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April 22, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **June 8, 2004**

Case No.: **TIA-0107**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that one illness was related to work at the DOE and another illness was not. 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 negative determination. As explained below, we have concluded that the Appeal should be denied.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed 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); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004) (the Authorization Act). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Applicant filed a Subpart B application with DOL and a Subpart D application with OWA, claiming illnesses related to toxic exposures during employment at DOE. The OWA referred a claim of chronic asthmatic bronchitis and prostate cancer to the Physician Panel.

The Physician Panel issued a positive determination on the bronchitis and a negative determination on the prostate cancer. In the negative determination on prostate cancer, the Panel stated that the Applicant was exposed to a variety of metals, solvents, acids, asbestos, and ionizing radiation, but the Panel found that those exposures were not a significant factor in aggravating, contributing to or causing his prostate cancer. In explaining its determination, the Panel discussed prostate cancer, opining that (i) it was a common cancer, (ii) there are no known environmental causes, and (iii) the Applicant's radiation exposure was too low to be a risk factor.

The OWA accepted both the positive and negative determinations, and the Applicant filed an appeal. In his appeal, the Applicant makes two arguments.

First, the Applicant argues that the Physician Panel determination on prostate cancer should have discussed his skin cancer. The Applicant states that he submitted relevant documentation to the local resource center for submission to DOL and OWA, and he has submitted medical records with his appeal. The Applicant states that the existence of the skin cancer supports his prostate cancer claim.

Second, the Applicant argues that the Physician Panel should have mentioned his beryllium sensitivity. The Applicant attaches a decision by DOL that grants a Subpart B claim for beryllium sensitivity. The decision also refers to a pending Subpart B claim for prostate cancer that is awaiting a radiation dose reconstruction by the National Institute of Occupational Safety and Health (NIOSH).

In response to the appeal, we requested that OWA submit a copy of the record in this case. The OWA has not submitted a copy, and we understand that attempts to locate the record have been unsuccessful. As explained below, however, an evaluation of the Applicant's contentions do not require a review of the record.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Panel's failure to discuss skin cancer and beryllium sensitivity does not indicate Panel error. The Applicant's argument that the Panel should have specifically mentioned his skin cancer is, at best, a disagreement with the Panel's medical opinion that his radiation exposure was too low to have been a factor in his illness. The Applicant's argument that the Panel should have mentioned his beryllium sensitivity is unclear; he does not argue that it relates to the prostate cancer claim nor does he argue that he claimed it as a separate illness. In any event, the DOL's Subpart B positive determination on beryllium sensitivity renders the issue moot, since the determination satisfies the Subpart E requirement that the illness be related to

toxic exposure during DOE employment. *See* Authorization Act § 3675(a).

As the foregoing indicates, the Applicant has not demonstrated Panel error and, therefore, the appeal should be denied. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this claim does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0107, be, and hereby is, denied.

(2) This denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 22, 2005