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April 7, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Petition for Special Redress

Name of Case: Beryllium Petition
Date of Filing: June 27, 2005
Case Number: TEG-0002

XXXXXXXXXX (the Petitioner), an employee of BWXT Pantex, LLC (the Contractor), filed a Petition for Special Redress (the Petition) with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE). The Petitioner contends that she is entitled to medical removal protection benefits under the Chronic Beryllium Disease Prevention Program ("the CBD Prevention Program" or "the Beryllium Rule"), 10 C.F.R. Part 850, even though there is no detectable airborne beryllium at the site.

A worker is entitled to medical removal if the Site Occupational Medical Director (SOMD) determines that it is medically appropriate to remove the worker from a position involving airborne beryllium exposure. In this case, both parties agree that there is no airborne beryllium at the site. Accordingly, the Rule does not require medical removal.

I. BACKGROUND

The regulations establishing the CBD Prevention Program are set forth at 10 C.F.R. Part 850, "Chronic Beryllium Disease Prevention Program." The purpose of the program is to "reduce the number of workers currently exposed to beryllium at DOE facilities managed by DOE or its contractors, minimize the levels of, and potential for, exposure to beryllium, establish medical surveillance requirements to ensure early detection of disease, and improve the state of information regarding chronic beryllium disease and beryllium sensitization." 64 Fed. Reg. 68854. If a DOE worker believes that a DOE contractor is not complying with the requirements of this program, he or she can petition to OHA to resolve the dispute. See 10 C.F.R. § 850.5.

The Petitioner was hired by the Contractor in April 2000 as a technician. Petitioner's Letter to OHA, June 17, 2005 (Petition). In May 2003, the Petitioner was diagnosed with sensitivity to beryllium. One year later, she was diagnosed with CBD. *Id.*, Electronic Mail Message from SOMD to Petitioner, April 13, 2005 (E-mail from SOMD).¹

In November 2004, due to her concerns about her diagnosis, the Petitioner asked the Contractor for a position outside a specified area of the site comprised of several facilities (the Area). The Contractor informed the Petitioner that there were no comparable positions available outside the Area. Letter from Contractor Employment Manager to Petitioner, December 15, 2004. At the Petitioner's request, the Contractor moved the Petitioner to a temporary non-comparable position outside the Area but stated that the position could not be maintained indefinitely due to a collective bargaining agreement between the Contractor and the labor union of which the Petitioner was a member. *Id.*

In April 2005, the Petitioner requested that the SOMD opine that she was entitled to medical removal under the CBD Prevention Program. The SOMD denied her request on the ground that there was "no detectable beryllium in the air in any workplace at [the site] at this time." E-mail from SOMD. Subsequently, the Petitioner obtained a permanent non-comparable position outside the Area. The position has a lower rate of pay than the Petitioner's prior technician position. Petition; Letter from Contractor to Janet Freimuth, OHA, September 6, 2005 (Contractor's Response Letter).

The Petitioner contends that she is entitled to medical removal from the Area and any benefits flowing from medical removal. See 10 C.F.R. § 850.35. She reasons that, even though there is no detectable airborne beryllium at the site, the possibility of the presence of undetectable beryllium is greater in the Area. Petitioner's Letter. In response to the Petition, the Contractor states that the Area encompassed facilities that had been cleaned and maintained in accordance with the provisions of the CBD Prevention Program and areas that had never been contaminated with beryllium. Contractor's Response Letter. The Contractor argues that the Rule does not require medical removal because there is no detectable airborne beryllium at the site. *Id.*

II. ANALYSIS

The Rule provides for medical removal of a "beryllium-associated worker" from exposure to beryllium if the SOMD determines that it is

¹ The Contractor argued that there was "some disagreement between the diagnoses obtained by [the Petitioner]" but conceded that the Petitioner was at least sensitive to beryllium. Letter from Contractor to Janet Freimuth, OHA, September 6, 2005 (Contractor's Response Letter).

medically appropriate" to do so.² 10 C.F.R. § 850.35. It is undisputed that the SOMD denied the Petitioner's request for medical removal from the Area, and we see no basis for faulting that decision. The medical removal provisions refer to airborne beryllium. 10 C.F.R. § 850.35. This is consistent with the fact that there has long been consensus in the scientific community that exposure to airborne beryllium is the only cause of CBD. 64 Fed. Reg. 68854. It is undisputed that there is no detectable airborne beryllium at the site, including the Area. Accordingly, the Petitioner's argument - that she is unusually sensitive to beryllium and, therefore, entitled to removal to a position with the lowest possibility of having undetectable beryllium - is simply not provided for in the Rule. Accordingly, there is no basis for finding that the Petitioner is entitled to medical removal, or related medical removal protection benefits, under the Rule.

III. CONCLUSION

It is undisputed that there is no detectable airborne beryllium at the site. Since there is no detectable beryllium in the Area, the Petitioner is not entitled to medical removal or related medical removal protection benefits. Accordingly, the Petition should be denied.

IT IS THEREFORE ORDERED THAT:

- (1) The Petition for Special Redress, Case No. TEG-0002, be, and hereby is, denied.
- (2) This is a final agency decision of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 7, 2006

² The Rule defines a "beryllium-associated worker" as "a current worker who is or was exposed or potentially exposed to airborne concentrations of beryllium at a DOE facility." 10 C.F.R. § 850.3.