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October 8, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: June 10, 2004

Case No.: TIA-0109

XXXXXXXXXXXXX (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 father (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, I 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 or EEOICPA) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. The Act provides for two programs.

The Department of Labor (DOL) administers the first program, which provides \$150,000 and medical benefits to certain workers with specified illnesses. The relevant illness in this case is "established chronic beryllium disease (CBD)." 42 U.S.C. § 7384l(7).

The DOE administers the second program, which does not itself provide any monetary benefits. Instead, it is intended to aid

DOE contractor employees in obtaining workers' compensation benefits under state law. Under the DOE program, 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). As the foregoing indicates, the DOE program itself does not provide any monetary or medical benefits.

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.

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request that the DOE's Office of Hearings and Appeals review certain OWA decisions. An applicant may appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is 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 is filed pursuant to that Section. Specifically, the applicant seeks review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

B. Factual Background

The record in this case indicates that from 1954 through 1958, the worker was a pipefitter at the X-10 and Y-12 plants at the DOE's site in Oak Ridge, Tennessee. The applicant claims that the worker developed beryllium disease as a result of exposure to beryllium at the work site. The worker died by suicide in 1963.

In 2001, the worker's family applied for compensation under the DOL beryllium benefits program referred to above. Since the worker's medical records, which were by then approximately 40 years old, did not establish whether he had beryllium disease, the DOL requested that the National Jewish Medical and Research Center (NJM) in Denver, Colorado review the worker's file and reach an assessment of his condition. In a letter of August 6, 2003, a physician associated with the NJM provided a review of

the worker's condition using the following five criteria specified in the Act:

For diagnoses before January 1, 1993, the presence of

(i) occupational or environmental history, or epidemiologic evidence of beryllium exposure; and

(ii) any three of the following criteria:

(I) Characteristic chest radiographic (or computed tomography (CT)) abnormalities.

(II) Restrictive or obstructive lung physiology testing or diffusing lung capacity defect.

(III) Lung pathology consistent with chronic beryllium disease.

(IV) Clinical course consistent with a chronic respiratory disorder.

(V) Immunologic tests showing beryllium sensitivity (skin patch test or beryllium blood test preferred).

42 U.S.C. § 73841(13)(B).

The NJM letter did not definitively state whether the worker's condition, as evidenced by his record, satisfied three of the five criteria as specified in the Act. Rather, the letter described the worker's lung and respiratory condition based on his medical records as it applied to each criterion. Based on their reading of the letter, two DOL claims examiners found the worker had beryllium disease, reached a positive determination with respect to the applicant's claim for compensation, and awarded the worker's family \$150,000 under the DOL program.

However, the DOE Physician Panel rendered a negative determination on the applicant's claim for workers' compensation benefits in the DOE program. The Panel found that the worker's medical records showed "no evidence of parenchymal disease, pulmonary function testing, pathology, clinical course or immunologic test consistent with berylliosis." Based on the NJM

letter and other evidence in the record, the Panel determined that the worker did not present "symptoms and signs" of beryllium disease.

The Panel therefore issued a negative determination with respect to this application. The OWA accepted the Physician Panel's determination. See OWA May 28, 2004 Letter. The applicant then filed the instant appeal.

II. *Analysis*

In his appeal, the applicant raises two types of arguments. First, he claims that the Panel erred in its assessment of the facts in the file. Second, the applicant raises a broader objection concerning the inconsistent conclusions of the DOE Physician Panel and the DOL claims examiners in this case.

A. *Factual Errors*

The applicant argues that the Panel erred in its consideration of the worker's symptoms. The applicant cites the following statement in the Panel's report: "Chronic beryllium disease is a complex of symptoms and signs. Symptoms include dyspnea [difficult breathing], cough, fever, anorexia, and weight loss. Signs include skin lesions, granulomatous hepatitis, hypercalcemia, renal calculi and granuloma on chest-x-ray in an individual with a positive lymphocyte proliferation test on peripheral blood. None of these were evident in the OWA file."

The applicant asserts that dyspnea and coughing were evident from the record in this case, and points to a statement in the file from the worker's physician that he "has had choking and dyspnea on any effort that he started since 1956. He was coughing severely at this time." Record at 42. The applicant therefore asserts that the Panel's statement that the record did not show that the worker had the symptoms of dyspnea and cough is an error.

The applicant is correct. The record does indicate that the worker suffered from dyspnea and cough. The Panel's statement to the contrary could be due to an oversight in its review of the record, or to poor drafting of its report. In any event, the

error is ultimately an insignificant one. Even if the worker was experiencing coughing and dyspnea, it would not necessarily establish that he had beryllium disease. For example, as indicated in the NJM letter, the worker suffered from chronic bronchitis and emphysema. These two conditions are also consistent with coughing and dyspnea. I therefore find no basis for remanding this case based on this error.

