* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

October 6, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Petition for Special Redress

Name of Case: **Beryllium Petition**

Date of Filing: **January 7, 2005**

Case Number: **TEG-0001**

XXXXXXXXXX (the Petitioner), an employee of BWXT Y-12, L.L.C. (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 the Contractor has refused to provide benefits to which he is entitled under the DOE's Chronic Beryllium Disease Prevention Program (hereinafter "the CBD Prevention Program," "the Program," or "the Rule"), 10 C.F.R. Part 850. Specifically, the Petitioner argues that (1) because there is detectable beryllium in his workplace, he is entitled to "permanent medical removal protection benefits" which would allow him to stop working for two years while maintaining his salary, seniority and other benefits and (2) the Contractor wrongfully failed to compensate him for wages lost in connection with various medical absences.

As explained in greater detail below, we have determined that the Program does not provide for the claimed relief. First, the Rule does not require contractors to provide a beryllium-free environment. Rather, it provides for permanent medical removal protection benefits when a "beryllium-associated worker" cannot be transferred to a comparable position where beryllium exposures are "below the action level." 10 C.F.R. § 850.35(b)(ii); *see also* 10 C.F.R. § 850.3 (definition of "beryllium-associated worker"), 10 C.F.R. § 850.23(a) (definition of "action level"). Permanent medical removal protection benefits include maintaining the worker's earnings, seniority, and other worker rights and benefits. *Id*. § 850.35(b)(ii). In this case, the Petitioner was removed to a position that satisfies the requirements of the Rule and, therefore, he is not entitled to permanent medical removal protection benefits. Second, the Rule contains no provision for compensation for absences related to CBD symptoms or treatment. Accordingly, we have determined that the Petition should be denied.

I. Background

One of the purposes of the CBD Prevention Program is to identify chronic beryllium disease (CBD) in the worker population through medical surveillance and, when necessary, to provide for medical removal of beryllium-associated workers. 64 Fed. Reg. 68854. If a DOE worker believes that a DOE contractor is not complying with the Rule, the worker can petition to OHA to resolve the dispute. *See* 10 C.F.R. § 850.5. The Petition was filed pursuant to that provision.

Most of the facts in this case appear undisputed. The Petitioner is a machinist who has worked for the Contractor since 1968 and was diagnosed with CBD in 1993. In 1994 or 1995, the Contractor transferred the Petitioner to his current job location in order to minimize his exposure to beryllium. The Petitioner states that "[t]he transfer was made following incidents in [his] former work area where beryllium parts were routinely brought into the area, and there was concern that [he] could not be protected." Petitioner's Letter, April 15, 2005.

The Petitioner contends that the Contractor wrongfully denied his request for "permanent medical removal protection benefits." 10 C.F.R. § 850.35(b). The Petitioner states that there have been several incidents where detectable amounts of beryllium were found in his workspace. Petitioner's Letter, April 15, 2005. Therefore, the Petitioner maintains, he is entitled to stop working and receive two years' worth of salary and benefits.

The Petitioner also contends that the Contractor has wrongfully failed to compensate him for lost wages attributable to various medical absences. According to the Petitioner, the absences were beryllium-related and, therefore, he should have been compensated for them. Petitioner's Letter, January 4, 2005; Petitioner's Letter, April 15, 2005.

In response to the Petition, the Contractor contends, *inter alia*, that the CBD Prevention Program does not provide for the claimed benefits. The Contractor also states that the Petitioner settled a state workers' compensation claim, pursuant to which the Petitioner received "a monetary award for permanent partial disability, which was intended to compensate him for future wage loss." Contractor's Letter, January 28, 2005.[1]

[1] The Contractor stated that the settlement also provided for the payment of future CBD-related medical expenses for life.

II. Analysis

A. Permanent Medical Removal Protection Benefits

The Petitioner contends that the Contractor has denied him "permanent removal protection benefits" i.e., the right to stay home and collect two years' worth of salary and benefits. In support of his contention, the Petitioner argues that there are detectable amounts of beryllium in his current work environment. In essence, the Petitioner argues that he is entitled to a beryllium-free environment. As explained below, the Rule does not create such a right.

Section 850.35 of the Rule governs medical removal. The Rule provides for permanent medical removal of a "beryllium-associated worker" from a job involving exposure to beryllium if the site occupational medical director (SOMD) determines that it is "medically appropriate" to do so. 10 C.F.R. § 850.35. The Rule requires that a contractor provide the beryllium-associated worker the opportunity to "transfer to another position which is available, or later becomes available, for which the beryllium-associated worker is qualified (or for which the worker can be trained in a short period) and where beryllium exposures are as low as possible, but in no event at or above the action level." *Id*. § 850.35(b)(i). The Rule also provides that "*if the beryllium-associated worker cannot be transferred to a comparable job where beryllium exposures are below the action level*" the contractor must provide a maximum of two years of permanent medical removal protection benefits. *Id*. § 850.35(b)(ii) (emphasis added). Permanent medical removal protection benefits include maintaining the removed worker's total normal earnings, seniority and other worker rights and benefits, as though the worker had not been removed. *Id*. § 850.35(b)(3).

It is undisputed that the Contractor has afforded the Petitioner medical removal to a comparable job. According to the Petitioner, he was moved to his current position in 1994 or 1995, several years before the enactment of the Rule, to protect him from exposure to beryllium. He further states that he "remain[s] in the same job classification category. While the location changed, the job did not, [he is] still an hourly machinist." Petitioner's Letter, April 15, 2005.

The Petitioner's contention that he is entitled to a beryllium-free environment is inconsistent with the express terms of the Rule. Under the Rule, a worker is entitled to permanent removal protection benefits if the contractor cannot provide a comparable job "where beryllium exposures are below the action level." 10 C.F.R. § 850.35(b)(ii); *see also*, 10 C.F.R. § 850.23(a) (definition of "action level"). The Petitioner concedes that beryllium exposures at his current job are below the action level. *See* Electronic Mail Message from Petitioner to Janet Freimuth, OHA, March 30, 2005. Accordingly, there is no basis for finding that the Petitioner is entitled to permanent removal protection benefits under the Rule.

B. Wage Loss Complaints

The Petitioner also contends that he is entitled to lost wages for absences attributable to CBD symptoms or treatment. The Petitioner argues that the CBD Prevention Program provides for compensation for these types of wage loss and is in addition to that available through workers' compensation programs. As explained below, the Rule does not provide for the claimed compensation.[2]

The Rule contains no provision providing for compensation for lost wages for absences associated with CBD symptoms or treatment. Instead, the Rule provides for medical surveillance or monitoring. The Rule requires that a contractor "establish and implement a medical surveillance program for beryllium-associated workers who voluntarily participate in the program." 10 C.F.R. § 850.34(a). The medical surveillance program "is aimed at (1) identifying workers at higher risk of adverse health effects from exposure to beryllium; (2) preventing beryllium-induced disease by linking health outcomes to beryllium tasks; and (3) making possible the early treatment of beryllium-induced disease." 64 Fed. Reg. 68889. Thus, the program is designed to ensure the prompt identification of workers who have become sensitized to beryllium or who have developed CBD; it is not designed to provide compensation for wage loss attributable to CBD symptoms or treatment and, therefore, does not provide for the type of relief the Petitioner seeks.[3]

III. Conclusion

The Petitioner is not entitled to be "sent home" with full wages, seniority, and benefits for two-years. Instead, the Petitioner has been granted medical removal to a comparable job where beryllium exposures are below the action level. Similarly, the Petitioner is not entitled to lost wages from absences related to CBD symptoms and treatment. While participation in the contractor's medical

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[2] We note that it is not clear whether the Petitioner has satisfied the requirement that he exhaust applicable grievance-arbitration procedures with respect to his claims for lost wages. We do not, however, believe that we need to further examine that issue here, since the Rule does not provide for the type of relief requested.

[3] Although the CBD Prevention Program is not a workers' compensation program, there are compensation programs for workers, such as the Petitioner, who develop CBD in the course of their employment with DOE. In addition to state workers' compensation programs, the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act), as amended, *see* 42 U.S.C. §§ 7384 *et seq.*, provides for two separate compensation programs, both of which would be available to a DOE contractor employee with CBD. Subpart B of the Act provides uniform lump-sum payments and medical benefits to DOE contractor employees with CBD. 42 U.S.C. § 7384l; 20 C.F.R. Parts 1 and 30. Subpart E – a federal workers' compensation program for DOE contractor employees - provides variable lump-sum payments (based on a worker's permanent impairment and/or years of established wage-loss) and medical benefits. *See* 42 U.S.C. § 7385s; 20 C.F.R. Parts 1 and 30.

surveillance program should not result in lost wages, the Petitioner's absences were not of that type, and, therefore, are outside the scope of the Rule.

Although the CBD Prevention Program is not a workers' compensation program, the Petitioner has avenues of relief. In addition to state workers' compensation, two federal compensation programs provide for benefits for a DOE contractor employee with CBD - Subpart B and Subpart E of the EEOCIPA. *See* 42 U.S.C. §§ 7384, 7385; 20 C.F.R. Parts 1 and 30. We encourage the Petitioner to seek relief through those programs.

IT IS THEREFORE ORDERED THAT:

(1) The Petition for Special Redress filed by XXXXXXXXXX, Case No. TEG-0001, 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: October 6, 2005

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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.

December 9, 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Appeal

Case Name: Pacific Underground Construction, Inc.

Date of Filing: October 5, 2009

Case Number: TEG-0005

This decision concerns a Petition for Special Redress (Petition) filed by Pacific Underground Construction, Inc. (PUC). In its Petition, filed pursuant to OHA procedural regulations set forth in 10 CFR Part 1003, Subpart G, PUC requests that OHA review a Final Notice of Violation issued to PUC on September 3, 2009, by the DOE Office of Health, Safety and Security (HSS) under the provisions of 10 CFR Part 851 (Worker Safety and Health Program).

I. Background

A. Worker Safety and Health Program

Under Section 3173 of the National Defense Authorization Act (NDAA) of 2003, Congress directed DOE to promulgate worker safety and health regulations that maintain a high level of protection for employees of DOE contractors. *See* Public Law 107-314 (December 2, 2002), codified at 42 U.S.C. 2282(c)(3). The NDAA provided that these regulations include flexibility to tailor implementation to reflect activities and hazards associated with a particular work environment; to take into account special circumstances for facilities permanently closed or demolished, or which title is expected to be transferred; and to achieve national security missions in an efficient and timely manner. The statute further makes covered DOE contractors that violate these regulations subject to civil penalties for violations of nuclear safety regulations. *See* 42 U.S.C. 2282(c)(3).

The DOE Worker Safety and Health Program, codified in 10 CFR Part 851, was adopted by DOE effective February 9, 2007, to implement the statutory mandate of Section 3173 of the NDAA. Part 851 establishes the framework for a worker protection program designed to reduce and prevent occupational injuries, illnesses, and accidental losses by requiring DOE contractors to provide their employees with safe and healthful workplaces. DOE contractors (except those in facilities operated under the authority of the Deputy Administrator for Naval Reactors or who are regulated by the Occupational Safety and Health Administration) are responsible for developing and implementing a DOE-approved worker safety and health program consistent with the provisions of 10 CFR Part

851. Pursuant to Part 851, DOE contractors are responsible for the health and safety of their employees while they are present on the DOE site for purposes of their employment, to maintain safe conditions at all of the DOE workplaces for which they are responsible (*see generally* Part 851, Subpart B) and to coordinate with other contractors responsible for work at the covered workplaces to ensure the safety and health of workers at multi-contractor facilities. *See* 10 CFR § 851.11(a)(2)(ii). DOE contractors and subcontractors at any tier are responsible for compliance with Part 851. The program establishes procedures for HSS to investigate whether a requirement has been violated, for determining the nature and extent of such violation, and for imposing an appropriate remedy. *See id.* §§ 851.40-851.44.

B. PUC Final Notice of Violation

The DOE's SLAC National Accelerator Laboratory (SLAC) occupies 426 acres of Stanford University (Stanford) property south of San Francisco, California, and is sited approximately 2 miles west of the main campus. Since its construction in the 1960s, state-of-the-art electron accelerators and related experimental facilities for use in high-energy physics and synchrotron radiation research have been designed, constructed, and operated at SLAC. SLAC is operated by Stanford under contract with the DOE's Office of Science.

PUC is an underground pipeline construction company based in San Jose, California. On May 18, 2007, following a bidding process, PUC entered into a contract with Stanford (SLAC Construction Subcontract No. 515-S-68711) to perform replacement of underground mechanical utilities for hot water, chilled water and cooling tower water systems in specified areas of the SLAC campus, as part of the SLAC Safety and Operational Reliability Improvements (SORI) Project. On June 14, 2007, PUC entered into a subcontract with another pipeline construction company, Western Allied Mechanical, Inc. (Western Allied) to remove, fabricate, and replace a portion of the utilities piping covered by PUC's contract with Stanford.

Part 851 enforcement proceedings were initiated by HSS against SLAC, PUC and Western Allied following an investigation undertaken by HSS into the facts and circumstances surrounding a polyvinyl (PVC) pipe explosion that occurred on September 13, 2007, in Sector 30 of the linear accelerator facility at the SLAC. The investigation revealed that the explosion occurred when a Western Allied welder began cutting into a metal pipe to install a pressure gauge. The metal pipe was connected to PVC piping that had been installed the previous day using PVC primer and cement, and then sealed for pressure testing. The heat from the welder's acetylene torch ignited residual vapors from the primer and cement that were trapped inside the piping, causing the explosion. The force of the explosion, which occurred in an outdoor trench, threw shrapnel 60 feet outward. One piece was found more than 100 feet from the scene and another piece punctured an adjacent sheet metal wall. No workers were permanently injured, but one worker suffered temporary hearing loss and another worker was nearly knocked to the ground from the force of the explosion.

Following its investigation, HSS issued a Report of Investigation, dated July 23, 2008, in which it identified multiple violations by PUC of the DOE worker safety and health requirements of Part 851. These violations are described in a Preliminary Notice of Violation (PNOV), 10 CFR § 851.42,

issued to PUC on April 3, 2009.1/ According to the PNOV, the violations by PUC involved deficiencies in construction safety and fire protection, and failure to adhere to general safety requirements and procedures.

With regard to construction safety, the PNOV states that PUC failed to ensure that its subcontractor, Western Allied, developed a construction project safety and health plan, and activity hazard analysis in accordance with 10 CFR § 851.24 and Part 851, Appendix A, Section 1 (*Construction Safety*). According to the PNOV, the site-specific safety plan (SSSP) and job safety analysis (JSA) prepared by Western Allied did not adequately identify and assess the hazards associated with the piping replacement work being done in Sector 30 or establish controls necessary to eliminate or abate those hazards to protect workers. PNOV at 2. In this regard, the PNOV states, *inter alia*, that "[t]he JSA listed 'cutting and torching of bolts' as a phase of work/job step and 'static electricity and sparks' as potential hazards. The analysis failed to consider the potentially explosive conditions created by the combination of ignitable vapors from the PVC primer and cement, and enclosed space (i.e., sealed piping system), and the application of heat to the carbon steel piping attached to the PVC piping." *Id.* at 3.

The PNOV further charges that PUC failed to ensure that appropriate welding and cutting fire safety control measures were implemented or failed to ensure that Western Allied was cognizant of the potential flammable and explosion hazards associated with performing hot work on piping that could contain ignitable vapors. The PNOV notes that "[t]he welder performing the hot work on September 13, 2007, . . . had no experience working with a piping configuration comprised to different materials (ductile iron, PVC, and steel) such as the one used in the underground utilities upgrade in Sector 30 of the linear accelerator facility." *Id.* at 5. Finally, among the general health and safety deficiencies found by HSS, the PNOV cites PUC's failures: 1) to document the results of safety inspections for the work performed by Western Allied, 2) to review the SSSP submitted by Western Allied, in accordance with its contract with Stanford, and 3) to ensure that a JSA was prepared, or the existing JSA modified, to reflect work performed by Western Allied to install a pressure gauge in the carbon steel pipe, purportedly discussed during a tailgate meeting on the day of the explosion. PNOV at 6.

The PNOV concludes that, collectively, PUC's safety deficiencies relating to the September 13, 2007, incident constitute a Severity Level I violation since "there is a potential that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use . . . ." PNOV at 6, *quoting*

1/ HSS concurrently issued PNOV's to SLAC and Western Allied citing Part 851 violations as a result of their involvement and safety deficiencies in connection with the September 13, 2007, incident.

10 CFR Part 851, Appendix B, section VI(b)(1).2/ On this basis, the PNOV proposes that PUC pay a civil penalty of $42,000.

On May 1, 2009, PUC filed a response to the PNOV (PNOV Response) in which it argues that the firm should not be held liable under Part 851 for the alleged violation. More specifically, PUC argues that the firm was never informed during the contract bidding process, through project documents or otherwise, that its work was subject to the health and safety standards of Part 851. PUC asserts that the firm "submitted a bid with the understanding Stanford University would be administering, reviewing, and approving all construction related documents including safety." PNOV Response at 1. Regarding construction safety, PUC contends that "[t]he SSSP submitted by PUC and Western Allied was accepted by Stanford University [and, a]ny questions with the SSSP should have been communicated by SLAC upon review." According to PUC, SLAC assumed daily job safety analysis responsibilities and PUC was not expected to have expertise in cutting/welding work or in identifying, evaluating or controlling hazardous exposures. PUC maintains that it "performed its due diligence in obtaining Western Allied safety program and ensuring [job safety analyses] were submitted to SLAC on a daily basis for work activity." *Id.* While PUC concedes that it did obtain the SSSP from Western Allied and submit it to SLAC, PUC argues that the pressure gauge installation work cited in the PNOV "was beyond the reasonable scope of expertise for PUC." *Id.* at 2. Finally, PUC contends that the proposed financial penalty would have a significant financial impact on the firm and detrimentally affect its ability to qualify for future projects. *Id.*

HSS considered the contentions raised by PUC in its PNOV Response and determined nonetheless that a Final Notice of Violation (FNOV) be issued to PUC on September 3, 2009, assessing the proposed civil penalty of $42,000.3/ In reaching this determination, HSS states:

2/ In its letter transmitting the PNOV, HSS asserts that "the explosion could have resulted in fatalities or severe injuries far exceeding the temporary hearing loss reported by one worker. These consequences were averted only by circumstance and timing. As the General Construction Subcontractor for the underground utilities replacement work, [PUC] was responsible for proper execution of the work associated with the Safety and Operational Reliability Improvements project in Sector 30 of the linear accelerator facility. This included a responsibility for ensuring safe working conditions not only for [PUC] employees but also those subcontractor employees performing work pursuant to a contract with [PUC]." Letter of April 3, 2009, from John S. Boulden III, Acting Director, HSS Office of Enforcement, to Thad M. Corbett, Vice President, PUC.

3/ Concurrently, on September 3, 2009, HSS issued FNOV's to SLAC and Western Allied, imposing civil penalties of $210,000 and $56,000, respectively, based upon their Part 851 violations found by HSS relating to the September 13, 2007, pipe explosion. Neither SLAC or Western Allied elected to petition OHA for a review of the respective FNOV's issued to those contractors.

> [N]one of the reasons stated in the reply to the PNOV justify the rescission of the violation or mitigation of the proposed penalty. Since the inception of the Part 851 enforcement on February 9, 2007, contractors, including subcontractors, have been responsible for the safety and health of both their employers and any lower tier subcontractor employees that conduct activities at DOE covered workplaces. Actions by PUC provide evidence of PUC's acceptance of responsibility with Part 851 requirements including: (1) article 7 of the Stanford University-PUC contract, signed on May 18, 2007, which specifically cites this responsibility; and (2) the Subcontractor Site Specific Health & Safety Plan Form, signed by PUC and submitted to Stanford University before commencement of the underground utilities upgrade work. PUC should have fully considered any lack of expertise needed to comply with Part 851 and provide effective oversight of Western Allied's cutting, welding, and pressure gauge installation activities before entering into a contractual agreement with Stanford University for the full scope of the cooling tower water pipe replacement work.

FNOV at 1. In the letter transmitting the FNOV to PUC, HSS informed PUC of its right to request a review of the FNOV by OHA, 10 CFR § 851.44, by the filing of a petition under OHA procedural regulations set forth at 10 CFR Part 1003, Subpart G.

C. PUC's Petition

In its Petition, received by OHA on October 5, 2009, PUC asserts that "PUC's capacity was as a subcontractor not a General Subcontractor as suggested. The reference to General Subcontractor does not exist in the ITB [bid solicitation] distributed by Stanford University. PUC is not a DOE registered contractor nor subcontractor as parts of the report suggest." Petition at 1. Beyond this assertion, PUC merely recites the arguments raised in its PNOV Response: "PUC reiterates the fact that the 10 CFR 851 rule was not included in the ITB and maintains that this oversight by Stanford University should not punish or incriminate subcontractors that were not properly informed of the potential impact. It is SLAC's responsibility to distribute all appropriate documents. This alleged violation would have a significant impact on PUC. The current amount of the proposed fine would impact PUC's financial standing in a year that is forecast to have a 40-50% decline in revenues." *Id.*

Pursuant to 10 CFR §§ 1003.75 and 1003.76 of OHA's procedural regulations, we directed that PUC provide specified additional information in support of its petition. *See* Letter of October 19, 2009, from Fred L. Brown, Deputy Director, OHA, to Thad M. Corbett, Vice President, PUC. PUC provided the requested information in submissions received by OHA on November 3, and November 23, 2009. In its November 3, 2009, submission (November 3 Submission), PUC again raises the argument advanced in its PNOV Response that SLAC, and not PUC, was responsible for reviewing the required safety documentation (JSA's) and ensuring the safety of the work performed by Western Allied.

II. Analysis

We have thoroughly considered the arguments raised by PUC in its petition and the supporting documentation provided by the firm. For the reasons below, we have determined that PUC's petition must be denied.

Initially, we cannot accept PUC's position that the firm should not be held liable for the Part 851 violations found by HSS relating to the September 13, 2007, incident, because the firm was not given specific notice of the applicability of Part 851 during the contract bidding process. We note initially that the SLAC Instructions to Bidders, provided by PUC in its supplemental submission, clearly states in pertinent part: "Individuals who work at SLAC under subcontract to perform specific construction activities are responsible for complying with all applicable laws and regulations including . . . DOE Safety Orders, ... " *See* PUC November 3 Submission, SLAC Instructions to Bidders for Fixed Price Construction Subcontracts and Purchase Orders, ¶ 14. In addition, and more importantly, the contract with Stanford signed by PUC on May 18, 2007, mirrors this language and specifically cites Part 851: "Individual's who work at SLAC under subcontract to perform specific construction activities are responsible for complying with all applicable laws and regulations including . . . the U.S. Department of Energy - Worker Health and Safety Program (10 CFR 851) . . . These expectations shall also be flowed down to any lower-tier subcontractors that are in the employ of the Subcontractor while performing the effort on SLAC premises." Article 7, SLAC Construction Subcontract, Number 515-S-68711 (awarded to PUC). Thus, PUC's claim that the firm had no notice of the applicability of Part 851 is without merit.

Nor can we accept PUC's position that the firm bore no responsibility for the unsafe practices of its subcontractor, Western Allied. In its Petition (at 1), PUC asserts that it "was a subcontractor not a General Subcontractor as suggested," apparently contesting HSS's statement in the Report of Investigation that: "PUC, as a 'General Construction Subcontractor,' had general supervisory authority over Western Allied for the work performed by Western Allied under contract to PUC. This included responsibility for ensuring Western Allied's compliance with worker safety and health requirements." July 12, 2008, Report of Investigation at 2. Apparently, through artificial semantic distinction, PUC now seeks to diminish its level of responsibility for ensuring the safe practices of its subcontractor, Western Allied. We will not go down that path. It is correct that PUC is identified as "Subcontractor" in the contract PUC entered into a contract with Stanford (SLAC Construction Subcontract No. 515-S-68711) on May 18, 2007. However, in the June 14, 2007, Construction Subcontract Agreement with Western Allied, PUC identifies itself as "General Contractor" and Western Allied as "Subcontractor." The simple facts are that Stanford contracted with PUC to perform replacement of underground utilities in connection with the SORI Project and PUC elected to subcontract a portion of its work to Western Allied. No contractual relationship existed between

Stanford and Western Allied, 4/ but only between Stanford and PUC.5/ We find untenable PUC's attempt to now distance itself from the contractor it chose to hire.

In the cover letter to its November 3 Submission, PUC asserts that "SSSP's for Western Allied were submitted directly to Stanford University without exception. . . . . Chapter 42 and the Hazard Analysis Report shows SLAC as taking responsibility for JSA's. The hazard report spells out roles and responsibilities. Chapter 42 section 5 delineates responsibilities of SLAC and the subcontractor." We have reviewed the cited "Roles and Responsibilities" provisions, Section 5.1.3. of Chapter 42, Subcontractor Construction Safety, of the SLAC Environment, Safety and Health Manual (ES&H Manual), submitted by PUC.6/ We agree that these provisions require the SLAC Project Manager, *inter alia*, to establish "technical and safety requirements for the project" and

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4/ As part of its November 3 Submission, PUC provided the SLAC/Stanford University "General Terms and Conditions for Fixed Price Construction Subcontractors and Purchase Orders." Article 14 of this document, entitled "Control of Sub-Subcontractors,"relates to "lower-tier subcontractors utilized by the Subcontractor" and states specifically that "[n]othing contained in this subcontract shall create any contractual relation between the Sub-subcontractor and the University."

5/ PUC claimed in its PNOV Response that PUC does not have the expertise in assessing the safety hazards associated with pipe cutting/welding work undertaken by Western Allied. However, we must agree with the FNOV that PUC should have fully considered any lack of expertise needed to comply with Part 851 and provide effective oversight of Western Allied's cutting, welding, and pressure gauge installation activities before entering into a contractual agreement with Stanford University for the full scope of the cooling tower water pipe replacement work. *See* FNOV at1.

6/ We note that the version of Chapter 42 (Subcontractor Construction Safety) of the ES&H Manual submitted by PUC is dated "18 November 2005." *See* PUC's November 3 Submission. However, the FNOV quotes provisions from an updated version of Chapter 42 issued on June 1, 2007, which apparently more clearly defines the safety role of the subcontractor. *See* FNOV at 5-6. For instance, the June 1, 2007, version of Chapter 42 (Section 5.1.9.8) states specifically that the subcontractor (PUC) "[t]akes primary responsibility for the safety of their personnel, their subs [i.e Western Allied], and their equipment." PUC argues, however, that "[t]he June 1, 2007 version of Chapter 42 is after the bid date and award date. Any revisions, post bid and post award, would be distributed by SLAC and [PUC] does not have a record of being notified of revisions." E-mail dated December 3, 2009, from Thad M. Corbett, Vice President, PUC, to Fred L. Brown, Deputy Director, OHA. Notwithstanding, we find that HSS correctly applied the updated version of Chapter 42, in effect at the time of the September 13, 2007, incident. In any event, we find that even under the November 2005 version of Chapter 42, PUC is properly held accountable for its failure to ensure the safety practices of its subcontractor, Western Allied. As discussed in this decision, we reject PUC's claim that the "Roles and Responsibilities" provisions of Chapter 42 absolved PUC of this safety obligation.

conduct "appropriate techical and safety reviews of the project in accordance with SLAC policy." Chapter 42, ES&H Manual, Section 5.1.3.3. In addition, these provisions specify that a University Technical Representative is responsible for "[r]eviewing the subcontractor's site-specific safety plan, job safety analysis, and relevant material safety data sheets . . ." *Id.*

However, Chapter 42 of the ES&H Manual does not relinquish PUC, as subcontractor, of its responsibility to ensure the safe practices of its lower tier subcontractor. Section 5.1.3.1 of the "Roles and Responsibilities" provisions reads, in part:

> *Subcontractors* working at SLAC are responsible for providing their employees, the employees of their lower-tier subcontractors, . . . with a work site free from safety and health hazards. Subcontractors are required to comply with their contract's safety specifications, including DOE orders, and applicable federal, state, local, and SLAC safety regulations and policies. Subcontractors are responsible for ensuring the employees they bring on the site to work are technically qualified and capable of performing that work in a safe manner. Construction subcontractors are responsible for providing technically competent, physically capable personnel fully trained in the safety requirements of their craft.

A fair reading of these provisions, in concert, compels a conclusion that SLAC, PUC and Western Allied each had an individual and shared responsibility to ensure that all appropriate safety measures and procedures were implemented with regard to the cutting, welding and gauge installation work being done by Western Allied employees. SLAC and Western Allied have not been excused from their failures to fulfill their safety obligations (*see* note 3, *supra*), and we are not persuaded that PUC should be insulated from its own failure.7/

Finally, we do not accept PUC's contention that the FNOV causes the firm a financial hardship. PUC argues that the $42,000 civil penalty assessed against it by the FNOV would have "a significant financial impact on PUC." On October 19, 2009, we requested that PUC provide documentation to support its claim that the civil penalty "will cause PUC to suffer an economic hardship." *See* Letter of October 19, 2009, from Fred L. Brown, Deputy Director, OHA, to Thad M. Corbett, Vice President, PUC, at 2. However, PUC has provided no specific evidence to support its claim, but makes only a general assertion in the cover letter to its November 3 Submission that "[a]s for economic hardship, PUC sales are down approximately 30% and as stated in prior correspondence,

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7/ While PUC asserts that the JSA's prepared by Western Allied were ultimately submitted to SLAC for review, PUC does not dispute the finding in the FNOV: "The JSA prepared by Western Allied for the piping replacement work, 'CTW Piping Replacement - Sectors 21 thru 30,' dated September 4, 2007, did not identify foreseeable hazards and appropriate protective measures associated with the work to be performed. PUC representatives, including the project foreman, periodically reviewed the JSA as evidenced by their signatures on the JSA as part fo daily sign in expectations." FNOV at 3.

this violation will cause complications in the prequalification process for future opportunities." Without more, we find this assertion unsubstantiated and speculative.

Moreover, we note that in imposing a $42,000 penalty on PUC, HSS explains in the FNOV: "In weighing the imposition of a penalty, DOE considered the role of the other contractors involved, the size of PUC's company, the economic impact of a penalty, and PUC's corrective actions to prevent recurrence. Based on these factors, DOE consolidated PUC's multiple violations into one Severity Level I violation and then reduced the base penalty value of $70,000 accordingly." FNOV at 2. Under these circumstances, we do not find the civil penalty assessed by the FNOV to be inappropriate or unduly punitive. We also observe that the $42,000 civil penalty imposed on PUC is less than the civil penalties assessed against SLAC and Western Allied for their malfeasance in connection with the September 13, 2007, incident.

For the foregoing reasons, we affirm the issuance of the September 3, 2009, FNOV to PUC.

It Is Therefore Ordered That:

(1) The Petition for Special Redress filed by Pacific Underground Construction, Inc., on October 5, 2009, is hereby denied.

(2) This is a final Order of the U.S. Department of Energy.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 9, 2009

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

January 28, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: October 11, 2002

Case No.: TIA-0002

XXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for assistance in filing for state workers' compensation benefits. The DOE Office of Worker Advocacy determined that the applicant, a uranium miner, was not a "DOE contractor employee" and, therefore, was not eligible for the assistance program. The applicant appeals that determination. As explained below, we have concluded that the determination is correct.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. Parts A and D of the Act provide benefits to certain workers.

Part A of the Act provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 7384l(1).

Part D of the Act provides for a DOE program to assist "Department of Energy contractor employee[s]" in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for

this program and has a web site that provides extensive information concerning the program. 1/

Pursuant to an Executive Order, the DOE has published a list of facilities covered by the Act and has designated next to each facility whether it falls within the Act's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 67 Fed. Reg. 79,068 (December 27, 2002) (current list of facilities). 2/ The DOE's published list also refers readers to the DOE Office of Worker Advocacy web site for additional information about the facilities. 67 Fed. Reg. 79,069 (citing www.eh.doe.gov/advocacy).

This case concerns Part D of the Act, the portion of the Act that provides for DOE assistance to DOE contractor employees in filing for state workers' compensation benefits. Part D establishes a DOE process through which independent physician panels consider whether employee illnesses were caused by exposure to toxic substances at DOE facilities. If a physician panel issues a determination favorable to the employee, the DOE assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52,841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). As stated above, the DOE Office of Worker Advocacy is responsible for this program.

In his application for assistance, the applicant states that he worked as a uranium miner for Kerr-McGee in Grants, New Mexico, from approximately 1960 to 1966. The applicant states that since that time he has worked "on and off" as a cement finisher.

1/ *See* www.eh.doe.gov/advocacy.

2/ *See* Executive Order No. 13,179 (December 7, 2000). The DOE first published a list in January 2001, 66 Fed. Reg. 4003 (January 17, 2001), and a revised list in June 2001, 66 Fed. Reg. 31218 (June 11, 2001).

The applicant states that in 1990 he became ill with chronic bronchitis and calluses on his larynx, which he believes resulted from his work as a uranium miner for Kerr-McGee.

The DOE Office of Worker Advocacy determined that the applicant was not a DOE contractor employee. *See* September 16, 2002 Letter from the Office of Worker Advocacy to the applicant. Accordingly, the DOE Office of Worker Advocacy determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits.

In his appeal, the applicant does not address the determination's finding that he was not employed at a DOE facility. Instead, the applicant states that he hopes to submit more information about his illness.

II. Analysis

A. Worker Programs

As an initial matter, we emphasize that an application for DOE assistance in filing for state workers' compensation benefits is separate from an application for such benefits. A DOE decision that an applicant is not eligible for DOE assistance does not affect (i) an applicant's right to file for state workers' compensation benefits without DOE assistance or (ii) whether the applicant is eligible for state workers' compensation benefits under applicable state law.

Similarly, we emphasize that an application for DOE assistance in filing for state workers' compensation benefits is separate from any claims made under other statutory provisions. Thus, a DOE decision concerning DOE assistance in filing for state workers' compensation benefits does not affect any claims made under other statutory provisions.

We now turn to whether the applicant in this case is eligible for DOE assistance in filing for state workers' compensation benefits.

B. Whether the Applicant is Eligible for DOE Assistance in Filing for State Workers' Compensation Benefits

As explained below, we have concluded that the applicant was not a "DOE contractor employee" and, therefore, is not eligible for DOE assistance in filing for state workers' compensation benefits. Our conclusion is based on our understanding of the uranium mining and milling industry in general, and our conclusion is consistent with the applicant's employment by Kerr-McGee in particular.

1. The Uranium Mining and Milling Industry

A 1982 DOE report describes the history of the uranium industry in the United States. *See* "Commingled Uranium-Tailings Study," DOE/DP-0011, vol. II (June 30, 1982), App. D ("History of the [Atomic Energy Commission] Domestic Uranium Concentrate Procurement Program") (hereinafter the 1982 DOE Report). The report concerned the fact that uranium mills sold uranium concentrate to both the federal government and other entities, and that the federal government was responsible for paying a share of the clean up costs based on the amount of its purchases. By way of background, the report describes the development of the nation's uranium mining and milling industry.

The 1982 DOE report describes the period 1947 to 1970, when the DOE's predecessor, the Atomic Energy Commission (AEC), purchased uranium ore and concentrate from private firms. The report indicates that, with the exception of a mill in Utah, the mines and mills were privately operated. 3/ In 1962, the AEC stopped purchasing uranium ore. 1982 DOE Report at D-4. Aside from the uranium procurement program, the AEC leased federal lands to private firms in exchange for a royalty share of any production. In 1962, the AEC discontinued the leasing program. 1982 DOE Report at D-7.

The 1982 DOE report discusses some of the AEC's specific purchase contracts, including the one with the applicant's

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3/ The AEC purchased a Monticello, Utah mill in 1948. 1982 DOE Report at D-6.

employer - Kerr-McGee, which mined and milled uranium in Grants, New Mexico. The report provides in relevant part:

> On May 3, 1957, Kermac Nuclear Fuels [Kerr-McGee's predecessor] and the U.S. Atomic Energy commission signed . . . a purchase contract . . . for the delivery of U_3O_8 concentrate to the AEC. There were three modifications to the original contract. The first (November 28, 1960) changed the pricing formula, amended the AEC option to a firm commitment, and broadened the ore source for U_3O_8. The second (August 28, 1964) was the "stretch-out" contract, which reduced deliveries through 1966 and added 1967-through-1970 deliveries according to a detailed cost formula. The third (April 23, 1966) had no effect on quantity, prices, or schedules. The AEC contract was for purchase of U_3O_3 concentrate with no separate amount stated as a milling fee.

1982 Report at A-67 (emphasis added). Thus, the 1982 Report indicates that the AEC contract with Kerr-McGee provided for the sale of uranium concentrate, and that the sales occurred over the period 1957 to 1970.

2. Whether the Applicant is Eligible for DOE Assistance in Filing for State Workers' Compensation Benefits

In order to be eligible for DOE assistance in filing for state workers' compensation benefits, the worker must be a "Department of Energy contractor employee." 42 U.S.C. § 7385o(b). The term "Department of Energy contractor employee" is defined in relevant part as:

> An individual who is or was employed at a Department of Energy facility by -
>
> > (i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or

> (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

42 U.S.C. § 7384l(11)(B); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). A "Department of Energy facility" is defined in relevant part as:

> [A]ny building, structure, or premise, including the grounds upon which such building, structure, or premise is located -
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> (A) in which operations are, or have been, conducted by, or on behalf of, the Department of Energy ... and
>
> (B) with regard to which the Department of Energy has or had -
>
> (i) a proprietary interest; or
>
> (ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction or maintenance services.

42 U.S.C. § 7384l(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). Although the DOE's published list of DOE facilities does not include any uranium mining or milling sites, 67 Fed. Reg. 79,069-79,074, those sites would be DOE facilities if they met the statutory and regulatory definition.

The 1982 DOE Report indicates that, with the possible exception of employees at the AEC's Utah mill, uranium mine and mill workers were not "DOE contractor employees." In order to be a DOE contractor employee, the employee must work for a firm that has a contract to provide "management and operating, management and integration, environmental remediation," or other "services" at a DOE facility. Neither the AEC procurement contracts nor the AEC mine leases required the contractor to provide services. Under the AEC procurement contracts, the contractor sold product to the AEC. Under the mine leases, the contractor paid a royalty-in-kind on ore production in exchange for a leasehold

interest. Since the AEC procurement contracts and the leases were not contracts for services, the firms that entered into those contracts did not have the type of contracts that would make them DOE contractors, let alone contractors performing work at a DOE facility. Accordingly, their workers, including the worker in this case, do not meet the definition of a "DOE contractor employee."

The 1982 DOE Report's description of the Kerr-McGee, Grants, New Mexico operation during the period 1957 to 1970 is consistent with our understanding that the nation's uranium industry was privately operated during the 1947 to 1970 period of the AEC procurement program. As stated above, the 1982 DOE Report describes the Kerr-McGee contract as providing for the sale of uranium concentrate, and there is nothing in the contract calling for Kerr-McGee to provide services at a DOE facility.

As the foregoing indicates, the applicant was not a DOE contractor employee and, therefore, is not eligible for DOE assistance in filing for state workers' compensation benefits. Again, we emphasize that this determination does not affect whether the applicant is eligible for (i) state workers' compensation benefits or (ii) federal monetary and medical benefits available under other statutory provisions.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0002 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: January 28, 2003

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

December 12, 2002
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: October 16, 2002

Case No.: TIA-0003

XXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The DOE Office of Worker Advocacy determined that the applicant was not a DOE contractor employee and, therefore, that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, we have concluded that the DOE Office of Worker Advocacy determination is correct.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. Parts A and D of the Act provide benefits to certain workers.

Part A of the Act provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 7384l(1).

Part D of the Act provides for a DOE program to assist "Department of Energy contractor employee[s]" in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for

this program and has a web site that provides extensive information concerning the program. 1/

Pursuant to an Executive Order, the DOE has published a list of facilities covered by the Act and has designated next to each facility whether it falls within the Act's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 66 Fed. Reg. 31,218 (June 11, 2001) (current list of facilities). 2/ The DOE's published list also refers to the DOE Office of Worker Advocacy web site for additional information about the facilities. 66 Fed. Reg. 31,219 (citing www.eh.doe.gov/advocacy).

This case concerns Part D of the Act, the portion of the Act that provides for DOE assistance to DOE contractor employees in filing for state workers' compensation benefits. Part D establishes a DOE process through which independent physician panels consider whether employee illnesses were caused by exposure to toxic substances at DOE facilities. If a physician panel issues a determination favorable to the employee, the DOE assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52,841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). As stated above, the DOE Office of Worker Advocacy is responsible for this program.

In his application for DOE assistance in filing for state workers' compensation benefits, the applicant stated that he was an employee of the Allied Chemical Corp. plant in Metropolis, Illinois, from approximately 1958 to 1961. The DOE Office of Worker Advocacy determined that the applicant was employed by an

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1/ *See* www.eh.doe.gov/advocacy.

2/ *See* Executive Order No. 13,179 (December 7, 2000). The DOE first published a list in January 2001, 66 Fed. Reg. 4003 (January 17, 2002), and a revised list in June 2001.

atomic weapons employer, not a DOE contractor. *See* September 12, 2002 Letter from DOE Office of Worker Advocacy to the applicant. Accordingly, the DOE Office of Worker Advocacy determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits. In his appeal, the applicant contests that determination.

II. Analysis

A. Worker Programs

As an initial matter, we emphasize that an application for DOE assistance in filing for state workers' compensation benefits is separate from an application for such benefits. A DOE decision that an applicant is not eligible for DOE assistance does not affect (i) an applicant's right to file for state workers' compensation benefits without DOE assistance or (ii) whether the applicant is eligible for state workers' compensation benefits under applicable state law.

Similarly, we emphasize that an application for DOE assistance in filing for state workers' compensation benefits is separate from any claims made under other statutory provisions. Thus, a DOE decision concerning DOE assistance in filing for state workers' compensation benefits does not affect a claim with the Department of Labor for federal monetary or medical benefits under Part A of the EEOICPA.

We now turn to whether the applicant in this case is eligible for DOE assistance in filing for state workers' compensation benefits.

B. Whether the Applicant is Eligible for DOE Assistance in Filing for State Workers' Compensation Benefits

In order to be eligible for DOE assistance in filing for state workers' compensation benefits, the applicant must have been a "Department of Energy contractor employee." 42 U.S.C. § 7385o(b). In order to be a "Department of Energy contractor employee," a contractor employee must have worked at a "Department of Energy facility." 42 U.S.C. § 7384l(11); 67 Fed. Reg. 52,854 (to be codified at 10 C.F.R. § 852.2). Under the

Act and the implementing regulations, a DOE facility is a facility (i) where DOE conducted operations and (ii) where DOE had a proprietary interest or contracted with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services. *Id.* § 7385o(1)(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2) (emphasis added).

The applicant is not a DOE contractor employee because he did not work at a DOE facility. The DOE's published list of facilities designates the Allied Chemical plant as "AWE," the code for "atomic weapons employer facility." 66 Fed. Reg. 31,222. The DOE Office of Worker Advocacy web site describes the Allied Chemical plant as a privately-owned plant that produced uranium hexafloride feed and sold the feed to the DOE's Paducah, Kentucky Gaseous Diffusion Plant. That description indicates that DOE did not conduct operations at the facility, did not have a proprietary interest in the facility, and did not have a management, environmental remediation, construction, or maintenance contract with the firm. Accordingly, the Allied Chemical plant does not fall within the definition of a DOE facility, 42 U.S.C. § 7385o(1)(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2) (emphasis added). Finally, we have no reason to question the accuracy of the web site description of the facility.

As the foregoing indicates, the applicant was not a DOE contractor employee and, therefore, is not eligible for DOE assistance in filing for state workers' compensation benefits. Again, we emphasize that this determination does not affect whether the applicant is eligible for (i) state workers' compensation benefits or (ii) federal monetary and medical benefits available under other statutory provisions, including any EEOIPCA claims at the Department of Labor.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0003 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: December 12, 2002

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

December 6, 2002
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: October 16, 2002

Case No.: TIA-0004

XXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits for her late husband, XXXXXXXXXX (the worker). The DOE Office of Worker Advocacy determined that the worker was not a DOE contractor employee and, therefore, that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, we have concluded that the DOE Office of Worker Advocacy determination is correct.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. Parts A and D of the Act provide benefits to certain workers.

Part A of the Act provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 7384l(1).

Part D of the Act provides for a DOE program to assist "Department of Energy contractor employee[s]" in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C.

§ 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Pursuant to an Executive Order, the DOE has published a list of facilities covered by the Act and has designated next to each facility whether it falls within the Act's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 66 Fed. Reg. 31,218 (June 11, 2001) (current list of facilities). 2/ The DOE's published list also refers to the DOE Office of Worker Advocacy web site for additional information about the facilities. 66 Fed. Reg. 31,219 (citing www.eh.doe.gov/advocacy/faclist).

This case concerns Part D of the Act, the portion of the Act that provides for DOE assistance to DOE contractor employees in filing for state workers' compensation benefits. Part D establishes a DOE process through which independent physician panels consider whether employee illnesses were caused by exposure to toxic substances at DOE facilities. If a physician panel issues a determination favorable to the employee, the DOE assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). As stated above, the DOE Office of Worker Advocacy is responsible for this program.

In her application for DOE assistance in filing for state workers' compensations benefits, the applicant stated that her late husband was an employee of the Linde Ceramics Plant. The DOE Office of Worker Advocacy determined that the worker was

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1/ *See* www.eh.doe.gov/advocacy.

2/ *See* Executive Order No. 13,179 (December 7, 2000). The DOE first published a list in January 2001, 66 Fed. Reg. 4003 (January 17, 2002), and a revised list in June 2001.

employed by an atomic weapons employer, not a DOE contractor. *See* September 12, 2002 Letter from DOE Office of Worker Advocacy to the applicant. Accordingly, the DOE Office of Worker Advocacy determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits. In her appeal, the applicant contests that determination. In connection with her appeal, the applicant states that the worker was employed at the Linde Ceramics Plant from March 8, 1943 to April 1, 1980.

II. Analysis

A. Worker Programs

As an initial matter, we address an apparent confusion about Part D assistance applications, i.e., applications for DOE assistance in filing for state workers' compensation benefits. A Part D assistance application is separate from an application for state workers' compensation benefits. A DOE decision that an applicant is not eligible for Part D assistance does not affect (i) an applicant's right to file for state workers' compensation benefits without DOE assistance or (ii) whether the applicant is eligible for state workers' compensation benefits under applicable state law. Thus, nothing in this decision affects either the applicant's right to file for state workers' compensation benefits or the applicant's eligibility for those benefits under state law.

Similarly, a Part D assistance application is separate from any claims made under other statutory provisions. Thus, nothing in this decision - which concerns Part D assistance under the EEOICPA - would affect the applicant's right to file a claim with the Department of Labor for federal monetary or medical benefits under Part A of the EEOICPA.

We now turn to whether the applicant is eligible for Part D assistance.

B. Whether the Applicant is Eligible for Part D Assistance

The DOE's published list of facilities includes the Linde Ceramics Plant. The list designates the plant as "AWE" and

"DOE," the codes for "atomic weapons employer facility" and "DOE facility." 66 Fed. Reg. 31,222. The DOE Office of Worker Advocacy web site indicates that during World War II, the plant was part of Carbide and Carbon Chemical Corporation, later known as Union Carbide. 3/ The web site further indicates that plant was (i) an atomic weapons employer facility from 1940 until 1950, when the plant was placed on standby, and (ii) a DOE facility from 1996 to 1997, when remediation work was performed there on behalf of DOE. *Id.*

Based on the foregoing, the DOE Office of Worker Advocacy correctly concluded that the worker was not a DOE contractor employee. The worker's employment at the facility ended in 1980, long before the 1996 to 1997 period for which the plant is designated as a DOE facility.

Because the worker was not a DOE contractor employee, the applicant is not eligible for the Part D assistance program, i.e., DOE assistance in filing for state workers' compensation benefits. Again, we emphasize that this determination does not affect the applicant's eligibility for (i) state workers' compensation benefits or (ii) federal monetary and medical benefits available under other statutory provisions, including EEOIPCA claims at the Department of Labor.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0004 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: December 6, 2002

3/ *See* www.eh.doe.gov/advocacy/faclist/showfacility.cfm.

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

December 10, 2002
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: October 17, 2002

Case No.: TIA-0005

XXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The DOE Office of Worker Advocacy determined that the applicant was not a DOE contractor employee and, therefore, not eligible for the assistance program. The applicant appeals that determination. As explained below, the applicant's stated employer was a DOE contractor and, therefore, we are remanding the application to the DOE Office of Worker Advocacy for further consideration.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. Parts A and D of the Act provide benefits to certain workers.

Part A of the Act provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 7384l(1).

Part D of the Act provides for a DOE program to assist "Department of Energy contractor employee[s]" in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C.

§ 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Pursuant to an Executive Order, the DOE has published a list of facilities covered by the Act and has designated next to each facility whether it falls within the Act's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 66 Fed. Reg. 31,218 (June 11, 2001) (current list of facilities). 2/ The DOE's published list also refers to the DOE Office of Worker Advocacy web site for additional information about the facilities. 66 Fed. Reg. 31,219 (citing www.eh.doe.gov/advocacy).

This case concerns Part D of the Act, the portion of the Act that provides for DOE assistance to DOE contractor employees in filing for state workers' compensation benefits. Part D establishes a DOE process through which independent physician panels consider whether employee illnesses were caused by exposure to toxic substances at DOE facilities. If a physician panel issues a determination favorable to the employee, the DOE assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). As stated above, the DOE Office of Worker Advocacy is responsible for this program.

In his application for DOE assistance in filing for state workers' compensation benefits, the applicant stated that he worked at the Huntington Pilot Plant in Huntington, West Virginia, from 1952 to 1987. The DOE Office of Worker Advocacy

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1/ *See* www.eh.doe.gov/advocacy.

2/ *See* Executive Order No. 13,179 (December 7, 2000). The DOE first published a list in January 2001, 66 Fed. Reg. 4003 (January 17, 2002), and a revised list in June 2001.

determined that the applicant was employed by an atomic weapons employer, not a DOE contractor. *See* September 9, 2002 Letter from DOE Office of Worker Advocacy to the applicant. Accordingly, the DOE Office of Worker Advocacy determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits. In his appeal, the applicant contests that determination.

II. Analysis

The issue on appeal is whether the Huntington Pilot Plant was a DOE facility. As explained below, it is undisputed on appeal that the Huntington Pilot Plant was a DOE facility.

In response to the appeal, we reviewed the DOE's published list of facilities, as well as the DOE Office of Worker Advocacy web site facility descriptions. The DOE's published list of facilities designates the Huntington Pilot Plant as "AWE" and "DOE," the codes for "atomic weapons employer facility" and "DOE facility." 66 Fed. Reg. 31,222. In contrast, the DOE Office of Worker Advocacy web site describes the plant exclusively as a DOE facility. 3/

We contacted the DOE Office of Worker Advocacy concerning the differing descriptions of the Huntington Pilot Plant. The Office advised us that the web site description is accurate. The Office further advised us that an upcoming revision to the published of facilities would delete the "AWE" reference for the Huntington facility.

As the foregoing indicates, the DOE Office of Worker Advocacy views the Huntington Pilot Plant as a DOE facility. Because the applicant has stated that he worked at the facility, we are remanding the application for further consideration.

3/ *See* www.eh.doe.gov/advocacy.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0005 be, and hereby is, granted as set forth in Paragraph 2 below.

(2) The application is remanded to the DOE Office of Worker Advocacy for further processing.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: December 10, 2002

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

February 10, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: October 17, 2002

Case No.: TIA-0006

XXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for assistance in filing for state workers' compensation benefits on behalf of her late father, XXXXXXXXXX (the worker). The DOE Office of Worker Advocacy determined that the worker, a uranium miner, was not a "DOE contractor employee" and, therefore, that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, we have concluded that the determination is correct.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. Parts A and D of the Act provide benefits to certain workers.

Part A of the Act provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 7384l(1). Part A also provides federal monetary and medical benefits for uranium workers who received a benefit under the Radiation Exposure Control Act (RECA), 42 U.S.C. 2210 note. *See* 42 U.S.C. § 7384u.

Part D of the Act provides for a DOE program to assist "Department of Energy contractor employee[s]" in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Pursuant to an Executive Order, the DOE has published a list of facilities covered by the Act and has designated next to each facility whether it falls within the Act's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 67 Fed. Reg. 79,068 (December 27, 2002) (current list of facilities). 2/ The DOE's published list also refers readers to the DOE Office of Worker Advocacy web site for additional information about the facilities. 67 Fed. Reg. 79,069 (citing www.eh.doe.gov/advocacy).

This case concerns Part D of the Act, the portion of the Act that provides for DOE assistance to DOE contractor employees in filing for state workers' compensation benefits. Part D establishes a DOE process through which independent physician panels consider whether employee illnesses were caused by exposure to toxic substances at DOE facilities. If a physician panel issues a determination favorable to the employee, the DOE assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52,841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). As stated above, the DOE Office of Worker Advocacy is responsible for this program.

1/ *See* www.eh.doe.gov/advocacy.

2/ *See* Executive Order No. 13,179 (December 7, 2000). The DOE first published a list in January 2001, 66 Fed. Reg. 4003 (January 17, 2001), and a revised list in June 2001, 66 Fed. Reg. 31218 (June 11, 2001).

The application for assistance states that beginning at least as early as 1947, and ending in 1956, the worker was a uranium miner for various mining companies, including Vanadium Corp. of America, in Oak Springs, Arizona. The application further indicates that the worker became ill with lung disease as result of his work as a uranium miner. Finally, the application indicates that the worker received a $100,000 RECA benefit.

The DOE Office of Worker Advocacy determined that the applicant was not a DOE contractor employee. *See* September 26, 2002 letter from the Office of Worker Advocacy to the applicant. Accordingly, the DOE Office of Worker Advocacy determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits.

In her appeal, the applicant does not directly address whether the employees of uranium mines were DOE contractor employees. Instead, she states that the uranium mining companies should compensate the uranium miners and their families under workers' compensation programs.

II. Analysis

A. Worker Programs

As an initial matter, we emphasize that an application for DOE assistance in filing for state workers' compensation benefits is separate from an application for those benefits. A DOE decision that an applicant is not eligible for DOE assistance does not affect (i) an applicant's right to file for those benefits without DOE assistance or (ii) whether the applicant is eligible for those benefits under applicable state law.

Similarly, we emphasize that an application for DOE assistance in filing for state workers' compensation benefits is separate from any claims made under other statutory provisions. Thus, a DOE decision concerning DOE assistance in filing for state workers' compensation benefits does not affect any claims made under other statutory provisions.

We now turn to whether the applicant in this case is eligible for DOE assistance in filing for state workers' compensation benefits.

B. Whether the Applicant is Eligible for DOE Assistance in Filing for State Workers' Compensation Benefits

As explained below, employees of uranium mining companies are not "DOE contractor employees." According, employees of uranium mining companies, such as the worker in this case, are not eligible for the DOE assistance program.

1. The Uranium Mining and Milling Industry

A 1982 DOE report describes the history of the uranium industry in the United States. *See* "Commingled Uranium-Tailings Study," DOE/DP-0011, vol. II (June 30, 1982), App. D ("History of the [Atomic Energy Commission] Domestic Uranium Concentrate Procurement Program") (hereinafter the 1982 DOE Report). The report concerns the fact that uranium mills sold uranium concentrate to both the federal government and other entities, and that the federal government was responsible for paying a share of the environmental remediation costs based on the amount of its purchases. By way of background, the report describes the development of the nation's uranium mining and milling industry.

The 1982 DOE report describes the period 1947 to 1970, when the DOE's predecessor, the Atomic Energy Commission (AEC), purchased uranium ore and concentrate from private firms. The report states that its first contract, executed in 1947, was for the purchase of uranium concentrate from Vanadium Corporation of American. The report indicates that, with the exception of a mill in Utah, the mines and mills were privately operated. 3/ In 1962, the AEC stopped purchasing uranium ore. 1982 DOE Report at D-4. Aside from the uranium procurement program, the AEC leased federal lands to private firms in exchange for a royalty

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3/ The AEC purchased a Monticello, Utah mill in 1948. 1982 DOE Report at D-6.

share of any production. In 1962, the AEC discontinued the leasing program. 1982 DOE Report at D-7.

2. Whether the Applicant is Eligible for DOE Assistance in Filing for State Workers' Compensation Benefits

In order to be eligible for DOE assistance in filing for state workers' compensation benefits, the worker must be a "Department of Energy contractor employee." 42 U.S.C. § 7385o(b). The term "Department of Energy contractor employee" is defined in relevant part as:

> An individual who is or was employed at a Department of Energy facility by -
>
> > (i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or
> >
> > (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

42 U.S.C. § 7384l(11)(B); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). A "Department of Energy facility" is defined in relevant part as:

> [A]ny building, structure, or premise, including the grounds upon which such building, structure, or premise is located -
>
> > (A) in which operations are, or have been, conducted by, or on behalf of, the Department of Energy ... and
> >
> > (B) with regard to which the Department of Energy has or had -
> >
> > > (i) a proprietary interest; or
> > >
> > > (ii) entered into a contract with an entity to provide management and operation, management and

> integration, environmental remediation services, construction or maintenance services.

42 U.S.C. § 7384l(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). Although the DOE's published list of DOE facilities does not include any uranium mining or milling sites, 67 Fed. Reg. 79,069-79,074, those sites would be DOE facilities if they met the statutory and regulatory definition.

The 1982 DOE Report indicates that, with the possible exception of employees at the AEC's Utah mill, uranium mine and mill workers were not "DOE contractor employees." In order to be a DOE contractor employee, the employee must work for a firm that has a contract to provide "management and operating, management and integration, environmental remediation," or other "services" at a DOE facility. Neither the AEC procurement contracts, such as the one with Vanadium Corporation of America, nor the AEC mine leases required the contractor to provide services. Under the AEC procurement contracts, the contractor sold product to the AEC. Under the mine leases, the contractor paid a royalty-in-kind on ore production in exchange for a leasehold interest. Since the AEC procurement contracts and the leases were not contracts for services, the firms that entered into those contracts did not have the type of contracts that would make them DOE contractors, let alone contractors performing work at a DOE facility. Accordingly, their workers, including the worker in this case, do not meet the definition of a "DOE contractor employee."

As the foregoing indicates, the worker was not a DOE contractor employee and, therefore, the applicant is not eligible for DOE assistance in filing for state workers' compensation benefits. Again, we emphasize that this determination does not affect whether the applicant is eligible for (i) state workers' compensation benefits or (ii) federal monetary and medical benefits available under other statutory provisions.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0006 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: February 10, 2003

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

February 13, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: October 17, 2002

Case No.: TIA-0007

XXXXXXXXXX (the worker) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for assistance in filing for state workers' compensation benefits. The DOE Office of Worker Advocacy determined that the worker, a uranium miner, was not a "DOE contractor employee" and, therefore, that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, we have concluded that the determination is correct.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. Parts A and D of the Act provide benefits to certain workers.

Part A of the Act provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 7384l(1). Part A also provides federal monetary and medical benefits for uranium workers who received a benefit under the Radiation Exposure Control Act (RECA), 42 U.S.C. 2210 note. *See* 42 U.S.C. § 7384u.

Part D of the Act provides for a DOE program to assist "Department of Energy contractor employee[s]" in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Pursuant to an Executive Order, the DOE has published a list of facilities covered by the Act and has designated next to each facility whether it falls within the Act's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 67 Fed. Reg. 79,068 (December 27, 2002) (current list of facilities). 2/ The DOE's published list also refers readers to the DOE Office of Worker Advocacy web site for additional information about the facilities. 67 Fed. Reg. 79,069 (citing www.eh.doe.gov/advocacy).

This case concerns Part D of the Act, the portion of the Act that provides for DOE assistance to DOE contractor employees in filing for state workers' compensation benefits. Part D establishes a DOE process through which independent physician panels consider whether employee illnesses were caused by exposure to toxic substances at DOE facilities. If a physician panel issues a determination favorable to the employee, the DOE assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52,841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). As stated above, the DOE Office of Worker Advocacy is responsible for this program.

1/ *See* www.eh.doe.gov/advocacy.

2/ *See* Executive Order No. 13,179 (December 7, 2000). The DOE first published a list in January 2001, 66 Fed. Reg. 4003 (January 17, 2001), and a revised list in June 2001, 66 Fed. Reg. 31218 (June 11, 2001).

In his application for assistance, the applicant states that he worked as a uranium miner for United Nuclear Mines in Grants, New Mexico, from approximately 1968 to 1980. The applicant states that has a lung condition, which he believes resulted from his work as a uranium miner.

The DOE Office of Worker Advocacy determined that the applicant was not a DOE contractor employee. *See* September 11, 2002 letter from the Office of Worker Advocacy to the applicant. Accordingly, the DOE Office of Worker Advocacy determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits.

In his appeal, the applicant does not directly address whether the employees of uranium mines were DOE contractor employees. Instead, the applicant maintains that his illness resulted from his work as a uranium miner.

II. Analysis

A. Worker Programs

As an initial matter, we emphasize that an application for DOE assistance in filing for state workers' compensation benefits is separate from an application for those benefits. A DOE decision that an applicant is not eligible for DOE assistance does not affect (i) an applicant's right to file for those benefits without DOE assistance or (ii) whether the applicant is eligible for those benefits under applicable state law.

Similarly, we emphasize that an application for DOE assistance in filing for state workers' compensation benefits is separate from any claims made under other statutory provisions. Thus, a DOE decision concerning DOE assistance in filing for state workers' compensation benefits does not affect any claims made under other statutory provisions.

We now turn to whether the applicant in this case is eligible for DOE assistance in filing for state workers' compensation benefits.

B. Whether the Applicant is Eligible for DOE Assistance in Filing for State Workers' Compensation Benefits

As explained below, employees of uranium mining companies are not "DOE contractor employees." According, employees of uranium mining companies, such as the worker in this case, are not eligible for the DOE assistance program.

1. The Uranium Mining and Milling Industry

A 1982 DOE report describes the history of the uranium industry in the United States. *See* "Commingled Uranium-Tailings Study," DOE/DP-0011, vol. II (June 30, 1982), App. D ("History of the [Atomic Energy Commission] Domestic Uranium Concentrate Procurement Program") (hereinafter the 1982 DOE Report). The report concerns the fact that uranium mills sold uranium concentrate to both the federal government and other entities, and that the federal government was responsible for paying a share of the environmental remediation costs based on the amount of its purchases. By way of background, the report describes the development of the nation's uranium mining and milling industry.

The 1982 DOE report describes the period 1947 to 1970, when the DOE's predecessor, the Atomic Energy Commission (AEC), purchased uranium ore and concentrate from private firms. The report indicates that, with the exception of a mill in Utah, the mines and mills were privately operated. 3/ In 1962, the AEC stopped purchasing uranium ore. 1982 DOE Report at D-4. Aside from the uranium procurement program, the AEC leased federal lands to private firms in exchange for a royalty share of any production. In 1962, the AEC discontinued the leasing program. 1982 DOE Report at D-7.

3/ The AEC purchased a Monticello, Utah mill in 1948. 1982 DOE Report at D-6.

2. Whether the Applicant is Eligible for DOE Assistance in Filing for State Workers' Compensation Benefits

In order to be eligible for DOE assistance in filing for state workers' compensation benefits, the worker must be a "Department of Energy contractor employee." 42 U.S.C. § 7385o(b). The term "Department of Energy contractor employee" is defined in relevant part as:

> **An individual who is or was employed at a Department of Energy facility by -**
>
> > **(i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or**
> >
> > **(ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.**

42 U.S.C. § 7384l(11)(B); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). A "Department of Energy facility" is defined in relevant part as:

> **[A]ny building, structure, or premise, including the grounds upon which such building, structure, or premise is located -**
>
> > **(A) in which operations are, or have been, conducted by, or on behalf of, the Department of Energy ... and**
> >
> > **(B) with regard to which the Department of Energy has or had -**
> >
> > > **(i) a proprietary interest; or**
> > >
> > > **(ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction or maintenance services.**

42 U.S.C. § 7384l(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). Although the DOE's published list of DOE facilities does not include any uranium mining or milling sites, 67 Fed. Reg. 79,069-79,074, those sites would be DOE facilities if they met the statutory and regulatory definition.

The 1982 DOE Report indicates that, with the possible exception of employees at the AEC's Utah mill, uranium mine and mill workers were not "DOE contractor employees." In order to be a DOE contractor employee, the employee must work for a firm that has a contract to provide "management and operating, management and integration, environmental remediation," or other "services" at a DOE facility. Neither the AEC procurement contracts nor the AEC mine leases required the contractor to provide services. Under the AEC procurement contracts, the contractor sold product to the AEC. Under the mine leases, the contractor paid a royalty-in-kind on ore production in exchange for a leasehold interest. Since the AEC procurement contracts and the leases were not contracts for services, the firms that entered into those contracts did not have the type of contracts that would make them DOE contractors, let alone contractors performing work at a DOE facility. Accordingly, their workers, including the worker in this case, do not meet the definition of a "DOE contractor employee."

As the foregoing indicates, the worker was not a DOE contractor employee and, therefore, the applicant is not eligible for DOE assistance in filing for state workers' compensation benefits. Again, we emphasize that this determination does not affect whether the applicant is eligible for (i) state workers' compensation benefits or (ii) federal monetary and medical benefits available under other statutory provisions.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0007 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: February 13, 2003

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

November 19, 2002
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: October 18, 2002

Case No.: TIA-0008

XXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for assistance in filing for state workers' compensation benefits for her late husband, XXXXXXXXXX (the worker). The Office of Worker Advocacy determined that the worker was not a DOE contractor employee and, therefore, was not eligible for the assistance program. The applicant appeals that determination. As explained below, we have concluded that the application should be remanded for further consideration.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. Part A of the Act provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. §§ 7384l(1). Part D of the Act provides a DOE program to assist "Department of Energy contractor employee[s]" in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o.

Pursuant to an Executive Order, DOE has published a list of facilities covered by the Act and has designated next to each facility whether it falls within the Act's definition of "atomic weapons employer facility," "beryllium vendor," or "Department

of Energy facility." 66 Fed. Reg. 31,218 (June 11, 2001) (current list of facilities). 1/

This case concerns Part D of the Act, the portion of the Act that applies to DOE contractor employees. Part D establishes a DOE process through which independent physician panels consider whether employee illnesses were caused by exposure to toxic substances at DOE facilities. If a physician panel issues a determination favorable to the employee, the DOE assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852).

In her application for assistance, the applicant states that her late husband was an employee of Hardie Jamieson Trucking and Moab Truck Center, which had contracts with Union Carbide Corporation to haul uranium ore from various mining sites to milling sites. The application indicates that her husband later became ill with lung cancer and died.

The Office of Worker Advocacy determined that the applicant's late husband was not a DOE contractor employee. *See* September 11, 2002 Letter from the Office of Worker Advocacy to the applicant. Accordingly, the Office of Worker Advocacy determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits.

In her appeal, the applicant states that her late husband should be considered a Department of Energy contractor employee. She argues that the uranium ore was mined and milled exclusively for the federal government at "federally controlled sites."

1/ *See* Executive Order No. 13,179 (December 7, 2000). The DOE first published a list in January 2001, 66 Fed. Reg. 4003 (January 17, 2002), and a revised list in June 2001.

II. Analysis

A. Worker Programs

As an initial matter, we address the applicant's apparent confusion about the nature of the Part D assistance program. In the appeal, the applicant makes a statement which suggests that Part D provides for monetary compensation. Our review of other appeals confirms that some confusion exists among applicants about the various compensation and assistance programs. Accordingly, we address both the Part D assistance program and other worker programs.

As indicated above, Part D does not provide for monetary benefits. Instead, Part D is a program to assist workers in filing for state workers' compensation benefits. A decision that an applicant is not eligible for Part D assistance does not affect an applicant's right to file for state workers' compensation benefits. Similarly, a decision that the applicant is or is not eligible for Part D assistance does not affect whether the applicant is eligible for state worker's compensation benefits under applicable state law.

Moreover, a decision concerning an applicant's eligibility for Part D assistance does not affect any claim to federal monetary or medical benefits under other statutory provisions. The applicant in this case received an award under the Radiation Exposure Control Act (RECA), 42 U.S.C. 2210 note, and has applied for an additional $50,000 benefit under the provisions in Parts A through C of the EEOICPA, 42 U.S.C. § 7384u. The RECA and EEOICPA benefits for uranium workers are separate from Part D of the EEOICPA. Again, nothing in this decision - which concerns Part D of the EEOICPA - would affect the applicant's rights to those benefits.

With this clarification, we now turn to whether the applicant is eligible for Part D assistance.

B. Whether the Applicant is Eligible for Part D Assistance

The Office of Worker Advocacy determined that the applicant was not eligible for the assistance program because the applicant was the recipient of an award under the Radiation Exposure Control Act, 42 U.S.C. 2210. As explained below, we believe that the applicant's eligibility turns on whether the mining and milling sites at which her husband worked were DOE facilities within the meaning of the Act.

As indicated above, Part D applies to workers who fall within the definition of a "Department of Energy contractor employee." 42 U.S.C. § 7385o(b). In order to be a "Department of Energy contractor employee," a contractor employee must have worked at a "Department of Energy facility." 42 U.S.C. § 7384l(11); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). The term "Department of Energy contractor employee" is defined as:

> (A) An individual who is or was in residence at a Department of Energy facility as a researcher for one or more periods aggregating at least 24 months.
>
> (B) An individual who is or was employed at a Department of Energy facility by -
>
> > (i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or
> >
> > (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

42 U.S.C. § 7384l(11); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2) (emphasis added). A "Department of Energy facility" is defined as:

> [A]ny building, structure, or premise, including the grounds upon which such building, structure, or premise is located -
>
> > (A) in which operations are, or have been, conducted by, or on behalf of, the Department of Energy (except for buildings, structures, premises, grounds, or operations covered by Executive Order No. 12344, dated February 1, 1982 (42 U.S.C. 7158 note), pertaining to the Naval Nuclear Propulsion Program); and
> >
> > (B) with regard to which the Department of Energy has or had -
> >
> > > (i) a proprietary interest; or
> > >
> > > (ii) entered into a contract with an entity to provide management and operation, management and

> integration, environmental remediation services, construction or maintenance services.

42 U.S.C. § 7384l(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2) (emphasis added).

It is undisputed that the mining and milling sites at issue here are not on DOE's published list of facilities. For Colorado - the state at issue here - the DOE facilities consist of two DOE nuclear weapon explosion sites and the DOE Rocky Flats plant. 66 Fed. Reg. 31219. In fact, the DOE's list does not appear to contain any mining and milling sites for any states.

Although a facility is not on the DOE's published list of facilities, it may be covered by the Act. DOE's published list reflects the DOE's effort to identify all facilities covered by the Act. *See* 67 Fed. Reg. 31218-19. Accordingly, even though a facility is not on the list, it may fall within the Act's definition of a DOE facility. Accordingly, we turn to a consideration of whether the mining and milling sites at issue here fall within that definition.

If the mining and milling sites at issue in this application were privately operated, they are not DOE facilities. It is clear that privately operating mining and milling sites do not fall within the Act's definition of a "Department of Energy facility," because DOE did not have a "propriety interest" in such sites, and DOE did not contract for the "management and operation, management and integration, environmental remediation services, construction or maintenance" of those sites. *See* 42 U.S.C. § 7384l(12); 67 Fed. Reg. 82854 (to be codified at 10 C.F.R. § 852.2). Moreover, the fact that private mining and milling facilities do not fall within the Act's definition of a "Department of Energy facility" is consistent with Part A of the Act. Part A, which provides federal monetary and medical benefits to workers with certain illnesses, extends to employees of certain private employers, including uranium transporters. 42 U.S.C. § 7384u (uranium employees). *See also* 42 U.S.C. §§ 7384s, 7384l(4),(6),(7) (employees of "beryllium vendors" and of "atomic weapons employers"). Accordingly, the Act, as a whole, indicates that when Congress intended a provision to apply to employees of private employers who contributed to the nation's atomic weapons program, Congress so specified. That was not done with respect to Part D. Finally, it makes sense that Part D does not apply to employees of private firms, because DOE would not normally be involved in their state workers' compensations claims.

The determination at issue here does not specifically indicate whether the mining and milling sites at which the worker was employed were privately operated. It is our general understanding that the nation's uranium mines and mills were privately operated. It seems to us, however, that a determination that a uranium worker is not eligible for Part D assistance should specifically address the issue whether the mines or mills were privately operated. If all the nation's uranium mines and mills were privately operated, the determination should so state. If all the nation's uranium mines and mills were not privately operated, the determination should explain why the uranium mines and mills at issue in a given application would not fall within the definition of a DOE facility.

In this case, the determination did not address the nature of the mining and milling sites or whether they fall within the definition of a DOE facility. Accordingly, we have determined that it is appropriate to remand the application for such a determination.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0008 be, and hereby is, granted to the extent set forth in Paragraph 2 below.

(2) The application for assistance is remanded to the Office of Worker Advocacy for issuance of a more detailed determination concerning whether any of the mining and milling sites identified in the application meet the definition of a DOE facility.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: November 19, 2002

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

November 15, 2002
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: October 18, 2002

Case No.: TIA-0009

XXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for assistance in filing for state workers' compensation benefits for her late husband, XXXXXXXXXX (the worker). The Office of Worker Advocacy determined that the applicant is not eligible for the assistance program. The applicant appeals that determination. As explained below, we have concluded that the appeal should be granted and the application for assistance remanded to the Office of Worker Advocacy for further consideration.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. Part A of the Act provides federal monetary and medical benefits to certain workers having radiation-induced cancers, beryllium illness, or silicosis. Part D of the Act provides a DOE program to assist DOE contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. This case concerns Part D of the Act.

The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852).

The Office of Worker Advocacy determined that the applicant's late husband was not a DOE contractor employee. *See* September 10, 2002 Letter from the Office of Worker Advocacy to the applicant. Accordingly, the Office of Worker Advocacy

determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits.

In her appeal, the applicant states that her late husband was a DOE contractor employee. She argues that her husband worked at the DOE's Kansas City, Missouri plant.

II. Analysis

Part D of the Act, which establishes the program at issue here, covers "Department of Energy contractor employees." 42 U.S.C. § 7385o(b). In order to be a "Department of Energy contractor employee," a contractor employee must have worked at a "Department of Energy facility." 42 U.S.C. § 7384l(11); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). Pursuant to an Executive Order, DOE has published a list of DOE facilities. 66 Fed. Reg. 31218 (June 11, 2001) (current list of facilities). That list also includes facilities that fall within the Act's definition of "beryllium vendors" and "atomic weapons employers," whose employees are covered by Part A of the Act.

In her application, the applicant stated that her husband worked for Bendix and Allied Signal at 95th and Troost, Kansas City, Missouri. In her appeal, the applicant indicates that her husband also worked for Honeywell at that location.

A worker who was employed by Bendix, Allied Signal, and Honeywell at 95th & Troost, Kansas City, Missouri, is a DOE contractor employee. The DOE's Kansas City plant is located at 95th & Troost, and the three firms mentioned are the successive managing contractors of the facility. The DOE's published list of DOE facilities includes the DOE's Kansas City plant. 66 Fed. Reg. 31221.

The Office of Worker Advocacy determination indicates that it viewed the applicant's description of her husband's employment as not falling within the definition of a DOE contractor employee. As indicated above, we believe that determination was in error and, therefore, we are remanding the appeal to the Office of Worker Advocacy for further processing.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0009 be, and hereby is, granted as set forth in Paragraph (2) below.

(2) The application for assistance is remanded to the Office of Worker Advocacy for further processing.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: November 15, 2002

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

January 7, 2003

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: October 22, 2002

Case No.: TIA-0010

XXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The DOE Office of Worker Advocacy determined that the applicant was not a DOE contractor employee and, therefore, that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, we have concluded that the DOE Office of Worker Advocacy determination is correct.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. Parts A and D of the Act provide benefits to certain workers.

Part A of the Act provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 7384l(1).

Part D of the Act provides for a DOE program to assist "Department of Energy contractor employee[s]" in filing for state workers' compensation benefits for illnesses caused by exposure to toxic

substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Pursuant to an Executive Order, the DOE has published a list of facilities covered by the Act and has designated next to each facility whether it falls within the Act's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 67 Fed. Reg. 79,068 (December 27, 2002) (current list of facilities). 2/ The DOE's published list also refers to the DOE Office of Worker Advocacy web site for additional information about the facilities. 67 Fed. Reg. 79,069 (citing www.eh.doe.gov/advocacy).

This case concerns Part D of the Act, the portion of the Act that provides for DOE assistance to DOE contractor employees in filing for state workers' compensation benefits. Part D establishes a DOE process through which independent physician panels consider whether employee illnesses were caused by exposure to toxic substances at DOE facilities. If a physician panel issues a determination favorable to the employee, the DOE assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52,841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). As stated above, the DOE Office of Worker Advocacy is responsible for this program.

In his application for DOE assistance in filing for state workers' compensation benefits, the applicant stated that he was an employee of the Bethlehem Steel plant in Lackawanna, New York, from approximately 1951 to 1956. The DOE Office of Worker Advocacy determined that the applicant was employed by an atomic weapons employer, not a DOE contractor. *See* September 9, 2002 Letter from DOE

1/ *See* www.eh.doe.gov/advocacy.

2/ *See* Executive Order No. 13,179 (December 7, 2000). The DOE first published a list in January 2001, 66 Fed. Reg. 4003 (January 17, 2002), and a revised list in June 2001.

Office of Worker Advocacy to the applicant. Accordingly, the DOE Office of Worker Advocacy determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits. In his appeal, the applicant contests that determination.

II. Analysis

A. Worker Programs

As an initial matter, we emphasize that an application for DOE assistance in filing for state workers' compensation benefits is separate from an application for such benefits. A DOE decision that an applicant is not eligible for DOE assistance does not affect (i) an applicant's right to file for state workers' compensation benefits without DOE assistance or (ii) whether the applicant is eligible for state workers' compensation benefits under applicable state law.

Similarly, we emphasize that an application for DOE assistance in filing for state workers' compensation benefits is separate from any claims made under other statutory provisions. Thus, a DOE decision concerning DOE assistance in filing for state workers' compensation benefits does not affect any claims made under other statutory provisions.

We now turn to whether the applicant in this case is eligible for DOE assistance in filing for state workers' compensation benefits.

B. Whether the Applicant is Eligible for DOE Assistance in Filing for State Workers' Compensation Benefits

In order to be eligible for DOE assistance in filing for state workers' compensation benefits, the applicant must have been a "Department of Energy contractor employee." 42 U.S.C. § 7385o(b). In order to be a "Department of Energy contractor employee," a contractor employee must have worked at a "Department of Energy facility." 42 U.S.C. § 7384l(11); 67 Fed. Reg. 52,854 (to be codified at 10 C.F.R. § 852.2). Under the Act and the implementing regulations, a DOE facility is a facility (i) where DOE conducted operations and (ii) where DOE had a proprietary interest or contracted with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services. *Id.* § 7385o(l)(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2) (emphasis added).

The applicant is not a DOE contractor employee because he did not work at a DOE facility. The DOE's published list of facilities designates the Bethlehem Steel plant as "AWE," the code for "atomic weapons employer facility." 67 Fed. Reg. 79,072. The DOE Office of Worker Advocacy web site describes the Bethlehem Steel plant as an "atomic weapons employer facility" during the period 1949 to 1952. The web site states that in 1949 the plant developed rolling mill pass schedules to be used in the planned uranium milling operation at DOE's Fernald facility. The site also states that the Bethlehem Steel plant performed uranium rolling experiments to help design the Fernald rolling mill. 3/ This description indicates that DOE did not conduct operations at the facility, did not have a proprietary interest in the facility, and did not have a management, environmental remediation, construction, or maintenance contract with the firm. Accordingly, the Bethlehem Steel plant does not fall within the definition of a DOE facility, 42 U.S.C. § 7385o(1)(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2) (emphasis added). Finally, we have no reason to question the accuracy of the web site description of the facility.

As the foregoing indicates, the applicant was not a DOE contractor employee and, therefore, is not eligible for DOE assistance in filing for state workers' compensation benefits. Again, we emphasize that this determination does not affect whether the applicant is eligible for (i) state workers' compensation benefits or (ii) federal monetary and medical benefits available under other statutory provisions.

3/ The Fernald rolling mill began operations in 1952. The DOE's web site contains a report describing DOE facility operations, including Fernald. *See* http://www.eh.doe.gov/legacy/reports/reports.html.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0010 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: January 7, 2003

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February 12, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: October 29, 2002

Case No.: TIA-0012

XXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits on behalf of XXXXXXXXXX, his late brother (the worker). The DOE Office of Worker Advocacy determined that the worker was not a DOE contractor employee and, therefore, that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, we have concluded that the DOE Office of Worker Advocacy determination is correct.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. Parts A and D of the Act provide benefits to certain workers.

Part A of the Act provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 7384l(1).

Part D of the Act provides for a DOE program to assist "Department of Energy contractor employee[s]" in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C.

§ 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Pursuant to an Executive Order, the DOE has published a list of facilities covered by the Act and has designated next to each facility whether it falls within the Act's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 67 Fed. Reg. 79,068 (December 27, 2002) (current list of facilities). 2/ The DOE's published list also refers to the DOE Office of Worker Advocacy web site for additional information about the facilities. 67 Fed. Reg. 79,069 (citing www.eh.doe.gov/advocacy).

This case concerns Part D of the Act, the portion of the Act that provides for DOE assistance to DOE contractor employees in filing for state workers' compensation benefits. Part D establishes a DOE process through which independent physician panels consider whether employee illnesses were caused by exposure to toxic substances at DOE facilities. If a physician panel issues a determination favorable to the employee, the DOE assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52,841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). As stated above, the DOE Office of Worker Advocacy is responsible for this program.

The application for DOE assistance in filing for state workers' compensation benefits states that the worker was employed at the Vitro Manufacturing plant in Canonsburg, Pennsylvania, from

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1/ *See* www.eh.doe.gov/advocacy.

2/ *See* Executive Order No. 13,179 (December 7, 2000). The DOE first published a list in January 2001, 66 Fed. Reg. 4003 (January 17, 2001), and a revised list in June 2001, 66 Fed. Reg. 31218 (June 11, 2001).

approximately 1942 to 1945. The DOE Office of Worker Advocacy determined that the worker was employed by an atomic weapons employer, not a DOE contractor. *See* September 10, 2002 Letter from DOE Office of Worker Advocacy. Accordingly, the DOE Office of Worker Advocacy determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits. In his appeal, the applicant contests that determination.

II. Analysis

A. Worker Programs

As an initial matter, we emphasize that an application for DOE assistance in filing for state workers' compensation benefits is separate from an application for such benefits. A DOE decision that an applicant is not eligible for DOE assistance does not affect (i) an applicant's right to file for state workers' compensation benefits without DOE assistance or (ii) whether the applicant is eligible for state workers' compensation benefits under applicable state law.

Similarly, we emphasize that an application for DOE assistance in filing for state workers' compensation benefits is separate from any claims made under other statutory provisions. Thus, a DOE decision concerning DOE assistance in filing for state workers' compensation benefits does not affect any claims made under other statutory provisions.

We now turn to whether the applicant in this case is eligible for DOE assistance in filing for state workers' compensation benefits.

B. Whether the Applicant is Eligible for DOE Assistance in Filing for State Workers' Compensation Benefits

In order to be eligible for DOE assistance in filing for state workers' compensation benefits, the worker must be a "Department of Energy contractor employee." 42 U.S.C. § 7385o(b). The term "Department of Energy contractor employee" is defined in relevant part as:

> An individual who is or was employed at a Department of Energy facility by -

> (i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or
>
> (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

42 U.S.C. § 7384l(11)(B); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). A "Department of Energy facility" is defined in relevant part as:

> [A]ny building, structure, or premise, including the grounds upon which such building, structure, or premise is located -
>
> (A) in which operations are, or have been, conducted by, or on behalf of, the Department of Energy ... and
>
> (B) with regard to which the Department of Energy has or had -
>
> (i) a proprietary interest; or
>
> (ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction or maintenance services.

