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April 29, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: October 8, 2004

Case No.: TIA-0237

XXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits for his wife (the Worker). The OWA referred the application to an independent Physician Panel (the Physician Panel and the Panel), which determined that the Applicant'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 As originally enacted, the Act provided for two programs.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.

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While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub.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 Worker was employed as a clerk and a reproduction operator at the Savannah River Site (the plant). She worked at the plant for approximately 31 years, from 1972 to 2003. An application was filed with the OWA, requesting physician panel review of pancreatic cancer.

The OWA referred the matter to the Physician Panel, which issued a negative determination. The Panel found that the Worker was a clerk in an office and may have been exposed to methyl ethyl ketone, a cleaner for mimeograph machines. The Panel found that her exposure to radiation was not above background levels. The Panel discussed pancreatic cancer, opining that it is not caused by workplace toxins. The Panel cited the Worker's history of diabetes as a slight risk factor. *See* Physician Panel Report. The OWA accepted the determination, and the Applicant appealed.

In his appeal, the Applicant advances several arguments. First, he states that the Worker had unknown toxic exposures. He states that she worked in the raw material production facility of the plant for about four years. Second, the

Applicant challenges the Panel's discussion of risk factors. The Applicant states that scientific studies have not proven conclusively that occupational exposures do not contribute to the onset of pancreatic cancer. The Applicant further states that the Worker had no family history of cancer and that she was diagnosed with diabetes only a few months prior to her cancer diagnosis.

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 Applicant's arguments do not indicate Panel error. The Panel is required to determine whether it is "at least as likely as not" that occupational exposures were a significant factor in the illness. Arguments about the possibility of unknown exposures and the fact that occupational exposures have not been "conclusively" ruled out as a factor do not mean that it is "at least as likely as not" that exposures were a significant factor in the Applicant's illness. Similarly, the Applicant's argument that the Worker had no other known risk factors does not mean that it is "at least as likely as not" that the occupational exposures were a factor in her illness.

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-0237 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 29, 2005