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May 19, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: October 20, 2004

Case No.: TIA-0273

XXXXXXXXXXXX (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 Applicant 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. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for 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While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub.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). 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 Applicant was employed at DOE's Oak Ridge site (the site). The Applicant worked in various positions at the site for approximately thirty-nine years, in periods from 1945 to 1988. The Applicant filed an application with OWA, requesting physician panel review of five illnesses - hearing loss, tinnitus, benign pituitary tumor, benign lung tumor, and left acute and chronic subdural hematoma.

The Physician Panel rendered a negative determination on the claimed illnesses. For the claimed hearing loss and tinnitus, the Panel stated that the Applicant's records indicate that the conditions are consistent with hereditary hearing loss and noise-induced hearing loss and, therefore, outside the scope of the Act. For the claimed pituitary tumor, the Panel stated that there was no known relationship between the illness and occupational exposures to ionizing radiation and toxic chemicals. For the claimed lung tumor, the Panel determined that the illness was the result of an infectious process and not workplace exposures to toxic substances. For the claimed subdural hematoma, the Panel stated that the condition is generally related to trauma. The Panel stated that "a toxic or radiological connection might be asserted if [the Applicant] had a blood disorder that caused excessive bleeding, but no such disorder was described." Panel Report at 4.

The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal. The Applicant presented several arguments on appeal. First, the Applicant claimed that the type of hearing protection he was provided was later found to be inadequate. Second, the Applicant stated that he received a positive Subpart B determination from the DOL for the pituitary tumor. Third, the Applicant questioned whether it was possible that his lung tumor was

caused by work-related factors. Regarding the Panel's determination on the claimed subdural hematoma, the Applicant questioned whether the Panel requested information regarding a possible blood disorder from his physician.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to a toxic exposure during employment at DOE. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, 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 on appeal do not provide a basis for finding panel error.

First, it is not disputed that the Applicant's hearing loss may be attributable to excessive noise exposures. However, hearing loss is not a condition covered by the act. The Physician Panel Rule applied to a DOE contractor employee whose illness or death "arose out of and in the course of employment by a DOE contractor and through exposure to a toxic substance at a DOE facility." 10 C.F.R. § 852.1(4). A toxic substance was defined as "any material that has the potential to cause illness or death because of its radioactive, chemical, or biological nature." 10 C.F.R. § 852.2. Noise is not a "toxic substance." Therefore, this argument does not provide a basis for finding Panel error.

Second, the Applicant's receipt of a positive Subpart B determination for his pituitary tumor satisfies the Subpart E requirement that the illness be related to toxic exposure during employment at DOE. Accordingly, further consideration of the claimed pituitary tumor is unnecessary.

Third, the Applicant's questions regarding whether his lung tumor could have been caused by work-related factors and whether the Panel requested information from the Applicant's physician regarding a possible blood disorder reflect a misunderstanding of the applicable standard and are ultimately mere disagreements with the Panel's medical judgment. The Panel is not required to prove the existence of a relationship between an illness and occupational exposures; the Panel is required to consider whether there is sufficient evidence of a relationship. Similarly, the Panel is not required to contact the Applicant's physician to request information regarding possible causes of an illness; rather, the Panel is required to consider the record before it to determine whether it is at least as likely as not that an

applicant's illness was caused, contributed to, or aggravated by exposure to a toxic substance while working at DOE.

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 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-0273 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: May 19, 2005