42 U.S.C. § 7384l(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2).

During the period of the worker's employment, 1942 to 1945, the Vitro Manufacturing plant was not a DOE facility. For the period 1942 to 1957, the DOE's published list of facilities designates Vitro Manufacturing as "AWE" and "BE," the codes for "atomic weapons employer facility" and "beryllium vendor." 67 Fed. Reg. 79,073. The DOE Office of Worker Advocacy web site

describes the Vitro Manufacturing plant as a private uranium milling facility during that period. 3/ The web site states that the site is one of 24 former uranium mill sites designated for DOE remediation under the Uranium Mill Tailings Radiation Control Act (UMTRCA), *see* 42 U.S.C. 7901 *et seq.* The foregoing description is consistent with a description provided by the DOE Office of Environmental Management. 4/ Thus, during the period 1942 to 1957, the DOE did not conduct operations at the facility, did not have a proprietary interest in the facility, and did not have a management, environmental remediation, construction, or maintenance contract with the firm. Accordingly, for that period, the Vitro Manufacturing plant does not fall within the definition of a DOE facility, 42 U.S.C. § 7385o(1)(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2) (emphasis added). 5/

As the foregoing indicates, the worker was not a DOE contractor employee and, therefore, the applicant is not eligible for DOE assistance in filing for state workers' compensation benefits. Again, we emphasize that this determination does not affect whether the applicant is eligible for (i) state workers' compensation benefits or (ii) any other available form of relief.

3/ *See* www.eh.doe.gov (Facility Info/Searchable List of Covered Facilities).

4/ *See* www.em.doe.gov (Featured Items/Considered Sites Database).

5/ Although the DOE's published list of facilities correctly describes the Vitro Manufacturing plant for the period 1942 to 1957, the list does not address the site's status as a DOE facility during DOE environmental remediation activities pursuant to UMTRCA. Accordingly, we believe that, although not relevant to the instant case, the description of the site should be augmented.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0012 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: February 12, 2003

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

January 16, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: November 19, 2002

Case No.: TIA-0013

XXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The DOE Office of Worker Advocacy determined that the applicant had not provided reasonable evidence that his hearing loss was caused by exposure to a toxic substance and, therefore, that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, we have concluded that the DOE Office of Worker Advocacy determination is correct.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. Parts A and D of the Act provide benefits to certain workers.

Part A of the Act provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 7384l(1).

Part D of the Act provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by "exposure to a toxic substance" at a DOE facility. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information

concerning the program. 1/ The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52,841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852).

Pursuant to an Executive Order, the DOE has published a list of facilities covered by the Act and has designated next to each facility whether it falls within the Act's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 67 Fed. Reg. 79,068 (December 27, 2002) (current list of facilities). 2/ The DOE's published list also refers to the DOE Office of Worker Advocacy web site for additional information about the facilities. 67 Fed. Reg. 79,069 (citing www.eh.doe.gov/advocacy).

This case concerns Part D of the Act, the portion of the Act that provides for DOE assistance to DOE contractor employees in filing for state workers' compensation benefits. Part D establishes a DOE process through which independent physician panels consider whether employee illnesses were caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o(d)(3). If a physician panel issues a determination favorable to the employee, the DOE assists the applicant in filing for state workers' compensation benefits. 42 U.S.C. § 7385o(e)(3)(A). In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3)(B) & (C). As stated above, the Physician Panel Rule implements the Part D assistance program, and the DOE Office of Worker Advocacy is responsible for this program.

In his application for DOE assistance in filing for state workers' compensation benefits, the applicant stated that he was an employee of Rust Engineering Construction from 1982 to 1988 and worked as a painter at various sites at DOE's Oak Ridge, Tennessee facility. The applicant claimed hearing loss caused by exposure to toxic substances at those sites.

1/ *See* www.eh.doe.gov/advocacy.

2/ *See* Executive Order No. 13,179 (December 7, 2000). The DOE first published a list in January 2001, 66 Fed. Reg. 4003 (January 17, 2002), and a revised list in June 2001, 66 Fed. Reg. 31218 (June 11, 2001).

In support of his claim, the applicant submitted a medical report prepared by a physician and dated October 22, 2001. The report discussed the results of an August 2001 medical examination, and the report states that the examination was conducted in order to determine whether the applicant had any health effects from his work at the DOE's Oak Ridge facilities.

The report discussed the results of a hearing test. The report stated:

> Your hearing test showed a hearing loss. The pattern of hearing loss is not what we usually see from noise exposure. We recommend you see a hearing specialist for further testing. If you would like us to suggest a hearing specialist, please call our Nurse Coordinator ....

October 22, 2001 physician report at 2. Attached to the report was an "Audiometric Record," reporting the results of the hearing test. In addition to reporting the audiometric results, the report stated that the applicant had cerum plugs (earwax) in both ears, and that the applicant had played drums within 14 hours of the test.

In its September 19, 2002 determination, the DOE Office of Worker Advocacy found that the applicant was not eligible for physician panel review. The determination stated that hearing loss is not commonly associated with exposure to a toxic substance. The determination stated that if the applicant had additional information to support his claim that his hearing loss was caused by exposure to a toxic substance, he should submit that information to the DOE.

In response to the September 19, 2002 determination, the applicant filed the instant appeal. After reviewing the appeal and underlying documents, we wrote to the applicant to ask if he had any other evaluations of his hearing loss. The applicant replied that he had not, stating that the DOE had not sent him to a hearing specialist.

II. Analysis

A. Worker Programs

As an initial matter, we emphasize that an application for DOE assistance in filing for state workers' compensation benefits is separate from an application for such benefits. A DOE decision that an applicant is not eligible for DOE assistance does not affect (i) an applicant's right to file for state workers' compensation benefits without DOE assistance or (ii) whether the applicant is eligible for state workers' compensation benefits under applicable state law.

Similarly, we emphasize that an application for DOE assistance in filing for state workers' compensation benefits is separate from any claims made under other statutory provisions. Thus, a DOE decision concerning DOE assistance in filing for state workers' compensation benefits does not affect any claims made under other statutory provisions.

We now turn to whether the applicant in this case is eligible for DOE assistance in filing for state workers' compensation benefits, specifically whether the applicant is eligible for physician panel review.

B. Whether the Applicant is Eligible for Physician Panel Review

As an initial matter, we note that workers with hearing loss caused by noise exposure are not eligible for the DOE assistance program. The Act established the DOE assistance program for illnesses resulting from "exposure to a toxic substance" at a DOE facility. 42 U.S.C. § 7385o(d)(3). The Physician Panel Rule defines a "toxic substance" as "any material that has the potential to cause illness or death because of its radioactive, chemical, or biological nature." 67 Fed. Reg. 2854 (to be codified at 10 C.F.R. § 852.2). The preamble to the rule specifically rejected a proposal that noise be included in the definition of a toxic substance:

> One commenter suggested that noise should be included as a toxic substance. DOE understands that noise can cause harm to workers in certain situations. However, the dictionary defines "toxic" as "of, relating to, or caused by poison or toxin." DOE does not believe that noise operates to poison people because it does not injure by chemical action. Hence, it does not fit comfortably within the ordinary

> meaning of "toxic substance." Neither the text of Part D nor its legislative history suggests otherwise.

67 Fed. Reg. 52843. Accordingly, the Act's requirement that the illness be caused by exposure to a "toxic substance" excludes hearing loss caused by noise exposure.

As the foregoing indicates, if the applicant's hearing loss was caused by noise exposure, the applicant is not eligible for the DOE assistance program. We now turn to whether the applicant has submitted "reasonable evidence" that his hearing loss may be related to exposure to a toxic substance at DOE's Oak Ridge facilities.

The Act requires that, in order to eligible for physician panel review, the applicant must provide "reasonable evidence" that the illness "may have been related" to exposure to a toxic substance at a DOE facility. 42 U.S.C. § 7385o(b)(2)(B) & (d)(3). In implementing the requirement of "reasonable evidence," the Physician Panel Rule requires that the applicant submit the following:

> The name and address of any licensed physician who is the source of a diagnosis based upon documented medical information that the employee has or had an illness and that the illness may have resulted from exposure to a toxic substance while employed at a DOE facility and, to the extent practicable, a copy of the diagnosis and a summary of the information upon which the diagnosis is based.

67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.4(a)(2)).
The applicant has not submitted "reasonable evidence" or any logical argument that his hearing loss, diagnosed in 2001, may have been related to exposure to a toxic substance during his employment at DOE's Oak Ridge facilities in the 1980's. The applicant attempts to rely on the October 22, 2001 physician's report, but the report merely states that "[t]he pattern of hearing loss is not what we usually see from noise exposure." Thus, the report does not provide a basis to believe that the applicant's hearing loss may have been related to exposure to a toxic substance. Given the report's failure to identify exposure to a toxic substance as a possible cause of the applicant's hearing loss, the DOE's Worker Advocacy Office correctly concluded that the applicant failed to present sufficient evidence to submit his case to a physician panel.

The applicant has suggested that, if the October 22, 2001 physician's report is insufficient, DOE is required to provide him with an examination by a hearing specialist. Our review indicates that neither the Act nor the implementing rule requires the DOE to provide such an examination. *See also* 67 Fed. Reg. 52844.

As the foregoing indicates, we have determined that the applicant is not eligible for assistance in filing for state workers' compensation benefits. Again, we emphasize that this determination does not affect whether the applicant is eligible for (i) state workers' compensation benefits or (ii) federal monetary and medical benefits available under other statutory provisions.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0013 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: January 16, 2003

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

December 23, 2002
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: November 1, 2002

Case No.: TIA-0014

XXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The DOE Office of Worker Advocacy determined that the applicant was not a DOE contractor employee and, therefore, not eligible for the assistance program. The applicant appeals that determination. As explained below, the applicant's stated employer was a DOE contractor and, therefore, we are remanding the application to the DOE Office of Worker Advocacy for further consideration.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. Parts A and D of the Act provide benefits to certain workers.

Part A of the Act provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 7384l(1).

Part D of the Act provides for a DOE program to assist "Department of Energy contractor employee[s]" in filing for state workers' compensation benefits for illnesses caused by exposure to toxic

substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Pursuant to an Executive Order, the DOE has published a list of facilities covered by the Act and has designated next to each facility whether it falls within the Act's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 66 Fed. Reg. 31,218 (June 11, 2001) (current list of facilities). 2/ The DOE's published list also refers to the DOE Office of Worker Advocacy web site for additional information about the facilities. 66 Fed. Reg. 31,219 (citing www.eh.doe.gov/advocacy).

This case concerns Part D of the Act, the portion of the Act that provides for DOE assistance to DOE contractor employees in filing for state workers' compensation benefits. Part D establishes a DOE process through which independent physician panels consider whether employee illnesses were caused by exposure to toxic substances at DOE facilities. If a physician panel issues a determination favorable to the employee, the DOE assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). As stated above, the DOE Office of Worker Advocacy is responsible for this program.

In his application for DOE assistance in filing for state workers' compensation benefits, the applicant stated that he worked at the Huntington Pilot Plant in Huntington, West Virginia, from 1953 to 1987. The DOE Office of Worker Advocacy determined that the applicant was employed by an atomic weapons employer, not a DOE contractor. *See* September 10, 2002 Letter from DOE Office of Worker Advocacy to the applicant. Accordingly, the DOE Office of Worker Advocacy determined

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1/ *See* www.eh.doe.gov/advocacy.

2/ *See* Executive Order No. 13,179 (December 7, 2000). The DOE first published a list in January 2001, 66 Fed. Reg. 4003 (January 17, 2002), and a revised list in June 2001.

that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits. In his appeal, the applicant contests that determination.

II. Analysis

The issue on appeal is whether the Huntington Pilot Plant was a DOE facility. As explained below, it is undisputed on appeal that the Huntington Pilot Plant was a DOE facility.

In response to the appeal, we reviewed the DOE's published list of facilities, as well as the DOE Office of Worker Advocacy web site facility descriptions. The DOE's published list of facilities designates the Huntington Pilot Plant as "AWE" and "DOE," the codes for "atomic weapons employer facility" and "DOE facility." 66 Fed. Reg. 31,222. In contrast, the DOE Office of Worker Advocacy web site describes the plant exclusively as a DOE facility. 3/

We contacted the DOE Office of Worker Advocacy concerning the differing descriptions of the Huntington Pilot Plant. The Office advised us that the web site description is accurate. The Office further advised us that an upcoming revision to the published of facilities would delete the "AWE" reference for the Huntington facility.

As the foregoing indicates, the DOE Office of Worker Advocacy views the Huntington Pilot Plant as a DOE facility. Because the applicant has stated that he worked at the facility, we are remanding the application for further consideration.

3/ *See* **www.eh.doe.gov/advocacy.**

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0014 be, and hereby is, granted as set forth in Paragraph 2 below.

(2) The application is remanded to the DOE Office of Worker Advocacy for further processing.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: December 23, 2002

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

December 23, 2002
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: November 4, 2002

Case No.: TIA-0015

XXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits on behalf of her late husband, XXXXXXXXXX (the worker). The DOE Office of Worker Advocacy determined that the worker was not a DOE contractor employee and, therefore, not eligible for the assistance program. The applicant appeals that determination. As explained below, the worker's stated employer was a DOE contractor and, therefore, we are remanding the application to the DOE Office of Worker Advocacy for further consideration.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. Parts A and D of the Act provide benefits to certain workers.

Part A of the Act provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 7384l(1).

Part D of the Act provides for a DOE program to assist "Department of Energy contractor employee[s]" in filing for state workers' compensation benefits for illnesses caused by exposure to toxic

substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Pursuant to an Executive Order, the DOE has published a list of facilities covered by the Act and has designated next to each facility whether it falls within the Act's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 66 Fed. Reg. 31,218 (June 11, 2001) (current list of facilities). 2/ The DOE's published list also refers to the DOE Office of Worker Advocacy web site for additional information about the facilities. 66 Fed. Reg. 31,219 (citing www.eh.doe.gov/advocacy).

This case concerns Part D of the Act, the portion of the Act that provides for DOE assistance to DOE contractor employees in filing for state workers' compensation benefits. Part D establishes a DOE process through which independent physician panels consider whether employee illnesses were caused by exposure to toxic substances at DOE facilities. If a physician panel issues a determination favorable to the employee, the DOE assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). As stated above, the DOE Office of Worker Advocacy is responsible for this program.

In her application for DOE assistance in filing for state workers' compensation benefits, the applicant stated that the worker was employed at the Huntington Pilot Plant in Huntington, West Virginia, from around 1952 to 1964. The DOE Office of Worker Advocacy determined that the worker was employed by an atomic weapons employer, not a DOE contractor. *See* September 10, 2002 Letter from DOE Office of Worker Advocacy to the applicant. Accordingly, the DOE Office of

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1/ *See* www.eh.doe.gov/advocacy.

2/ *See* Executive Order No. 13,179 (December 7, 2000). The DOE first published a list in January 2001, 66 Fed. Reg. 4003 (January 17, 2002), and a revised list in June 2001.

Worker Advocacy determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits. In her appeal, the applicant contests that determination.

II. Analysis

The issue on appeal is whether the Huntington Pilot Plant was a DOE facility. As explained below, it is undisputed on appeal that the Huntington Pilot Plant was a DOE facility.

In response to the appeal, we reviewed the DOE's published list of facilities, as well as the DOE Office of Worker Advocacy web site facility descriptions. The DOE's published list of facilities designates the Huntington Pilot Plant as "AWE" and "DOE," the codes for "atomic weapons employer facility" and "DOE facility." 66 Fed. Reg. 31,222. In contrast, the DOE Office of Worker Advocacy web site describes the plant exclusively as a DOE facility. 3/

We contacted the DOE Office of Worker Advocacy concerning the differing descriptions of the Huntington Pilot Plant. The Office advised us that the web site description is accurate. The Office further advised us that an upcoming revision to the published of facilities would delete the "AWE" reference for the Huntington facility.

As the foregoing indicates, the DOE Office of Worker Advocacy views the Huntington Pilot Plant as a DOE facility. Because the applicant has stated that the worker was employed at the facility, we are remanding the application for further consideration.

3/ ***See*** **www.eh.doe.gov/advocacy.**

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0015 be, and hereby is, granted as set forth in Paragraph 2 below.

(2) The application is remanded to the DOE Office of Worker Advocacy for further processing.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: December 23, 2002

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

February 10, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: December 20, 2002

Case No.: TIA-0016

XXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits on behalf of XXXXXXXXXX, her late father (the worker). The DOE Office of Worker Advocacy determined that the worker was not a DOE contractor employee and, therefore, that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, we have concluded that the DOE Office of Worker Advocacy determination is correct.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. Parts A and D of the Act provide benefits to certain workers.

Part A of the Act provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 7384l(1).

Part D of the Act provides for a DOE program to assist "Department of Energy contractor employee[s]" in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C.

§ 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Pursuant to an Executive Order, the DOE has published a list of facilities covered by the Act and has designated next to each facility whether it falls within the Act's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 67 Fed. Reg. 79,068 (December 27, 2002) (current list of facilities). 2/ The DOE's published list also refers to the DOE Office of Worker Advocacy web site for additional information about the facilities. 67 Fed. Reg. 79,069 (citing www.eh.doe.gov/advocacy).

This case concerns Part D of the Act, the portion of the Act that provides for DOE assistance to DOE contractor employees in filing for state workers' compensation benefits. Part D establishes a DOE process through which independent physician panels consider whether employee illnesses were caused by exposure to toxic substances at DOE facilities. If a physician panel issues a determination favorable to the employee, the DOE assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52,841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). As stated above, the DOE Office of Worker Advocacy is responsible for this program.

The application for DOE assistance in filing for state workers' compensation benefits states that the worker was employed at the Armco Steel plant in Baltimore, Maryland. The DOE Office of

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1/ *See* www.eh.doe.gov/advocacy.

2/ *See* Executive Order No. 13,179 (December 7, 2000). The DOE first published a list in January 2001, 66 Fed. Reg. 4003 (January 17, 2001), and a revised list in June 2001, 66 Fed. Reg. 31218 (June 11, 2001).

Worker Advocacy determined that the worker was employed by an atomic weapons employer, not a DOE contractor. *See* September 10, 2002 Letter from DOE Office of Worker Advocacy. Accordingly, the DOE Office of Worker Advocacy determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits.

The applicant appeals from that determination. In conjunction with her appeal, the applicant enclosed newspaper articles stating that Armco Steel sold rolled steel to the federal government for the nation's weapons program.

II. Analysis

A. Worker Programs

As an initial matter, we emphasize that an application for DOE assistance in filing for state workers' compensation benefits is separate from an application for such benefits. A DOE decision that an applicant is not eligible for DOE assistance does not affect (i) an applicant's right to file for state workers' compensation benefits without DOE assistance or (ii) whether the applicant is eligible for state workers' compensation benefits under applicable state law.

Similarly, we emphasize that an application for DOE assistance in filing for state workers' compensation benefits is separate from any claims made under other statutory provisions. Thus, a DOE decision concerning DOE assistance in filing for state workers' compensation benefits does not affect any claims made under other statutory provisions.

We now turn to whether the applicant in this case is eligible for DOE assistance in filing for state workers' compensation benefits.

B. Whether the Applicant is Eligible for DOE Assistance in Filing for State Workers' Compensation Benefits

In order to be eligible for DOE assistance in filing for state workers' compensation benefits, the applicant must be applying on behalf of a worker who was a "Department of Energy contractor

employee." 42 U.S.C. § 7385o(b). In order to be a "Department of Energy contractor employee," a contractor employee must have worked at a "Department of Energy facility." 42 U.S.C. § 7384l(11); 67 Fed. Reg. 52,854 (to be codified at 10 C.F.R. § 852.2). Under the Act and the implementing regulations, a DOE facility is a facility (i) where DOE conducted operations and (ii) where DOE had a proprietary interest or contracted with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services. *Id.* § 7385o(l)(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2) (emphasis added).

The DOE's published list of facilities designates the Armco Steel plant as "AWE," the code for an "atomic weapons employer" facility. 67 Fed. Reg. 79,071. The DOE Office of Worker Advocacy web site indicates that Armco Steel performed a one-time, test rolling of uranium billets for the Atomic Energy Commission in 1948. This description is consistent with the evaluation of the plant by the DOE's Office of Environmental Management, 3/ and we have no reason to believe that it is inaccurate.

The worker in this case was not a DOE contractor employee because he did not work at a DOE facility. The foregoing description indicates that DOE did not conduct operations at the facility, did not have a proprietary interest in the facility, and did not have a management, environmental remediation, construction, or maintenance contract with the firm. The newspaper articles referring to the firm's sale of stainless steel to the government do not change that result. Accordingly, the Armco Steel plant does not fall within the definition of a DOE facility, 42 U.S.C. § 7385o(l)(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2) (emphasis added).

As the foregoing indicates, the worker was not a DOE contractor employee and, therefore, the applicant is not eligible for DOE assistance in filing for state workers' compensation benefits. Again, we emphasize that this determination does not affect whether the applicant is eligible for (i) state workers'

3/ *See* www.em.doe.gov (Featured Items/Considered Sites Database).

compensation benefits or (ii) federal monetary and medical benefits available under other statutory provisions.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0016 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: February 10, 2003

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

April 2, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: January 7, 2003

Case No.: TIA-0017

XXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Worker Advocacy Office for DOE assistance in filing for state workers' compensation benefits. The DOE Worker Advocacy Office determined that the applicant was not a DOE contractor employee and, therefore, was not eligible for DOE assistance. The applicant appeals that determination. As explained below, we have concluded that the determination is correct.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act creates two programs for workers.

The Department of Labor (DOL) administers the first EEOICPA program, which provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 7384l(1). The DOL program also provides federal monetary and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, the DOE program provides for an independent physician panel assessment of whether a "Department of Energy contractor employee" has an illness related to exposure to a toxic substance at a DOE facility. 42 U.S.C. § 7385o. 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 a claim. 42 U.S.C. § 7385o(e)(3). The DOE program is limited to DOE contractor employees because DOE and DOE contractors would not be involved in state workers' compensation proceedings involving other employers.

The regulations for the DOE program are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52,841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). The DOE Worker Advocacy Office is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Pursuant to an Executive Order, the DOE has published a list of facilities covered by the DOL and DOE programs, and the DOE has designated next to each facility whether it falls within the EEOICPA's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 67 Fed. Reg. 79,068 (December 27, 2002) (current list of facilities). 2/ The DOE's published list also refers readers to the DOE Worker Advocacy Office web site for additional information about the facilities. 67 Fed. Reg. 79,069.

This case involves the DOE program, i.e., the program through which DOE contractor employees may obtain independent physician panel determinations. The applicant states that he worked for Harshaw Chemical Co. and Harshaw Filtrol Partners in Cleveland, Ohio during

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1/ *See* www.eh.doe.gov/advocacy.

2/ *See* Executive Order No. 13,179 (December 7, 2000). The DOE first published a list in January 2001, 66 Fed. Reg. 4003 (January 17, 2001), and a revised list in June 2001, 66 Fed. Reg. 31218 (June 11, 2001).

the 1970's and 1980's and was injured during that employment by exposure to toxic substances. The DOE Worker Advocacy Office determined that the applicant's employer was an "atomic weapons employer," not a DOE contractor. *See* December 6, 2002 letter from DOE Worker Advocacy Office to the applicant. Accordingly, the DOE Worker Advocacy Office determined that the applicant was not eligible for the physician panel process. In his appeal, the applicant argues that he was a DOE contractor employee.

II. Analysis

A. Worker Programs

As an initial matter, we emphasize that the DOE physician panel process is separate from state workers' compensation proceedings. A DOE decision that an applicant is not eligible for the DOE physician panel process does not affect (i) an applicant's right to file for state workers' compensation benefits or (ii) whether the applicant is eligible for those benefits under applicable state law.

Similarly, we emphasize that the DOE physician panel process is separate from any claims made under other statutory provisions. Thus, a DOE decision concerning the physician panel process does not affect any claims made under other statutory provisions, such as programs administered by DOL and DOJ.

We now turn to whether the applicant in this case is eligible for the physician panel process.

B. Whether the Applicant is Eligible for the DOE Physician Panel Process

As stated above, the Physician Panel Rule applies only to employees of DOE contractors who worked at DOE facilities. Again, the reason is that DOE and its contractors would not be parties to workers' compensation proceedings involving other employers.

When the DOE Worker Advocacy Office determined that the applicant was not a DOE contractor employee, that Office indicated that Harshaw was an "atomic weapons employer," not a DOE contractor.

This determination is consistent with the DOE's published list and description of facilities, which identifies Harshaw as an "AWE," i.e., an "atomic weapons employer," during the period 1942 to 1955, when the firm processed uranium for the government. *See* 67 Fed. Reg. 79,073; www.eh.doe.gov/advocacy (searchable database on sites).

The DOE Worker Advocacy Office determination that the Harshaw plant was not a DOE facility is correct. A DOE facility is a facility where the DOE conducted operations and either had a proprietary interest or contracted with a firm to provide management and operation, management and integration, environmental remediation services, or construction or maintenance services. 42 U.S.C. § 7384l(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). During the applicant's employment, Harshaw was a privately owned and operated chemical company. As of 2001, the site was owned by Englehard Corporation and Chevron Chemical LLC.

In his appeal, the applicant raises the issue whether the 1974 inception of the Formerly Utilized Sites Remedial Action Program (FUSRAP) resulted in DOE environmental remediation activities at the site, thereby rendering the Harshaw site a DOE facility. A report prepared by the United States Army Corps of Engineers indicates that FUSRAP environmental remediation activities have not yet begun. *See* U.S. Army Corps of Engineers, FUSRAP Preliminary Assessment, Former Harshaw Chemical, Cleveland, Ohio (April 27, 2001). The Preliminary Assessment indicates that in 1999 the DOE advised the Corps of Engineers that the Harshaw site was eligible for inclusion in the program, that in 2001 the Corps of Engineers completed its Preliminary Asssessment of the site, and that the next step is site inspection. *Id.* at 1, 7. Thus, the Preliminary Assessment indicates that although FUSRAP began in 1974, the DOE did not perform environmental remediation activities at the site.

Because DOE did not conduct environmental remediation activities at Harshaw, there are no DOE activities that would render the Harshaw plant a DOE facility. Accordingly, the applicant is not eligible for the DOE physician panel process. Again, we emphasize that this determination does not affect whether the applicant is eligible for (i) state workers' compensation benefits or (ii) federal monetary and medical benefits available under other statutory provisions.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0017 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: April 2, 2003

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

June 18, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: January 23, 2003

Case No.: TIA-0019

XXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy for DOE assistance in filing for state workers' compensation benefits. The DOE Office of Worker Advocacy determined that the applicant was not a DOE contractor employee and, therefore, was not eligible for DOE assistance. The applicant appeals that determination. As explained below, we have concluded that the determination is correct.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act creates two programs for workers.

The Department of Labor (DOL) administers the first EEOICPA program, which provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "facility owned, operated, or occupied by a beryllium vendor" (beryllium vendor facility) in the case of beryllium illness. *See* 42 U.S.C. § 7384l(1). The DOL program also provides federal monetary and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, the DOE program provides for an independent physician panel assessment of whether a DOE contractor employee has an illness related to exposure to a toxic substance at a DOE facility. 42 U.S.C. § 7385o. 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). The DOE program is limited to DOE contractor employees performing work at DOE facilities because DOE and DOE contractors would not be involved in state workers' compensation proceedings involving other employers.

The regulations for the DOE program are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52,841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information about the program. 1/

Pursuant to an Executive Order, the DOE has published a state-by-state list of facilities covered by the DOL and DOE programs. The entry for each facility contains a code designating its status under the EEOICPA: (i) atomic weapons employer facility (designated by the code "AWE"), (ii) beryllium vendor facility (designated by the code "BE"), or (iii) DOE facility (designated by the code "DOE"). 67 Fed. Reg. 79,068 (December 27, 2002) (current list of facilities). 2/ The DOE's facility list also refers readers to the DOE Office of Worker Advocacy web site for additional information about the facilities. 67 Fed. Reg. 79,069.

This case involves the DOE program, i.e., the program through which a DOE contractor employee may obtain an independent physician panel determination that the employee's illness arose out of and in the

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1/ *See* www.eh.doe.gov/advocacy.

2/ *See* Executive Order No. 13,179 (December 7, 2000). The DOE first published a list in January 2001, 66 Fed. Reg. 4003 (January 17, 2001), and a revised list in June 2001, 66 Fed. Reg. 31218 (June 11, 2001).

course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility. The applicant states that from 1969 to 1970 she was employed by a firm called Physics International, Inc., located at 2700 Merced Street, San Leandro, California. The applicant further states that in 1995, she was diagnosed with multiple myeloma, which is now in remission. She believes that her illness was caused by exposure to radiation during her employment at Physics International.

The DOE Office of Worker Advocacy determined that the applicant was not employed at a DOE facility. In support of its determination, the DOE Office of Worker Advocacy stated that none of the employment listed on the application referred to a facility on the DOE facilities list. *See* December 20, 2002 letter from DOE Office of Worker Advocacy to the applicant. Accordingly, the DOE Office of Worker Advocacy determined that the applicant was not eligible for the physician panel process.

In her appeal, the applicant questions the determination that the Physics International plant was not a DOE facility. In addition to the information provided with her appeal, she referred to other material that she provided to the DOE. We obtained this information, which consists of a September 11, 2002 letter and attachments, from the DOE Office of Worker Advocacy. Accordingly, our consideration of her appeal includes a consideration of that material.

II. Analysis

As an initial matter, we emphasize that the DOE physician panel process is separate from state workers' compensation proceedings. A DOE decision that an applicant is not eligible for the DOE physician panel process does not affect (i) an applicant's right to file for state workers' compensation benefits or (ii) whether the applicant is eligible for those benefits under applicable state law. As explained below, we have determined that the applicant in this case is not eligible for the DOE physician panel process.

The issue in this case is whether the applicant worked at a DOE facility. As the DOE Office of Worker Advocacy correctly observed, the DOE facilities list does not include the Physics International

plant. As explained below, we do not believe that the Physics International plant was a DOE facility.

The applicant states that she worked for a department in Physics International that was responsible for nuclear research and experiments, including experiments on the impact of pulsed radiation on weapons. She indicates that she worked for lab technicians and physicists who worked with a variety of agencies, including DOE's Lawrence Livermore National Laboratory. She indicates that the corporate successor of Physics International - the Pulsed Sciences Division of Titan Corporation - now performs similar work for parts of the Defense Department and two DOE's laboratories - Lawrence Livermore and Sandia National Laboratory.

The applicant's description of the Physics International plant at the time of her employment is generally supported by the web site print-outs that she submitted concerning the firm's successor. Those print-outs state that Physics International was formed in 1960 and, as the result of a series of corporate changes, is now Titan's Pulsed Sciences Division. The print-outs further state that the firm pioneered the use of pulsed power to simulate nuclear weapons effects for military and industrial applications and that Titan's customers include the Defense Threat Reduction Agency and DOE's Lawrence Livermore and Sandia laboratories. Finally, the print-outs state that the firm houses and operates computers provided by the Defense Threat Reduction Agency.

The foregoing description indicates that the Physics International plant was not a DOE facility. Under the EEOICPA and the Physician Panel Rule, a DOE facility is a facility (i) where DOE conducted operations and (ii) where DOE had a proprietary interest or contracted with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services. 42 U.S.C. § 7385o(l)(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). Assuming arguendo that conducting experiments for DOE could qualify as conducting operations on behalf of DOE, the facility does not meet the second prong of the test. DOE did not have a proprietary interest in the plant, and contracts with DOE laboratories to perform experiments are not contracts for "management and operation, management and integration, environmental remediation services, construction, or maintenance." *See* 42 U.S.C. § 7384l(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). Accordingly, the Physics International plant was not a DOE facility and its workers are not eligible for the DOE physician panel process. This makes sense

because DOE would not be involved in any state workers' compensation proceedings involving the facility and its workers.

As the foregoing indicates, the applicant was not employed at a DOE facility and, therefore, is not eligible for DOE assistance in filing for state workers' compensation benefits. Again, we emphasize that this determination does not affect whether the applicant is eligible for state workers' compensation benefits.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Appeal, Case No. TIA-0019 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: June 18, 2003

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

March 14, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: February 13, 2003

Case No.: TIA-0021

XXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for assistance in filing for state workers' compensation benefits on behalf of XXXXXXXXXX (the worker). The DOE Office of Worker Advocacy determined that the worker, a uranium miner, was not a "DOE contractor employee" and, therefore, that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, we have concluded that the determination is correct.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act creates two programs for workers.

The Department of Labor (DOL) administers the first EEOICPA program, which provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 7384l(1). The DOL program also provides federal monetary and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the

Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. 2210 note. *See* 42 U.S.C. § 7384u.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, the DOE program provides for an independent physician panel assessment of whether a "Department of Energy contractor employee" has an illness related to exposure to a toxic substance at a DOE facility. 42 U.S.C. § 7385o. In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to oppose 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 in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE program is limited to DOE contractor employees because DOE and DOE contractors would not be present as parties in state workers' compensation proceedings involving other employers.

The regulations for the DOE program are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52,841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Pursuant to an Executive Order, the DOE has published a list of facilities covered by the DOL and DOE programs, and the DOE has designated next to each facility whether it falls within the EEOICPA's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 67 Fed. Reg. 79,068 (December 27, 2002) (current list of facilities). 2/ The DOE's published list also refers readers to the DOE Office of Worker Advocacy web site for additional information about the facilities. 67 Fed. Reg. 79,069.

1/ *See* www.eh.doe.gov/advocacy.

2/ *See* Executive Order No. 13,179 (December 7, 2000). The DOE first published a list in January 2001, 66 Fed. Reg. 4003 (January 17, 2001), and a revised list in June 2001, 66 Fed. Reg. 31218 (June 11, 2001).

This case involves the DOE program, i.e., the program through which DOE contractor employees may obtain independent physician panel determinations. The application states that the worker was a uranium miner from 1958 to 1985. The application further states that the worker was employed by two companies - Phillips Petroleum Co. and Kerr-McGee.

In response to the application, the DOE Office of Worker Advocacy determined that the worker was not a DOE contractor employee. *See* December 6, 2002 letter from the Office of Worker Advocacy to the applicant. Accordingly, the DOE Office of Worker Advocacy determined that the applicant was not eligible for the physician panel process.

In her appeal, the applicant does not directly address whether the worker was a DOE contractor employee. Instead, she states that the worker contracted lung disease as the result of his work in the uranium mines and that he qualifies for RECA compensation under the amended standards.

Upon our receipt of the appeal, we wrote to the applicant, advising her that we had received the appeal. In response to her statement that she believed that the worker qualified for a RECA benefit under the amended, lower radiation exposure standards, we provided her with the toll free number at the Department of Justice for RECA claims.

II. Analysis

A. Worker Programs

As an initial matter, we emphasize that the DOE physician panel process is separate from state workers' compensation proceedings. A DOE decision that an applicant is not eligible for the DOE physician panel process does not affect (i) an applicant's right to file for state workers' compensation benefits or (ii) whether the applicant is eligible for those benefits under applicable state law.

Similarly, we emphasize that the DOE physician panel process is separate from any claims made under other statutory provisions.

Thus, a DOE decision concerning the physician panel process does not affect any claims made under other statutory provisions, such as programs administered by DOL and DOJ.

We now turn to whether the applicant in this case is eligible for the physician panel process.

B. Whether the Applicant is Eligible for the DOE Physician Panel Process

As explained above, the physician panel process is limited to "DOE contractor employees." As explained below, employees of uranium mining companies are not DOE contractor employees.

1. The Uranium Mining and Milling Industry

A 1982 DOE report describes the history of the uranium industry in the United States. *See* "Commingled Uranium-Tailings Study," DOE/DP-0011, vol. II (June 30, 1982), App. D ("History of the [Atomic Energy Commission] Domestic Uranium Concentrate Procurement Program") (hereinafter the 1982 DOE Report). The report concerns the fact that uranium mills sold uranium concentrate to both the federal government and other entities, and that the federal government was responsible for paying a share of the environmental remediation costs based on the amount of its purchases. By way of background, the report describes the development of the nation's uranium mining and milling industry.

The 1982 DOE report describes the period 1947 to 1970, when the DOE's predecessor, the Atomic Energy Commission (AEC), purchased uranium ore and concentrate from private firms. The report states that its first contract, executed in 1947, was for the purchase of uranium concentrate from Vanadium Corporation of America. The report indicates that, with the exception of a mill in Utah, the mines and mills were privately operated. 3/ In 1962, the AEC stopped purchasing uranium ore. 1982 DOE Report at D-4. Aside from the uranium procurement program, the AEC leased federal lands

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3/ The AEC purchased a Monticello, Utah mill in 1948. 1982 DOE Report at D-6.

to private firms in exchange for a royalty share of any production. In 1962, the AEC discontinued the leasing program. 1982 DOE Report at D-7.

2. Whether the Worker was a "DOE Contractor Employee"

The term "Department of Energy contractor employee" is defined in relevant part as:

> An individual who is or was employed at a Department of Energy facility by -
>
> > (i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or
> >
> > (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

42 U.S.C. § 7384l(11)(B); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). A "Department of Energy facility" is defined in relevant part as:

> [A]ny building, structure, or premise, including the grounds upon which such building, structure, or premise is located -
>
> > (A) in which operations are, or have been, conducted by, or on behalf of, the Department of Energy ... and
> >
> > (B) with regard to which the Department of Energy has or had -
> >
> > > (i) a proprietary interest; or
> > >
> > > (ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction or maintenance services.

42 U.S.C. § 7384l(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). Although the DOE's published list of DOE facilities does not include any uranium mining or milling sites, 67 Fed. Reg. 79,069-79,074, those sites would be DOE facilities if they met the statutory and regulatory definition.

The 1982 DOE Report indicates that, with the possible exception of employees at the AEC's Utah mill, uranium mine and mill workers were not "DOE contractor employees." In order to be a DOE contractor employee, the employee must work for a firm that has a contract to provide "management and operating, management and integration, environmental remediation," or other "services" at a DOE facility. Neither the AEC procurement contracts nor the AEC mine leases required the contractor to provide services. Under the AEC procurement contracts, the contractor sold product to the AEC. Under the mine leases, the contractor paid a royalty-in-kind on ore production in exchange for a leasehold interest. Since the AEC procurement contracts and the leases were not contracts for services, the firms that entered into those contracts did not have the type of contracts that would make them DOE contractors, let alone contractors performing work at a DOE facility. Accordingly, their workers, including the uranium miner in this case, do not meet the definition of a "DOE contractor employee." *See Worker Appeal*, 28 DOE ¶ _____, Case No. TIA-0007 (2003); *Worker Appeal*, 28 DOE ¶ _____, Case No. TIA-0006 (2003); *Worker Appeal*, 28 DOE ¶ 80,624, Case No. TIA-0002 (2003).

As the foregoing indicates, the worker was not a DOE contractor employee and, therefore, the applicant is not eligible for the DOE physician panel process. Again, we emphasize that this determination does not affect whether the applicant is eligible for (i) state workers' compensation benefits or (ii) federal monetary and medical benefits available under other statutory provisions.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0021 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: March 14, 2003

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

April 9, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: March 17, 2003

Case No.: TIA-0022

XXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Worker Advocacy Office for DOE assistance in filing for state workers' compensation benefits based on the employment of her late husband, XXXXXXXXXX (the worker). The DOE Worker Advocacy Office determined that the worker was not a DOE contractor employee and, therefore, that the applicant was not eligible for DOE assistance. The applicant appeals that determination. As explained below, we have concluded that the determination is correct.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act creates two programs for workers.

The Department of Labor (DOL) administers the first EEOICPA program, which provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 7384l(1). The DOL program also provides federal monetary and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, the DOE program provides for an independent physician panel assessment of whether a "Department of Energy contractor employee" has an illness related to exposure to a toxic substance at a DOE facility. 42 U.S.C. § 7385o. 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 claim. 42 U.S.C. § 7385o(e)(3). The DOE program is limited to DOE contractor employees because DOE and DOE contractors would not be involved in state workers' compensation proceedings involving other employers.

The regulations for the DOE program are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52,841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). The DOE Worker Advocacy Office is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Pursuant to an Executive Order, the DOE has published a list of facilities covered by the DOL and DOE programs, and the DOE has designated next to each facility whether it falls within the EEOICPA's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 67 Fed. Reg. 79,068 (December 27, 2002) (current list of facilities). 2/ The DOE's published list also refers readers to the DOE Worker Advocacy Office web site for additional information about the facilities. 67 Fed. Reg. 79,069.

This case involves the DOE program, i.e., the program through which DOE contractor employees may obtain independent physician panel determinations. The applicant states that the worker was employed

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1/ *See* www.eh.doe.gov/advocacy.

2/ *See* Executive Order No. 13,179 (December 7, 2000). The DOE first published a list in January 2001, 66 Fed. Reg. 4003 (January 17, 2001), and a revised list in June 2001, 66 Fed. Reg. 31218 (June 11, 2001).

by Vulcan Crucible Steel from 1939 to 1965, except for military service from 1944 and 1946. The applicant further states that the worker became ill with lung disease as a result of his employment.
The DOE Worker Advocacy Office determined that the worker was employed by an "atomic weapons employer," not a DOE contractor. *See* December 6, 2002 letter from DOE Worker Advocacy Office to the applicant. Accordingly, the DOE Worker Advocacy Office determined that the worker was not eligible for the physician panel process. In the appeal, the applicant argues that the worker was a DOE contractor employee.

II. Analysis

A. Worker Programs

As an initial matter, we emphasize that the DOE physician panel process is separate from state workers' compensation proceedings. A DOE decision that an applicant is not eligible for the DOE physician panel process does not affect (i) an applicant's right to file for state workers' compensation benefits or (ii) whether the applicant is eligible for those benefits under applicable state law.

Similarly, we emphasize that the DOE physician panel process is separate from any claims made under other statutory provisions. Thus, a DOE decision concerning the physician panel process does not affect any claims made under other statutory provisions, such as programs administered by DOL and DOJ.

We now turn to whether the applicant in this case is eligible for the physician panel process.

B. Whether the Applicant is Eligible for the DOE Physician Panel Process

As stated above, the Physician Panel Rule applies to DOE contractor employees who worked at DOE facilities. As explained below, the worker was employed at an atomic weapons employer facility.

The DOE's published facilities list, and the accompanying DOE Worker Advocacy Office description, identify the Vulcan Crucible Steel plant as an atomic weapons employer facility during the worker's employment. The DOE Worker Advocacy Office description identifies Vulcan Crucible Steel as a predecessor of Aliquippa Forge and (i) an "AWE," i.e., an "atomic weapons employer facility," from 1947 to 1950, when the firm fabricated uranium metal for the AEC and (ii) a DOE facility from 1983 to 1994. *See* 67 Fed. Reg. 79,073 (entry for Aliquippa Forge); www.eh.doe.gov/advocacy (Aliquippa Forge entry in searchable database on sites).

The foregoing description is consistent with the DOE's report on the plant under the Formerly Utilized Sites Remedial Action Program (FUSRAP). The FUSRAP report for the Vulcan Crucible Steel plant indicates that the DOE designated the site for environmental remediation in 1983, long after the end of the worker's employment. *See* www.em.doe.gov. (searchable database on sites).

We have no reason to believe that the foregoing descriptions are inaccurate, and they indicate that when the worker was employed at the Vulcan Crucible Steel plant, the plant was not a DOE facility. A DOE facility is a facility where (i) the DOE conducted operations and (ii) had a proprietary interest or contracted with a firm to provide management and operation, management and integration, environmental remediation services, or construction or maintenance services. 42 U.S.C. § 7384l(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). During the worker's employment, the Vulcan Crucible Steel plant was privately owned and operated and, therefore, was not a facility where DOE conducted operations, had a proprietary interest, or contracted for management and operation, management and integration, environmental remediation services, or construction and maintenance services.

Because the worker was not employed at a DOE facility, the applicant is not eligible for the DOE physician panel process. Again, we emphasize that our decision does not affect whether the applicant is eligible for (i) state workers' compensation benefits or (ii) federal monetary and medical benefits available under other programs, such as those that DOL and DOJ administer.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0022 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: April 9, 2003

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

May 7, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: March 28, 2003

Case No.: TIA-0024

XXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy for DOE assistance in filing for state workers' compensation benefits based on the employment of his late father, XXXXXXXXXX (the worker). The DOE Office of Worker Advocacy determined that the worker was not a DOE contractor employee and, therefore, that the applicant was not eligible for DOE assistance. The applicant appeals that determination. As explained below, we have concluded that the determination is correct.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act creates two programs for workers.

The Department of Labor (DOL) administers the first EEOICPA program, which provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "facility owned, operated, or occupied by a beryllium vendor" (beryllium vendor facility) in the case of beryllium illness. *See* 42 U.S.C. § 7384l(1). The DOL program also provides federal monetary and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice

Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, the DOE program provides for an independent physician panel assessment of whether a "Department of Energy contractor employee" has an illness related to exposure to a toxic substance at a DOE facility. 42 U.S.C. § 7385o. 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 claim. 42 U.S.C. § 7385o(e)(3). The DOE program is limited to DOE contractor employees performing work at DOE facilities because DOE and DOE contractors would not be involved in state workers' compensation proceedings involving other employers.

The regulations for the DOE program are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52,841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information about the program. 1/

Pursuant to an Executive Order, the DOE has published a state-by-state list of facilities covered by the DOL and DOE programs. The entry for each facility contains a code designating its status under the EEOICPA: (i) atomic weapons employer facility (designated by the code "AWE"), (ii) beryllium vendor facility (designated by the code "BE"), or (iii) DOE facility (designated by the code "DOE"). 67 Fed. Reg. 79,068 (December 27, 2002) (current list of facilities). 2/ The DOE's facility list also refers readers to the DOE Office of Worker Advocacy web site for additional information about the facilities. 67 Fed. Reg. 79,069.

1/ *See* www.eh.doe.gov/advocacy.

2/ *See* Executive Order No. 13,179 (December 7, 2000). The DOE first published a list in January 2001, 66 Fed. Reg. 4003 (January 17, 2001), and a revised list in June 2001, 66 Fed. Reg. 31218 (June 11, 2001).

This case involves the DOE program, i.e., the program through which DOE contractor employees may obtain independent physician panel determinations that their illness is related to their exposure to a toxic substance during their employment at a DOE facility. The applicant states that the worker was employed by Bethlehem Steel at its Lackawanna, New York plant from approximately 1939 to 1964, and that the worker became ill as a result of that employment.

The DOE Office of Worker Advocacy determined that the worker was not employed by a DOE contractor at a DOE facility. Instead, the DOE Office of Worker Advocacy indicated that the worker was employed at an atomic weapons employer facility. *See* November 14, 2002 letter from DOE Office of Worker Advocacy to the applicant. Accordingly, the DOE Office of Worker Advocacy determined that the worker was not eligible for the physician panel process. In the appeal, the applicant disagrees with that determination.

II. Analysis

A. Worker Programs

As an initial matter, we emphasize that the DOE physician panel process is separate from state workers' compensation proceedings. A DOE decision that an applicant is not eligible for the DOE physician panel process does not affect (i) an applicant's right to file for state workers' compensation benefits or (ii) whether the applicant is eligible for those benefits under applicable state law.

Similarly, we emphasize that the DOE physician panel process is separate from any claims made under other statutory provisions. Thus, a DOE decision concerning the physician panel process does not affect any claims made under other statutory provisions.

We now turn to whether the applicant in this case is eligible for the DOE physician panel process.

B. Whether the Applicant is Eligible for the DOE Physician Panel Process

As explained above, the DOE physician panel process is limited to DOE contractor employees. In order to be a DOE contractor employee, a worker must be employed by a firm that manages or provides other specified services at a DOE facility, and the worker must actually be employed at the DOE facility. As explained below, the Bethlehem Steel plant was not a DOE facility and, therefore, the worker was not a DOE contractor employee.

The DOE facility list indicates that the Bethlehem Steel plant was not a DOE facility. The DOE facility list includes the plant but identifies the plant as an "atomic weapons employer facility" (AWE) from 1949 to 1952. The DOE description states that in 1949 the plant developed rolling mill pass schedules to be used in the planned uranium milling operation at DOE's Fernald facility. The description also states that the plant performed uranium rolling experiments to help design the Fernald rolling mill. 3/ This description is consistent with the DOE's report on the plant under the Formerly Utilized Sites Remedial Action Program (FUSRAP). *See* FUSRAP Considered Sites Database Report, www.em.doe.gov (searchable database) (accessed April 7, 2003).

In a prior decision, we held that the Bethlehem Steel plant was not a DOE facility. *See Worker Appeal*, Case No. TIA-0010, 28 DOE ¶ 80,261 (2003). In that case, we noted that under the EEOICPA and the Physician Panel Rule, a DOE facility is a facility (i) where DOE conducted operations and (ii) where DOE had a proprietary interest or contracted with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services. 42 U.S.C. § 7385o(l)(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). We concluded that the DOE description of the work at the plant did not indicate that DOE conducted operations at the plant, had a proprietary interest in the plant, or had a contract with the entity to provide management and operation, management and

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3/ The Fernald rolling mill began operations in 1952. The DOE's web site contains a report describing DOE facility operations, including Fernald. *See* www.eh.doe.gov/legacy.

integration, environmental remediation services, construction or maintenance services. Accordingly, we concluded that the plant did not fall within the definition of a DOE facility. *Worker Appeal,* 28 DOE at 80,841, slip op. at 4.

In the instant appeal, the applicant states that the Bethlehem Steel plant was not an atomic weapons employer facility, because the plant "produced all kinds of steel products." As an initial matter, we note that the definition of "atomic weapons employer facility" is not limited to facilities exclusively engaged in atomic weapons work. *See* 42 U.S.C. § 7384o(5). More importantly, the issue here is whether the Bethlehem Steel plant was a DOE facility. The DOE description of the plant, the FUSRAP report, and the description provided by the applicant indicate that the plant was privately owned and operated by Bethlehem Steel and, therefore, that DOE did not conduct operations at the facility, have a proprietary interest in the facility, or contract for management and operation, management and integration, environmental remediation services, construction or maintenance services of the facility. *See* 42 U.S.C. § 7384l(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). Accordingly, the plant was not a DOE facility and its workers are not eligible for the DOE physician panel process. This makes sense because DOE would not be involved in any state workers' compensation proceedings involving the plant and its workers.

As the foregoing indicates, the worker was not employed at a DOE facility and, therefore, the applicant is not eligible for DOE assistance in filing for state workers' compensation benefits. Again, we emphasize that this determination does not affect whether the applicant is eligible for (i) state workers' compensation benefits or (ii) federal monetary and medical benefits available under other statutory provisions.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Appeal, Case No. TIA-0024 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: May 7, 2003

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

June 30, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: June 5, 2003

Case No.: TIA-0025

XXXXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, we are remanding the application to the DOE Office of Worker Advocacy for further consideration.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Part D establishes a DOE process through which independent physician panels consider whether employee illnesses were caused by exposure to toxic substances at DOE facilities. Generally, if a physician

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1/ ***See*** **www.eh.doe.gov/advocacy.**

panel issues a determination favorable to the employee, the DOE Office of Worker Advocacy accepts the determination and assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). As stated above, the DOE Office of Worker Advocacy is responsible for this program.

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office 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 Program Office. 10 C.F.R. § 852.18(a)(2).

In his application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted that he was a machinist for Rockwell International at the DOE's Rocky Flats site in Golden, Colorado. He further indicated that he has contracted numerous illnesses as a result of exposure to plutonium, uranium, other radioactive materials and beryllium. He also claimed he was involved in a workplace accident involving beryllium. He requested that the Office of Worker Advocacy refer his claim to a Physician Panel for review. The Physician Panel issued a negative determination on this claim, and the Panel's decision was adopted by the Office of Worker Advocacy. *See* April 11, 2003 Physician Panel Case Review and May 13, 2003 Letter from DOE to the applicant. Accordingly, the DOE Office of Worker Advocacy determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits. In his appeal, the applicant contests the Physician Panel's determination.

II. Analysis

A. Standard of Review for Physician Panel

A key issue on appeal is whether the Physician Panel applied the correct standard in making its determination in this case.

As stated above, Part D of the Act provides that a Physician Panel will consider whether employee illnesses were caused by exposure to toxic substances at DOE facilities. Specifically, the Act states that a "panel shall review an application . . . and determine under guidelines established by the Secretary [of Energy] whether the illness or death that is the subject of the application arose out of and in the course of employment by the Department of Energy and exposure to a toxic substance at a Department of Energy facility." 42 U.S.C. § 7385o(d)(3). The relevant regulation amplifies this standard, providing that a Physician Panel must determine "whether <u>it is at least as likely as not</u> that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in <u>aggravating, contributing to or causing</u> the illness or death of the worker at issue." 10 C.F.R. § 852.8 (emphasis added).

The Panel in the present case stated its conclusion using the following standard: "None of the exposures were considered by any of the panelists to be related in any <u>more-probable-than-not causative</u> manner to any of [the applicant's] diagnoses." (Emphasis added) The standard adopted by the DOE is more favorable to applicants than the standard applied by the Panel. As an initial matter, the DOE standard requires that the exposure be "a significant factor in aggravating, contributing to or causing the illness or death." Thus, it is not necessary that the exposure be "causative," which was the Panel's standard. The Panel could find in favor of an applicant if it believed that the exposure aggravated or contributed to an applicant's illness or death.

Secondly, the Panel's use of the "more probable than not" standard is incorrect. As the DOE has stated, it is the applicant's burden to present evidence to establish that it is "at least as likely as not" that the exposure was such a factor. This, too, is a standard more favorable to the applicant than the one applied by the Panel. See 67 Fed. Reg. 52841, 52847-48 (August 14, 2002). Accordingly, we find that this matter should be remanded to the Office of Worker Advocacy for a Physician Panel determination using the appropriate "as least as likely as not" standard, as well as an evaluation of

whether the exposures experienced by the applicant aggravated, contributed or caused his illnesses.

B. Substantive Consideration of Applicant's Condition

The applicant also states that the Panel's review of his medical condition was incomplete. For example, the applicant alleges that the Panel relied only on reported levels of radiation exposures submitted to it by the DOE contractor. The applicant contends that it is well-known that contractor records are incomplete and understated. The applicant alleges that the Panel failed to take this fact and his own experiences into consideration. The applicant gives several examples of instances in which he believes he was subject to additional radiation exposures and has provided some additional material on this point. The Panel should give specific consideration to this claim, as set out in more detail in Item 2 of the applicant's appeal.

The applicant has provided a list of the diseases or conditions that he alleges were caused by exposure to toxic substances at a DOE facility. He names seven conditions that he claims the panel did not consider. He has provided exhibits documenting those conditions. The regulations provide that the Panel's findings must include "[e]ach illness . . . that is the subject of the application." Further, the Panel's findings must state for each illness whether it arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility. 10 C.F.R. § 852.12(a),(b)(4). We find that in failing to discuss all the illnesses, the Panel did not fully satisfy this requirement. If the Panel views the omitted illnesses as not warranting full consideration, the Panel should explain the basis for that view.

The applicant also alleges that some of the Panel's conclusions were simply incorrect, and not based on available evidence. In this regard, he cites the Panel's finding that there was a "lack of credible diagnoses related medically to the exposures claims." The applicant objects to that finding, and points to a November 19, 1999 diagnosis stating that his radiation exposure to plutonium and other radionuclides "may have been absorbed up into his bone and be responsible for his overall joint and degenerative diseases." He included that diagnosis in the additional material as Attachment 9. In this regard, the Physician Panel rule provides that the Panel must provide the Program Office with any evidence contrary to its determination, and state why the panel finds this evidence not persuasive. 10 C.F.R. § 852.12(c)(1). Thus, the Panel is required

to consider and include in its findings a discussion of evidence that conflicts with its ultimate determination.

Moreover, in reaching its determination the Panel should evaluate not only the individual diseases and conditions that the applicant is suffering from, but also, if possible, whether it is as likely as not that he would have suffered from all of these conditions simultaneously in the absence of his exposure to radioactive materials or other toxic substances.

In sum, on remand, the Panel should consider the areas in which the applicant claims that the review was incomplete and in error. In performing its new review, the Panel should consider the additional information submitted by the applicant.

We have provided the Office of Worker Advocacy with a copy of the additional information provided by the applicant. This includes the applicant's Notice of Appeal, dated June 5, 2003, and the applicant's Amended Appeal, dated June 19, 2003. The Panel should give full consideration to this additional information as part of the remand we are ordering.

C. Signatures of Panel Members on the Determination Document

Section 852.12 states that the determination and findings must be signed by all panel members. The applicant claims that the Panel's determination document was signed by only one of the three members. After reviewing the complete file in this matter, we found copies of the Panel's determination showing that each of the Panel members signed identical, but separate, versions of the determination. This is reasonable, inasmuch as the Panel members apparently reached their determination not in the presence of each other, but via telephone. See 10 C.F.R. § 852.11(b). Accordingly, we see no error here.

D. Interview of Applicant

The applicant contends that he was never personally interviewed by the Panel. The regulations provide the Panel may make a determination as to whether it needs additional information that can only be provided by an applicant through an interview. 10 C.F.R. § 852.10(a). However, an applicant is not entitled to such an interview. This is clearly a matter left to the Panel's discretion. Thus, there is no error in the fact that the Panel decided not interview the applicant in this case.

The applicant also contends that the Office of Worker Advocacy's (OWA) Procedure Manual provides that the Case Manager should conduct an interview lasting one to one and one-half hours with an applicant. The applicant here states that such an interview was never conducted with him. As the OWA Procedure Manual makes clear, this interview is called for when the Case Manager concludes that an occupational history is not included in the file. OWA Procedure Manual 16(a)(1). In this case, the Case Manager apparently did not reach that conclusion. That decision was well within the Case Manager's discretion. Further, based on our own review of the file in this case, we believe that there was significant development of the applicant's occupational history, and therefore no obvious reason to conduct the in-depth interview described in the OWA Procedure Manual. Accordingly, we see no error on this point. The applicant in this case was simply not entitled to an interview.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0025 be, and hereby is, granted as set forth in Paragraph 2 below.

(2) The application is remanded to the DOE Office of Worker Advocacy for further action in accordance with the above determination.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: June 30, 2003

July 11, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: June 9, 2003

Case No.: TIA-0026

XXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, we are remanding the application to the DOE Office of Worker Advocacy for further consideration.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or 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.

The Department of Labor (DOL) administers the first program, which provides $150,000 and medical benefits to certain workers with specified illnesses. Those workers include DOE employees and DOE contractor employees who worked at DOE facilities and contracted specified cancers associated with radiation exposure. 42 U.S.C. § 7341l(9). In general, a worker in that group is eligible for an award if the worker was a "member of the Special Exposure Cohort" or if it is determined that the worker sustained the cancer in the performance of duty. *Id.* Membership in the Special Exposure Cohort includes DOE employees and DOE contractor employees who were employed on Amchitka Island, Alaska prior to 1974 and were exposed to ionizing radiation in the performance of duty related to the

Long Shot, Milrow, or Cannikin underground nuclear tests. 42 U.S.C. §7341l(14)(B). Those tests occurred in October 1965, October 1969, and November 1971, respectively. The DOL program also provides $50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, it is intended to aid qualified individuals in obtaining workers' compensation benefits under state law. The DOE program provides for an independent physician panel assessment of whether a DOE contractor employee has an illness related to exposure to a toxic substance during employment at a DOE facility. 42 U.S.C. § 7385o. 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). The DOE program is limited to DOE contractor employees because DOE and DOE contractors would not be involved in state workers' compensation proceedings involving other employers.

The DOE has issued regulations, which are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Under the EEOICPA, a physician panel reviews an application to determine whether the illness or death that is the subject of the application arose out of and in the course of the individual's employment, and exposure to a toxic substance, at a Department of Energy facility. 42 U.S.C. § 7385o(d)(3). The relevant regulation amplifies this standard, providing that a physician panel must determine "whether it is at least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker at issue." 10 C.F.R. § 852.8.

1/ *See* www.eh.doe.gov/advocacy.

The Physician Panel Rule provides for an appeal process. 10 C.F.R. § 852.18. An applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office determinations. An applicant may appeal a determination by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final determination by the Program Office not to accept a physician panel determination in favor of an applicant.

The applicant in this case worked for various DOE contractors at the DOE's Amchitka, Alaska underground nuclear test site. He filed applications with both the DOL and DOE programs, based on a diagnosis of colon cancer. The applicant received a DOL award, based on membership in the Special Exposure Cohort. The instant case concerns his application to the DOE program, the second program under the EEOICPA.

The DOE Office of Worker Advocacy referred the application to a physician panel for review, and the panel issued a negative determination. To determine the applicant's exposure, the panel relied on (i) a 1998 report prepared by Dr. Rosalie Bertell, entitled "Summary of Data on Potential Worker Exposures to Ionizing Radiation, Amchitka, Alaska", and (ii) the opinion of Jeffrey L. Kotch, a DOL health physicist, see January 25, 2002 DOL Notice of Final Decision. For reasons discussed in the determination, the panel calculated the applicant's radiation exposure based on the reported background radiation level at the site. The physician panel considered this exposure, along with the applicant's age and the applicant's heredity, and concluded that it was "unlikely that the minimal radiation exposure that he had was contributory" to the development of the colon cancer. Determination at 4.

The physician panel's determination was accepted by the DOE Office of Worker Advocacy. *See* April 11, 2003 Physician Panel Case Review and May 7, 2003 Letter from DOE to the applicant. Accordingly, the DOE Office of Worker Advocacy determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits.

In his appeal, the applicant contests the physician panel determination. The applicant contends that the physician panel determination understates his radiation exposure and fails to give consideration to evidence supporting a link between his exposure and his cancer.

In response to the appeal, we requested a copy of the applicant's file from the DOE Office of Worker Advocacy. That file includes material that the applicant submitted to the DOE, as well as documents concerning the applicant's DOL proceeding.

II. Analysis

A. The Physician Panel Determination

As an initial matter, we note that the Physician Panel performed a conscientious review of the application. The Panel's determination followed a prescribed format, included detailed calculations of the applicant's radiation exposure and risk of colon cancer, addressed the impact of the applicant's age and hereditary, and discussed information favorable to the applicant. The consideration of the application was complicated by the apparent lack of a single, clear and comprehensive statement of the applicant's periods of employment and his duties during those periods.

As explained below, despite the conscientious effort of the physician panel, the determination did not take into consideration all of the periods of claimed employment, duties, and evidence. Accordingly, we are remanding the application for further consideration. We suggest that on remand, and prior to further consideration, the applicant be asked to either (i) confirm that the information below is complete or (ii) supplement the information so that it is complete.

B. The Applicant's Level of Radiation Exposure

The applicant maintains that the physician panel determination did not consider all his periods of employment at the site nor the level of exposure associated with the type of work he performed during those periods. The appeal did not specifically identify those periods of employment, but stated that the applicant had provided them to DOE. The appeal also did not identify the nature of the applicant's duties, except to state that they included moving tailings.

1. The Applicant's Periods of Employment

The application includes a form for listing employment history. The form contains separate blocks for each employment. Each block provides for the contractor's name and address, the starting and

ending dates of the employment, and the applicant's position title and duties. The first page of the form for employment history has blocks for two employers and a second page provides blocks for additional employers.

The file contains the first page of the employment history form. On that page, the applicant listed two employers, covering the periods June 1964 to November 1964, and April 1965 to November 19, 1965. The physician panel based its determination on those two periods.

The applicant's assertions about additional periods of employment are not clear. In his appeal, the applicant states that he worked on the site before and after each of the underground tests. He does not identify those periods but states that they are reflected in his application and submissions. The application and submissions, however, sometimes have incomplete or conflicting dates and do not give a clear picture of the applicant's employment.

We do find, however, that the file supports the conclusion that the applicant had a period of employment not considered by the physician panel. That period was September 1967 to September 1968, and is documented in records from the DOL proceeding, specifically a union official affidavit.

2. The Nature of the Applicant's Employment

The applicant described his work in his employment history and an undated letter in the file (Bates No. 00040). In general, the applicant described himself as a laborer and his duties as stemming, well logging, handling mud lines, dismantling the structure over "ground zero," and unloading barges and airplanes. In his appeal, he states that since this work involved movement of the tailings, the applicant received radiation exposure above background levels.

The physician panel described the applicant's job as "heavy equipment" operator. The panel generally described the applicant's work as work that did not fit within the categories of worker exposure discussed in Dr. Bertell's report. Accordingly, the physician panel concluded that the applicant did not have radiation exposure apart from the general background radiation at the site.

We believe that the physician panel should have looked more closely at, and specifically addressed, the applicant's duties, both with respect to the report and in general. The physician panel should have considered whether the duty of unloading supplies placed him in the second category of exposures described in Dr. Bertell's report, i.e., exposures associated with the receipt, movement, and storage of radioactive materials. In addition, the physician panel should have considered whether the applicant's work involved radiation exposure, even if the particular work does not fit in the categories listed in Dr. Bertell's report. Dr. Bertell's report purports to identify the primary sources of radiation exposure and, therefore, does not rule out radiation exposure from other sources.

3. October 25, 2002 Physician Statement

The applicant contends that the physician panel did not address an October 25, 2002 physician statement by Dr. Lawrence L. Reynolds. Dr. Reynolds states that the applicant's child was born with congenital birth defects that could have been due to the applicant's radiation exposure. Although the physician panel did address other information favorable to the applicant, this evidence was in the application file and should also have been addressed. *See* 10 C.F.R. § 852.12(c)(1).

4. The January 9, 2003 Physician Statement

The applicant contends that the physician panel did not give proper consideration to a January 9, 2003 statement by Dr. John H. Ward, the physician who was responsible for the applicant's treatment following his 1997 surgery for colon cancer. In his one sentence statement, Dr. Ward opines that the applicant's radiation exposure at the test site was probably a substantial factor in causing, aggravating or accelerating the applicant's condition. Dr. Ward does not, however, provide or refer to any supporting findings or analysis for that conclusion.

The physician panel's failure to specifically refer to Dr. Ward's statement was not a deficiency. We note that since Dr. Ward provided no supporting findings or analysis, the only favorable "information" that need be addressed was Dr. Ward's conclusory statement that the applicant's illness was linked to radiation exposure. The physician panel determination clearly sets out the basis for its disagreement with such a conclusion. Accordingly, its failure to specifically refer to Dr. Ward's opinion is not a deficiency in the determination.

5. The DOL Award

The applicant also contends that the physician panel failed to give proper consideration to the DOL award. Under the DOL program, the applicant was eligible for an award because (i) he was a member of the Special Exposure Cohort, i.e., he was at Amchitka before 1974, and (ii) he developed colon cancer after the beginning of his employment there. *See* 20 C.F.R. § 30.210(a)(1). Thus, as the physician panel correctly noted, the applicant's DOL award does not represent a finding that the applicant meets the causation standard of the Physician Panel Rule. Accordingly, the physician panel did not err with respect to the significance of the DOL award.

C. Further Steps

Based on the discussion in Parts B.1, B.2, and B.3 above, we have concluded that the application should be remanded for further consideration. As discussed above, the file indicates that the following employment, duties, and evidence should be considered: (i) three periods of employment at the site - June 1964 to November 1964, April 1965 to November 19, 1965, and September 1967 to September 1968, (ii) a discussion of the nature of the applicant's work during those periods - stemming, well logging, handling mudlines, and dismantling the structure over ground zero, and (iii) the physician's statement concerning the applicant's child. In addition, prior to any further consideration, the applicant should be asked to (i) specify which duties he performed during each period and (ii) confirm that there are no other duties or employment periods.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0026 be, and hereby is, granted as set forth in Paragraph 2 below.

(2) The application is remanded to the DOE Office of Worker Advocacy for further action in accordance with the above determination.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: July 11, 2003

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October 27, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: July 15, 2003

Case No.: TIA-0027

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's late husband, William H. Kendall (the worker), was a DOE contractor employee at DOE's Amchitka, Alaska site. The OWA referred the application to an independent physician panel. The panel determined that the worker's illness was not related to his work as a DOE contractor employee, and the OWA accepted the panel's determination. The applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA), arguing that the panel's determination was erroneous. As explained below, we have concluded that the application should be remanded to OWA for additional consideration.

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.

The Department of Labor (DOL) administers the first program, which provides $150,000 and medical benefits to certain workers with specified illnesses. Those workers include DOE and DOE contractor employees who worked at DOE facilities and contracted specified cancers associated with radiation exposure. 42 U.S.C. § 7341l(9). In general, a worker in that group is eligible for an award if the

worker was a "member of the Special Exposure Cohort" or if it is determined that the worker sustained the cancer in the performance of duty. *Id.* Membership in the Special Exposure Cohort includes DOE employees and DOE contractor employees who were employed on Amchitka Island, Alaska prior to 1974 and were exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests. 42 U.S.C. §7341l(14)(B). Those tests occurred in October 1965, October 1969, and November 1971, respectively. The DOL program also provides $50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u. To implement the program, the DOL has issued regulations, 20 C.F.R. Part 30, and has a web site that provides extensive information concerning the program. 1/

The DOE administers the second program, which does not provide for monetary or medical benefits. Instead, it 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 an identified 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). 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). The DOE program is limited to DOE contractor employees because DOE and DOE contractors would not be involved in state workers' compensation proceedings involving other employers. 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 Act requires that the DOE assist DOL and DOE applicants by providing certain records in DOE's control. *See* 42 U.S.C. §§ 7384v(a), 7385o(e). That assistance includes verifying the workers' claims concerning their employment history at DOE and

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1/ *See* www.dol.gov/esa.

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

providing their exposure records. *See* 67 Fed. Reg. 52841, 52848 (2002) (preamble to the Physician Panel Rule).

The applicant in this case filed applications with both the DOL and DOE programs, stating that the worker was employed by various DOE contractors as a pipefitter at Amchitka in connection with the Long Shot and Milrow tests. One employer was the worker's incorporated business; other employers were partnerships or joint ventures with other businesses. The application attributed the worker's subsequent death from lung cancer at the age of 63 to exposure to radiation during his work at Amchitka.

The DOL processed the DOL application and approved an award in May 2002. The DOL final decision discusses the efforts to verify the worker's employment. See DOL Final Decision dated May 11, 2002.

When the DOL asked the DOE to verify the worker's employment at Amchitka, DOE advised that it did not have any record of the worker's employment. See DOE Response to Employment History for Claim Under EEOICPA (DOL Form EE-5), dated September 25, 2001. The DOL then sought alternative evidence. The DOL also contacted the DOE a second time, and the DOE reiterated that it had no information concerning the worker or his companies, stating that the worker's firm was not a prime contractor and that the DOE had limited information on subcontractors at Amchitka. See DOL Final Decision at 2. Ultimately, the DOL record included (i) an Alaskan agency's confirmation that a business license had been issued to the worker's firm, 3/ (ii) the worker's Social Security Administration itemized statement of earnings, (iii) a letter from the local plumbers and pipefitters union, confirming that the worker was a member of the union during the relevant period, 4/ (iv) a copy of an affidavit from a co-worker, attesting that the worker was employed at Amchitka, and (v) an affidavit from a union official, attesting that the co-worker was an employed at Amchitka by the worker's business from January 1966 to April 1966 and by an

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3/ Letter dated April 25, 2002 from the Alaska Department of Community and Economic Development, Division of Occupational Licensing.

4/ Letter dated December 22, 1986 from the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry Local 367 (worker was a continuous member in good standing from 1963 to 1975).

unrelated business during a later period. The DOL concluded that the worker was a DOE contractor employee at Amchitka from January 1966 to April 1966 and, therefore, was a member of the Special Exposure Cohort. That membership, together with his subsequent diagnosis of lung cancer, resulted in a DOL award to the applicant.

During its processing of the applicant's DOE application, the DOE obtained the DOL file and included the file in the material sent to the physician panel. The DOE summary of the worker's application listed the verified period of employment as January 1966 to April 1966, and the physician panel used that period for its calculation of the worker's radiation exposure.

Because the DOE did not have exposure records for the worker, the physician panel based its calculation of the worker's radiation exposure on (i) a 1998 report prepared by Dr. Rosalie Bertell, entitled "Summary of Data on Potential Worker Exposures to Ionizing Radiation, Amchitka, Alaska", and (ii) the opinion of Jeffrey L. Kotch, a DOL health physicist. The panel noted that it had no evidence that the worker had any radiation exposure above background level, but included an additional amount that the Bertell report assigned to exposure to contaminated water. *See* Panel Report at 1-2; Bertell Report at 3. Even with that additional amount, the panel concluded that the exposure would have been less than one percent above background level. The physician panel concluded that this exposure was too small to have contributed to the worker's illness.

The OWA accepted the physician panel's determination. *See* June 30, 2003 Physician Panel Case Review and May 22, 2003 Letter from the DOE to the applicant. Accordingly, the OWA determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits.

In her appeal, the applicant contends that the January 1966 to April 1966 employment period used by the physician panel represents only part of the worker's employment at Amchitka. The applicant argues that she has difficulty documenting the worker's employment because most of his co-workers have died of cancer.

II. Analysis

A. The Worker's Period of Employment at Amchitka

It is clear that the DOE attempted to verify that the employers listed in the applicant's DOE application performed work at Amchitka. The DOE made this attempt in connection with DOL's processing of the applicant's DOL application. The DOE responded that it had no employment information concerning the worker, and there is no reason to believe that the DOE's response was incorrect.

It is also clear that the DOE did not attempt to verify whether the additional employers listed on the worker's social security records performed work at Amchitka and, if so, when. The DOE did not attempt such verification in response to DOL requests: the DOL inquiries focused on the employment listed on the application. See DOL Notice of Final Decision dated May 11, 2002. The DOE did not attempt such verification when it processed the DOE application, apparently not seeing any need for verification beyond the January 1966 to April 1966 period. As explained below, the Act requires that DOE make such an attempt.

The Act requires that the DOE assist DOL and DOE applicants in obtaining information in DOE's control concerning their employment history and exposures. *See* 42 U.S.C. §§ 7384v(a), 7385o(e); 67 Fed. Reg. 52841, 52848 (2002) (preamble to the Physician Panel Rule). The extent of the worker's employment at Amchitka is critical to this application for assistance, since the length of employment affects the physician panel's assessment of the worker's exposures. Thus, if the worker was employed at Amchitka at different times by different employers, the total length of the employment should be considered by the physician panel. In this respect, the physician panel process differs from a DOL Special Exposure Cohort case, in which DOL is only seeking enough information to conclude that a worker with a covered disease belongs to the Special Exposure Cohort. *See* 20 C.F.R. § 30.210(a)(1).

Because the Act requires that the DOE attempt to verify the worker's full period of employment at Amchitka, the application should be remanded so that the DOE can attempt to verify that the additional employers were DOE contractors or subcontractors at Amchitka during their employment of the worker. The DOE may limit its review to the periods that the DOE performed work at Amchitka

for the Long Shot and Milrow tests, since the applicant is claiming employment related to those tests.

Although the Act does not require that the DOE seek information outside its control, we believe that union records might help support the application and, therefore, we suggest that the applicant contact the union. During the Long Shot and Milrow periods, the worker was a member of the union, and employed by various firms - his own company, partnerships and joint ventures, and independent firms. Although the applicant indicated in the DOL process that her attempt to obtain union review of its records was unsuccessful, it appears to us that a second attempt may be successful. The co-worker obtained an affidavit from the local union based on its dispatch records. In addition, the DOL spoke to the union concerning the worker. Although the DOL inquiry was not fruitful, it appears that the inquiry was limited to the worker's business and, therefore, did not encompass his work for other employers during the relevant periods. *See* DOL Final Decision at 2. Accordingly, we suggest that the applicant contact the union to see if its records would help identify whether the worker's employers performed work at Amchitka during the Long Shot and Milrow periods.

B. The Worker's Exposures at Amchitka

Although radiation exposure was the only exposure claimed on the application, the physician panel also should have considered asbestos exposure. The physician panel is required to review all of the records submitted to it by the program office. See 10 C.F.R. § 852.9. One of the worker's medical records mentions asbestos exposure, 5/ and asbestos exposure is associated with pipefitting and lung cancer. 6/ Given the foregoing, the physician panel should have addressed the issue of asbestos exposure. Accordingly, once the process for verifying the worker's employment is completed, the case should be sent back to the physician panel for a determination based on the verified employment and radiation and asbestos exposure.

5/ See Surgeon Operative Report, Providence Medical Center, dated October 26, 1987.

6/ *See generally* National Cancer Institute, Cancer Facts, Asbestos Exposures: Questions and Answers at http://cis.nci.nih.gov.

Finally, although the physician panel concluded that the radiation exposure was too small to have contributed to the worker's lung cancer, the physician panel went on to mention the worker's age and history of tobacco use as more probable factors. We could not find any reference in the file to a history of tobacco use. Accordingly, on remand, the physician panel should explain the source of that statement and whether it refers to smoking, as opposed to other tobacco use.

III. *Summary*

As discussed above, we have concluded that the application should be remanded for further consideration. The OWA should seek DOE verification that the worker's additional employers during the periods when DOE performed work related to the Long Shot and Milrow tests were DOE contractors or subcontractors at Amchitka during those periods. When the DOE has completed that process, a physician panel should review the application based on the worker's exposure to radiation and asbestos during the verified employment periods. Finally, the physician panel should identify the source of its statement that the worker had a history of tobacco use and whether that statement refers to smoking.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0027 be, and hereby is, granted as set forth in Paragraph (2) below.

(2) The application described in the appeal is remanded to the DOE Office of Worker Advocacy for further consideration consistent with this Decision and Order.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 27, 2003

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

November 21, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Date of Filing: **July 22, 2003**

Case No.: **TIA-0028**

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's late husband, XXXXXXXXXX (the worker), was a DOE contractor employee at a DOE facility. The OWA referred the application to an independent physician panel, which determined that the worker's illnesses were not related to his work 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).

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.

The Department of Labor (DOL) administers the first program, which provides $150,000 and medical benefits to certain workers with specified illnesses. Those workers include DOE and DOE contractor employees who worked at DOE facilities and contracted specified cancers associated with radiation exposure. 42 U.S.C. § 7341l(9). A worker is eligible for an award if the worker was a "member of the Special Exposure Cohort" or if DOL determines that the worker sustained the cancer in the performance of duty. *Id.* The DOL program also provides $50,000 and medical benefits for uranium workers who receive a benefit from a program administered by

the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u. To implement the program, the DOL has issued regulations, 20 C.F.R. Part 30, and has a web site that provides extensive information concerning the program.1/

The DOE administers the second program, which does not provide for monetary or medical benefits. Instead, it 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. § 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). 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 worker in this case filed applications with both the DOE and DOL programs. The worker died of prostate cancer during the pendency of his applications. His wife, as his survivor, became the applicant.

The DOE application claimed the following illnesses: prostate cancer, bone, and lymph node cancer, heart disease (3 heart attacks & 7 heart bypasses), major depression, sleep apnea, and hypertension. The application claimed that those illnesses were related to exposures to toxic substances at DOE.

In its determination, the physician panel considered each of the claimed illnesses. The physician panel stated that the worker had the illness, and the physician panel identified the approximate date of onset. The physician panel did not find that the illness was related to exposure to a toxic substance at DOE. Instead, the physician panel found that there was insufficient information to

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1/ *See* www.dol.gov/esa.

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

support a conclusion that exposures aggravated, contributed to, or caused the illness.

With respect to the claimed cancers, the physician panel stated that prostate cancer was the primary cancer and that the other two cancers were the result of metastatic spread. For prostate cancer, the physician panel identified "multiple risk factors" for the worker, including smoking and family history. Although the physician panel also identified exposure to cadmium or other heavy metals as a possible risk factor, the physician panel found that the medical surveillance data on the worker did not support significant cadmium or other heavy metal exposure.

The OWA accepted the physician panel's determination. *See* June 16, 2003 Physician Panel Case Review and July 9, 2003 Letter from the DOE to the applicant. Accordingly, the OWA determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits.

In her appeal, the applicant contends that the physician panel determination is wrong. The applicant states that she believes that there is a direct link between the applicant's death and exposures at a DOE facility. She states that the worker suddenly became allergic to gold jewelry and that whatever caused that allergy "may very well" have accelerated his prostate cancer.

II. Analysis

As an initial matter, we question whether the claim of a gold allergy would have affected the physician panel determination. The panel listed the risk factors for prostate cancer, and the only toxic substances on that list were "heavy metals, e.g. cadmium." The panel specifically found that the medical surveillance records for the worker indicated insufficient exposures to those substances to aggravate, contribute, or cause prostate cancer. Furthermore, the panel specifically found that the worker had multiple risk factors for prostate cancer, including smoking and family history. Thus, for the gold allergy claim to have affected the determination, the panel would have had to consider (i) the applicant's claim that the worker had a gold allergy, (ii) whether the gold allergy was attributable to heavy metal exposure, (iii) whether the gold allergy indicated a greater level of heavy metal exposure than previously considered, and (iv) whether that greater amount, in the presence of the worker's other risk factors, was a significant factor in aggravating, contributing, or causing

the worker's prostate cancer. Accordingly, the impact that a gold allergy claim would have had on the physician panel is speculative.

In any event, the applicant's claim of a gold allergy does not indicate any deficiency or error in the physician panel determination. The physician panel is required to review all of the records provided and to address certain matters in its determination. 10 C.F.R. §§ 852.9, 852.12. This the panel did. The application did not claim the existence of a gold allergy, and we could not find any reference to a gold allergy in the worker's medical records. Because the application and supporting documents did not mention the gold allergy, the panel could not have considered it, let alone had any reason to address it in its determination.

Because the applicant has not identified a deficiency or error in the physician panel determination, 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-0028 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: November 21, 2003

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October 1, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: August 8, 2003

Case No.: TIA-0029

XXXXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, we are remanding the application to the OWA for further consideration.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. Generally, if a physician panel issues a determination favorable to

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1/ *See* www.eh.doe.gov/advocacy.

the employee, the DOE Office of Worker Advocacy accepts the determination and assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). As stated above, the DOE Office of Worker Advocacy is responsible for this program.

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office 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 Program Office. 10 C.F.R. § 852.18(a)(2). *See Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In his application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted that he worked at the DOE's Hanford facility in Richland, Washington from June 1994 to October 1996. During that time, he was an asbestos abatement worker and worked as an insulator, removing asbestos from machinery and pipes at the DOE's Hanford facility. He further indicated that his X-ray findings of February 2002 revealed scarring in his lung linings, pleural thickening, and pleural plaques. A medical examination of May 7, 2002 and addendum of June 13 noted the existence of bilateral pleural plaques resulting from asbestos exposure. This diagnosis was provided by an independent physician.

The Physician Panel issued a negative determination on this claim. The Panel found as follows: "[the applicant's] conditions did not arise out of and in the course of employment by a DOE employer and exposure to a toxic material at a DOE facility." In this regard the Panel stated that the applicant had some asbestos exposures during some of his work at Hanford facilities, but that he also had asbestos exposure in other jobs prior to working at Hanford facilities. Further, the panel noted that the mean latent period

for the formation of pleural plaques, from which the applicant suffers, is over 20 years. Since the applicant began to work at Hanford in 1994, the panel found this condition most likely resulted from exposures to asbestos prior to the employment at Hanford. Moreover, the panel found that in the absence of interstitial fibrosis on chest X-rays and pulmonary function tests abnormalities, pleural plaques alone are not a disease or cause of disability. The Panel's decision was adopted by the Office of Worker Advocacy. *See* June 27, 2003 Physician Panel Report. Accordingly, the DOE Office of Worker Advocacy determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits. July 7, 2003 Letter from DOE to the applicant. In his appeal, the applicant contests the Physician Panel's determination that his lung-related conditions were not related to his work at the Hanford facility. 2/

II. Analysis

A. Standard of Review for Physician Panel

One issue on appeal is whether the Physician Panel applied the correct standard in making its determination in this case.

As noted above, the Physician Panel found that "[the applicant's] conditions did not arise out of and in the course of employment by a DOE employer and exposure to a toxic material at a DOE facility." While the "arise out of and in the course of employment" language adopted by the Panel tracks a part of the relevant regulation, it misses a key component. Section 852.8 provides that the panel's determination as to whether the illness or death "arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility" must be made on the basis of "whether it is at least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker." (Emphasis added.)

2/ The original application also indicated that the applicant suffered from prostate cancer. The applicant does not refer to the finding by the Panel that there is no evidence associating asbestos exposure and prostate cancer. Accordingly, no further consideration of that issue is warranted.

Thus, the Panel could find in favor of an applicant if it believed that the exposure to toxic material was a significant factor in aggravating or contributing to an applicant's illness or death. The Report's partial citation of the regulation suggests that the panel may not have applied the correct standard in this case. Indeed, no specific consideration was given to whether the exposure to asbestos at the Hanford facility was a significant factor in aggravating or contributing to the applicant's pleural plaques. The determination as set forth in the Report is incomplete in this regard.

