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March 9, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: July 7, 2004

Case No.: TIA-0125

XXXXXXXXXXX (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 the Worker's illness was not related to her work at the 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. 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 As originally enacted, the Act provided for two programs.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, and its web site provides extensive information concerning the program.[1]

[1] **www.eh.doe.gov/advocacy**

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While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub.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). 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.

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 is currently employed at the Savannah River Site (the site) as a truck driver. The Applicant has worked at the site since 1984.

The Applicant filed an application with the OWA, requesting physician panel review of two illnesses, mental stress and an ulcer.

The Physician Panel rendered a negative determination for both of these illnesses, which the OWA accepted. In regard to the claim of mental stress, the Panel stated that there were no psychological or psychiatric records in the file provided for review. In regard to the claim of an ulcer, the Panel stated that the Worker's overall gastrointestinal complaints were due to a bacterial infection and esophageal reflux and not to a toxic substance during the course of employment at the site.[1] Subsequently, the Applicant filed the instant appeal.

[1] *See* Physician Panel Report at 1.

In her appeal, the Applicant maintains that the negative determination is incorrect. The Applicant asserts that her illnesses were the result of toxic exposures received during her employment at the site. The Applicant states that she has eleven siblings and none of her sisters and brothers has been as sick as she.[2]

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 Applicant's argument does not provide a basis for finding panel error. As mentioned above, the Physician Panel found no evidence to support the claim of mental stress. The Applicant has not pointed to any evidence of mental stress in the record and, therefore, has not identified panel error on that claimed illness. With respect to the ulcer claim, the Applicant similarly has not identified Panel error. The Applicant's argument that no one in her family suffers from ulcers does not mean that toxic exposures at DOE were a factor in that illness. Instead, the Applicant's argument is a mere disagreement with the Panel's medical judgment, rather than an indication of panel error.

As the foregoing indicates, the appeal does not present a basis for finding panel error and, therefore, 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-0125 be, and hereby is, denied.

[2] *See* Applicant's Appeal Letter.

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

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

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 9, 2005