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August 27, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal
Date of Filing: August 4, 2004
Case No.: TIA-0154

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, 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) 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, one of which is administered by the DOE. 1/

The DOE program 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

1/ The Department of Labor administers the other program. See 10 C.F.R. Part 30; www.dol.gov/esa.

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 and has a web site that provides extensive information concerning the program. 2/

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 May 1947 through May 1951, the worker was a millwright at the DOE's Oak Ridge, Tennessee site. According to the applicant, this job involved working with toxic substances. The applicant claims that the worker developed chronic obstructive pulmonary disease (COPD), stomach disease, bleeding duodenal ulcer, duodenal fistula, bronchial pneumonia and septic embolism as a result of his exposure to toxic substances at the work site.

The Physician Panel rendered a negative determination on this claim. The Panel unanimously found that the worker's illness did not arise "out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility." The Panel based this conclusion on the standard of whether it believed that "it was

2/ See www.eh.doe.gov/advocacy.

at least as likely as not that exposure to a toxic substance at a DOE facility during the course of the worker's employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the worker's illness or death."

In considering the claim, the Panel found no evidence that the worker had respiratory disease, breathing problems or COPD before his terminal hospitalization in 1951. The Panel therefore rejected the COPD claim. The Panel further determined that there was no relationship between any of the worker's other diseases and exposures to toxic substances.

The OWA accepted the Physician Panel's determination. See OWA July 16, 2004 Letter. The applicant filed the instant appeal.

II. Analysis

In her appeal, the applicant maintains that the worker was exposed to mercury, asbestos, lithium, lithium hydroxide and mixed wastes. The applicant bases this assertion on plant profile descriptions, indicating that the environment in buildings in which the worker was stationed may have presented these hazards. The applicant also states that the worker came in contact with beryllium.

These assertions, even if true, do not indicate any basis for further Panel review in this case. The Panel's decision was based on its determination that the individual did not have COPD, and that the remaining diseases bore no relationship to toxic exposure. Therefore, even if the applicant is correct and the worker was exposed to all of the named substances, it would not change the result in this case, since according to the Panel, the worker's diseases are simply unrelated to toxic exposure.

The applicant has raised no challenge to that determination, other than a contention that the worker "could have had [undiagnosed] cancer" that was caused by radiation and other toxic exposures at the plant, and further that he was healthy when he first started working and became sick while at work. She concludes that, given that there is no family history of similar diseases and that the worker died at an early age, it must have been something at work that caused his diseases.

The standard in these cases is, as stated above, whether "it was at least as likely as not that exposure to a toxic substance at a DOE facility during the course of the worker's employment by a DOE contractor was a significant factor in aggravating, contributing to

or causing the worker's illness or death." The above arguments regarding the cause of the worker's illnesses, which merely suggest uncorroborated possibilities, do not meet that test, and accordingly, must be rejected.

In sum, 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-0154 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: August 27, 2004