B. Substantive Consideration of Applicant's Condition

The applicant also states that the Panel's review of his medical condition was incomplete. The OWA case summary indicated that the applicant claimed asbestosis as the covered illness in this claim. It is clear that at this time the applicant has not presented any evidence of asbestosis, and therefore the Panel properly rejected a claim based on that illness.

However, throughout the claims process the applicant presented evidence that he suffers from another condition related to exposure to asbestos: the formation of pleural plaques. The Panel also rejected a claim based on this condition. The Panel found (i) that formation of pleural plaques alone is not a disease or cause of disability, but rather a "bio-marker of exposure to asbestos;" and (ii) that since the mean latent period for the formation of pleural plaques is over 20 years, the pleural plaques suffered by the applicant are unlikely to represent the effects of asbestos exposures during work at the Hanford facilities, which began in 1994, but rather result from earlier asbestos exposures.

In his appeal, applicant points out that an independent physician specifically found that the pleural plaques was a disease. The applicant's medical records, which the Panel reviewed, included a June 13, 2002 addendum prepared by the independent physician. That addendum stated: "There are objective medical findings indicating [the applicant's] pleural disease is likely the result of asbestos exposure while employed at Hanford. . . . His diagnosed condition is due to his employment at Hanford." The Panel did not refer to this evidence in the report. In fact, the Panel specifically indicated that "there was no contrary evidence," to its own finding.

This matter is therefore remanded for a consideration by the Physician Panel of the following matters:

(a) The Panel should reconsider whether pleural plaques are an illness. In so doing, the Panel should consider the opinion of the independent physician that the individual's "pleural disease is likely the result of asbestos exposure while employed at Hanford." If the Panel uses medical literature to support a finding that pleural plaques are not an illness, it should place a copy of that material in the record to substantiate its finding and so that the applicant can review it.

(b) If it finds that pleural plaques are an illness, the Panel should consider evidence that the pleural plaques were caused by employment at Hanford. We note that the Panel stated that mean formation period for pleural plaques is over 20 years, and thus the pleural plaques are unlikely to represent the effects of asbestos exposures during the applicant's work at Hanford, which began in 1994. The panel should state the specific scientific evidence that it relied on in reaching a determination that formation takes "over a 20-year mean" period.

(c) Further, if pleural plaques are determined to be an illness, as discussed above, even if the pleural plaques were not caused by the applicant's employment at Hanford, the Panel should consider whether it is as least as likely as not that the more recent asbestos exposure at Hanford was a significant factor in aggravating or contributing to the formation of the pleural plaques.

We have provided the Office of Worker Advocacy with a copy of the applicant's Notice of Appeal, which we received on August 8, 2003.
IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0029 be, and hereby is, granted as set forth in Paragraph 2 below.

(2) The application is remanded to the DOE Office of Worker Advocacy for further action in accordance with the above determination.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 1, 2003

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

December 1, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Date of Filing: **August 26, 2003**

Case No.: **TIA-0030**

XXXXXXXXXX (the worker) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The worker was a DOE contractor employee at a DOE facility. The OWA referred the application to an independent physician panel, which determined that the worker's illnesses were not related to his work 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).

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.

The Department of Labor (DOL) administers the first program, which provides $150,000 and medical benefits to certain workers with specified illnesses. Those illnesses include beryllium disease and specified cancers associated with radiation exposure. 42 U.S.C. § 7341l(9). The DOL program also provides $50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u. To implement the program, the DOL has

issued regulations, 20 C.F.R. Part 30, and has a web site that provides extensive information concerning the program.1/

The DOE administers the second program, which does not provide for monetary or medical benefits. Instead, it 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. § 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). The DOE program is limited to DOE contractor employees because DOE and DOE contractors would not be involved in state workers' compensation proceedings involving other employers. 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 worker in this case filed a DOE application, claiming two illnesses - chronic obstructive pulmonary disease (COPD) and basal cell carcinoma - and exposures to beryllium and ionizing radiation. During the application process, the worker claimed two additional illnesses - heart disease and hypertension - and exposures to cadmium, mercury, and toluene.

In its determination, the physician panel considered the illnesses claimed in the original application: COPD and basal cell carcinoma. The panel stated that the claimant attributed his COPD to beryllium exposure, and the panel unanimously determined that the COPD was unrelated to beryllium exposure. The panel cited negative test results for beryllium sensitivity and negative biopsy results for beryllium disease. In addition, the panel noted long-standing pulmonary complaints dating back to when the worker was in his 40's and cigarette use dating back to the worker's teenage years. The panel then considered whether the worker's basal cell carcinoma was attributable to radiation exposure. A majority of the panel

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1/ *See* www.dol.gov/esa.

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

concluded that it was not, stating that the worker's exposure was too small. In addition, the panel cited other factors that indicated that the cancer was related to ultraviolet light exposure, including evidence of solar changes on the worker's skin and the location of the lesions in sun exposed areas.

The OWA accepted the physician panel's determination. *See* July 3, 2003 Letter from the DOE to the applicant. Accordingly, the OWA determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits. In his appeal, the applicant contends that the physician panel determination is wrong.

II. Analysis

The Physician Panel Rule specifies what a physician panel must include in its determination. The panel must address each claimed illness, make a finding whether that illness arose out of and in the course of the worker's DOE employment, and state the basis for that finding. 10 C.F.R. § 852.12(a)(5). Although the rule does not specify the level of detail to be provided, the basis for the finding should indicate, in a manner appropriate to the specific case, that the panel considered the claimed exposures.

The panel determination addressed the two illnesses listed in the application. The panel determination explained why it found that the COPD was unrelated to exposures to beryllium, and why it found that the basal cell carcinoma was unrelated to exposure to ionizing radiation. The panel determination concluded that the COPD was not beryllium disease and, therefore, was not related to beryllium exposure. For the basal cell carcinoma, the panel determination addressed the level of the worker's exposures, the general risk factors for the diseases, and the presence of risk factors for the worker. As explained below, however, the panel determination did not address all of the matters required by the rule.

The panel determination did not address the two additional illnesses claimed during the application process, i.e., heart disease and hypertension. The apparent oversight was likely attributable to the fact that these two additional illnesses were not listed in the application. In any event, the worker claimed these illnesses, and the rule requires their consideration.

In addition, for the worker's COPD and basal cell carcinoma claims, the panel determination did not address all of the claimed

exposures. Although the panel determination explained why it found that the worker's COPD was not related to beryllium exposure, the panel determination did not address whether the worker's COPD was related to exposure to ionizing radiation or the other identified toxic substances. In this regard, we note that in September 6, 2001, and October 18, 2001 evaluations, a physician characterized the worker as having "possible occupational asthma" and "occupational asthma," respectively. The panel determination should have stated whether the ionizing radiation or other claimed exposures were a significant factor in aggravating or contributing to the worker's COPD and state the basis for those findings. Similarly, although the panel determination explained why it found that the worker's basal cell carcinoma was not related to exposure to ionizing radiation, the panel did not address the other claimed toxic exposures. The panel determination should have stated whether the other claimed exposures were a significant factor in aggravating or contributing to the illnesses and explain the basis for those findings.

Based on the foregoing, the physician panel determination should be remanded for further consideration. We note that, during the course of this appeal, the applicant has been diagnosed with prostate cancer and has requested that any remand to the physician panel consider that illness. We suggest that prior to OWA referral to a physician panel, OWA confirm with the applicant the illnesses and exposures claimed and identify them for the physician panel.

Finally, we note that the worker objects to the panel determination's description of his smoking history; he states that the determination overstates his smoking history. The panel's description is consistent with the worker's medical records, which indicate a long history of smoking. If the worker wishes to claim that there were intermittent periods when he smoked less or not at all, the worker should identify those periods and the level of consumption in detail in an affidavit and submit it to OWA. Whether any such submission is consistent with his medical records and indicates a reduction that is significant from a medical standpoint is a matter for the physician panel.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0030 be, and hereby is, granted as set forth in paragraph (2) below.

(2) The application that is the subject of Case No. TIA-0030 is remanded to the Office of Worker Advocacy for further consideration consistent with this Decision and Order.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: December 1, 2003

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

January 20, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: September 26, 2003

Case No.: TIA-0031

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 from 1991 to 1994. The OWA referred the application to an independent physician panel, which determined that the applicant's illnesses were not related to her work 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).

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.

The Department of Labor (DOL) administers the first program, which provides $150,000 and medical benefits to certain workers with specified illnesses. Those workers include DOE and DOE contractor employees who worked at DOE facilities and contracted specified cancers associated with radiation exposure. 42 U.S.C. § 7341l(9). A worker is eligible for an award if the worker was a "member of the Special Exposure Cohort" or if DOL determines that the worker sustained the cancer in the performance of duty. *Id.* The DOL program also provides $50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the

Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u. To implement the program, the DOL has issued regulations, 20 C.F.R. Part 30, and has a web site that provides extensive information concerning the program. 1/

The DOE administers the second program, which does not provide for monetary or medical benefits. Instead, it 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. § 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). 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 applicant is 57 years old. She worked at a DOE facility as a janitor and material handler for three years - from 1991 to 1994. Since 1995, she has been receiving disability benefits. In her application, the applicant identifies a number of claimed illnesses, which she attributes to working around toxic dusts and chemicals at DOE.

In its report, the physician panel identified ten claimed illnesses: asthma, bronchitis, arthritis, arthritis-knees, herniated disk, fibromyalgia, hypertension, tachycardia, depression, and heavy metal poisoning. The panel addressed each of the illnesses and ultimately found that the worker either did not have the illness or that the illness was not related to exposure to a toxic substance at DOE.

1/ *See* www.dol.gov/esa.

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

The OWA accepted the physician panel's determination. *See* August 29, 2003 Letter from the DOE to the applicant. Accordingly, the OWA determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits.

In her appeal, the applicant contends that the physician panel determination is wrong. She states that "it is believed" that her numerous illnesses are a direct result of her employment at DOE. In response to her appeal, the OHA contacted the applicant to ascertain if she disagreed with specific parts of the determination. She identified a number of disagreements, which are addressed below.

II. Analysis

A. Toxic Substances as Possible Causes of Illnesses

The applicant maintains that the panel determination is inconsistent with the record. She cites documents that discuss various toxic substances and the illnesses that they may cause. Record (R.) at 621-28.

Although the record contains documents that discuss various toxic substances and the illnesses that they might cause, the documents do not warrant a conclusion that the applicant's illnesses resulted from toxic exposures. The panel considers whether the facts presented in a given case indicate that the applicant was exposed to a toxic substance and, if so, whether the exposure was a significant factor in causing, contributing, or aggravating the illness. Accordingly, the showing of a possible relationship between exposure to a toxic substance and an illness is not sufficient to require a positive determination by the physician panel.

As the foregoing indicates, the physician panel process is a case specific process. Accordingly, we turn to the applicant's specific disagreements with the panel determination.

B. Asthma and Bronchitis

The panel found that the applicant had asthma and bronchitis but that the record did not contain evidence of exposures that were a significant factor in causing, contributing to, or aggravating those illnesses. In its discussion of the applicant's illness, the

panel found that the applicant had not reported any shortness of breath at DOE, and opined that the asthma and bronchitis were likely related to the applicant's pre-existing allergies, see R. at 63, and smoking history, see R. at 442.

The applicant maintains that she had sufficient exposures to support a positive determination. The applicant does not point to any specific industrial hygiene records, but states that her work as a janitor involved exposure to toxic dusts and solvents. In addition, the applicant maintains that she reported shortness of breath at DOE. Third, the applicant maintains that she has a minimal smoking history.

The applicant has not demonstrated an error in the panel determination. We find no basis for the first two arguments. The applicant has not identified any specific exposure records supporting her claim, and we did not identify any such records. Moreover, the applicant did not identify any specific records showing that she complained of shortness of breath during her employment at DOE, and the only instance we could identify occurred when she awoke one day with rapid heart beat and slight shortness of breath, went to work, and reported the problem, R. at 467. Finally, although the applicant's health records are contradictory concerning the amount of her smoking, *compare* R. at 442 (½ pack a day for ten years) *with* R. at 34 (occasionally), the panel's discussion of her smoking history was not necessary to its finding: the panel based its finding on the absence of documented exposures. Accordingly, the contradictory evidence about the applicant's smoking history was not "significant contrary evidence" that the panel needed to address. 10 C.F.R. §§ 852.9, 852.12.

C. Fibromyalgia

The panel found that there was no conclusive evidence that the applicant had fibromyalgia. The panel further found that any such fibromyalgia was not work related.

The applicant objects to the finding that there is no conclusive evidence of fibromyalgia. She states that a physician diagnosed her as having fibromyalgia.

The applicant is correct that a physician diagnosed her as having fibromyalgia. R. at 587. Nonetheless, at least one other physician opined that the applicant did not meet the objective criteria for such a diagnosis, R. at 634, and the applicant has not

identified any physician disagreement with that opinion. Accordingly, the panel correctly viewed the evidence as inconclusive. More importantly, the panel's view of the diagnosis as inconclusive did not hurt the applicant: the panel went on to address whether the claimed fibromyalgia was work related and concluded that it was not. The applicant has not pointed to any physician diagnosis to the contrary, and we could find none in the record. Accordingly, the applicant has not demonstrated any error in the physician panel finding concerning fibromyalgia.

D. Heavy Metal Poisoning

The applicant's medical records include the results of hair sample tests during the period November 2000 to March 2001, and an April 2001 hospital stay in which the applicant underwent a procedure to remove heavy metals from the body. The procedure - referred to as chelation - involves intravenous introduction of a chemical that attaches to heavy metals and is excreted in the urine. Although the hospital records show charges for urine tests for heavy metals, there is no record of the results of such tests, and the applicant states that the hospital incorrectly failed to do them. The physician's discharge notes list heavy metal exposure as a diagnosis.

The panel found that there was no evidence of heavy metal poisoning. All of the panel members concluded that the hair sample tests were insufficient to support such a diagnosis. One of the panel members opined that the applicant was chelated without justification and noted the absence of any urine tests for heavy metals or blood tests for lead.

Although the applicant disagrees with the panel's finding, the applicant has not demonstrated a panel error. The physician's discharge notes state a diagnosis of heavy metal exposure, which is not synonymous with heavy metal poisoning. Moreover, there are no urine or blood tests to support a diagnosis of heavy metal poisoning. Accordingly, the applicant has not demonstrated that the physician panel was incorrect when it concluded that the evidence did not indicate heavy metal poisoning.

E. Hearing Loss

The panel did not consider one of the claimed illnesses - hearing loss. The applicant claims that her hearing loss was caused by exposure to noise during her work at DOE.

The OWA did not ask the physician panel to consider the applicant's claim of hearing loss, and that decision was correct. The Act establishes the DOE assistance program for illnesses resulting from "exposure to a toxic substance" at a DOE facility. 42 U.S.C. § 7385o(d)(3). The physician panel rule defines a "toxic substance" as "any material that has the potential to cause illness or death because of its radioactive, chemical, or biological nature." 67 Fed. Reg. 2854 (to be codified at 10 C.F.R. § 852.2). The preamble to the rule specifically rejected a proposal that noise be included in the definition of a toxic substance:

> One commenter suggested that noise should be included as a toxic substance. DOE understands that noise can cause harm to workers in certain situations. However, the dictionary defines "toxic" as "of, relating to, or caused by poison or toxin." DOE does not believe that noise operates to poison people because it does not injure by chemical action. Hence, it does not fit comfortably within the ordinary meaning of "toxic substance." Neither the text of Part D nor its legislative history suggests otherwise.

67 Fed. Reg. 52843. Accordingly, the Act's requirement that the illness be caused by exposure to a "toxic substance" excludes hearing loss caused by noise exposure. Accordingly, as we have previously stated, noise-induced hearing loss is not covered by the rule. See *Worker Appeal*, Case No. TIA-13 (January 16, 2003).

Because the applicant has not identified a deficiency or error in the physician panel determination, 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-0031 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: January 20, 2004

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

February 6, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: October 14, 2003

Case No.: TIA-0032

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 from 1970 to 1997. The OWA referred the application to an independent physician panel, which determined that the applicant did not have illnesses related to his work at DOE. The OWA accepted the panel's determination. The applicant filed the instant appeal.

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.

The Department of Labor (DOL) administers the first program, which provides $150,000 and medical benefits to certain workers with specified illnesses. Those workers include DOE and DOE contractor employees who worked at DOE facilities and contracted specified cancers associated with radiation exposure. 42 U.S.C. § 7341l(9). A worker is eligible for an award if the worker was a "member of the Special Exposure Cohort" or if DOL determines that the worker sustained the cancer in the performance of duty. *Id.* The DOL program also provides $50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure

Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u. To implement the program, the DOL has issued regulations, 20 C.F.R. Part 30, and has a web site that provides extensive information concerning the program. 1/

The DOE administers the second program, which does not provide for monetary or medical benefits. Instead, it 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. § 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). 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 applicant was employed at a DOE facility as a janitor and structural group tradesman from 1970 to 1997. In 1997, the applicant retired on disability. In his application, he identified a number of claimed illnesses, which he attributed to working around toxic dusts and chemicals at DOE, and he specifically mentioned a December 1985 incident involving exposure to fumes.

In its report, the physician panel identified a number of claimed illnesses. They are dypsnea, multiple chemical sensitivities and exposures associated with toxic encephalopathy, chronic sinusitis, induced food intolerance, gastrointestinal symptoms, difficulty concentrating, fibromyalgia, chronic fatigue syndrome, pulmonary fibrosis, obstructive sleep apnea, and depression.

The panel found that the applicant did not have an illness that arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility. The panel explained the basis for its determination as follows.

1/ *See* www.dol.gov/esa.

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

> **Two panelists thought there was insufficient documentation to support any work relatedness to the claims. [The applicant] was very thoroughly evaluated by multiple specialists from the mid 1980's to the mid 1990's none of whom could arrive at any definitive association between work conditions and his symptoms, nor could they substantiate his claimed illnesses.**
> **One panelist thought there were "at least as likely as not" work related conditions that could have caused the lung disease as well as the psychological impairment. This was based upon [the applicant's] premorbid state of health, the temporal relationship of the progression of his symptoms while working at [DOE], neuropsychological testing possibly consistent with toxic induced brain dysfunction, and possible chronic dust exposure that might have contributed to this pulmonary and sinus conditions. No association was found between work and the remainder of his claims and diagnosis.**

Report at 1. The panel described the split in the panel as follows:

> **Drs. Kramer and Stein voted NO. Dr. Green voted YES as per the above arguments. Therefore, the majority opinion is that [the worker's] claims/illnesses did not arise from conditions at (DOE) because his claims were mostly unilateral and with insufficient support from independent expert sources.**

Id. **Finally, in response to the request to provide "any evidence presented that is contrary to the final panel decision, and why the panel finds it not to be persuasive" the panel answered "NA" or not applicable.** ***Id.***

The OWA accepted the physician panel's determination. ***See*** **September 12, 2003 Letter from the DOE to the applicant. Accordingly, the OWA determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits.**

In his appeal, the applicant contends that the determination states an erroneous standard of review and is contrary to the medical records submitted in conjunction with the application. These arguments are addressed below.

II. Analysis

A. The Standard of Review

The panel did not clearly apply the correct standard. The panel is to determine whether it is at least as likely as not that exposure to toxic substances at DOE was a significant factor in causing, contributing to, or aggravating an illness. 10 C.F.R. § 852.8. The panel stated:

> Two panelists thought there was insufficient documentation to support any work relatedness to the claims. [The applicant] was very thoroughly evaluated by multiple specialists from the mid 1980's to the mid 1990's none of whom could arrive at any definitive association between work conditions and his symptoms, nor could they substantiate his claimed illnesses.
> . . . . Therefore, the majority opinion is that [the applicant's] claims/illnesses did not arise from conditions at (DOE) because his claims were mostly unilateral and with insufficient support from independent expert sources.

Report at 1. This wording is problematic in two ways. First, the way in which the panel referred to the worker's evaluation by medical specialists suggests that the panel relied on those evaluations rather than making its own independent determination. Second, the panel's reference to the lack of a "definitive" association between the worker's symptoms and his work reflects a different, and arguably higher, standard than the "at least as likely as not" standard. 10 C.F.R. § 852.8. Accordingly, it is not clear that the panel applied the correct standard.

B. The Panel's Findings

The panel did not adequately state the basis for its determination, 10 C.F.R. § 852.12. In general, where a panel makes inaccurate statements about significant evidence, the basis for the ultimate determination is unclear. In this case, the panel stated that "none" of the specialists who saw the worker could substantiate an illness or its work-relatedness, but that statement is incorrect. Some of the specialists found evidence of brain dysfunction, pulmonary disease, and multiple chemical sensitivities. In 1989, a neurotoxicologist found "organic brain dysfunction, suspect hypoxia" and stated that, "[i]n the absence of additional information to the contrary, the presumed cause was: an incident

on or about December 1985 to January 1986." 3/ In 1991, a radiology report on chest studies gave its impression as follows:

> 1. Extensive volume loss consistent with restrictive lung disease and if the history is positive for asbestos exposure, the exam would be positive for asbestosis. 2. Evidence of cor pulmonale. 4/

In 1993, a neurotoxicologist stated that he administered the Neurotoxicity Screeening Survey, and that the results were consistent with the symptoms reported by people with diagnosed neurotoxicity. 5/ During 1996 and 1998, a physician, board-certified in environmental medicine, diagnosed the worker as suffering from multiple chemical sensitivities as the result of toxic exposures at work. 6/ The panel's inaccurate characterization of the foregoing raises the question of how it would have viewed the evidence, particularly in light of an industrial hygiene report identifying a number of toxic substances to which the worker may have been exposed. 7/

III. Summary and Conclusion

As the foregoing indicates, the panel did not clearly apply the correct standard, and the panel incorrectly characterized significant evidence. Accordingly, the determination should be

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3/ See Lawrence F. Wilson, Ph.D (Clinical Neuropsychologist) Psychology Consultation Report: Neuropsychological Evaluation dated August 25, 1989, at 4.

4/ See National Jewish Center Radiology Report dated May 20, 1991; see also National Jewish Center Occupational/ Environmental Medicine Clinic Summary dated May 21, 1991, at 7.

5/ See Letter by Raymond Singer, Ph.D ABPN (Neuropsychology) and Neurotoxicologist dated April 18, 1993.

6/ See Letter by Dr. William A. Shrader dated August 21, 1996, at 1; see also Letters by Dr. William A. Shrader dated March 19, 1996, July 31, 1996, November 27, 1996, and April 21, 1998.

7/ See Industrial Hygiene Services Investigation Report dated May 16, 1990.

remanded to the physician panel for a new determination that clearly applies the correct standard and that addresses the evidence identified above.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0032 be, and hereby is granted as set forth in paragraph 2 below.

(2) The application that is the subject of this appeal is hereby remanded to the Office of Worker Advocacy for resubmission to the physician panel and a new determination.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: Frebruary 6, 2004

December 18, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: October 16, 2003

Case No.: TIA-0033

XXXXXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, the appeal should be denied.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. Generally, if a physician panel issues a determination favorable to

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1/ ***See*** **www.eh.doe.gov/advocacy.**

the employee, the DOE Office of Worker Advocacy accepts the determination and assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). As stated above, the DOE Office of Worker Advocacy is responsible for this program.

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office 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 Program Office. 10 C.F.R. § 852.18(a)(2). *See Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In his application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted that he worked at the DOE's Los Alamos National Laboratory in Los Alamos, New Mexico from 1974 through 1994. During that time, he worked as a mechanical welder. In connection with his employment he claims exposure to "toxic odors." He stated that as a result of his employment, he suffers from chronic obstructive pulmonary disease and beryllium exposure.

The Physician Panel issued a negative determination on this claim. The Panel found as follows: "[the applicant's] conditions did not arise out of and in the course of employment by a DOE employer and exposure to a toxic material at a DOE facility." In this regard the Panel stated that there was no evidence of either beryllium sensitivity or berylliosis. The Panel links the individual's chronic obstructive pulmonary disease to his habit of smoking a pack of cigarettes a day.

II. Analysis

As noted above, the Physician Panel found that "[the applicant's] conditions did not arise out of and in the course of employment by a DOE employer and exposure to a toxic material at a DOE facility." Specifically, the Panel indicated that it considered whether it was at least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker. The Panel responded to this issue in the negative.

The applicant seeks review of this determination. He believes that his chronic obstructive pulmonary disease was caused by inhaling fumes from the exhaust fans throughout his work site. Other than stating his belief, he provides no support for this contention.

The applicant's belief, with nothing more, is not convincing. It does not establish any deficiency or error in the Panel's determination. While the record here indicates that the applicant was exposed to some toxic substances during his employment, there is no indication that the Panel failed to consider these exposures in reaching its determination that the applicant's condition was not caused by any work related toxic exposures at a DOE facility.

Because the applicant has not identified a deficiency or error in the Panel's determination, 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-0033 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: December

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January 7, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Date of Filing: **November 17, 2003**

Case No.: **TIA-0034**

XXXXXXXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, the appeal should be denied.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. Generally, if a physician panel issues a determination favorable to

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1/ ***See*** **www.eh.doe.gov/advocacy.**

the employee, the DOE Office of Worker Advocacy accepts the determination and assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). As stated above, the DOE Office of Worker Advocacy is responsible for this program.

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office 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 Program Office. 10 C.F.R. § 852.18(a)(2). *See Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In her application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted that she worked at the DOE's Rocky Flats site in Golden, Colorado from 1977 through 1986. During that time, she worked as an analytical radioassay laboratory technician. In connection with her employment, she claims exposure to "high level radioactive substances." She believes that this exposure has caused her to suffer from chronic iritis in both eyes.
The Physician Panel issued a negative determination on this claim. The Panel found as follows: "[the applicant's] conditions did not arise out of and in the course of employment by a DOE employer and exposure to a toxic material at a DOE facility." In this regard the Panel stated that there was "no medical or industrial hygiene record of any significant exposures to toxic chemicals, radiation or other possible causes for this ophthalmologic condition." The Panel noted that causes of the iritis are "varied and seldom identified. Clearly not occupational exposure related."

II. Analysis

As noted above, the Physician Panel found that "[the applicant's] conditions did not arise out of and in the course of employment by a DOE employer and exposure to a toxic material at a DOE facility." Specifically, the Panel indicated that it considered whether it was at least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the applicant. The Panel responded to this issue in the negative.

The applicant seeks review of this determination. She states that none of the physicians who have evaluated her condition have been able to explain the reasons for her disease. She believes that a possible cause of her iritis was her work with radioactive substances. However, other than stating this possibility, she provides no support for her contention. She has not provided, for example, a diagnosis from her own physician indicating that her condition was caused by exposure to a toxic substance at a DOE site. *See, Worker Appeal* (TIA-0029), 28 DOE ¶ 80,303 (October 1, 2003).

The applicant's belief, with nothing more, is not convincing. It does not establish any deficiency or error in the Panel's determination. While the record here indicates that the applicant was exposed to some toxic substances during her employment, there is no indication that the Panel failed to consider the exposure in reaching its determination that the applicant's iritis was not caused by any work-related toxic exposures at a DOE facility.

The applicant also questions why the three opinions issued by the Panel members in this case are identical. She implies that this might indicate some irregularity in the Panel's evaluation process. The applicant should be aware that if the Panel is unanimous in its determination, it issues a single opinion, which all members then sign. Section 852.12 states that the determination and findings must be signed by all Panel members. As a rule, each Panel member signs an identical, but separate, version of the determination. This is reasonable, inasmuch as the Panel members may reach their determination not in the presence of each other, but via telephone. See 10 C.F.R. § 852.11(b). Accordingly, it is appropriate that there are three identical Panel determinations in the record of this case. *Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (June 30, 2003).

Because the applicant has not identified a deficiency or error in the Panel's determination, 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-0034 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: January 7, 2004

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December 15, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: November 25, 2003

Case No.: TIA-0035

XXXXXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The applicant's late husband (the worker) was a DOE contractor employee at a DOE facility. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, the appeal should be denied.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program.1/

Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses.

1/ ***See*** **www.eh.doe.gov/advocacy.**

Generally, if a physician panel issues a determination favorable to the employee, the DOE Office of Worker Advocacy accepts the determination and assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). As stated above, the DOE Office of Worker Advocacy is responsible for this program.

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office 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 Program Office. 10 C.F.R. § 852.18(a)(2). *See Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

The present application for DOE assistance in filing for state workers' compensation benefits indicated that the worker was employed as a laboratory analyst and a radiographer at the DOE's Y-12 Plant in Oak Ridge, Tennessee from December 27, 1950 through February 13, 1974. The application claimed that the worker was exposed to radiation, lithium and cobalt 60. The worker was diagnosed with heart problems in July 1997 and emphysema and lung scarring in July 2001.

The Physician Panel issued a negative determination on this claim. The Panel found as follows: "[the worker's] conditions did not arise out of and in the course of employment by a DOE employer and exposure to a toxic material at a DOE facility." In this regard the Panel stated in its report that "none of the claimed conditions could be linked to any exposure at the Oak Ridge facility and the over-riding etiology of the conditions is most likely the 50 year pack [a day] history of cigarette smoking." The Panel's decision was adopted by the Office of Worker Advocacy. Accordingly, the DOE Office of Worker Advocacy determined that the worker was not

eligible for DOE assistance in filing for state workers' compensation benefits. October 28, 2003 Letter from DOE to the applicant. In her appeal, the applicant contests the Physician Panel's determination that the worker's conditions were not related to his work at the Y-12 facility.

II. Analysis

As noted above, the Physician Panel found that "[the worker's] conditions did not arise out of and in the course of employment by a DOE employer and exposure to a toxic material at a DOE facility." Specifically, the Panel indicated that it considered whether it was at least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker. The Panel responded to this issue in the negative. The Panel further indicated that there was no link between the named exposures and the three conditions claimed by the applicant. In the Panel's opinion, the conditions were most likely to have been caused by the worker's 50 year habit of smoking a pack of cigarettes a day.

The applicant believes that this determination was incorrect. First she refers to another lung disease, pneumoconiosis, which is caused by inhalation of mineral dusts from substances such as coal and beryllium. The applicant claims that the worker was exposed to many toxic substances during his employment at the Y-12 Plant, but that the exposures were not documented. The applicant believes that the exposures could have caused pneumoconiosis. She also claims that the worker did not smoke for the entire 50 year period noted by the Panel. She maintains that the worker stopped smoking "several times."

The applicant's claim that the worker may have suffered from pneumoconiosis does not establish any deficiency or error in the Panel's determination. As an initial matter, there is no evidence in the record in this case suggesting that the worker may have suffered from this disease. Moreover, as the applicant acknowledges, there is no evidence in the record that the worker was exposed to a variety of toxic substances at the Y-12 Plant. Thus, the claim that the worker was exposed to toxic substances that were not considered by the Panel is speculative, as is the contention that these alleged exposures caused pneumoconiosis.

Furthermore, the Panel is required to review all of the records provided and to address certain matters in its determination. 10

C.F.R. §§ 852.9, 852.12. This the panel did. The applicant did not raise the pneumoconiosis claim prior to the filing of the instant appeal. Therefore, the Panel could not have considered it. Accordingly, there is no error by the Panel with respect to this issue.

I reach the same conclusion with respect to the applicant's claim that the worker stopped smoking several times. There are repeated references in the file to the worker's 50 year smoking habit. There is no corroborative evidence in the file that the worker did in fact stop smoking. Further, the applicant did not object to the references to the worker's 50-year smoking habit prior to the issuance of the Panel's report. Thus, even if it were true that the individual did stop smoking "several times," there was no error by the Panel with respect to this issue.

Because the applicant has not identified a deficiency or error in the Panel's determination, there is no basis for an order remanding the matter to OWA for a second Panel determination. *See, Worker Appeal* (Case No. TIA-0028), November 21, 2003. Accordingly, the appeal should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0035 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: December 15, 2003

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December 16, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Date of Filing: **November 26, 2003**

Case No.: **TIA-0036**

XXXXXXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, the appeal should be denied.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program.1/

Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. Generally, if a physician panel issues a determination favorable to

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1/ *See* www.eh.doe.gov/advocacy.

the employee, the DOE Office of Worker Advocacy accepts the determination and assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). As stated above, the DOE Office of Worker Advocacy is responsible for this program.

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office 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 Program Office. 10 C.F.R. § 852.18(a)(2). *See Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In his application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted that he has worked at the DOE's Rocky Flats Plant in Golden, Colorado since 1970, and is still presently employed there. During that time, he has worked as a radiological control technician. In connection with his employment he claims exposure to radioactive, hazardous and toxic materials on a routine basis. He has stated that as a result of his employment, he suffers from fibromyalgia, including chest pains during deep breathing, and beryllium sensitivity.

The Physician Panel issued a negative determination on this claim. The Panel found as follows: "[the applicant's] conditions did not arise out of and in the course of employment by a DOE employer and exposure to a toxic material at a DOE facility." In this regard the Panel specifically stated that laboratory testing did not show positive Beryllium lymphocyte proliferation tests. 2/ The Panel

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2/ The Panel did note that the applicant had one beryllium

(continued...)

furtherdeterminedthat "with a reasonable degree of medical certainty [the applicant's] diagnosis of Fibromyalgia is not causally related to or aggravated by [his] work exposures or work activities."

II. Analysis

As noted above, the Physician Panel found that "[the applicant's] conditions did not arise out of and in the course of employment by a DOE employer and exposure to a toxic material at a DOE facility." Specifically, the Panel indicated that it considered whether it was at least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker. The Panel responded to this issue in the negative.

The Applicant believes that this determination was incomplete. He claims that the Panel failed to consider that his health problems were caused by the combined effects of exposure to radionuclides and other toxic materials such as carbon tetrachloride, trichlorethylene, nitric acid, sulfuric acid, beryllium, asbestos, fluorine gas, tritium catalyzed paints, lead, toluene, hydrogen peroxide and cyanide. The applicant states that these materials were present in his work area, but that there was no industrial hygiene monitoring at his work site from 1970 to 1985.

The applicant's claims do not establish any deficiency or error in the Panel's determination. The exposures cited by the applicant are included in the record reviewed by the Panel. There is no evidence indicating that the Panel failed to consider the combined effects of these exposures in reaching its determination that the applicant's condition was not caused by any work related exposures at a DOE facility.

Because the applicant has not identified a deficiency or error in the Panel's determination, there is no basis for an order remanding the matter to OWA for a second Panel determination. Accordingly, the appeal should be denied.

2/ (...continued)
lymphocyte proliferation test (Be-LTT) panel that was considered borderline, and determined that "testing does not conclusively indicate positive Be-LTT blood testing."

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0036 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: December 16, 2003

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February 23, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: December 1, 2003

Case No.: TIA-0037

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's late husband, XXXXXXXXXX (the worker), was a DOE contractor employee at a DOE facility from 1944 to 1976. The OWA referred the application to an independent physician panel, which determined that the worker's illnesses were not related to his work 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).

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.

The Department of Labor (DOL) administers the first program, which provides $150,000 and medical benefits to certain workers with specified illnesses. Those illnesses include beryllium disease and specified cancers associated with radiation exposure. 42 U.S.C. § 7341l(9). The DOL program also provides $50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u. To implement the program, the DOL has

issued regulations, 20 C.F.R. Part 30, and has a web site that provides extensive information concerning the program. 1/

The DOE administers the second program, which does not itself provide any monetary or medical benefits. Instead, it 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. § 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). 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 worker was employed at a DOE facility from 1944 to 1976. The worker was a process operator and chemical operator. In 1976, at the age of 56 years, the worker retired based on disability attributable to chronic obstructive pulmonary disease (COPD/emphysema). 3/ The worker died in 1992, at the age of 71 years.

The applicant applied to DOL for a $150,000 payment based on beryllium disease. The issue at DOL was whether the COPD was beryllium disease. DOL referred the issue to a physician who specializes in occupational medicine at the National Jewish Medical and Research Center and is a professor of pulmonary sciences at the University of Colorado School of Medicine. 4/ The physician opined

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1/ *See* www.dol.gov/esa.

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

3/ See July 12, 1976 memorandum from Gino Zanolli, M.D., Union Carbide.

4/ See October 3, 2002 Request for Medical Evidence Consultation from DOL to Lee S. Newman, M.D., M.A., F.C.C.P., Head, Division of Environmental and Occupational Health Sciences, National Jewish Medical Research Center.

that there was insufficient medical evidence to conclude that the worker met the applicable criteria for diagnosis of beryllium disease set forth in EEOICPA. 5/ Accordingly, the applicant's DOL claim was denied. 6/

The applicant also filed an application with DOE, the application at issue in this case. The applicant identified the illnesses on which she sought physician panel review and attributed those diseases to exposure to toxic substances, including beryllium, radiation, and mercury.

The physician panel reviewed the application and issued a report. The panel addressed four illnesses: chronic obstructive pulmonary disease (COPD), coronary artery disease, cardiopulmonary edema, and hypertension. The panel found that the worker had the claimed illnesses, but found that they were not related to exposure to a toxic substance at DOE. The panel addressed each of the illnesses separately and stated the basis for its determination. With respect to COPD, the panel found that the documentation did not indicate beryllium disease but rather COPD/emphysema. The panel cited a long standing history of smoking and asthmatic bronchitis. With respect to coronary artery disease, cardiopulmonary edema, and hypertension, the panel found that there was insufficient information to find that the illnesses were related to toxic exposures at DOE. For coronary artery disease and cardiopulmonary edema, the panel cited various risk factors for the worker, including smoking, diabetes, and hypertension. With respect to hypertension, the panel stated that the condition was common in the population, and the panel listed various general risk factors, one of which was smoking.

5/ See November 4, 2002 Letter from Lee S. Newman, M.D., M.A., F.C.C.P., Head, Division of Environmental and Occupational Health Sciences, National Jewish Medical Research Center, and Professor, Department of Medicine and Department of Preventive Medicine and Biometrics, Division of Pulmonary Sciences and Critical Care Medicine, University of Colorado School of Medicine, to DOL.

6/ See May 7, 2003 DOL Notice of Final Decision.

The OWA accepted the physician panel's determination. *See* October 28, 2003 Letter from the DOE to the applicant. Accordingly, the OWA determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits.

In her appeal, the applicant contends that the physician panel determination is wrong. In response to her appeal, the OHA contacted the applicant to ascertain if she disagreed with specific parts of the determination. She identified a number of disagreements, which are addressed below.

II. Analysis

A. The Worker's Health Status When He Began Work at DOE

The applicant maintains that the worker was healthy when he started work at DOE in 1944 and, therefore, his illnesses must be attributable to work at DOE.

The applicant is correct in describing the worker's health as good when he began work at DOE. Nonetheless, the decline in the worker's health over the years does not establish that the decline was related to work, as opposed to age, genetic factors, or other non-work related causes.

B. The Worker's COPD

The applicant maintains that the panel erred when it did not diagnose the worker's COPD as beryllium disease. She states that the worker was sick before the diagnostic tests for beryllium disease were used, that most of his medical records are no longer available, and that there was no reason for his treating physician to pursue the cause of his COPD at the time he was hospitalized just before his death. She has submitted a letter from a physician from the worker's home town, stating that the physician believes that the worker had beryllium disease.

The applicant has not demonstrated that the panel erred. The panel explained why it did not diagnose the worker's COPD as beryllium disease. The panel stated:

> There is no supporting documentation for berylliosis seen on multiple chest x-rays and no supporting documentation of immunological studies, abnormal chest CT scan, or lung

pathology specimens. Instead, the medical records document x-ray, pulmonary function tests, and lab studies consistent with chronic obstructive pulmonary disease/emphysema.

Report at 2. The panel finding is consistent with the physician opinion obtained by DOL, a two-page opinion that discussed the worker's medical records. Thus, four physicians, who are specialists in occupational medicine, have found that the evidence is insufficient to diagnose berylliosis, and they have explained the basis for their determination. The only contrary medical opinion is from a physician who is not a specialist in the area and has not provided an explanation of his differing view. 7/ Based on the foregoing, the weight of the evidence supports the panel determination.

C. The Panel's Reference to Smoking as a Risk Factor for the Worker's Illnesses

The applicant maintains that the worker quit smoking 15 years ago and, therefore, she objects to the panel's mention of smoking as a risk factor for the worker's illnesses. The applicant's contention concerning when the worker quit smoking is consistent with the worker's medical records. The report of a January 7, 1990 cardiology consultation states that the worker stopped smoking "two years ago." 8/ The worker's cessation of smoking would not, however, affect the accuracy of the panel's reference to the worker's smoking as a risk factor. The panel referred to the worker's "long standing history of smoking," and "heavy smoking," and the worker's medical records support those characterizations. The records indicate that the worker smoked for at least 38 years - from the age of 16 years to about the age of 54 years, that the worker was smoking at the time of his disability retirement in 1976 at the age of 56 years, and that he continued to smoke for sometime thereafter. 9/ Accordingly, a cessation of smoking in the late

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7/ See 2002 Memorandum from Louis C. Battista, M.D., F.A.C.F.P.

8/ See January 7, 1990 Cardiology Consultation (Attending Physician: Dr. Page).

9/ See February 3, 1962 Letter from William K. Rogers, M.D. (diagnosis of bronchitis, reference to worker's "description of his father's case which sounds like pulmonary emphysema and bronchitis" and advice to worker that "he very definitely should stop smoking"); March 6, 1974 Medical History by Laurence Dry, M.D. ("patient has been a heavy smoker for many, many years"); July 22, 1974 Health Evaluation (page 2, smoking); January 30, 1975 Summary by T.J. Grause, M.D. (patient told by his private doctor that he had to give up smoking and he has done so); January 7, 1990 Cardiology Consultation (Attending Physician: Dr. Page) (worker quit "two years ago").

1980's does not negate the panel's finding that the worker had a long smoking history leading up to his disability retirement.

D. The Panel's Reference to Family History as a Risk Factor for Coronary Artery Disease, Cardiopulmonary Edema, and Hypertension

The applicant objects to the panel's reference to family history in its discussion of the worker's coronary artery disease, cardiopulmonary edema, and hypertension. The applicant maintains that the worker did not have a family history of those conditions.

The panel's references to family history do not constitute errors in the determination. The panel referred to the worker's family history as one of his risk factors for coronary artery disease and cardiopulmonary edema, and the worker's medical records support those references. The file contains (i) a 1962 physician letter noting that the worker reported that his father had pulmonary problems and (ii) a 1974 health evaluation in which the worker reported a family history of heart disease and diabetes. 10/ The panel did not refer to the worker's family history as a risk factor for hypertension. Instead, the panel referred to general risk factors for hypertension and specifically identified smoking as a risk factor specific to the worker. Accordingly, the panel's references to family history as risk factors do not constitute errors in the determination.

III. Summary and Conclusion

As the foregoing discussion indicates, the applicant has not demonstrated error in the physician panel determination. Accordingly, the appeal should be denied.

10/ See note 9.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0037 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: February 23, 2004

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March 11, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Date of Filing: **December 3, 2003**

Case No.: **TIA-0038**

XXXXXXXXXXXXXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The applicant's late husband (the worker) was a DOE contractor employee at a DOE facility. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, the appeal should be denied.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. Generally, if a physician panel issues a determination favorable to

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1/ ***See*** **www.eh.doe.gov/advocacy.**

the employee, the DOE Office of Worker Advocacy accepts the determination and assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). As stated above, the DOE Office of Worker Advocacy is responsible for this program.

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office 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 Program Office. 10 C.F.R. § 852.18(a)(2). *See Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In her application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted that from 1962 through 1994, her husband worked as an engineer at the DOE's Y-12 plant in Oak Ridge, Tennessee. The worker died in 1994 of amyotrophic lateral sclerosis (ALS). The applicant believes that exposure to mercury and radiation in the Y-12 workplace caused her husband's disease and his death.

The Physician Panel issued a negative determination on this claim. The Panel 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 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 worker's death from ALS, the Physician Panel unanimously found that a "causal connection between ALS and mercury

exposure is not established, nor is evidence of such exposure. [The worker's] symptoms and signs are not those of chronic mercury poisoning."

II. Analysis

The applicant seeks review of the Panel's determination, maintaining that the Panel did not reach a correct determination on the issue of whether mercury and/or radiation exposure caused her husband to die of ALS. She has submitted three newspaper/magazine articles that she alleges support her position on both exposures.

The articles offer no evidence of error by the Panel. The first article submitted by the applicant is undated and entitled "A week of golf--and life." 2/ It focuses on a professional golfer suffering from ALS, who states that he is undergoing treatment to remove mercury from his system and "is hopeful that might explain what caused ALS."

The second article is entitled "ALS Updates," and is taken from "News from the Les Turner ALS Foundation." The article appears to date from 2003. This article refers to an ALS mortality study that was prompted by concerns of some workers and community residents of Kelly Air Force Base that there were "health threats from toxic chemicals or radiation" at the Base or in the local environment. The study concluded that the number of ALS deaths at the Base was not excessive. The article indicates that another study is underway to examine common characteristics of ALS sufferers, and notes that some ALS deaths may not have been included in the mortality study.

The third article, dated November 16, 1997, is taken from "The Tennessean," and is entitled "What's next in Oak Ridge?" The subject of this article is health and learning problems in Oak Ridge that possibly were caused by environmental contamination. It indicates in a general way some approaches to these problems. One suggested approach was to extract hair, blood and urine samples from ill residents in the area to see if the samples contain high levels of poisons, among them uranium and other heavy metals and mercury. Another solution mentioned is to poll doctors about their experience with neurological diseases such as ALS and multiple sclerosis. The article did not offer any conclusions about the cause of ALS.

2/ The source of the article is not indicated.

These three articles merely point out that some people appear to be investigating the possibility of a link between ALS and environmental factors. None of the three articles in any way indicates that a link between ALS and radiation or mercury exposure has been demonstrated or is even likely.

As discussed above, the standard to be applied in these cases is whether it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to or causing the worker's illness or death. The Panel applied that standard here, and there is simply no evidence in the record, including the additional material submitted by the applicant, to suggest that the Panel's conclusion was incorrect. The articles that the applicant submitted do not in any way contradict the Panel's finding. The standard that the applicant seems to propose, that some people are considering the possibility that ALS is caused by mercury or radiation exposure, is not applicable in this type of case. 3/ The applicant has not pointed to any data in the record either contradicting the Panel's determination or suggesting that the Panel's overall decision was in error. Accordingly, the appeal must be denied.

In rejecting the applicant's contention that exposure to "nuclear material" may have caused her husband's ALS, I note that the Panel did not specifically address this aspect of the claim. However, this does not mean that the Panel failed to evaluate the whole file in the case and fully consider the individual's dosimetry record. We believe that the Panel rejected the contention that the worker's ALS was linked to radiation exposure. The report indicates that the Panel rendered an overall negative determination on the applicant's claim, and the Panel's discussion indicates that it considered possible causes of ALS. Therefore, I see no basis for remanding this aspect of the case to the Panel for a specific discussion on whether exposure to nuclear material caused the worker's ALS.

In sum, the applicant's beliefs, with nothing more, are not convincing. They do not establish any deficiency or error in the Panel's determination. Because the applicant has not identified a deficiency or error in the Panel's determination, there is no basis for an order remanding the matter to OWA for a second Panel determination. Accordingly, the appeal should be denied.

3/ Moreover, the record indicates that the level of the worker's exposure to mercury was within accepted limits.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0038 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: March 11, 2004

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

February 25, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Date of Filing: **December 9, 2003**

Case No.: **TIA-0039**

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 has been a DOE contractor employee at a DOE facility for many years. The OWA referred the application to an independent physician panel, which determined that two of the applicant's illnesses were related to his work at DOE but that the rest were not. 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 negative determination, particularly with respect to bone pain and peripheral neuropathy.

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.

The Department of Labor (DOL) administers the first program, which provides $150,000 and medical benefits to certain workers with specified illnesses. Those illnesses include beryllium disease and specified cancers associated with radiation exposure. 42 U.S.C. § 7341l(9). The DOL program also provides $50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note.

See 42 U.S.C. § 7384u. To implement the program, the DOL has issued regulations, 20 C.F.R. Part 30, and has a web site that provides extensive information concerning the program. 1/

The DOE administers the second program, which does not itself provide any monetary or medical benefits. Instead, it 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. § 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). 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 worker has been employed at a DOE facility for many years - from 1963 to 1988 and from 1992 to the present. The worker is a technical specialist and has worked with toxic substances, including beryllium, radiation, and cadmium. The applicant requested physician panel review concerning whether his illnesses and symptoms are related to his exposures at DOE.

The physician panel reviewed the application and issued a report. The panel identified the following illnesses or symptoms: prostate cancer, peripheral neurophathy, chronic lung disease, osteomalacia, bone pain, nephrosis, and hypothyroidism. The panel found that cadmium exposure likely caused the prostate cancer and nephrosis. The panel rejected the applicant's claim for the other illnesses, stating that "[t]here is no convincing objective evidence that the other conditions claimed are related to [the worker's] employment." Report at 1.

The OWA accepted the physician panel's determination, and the OWA advised the applicant that he had received a positive

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1/ *See* www.dol.gov/esa.

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

determination. *See* May 22, 2003 Letter from the DOE to the applicant. Because the OWA letter characterized the panel determination as positive, the letter did not mention the right to an appeal. Sometime thereafter, the applicant filed this appeal on the negative part of the determination. The applicant is particularly interested in a determination concerning bone pain and peripheral neuropathy; the applicant states that he has significant medical expenses associated with those problems and, therefore, seeks workers' compensation benefits that includes those problems.

II. Analysis

As stated above, the negative part of the determination consists of a finding that there is "no convincing objective evidence" that the remaining illnesses were related to the applicant's employment at DOE. As explained below, that part of the determination did not meet the requirement of the rule in two respects.

First, the determination's reference to "no convincing objective evidence" indicates that the panel applied an overly stringent standard of proof. The Physician Panel Rule does not require "convincing objective evidence." Rather, it requires that the evidence indicate that it is "at least as likely as not" that an exposure to a toxic substance at DOE was a significant factor in aggravating, contributing to or causing the illness or death. 10 C.F.R. § 852.8. The "at least as likely as not" standard is a standard of proof more favorable to the applicant. *See* 67 Fed. Reg. 52841, 52847-48 (August 14, 2002) (preamble to the Physician Panel Rule explaining Section 852.8). Accordingly, the determination should be remanded for a determination using the appropriate "as least as likely as not" standard.

Second, the determination's failure to provide any further explanation of its negative finding is, in the context of this case, insufficient. The Physician Panel Rule requires that the panel explain "the basis of its determination" of whether the illness arose out of exposure to a toxic substance at DOE. 10 C.F.R. § 852.12(b)(5). Although a summary statement may satisfy this requirement in some cases, a summary statement does not satisfy this requirement in a case such as this, which contains evidence of exposures and multiple illnesses or symptoms potentially related to those exposures. *See Worker Appeal, TIA-0025* (June 30, 2003), www.oha.doe.gov/cases/wa/tia0025.pdf. For this reason, the "basis for the determination" should indicate how the panel evaluated each illness or symptom, and how the panel

viewed the illnesses and symptoms in their totality, i.e., the likelihood that an individual would have suffered from all of the illnesses or conditions in the absence of exposure to toxic substances.

III. Summary and Conclusion

As the foregoing discussion indicates, the determination should be remanded for a determination that applies the correct standard and explains the basis for the determination. *See* 10 C.F.R. §§ 852.8, 852.12(b)(5). The determination should address all of illnesses or symptoms on which the applicant received a negative determination, unless OWA obtains a statement from the applicant limiting the remand to a subset of those illnesses or symptoms.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-00379 be, and hereby is, granted as set forth in paragraph 2 below.

(2) The application that is the subject of Appeal No. TIA-0039 should be remanded to the Office of Worker Advocacy for further consideration.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 25, 2004

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

March 9, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: December 17, 2003

Case No.: TIA-0040

XXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Worker Advocacy Office for DOE assistance in filing for state workers' compensation benefits. The DOE Worker Advocacy Office determined that the applicant was not a DOE contractor employee and, therefore, was not eligible for DOE assistance. The applicant appeals that determination. As explained below, we have concluded that the determination is correct.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act creates two programs for workers.

The Department of Labor (DOL) administers the first EEOICPA program, which provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 7384l(1). The DOL program also provides federal monetary and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, the DOE program provides for an independent physician panel assessment of whether a "Department of Energy contractor employee" has an illness related to exposure to a toxic substance at a DOE facility. 42 U.S.C. § 7385o. 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). The DOE program is limited to DOE contractor employees because DOE and DOE contractors would not be involved in state workers' compensation proceedings involving other employers.

The regulations for the DOE program are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The DOE Worker Advocacy Office is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Pursuant to an Executive Order, 2/ the DOE has published a list of facilities covered by the DOL and DOE programs, and the DOE has designated next to each facility whether it falls within the EEOICPA's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 68 Fed. Reg. 43,095 (July 21, 2003) (current list of facilities). The DOE's published list also refers readers to the DOE Worker Advocacy Office web site for additional information about the facilities. 68 Fed. Reg. 43,095.

This case involves the DOE program, i.e., the program through which DOE contractor employees may obtain independent physician panel determinations. The applicant states that he worked for Harshaw Chemical Co. - Engelhard in Ohio from 1956 to 1966 and was exposed to beryllium during that employment. The DOE Worker Advocacy Office determined that the applicant was employed by an "atomic weapons employer," not a DOE contractor. *See* November 18, 2003

1/ *See* www.eh.doe.gov/advocacy.

2/ *See* Executive Order No. 13,179 (December 7, 2000).

letter from DOE Worker Advocacy Office to the applicant. Accordingly, the DOE Worker Advocacy Office determined that the applicant was not eligible for the physician panel process. In his appeal, the applicant argues that he was a DOE contractor employee.

II. Analysis

A. Worker Programs

As an initial matter, we emphasize that the DOE physician panel process is separate from state workers' compensation proceedings. A DOE decision that an applicant is not eligible for the DOE physician panel process does not affect (i) an applicant's right to file for state workers' compensation benefits or (ii) whether the applicant is eligible for those benefits under applicable state law.

Similarly, we emphasize that the DOE physician panel process is separate from any claims made under other statutory provisions. Thus, a DOE decision concerning the physician panel process does not affect any claims made under other statutory provisions, such as programs administered by DOL and DOJ.

We now turn to whether the applicant in this case is eligible for the physician panel process.

B. Whether the Applicant is Eligible for the DOE Physician Panel Process

As stated above, the Physician Panel Rule applies only to employees of DOE contractors who worked at DOE facilities. Again, the reason is that DOE and its contractors would not be parties to workers' compensation proceedings involving other employers.

When the DOE Worker Advocacy Office determined that the applicant was not a DOE contractor employee, that Office indicated that Harshaw was an "atomic weapons employer," not a DOE contractor. This determination is consistent with the DOE's published list and description of facilities. The only entry for Harshaw defines the firm as an "AWE," i.e., an "atomic weapons employer," during the

period 1942 to 1955, when the firm processed uranium for the government. *See* 67 Fed. Reg. 79,073; www.eh.doe.gov/advocacy (searchable database on sites).

The DOE Worker Advocacy Office determination that the Harshaw plant was not a DOE facility is correct. A DOE facility is a facility where the DOE conducted operations and either had a proprietary interest or contracted with a firm to provide management and operation, management and integration, environmental remediation services, or construction or maintenance services. 42 U.S.C. § 7384l(12); 10 C.F.R. § 852.2. During the applicant's employment, Harshaw was a privately owned and operated chemical company; as of 2001, the site was owned by Englehard Corporation and Chevron Chemical LLC. *See Worker Appeal (Case No. TIA-0017),* 28 DOE ¶ 80,261 (2003). Accordingly, as we have previously held, the Harshaw plant was not a DOE facility.

Because the Harshaw plant was not a DOE facility, the applicant is not eligible for the DOE physician panel process. Again, we emphasize that this determination does not affect whether the applicant is eligible for (i) state workers' compensation benefits or (ii) federal monetary and medical benefits available under other statutory provisions.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0040 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: March 9, 2004

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

February 6, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: January 16, 2004

Case No.: TIA-0042

XXXXXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, we are remanding the application to the OWA for further consideration.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. Generally, if a physician panel issues a determination favorable to

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1/ ***See*** **www.eh.doe.gov/advocacy.**

the employee, the DOE Office of Worker Advocacy accepts the determination and assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). As stated above, the DOE Office of Worker Advocacy is responsible for this program.

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office 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 Program Office. 10 C.F.R. § 852.18(a)(2). *See Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In his application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted on his "Employment History Claim Form" that he worked at the DOE's Hanford facility in Richland, Washington "off and on some time during the 1980's; 1991-1993; and 1995-1996." Record at 7. 2/ During that time, he was a laborer and worked with insulation. His medical evaluation dated November 20, 2000, indicated that he suffers from pleural plaques and asbestos-related disease. This diagnosis was made by a physician, as part of a health screening program offered by the applicant's trade union. Record at 29-30.

The Physician Panel issued a negative determination on this claim. The Panel found as follows: "It was not felt that the . . . asbestos related pleural disease was as least as likely as not . . . due to his on and off employment from 1991-1993 and employment from 1995-1996 in his capacity as a laborer at Hanford. It was the opinion of

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2/ The actual number on this page of the record was obscured by text, but the page itself was located between pages 6 and 8.

the group that his exposure to asbestos during this time period was relatively small and the asbestos related pleural disease found on his chest radiograph in 2000 did not allow a latency period long enough for the pleural disease to be associated with his work at a DOE facility because it is common for this to occur 15 or more years following exposure."

The Panel's decision was adopted by the Office of Worker Advocacy. *See* November 10, 2003 Physician Panel Report. Accordingly, the DOE Office of Worker Advocacy determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits. December 30, 2003 Letter from DOE to the applicant. In his appeal, the applicant contests the Physician Panel's determination that his lung-related condition is not related to his work at the Hanford facility.

II. Analysis

As indicated above, the Panel's negative determination in this case is based on its belief that there was at most a nine-year latency period for the development of the individual's pleural plaques, whereas the Panel considered a 15 year latency period to be necessary. However, as stated above, the applicant indicated in his "Employment History Claim Form" that he worked at Hanford not only during the 1991-1993 and 1995-1996 periods considered by the Panel, but also "off and on in the 1980's." If this is true, then the 15 year latency period referred to by the Panel could well have been achieved.

There is no clear indication that OWA asked Hanford to provide employment information for the applicant regarding the earlier dates, that Hanford ever specifically considered whether the applicant worked at the site during the 1980s, or that Hanford rejected as unsubstantiated the applicant's claim that he worked at the site during the 1980s. It is not clear why the OWA did not ask Hanford whether the applicant worked there during the 1980s, as he claimed. There is also no indication that OWA asked the Panel to consider the employment dates cited by the applicant, and the Panel did not state that it rejected consideration of the earlier period.

This matter is therefore remanded to the OWA for a determination as to whether the applicant was employed by Hanford during the 1980s. If so, the Physician Panel should consider in light of the additional information whether it is at least as likely as not that asbestos exposure at Hanford was a significant factor in causing,

aggravating or contributing to the formation of the applicant's pleural plaques.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0042 be, and hereby is, granted as set forth in Paragraph 2 below.

(2) The application is remanded to the DOE Office of Worker Advocacy for further action in accordance with the above determination.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 6, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

February 24, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Date of Filing: **January 21, 2004**

Case No.: **TIA-0043**

XXXXXXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, the appeal should be denied.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. Generally, if a physician panel issues a determination favorable to the employee, the DOE Office of Worker Advocacy accepts the

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1/ ***See*** **www.eh.doe.gov/advocacy.**

determination and assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). As stated above, the DOE Office of Worker Advocacy is responsible for this program.

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office 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 Program Office. 10 C.F.R. § 852.18(a)(2). *See Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In her application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted that she worked at the DOE's Oak Ridge X-10 plant in Oak Ridge, Tennessee from June 20, 1978 through August 18, 1978. During that time, she was a "Plotter Operator," a clerical position that involved changing computer tapes and printing large documents. She believes that working in the X-10 environment caused her to experience "hypothyroidism" and "stomach problems."

The Physician Panel issued a negative determination on this claim. The Panel found that the applicant'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 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 reaching its determination, the Panel noted that the applicant worked at the X-10 plant for only two months, a relatively short period of time. The Panel also found that there was insufficient information to support

a conclusion that the applicant experienced any significant exposure to a toxic substance while at work. Further, the Panel found it unlikely that the stated conditions could be related to toxic exposure at work, given the 23-year latency period between the onset of the symptoms and the time when the applicant worked at the X-10 plant. The Panel noted that the symptoms that the applicant complains of are common in the normal population and "are not indicative of a specific toxic exposure."

II. Analysis

The applicant seeks review of the Panel's determination. She objects to the fact that the Panel found her two-month work period at the X-10 site to be too short to conclude that her physical conditions were caused by exposure to a toxic substance at a DOE site. She also objects to the Panel's finding that there is insufficient information to support a conclusion that she actually was exposed to any toxic substance while she was at the plant. She believes that the "dust from the building and environment settled on [her] body 24 hours a day," and that she "drank the water from water fountains and ate the food from the cafeteria." She implies that toxic substances were present in the overall environment at the X-10 plant. She blames the lack of records regarding her toxic exposure to the DOE's poor record-keeping, noting that no monitoring records for her were located in the industrial hygiene data bases for monitoring records.

She states that her symptoms developed in approximately 1979, shortly after her work at the plant, thus disputing the 23-year latency period posited by the Panel. However, she indicates that her medical records for the period from 1979 through 1995 are, for various reasons, unavailable.

There is no question that this applicant suffers from several illnesses, including a thyroid condition and stomach problems. However, there is simply no evidence that these conditions were caused by exposure to any toxic substance at the X-10 plant. In fact, there is no evidence that the applicant actually experienced exposure to any toxic substance during her brief employment in a clerical position at that site. Other than stating this possibility, the applicant provides no support for her contention that she was exposed to a toxic substance in the dust, food, air or water at the X-10 plant that caused her illnesses. She has not provided, for example, a diagnosis from her own physician indicating that her conditions were caused by exposure to a toxic substance at

a DOE site. *See, Worker Appeal* (TIA-0029), 28 DOE ¶ 80,303 (October 1, 2003).

The applicant's belief, with nothing more, is not convincing. It does not establish any deficiency or error in the Panel's determination.

Because the applicant has not identified a deficiency or error in the Panel's determination, 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-0043 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: February 24, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

February 26, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: January 28, 2004

Case No.: TIA-0044

XXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The applicant's late husband (the worker) was a DOE contractor employee at a DOE facility. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, the appeal should be denied.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. Generally, if a physician panel issues a determination favorable to

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1/ ***See*** **www.eh.doe.gov/advocacy.**

the employee, the DOE Office of Worker Advocacy accepts the determination and assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). As stated above, the DOE Office of Worker Advocacy is responsible for this program.

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office 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 Program Office. 10 C.F.R. § 852.18(a)(2). *See Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In her application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted that her husband worked at the DOE's Oak Ridge K-25, K-31 and K-33 plants in Oak Ridge, Tennessee from 1971 through 1982. During that time, he was a "Cascade Supervisor," a position that involved machinery repair, thereby exposing him to toxic chemicals used for machinery-cleaning. The applicant believes the exposure caused her husband's 1977 and 1982 heart attacks, his 1980 collapsed lung and a rash which he developed in 1977.

The Physician Panel issued a negative determination on this claim. The Panel 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 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 worker's heart attack, the Physician Panel found that the worker's "exposure to methylene chloride was minimal and not a factor in the development of this claimant's myocardial infarction." 2/ The Panel noted that an explanation for the worker's heart attack might be his history of smoking and hypertension.

The worker's skin rash was diagnosed as psoriasis or actinic keratosis. Two of the three panel members found that the rash was "not reflective of occupational dermatoses." 3/

The Panel reached a unanimous decision that exposure to a toxic substance was unrelated to the worker's collapsed lung. The Panel noted the individual's smoking history as the most probable cause of this condition.

2/ The Panel's determination on this illness was not unanimous. One Panel member believed that exposure to methylene chloride "suggests a possible association" with his myocardial infarction. For this reason, this physician decided that exposure was a contributing factor to the heart attacks. However, this Panel member used an incorrect standard in reaching his decision. As indicated above, the "at least as likely as not" standard is applicable in these cases. However, ultimately, it makes no difference here, since this Panel member was in the minority. We recommend that future Panel members review their determinations carefully in light of the correct standards.

3/ The third Panel member stated that "there was no evidence" of the worker's conditions as "being an occupational dermatitis, but . . . in the absence of patch testing or biopsy findings the possibility of an occupational . . . dermatitis cannot be ruled out." Based on this possibility, this Panel member decided that exposure to a toxic substance was a contributing factor to the skin condition. As discussed in Note 2 above, this standard is incorrect. Again, however, it makes no difference in the outcome of the case.

II. Analysis

The applicant seeks review of the Panel's determination.

A. Heart Attack

The applicant claims that the Panel incorrectly found that smoking and hypertension were the causes of her husband's heart attack. She claims that her husband did not take up smoking until after he had his first heart attack in 1977. She also contends that there is considerable evidence that the worker had normal blood pressure and that he has no history of hypertension. Thus, the applicant challenges the information that the Panel used to state what it believed were the most likely causes of the worker's heart condition. However, the Panel's speculation as to what might have caused the worker's heart attacks is not a proper basis for appeal in this case. The Panel determined, using the correct regulatory standard, that exposure to a toxic substance was not a cause of the worker's heart attacks. Thus, even if the Panel were incorrect in attributing the worker's heart attacks to smoking 4/ and hypertension 5/, this does not mean that it was incorrect in its determination that the disease was not caused by exposure to a toxic substance. In this regard, the applicant has pointed to no information in the record suggesting that the heart attacks were related to exposure to a toxic substance at a DOE facility. Consequently, there is no basis for any reversal or remand on this issue.

4/ The applicant argues that the worker did not begin to smoke until after his first heart attack in 1977. After reviewing the record, we recognize that there is some discrepant information on this point. However, overall, we believe that it is clear from the worker's own statements that he smoked at least 20 cigarettes per day beginning as early as 1960. *E.g.* Record at 139. In any event, as we indicate above, the worker's smoking habits are not the determinative factor.

5/ The applicant correctly points out that there is considerable information in the record to the effect that the worker did not suffer from hypertension. *E.g.*, Record at 154-65. However, as stated in Note 4 above, the Panel's speculation as to what might have been the cause of the worker's condition, even if incorrect, does not form a basis upon which to remand this case for further consideration.

B. Skin Rash

In her appeal, the applicant contends that there is a possibility that the worker's skin rash was caused by lupus. She also maintains that the Panel "could not possibly rule out any possibility of occupational dermatitis." As discussed above, the standard to be applied in these cases is whether it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to or causing the worker's illness or death. The Panel applied that standard here, and there is simply no evidence in the record to suggest that the Panel's conclusion was incorrect. The standard that the applicant proposes, whether there is any possibility that the disease was caused by toxic exposure, is not applicable in these cases. Moreover, the applicant has not pointed to any data in the record either contradicting the Panel's determination or suggesting that the Panel's overall decision was in error. Accordingly, we must reject this aspect of the appeal.

C. Collapsed Lung

The applicant believes that exposure to toxic substances cannot be ruled out as the cause for the collapsed lung. She points out that in their determination, the Panel members acknowledged that "pulmonary function tests showed only minimal changes indicative of chronic tobacco use." The applicant therefore challenges the Panel's conclusion that smoking was the cause of the worker's collapsed lung. As we pointed out in the discussion above regarding the worker's heart condition, the Panel used the correct standard in reaching its conclusion that the lung condition was not related to exposure to a toxic substance at the DOE facility. The fact that the Panel may not have correctly identified the actual cause of the condition claimed does not form the basis for a remand in this case.

The applicant has not shown any errors in the Panel's determination. She has not furnished any contrary information suggesting that the Panel erred. She has not provided, for example, a diagnosis from the worker's own physician indicating that his conditions were caused by exposure to a toxic substance at a DOE site. *See, Worker Appeal* (TIA-0029), 28 DOE ¶ 80,303 (October 1, 2003).

The applicant's belief, with nothing more, is not convincing. It does not establish any deficiency or error in the Panel's determination.

Because the applicant has not identified a deficiency or error in the Panel's determination, 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-0044 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: February 26, 2004

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

May 5, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: February 3, 2004

Case No.: TIA-0045

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's late husband, XXXXXXXXXX (the Worker), was a DOE contractor employee at a DOE facility for many years. An independent physician panel (the Physician Panel or the Panel) determined that the Worker's illness was not related to his work 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 granted in part.

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.

The Department of Labor (DOL) administers the first program, which provides $150,000 and medical benefits to certain workers with specified illnesses. Those illnesses include beryllium disease and specified cancers associated with radiation exposure. 42 U.S.C. § 7341l(9). The DOL program also provides $50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u. To implement the program, the DOL has

issued regulations, 20 C.F.R. Part 30, and has a web site that provides extensive information concerning the program. 1/

The DOE administers the second program, which does not itself provide any monetary or medical benefits. Instead, it 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. § 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). 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. Factual Background

The Worker was a DOE contractor employee at the DOE's Oak Ridge Y-12 facility. The Worker was a laborer and material handler. He began working at the site in 1952 at the age of 39; he stopped working in 1972 at the age of 59, when he received a disability termination based on arthritis. Record at 17, 159, 236-37. In 2001, the Worker died at the age of 88. *Id.* at 27. The death certificate listed pneumonia as the immediate cause of death and "CHF" (chronic heart failure) and diabetes as conditions leading to the immediate cause. *Id.*

In her application for physician panel review, the Applicant listed two conditions: "basal cell carcinoma" and "skin disease." The Physician Panel issued a report limited to basal cell carcinoma of a nasolacrimal duct. The Panel agreed that the worker had the illness, but concluded that it was not related to his employment at DOE. Report at 1. The Panel noted that basal cell carcinoma was common in the general population, that the Worker's carcinoma was located on a sun-exposed area, and that the Panel did not see

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1/ *See* www.dol.gov/esa.

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

evidence of an acute radiation exposure or other exposure that might have been a factor. *Id.*

The OWA accepted the Physician Panel's determination. S*ee* OWA January 9, 2004 Letter. The Applicant then filed the instant appeal.

In her appeal, the Applicant maintains that the Physician Panel determination is not correct. The Applicant argues that the Worker had "extensive skin cancers" that were related to radiation exposure at DOE.

II. Analysis

The Physician Panel Rule specifies what a physician panel must include in its determination. The panel must address each claimed illness, make a finding whether that illness arose out of and in the course of the worker's DOE employment, and state the basis for that finding. 10 C.F.R. § 852.12.

The Physician Panel identified basal cell carcinoma of the nasolacrimal duct as a claimed illness, and the Physician Panel addressed the matters required by the Rule. The Panel concluded that the illness was "most likely *not* related" to exposures at DOE. The Panel explained:

> Particular note was the fact that this lesion was in a sun-exposed area and occurred many years after his medical termination from Oak Ridge in 1972.
>
> . . . [B]asal cell carcinomas are very common in the population in general. Finally, there were no dose reconstruction records to suggest any acute radiation exposure, which could have been a risk factor. Other occupational causes of basal cell carcinomas, such as working in tar, or with pesticides or herbicides, or arsenic ingestion were not found in the records.

Report at 1. As the foregoing indicates, the Panel addressed the illness, made a determination, and explained the basis for its determination. Accordingly, for basal cell carcinoma of the nasolacrimal duct, the Panel determination complies with the requirements of the Rule.

Moreover, there is nothing in the record to indicate that the Physician Panel made a substantive error. The Panel correctly noted the absence of a dose reconstruction in the record, and the record contains no other exposure information - the site reported that it had no industrial hygiene records for the Worker, and the site clinic records for the Worker do not reference exposures. Record at 29, 124. Furthermore, the Panel explained its opinion, and there is no contrary medical opinion in the record. Accordingly, for basal cell carcinoma of the nasolacrimal duct, the Panel determination is consistent with the record.

The Applicant's argument on appeal is that the Worker was exposed to radiation, despite the absence of exposure data. This argument is not a basis for concluding that the Panel determination is incorrect. Moreover, the Applicant will be receiving new information concerning the Worker's radiation exposure. The DOL has referred the Applicant's DOL claim to the National Institute of Occupational Safety and Health (NIOSH) for a dose reconstruction. Record at 29. If the Applicant receives a dose reconstruction that she believes is significant new information, the Applicant may request further panel review.

Although we find no error with respect to the Physician Panel determination on the basal cell carcinoma of the nasolacrimal duct, the Panel did err in its failure to consider a second claimed illness: skin disease. Record at 2. The record indicates that the skin disease claim refers to a basal cell carcinoma of the scalp. Record at 40. The Panel did not consider this claim separately or in conjunction with the eyelid claim. Although it appears that the Panel's analysis on the eyelid claim would apply equally to the scalp claim, we remand the application to OWA for their consideration of that issue.

III. Summary and Conclusion

As the foregoing discussion indicates, we have not identified any Panel error concerning the claim of basal cell carcinoma of the nasolacrimal duct. As the foregoing discussion also indicates, the Applicant's claim of basal cell carcinoma of the scalp should be remanded to OWA for further consideration.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0045 be, and hereby is, granted as set forth in paragraph 2 below.

(2) The application that is the subject of the Appeal should be remanded to the Office of Worker Advocacy for further consideration of the Applicant's claim.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 5, 2004

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

April 29, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: February 4, 2004

Case No.: TIA-0046

XXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Worker Advocacy Office for DOE assistance in filing for state workers' compensation benefits based on the employment of his late father, XXXXXXXXXX (the worker). The DOE Office of Worker Advocacy (OWA) determined that the applicant was not a DOE contractor employee and, therefore, was not eligible for DOE assistance. The applicant appeals that determination. As explained below, we have concluded that the determination is correct.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act creates two programs for workers.

The Department of Labor (DOL) administers the first EEOICPA program, which provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 7384l(1). The DOL program also provides federal monetary and medical benefits for uranium workers who receive a

benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u.

The DOE administers the second EEOICPA program, which does not directly provide for monetary or medical benefits. Instead, the DOE program provides for an independent physician panel assessment of whether a "Department of Energy contractor employee" has an illness related to exposure to a toxic substance at a DOE facility. 42 U.S.C. § 7385o. 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. 42 U.S.C. § 7385o(e)(3). The DOE program is specifically limited to DOE contractor employees, because the DOE would not be involved in state workers' compensation proceedings involving the employees of other firms.

The regulations for the DOE program 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. 1/

Pursuant to an Executive Order, 2/ the DOE has published a list of facilities covered by the EEOICPA, and the DOE has designated next to each facility whether it falls within the EEOICPA's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 68 Fed. Reg. 43,095 (July 21, 2003) (current list of facilities). The DOE's published list also refers readers to the OWA web site for additional information about the facilities. 68 Fed. Reg. 43,095.

This case concerns the DOE program. The applicant also applied to the DOL program for the $150,000 benefit and is awaiting a decision. The decision in this case does not affect the DOL proceeding.

1/ *See* www.eh.doe.gov/advocacy.

2/ *See* Executive Order No. 13,179 (December 7, 2000).

B. Procedural History

In his application, the applicant states that his father was employed by Bethlehem Steel, at its Lackawanna, New York plant, from approximately 1934 to 1975. The applicant states that his father became ill as the result of toxic exposures during that employment.

The OWA determined that the worker was not a DOE contractor employee. Instead, the OWA indicated that the worker was employed by an atomic weapons employer. *See* January 9, 2004 letter from OWA to the applicant. Accordingly, the OWA determined that the applicant was not eligible for the physician panel process.

In his appeal, the applicant disagrees with the OWA determination. The applicant maintains that Bethlehem Steel did atomic weapons work for the DOE and, therefore, DOE should compensate the applicant for the worker's illness.

II. Analysis

The DOE physician panel process is designed to eliminate an impediment to state workers' compensation claims filed by DOE contractor employees. See 67 Fed. Reg. 52841, 52842. Specifically, the process is designed to eliminate DOE opposition to claims based on illnesses that arose from toxic exposures during employment at DOE facilities. *Id.* The purpose of the process is to "ensure that DOE will assist, rather than hinder," the claims that receive a positive physician panel determination. 67 Fed. Reg. 52841, 52842 (August 14, 2002).

The Act and the implementing rule define DOE contractor employees as those employed at a DOE facility by a firm that manages or provides other specified services at the facility. 42 U.S.C. § 7384; 10 C.F.R. 852.2. The rule does not apply to atomic weapons employers because DOE would not be involved in state workers' compensation claims filed by their employees.

The DOE list of EEOICPA facilities does not identify the Bethlehem plant as a DOE facility. Instead, the list designates the Bethlehem Steel plant as an "atomic weapons employer facility." The Act defines an "atomic weapons employer" as

> an entity, other than the United States, that -
>
> (A) processed or produced, for use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining and milling; and
>
> (B) is designated by the Secretary of Energy as an atomic weapons employer for purposes of the compensation program.

42 U.S.C. 7384; 10 C.F.R. § 852.2. The DOE web site description states that the plant developed rolling mill pass schedules to be used in the planned uranium milling operation at DOE's Fernald facility. The description also states that the plant performed uranium rolling experiments to help design the Fernald rolling mill. 3/ This description is consistent with DOE's report on the plant under the Formerly Utilized Sites Remedial Action Program (FUSRAP). *See* FUSRAP Considered Sites Database Report, www.em.doe.gov (searchable database under the word "resources") (accessed April 19, 2004).

In prior decisions, we have held that the Bethlehem Steel plant was not a DOE facility. *See Worker Appeal,* Case No. TIA-0055, 28 DOE ¶ 80,331 (2004); *Worker Appeal,* Case No. TIA-0010, 28 DOE ¶ 80,261 (2003). In those cases, we noted that under the EEOICPA and the Physician Panel Rule, a DOE facility is a facility (i) where DOE or its predecessors 4/ conducted operations and (ii) where DOE had a proprietary interest or contracted with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services. 42 U.S.C. § 7384; 10 C.F.R. 852.2. We concluded that the DOE description of the work at the plant did not indicate that DOE conducted operations at the plant, had a proprietary interest in the plant, or had a contract with the

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3/ The Fernald rolling mill began operations in 1952. The DOE's web site contains a report describing DOE facility operations, including Fernald. *See* www.eh.doe.gov/legacy.

4/ DOE predecessors include the Manhattan Engineering District, the Atomic Energy Commission, and the Energy Research and Development Administration. *See* 10 C.F.R. § 852.2 (a definition of DOE).

entity to provide management and operation, management and integration, environmental remediation services, or construction or maintenance services. Accordingly, we concluded that the plant did not fall within the definition of a DOE facility.

The same analysis applies to the instant appeal. The fact that a facility performed atomic weapons work does not render the plant a DOE facility: the Act provides a specific definition of DOE facility, which distinguishes it from other facilities that performed atomic weapons work for the DOE. Again, this makes sense because DOE would not be involved in any state workers' compensation proceeding involving atomic weapons employer facilities. Accordingly, the benefit of the process - that DOE not oppose the claim directly or indirectly through its contractor - would have no value to a worker at an atomic weapons employer facility.

As the foregoing indicates, the worker was not employed at a DOE facility and, therefore, the applicant is not eligible for the physician panel process. This determination does not affect whether the applicant is eligible for (i) a DOL award or (ii) state workers' compensation benefits.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0046 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: April 29, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

March 17, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Date of Filing: **February 3, 2004**

Case No.: **TIA-0047**

XXXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The applicant's late husband (the worker) was a DOE contractor employee at a DOE facility. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, this matter should be remanded to OWA for further action.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Part D establishes a DOE process through which independent Physician Panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. Generally, if a Physician Panel issues a determination favorable to the employee, the DOE Office of Worker Advocacy accepts the determination, and instructs the contractor not to oppose the claim unless required by law to do so. The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. 10 C.F.R.

1/ ***See*** **www.eh.doe.gov/advocacy.**

Part 852. As stated above, the DOE Office of Worker Advocacy is responsible for this program.

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office 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 Program Office. 10 C.F.R. § 852.18(a)(2). *See Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In her application, the applicant asserted that from 1951 through 1953, her husband worked as a pipefitter at the DOE's Paducah, Kentucky gaseous diffusion plant. *See* 10 C.F.R. § 852.2. The worker died in 1996 of heart disease. The applicant believes that exposure to asbestos at the plant caused her husband to suffer from asbestosis and lung cancer.

The Physician Panel issued a negative determination on this claim. The Panel 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 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 applicant's claim of asbestosis, the Panel noted that the worker's "employment at Paducah with the possible exposure to asbestos may be related to the development of his benign asbestos induced pleural disease." The Panel noted that the worker's medical "records do not reveal any . . . test in which he was found to have asbestosis." It was also the opinion of the Panel that the worker did not suffer from asbestosis. Accordingly, the Panel issued a negative determination with respect to this illness. The Panel did not address whether it is at least as likely as not that the worker's pleural disease was caused, aggravated or contributed to by exposure to asbestos at a DOE facility. The Panel also did not address the applicant's lung cancer claim.

II. Analysis

The applicant seeks review of the Panel's determination, maintaining that the Panel did not reach a complete determination on this claim. The applicant indicates that a determination should have been made not only on the asbestosis claim, but also on lung cancer. She asks that a review of the file be made with respect to lung cancer and has enclosed pathology reports and a final hospital discharge report for her husband with respect to this disease. This evidence was also in the record sent to the Panel. In her appeal, the applicant does not challenge the Panel's rejection of the asbestosis claim.

A. Asbestos Related Disease

It is clear that the record in this case does not show that the worker suffered from asbestosis. However, as the Panel recognized, the worker was diagnosed in 1986 with benign asbestos-induced pleural disease. It was the opinion of the Panel that the worker's employment at Paducah "with his possible exposure to asbestos may be related to the development of his Benign Asbestos Induced Pleural Disease." However, since the applicant's claim was based on asbestosis, from which the worker did not suffer, and not on "asbestos-induced pleural disease," the Panel issued a negative determination.

As a rule, Physician Panels in these cases are not expected to reach out and consider illnesses not specifically claimed by an applicant. For example, if an applicant bases a claim on asbestosis, a Panel is not expected to consider whether a worker's diagnosed skin cancer was caused by exposure to a toxic substance at a DOE facility. However, in this case, even though the worker did not suffer from the claimed disease, asbestosis, he clearly did suffer from a related lung condition caused by exposure to the same substance, asbestos. The Panel specifically recognized that the worker suffered from asbestos-induced pleural disease. This condition is considered to be a precursor to asbestosis, as well as an independent disease. Some applicants perceive asbestosis to include pleural disease, and for this reason do not request separate consideration of that illness. In this situation, I believe that the Panel should have considered whether it is at least as likely as not that exposure to asbestos at the Paducah Plant was a significant factor in aggravating, contributing to or causing the worker's asbestos-induced pleural disease.

Accordingly, I will remand this case to the OWA for further action on this issue.

B. Lung Cancer

The record regarding the lung cancer claim is not a consistent one. In an April 2002 document entitled "Request for Review by Medical Panels,"

the applicant claimed lung cancer as the illness caused by her husband's work at Paducah that she wished the Panel to consider. Asbestosis was not mentioned. Record at 2. However, the record refers to a telephone conversation of August 13, 2003, in which the applicant was asked whether she was claiming both asbestosis and lung cancer. The record states that the applicant replied that she was claiming only asbestosis. Record at 18. Accordingly, this case was sent to the Physician Panel for review solely on the asbestosis claim. The applicant now maintains that she intended that both illnesses be reviewed. She does not recall the August 13 phone conversation, although she does not deny that it took place. See Memorandum of March 9, 2004 telephone conversation with applicant.

As indicated above, a Physician Panel is not expected to issue a determination with respect to an illness not claimed by the applicant. It is clear that the lung cancer matter was not sent to the Panel as a disease to consider. Therefore, the Panel did not err in not considering this illness.

Overall, it appears to me that at one point the applicant did request that lung cancer be omitted from her application. The applicant now seems confused about this issue. As a matter of common sense, I believe that the applicant must have made a mistake in asking that the lung cancer claim be excluded. Given that I am remanding this case on the issue of pleural disease, I believe that as part of that remand, the Panel should consider the lung cancer claim. 2/

Accordingly, the appeal should be granted and this matter should be remanded to the OWA for further action consistent with this Decision.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0047 be, and hereby is, granted as set forth in Paragraph 2 below.

