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September 7, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Case Number: **TIA-0087**

Date of Filing: **April 21, 2004**

XXXXX (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's late husband (the worker) was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the worker's illness was not related to a toxic exposure 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). As explained below, we have concluded that the appeal should be denied.

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) provides various forms of assistance or relief to workers currently or formerly employed by the nation's atomic weapons programs. See 42 U.S.C. §§ 7384, 7385. This case concerns Part D of the Act, which provides for a program to assist DOE 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. 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. The DOE has issued regulations to implement Part D of the Act, hereinafter referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The DOE's program implementing Part D is administered by OWA.

Generally, if a physician panel issues a determination favorable to the employee, OWA accepts the determination and instructs the contractor not to oppose the claim unless required by law to do so. For those applicants who receive an unfavorable determination, the Physician Panel Rule provides an appeal process. Under this process, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review

certain OWA decisions. 10 C.F.R. § 852.18. The present appeal seeks review of a negative determination by a Physician Panel that was accepted by OWA. 10 C.F.R. §852.18(a)(2). 10 C.F.R. § 852.18(c) states that an appeal is governed by the OHA procedural regulations set forth at 10 C.F.R. Part 1003. The applicable standard of review is set forth at 10 C.F.R. § 1003.36(c), which provides that “OHA may deny any appeal if the appellant does not establish that – (1) the appeal was filed by a person aggrieved by a DOE action; (2) the DOE’s action was erroneous in fact or law; or (3) the DOE’s action was arbitrary or capricious.” 10 C.F.R. § 1003.36(c).

B. Factual Background

The worker was employed by a DOE contractor at the Y-12 Plant in Oak Ridge, Tennessee, at various times from 1953 through 1973. Record at 7. The applicant submitted a claim to the OWA. As part of the application process, the applicant completed an OWA Form entitled “Request for Review by Medical Panel.” Question 13 of that form asks “What illness did the deceased have diagnosed by a physician, that you believe was related to his or her work at a DOE facility?” Record at 2. The applicant responded: “lung condition/COPD [chronic obstructive pulmonary disease].” *Id.*

The OWA caseworker reviewed and prepared the case file and then forwarded it to the Physician Panel. The cover sheet to the case file identified one claimed illness: lung condition/COPD. The Physician Panel reviewed the case file and issued a report in which it found

[The worker’s] record has very little medical information in it.... COPD is mentioned only in the 2 documents which are available from his personal medical record. His death certificate lists under other conditions “COPD.” [The worker’s personal physician] lists “COPD” in a long list of diagnoses in a 1 page letter. Records from Oak Ridge contain serial normal chest X-rays and electrocardiograms. There are no pulmonary function tests in either section of the record. It is established that [the worker] was a smoker based on 2 notes that he had quit smoking sometime around 1960. At the time he was about age 40 and was probably at least a 20 pack year smoker. Cigarette smoking is the leading cause of COPD.

There is no record of any exposures at Oak Ridge which may have caused COPD nor is there any record of his being diagnosed with or having symptoms of COPD in his records from Oak Ridge. Most occupational exposures to potential pulmonary contaminants cause restrictive disease rather than obstructive disease. Pulmonary function tests and chest X-rays anytime during the 10 year interval between his last employment at Oak Ridge and his demise would be extremely valuable in establishing a diagnosis of COPD.

The panel concludes that a diagnosis of COPD has not been established in this case, nor had it been [likely it would] have been caused by any exposure at Oak Ridge. The most likely contributor to any COPD would have been cigarette smoking.

* * *

The panel concludes there is insufficient medical evidence to support any diagnosis of “lung condition” except “COPD” which is considered separately.

Determination at 2-3. On April 21, 2004, the applicant appealed that determination.

II. Analysis

Under Part 852, “[w]hether a positive or favorable determination is rendered is to be based solely on the standard set forth [at 10 C.F.R.] § 852.8.” 67 Fed. Reg. 52850 (August 14, 2002). That regulation states:

A Physician Panel must determine whether the illness or death arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility on the basis of whether it is as least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker at issue.

10 C.F.R. § 852.8. The preamble to Part 852 states “[t]he DOE intends that, as used in this context, the word ‘significant’ should have its normal dictionary definition and meaning –that is, ‘meaningful’ and/or ‘important’.” 67 Fed. Reg. 52847 (August 14, 2002).

The Physician Panel’s finding that the applicant has not shown that the worker had any lung condition other than COPD is well supported by the Record, which does not contain any documentation of a lung condition other than COPD. Accordingly, that finding is neither erroneous nor arbitrary or capricious.

The case file does contain evidence that the worker’s personal physician diagnosed him with COPD some nine years after his last employment at Oak Ridge. COPD was also noted as a “significant condition” on his death certificate one year later. However, the record contains no evidence that the worker was exposed to any toxic substance at Oak Ridge which may have caused COPD. Accordingly, the Panel’s finding under 10 C.F.R. § 852.8 that there is no link established between the worker’s exposure at Oak Ridge and his COPD is neither erroneous nor arbitrary or capricious.

In her appeal, the applicant maintains that the denial is based in large degree on cigarette smoking being a contributor to the COPD condition. The appeal contains statements from the worker’s adult children and the applicant. According to the applicant, the

worker had not smoked since 1949. According to the worker's children, they have no recollection of their father smoking. There is no reason to doubt his family members' contention that the worker had not smoked since 1949, some 34 years before he died. However, this factual error in and of itself does not mean the Panel's decision should be reversed. The Panel found that there was no evidence of exposures in the record that could have caused COPD, and I see none. Under the circumstances of this case, even if the Panel's reference to the worker's history as a smoker were factually incorrect, that would not constitute an error under the legal standard set forth in 10 C.F.R. § 852.8. The Panel's conjecture that smoking may have caused the worker's COPD is simply irrelevant, in the absence of any evidence that exposures at Oak Ridge caused the worker's COPD.

III. Conclusion

The applicant has not demonstrated any 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-0087 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: September 7, 2004