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September 17, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: August 24, 2004

Case No.: TIA-0175

XXXXXXXXXX (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 was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Worker did not have an illness 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 worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385(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

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

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

B. Procedural Background

The Applicant was employed at DOE's Los Alamos site. He worked at the site as an electronics trainee in 1976 and as a security police officer from 1984 to 1997. Record at 11.

The Applicant filed an application with OWA, requesting physician panel review of three illnesses. They were scarring in the left lung, sleep apnea, and hypoxemia. The Applicant claimed that his illnesses were a result of working in electronics, which led to exposure to various chemicals and solvents, beryllium, and other hazardous materials. The Applicant also claims that his work as a security officer involved exposure to beryllium and plutonium while standing guard as experiments were conducted using those substances.

The Physician Panel rendered a negative determination on the claimed illnesses. For the claimed scarring the left lung, the Panel agreed that the Applicant has minimal scars in his lung bases, but stated that there were no significant occupational exposures and that the scarring was of unknown cause. For the sleep apnea, the Panel agreed that the Applicant had the illness, but stated that sleep apnea is not known to be associated with any chemical exposure. For the claimed hypoxemia, the Panel stated that the Applicant had hypoxemia during sleep due to his obstructive sleep apnea, and with exercise due to lung scarring, chest wall changes, and/or diaphragmatic eventration. The Panel did not see evidence linking the claimed hypoxemia to any occupational exposures.

The OWA accepted the Physician Panel's negative determinations on the claimed scarring in the left lung, sleep apnea, and hypoxemia. The Applicant filed the instant appeal.

II. Analysis

Under the Physician Panel Rule, independent physicians render an opinion whether a claimed illness is related to a toxic exposure during employment at DOE. The Rule requires that the Panel address each claimed illness, make a finding whether that illness was related

² See www.eh.doe.gov/advocacy.

to a toxic exposure at DOE, and state the basis for that finding.
10 C.F.R. § 852.12.

We have not hesitated to remand an application where the Panel report did not address all the claimed illnesses,³ applied the wrong standard,⁴ or failed to explain the basis of its determination.⁵ On the other hand, mere disagreements with the Panel's opinion are not a basis for finding Panel error.

In his appeal, the Applicant maintains that the negative determinations are incorrect. The Applicant contends that his illnesses were a result of his working as an electronics trainee and security officer, which exposed him to various hazardous substances. The Applicant's argument is not a basis for finding panel error. As mentioned above, the Panel addressed each claimed illness, made a determination, and explained the basis of that determination. The Applicant's arguments are merely disagreements with the Panel's medical judgment, rather than indications of panel error.

The Applicant also objects to a statement in the Panel's report regarding a note in the consult of 6/26/2001 indicating proximity to pet birds. Record at 70. The Applicant states that the parakeet he owned died some time before his doctor's visit and that the doctor must have misunderstood him. This assertion, even if true, would not change the result in the Applicant's case. The Panel determined that the Applicant did not have significant occupational exposures. Accordingly, statements about other possible causes of the Applicant's illnesses do not affect the determination.

The Applicant further states in his appeal that in addition to the claimed illnesses, his medical reports mention diabetes, hypertension, and fibromyalgia. The Applicant did not claim these illnesses in his application to OWA; therefore, the Panel did not err in not considering these illnesses. Moreover, given the Panel's finding that the Applicant did not have any significant occupational exposures, we doubt that consideration of these illnesses would produce a positive determination. If, nonetheless, the Applicant seeks panel review of these illnesses, the Applicant may file a request with OWA.

As the foregoing indicates, the Applicant has not identified any error in the physician panel process. Accordingly, the appeal should be denied.

IT IS THEREFORE ORDERED THAT:

³*Worker Appeal*, Case No. TIA-0030, 28 DOE ¶ 80,310 (2003).

⁴*Worker Appeal*, Case No. TIA-0032, 28 DOE ¶ 80,322 (2004).

⁵*Id.*

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0175 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 17, 2004