(2) The application is remanded to the DOE Office of Worker Advocacy for further action in accordance with the above determination.

(3) This is a final Order of the Department of Energy.

2/ But for her confusion and the fact that this case is being remanded on the pleural disease issue, the applicant would be required to file a new application with OWA for consideration of the lung cancer issue.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 17, 2004

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

June 25, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Date of Filing: **February 6, 2004**

Case No.: **TIA-0048**

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 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. The Act provides for two programs.

The Department of Labor (DOL) administers the first program, which provides $150,000 and medical benefits to certain workers with specified illnesses. Those illnesses include beryllium disease and specified cancers associated with radiation exposure. 42 U.S.C. § 7411(9). The DOL program also provides $50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u. To implement the program, the DOL has

issued regulations, 20 C.F.R. Part 30, and has a web site that provides extensive information concerning the program. 1/

The DOE administers the second program, which does not itself provide any monetary or medical benefits. Instead, it 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. § 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). 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. Factual Background

The Applicant has been diagnosed with sarcoidosis. The record contains a report on that illness by the National Heart, Blood, and Lung Insitute of the National Institute of Health. Record at 1006-19. The report describes the disease as causing inflammation that produces small lumps (also called nodules or granulomas) in the tissues. Record at 1006-07. The report states that the cause of the disease is not known. Record at 1008. Finally, the report states that some other diseases produce sarcoidosis-like reactions:

> The doctor confirms the diagnosis of sarcoidosis by eliminating other diseases with similar features. These include berylliosis (a disease resulting from exposure to beryllium metal), tuberculosis, farmer's lung disease (hypersensitivity pneumonitis), fungal infections, rheumatoid arthritis, rheumatic fever, and cancer of the lymph nodes (lymphoma).

1/ *See* www.dol.gov/esa.

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

Record at 1010. Accordingly, if a patient with sarcoidosis-like lung symptoms tested positive for beryllium sensitivity, the patient would have a diagnosis of beryllium disease.

The Applicant was employed as a laborer and clerk by DOE contractors at the X-10 plant at the DOE's Oak Ridge facility. The Applicant began working at the site in 1974 at the age of 18; his employment ended in 1988 at the age of 32. When his employment ended, he applied for disability benefits. Record at 12, 28, 976-77. *See also* Record at 974, 1109. He also filed for state workers' compensation benefits, based on a back injury and on a diagnosis of sarcoidosis. Record at 980-84. With respect to the sarcoidosis, he maintained that his work included planting pine trees and he was exposed to fungus in pine pollen. Record at 982-83.

In his application to the DOE, the Applicant listed sarcoidosis as his claimed illness. Record at 2. With respect to his exposures, the Applicant stated that he "worked [at] burial grounds, worked around asbestos, worked in hot cells (bldg. 3017)." Record at 9. The file includes extensive medical documentation concerning the diagnosis of sarcoidosis. The file also contains the results of a beryllium sensitivity test, which was negative. Record at 861-62.

In addition to his DOE application. the Applicant filed a claim at DOL based on sarcoidosis. Record at 5. The record contains information on the case development phase of that proceeding. Record 951, 962-64. During that phase, the DOL noted that sarcoidosis was not a covered disease under its program, but stated that it would consider whether the Applicant had chronic beryllium disease. The most recent DOL document in the record indicates that DOL furnished the Applicant's records to a physician for review. Although no further DOL information is in the record, the Applicant, on appeal, states that DOL did find that he has chronic beryllium disease.

In considering the DOE application, the Physician Panel found that the Applicant had sarcoidosis, but the Panel did not render a positive determination. Instead, the Panel found that the sarcoidosis was not related to a toxic exposure at DOE. The Panel specifically considered whether the Applicant might have beryllium disease. The Panel stated:

> Patient worked in a DOE facility (Oak Ridge) where beryllium was used prior to developing disease, and he reported personal

> exposure to beryllium. Records obtained from OWA indicate that beryllium had been used at the facility where he was employed.
>
> He had a biopsy-proven diagnosis of sarcoidosis. He was treated for sarcoidosis with prednisone, which can lead to aseptic necrosis of the femoral head. He did develop this condition, requiring hip surgery.
>
> His medical records indicate one beryllium test which appears to be a blood lymphocyte transformation test for beryllium. The test would be expected to be positive for beryllium disease - which is clinically very similar to sarcoidosis. In his medical record, this test is reported as negative.
>
> Based on this available information, the patient's sarcoidosis does not appear to have been cause by occupational exposures. However, if he has further testing for beryllium sensitization, either blood or broncho-alveolar lavage, which is positive, then his case should be re-reviewed.

Report at 1. The OWA accepted the Physician Panel's determination. See OWA February 2, 2004 Letter. The Applicant then filed the instant appeal.

In his appeal, the Applicant maintains that the Physician Panel determination is not correct. His arguments are considered below.

II. *Analysis*

The Applicant argues that the Physician Panel determination is inconsistent with a court decision on his state workers' compensation claim. As we understand his appeal, he maintains that a lower court granted his claim, but that a higher court reversed on statute of limitations grounds. He also argues that the Panel determination is inconsistent with a DOL determination that he has chronic beryllium disease.

As an initial matter, we note that the record does not contain the court decision on the Applicant's state workers' compensation claim or the DOL determination on his DOL application. Accordingly, the Panel did not have the opportunity to review those records.

More importantly, positive determinations or medical opinions in other contexts do not, themselves, indicate Panel error. The Physician Panel Rule requires that the independent physicians, who are panel members, render an opinion. 10 C.F.R. § 852.10. Because the physicians are rendering an opinion, the existence of contrary opinions or determinations do not, themselves, indicate Panel error.

In this case, we see no basis for finding Panel error. The Panel agreed that the Applicant had the claimed illness - sarcoidosis - so the only remaining issue is whether that illness is related to a toxic exposure at DOE. The Panel brought its expertise to bear on that issue, and we find no basis for concluding that it erred.

The Applicant originally attributed his sarcoidosis to planting pine trees - specifically exposure to a fungus in pine pollen. The record indicates that the cause of sarcoidosis is unknown, Record at 1008, and the record does not have a more specific diagnosis linking his illness to a fungus in pine pollen.

The Applicant now attributes his condition to beryllium exposure. As indicated above, the cause of sarcoidosis is unknown, and the Panel relied on the Applicant's negative test result for beryllium sensitivity in concluding that the record did not indicate that he had beryllium disease. The Panel specifically stated that if a future test was positive, the case should be re-reviewed. The Panel's reliance on the Applicant's negative beryllium sensitivity test is consistent with statutory and regulatory recognition of the probative value of the test. *See* 42 U.S.C. § 7384l(13); 64 Fed. Reg. 68,854, 68,856 (1999) (DOE Chronic Beryllium Disease Prevention Program).

In sum, we see no basis for finding the Panel's determination was in error or was arbitrary and capricious. If the Applicant has addition information about his condition, or if he obtains a positive beryllium sensitivity test in the future, he may request further panel review based on that information.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0048 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: June 25, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

April 15, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Date of Filing: **February 6, 2004**

Case No.: **TIA-0049**

XXXXXXX (the applicant or the worker) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The applicant was a DOE contractor employee at a DOE facility. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, this matter should be remanded to OWA for further action.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Part D establishes a DOE process through which independent Physician Panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses.

1/ ***See*** **www.eh.doe.gov/advocacy.**

Generally, if a Physician Panel issues a determination favorable to the employee, the DOE Office of Worker Advocacy accepts the determination, and instructs the contractor not to oppose the claim unless required by law to do so. The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. As stated above, the DOE Office of Worker Advocacy is responsible for this program.

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office 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 Program Office. 10 C.F.R. § 852.18(a)(2). *See Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In his application, the applicant asserted that from 1945 through 1990, he worked as a maintenance mechanic at the K-25 Plant at DOE site in Oak Ridge, Tennessee. He indicated that he routinely worked with friable asbestos in performing compressor maintenance. The applicant believes that exposure to asbestos at the plant caused him to suffer from asbestosis and chronic obstructive pulmonary disease (COPD).

The Physician Panel issued a negative determination on this claim. The Panel 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 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 applicant's claim of asbestosis, the Panel noted that the worker "does exhibit calcified pleural plaques and mild scarring of lung base. . . consistent with past asbestos exposures." However, the Panel concluded that "Claimant's file contains no indication that the diagnosis of asbestosis has been made by competent medical authority."

It was thus the opinion of the Panel that the worker did not suffer from asbestosis. Accordingly, the Panel issued a negative determination with respect to this illness.

With respect to the applicant's claim of COPD, the Panel found that the applicant's medical records do not show that he has been diagnosed with COPD, but rather that he has been diagnosed with and is being treated for asthma. It was the Panel's opinion that only asthma patients with unremitting airflow obstruction are considered to have COPD. The Panel noted that "the 6/18/03 medical record entry indicates that the claimant's chest is 'clear'; and the entry of 5/22/01 indicates that as a 74 y/o claimant was 'running a mile and a half . . .with no difficulty.'" The Panel also stated that "nothing in the claimant's file indicates that exposure to a toxic substance while a contract employee at a DOE facility contributed to claimant developing asthma ten years after his retirement."

II. Analysis

The applicant appeals the Panel's determination, maintaining that the Panel's decision was incorrect.

A. Asbestosis/Asbestos Related Disease

The applicant asks for a review of the rejection of his claim of asbestosis based on his lung nodule.

It is clear that the record in this case does not show that the worker suffered from asbestosis. As the Panel recognized, the worker was diagnosed in 2000 with "calcified pleural plaques and mild scarring of lung base on CT scan of chest, consistent with past asbestos exposure." The Panel also determined that "the claimant's file contains no indication that the diagnosis of asbestosis has been made by a competent medical authority." Since the applicant's claim was based on asbestosis, from which the worker did not suffer, and not on "pleural plaques," the Panel issued a negative determination.

As a rule, Physician Panels in these cases are not expected to reach out and consider illnesses not specifically claimed by an applicant. For example, if an applicant bases a claim on asbestosis, a Panel is not expected to consider whether a worker's diagnosed skin cancer was caused by exposure to a toxic substance at a DOE facility. *Worker Appeal* (Case No. TIA-0047), 28 DOE ¶ 80,333 (March 17, 2004). However, in this case, even though the worker does not suffer from the claimed disease, asbestosis, he clearly has a related lung

condition caused by exposure to the same substance, asbestos. The Panel specifically recognized that the worker suffered from pleural plaques "consistent with past asbestos exposures." Further, the Panel stated that, "given claimant's job title of Maintenance Mechanic, it can be assumed that claimant could well have been exposed to some level of airborne asbestos on a periodic basis while working as a contract employee with DOE. If claimant were to develop asbestos-related illness at some future date, the Physician Panel concludes that it would be *equally as likely as not* that this presumed and undocumented exposure to asbestos had significantly contributed to that future disease." (Emphasis in original.)

I believe that a re-evaluation of the Panel's negative determination is warranted. Pleural plaques is considered to be a precursor to asbestosis. Many applicants perceive asbestosis to include pleural disease, and for this reason do not request separate consideration of that illness. In this situation, I believe that the Panel should have specifically considered whether it is at least as likely as not that exposure to asbestos at the Oak Ridge K-25 Plant was a significant factor in aggravating, contributing to or causing the worker's asbestos-induced pleural disease. In its statement "if the claimant were to develop asbestos-related illness. . ." the Panel appears to have rejected the possibility that pleural plaques is an asbestos-related illness. However, it is our understanding that OWA considers pleural plaques to be an illness for purposes of the Physician Panel rule. Accordingly, if, upon remand, the Panel should maintain its stated conclusion that pleural plaques is not an asbestos-related illness, it should fully explain its rationale.

Accordingly, I will remand this case to the OWA for further action on this issue.

B. COPD

The applicant also appeals the Panel's decision regarding his assertion that he suffers from COPD. He contends that the statement that he ran a mile and a half with no difficulty in 2001 is incorrect and that he has not been "able to run for many years." Even if, contrary to the indication in his medical records, the applicant has not been able to run for many years, this does not mean that he in fact suffers from COPD, or that the Panel's determination was incorrect. As the Panel noted, the record does not support a diagnosis of occupationally related COPD. In fact, there is no mention of COPD in the applicant's medical record submitted in this proceeding. While the applicant has been diagnosed with asthma, the Panel concluded that in this case it does

not mean that the applicant has COPD. There is no evidence in the record supporting the claim that the applicant's asthma and COPD are synonymous. Further, the Panel found no exposure to a toxic substance at a DOE facility contributed to the applicant's asthma. There is no contrary evidence in the record of this case. Therefore, I will not grant the appeal with respect to COPD.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0049 be, and hereby is, granted as set forth in Paragraph 2 below.

(2) The application is remanded to the DOE Office of Worker Advocacy for further action in accordance with the above determination.

(3) This is a final Order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 15, 2004

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

June 15, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: February 10, 2004

Case No.: TIA-0050

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) did not find that the Applicant had 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 granted and the matter remanded for further consideration.

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.

The Department of Labor (DOL) administers the first program, which provides $150,000 and medical benefits to certain workers with specified illnesses. Those illnesses include beryllium disease and specified cancers associated with radiation exposure. 42 U.S.C. § 7341l(9). The DOL program also provides $50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u. To implement the program, the DOL has

issued regulations, 20 C.F.R. Part 30, and has a web site that provides extensive information concerning the program. 1/

The DOE administers the second program, which does not itself provide any monetary or medical benefits. Instead, it 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. § 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). 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. Factual Background

The Applicant was a DOE contractor employee at the DOE's Savannah River Site facility. He began working at the site in 1984 at the age of 38; he stopped working in 1997 at the age of 51, when he received a medical termination based on a foot disorder and resulting pain. Record at 12, 101, 540. After he left employment at DOE, the Applicant became ill with pneumonia several times. In 2002, a bout of pneumonia necessitated the removal of the lower part of his right lung.

In his application, the Applicant claimed that his foot disorder was caused by his employment at DOE. During the case development process, he requested that a "lung condition" be added to his application.

The Physician Panel found that the worker had the claimed foot disorder, but did not render a positive determination on that disorder. Instead, the Panel found that the illness was not related to exposure to a toxic substance at DOE. In doing so, the

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1/ *See* www.dol.gov/esa.

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

Panel addressed the Applicant's claim that the disorder was related to standing, walking, and running on the job.

The Panel found that the worker had a lung condition, but did not render a positive determination on that illness. The Physician Panel thoroughly addressed the issue of whether the lung condition was chronic obstructive pulmonary disease (COPD), beryllium disease, asbestosis, or pleural plaques. The Panel found that the Applicant did not have these conditions and discussed those findings in detail. In the narrative explanation of its negative determination on COPD, the Panel found that the Applicant had a serious lung condition but attributed that condition largely to a 2002 illness and surgery rather than a progression of pre-existing borderline restrictive lung disease. The Panel did not expressly address whether it was as least as likely as not that a toxic exposure at DOE was a significant factor in causing, aggravating, or contributing to the worker's lung condition.

The OWA accepted the Physician Panel's determination. *See* OWA January 27, 2004 Letter. The Applicant then filed the instant appeal.

In his appeal, the Applicant maintains that the Physician Panel determination is not correct. The Applicant's arguments are discussed below.

II. Analysis

A. Whether the Panel Determination Meets the Requirements of the Physician Panel Rule

The Physician Panel Rule specifies the matters that a physician panel must address in its determination. The panel must address each claimed illness, make a finding whether that illness was related to exposure to a toxic substance at a DOE facility, and state the basis for that finding. 10 C.F.R. § 852.12.

For the foot disorder, the Physician Panel determination addressed the matters required by the Rule. The Panel discussed the Applicant's claim that the disorder was related to standing, walking, and running on the job. The Panel found that the illness was not related to exposure to a toxic substance at DOE.

For the claimed "lung condition," Physician Panel determination did not address the matters required by the Rule. The Panel found that

the Applicant has a serious lung condition and it appears to us that the Panel found that the Applicant has restrictive lung disease. Although the Panel discussed this condition in the narrative of its determination on COPD, the Panel did not make the required finding, i.e., whether it is at least as likely as not that exposure to a toxic substance during employment at DOE was a significant factor in causing, aggravating, or contributing to that condition. 10 C.F.R. § 852.12. Because the Panel report did not make the required finding on the Applicant's lung condition, the application should be remanded for further review.

B. Whether the Panel Erred in the Findings That it Did Make

1. Foot Disorder

The Applicant challenges the negative determination on his foot disorder. The Applicant argues that his foot disorder is related to his job at DOE, specifically his standing, walking, and yearly test of running a mile and one-half in a certain time. This argument does not indicate Panel error.

The Physician Panel Rule is limited to illnesses that are related to exposure to a toxic substance. 10 C.F.R. § 852.1(a)(3). Standing, walking, and running are physical activities - not "substances," let alone "toxic" substances. *Id.* § 852.2. Accordingly, the Panel correctly concluded that the disorder was not related to exposure to a toxic substance at a DOE facility.

2. Lung Condition

The Applicant alleges exposure to toxic substances that could cause COPD, CBD, asbestosis, and pleural plaques. The Panel found that the Applicant did not have those illnesses and this finding is consistent with the two letters submitted by the Applicant's pulmonary specialist. See Letters Dated May 13, 2003 and February 18, 2004. Accordingly, there is no basis for finding Panel error with respect to those findings.

The Applicant also argues that the Panel incorrectly attributed his lung condition to his 2002 illness and surgery. The Applicant supplies a February 18, 2004 letter from his pulmonary specialist, which states that the Applicant's pulmonary function tests declined after his DOE employment but prior to the illness and surgery, thereby indicating that his lung disease pre-dated his 2002 illness and surgery.

The February 18, 2004 letter contains new information that the Panel did not have a chance to consider. The record sent to the Panel did not contain the results of any pulmonary function tests between 1997, when the Applicant's employment at DOE ended, and the fall of 2002, when the Applicant became ill with pneumonia and had surgery. Thus, the record did not contain the pulmonary function tests referred to in the February 18, 2004 letter. This new information should be included in the record of any subsequent review.

Finally, we note that the Panel did not address the Applicant's claim that his lung condition is the result of the smoking of a co-worker, i.e., secondhand smoke. We see nothing in the statute or the Rule to suggest that Congress intended the phrase "toxic substance" to extend to smoke produced by the tobacco use of co-workers. Accordingly, there was no reason for the Panel to consider this claimed exposure.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0050 be, and hereby is, granted as set forth in Paragraph 2.

(2) The Application that is the subject of this Appeal is remanded for further consideration.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: June 15, 2004

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April 21, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: February 10, 2004

Case No.: TIA-0051

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 has been a DOE contractor employee at a DOE facility for many years. The OWA referred the application to an independent physician panel, which determined that the Applicant's illness was not related to his work 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), challenging the panel's determination.

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.

The Department of Labor (DOL) administers the first program, which provides $150,000 and medical benefits to certain workers with specified illnesses. Those illnesses include beryllium disease and specified cancers associated with radiation exposure. 42 U.S.C. § 7341l(9). The DOL program also provides $50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u. To implement the program, the DOL has issued regulations, 20 C.F.R. Part 30, and has a web site that provides extensive information concerning the program. 1/

1/ *See* www.dol.gov/esa.

The DOE administers the second program, which does not itself provide any monetary or medical benefits. Instead, it 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. § 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). 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. Factual Background

The Applicant has been employed at a DOE facility for many years - from 1967 to 1986. He is a machinist and has claimed to have worked with toxic substances, including beryllium, uranium, and asbestos. The Applicant requested physician panel review concerning whether his asthma and his "asbestos related lung disease" (pleural plaques - a scarring of the lining of the lungs) are related to his exposures at DOE.

The physician panel reviewed the application and issued a report. *See* OWA Physician Panel Report (November 11, 2003) (Report). The panel found that with regard to the "asbestos related pleural plaques" there was no evidence in the record (other than the Applicant's own self-reporting) to confirm that the Applicant had actually been exposed to asbestos during his employment at DOE. The Report went on to state that the pleural scarring could be legitimately ascribed to the Applicant's other current lung diseases - chronic bronchitis, asthma and chronic obstructive pulmonary disease (COPD). Report at 1. Consequently, the physician panel did not find "any causal relationship between his occupational exposures and illnesses." Report at 1.

The OWA accepted the physician panel's determination, and the OWA advised the Applicant that he had received a negative determination. *See* February 10, 2004 Letter from the Applicant to OHA. On February 10, 2004, the Applicant filed this appeal concerning the determination. While the Applicant has not identified specific grounds for his appeal, he believes that his breathing problems were caused by his exposures to toxic materials at DOE.

II. Analysis

With regard to the physician's panel determination concerning the Applicant's asbestos related pleural plaques, we find that there is no basis to remand this decision. Our review of the record supports the panel's finding that there was no documentary evidence indicating that the Applicant was exposed to

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

asbestos. In the Applicant's request for a review he states that he was exposed to asbestos in the form of machining, insulation and fabrication. February 10, 2004 Letter from the Applicant to OHA at 1. However, none of the additional records he submitted with his request indicates any specific incidents of exposure or evidence of monitoring for asbestos. 3/ Accordingly, we find no error in the panel's decision concerning the asbestos related pleural plaques.

However, in his November 15, 2002 request for review by a physician panel, the Applicant stated that he believed that his *asthma* had been caused by his work at a DOE facility. *See* Case No. TIA-0051 Record at 1. 4/ The physician panel does not appear to have issued an opinion as to whether the Applicant's claimed asthma is related to his exposure to toxic substances at DOE. 5/ Consequently we will remand this case to the physician panel so that the panel may issue an opinion as to whether the Applicant's claimed asthma is related to his alleged exposure to toxic substances. *See* 10 C.F.R. § 852.12(b); *Worker Appeal, TIA-0039* (February 25, 2004), www.oha.doe.gov/cases/wa/tia0039.pdf ("the 'basis for the determination' should indicate how the panel evaluated *each* illness or symptom" (emphasis added)).

III. Summary and Conclusion

As the foregoing discussion indicates, the determination should be remanded for a determination concerning the Applicant's claimed asthma. *See* 10 C.F.R. §§ 852.8, 852.12(b)(5).

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0051 be, and hereby is, granted as set forth in paragraph 2 below.

3/ These records do show that he was monitored for Beryllium exposure. February 10, 2004 Letter from the Applicant to OHA.

4/ The record in this case indicates that on November 2, 2002, "asthma & hearing loss" claimed in a state proceeding "was added." *See* Case No. TIA-0051 Record at 23 (CMS View History entry for November 1, 2002).

5/ The physician panel report did not find "any causal relationship between his occupational exposures and illnesses." However, it is unclear as to what diseases the word "illnesses" refers to. In addition, the panel may wish to consider whether his hearing loss was related to exposure to toxic substances while an employee at DOE.

(2) The application that is the subject of Appeal No. TIA-0051 should be remanded to the Office of Worker Advocacy for further consideration.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 21, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

April 21, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Case Name: Worker Appeal

Date of Filing: February 10, 2004

Case Number: TIA-0052

XXXXXXXX XXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The applicant is the widow of XXXXXX XXXXXXXX (the worker), a former DOE contractor employee. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, we have concluded that the appeal should be denied.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program.[1/]

Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or

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1/ *See* www.eh.doe.gov/advocacy.

contributed to employee illnesses. Generally, if a physician panel issues a determination favorable to the employee, the DOE Office of Worker Advocacy accepts the determination and assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 10 C.F.R. Part 852. As stated above, the DOE Office of Worker Advocacy is responsible for this program.

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office 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 Program Office. 10 C.F.R. § 852.18(a)(2). *See Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In her application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted on the "Employment History Claim Form" that her deceased husband[2/] worked at the DOE's Rocky Flats, Colorado from 1956 to 1981 as a security guard and foundry worker supervisor. The applicant stated further that during his 25 years of work service, her husband worked in close proximity to enriched uranium, plutonium, beryllium and americium, and was "contaminated many times." In her request to the Office of Worker Advocacy for Physician Panel review, the applicant claimed that her husband's renal disease, diagnosed in 1998, was caused by his work at the DOE facility.

The Physician Panel issued a negative determination on this claim. In evaluating the claim, the Panel considered not only the diagnosis of renal disease cited in the applicant's request, but each of the diagnoses identified as the worker's cause of death on his Death Certificate, including diabetes mellitus, renal insufficiency and hypertension. *See* note 2. The Panel found that none of these illnesses was "caused, contributed or aggravated by his working conditions." The Panel states in its report that: "[the worker] had numerous medical problems . . . . Most of these medical problems are quite common or known complications of common problems. There is no

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2/ The record indicates that the worker died on December 11, 2001, at the age of 82. The worker's Death Certificate lists the causes of death as renal failure, hypertension and diabetes.

evidence from his radiation safety monitoring that he had an unsafe level of exposure that might account for any of his medical problems." OWA Physician Panel Report (Report), issued November 4, 2003. The Panel's decision was adopted by the Office of Worker Advocacy. Accordingly, the Office of Worker Advocacy determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits. *See* Letter of December 30, 2003, from DOE to the applicant.

In her appeal, the applicant seeks review of the Physician Panel's determination on the following grounds:

> As noted in his records, [the worker] had psoriasis on 100% of his body, caused by the beryllium washes at Rocky Flats. Topical agents helped manage this slightly, never healing him completely. [The worker]'s records also show cancer in the side of his forehead and lip. These most likely were caused by chemical exposures at Rocky Flats.
>
> You will also find in the records you currently have, the summary of event of the fire in Building 77 and the exposure of harmful chemicals to [the worker]. Many of his long term health problems most likely were a direct result of this exposure.

These matters are considered below.

II. Analysis

In her Appeal, the applicant claims that the Physician Panel improperly failed to consider two medical conditions suffered by the applicant, psoriasis and cancer. According to the applicant, the worker's psoriasis covering his entire body was caused by "beryllium washes," and the worker's cancer on the side of his forehead and lip was caused by "chemical exposures." Our review of the Report confirms that the Physician Panel did not evaluate these conditions as diagnoses "requested for review." However, we do not find that the Panel erred in this regard.

In the Employment History Claim Form, the applicant stated that the worker had been exposed to a number of toxic substances, including beryllium. However, in her request to the OWA for Physician Panel Review, the applicant listed only renal disease, diagnosed in 1998, as an illness which she believed to be caused by the worker's employment at a DOE facility. There is no indication in the OWA Case History that the applicant sought to supplement her request with the illnesses now raised in her Appeal. We therefore find that the Physician Panel properly limited its evaluation to the worker's renal disease and two other illnesses, diabetes and hypertension, specified as causes of death in the worker's Death Certificate, as the diagnoses "requested for

review." The Panel determined that none of these illnesses was "caused, contributed to or aggravated by his working conditions."

Finally, we note that while the Panel did not evaluate psoriasis or cancer as illnesses "requested for review," it did generally consider the worker's psoriasis condition. The Panel observed in its Report that the worker had "numerous medical problems . . . quite common or known complications of common problems," and listed the following: congestive heart failure, aortic valve replacement, hypothyroidism, recurrent cellulitis, bladder tumor, coronary artery disease, psoriasis and osteomyelitis. Similar to the diagnoses requested for review, however, the Panel determined that "[t]here is no evidence from his radiation safety monitoring that he had an unsafe level of exposure that might account for any of his medical problems."

We therefore conclude that the applicant's Appeal does not establish any deficiency or error in the Panel's determination. Because the applicant has not identified a deficiency or error in the Panel's determination, there is no basis for an order remanding the matter to OWA for a second Panel determination. Accordingly, the Appeal should be denied.[3/]

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0052 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: April 21, 2004l

3/ If the applicant wishes to pursue the possibility of Physician Panel review based upon the additional claims raised for the first time in this Appeal, i.e. that the worker suffered from psoriasis caused by "beryllium washes" and cancer caused by "chemical exposures," the applicant should contact the OWA.

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

May 25, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case:	Worker Appeal
Date of Filing:	February 20, 2004
Case No.:	TIA-0053

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 has been a DOE contractor employee at a DOE facility since 1981. The OWA referred the application to an independent physician panel, which determined that the worker's illness was not related to her work 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 we explain below, we have concluded that the physician panel's determination is correct.

I. Background

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.

The Department of Labor (DOL) administers the first program, which provides $150,000 and medical benefits to certain workers with specified illnesses. Those illnesses include beryllium disease and specified cancers associated with radiation exposure. 42 U.S.C. § 7341l(9). The DOL program also provides $50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u. To implement the program, the DOL has issued regulations, 20 C.F.R. Part 30, and has a web site that provides extensive information concerning the program.[1/]

[1/] *See* www.dol.gov/esa.

The DOE administers the second program, which does not itself provide any monetary or medical benefits. Instead, it 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. § 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). 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 Applicant has been employed at a DOE facility since 1981. The Applicant is a High Level Waste Processing Operator. In 1986, at the age of 38 years, the worker was diagnosed with Glomus Tympanicum Tumor of the right middle ear. The tumor has recurred on three subsequent occasions.

The Applicant filed an application with DOE, the application at issue in this case. The Applicant identified a recurring tumor as the illness on which she sought physician panel review and attributed this tumor to exposure to toxic substances, including xenon, krypton, and radiation.

The physician panel reviewed the application and issued a report. The panel found that the tumors were not related to exposure to a toxic substance at DOE. The panel based its determination on four factors, the first three of which support the panel's position that the Applicant had the tumor before her employment with DOE. First, the panel found that the period from initial exposure to the toxic substances to the diagnosis of the tumor was less than the latency period, *i.e.*, less than five years. The panel found that such a short period indicated that the tumor pre-dated her DOE employment. Secondly, the panel found that the large size of the tumor when it was originally diagnosed indicated that it pre-dated her DOE employment. Thirdly, the panel found that the characteristic slow growth of this type of tumor indicated that it pre-dated her DOE employment. Finally, the panel found that the lack of any known associations of environmental exposures with this type of tumor indicated that it was not related to her employment at the DOE facility.

The OWA accepted the physician panel's determination. *See* January 21, 2004 Letter from the DOE to the Applicant. Accordingly, the OWA determined that the Applicant was not eligible for DOE assistance in filing for state workers' compensation benefits.

[2/] *See* www.eh.doe.gov/advocacy.

In her appeal, the Applicant contends that the physician panel determination is wrong. She states that the fact that she has had four tumors in rapid succession is rare. She states that the last three tumors grew very fast.

II. Analysis

The Applicant maintains that because she is of small stature and weighs less than the average worker, the same amount of chemical radiation and contamination has a greater effect on her than on an average size person. Further, she claims that she was routinely exposed to toxic chemicals without adequate protective equipment or clothing. Additionally, she alleges that many of the chemicals that were routinely used during the 1980's are no longer allowed today because they are too hazardous and that safeguards and practices with regard to radiation and contamination exposures were much more lax in the 1980s. The Applicant concludes that she believes her job as a High Level Waste Processing Operator at the DOE facility contributed to her tumor growths.

The Applicant maintains that the panel determination contains several factual errors. First, the Applicant maintains that the panel erred when it stated that glomus tympanicum tumor is a common neoplasm. Although the Applicant maintains that to have four tumors in rapid succession is not common, that statement, even if correct, does not mean that the type of tumor is not common. In any event, the panel notes that a period of little growth of the tumors can be followed by rapid growth and, therefore, that the rate of recurrence does not render the tumor uncommon. Second, the Applicant claims that she has been told by a number of physicians that she is fortunate to have found the tumors early so that they had not metastasized. The panel pointed out this fact and, therefore, there is no disagreement on this point. Finally, the Applicant claims that the panel erred in stating that she first began having pulsatile tinnitus, which was then diagnosed as the glomus tympanicum tumor. In fact, the Applicant states, the pulsatile tinnitus occurred after she had the surgery to remove the tumor. The record is not clear on this point. One report from the Applicant's doctor indicates that she sought treatment because she heard a "swishing sound." However, even if the panel erred about the initial symptom of the tumor, the error is not relevant to the panel's finding that the tumor predates her employment with DOE.

The Applicant has not demonstrated that the panel erred in its conclusion that her tumors were not related to her DOE employment. The panel explained why it did not find that it was at least as likely as not that exposure to a toxic substance at a DOE facility during the course of the Applicant's employment was a significant factor in aggravating, contributing to or causing the worker's illness. As stated above, the short period between the start of the potential exposure to the diagnosis, the large size of the tumor when it was found, the characteristic slow growth of this type of tumor, and the lack of known associations of environmental exposure with this type of tumor led the panel to find that

the Applicant's job at the DOE facility is a very unlikely factor in the occurrence or growth pattern of the glomus tumor. Based on the foregoing, the weight of the evidence supports the panel determination.

III. Summary and Conclusion

As the foregoing discussion indicates, the Applicant has not demonstrated error in the physician panel determination. Accordingly, the appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0053 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: May 25, 2004

CONCURRENCE SHEET

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Fishman	Cronin	Freimuth

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April 8, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Date of Filing: **February 27, 2004**

Case No.: **TIA-0054**

XXXXXXX XXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The applicant was a DOE contractor employee at a DOE facility. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, the appeal should be denied.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. Generally, if a physician panel issues a determination favorable to the employee, the DOE Office of Worker Advocacy accepts the

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1/ ***See*** **www.eh.doe.gov/advocacy.**

determination and instructs the contractor not to oppose the claim unless required by law to do so. The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 10 C.F.R. Part 852. As stated above, the DOE Office of Worker Advocacy is responsible for this program.
The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office 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 Program Office. 10 C.F.R. § 852.18(a)(2). *See Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In her application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted that for fourteen years she worked as a storekeeper, a reproduction operator and a mail clerk at the DOE's Hanford site in Richland, Washington. The applicant stated that she worked in the 300 Area of the Hanford Site. She was diagnosed with minimal change disease, nephrotic syndrome and anemia about nine years after she stopped working at the Hanford site. The applicant believes that exposure to contaminants in the workplace caused these diseases.

The Physician Panel issued a negative determination on each of the diseases listed in her claim. In each instance, the Panel 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 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." Physician Panel Determination.

In considering the worker's claims for minimal change disease and nephrotic syndrome, the Physician Panel unanimously found that "there is no evidence in the chart review to indicate an association between the patient's employment and any acute poisoning including a nephrotoxic injury." With respect to the nephrotic syndrome, the Physician Panel also found that "the [patient's employment] history

showed no evidence of specific known incident or exposure to solvents or toxicants at work." With respect to the anemia, the Physician Panel unanimously found that it was "most likely that her anemia is due to her renal disease." Once again, they concluded that the "history failed to show any evidence of specific known incident or exposure to solvents or toxicants that could be associated with her anemia." *Id.*

II. Analysis

The applicant seeks review of the Panel's determination. In her appeal letter, the applicant asserts that her former co-workers in the 300 Area have a high level of illness, indicating the presence of environmental hazards.

> Out of 38 of us so far, a few are deceased, and the others suffer from different disorders. Cancer, MS, brain tumors, reproduction disorders, stomach complications, and liver and kidney disease.

February 24, 2004 Appeal Letter. She also asserts that the 3706 Building where she worked was eventually closed because of safety concerns, and that the shallow burial of contaminated wastes occurred in the 300 Area. While she acknowledges that her disease can be caused by many things, including things unrelated to her DOE workplace, she contends that other toxic materials that existed in the 300 Area such as lead, mercury, lithium, solvents and ammonia are potential causes of her diseases.

> When we used solvents to clean the rollers of all the machines daily, we wore gloves but no protection from inhalation. Also I was exposed to ammonia fumes daily for at least a year. For seven hours a day I worked in that room with the exception of two breaks and my lunch.

Id.

The individual's assertions in her Appeal letter concerning her exposure to toxic materials in the workplace do not indicate Physician Panel error. The Panel addressed the exposures identified in the record. In her original application, which was reviewed by the Physician Panel, she stated that she was routinely exposed to ammonia fumes in the workplace, and that she used solvents to clean the rollers of printing presses and copying machines. She also stated that she delivered mail in the 300 Area and was exposed to the air in "almost every building" in the area. Employee Application at 14. The Panel specifically rejected this level of exposure to

these hazards as a probable cause of her renal disease. As the Panel's determination states, "there is no evidence in the chart review to indicate an association between the patient's employment and any acute poisoning including a nephrotoxic injury. In addition, the history showed no evidence of specific known incident or exposure to solvents or toxicants at work." Physician Panel Determination at 1. Similarly, the Panel found that her history "failed to show any evidence of specific incident or exposure to solvents or toxicants that could be associated with her anemia." *Id.* at 3. In making these findings, the Panel clearly rejected the level of exposure to ammonia and cleaning solvents reported by the individual as sufficient to give rise to her renal disease and anemia. They also rejected her report of general exposure to background toxicity in the 300 Area as sufficient to cause or to aggravate these diseases. The applicant's other assertions on appeal concerning illnesses and deaths among her former co-workers and the alleged shallow burial of toxic wastes on or near the 300 Area are undocumented and do not indicate Panel error.

As discussed above, the standard to be applied in these cases is whether it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to or causing the worker's illness or death. The Panel applied that standard here, and the applicant has not pointed to any data in the record either contradicting the Panel's determination or suggesting that the Panel's overall decision was in error. In sum, the applicant's beliefs, with nothing more, are not convincing. They do not establish any deficiency or error in the Panel's determination. Because the applicant has not identified a deficiency or error in the Panel's determination, 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-0054 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: April 8, 2004

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

March 12, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: February 27, 2004

Case No.: TIA-0055

xxxxxxxxxxxxxxxxxx (the applicant) applied to the Department of Energy (DOE) Worker Advocacy Office for DOE assistance in filing for state workers'compensation benefits based on the employment of her late father, xxxxxxxxxxx. The DOE Worker Advocacy Office determined that the applicant was not a DOE contractor employee and, therefore, was not eligible for DOE assistance. The applicant appeals that determination. As explained below, we have concluded that the determination is correct.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act creates two programs for workers.

The Department of Labor (DOL) administers the first EEOICPA program, which provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 7384l(1). The DOL program also provides federal monetary and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, the DOE program provides for an independent physician panel assessment of whether a "Department of Energy contractor employee" has an illness related to exposure to a toxic substance at a DOE facility. 42 U.S.C. § 7385o. 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).

The DOE program is specifically limited to DOE contractor employees who worked at DOE facilities. The reason is that the DOE would not be involved in state workers' compensation proceedings involving other employers.

The regulations for the DOE program are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The DOE Worker Advocacy Office is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Pursuant to an Executive Order, 2/ the DOE has published a list of facilities covered by the DOL and DOE programs, and the DOE has designated next to each facility whether it falls within the EEOICPA's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 68 Fed. Reg. 43,095 (July 21, 2003) (current list of facilities). The DOE's published list also refers readers to the DOE Worker Advocacy Office web site for additional information about the facilities. 68 Fed. Reg. 43,095.

This case involves the DOE program, i.e., the program through which DOE contractor employees may obtain independent physician panel determinations that their illness is related to their exposure to a toxic substance during their employment at a DOE facility. The applicant states that the worker was employed by Bethlehem Steel

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1/ ***See*** **www.eh.doe.gov/advocacy.**

2/ ***See*** **Executive Order No. 13,179 (December 7, 2000).**

from approximately 1936 to 1978, and that the worker became ill as a result of that employment.

The DOE Office of Worker Advocacy determined that the worker was not employed by a DOE contractor at a DOE facility. Instead, the DOE Office of Worker Advocacy indicated that the worker was employed at an atomic weapons employer facility. *See* January 9, 2004 letter from DOE Office of Worker Advocacy to the applicant. Accordingly, the DOE Office of Worker Advocacy determined that the worker was not eligible for the physician panel process. In the appeal, the applicant disagrees with that determination.

II. Analysis

A. Worker Programs

As an initial matter, we emphasize that the DOE physician panel process is separate from state workers' compensation proceedings. A DOE decision that an applicant is not eligible for the DOE physician panel process does not affect (i) an applicant's right to file for state workers' compensation benefits or (ii) whether the applicant is eligible for those benefits under applicable state law.

Similarly, we emphasize that the DOE physician panel process is separate from any claims made under other statutory provisions. Thus, a DOE decision concerning the physician panel process does not affect any claims made under other statutory provisions, such as programs administered by DOL and DOJ.

We now turn to whether the applicant in this case is eligible for the physician panel process.

B. Whether the Applicant is Eligible for the DOE Physician Panel Process

As explained above, the DOE physician panel process is limited to DOE contractor employees. In order to be a DOE contractor employee, a worker must be employed by a firm that manages or provides other specified services at a DOE facility, and the worker must actually be employed at the DOE facility. As explained below, the Bethlehem

Steel plant was not a DOE facility and, therefore, the worker was not a DOE contractor employee.

The DOE facility list indicates that the Bethlehem Steel plant was not a DOE facility. The DOE facility list includes the plant but identifies the plant as an "atomic weapons employer facility" (AWE) from 1949 to 1952. The DOE description states that in 1949 the plant developed rolling mill pass schedules to be used in the planned uranium milling operation at DOE's Fernald facility. The description also states that the plant performed uranium rolling experiments to help design the Fernald rolling mill. 3/ This description is consistent with DOE's report on the plant under the Formerly Utilized Sites Remedial Action Program (FUSRAP). *See* FUSRAP Considered Sites Database Report, www.em.doe.gov (searchable database) (accessed April 7, 2003).

In prior decisions, we have held that the Bethlehem Steel plant was not a DOE facility. *See Worker Appeal*, Case No. TIA-0010, 28 DOE ¶ 80,261 (2003). In that case, we noted that under the EEOICPA and the Physician Panel Rule, a DOE facility is a facility (i) where DOE or its predecessors 4/ conducted operations and (ii) where DOE had a proprietary interest or contracted with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services. 42 U.S.C. § 738o (1)(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). We concluded that the DOE description of the work at the plant did not indicate that DOE conducted operations at the plant, had a proprietary interest in the plant, or had a contract with the entity to provide management and operation, management and integration, environmental remediation services, construction or maintenance services. Accordingly, we concluded that the plant did not fall within the definition of a DOE facility. *Worker Appeal*, 28 DOE at 80, 841, slip op. at 4. This same analysis applies to the instant appeal. Thus, the Bethlehem Steel plant was not a DOE

3/ The Fernald rolling mill began operations in 1952. The DOE's web site contains a report describing DOE facility operations, including Fernald. *See* www.eh.doe.gov/legacy.

4/ DOE predecessors include the Manhattan Engineering District, the Atomic Energy Commission, and the Energy Research and Development Administration. *See* 10 C.F.R. § 852.2 (a definition of DOE).

facility and its workers are not eligible for the DOE physician panel process. This makes sense because DOE would not be involved in any state workers' compensation proceeding involving the plant and its workers.

As the foregoing indicates, the worker was not employed at a DOE facility and, therefore, the applicant is not eligible for DOE assistance in filing for state workers' compensation benefits. Again, we emphasize that this determination does not affect whether the applicant is eligible for (i) state workers' compensation benefits or (ii) federal monetary and medical benefits available under other statutory provisions.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0055 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: March 12, 2004

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Chapman **Freimuth**

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* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

April 26, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Date of Filing: **March 2, 2004**

Case No.: **TIA-0056**

XXXXXXX XXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The applicant was a DOE contractor employee at a DOE facility. Based on a negative determination from an independent Physician Panel (the Panel), the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, the appeal should be denied.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. Generally, if a physician panel issues a determination favorable to the employee, the DOE Office of Worker Advocacy accepts the

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1/ ***See*** **www.eh.doe.gov/advocacy.**

determination and instructs the contractor not to oppose the claim unless required by law to do so. The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 10 C.F.R. Part 852. As stated above, the DOE Office of Worker Advocacy is responsible for this program.

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 (OHA) review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office 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 Program Office. 10 C.F.R. § 852.18(a)(2). *See Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In his application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted that for twenty five years his work involved the inspection, testing and management of special nuclear materials at the DOE's Y-12 Plant in Oak Ridge, Tennessee. For an additional six years he worked at the Y-12 Plant as a Lab Supervisor, where he managed the nondestructive testing of metallic, nonmetallic and special nuclear materials. He was diagnosed with muscular fasciculations, chronic obstructive pulmonary disease (COPD), renal disease (kidney stones) and mild restrictive physiology. He also has reported symptoms of Central Nervous System disease including memory loss, loss of smell, muscular loss/deterioration, ringing sensation in the ears, and headache. The applicant believes that exposure to contaminants in the workplace, particularly lithium, caused these diseases.

The Panel issued a negative determination on each of the diseases listed in his claim. In each instance, the Panel concluded 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 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." Physician Panel Determination.

In considering the worker's claims concerning his neurological symptoms, the Panel unanimously rejected his assertion that exposure

to lithium dust in the workplace was the cause of his symptoms. It indicated that these symptoms have a variety of causes and "there is no evidence now of a work-related cause" for those symptoms. However, it suggested that the applicant's neurologist order tests for "heavy metal poisoning."

With respect to the applicant's COPD, the Panel reviewed the submitted medical information and found "he does not seem to have COPD and has shown no evidence at all that would lead us to the conclusion that he had some other work-related lung disease." In this regard, it noted that there is no evidence in the record that the applicant has been tested for beryllium sensitivity. It also noted that although asbestos could cause a restrictive lung condition, "there are no x-ray reports suggesting stigmata of asbestosis." With respect to his kidney stones, the Panel concluded that

> the information at hand does not support an occupational link with the stones. We would need information on the type of stone passed to comment further on the possibilities.

Id. at 2.

II. Analysis

The applicant seeks review of the Panel's determination. In his appeal letter, the applicant asserts that "my loss of smell was not addressed as far as I can tell in the Physicians Panel Report." He also states that he was exposed to cadmium vapors in the workplace for 15 years and believes that this could have resulted in a loss of smell. He also asserts that his loss of breathing function was caused by his exposure to perchloroethylene and other chemicals used in the cleaning process he worked in for many years with poor ventilation. He continues to assert that his central nervous system damage may have been caused by the "numerous solvents, epoxies, mercury, uranium dust, PCBs, and other toxic substances during my 31 years working at the Oak Ridge facilities. . ." He believes that his exposure to lithium hydride caused several of these symptoms. Finally, he questions why the Panel noted that he declined a termination physical when he left his employment at the DOE's Oak Ridge facility.

The individual's assertions in his Appeal letter concerning his exposure to toxic materials in the workplace do not indicate Panel error. The Panel addressed the exposures identified in the record. In the work history section of his original application, which was

reviewed by the Panel, the applicant stated that he was routinely exposed to ionizing radiation, and worked with highly enriched uranium, low-enriched uranium, transuranic lithium, deuterium and unknown toxic materials, often without personal protective equipment. In the portion of his application entitled "Facility Data: Incident/Accident Report", which was also reviewed by the Panel, there is a medical incident report dated November 30, 2000 in which Dr. N. Allen Baines reports that the applicant feels that his neurological symptoms might be secondary to his workplace exposures to asbestos, beryllium, cadmium, epoxies, lasers, lead, mercury, nickel, plutonium, ionizing radiation and uranium. The Panel refers to these exposures at page 5 of its report. As noted above, the Panel concludes that in the absence of any medical tests indicating that the applicant has heavy metal poisoning, beryllium sensitivity or stigmata of asbestosis, there is no evidence that any of the applicant's medical symptoms are related to his exposure to toxic materials in the workplace.

Nor did the Panel neglect to consider his loss of smell. It specifically lists this symptom on pages one and two of the Report, and notes that it should be considered along with other symptoms as part of a single neurological disorder. Report at 1. Finally, the Physician Panel Report's summary of Dr. Baines' November 2000 incident report also contains the statement: "Findings: patient declined termination physical, has SOB [shortness of breath] and muscle fasciculations." This merely quotes what Dr. Baines had listed in his report under "Findings" and is no indication that the Panel attached any adverse inference to the applicant's decision to forego the termination physical.

As discussed above, the standard to be applied in these cases is whether it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to or causing the worker's illness or death. The Panel applied that standard here, and the applicant has not pointed to any data in the record either contradicting the Panel's determination or suggesting that the Panel's overall decision was in error. The applicant's beliefs, with nothing more, that his workplace exposures caused his symptoms do not establish any deficiency or error in the Panel's determination. Because the applicant has not identified a

deficiency or error in the Panel's determination, there is no basis for an order remanding the matter to OWA for a second Panel determination. Accordingly, the appeal should be denied. 2/

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0056 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: April 26, 2004

2/ If the applicant receives new information to support his claims, the applicant may request a second physician panel review.

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

June 26, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Date of Filing: **March 9, 2004**

Case No.: **TIA-0057**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits, based on the employment of his late father, XXXXXXXXXX (the Worker). 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 did not have an illness related to 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.

The Department of Labor (DOL) administers the first program, which provides $150,000 and medical benefits to certain workers with specified illnesses. Those illnesses include beryllium disease and specified cancers associated with radiation exposure. 42 U.S.C. § 7411(9). The DOL program also provides $50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u. To implement the program, the DOL has

issued regulations, 20 C.F.R. Part 30, and has a web site that provides extensive information concerning the program. 1/

The DOE administers the second program, which does not itself provide any monetary or medical benefits. Instead, it 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. § 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). 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 specifies the standard for Physician Panel determinations. The Rule provides:

> A Physician Panel must determine whether the illness or death arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility on the basis of whether it is as least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to, or causing the illness or death of the worker at issue.

10 C.F.R. § 852.8. As the foregoing indicates, the Panel must determine whether "it is as least as likely as not" that a worker's exposure was a "significant factor in aggravating, contributing to, or causing" the illness or death at issue.

1/ *See* www.dol.gov/esa.

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

B. Factual Background

The Worker was employed as a janitor by a DOE contractor at the DOE's Los Alamos National Laboratory. The Worker began his employment at the site in 1969 at the age of 54; his employment ended in 1981 at the age of 66, when he accepted a voluntary termination pursuant to a reduction-in-force. In 1992, at the age of 77, he was diagnosed with leukemia (polycythemia vera), and he died in 2001 at the age of 85. His death certificate listed renal failure as the immediate cause of death, pulmonary edema as a condition leading to his renal failure, and polycythemia vera as a significant condition contributing to his death.

In the application at issue in this case, the Applicant listed polycythemia vera and renal failure as the claimed illnesses. With respect to exposures, the Applicant stated that the Worker was employed in all areas at the site, including those with beryllium.

The Physician Panel found that the Worker had polycythemia vera, but the Panel did not render a positive determination. The Panel stated:

> **Polycythemia vera is a clonal disorder. It is the most common myeloproliferative disorder and occurs in about 2 per 100,000 people. It occurs in all age groups and has a genetic basis. A slight overall male predominance is observed. The etiology of Polycythemia vera is unknown.**

Report at 1. Based on the foregoing, the Panel unanimously found that the illness was not related to toxic exposure at the DOE.

The Physician Panel found that the Worker had died of renal failure, but the Panel did not render a positive determination on that illness. The Panel discussed the Worker's medical history in detail and then stated:

> **No specific diagnosis is given to the renal failure, which may have been a consequence of dehydration and/or congestive heart failure. Also dosimetry records show very low Skin and Deep radiation exposure and zero neutron exposure over his working lifetime. There are lists of all chemicals to which the claimant had potential exposure. However, there is no record of a chronic exposure or accidental over exposure to any chemical(s) in particular. The family notes that he was**

> exposed to beryllium. Beryllium would be expected to cause a pulmonary disorder, not present as renal failure.

Report at 2. Based on the foregoing, the Panel unanimously found that the illness was not related to toxic exposure at DOE.

In his appeal, the Applicant maintains that the Physician Panel determination is not correct. Specifically, the Applicant challenges the Panel's determination on polycythemia vera. The Applicant provides a letter from the Worker's physician, stating that radiation exposure could have caused the Worker's polycythemia vera. He cites an article in the Journal of the American Medical Association in which "the authors suggest there may be a relationship between ionizing radiation and the development of polycythemia vera." July 17, 2002 Letter at 1-2. The physician concludes that "if [the Worker] were in a position where he could have been exposed to ionizing radiation, there is little question in my mind that this may have played a role in his diagnosis of polycythemia vera." *Id.* at 2.

II. *Analysis*

The physician's letter does not indicate Panel error. The Physician Panel determination stated that the etiology of polycythemia vera is unknown. The physician's letter does not conflict with that finding. The reference to an article in which "the authors suggest that there may be a relationship" between ionizing radiation and the development of polycythemia vera falls short of the regulatory standard. The suggestion that there may be a relationship does not mean that "it is as least as likely as not" that radiation exposure is "a significant factor in aggravating, contributing, or causing" polycythemia vera in general, let alone that radiation exposure was a significant factor in this case. Accordingly, the physician's letter does not provide a basis for finding Panel error.

Based on the foregoing, the Appeal should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0057 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: June 25, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

April 13, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Date of Filing: **March 18, 2004**

Case No.: **TIA-0059**

XXXXXXXXX (the applicant or the worker) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The applicant was a DOE contractor employee at a DOE facility. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, the appeal should be denied.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. Generally, if a physician panel issues a determination favorable to

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1/ ***See*** **www.eh.doe.gov/advocacy.**

the employee, the DOE Office of Worker Advocacy accepts the determination and instructs the contractor not to oppose the claim unless required by law to do so. The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 10 C.F.R. Part 852. As stated above, the DOE Office of Worker Advocacy is responsible for this program.

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office 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 Program Office. 10 C.F.R. § 852.18(a)(2). *See Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In her application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted that for a six-month period in 1944, she was a cafeteria worker at the DOE site in Hanford, Washington. Later, she was diagnosed with thyroid multinodular goiter. 2/ The applicant believes that exposure to sand that was present at the Hanford site and exposure to radiation-contaminated articles of clothing worn by Hanford workers caused this condition.

The Physician Panel issued a negative determination on this claim. The Panel 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 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."

2/ The earliest notation of an abnormality of the applicant's thyroid that appears in the record of this case was in 1974. Record at 120.

In considering the worker's disease, the Physician Panel unanimously found that "there was no known or documented toxicological exposure during [the applicant's] 6 months of employment as a cafeteria worker in 1944. [The applicant] cites sand, dishwashing detergents and cleaners as exposures of concern to her. However, there is no medical evidence in the literature linking these to the development of thyroid multinodular goiter."

II. Analysis

The applicant seeks review of the Panel's determination. First, she denies that she claimed that exposure to cleaning agents and dishwashing detergents caused her thyroid disease. She states that this was an interpretation by the individual who interviewed her regarding her work history. The applicant claimed it was therefore erroneous to include it in the material sent to the Panel.

Even if the Panel did consider a factor that was incorrectly included for evaluation, it does not constitute an error warranting remand in this case. Elimination of the cleaning agents from consideration would still not result in a favorable result for this applicant. It would just mean that there was one fewer reason upon which to base a positive determination for her. I fail to discern any prejudice to the applicant by the Panel's considering this issue. Accordingly, this objection does not constitute a basis for a remand.

The applicant also asserts that one of her claims, that she was exposed to workers' radiation-contaminated clothing, was not considered by the Panel. In this regard, she states that she picked up workers' contaminated clothing as part of her job. It is true that the Panel did not specifically refer to this issue. However, this does not mean that the Panel did not give consideration to this matter. One of the Panel's conclusions was that "Exposure evidence is lacking in this case." The Panel also stated that "a job exposure matrix was done and food service workers were noted to have no exposures of concern." *See* Record at 227. These conclusions implicitly cover the applicant's claim that she was exposed to toxic materials through contact with workers' contaminated clothing. *See Worker Appeal* (Case No. TIA-0038), 28 DOE ¶ _____ (March 11, 2004). She has not provided any information refuting the Panel's statement that cafeteria workers did not suffer any "exposures of concern." She has not supported her contention that she did in fact pick up contaminated clothing or even came into contact with it. The applicant's assertions alone are insufficient in this regard. I therefore see no basis for remanding this matter for a specific

determination as to whether exposure to workers' clothing could have caused the applicant's thyroid disease.

The applicant further contends that radioactive material entered her system through the air and through sand storms. She refers in a general way to articles that she has read regarding the release of radioactive materials into the air during 1944. She has not provided copies of these articles. Thus, there is simply no evidence upon which I can conclude that the Panel made any error. In fact, the applicant has not provided any information to indicate that the Panel's determination was incorrect. For example, she has not submitted any medical or scientific literature indicating that Hanford cafeteria workers were exposed to toxic materials in any way, either by the air, sand or through exposure to workers' clothing. The applicant has not pointed to any data in the record either contradicting the Panel's determination or suggesting that the Panel's overall decision was in error.

In sum, the applicant's beliefs, with nothing more, are not convincing. They do not establish any deficiency or error in the Panel's determination. Because the applicant has not identified a deficiency or error in the Panel's determination, 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-0059 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: April 13, 2004

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July 1, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: March 15, 2004

Case No.: TIA-0060

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits, based on the employment of her late father, XXXXXXXXXX (the Worker). 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 did not have an illness related to 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 remanded to OWA for further processing.

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.

The Department of Labor (DOL) administers the first program, which provides $150,000 and medical benefits to certain workers with specified illnesses. Those illnesses include beryllium disease and specified cancers associated with radiation exposure. 42 U.S.C. § 7341l(9). The DOL program also provides $50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note.

See 42 U.S.C. § 7384u. To implement the program, the DOL has issued regulations, 20 C.F.R. Part 30, and has a web site that provides extensive information concerning the program. 1/

The DOE administers the second program, which does not itself provide any monetary or medical benefits. Instead, it 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. § 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). 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 preamble to the Physician Panel Rule provides that, although an applicant "bears primary responsibility for submitting sufficient information to support his/her application," DOE "will assist applicants as it is able." 67 Fed. Reg. 52841, 52844 (2002). Accordingly, in processing applications, the OWA requests the DOE facility in question to provide information, including exposure information.

B. Factual Background

The Worker was employed as a truck driver by a DOE contractor at the DOE's Idaho site. The Worker's medical records indicate that he was born in 1913. The Worker began his employment at the site in 1951 at the age of 38; his employment ended in 1971 at the age of 58. In 1964, at the age of 51, he was diagnosed with chronic obstructive pulmonary disease (COPD). In 1975, he died at the age of 62. His death certificate lists COPD as the cause of his death.

1/ *See* www.dol.gov/esa.

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

In the application, the Applicant claimed that the Worker acquired COPD as the result of clean-up activities following nuclear accidents. The Applicant stated that the Worker was a bus driver and that he "went into the blown reactors and helped remove the bodies. Radiation - SL-1 Fatality." Employment History at 1. A supplement to the application lists a number of sites of employment but does not identify them as sites of nuclear accidents. The supplement also lists the names and addresses of other drivers who were involved in the SL-1 reactor and are presumably potential sources of information.

The Physician Panel found that the Worker had COPD, with 1962 as the approximate date of onset, but the Panel found that the Worker's COPD was not related to his DOE employment. The Panel noted the Worker's smoking history:

> The claimant began smoking in his teen years. As of 1969 he was smoking a half package of cigarettes daily. Chronic bronchitis had been evident since 1962 and emphysema was initially diagnosed in 1964. Radiographically, he had marked emphysema in 1968. Prior to that a chest radiograph in 1953 revealed only old pulmonary granulomatous disease and an old left pleuro-diaphragmatic inflammatory reaction.

Report at 1. The Panel's determination was unanimous.

In her appeal, the Applicant maintains that the Worker had significant toxic exposures:

> My father was assigned as a bus driver for Idaho Nuclear, and was utilized as clean-up personnel in the case of nuclear accidents. [My father] was also flown to various other locations for clean up of their incidents, as well.

Appeal at 1. The Applicant states that her family believes that the Worker's clean-up activities "led to his premature death." *Id.* 3/

3/ The Applicant also notes that the Panel Report provided an inaccurate date of birth for the Worker. The Applicant's medical records state his correct date of birth. The Applicant does not argue that the incorrect date affected the determination and therefore we shall give this matter no further consideration.

II. *Analysis*

As indicated above, when an applicant files an application for physician panel review, the DOE "will assist applicants as it is able." 67 Fed. Reg. 52844. The record indicates that the DOE may have further information concerning the Worker's exposures. The application mentions the cleanup of nuclear accidents and specifically mentions the SL-1 accident, which occurred in 1961, one year before the diagnosis of his breathing problem. The SL-1 accident is discussed in material at the DOE facility web site. *See* http://www.inel.gov/proving-the-principle. Although the record indicates that the OWA requested information from the site concerning the Worker, the record does not indicate that the OWA mentioned the SL-1 incident or nuclear accidents at the site in general. Accordingly, consistent with the goal of identifying DOE information that might assist applicants, see 67 Fed. Reg. 52844, the application should be remanded so that OWA can ask the DOE site whether it has (i) information concerning the Worker's participation and exposure in the clean-up of nuclear accidents, including the accident at the SL-1 reactor, or (ii) general information concerning the exposures of workers involved in such clean-up. Upon receiving a response from the site, OWA should either arrange for further panel review or issue a determination that such review is not warranted.

Based on the foregoing, we have determined that the application should be remanded to the Office of Worker Advocacy for further consideration consistent with this decision.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0060 be, and hereby is, granted as set forth in Paragraph 2 below.

(2) The application that is the subject of this appeal is remanded to the Office of Worker Advocacy for further processing.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: July 1, 2004

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MAY 13, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Case Name: Worker Appeal

Date of Filing: March 15, 2004

Case Number: TIA-0061

XXXXXX XXX XXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The applicant is the widow of XXXX XXXXXXX, XXX (the worker), a former DOE contractor employee. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program.[1/] The applicant appeals that determination. As explained below, we have concluded that the appeal should be denied.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program.[2/]

Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or

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1/ The applicant is disabled. The request for OWA assistance and the present appeal were filed on behalf of the applicant by her son, XXXX XXXXXXX, XXX, under a Power of Attorney.

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

contributed to employee illnesses. Generally, if a physician panel issues a determination favorable to the employee, the DOE Office of Worker Advocacy accepts the determination and assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 10 C.F.R. Part 852. As stated above, the DOE Office of Worker Advocacy is responsible for this program.

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office 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 Program Office. 10 C.F.R. § 852.18(a)(2). *See Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In her application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted on the required Work History claim form that her deceased husband worked at the DOE's K-25 Plant in Oak Ridge, Tennessee, from June 21, 1944 to July 31, 1946, as an area foreman. *See* OWA Case Record at 21 (application dated September 5, 2002). The applicant claimed in her request for Physician Panel review that her husband's carcinoma of the jejunum,[3/] diagnosed in 1969, was caused by his work at the DOE facility. *Id*. at 2. According to the OWA record, the applicant more specifically claims that in the course of his employment the worker was exposed to asbestos, ionizing radiation, green salt, and inhalation of uranium dust. *Id*. at 281.

The Physician Panel issued a negative determination on this claim. In evaluating the claim, the Panel considered the diagnosis of carcinoma of the jejunum cited in the applicant's request. This is also the illness specified as the worker's cause of death on his Death Certificate. *See* note 3. The Panel determined that the worker's employment by the DOE contractor was not a significant factor in aggravating,

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3/ The OWA Case Record indicates that the worker died on May 1, 1970, at the age of 60. The worker's Death Certificate states the cause of death was "carcinoma of jejunum with metastases." OWA Case Record at 32. Under "Other Significant Conditions," the Death Certificate indicates that the worker also suffered from "Jacksonian epilepsy." *Id.*

contributing to or causing this illness. In reaching this determination, the Panel states in its report:

> This case involves a claim by the wife of a worker employed from 6/2/44 through 7/31/46 (age 35 - 37). 24 years after termination for non-medical reasons, the worker developed neoplasm of the jejunum. He died shortly after the diagnosis and surgery of metastic disease at age 61 years. Although there is no pathology report of the examination of the tumor removed, the hospital summary and death certificate reasonably represent an accurate diagnosis which is reasonably acceptable.
>
> . . . Cancers of the small bowel are rare despite a slow increase over the past. A Medline search from 1960 - 2003 did not reveal any testimonial or epidemiological relationships between risk factors and jejunum tumors. Comparison with the over all [treating hospital] patient population did not identify any risk factors characteristic of this cancer.
> . . .
> The association between asbestos and GI cancers is not near as strong as it is for lung cancers. After consideration of asbestos as a contributing factor in this case, it was agreed that the possibility was so remote as not to meet the minimal standards required in this review.

Panel Report at 1 (citations omitted).

In her appeal, the applicant does not contest the Physician Panel's determination regarding the worker's diagnosis of carcinoma of the jejunum. Instead, the applicant asserts that the Panel failed to consider another medical condition:

> [We] would like to request your consideration of the toxic exposures at K-25 during [the worker's] employment as a cause for his nonmalignant, nonspace occupying glioma of the left cerebral motor nerve. This information was available on the application dated September 5, 2002, however, not considered.
> . . .
> This illness was very devastating to [the worker] and his family. He would have very severe headaches and an occasional grand mal seizure. [The worker] could work very little from the time he left K-25 with [the DOE contractor] until his death on May 1, 1970. . . . [We] feel that this glioma was either caused or exacerbated by radiation received during his employment at K-25 in Oak Ridge, Tennessee.

The applicant has attached a copy of a hospital medical record dated July 14, 1969, indicating that the worker's glioma was first diagnosed in 1947, one year after being

terminated by the DOE contractor. Appeal, Attachment 2. The applicant contests the statement made by the Panel in its report that the worker was terminated by the DOE contractor in 1946 "for non-medical reasons," and has attached a company record dated July 22, 1946, in support of her position. Appeal, Attachment 3.

II. Analysis

In her Appeal, the applicant claims that the Physician Panel improperly failed to consider another medical condition suffered by the worker, a glioma of the left cerebral motor nerve (a brain tumor). The applicant believes that the worker's brain tumor was "caused or exacerbated by radiation" to which the worker was exposed during his two years of employment with the DOE contractor. Our review of the Report confirms that the Physician Panel did not evaluate this condition as a diagnosis requested for review. However, we do not find that the Panel erred in this regard.

In her request to the OWA for Physician Panel Review, the applicant listed only carcinoma of the jejunum, diagnosed on July 19, 1969, as an illness which she believed to be caused by the worker's employment at a DOE facility. There is no indication in the OWA Case History that the applicant sought to supplement her request with the illness now raised in her Appeal. Further, the worker's medical records indicate that the symptoms associated with his brain tumor predated his two-year employment at the DOE facility, from June 21, 1944 to July 31, 1946.

The worker's 1969 hospital record states that the symptoms associated with the brain tumor, diagnosed in 1947, began in "1940 at which time he noticed the onset of numbness in the right upper extremity which was transient first and then became persistent and was associated with Jacksonian seizures. These seizures would involve the right upper extremity, shoulder, neck and face and ultimately there developed some muscle atrophy and some contracture in the right hand muscles on the right." Appeal, Attachment 2; OWA Case Record at 51. The applicant asserts in her present appeal that the 1969 hospital record is wrong in stating that the worker's condition emerged in 1940.[4/] However, this information is corroborated by the contractor's contemporaneous medical records.

The worker's pre-employment physical examination report, dated June 12, 1944, states that the worker had "Neuritis rt. arm & hand" and that this condition resulted in a "50% loss of function of rt. hand." OWA Case Record at 231, 232. A company Dispensary Record dated July 2, 1946, states concerning the condition: "Onset 6 years ago. . . . Recommend medical release on the grounds that shift work is apt to aggravate

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4/ The applicant maintains in her appeal that "[t]he statement that [the worker] was in good health until 1940 is probably wrong also, it should have been 1946." Appeal at 1.

present physical disability." *Id*. at 233. Based upon this recommendation, the worker was given a medical termination effective July 31, 1946, after working with the disability for two years. *Id*. at 43, 234, 239; Appeal, Attachment 3.[5/] Since it is apparent that symptoms attributable to the worker's brain tumor predated his employment, the record does not support the applicant's claim in her appeal that the condition was caused by his employment with the DOE contractor.

We conclude that the Physician Panel properly limited its evaluation to the worker's carcinoma of the jejunum, specified in the applicant's request and stated as the cause of death in the worker's Death Certificate. We therefore find that the applicant's Appeal does not establish any deficiency or error in the Panel's determination. Because the applicant has not identified a deficiency or error in the Panel's determination, there is no basis for an order remanding the matter to OWA for a second Panel determination. Accordingly, the Appeal should be denied.[6/]

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0061 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: May 13, 2004

5/ The applicant is correct that the Physician Panel was erroneous in stating in its report that the worker was terminated in 1946 "for non-medical reasons." However, this statement had no bearing upon the Physician Panel's determination regarding the illness under review, carcinoma of the jejunum, diagnosed in 1969.

6/ The applicant may contact the OWA concerning the possibility of Physician Panel review if she wishes to pursue the claim that radiation exposure while employed at the DOE facility was a significant factor in aggravating the worker's brain tumor.

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April 6, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Date of Filing: **March 18, 2004**

Case No.: **TIA-0063**

XXXXXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The applicant was a DOE contractor employee at a DOE facility. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, the appeal should be denied.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. Generally, if a physician panel issues a determination favorable to

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1/ ***See*** **www.eh.doe.gov/advocacy.**

the employee, the DOE Office of Worker Advocacy accepts the determination and instructs the contractor not to oppose the claim unless required by law to do so. The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 10 C.F.R. Part 852. As stated above, the DOE Office of Worker Advocacy is responsible for this program.
The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office 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 Program Office. 10 C.F.R. § 852.18(a)(2). *See Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In his application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted that from 1991 through 1996, he worked as a designer and drafter in the engineering department at the DOE site in Oak Ridge, Tennessee. The applicant stated that he worked in the Y-12, K-25 and X-10 plants. He was diagnosed with rectal cancer in 2002. The applicant believes that exposure to radiation and other contaminants in the workplace caused this disease.

The Physician Panel issued a negative determination on this claim. The Panel 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 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 worker's disease, the Physician Panel unanimously found that "rectal cancer, is not compatible with causation by any toxic agents to which the applicant may have been exposed in the work environment."

II. Analysis

The applicant seeks review of the Panel's determination. The applicant claims that as part of his work routine he was expected to enter areas that may have been contaminated not only by radiation, but also with mercury, beryllium, or other toxic substances. He states that he was never told he was entering a hazardous environment. He believes that his cancer was caused by this exposure.

As the Panel's determination states, "the factors responsible for causing rectal cancer are uncertain. . . . There is no significant evidence to point to environmental factors other than possibly tobacco smoke and ethanol consumption as etiologic agents of rectal cancer. . . . Radiation is not known to be a causal factor in rectal cancer."

As discussed above, the standard to be applied in these cases is whether it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to or causing the worker's illness or death. The Panel applied that standard here, and there is simply no evidence in the record to suggest that the Panel's conclusion was incorrect. In this regard, the applicant has not provided any information to indicate that the Panel's determination was incorrect. For example, he has not provided an assessment by his own physician indicating that the cause of his disease was exposure to toxic materials. He has not submitted any medical or scientific literature indicating that exposure to radiation, beryllium, mercury or other contaminants bears a causal relationship to the development of rectal cancer. The applicant has not pointed to any data in the record or elsewhere either contradicting the Panel's determination or suggesting that the Panel's overall decision was in error.

In sum, the applicant's beliefs, with nothing more, are not convincing. They do not establish any deficiency or error in the Panel's determination. Because the applicant has not identified a deficiency or error in the Panel's determination, 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-0063 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: April 6, 2004

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JULY 22, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: March 19, 2004

Case No.: TIA-0064

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, and she claims that she has seven illnesses that are a result of exposure to toxic substances at a DOE facility. An independent physician panel (the Physician Panel or the Panel) rendered positive determinations on two illnesses and negative determinations on the other five. The OWA accepted the Panel's determination, and the Applicant appealed to 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 Applicable 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. 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. § 7385o(d)(3). In general, if a physician

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

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/

B. The Application

The Applicant was employed as XXXXXXXXXX at XXXXXXXXXX. The Applicant was born in XXXX. She worked on the site from approximately XXXX to XXXX and from XXXX to XXXX. The Applicant sought physician panel review of illnesses that she attributes to exposure to radiation and other hazardous substances.

The OWA referred the application to a physician panel, and the Panel's determinations are reflected in an October 2003 report. The Panel report specifically discussed the Applicant's exposures to cleaning agents such as trichloroethylene or 1,1,1,-trichloroethane, radiation, industrial fluoride, and polychlorinated biphenyls (PCBs). The Panel's determinations on the illnesses were unanimous.

The Panel rendered positive determinations on chronic bronchitis and depression. The Panel found that it was at least as likely as not that the Applicant's chronic bronchitis was related to her exposure to cleaning agents such as trichloroethylene or 1,1,1,-trichloroethane, radiation, and contaminated dust. Similarly, the Panel found that it was at least as likely as not that the Applicant's depression was related to her exposure to trichloroethylene or 1,1,1,-trichloroethane.

The Panel rendered negative determinations on hypothyroidism, multiple leiomyomata (uterine tumors), osteoarthritis, fibromyalgia, and post traumatic stress disorder. The Panel found

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

that the etiology of the illness was unknown and/or that the illnesses were not related to the Applicant's exposures. The Panel found that the Applicant's monitoring data for radiation, fluoride, and PCBs were within acceptable limits.

The following is an overview of the panel's findings. 1) For hypothyroidism, the Panel discussed the common causes, referred to the possibility of a relationship between the illness and PCB exposure as a theory, and cited the Applicant's PCB results as being within acceptable limits. 2) For multiple leiomyomata, the Panel stated that one in four women were affected, and the Panel explained why it did not accept the opinion of the Applicant's physician that multiple exposures caused the illness. 3) For osteoarthritis, the Panel stated that the "cause is unknown but trauma, heredity and age are factors." The Panel again explained why it did not accept the physician's opinion that multiple exposures caused the illness. The Panel also cited the Applicant's radiation and fluoride monitoring data as being well within applicable limits. 4) For fibromyalgia, the Panel stated that the "etiology is at present unknown" and, therefore, that the Panel could not find that the illness was related to toxic exposures at DOE. 5) Finally, for Post Traumatic Stress Disorder, the Panel stated that the disorder is defined as being caused by an event, rather than by the effect of a toxic exposure.

The OWA accepted the Physician Panel's determinations. Specifically, the OWA accepted the positive determinations on chronic bronchitis and depression and the negative determinations on the other five illnesses.

The Applicant appeals OWA's acceptance of the negative determinations. The Applicant's challenges to the panel determinations are discussed below. Because of the large number of documents, our docket room numbered the record reviewed by the panel (pages 1 to 568) and the Applicant's April 15, 2004 appeal submission (pages 569 to 1012).

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 (i) make a finding whether that illness was related to a toxic exposure at DOE and (ii) state the basis for that finding. 10 C.F.R. § 852.12.

We have not hesitated to remand an application where we find panel error. For example, we have remanded applications 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 do not indicate panel error. 6/

The Applicant argues that the Panel decision is incorrect. She provides a list of exposures and states that they were provided to the panel. 7/ She also states she was not monitored frequently enough to capture all her exposures and that PCB tests of coworkers workers showed elevated levels. 8/ Finally, she states that the Panel's negative determinations are inconsistent with (i) prior workers' compensation decisions approving claims for her illnesses and (ii) her physicians' opinions.

The Applicant has not identified panel error. The Panel report indicates that the Panel considered the record thoroughly. The report discussed the Applicant's exposure to cleaning solvents, radiation, fluoride, and PCBs. The report's detail indicates that the Panel brought its medical judgment to bear on the specifics of the Applicant's case. Although the Applicant argues that the panel's judgment is inconsistent with workers' compensation

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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.*

6/ *Worker Appeal,* Case No. TIA-0066, 28 DOE ¶ _____ (2004).

7/ We note that the Appeal refers to "PCB results 1/24/84." We could not find any such reference in the record sent to the Panel or in the documents submitted on Appeal. Accordingly, the cited results cannot be a basis for finding Panel error. We also note that the Appeal refers to above normal "PCB readings" in "GOODYEAR document GAT 365-83-150." We did not see any such readings, Record at 696, and other records state that the tests were normal, See Summary, DOE Occupational Safety or Healthy Complaint at GAT Regarding Employee Exposure to Polychlorinated Biphenyls (PCB) at 2, Record at 505.

8/ See discussion in footnote 7 above.

decisions on her illnesses 9/ and other medical opinions, the alleged inconsistencies are merely differing opinions on medical issues. As such, they do not provide a basis for finding panel error. Accordingly, the Appeal should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0064 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: July 22, 2004

9/ In this regard, we accept, for the sake of argument, the Applicant's assertions that she was approved for workers' compensation for the five denied illnesses.

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June 25, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: March 23, 2004

Case No.: TIA-0065

XXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy for DOE assistance in filing for state workers' compensation benefits based on the employment of her late husband, **XXXXXXXXXX** (the worker). The DOE Office of Worker Advocacy determined that the applicant was not a DOE contractor employee and, therefore, was not eligible for DOE assistance. The applicant appeals that determination. As explained below, we have concluded that the determination is correct.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act creates two programs for workers.

The Department of Labor (DOL) administers the first EEOICPA program, which provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 7384l(1). The DOL program also provides federal monetary and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice

(DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, the DOE program provides for an independent physician panel assessment of whether a "Department of Energy contractor employee" has an illness related to exposure to a toxic substance at a DOE facility. 42 U.S.C. § 7385o. 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).

The DOE program is specifically limited to DOE contractor employees who worked at DOE facilities. The reason is that the DOE would not be involved in state workers' compensation proceedings involving other employers.

The regulations for the DOE program are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Pursuant to an Executive Order, 2/ the DOE has published a list of facilities covered by the DOL and DOE programs, and the DOE has designated next to each facility whether it falls within the EEOICPA's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 68 Fed. Reg. 43,095 (July 21, 2003) (current list of facilities). The DOE's published list also refers readers to the DOE Worker Advocacy Office web site for additional information about the facilities. 68 Fed. Reg. 43,095.

This case involves the DOE program, i.e., the program through which DOE contractor employees may obtain independent physician panel

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1/ *See* www.eh.doe.gov/advocacy.

2/ *See* Executive Order No. 13,179 (December 7, 2000).

determinations that their illness is related to their exposure to a toxic substance during their employment at a DOE facility. The applicant states that her husband was an employee of the Linde Air Products Plant. The DOE Office of Worker Advocacy determined that the worker was employed by an atomic weapons employer, not a DOE contractor. *See* February 24, 2004 Letter from the DOE Office of Worker Advocacy to the applicant. Accordingly, the DOE Office of Worker Advocacy determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits. In the appeal, the applicant disagrees with that determination.

II. Analysis

A. Worker Programs

As an initial matter, we emphasize that the DOE physician panel process is separate from state workers' compensation proceedings. A DOE decision that an applicant is not eligible for the DOE physician panel process does not affect (i) an applicant's right to file for state workers' compensation benefits or (ii) whether the applicant is eligible for those benefits under applicable state law.

Similarly, we emphasize that the DOE physician panel process is separate from any claims made under other statutory provisions. Thus, a DOE decision concerning the physician panel process does not affect any claims made under other statutory provisions, such as programs administered by DOL and DOJ.

We now turn to whether the applicant in this case is eligible for the physician panel process.

B. Whether the Applicant is Eligible for the DOE Physician Panel Process

As explained above, the DOE physician panel process is limited to DOE contractor employees. In order to be a DOE contractor employee, a worker must be employed by a firm that manages or provides other specified services at a DOE facility, and the worker must actually be employed at the DOE facility. The DOE's published list of facilities includes the Linde Air Products Plant, but does not list the plant as a DOE facility. Instead, the list designates

the plant as "AWE," the code for "atomic weapons employer facility." 66 Fed. Reg. 31,222. The DOE Office of Worker Advocacy web site indicates that during World War II, the plant was part of Carbide and Carbon Chemical Corporation, later known as Union Carbide. The web site further indicates that the plant was an atomic weapons employer facility from 1945-1947. Accordingly, the determination that the worker was not employed at a DOE facility is consistent with the DOE's published description of the worker's facility, and we have no reason to believe that the description is incorrect or incomplete.

Based on the foregoing, we have determined that the DOE Office of Worker Advocacy correctly concluded that the worker was not a DOE contractor employee. Because the worker was not a DOE contractor employee, the applicant is not eligible for DOE assistance in filing for state workers' compensation benefits. Again, we emphasize that this determination does not affect the applicant's eligibility for (i) state workers' compensation benefits or (ii) federal monetary and medical benefits available under other statutory provisions, including EEOIPCA claims at the Department of Labor.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0065 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: June 25, 2004

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July 9, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: March 24, 2004

Case No.: TIA-0066

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 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. 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

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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/

B. Procedural Background

The Applicant was employed as a pipe welder and inspector at DOE's Savannah River site. The Applicant was born in 1923, and he worked at the site for 30 years, from 1951 to 1981.

The Applicant filed an application with OWA, requesting physician panel review of four illnesses. They were asbestosis, prostate problems, coronary artery disease, and sternal osteomyelitis. The Applicant claimed exposure to asbestos, radiation, and other toxic substances. He attributed the sternal osteomyelitis to a 1965 exposure to reactor process water.

The Physician Panel rendered a determination on each of the four illnesses. The Panel rendered a positive determination on asbestosis, and negative determinations on the three remaining illnesses. For the claimed prostate problems, the Panel did not see any medical information indicating that the Applicant had problems. For the coronary artery disease, the Panel agreed that he had the illness, stated that it could not be related to any work exposure, and noted the presence of a risk factor - elevated lipids. For the sternal osteomyelitis, the Panel stated that it occurred in 2000, secondary to a sternotomy performed in connection with coronary artery bypass surgery. The Panel specifically rejected the Applicant's argument that the osteomyelitis was related to the cited 1965 incident.

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

The OWA accepted the Physician Panel's determinations: the positive determination on asbestosis, as well as the negative determinations on prostate problems, coronary artery disease, and sternal osteomyelitis. *See* OWA February 20, 2004 Letter. The Applicant filed the instant appeal.

In his appeal, the Applicant maintains that the negative determinations are not correct. The Applicant states that he had toxic exposures during his employment at Savannah River, that his daughter, who laundered his work clothes from 1960 to 1965, died of cancer in 1999, and that he has no family history of two of the illnesses: prostate problems and sternal osteomyelitis.

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 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 this case, the Applicant's arguments on appeal - that he had exposures and no family history of two of the three illnesses - are not bases for finding panel error. As mentioned above, the Physician 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. Accordingly, the appeal does not provide a basis for finding panel error and, therefore, should be denied.

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.*

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0066 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: July 9, 2004

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

August 6, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: March 25, 2004

Case No.: TIA-0067

XXXXXXXXXXXXXXX (the Applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for assistance in filing for state workers' compensation benefits on behalf of his late father, XXXXXX (the Worker). The Applicant was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that most of the chemicals that the Worker was exposed to are not carcinogenic and those that are carcinogenic are not associated with prostate cancer. 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. § 7385o(d)(3). In general, if a physician panel issues a determination favorable

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[1/] The Department of Labor administers the other program. *See* 20 C.F.R. Part 30; www.dol.gov/esa.

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/]

B. Procedural Background

The Worker was employed as a chemical operator and clerk at DOE's Oak Ridge K-25 and Y-12 sites. The Applicant filed an application with OWA, requesting physician panel review of the Worker's prostate cancer. The Applicant claimed that the Worker had been exposed to all chemicals at the Oak Ridge site. The Applicant stated that he specifically remembered that the Worker cleaned up mercury spills in Y-12.

The Physician Panel rendered a negative determination on the prostate cancer. The Panel stated that most of the chemicals that the Worker was exposed to are not carcinogenic. The Panel further stated that the chemicals that are carcinogenic are not associated with malignancies of the prostate gland. Finally, the Panel noted that the Worker was at the site for less than five years, during the period 1954 to 1959.

The OWA accepted the Physician Panel's determination. *See* OWA March 1, 2004 Letter. The Applicant filed the instant appeal. In his appeal, the Applicant maintains that the negative determination is not correct. The Applicant claims that although the Panel stated that most of the chemicals are not carcinogenic, some are, and he states that his father was the first person on his side of the family to be diagnosed with cancer. Further, the Applicant states that the Panel did not take into consideration that the Worker was assigned to the Y-12 site by the local labor union from 1957 to 1965.[3/]

[2/] *See* www.eh.doe.gov/advocacy.

[3/] In his Appeal, the Applicant claims that the Worker was assigned by the local labor union to Y-12 from 1957 to 1965. In a submission accompanying his Appeal, he claimed that his father worked for the local labor union at K-25 from 1960 to 1980.