The applicant next contends that the Panel report inaccurately cites "date of onset" of the beryllium disease as "N/A." The applicant appears to believe that N/A means "not available." He points to Line 6 of a Physician's Certificate giving the "date of onset" of the illness as 1956. Record at 313.

The applicant's description of the certificate is inaccurate. After reviewing the certificate, I find no mention of beryllium. The illnesses that the certificate refers to are cyanosis and dyspnea. As stated above, dyspnea is difficult respiration. Cyanosis is a bluish or purplish discoloration of the skin due to deficient oxygenation of the blood. Neither condition is the same as beryllium disease. Thus, contrary to the applicant's belief, the 1956 date does not refer to the onset of beryllium disease.

The applicant is also incorrect in his belief that the Panel's "N/A" means unavailable. I believe the Panel intended to indicate that the date of onset was "not applicable," since it found that the worker did not have berylliosis. In this regard, as discussed below, when the Panel meant to indicate that data was "not available," as it did elsewhere in the report, it did not use the symbol "N/A," but rather used the term "unavailable." I therefore see no Panel error on this point.

The applicant further objects to the notations by the Panel concerning whether the worker was exposed to beryllium. For example, the Panel stated that dosimetry records, area sampling and industrial hygiene assertions were "unavailable." It found the "site analysis: non-contributory." The applicant points out that the DOL's Recommended Decision found that the worker was exposed to beryllium, and therefore argues that the Physician Panel's report is incorrect on this point.

As noted above, the Panel found that the worker did not have beryllium disease. Therefore, the issue of whether the worker

was exposed to beryllium is irrelevant. Thus, even if the Panel ultimately erred in its assertion that exposure information was unavailable or non-contributory, it would be harmless error, since it would make no difference in the outcome of this case. In any event, the argument that the DOL examiners found that the worker was exposed to beryllium cannot prevail here. As discussed in detail below, I find that the DOL determination, including its findings of fact and conclusions of law, is not dispositive in these workers' compensation cases before the DOE.

B. Inconsistent DOE and DOL Results

The applicant believes that the Panel improperly disregarded the DOL determination, and its conclusion of law that the worker had chronic beryllium disease. The applicant thereby implicitly argues that the Panel is not free to reject the DOL findings. I do not agree with that proposition. As an initial matter, I do not believe that the DOL determination is dispositive in DOE beryllium cases. If it were, there would be no need for a DOE physician panel review. The Act and relevant regulations make no provision for bypassing the DOE physician panel review in beryllium cases that have been granted by DOL. Accordingly, I must conclude that physician panel review is required.

Furthermore, after reviewing the Physician Panel's report, I find no error with respect to the issue of whether the worker had beryllosis.

As stated above, the DOL determination was based on the NJM report, which discussed the worker's medical condition as it related to the five criteria set forth in Section 73841(13)(B). The NJM report did not state conclusively whether or not the worker had met the standard for establishing beryllium disease. For example, with respect to the first criterion, "characteristic chest radiograph or computed tomography denoting abnormalities," the NJM simply reviewed the worker's chest radiographs, without specifically stating whether it believed that they were characteristic of a person with beryllium disease. With respect to the second criterion, "restrictive or obstructive lung physiology test or diffusing capacity defect," the NJM report indicated that the worker's pulmonary function "may be associated with CBD; however the medical record noted previous diagnoses of chronic bronchitis and emphysema." The NJM opinion is thus not clear with respect to this criterion. Overall, the report did not unequivocally state whether the worker met three of the five criteria, as required by Section 73841(13)(B).

Based on the NJM report, the DOL found that the worker had chronic beryllium disease. Specifically, the DOL claims examiners determined that the worker met criteria I, II and IV. Subsequently, the DOE Physician Panel reviewed the NJM letter, brought its own expertise to bear on the subject, and reached a conclusion that was not consistent with that of the DOL. The applicant believes that the DOE Physician Panel erred.

I disagree. The Panel indicated that it reviewed the report generated by NJM, and it did not find that the evidence indicated that the worker's condition was consistent with berylliosis. The inconsistency in the DOL and DOE determinations does not necessarily mean that the DOE physicians erred. The applicant has pointed to the difference in the opinions, but has provided no information to indicate that the DOE Physician Panel erred in its ultimate determination that the worker did not have CBD. Accordingly, I must reject this aspect of his appeal.

III. *Conclusion*

In sum, the applicant has not demonstrated any error in the Panel's determination that warrants further review in this case. Thus, 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-0109 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: October 8, 2004