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August 13, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: April 16, 2004

Case No.: TIA-0083

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits based on the employment of her late husband, XXXXXXXXXXXX (the Worker). The Worker was 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 Worker's illnesses were 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) covers 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 does not itself provide any monetary or medical benefits but instead is intended to assist DOE contractor employees in obtaining workers' compensation benefits under state law. Pursuant to Part D, 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. 1/

B. Factual Background

The Worker was employed (with the exception of a few intermittent months) at a DOE facility from 1959 to 1988. He was a laborer/foreman and the Applicant has claimed that he was exposed to radiation while working at the DOE facility. In the Request for Review, the Applicant asked for a physician panel review concerning whether the Worker's "polycythemia vera" and "Other lung - mild COPD" (chronic obstructive pulmonary disease) are related to his radiation exposure at DOE. *See* Case No. TIA-0083 Record (Record) at 2. 2/

The physician panel reviewed the application and issued a report. *See* January 22, 2004 Physician Panel Report (Report). With regard to the COPD, the panel noted that the medical records indicated that the Worker had no history of smoking but had a "recorded history" of working 3 to 4 years in an unspecified type of mine. 3/ Report at 1. The panel reported that none of the chest X-rays taken of the Worker's lungs indicated any type of features that would be suggestive of COPD. Report at 2. The panel reviewed all the available clinical notes, X-ray findings, and pulmonary function tests in the record and could find no basis to support a finding that the Worker suffered from COPD. Report at 2. Further, the panel went on to state that there is no evidence that exposure to radiation, even at high levels, would cause COPD. Report at 2.

In its report, the panel also found that the Worker's polycythemia vera was not due to any exposure to toxic substances at the DOE facility. 4/ The panel noted that the only risk factor for polycythemia vera is age over 50 and that no link had been established between polycythemia vera and low dose radiation exposure. Report at 3. The panel did state that high radiation doses for the survivors of the Hiroshima and Nagasaki atomic bomb blasts had been linked to an increased incidence of polycythemia vera. Report at 4. According to the available records, the Worker's radiation exposure revealed a total rem exposure of

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

2/ The Worker was diagnosed as suffering from polycythemia vera in 1992. Record at 92. In the medical records detailing the Worker's treatment of polycythemia vera there is a physician's note that states "mild COPD." Record at 90.

3/ The panel defined COPD as an obstructive airway disease due to chronic bronchitis or emphysema. Report at 1.

4/ Polycythemia vera is a blood disorder characterized by increased bone marrow production of red blood cells, platelets and sometimes white blood cells. Report at 3.

3.37 rems of Pu-239 and Pu-238. Record at 227. 5/ A urinalysis taken in October 1964 revealed the presence of 8d/ml of U-235 in the Worker's urine. Report at 4; Record at 370. Another urinalysis on November 1964 also revealed the presence of 13d/ml U-235 in the Worker's urine. 6/ Report at 4; Record at 370. The radiation primarily associated with these exposures consisted of alpha particles.7/ The panel noted that this type of radiation has little penetrating power and has no specific causal relationship with polycythemia vera. Report at 4.

The OWA accepted the physician panel's determination, and the OWA advised the Applicant that she had received a negative determination. See April 2, 2004 Letter from the Applicant to OHA (Letter). On April 16, 2004, the Applicant filed this appeal concerning the determination, on the specific grounds that the panel used incorrect information when it noted in its report that the Worker had a 3 to 4 year history of participating in mining. Letter at 1. The Appellant stated that the only jobs the Worker performed were that as a laborer and as a foreman. Letter at 1. We consider her argument below.

II. Analysis

The Applicant believes that the panel's decision is flawed because of its statement that there is a "recorded history of 3 to 4 years unspecified mining." Report at 1. Our review of the records indicates that a medical history prepared by a physician reported that the Worker "worked in mines for 3 - 4 years." Record at 98-99. Consequently, we cannot find that the panel's reference to this information was an error.

Overall, we can find no error with the panel's findings. The panel considered each of the claimed illnesses. With respect to the COPD claim, the panel examined the available evidence to come to the conclusion that the Worker did not, in fact, suffer from COPD. Given the details provided by the panel it appears that they have considered all of the record in making their finding. We have verified the facts cited in the record used to form the judgment of the panel members. Significantly, the panel did not use the disputed fact concerning the Worker's involvement in mining in determining that the Worker did not suffer from COPD. Moreover, even if the Worker suffered from COPD, there is no relationship between radiation exposure and that disease. Thus, we find no reason to disturb the panel's finding with regard to COPD.

5/ A rem is a measurement unit of absorbed radiation. Pu- 238 and Pu-239 are two different isotopes (atoms with the same number of protons but different numbers of neutrons) of the radioactive element plutonium.

6/ U-235 is a specific isotope of the radioactive element uranium. We have not been able to determine what specific unit of measurement "d/ml" represents.

7/ An alpha particle consists of two protons and two neutrons.

We also find no error with the panel's finding concerning the Worker's polycythemia vera. The panel reviewed the available radiation exposure records concerning the Worker and determined that his radiation exposure was too low and of a type unlikely to cause polycythemia vera. Our review of the record confirms that the panel considered the available radiation exposure records and does not reveal any error in the panel's findings. We find no reason to remand this case back to the panel.

III. Conclusion

In its review, the panel examined the available medical records and determined that the Worker's estimated radiation exposure would not have caused his polycythemia vera. Further, the panel determined that the Worker did not in fact suffer from COPD and that even if he did, there is no association between radiation and COPD. As the foregoing discussion indicates, the Applicant's appeal should be denied.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0083 is hereby denied.
- (2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: August 13, 2004