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 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,[4/] applied the wrong standard,[5/] or failed to explain the basis of its determination.[6/] On the other hand, mere disagreements with the panel's opinion are not a basis for finding panel error.[7/]

In this case, the Applicant's arguments about the Worker's exposures and risk factors are not bases for finding panel error. As mentioned above, the Physician Panel addressed the prostate cancer and considered whether the chemicals were carcinogenic. It found that those chemicals that are carcinogenic are not associated with malignancies of the prostate gland. Thus the Applicant's arguments are merely disagreements with the panel's medical judgment, rather than indications of panel error.[8/]

Similarly, the Applicant's contention that the Worker was assigned to Y-12 for an additional period not considered by the Panel is not a basis for finding Panel error. The Oak Ridge site did not have records of employment after 1959 and, therefore, the Panel did not consider any employment beyond that period. Moreover, consideration of any additional period of employment is unlikely to affect the Panel determination unless it involves exposures not previously considered. As indicated above, the Panel found that the Worker's exposures were not associated with prostate cancer. If the Applicant believes that the additional claimed employment may have an impact on the Panel's determination, the Applicant should contact the OWA to provide documentation of that employment and to request further panel review based on that documentation.

[4/] *Worker Appeal*, Case No. TIA-0030, 28 DOE ¶ 80,310 (2003).

[5/] *Worker Appeal*, Case No. TIA-0032, 28 DOE ¶ 80,322 (2004).

[6/] *Id.*

[7/] *Worker Appeal*, Case No. TIA-0066, 29 DOE ¶ _____ (2004).

[8/] *See Id.*

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0067 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 6, 2004

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June 2, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Date of Filing: **March 26, 2004**

Case No.: **TIA-0068**

XXXXXXX XXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The applicant's late husband (hereinafter "the worker") was a DOE contractor employee at a DOE facility. Based on a negative determination concerning the worker from an independent Physician Panel (the Panel), the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, the appeal should be granted.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. Generally, if a physician panel issues a determination favorable to

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1/ ***See*** **www.eh.doe.gov/advocacy.**

the employee, the DOE Office of Worker Advocacy accepts the determination and instructs the contractor not to oppose the claim unless required by law to do so. The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 10 C.F.R. Part 852. As stated above, the DOE Office of Worker Advocacy is responsible for this program.
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 (OHA) review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office 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 Program Office. 10 C.F.R. § 852.18(a)(2). *See Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In her application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted that for 33 years the worker was an employee at the DOE's facility in Oak Ridge, Tennessee, where he worked in the X-10, K-25 and Y-12 plants. She stated that he was exposed to chemicals, radiation and hazardous materials in the workplace. She further stated that after the worker's retirement in 1981, his health began to deteriorate and he was hospitalized on several occasions for breathing problems and unexplained illnesses. She stated that during his final illness and hospitalization, he spent six weeks on a ventilator, his lungs not functional, before his death in early January, 1989. In support of her application for DOE assistance, she submitted hospital records concerning the worker's treatment during his final hospitalizations and an analysis of those treatment records by a licensed physician in Tennessee (the applicant's physician). In a report dated July 19, 2002, the applicant's physician made the following findings:

> I have been advised that the Department of Energy understands that [the worker] was exposed to beryllium over periods of time during his employment and it is well known that symptoms from beryllium toxicity may occur acutely or may not develop for decades after exposure, even though the exposure may have been brief.
>
> It is my opinion that [the worker] probably breathed dust or fumes which contained beryllium during his work for the

> **Department of Energy. Unfortunately, during the time when he was exposed and following and during the time in the 1980s when he was becoming symptomatic of the disease, the beryllium pathologic process was not clearly understood by health care providers. A blood patch testing of the skin (BeLPT) was not performed. Because of his instability during the hospitalization of December of 1988, a bronchoscopy with biopsy was not performed.**
>
> **His symptoms in the mid and late 1980s involving dyspnea and cough with chronic fever, anorexia and weight loss are common findings in beryllium toxicity. His presentation in December of 1988 with suspected sepsis along with variable chest x-ray findings in my opinion corresponds with a patient who has had an insidious onset of beryllium associated disease delayed by decades. It is my opinion based upon the history and clinical course during his last hospitalization that beryllium was causative of his pulmonary failure and ultimate death. As stated, no other etiologic pathogen/process was identified.**

July 19, 2002 analysis of applicant's physician at 2.

The applicant previously had submitted an EEOICPA claim to the Department of Labor (DOL) contending that the worker's exposure to toxic materials in the workplace was a contributing factor to his final illness and death. On the basis of this physician's analysis and records obtained from the DOE, the DOL granted the applicant's claim. In a *Notice of Final Decision Following a Hearing* dated August 1, 2002 (the *DOL Final Decision*), the DOL concluded that the factual and medical evidence met the criteria for beryllium illness set forth at Section 73841(13)(B) of the EEOICPA. Specifically, the DOL found that the (i) the worker had over thirty five years of beryllium exposure at the DOE Oak Ridge facility; (ii) that the applicant's physician's interpretation of the worker's chest x-rays from December 1988 corresponds with beryllium abnormalities; (iii) that chemistry profiles performed during the worker's final hospitalization showed him to be hypoxic, meaning he had insufficient oxygenation of arterial blood and indicating a diffusing lung capacity defect; and (iv) the worker's final hospitalization is characterized by a clinical course consistent with a chronic respiratory disorder. *DOL Final Decision* at 3.

In its determination, the physician panel considered the medical information and the physician analysis concerning the worker's final illness. The panel acknowledged that the worker "worked as a welder and welder-inspector at the Y-12 plant in Oak Ridge from 1946 to

May 31, 1981, at which time he retired." However, the panel did not acknowledge that the applicant's husband had been exposed to beryllium, or that his final illness was consistent with beryllium disease. Specifically, it made the following findings:

> 1. Epidemiologic evidence of significant beryllium exposure.
> None. 8/18/03 memo indicated no IH sampling data available.
>
> 2. Presence of beryllium in lung tissue, lymph nodes or urine.
> No tests done.
>
> 3. Evidence of lower respiratory tract disease and a clinical course consistent with beryllium disease.
> Uncertain.
>
> 4. Radiologic evidence of interstitial disease consistent with a fibronodular process.
> Interstitial disease, yes, but not consistent with [chronic beryllium disease] as we read the chest x-ray reports.
>
> 5. Evidence of a restrictive or obstructive ventilatory defect or diminished carbon monoxide diffusing capacity.
> The most recent Spirogram we could locate was dated 10/8/80. No evidence of either obstructive or restrictive disease.
>
> 6. Pathologic changes consistent with beryllium disease or examination of lung tissue and/or lymph nodes. . . .
> [the worker's] terminal illness does not fit this criterion as we understand the records. In conclusion, we do not agree with [the applicant's physician], that is we cannot support a diagnosis of Chronic Beryllium Disease.

Panel Report at 3.

The OWA accepted the physician panel's determination. *See* March 3, 2003 Letter from the DOE to the applicant. Accordingly, the OWA determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits.

In her appeal, the applicant contends that the physician panel determination is erroneous, and refers to a March 19, 2004 letter in which the applicant's physician objects to the conclusions reached by the Physician Panel. In that letter, the applicant's physician

asserts that "it is undisputed that [the worker] was environmentally exposed to beryllium in his work for DOE from the 1950's in his capacity as a welding inspector/engineer." He asserts that many of the symptoms experienced by the worker in the 1980's are consistent with chronic beryllium illness. He concludes:

> Since chronic beryllium disease can manifest primarily as pneumonitis with exertional dyspnea, cough (often productive), chest pain, fevers, hemoptysis with malaise, anorexia, and weight loss and these signs and symptoms were all present in [the worker's] history over his last year, it is my opinion that the process which caused [his] death was beryllium related.

March 19, 2004 letter at 2.

II. Analysis

The Physician Panel Rule specifies what a physician panel must include in its determination. The panel must address each claimed illness, make a finding whether that illness arose out of and in the course of the worker's DOE employment, and state the basis for that finding. 10 C.F.R. § 852.12(a)(5). Although the rule does not specify the level of detail to be provided, the basis for the finding should indicate, in a manner appropriate to the specific case, that the panel considered the claimed exposures.

The panel determination addressed the applicant's claim that the worker suffered from chronic beryllium disease (CBD), and that CBD contributed to his death. The panel concluded that his terminal illness did not fit the criteria for CBD "as we understand the records." Panel Report at 3. However, we find that the panel's explanations of its evaluation of these criteria are not sufficient to explain its fundamental disagreements with the DOL's determination, based on the report of the applicant's physician, that the worker had CBD.

As noted above, the DOL determination finds that the worker had over thirty five years of beryllium exposure at the DOE Oak Ridge facility and therefore meets the key criterion of "occupational or environmental history, or epidemiologic evidence of beryllium exposure." ***DOL Final Decision*** at 2, ***quoting*** Section 73841(13)(b) of the EEOICPA. However, while the Panel Report acknowledges that the worker was employed as a welder and welder-inspector at the Y-12 Plant at Oak Ridge from 1946 to 1981, it makes no finding that he was exposed to significant amounts of beryllium. It appears to base this conclusion solely on the lack of IH sampling data available for

the worker. We believe that a further explanation is warranted if the panel is rejecting the occupational or environmental history of the worker as indicating significant beryllium exposure, especially when both the DOL and the applicant's physician accepted his work history as indicating significant beryllium exposure.

Similarly, the DOL accepted the finding of the applicant's physician that the worker evidenced a lower respiratory tract disease and a clinical course consistent with CBD. The panel rejects this conclusion on the grounds that this evidence is "uncertain." We believe that a more detailed explanation concerning the panel's independent analysis of the medical evidence is warranted where its conclusions are in disagreement with a physician's findings that have been accepted by the DOL. In this regard, the panel should consider the applicant's physician's assertion that the historical record for the worker documents symptoms consistent with CBD even where the contemporary diagnoses for these symptoms may have been inaccurate. *See* March 19, 2004 letter of applicant's physician at 1.

For the same reasons, we believe that the panel should explain the basis for its conclusion that the worker's chest x-ray reports are not consistent with a fibronodular disease process.

Based on the foregoing, the physician panel determination should be remanded for further consideration.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0068 be, and hereby is, granted as set forth in paragraph (2) below.

(2) The application that is the subject of Case No. TIA-0068 is remanded to the Office of Worker Advocacy for further consideration consistent with this Decision and Order.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: June 2, 2004

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April 29, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Date of Filing: **March 26, 2004**

Case No.: **TIA-0069**

XXXXXXXX (the applicant or the worker) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The applicant was a DOE contractor employee at a DOE facility. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, the appeal should be denied.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to a toxic substance at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Part D establishes a DOE process through which independent Physician Panels consider whether exposure to a toxic substance at DOE facilities caused, aggravated or contributed to employee illnesses. Generally, if a Physician Panel issues a determination favorable to

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1/ ***See*** **www.eh.doe.gov/advocacy.**

the employee, the DOE Office of Worker Advocacy accepts the determination and instructs the contractor not to oppose the claim unless required by law to do so. The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 10 C.F.R. Part 852. As stated above, the DOE Office of Worker Advocacy is responsible for this program.
The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office 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 Program Office. 10 C.F.R. § 852.18(a)(2). *See Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In his application for DOE assistance in filing for state workers' compensation benefits, the worker asserted that from 1954 through 1985, he was a machinist in the Y-12 plant at the DOE site in Oak Ridge, Tennessee. He was diagnosed with "lung problems" in 2002. The applicant believes that exposure to radiation and other contaminants in the workplace caused this illness.

The Physician Panel issued a negative determination on this claim. The Panel 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 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 worker's claim, the Physician Panel unanimously found that the applicant "has evidence of lung disease." However, after reviewing the occupational toxic exposures in the record, the Panel concluded that the results of a CT scan "indicate non-specific findings and thus cannot be attributed to a specific environmental exposure or environmental/occupational cause."

II. Analysis

The applicant seeks review of the Panel's determination. The applicant claims that the medical reports do not indicate "all the conditions that I have worked in while at Union Carbide." He emphasizes that he was exposed to radiation. Moreover, he states that his pulmonary specialist indicated that his "lung condition is due to exposure to chemicals/substances which I was exposed to while working, rather than smoking." The worker further asserts that "in order to make a definite diagnosis, [the pulmonary specialist] would have to do a lung biopsy which he would rather not do due to the seriousness of a major operation."

As stated above, the Panel found "evidence of lung disease" in this case. The Panel cited the findings of the applicant's physician that the applicant has interstitial lung disease and emphysema. The Panel then considered whether DOE-related occupational exposures to beryllium, asbestos, and radiation caused, contributed to or aggravated those conditions. Based on beryllium sensitivity tests, the Panel concluded that the applicant showed no evidence of beryllium sensitization. The Panel noted the applicant's claim of asbestos exposures, but also noted that details of the exposure were not provided. The Panel therefore rejected asbestos exposure as a factor for the applicant's lung disease. Similarly, the Panel found no reports of involvement in any major radiation accidents or of high levels of airborne exposure to radiation. Thus, overall, the Panel determined that there was not sufficient evidence to link the applicant's lung disease to any toxic exposure at a DOE site.

As discussed above, the standard to be applied in these cases is whether it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to or causing the worker's illness or death. The Panel applied that standard here, and there is no basis for concluding that the Panel's determination was incorrect. The applicant has not pointed to any information in the file indicating that the Panel's conclusion was erroneous. The applicant states that he was exposed to "conditions" not set out in the record. The applicant had the opportunity to provide this information for the Panel's consideration, but failed to supplement the record. Record at 318. The applicant's assertion that his own physician believed his disease was due to occupational exposures does not demonstrate Panel error. The record contains notations by the applicant's physician to the effect that the worker's abnormal X-ray was "likely occupational," and "consistent with occupational lung disease." Record at 25, 26, 27. I believe that such passing references to a

possible cause were implicitly rejected by the Panel. I see no reason to conclude that the Panel erred, and should have automatically accepted this rather general observation by the applicant's physician. The worker states that his doctor believed that a lung biopsy would be necessary to reach a definite diagnosis. This assertion tends to support the position of the Panel that information was lacking to substantiate the claim that it was at least as likely as not that exposure to a toxic substance at a DOE site caused, aggravated or contributed to the applicant's lung disease.

In sum, the applicant has not demonstrated any deficiency or 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-0069 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: April 29, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

July 2, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: March 26, 2004

Case No.: TIA-0070

xxxxxxxx (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits based on the employment of her late father, xxxxxxxxxxx (the Worker). The Worker was a DOE contractor employee at a DOE facility for many years. The OWA referred the application to an independent physician panel, which determined that the Worker's illnesses were not related to his work 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), challenging the panel's determination.

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) covers 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.

The Department of Labor (DOL) administers the first program, which provides $150,000 and medical benefits to certain workers with specified illnesses. Those illnesses include beryllium disease and specified cancers associated with radiation exposure. 42 U.S.C. § 7341l(9). The DOL program also provides $50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u. To implement the program, the DOL has issued regulations, 20 C.F.R. Part 30, and has a web site that provides extensive information concerning the program. 1/

1/ *See* www.dol.gov/esa.

The DOE administers the second program, which does not itself provide any monetary or medical benefits. Instead, it 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. § 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). 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. Factual Background

The Worker was employed at a DOE facility from 1951 to 1983. He was a maintenance mechanic/machinist and the Applicant has claimed that he was exposed to radiation while working at the DOE facility. On the Request for Review, the Applicant asked for a physician panel review concerning whether her father's "acute myeloblastic leukemia" and "renal failure" are related to his exposures at DOE. 3/ *See* Case No. TIA-0070 Record (Record) at 2.

The records indicate that pursuant to a routine annual physical in 1982, the Worker was found to have an abnormal white blood cell count and hematomas on his forearms. Record at 191. Subsequent medical testing led to the Worker being diagnosed with acute myeloblastic leukemia (AML). *Id*. The Worker received chemotherapy treatment for AML and was eventually placed on a disability pension by his employer at the DOE facility. Record at 38-66, 263-64.

In 1984-85, the Worker developed a large renal (kidney) cyst. Despite several attempts to drain the cyst, the cyst did not heal. Record at 30. Upon the Worker's worsening condition, he was admitted into a hospital where it was decided to remove the cyst, which necessitated a physician to conduct a radical nephrectomy (removal of the kidney). *Id*. After the surgery, the Worker experienced several bouts of internal bleeding, requiring two additional surgeries. Record at 30-31. The Worker subsequently developed hepatic and renal failure and subsequently passed away. Record at 31.

The physician panel reviewed the application and issued a report. *See* February 17, 2004 Physician Panel Report (Report). With regard to the AML, the panel noted that the Worker had documented exposure

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

3/ The record refers to the Worker's leukemia using different, yet similar terms, such as acute myologenous leukemia. For consistency, we will use the term acute myeloblastic leukemia, as specified in the panel report.

to radiation for the years 1954 to 1970 with total radiation doses of 1250 mrems deep and 1810 mrems shallow. 4/ Report at 1. The panel also noted that there was one documented inhalation exposure indicated by nasal swab tests indicating an exposure of 508 d/m in the left nostril and 848 d/m in the right nostril. 5/ *Id*.; Record at 224. Because the National Institute of Occupational Safety and Health (NIOSH) had not yet completed a dose reconstruction to estimate the total exposure to radiation the Worker received, the panel itself estimated that he received a maximum total dose of radiation of 5 rem over his 30 year working career. The panel found that an exposure of 5 rem would be "a rather insignificant dose" and therefore was unlikely to have cause the Worker's AML. The panel stated that AML becomes more common with age and the Worker was 60 years old when diagnosed with the illness. The panel also cited medical literature stating that there was controversy as to whether high radiation doses or occupational exposure to radiation caused an increased incidence of AML. *Id*. The panel concluded that the Worker's AML was neither caused nor contributed to by his employment at the DOE facility. The panel, however, stated that a NIOSH dose reconstruction and a probability of causation analysis would "significantly clarify any possible connection between his [the Worker] employment and his AML." *Id*.

In its report, the panel found that the Worker's renal failure was not due to any exposure to toxic substances at the DOE facility. Citing the Worker's death certificate, which listed the cause of death as "[m]ultiple organ system failure; acute tubular necrosis, hepatic failure, removal of right kidney for renal cyst and leukemia," the panel found that the Worker's death was not due to his AML but due to renal failure following the nephrectomy to remove the cyst. Report at 2. Furthermore, in the panel's opinion, because the Worker's AML was not caused by his occupational exposure at DOE, any role it played with regard to his renal shutdown would also not be caused by his exposure at DOE.

The OWA accepted the physician panel's determination, and the OWA advised the Applicant that she had received a negative determination. *See* March 12, 2004 Letter from the Applicant to OHA. On March 26, 2004, the Applicant filed this appeal concerning the determination, generally asserting that the panel reached its conclusion by working "backwards basing their finding mostly on a death certificate instead of medical records." April 6, 2004 Appeal Submission at 1. The Applicant has enumerated four specific grounds for her appeal:

(1) The failure of the renal cyst to heal that prompted her father's nephrectomy was caused by her father's lowered immune system response due to his AML and the death certificate was completed by the urologist who performed the surgery and not by an oncologist;
(2) Her father had told his family that he had been one of the employees selected to "clean up the site during an accident in the 1950s";

4/ A rem is a measurement unit of absorbed radiation. A mrem is one-thousandth of a rem.

5/ The record does not indicate what unit of radiation measurement "d/m" refers.

(3) The panel made its findings without the benefit of a NIOSH radiation dose reconstruction; and

(4) The oncology physician group that treated the Worker believes that the physician panel made "a serious error in judgment" and that the group requests that the initial medical records be consulted and that the death certificate be viewed in light of the initial cause for going to surgery.

We consider these arguments below.

II. *Analysis*

In her Appeal, the Applicant challenges the panel's consideration of her AML claim. She argues that the panel did not consider all of the Worker's medical records and that the radiation exposure data is incomplete. In addition, she challenges the panel's consideration of the Worker's renal failure as a separate illness. She maintains that the renal failure was a consequence of the Worker's AML, i.e., that the AML precluded the healing of the renal cyst, which precipitated a series of events leading to the renal failure. Accordingly, she views the panel's consideration of the renal failure as a misunderstanding of her claim.

We have throughly reviewed the panel's evaluation of the AML claim and do not find any panel error. The Physician Panel Rule requires that the panel explain the basis of its determination. 10 C.F.R. § 852.12. As described below, the panel explained the basis of its determination concerning the Worker's AML, and the record supports that determination.

Contrary to the Applicant's assertion, it appears that the panel did review all the medical records available to it in making its determination. *See* Report at 1; Record at 184. The panel specifically reviewed and cited the available radiation data in the records in coming to its decision. The Applicant's statement, on appeal, that the Worker told family members that he had been involved with cleaning up the site (and by implication exposed to radiation) in the 1950s does not indicate panel error. Further, the panel addressed the risk factors for AML. The panel stated that an individual's chance of suffering from AML goes up with age and that the Worker was over 60 years old at the time of his AML diagnosis. The panel also noted that the medical literature that it researched cast doubt on whether high radiation doses or occupational radiation exposure causes AML. Accordingly, the panel explained the basis of its determination and we see no basis for finding error in that explanation.

The fact that the panel did not have a NIOSH radiation dose reconstruction does not indicate panel error. The record indicates that the Applicant elected to proceed to panel review rather than await the completion of the NIOSH dose reconstruction. Record at 23 (10/27/30 entry). The panel makes a decision based upon record presented to it. In the present case, the panel used the available radiation dose information in the record as well as information as to the nature of AML to make its conclusion. As such it has

explained the basis for its determination and we can find no obvious error. It is apparent from the report that the panel would have liked to have reviewed a NIOSH dose reconstruction for the Worker. If the Applicant receives a NIOSH dose reconstruction pursuant to her DOL claim for benefits, she can request that the Office of Worker Advocacy provide another panel review based on this additional information.

III. Conclusion

In its review, the panel examined the available medical records and determined that the Worker's estimated radiation exposure would not have caused his AML. Further, the panel noted that it was questionable whether occupational exposure to radiation could cause AML. As the foregoing discussion indicates, the Applicant's appeal should be denied.

IT IS THEREFORE ORDERED THAT:

(5) The Appeal filed in Worker Advocacy Case No. TIA-0070 is hereby denied.

(6) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: July 2, 2004

July 2, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case:	Worker Appeal
Date of Filing:	March 30, 2004
Case No.:	TIA-0071

XXXXXXXXXXX (the applicant or "Applicant") applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee at a DOE facility for five years. The OWA referred her application to an independent physician panel, which determined that the Applicant's illness was not related to her work at DOE. The OWA accepted the panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals challenging the panel's determination.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act creates two programs for workers.

The Department of Labor (DOL) administers the first EEOICPA program, which provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 7384l(1). The DOL program also provides federal monetary and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, the DOE program provides for an independent physician panel assessment of whether a "Department of Energy contractor employee" has an illness related to exposure to a toxic substance at

a DOE facility. 42 U.S.C. § 7385o. 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).

The DOE program is specifically limited to DOE contractor employees who worked at DOE facilities. This limitation exists because DOE would not be involved in state workers' compensation proceedings involving other employers. The applicant states that she was employed by Oak Ridge National Laboratory (ORNL) from 1989 to 1994, and that she became ill as a result of that employment. Pursuant to an Executive Order, 1/ the DOE has published a list of facilities covered by the DOL and DOE programs, and the DOE has designated next to each facility whether it falls within the EEOICPA's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 68 Fed. Reg. 43,095 (July 21, 2003) (current list of facilities). The DOE's published list also refers readers to the OWA web site for additional information about the facilities. 68 Fed. Reg. 43,095. Oak Ridge is a DOE facility.

The regulations for the DOE program 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/ This case involves the DOE program, i.e., the program through which DOE contractor employees may obtain independent physician panel determinations that their illness is related to their exposure to a toxic substance during their employment at a DOE facility. The applicant asserts that the Panel's decision was incorrect for several reasons. Letter from Applicant to Director, Office of Hearings and Appeals (March 30, 2004). First, the applicant alleges that she did not wear a dosimeter when she performed inspections at the Paducah Plant and at the High Flux Reactor at ORNL. Second, the applicant is most concerned over alleged contamination in the attic of Building 2001 at ORNL. The applicant contends that the building is "highly contaminated" and that she and all of the women housed in the building developed breast cancer.

The Physician Panel reviewed the application and issued a report. See OWA Physician Panel Report (February 4, 2004) (Report). The Panel unanimously determined that it was unlikely that exposure to a toxic substance at a DOE facility during the course of the Applicant's employment was a significant factor in aggravating, contributing to or causing the applicant's illness. In the appeal, the applicant disagrees with that determination.

1/ *See* Executive Order No. 13,179 (December 7, 2000).

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

II. Analysis

The applicant claims that the Panel decision is incorrect. She contends that during portions of her employment (specifically, inspections at the Paducah Plant and the High Flux Reactor at ORNL) she was not monitored for exposure to radiation via a dosimeter. She is very concerned about exposure in Building 2001 at the ORNL, a building that she alleges is highly contaminated. In addition, she contends that only one other person in her family has ever had cancer –her father, who had worked at Oak Ridge in the 1940s to 1950s, without safety gear.

The Panel report specifically addresses the applicant's contention that she was exposed to significant amounts of radiation. The report states that "the latency period for the clinical detection of breast cancer is probably much longer than five years." This statement was based on a recent medical journal which defined "significant" radiation exposure as exposure for at least five days a week for more than seven years. Applicant was exposed to radiation for five years. The Panel notes that even among over 1000 females who worked at Y-12 between 1947 and 1990 at jobs with a high risk of exposure to radiation and chemicals, only 11 women died from breast cancer, a statistically insignificant percentage. The study was conducted during a time prior to "close environmental monitoring." Finally, the report notes that the applicant's recorded dosimetry readings were close to zero.

The Panel report also addresses the applicant's apparent assertion that she has no other risk factors for breast cancer. The Panel notes that although 70% of women diagnosed with breast cancer have no identifiable risk factors, the applicant had fibrocystic disease, which probably increased her risk of developing breast cancer.

With regard to the Panel's determination concerning the individual's breast cancer, we find that there is no basis to remand this decision. Our review of the record supports the panel's finding that there was no documentary evidence indicating that the Applicant had a significant exposure to radiation. In fact, the Applicant indicated in her termination statement of December 15, 1999 that she had not been exposed to radiation or toxic materials above the permissible limit. We have reviewed the record of this case for any evidence that Building 2001 was highly contaminated as described by Applicant, and find no evidence to support that allegation. The record also contains no evidence regarding the number of women who worked at Building 2001 and developed breast cancer. Accordingly, we find no error in the Panel's decision.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0071 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: July 2, 2004

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June 4, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: March 31, 2004

Case No.: TIA-0072

XXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The applicant's late husband (the worker) was a DOE contractor employee at a DOE facility. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, the appeal should be granted.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (EEOICPA or 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.

The Department of Labor (DOL) administers the first program, which provides $150,000 and medical benefits to certain workers with specified illnesses. Those illnesses include beryllium disease and specified cancers associated with radiation exposure. 42 U.S.C. § 7341l(9). The DOL program also provides $50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u. To implement the program, the DOL has issued

regulations, 20 C.F.R. Part 30, and has a web site that provides extensive information concerning the program. 1/

The DOE administers the second program, which does not itself provide any monetary or medical benefits. Instead, it 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. § 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). To implement the program, the DOE has issued regulations, which are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. 2/

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office 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 Program Office. 10 C.F.R. § 852.18(a)(2). *See Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

B. Factual Background

In the application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted that the worker was employed from November 1954 through May 2, 1989 as a machinist at the DOE site in Oak Ridge, Tennessee. Record at 9. The applicant

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1/ *See* www.dol.gov/esa.

2/ The OWA is responsible for this program and has a web site that provides extensive information concerning the program. *See* www.eh.doe.gov/advocacy.

contends that the worker had "lung disease" as a result of exposure to beryllium at the DOE work site. 3/

The Physician Panel issued 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 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 Panel determined that the worker did not have beryllium disease. The Panel found that a more probable explanation of the worker's lung illness was "histoplasmosis." The Panel issued a negative determination with respect to the claim. *See* December 12, 2003 Physician Panel Report.

The Panel's decision was adopted by the OWA. Accordingly, that Office determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits. March 1, 2004 Letter from DOE to the applicant. The applicant appeals that determination.

II. Analysis

In her appeal, the applicant contests the Physician Panel's determination that the worker's lung condition was not beryllium disease. In this regard, the applicant points out that DOL determined that the worker had chronic beryllium disease (CBD) under the standards set forth in the EEOICPA and awarded him $150,000 pursuant to the Act. Record at 316.

The Physician Panel Rule specifies what a physician panel must include in its determination. The panel must address each claimed illness, make a finding whether that illness arose out of and in the

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3/ The worker died of acute myocardial infarction on May 2, 1989. Record at 16. The applicant also claimed that the worker suffered from kidney disease. This claim was rejected by the Panel, and by the DOL. It does not form part of the instant appeal. In her original claim, the applicant also cited radiation exposure as a possible cause of the worker's illness. That allegation has not been raised in this proceeding.

course of the worker's DOE employment, and state the basis for that finding. 10 C.F.R. § 852.12(a)(5). Although the rule does not specify the level of detail to be provided, the basis for the finding should indicate, in a manner appropriate to the specific case, that the panel considered the relevant information, including any conflicting information.

I believe that the Panel did not adequately explain the basis for its determination. Standards for determining whether a worker has CBD are set out in the Act. *See* 42 U.S.C. § 7384i(13)(B). In view of the fact that DOL applied those standards and found that the worker did suffer from CBD, the Panel should explain why it disagrees with the DOL result. On remand, the Panel should indicate whether it applied a different standard. If the Panel did use a different standard, it should explain why it did so, what that standard was, and what medical evidence exists supporting a finding that the worker did not suffer from CBD under that standard. If the Panel applied the statutory standard, it should explain its determination. As part of its reconsideration of this matter, the Panel should explain in detail if it disagrees with the assertions and conclusions set forth in the "Statement of Case" that forms part of the DOL Recommended Decision in this case. Record at 358. If on remand the Panel reconsiders its original opinion and agrees with DOL, it may, of course, issue a new determination consistent with that revised decision.

III. Conclusion

As the foregoing indicates, the appeal should be granted and this matter should be remanded to OWA for further action consistent with the above determination.

IT IS THEREFORE ORDERED THAT:

(1) The appeal filed in Worker Advocacy Case No. TIA-0072 be, and hereby is, granted as set forth in Paragraph (2) below.

(2) The application is remanded to the DOE Office of Worker Advocacy for further action in accordance with the above determination.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: June 4, 2004

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August 5, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case:	Worker Appeal
Date of Filing:	April 1, 2004
Case No.:	TIA-0073

XXXXXXX (the applicant), a former DOE contractor employee at a DOE facility, applied to the Department of Energy's (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. Based on a negative determination from an independent Physician Panel, OWA determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, the appeal is granted and the application remanded to OWA.

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) provides various forms of assistance or relief to workers currently or formerly employed by the nation's atomic weapons programs. See 42 U.S.C. §§ 7384, 7385. This case concerns Part D of the Act, which provides for a program to assist DOE contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. The DOE has issued regulations to implement Part D of the Act, which are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The DOE's program implementing Part D is administered by OWA.

Generally, if a physician panel issues a determination favorable to the employee, OWA accepts the determination and instructs the contractor not to oppose the claim unless required by law to do so. For those applicants who receive an unfavorable determination, the Physician Panel Rule provides an appeal process. Under this process, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain OWA decisions. 10 C.F.R. § 852.18. The present appeal seeks

review of a negative determination by a Physician Panel that was accepted by OWA. 10 C.F.R. §852.18(a)(2). 10 C.F.R. § 852.18(c) mandates that an appeal is governed by the OHA procedural regulations set forth at 10 C.F.R. Part 1003. The applicable standard of review is set forth at 10 C.F.R. § 1003.36(c), which provides that "OHA may deny any appeal if the appellant does not establish that – (1) the appeal was filed by a person aggrieved by a DOE action; (2) the DOE's action was erroneous in fact or law; or (3) the DOE's action was arbitrary or capricious." 10 C.F.R. § 1003.36(c).

B. Factual Background

The applicant was employed by various DOE contractors at the Portsmouth Gaseous Diffusion Plant in Piketon, Ohio from 1954 through 1983. Record at 4. The applicant submitted a claim to the OWA. As part of the application process, the applicant completed an OWA Form entitled "Request for Review by Medical Panels." Question 7 of that form asks "What illness(es) do you have that you believe is caused by your work at a DOE facility(s)?" Record at 1. The applicant responded: "asbestosis." *Id.* However, the medical records supplied by the applicant's did not contain any evidence that he has asbestosis or any other asbestos related disease. Instead, those records included a letter written to the applicant by Dr. Steven Markowitz, a board-certified specialist in both occupational and internal medicine. In this letter, Dr. Markowitz opines that the applicant had a different chronic lung condition, specifically chronic obstructive lung disease (COLD). Dr. Markowitz's letter further opines that "[the applicant's] history of exposure to toxic agents, especially acids and bases, at the gaseous diffusion plant, contributed to the development of chronic obstructive lung disease." Record at 31. The OWA caseworker reviewed and prepared the case file and then forwarded it to the Physician's Panel. The cover sheet to the case file identified one claimed illness: asbestosis. The Physician Panel reviewed the case file and issued a report in which it found

> [The applicant's] case file doe not substantiate a diagnosis of asbestosis. There are no physician reports with that diagnosis. The reports of chest x-rays, chest CTs and PFTs do not support a diagnosis of asbestosis. [The applicant] did work in a job position/location assessed to have high risk of asbestos exposure in building X-705 and area E, from 1975-1983, but there is no evidence in the file of asbestos related disease being present.
>
> * * *
>
> Asbestosis is characterized by shortness of breath, rales heard over the lungs on physical exams, radiologic findings of pulmonary fibrosis and/or asbestos exposure (e.g., pleural plaques), pulmonary function tests showing restrictive changes . . . . [The applicant] did not have the physical, radiologic or pulmonary function findings of asbestosis.

Physician Panel's Report at 1. On this basis, apparently, the Physician Panel issued a negative determination on his claim that was subsequently accepted by OWA. Accordingly, OWA determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits. March 12, 2004 Letter from DOE to the applicant. On April 1, 2004, the applicant appealed that determination.

II. Analysis

Under Part 852, "[w]hether a positive or favorable determination is rendered is to be based solely on the standard set forth [at 10 C.F.R.] § 852.8." 67 Fed. Reg. 52850 (August 14, 2002). That regulation states:

> A Physician Panel must determine whether the illness or death arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility on the basis of whether it is as least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker at issue.

10 C.F.R. § 852.8. The preamble to Part 852 states "[t]he DOE intends that, as used in this context, the word 'significant' should have its normal dictionary definition and meaning –that is, 'meaningful' and/or 'important'." 67 Fed. Reg. 52847 (August 14, 2002).

The Physician Panel's finding that the applicant has not shown that he has asbestosis or any other asbestos related disease is well supported by the Record, which does not contain any documentation of asbestosis. Accordingly, the finding is neither erroneous nor arbitrary or capricious.

However, the case file contains evidence that the applicant has a different lung disease, chronic obstructive lung disease (COLD), the development of which may have been caused in part by the applicant's exposure to toxic substances during his employment at a DOE facility. Dr. Markowitz's report unambiguously states his conclusion that "[the applicant's] history of exposure to toxic agents, especially acids and bases, at the gaseous diffusion plant, contributed to the development of chronic obstructive lung disease." Record at 31. The Physician Panel reviewed Dr. Markowitz's letter. The Physician Panel Report states in pertinent part,

> A comprehensive occupational medical evaluation by Dr. Steven Markowitz, report dated September 13, 1999, indicates [the applicant] has chronic obstructive lung disease, and not asbestosis. Chronic obstructive lung disease is caused by cigarette smoking, well documented in the case file. Occupational exposures to workplace chemicals, especially acids and bases, may have contributed to the lung disease, as noted by Dr. Markowitz.

Physician Panel's Report at 1. Although the Physician Panel's Report cites Dr. Markowitz's opinion that the Applicant has COLD, it does not contain an actual determination on that illness. The Physician Panel Rule requires that a Physician Panel make findings concerning "[e]ach illness or cause of death that is the *subject of the application*." 10 C.F.R. § 852.12(a) (emphasis supplied). In the present case, an applicant identified his chronic lung condition as asbestosis while supplying medical records indicating that an examining physician diagnosed the applicant with a different chronic lung condition, chronic obstructive lung disease. In such circumstances, the diagnosis claimed by the applicant and the diagnosis appearing in the medical records should have both been considered as the "subject[s]

of the application." Therefore both illnesses should have been included in the Physician Panel's determination under § 852.12.

III. Conclusion

As the foregoing indicates, I have identified an error in the OWA's determination in the case. Accordingly, the appeal should be granted and remanded to the Office of Worker Advocacy. On remand, the Office of Worker Advocacy should consider the applicant's chronic obstructive lung disease in accordance with § 852.8, and then issue a new determination clearly explaining its findings in accordance with 10 C.F.R. § 852.12.

It Is Therefore Ordered That:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0079 is hereby granted as set forth in Paragraph (2) and is denied in all other aspects.

(2) The application that is the subject of Case No. TIA-0079 is remanded to the Office of Worker Advocacy for further consideration consistent with this Decision and Order.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: August 5, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

September 8, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Date of Filing: **April 1, 2004**

Case No.: **TIA-0074**

XXXXXXX XXXXXXX (the Applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant's late husband, XXXXXXX XXXXXXX (the Worker) was a contractor employee at a DOE facility for many years. An independent Physician Panel (the Physician Panel or the Panel) determined that the Worker's illnesses were not related to his work at the DOE. The OWA accepted the Panel's determination, and the Applicant's counsel, XXXXXXX XXXXXXX, Esq., filed an appeal with the DOE's Office of Hearings and Appeals. As explained below, we have concluded that the appeal should be denied.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE

1/ ***See*** **www.eh.doe.gov/advocacy.**

facilities caused, aggravated or contributed to employee illnesses. Generally, if a physician panel issues a determination favorable to the employee, the DOE Office of Worker Advocacy accepts the determination and instructs the contractor not to oppose the claim unless required by law to do so. The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 10 C.F.R. Part 852. As stated above, the DOE Office of Worker Advocacy is responsible for this program.

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office 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 Program Office. 10 C.F.R. § 852.18(a)(2). *See Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In her application for DOE assistance in filing for state workers' compensation benefits, the Applicant asserted that for approximately 22 years the Worker was an employee at a DOE facility where he worked as a machinist in the "Beryllium Shop." Previous to this employment, he had worked as a guard at another building at the DOE facility for three years. DOE Record at 2, 3, and 9. She stated that he was exposed to "hot", *i.e.*, radioactive materials in the workplace. She claimed that his exposure to these materials resulted in the Worker being diagnosed with testicular cancer. The application also states that at the time of his death, the individual suffered from lung adhesia due to cobalt treatments for the cancer. Id. at 6.

In its determination, the Physician Panel considered the medical information concerning the Worker's illnesses that had been submitted by the Applicant. It rejected the Applicant's contention that the Worker's exposure to radioactive materials at a DOE facility caused, contributed to, or aggravated the Worker's testicular cancer. Specifically, it made the following findings:

> The information provided by OWA revealed that the employee was treated with surgery and cobalt radiation for a right seminoma. It was the opinion of the panel that Testicular

> Seminoma's have not been associated with exposure to radiation. Exposure to radiation was considered as his major exposure.

Panel Report at 1. The Panel also found that the Worker's exposure to radioactive materials at a DOE facility had not caused, contributed to, or aggravated the Worker's lung condition.

> It was felt by the panel that the lung problem referred to was a "Postop right open thoractomy, decortication of middle and lower lobe with decortication of the parietal pleura" (page 202 in the OWA records). This was done for bilateral pleural effusions which were related to either metastic testicular cancer and/or cobalt treatment for this testicular cancer (page 84 in OWA records).

Panel Report at 2.

The OWA accepted the Panel's determination. Accordingly, the OWA determined that the Applicant was not eligible for DOE assistance in filing for state workers' compensation benefits.

In her appeal, the Applicant contends that the Panel determination is erroneous because the Worker had significant radiation exposure during the course and scope of his employment at the DOE facility for approximately 25 years. Additionally, the Applicant states that the determination is deficient because it does not evaluate the Worker's beryllium exposure history and its relationship to his extensive lung problems which he suffered through the date of his death.

II. Analysis

The Physician Panel Rule specifies what a physician panel must include in its determination. The panel must address each claimed illness, make a finding whether that illness arose out of and in the course of the Worker's DOE employment, and state the basis for that finding. 10 C.F.R. § 852.12(a)(5). Although the rule does not specify the level of detail to be provided, the basis for the finding should indicate, in a manner appropriate to the specific case, that the panel considered the claimed exposures.

As discussed above, the Panel determination addressed the two illnesses or conditions listed in the Applicant's claim: (i) testicular cancer; and (ii) lung adhesia (due to cobalt treatment). With respect to the Worker's cancer, the Panel specifically

considered and rejected the Worker's exposure to radiation as a contributing factor in the Worker's testicular cancer. In this regard, the Panel stated its professional opinion that "Testicular Seminoma's have not been associated with exposure to radiation." The Applicant has pointed to no data in the record showing that this determination is incorrect. Accordingly, I must reject this aspect of the Applicant's appeal.

In the claim that she submitted to the DOE, the Applicant *did not assert* that the Worker was exposed to beryllium at a DOE facility or that he suffered from Chronic Beryllium Disease (CBD). While her application stated that the Worker was employed "in the Beryllium Shop", she does not list beryllium as a possible factor contributing to the development of the claimed illnesses. OWA Record at 9. On her application, she stated only that he was exposed to "hot", *i.e.*, radioactive materials in the workplace. The Panel did not err in confining its analysis to the effects of radiation exposure on the Worker.

I note that an internal DOE document in the OWA Record that was forwarded to the Panel does refer to potential beryllium exposure regarding the Worker. This is a one page document bearing the date of December 12, 2002 and entitled "Preliminary Site Assignment of Legacy Workers' Compensation Claims." OWA Record at 2. Under the heading "Description of Injury" on this document is written the following: "Lung/respiratory; Beryllium exposure." However, the Panel is not required to discuss every hazardous material that is mentioned in the record. Rather, whether the Panel mentions a particular exposure depends on the facts of the case. In this case, the Panel had no reason to discuss beryllium exposure. The application described the lung condition as lung adhesions caused by the cobalt treatments for testicular cancer. The Panel agreed that the lung adhesions were related to the testicular cancer, stating that they were the result of surgery for pleural effusions related to "either metastic testicular cancer and/or cobalt treatment for this testicular cancer." The Applicant has not alleged that beryllium exposure could cause testicular cancer, and we know of no such association. Instead, our understanding is that the only illness associated with beryllium exposure is CBD, a granulomatous lung disease caused by the body's immune response (or sensitization) to beryllium. *See Chronic Beryllium Disease Prevention Program*, 64 Fed. Reg. 68854,68856 (1999). Accordingly, the Panel's failure to consider beryllium exposure or CBD was not a deficiency or error.

Because the Applicant has not identified a deficiency or error in the Panel's determination, there is no basis for an order remanding

the matter to OWA for a second Panel determination. Therefore the appeal will be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0074 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 8, 2004

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July 29, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: April 1, 2004

Case No.: TIA-0075

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, and he claimed that he has two illnesses that are a result of exposure to toxic substances at a DOE facility. An independent physician panel (the Physician Panel or the Panel) rendered negative determinations on the illnesses. The OWA accepted the Panel's determinations, and the Applicant appealed to 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 Applicable 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. 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. § 7385o(d)(3). In general, if a physician panel issues a determination favorable to the employee, the DOE

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

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/

B. The Application

The Applicant was employed for 22 years in a variety of jobs at a DOE site - performing maintenance on the roads and grounds, inspecting tanks, and working at the fire department. Record at 14. The Applicant sought physician panel review of two claimed illnesses: chronic obstructive lung disease and hearing loss. *Id.* at 3. He claimed exposure to "all chemicals and contamination in every building at the plant." *Id.* at 14.

The OWA referred the application to a physician panel. The Panel's determinations are reflected in a December 2003 report.

The Panel found evidence that the Applicant has a "mild obstructive lung defect" compatible with a diagnosis of chronic obstructive lung disease. The Panel determined, however, that the lung disease was not related to his employment at DOE. The Panel noted the lack of evidence to support the claimed exposures, and found that the Applicant's X-rays were negative for dust induced pulmonary disease. The Panel noted the Applicant's significant smoking history - 2 to 3 packs per day for over 30 years - and stated that his pulmonary symptoms were "classic for so called 'smoker's lung.'" Report at 1.

The Panel found that the Applicant had hearing loss at least as far back as 1981, two years after he began work at DOE. The Panel noted his exposure to noise in his prior job and at DOE. The Panel found that the Applicant's hearing loss met all the criteria for noise-induced hearing loss and that there was no evidence of significant exposure to audiotoxic solvents.

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

The OWA accepted the Physician Panel's negative determinations, and the Applicant appealed. The Applicant objects to the Panel's determination on his lung disease, stating that he was exposed to toxic substances and that he stopped smoking for a period of time. He also objects to the Panel's determination on his hearing loss, stating that it was attributable to noise at the DOE workplace. Finally, he states that he has colon problems, and he attributes them to his DOE work.

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 (i) consider each claimed illness, (ii) make a finding whether the illness was related to a toxic exposure at DOE and (ii) state the basis for that finding. 10 C.F.R. § 852.12.

We have not hesitated to remand an application where we find error in the panel process. For example, we have remanded applications 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 do not indicate panel error. 6/

The Applicant has not identified panel error. The Panel report indicates that the Panel considered the record thoroughly, and the Applicant has not identified any factual error. The Panel's description of the Applicant's smoking history is consistent with the description he provided in a February 2001 questionnaire. Record at 39. More importantly, the Applicant does not dispute that he smoked for over thirty years: although the Applicant states that he quit three years earlier than he reported in the questionnaire, he also states that he has smoked for the last five years. Similarly, the Applicant does not dispute the Panel's finding that his hearing loss is noise-induced. Whether

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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.*

6/ *Worker Appeal,* Case No. TIA-0066, 28 DOE ¶ _____ (2004).

the noise occurred in a prior job or at DOE is not relevant, because noise is not a "toxic substance" and, therefore, not covered by the DOE program. *See* 42 U.S.C. § 7385o(d)(3); 67 Fed. Reg. 52843. *See also, e.g.*, *Worker Appeal*, Case No. TIA-13, 28 DOE ¶ 80,262 (2003).

Finally, the Panel's failure to consider colon problems was not an error. The Applicant did not mention these problems in his application. If the Applicant seeks panel review of those problems, the Applicant should file a request with the 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:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0075 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: July 29, 2004

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May 14, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: April 2, 2004

Case No.: TIA-0076

XXXXXXXX (the applicant or the worker) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The applicant was a DOE contractor employee at two DOE facilities. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, the appeal should be denied.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses.

1/ ***See*** **www.eh.doe.gov/advocacy.**

Generally, if a physician panel issues a determination favorable to the employee, the DOE Office of Worker Advocacy accepts the determination, and instructs the contractor not to oppose the claim unless required by law to do so. The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). As stated above, the DOE Office of Worker Advocacy is responsible for this program.

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office 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 Program Office. 10 C.F.R. § 852.18(a)(2). *See Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In his application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted on his form "Employment History for Claim Under EEOICPA" that he worked at the DOE's New Brunswick Laboratory in New Brunswick, New Jersey, from 1957 through 1977, and at the DOE facility in Idaho Falls, Idaho, from 1977 through 1987. Record at 10. During that time he was a scientific aide, working in a laboratory. He indicates that he performed analyses on uranium and other toxic materials including hydrochloric, hydrofluoric, perchloric, nitric, sulphuric, and other hazardous laboratory acids. He also indicates that he worked with elements such as "Gallium metal, Vanadium compounds and other exotic materials where the toxicity levels are not known." Record at 18. He was diagnosed with colon cancer in 1999. He believes that exposure to toxic materials at the DOE sites caused this illness.

The Physician Panel issued 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 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 Panel determined that the applicant did develop colon cancer. The Panel cited the known risk factors for colon cancer as heredity, diet and inflammatory bowel disease. The Panel stated that radiation is not a high risk factor. The Panel further found that a "NIOSH radiation dose reconstruction allotted him a total dose to the colon of just over 12 rem as a worst case overestimate. This does not approach the 50 % causation threshold." The Panel therefore issued a negative determination with respect to the claim. The Panel did not specifically address the applicant's claim concerning his exposure to toxic materials other than uranium. *See* February 17, 2004 Physician Panel Report.

The Panel's decision was adopted by the Office of Worker Advocacy. Accordingly, the DOE Office of Worker Advocacy determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits. March 12, 2004 Letter from DOE to the applicant. The applicant appeals that determination.

II. Analysis

In his appeal, the applicant contests the Physician Panel's determination that his colon cancer is not related to exposure to toxic materials during his work at the DOE sites.

A. Exposure to Radiation

The applicant first claims that the Panel's determination that he was exposed "as a worst case" to just over 12 rem is incorrect. He believes that he was exposed to much higher doses of radiation. He contends that the NIOSH dose reconstruction was too low.

I see no basis for remanding this issue to the Panel for further consideration. The applicant's assertions regarding his alleged exposure to higher levels of radiation do not establish any Panel error. In its determination, the Panel stated "known risk factors for colon cancer include heredity, diet and inflammatory bowel disease. Radiation is not considered a high risk factor. Even large radiation therapy doses to the pelvis only result in a very small statistical increase in colon cancer." Thus, the Panel rejected the claim that it is at least as likely as not that the applicant's colon cancer was related to radiation exposure, even in large doses. *See Worker Appeal* (Case No. TIA-0063), 28 DOE ¶ _____ (April 6, 2004). The Panel cited the scientific treatises it used in reaching its determination. OWA Physician Panel Report, Section B: References. The applicant has pointed to no data in the record

showing that this determination is incorrect, nor has he provided any additional scientific data refuting the Panel's conclusion as to the risk factors for colon cancer. Accordingly, I must reject this aspect of the worker's appeal.

B. Exposure to Other Toxic Substances

The applicant also contends that he was exposed to many toxic substances in addition to uranium during his employment at the New Brunswick Laboratory. These substances were enumerated in his Attachment A, which was attached to his form EE-3, "Employment History for Claim Under EEOICPA." Record at 10, 18, 19. The substances included laboratory acids and "exotic" materials. The applicant believes that the development of his cancer was also related to exposure to these other substances.

The Panel did not specifically address the applicant's claim that exposure to the additional materials named in Attachment A caused his colon cancer. However, there is no reason to presume that the Panel therefore overlooked this issue. As stated above, the Panel indicated that the known risk factors for colon cancer include heredity, diet and inflammatory bowel disease. I believe that the Panel thereby implicitly considered and rejected the applicant's contention that his colon cancer was caused by exposure to laboratory acids and "exotic" materials. As noted above, the applicant has neither pointed to any information in the record suggesting that this conclusion is erroneous, nor provided any scientific information indicating that the Panel's medical determination is in error. Accordingly, I see no basis for remanding this matter to the OWA for an explicit finding on this issue.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0076 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: May 14, 2004

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July 29, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: April 5, 2004

Case No.: TIA-0077

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, and he claimed that he had three illnesses that are a result of exposure to toxic substances at a DOE facility. An independent physician panel (the Physician Panel or the Panel) rendered a positive determination on one illness and negative determinations on the other two. The OWA accepted the Panel's determinations, and the Applicant appealed to 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 Applicable 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. 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. § 7385o(d)(3). In general, if a physician

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

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/

B. The Application

The Applicant was employed as a health physicist at a DOE site. The Applicant was born in 1918. He worked at the site for 30 years, until his retirement in 1976. The Applicant sought physician panel review of three claimed illnesses: skin cancer, pulmonary fibrosis, and Graves Disease (hyperthyroidism). The Applicant claimed exposure to ionizing radiation and dust.

The OWA referred the application to a physician panel, and the Panel's determinations are reflected in a February 2004 report. The Panel rendered a positive determination on skin cancer. The Panel rendered negative determinations for the other two illnesses. For pulmonary fibrosis, the Panel found no diagnosis of pulmonary fibrosis or supporting history of exposure to dusts. For Graves Disease, the Panel stated that the Applicant was diagnosed with the disease 25 years after his retirement and that the illness was unrelated to his work at DOE. The Panel stated that ionizing radiation is associated with thyroid cancer but not with Graves Disease. The Panel's determinations on the illnesses were unanimous.

The OWA accepted the Physician Panel's determinations. Specifically, the OWA accepted the positive determination on skin cancer and the negative determinations on pulmonary fibrosis and Graves Disease.

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

The Applicant appeals the OWA's acceptance of the negative determination on Graves Disease. The Applicant maintains that the panel determination contains a factual error.

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 (i) make a finding whether that illness was related to a toxic exposure at DOE and (ii) state the basis for that finding. 10 C.F.R. § 852.12.

The Applicant maintains that the Panel erred when it stated that the Applicant was not diagnosed with Graves Disease until twenty-five years after his retirement. The Applicant maintains that he was diagnosed with Graves Disease nine years after his retirement and that he reported symptoms of the illness during his employment.
As an initial matter, we note that the record supports the Applicant's assertion that he was diagnosed with Graves Disease about nine years after his retirement. A physician's report indicates that the Applicant was diagnosed with hyperthyroidism in 1986, ten years after his retirement. Record at 30. The physician was uncertain whether the hyperthyroidism was Graves Disease or Plummer's Disease, but the physician clearly gave a diagnosis of some type of hyperthyroidism. Record at 30. The physician's report also indicates, however, the Applicant's symptoms were recent: the physician's report describes the Applicant as giving a "2-3 month history of numerous symptoms consistent with" hyperthyroidism. Record at 28.

Although there appears to be a panel error in its statement of when the Applicant acquired Graves Disease, the date is not relevant to the Panel's determination that the illness is not related to the Applicant's work at DOE. The Panel rejected the Applicant's claim that the illness was related to ionizing radiation. The Panel stated that, although thyroid cancer is associated with ionizing radiation, Graves Disease is not. Moreover, there is nothing in the record to suggest that Graves Disease is associated with any type of toxic exposure. Accordingly, we see no basis for concluding that the Physician Panel's ultimate determination is incorrect and have determined that the Appeal should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0077 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: July 29, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

August 12, 2004
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: April 6, 2004

Case No.: TIA-0078

XXXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' benefits. The Applicant has been a DOE contractor employee at a DOE facility for many years. The OWA referred the application to an independent physician panel, which determined that the Applicant's illness was not related to her work 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), challenging the panel's determination.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act creates two programs for workers.

The Department of Labor (DOL) administers the first EEOICPA program, which provides $150,000 and medical benefits to certain workers with specified illnesses, including radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees and DOE contractor employees who worked at DOE facilities and contracted specified cancers associated with radiation exposure. 42 U.S.C. § 73411 (9). In general, a worker in that group is eligible for an award if the worker was a "member of the Special Exposure Cohort" or if it is determined that the worker sustained the cancer in the performance of duty. *Id.* Membership in the Special Exposure Cohort includes DOE employees and DOE contractor employees who were employed prior to February 1, 1992, at a gaseous diffusion plant in Oak Ridge, Tennessee; Paducah, Kentucky; or Portsmouth, Ohio. The DOL program also provides $50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, the DOE program is intended to aid qualified individuals in obtaining workers' compensation benefits under state law. The program provides for an independent physician panel assessment of whether a "Department of Energy contractor employee" has an illness related to exposure to a toxic substance during employment at a DOE facility. 42 U.S.C. § 7385o. 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).

The DOE program is specifically limited to DOE contractor employees who worked at DOE facilities. This limitation exists because DOE would not be involved in state workers' compensation proceedings involving other employers. Pursuant to an Executive Order, 1/ the DOE has published a list of facilities covered by the DOL and DOE programs, and the DOE has designated next to each facility whether it falls within the EEOICPA's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 68 Fed. Reg. 43,095 (July 21, 2003) (current list of facilities). The DOE's published list also refers readers to the DOE Worker Advocacy Office web site for additional information about the facilities. *Id*. The applicant states that she was employed by the Oak Ridge, Tennessee K-25 plant from January 1984 to May 1996, and that she contracted breast cancer in 1995 as a result of that employment. Oak Ridge is a DOE facility.

The regulations for the DOE program are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The DOE Worker Advocacy Office is responsible for this program and has a web site that provides extensive information concerning the program . 2/ This case involves the DOE program, i.e., the program through which DOE contractor employees may obtain independent physician panel determinations that their illness is related to their exposure to a toxic substance during their employment at a DOE facility. The Physician Panel reviewed the application and issued a report. *See* OWA Physician Panel Report (February 4, 2004) (Report). The panel found that the illness did not arise out of the applicant's employment. According to the panel, even though no dosimetry data was available for the period 1984-1989, the applicant's occupational radiation exposure reports from 1989 to 1995 reflected an annual effective dose equivalent of zero (0) millirems from external and internal radiation. In 2003, the applicant received a DOL award as a member of the Special Exposure Cohort. Nonetheless, the Panel unanimously determined that the applicant's illness did not arise from exposure to a toxic substance at a DOE facility.

1/ *See* Executive Order No. 13,179 (December 7, 2000).

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

In the appeal, the applicant disagrees with that determination, alleging that the Panel should have considered the following: (1) five years of dosimetry data (1985-1989) was not available to the Panel; (2) the material reviewed by the Panel did not reveal that she worked around leaking uranium containers, that she was not told at the time that the leaking containers were harmful, and that she did not wear special protective clothing while working around the allegedly hazardous material; and (3) the "very aggressive" nature of her cancer supports her contention that radiation exposure during her employment caused the disease. Letter from applicant to Director, Office of Hearings and Appeals (April 6, 2004). To support this allegation, she states that just four months after a mammogram, and during a time that her duties required her to enter buildings that she described as "contaminated," her doctor found a malignant tumor in her breast.

II. Analysis

The Panel noted the absence of dosimetry information for the first five years of the applicant's employment at Oak Ridge but did not specifically address whether the inclusion of this information would have had any impact on its decision. Nonetheless, annual occupational radiation exposure reports from the last six years of her employment (1989-1995), the six years leading up to her diagnosis of breast cancer, reflected zero millirems exposure. 3/

Our review of the file disclosed a document that appears to contain dosimetry information for the years 1984 to 1989. *See* Report HPX11 (V2.0): All TLD Assignments from 1981 to Current (March 18, 1996) (page 218 of Case No. TIA-0078 File). This report contains a list of 37 records-- 31 identical to the records in another document that was apparently used by the Panel in its assessment. *See* Historical Dosimeter Assignment Report (July 1, 2003) (page 210 of Case No. TIA-0078 File). The six records that are in the 1996 document contain dosimetry readings for the years 1984 through 1988–the years that the Panel considered missing. The first reading, for the period from January 3, 1984 to May 11, 1984, is

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3/ During a telephone conversation about her appeal, the applicant implied that the physician panel failed to give proper consideration to the DOL award she received in 2003. Under the DOL program, the applicant was eligible for an award because she was a member of the Special Exposure Cohort, i.e., (i) she worked at Oak Ridge prior to February 1, 1992, and (ii) she developed breast cancer in 1995. There are, however, significant differences in both programs. In fact, the preamble to the DOE Physician Panel rule specifically states that "some applicants who submit applications in both the DOE and DOL programs may receive different causation determinations from the two agencies." 67 Fed. Reg, 52,849 (Aug. 14, 2002) (explaining that Special Exposure Cohort members with a specific cancer can establish entitlement to benefits without a showing that the disease results form exposure to a toxic substance). The physician panel must meet a higher standard. 10 C.F.R. § 852.8. *See also Worker Appeal*, OHA Case No. TIA-0026, 28 DOE ¶ 80,295 (2003) (DOL award does not represent a finding that the applicant meets the causation standards of the Physician Panel Rule).

20 millirems of shallow exposure. All other readings in the 1996 document reflect zero millirems of exposure. Therefore, it appears that there was no significant dosage in the "missing" years.

In summary, despite the applicant's allegations that she worked around leaking uranium containers, entered contaminated buildings and wore no protective clothing, her dosimetry readings showed a minimal exposure during the first four months of 1984 and no exposure from May 1985 through November 1995. *See* Case No. TIA-0078 File at 218. We therefore conclude that the Appeal does not establish any deficiency or error in the Panel's determination and see no reason to remand this matter to the OWA for a second panel determination. Accordingly, the Appeal should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, OHA Case No. TIA-0078 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 12, 2004

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*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

May 20, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: April 2, 2004

Case No.: TIA-0079

XXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The applicant's late husband (the worker) was a DOE contractor employee at a DOE facility. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. 1/ As explained below, 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.

The Department of Labor (DOL) administers the first program, which provides $150,000 and medical benefits to certain workers with specified illnesses. Those illnesses include beryllium disease and specified cancers associated with radiation exposure. 42 U.S.C. § 7341l(9). The DOL program also provides $50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation

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1/ **The appeal was filed by the daughter of the applicant on behalf of her mother.**

Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u. To implement the program, the DOL has issued regulations, 20 C.F.R. Part 30, and has a web site that provides extensive information concerning the program. 2/

The DOE administers the second program, which does not itself provide any monetary or medical benefits. Instead, it 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. § 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). To implement the program, the DOE has issued regulations, which are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. 3/

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office 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 Program Office. 10 C.F.R. § 852.18(a)(2). *See Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

B. Factual Background

In the application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted that the worker was

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2/ *See* www.dol.gov/esa.

3/ The OWA is responsible for this program and has a web site that provides extensive information concerning the program. *See* www.eh.doe.gov/advocacy.

employed from 1943 through 1944 as a truck driver at the DOE site in Hanford, Washington. Record at 34. In October 1948, he was diagnosed with polycythemia vera, a form of bone cancer. He died from this disease in December 1948. The applicant contends that exposure to radiation at the DOE site caused this illness.

The Physician Panel issued 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 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 Panel determined that the applicant did develop bone cancer. However, the Panel pointed out that there are no occupational records indicating the level of radiation to which the worker was exposed, and no National Institute of Occupational Safety and Health (NIOSH) radiation dose reconstruction has been completed. The Panel therefore concluded that there was no evidence supporting the contention that the illness was caused by exposure to radiation.

In further support of its negative determination, the Panel stated that the course of polycythemia vera is usually slow and the median survival period is 11-15 years. Since the worker died in 1948, the Panel concluded that it was more likely than not that the worker developed the disease prior to beginning his employment at Hanford in 1943. Based on these factors, the Panel issued a negative determination with respect to the claim. *See* January 30, 2004 Physician Panel Report.

The Panel's decision was adopted by the OWA. Accordingly, that Office determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits. March 10, 2004 Letter from DOE to the applicant. The applicant appeals that determination.

II. Analysis

In her appeal, the applicant generally contests the Physician Panel's determination that the worker's polycythemia vera is not related to radiation exposure during his employment at the DOE site. The applicant has provided a statement that she gave to NIOSH to the effect that the worker lived on the Hanford site (with his family)

and therefore was exposed to more radiation than if he simply worked at the site. May 17, 2004 Post Panel Submission by Applicant at 9.

There is nothing in the record to indicate Physician Panel error. The Panel correctly noted the absence of a dose reconstruction in the record, and the record contains no exposure information. The site reported that it had no industrial hygiene records for the Worker. Record at 21, 26. Furthermore, the Panel explained its opinion, and there is no contrary medical opinion in the record.

The applicant's argument on appeal, that because the worker lived on the Hanford site, he was exposed to greater levels of radiation than workers who lived off-site, does not establish Panel error. The applicant raised this argument after the issuance of the Panel determination. Thus, the Panel did not have an opportunity to address this matter. Consequently, I find no error by the Panel on this point.

In any event, the applicant will be receiving new information concerning the worker's radiation exposure. The DOL has referred the applicant's DOL claim to NIOSH for a dose reconstruction. Record at 33, 34; May 17, 2004 Post Panel Submission by Applicant at 2-11. If the applicant receives a dose reconstruction that she believes is significant new information, she may request further panel review. *See Worker Appeal* (Case No. TIA-0045), 28 DOE ¶ _____ (May 5, 2004).

In performing a further review of this case, the Panel may wish to give direct consideration to the unusually young age at which the worker contracted the polycythemia vera. 4/ The Panel may also wish to explicitly consider whether the cited median survival period of 11-15 years is applicable in this case, since the worker received virtually no treatment for the polycythemia vera.

III. Conclusion

As the foregoing indicates, I have identified no error in the Panel's determination in the case. Accordingly, the appeal should be denied.

4/ Polycythemia vera occurs "rarely in patients under 40 years old." *Headline Plus Medical Encyclopedia: Polycythemia Vera*. *See* www.nlm.nih.gov. The worker was diagnosed with polycythemia vera when he was 36 years old.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0079 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: May 20, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

June 17, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case:	Worker Appeal
Date of Filing:	April 8, 2004
Case No.:	TIA-0080

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 has been a DOE contractor employee at DOE facilities for many years. The OWA referred the application to an independent physician panel, which determined that the Applicant's illnesses were not related to his work 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), challenging the panel's determination.

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) covers 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.

The Department of Labor (DOL) administers the first program, which provides $150,000 and medical benefits to certain workers with specified illnesses. Those illnesses include beryllium disease and specified cancers associated with radiation exposure. 42 U.S.C. § 7341l(9). The DOL program also provides $50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u. To implement the program, the DOL has issued regulations, 20 C.F.R. Part 30, and has a web site that provides extensive information concerning the program. 1/

1/ *See* www.dol.gov/esa.

The DOE administers the second program, which does not itself provide any monetary or medical benefits. Instead, it 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. § 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). 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. Factual Background

The Applicant was employed at DOE facilities from 1989 to 1995. He was a construction inspector and has claimed that he was exposed to radiation and to asbestos while working at DOE facilities. On his Request for Review, the Applicant asked for a physician panel review concerning whether his "partial removal of lung" and "hearing loss" are related to his exposures at DOE. *See* Case No. TIA-0080 Record (*Record*) at 1.

The records indicate that a pre-employment chest X-ray examination (in 1989) of the Applicant's lungs indicated that there was pleural scaring of both lungs and an abnormal soft tissue density of the apex (top) of the right lung. *Record* at 186. Subsequently, in 1992, the Applicant was hospitalized and his physician removed the apial (top) portion of the Applicant's right lung. A pathology report concerning the removed portion indicated that the tissue showed mild chronic inflamation, scaring, dilated bronchi (air spaces) with anthracotic pigment. *Record* at 45.

The Applicant was also given a pre-employment audiogram to test his hearing. This audiogram indicated that the Applicant's hearing was impaired with significant loss of hearing with regard to sounds at frequencies of 2000 Hz and above. *See* OWA Physician Panel Report (March 10, 2004) (*Report*) at 2; *Record* at 193. Subsequent audiograms also reflected a hearing loss.

The physician panel reviewed the application and issued a report. *See Report*. With regard to the portion of his lung that was removed, the panel noted that the Individual had claimed to have been exposed to radiation in 1991. However, the panel noted that the available records from the Applicant's employer indicated that he had no measurable exposure to radiation while an employee at DOE facilities. *Report* at 1. The panel found that the anthracotic pigment found in the removed portion of Applicant's lung was not a "radiation associated lesion" but represented carbon pigment from coal dust or urban pollution. *Report* at 2. The panel noted that this pigment is seen in virtually in all urban dwellers and smokers. Because the

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

Applicant was a life long smoker and the abnormal apial lesion of his lung was noted on his pre-employment physical, the panel concluded that the condition of the removed lung portion noted on the pathology report was caused by smoking and not the Individual's alleged exposure to toxins at DOE.

The OWA accepted the physician panel's determination, and the OWA advised the Applicant that he had received a negative determination. *See* March 10, 2004 Letter from the Applicant to OHA. On April 8, 2004, the Applicant filed this appeal concerning the determination. The Applicant has enumerated several grounds for his appeal. First, he asserts that the panel did not address two medical conditions he believes were caused by various exposures - a lung nodule separate from the portion of lung that was removed and a blood disease causing his red blood cells to be enlarged.3/ Second, the Applicant asserts that, in considering his claimed illnesses, the panel did not fully consider the possibility that he had been in fact exposed to radiation.4/ With regard to his hearing loss claim, the Applicant challenges the finding that he had a pre-existing hearing loss prior to his employment at a DOE facility. He states that at the time of his pre-employment physical he was never told of this hearing problem. *See* Memorandum of telephone conversation between Applicant and Richard Cronin, Assistant Director, OHA (May 6, 2004) at 2. He also asserts that while working at various DOE facilities he was exposed to large amounts of loud noises and was not given appropriate ear protection. The Applicant also points out that at least one expert opined

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3/ While the Applicant was not sure of the exact name of the condition, he may be referring to the abnormal Mean Corpuscular Volume (MCV) blood test results noted in the record.

4/ The Applicant challenges the accuracy of various records relating to his occupational exposure to radiation. The records submitted to the panel indicated that the Applicant did not have any documented exposure to radiation while working at DOE facilities. *Record* at 204. However, the Applicant has given a detailed account as to his presence in a building in the DOE's Nevada Test Site in October 1991 which had an exposed amount of radioactive Cesium-137. *Record* at 200-03. The Applicant's account contradicts the DOE facility's report of the incident. Specifically, the Applicant asserts that the facility's report of the incident incorrectly states that the Applicant told the author of the report that he did not go to the level of the building having the exposed Cesium-137. In his account, the Applicant states that he went to the same level as the exposed source and stood only 6 to 8 feet from the exposed source. *Record* at 200. The Applicant believes that it would be impossible for him to stand that close to the open Cesium-137 source and not receive a measurable radiation exposure, especially since the report listed radiation exposure rates from the Cesium-137 as high as 900mR/hr. *See Record* at 208. The Applicant also notes that the report, while reporting a dosimeter badge number for another individual who was exposed, contains no listing of his dosimeter badge number.

that his hearing loss was due to occupational noise exposure. *See* Applicant Appeal Submission (April 8, 2004) at 20 (September 3, 2002 letter).

Generally, the Applicant believes that the panel did not review the available record properly and that the records themselves are not sufficiently accurate. In particular, he notes the records indicate that there were no medical records concerning a physical examination in 1994. However, the Applicant has submitted pages from his date book that he claims indicate that he had a physical examination on April 5, 1994.

II. *Analysis*

A. Whether the Panel Should Have Considered the Applicant's Lung Nodule and Blood Disorder

The Physician Panel Rule requires that the panel make a determination on each claimed illness. *See* 10 C.F.R. § 852.12. The Applicant did not claim a lung nodule or blood disorder on his application. A review of the Applicant's Request for Review by Medical Panel form indicates that in the section marked "7. What illnesses do you have that you believed is caused by your work at a DOE facility(s)?" the Applicant only wrote "Hearing Loss" and "Partial Removal of Lung." *Record* at 1.The panel considered those two claimed illnesses and therefore, complied with the Rule. If the Applicant seeks physician panel review of the two additional illnesses, the Applicant should contact the Office of Worker Advocacy.

B. Partial Removal of Lung

The Physician Panel Rule requires that the panel explain the basis of its determination. 10 C.F.R. § 852.12. As described below, the panel explained the basis of its determination concerning the partial removal of one of the Applicant's lungs, and the record supports that determination.

The panel's decision is based upon records that indicate that the Applicant was a long-term smoker and that the pathology of the removed apial portion of the lung was consistent with changes caused by smoking. *See Record* at 45 (pathology report of removed lung tissue); *Record* at 30 (1992 History reporting that the Applicant had smoked ½ to 1 pack of cigarettes a day for 40 years). The Applicant's fundamental argument is with the finding that the changes in the removed lung tissue were "not a radiation associated lesion."

As an initial matter, we note that the panel finding that the removed lung tissue was "not a radiation associated lesion" is ambiguous. It is uncertain whether the panel found that the changes in the removed lung tissue are not of a type caused by radiation or whether the changes were not caused by radiation because

the Applicant had not been exposed to radiation. Nevertheless, we do not need to resolve this since there is sufficient evidence in the record to support the panel's decision no matter which interpretation is used.

Our review of the record indicates that the panel did consider the Applicant's account of his radiation exposure as well as the documentary evidence indicating that the Applicant had no measurable radiation exposure. 5/ *See Report* at 1. Given the fact that the panel considered his account as well as the other available documentary evidence, we can find no error in the panel concluding that the changes in the removed portion of his lung were not attributable to radiation. 6/ If the panel found that the changes in the removed portion of the lung were not of a type caused by radiation, then the Applicant's actual exposure to radiation is not relevant. On the other hand, if the panel found that the Individual had not been, in fact, been exposed to radiation, there is sufficient evidence in the record to support that panel finding, given the official DOE records that indicate that the Applicant had an exposure level of "0" during the year of the alleged exposure, 1991. *Record* at 204. Consequently, we find no basis to disturb the panel's determination with regard to the lung portion that was removed from the Applicant. *See Worker Appeal TIA-0045* (May 5, 2004), www.oha.doe.gov/cases/wa/tia0045.pdf (assertion of exposure to radiation despite the absence of exposure data is not a basis for concluding that panel determination is incorrect).

C. Hearing Loss

The Physician Panel Rule requires that the panel consider whether a claimed illness was related to exposure to toxic substances during employment at DOE. 10 C.F.R. § 852.1(a)(3). As explained below, the record indicates that the Applicant's hearing loss pre-dated his DOE employment and, in any event, was not caused by exposure to a toxic substance.

The Individual's challenges to the panel's finding concerning his hearing loss center around his assertions that he was never told of his hearing loss during his pre-employment physical; that he was exposed to loud noises during his employment at DOE facilities, and that the records may be incomplete as demonstrated by the lack of a record of his physical examination in 1994. None of these arguments is sufficient for us to conclude that the panel's decision should be remanded. 7/

5/ The Applicant notes that the panel incorrectly asserted that he had "infer[red] that his dosimetry badge was lost."

6/ In making this finding we do not express any opinion as the correctness of the conflicting accounts concerning the extent of the Applicant's Cesium-137 exposure.

7/ With regard to the Applicant's claim that one expert opined that his hearing loss was due to occupational exposure, we note that another expert that reviewed the Applicant's audiograms came to the opposite conclusion. *See* Applicant Appeal Submission (April 8, 2004) at 26 (January 17, 2003 letter). In any event, as discussed below, there is sufficient evidence in the record to support the panel's finding that the Applicant's hearing loss existed before his employment at DOE facilities.

The record clearly shows an audiogram from his pre-employment physical showing loss of hearing with regard to sounds at frequencies of 2000 Hz and above. *See Report* at 2; *Record* at 191-93. As such, it would not have been caused by his employment at DOE facilities. Thus, the panel's determination is adequately supported by evidence in the record. The Applicant's contention that the hearing loss did not exist prior to his employment at DOE facilities (because he was not informed of this hearing loss during his pre-employment physical) is outweighed by the audiogram data contained in the record.

Even if we assume that the Applicant's hearing loss had been caused by exposure to loud noises at DOE facilities, the provisions of the Physician Panel Rule would not cover the Applicant. Section 852.1(a)(3) of the Rule states:

> Physician Panels determine whether the illness or death of a DOE contractor employee arose out of and in the course of employment by a DOE contractor through exposure to a toxic substance at a DOE facility.

10 C.F.R. § 852.1(a)(3). A "toxic substance" is defined in the regulations as follows:

> Toxic substance means 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. For purposes of this regulation, noise (consisting of various sounds) is not a "material" and does not appear to cause harm by its radioactive, chemical or biological nature. Consequently, noise does not fall within the definition of a toxic substance and therefore, illnesses caused by noise are outside the scope of the Rule. *See* 67 Fed. Reg. 52841 (August 14, 2002) at 52843 (preamble to Physician Panel Rule stating "DOE does not believe that noise operates to poison people because it does not operate by chemical action . . . . it [noise] does not fit comfortably within the ordinary meaning of "toxic substances.")

Finally, while the Applicant alleges that some medical records may be missing, as demonstrated by his personal records indicating that he had a physical examination in 1994, the lack of such records would not by themselves invalidate the panel's findings. While records may be lost or misplaced, a physician panel can only review the records it has available. In the present case, we find there is sufficient evidence in the records available to the panel to support each of its findings.

III. Conclusion

As the foregoing discussion indicates, the Applicant's appeal should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0080 is hereby denied.

(2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: June 17, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

August 13, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: April 13, 2004

Case No.: TIA-0081

XXXXXXX XXXXXXX (the Applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant's late husband, XXXXXXXX XXXXXXXX (the Worker) was a contractor employee at a DOE facility for many years. An independent Physician Panel (the Physician Panel or the Panel) determined that the Worker's illnesses were not related to his 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. 1/ As explained below, we have concluded that the appeal should be denied.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this

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1/ The Applicant's appeal was filed on her behalf by the Applicant's daughter, XXXXXXX XXXXXXX, who holds Power of Attorney for the Applicant.

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

Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. Generally, if a physician panel issues a determination favorable to the employee, the DOE Office of Worker Advocacy accepts the determination and instructs the contractor not to oppose the claim unless required by law to do so. The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 10 C.F.R. Part 852. As stated above, the DOE Office of Worker Advocacy is responsible for this program.

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office 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 Program Office. 10 C.F.R. § 852.18(a)(2). *See Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In her application for DOE assistance in filing for state workers' compensation benefits, the Applicant asserted that for approximately 29 years the Worker was an employee at the DOE's facility in Oak Ridge, Tennessee, where he worked in the K-1401 and K-1420 areas within the K-25 plant. She stated that he was exposed to radioactive materials, toxic chemicals, asbestos, degreasers, acids, heat and noise, radiation and hazardous materials in the workplace. She claimed that his exposure to these substances resulted in the following illnesses or conditions during the period 1989 through 1992: (i) noncalcified irregular right middle lobe nodule; (ii) moderate obstructive lung disease; and (iii) kidney disease/dialysis. The Worker died in March 1995.

In its determination, the Physician Panel considered the medical information concerning the Worker's illnesses that had been

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

submitted by the Applicant. It rejected the Applicant's contentions that the Worker's exposure to toxic substances at a DOE facility caused, contributed to, or aggravated any of the Worker's documented illnesses. Specifically, it made the following findings:

> The panel felt that the lung nodule was a descriptive term ans was not an actual diagnosis that could be evaluated for causality, contribution or aggravation. The panel did not see evidence of an exposure at a DOE facility that would cause moderate obstructive lung disease; [The Worker] had a substantial history of smoking which is the most common cause of obstructive lung disease. According to [the Worker's physician], his kidney disease was due to his hypertension, vascular disease, and diabetes.

Panel Report at 1.

The OWA accepted the physician panel's determination. Accordingly, the OWA determined that the Applicant was not eligible for DOE assistance in filing for state workers' compensation benefits.

In her appeal, the Applicant contends that the physician panel determination is erroneous. On December 19, 2003, the Applicant had submitted an EEOICPA claim to the Department of Labor (DOL) contending that the Worker's exposure to toxic materials in the workplace was a contributing factor to Chronic Obstructive Pulmonary Disease (COPD) and Chronic Beryllium Disease (CBD). In a ***Notice of Final Decision*** dated April 2, 2004 (the ***DOL Final Decision***), the DOL determined that the Worker's employment at the K-25 Facility was sufficient to meet the requirement of an occupational or environmental history, or epidemiologic evidence of beryllium exposure. It further concluded that the factual and medical evidence concerning the Worker met the criteria for CBD set forth at Section 73841(13)(B) of the EEOICPA. On the basis of the finding in the DOL decision, the Applicant requests that her claim be reopened so that the evidence of the Worker's exposure to beryllium and CBD can be considered by the Panel.

II. Analysis

The Physician Panel Rule specifies what a physician panel must include in its determination. The panel must address each claimed illness, make a finding whether that illness arose out of and in the course of the Worker's DOE employment, and state the basis for that finding. 10 C.F.R. § 852.12(a)(5). Although the rule does not specify the level of detail to be provided, the basis for

the finding should indicate, in a manner appropriate to the specific case, that the panel considered the claimed exposures.

As discussed above, the Panel determination addressed the Applicant's claim that the Worker suffered from (i) noncalcified irregular right middle lobe nodule; (ii) moderate obstructive lung disease; and (iii) kidney disease/dialysis. The Applicant does not object to any of the specific findings made by the Panel concerning these illnesses. In the claim that she submitted to the DOE, the Applicant *did not assert* that the Worker was exposed to beryllium at a DOE facility or that he suffered from CBD. 3/ Accordingly, the Panel's failure to consider beryllium exposure or CBD was not a deficiency or error. Because the Applicant has not identified a deficiency or error in the Panel's determination, there is no basis for an order remanding the matter to OWA for a second Panel determination. Therefore the appeal will be denied. However, the Applicant is claiming a new illness and has presented evidence concerning the Worker's possible beryllium exposure at a DOE facility and resulting CBD. Under these circumstances, the Applicant should consider filing a request with the OWA for panel review of this issue.

3/ In fact, the only reference to beryllium exposure that I found in the DOE record of this claim was a document entitled "Pulmonary History" dated December 18, 1974. The document is unsigned but appears to have been completed by someone who interviewed the Worker. It indicates that the Worker never worked with asbestos or beryllium. *See* Record of Claim at 523.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0081 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 13, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

September 17, 2004

OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **April 15, 2004**

Case No.: **TIA-0082**

XXXXXX XXXXXX (the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' benefits. The Applicant had worked as an employee at a DOE facility for approximately one year in the 1940's. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illnesses were not related to her work 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), challenging the Panel's determination.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act creates two programs for workers.

The Department of Labor (DOL) administers the first EEOICPA program, which provides $150,000 and medical benefits to certain workers with specified illnesses, including radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees and DOE contractor employees who worked at DOE facilities and contracted specified cancers associated with radiation exposure. 42 U.S.C. § 73411 (9). In general, a worker in that group is eligible for an award if the worker was a "member of the Special Exposure Cohort" or if it is determined that the

worker sustained the cancer in the performance of duty. *Id.* Membership in the Special Exposure Cohort includes DOE employees and DOE contractor employees who were employed prior to February 1, 1992, at a gaseous diffusion plant in Oak Ridge, Tennessee; Paducah, Kentucky; or Portsmouth, Ohio. The DOL program also provides $50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, the DOE program is intended to aid qualified individuals in obtaining workers' compensation benefits under state law. The program provides for an independent physician panel assessment of whether a "Department of Energy contractor employee" has an illness related to exposure to a toxic substance during employment at a DOE facility. 42 U.S.C. § 7385o. 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).

The DOE program is specifically limited to DOE contractor employees who worked at DOE facilities. This limitation exists because DOE would not be involved in state workers' compensation proceedings involving other employers. Pursuant to an Executive Order, 1/ the DOE has published a list of facilities covered by the DOL and DOE programs, and the DOE has designated next to each facility whether it falls within the EEOICPA's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 68 Fed. Reg. 43,095 (July 21, 2003) (current list of facilities). The DOE's published list also refers readers to the DOE Worker Advocacy Office web site for additional information about the facilities. *Id.* In her application, the Applicant stated that she was employed at what is now the DOE's Oak Ridge,

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1/ *See* Executive Order No. 13,179 (December 7, 2000).

Tennessee facility for approximately one year in the 1940's. She stated that in the 1960's she was diagnosed with Meniere's Syndrome, a condition that eventually resulted in severe hearing loss, and that in 2003 she was diagnosed with a malignant lymphoma of the bilateral lacrimal glands and nose.

The regulations for the DOE program are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The DOE Worker Advocacy Office is responsible for this program and has a web site that provides extensive information concerning the program .2/ This case involves the DOE program, i.e., the program through which DOE contractor employees may obtain independent physician panel determinations that their illness is related to their exposure to a toxic substance during their employment at a DOE facility. The Panel reviewed the application and issued a report. *See* OWA Physician Panel Report (February 11, 2004) (Report). The Panel unanimously determined that the Applicant's medical records did not support her claim that she had illnesses that arose from her exposure to a toxic substance at a DOE facility. With respect to Meniere's Disease (syndrome), the panel found that the cause is uncertain but is believed to be related to a build-up of excessive fluid in the inner ear. It found that there is "no established connection of this condition to radiation or toxic exposure." Panel Report at 1.

With respect to "Lacrimal Duct and Nose Lymphomas," the panel found that the Applicant's record

> does not contain any pathological evidence of lymphoma. There is no description of the type of lymphoma or any authoritative report in the record of this Applicant confirming a diagnosis of lymphoma.

Panel Report at 5.

In her Appeal, the Applicant disagrees with that determination, alleging that pathologic evidence of lymphoma had been submitted

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

for review by the Panel. She also asserts that the DOL "ruled that the lymphoma was caused by work and awarded compensation." She believes that the DOE should make a similar ruling.

