrees with that determination, alleging that the Panel should have considered the following: (1) five years of dosimetry data (1985-1989) was not available to the Panel; (2) the material reviewed by the Panel did not reveal that she worked around leaking uranium containers, that she was not told at the time that the leaking containers were harmful, and that she did not wear special protective clothing while working around the allegedly hazardous material; and (3) the "very aggressive" nature of her cancer supports her contention that radiation exposure during her employment caused the disease. Letter from applicant to Director, Office of Hearings and Appeals (April 6, 2004). To support this allegation, she states that just four months after a mammogram, and during a time that her duties required her to enter buildings that she described as "contaminated," her doctor found a malignant tumor in her breast.

II. Analysis

The Panel noted the absence of dosimetry information for the first five years of the applicant's employment at Oak Ridge but did not specifically address whether the inclusion of this information would have had any impact on its decision. Nonetheless, annual occupational radiation exposure reports from the last six years of her employment (1989-1995), the six years leading up to her diagnosis of breast cancer, reflected zero millirems exposure. 3/

Our review of the file disclosed a document that appears to contain dosimetry information for the years 1984 to 1989. *See* Report HPX11 (V2.0): All TLD Assignments from 1981 to Current (March 18, 1996) (page 218 of Case No. TIA-0078 File). This report contains a list of 37 records-- 31 identical to the records in another document that was apparently used by the Panel in its assessment. *See* Historical Dosimeter Assignment Report (July 1, 2003) (page 210 of Case No. TIA-0078 File). The six records that are in the 1996 document contain dosimetry readings for the years 1984 through 1988–the years that the Panel considered missing. The first reading, for the period from January 3, 1984 to May 11, 1984, is

---

3/ During a telephone conversation about her appeal, the applicant implied that the physician panel failed to give proper consideration to the DOL award she received in 2003. Under the DOL program, the applicant was eligible for an award because she was a member of the Special Exposure Cohort, i.e., (i) she worked at Oak Ridge prior to February 1, 1992, and (ii) she developed breast cancer in 1995. There are, however, significant differences in both programs. In fact, the preamble to the DOE Physician Panel rule specifically states that "some applicants who submit applications in both the DOE and DOL programs may receive different causation determinations from the two agencies." 67 Fed. Reg, 52,849 (Aug. 14, 2002) (explaining that Special Exposure Cohort members with a specific cancer can establish entitlement to benefits without a showing that the disease results form exposure to a toxic substance). The physician panel must meet a higher standard. 10 C.F.R. § 852.8. *See also Worker Appeal*, OHA Case No. TIA-0026, 28 DOE ¶ 80,295 (2003) (DOL award does not represent a finding that the applicant meets the causation standards of the Physician Panel Rule).

20 millirems of shallow exposure. All other readings in the 1996 document reflect zero millirems of exposure. Therefore, it appears that there was no significant dosage in the "missing" years.

In summary, despite the applicant's allegations that she worked around leaking uranium containers, entered contaminated buildings and wore no protective clothing, her dosimetry readings showed a minimal exposure during the first four months of 1984 and no exposure from May 1985 through November 1995. *See* Case No. TIA-0078 File at 218. We therefore conclude that the Appeal does not establish any deficiency or error in the Panel's determination and see no reason to remand this matter to the OWA for a second panel determination. Accordingly, the Appeal should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, OHA Case No. TIA-0078 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: August 12, 2004

c:/docs/0078.tia
HG-20

Adeyeye Freimuth

_____ _____