II. Analysis

The Physician Panel Rule specifies what a physician panel must include in its determination. A panel must address each claimed illness, make a finding whether that illness arose out of and in the course of the Worker's DOE employment, and state the basis for that finding. 10 C.F.R. § 852.12(a)(5). Although the rule does not specify the level of detail to be provided, the basis for the finding should indicate, in a manner appropriate to the specific case, that the panel considered the claimed exposures.

With respect to the Applicant's claim concerning lymphoma, the Panel noted the absence of any pathological evidence of lymphoma in the record before it, while the Applicant asserts that such evidence "was submitted for review." Appeal letter at 1. Attached to her Appeal letter is a copy of the evidence that she states was submitted. It includes a Radiology Consultation Report dated October 2002 concerning the condition of the Applicant's lacrimal glands revealed by an MRI (the 2002 MRI Report). It also contains numerous physician reports dating from April 2003 through July 2003 which indicate a medical diagnosis of lymphoma of the lacrimal glands. Our review of the Applicant's record indicates that none of these 2003 reports were included in the materials sent to the Panel for review. Our conclusion is supported by the Applicant's "History" which appears at pages 25 and 26 of Applicant's record. The Applicant's DOE case worker notes that on July 11, 2003 she sent the Applicant a letter asking for additional medical records and that on July 21, 2003 the Applicant had stated to another DOE employee that she would send the DOE oncology records concerning her diagnosis of bilateral malignant lymphoma of the lacrimal glands. However, the case worker notes that when additional medical records were received from the Applicant on August 5, 2003, there was only one new document, the 2002 MRI Report.

> Received from Applicant additional medical documentation received at OWA on 8/5/03. Review of file finds Former Program information has been previously submitted by Applicant. The one additional document submitted was MRI Brain & Stem with & without Contrast [referred to above as the 2002 MRI Report] . . . . No further medical documentation was submitted by Applicant (due back 8/11/03) for Meniere's syndrome or lacrimal duct & nose lymphomas since 30 day application letter sent. Will submit case to OWA MD for review. All available site and personal medical in file at this time.

Applicant's "History" at p. 25 of the Applicant's record. We therefore conclude that of the documents submitted by the Applicant with her Appeal letter, only the 2002 MRI Report was included in the administrative record submitted to the Panel for review.

We agree with the Panel's conclusion that this document is not sufficient to support the Applicant's claim of lymphoma. The 2002 MRI Report states that

> The [Applicant's] lacrimal glands are enlarged bilaterally. There is no focal mass, but the diffuse enlargement can be seen with collagen vascular diseases or sarcoidosis. Please correlate with history.

2002 MRI Report at 1. There is no description of lymphoma or diagnosis of lymphoma in this document. Accordingly, the Applicant has not shown that the Panel erred in its conclusion based on the medical evidence before it.

Nor do we find any merit in the Applicant's contention that the Panel failed to give proper consideration to the DOL award that she received in September 2003 on the basis of lymphoma. DOL Notice of Final Decision, administrative record at 388. The Panel could not rely on the DOL's determination. As discussed above, the Panel is required to address each claimed illness, and to make an independent finding whether that illness arose out of and in the course of the Worker's DOE employment. 10 C.F.R. § 852.12(a)(5). In this instance, the Panel concluded that it did not have

sufficient medical information before it to conclude that the Applicant had been properly diagnosed with lymphoma. We therefore conclude that the Applicant's Appeal does not establish any deficiency or error in the Panel's determination. Accordingly, the Appeal will be denied.

Finally, we note that the Panel's Report indicates that further information on the claimed lymphomas might result in a different determination. Report at 5. Accordingly, we are forwarding the information supplied by the applicant in her Appeal to the OWA so that it can arrange for further panel review based on this information.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, OHA Case No. TIA-0082 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

August 13, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case:	Worker Appeal
Date of Filing:	April 16, 2004
Case No.:	TIA-0083

XXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits based on the employment of her late husband, XXXXXXXXX (the Worker). The Worker was a DOE contractor employee at a DOE facility for many years. The OWA referred the application to an independent physician panel, which determined that the Worker's illnesses were not related to his work 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), challenging the panel's determination.

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) covers workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which does not itself provide any monetary or medical benefits but instead is intended to assist DOE contractor employees in obtaining workers' compensation benefits under state law. Pursuant to Part D, 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. § 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). 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. 1/

B. Factual Background

The Worker was employed (with the exception of a few intermittent months) at a DOE facility from 1959 to 1988. He was a laborer/foreman and the Applicant has claimed that he was exposed to radiation while working at the DOE facility. In the Request for Review, the Applicant asked for a physician panel review concerning whether the Worker's "polycythemia vera" and "Other lung - mild COPD" (chronic obstructive pulmonary disease) are related to his radiation exposure at DOE. *See* Case No. TIA-0083 Record (Record) at 2. 2/

The physician panel reviewed the application and issued a report. *See* January 22, 2004 Physician Panel Report (Report). With regard to the COPD, the panel noted that the medical records indicated that the Worker had no history of smoking but had a "recorded history" of working 3 to 4 years in an unspecified type of mine. 3/ Report at 1. The panel reported that none of the chest X-rays taken of the Worker's lungs indicated any type of features that would be suggestive of COPD. Report at 2. The panel reviewed all the available clinical notes, X-ray findings, and pulmonary function tests in the record and could find no basis to support a finding that the Worker suffered from COPD. Report at 2. Further, the panel went on to state that there is no evidence that exposure to radiation, even at high levels, would cause COPD. Report at 2.

In its report, the panel also found that the Worker's polycythemia vera was not due to any exposure to toxic substances at the DOE facility. 4/ The panel noted that the only risk factor for polycythemia vera is age over 50 and that no link had been established between polycythemia vera and low dose radiation exposure. Report at 3. The panel did state that high radiation doses for the survivors of the Hiroshima and Nagasaki atomic bomb blasts had been linked to an increased incidence of polycythemia vera. Report at 4. According to the available records, the Worker's radiation exposure revealed a total rem exposure of

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1/ *See* www.eh.doe.gov/advocacy.

2/ The Worker was diagnosed as suffering from polycythemia vera in 1992. Record at 92. In the medical records detailing the Worker's treatment of polycythemia vera there is a physician's note that states "mild COPD." Record at 90.

3/ The panel defined COPD as an obstructive airway disease due to chronic bronchitis or emphysema. Report at 1.

4/ Polycythemia vera is a blood disorder characterized by increased bone marrow production of red blood cells, platelets and sometimes white blood cells. Report at 3.

3.37 rems of Pu-239 and Pu-238. Record at 227. 5/ A urinalysis taken in October 1964 revealed the presence of 8d/m/l of U-235 in the Worker's urine. Report at 4; Record at 370. Another urinalysis on November 1964 also revealed the presence of 13d/m/l U-235 in the Worker's urine. 6/ Report at 4; Record at 370. The radiation primarily associated with these exposures consisted of alpha particles.7/ The panel noted that this type of radiation has little penetrating power and has no specific causal relationship with polycythemia vera. Report at 4.

The OWA accepted the physician panel's determination, and the OWA advised the Applicant that she had received a negative determination. *See* April 2, 2004 Letter from the Applicant to OHA (Letter). On April 16, 2004, the Applicant filed this appeal concerning the determination, on the specific grounds that the panel used incorrect information when it noted in its report that the Worker had a 3 to 4 year history of participating in mining. Letter at 1. The Appellant stated that the only jobs the Worker performed were that as a laborer and as a foreman. Letter at 1. We consider her argument below.

II. *Analysis*

The Applicant believes that the panel's decision is flawed because of its statement that there is a "recorded history of 3 to 4 years unspecified mining." Report at 1. Our review of the records indicates that a medical history prepared by a physician reported that the Worker "worked in mines for 3 - 4 years." Record at 98-99. Consequently, we cannot find that the panel's reference to this information was an error.

Overall, we can find no error with the panel's findings. The panel considered each of the claimed illnesses. With respect to the COPD claim, the panel examined the available evidence to come to the conclusion that the Worker did not, in fact, suffer from COPD. Given the details provided by the panel it appears that they have considered all of the record in making their finding. We have verified the facts cited in the record used to form the judgment of the panel members. Significantly, the panel did not use the disputed fact concerning the Worker's involvement in mining in determining that the Worker did not suffer from COPD. Moreover, even if the Worker suffered from COPD, there is no relationship between radiation exposure and that disease. Thus, we find no reason to disturb the panel's finding with regard to COPD.

5/ A rem is a measurement unit of absorbed radiation. Pu- 238 and Pu-239 are two different isotopes (atoms with the same number of protons but different numbers of neutrons) of the radioactive element plutonium.

6/ U-235 is a specific isotope of the radioactive element uranium. We have not been able to determine what specific unit of measurement "d/m/l" represents.

7/ An alpha particle consists of two protons and two neutrons.

We also find no error with the panel's finding concerning the Worker's polycythemia vera. The panel reviewed the available radiation exposure records concerning the Worker and determined that his radiation exposure was too low and of a type unlikely to cause polycythemia vera. Our review of the record confirms that the panel considered the available radiation exposure records and does not reveal any error in the panel's findings. We find no reason to remand this case back to the panel.

III. Conclusion

In its review, the panel examined the available medical records and determined that the Worker's estimated radiation exposure would not have caused his polycythemia vera. Further, the panel determined that the Worker did not in fact suffer from COPD and that even if he did, there is no association between radiation and COPD. As the foregoing discussion indicates, the Applicant's appeal should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0083 is hereby denied.

(2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: August 13, 2004

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

July 9, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: April 16, 2004

Case No.: TIA-0084

XXXXXXXXX (the Applicant) filed an appeal concerning an application to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits based on the employment of her late husband (the Worker). 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 did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant appealed to the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be granted and the application remanded to OWA.

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

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

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. § 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/

B. Procedural Background

The Worker was employed at DOE's Oak Ridge site. The Worker was born in 1920, and he worked at the site for 13 years, from 1972 until he retired in 1985. Record at 16, 21. In 2002, the Worker died, at the age of 82. *Id.* at 21. The death certificate cited cardio-respiratory arrest as the immediate cause of death, and respiratory insufficiency, bilateral pneumonia, and dementia as other conditions. *Id.*

The application sought physician panel review of the following illnesses: silicosis, asbestosis, and emphysema. Record at 2. The application stated that the Worker oiled machines and kept them clean and worked with concrete. The application attributed the Worker's illnesses to exposure to hazardous substances and cement.

The record indicates that the Applicant provided documentation of a diagnosis of silicosis to the OWA during the case development process. Record at 27 (Case History, 03/04/04 entry). The documentation apparently did not make its way into the record, and the record did not contain any other diagnosis of silicosis.

The Physician Panel rendered negative determinations on the three claimed illnesses. The Panel found no evidence that the Worker had

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

the illnesses. The OWA accepted the Physician Panel's determinations, and the Applicant filed the instant appeal.

In her appeal, the Applicant challenges the Panel's negative determination on silicosis. The Applicant maintains that the Worker was diagnosed with silicosis, and she supplies a copy of a hospital report that includes the following statement: "The silicosis is obvious on his chest x-ray but has evidently caused no problem." Physician Report on 01/11/02 Hospital Admission at 1.

II. *Analysis*

The Physician Panel Rule provides for OWA submission to the panel of records gathered during the case development process. 10 C.F.R. §§ 852.4 to 852.6. In this case, the record indicates that the applicant provided documentation of a diagnosis that did not make its way into the record. Accordingly, the application should be remanded to OWA for further processing. We will forward a copy of the documentation to OWA so that the application, supplemented with this material, may receive further panel review.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0084 be, and hereby is, granted as set forth in Paragraph 2 below.

(2) The Application that is the subject of this Appeal is remanded to the Office of Worker Advocacy for further processing consistent with this Decision.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: July 9, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

July 8, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Date of Filing: **March 26, 2004**

Case No.: **TIA-0085**

XXXXXXXXXXXXXXX (the applicant or the worker) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The applicant was a DOE contractor employee at a DOE facility. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, the appeal should be denied.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to a toxic substance at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Part D establishes a DOE process through which independent Physician Panels consider whether exposure to a toxic substance at DOE facilities caused, aggravated or contributed to employee illnesses. Generally, if a Physician Panel issues a determination favorable to

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1/ ***See*** **www.eh.doe.gov/advocacy.**

the employee, the DOE Office of Worker Advocacy accepts the determination and instructs the contractor not to oppose the claim unless required by law to do so. The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 10 C.F.R. Part 852. As stated above, the DOE Office of Worker Advocacy is responsible for this program.
The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office 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 Program Office. 10 C.F.R. § 852.18(a)(2). *See Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In her application for DOE assistance in filing for state workers' compensation benefits, the worker asserted that from 1970 until 1985, she was a graphic artist at the K-25 plant at the DOE site in Oak Ridge, Tennessee. She indicates that from 1985 through 1994, she worked as a senior printer for the engineering department in Building 9102-1 at the Oak Ridge Y-12 plant. She claims that in 1988, she was diagnosed with asthma. The material prepared by OWA states that the applicant claimed she developed chronic obstructive pulmonary disease (COPD) in 1986. The applicant states that Building 9102-1 was a "sick" building, with "water running down the walls" and the presence of mold. She claims that these conditions, along with exposure to photo chemicals in the building, caused these illnesses.

The Physician Panel issued a negative determination on this claim. The Panel found that the worker's illnesses 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 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 worker's claim, the Physician Panel unanimously found that the applicant did not have COPD. The Panel found that the applicant "probably has asthma." However, the Panel determined that the applicant probably developed the asthma prior to 1972, before she began working at Building 9102-1. The Panel further found no evidence that her asthma was aggravated by her work at that building. Accordingly, it issued a negative determination with respect to her claim.

II. Analysis

The applicant seeks review of the Panel's determination with respect to her asthma claim. 2/ She contends that she did not have asthma prior to working at Building 9102-1. She claims that she developed asthma in 1988, after working in that building.

As evidence for its conclusion that the applicant had asthmatic symptoms before her move to Building 9102-1, the Panel cited her reduced pulmonary function test results of 1985. The applicant has cited no evidence that contradicts that determination. In fact the record shows that the applicant had consistently low pulmonary function tests beginning in 1979 through 1983, years before her 1985 move to Building 9102-1. Record at 303.

The Panel also concluded that the applicant's asthma was not aggravated or contributed to by her work in Building 9102-1. The Panel cited her pulmonary function test of 1988, which showed lung functions at higher levels than in 1985. Record at 303. Moreover, the applicant's medical records show that her lung function tests for 1988 and 1994 are at similar levels. Record at 304. Thus, even after she had worked a number of years in Building 9102-1, the applicant's pulmonary function test results were better than those during the period 1979 through 1983, before she worked in Building 9102-1. Accordingly, the record supports the Panel's conclusion that her asthma was not aggravated or contributed to by her working in Building 9102-1. The applicant has pointed to nothing in the record that suggests that the Panel's determination was incorrect.

In sum, the applicant has not demonstrated any deficiency or error in the Panel's determination. Consequently, there is no basis for an

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2/ She does not contest the Panel's negative finding regarding COPD. I will therefore give no further consideration to that aspect of the Panel determination.

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-0085 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: July 8, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

September 29, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: April 21, 2004

Case No.: TIA-0086

XXXXXXXX (the applicant), a former DOE contractor employee at a DOE facility, applied to the Department of Energy's (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. Based on a negative determination from an independent Physician Panel, OWA determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, the appeal is granted in part and the application remanded to OWA.

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) provides various forms of assistance or relief to workers currently or formerly employed by the nation's atomic weapons programs. See 42 U.S.C. §§ 7384, 7385. This case concerns Part D of the Act, which provides for a program to assist DOE contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. The DOE has issued regulations to implement Part D of the Act, which are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The DOE's program implementing Part D is administered by OWA.

Generally, if a physician panel issues a determination favorable to the employee, OWA accepts the determination and instructs the contractor not to oppose the claim unless required by law to do so. For those applicants who receive an unfavorable determination, the Physician Panel Rule provides an appeal process. Under this process, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain OWA decisions. 10 C.F.R. § 852.18. The present appeal seeks

review of a negative determination by a physician panel that was accepted by OWA. 10 C.F.R. §852.18(a)(2). 10 C.F.R. § 852.18(c) mandates that an appeal is governed by the OHA procedural regulations set forth at 10 C.F.R. Part 1003. The applicable standard of review is set forth at 10 C.F.R. § 1003.36(c), which provides that "OHA may deny any appeal if the appellant does not establish that – (1) the appeal was filed by a person aggrieved by a DOE action; (2) the DOE's action was erroneous in fact or law; or (3) the DOE's action was arbitrary or capricious." 10 C.F.R. § 1003.36(c).

B. Factual Background

The Applicant was employed by various DOE contractors at the Los Alamos National Laboratory (LANL). The Applicant submitted a claim to OWA asserting that he was intermittently employed by various contractors at LANL as an insulator and asbestos worker from 1976 to 1991. During this period, the Applicant claims, he frequently installed or removed asbestos-containing insulation while working at LANL. The Applicant contends that his alleged asbestosis has resulted from exposure to asbestos that occurred in part during his employment at LANL. The Applicant also claims that he has a Beryllium Sensitivity.

On March 12, 2004, OWA issued a letter in which it accepted a negative determination by the Physician Panel. The determination is contained in the Physician Panel Report (the Report). The Report indicates that the Physician Panel found that the applicant's contention that he has a beryllium sensitivity is not supported by the available laboratory records.

The Report also sets forth the Physician Panel's conclusions concerning the Applicant's asbestosis claim, stating in pertinent part:

> The panel's conclusion is that claimant does not have asbestosis. He may have some pleural abnormalities indicative of asbestos exposure which is most likely to have occurred during employment not on a DOE site.

Id. On April 21, 2004, the applicant appealed OWA's determination.

II. Analysis

Under Part 852, "[w]hether a positive or favorable determination is rendered is to be based solely on the standard set forth [at 10 C.F.R.] § 852.8." 67 Fed. Reg. 52850 (August 14, 2002). That regulation states:

> A Physician Panel must determine whether the illness or death arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility on the basis of whether it is as least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the

illness or death of the worker at issue.

10 C.F.R. § 852.8. The preamble to Part 852 states "[t]he DOE intends that, as used in this context, the word 'significant' should have its normal dictionary definition and meaning –that is, 'meaningful' and/or 'important'." 67 Fed. Reg. 52847 (August 14, 2002).

A. Beryllium Sensitivity

The panel concluded that the Record does not support the Applicant's claim that he has a Beryllium Sensitivity. The Report notes that "a diagnosis of beryllium sensitivity requires 2 sequential positive tests." Physician Panel's Report at 2. The Report further notes that only one of four beryllium sensitivity tests administered to the Applicant indicated potential Beryllium Sensitivity. *Id.* The only basis provided by the Applicant's appeal of OWA's determination that he does not have a Beryllium Sensitivity is his claim that he only had three Beryllium Sensitivity tests as opposed to the four tests claimed by the physician's panel. However, even if we assume that the Applicant did in fact have only 3 Beryllium Sensitivity tests, the Physician Panel's findings would still be appropriate, since the record would still lack the information necessary to conclude the applicant has Beryllium Sensitivity, i.e. two sequential positive Beryllium Sensitivity tests. Consequently, I find no error by the Panel on this point.

B. Asbestos Related Disease

1. Diagnosis

The Physician Panel denied the Applicant's claim that he has asbestosis, instead finding that the applicant has "pleural abnormalities indicative of asbestos exposure." The Physician Panel reached this conclusion even though the Record indicates that at least one physician concluded that the applicant has asbestosis and another physician concluded that his findings suggests asbestosis.

On June 10, 1999, Dr. Alan S. Glann, a pulmonary physician, wrote that the Applicant has "asbestosis identified radiographically." Record at 98. On June 23, 1999, Dr. Glann wrote that a CT scan of the Applicant conducted on June 7, 1999 indicated that the Applicant has asbestosis. Record at 59, 60, 74. On August 30, 1999, Dr. Glann again wrote a letter in which he concluded that the Applicant has asbestosis. Record at 72-73. On December 4, 2000, the applicant was examined by Dr. Richard A. Brown, a colleague of Dr. Glann's. Noting "calcific pleural plaquing" and " very mild . . . basilar fibrosis," Dr. Brown opined that "these findings would then suggest asbestosis." Record at 60, 88-90.

On the other hand, two physicians have concluded that the Applicant does not have asbestosis. The Record contains a report in which Dr. Bob Gayler of the Johns Hopkins Bayview Medical Center states his impressions of a July 25, 2000 chest x-ray. Specifically, Dr. Gayler states: "The findings suggest prior pneumonia with pleural scarring or pleural infection. This is not a typical appearance of asbestosis." Record at 158. On December 6, 1989, Dr. William I. Christensen, the Medical

Director of the Presbyterian Occupational Medicine Clinic, wrote LANL's X-Ray department to inform it of his conclusion that the applicant did not have any asbestos related disease. Record at 185. On March 2001, Dr. Christensen wrote a nine page letter in which he opined that the Applicant had "asbestos related pleural disease without asbestosis." Record at 62. Interestingly, Dr. Christensen found that the Applicant's pleural abnormalities were *not consistent with pneumoconiosis*. Record at 164.

The Report does not explain why the Panel concluded that the Applicant does not have asbestosis - specifically, why it rejected the diagnoses of Drs. Glann and Brown, which were based on a CT scan. The Physician Panel Rule requires that a Physician Panel must explain why any evidence contrary to its determination is not persuasive. 10 C.F.R. § 852.12(c)(1). Accordingly, I am remanding this matter to the OWA for an explanation of why the Physician Panel found Dr. Glann and Dr. Brown's findings unpersuasive.

2. Extent of Exposure

The Physician Panel concluded that the Applicant's exposure at LANL occurred sporadically between 1986 and 1990, with fewer than 2 years total of work at LANL. The Appeal claims that the claimant was sporadically employed at LANL for a much longer time, from 1975 until 1990. The Record shows that during the application process, the Applicant repeatedly indicated that he had worked off and on at LANL for a period of 25 years, beginning in 1975 and concluding in 1990. Record at 6, 16, 19, 24 and 56. The Act requires that the DOE assist DOE applicants in obtaining information in DOE's control concerning their employment history and exposures. See 42 U.S.C. §§ 7384v(a), 7385o(e); 67 Fed. Reg. 52841, 52848 (2002) (preamble to the Physician Panel Rule). The Applicant claimed the he worked for three employers sporadically over the period 1975 to 1990. The OWA requested site records concerning the Applicant's employment, and the site responded with records documenting employment during the period 1986 to 1990 for two different contractors. We believe that, in conjunction with the remand discussed in Part II.B.1 above, further effort should be made to assist the Applicant in documenting his claimed earlier employment. The extent of the Applicant's employment at LANL is critical to this application for assistance, since the length of employment appears to have affected the Physician Panel's assessment of his claim. The site did not indicate whether the third employer identified by the Applicant performed work at the site during the claimed period of employment. OWA should request this information from the site and give the Applicant an opportunity to provide records to document the claimed employment. Possible records include social security records showing the Applicant's employer, union dispatch records, and co-worker affidavits.

3. Causation

The Physician Panel Rule requires that the Physician Panel's finding must include a determination of "whether the illness or death arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility." 10 C.F.R. § 852.12(b)(4). This determination must be made "on the basis of whether is it as least as likely as not that exposure to a toxic substance at a

DOE facility during the course of employment by a DOE contractor was *a significant factor in aggravating, contributing to,* or causing the illness or death of the worker at issue." 10 C.F.R. § 852.8 (emphasis supplied). The Report, by attributing the injury to asbestos exposures outside of LANL suggests that the Panel either concluded that the Applicant was not exposed to asbestos while employed at LANL, or concluded that any asbestos exposure incurred by the Applicant at LANL was not a significant factor in aggravating, contributing to, or causing the applicant's plural abnormalities or asbestosis.

The Report states that LANL records show that the Applicant was not exposed to asbestos while working at LANL. I find this statement rather puzzling. The Record clearly shows that the Applicant was employed at LANL as an "asbestos worker" and "insulator." Record at 14, 19, 24, 283, and 284. Both occupations typically involve significant exposure to airborne asbestos fibers. The Applicant also reports regular exposure to asbestos while employed at LANL.

The only information in the record to the contrary is a handwritten note appearing on a typed internal LANL memo dated December 6, 2002. The memo appears as page 263 in the Record. The handwritten note states: "While an insulator has the potential to work with Asbestos, [the applicant] was never assigned to a job where asbestos was identified in pre-job analysis. No IH exposure records were found in LANL or Johnson Control records." The handwritten portion of the memo is signed by Helena Whyte and dated December 13, 2002.

The Report fails to explain why the Panel chose to rely on the handwritten note instead of the other evidence suggesting that the applicant was exposed to asbestos while working at LANL. Since the Report fails to explain why the Panel did not find the evidence in the Record suggesting the Applicant was exposed to asbestos while working at LANL persuasive, the Rule's requirement set forth at 10 C.F.R. § 852.12(c)(1) has not been met. Accordingly, on remand, OWA should provide a full and complete explanation of why the Applicant's occupation and recollection of asbestos exposure did not persuade it that the Applicant was exposed to asbestos while employed at LANL.

The Report further cites a number of factors which allegedly limited the Applicant's asbestos exposure at LANL. Specifically, the Report notes: (1) the Applicant spent less than two years working at LANL, and (2) "by the applicant's own admission, he used better personal protective equipment during the years he did any work on the LANL site than while he was working for private employers." Assuming that both of these contentions are accurate, the Report still does not explain why they persuaded the Panel that any asbestos exposure incurred by the Applicant at LANL would "not as likely as not" have been a significant factor in aggravating, contributing to, or causing the Applicant's illness. Accordingly, on remand the panel should provide a more thorough explanation of its reasoning.

The Report also notes that two facts indicate the Applicant was most likely exposed to more asbestos during his employment outside of LANL than during his employment at LANL. Specifically, the Report notes that (1) the Applicant used better protective gear while working at LANL than while working outside of LANL, and (2) the vast majority of the applicant's 25 year history of working

with asbestos occurred outside of LANL. While it is clear that the Applicant's significant history of asbestos exposure outside of LANL would, by itself, account for the Applicant's asbestos related disease, the fact that a significant majority of the Applicant's exposure to asbestos occurred outside of LANL does not show that the Applicant's exposure to asbestos at LANL was unlikely to have been a significant factor in aggravating, contributing to or causing the Applicant's asbestos related disease. Accordingly, on remand the Panel should explain why it concluded that the Applicant's exposure to asbestos at LANL was not a significant factor in aggravating, contributing to or causing the Applicant's pleural abnormalities or asbestosis.

III. Conclusion

As the foregoing indicates, the Panel did not provide an explanation of its determination sufficient to satisfy the requirement in 10 C.F.R. § 852.12. On remand, the Office of Worker Advocacy should provide the Applicant with an opportunity to document his claimed employment, and then refer the Applicant's claims of asbestosis and pleural abnormalities to the Panel for a new determination clearly explaining its findings in accordance with 10 C.F.R. § 852.12.

It Is Therefore Ordered That:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0086 is hereby granted as set forth in Paragraph (2) and is denied in all other aspects.

(2) The application that is the subject of Case No. TIA-0086 is remanded to the Office of Worker Advocacy for further consideration consistent with this Decision and Order.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 29, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

September 7, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Case Number: **TIA-0087**

Date of Filing: **April 21, 2004**

XXXXX (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 husband (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) provides various forms of assistance or relief to workers currently or formerly employed by the nation's atomic weapons programs. See 42 U.S.C. §§ 7384, 7385. This case concerns Part D of the Act, which provides for a program to assist DOE contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. The DOE has issued regulations to implement Part D of the Act, hereinafter referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The DOE's program implementing Part D is administered by OWA.

Generally, if a physician panel issues a determination favorable to the employee, OWA accepts the determination and instructs the contractor not to oppose the claim unless required by law to do so. For those applicants who receive an unfavorable determination, the Physician Panel Rule provides an appeal process. Under this process, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review

certain OWA decisions. 10 C.F.R. § 852.18. The present appeal seeks review of a negative determination by a Physician Panel that was accepted by OWA. 10 C.F.R. §852.18(a)(2). 10 C.F.R. § 852.18(c) states that an appeal is governed by the OHA procedural regulations set forth at 10 C.F.R. Part 1003. The applicable standard of review is set forth at 10 C.F.R. § 1003.36(c), which provides that "OHA may deny any appeal if the appellant does not establish that – (1) the appeal was filed by a person aggrieved by a DOE action; (2) the DOE's action was erroneous in fact or law; or (3) the DOE's action was arbitrary or capricious." 10 C.F.R. § 1003.36(c).

B. Factual Background

The worker was employed by a DOE contractor at the Y-12 Plant in Oak Ridge, Tennessee, at various times from 1953 through 1973. Record at 7. The applicant submitted a claim to the OWA. As part of the application process, the applicant completed an OWA Form entitled "Request for Review by Medical Panel." Question 13 of that form asks "What illness did the deceased have diagnosed by a physician, that you believe was related to his or her work at a DOE facility?" Record at 2. The applicant responded: "lung condition/COPD [chronic obstructive pulmonary disease]." *Id.*

The OWA caseworker reviewed and prepared the case file and then forwarded it to the Physician Panel. The cover sheet to the case file identified one claimed illness: lung condition/COPD. The Physician Panel reviewed the case file and issued a report in which it found

> [The worker's] record has very little medical information in it…. COPD is mentioned only in the 2 documents which are available from his personal medical record. His death certificate lists under other conditions "COPD." [The worker's personal physician] lists "COPD" in a long list of diagnoses in a 1 page letter. Records from Oak Ridge contain serial normal chest X-rays and electrocardiograms. There are no pulmonary function tests in either section of the record. It is established that [the worker] was a smoker based on 2 notes that he had quit smoking sometime around 1960. At the time he was about age 40 and was probably at least a 20 pack year smoker. Cigarette smoking is the leading cause of COPD.
>
> There is no record of any exposures at Oak Ridge which may have caused COPD nor is there any record of his being diagnosed with or having symptoms of COPD in his records from Oak Ridge. Most occupational exposures to potential pulmonary contaminants cause restrictive disease rather than obstructive disease. Pulmonary function tests and chest X-rays anytime during the 10 year interval between his last employment at Oak Ridge and his demise would be extremely valuable in establishing a diagnosis of COPD.

> The panel concludes that a diagnosis of COPD has not been established in this case, nor had it been [likely it would] have been caused by any exposure at Oak Ridge. The most likely contributor to any COPD would have been cigarette smoking.
>
> * * *
>
> The panel concludes there is insufficient medical evidence to support any diagnosis of "lung condition" except "COPD" which is considered separately.

Determination at 2-3. On April 21, 2004, the applicant appealed that determination.

II. Analysis

Under Part 852, "[w]hether a positive or favorable determination is rendered is to be based solely on the standard set forth [at 10 C.F.R.] § 852.8." 67 Fed. Reg. 52850 (August 14, 2002). That regulation states:

> A Physician Panel must determine whether the illness or death arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility on the basis of whether it is as least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker at issue.

10 C.F.R. § 852.8. The preamble to Part 852 states "[t]he DOE intends that, as used in this context, the word 'significant' should have its normal dictionary definition and meaning –that is, 'meaningful' and/or 'important'." 67 Fed. Reg. 52847 (August 14, 2002).

The Physician Panel's finding that the applicant has not shown that the worker had any lung condition other than COPD is well supported by the Record, which does not contain any documentation of a lung condition other than COPD. Accordingly, that finding is neither erroneous nor arbitrary or capricious.

The case file does contain evidence that the worker's personal physician diagnosed him with COPD some nine years after his last employment at Oak Ridge. COPD was also noted as a "significant condition" on his death certificate one year later. However, the record contains no evidence that the worker was exposed to any toxic substance at Oak Ridge which may have caused COPD. Accordingly, the Panel's finding under 10 C.F.R. § 852.8 that there is no link established between the worker's exposure at Oak Ridge and his COPD is neither erroneous nor arbitrary or capricious.

In her appeal, the applicant maintains that the denial is based in large degree on cigarette smoking being a contributor to the COPD condition. The appeal contains statements from the worker's adult children and the applicant. According to the applicant, the

worker had not smoked since 1949. According to the worker's children, they have no recollection of their father smoking. There is no reason to doubt his family members' contention that the worker had not smoked since 1949, some 34 years before he died. However, this factual error in and of itself does not mean the Panel's decision should be reversed. The Panel found that there was no evidence of exposures in the record that could have caused COPD, and I see none. Under the circumstances of this case, even if the Panel's reference to the worker's history as a smoker were factually incorrect, that would not constitute an error under the legal standard set forth in 10 C.F.R. § 852.8. The Panel's conjecture that smoking may have caused the worker's COPD is simply irrelevant, in the absence of any evidence that exposures at Oak Ridge caused the worker's COPD.

III. Conclusion

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-0087 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 7, 2004

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August 11, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: April 26, 2004

Case No.: TIA-0088

XXXXXXXXX (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 worked as an electrician for DOE contractors at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Applicant had two illnesses that were the result of exposure to toxic substances at a DOE facility, and a third illness that was not. The OWA accepted the Panel's determination, and the Applicant's surviving spouse 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. § 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.

[1] The Department of Labor administers the other program. *See* 20 C.F.R. Part 30; www.dol.gov/esa.

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 as an electrician at a DOE facility for nearly thirty years, from 1970 to 1999. He filed an application with OWA, requesting physician panel review of three illnesses, asbestosis, small cell carcinoma, and melanoma. The Applicant claimed exposure to radiation and toxic materials, including asbestos, beryllium, lead, mercury, zinc, heavy metals, silica, and various solvents and solutions.

The Physician Panel rendered a determination on each of the three claimed illnesses. The Panel rendered positive determinations for asbestosis and small cell carcinoma, meaning that it concluded that exposure to a toxic substance at a DOE site was a significant factor in aggravating, contributing to or causing those illnesses. The Panel rendered a negative determination for melanoma. Although the records in the file clearly indicate that the Applicant suffered from a melanoma in his right eye, the Panel stated that there was insufficient scientific evidence that his work exposures caused, aggravated or contributed to the condition.

The OWA accepted the Physician Panel's determinations: the positive determinations for asbestosis and small cell carcinoma, as well as the negative determination for melanoma. *See* OWA March 25, 2004 Letter. The Applicant's surviving spouse filed the instant appeal. In her appeal, she stated that she does not accept the negative determination regarding her husband's melanoma, and requests that a more thorough investigation be made. She further stated that as an electrician, the Applicant worked in nearly every location at the facility, and that he developed problems with his lungs as early as 1978.

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 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 for its

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[2] *See* www.eh.doe.gov/advocacy.
[3] *Worker Appeal*, Case No. TIA-0030, 28 DOE ¶ 80,310 (2003).
[4] *Worker Appeal*, Case No. TIA-0032, 28 DOE ¶ 80,322 (2004).

determination. [5] On the other hand, mere disagreements with the Panel's opinion are not a basis for finding Panel error. [6]

In this case, the arguments raised in the appeal—that the Applicant worked throughout the facility and had lung problems for more than 20 years—are not bases for finding Panel error. The Physician Panel addressed each claimed illness, made a determination for each, and explained the basis for each determination. The arguments raised in the appeal are merely disagreements with the Panel's medical judgment regarding the cause of the Applicant's melanoma, rather than indications of Panel error. Accordingly, the appeal does not provide a basis for finding Panel error and, therefore, should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0088 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 11, 2004

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[5] *Id.*

[6] *Worker Appeal*, Case No. TIA-0066, 28 DOE ¶ 80,___ (July 9, 2004).

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August 3, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: April 27, 2004

Case No.: TIA-0089

XXXXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Worker Advocacy Office for DOE assistance in filing for state workers' compensation benefits based on his employment at the Knolls Atomic Power Laboratory. The DOE Office of Worker Advocacy (OWA) determined that the Applicant was not a DOE contractor employee under the applicable statute and, therefore, was not eligible for DOE assistance. The Applicant appeals that determination. As explained below, we have concluded that the determination is correct.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act creates two programs for workers, one of which is administered by the DOE. 1/

The DOE program provides for an independent physician panel assessment of whether a "Department of Energy contractor employee" has an illness related to exposure to a toxic substance at a DOE facility. 42 U.S.C. § 7385o. 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

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

contests the claim. 42 U.S.C. § 7385o(e)(3). As the foregoing indicates, the DOE program itself does not provide for benefits.

The DOE program is specifically limited to DOE contractor employees who worked at DOE facilities. The reason is that the DOE would not be involved in state workers' compensation proceedings involving other employers.

The regulations for the DOE program are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The DOE Worker Advocacy Office is responsible for this program and has a web site that provides extensive information concerning the program, including information in response to "Frequently Asked Questions." 2/

Pursuant to an Executive Order, 3/ the DOE has published a list of facilities covered by the EEOICPA programs, and the DOE has designated next to each facility whether it falls within the EEOICPA's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 68 Fed. Reg. 43,095 (July 21, 2003) (current list of facilities). The DOE's published list also refers readers to the OWA web site for additional information about the facilities. 68 Fed. Reg. 43,095.

The Applicant requested physician panel review, stating that he was employed at the Knolls Atomic Power Laboratory during the period 1978 to 1998. The OWA determined that the Applicant was not a DOE contractor employee under the EEOICPA. *See* April 7, 2004 Letter from OWA to the applicant. In the appeal, the Applicant disagrees with that determination.

II. Analysis

As explained above, the DOE physician panel process is limited to DOE contractor employees. In order to be a DOE contractor employee, a worker must be employed by a firm that manages or provides other specified services at a DOE facility, and the worker must actually be employed at the DOE facility. The EEOICPA excludes, from the definition of a DOE facility, facilities operated by the Naval

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

3/ *See* Executive Order No. 13,179 (December 7, 2000).

Nuclear Propulsion Program. The EEOICPA defines a DOE facility in relevant part as follows:

> **any building, structure, or premise, including the grounds upon which such building, structure, or premise is located . . . in which operations are, or have been, conducted by, or on behalf of, the Department of Energy (*except for buildings, structures, premises, grounds, or operations covered by Executive Order No. 12344, dated February 1, 1982 (42 U.S.C. 7158 note), pertaining to the Naval Nuclear Propulsion Program*). . . .**

42 U.S.C. § 7384l(12). Executive Order 12344 cites Knolls Atomic Power Laboratory as a Naval Nuclear Propulsion Program facility. Exec. Order No. 12344, 47 Fed. Reg. 4979 (1982). Consistent with this, the DOE facility list does not include the Knolls laboratory. *See* 68 Fed. Reg. 43095. The list does include the "Separations Process Research Unit," operated by the DOE at the Knolls laboratory from 1950 to 1965, see 68 Fed. Reg. 43099, but the Applicant did not begin work at the laboratory until 1978, well after the end of those operations. Accordingly, the OWA's determination that the Applicant was not a DOE contractor employee under the EEOICPA is consistent with the EEOICPA, Executive Order 12344, and the DOE facility list.

Based on the foregoing, we have determined that the OWA correctly concluded that the Applicant is not eligible for DOE assistance in filing for stated workers' compensation benefits. Accordingly, we have determined that the appeal should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0089 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 3, 2004

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September 14, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Case Number: **TIA-0090**

Date of Filing: **April 27, 2004**

XXXXX (the worker or the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. 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 illnesses were not related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the worker 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) provides various forms of assistance or relief to workers currently or formerly employed by the nation's atomic weapons programs. See 42 U.S.C. §§ 7384, 7385. This case concerns Part D of the Act, which provides for a program to assist DOE contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. The DOE has issued regulations to implement Part D of the Act, hereinafter referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The DOE's program implementing Part D is administered by OWA.

Generally, if a physician panel issues a determination favorable to the employee, OWA accepts the determination and instructs the contractor not to oppose the claim unless required by law to do so. For those applicants who receive an unfavorable determination, the Physician Panel Rule provides an appeal process. Under this process, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review

certain OWA decisions. 10 C.F.R. § 852.18. The present appeal seeks review of a negative determination by a Physician Panel that was accepted by OWA. 10 C.F.R. §852.18(a)(2). 10 C.F.R. § 852.18(c) states that an appeal is governed by the OHA procedural regulations set forth at 10 C.F.R. Part 1003. The applicable standard of review is set forth at 10 C.F.R. § 1003.36(c), which provides that "OHA may deny any appeal if the appellant does not establish that – (1) the appeal was filed by a person aggrieved by a DOE action; (2) the DOE's action was erroneous in fact or law; or (3) the DOE's action was arbitrary or capricious." 10 C.F.R. § 1003.36(c).

B. Factual Background

The worker was employed by a DOE contractor at the K-25 Plant in Oak Ridge, Tennessee, at various times from 1971 through 1975 or 1976. Record at 9. The applicant submitted a claim to the OWA. As part of the application process, the applicant completed an OWA Form entitled "Request for Review by Physician Panel." Question 9 of that form asks "What diagnosed illness(es) do you have that you believe to be caused by your work at a DOE facility?" Record at 1. The applicant responded: "double amputee, lung problems, stroke." *Id.*

The OWA reviewed and prepared the case file and then forwarded it to the Physician Panel. The cover sheet to the case file identified three claimed illnesses: "bilateral amputee 1998, lung problems 1998, stroke 1996." The Physician Panel reviewed the case file and issued a report in which it found

> [The worker] reports that in 1973 at the age of 29 he developed a blister on the sole of his [right] foot, which took months to heal. He claims that that incident resulted in a bi lateral amputation of his legs. No documentation is supplied as to his alleged bilateral amputation, or the reasons for such a procedure. Notes from his [personal physician] state[] that he has a fungal infection of the [right] foot on the sole. No involvement of the [left] foot is suggested. [The worker] states that he started to smoke in his 60's, and smoked about ½ pack per day. He also suffered a stroke, but the age and degree of the stroke are not certain due to lack of documentation.
>
> There is not enough documentation or information to support the claim of work relatedness of the double amputation.
>
> * * *
>
> There is no documentation of any lung disease or exposure to have caused any lung disease. There is a single incident recorded when he was seen in the medical department for [an] inhalation, after he was exposed to HF, and he "breathed some" he was treated and released. He has documented normal [chest X-rays] in 1970 and 1973. No other information is provided.
>
> * * *

> [The worker] is claiming a stroke, however, once again there is no documentation of the alleged stroke, or that he is or has suffered any residual impairment.
>
> He does have a history of at least mild hypertension. With his leg amputation, it is more likely he suffers some form of [peripheral vascular disease] that may have contributed to his [stroke].
>
> At present there is no evidence of any work related exposure that may have caused or contributed to his condition.

Determination at 1-5. On April 27, 2004, the applicant appealed that determination.

II. Analysis

Under Part 852, "[w]hether a positive or favorable determination is rendered is to be based solely on the standard set forth [at 10 C.F.R.] § 852.8." 67 Fed. Reg. 52850 (August 14, 2002). That regulation states:

> A Physician Panel must determine whether the illness or death arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility on the basis of whether it is as least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker at issue.

10 C.F.R. § 852.8. The preamble to Part 852 states "[t]he DOE intends that, as used in this context, the word 'significant' should have its normal dictionary definition and meaning –that is, 'meaningful' and/or 'important'." 67 Fed. Reg. 52847 (August 14, 2002).

The record supports the Physician Panel's finding that the applicant has not shown he had any exposure to a toxic substance while working at the K-25 Plant that was a significant factor in aggravating, contributing to or causing the amputation of his legs, lung problems, or his stroke. The record notes that the worker was exposed to "multiple contaminants." *Id*. at 13; see also 46-149 (Site Profile). However, there is no evidence that any work-related exposures caused his illnesses. Accordingly, the Panel's finding under 10 C.F.R. § 852.8 that there is no link established between the worker's exposure at Oak Ridge and his three medical problems is neither erroneous nor arbitrary or capricious.

When OHA contacted the worker in connection with his appeal, he maintained that he had been burned on both feet, and he stated that he has obtained additional exposure data and medical records that were not available for review by the Physician Panel that considered his case. Memo of Telephone Conversation on September 9, 2004 between

the worker and Thomas O. Mann, OHA. The case file does contain evidence that the worker's personal physician diagnosed him with an ulcer on his right foot, "apparently fungus in nature," during his employment at Oak Ridge. Record at 202. But the worker's claim that he sustained burns on both feet that led to his retirement on disability, is not documented in the medical records reviewed by the Panel. This does not amount to a showing of error in the Panel determination that is the subject of the present appeal, but it may warrant further panel review, as explained below.

III. Conclusion

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.

The worker's possession of new information not considered by the Panel that rejected his initial claim does not constitute grounds for granting the appeal and remanding the matter to the OWA. However, the worker may submit this information to the OWA and ask for further Panel review.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0090 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 14, 2004

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July 16, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: April 28, 2004

Case No.: TIA-0091

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. An independent physician panel determined that one of the Applicant's illnesses was related to his work at DOE, but that three other illnesses were not. The OWA accepted the panel's determination, and the applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA).

I. Background

A. The Applicable 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. 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. § 7385o(d)(3). In general, if a physician panel issues a determination favorable to the employee, the DOE

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

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 Act provides for two programs.

B. The Application

The Applicant was employed by a DOE contractor as a chemical operator at the DOE's Oak Ridge Y-12 plant. The Applicant was born in 1927. He worked at the site from 1953 until his retirement in 1990, at the age of 62.

The Applicant filed an application for physician panel review, claiming that he had two illnesses related to toxic exposures at DOE - chronic obstructive pulmonary disease (COPD) and basal cell carcinoma. During the case development process, the Applicant claimed that he had two additional illnesses related to toxic exposures at DOE - heart disease and hypertension.

In 2003, a physician panel considered the illnesses claimed in the original application: COPD and basal cell carcinoma. The panel determined that they were not related to the Applicant's DOE employment.

The OWA accepted the 2003 panel determinations, and the Applicant appealed, arguing panel error. In addition, the Applicant stated that his medical records overstated his smoking. Finally, he stated that he had just been diagnosed with a fifth illness - prostate cancer.

After considering the appeal, we remanded the application for further consideration. *Worker Appeal,* Case No. TIA-0030 (December 1, 2003), 28 DOE ¶ 80,310 (2003). We found that the panel report on COPD and basal cell carcinoma was unclear

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

concerning whether the panel had considered all of the claimed exposures. In addition, we found that the panel should have considered the two illnesses added to the application during the case development process, i.e., hypertension and heart disease. We stated that, prior to a second referral of the application to a physician panel, the Applicant could submit an affidavit concerning his smoking history.

On remand, the physician panel reviewed the application again. The panel considered the four illnesses claimed in the application process. The physician panel issued a positive determination on COPD, and negative determinations on basal cell carcinoma, heart disease and hypertension. For the three negative determinations, the panel's explanation clearly stated that it found no association between the illnesses and toxic exposures at DOE.

In his current Appeal, the Applicant challenged the negative determinations. He discussed his health and exposures, and he stated that no one in his family has had hypertension or skin or prostate cancer. The Applicant supplied medical records in support of his appeal, including a diagnosis of prostate cancer. Finally, during our consideration of the Appeal, the Applicant advised us that he has additional medical problems.

II. Analysis

The Physician Panel Rule specifies what a physician panel must include in its determination. The panel must address each claimed illness, make a finding whether that illness arose out of and in the course of the worker's DOE employment, and state the basis for that finding. 10 C.F.R. § 852.12(a)(5). As the history of this case shows, we have not hesitated to remand an application where the panel report did not address the matters required by the Rule.

The Applicant's arguments on appeal - that he had occupational exposures and no family history of some illnesses - are not bases for finding panel error. As mentioned above, the Physician 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.

As for the lack of panel review on prostate cancer, we similarly find no error. The illness was not claimed in the application or the case development process and, therefore, the record did not

contain any information on the illness. It appears to us that the first documentation of the illness was filed in conjunction with the instant appeal. If the Applicant seeks panel review of prostate cancer or any other illness, he should file a written request with OWA. In the meantime, we will forward, to OWA, the documents that the Applicant submitted in conjunction with his Appeal.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0091 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: July 16, 2004

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August 4, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: April 28, 2004

Case No.: TIA-0092

XXXXXXXXXXXX (the Applicant) applied to the Office of Worker Advocacy (OWA) of the Department of Energy (DOE) for assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee, and he claims that he has two illnesses that are a result of exposure to toxic substances at a DOE facility. An independent physician panel (the Physician Panel) rendered a positive determination on one illness and a negative determination on the other. The OWA accepted the Physician Panel's determination, and the Applicant appealed the negative determination to the DOE's Office of Hearings and Appeals. As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Applicable 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. 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. § 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.

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

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. The Application

The Applicant worked at a DOE facility from 1970 to 1994, as an assistant production operator, a production operator, a janitor, a guard and a security inspector. In connection with his employment, he claims exposure to uranium and other hazardous substances. He believes that this exposure has caused him to suffer from optic neuritis.[3]

The OWA referred the application to a Physician Panel, and the Physician Panel's determinations are reflected in a March 2004 report. The Panel found that the Applicant had worked with uranium, worked in buildings that were contaminated with mercury, and been exposed to other hazardous substances such as paint and paint thinners, dust and beryllium. With regard to his optic neuritis, however, the Panel concluded as follows: "[The Applicant] was diagnosed as having papilledema and papillitis in 1994. This condition is unlikely to have been caused by exposure to toxins during his employment. This panel finds no association between his employment and the claimed condition." The OWA accepted the Physician Panel's determinations with regard to both illnesses. The Applicant does not wish to dispute the positive determination on breathing problems, but does appeal the Physician Panel's determination about optic neuritis.

II. Analysis

Under the Physician Panel Rule, independent physicians render an opinion whether a claimed illness claimed "arose out of and in the course of employment" by a DOE contractor and "exposure to a toxic substance at a DOE facility." 10 C.F.R. § 852.8. The Rule instructs the Panel to make that determination by deciding whether it is "as least as likely as not" that exposure to a toxin at the facility was a significant factor in aggravating, contributing to, or causing the illness. *Id.* The Rule requires that the Physician Panel (i) make a finding whether that illness was related to a toxic exposure at DOE and (ii) state the basis for that finding. 10 C.F.R. § 852.12.

We have not hesitated to remand an application where we have found Physician Panel error. For example, we have remanded applications where the Physician Panel report did not address all the claimed illnesses,[4] applied the wrong standard,[5] or failed to explain the basis of its

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[2] *See* www.eh.doe.gov/advocacy.

[3] He also claimed that the exposure caused him to suffer from breathing problems, and the Physician Panel rendered a positive determination for that condition.

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

determination.[6] On the other hand, mere disagreements with the Physician Panel's opinion do not indicate panel error.[7]

As noted above, the Physician Panel found that "[the Applicant's optic neuritis] is unlikely to have been caused by exposure to toxins during his employment." It found no connection at all between the toxic substances to which the applicant was exposed during his employment at Oak Ridge and his optic neuritis. The applicant seeks review of this determination. He has not identified any specific error on the part of the Physician Panel. The Physician Panel's report indicates that the Physician Panel considered the record thoroughly. The report details the Applicant's exposure or possible exposure to numerous hazardous substances. Consequently, we find that the Physician Panel fully considered the exposure when it employed its medical judgment in reaching its determination that the applicant's optic neuritis was not caused by any work-related toxic exposures at a DOE facility.

Because the Physician Panel's report demonstrates its consideration of the Applicant's exposure to all the hazardous substances listed in his application and the exercise of its medical judgment on those facts, we find no error in the Physician Panel's determination. Accordingly, the appeal should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0092 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: August4, 2004

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

[6] *Id.*

[7] *Worker Appeal,* Case No. TIA-0066, 28 DOE ¶ _____ (July 9, 2004).

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October 14, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: April 29, 2004

Case No.: TIA-0093

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's late husband (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 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 for workers.

The Department of Labor (DOL) administers the first program, which provides $150,000 and medical benefits to certain workers with specified illnesses. Eligible workers include DOE employees and DOE contractor employees who worked at DOE facilities and contracted specified cancers associated with radiation exposure. 42 U.S.C. § 7384l. In general, a worker in that group is eligible for an award if the worker was a member of the Special Exposure Cohort or if it is determined that the worker sustained the cancer in the performance of duty. *Id*. Membership in the Special Exposure Cohort includes DOE employees and DOE contractor employees who were employed prior to February 1, 1992, at a gaseous diffusion plant in Oak Ridge, Tennessee; Paducah, Kentucky; or Portsmouth, Ohio.

The DOE administers the second program. 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 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.[1]

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. Procedural Background

The Applicant was employed as a laboratory technician at the DOE's Oak Ridge site. The Worker worked at the site for 3 years from 1967 to 1970.

The Applicant filed an application with OWA, requesting physician panel review of one illness – non-Hodgkin's lymphoma. The Physician Panel rendered a negative determination on the claimed illness and explained the basis of its determination. The OWA accepted the Physician Panel's negative determination.

The Applicant appeals the negative determination on the claimed non-Hodgkin's lymphoma. The Panel agreed that the Worker had the illness, but the Panel determined that there was no evidence establishing a relationship between any exposures at the Worker's workplace and the illness.

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[1] ***See*** **www.eh.doe.gov/advocacy.**

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 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,[2] applied the wrong standard,[3] or failed to explain the basis of its determination.[4] On the other hand, mere disagreements with the Panel's opinion are not a basis for finding Panel error.

In her appeal, the Applicant maintains that the negative determination on the Worker's illness is incorrect. First, the Applicant argues that the Panel's determination is inconsistent with the fact that she received an award from DOL. Second, the Applicant argues that the DOE cannot prove that the Worker's illness was not caused by workplace exposures and that the Worker was likely exposed to various hazardous chemicals and solvents. As explained below, the Applicant's arguments are not a basis for finding panel error.

First, the DOL award does not represent a finding that the Applicant meets the causation standard of the DOE Physician Panel Rule. The Applicant was eligible for an award under the DOL program because the Worker was a member of the Special Exposure Cohort, i.e. he worked at the Oak Ridge gaseous diffusion plant, and he developed non-Hodgkin's lymphoma after the beginning of his employment there. *See* 20 C.F.R. § 30.210. Under the Physician Panel Rule, the Panel can render a positive determination only if the Panel determines that "it is at least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker at issue." 10 C.F.R. § 852.8. Thus, the causation standards of the two programs differ. The preamble to the DOE Physician Panel Rule discusses this difference:

> **Under the DOL program, a member of a Special Exposure Cohort...who has a specified cancer could establish entitlement to benefits for a specified cancer without showing that the disease is the result of exposure to a toxic substance because the statute dispenses with that requirement for Special Exposure Cohort members in the DOL**

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

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

[4] ***Id.***

> program. A Physician Panel, however, can make a positive determination only if sufficient evidence is provided to meet the standard as specified in section 852.8.

67 Fed. Reg. 52,849. Thus, the DOL award does not represent a DOL conclusion that the Applicant meets the causation standard of the Physician Panel Rule. Accordingly, the fact that the Applicant received a DOL award does not provide a basis for finding panel error.

Second, the Applicant's argument that the Worker was likely exposed to various hazardous chemicals and solvents is not a basis for finding panel error. As mentioned above, the Panel addressed the claimed illness of non-Hodgkin's lymphoma, made a determination on the illness, and explained the basis of that determination – that there was insufficient evidence showing a relationship between any workplace exposures and the Worker's illness. The Applicant's argument on appeal is merely a disagreement with the Panel's medical judgment, rather than an indication of Panel error.

As the foregoing indicates, the appeal does not provide a basis for finding panel error and, therefore, should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0093 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: October 14, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: April 30, 2004

Case No.: TIA-0094

XXXXXXXXXXXXXXXXXX (the applicant or the worker) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The applicant was a DOE contractor employee at a DOE facility. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, the appeal should be denied.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to a toxic substance at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Part D establishes a DOE process through which independent Physician Panels consider whether exposure to a toxic substance at DOE facilities aggravated, contributed to or caused employee illnesses. Generally, if a Physician Panel issues a determination favorable to

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1/ *See* www.eh.doe.gov/advocacy.

the employee, the DOE Office of Worker Advocacy accepts the determination and instructs the contractor not to oppose the claim unless required by law to do so. The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 10 C.F.R. Part 852. As stated above, the DOE Office of Worker Advocacy is responsible for this program.
The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office 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 Program Office. 10 C.F.R. § 852.18(a)(2). *See Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In his application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted that from December 1953 through March 1989 he was an electrical instruments maintenance mechanic at the DOE Savannah River site (SRS) in Aiken, South Carolina. From June 1989 through December 1991, he was an electrical instruments supervisor at that site. He claims he is suffering from the following conditions: lung abnormalities; heart failure; and prostate cancer. The applicant believes that exposure to radiation and toxic chemicals in the DOE workplace caused these illnesses.

The Physician Panel issued a unanimous negative determination on this application. The Panel 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 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 worker's lung abnormalities, the Physician Panel found no indication in the record that this worker had "specific exposures to chemicals." The Panel also found that although the record shows "lung tissue abnormalities" in a 2000 chest X-ray, "no

diagnosis of the kind of lung condition has been provided." The Panel therefore reached a negative conclusion regarding this claimed illness.

With respect to the worker's claim of "heart failure," the Panel found that a "physical examination done on 3/15/2000 revealed no abnormal findings with his cardiovascular exam." The Panel noted that the worker has had elevated cholesterol levels for many years, a positive family history for heart disease, a history of abnormal EKGs, and smoked/chewed tobacco for many years. The Panel also noted that the worker developed congestive cardiomyopathy ten years after retirement. The Panel concluded that this condition did not arise out of and in the course of employment by a DOE contractor, but was "due to life style habits and family traits."

In considering the applicant's prostate cancer, the Panel found that at the time he retired, he did not have prostate cancer and that he developed it about ten years later, when he was 72 years old. The Panel noted that prostate cancer is a disease of "aging men. . . . He developed it as do so many other men in the expected age range." The Panel concluded that the applicant's prostate cancer was not related to his employment by a DOE contractor.

II. Analysis

In his appeal, the applicant objects specifically to the Panel's conclusion that his heart failure can be attributed to family traits and to his life style. 2/ He disagrees with the Panel's statement that he has a history of high cholesterol and that his father had heart disease. He further states that he smoked tobacco very little, although he admits that he chewed tobacco. In addition, the worker has included with his appeal a one-page submission dated March 11, 2004, which notes his assertions that he worked with mercury, a chemical known as "Spot Check," transformer oil, and triclene. 3/ He claims that the Panel failed to consider specifically his exposure to these toxic substances. Finally, he contends that his own doctor told him that the cause of congestive

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2/ The applicant raises no specific objections to the Panel's negative determination with respect to his lung abnormalities and his prostate cancer. Accordingly, I will not review these aspects of the Panel's decision.

3/ The document is numbered page 7 of 10. It is not clear from this single page to what larger document it belongs.

heart failure is unknown and that it might be due to heredity, virus or environment. The worker therefore argues that the Panel improperly concluded that work at the SRS did not cause his heart failure.

Although the applicant maintains that the Panel's discussion of his risk factors contains some errors, the record indicates that any such errors, if they do exist, would not have affected the Panel's ultimate negative determination. The Panel stated that the record gave no indication of "specific exposures to chemicals" and the applicant has not pointed to anything in the record to the contrary. The applicant cites a March 11 document in which he referred to exposures. However, the document is not in the record and postdates the Panel report. Accordingly, the Panel did not err in failing to consider it.

The opinion of the applicant's physician is also not part of the record, and therefore there was no Panel error in its failure to address it. In any event, I find the physician's opinion supports, rather than contradicts, the Panel determination. As indicated above, the Panel can issue a positive determination only if it finds that "it is at least as likely as not" that a toxic exposure at a DOE work site was a significant factor in aggravating, contributing to or causing the claimed illness. The physician's opinion that the cause of the applicant's heart failure is unknown but could be heredity, virus or environment falls short of meeting that standard.

In sum, even if the Panel was incorrect in its analysis of the likely underlying causes of the worker's heart condition, this does not mean that it was incorrect in its determination that the condition is unrelated to toxic exposure at a DOE site. I therefore find that the applicant has not demonstrated any deficiency or 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-0094 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:

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

June 15, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Date of Filing: **May 3, 2004**

Case No.: **TIA-0095**

XXXXXXXXXXXXXX (the applicant or the worker) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The applicant was a DOE contractor employee at a DOE facility. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, the appeal should be denied.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to a toxic substance at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Part D establishes a DOE process through which independent Physician Panels consider whether exposure to a toxic substance at DOE facilities caused, aggravated or contributed to employee illnesses. Generally, if a Physician Panel issues a determination favorable to

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1/ ***See*** **www.eh.doe.gov/advocacy.**

the employee, the DOE Office of Worker Advocacy accepts the determination and instructs the contractor not to oppose the claim unless required by law to do so. The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 10 C.F.R. Part 852. As stated above, the DOE Office of Worker Advocacy is responsible for this program.
The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office 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 Program Office. 10 C.F.R. § 852.18(a)(2). *See Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In his application for DOE assistance in filing for state workers' compensation benefits, the worker asserted that from 1963 through October 1967 he was an instrument mechanic in a fabrication shop in the K-25 Building and elsewhere at the DOE site in Oak Ridge, TN. Thereafter, through 1993, he was an electrician at the Y-12 Plant and in other areas of the Oak Ridge site. He claims he is suffering from the following conditions: a spot on the lungs; a blood clot to the brain; breathing problems; and loss of hearing. The applicant believes that exposure to radiation, beryllium, mercury and other contaminants in the workplace caused these illnesses.

The Physician Panel issued a unanimous negative determination on this claim. The Panel 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 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 worker's "spot on the lungs," the Physician Panel found that the applicant has a lung nodule that is an "isolated lesion." However, the Panel also determined that chest films and a

CT scan show no evidence of asbestos or other fibrotic disease that might be associated with the nodule. The Panel indicated that the individual had a negative test for beryllium sensitivity, and that the worker has "essentially normal" pulmonary function. The Panel noted that the applicant's "40 pack-year" smoking history "is sufficient to place [him] at risk, should the nodule should turn out to be malignant." Accordingly, the Panel came to a negative determination concerning the individual's spot on the lungs. The Panel gave the same reasons for its negative determination regarding the applicant's claimed breathing problems. With respect to the applicant's claim of a blood clot to the brain, the Panel found "no exposure documented that is plausibly associated with embolic disease." In its report, the Panel did not consider the applicant's claim of hearing loss.

II. Analysis

The applicant seeks review of the Panel's determination.

With respect to the lung spot, the applicant claims that the Panel has not proven, through a biopsy or otherwise, that the condition is not due to toxic exposure at the Y-12 plant. He insists that his smoking is not sufficient to cause this condition. He states that he only smoked "in his later years," and that the true cause of his lung illness is exposure to toxic substances at the K-25 and Y-12 plants. The applicant makes a similar claim with respect to his breathing problems, emphasizing that he was exposed to mercury, asbestos and other toxic chemicals at the K-25 and Y-12 plants.

The applicant misstates the standard. In Part D cases, the Panel determines whether it is at least as likely as not that an illness is related to exposure to a toxic substance at a DOE site. 67 Fed. Reg. 52,841 at 52,842 (August 14, 2002). Thus, the Physician Panel is not expected to demonstrate that the illness is not related to such exposure. In this case, I see no evidence in the record suggesting that the lung conditions about which the applicant complains are related to toxic exposure at the DOE site. The Physician Panel found that his pulmonary function was "essentially normal," and that there was no evidence of asbestos or fibrotic disease that might be associated with respiratory disease. Nor is there any indication that the nodule is malignant. A radiology report of December 17, 2001 indicates that the applicant has "no nodules that are suspicious of lung cancer." Record at 29. The applicant has pointed to no evidence in the record that contradicts the Panel's determination, and I see none.

The applicant's claim that the Panel erred in its assertion regarding his smoking habit is of no avail. As an initial matter, as discussed above, the Panel determined, using the correct standard, that the applicant is not suffering from any lung illness related to toxic exposure at a DOE site. The fact that the Panel may have suggested that smoking could be the cause of the worker's lung conditions does not indicate any error in its determination. Moreover, the worker's assertion that he did not begin smoking "until his later years" is not borne out by the record in this case. For example, a pulmonary history report dated July 2, 1979, indicates that the applicant had been smoking more than 2 packs of cigarettes per day for 13 years. Record at 319. 2/ In any event, as I stated above, there is no evidence in the record to indicate that the Panel's decision concerning the worker's lung conditions was in error.

With respect to the blood clot to the brain, the worker again asserts that the Panel cannot disprove that this condition was caused by exposure to a toxic substance at a DOE site. As I stated above, the applicant misstates the standard. I find that the Panel applied the correct standard, and see no Panel error.

The applicant points out that the Panel failed to include a determination regarding his hearing loss. This issue can be disposed of summarily, without the need for any Panel involvement. There is evidence that the individual has sustained a hearing loss. However, the results of a physical examination of January 8, 2002, noted that the applicant's "abnormal hearing test can be caused by a variety of factors, including noise exposure and aging." The report went on to indicate, "given your noise exposure at the K-25 Gaseous Diffusion Plant . . . it is likely that occupational noise exposure contributed to your hearing loss." Record at 28.

As indicated above, proceedings under Part D of the EEOICPA cover workers who were exposed to a toxic substance during the course of employment at a DOE facility. 10 C.F.R. § 852.1(b). According to the regulations, toxic substance means "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 does not

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2/ While the worker's assertions regarding his smoking habits are discrepant, his smoking habits, as set out in the record, indicate a long history of tobacco use, and efforts to quit. *E.g.,* Record at 321.

fall within any of these three categories of toxins. Noise does not fit "comfortably" within the ordinary meaning of "toxic substance." 67 Fed. Reg. 52,841, 52,843. Thus, even though the Physician Panel report did not refer to the individual's hearing loss, there is no need to remand this matter for additional review. I find as a matter of law that there is no basis for any further consideration of this issue.

As discussed above, the standard to be applied in these cases is whether it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to or causing the worker's illness or death. The Panel applied that standard here, and there is no basis for concluding that the Panel's determination was incorrect.

In sum, the applicant has not demonstrated any deficiency or 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-0095 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: June 15, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

August 13, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Date of Filing: **May 7, 2004**

Case No.: **TIA-0096**

XXXXXXXXXXX (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 husband (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

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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

In her application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted that from 1954 through 1990, the worker was a stockkeeper, laborer, materials handler and assemblyman at the DOE's Oak Ridge, Tennessee site. According to the applicant, these jobs all involved working with toxic substances. The applicant claims that the worker developed malignant lymphoma as a result of his exposure to radiation and toxic chemicals at the work site.

The Physician Panel rendered a negative determination 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

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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 that the worker did have malignant lymphoma. However, Physician Panel noted that the record showed no evidence of any "acute exposures to toxic chemicals or physical agents during the work history provided." The Physician Panel further noted that dosimetry information on the worker showed very low exposures to radiation. In particular, the Physician Panel noted that the worker's documented radiation exposure does not rise to a level that would explain his disease.

The OWA accepted the Physician Panel's determination. *See* OWA May 3, 2004 Letter. The applicant filed the instant appeal.

II. *Analysis*

In her appeal, the applicant maintains that the worker was exposed to chemicals and other hazardous materials and argues that these exposures caused his lymphoma. However, she points to no evidence in the record to support her assertion. This contention in and of itself does not establish Panel error. The Panel found that there was no evidence of exposures in the record, and I see none. I therefore find no Panel error on the issue of whether the worker was exposed to toxic material at the DOE site. 3/

In its determination, the Panel stated that the worker smoked one and one-half packs of cigarettes per day for 10 years. The applicant responds to this by alleging that the worker had stopped smoking 38 years before his death, and claims that tobacco use could therefore not be the cause of his disease. Even if the applicant's assertion is true, it would not change the result in this case. The Panel did not determine that the lymphoma was related to smoking.

3/ In fact, in her appeal, the applicant seems to recognize that the record contains no evidence showing that the worker was exposed to toxic material at the DOE work site. The applicant maintains that she will seek hospital medical records to corroborate her claim that the worker was exposed to toxic substances at the work site. If she does obtain that information, she may certainly request that the OWA reopen the application.

It simply noted his smoking habit. I therefore see no Panel error on this point.

The applicant also maintains that the Panel failed to consider the worker's exposure to beryllium. The applicant points to no evidence in the record establishing that the worker was exposed to beryllium. Further, the applicant did not claim that the worker had beryllium disease. Accordingly, there is no Panel error with regard to exposure to beryllium.

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-0096 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 13, 2004

*** The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.**

June 28, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: May 7, 2004

Case No.: TIA-0097

XXXXXXXXX (the applicant or the worker) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appealed that determination. After reviewing that appeal, we determined that the application should be remanded to the DOE Office of Worker Advocacy for further consideration. *Worker Appeal*, (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003)(hereinafter TIA-0025). The OWA returned the application to the Panel for additional review and the Panel issued another determination. The applicant appeals this second determination. As explained below, this appeal should be denied.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this

program and has a web site that provides extensive information concerning the program. 1/

Part D establishes a DOE process through which independent physician panels consider whether employee illnesses were caused by exposure to toxic substances at DOE facilities. Generally, if a physician panel issues a determination favorable to the employee, the DOE Office of Worker Advocacy accepts the determination and instructs the contractor not to oppose the claim unless required by law to do so. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. *See* 67 Fed. Reg. 52841 (August 13, 2002). As stated above, the DOE Office of Worker Advocacy is responsible for this program.

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office 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 Program Office. 10 C.F.R. § 852.18(a)(2).

In his application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted that he was a machinist for Rockwell International at the DOE's Rocky Flats site in Golden, Colorado. He further indicated that he has contracted numerous illnesses as a result of exposure to plutonium, uranium, other radioactive materials and beryllium. He also claimed he was involved in a workplace accident involving beryllium. He requested that the Office of Worker Advocacy refer his claim to a Physician Panel for review. The Physician Panel issued a negative determination on this claim, and the Panel's decision was adopted by the Office of Worker Advocacy. *See* April 11, 2003 Physician Panel Case Review and May 13, 2003 Letter from DOE to the applicant. Accordingly, the DOE Office of Worker Advocacy determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits.

1/ *See* www.eh.doe.gov/advocacy.

The applicant contested the Physician Panel's determination in his first appeal. In TIA-0025, we found that the Panel had used an incorrect standard for considering the worker's application. The applicable standard in Part D cases is whether it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in causing, aggravating or contributing to employee illness. In its first report, the Panel used the standard of "whether it was more probable than not" that an illness was "caused" by exposure to a toxic substance. We indicated that on remand the Panel should reconsider the worker's illnesses using the correct standard.

In his first appeal, the applicant also claimed that the Panel failed to consider seven conditions that he listed in his application, and which he believes were related to toxic exposure at the DOE site. We indicated in TIA-0025 that in its review the Panel should consider, using the correct standard, all diseases noted in the application. Moreover, we indicated that in reaching its determination, the Panel should evaluate not only the individual diseases and conditions that the applicant is suffering from, but also, if possible, whether it is as likely as not that he would have suffered from all of these conditions simultaneously in the absence of his exposure to radioactive materials or other toxic substances. Finally, we stated that the Panel should consider the applicant's claim that the contractor's reported radiation exposure levels for him were incomplete and that he was exposed to additional radiation.

Based on our directive, the Panel issued a second report. In that determination, the Panel explicitly addressed 28 illnesses claimed by the applicant. The Panel found that the worker's chronic atrophic gastritis was related to his exposure to radiation at the DOE site, and therefore issued a positive determination regarding this illness. The Panel reached a negative conclusion with respect to the remaining illnesses. Thereafter, the applicant filed his second appeal.

II. Appeal

The bases for the instant appeal are as follows. First, the applicant objects to the Panel's determination with respect to all 27 conditions regarding which it reached a negative determination. In support of his position, the applicant points to information in the record which he believes contradicts the Panel's determination, and which he alleges the Panel did not consider. The applicant further alleges that in some instances the Panel again applied the

wrong standard in its consideration of his illnesses. Moreover, the applicant notes one condition, myoclonus, which the Panel did not include in its report. The applicant also claims that the Panel failed to address in its report whether it is as likely as not that he would have suffered from all of these conditions simultaneously in the absence of his exposure to radioactive materials or other toxic substances. Finally, the applicant contends that the report did not consider his claimed illnesses in light of the additional radiation to which he believes he was exposed at the DOE site.

III. Analysis

As discussed below, I cannot sustain any of these objections to the Panel's determination.

A. Radiation

I will not remand this matter to the OWA for further consideration of the radiation exposure issue. In reaching a positive conclusion with respect to the applicant's chronic gastritis, the Panel specifically noted the applicant's claimed radiation exposure as a key factor in its decision. I therefore find that the Panel gave consideration to the issue of whether the applicant was exposed to additional radiation as he claimed. The fact that the Panel did not repeat this statement in its consideration of each illness does not mean that the Panel did not review this issue on remand. I find that the Panel implicitly considered and rejected the applicant's claim that his remaining illnesses were related to additional radiation exposure beyond that recorded by the DOE. I see no reason to require the Panel to make a further, more explicit determination on this issue.

The applicant also believes that the DOE may prepare a site profile which will provide some additional information about radiation exposure. He suggests that further consideration of his claim could be delayed until such a site plan is developed. As discussed below, this decision finds no Panel error and therefore no basis for remanding the application. If additional relevant information regarding his exposure becomes available, the worker may request that OWA give further consideration to his application.

B. Inadequate Consideration of Specific Diseases

The worker raises a number of objections to the manner in which the Panel considered the illnesses about which it reached a negative

conclusion. 2/ First, the applicant states that in several instances the Panel failed to consider additional information that he provided to support his claim that his illness was caused by toxic exposures. For example, he points out that the Panel considered his colon polyp "benign," while his pathologist's report concerning the polyp included the notation, "precancer." The applicant also included as a reference two articles. One states that exposure effects of radiation include benign tumors. The other article indicates that "the period between 'normal' and 'full blown cancer' is called the 'precancerous stage' of disease." *See* Attachments 22 and 24. The applicant believes that the Panel should have made explicit reference to these articles and to the stated "precancer" diagnosis. He contends that in its report the Panel should have explained why it did not find this evidence persuasive.
I see no evidence of Panel error. First, there is no evidence or diagnosis of cancer. "Precancer" is not cancer. In this regard, there is no evidence that the polyp is related to toxic exposure at a DOE site. Second, neither of the enclosed articles suggests to me that the Panel failed to consider any important evidence relating to this worker, or reached an incorrect conclusion. The record in this case contains hundreds of pages. It is not reasonable to expect the Panel to provide a written response to every one of those pages. Some, such as Attachments 22 and 24, are merely general articles that the worker appears to have retrieved from the Internet. I do not believe the Panel is required to give a written response to every piece of information that an applicant submits, no matter how general, trivial or unpersuasive. The fact that this applicant was able to locate some broad statements about "precancer" and radiation exposure does not indicate that the Panel erred or that it failed to consider important information relevant to this particular applicant. I therefore will not sustain the applicant's claim that the Panel did not consider fully the relevant evidence.

The worker points out that in some instances the Panel reached a negative determination with respect to an illness on the grounds

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2/ It would be impracticable in this decision to examine in full detail every objection to each disease noted by the applicant. Further, such an approach would serve little purpose. I am confident that I am reaching a fair determination in this case, and that I can demonstrate this by discussing the more important examples of the applicant's contentions, thereby explaining why, as a whole, I believe that there is no Panel error.

that there was insufficient specificity in the record. The worker objects to these determinations. For example, the Panel reached this type of conclusion concerning the worker's brain lesion. The Panel stated "There was insufficient information presented on the nature of the brain lesion." The worker cites Attachment 10 to his first appeal as support for his contention that he has submitted sufficient information about the brain lesion to allow the Panel to conclude that it is at least as likely as not that it was related to toxic exposure at a DOE site. Attachment 10 includes the following observation: "Lesion of the anterior left external capsule. This most likely represents an infarct." I see nothing here on which the Panel could base a reasoned judgment that this condition, under the applicable standard, is related to toxic exposure. This is simply a statement that there was a brain lesion and that it most likely represents an infarct (or obstruction of local circulation). While the applicant has pointed to a condition that he has, there is certainly no evidence that it is an "illness" or that it has any occupational relationship.

The applicant states that, using similar reasoning citing insufficient information, the Panel incorrectly reached a negative conclusion regarding his claim of osteoporosis. In this instance, the worker's physician noted that "pt had mild osteopenia in OR when we did the fusion." Attachment K. This is simply a passing reference to a "mild" thinning of the bones, which is not severe enough to label osteoporosis. Without any other information about the osteopenia as it applies to the worker, I find that the Panel was correct in its assessment that there is not sufficient information for it to make a judgment about whether the osteopenia bears any relationship to toxic exposure at a DOE site.

The applicant also points out that the Panel report failed to address his claim of "myoclonus." 3/ The worker has provided a statement from a physician that includes the notation: "I believe he does likely have mild myoclonus." Attachment G. He also has provided a description of this condition which he retrieved from the Internet. Attachment H.

This issue warrants no further Panel review. There is no indication whatsoever that myoclonus is an illness, or that it bears any relationship to an occupational exposure. In fact, the description of myoclonus in Attachment H, provided by the worker, does not

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3/ Myoclonus refers to sudden, involuntary jerking of a muscle or a group of muscles. Attachment H.

provide any support for the contention that myoclonus is considered a disease caused by toxic exposure. That Attachment states that "myoclonus describes a symptom and generally is not a diagnosis of a disease." Thus, myoclonus does not appear to fall within the purview of Part D, which requires that the worker submit evidence of an "illness". 10 C.F.R. § 852.4. I therefore find that there is no reason on this score to return this matter to the Panel for additional evaluation.

The applicant states that the Panel reached an incorrect determination with regard to his renal disease because it did not have complete information at the time of their review. He indicates that he "was aware of the problem only a few weeks before their decision was rendered." He has attached some additional information on this point. Since the Panel admittedly did not have adequate information in front of it regarding this illness at the time it ruled, there is no Panel error which must be corrected. If the worker wishes to pursue this issue, he may request panel review of this illness.

C. Use of Incorrect Standard

The applicant also claims that the Panel applied the wrong standard in its consideration of some of the claimed illnesses. The applicant cites, for example, the Panel's treatment of his arthritis. The Panel stated the following as the key factors in rendering its decision: "Arthritis is a very common disease that has no known specific relationship to occupational substances, nonetheless some solvents have been associated with contributing to arthritis, however, we feel that the amount of exposure he had was, more likely than not, not a significant amount of exposure." The worker claims that the correct standard is "'at least as likely as not' that the exposures caused, aggravated or contributed to the disease or conditions." The applicant therefore asserts an error by the Panel that must be corrected.

This objection does not persuade me that an error was made. As an initial matter, the Panel's report clearly sets out the correct standard for considering whether the arthritis was related to toxic exposure at a DOE site. The report cites the standard as follows: "Did this illness arise out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility based on whether it is 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?" With respect to the worker's arthritis, the Panel unanimously answered the question in the negative. Thus, there can be no doubt that the Panel applied the correct standard in considering the relationship between the claimed illness and toxic exposure.

The Panel went on to discuss the factors it used in reaching its determination, including information about the level of exposure experienced by the applicant. It noted that the amount of exposure he had to solvents was, more likely than not, not significant. This is just another way of saying that the exposures were not a significant factor in aggravating, contributing to or causing the illness. The applicant has not shown that he was exposed to significant amount of solvents, or established, based on DOE site records, that the Panel's assertion regarding that exposure was incorrect. I therefore conclude that the Panel applied the correct standard in considering the worker's arthritis. I see no reason to return this issue to the Panel for additional review.

D. Consideration of Illnesses as a Whole

I also see no usefulness in remanding this matter to the Panel for an express statement of whether the applicant would have suffered from all of the named conditions simultaneously in the absence of his exposure to radioactive materials or other toxic substances. The Panel's report indicates that it responded to the OHA remand order. It reversed its determination on one of the illnesses and specifically addressed the other claimed illnesses. Some of these were too general in nature to make a judgment on. As a matter of common sense, unless there is a pattern to the diseases which is not evident here, or some linkage among the diseases which increases the probability that toxic exposure caused the diseases, I see no reason to believe that even though all but one of the named illnesses were unrelated to toxic exposure at a DOE site, it is nevertheless at least as likely as not that the combination of the named illnesses was related to such exposure. Given the results of the second Panel report, I believe that requiring a written statement on the issue of the combined diseases would simply be a matter of speculation from the Panel. I therefore find that this issue does not merit further consideration in this case.

IV. Conclusion

As discussed above, the applicant has not demonstrated any deficiency or error in the Panel's determination. Consequently,

there is no basis for an order remanding the matter again to OWA for a third Panel determination.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0097 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: June 28, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

August 19, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: May 18, 2004

Case No.: TIA-0098

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. 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. § 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).

[1/] The Department of Labor administers the other program. *See* 20 C.F.R. Part 30; www.dol.gov/esa.

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 as a secretary at DOE's Oak Ridge site from 1991 to 1996. The Applicant filed an application with OWA, requesting physician panel review of one illness, Chronic Inflammatory Demyelinating Polyneuropathy or Neuropathy (CIDP or CIDN). The Applicant claimed that she was exposed to toxic substances, but she dhoes not know what substances she was exposed to. She claimed that the building in which she worked has since been torn down and a large amount of earth removed from the area.

The Physician Panel rendered a determination on the illness after consulting with a board certified neurologist, who stated that CIPN is not caused by exposure to toxic substances. The Panel rendered a negative determination on the CIPN. The OWA accepted the Physician Panel's determination. *See* OWA February 10, 2004 Letter. The Applicant filed the instant appeal.

In her Appeal, the Applicant maintains that the negative determination is not correct. The Applicant states that she was healthy until she began working at the Oak Ridge site.

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 the 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.

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

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[2/] *See* www.eh.doe.gov/advocacy.

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

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

its determination.[5/] On the other hand, mere disagreements with the panel's opinion are not a basis for finding panel error.

In this case, the Applicant's argument on appeal, that she was healthy until she began working at the Oak Ridge site, is not a basis for finding panel error. As mentioned above, the Physician Panel addressed the claimed illness, going as far as to consult with an expert in the field of neurology; 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. Accordingly, the Appeal does not provide a basis for finding panel error and, therefore, should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0098 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 19, 2004

[5/] *Id.*

The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

September 27, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: May 21, 2004

Case No.: TIA-0099

XXXXXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy for assistance in filing for state workers' compensation benefits based on her employment at the Sequoyah Fuels Corporation in Gore, Oklahoma. The DOE Office of Worker Advocacy determined that the applicant was not a DOE contractor employee under the regulations at issue here and, therefore, was not eligible for DOE assistance. The applicant appeals that determination. As explained below, we have concluded that the determination is correct.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act creates two programs for workers.

The Department of Labor (DOL) administers the first EEOICPA program, which provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 73841(1). The DOL program also provides federal monetary and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 7384u.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, the DOE program provides for an independent physician panel assessment of whether a "Department of Energy contractor employee" has an illness related to exposure to a toxic substance at a DOE facility. 42 U.S.C. § 7385o. 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).

The DOE program is specifically limited to DOE contractor employees[1] who worked at DOE facilities.[2] The reason is that the DOE would not be involved in state workers' compensation proceedings involving other employers.

The regulations for the DOE program are referred to as the Physician Panel Rule and are set forth at 10 C.F.R. Part 852. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program.[3]

Pursuant to an Executive Order,[4] the DOE has published a list of facilities covered by the DOL and DOE programs, and the DOE has designated next to each facility whether it falls within the EEOICPA's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 69 Fed. Reg. 51,825 (August 23, 2004) (current list of facilities). The DOE's published list also refers readers to the DOE Worker Advocacy Office web site for additional information about the facilities. 69 Fed. Reg. 51,825.

II. The Appeal

This case involves the program administered by the DOE that provides access for eligible DOE contractor employees or their survivors to a Physicians Panel Process. The Physicians Panel established under the EEOICPA determines the validity of claims that a current or former DOE contractor employee's illness or death arose from his or her exposure to a toxic substance during the course of his or her employment at a DOE facility.

In the case at hand, the DOE Worker Advocacy Office declined to present the applicant's application to a Physicians Panel because the office determined that the applicant did not meet the eligibility requirements for the Physicians Panel Process. *See* April 29, 2004 letter from the DOE Worker Advocacy Office to the applicant.

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[1] A DOE contractor is defined as follows: (a) an individual who is or was in residence at a DOE facility as a researcher for one or more periods aggregating at least 24 months; (b) an individual who is or was employed at a DOE facility by (i) an entity that contracted with DOE to provide management and operation, management and integration, or environmental remediation at the facility; or (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility. 10 C.F.R. § 852.2.

[2] A DOE facility is defined as: any building, structure or premise, including the grounds upon which such building, structure, or premise is located: (a) in which operations are, or have been, conducted by, or on behalf of the DOE (except for buildings, structures, premises, grounds, or operations covered by Executive Order No. 12344 dated February 1, 1982 (42 U.S.C. § 7158 note), pertaining to Naval Nuclear Propulsion Program); and (b) with regard to which DOE has or had (i) a propriety interest; or (ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services. 10 C.F.R. § 852.2.

[3] *See* www.eh.doe.gov/advocacy.

[4] *See* Executive Order No. 13,179 (December 7, 2000).

In her appeal, the applicant states that she worked at the Sequoyah Fuels Corporation in Gore, Oklahoma (hereinafter referred to as "Sequoyah") from June 1978 through November 1992. According to the applicant, she was exposed twice to toxic substances during her employment at Sequoyah, *i.e,*. 1986 and 1992, when uranium hexafluoride was accidently released into the company's ventilation system.[5] She believes that these chemical exposures caused her to develop asthma with diminished lung capacity, and other medical conditions. The applicant claims that Sequoyah processed uranium hexafluoride for the DOE and, for this reason, she should be able to use the DOE Physician Panel Process.

III. Analysis

As noted above, access to the DOE Physician Panel is limited to applications filed by or on behalf of a DOE contractor employee who is or was employed at a DOE facility. *See* 10 C.F.R. § 852.1(b). To determine whether the worker in question was a DOE contractor who worked at a DOE facility, we first consulted the DOE's published facilities list set forth at 69 Fed. Reg. 51,825. We discovered that Sequoyah is not listed on the published facilities list. Second, we searched for but were unable to locate any information to suggest that Sequoyah was ever a DOE contractor. For example, the company did not do research for one or more periods aggregating at least 24 months; it did not contract with DOE to provide management and operation, management and integration, or environmental remediation at the facility; or provide any services, including construction and maintenance, to the DOE at the facility. 10 C.F.R. § 852.2. Furthermore, we found no evidence that Sequoyah was ever a DOE facility. None of Sequoyah's buildings, structures or premises, including the grounds upon which its buildings, structures, or premises were located, were operated or conducted by, or on behalf of the DOE. Moreover, the DOE never had a propriety interest in Sequoyah. Lastly, we found no information that the DOE ever entered into a contract with Sequoyah to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services for the agency. 10 C.F.R. § 852.2. [6]

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[5] Uranium Hexafluoride is the chemical form of uranium that is used in the uranium enrichment process. *See* www.ead.anl.gov/uraniumguide/ucompound/forms.

[6] The Office of Worker Advocacy advised this Office that Sequoyah did provide materials to the Paducah Gaseous Diffusion Plant and the Portsmouth Gaseous Diffusion Plant, two plants owned by the Department of Energy and leased an operated by the United States Enrichment Corporation. *See* Electronic Mail Message dated September 20, 2004 from Karoline Anders, Office of Worker Advocacy to Janet Freimuth, Office of Hearings and Appeals. However, providing materials to these two plants is not sufficient for Sequoyah to come within the specific EEOICPA definitions of DOE contractor and DOE facility.

As an aside, we inquired about Sequoyah's possible designation as an "Atomic Weapons Employer" (AWE) to ascertain whether the applicant might be able to avail herself of other statutory programs such as the ones administered by the Department of Labor and the Department of Justice. The Office of Worker Advocacy informed this Office that Sequoyah provided materials to the Paducah and Portsmouth Gaseous Diffusion Plants after those two locations changed their mission from producing material that was used in the production of atomic weapons. Hence, Sequoyah also cannot be considered an AWE under the EEOICPA.

Based on all the foregoing, we find that the Office of Worker Advocacy correctly determined that the applicant was not a DOE contractor employee who worked at a DOE facility.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0099 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 27, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

October 14, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: May 25, 2004

Case No.: TIA-0100

XXXXXXXXXXXXXX the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy for assistance in filing for state workers' compensation benefits based on the employment of his deceased father, XXXXXXXXX. The DOE Office of Worker Advocacy determined that the applicant's deceased father was not a DOE contractor employee under the regulations at issue here and, therefore, was not eligible for DOE assistance. The applicant appeals that determination. As explained below, we have concluded that the determination is correct.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act creates two programs for workers.

The Department of Labor (DOL) administers the first EEOICPA program, which provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 73841(1). The DOL program also provides federal monetary and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, the DOE program provides for an independent physician panel assessment of whether a "Department of Energy contractor employee" has an illness related to exposure to a toxic substance at a DOE facility. 42 U.S.C. § 7385o. 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).

The DOE program is specifically limited to DOE contractor employees[1] who worked at DOE facilities.[2] The reason is that the DOE would not be involved in state workers' compensation proceedings involving other employers.

The regulations for the DOE program are referred to as the Physician Panel Rule and are set forth at 10 C.F.R. Part 852. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program.[3]

Pursuant to an Executive Order,[4] the DOE has published a list of facilities covered by the DOL and DOE programs, and the DOE has designated next to each facility whether it falls within the EEOICPA's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 69 Fed. Reg. 51,825 (August 23, 2004) (current list of facilities). The DOE's published list also refers readers to the DOE Worker Advocacy Office web site for additional information about the facilities. 69 Fed. Reg. 51,825.

II. The Appeal

This case involves the program administered by the DOE that provides access for eligible DOE contractor employees or their survivors to a Physicians Panel Process. The Physicians Panel established under the EEOICPA determines the validity of claims that a current or former DOE contractor employee's illness or death arose from his or her exposure to a toxic substance during the course of his or her employment at a DOE facility.

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[1] A DOE contractor is defined as follows: (a) an individual who is or was in residence at a DOE facility as a researcher for one or more periods aggregating at least 24 months; (b) an individual who is or was employed at a DOE facility by (i) an entity that contracted with DOE to provide management and operation, management and integration, or environmental remediation at the facility; or (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility. 10 C.F.R. § 852.2.

[2] A DOE facility is defined as: any building, structure or premise, including the grounds upon which such building, structure, or premise is located: (a) in which operations are, or have been, conducted by, or on behalf of the DOE (except for buildings, structures, premises, grounds, or operations covered by Executive Order No. 12344 dated February 1, 1982 (42 U.S.C. § 7158 note), pertaining to Naval Nuclear Propulsion Program); and (b) with regard to which DOE has or had (i) a propriety interest; or (ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services. 10 C.F.R. § 852.2.

[3] *See* www.eh.doe.gov/advocacy.

[4] *See* Executive Order No. 13,179 (December 7, 2000).

In the case at hand, the DOE Worker Advocacy Office declined to present the applicant's application to a Physicians Panel because the office determined that the applicant's deceased father did not meet the eligibility requirements for the Physicians Panel Process. *See* May 7, 2004 letter from the DOE Worker Advocacy Office to the applicant.

In the original application that he filed with the Office of Worker Advocacy, the applicant stated that his deceased father worked as a laborer and maintenance worker at the E.I. DuPont Chambers Works plant (Dupont Deepwater Works) in Deepwater, New Jersey from January 2, 1944 to July 30, 1982. According to the applicant, his deceased father developed stomach cancer as a result of his 38-year exposure to lead, radiation and chemicals while employed at DuPont Deepwater Works. In his appeal, the applicant argues that his deceased father had an identifiable illness that was work-related. He further contends that the DuPont Deepwater Works site "was contracted by DOE," and that the DOE is a "third-party to our claim." For all these reasons, the applicant believes that he should be able to avail himself of the DOE's Physician Panel Process.

III. Analysis

A. Worker Programs

As an initial matter, we emphasize that the DOE Physician Panel Process is separate from state workers' compensation proceedings. A DOE decision that an applicant is not eligible for the DOE Physician Panel Process does not affect (i) an applicant's right to file for state workers' compensation benefits or (ii) whether the applicant is eligible for those benefits under applicable state law.

Similarly, we emphasize that the DOE Physician Panel Process is separate from any claims made under other statutory provisions. Thus, a DOE decision concerning the Physician Panel Process does not affect any claims made under other statutory provisions, such as programs administered by DOL and DOJ.

We now turn to whether the applicant in this case is eligible for the DOE Physician Panel process.

B. Whether the Applicant is Eligible for the DOE Physician Panel Process

As noted above, access to the DOE Physician Panel is limited to applications filed by or on behalf of a DOE contractor employee, *i.e.*, an individual who is or was employed at a DOE facility by a DOE contractor. *See* 10 C.F.R. § 852.1(b). Under the EEOICPA, a worker who was employed by an Atomic Weapons Employer or a Beryllium Vendor is not eligible to use the DOE Physician Panel.

To determine whether the worker in question was a DOE contractor employee under the applicable statute and regulations, we consulted the DOE's published facilities list set forth at 69 Fed. Reg. 51,825. On that list, DuPont Deepwater Works in Deepwater, New Jersey is listed as "AWE" for the period 1942-1949 and "DOE" for the year 1996. The

codes "AWE" and "DOE" denote "atomic weapons employer facility" [5] and "DOE facility," respectively. We next reviewed the Office of Worker Advocacy web site for additional information. There, we learned a number of facts about the facility in question. www.eh.doe.gov/advocacy (DuPont Deepwater Works entry in searchable database on sites). In the 1940s, DuPont Deepwater Works produced uranium products and conducted research on uranium hexafluoride at the facility. DuPont Deepwater Works conducted these activities first for the U.S. Office of Scientific Research and Development, and later under contract to the Manhattan Engineering District (MED) and the Atomic Energy Commission (AEC). DuPont Deepwater Works also developed processes to convert uranium dioxide to uranium hexafluoride, and produced uranium oxide and uranium metal which was used to fuel the CP-1 reactor at the University of Chicago. After completion of these activities, the AEC conducted limited decontamination and released the site to DuPont Deepwater Works for reuse. DuPont Deepwater Works currently operates a chemical plant at this site. According to the web site, the only year in which actual remediation was performed under contract with the DOE was 1996.

Based on the available evidence, we conclude that the applicant's deceased father was not a DOE contractor employee. There is no information that we found that would allow us to conclude that DuPont Deepwater Works was a DOE facility at any time between 1944 and 1982. Neither the DOE nor its predecessors ever had a propriety interest in DuPont Deepwater Works. Moreover, we found no evidence that DOE or its predecessors ever entered into a contract during the period 1944 to 1982 with any entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services at DuPont Deepwater Works. [6] As noted above, the only year that the DOE entered into a contract with an entity to provide environmental remediation services at DuPont Deepwater Works was in 1996, 14 years after the applicant's late father left DuPont Deepwater Work's employ. For these reasons, we conclude that the applicant's deceased father (1) did not work at a DOE facility and (2) was not employed by a "DOE contractor" as that term is defined in the applicable statute and regulations.

We reiterate that our decision regarding the applicant's ineligibility in this case does not affect his eligibility for (i) state workers' compensation benefits or (ii) federal monetary and medical benefits under other statutory provisions, including EEOICPA claims at the Department of Labor.[7]

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[5] An "Atomic Weapons Employer Facility" is defined as a facility, owned by an atomic weapons employer, that is or was used to process or produce, for use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining and milling. EEOICPA, 42 U.S.C. § 73841(5).

[6] The DOE's records show that the Dupont Deepwater Works facility was an Atomic Weapons Employer for a portion of the time that the applicant's deceased father worked at the facility, i.e., 1944-1949.

[7] As noted earlier in this Decision, the Department of Labor administers the EEOICPA program which provides federal monetary and medical benefits to, among others, workers who were employed by Atomic Weapons Employers who developed radiation-induced cancer.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0100 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: October 14, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

September 24, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: May 26, 2004

Case No.: TIA-0101

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's late husband (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 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

[1] **The 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]

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. Procedural Background

The Worker was employed at DOE's Hanford site. He worked at the site as a patrolman from 1956 to 1971 and as a laborer in 1989 and from 1991 to 1996.

The Applicant filed an application with OWA, requesting physician panel review of one illness, lung cancer. The Applicant claimed that her late husband's illness was a result of his duties as a laborer, which led to exposure to paints, asbestos, radiation, welding and iron fumes, various solvents and dusts, and insulation.

The Physician Panel rendered a negative determination on the claimed lung cancer. The Panel agreed that the Worker had lung cancer, but stated that the disease was not caused by occupational exposures.

The OWA accepted the Physician Panel's negative determination on the lung cancer. 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 to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12.

[2] *See* www.eh.doe.gov/advocacy.

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 her appeal, the Applicant supplies additional information. First, she supplies a copy of a pathology report. Second, she supplies a 1999 physician letter stating that the tests indicated that the Worker's breathing tests and chest x-ray were consistent with asbestosis.

This additional information does not indicate panel error. A physician panel bases its consideration on the record presented to it. Accordingly, the existence of additional information, not included in the record, does not support a finding of panel error. In any event, we doubt that the additional information would have changed the panel result. Our understanding of the pathology report is that it indicates that the Worker had lung cancer as opposed to cancer of another organ that had spread to the lung. Although the Panel noted the absence of the pathology report as leaving open the question of the original cancer site, the Panel's analysis assumed that the lung was the primary site. Accordingly, we do not believe that the inclusion of the pathology report would have changed the Panel's analysis. Similarly, we doubt that the physician's statement concerning asbestosis would have affected the Panel determination. The Panel report agreed that the Worker's 1999 chest x-ray suggested asbestosis, but the Panel found that the asbestosis was not related to exposures at DOE.[6] Accordingly, we do not believe that the inclusion of the physician's statement would have affected the Panel's analysis.

As the foregoing indicates, the appeal does not provide a basis for finding panel error and, therefore, should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0101 be, and hereby is, denied.

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[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.***

[6] **For the Worker's period of employment as a patrolman, the Panel noted the absence of any evidence of asbestos exposure. For the Worker's period of employment as a laborer, the Panel acknowledged the possibility of asbestos exposure but found that the amount of exposure and the latency period of asbestosis indicated that the Worker's asbestosis was not attributable to any such exposures.**

(2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 24, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

October 14, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: June 2, 2004

Case No.: TIA-0104

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's late husband (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 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 remanded to OWA for further processing.

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 for workers.

The Department of Labor (DOL) administers the first program, which provides $150,000 and medical benefits to certain workers with specified illnesses. Eligible workers include DOE employees and DOE contractor employees who worked at DOE facilities and contracted specified cancers associated with radiation exposure. 42 U.S.C. § 7384l. In general, a worker in that group is eligible for an award if the worker was a member of the Special Exposure Cohort or if it is determined that the worker sustained the cancer in the performance of duty. *Id*. Membership in the Special Exposure Cohort includes DOE employees and DOE contractor employees who were employed prior to February 1, 1992, at a gaseous diffusion plant in Oak Ridge, Tennessee; Paducah, Kentucky; or Portsmouth, Ohio.

The DOE administers the second program. 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 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.[1]

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. Procedural Background

The Worker was employed as a painter at the DOE's Paducah site. The Worker's employment from 1951 to 1955 was verified by affidavit.

The Applicant filed an application with OWA, requesting physician panel review of one illness – multiple myeloma. The Physician Panel rendered a negative determination on the claimed illness and explained the basis of the determination. The OWA accepted the Physician Panel's negative determination on the claimed illness.

The Applicant appeals the negative determination on the claimed multiple myeloma. The Panel agreed that the Applicant had the illness, but the Panel determined that there was insufficient evidence establishing a relationship between any exposures at the Applicant's workplace and the illness.

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[1] ***See*** **www.eh.doe.gov/advocacy.**

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 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,[2] applied the wrong standard,[3] or failed to explain the basis of its determination.[4] On the other hand, mere disagreements with the Panel's opinion are not a basis for finding Panel error.

In her appeal, the Applicant maintains that the negative determination on the Worker's multiple myeloma is incorrect. First, the Applicant contends that the Panel's determination is inconsistent with the DOL's findings that the Worker was a member of the Special Exposure Cohort and was entitled to an award. Second, the Applicant states that the Panel did not have a copy of the Worker's death certificate. Lastly, the Applicant maintains that the Panel made its determination with the absence of information confirming the entire length of the Worker's employment at the Paducah site. As explained below, the Applicant's first two arguments are not a basis for finding panel error; however, the Applicant's argument relating to the Worker's length of employment is sufficient to warrant further consideration by OWA.

The Applicant's argument that the Panel's negative determination is inconsistent with the DOL's findings is not a basis for finding panel error. The DOL did not find that the Applicant meets the causation standard of the DOE Physician Panel Rule. The Applicant was eligible for an award under the DOL program because the Worker was a member of the Special Exposure Cohort, i.e. he worked at the Paducah site, and he developed multiple myeloma after the beginning of his employment there. *See* 20 C.F.R. § 30.210. Under the Physician Panel Rule, the Panel can render a positive determination only if the Panel determines that "it is at least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker at issue." 10 C.F.R. § 852.8. Thus, the causation standards of the two programs differ. The preamble to the DOE Physician Panel Rule discusses this difference:

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

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

[4] ***Id.***

> **Under the DOL program, a member of a Special Exposure Cohort...who has a specified cancer could establish entitlement to benefits for a specified cancer without showing that the disease is the result of exposure to a toxic substance because the statute dispenses with that requirement for Special Exposure Cohort members in the DOL program. A Physician Panel, however, can make a positive determination only if sufficient evidence is provided to meet the standard as specified in section 852.8.**

67 Fed. Reg. 52,849. Thus, the DOL award does not represent a DOL conclusion that the Applicant meets the causation standard of the Physician Panel Rule.

Second, the Applicant's argument that the Panel did not have a copy of the Worker's death certificate is not a basis for finding panel error. A physician panel bases its determination on the record as presented to it. The existence of other information not included in the record does not provide a basis for finding panel error. In any event, we doubt that the death certificate would have changed the panel result. The death certificate states multiple myeloma as the underlying cause of the Worker's death. The Panel agreed that the Worker had the illness; therefore, the inclusion of the death certificate in the record would not have altered the Panel's analysis and its subsequent determination that there was insufficient evidence linking the Worker's illness to occupational exposures.

Lastly, the Applicant's argument that the Panel did not consider the entire length of the Worker's employment at the Paducah site presents a basis for remanding the application to OWA for further consideration. In his application, the Worker listed the following periods of employment: 1951 to 1955, the 1960's, and the mid-1970's. Record at 11-12. The Panel noted that three of the Worker's co-workers confirmed by affidavit that the Worker was employed at the Paducah site from 1951 to 1955. Report at 1; *see also* Record at 12-13, 15-16, and 18-19. The Panel noted the lack of verifications to validate the remaining period. The record indicates that the DOE has further information concerning the Worker's employment. The DOL Notice of Recommended Decision stated that the Worker's "Personnel Clearance Master Card" established that the Worker was issued clearances during each of the claimed periods of employment.

When an applicant files an application for physician panel review, the DOE "will assist applicants as it is able." 67 Fed. Reg. 52844. Consistent with this goal, the application should be remanded so that OWA can obtain the document referred to in the DOL decision. After receiving the document, OWA should either arrange for further panel review or issue a determination that such review is not warranted.

Based on the foregoing, we have determined that the application should be remanded to the Office of Worker Advocacy for further consideration consistent with this decision.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0104 be, and hereby is, granted as set forth in Paragraph 2 below.

(2) The application that is the subject of this appeal is remanded to the Office of Worker Advocacy for further processing.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 14, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

September 10, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Date of Filing: **June 4, 2004**

Case No.: **TIA-0105**

XXXXXXXXXXX (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 husband (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

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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 March 1951 through March 1984, the worker was a machinist at the DOE's Oak Ridge, Tennessee site. According to the applicant, this job involved working with toxic substances including "atomic weapon components, uranium and beryllium." The record indicates that the worker had abdominal cancer ("intra-abdominal carcinomatosis"). He died from this disease in 1994. The applicant claims that the worker's disease and death were due to exposures 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

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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 noted that the pathology report for the worker showed "metastatic moderate to poorly differentiated adenocarcinoma." The Panel also stated, "the disease of concern is adenocarcinoma of unknown primary origin. There are few occupational risk factor references on this rare disease." The Panel therefore determined that it could not conclude that it was at least as likely as not that an exposure at the DOE work site was the cause of the adenocarcinoma.

However, the Panel did proceed to discuss in a general way in what organ the adenocarcinoma might have originated, and the possible causes for the cancer. For example, the Panel noted that the operating surgeon thought that the pancreas may have been the primary site for the disease. The Panel stated that pancreatic cancer is associated with smoking. The Panel pointed out that the record is unclear when and how much the worker may have smoked. The Panel indicated that pancreatic cancer is also associated with heavy alcohol consumption, but noted there is no reference in the case file to heavy drinking.

The Panel noted that the worker was exposed to radiation, but it was not persuaded that the level of his exposure would have been a risk factor for pancreatic cancer. In addition, the Panel pointed out that radiation exposure has not been widely accepted as a risk factor for pancreatic cancer.

The Panel further observed that the worker had a non-malignant colonic polyp removed in 1976. The Panel stated that the worker was obese for most of his working life and that this is a risk factor for colon cancer. However, the Panel concluded that "there are no work related toxic exposures that may have been contributory to this disease process" (i.e., "malignant colon adenocarcinoma").

Based on the foregoing factors, the Panel issued a negative report for this worker. The OWA accepted the Physician Panel's determination. *See* OWA June 1, 2004 Letter. The applicant filed the instant appeal.

II. *Analysis*

In her appeal, the applicant objects to a number of statements that the Panel made in its report. She claims the worker did not smoke, other than an occasional cigar. She maintains that the worker "was not a drinker." She contends he was not obese. She therefore asserts that the worker's cancer could not have been caused by any of these factors.

These assertions, even if true, would not change the result in this case. The Panel did not determine that the worker's disease was actually caused by any of these factors, and none of them actually entered into the Panel's deliberations. The Panel clearly stated at the outset that the origin of the adenocarcinoma was unknown. It went on to consider some of the likely primary sources of the adenocarcinoma, some non work-related possible causes for the illness, as well as "potential work-related attribution for these diseases." This medical discussion provided some additional insights, but, based on the evidence provided, the Panel could not reach a determination as to the cause of the individual's cancer. Thus, there is no basis for any reevaluation by the Panel based on these objections by the applicant.

The applicant also states that the cancer was widespread throughout her husband's body, and that her husband "must have been exposed to hazardous substances" during the time he worked in an experimental machine shop. She identified beryllium as an exposure. She points to a co-worker of her husband who died of pancreatic cancer during the same week as her husband and asserts this must be more than a coincidence.

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 suggestions regarding the cause of the worker's adenocarcinoma, which set forth uncorroborated possibilities and speculation, do not meet that test. Accordingly, they must be rejected. [3]

3/ There is no merit to the applicant's suggestion that the worker's exposure to beryllium may have caused his adenocarcinoma. It is our understanding that the only illness associated with beryllium exposure is CBD, a granulomatous

(continued...)

In sum, although the Panel did discuss some possible causes for the disease involved here, the key determination here was that the worker's illness was not related to a toxic exposure at a DOE site. 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-0105 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 10, 2004

3/ (...continued)
lung disease. *Worker Appeal* (Case No. TIA-0074), 29 DOE ¶ _____ (September 8, 2004).

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

October 13, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Date of Filing: **April 13, 2004**

Case No.: **TIA-0106**

XXXXXX XXXXXXX (the Applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant was a contractor employee at a DOE facility for many years. An independent Physician Panel (the Physician Panel or the Panel) determined that the Applicant's illnesses were not related to his 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. As explained below, we have concluded that the appeal should be denied.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. *See* www.eh.doe.gov/advocacy.

Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. Generally, if a physician panel issues a determination favorable to the employee, the DOE Office of Worker Advocacy accepts the determination and instructs the contractor not to oppose the claim unless required by law to do so. The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. See 10 C.F.R. Part 852. As stated above, the DOE Office of Worker Advocacy is responsible for this program.

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office 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 Program Office. 10 C.F.R. § 852.18(a)(2). See Worker Appeal (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In his application for DOE assistance in filing for state workers' compensation benefits, the Applicant asserted that for approximately 22 years he was an employee at the DOE's facility in Oak Ridge, Tennessee. He stated that he was exposed to radioactive materials, toxic chemicals and asbestos in the workplace. He claimed that his exposure to these substances resulted in the following illnesses or conditions: (I) multiple myeloma which was diagnosed in 2000; and (ii) asbestosis beginning in 1987.

In its determination, the Physician Panel considered the medical information concerning the Worker's illnesses that had been submitted by the Applicant. With respect to the multiple myeloma, it concluded that this condition did not, on an as least as likely as not basis, arise out of exposure to a toxic substance at a DOE facility. Specifically, it found that a review of the Applicant's dosimetry records revealed that the applicant's documented radiation received over the course of his DOE career was "next to nothing". It also found that these records appeared to be reasonably complete. Finally, it found that there was insufficient evidence that exposure to other toxic substances significantly contributed to the Applicant's multiple myeloma. Panel Report at 2.

With respect to the Applicant's other claimed illness, the Panel concludes that

> **The applicant does not have any disease related to his claimed illness, asbestosis. Nor does he have asbestos related pleural disease.**

Panel Report at 3. It finds that there is no record of interstitial fibrosis in the Applicant's lungs, which would be expected if he had asbestosis. It also finds that there is insufficient medical evidence to support the Applicant's assertion that a calcified plaque in the Applicant's right lung that developed prior to 1993 is an asbestos-related plaque. The Panel finds that it is unlikely that such a plaque would develop no more than ten years from the beginning of DOE exposure to asbestos and that other causes of pleural calcification, such as infectious granulomatous disease, are plausible and probably more likely. *Id.*

The OWA accepted the Physician Panel's determination. Accordingly, the OWA determined that the Applicant was not eligible for DOE assistance in filing for state workers' compensation benefits.

In his appeal, the Applicant contends that the Physician Panel determination is erroneous. With respect to his multiple myeloma, he states that the Panel relied on dosimetry readings

that were low because employees were told to place the dosimeters inside plastic bags inside their clothing so they would not get dirty. He states that the Panel did not consider "the actual work area that I spent 7 years in or my chemical exposures." He states that two or three of his co-workers also developed multiple myeloma and that he used to eat lunch in an area that now requires full protective equipment and clothing. He states that he used a chemical called "Tap-Magic" to wash down equipment that was extremely toxic. With respect to his claimed asbestosis, he attaches an interoffice memo to his appeal as evidence of his exposure. He also states that his doctor has told him that his asbestosis has gotten worse.

II. Analysis

The Physician Panel Rule specifies what a physician panel must include in its determination. The panel must address each claimed illness, make a finding whether that illness arose out of and in the course of the Worker's DOE employment, and state the basis for that finding. 10 C.F.R. § 852.12(a)(5). Although the rule does not specify the level of detail to be provided, the basis for the finding should indicate, in a manner appropriate to the specific case, that the panel considered the claimed exposures.

Although the Applicant maintains that the Panel's analysis of his risk factors omits important information, the record indicates that the Panel fully considered the information before it. With respect to the multiple myeloma, the Panel stated that the record gave no indication of significant exposure by the Applicant to radiation or to specific toxic substances that would be likely to cause this form of cancer. The Applicant does not identify any information in the record that contradicts the Panel's finding. Because the Applicant has not identified a deficiency or error in the Panel's determination, there is no basis for an order remanding the matter to OWA for a second Panel determination. If the Applicant has new evidence of radiation exposure in a DOE workplace or new medical information linking a specific toxic exposure to multiple myeloma, he should submit that information to the OWA so that it can determine whether physician panel review of that information is warranted.

With respect to the Applicant's claim that he suffers from asbestosis, the Physician Panel concluded that this diagnosis was not supported by the medical evidence in the record. Contrary to the Applicant's assertion, the Panel did not find that his work at the DOE facility could not have resulted in exposure to asbestos. Rather, it found that the current medical evidence in the record before it did not adequately support a diagnosis of asbestosis or asbestos related pleural disease. The Applicant does not identify any medical information in the record that was overlooked by the Panel. The Panel notes, however, that if the Applicant worked in an environment in which asbestos was widely present, he should continue to be monitored for the medical complications of asbestos exposure. The Applicant states that he recently was told by his doctor that his lung condition is deteriorating due to asbestos exposure. If this is the case, he should document this condition and submit the new information to the OWA so that it can determine whether physician panel review of the information is warranted.

As discussed above, the Panel determination fully addressed the Applicant's claims that he suffered from multiple myeloma and asbestosis. Therefore the appeal will be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0106 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: October 13, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

April 22, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **June 8, 2004**

Case No.: **TIA-0107**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that one illness was related to work at the DOE and another illness was not. 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 negative 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 Applicant filed a Subpart B application with DOL and a Subpart D application with OWA, claiming illnesses related to toxic exposures during employment at DOE. The OWA referred a claim of chronic asthmatic bronchitis and prostate cancer to the Physician Panel.

The Physician Panel issued a positive determination on the bronchitis and a negative determination on the prostate cancer. In the negative determination on prostate cancer, the Panel stated that the Applicant was exposed to a variety of metals, solvents, acids, asbestos, and ionizing radiation, but the Panel found that those exposures were not a significant factor in aggravating, contributing to or causing his prostate cancer. In explaining its determination, the Panel discussed prostate cancer, opining that (i) it was a common cancer, (ii) there are no known environmental causes, and (iii) the Applicant's radiation exposure was too low to be a risk factor.

The OWA accepted both the positive and negative determinations, and the Applicant filed an appeal. In his appeal, the Applicant makes two arguments.

First, the Applicant argues that the Physician Panel determination on prostate cancer should have discussed his skin cancer. The Applicant states that he submitted relevant documentation to the local resource center for submission to DOL and OWA, and he has submitted medical records with his appeal. The Applicant states that the existence of the skin cancer supports his prostate cancer claim.

Second, the Applicant argues that the Physician Panel should have mentioned his beryllium sensitivity. The Applicant attaches a decision by DOL that grants a Subpart B claim for beryllium sensitivity. The decision also refers to a pending Subpart B claim for prostate cancer that is awaiting a radiation dose reconstruction by the National Institute of Occupational Safety and Health (NIOSH).

In response to the appeal, we requested that OWA submit a copy of the record in this case. The OWA has not submitted a copy, and we understand that attempts to locate the record have been unsuccessful. As explained below, however, an evaluation of the Applicant's contentions do not require a review of the record.

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 Panel's failure to discuss skin cancer and beryllium sensitivity does not indicate Panel error. The Applicant's argument that the Panel should have specifically mentioned his skin cancer is, at best, a disagreement with the Panel's medical opinion that his radiation exposure was too low to have been a factor in his illness. The Applicant's argument that the Panel should have mentioned his beryllium sensitivity is unclear; he does not argue that it relates to the prostate cancer claim nor does he argue that he claimed it as a separate illness. In any event, the DOL's Subpart B positive determination on beryllium sensitivity renders the issue moot, since the determination satisfies the Subpart E requirement that the illness be related to

toxic exposure during DOE employment. *See* Authorization Act § 3675(a).

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-0107, 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 22, 2005

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September 23, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Case Number: **TIA-0108**

Date of Filing: **June 9, 2004**

XXXXX (the worker or the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. 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 illnesses were not related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the worker 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, and the worker encouraged to request further review based on any additional information that was not available when the Panel made its initial determination.

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) provides various forms of assistance or relief to workers currently or formerly employed by the nation's atomic weapons programs. See 42 U.S.C. §§ 7384, 7385. This case concerns Part D of the Act, which provides for a program to assist DOE contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. The DOE has issued regulations to implement Part D of the Act, hereinafter referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The DOE's program implementing Part D is administered by OWA.

Generally, if a physician panel issues a determination favorable to the employee, OWA accepts the determination and instructs the contractor not to oppose the claim unless required by law to do so. For those applicants who receive an unfavorable determination, the Physician Panel Rule provides an appeal process. Under this process,

an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain OWA decisions. 10 C.F.R. § 852.18. The present appeal seeks review of a negative determination by a Physician Panel that was accepted by OWA. 10 C.F.R. §852.18(a)(2). 10 C.F.R. § 852.18(c) states that an appeal is governed by the OHA procedural regulations set forth at 10 C.F.R. Part 1003. The applicable standard of review is set forth at 10 C.F.R. § 1003.36(c), which provides that "OHA may deny any appeal if the appellant does not establish that – (1) the appeal was filed by a person aggrieved by a DOE action; (2) the DOE's action was erroneous in fact or law; or (3) the DOE's action was arbitrary or capricious." 10 C.F.R. § 1003.36(c).

B. Factual Background

The worker was employed by DOE contractors at the K-25 Plant in Oak Ridge, Tennessee, from 1944 through 1986. Record at 8. The applicant submitted a claim to the OWA. As part of the application process, the applicant completed OWA Forms entitled "Request for Review by Physician Panel." Question 7 of those forms asks "What illness(es) do you have that you believe is caused by your work at a DOE facility?" Record at 1, 3. The applicant responded: "severe heart problems 1988, extremely low blood count 1988 contributed to heart attack," and he also claimed that his skin cancer was caused by his work at the DOE facility. *Id.* at 1-3,12.[*]

The OWA reviewed and prepared the case file and then forwarded it to the Physician Panel. The cover sheet to the case file identified three claimed illnesses: "severe heart problems 1988, extremely low blood count 1988, skin cancer." The Physician Panel reviewed the case file and issued a report in which it described the worker's serious heart attack in April 1988, and found

> He had a past history syncopal (fainting spells) episodes of ventricular fibrillation or complete heart block. The root cause of his coronary problems was probably his high cholesterol with elevated low-density lipoproteins and depressed high-density lipoproteins.

The Panel referred to a table showing the worker's historical total cholesterol, LDL, and HDL levels, and noted further that

> Smoking may have contributed to his heart disease, but it is not likely, given the remote history.

* * *

With respect to the worker's low blood count, the Panel found

[*] The worker claimed he suffered hearing loss as a result of exposure to noise at the DOE facility. However, noise is not considered a "toxic substance" for purposes of this program, and the Panel did not consider this claim.

> He developed mild, not severe, anemia in 1987-1988; the root cause was not determined but it was suspected that multiple blood donations with a decrease in the red meat in his diet contributed. He was started on Feragon which is an iron supplement, and hemoglobin and hemocrit increased then stabilized, and he has not had further problems. [The worker's personal physician's] letter of 11/6/87 summarizes this….

The Panel referred to a table showing the worker's hemoglobin and hemocrit levels during the period 1986-1987, and found the worker was "just below the reference range [for adult males], not severely low."

* * *

Addressing the skin cancer, the Panel noted that in over 40 years of employment at Oak Ridge, the worker was "routinely monitored for uranium, fluorides, mercury, and alpha emitters. All exposures were well below the action points…." *Id.* at 3. The panel discussed the worker's seven skin cancers (all basal cell carcinomas), noting the years when they were diagnosed, where they occurred, and the nature of the disease:

1-4-88	Back of left ear
6-7-90	Superior nasal crease
7-24-90	Superior nasal crease
3-27-92	Left ear
11-13-95	Left ear
12-17-95	Left ear
4-18-02	Left nasal crease

> Basal Cell Carcinomas are the most commonly diagnosed skin cancers, with the great majority being found on the sun-exposed portions of the face and neck. Age and ultraviolet radiation in the form of sunlight exposure are the most common risk factors, although ionizing radiation and arsenic exposure are also risks.
>
> Given that [the worker] was 64 years old when the first basal cell carcinoma was excised, along with a life-long exposure to ultraviolet radiation in a sunny area of the country, with work on his father's farm during his younger years, the panel concluded that non-occupational factors were much more likely causative of these particular basal cell cancers.

Determination at 1-4. On June 9, 2004, the applicant appealed that determination.

II. Analysis

Under Part 852, "[w]hether a positive or favorable determination is rendered is to be based solely on the standard set forth [at 10 C.F.R.] § 852.8." 67 Fed. Reg. 52850 (August 14, 2002). That regulation states:

> A Physician Panel must determine whether the illness or death arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility on the basis of whether it is as least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker at issue.

10 C.F.R. § 852.8. The preamble to Part 852 states "[t]he DOE intends that, as used in this context, the word 'significant' should have its normal dictionary definition and meaning –that is, 'meaningful' and/or 'important'." 67 Fed. Reg. 52847 (August 14, 2002).

The record supports the Physician Panel's finding that the applicant has not shown he had any exposure to a toxic substance while working at the K-25 Plant that was a significant factor in aggravating, contributing to or causing his heart attack, his low blood count, or his skin cancer. In connection with his appeal, the worker stated that he believes exposure to a toxic substance, trichloroethylene (TCE), damaged his liver and caused his high cholesterol and heart problems. Memorandum of July 6, 2004 telephone call from the worker to Janet N. Freimuth, OHA. He also believes that toxic exposure caused his low blood count and that iron he took for it precipitated his heart attack. The record notes that the worker was exposed to toxic substances. However, there is no evidence that any work-related exposures caused his heart attack, his low blood count, or his skin cancer. High cholesterol is a common condition, whose cause is often unknown, and there is no evidence that exposure to TCE caused it in this individual. The worker's blood count was barely below the normal range for a very short period. Skin cancer is another common condition, and as the Panel observed, it can be caused by sun exposure. Accordingly, the Panel's finding under 10 C.F.R. § 852.8 that there is no link established between the worker's exposure at Oak Ridge his three medical problems is neither erroneous nor arbitrary or capricious.

On appeal, the worker asserts that the record is incomplete on skin cancer. He claims he had skin cancer a few times before the ones noted by the Panel, which began when he was 64 years old, and that all of the cancers were not in sun-exposed areas, namely, the crevice of the nose and ear, and close to the hairline, and other cancers were not on his face. However, the worker was unable to get the records of his earliest skin cancers from the treating physicians because the records were no longer available. Disagreeing with the Panel's conclusion that sun exposure caused all of his skin cancers, the worker's appeal letter stated

> As the panel noted, I was very young (age 20) when I went to work at K-25 in Oak Ridge. Prior to that time, I was in school (inside). In the late afternoon after school, I helped some on the farm.
>
> I did not get overexposed to the sun as the panel rationalized. When I worked at K-25 for almost 42 years, my work was inside (out of the sun).

Under the circumstances of this case, even if the Panel was wrong to surmise that all of the worker's skin cancers were attributable to sun exposure, this factual error in and of itself does not mean the Panel's determination should be reversed under the legal standard in 10 C.F.R. § 852.8. The Panel found that there was no evidence of exposures in the record that could have caused the worker's skin cancers, and I see none.

However, the worker claims that the exposure history report he received from K-25 did not contain any records from two periods, e.g., 1945 to 1948, and 1962 to 1975, and that "some of these missing years were my worst years of exposure to dangerous chemicals." According to the worker, he was a glass blower for about 9 years during the period 1962 to 1975, working on different equipment contaminated with radiation. He also states that he worked on several experimental projects, including one making xenon light tubes from quartz glass:

> During fabrication, when melting the quartz with a hydrogen torch, the light given off was very bright and the same frequency as sunlight, this along with the high heat and close range was very hard on the skin on my face and arm.

Record at 527. There is no indication that the Panel considered evidence of this specific exposure, or any other exposure data from the two missing periods. Nor is there evidence that the Panel considered any skin cancers the worker contracted before the age of 64. This does not amount to a showing of error in the Panel determination that is the subject of the present appeal, but it may warrant further Panel review of additional information, as explained below.

We suggest that the worker have a medical professional examine him and document all of the sites of skin cancer surgery. He can also try anew to obtain exposure data from DOE for the two missing periods. The worker should provide any additional information not considered in the initial determination to the OWA and request further Panel review.

III. Conclusion

The applicant has not demonstrated any error in the Panel's determinations regarding his heart attack, his low blood count, or his skin cancer. 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-0108 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 23, 2004

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October 8, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Date of Filing: **June 10, 2004**

Case No.: **TIA-0109**

XXXXXXXXXXX (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, I 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 or EEOICPA) 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.

The Department of Labor (DOL) administers the first program, which provides $150,000 and medical benefits to certain workers with specified illnesses. The relevant illness in this case is "established chronic beryllium disease (CBD)." 42 U.S.C. § 7384l(7).

The DOE administers the second program, which does not itself provide any monetary benefits. Instead, it 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. § 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.

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 1954 through 1958, the worker was a pipefitter at the X-10 and Y-12 plants at the DOE's site in Oak Ridge, Tennessee. The applicant claims that the worker developed beryllium disease as a result of exposure to beryllium at the work site. The worker died by suicide in 1963.

In 2001, the worker's family applied for compensation under the DOL beryllium benefits program referred to above. Since the worker's medical records, which were by then approximately 40 years old, did not establish whether he had beryllium disease,
the DOL requested that the National Jewish Medical and Research Center (NJM) in Denver, Colorado review the worker's file and reach an assessment of his condition. In a letter of August 6, 2003, a physician associated with the NJM provided a review of

the worker's condition using the following five criteria specified in the Act:

> For diagnoses before January 1, 1993, the presence of
> (i) occupational or environmental history, or epidemiologic evidence of beryllium exposure; and
>
> (ii) any three of the following criteria:
>
> (I) Characteristic chest radiographic (or computed tomography (CT)) abnormalities.
> (II) Restrictive or obstructive lung physiology testing or diffusing lung capacity defect.
> (III) Lung pathology consistent with chronic beryllium disease.
> (IV) Clinical course consistent with a chronic respiratory disorder.
> (V) Immunologic tests showing beryllium sensitivity (skin patch test or beryllium blood test preferred).

42 U.S.C. § 7384l(13)(B).

The NJM letter did not definitively state whether the worker's condition, as evidenced by his record, satisfied three of the five criteria as specified in the Act. Rather, the letter described the worker's lung and respiratory condition based on his medical records as it applied to each criterion. Based on their reading of the letter, two DOL claims examiners found the worker had beryllium disease, reached a positive determination with respect to the applicant's claim for compensation, and awarded the worker's family $150,000 under the DOL program.

However, the DOE Physician Panel rendered a negative determination on the applicant's claim for workers' compensation benefits in the DOE program. The Panel found that the worker's medical records showed "no evidence of parenchymal disease, pulmonary function testing, pathology, clinical course or immunologic test consistent with berylliosis." Based on the NJM

letter and other evidence in the record, the Panel determined that the worker did not present "symptoms and signs" of beryllium disease.

The Panel therefore issued a negative determination with respect to this application. The OWA accepted the Physician Panel's determination. *See* OWA May 28, 2004 Letter. The applicant then filed the instant appeal.

II. *Analysis*

In his appeal, the applicant raises two types of arguments. First, he claims that the Panel erred in its assessment of the facts in the file. Second, the applicant raises a broader objection concerning the inconsistent conclusions of the DOE Physician Panel and the DOL claims examiners in this case.

A. Factual Errors

The applicant argues that the Panel erred in its consideration of the worker's symptoms. The applicant cites the following statement in the Panel's report: "Chronic beryllium disease is a complex of symptoms and signs. Symptoms include dyspnea [difficult breathing], cough, fever, anorexia, and weight loss. Signs include skin lesions, granulomatous hepatitis, hypercalcemia, renal calculi and granuloma on chest-x-ray in an individual with a positive lymphocyte proliferation test on peripheral blood. None of these were evident in the OWA file."

The applicant asserts that dyspnea and coughing were evident from the record in this case, and points to a statement in the file from the worker's physician that he "has had choking and dyspnea on any effort that he started since 1956. He was coughing severely at this time." Record at 42. The applicant therefore asserts that the Panel's statement that the record did not show that the worker had the symptoms of dyspnea and cough is an error.

The applicant is correct. The record does indicate that the worker suffered from dyspnea and cough. The Panel's statement to the contrary could be due to an oversight in its review of the record, or to poor drafting of its report. In any event, the

error is ultimately an insignificant one. Even if the worker was experiencing coughing and dyspnea, it would not necessarily establish that he had beryllium disease. For example, as indicated in the NJM letter, the worker suffered from chronic bronchitis and emphysema. These two conditions are also consistent with coughing and dyspnea. I therefore find no basis for remanding this case based on this error.

The applicant next contends that the Panel report inaccurately cites "date of onset" of the beryllium disease as "N/A." The applicant appears to believe that N/A means "not available." He points to Line 6 of a Physician's Certificate giving the "date of onset" of the illness as 1956. Record at 313.

The applicant's description of the certificate is inaccurate. After reviewing the certificate, I find no mention of beryllium. The illnesses that the certificate refers to are cyanosis and dyspnea. As stated above, dyspnea is difficult respiration. Cyanosis is a bluish or purplish discoloration of the skin due to deficient oxygenation of the blood. Neither condition is the same as beryllium disease. Thus, contrary to the applicant's belief, the 1956 date does not refer to the onset of beryllium disease.

The applicant is also incorrect in his belief that the Panel's "N/A" means unavailable. I believe the Panel intended to indicate that the date of onset was "not applicable," since it found that the worker did not have berylliosis. In this regard, as discussed below, when the Panel meant to indicate that data was "not available," as it did elsewhere in the report, it did not use the symbol "N/A," but rather used the term "unavailable." I therefore see no Panel error on this point.

The applicant further objects to the notations by the Panel concerning whether the worker was exposed to beryllium. For example, the Panel stated that dosimetry records, area sampling and industrial hygiene assertions were "unavailable." It found the "site analysis: non-contributory." The applicant points out that the DOL's Recommended Decision found that the worker was exposed to beryllium, and therefore argues that the Physician Panel's report is incorrect on this point.

As noted above, the Panel found that the worker did not have beryllium disease. Therefore, the issue of whether the worker

was exposed to beryllium is irrelevant. Thus, even if the Panel ultimately erred in its assertion that exposure information was unavailable or non-contributory, it would be harmless error, since it would make no difference in the outcome of this case. In any event, the argument that the DOL examiners found that the worker was exposed to beryllium cannot prevail here. As discussed in detail below, I find that the DOL determination, including its findings of fact and conclusions of law, is not dispositive in these workers' compensation cases before the DOE.

B. Inconsistent DOE and DOL Results

The applicant believes that the Panel improperly disregarded the DOL determination, and its conclusion of law that the worker had chronic beryllium disease. The applicant thereby implicitly argues that the Panel is not free to reject the DOL findings. I do not agree with that proposition. As an initial matter, I do not believe that the DOL determination is dispositive in DOE beryllium cases. If it were, there would be no need for a DOE physician panel review. The Act and relevant regulations make no provision for bypassing the DOE physician panel review in beryllium cases that have been granted by DOL. Accordingly, I must conclude that physician panel review is required.

Furthermore, after reviewing the Physician Panel's report, I find no error with respect to the issue of whether the worker had berylliosis. As stated above, the DOL determination was based on the NJM report, which discussed the worker's medical condition as it related to the five criteria set forth in Section 7384l(13)(B). The NJM report did not state conclusively whether or not the worker had met the standard for establishing beryllium disease. For example, with respect to the first criterion, "characteristic chest radiograph or computed tomography denoting abnormalities," the NJM simply reviewed the worker's chest radiographs, without specifically stating whether it believed that they were characteristic of a person with beryllium disease. With respect to the second criterion, "restrictive or obstructive lung physiology test or diffusing capacity defect," the NJM report indicated that the worker's pulmonary function "may be associated with CBD; however the medical record noted previous diagnoses of chronic bronchitis and emphysema." The NJM opinion is thus not clear with respect to this criterion. Overall, the report did not unequivocally state whether the worker met three of the five criteria, as required by Section 7384l(13)(B).

Based on the NJM report, the DOL found that the worker had chronic beryllium disease. Specifically, the DOL claims examiners determined that the worker met criteria I, II and IV. Subsequently, the DOE Physician Panel reviewed the NJM letter, brought its own expertise to bear on the subject, and reached a conclusion that was not consistent with that of the DOL. The applicant believes that the DOE Physician Panel erred.

I disagree. The Panel indicated that it reviewed the report generated by NJM, and it did not find that the evidence indicated that the worker's condition was consistent with berylliosis. The inconsistency in the DOL and DOE determinations does not necessarily mean that the DOE physicians erred. The applicant has pointed to the difference in the opinions, but has provided no information to indicate that the DOE Physician Panel erred in its ultimate determination that the worker did not have CBD. Accordingly, I must reject this aspect of his appeal.

III. *Conclusion*

In sum, the applicant has not demonstrated any error in the Panel's determination that warrants further review in this case. Thus, 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-0109 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: October 8, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

September 20, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Date of Filing: **June 10, 2004**

Case No.: **TIA-0110**

XXXXXXXXXXXXXX (the applicant or the worker) 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'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 or EEOICPA) 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.

The Department of Labor (DOL) administers the first program, which provides $150,000 and medical benefits to certain workers with specified illnesses. As relevant to this case, the illnesses include specified cancers associated with radiation exposure. 42 U.S.C. § 73411(9).

The DOE administers the second program, which does not itself provide any monetary benefits. Instead, it 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. § 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 1955 through 1968, the worker was a chemical operator at the DOE's Portsmouth Gaseous Diffusion plant in Piketon, Ohio. According to the applicant, this job involved working with plant spills involving toxic substances. He claims that he developed colon cancer as a result of exposure to uranium 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

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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 that the worker had colon cancer. The Panel recognized that the worker was exposed to uranium, but found that his colon cancer was not related to the exposure. The Panel therefore issued a negative determination with respect to this application.

The OWA accepted the Physician Panel's determination. *See* OWA May 13, 2004 Letter. The applicant filed the instant appeal.

II. *Analysis*

In his appeal, the applicant argues that the Panel erred (i) in its consideration of his exposure to uranium; (ii) in its application of the standard of proof; (iii) in its consideration of other causes of colon cancer; and (iv) in its failure to give due recognition to the compensation he received for his illness from the DOL. He also claims that the copy of the Panel report that he received was incomplete.

A. Uranium Exposure

In the appeal, the applicant argues that the Panel did not give full consideration to his entire exposure to uranium. He points to a statement in the Panel determination noting that in 1965 he was exposed to levels of uranium that were above plant limits. He argues that the record indicates that he was exposed to even higher levels of uranium in other years, pointing out that his combined exposures were great enough to exclude him from the workplace for several periods of time. He believes that if the Panel had considered the full level of his uranium exposure over his entire DOE work history, it would have reached a different conclusion about whether his colon cancer was related to his uranium exposure.

After reviewing the record, I see no Panel error. Given that the applicant's total radiation exposure was part of the record in this case, I have no reason to believe that the Panel did not review it and give it appropriate consideration. *E.g.,* Record at 268. In fact, the Panel's report clearly states that it reviewed his "total radiation exposure," and found it "unremarkable." This means that the Panel simply did not consider the overall level of radiation exposure to be significant here. The applicant has not shown any

basis for concluding that this determination is incorrect, or for believing that the Panel did not actually review the entire record. I therefore find no basis for any further Panel review on the issue of the level of radiation exposure.

B. Standard of Proof

The applicant argues that the Panel applied an incorrect standard in considering whether his colon cancer was related to a toxic exposure at the workplace. He notes that the Panel's discussion of the "key factors" entering into its determination states, "it is not likely that his colon cancer was caused, contributed or aggravated by a toxic exposure while working at a DOE facility." The applicant points out that the standard in these cases is whether "it is at least as likely as not" that the toxic exposure was a significant factor in aggravating, contributing to or causing the worker's illness or death. The applicant asserts that this standard may be met if there is only a 50-50 chance that the toxic exposure was a significant factor.

The applicant is correct in his characterization of the standard. However, I am not persuaded that the Panel applied the standard erroneously. As noted above, the Panel responded to the following question in the negative: "Did this illness [colon cancer] arise 'out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility based on whether it is 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?'" This is the correct enunciation of the standard and I therefore have no doubt that the Panel applied it correctly here. I do not think that the fact that the Panel's "key factors" narrative did not precisely track this language means that it did not apply the standard correctly. Rather, I believe that the Panel unartfully rephrased its conclusion in the "key factors" section of its determination. Indeed, the panel's characterization of the applicant's exposure as "unremarkable" indicates that the panel did not view the exposure as significant, let alone a significant factor in the applicant's case. I therefore find no Panel error with respect to the standard of proof that it applied.

C. Other Causes of Colon Cancer

In its report, the Panel referred to other factors that may cause colon cancer, such as diet, heredity, and inflammatory bowel

disease. The Panel noted that the latter two causes did not seem to be issues here, but stated that the individual was "moderately obese, drank a lot of coke, and had adult onset diabetes. Presumably he had a standard, American diet, which increases the risk of colon cancer."

The applicant generally objects to these assertions, as either untrue or as not precluding that his uranium exposure could have contributed to his colon cancer. The applicant points to the relatively young age (53) at which he developed colon cancer and asserts that even if he were predisposed to the disease, the early diagnosis "would tend to indicate that it was at least as likely as not that the exposure was a significant factor in aggravation or contribution to the illness in the form of acceleration of the onset."

Again, I see no basis for further Panel review. The Panel did not determine that his colon cancer was caused by his eating habits or obesity. It just pointed out that these are risk factors for colon cancer. Secondly, as discussed above, the Panel's decision was based on its determination that the applicant's colon cancer was not caused, aggravated, or contributed to by exposure to uranium. There is thus no need to revisit this issue in light of the applicant's dietary habits. Finally, there is no support in the record for the applicant's assertion that the allegedly early onset of his cancer bears any relationship whatsoever to exposure to a toxic substance at the DOE work site.

D. DOL Compensation

The applicant points out that he received $150,000 under the DOL program discussed above, awarding compensation under the EEOICPA to certain uranium workers who developed cancer. He argues that this means that there is a legislative recognition that radiation was a significant factor in his illness.

I cannot agree. The causation standard in Section 852.8 and the causation standard applied by DOL for benefits determinations under the EEOICPA are different. Accordingly, this difference in causation standards may produce inconsistent causation determinations from the DOE and the DOL with respect to workers who file applications in both the DOE and DOL programs. However, the DOE has determined that nothing in the Act required that the same causation standard be used for the two programs. 67 Fed. Reg. 52847 (August 14, 2002). The DOE physician panel must meet a higher standard. 10 C.F.R. § 852.8. *See also, Worker Appeal* (Case No.

TIA-0078), 29 DOE ¶ 80,131, 80,559 n.3 (2004). Therefore, the inconsistent results from the DOE and the DOL do not establish any basis for further Panel review.

E. Incomplete Panel Report

The applicant claims that he did not receive a complete copy of the Panel's report. After reviewing his copy, we noted that it excluded the question regarding whether the Panel's determination was unanimous. At our request, the OWA sent us a copy of the Panel report which includes this question and the Panel's response. That copy indicates that the Panel's negative determination was indeed unanimous. A copy of the report showing the Panel's response to the question accompanies this determination.

III. *Conclusion*

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-0110 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 20, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

September 24, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: June 14, 2004

Case No.: TIA-0111

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's late husband (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 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 for workers.

The Department of Labor (DOL) administers the first program, which provides $150,000 and medical benefits to certain workers with specified illnesses. Eligible workers include DOE employees and DOE contractor employees who worked at DOE facilities and contracted specified cancers associated with radiation exposure. 42 U.S.C. § 7384l. In general, a worker in that group is eligible for an award if the worker was a member of the Special Exposure Cohort or if it is determined that the worker sustained the cancer in the performance of duty. *Id*. Membership in the Special Exposure Cohort includes DOE employees and DOE contractor employees who were employed prior to February 1, 1992, at a gaseous diffusion plant in Oak Ridge, Tennessee; Paducah, Kentucky; or Portsmouth, OH.

The DOE administers the second program. 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 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.[1]

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. Procedural Background

The Worker was employed as a mechanic and maintenance worker at DOE's Oak Ridge site. The Worker worked at the site for nearly 35 years, from 1952 to 1958 and from 1959 to 1988.

The Applicant filed an application with OWA, requesting physician panel review of four illnesses. They were lung cancer, liver cancer, renal disease, and kidney failure.

The Physician Panel rendered a negative determination on each of the claimed illnesses. The Panel agreed that the Worker had lung cancer and that the worker was exposed to low whole body radiation. However, the Panel determined that lung cancer is not associated with low whole body radiation but is strongly related to smoking. The Panel noted that the Worker had a long history of smoking. The Panel agreed that the Worker had liver cancer, but stated that the liver cancer represented metastasis of the lung cancer. Finally, the Panel agreed

[1] *See* www.eh.doe.gov/advocacy.

that the Worker had renal failure and kidney disease, stated that these illnesses were not caused by occupational exposures, but rather were consistent with the effects of a particular medication taken by the Worker.

The OWA accepted the Physician Panel's negative determination on each of the claimed illnesses. 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 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,[2] applied the wrong standard,[3] or failed to explain the basis of its determination.[4] On the other hand, mere disagreements with the Panel's opinion are not a basis for finding Panel error.

In her appeal, the Applicant maintains that the negative determination is incorrect. The Applicant contends that her late husband's illness is a result of his working as a mechanic at the Oak Ridge site. First, the Applicant states that although her husband worked in the garage as a mechanic, he was a "troubleshooter" who was exposed to various hazardous materials. Applicant's letter to Director, OHA, June 9, 2004. Second, the Applicant claims that the report is incorrect as to the extent of her husband's smoking. She states that her husband quit smoking and, in any event, he did not smoke as extensively as the report suggests. Third, the Applicant contends that the negative determination is inconsistent with the fact that she received an award from DOL.

The Applicant's arguments are not a basis for finding panel error. As mentioned above, the Panel addressed each of the claimed illnesses, made a determination on the illnesses, and explained the basis of that determination, i.e. that the illnesses were not caused by occupational exposures to toxic substances. The Panel's explanation includes a discussion of exposures. The discussion makes clear that the Panel viewed those exposures as insignificant. Accordingly, even if the Panel overstated the Worker's smoking history, any such overstatement

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

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

[4] ***Id.***

would not have affected the decision. Finally, the Applicant's DOL award does not represent a finding that the Applicant meets the causation standard of the DOE Physician Panel Rule. The Applicant was eligible for an award under the DOL program because the Worker was a member of the Special Exposure Cohort, i.e. he worked at the K-25 plant at Oak Ridge, and he developed lung cancer after the beginning of his employment there. *See* 20 C.F.R. § 30.210. Under the Physician Panel Rule, the Panel can render a positive determination only if the Panel determines that "it is at least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker at issue." 10 C.F.R. § 852.8. Thus, the causation standards of the two programs differ. The preamble to the DOE Physician Panel Rule discusses this difference:

> Under the DOL program, a member of a Special Exposure Cohort...who has a specified cancer could establish entitlement to benefits for a specified cancer without showing that the disease is the result of exposure to a toxic substance because the statute dispenses with that requirement for Special Exposure Cohort members in the DOL program. A Physician Panel, however, can make a positive determination only if sufficient evidence is provided to meet the standard as specified in section 852.8.

67 Fed. Reg. 52,849. Thus, while findings of the DOL may be relevant to the Panel's assessment of the Applicant's case, they do not represent a DOL conclusion that the Applicant meets the causation standard of the Physician Panel Rule.

As the foregoing indicates, the appeal does not provide a basis for finding panel error and, therefore, should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0111 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 24, 2004

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January 11, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **June 14, 2004**

Case No.: **TIA-0112**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The Applicant's late husband (the Worker) was a DOE contractor employee at a DOE facility. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the worker's illnesses were not related to his work at a DOE facility. 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 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, and its web site provides extensive information concerning the program.[1]

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

[1] **www.eh.doe.gov/advocacy**

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. In addition, under Subpart E, an applicant is deemed to have an illness related to a work related toxic exposure at DOE if the applicant received a positive determination under Subpart B.

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 at the DOE's Savannah River site. He worked at the site, primarily as a heavy water operator, for nearly 27 years, from 1952 to 1979.

The Applicant filed an application with the OWA, requesting physician panel review of two illnesses – heart disease and chronic obstructive pulmonary disease (COPD). The Applicant asserted that the Worker's illnesses were the result of exposure to hazardous chemicals in the course of his employment. The Physician Panel rendered a negative determination on each of these illnesses. The Panel found that there was insufficient evidence establishing a link between the Applicant's heart disease and his workplace exposures. The Panel noted that the Worker had a number of non-occupational cardiac risk factors, including hypertension, heavy smoking, and heavy alcohol usage. The panel further determined that there was insufficient evidence of workplace exposures that could have contributed to the Worker's COPD. The Panel noted the non-occupational factors listed above as possible aggravating factors of the COPD.

The OWA accepted the Physician Panel's negative determinations and, subsequently, the Applicant filed the instant appeal.

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 a toxic exposure at the DOE site, and state the basis for that finding.[2]

The Applicant argues that the Physician Panel erred in determining that the Worker's illnesses were not related to his workplace exposures. First, the Applicant points out errors in the Panel report. Second, the Applicant also provides a DOL Notice of Final Decision which states that, since the Worker had an occupational history of beryllium exposure and the Worker's medical records satisfied three of the five criteria necessary to establish chronic beryllium disease (CBD), the evidence establishes that the Worker had CBD.

First, with regard to the errors in the panel report, the Applicant's arguments do not provide a basis for granting the appeal. In her appeal, the Applicant states that there was an error regarding the Worker's name, position of employment, and alcohol use. The Panel considered the entire record in making its determination. The record accurately states the Worker's name and position of employment. Consequently, the errors Applicant refers to do not indicate an error in the Panel's analysis. The Applicant also maintains that the Panel overstated the Worker's alcohol use. The record includes substantial evidence documenting the Worker's alcohol use. Furthermore, the Panel report includes a discussion of exposures. The discussion makes clear that the Panel viewed the exposures as insignificant. Accordingly, even if the Panel overstated the Worker's alcohol use, any such overstatement would not have affected the decision.

Second, the DOL award letter stating that the Worker had CBD does not indicate panel error. CBD was not a claimed illness. Therefore, the Panel's failure to consider CBD was not error. If the Applicant wishes to claim CBD as an additional illness, she should contact the DOL in order to request information on how to proceed with her claim. Under Subpart E, the DOL award for CBD under Subpart B will result in a positive Subpart E award.

As the foregoing indicates, the Applicant's claim does not provide 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 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-0112 be, and hereby is, denied.

[2] 10 C.F.R. § 852.12.

(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: January 11, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

October 8, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: June 17, 2004

Case No.: TIA-0113

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's late husband (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 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 for workers.

The Department of Labor (DOL) administers the first program, which provides $150,000 and medical benefits to certain workers with specified illnesses. Eligible workers include DOE employees and DOE contractor employees who worked at DOE facilities and contracted specified cancers associated with radiation exposure. 42 U.S.C. § 7384l. In general, a worker in that group is eligible for an award if the worker was a member of the Special Exposure Cohort or if it is determined that the worker sustained the cancer in the performance of duty. *Id*. Membership in the Special Exposure Cohort includes DOE employees and DOE contractor employees who were employed prior to February 1, 1992, at a gaseous diffusion plant in Oak Ridge, Tennessee; Paducah, Kentucky; or Portsmouth, OH.

The DOE administers the second program. 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 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.[1]

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. Procedural Background

The Worker was employed as a welder at the DOE's Portsmouth site. The Worker worked at the site for nearly 6 years, from 1956 to 1961.

The Applicant filed an application with OWA, requesting physician panel review of one illness—pancreatic cancer. The Physician Panel rendered a negative determination on the claimed illness and explained the basis of that determination. The OWA accepted the Physician Panel's negative determination on the claimed illness.

The Applicant appeals the negative determination on the claimed pancreatic cancer. The Panel agreed that the Applicant had the illness, but the Panel determined that there was no medical evidence establishing a relationship between any exposures at the Applicant's workplace and the illness.

II. Analysis

Under the Physician Panel Rule, independent physicians render an opinion whether a claimed illness is related to a toxic exposure

[1] *See* www.eh.doe.gov/advocacy.

during employment at DOE. The Rule requires 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.

We have not hesitated to remand an application where the Panel report did not address all the claimed illnesses,[2] applied the wrong standard,[3] or failed to explain the basis of its determination.[4] On the other hand, mere disagreements with the Panel's opinion are not a basis for finding Panel error.

In her appeal, the Applicant maintains that the negative determination is incorrect. First, the Applicant contends that the negative determination on the Worker's pancreatic cancer is inconsistent with the fact that she received an award from DOL. Second, the Applicant supplies additional hospital records that were found and forwarded to the Applicant. Lastly, the Applicant questions whether the Panel reviewed the Worker's records, as opposed to those of another worker, since the Worker's social security number is listed incorrectly on OWA's determination letter. As explained below, the Applicant's arguments are not a basis for finding panel error.

First, the DOL award does not represent a finding that the Applicant meets the causation standard of the DOE Physician Panel Rule. The Applicant was eligible for an award under the DOL program because the Worker was a member of the Special Exposure Cohort, i.e. he worked at the Portsmouth site, and he developed pancreatic cancer after the beginning of his employment there. *See* 20 C.F.R. § 30.210. Under the Physician Panel Rule, the Panel can render a positive determination only if the Panel determines that "it is at least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker at issue." 10 C.F.R. § 852.8. Thus, the causation standards of the two programs differ. The preamble to the DOE Physician Panel Rule discusses this difference:

> **Under the DOL program, a member of a Special Exposure Cohort...who has a specified cancer could establish entitlement to benefits for a specified cancer without showing that the disease is the result of exposure to a toxic substance because the statute dispenses with that requirement for Special Exposure Cohort members in the DOL program. A Physician Panel, however, can make a positive**

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

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

[4] ***Id.***

> determination only if sufficient evidence is provided to meet the standard as specified in section 852.8.

67 Fed. Reg. 52,849. Thus, the DOL award does not represent a DOL conclusion that the Applicant meets the causation standard of the Physician Panel Rule. Accordingly, the fact that the Applicant received a DOL award does not provide a basis for finding panel error.

Second, the additional hospital records provided by the Applicant do not indicate panel error. A physician panel bases its consideration on the record presented to it. Accordingly, the existence of additional information, not included in the record, does not support a finding of panel error. In any event, we doubt that the additional information would have changed the panel result. The additional hospital records all indicate that the Worker had pancreatic cancer, as opposed to cancer of other organs that had spread to the pancreas. The Panel agreed that the Worker had pancreatic cancer and, therefore, the inclusion of the additional hospital records would not have changed the Panel's analysis.

Lastly, the Applicant correctly notes that the determination letter contains the wrong social security number, but that error does not indicate an error in the Panel's analysis. The records reviewed by the Panel are those pertaining to the Worker, identified by the Worker's correct social security number. Accordingly, the use of an incorrect social security number in the determination letter was simply a clerical error and not an indication that the Panel mistakenly reviewed the records of another individual.

As the foregoing indicates, the appeal does not provide a basis for finding panel error and, therefore, should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0113 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: October 8, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **June 18, 2004**

Case No.: **TIA-0114**

XXXXXXXXXX (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 her late husband, XXXXXXXXXX (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illnesses were not related to his work at a DOE facility. The OWA accepted the Panel's determinations, 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 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, and its web site provides extensive information concerning the program.[1]

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. OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Worker was employed as a truck operator and the captain of the fire guard security at the DOE's Oak Ridge site (the site) for approximately twenty-six years, from 1974 to 2000.

The Applicant filed a claim with the OWA, requesting physician panel review of claims of two illnesses: brain cancer and pulmonary fibrosis. The Applicant asserted that the Worker's illnesses were the result of his work in "hot burial grounds and buildings."[2]

The Physician Panel rendered negative determinations with regard to both of the illnesses. The Panel examined the Worker's dosimetry readings and his exposure records. It concluded his dosimetry record showed that his total radiation exposure was below the permissible occupational

[1] *See* Department of Energy, Office of Worker Advocacy, *available at* www.eh.doe.gov/advocacy.
[2] Record (Work History for Claim under EEOICPA).

exposure standard.[3] In its report, the Panel also considered a mercury spill which was documented in the site medical records. However, it noted that the record lacked documentation of any other exposures. Therefore, the Panel found that there was insufficient evidence to support the conclusion that exposure to toxic chemicals or radiation was a significant factor in causing, contributing or aggravating the brain cancer.

The Panel also reviewed the Applicant's claim of pulmonary fibrosis. Although the Panel acknowledged that the Worker had the condition, the Panel concluded that there was insufficient evidence to show that the pulmonary fibrosis was related to any toxic exposures at the site. The Panel considered it more likely instead that the disease was associated with the Worker's chemotherapy medication and history of smoking.

The OWA accepted the Physician Panel's negative determinations, and the Applicant filed the instant appeal.

In her appeal, the Applicant maintains that the Panel's negative determination is incorrect. The Applicant contends that the Worker was "required to enter and inspect numerous buildings containing radioactive substances, toxins, both light and heavy metals, airborne particulates, and noxious odors and fumes on a regular basis."[4] The Applicant further asserts that exposure to these substances are known causes of brain cancer and pulmonary fibrosis.

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

The Applicant's appeal alleges exposure to substances not identified in the original application. Because these are new assertions, the Panel did not have a chance to consider them and, therefore, they do not indicate Panel error. If

[3] Panel Report at 1.
[4] Applicant's Appeal Letter, dated June 16, 2004.

the Applicant wishes to have these additional exposures considered, she should raise the issue with the DOL.

As the foregoing indicates, the Physician Panel addressed the Applicant's claims of brain cancer and pulmonary fibrosis, made its determinations, and explained the reasoning for its conclusions. The Applicant's appeal asserts new exposures, but does not indicate error on the part of the Panel. Therefore, the appeal should be denied.

Finally, we note that new information may be available concerning the Worker's level of radiation exposure. The record indicates that, at the time the Panel considered the claim, the National Institute for Occupational Safety and Health (NIOSH) was in the process of performing a dose reconstruction.[5] This NIOSH dose reconstruction may provide further information that would support the Applicant's Subpart E claim.

In compliance with Subpart E, these claims will be transferred to the DOL for review. OHA's denial of these claims does not purport to dispose of or in any way prejudice the DOL's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0114 be, and hereby is, denied.

(2) The denial pertains only to the DOE claims and not to the DOL's review of these claims under Subpart E.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date:

[5] *See* Record (Case History).

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

October 28, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: June 18, 2004

Case No.: TIA-0115

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 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. 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 reimburse the contractor for any costs that it incurs if it contests

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

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. Procedural Background

The Applicant was employed at DOE's Rocky Flats site. He worked at the site as a computer drafting designer for nearly 4 years, from 1991 to 1995.

The Applicant filed an application with OWA, requesting physician panel review of three illnesses. The Physician Panel rendered a negative determination on each of the claimed illnesses and explained the basis of each determination. The OWA accepted the Physician Panel's negative determination on each of the claimed illnesses.

The Applicant appeals the negative determination on one of the illnesses – thyroid cancer. For the thyroid cancer, the Panel agreed that the Applicant had the illness, but the Panel determined that there was insufficient evidence establishing a relationship between any exposures at the Applicant's workplace and the illnesses.

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 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

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[2] ***See*** **www.eh.doe.gov/advocacy.**

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

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 Panel's negative determination is incorrect. The Applicant advances several arguments which are considered below.

First, the Applicant argues that the Panel's negative determination is incorrect because thyroid cancer is most notably linked to occupational and environmental exposures, and different levels of radiation affect different people differently. The Applicant's argument does not provide a basis for finding panel error. The Panel addressed the claimed illness, made a determination on the illness, and explained the basis of that determination – that there was insufficient evidence establishing a relationship between any workplace exposures and the Applicant's illness. The Applicant's argument is merely disagreement with the Panel's medical judgment rather than an indication of panel error.

Second, the Applicant argues that the fact that he did not have any of the conditions or treatments listed by the Panel as other risk factors indicates that the cause of his cancer was occupational exposures to radiation. This argument does not provide a basis for finding panel error. In listing other risk factors of thyroid cancer, the Panel was speculating as to the most common risks to the thyroid gland and was not stating that the Applicant was affected by those other factors. Although the Panel discussed some possible causes for thyroid cancer, the key determination here was that the Applicant's illness was not related to toxic exposures at a DOE site.

Lastly, the Applicant argues that the Physician Panels are issuing too many negative determinations on cancer claims. The Applicant's argument does not provide a basis for granting the appeal. In making its determinations, the Panel must follow the regulations set forth by the DOE in the Physician Panel Rule. *See* 10 C.F.R. Part 852. In the instant case, the Panel addressed each claimed illness, made a determination on each illness, and explained the basis of each determination. Accordingly, the Applicant's argument does not indicate panel error.

As the foregoing indicates, the appeal does not provide a basis for finding panel error and, therefore, should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0115 be, and hereby is, denied.

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

[5] ***Id.***

(2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 28, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

September 20, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: June 21, 2004

Case No.: TIA-0116

XXXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy for assistance in filing for state workers' compensation benefits based on the employment of her late husband, XXXXXXXXX (the worker). The DOE Office of Worker Advocacy determined that the applicant was not a DOE contractor employee under the regulations at issue here and, therefore, was not eligible for DOE assistance. The applicant appeals that determination. As explained below, we have concluded that the determination is correct.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act creates two programs for workers.

The Department of Labor (DOL) administers the first EEOICPA program, which provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 73841(1). The DOL program also provides federal monetary and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 7384u.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, the DOE program provides for an independent physician panel assessment of whether a "Department of Energy contractor employee" has an illness related to exposure to a toxic substance at a DOE facility. 42 U.S.C. § 7385o. 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).

The DOE program is specifically limited to DOE contractor employees[1] who worked at DOE facilities.[2] The reason is that the DOE would not be involved in state workers' compensation proceedings involving other employers.

The regulations for the DOE program are referred to as the Physician Panel Rule and are set forth at 10 C.F.R. Part 852. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program.[3]

Pursuant to an Executive Order,[4] the DOE has published a list of facilities covered by the DOL and DOE programs, and the DOE has designated next to each facility whether it falls within the EEOICPA's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 69 Fed. Reg. 51,825 (August 23, 2004) (current list of facilities). The DOE's published list also refers readers to the DOE Worker Advocacy Office web site for additional information about the facilities. 69 Fed. Reg. 51,825.

II. The Appeal

This case involves the program administered by the DOE that provides access for eligible DOE contractor employees or their survivors to a Physicians Panel Process. The Physicians Panel established under the EEOICPA determines the validity of claims that a current or former DOE contractor employee's illness or death arose from his or her exposure to a toxic substance during the course of his or her employment at a DOE facility.

In the case at hand, the DOE Worker Advocacy Office declined to present the applicant's application to a Physicians Panel because the office determined that the applicant's late husband did not meet the eligibility requirements for the Physicians Panel Process. *See* May 11, 2004 letter from DOE Worker Advocacy Office to the applicant.

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[1] A DOE contractor is defined as follows: (a) an individual who is or was in residence at a DOE facility as a researcher for one or more periods aggregating at least 24 months; (b) an individual who is or was employed at a DOE facility by (i) an entity that contracted with DOE to provide management and operation, management and integration, or environmental remediation at the facility; or (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility. 10 C.F.R. § 852.2.

[2] A DOE facility is defined as: any building, structure or premise, including the grounds upon which such building, structure, or premise is located: (a) in which operations are, or have been, conducted by, or on behalf of the DOE (except for buildings, structures, premises, grounds, or operations covered by Executive Order No. 12344 dated February 1, 1982 (42 U.S.C. § 7158 note), pertaining to Naval Nuclear Propulsion Program); and (b) with regard to which DOE has or had (i) a propriety interest; or (ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services. 10 C.F.R. § 852.2.

[3] *See* www.eh.doe.gov/advocacy.

[4] *See* Executive Order No. 13,179 (December 7, 2000).

In her appeal, the applicant states that her late husband worked his entire life for one employer, Aliquippa Forge-Universal Cyclops, Inc. in Aliquippa, Pennsylvania (hereinafter referred to as "Aliquippa-Forge"). According to the applicant, her late husband's employment spanned 35 years at Aliquippa-Forge, from 1944 to 1979. She claims further that her late husband became ill from exposure to radioactive material and silica metal dust while working at his place of employment. The applicant argues on appeal that the decision by the DOE Worker Advocacy Office is unfair because her husband was already stricken with illness by the time the DOE took over the facility in question. She contends further that her husband never received any compensation for his illness and that someone should be held responsible for his illness.

III. Analysis

A. Worker Programs

As an initial matter, we emphasize that the DOE physician panel process is separate from state workers' compensation proceedings. A DOE decision that an applicant is not eligible for the DOE physician panel process does not affect (i) an applicant's right to file for state workers' compensation benefits or (ii) whether the applicant is eligible for those benefits under applicable state law.

Similarly, we emphasize that the DOE physician panel process is separate from any claims made under other statutory provisions. Thus, a DOE decision concerning the physician panel process does not affect any claims made under other statutory provisions, such as programs administered by DOL and DOJ.

We now turn to whether the applicant in this case is eligible for the DOE Physician Panel process.

B. Whether the Applicant is Eligible for the DOE Physician Panel Process

As noted above, access to the DOE Physician Panel is limited to applications filed by or on behalf of a DOE contractor employee who is or was employed at a DOE facility. See 10 C.F.R. § 852.1(b). Under the EEOICPA, a worker who was employed by an Atomic Weapons Employer or a Beryllium Vendor is not eligible to use the DOE Physician Panel.

To determine whether the worker in question was a DOE contractor who worked at a DOE facility, we consulted the DOE's published facilities list set forth at 69 Fed. Reg. 51,825. On that list, Aliquippa-Forge (also known as Vulcan Crucible Steel Co. and Universal Cyclops, Inc.) is listed as "AWE" and "DOE," the codes for "atomic weapons employer facility" [5] and "DOE facility." We next reviewed the Office of Worker Advocacy web site. There, we learned that Aliquippa-Forge was a DOE facility for only

[5] An "Atomic Weapons Facility" is defined as a facility, owned by an atomic weapons employer, that is or was used to process or produce, for use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining and milling. EEOICPA, § 30.5(e).

one year, 1988, when Bechtel National Inc. (Bechtel) provided environmental remediation work under an umbrella contract with the DOE. See 69 Fed. Reg. 51,825 (entry for Aliquippa-Forge); www.eh.doe.gov/advocacy (Aliquippa Forge entry in searchable database on sites). We also reviewed a Final Report issued by the Oak Ridge Institute for Science and Education in December 1992 on the Aliquippa-Forge facility to learn more about the facility. According to the Final Report, Bechtel, a DOE contractor, performed a limited radiological survey of the Aliquippa-Forge site in December 1987. The Final Report states that Bechtel conducted interim remedial activities on the site in 1988. The report does not state when Bechtel completed remediation activities on the site. Nevertheless, the issue of when Bechtel completed its remediation of the Aliquippa-Forge site is not relevant here because Bechtel became a DOE contractor after the applicant's late husband left the employ of Aliquippa- Forge in 1979.

Based on the available evidence, we conclude that the applicant's late husband was not a DOE contractor who worked at a DOE facility. Her late husband worked for Aliquippa-Forge from 1944 to 1979. Aliquippa-Forge did not become a DOE facility until nine years after the applicant's late husband left Aliquippa-Forge's employ.

The Office of Worker Advocacy website also indicates that Aliquippa-Forge was an "Atomic Weapons Employer" from1947 to 1950 when the Atomic Energy Commission operated a rolling mill, two furnaces and cutting and extrusion equipment at the facility. However, since workers employed by Atomic Weapons Employers cannot use the DOE Physician Panel process, the DOE cannot accept applicant's claim for processing. We reiterate that our decision regarding the applicant's ineligibility in this case does not affect her eligibility for (i) state workers' compensation benefits or (ii) federal monetary and medical benefits under other statutory provisions, including EEOIPCA claims at the Department of Labor.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0116 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 20, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

October 28, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: June 22, 2004

Case No.: TIA-0117

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 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. 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

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

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. Procedural Background

The Applicant was employed as an engineer at DOE's Idaho National Engineering Laboratory. The Applicant worked at the site from 1950 to 1983.

The Applicant filed an application with OWA, requesting physician panel review of one illness – prostate cancer.

The Physician Panel rendered a negative determination on the claimed illness. The Panel agreed that the Applicant had prostate cancer and was exposed to low radiation levels and cadmium. However, the Panel determined that the Applicant's radiation levels were well below accepted occupational limits and that prostate cancer is no longer thought to be related to exposure to cadmium.

The OWA accepted the Physician Panel's negative determination on the claimed prostate cancer. 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 determination is incorrect. The Applicant argues that the determination is in error because his radiation exposure was caused "by standing on top of or over a plutonium-beryllium high energy neutron source without shielding between him and the neutron flux" rather than exposure to cadmium as indicated by the Panel.

The Applicant's argument is not a basis for finding panel error. As mentioned above, the Panel addressed the claimed illness, made a determination on the illness, and explained the basis of that determination. While the Panel did not mention the specific origin of the Applicant's radiation exposure, the Panel discussed the Applicant's specific levels of exposure and stated they were "well below" occupational limits. Accordingly, the appeal does not provide a basis for finding panel error and, therefore, should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0117 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: October 28, 2004

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[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.*

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

April 22, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **June 23, 2004**

Case No.: **TIA-0118**

XXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illnesses were not related to her work at a DOE facility. 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.[1]

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.[2] Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.[3] Subpart E provides that all Subpart D claims will be considered as Subpart E claims.[4] OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Applicant was employed as a lab technician at the DOE's Savannah River site (the site) for approximately thirty years.

The Applicant filed an application with the OWA, requesting physician panel review of her claims of neurodermatitis, digestive problems, rectal polyps, shortness of breath, sinus problems, and a benign breast mass. The Applicant asserted that her illnesses were the result of exposure to "radiation, toxins, chemicals and other occupational hazards" present at the site.[5]

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[1] *See* OWA website, *available at* http://www.eh.doe.gov/advocacy/index.html

[2] Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).

[3] *See id.* § 3675(a).

[4] *See id.* § 3681(g).

[5] *See* Record at 11.

The Physician Panel rendered a negative determination for each of the claimed illnesses. The Panel found insufficient evidence that toxic exposures at DOE were a significant factor in aggravating, contributing to, or causing the illnesses. The Panel stated that one of the illnesses pre-dated her DOE employment and that the Applicant had risk factors for some of the other illnesses. The OWA accepted the Physician Panel's determinations, and the Applicant filed the instant appeal.

On appeal, the Applicant disagrees with a number of statements in the Panel report concerning her medical history and risk factors. She contends that none of her personal physicians have been able to identify the cause of her illnesses.

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 a 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 has not identified Panel error. The record supports the Panel's references to the Applicant's prescription drug usage,[6] weight,[7] smoking history[8] and use of a wood burning stove.[9] The Applicant's argument that her personal physicians have not been able to identify the cause of her illnesses is consistent with the Panel's negative determination on the issue of whether "it is at least as likely as not" that the exposures were a significant factor in her illnesses.

As the foregoing indicates, the Applicant has not demonstrated Panel error. In compliance with Subpart E,

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[6] *See* Record at 281.
[7] *See* Panel Record at 34, 52, 106.
[8] *See* Panel Record at 28, 32, 35.
[9] *See* Panel Report at 34.

these claims will be transferred to the DOL for review. OHA's denial of these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0118 be, and hereby is, denied.

(2) The denial pertains only to the DOE claims and not to the DOL's review of these claims 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 22, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

September 30, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: June 23, 2004

Case No.: TIA-0119

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 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. The Act provides for two programs for workers.

The Department of Labor (DOL) administers the first program. The program provides for $150,000 and medical benefits to certain workers with specified illnesses. The illnesses include specified cancers associated with radiation exposure. 42 U.S.C. § 7384l.

The DOE administers the second program. 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 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.[1]

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. Procedural Background

The Applicant was employed as a record clerk and forms designer at DOE's Paducah site. The Worker worked at the site for nearly 3 years, from 1952 to 1955.

The Applicant filed an application with OWA, requesting physician panel review of six illnesses. The Physician Panel rendered a negative determination on each of the claimed illnesses and explained the basis of each determination. The OWA accepted the Physician Panel's negative determination on each of the claimed illnesses.

The Applicant appeals the negative determination on two of the illnesses—breast cancer and osteoporosis. For those illnesses, the Panel agreed that the Applicant had the illnesses, but the Panel determined that there was no evidence establishing a relationship between any exposures at the Applicant's workplace and the illnesses.

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

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[1] ***See*** **www.eh.doe.gov/advocacy.**

We have not hesitated to remand an application where the Panel report did not address all the claimed illnesses,[2] applied the wrong standard,[3] or failed to explain the basis of its determination.[4] On the other hand, mere disagreements with the Panel's opinion are not a basis for finding Panel error.

In her appeal, the Applicant maintains that the negative determinations on her breast cancer and osteoporosis are inconsistent with the fact that she received an award from DOL. The Applicant's argument is not a basis for finding panel error.

The DOL award does not represent a finding that the Applicant meets the causation standard of the DOE Physician Panel Rule. The Applicant was eligible for an award under the DOL program because she was a member of the Special Exposure Cohort, i.e. she worked at the DOE's Paducah site, and she developed breast cancer after the beginning of her employment there. *See* 20 C.F.R. § 30.210. Under the Physician Panel Rule, the Panel can render a positive determination only if the Panel determines that "it is at least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker at issue." 10 C.F.R. § 852.8. Thus, the causation standards of the two programs differ. The preamble to the DOE Physician Panel Rule discusses this difference:

> **Under the DOL program, a member of a Special Exposure Cohort...who has a specified cancer could establish entitlement to benefits for a specified cancer without showing that the disease is the result of exposure to a toxic substance because the statute dispenses with that requirement for Special Exposure Cohort members in the DOL program. A Physician Panel, however, can make a positive determination only if sufficient evidence is provided to meet the standard as specified in section 852.8.**

67 Fed. Reg. 52,849. Thus, the DOL award does not represent a DOL conclusion that the Applicant meets the causation standard of the Physician Panel Rule. Accordingly, the fact that the Applicant received a DOL award does not provide a basis for finding panel error and, therefore, the appeal should be denied.

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

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

[4] ***Id.***

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0119 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 30, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

October 28, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: June 25, 2004

Case No.: TIA-0120

XXXXXXXXXXX (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. 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

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

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. Procedural Background

The Applicant was employed as an electrician at the DOE's Paducah site. The Applicant worked at the site for 31 years, from 1968 to 1999.

The Applicant filed an application with OWA, requesting physician panel review of one illness – bilateral lung opacities.

The Physician Panel rendered a negative determination on the claimed illness. The Panel agreed that the Applicant had the illness. However, the Panel determined that the Applicant's illness was not related to the Applicant's occupational exposures. The Panel noted that the record indicated possible exposures to asbestos, beryllium, and welding fumes, but that such exposures were not known to produce the claimed illness.

The OWA accepted the Physician Panel's negative determination on the claimed bilateral lung opacities. 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

[2] *See* www.eh.doe.gov/advocacy.

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.

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 determination is incorrect. The Applicant argues generally that his health problems were probably caused by his work environment and exposures to toxic substances during the course of his duties.

The Applicant's argument does not provide a basis for finding panel error. The Panel addressed the claimed illness, made a determination on the illness, and explained the basis of that determination, i.e. that the Applicant's exposures were not known to produce the illness claimed by the Applicant. The Applicant's argument on appeal is merely a disagreement with the Panel's medical judgment rather than an indication of panel error.

In his appeal, the Applicant also maintains that he has respiratory symptoms — shortness of breath, severe coughs, and regular chest pains. The Applicant further states that he will seek a medical evaluation of these symptoms. The existence of these symptoms does not indicate panel error. The Applicant did not claim these symptoms in his application. If the applicant receives significant new information about his condition, the Applicant should amend his application.

As the foregoing indicates, the appeal does not provide a basis for finding panel error and, therefore, should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0120 be, and hereby is, denied.

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[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.*

(2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 28, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

May 6, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: June 28, 2004

Case No.: TIA-0121

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the illnesses were not related to 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). As explained below, we have concluded that the Appeal should be granted.

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 Applicant filed a Subpart B application with DOL, claiming prostate cancer. The Applicant filed a Subpart D application with OWA, claiming prostate cancer and several other illnesses. The Applicant claimed employment as a plumber/steamfitter at the DOE's Hanford site from 1965 to 1987. Record at 8-9, 16.

The Hanford site verified that the Applicant was employed at the site, but not for the claimed period. The Hanford site stated that it located (i) a 1975 treatment record, which indicated a presence at the site for an unknown period, and (ii) dosimetry records for a one-month period in 1977. Record at 14-15.

The DOL and the OWA processed the applications. The DOL provided the Applicant with an opportunity to submit additional information to support his claim of lengthy employment at the site. The DOL file contains additional information, such as the Applicant's social security records, but the DOL did not find employment beyond that verified by the Hanford site. The DOL referred the

prostate cancer claim to the National Institute of Occupational Safety and Health (NIOSH) for a radiation dose reconstruction, stating the verified employment as a month in 1975 and a month in 1977.

With respect to his OWA application, the Applicant elected to have OWA send his application to the Physician Panel, without awaiting the results of the dose reconstruction. The OWA referred the application to the Panel, which issued a negative determination on the claimed illnesses.

The Applicant filed an appeal, stating that he disagreed with the determination. We provided the Applicant with an opportunity to submit additional information to support his claim of lengthy employment at the site, such as affidavits from co-workers, but we did not receive any information.

In our review of the file, we noted that the Applicant's social security records showed employment by numerous companies during the claimed period of employment at the site. Record at 331-344. We forwarded the relevant portion of the list, Record at 333-344, to the OWA and asked whether any of the employers were subcontractors at the site during the period when they employed the Applicant. The OWA responded that Stone and Webster Engineering Corp., the Applicant's employer in 1969 and 1970, was a Hanford subcontractor and "probably" performed work at the site during that period. OWA May 2, 2005 letter to OHA.

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.

Although the Applicant bears primary responsibility for supporting a claim, "the DOE will assist applicants as it is able." See 67 Fed. Reg. 52,841, 52,844 (2002). In processing the application, the OWA did not identify Stone and Webster as a Hanford subcontractor during the period the firm employed the Applicant. Although such information may not be sufficient, by itself, to demonstrate the claimed employment, it is relevant information that should have been provided to the Applicant. Accordingly, reconsideration of the application may be warranted.

If the Applicant wishes to pursue a claim of employment during the period of 1969 to 1970, he should consult the DOL on how to proceed.

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 grant of this appeal 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-0121, be, and hereby is, granted.

(2) The OWA has provided additional information that may help the Applicant demonstrate his employment at the site.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 6, 2005

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October 25, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: June 28, 2004

Case No.: TIA-0122

XXXXXXXXXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy for assistance in filing for state workers' compensation benefits based on his employment at Bendix Corporation (Bendix) and Rust GeoTech, Inc. (GeoTech) in Grand Junction, Colorado. The DOE Office of Worker Advocacy determined that the applicant was not a DOE contractor employee under the regulations at issue here and, therefore, was not eligible for DOE assistance. The applicant appeals that determination. As explained below, we have concluded that the Office of Worker Advocacy erred in its determination and have remanded the case to that office for appropriate processing.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act creates two programs for workers.

The Department of Labor (DOL) administers the first EEOICPA program, which provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 73841(1). The DOL program also provides federal monetary and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, the DOE program provides for an independent physician panel assessment of whether a "Department of Energy contractor employee" has an illness related to exposure to a toxic substance at a DOE facility. 42 U.S.C. §

7385o. 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).

The DOE program is specifically limited to DOE contractor employees[1] who worked at DOE facilities.[2] The reason is that the DOE would not be involved in state workers' compensation proceedings involving other employers.

The regulations for the DOE program are referred to as the Physician Panel Rule and are set forth at 10 C.F.R. Part 852. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program.[3]

Pursuant to an Executive Order,[4] the DOE has published a list of facilities covered by the DOL and DOE programs, and the DOE has designated next to each facility whether it falls within the EEOICPA's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 69 Fed. Reg. 51,825 (August 23, 2004) (current list of facilities). The DOE's published list also refers readers to the DOE Worker Advocacy Office web site for additional information about the facilities. 69 Fed. Reg. 51,825.

II. The Appeal

This case involves the program administered by the DOE that provides access for eligible DOE contractor employees or their survivors to a Physicians Panel Process. The Physicians Panel established under the EEOICPA determines the validity of claims that a current or former DOE contractor employee's illness or death arose from his or her exposure to a toxic substance during the course of his or her employment at a DOE facility.

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[1] A DOE contractor is defined as follows: (a) an individual who is or was in residence at a DOE facility as a researcher for one or more periods aggregating at least 24 months; (b) an individual who is or was employed at a DOE facility by (i) an entity that contracted with DOE to provide management and operation, management and integration, or environmental remediation at the facility; or (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility. 10 C.F.R. § 852.2.

[2] A DOE facility is defined as: any building, structure or premise, including the grounds upon which such building, structure, or premise is located: (a) in which operations are, or have been, conducted by, or on behalf of the DOE (except for buildings, structures, premises, grounds, or operations covered by Executive Order No. 12344 dated February 1, 1982 (42 U.S.C. § 7158 note), pertaining to Naval Nuclear Propulsion Program); and (b) with regard to which DOE has or had (i) a propriety interest; or (ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services. 10 C.F.R. § 852.2.

[3] *See* www.eh.doe.gov/advocacy.

[4] *See* Executive Order No. 13,179 (December 7, 2000).

In the case at hand, the DOE Worker Advocacy Office declined to present the applicant's application to a Physicians Panel because the office determined that the applicant did not meet the eligibility requirements for the Physicians Panel Process. *See* April 13, 2004 letter from the DOE Worker Advocacy Office to the applicant.

In the original application that he filed with the Office of Worker Advocacy, the applicant stated that he worked as a Remediation Inspector from 1981 to 1986 for Bendix and Geo-Tech at the DOE's Grand Junction Operations Office in Grand Junction, Colorado. According to the applicant, his job required him to (1) inspect properties that were being remediated and (2) ensure that all uranium mill tailings were retrieved and hauled away. He related in his application that he did not wear any protective clothing while performing his work for these two contractors. The applicant believes that the cancer from which he is currently suffering resulted from his exposure to radiation while he was employed at Bendix and Geo-Tech.

In his appeal, the applicant argues the Office of Worker Advocacy incorrectly determined that he did not work for a DOE contractor at a DOE facility. He submits that he is sure that Geo-Tech was a DOE contractor at DOE's Grand Junction, Colorado facility. For this reason, the applicant submits that he should be able to avail himself of the DOE's Physician Panel Process.

III. Analysis

As noted above, access to the DOE Physician Panel is limited to applications filed by or on behalf of a DOE contractor employee, *i.e.*, an individual who is or was employed at a DOE facility by a DOE contractor. *See* 10 C.F.R. § 852.1(b). To determine whether the worker in question was a DOE contractor employee under the applicable statute and regulations, we consulted the DOE's published facilities list set forth at 69 Fed. Reg. 51,825. On that list, Grand Junction Operations Office (Grand Junction) in Grand Junction, Colorado is listed as a "DOE" facility. We next reviewed the Office of Worker Advocacy web site for additional information. There, we learned that the Grand Junction Operations Office has operated continuously as a DOE facility since 1943.

To determine whether the applicant worked for a DOE contractor, we also consulted the Office of Worker Advocacy Website. Because the web site only listed contractors at Grand Junction for various periods between 1943 and 1971, we contacted the Office of Worker Advocacy seeking information about the identity of DOE contractors at Grand Junction for periods after 1971. We learned that Bendix Field Engineering Corporation was a prime contractor for the DOE at its Grand Junction location from July 11, 1975 to September 30, 1986. According to a document obtained from the Office of Worker Advocacy, Bendix Field Engineering Corporation engaged in remediation activities at the DOE's Grand Junction location and oversaw projects involving uranium mill tailings. That same document shows that Geo-Tech or its corporate predecessors acted as a prime contractor for DOE at the Grand Junctions location from October 1, 1986 to September 4, 1996. These companies, according to the document obtained from the Office of Worker

Advocacy, worked on various remediation projects including the disposal of uranium mill tailings and tailings-contaminated material.

Based on the documentation discussed above, we find that the applicant meets the statutory and regulatory definitions under Subpart D of the EEOICPA, *i.e.*, he worked for not one but two DOE contractors, Bendix and Geo-Tech, at a DOE facility, the Grand Junction Operations Office. Accordingly, we find that the Office of Worker Advocacy erred in deciding not to present the applicant's application to the DOE Physician Panel. We will, therefore, remand the applicant's application to the Office of Worker Advocacy for appropriate processing.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0122 be, and hereby is, granted.

(2) The Applicant's claim is hereby remanded to the Office of Worker Advocacy.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 25, 2004

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January 12, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: June 28, 2004

Case No.: TIA-0123

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'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 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, and its web site provides extensive information concerning the program.[1]

[1] **www.eh.doe.gov/advocacy**

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. 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.

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 as an electrician at DOE's Savannah River site. The Applicant worked at the site for nearly 13 years, between 1987 and 2001.

The Applicant filed an application with OWA, requesting physician panel review of two illnesses – asbestosis and leukemia.

The Physician Panel rendered a negative determination on each claimed illness. For the asbestosis, the Panel found that, although the Worker did have chronic obstructive lung disease, the Worker did not have asbestosis. For the leukemia, the Panel found that the Worker did not have leukemia.

The OWA accepted the Physician Panel's negative determinations on the claimed illnesses. The Applicant filed the instant appeal.

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.

In her appeal, the Applicant maintains that the negative determinations are incorrect. She advances several arguments. First, the Applicant argues that she knows for a fact that the Worker had asbestosis and that the condition was not from cigarette smoking. Second, the Applicant states that the Worker received compensation from court cases involving asbestos and from asbestos manufacturers. Third, the Applicant argues that one of the Worker's doctors was "almost certain" that the Worker had leukemia at the time of the Worker's death. The Applicant points to a progress note in the Worker's medical records in which the doctor expresses concern that the Worker's steadily declining blood counts could ultimately transition to acute leukemia in the future.

The Applicant's arguments are not a basis for finding panel error. As mentioned above, the Panel addressed the claimed illnesses, made a determination on each illness, and explained the basis of that determination. For the asbestosis, the Panel determined that the Worker did not have asbestosis. A key factor in the Panel's determination was that the Worker's autopsy did not reveal findings consistent with asbestosis. Furthermore, the Panel indicated that, even if the Worker did have asbestosis, the latency period between exposure to asbestos and the onset of asbestosis is significantly longer than the relatively short period of time between the Worker's employment at DOE and the onset of his illness. For the leukemia, the Panel determined that the Worker's blood and bone marrow test results did not provide evidence of leukemia, but rather indicated refractive anemia with myelodysplasia. As the foregoing indicates, the Applicant's arguments are mere disagreements with the Panel's medical judgment rather than indications of panel error.

Disagreements with the Panel's medical judgment do not provide a basis for finding 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-0123 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: January 12, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

October 25, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Case Number: **TIA-0124**

Date of Filing: **June 29, 2004**

XXXXX (the worker) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The worker was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that some of the worker's illnesses were not related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the worker 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 in part and granted in part, and the matter remanded to OWA for review of one portion of the claim that was not considered when the Panel made its initial determination.

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) provides various forms of assistance or relief to workers currently or formerly employed by the nation's atomic weapons programs. See 42 U.S.C. §§ 7384, 7385. This case concerns Part D of the Act, which provides for a program to assist DOE contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. The DOE has issued regulations to implement Part D of the Act, hereinafter referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The DOE's program implementing Part D is administered by OWA.

Generally, if a physician panel issues a determination favorable to the employee, OWA accepts the determination and instructs the contractor not to oppose the claim unless required by law to do so. For those applicants who receive an unfavorable determination, the Physician Panel Rule provides an appeal process. Under this process,

an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain OWA decisions. 10 C.F.R. § 852.18. The present appeal seeks review of a negative determination by a Physician Panel that was accepted by OWA. 10 C.F.R. §852.18(a)(2). 10 C.F.R. § 852.18(c) states that an appeal is governed by the OHA procedural regulations set forth at 10 C.F.R. Part 1003. The applicable standard of review is set forth at 10 C.F.R. § 1003.36(c), which provides that "OHA may deny any appeal if the appellant does not establish that – (1) the appeal was filed by a person aggrieved by a DOE action; (2) the DOE's action was erroneous in fact or law; or (3) the DOE's action was arbitrary or capricious." 10 C.F.R. § 1003.36(c).

B. Factual Background

The worker was employed by DOE contractors at the gaseous diffusion plant in Portsmouth, Ohio from May 1, 1981 through May 14, 1982. Record at 7. The applicant submitted a claim to the OWA. As part of the application process, the applicant completed OWA Form entitled "Claim for Benefits under Energy Employees Occupational Illness Compensation Program Act." Question 8 of the form asks "Identify Diagnosed Conditions Being Claimed." Record at 3. The applicant responded: "chemical inhalation hydrogen fluoride (HF) chemical pharyngitis, industrial related post traumatic injury related psychiatric disability, chemical inhalation HF occupational chemical obstructive bronchial asthma plus reactive airway dysfunction syndrome." *Id.* at 3.

The OWA reviewed and prepared the case file and then forwarded it to the Physician Panel. The cover sheet to the case file identified three claimed illnesses: "chemical pharyngitis, occupational bronchial asthma, chronic bronchitis." The Physician Panel reviewed the case file and issued a report in which it made a positive determination for chemical pharyngitis, and a negative determination for occupational bronchial asthma and chronic bronchitis.[1] However, the Panel's report mistakenly listed Paducah rather than Portsmouth as the gaseous diffusion plant where the worker was employed, and the OWA's cover letter directed him to apply for workers' compensation benefits from the State of Kentucky, instead of Ohio. As discussed below, the Panel apparently did not consider the worker's claim for "industrial related post traumatic injury related psychiatric disability."

With respect to the worker's claims that exposure to HF and other toxic substances at the gaseous diffusion plant caused, aggravated or contributed to his bronchial asthma and chronic bronchitis, the Panel noted that the worker had inhaled HF gas in the incident on October 13, 1981. The Panel first considered the worker's bronchial asthma claim, reviewed his medical records, and noted that he had a normal chest x-ray in the year following the HF exposure. The Panel also cited a letter reporting on an examination a few months after the HF exposure which found

[1] Since the Panel made a favorable determination regarding a link between the worker's exposure to hydrogen fluoride and his chemical pharyngitis, the present appeal does not challenge that portion of the report.

> The breathing tests did show a significant abnormality of a mild nature. This abnormality essentially showed an increase in the reactivity of the trachea and bronchi when measured by the breathing test…This breathing obstruction did however, revert to normal when you [the worker] were given a medicine to dilate your breathing tubes…work relatedness of which I believe is unknown at this time…I believe that the effects you likely suffered as a result of the incident involving hydrogen fluoride gas or fume, are resolvable and will likely not cause you any serious long term harm.

A follow-up pulmonary consultative report in 1998 stated

> I do not believe [the worker's] symptomatic dyspnea (abnormal or uncomfortable breathing) relating to his inability to work, was related to his brief occupational exposure 16 years earlier. I feel this history, examination and PFTs (pulmonary function tests) are more consistent with dyspnea on the basis of COPD (chronic obstructive lung disease) related to his long-term smoking history.

Based on these and other, similar findings in the worker's medical history, the Panel concluded that

> There is insufficient medical evidence provided that links a relationship to this diagnosis to exposure(s) at the workplace. Post-incident exposure testing was negative; there was no lost time from work. There no obvious need for evaluation for hospitalization following this incident. There are not reports of asthmatic type reactions occurring either before or after initial exposure to this or any other substance at the workplace.
>
> * * *
>
> The history of cigarette smoking alone is sufficient cause to lead to this diagnosis which is a component condition (asthma) of the diagnosis of COPD (chronic obstructive lung disease).

Determination at 1-4.

The Panel relied on the same evidence to make a negative determination on the worker's claim that exposures to HF and other toxic substances were linked to his chronic bronchitis. On June 9, 2004, the applicant appealed that determination.

II. Analysis

Under Part 852, "[w]hether a positive or favorable determination is rendered is to be based solely on the standard set forth [at 10 C.F.R.] § 852.8." 67 Fed. Reg. 52850 (August 14, 2002). That regulation states:

> A Physician Panel must determine whether the illness or death arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility on the basis of whether it is as least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker at issue.

10 C.F.R. § 852.8. The preamble to Part 852 states "[t]he DOE intends that, as used in this context, the word 'significant' should have its normal dictionary definition and meaning –that is, 'meaningful' and/or 'important'." 67 Fed. Reg. 52847 (August 14, 2002).

The record supports the Physician Panel's finding that the worker has not shown he had any exposure to a toxic substance while working at the Portsmouth plant that was a significant factor in aggravating, contributing to or causing his bronchial asthma, or his chronic bronchitis. In connection with his appeal, the worker states that he was placed on work restriction after his HF exposure on October 13, 1981, and remained on restricted status lasted until he resigned in May 1982. He also believes that he experienced other symptoms, including a "low iron count, upper W.B.C. (white blood count), elevated Fluoride reading 10/14/81 – 10/16/81 (immediately after his HF exposure), elevated Alpha reading, 2/25/82," and swelling across his nose, eyelids, neck and pharynx. According to the worker's appeal, his "records also show many missed work days and also many days sent home by Med. Dept. to return to Med. Dept. days later."

The record notes that the worker inhaled HF on October 13, 1981, and was possibly exposed to other toxic substances. However, there is no evidence that any work-related exposures caused his bronchial asthma, or his chronic bronchitis. As the Panel observed, these conditions are commonly caused by cigarette smoking, and the worker has been a chronic smoker since the age of 19. Accordingly, the Panel's finding under 10 C.F.R. § 852.8 that there is no link established between the worker's exposure at Portsmouth and two of his three claimed medical problems--bronchial asthma and chronic bronchitis-- is neither erroneous nor arbitrary or capricious.

On appeal, the worker also asserts that the Panel's report failed altogether to consider whether the HF exposure incident on October 13, 1981 caused, aggravated or contributed to his third claimed medical problem, post traumatic injury related psychiatric disability. The worker is correct. The record confirms that he claimed this illness on the form he submitted to OWA. There is ample evidence in the record that a series of different psychiatrists and psychologists, who evaluated the worker in the context of his ongoing disability claims before the Ohio Bureau of Worker's Compensation, found a connection between his HF exposure and subsequent post traumatic psychiatric disability related to the worker's chemical pharyngitis. Beginning in 1989, the Ohio State agency allowed the worker's claim for "chemical inhalation of hydrogen fluoride, chemical pharyngitis; post traumatic injury related psychiatric disability," based on these evaluations. Record at 504. The worker is now considered by the Ohio agency to be 90 percent disabled.

There is no explanation why the Panel failed to consider or even mention this extensively documented medical problem, which a number of experts found to be linked to the worker's HF exposure in October 1981. Accordingly, I find that the matter should be remanded to OWA to consider this aspect of the worker's claim.

Finally, the worker points out that the Panel mistakenly stated that he worked in the Paducah gaseous diffusion plant, when he actually worked in the Portsmouth plant, and thus misdirected him to apply for workmen's compensation benefits in Kentucky, rather than Ohio. The record confirms that the worker was employed in Portsmouth, not Paducah. The Panel's misstatements could be due to an oversight in its review of the record, or to poor drafting of its report. In any event, these errors are ultimately insignificant, as they would not change either the Panel's determination or the result reached in the present appeal.

III. Conclusion

The worker has not demonstrated any error in the Panel's determinations regarding his bronchial asthma, or his chronic bronchitis. However, the worker has shown that the Panel failed to consider one of his claims, for post traumatic injury related psychiatric disability linked to his chemical pharyngitis from exposure to HF gas at the DOE facility, even though the record is replete with information about this medical condition. In addition, the worker has shown that the Panel made certain factual errors that should be corrected. Consequently, this case shall be remanded the matter to OWA for further processing. Accordingly, the appeal should be denied in part, and granted in part.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0124 be, and hereby is, denied in part, and granted in part.

(2) The matter is hereby remanded to the Office of Worker Advocacy to consider the worker's claim that he suffered post traumatic injury related psychiatric disability linked to his chemical pharyngitis from exposure to HF gas at the DOE facility.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 25, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

March 9, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: July 7, 2004

Case No.: TIA-0125

XXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker'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, and its web site provides extensive information concerning the program.[1]

[1] **www.eh.doe.gov/advocacy**

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.

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 is currently employed at the Savannah River Site (the site) as a truck driver. The Applicant has worked at the site since 1984.

The Applicant filed an application with the OWA, requesting physician panel review of two illnesses, mental stress and an ulcer.

The Physician Panel rendered a negative determination for both of these illnesses, which the OWA accepted. In regard to the claim of mental stress, the Panel stated that there were no psychological or psychiatric records in the file provided for review. In regard to the claim of an ulcer, the Panel stated that the Worker's overall gastrointestinal complaints were due to a bacterial infection and esophageal reflux and not to a toxic substance during the course of employment at the site.[1] Subsequently, the Applicant filed the instant appeal.

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[1] ***See*** **Physician Panel Report at 1.**

In her appeal, the Applicant maintains that the negative determination is incorrect. The Applicant asserts that her illnesses were the result of toxic exposures received during her employment at the site. The Applicant states that she has eleven siblings and none of her sisters and brothers has been as sick as she.[2]

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 Applicant's argument does not provide a basis for finding panel error. As mentioned above, the Physician Panel found no evidence to support the claim of mental stress. The Applicant has not pointed to any evidence of mental stress in the record and, therefore, has not identified panel error on that claimed illness. With respect to the ulcer claim, the Applicant similarly has not identified Panel error. The Applicant's argument that no one in her family suffers from ulcers does not mean that toxic exposures at DOE were a factor in that illness. Instead, the Applicant's argument is a mere disagreement with the Panel's medical judgment, rather than an indication of panel error.

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 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-0125 be, and hereby is, denied.

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[2] ***See*** **Applicant's Appeal Letter.**

(2) This denial pertains only to the DOE claim and not to the DOL's review of these claims under Subpart E.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 9, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

September 30, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: June 30, 2004

Case No.: TIA-0126

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'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 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 for workers.

The Department of Labor (DOL) administers the first program, which provides $150,000 and medical benefits to certain workers with specified illnesses. Eligible workers include DOE employees and DOE contractor employees who worked at DOE facilities and contracted specified cancers associated with radiation exposure. 42 U.S.C. § 7384l. In general, a worker in that group is eligible for an award if the worker was a member of the Special Exposure Cohort or if it is determined that the worker sustained the cancer in the performance of duty. *Id*. Membership in the Special Exposure Cohort includes DOE employees and DOE contractor employees who were employed prior to February 1, 1992, at a gaseous diffusion plant in Oak Ridge, Tennessee; Paducah, Kentucky; or Portsmouth, OH.

The DOE administers the second program. 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 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.[1]

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. Procedural Background

The Applicant was employed as a pipe fitter and welder at two DOE gaseous diffusion plants—Portsmouth and Oak Ridge. The Worker worked at the sites for nearly 3 years in 1945, and in periods ranging from 1953 to 1955.

The Applicant filed an application with OWA, requesting physician panel review of two illnesses—lung cancer and brain cancer. The Physician Panel rendered a negative determination on each of the claimed illnesses and explained the basis of each determination. The OWA accepted the Physician Panel's negative determination on each of the claimed illnesses.

The Applicant appeals the negative determination on the two illnesses. For the lung cancer, the Panel agreed that the Applicant had the illness, but the Panel determined that there was no evidence establishing a relationship between any exposures at the Applicant's workplace and the illness. For the claimed brain cancer, the Panel agreed that the Worker had the illness, but stated that the brain cancer represented metastasis of the lung cancer.

[1] *See* www.eh.doe.gov/advocacy.

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 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,[2] applied the wrong standard,[3] or failed to explain the basis of its determination.[4] On the other hand, mere disagreements with the Panel's opinion are not a basis for finding Panel error.

In her appeal, the Applicant maintains that the negative determinations on the Worker's lung cancer and brain cancer are inconsistent with the fact that she received an award from DOL. The Applicant's argument is not a basis for finding panel error.

The DOL award does not represent a finding that the Applicant meets the causation standard of the DOE Physician Panel Rule. The Applicant was eligible for an award under the DOL program because the Worker was a member of the Special Exposure Cohort, i.e. he worked at two DOE gaseous diffusion plants, and he developed lung cancer after the beginning of his employment there. *See* 20 C.F.R. § 30.210. Under the Physician Panel Rule, the Panel can render a positive determination only if the Panel determines that "it is at least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker at issue." 10 C.F.R. § 852.8. Thus, the causation standards of the two programs differ. The preamble to the DOE Physician Panel Rule discusses this difference:

> **Under the DOL program, a member of a Special Exposure Cohort...who has a specified cancer could establish entitlement to benefits for a specified cancer without showing that the disease is the result of exposure to a toxic substance because the statute dispenses with that requirement for Special Exposure Cohort members in the DOL program. A Physician Panel, however, can make a positive determination only if sufficient evidence is provided to meet the standard as specified in section 852.8.**

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

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

[4] ***Id.***

67 Fed. Reg. 52,849. Thus, the DOL award does not represent a DOL conclusion that the Applicant meets the causation standard of the Physician Panel Rule. Accordingly, the fact that the Applicant received a DOL award does not provide a basis for finding panel error and, therefore, the appeal should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0126 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 30, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

March 14, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **June 30, 2004**

Case No.: **TIA-0127**

XXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illness was not related to his 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 granted.

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, and its web site provides extensive information concerning the program.[1]

[1] **www.eh.doe.gov/advocacy.**

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. OHA continues to process appeals until DOL commences Subpart E administration.

B. Procedural Background

The Worker was employed as a janitor at the Portsmouth Gaseous Diffusion Plant (the plant). He worked at the plant from to 1974 to 1998.

The Applicant filed an application with the OWA, requesting a physician panel review of 3 illnesses - chronic obstructive pulmonary disease (COPD), emphysema, and bronchitis. The Applicant claimed that these conditions were due to exposures to toxic and hazardous materials at the plant.

The Physician Panel rendered a negative determination on all illnesses. The Panel identified a number of toxic substances but found that none of them are known to be associated with COPD. The Panel cited smoking as the most significant contributing factor to the Applicant's claimed illnesses. The OWA accepted the Physician Panel's negative determinations on the claimed illnesses. Subsequently, the Applicant filed the instant appeal.

In his appeal, the Applicant argues that his smoking was not the cause of the claimed conditions but rather that his conditions were caused by exposures to lithium, Polychlorinated Biphenyls (PCBs), radioactive oils and contaminated materials. *See* Applicant Appeal Letter.

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.

We have concluded that the Panel failed to provide an adequate explanation for its determination. The Panel did not address the issue of whether the Applicant's exposure to lithium was a factor in his COPD, emphysema, and bronchitis. The Applicant has indicated that he was frequently exposed to lithium. The record supports the Applicant's claim of lithium exposure; medical and occupational records from the plant indicate several instances where the Applicant was injured while working with lithium. *See* OWA Record, at 299-304. Accordingly, the Panel should have discussed the lithium exposures and explained whether these exposures could have been a significant factor in causing, contributing to, or aggravating the Applicant's lung disease.

In compliance with Subpart E, this 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 review of this claim does not 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-0127 be, and hereby is, granted.

(2) The Physician Panel Report failed to explain adequately the basis of its determination. Further consideration is in order.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 14, 2005

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October 29, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **June 30, 2004**

Case No.: **TIA-0129**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' benefits for her late husband, XXXXXXXXXX (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the worker's illnesses were not related to his 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.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (the EEOICPA or 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

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

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 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's late husband was employed as a laborer and a janitor at DOE's Oak Ridge site. He worked at the site for approximately 27 years, from 1967 to 1994.

The Applicant filed an application with OWA, requesting physician panel review of two illnesses, kidney disease and asbestosis. The Applicant claimed that her late husband's illness was a result of working for many years in different buildings of the Oak Ridge site in which he may have been exposed to toxic substances. The Physician Panel rendered a negative determination with regard to both of the claimed illnesses. The Panel agreed that the Applicant had the claimed kidney disease, but stated that the illness was not a result of a toxic exposure at the DOE site. The Panel also determined that Worker did not have the claimed asbestosis.

The OWA accepted the Physician Panel's negative determinations with respect to the two claimed illnesses: the kidney disease and the asbestosis.

In her appeal, the Applicant maintains that the negative determination regarding asbestosis is incorrect. The Applicant contends that her late husband was exposed to asbestos during the entire time that he was employed at the Oak Ridge site. In support of this assertion, the

[2] *See* www.eh.doe.gov/advocacy.

Applicant submitted new documentation--a letter from a physician and other medical documentation--which was not part of the original record.

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

As indicated above, the Applicant appeals the determination of the Panel with respect to the claim concerning asbestosis. In her appeal, the Applicant submitted new information including a letter from a physician discussing a chest x-ray performed on January 13, 2000 and pulmonary function tests conducted on March 27, 2000. The Applicant also submitted the results from the x-ray and pulmonary function tests from those dates. In his letter, the physician concluded that the Worker had asbestosis contracted through occupational exposure to asbestos.

The Applicant's submission of new information does not warrant a finding of Panel error. The Physician Panel makes its determination based on the records which are presented to it.

Moreover, in this case, we doubt that the new information would have changed the Panel's decision. The Panel acknowledged that the Applicant's late husband had a risk of asbestos exposure during his period of employment at the site. The Panel reviewed chest x-rays from 1974 through 1994, and from May 2001. The Panel determined that the 1974 through 1994 x-rays "were considered within normal limits" and that the May 2001 x-rays were "normal for age with no findings of any pneumoconiosis." Since the May 2001 x-rays post-date the 2000 x-rays, it is unlikely that the existence of the 2000 x-rays would have affected the Panel's decision.

As the foregoing indicates, the existence of this new information does not support a finding of Panel error and, for this reason, the appeal should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The appeal filed in Worker Advocacy Case No. TIA-0129 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: October 29, 2004

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October 8, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: June 30, 2004

Case No.: TIA-0130

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 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. The Act provides for two programs for workers.

The Department of Labor (DOL) administers the first program, which provides $150,000 and medical benefits to certain workers with specified illnesses. Eligible workers include DOE employees and DOE contractor employees who worked at DOE facilities and contracted specified cancers associated with radiation exposure. 42 U.S.C. § 7384l. In general, a worker in that group is eligible for an award if the worker was a member of the Special Exposure Cohort or if it is determined that the worker sustained the cancer in the performance of duty. *Id*. Membership in the Special Exposure Cohort includes DOE employees and DOE contractor employees who were employed prior to February 1, 1992, at a gaseous diffusion plant in Oak Ridge, Tennessee; Paducah, Kentucky; or Portsmouth, Ohio.

The DOE administers the second program. 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 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.[1]

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. Procedural Background

The Applicant was employed as a staff auditor at DOE's Oak Ridge site. The Worker has worked at the site for 20 years, from 1984 to the present.

The Applicant filed an application with OWA, requesting physician panel review of one illness – ovarian cancer. The Physician Panel rendered a negative determination on the claimed illness and explained the basis of its determination. The OWA accepted the Physician Panel's negative determination on the claimed illness.

The Applicant appeals the Panel's negative determination. The Panel agreed that the Applicant had ovarian cancer, but the Panel determined that there was no evidence establishing a relationship between any exposures at the Applicant's workplace and the illness.

II. Analysis

Under the Physician Panel Rule, independent physicians render an opinion whether a claimed illness is related to a toxic exposure

[1] ***See*** **www.eh.doe.gov/advocacy.**

during employment at DOE. The Rule requires 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.

We have not hesitated to remand an application where the Panel report did not address all the claimed illnesses,[2] applied the wrong standard,[3] or failed to explain the basis of its determination.[4] On the other hand, mere disagreements with the Panel's opinion are not a basis for finding Panel error.

In her appeal, the Applicant maintains that the negative determination is incorrect. First, the Applicant states that, although the Panel indicated in its report that she was a Y-12 employee, she worked for several years at the K-25 site. Second, she notes that the DOL designated her as a member of the Special Exposure Cohort. The Applicant states that although her employment was administrative in nature, her duties as an internal auditor required access to various sites and facilities, including K-25 and the Paducah and Portsmouth sites, and it is possible that she came in contact with hazardous materials. Lastly, the Applicant notes that there is no history of cancer of any type in her family. As explained below, the Applicant's arguments do not provide a basis for granting the appeal.

First, the Panel's failure to mention the Applicant's K-25 employment does not indicate panel error. The Panel considered the entire period of the Applicant's employment, from 1984 to the present. The record, reviewed by the Panel, indicated that the Applicant worked at K-25 and several other plants during the course of her employment. Record at 9, 19, 20, 145, 151, and 157. Accordingly, the Panel's statement that the Applicant was a Y-12 employee does not indicate a failure to consider her K-25 employment..

Second, the fact that the Applicant was designated a member of the Special Exposure Cohort under the DOL program does not represent a finding that the Applicant was exposed to toxic substances in the course of her employment or that any such exposure contributed to her illness. Under the Physician Panel Rule, the Panel can render a positive determination only if the Panel determines that "it is at least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker at issue." 10 C.F.R. § 852.8. Thus, the causation standards of the DOL program and the DOE program differ.

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

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

[4] ***Id.***

The preamble to the DOE Physician Panel Rule discusses this difference:

> **Under the DOL program, a member of a Special Exposure Cohort...who has a specified cancer could establish entitlement to benefits for a specified cancer without showing that the disease is the result of exposure to a toxic substance because the statute dispenses with that requirement for Special Exposure Cohort members in the DOL program. A Physician Panel, however, can make a positive determination only if sufficient evidence is provided to meet the standard as specified in section 852.8.**

67 Fed. Reg. 52,849. Thus, being designated a member of the Special Exposure Cohort, and subsequently receiving a DOL award, does not represent a DOL conclusion that the Applicant meets the causation standard of the Physician Panel Rule. Despite the Applicant's arguments that it is possible that she was exposed to hazardous substances, there is no evidence in the record that she was exposed to any such substances.

Lastly, the Applicant's statement that there is no history of cancer of any type in her family does not provide a basis for finding panel error. The absence of a family history of an illness does not mean that the illness is related to DOE employment.

As indicated above, the Applicant's arguments are merely disagreements with the Panel's medical judgment, rather than indications of Panel error. Accordingly, the appeal does not provide a basis for finding panel error and, therefore, should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0130 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: October 8, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: July 1, 2004

Case No.: TIA-0131

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's late husband (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 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 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 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 contactor 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, and its web site provides extensive information concerning the program.[1]

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

[1] www.eh.doe.gov/advocacy

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. In addition, under Subpart E, an applicant is deemed to have an illness related to a work related toxic exposure at DOE if the applicant received a positive determination under Subpart B.

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 at DOE=s Oak Ridge site. He worked at the site as a machine cleaner for nearly 25 years, from 1967 to 1992.

The Applicant filed an application with OWA, requesting physician panel review of two illnesses. The Physician Panel rendered a negative determination on each of the claimed illnesses and explained the basis of each determination. The OWA accepted the Physician Panel=s negative determination on each of the claimed illnesses.

The Applicant appeals the negative determination on one of the illnesses **C** bladder cancer. The Panel agreed that the Worker had bladder cancer, but the Panel determined that there was insufficient evidence establishing a relationship between any exposures at the Applicant=s workplace and the illness.

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

In her appeal, the Applicant argues that the Physician Panel erred in determining that the Worker=s illness was not related to his workplace exposures. The Applicant argues that the Worker was exposed to extremely hazardous materials and chemicals, including cleaning solutions, metals, PCBs, and lead. The Applicant states that when the Worker was first diagnosed with bladder cancer his doctor asked him

where he had worked, what he was exposed to, and whether he worked at one of the DOE plants at Oak Ridge.

The Applicant=s argument **C** that the worker was exposed to hazardous substances that caused his bladder cancer **C** is merely a disagreement with the Panel=s medical judgment rather than an indication of panel error. Accordingly, the Applicant=s claim does not provide 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 or in any way prejudice the Department of Labor=s review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0131 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: December 21, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

September 30, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: July 8, 2004

Case No.: TIA-0132

XXXXXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy for assistance in filing for state workers' compensation benefits based on the employment of her late husband, XXXXXXXXX (the worker). The DOE Office of Worker Advocacy determined that the applicant was not a contractor employee under the regulations at issue here and, therefore, was not eligible for DOE assistance. The applicant appeals that determination. As explained below, we have concluded that the determination is correct.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act creates two programs for workers.

The Department of Labor (DOL) administers the first EEOICPA program, which provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 73841(1). The DOL program also provides federal monetary and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 7384u.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, the DOE program provides for an independent physician panel assessment of whether a "Department of Energy contractor employee" has an illness related to exposure to a toxic substance at a DOE facility. 42 U.S.C. § 7385o. 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).

The DOE program is specifically limited to DOE contractor employees[1] who worked at DOE facilities.[2] The reason is that the DOE would not be involved in state workers' compensation proceedings involving other employers.

The regulations for the DOE program are referred to as the Physician Panel Rule and are set forth at 10 C.F.R. Part 852. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program.[3]

Pursuant to an Executive Order,[4] the DOE has published a list of facilities covered by the DOL and DOE programs, and the DOE has designated next to each facility whether it falls within the EEOICPA's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 69 Fed. Reg. 51,825 (August 23, 2004) (current list of facilities). The DOE's published list also refers readers to the DOE Worker Advocacy Office web site for additional information about the facilities. 69 Fed. Reg. 51,825.

II. The Appeal

This case involves the program administered by the DOE that provides access for eligible DOE contractor employees or their survivors to a Physician Panel Process. The Physician Panel established under the EEOICPA determines the validity of claims that a current or former DOE contractor employee's illness or death arose from his or her exposure to a toxic substance during the course of his or her employment at a DOE facility.

In the case at hand, the DOE Worker Advocacy Office declined to present the applicant's application to a Physician Panel because the office determined that the applicant's late husband did not meet the eligibility requirements for the Physician Panel Process. *See* May 7, 2004 letter from DOE Worker Advocacy Office to the applicant.

In her hand-written appeal, the applicant claims that she has already provided all pertinent information to the DOE Worker Advocacy Office except a 1991 letter from her

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[1] A DOE contractor is defined as follows: (a) an individual who is or was in residence at a DOE facility as a researcher for one or more periods aggregating at least 24 months; (b) an individual who is or was employed at a DOE facility by (i) an entity that contracted with DOE to provide management and operation, management and integration, or environmental remediation at the facility; or (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility. 10 C.F.R. § 852.2.

[2] A DOE facility is defined as: any building, structure or premise, including the grounds upon which such building, structure, or premise is located: (a) in which operations are, or have been, conducted by, or on behalf of the DOE (except for buildings, structures, premises, grounds, or operations covered by Executive Order No. 12344 dated February 1, 1982 (42 U.S.C. § 7158 note), pertaining to Naval Nuclear Propulsion Program); and (b) with regard to which DOE has or had (i) a propriety interest; or (ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services. 10 C.F.R. § 852.2.

[3] *See* www.eh.doe.gov/advocacy.

[4] *See* Executive Order No. 13,179 (December 7, 2000).

late husband's doctor. The applicant provided us with a copy of the 1991 letter, along with her appeal.

III. Analysis

A. Factual Background

According to the applicant, her late husband worked as a machinist for International Nickel Company (INCO) in Huntington, West Virginia from sometime in 1941 until July 1982. The applicant states that her husband suffered from stomach and esophageal cancer as a result of his exposure to toxic materials while working at INCO.

B. Worker Programs

It is important to emphasize that the DOE Physician Panel Process is separate from state workers' compensation proceedings. A DOE decision that an applicant is not eligible for the DOE physician panel process does not affect (i) an applicant's right to file for state workers' compensation benefits or (ii) whether the applicant is eligible for those benefits under applicable state law.

Similarly, we emphasize that the DOE Physician Panel Process is separate from any claims made under other statutory provisions. Thus, a DOE decision concerning the Physician Panel Process does not affect any claims made under other statutory provisions, such as programs administered by DOL and DOJ.

We now turn to whether the applicant in this case is eligible for the DOE Physician Panel Process.

B. Whether the Applicant is Eligible for the DOE Physician Panel Process

As noted above, access to the DOE Physician Panel is limited to applications filed by or on behalf of a DOE contractor employee who is or was employed at a DOE facility. *See* 10 C.F.R. § 852.1(b). Under the EEOICPA, a worker who was employed by an Atomic Weapons Employer or a Beryllium Vendor is not eligible to use the DOE Physician Panel.

To determine whether the worker in question was a DOE contractor who worked at a DOE facility, we first consulted the DOE's published facilities list set forth at 69 Fed. Reg.51,825. On that list, only one entry for the state of West Virginia appears. It is for the Huntington Pilot Plant in Huntington, West Virginia. We then consulted the website for the Office of Worker Advocacy where we discovered that the Huntington Pilot Plant is listed as a Department of Energy facility from 1951-1963 and 1978-1979. The facilities list also indicates that INCO was the contractor on the site from 1951 to 1963.

To understand why the applicant's late husband was not considered a DOE contractor at a DOE facility for at least the portion of his employment that covered the periods, 1951-1963 and 1978-1979, we contacted the DOE Office of Worker Advocacy. According to the DOE Office of Worker Advocacy, only the nuclear portion of the site in Huntington, West Virginia, was a Department of Energy facility under 10 C.F.R. § 852.2. The nuclear portion of the site in question is identified on the DOE's Environmental Management's website as the Reduction Pilot Plant. [5]

According to the Office of Worker Advocacy, it determined that the worker in question did not work at the Reduction Pilot Plant after obtaining documentation from Special Metals Corporation, a company that does employment verification for INCO. Specifically, a Human Resources Representative from Special Metals Corporation confirmed in a Memorandum dated September 12, 2002 that the applicant's late husband did not work for the Reduction Pilot Plant during any time of his 41 year employment with INCO or its successor companies. The Office of Worker Advocacy provided a copy of the subject memorandum for our review.

After reviewing the September 12, 2002 Memorandum from Special Metals Corporation, we conclude that the applicant's late husband was not a DOE contractor who worked at a DOE facility. For this reason, we find that the Office of Worker Advocacy correctly decided not to present the applicant's claim to the DOE Physician Panel. We reiterate, however, that our decision regarding the applicant's ineligibility in this case does not affect her eligibility for (i) state workers' compensation benefits or (ii) federal monetary and medical benefits under other statutory provisions, including EEOICPA claims at the Department of Labor.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0132 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 30, 2004

[5] A Radiological Assessment Report for the site in question states that the Atomic Energy Commission built the Huntington Pilot Plant in 1951 to supply nickel powder for use in the Paducah and Portsmouth gaseous diffusion plants. The Report further states that one source of the nickel used in the plant was scrap nickel which was contaminated with uranium. According to the Report, the plant was shut down in 1963 and demolished in 1978-1979. *See* Formerly Utilized Sites Remedial Action Program data base for Huntington Pilot Plant accessed via www.*em.doe/gov*.

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

May 24, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **July 9, 2004**

Case No.: **TIA-0133**

XXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits, based on the employment of her late husband (the Worker). The Worker had been employed as 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. The Applicant's son (the Appellant) filed an appeal with the DOE's Office of Hearings and Appeals (OHA). In his appeal, he stated that the Applicant had died and that he was pursing the appeal. 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. 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.

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 laborer at the Savannah River Site (the site). The application states that he worked at the site for 36 years -- from 1951 to 1987. The Applicant requested physician panel review of one illness -- kidney problems.

The Physician Panel rendered a negative determination on the illness. The Panel stated that the claimed illness was end-stage renal disease and was not caused by toxic exposure. Instead, the Panel stated that the end-stage renal disease resulted from diabetes, high blood pressure and smoking. In support of its finding, the Panel discussed the Worker's medical records. The OWA accepted the Physician Panel's determination, and the Applicant filed the instant appeal.

In his appeal, the Applicant argues that the Worker was exposed to toxic substances during his work at the site.

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.

As an initial matter, we note that the Worker may have been exposed to toxic substances at the site. The Worker worked throughout the site as a laborer. OWA Record at 21, 22. The site profile lists toxins harmful to kidneys as present in many of the areas where the Worker was located. OWA Record at 88, 112. As explained below, however, the Worker's possible exposure to toxic substances does not indicate Panel error.

In general, we expect the Panel to address a worker's toxic exposures. However, in this case, it was not necessary to the logic of the Panel decision. The Panel found, based on the medical records, that the Worker's renal disease was a complication of his diabetes. The Applicant does not challenge the Panel's analysis of the Worker's medical records, and his mere disagreement with the Panel's medical opinion is not a basis for finding Panel error. Accordingly, the appeal should be denied.

In compliance with Subpart E, these claims 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 review of these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-133, be, and hereby is, denied.

(2) The denial pertains only to the DOE claim and not to the DOL's review of these claims 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 24, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

April 29, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **July 12, 2004**

Case No.: **TIA-0135**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance with filing for state workers' compensation benefits for her late husband (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illness was not related to his work at a DOE facility. 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 granted.

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.[1] Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.[2] Subpart E provides that all Subpart D claims will be considered as Subpart E claims.[3] OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Worker was employed intermittently as a utility operator in the boiling room at the DOE's Oak Ridge K-25 site for approximately nine years, from 1946 to 1947 and from 1953 to 1961.

The Applicant filed an application with the OWA, requesting physician panel review of one illness, malignant melanoma. The Applicant claimed that the Worker's illness was the result of being exposed to ionizing radiation during his work at the site.

The Physician Panel rendered a negative determination with regard to the claimed illness. The Panel agreed that the Worker had malignant melanoma, but stated that there was insufficient evidence to conclude that it was "more likely than not" that the melanoma was related to toxic exposure

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[1] Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).
[2] *See id.* § 3675(a).
[3] See id. § 3681(g)

at the DOE site. The Panel cited the Worker's sun exposure as a risk factor.

The OWA accepted the Physician Panel's negative determination, and the Applicant filed the instant appeal. In her appeal, the Applicant states that the melanoma was on the bottom of the Worker's foot, that there is no history of cancer in the Worker's family, and that the Worker was continually exposed to radiation at the Oak Ridge site -- he worked around "hot stuff" and ate lunch in contaminated work areas.[4]

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 a 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.

As an initial matter, we note that the Panel appeared not to know, or consider, the location of the melanoma. The Panel referred to the Worker's sun exposure as a risk factor, but the record is manifestly clear that the melanoma was located on the bottom of the Worker's foot, s*ee, e.g.*, Record at 25.

Moreover, the Panel applied an overly strict standard of causation. When the Panel considered whether it was "more likely than not" that the illness was related to a toxic exposure at DOE, the Panel did not comply with the Physician Panel Rule. The Rule requires a consideration of whether it is "at least as likely as not" that the illness was related to a toxic exposure at DOE. 10 C.F.R. § 852.8. The Panel's use of an overly strict warrants further consideration of the application. Further consideration should take into account the location of the Worker's melanoma and the results of the National Institute of

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[4] Applicant Appeal Letter, dated July 8, 2004.

Occupational Safety and Health (NIOSH) dose reconstruction that was pending at the time of the Panel report.[5]

As the foregoing indicates, the appeal should be granted. In compliance with Subpart E, this claim will be transferred to the DOL for review. OHA's grant of this appeal does not purport to dispose of or in any way prejudice the Department of Labor's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0135 be, and hereby is, granted.

(2) Further consideration of the application is warranted.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 29, 2005

[5] ***See*** **Record (Case History).**

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

October 26, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: July 12, 2004

Case No.: TIA-0136

XXXXXXXXXXX (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. 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 reimburse the contractor for any costs that it incurs if it contests

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

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. Procedural Background

The Applicant was employed at DOE's Oak Ridge (Y-12) site. He worked at the site as a machinist and plant shift superintendent for nearly 35 years, from 1951 to 1986.

The Applicant filed an application with OWA, requesting physician panel review of three illnesses – colon cancer, coronary artery disease, and hip replacements. The Physician Panel rendered a negative determination on each of the claimed illnesses and explained the basis of each determination. The OWA accepted the Physician Panel's negative determination on each of the claimed illnesses.

The Applicant appeals the negative determination on each of the illnesses. For the colon cancer, two members of the Panel determined that the Applicant's occupational exposures were not sufficient to have caused, aggravated, or contributed to the illness. One member of the Panel determined that, given the Applicant's exposure to asbestos and metal working fluids and the length of the Applicant's period of employment, it was likely that occupational exposures caused the colon cancer. For the claimed coronary artery disease, the Panel determined that there was no evidence linking the illness to the Applicant's workplace exposures. For the claimed hip replacements, the Panel determined that there was no indication that the illness was caused by any specific workplace event.

The OWA accepted the Physician Panel's negative determination on each of the claimed illnesses. The Applicant filed the instant appeal.

[2] *See* www.eh.doe.gov/advocacy.

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 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 Panel's negative determination is incorrect. The Applicant advances several arguments which are considered below.

First, regarding his workplace exposures, the Applicant argues generally that radiation exposure records are often incomplete or unavailable. The Applicant maintains that he had access to the entire plant during his 35 years of employment at Y-12 and he was exposed to various hazardous and toxic substances, including asbestos and machining fluids, in the course of performing his duties. This argument does not provide a basis for finding panel error. The Panel examined each claimed illness, made a determination on each illness, and explained the basis of that determination. The Applicant's argument on appeal is merely a disagreement with the Panel's medical judgment rather than an indication of panel error.

Second, regarding his hip replacements, the Applicant argues that the fact that the floors and steps at the Y-12 site are primarily concrete and that he made several trips daily around the buildings could have contributed to his need for hip replacements. Although the Panel addressed the claimed hip replacements, the Physician Panel Rule applies 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 is 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. The Applicant attributes his hip replacements to walking on concrete. Concrete is not a "toxic substance." Therefore, the Applicant's arguments

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[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.***

relating to the hip replacement do not provide a basis for granting the appeal.

Lastly, the Applicant argues that the two members of the Panel who rendered a negative determination on his colon cancer are "doing what Congress said they would not do, make employees prove their claims." The Applicant's argument does not provide a basis for finding panel error. Under the Physician Panel Rule, a physician panel, after examining an individual employee's record, must make a determination as to whether the employee's illness arose through exposure to a toxic substance in the course of the employee's employment at a DOE facility. 10 C.F.R. § 852.1. In the instant case, the Panel examined each of the Applicant's claimed illnesses, made a determination on each illness, and explained the basis of that determination. Accordingly, the Applicant's argument does not provide a basis for finding panel error.

As the foregoing indicates, the appeal does not provide a basis for finding panel error and, therefore, should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0136 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: October 26, 2004

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September 30, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: July 13, 2004

Case No.: TIA-0137

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits based on his employment as a DOE contractor employee at a DOE facility for many years. The OWA referred the application to an independent physician panel, which determined that the Applicant's illnesses were not related to his work 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), challenging the panel's determination.

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) covers workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which does not itself provide any monetary or medical benefits but instead is intended to assist DOE contractor employees in obtaining workers' compensation benefits under state law. Pursuant to Part D, 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. § 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). 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. [1]

[1] *See* www.eh.doe.gov/advocacy.

B. Factual Background

The Applicant was employed at a DOE facility from 1971 to 2003. He was an Instrument Mechanic and has claimed that he was exposed to radiation and radioactive contaminants, beryllium and other toxic chemicals while working at the DOE facility. In the request for review, the Applicant asked for a physician panel review concerning whether his "allergies," "asthma" and "kidney stones" are related to his various exposures at DOE. *See* Case No. TIA-0137 Record (Record) at 1.

The physician panel reviewed the application and issued a report. *See* April 24, 2004 Physician Panel Report (Report) contained in Applicant's Appeal Letter dated July 7, 2004. With regard to the Applicant's allergies, the panel stated in its Report that the Applicant's pre-employment physical noted that the Applicant had a history of allergies. The panel also stated that the Applicant's medical records indicated that he had suffered from allergic rhinitis. Further, the panel opined that there was no evidence that his exposures at his work site were related to his histories of "atopy" or that his allergies were aggravated by his employment. [2]

In reviewing the Applicant's claim with regard to his asthma, the panel noted that he had a pre-existing history of asthma and that given his concurrent history of allergies the Applicant most likely suffered from "allergic asthma." The panel stated that the available pulmonary function tests contained in the record were normal and did not show any evidence of pulmonary obstruction. Other than some episodes of "asthmatic bronchitis," there was no evidence that the Applicant suffered from episodes of asthma or that he had been absent from work due to asthma. The panel did not find any evidence of work-aggravated asthma. Lastly, the panel found that the Applicant's kidney stones were not related to exposure to a toxic substance at a DOE facility. The panel stated that it found no evidence indicating that there was a causal relationship between exposure to toxic substances and kidney stones. [3]

The OWA accepted the physician panel's determination, and the OWA advised the Applicant that he had received a negative determination. *See* Applicant's Appeal Letter dated July 7, 2004. On July 13, 2004, the Applicant filed this appeal concerning the determination.

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[2] "Atopy" refers to various allergic reactions.

[3] In the Report, the panel noted that kidney stones are usually found in men and result from problems in an individual's purine (a class of chemicals found in various foods) metabolism which results in increased production of uric acid in the body. The Report also stated that a diet high in purines could predispose an individual to kidney stones and that the disease was more common in white collar workers than in manual workers.

The Applicant believes that the Panel's determination is flawed because it did not consider the specific types of allergic reactions he experienced – skin rashes, boils and other skin problems he believes were caused by 33 years of exposure to many types of toxic materials at the DOE site. The Applicant also challenges the panel's determination with regard to asthma. Specifically, while he agrees that he did not have asthma attacks during his period of employment, the Applicant claims that he suffered from a number of respiratory problems such as bronchitis, "early stage" emphysema, shortness of breath and coughing, which were not reviewed by the panel.

Lastly, the Applicant challenges the panel's determination concerning his kidney stones. He asserts that an abnormally large number of individuals who worked his DOE facility suffered from kidney stones. He also notes that since he has retired he has not had any further kidney stones.

II. *Analysis*

The Applicant believes that the panel's decision concerning his "asthma" and "allergies" is flawed because the panel did not consider the specific illnesses he listed in his appeal letter. We examined the form on which the Applicant requested physician panel review. In answering question 7, which asks "what illness(es) do you have that you believe is caused by your work at a DOE facility(s)," the Applicant's response was "allergies" and "asthma." Record at 1. It is apparent that the Applicant did not specifically identify the particular illnesses for which he sought review. This is significant especially since apparently the term "allergies" could refer to a number of conditions. The panel seems to have interpreted the Applicant's request as a request for review of his allergic rhinitis. Thus, the panel only conducted a review for "allergic rhinitis" and asthma.[4] Given the named illnesses the Applicant specified in his request, we find no error in the panel's determination. However, if the Applicant wishes to obtain panel review on the specific illnesses has mentioned in his appeal, he can file another request for review with the Office of Worker Advocacy.

With regard to the Applicant's arguments concerning the panel's findings concerning his kidney stones, we again find no error in the panel's findings. The Applicant's arguments concerning coextensive duration of his employment at the DOE facility and the occurrence of his kidney stones and the allegedly higher rate of individuals suffering from kidney stones at the facility does not outweigh the considered medical opinions of the panel's physicians. The Applicant has not pointed out, for example, (i) any mistake in fact that the panel made or (ii) other expert medical opinions in the record that would support his claim. Consequently, we must reject the Applicant's arguments.

[4] "Allergic rhinitis" refers to the illness commonly called "hay fever" and is marked by an allergy-related inflammation of the nasal passages.

III. Conclusion

In its review, the panel examined the available medical records and determined that the Applicant's asthma, allergies and kidney stones were not caused by his exposures to toxic materials at a DOE facility. None of the arguments that the Applicant has presented indicates panel error. Consequently, as the foregoing discussion indicates, the Applicant's appeal should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0137 is hereby denied.

(2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 30, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

December 9, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: July 14, 2004

Case No.: TIA-0138

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in obtaining state workers= compensation benefits. An independent physician panel (the Physician Panel or the Panel) issued a positive determination on two illnesses and a negative determination on the remaining illnesses. The Applicant appealed the negative determination, and we remanded the application for further consideration. See Worker Appeal, Case No. TIA-0039, 28 DOE & 80,327 (2003). The Panel issued a second negative determination, and the Applicant filed the instant appeal. As explained below, we have determined that the Appeal should be granted and the application given further consideration.

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 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 contactor 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, and its web site provides extensive information concerning the program. 1/

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. OHA continues to process appeals until DOL commences Subpart E administration.

B. Procedural History

The Applicant filed an application for physician panel review, in which he claimed that he had a number of illnesses that were related to exposure to toxic substances during his employment at a DOE facility. The Applicant worked at a DOE facility from 1963 to 1988 and from 1992 until relatively recently. From 1963 to 1980, the Applicant worked as a technical specialist in a metallurgy department, and it is this period that is the primary focus of his application. The Applicant claimed the following illnesses: nephrosis, prostate cancer, peripheral neuropathy, bone pain, osteomalacia, hypothyroidism, and chronic lung disease. The Applicant submitted voluminous information on his exposures and his illnesses. The information included (i) a February 2001 report by a pulmonologist at the National Jewish Medical Center, who referred the Applicant to a toxicologist, (ii) a handwritten letter from his supervisor (the Supervisor) to a toxicologist, attaching a list of the substances and processes involved in their work, (iii) a May 2001 report by the toxicologist, who concluded that the Applicant=s illnesses were related to exposure to cadmium and solvents, and (iv) a May 2002

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

letter from the DOE contractor who employed the Applicant (the DOE Contractor), confirming that the Supervisor's letter accurately described the Applicant's work.

The OWA referred all seven illnesses to the Physician Panel, and the Panel issued the first determination in this case. The Physician Panel rendered a positive determination on two illnesses - nephrosis and prostate cancer. The Panel found that those illnesses were related to the Applicant=s exposure to cadmium. The Physician Panel rendered a negative determination on the remaining illnesses. The Panel stated that A[t]here is no convincing objective evidence that the other conditions claimed are related to [the worker=s] employment.@ Report at 1.

The OWA accepted the determinations, and the Applicant appealed. We granted the appeal. See Worker Appeal, Case No. TIA-0039, 28 DOE & 80,327 (2003). We found that the Panel=s explanation on the remaining illnesses reflected an overly stringent standard of proof and lacked sufficient detail. Accordingly, we remanded the application for further consideration. We noted that the Applicant was particularly interested in a positive determination on two illnesses - bone pain and peripheral neuropathy - and indicated that he had the option of eliminating the other illnesses from further consideration.

In response to the remand, the Panel issued a new determination (the Determination). The Panel stated that, pursuant to the Applicant=s direction, the Panel limited its review to bone pain and peripheral neuropathy. The Panel determined that those illnesses were not related to exposures to a toxic substance at DOE.

First, the Panel discussed the Applicant=s exposures. The Panel devoted most of its discussion to the Applicant=s work during the 1963 to 1980 period, which everyone agrees is the period of greatest exposure. The Panel viewed those exposures as insignificant.

Second, the Panel addressed the Applicant's bone pain. The Panel stated that occupational causes of bone pain include cadmium, lead, or fluoride exposure. Although the Panel had previously found that the Applicant=s prostate cancer and nephrosis were related to cadmium exposure, the Panel rejected cadmium exposure as a cause of his bone pain, citing the nature and timing of his condition. The Panel eliminated lead and

fluoride exposure as factors, stating that the Applicant Adoes not appear to have had significant exposure@ to those substances. Determination at 2.

Third, the Panel addressed the Applicant's peripheral neuropathy. The Panel stated that occupational causes of peripheral neuropathy include solvents, lead, acrylamide, arsenic, thallium, mercury, and methyl bromide. The Panel stated that while the Applicant Amay have been exposed@ to Avarious neurotoxins such as solvents and lead, no industrial hygiene information is available on his exposures.@ Report at 2. In any event, the Panel rejected solvents as a cause, citing the nature and timing of his neuropathy.

The Panel's finding with respect to the timing of his illnesses was the same for bone pain and peripheral neuropathy. The Panel stated that the Applicant did not have the conditions until the 1990's, well after the period of maximum exposure to toxic substances.

The Applicant appeals from the Determination. His arguments are discussed below.

II. Analysis

A. Applicable Standards

The Physician Panel Rule set forth the standard for the Panel to use in making its determination. The standard was whether Ait is at least as likely as not@ that exposure to a toxic substance during employment at a DOE facility was a Asignificant factor in aggravating, contributing to or causing the illness.@ 10 C.F.R. § 852.8. The Rule required that the panel explain Athe basis of its determination.@ 10 C.F.R. ' 852.12(b)(5). The preamble to the Rule stated that, although an applicant bore primary responsibility for submitting sufficient information to support the application, DOE would assist applicants as it was able. 67 Fed. Reg. 52841, 52844 (2002).

B. The Applicant's Exposures

The Applicant maintains that the Panel understated his exposures. As explained below, we have concluded that the Panel failed to provide an adequate explanation of why it viewed the exposures as insignificant.

The Panel cited the Supervisor's letter, but the Panel did not cite the letter=s list of toxic substances and processes. Instead, the Panel quoted the letter=s discussion of protective measures, implicitly finding that the protective measures precluded significant exposure.

The implicit finding that protective measures resulted in insignificant exposure is difficult to reconcile with the record. The finding is inconsistent with the purpose of the Supervisor's letter and the May 2002 DOE Contractor's letter, which were written to support the Applicant's claim of occupational illness. Moreover, the Panel inaccurately quoted the Supervisor=s discussion of protective measures, and the inaccuracy was significant. When the Supervisor discussed the protective measures for known toxic substances, as opposed to non-hazardous substances, he used quotation marks around the word Aknown@ and the word Anon-hazardous.@ The Supervisor=s use of quotation marks indicates that substances deemed non-hazardous at the time - 20 to 40 years go – may now be recognized as toxic. The Panel omitted those quotation marks from the excerpted portion of the letter and, therefore, this meaning was lost. In addition to misreading the Supervisor's letter, the Panel did not discuss or refer to what we believe to be an important part of the DOE Contractor's letter, which referred to the Applicant's Aintimate involvement@ with the substances and work identified in the Supervisor's letter.2/ Finally, the

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2/ The DOE Contractor's letter provides in relevant part:

> A team of Records, Declassification, Legal and Human Resources staff . . . has reviewed both classified and non-classified materials including publications, photographs, invention reports and laboratory record books which document the materials and operations [the Applicant] was involved with . . . during the 1963 to 1980 period. In addition, the team interviewed [the Supervisor], the Senior Scientist who was the Project Manager for this vital National Security work. [The Supervisor] has provided a letter detailing and confirming the substances and processes [the Applicant] was involved with on this program. The nature of the operations/processes was quite varied and included brazing, spot welding, vapor degreasing, bead blasting, electro-polishing for equipment fabrication, assembly, disassembly and product testing ....
> (continued ...)

implicit finding that protective measures resulted in insignificant exposure seems inconsistent with the Panel's determination that the Applicant's nephrosis and prostate cancer resulted from cadmium exposure.

The degree of exposure is significant because the Supervisor's letter identifies substances that the Panel cited as potential causes of bone pain and peripheral neuropathy. The Panel identified cadmium, lead, or fluoride exposure as possible causes of bone pain, and it identified solvents, lead, acrylamide, arsenic, thallium, mercury, and methyl bromide as possible causes of peripheral neuropathy. The Supervisor's letter includes some of those substances, namely cadmium, lead, solvents, and mercury.

As the foregoing indicates, the Panel has not adequately explained the basis for its determination that the Applicant's exposures were insignificant. Accordingly, the application should receive further consideration.

Further consideration of this application should include material submitted in conjunction with the appeal. The appeal file contains two more letters from the Supervisor. These letters will be referred to as the Supervisor's second and third letters.

(. . . continued)
The substances used in this research program included radioactive materials, toxic solvents and heavy metals including cadmium.

Due to the nature of this program, [the Applicant] was exposed to many hazardous substances. ...

A review of the attached documents supports and verifies [the Applicant's] ... claim concerning the job responsibilities of his position .... [A classification officer] conducted an intensive search of classified materials and cannot provide details on the classified work, except to say that there is nothing in the record that would diminish in any way his intimate involvement with the work and the materials identified in the unclassified documents.

May 2, 2002 letter at 1.

The Supervisor=s second letter, again addressed to the toxicologist, is an undated, typed, follow-up letter to the first and concerns the difficulties the Applicant was experiencing in his workers= compensation claim. The Supervisor states that the Applicant informed him that one of the examiners Aquestioned the validity of the large number of substances used by our team.@ The Supervisor states that Ait came as a surprise@ that his first letter and the DOE contractor=s May 2002 Asupportive@ letter were not a sufficient explanation of the Applicant=s exposures. The Supervisor goes on to provide a list of substances with a new column that states how they were used, as well as a list of various articles, papers, and reports that discuss the work. The Supervisor states that he identified the portions of those documents that showed how an individual could be exposed to the substances in question.

The Supervisor=s third letter, dated July 12, 2004, is addressed to this office and supports the instant appeal. The Supervisor states that the Panel drew Athe wrong conclusions@ from his first letter. The Supervisor attributes the wrong conclusions to the Panel=s lack of information about the building where they worked and the research they were doing. The Supervisor states that Athe building=s complex ventilation system did not make it easy to ventilate some of the smaller rooms@ including two of the roughly 8 by 12 foot rooms that the Applicant used for torch brazing and metal fabrication. The Supervisor states that the Applicant Aparticipated in experiments to study metallic arcs in gas discharges using lead cathodes@ and that lead exposure came from Askin contact and dust inhaled from mechanical operations to remove flux and excess solder.@ Supervisor's third letter at 3. The Supervisor describes the Applicant=s work with fluorides, referring to fumes and skin exposure Ahigh enough to turn the skin white.@ Id. The Supervisor provides further relevant information, which need not be detailed here but should be reviewed in a further consideration of this case. Consideration of the Supervisor's letter should take into account the difficulty of documenting exposures associated with classified work.

C. The Timing of the Applicant=s Bone Pain and Peripheral Neuropathy

The Applicant maintains that the Panel erred when it stated that he did not experience bone pain and peripheral neuropathy until well after the 1963 to 1980 period of maximum potential exposure. The Applicant states that he had the two illnesses in

the 1970s and that he reported them in medical examinations with site doctors and with his private physicians. He recognizes that the reports of site examinations do not include these reports, and he states that he has attempted, but been unable, to locate his private medical records for that period.

The record reviewed by the Panel contained little information on the timing of the Applicant's illnesses. The contemporaneous notes of site physicians during the 1963 to 1980 period do not mention bone pain or peripheral neuropathy. On the other hand, a February 2001 pulmonologist=s report refers to the Applicant=s report that his symptoms began in the 1963 to 1980 period.

The appeal contains additional information concerning the timing of the Applicant's illnesses. The Supervisor's third letter states that the Applicant=s physical problems were present and increased in intensity and frequency during the 1963 to 1990 time period.

As mentioned above, in general, we review Panel determinations based on the record presented to the Panel. Since the Panel did not have the benefit of the Supervisor's third letter, the Panel cannot be faulted for failing to consider it. The letter is significant new information that should be considered along with the issue of the Applicant's exposures.

III. Summary and Conclusion

The application should be given further consideration based on the record, augmented by the Supervisor's second and third letters. Further consideration should be given to the evidence of the Applicant=s exposures, the difficulty of documenting his exposures given the classified nature of his work, and the evidence that his illnesses began during the time of those exposures. The Applicant may wish to submit the attachments to the Supervisor's second letter for inclusion in this consideration.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0138 be, and hereby is, granted as set forth in paragraph 2 below.

(2) The Physician's Panel Report failed to explain adequately the basis of its determination and the Applicant has

submitted significant new information relevant to his application. Reconsideration is in order.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: December 9, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

February 15, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: July 14, 2004

Case No.: TIA-0139

XXXXXXXXXX (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 her late husband XXXXXXXXXX (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illness was not related to his work at a DOE facility. 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 application should be given further consideration.

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, and its web site provides extensive information concerning the program.[1]

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. OHA continues to process appeals until DOL commences Subpart E administration.

B. Procedural Background

The Applicant filed an application with the OWA, requesting Physician Panel review of the Worker's lung cancer. The Applicant stated that the Worker was employed as a machinist at the DOE's Oak Ridge Y-12 facility (the site) for approximately 21 years, from March 1954 to September 1975. The Applicant claimed that the Worker's lung cancer was the result of his exposure to hazardous chemicals, in particular beryllium, at the site.

The Physician Panel agreed that the Worker had lung cancer, but concluded that it was not due to toxic exposure at the DOE site. In its report, the Panel referenced the Worker's medical, dispensary, bioassay, and dosimetry records and concluded that "there is no indication in the information provided that [the Worker] had exposure to any substances known to be associated with development of lung cancer other than cigarette smoke and ionizing radiation."[2] Based

[1] *See* http://www.eh.doe.gov/advocacy/index.html.
[2] Physician Panel Report at 1.

on its examination of the Worker's dosimetry records, the Panel found that his radiation exposure was "far below the accepted occupational exposure limits."[3] The Panel determined that the type of lung cancer which the Worker possessed—-squamous cell carcinoma--"is a type related to smoking."[4] The Panel relied on the plant's dispensary records which indicated that the Worker was a heavy smoker. Ultimately, the Panel concluded that in the absence of evidence that the Worker was exposed to "other substances associated with the development of lung cancer" or over-exposed to ionizing radiation, his "metastatic squamous cell carcinoma of the lung did *not* arise from or out of his employment at a DOE facility."[5]

The OWA accepted the Physician Panel's negative determination, and the Applicant filed this appeal. In her initial application as well as her appeal, the Applicant states that the Worker was a machinist in the site's beryllium shop and that he "was exposed to significant levels of beryllium because he worked [periodically] in the beryllium shop for six months at a time."[6] The Applicant also resubmits some of the documentation which formed a part of the original record, including several medical reports from the site's dispensary highlighting the worker's exposure to beryllium and other substances.

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.

We have concluded that the Panel failed to provide an adequate explanation for its determination. The reason is that the Panel did not address the issue of whether the Applicant's exposure to beryllium was a factor in his lung cancer. In her application, the Applicant has indicated that the Worker was frequently exposed to beryllium. The

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[3] *Id.* at 2.
[4] *Id.* at 2.
[5] *Id.* at 2 (Panel's emphasis).
[6] *See* Applicant's Appeal Letter.

record supports the Applicant's claim of beryllium exposure. Medical records from the dispensary indicate several instances where the Worker was injured while working with beryllium and reported to the plant physician for treatment. The record also supports the Applicant's contention that exposure to beryllium can cause lung cancer. The Y-12 Site Profile identifies beryllium as a "known or suspected non-radiation lung carcinogen."[7] Moreover, beryllium and beryllium compounds have also been identified as carcinogens by the U.S. Department of Health and Human Services.[8] Accordingly, the Panel should have discussed the beryllium exposure and explained whether this exposure could have been connected with the Worker's lung cancer.

As the foregoing indicates, the Panel has not adequately explained the basis for its determination. Accordingly, this application should receive further consideration. The record indicates that, at the time the Panel considered the claim, the National Institute for Occupational Safety and Health (NIOSH) was in the process of performing a dose reconstruction.[9] This NIOSH dose reconstruction may provide further information that would support the Applicant's Subpart E claim. We note that further review of the application should also take into account a dose reconstruction.

In compliance with Subpart E, this 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 review of this claim does not purport to dispose of or in any way prejudice the Department of Labor's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0139 be, and hereby is, granted as set forth in paragraph 2 below.

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[7] *See* Y-12 Plant Site Profile, U.S. Department of Energy, Office of Oversight, Environment, Safety and Health (December 1999), at 35.
[8] *See* Report on Carcinogens, Eleventh Edition; U.S. Department of Health and Human Services, Public Health Service, National Toxicology Program, *available at* http://ntp.niehs.nih.gov/ntp/roc/toc11.html.
[9] *See* Record (Case History).

(2) The Physician Panel Report failed to explain adequately the basis of its determination. Reconsideration is in order.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 15, 2005

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February 9, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **July 14, 2004**

Case No.: **TIA-0140**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' benefits for her late husband XXXXXXXXXX (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illness was not related to his 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 dismissed.

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, and its web site provides extensive information concerning the 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. OHA continues to process appeals until DOL commences Subpart E administration.

B. Procedural Background

The Worker was employed as a centrifuge operator at the Oak Ridge Gaseous Diffusion Plant (the plant). He worked at the plant for eight years, from January 1975 to January 1983.

The Applicant filed an application with the OWA, requesting that a physician panel review the Worker's kidney cancer. The Applicant asserted that this illness was due to exposure to toxic and hazardous materials and chemicals at the site. The Physician Panel rendered a negative determination which the OWA accepted. Subsequently, the Applicant filed the instant appeal.

In her appeal, the Applicant asserts that the Worker's illness was caused by exposure to toxic chemicals at the plant. The Applicant also argues that the compensation which she received from the Department of Labor program is evidence that her husband contracted cancer as a result of working at a DOE facility.

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 Applicant's positive DOL Subpart B determination satisfies the Subpart E requirement that the illness be related to toxic exposure during employment at DOE. Accordingly, Subpart E has rendered moot the physician panel determination and consideration of any challenge to the Panel report is not necessary.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0140 be, and hereby is, dismissed.

(2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 9, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

December 20, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: July 15, 2004

Case No.: TIA-0141

XXXXXXXXX (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 her late husband, XXXXXXXX (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the worker's illnesses were not related to his work at a DOE facility. 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 dismissed as moot.

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 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 contactor 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, and its web site provides extensive information concerning the program at http://www.eh.doe.gov/advocacy/.

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. In addition, under Subpart E, an applicant is deemed to have an illness related to a work related toxic exposure at DOE, if the applicant received a positive determination under Subpart B.

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 guard at the DOE's Paducah Gaseous Diffusion Plant (the Plant). He worked at the plant for fifteen years, from 1951 to 1966. Under the DOL Program, it was determined that the Worker was a member of the "Special Exposure Cohort" and that he developed multiple myeloma during his employment at a DOE facility.[1] Accordingly, the Applicant received compensation under that program.

The Applicant filed an application with the OWA, requesting physician panel review of claims of multiple myeloma and amyloidosis. The Applicant asserted that the Worker's illnesses were the result of exposure to hazardous chemicals at the Plant. The Physician Panel rendered a negative determination for both of these illnesses. The Panel found insufficient evidence to establish a diagnosis of multiple myeloma. The Panel agreed

[1] See 20 C.F.R. § 30.210.

that the Worker had amyloidosis, but found insufficient evidence of toxic exposures to find that it was work-related.

The OWA accepted the Physician Panel's negative determinations and, subsequently, the Applicant filed the instant appeal.

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 a toxic exposure at the DOE site, and state the basis for that finding.[2]

The Applicant argues that the Physician Panel erred when it found insufficient evidence of multiple myeloma. The Applicant points to the DOL Subpart B determination that the Worker had multiple myeloma. The Applicant also provides a number of articles about multiple myeloma, discussing its relationship with amyloidosis, the other claimed illness. Although the Applicant recognizes that the record does not contain radiation exposure records, she asserts that "her husband's duties kept him in buildings where uranium, technetium, plutonium, beryllium, cadmium, mercury, hydrofluoric acid, uranium tetrafluoride, etc., were stored and processed."[3] Moreover, she states that "no protective equipment was offered or provided to [her] husband who would spend entire shifts in the hazardous environments."[4] Finally, she cites various dispensary visits as evidence of toxic exposures.

Subpart E has rendered moot the physician panel determination. The Applicant's positive DOL Subpart B determination satisfies the Subpart E requirement that the illness be related to toxic exposure during employment at DOE. The Applicant received a positive DOL Subpart B determination for multiple myeloma, and the panel report recognized that amyloidosis is associated with multiple myeloma. Accordingly, consideration of alleged errors in the Panel report is not necessary.

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[2] 10 C.F.R. § 852.12.
[3] Applicant's Appeal Letter dated July 7, 2004, at 3.
[4] *Id.*

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0141 be, and hereby is, dismissed as moot.

(2) This is a final order of the Department of Energy

George B. Breznay
Director
Office of Hearings and Appeals

Date: December 20, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

January 11, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: July 16, 2004

Case No.: TIA-0142

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'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 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 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 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, and its web site provides extensive information concerning the program.[1]

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

[1] **www.eh.doe.gov/advocacy**

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. In addition, under Subpart E, an applicant is deemed to have an illness related to a work related toxic exposure at DOE if the applicant received a positive determination under Subpart B.

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 at DOE's Idaho National Engineering and Environmental Laboratory. He worked at the site as a laborer/cement mason for nearly 29 years, from 1950 to 1979.

The Applicant filed an application with OWA, requesting physician panel review of two illnesses – leukemia and severe anemia. The Physician Panel rendered a negative determination on each of the claimed illnesses and explained the basis of each determination. The Panel agreed that the Worker had severe anemia and leukemia. However, the Panel determined, based on the limited records available to it, that there was no evidence of sufficient exposures to toxic substances which could have contributed to the Worker's illnesses.

The OWA accepted the Physician Panel's negative determinations and, subsequently, the Applicant filed the instant appeal.

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.

In her appeal, the Applicant argues that the Physician Panel erred in determining that the Worker's illnesses were not related to his workplace exposures. The Applicant states that the Worker's medical records were destroyed. The Applicant also states that although the

Panel stated that the Worker died of heart failure, the Worker's leukemia was the main cause of his death.

The Applicant's arguments do not provide a basis for finding panel error. With regard to the Worker's cause of death, the Panel agreed that the Worker's anemia caused his death. The report cites the Worker's death certificate, which states that the Worker died of "heart failure secondary to severe anemia with blasts, variant of leukemia." See Panel Report at 1. With regard to the lack of medical records, the Applicant's argument does not indicate panel error. In making its determination, the Panel examined the entire record that was available. The Panel determined, on the basis of that record, that there was no evidence establishing a relationship between the Worker's illnesses and his occupational exposures. Therefore, the Applicant's arguments are mere disagreements with the Panel's medical judgment rather than indications of panel error.

In her appeal, the Applicant provides a letter from the National Institute for Occupational Safety and Health (NIOSH), dated after the Panel completed its report and OWA informed the Applicant of the Panel's determination, which indicates that NIOSH was in the process of completing the Worker's dose reconstruction report. The DOL will be able to consider this information when it reviews the Applicant's claim.

As the foregoing indicates, the Applicant's claim does not provide 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 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-0142 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: January 11, 2005

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January 7, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **July 19, 2004**

Case No.: **TIA-0143**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the worker's illnesses were not related to his work at a DOE facility. 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 contactor 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, and its web site provides extensive information concerning the 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. OHA continues to process appeals until DOL commences Subpart E administration.

B. Procedural Background

The Applicant was employed as a sheet metal trainee at the DOE's Oak Ridge site. He worked at the site for ten months, from June 1952 to April 1953.

The Applicant filed an application with the OWA, requesting physician panel review of four illnesses: colon cancer, bilateral renal cyst, hepatic cyst, and nodules in the body. The Applicant claimed that his illnesses were the result of exposure to hazardous chemicals at the site. The Physician Panel rendered a negative determination with regard to all of the claimed illnesses. The Panel agreed that the Applicant had each of these illnesses, but concluded that they were not due to toxic exposure at the DOE site. The OWA accepted the Physician Panel's negative determinations. In his appeal, the Applicant challenges the negative determinations.

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

In his appeal, the Applicant contends that the Panel did not specifically address the presence of nodules in his lungs. In support of this assertion, the Applicant resubmitted a radiology consultation report dated September 23, 1999.[1] Contrary to the Applicant's assertion, the Panel specifically considered his lung nodules. The Panel both evaluated and referenced this radiological report.[2] Consistent with the report, the Panel determined that "these 'nodules in the body' are most probably the manifestation of an old infection."[3]

With respect to all his illnesses, the Applicant contends that he was exposed to many hazardous chemicals. As an example, the Applicant resubmits a laboratory record measuring the presence of potentially toxic elements in a hair sample.[4] These arguments are not bases for finding Panel error. The Physician Panel addressed each of the claimed illnesses, made a determination for each, and explained the reasoning for each conclusion. The arguments presented in the appeal are merely disagreements with the Panel's medical judgment, rather than indications of error on the part of the Panel.

As the foregoing indicates, the appeal does not provide a basis for finding panel error and, therefore, should be denied. In compliance with Subpart E, these claims 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 these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claim under Subpart E.

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[1] Panel Report, at 4.
[2] *See id.* at 2.
[3] *Id.* at 4.
[4] *See* Record, at 44.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0143 be, and hereby is, denied.

(2) The 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: January 7, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

January 31, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **July 20, 2004**

Case No.: **TIA-0144**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illnesses were not related to his work at a DOE facility. The OWA accepted the Panel's determinations, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determinations. 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, and its website provides extensive information concerning the 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. OHA continues to process appeals until DOL commences Subpart E administration.

B. Procedural Background

The Applicant was employed as a research fellow at Abbott Laboratory, Oak Ridge Institute of Nuclear Studies Hospital (the hospital). He worked at the hospital for approximately four months, from May 1963 to September 1963. During that period, he was involved in handling and administering radioisotopes to cancer patients.

The Applicant filed a claim with the OWA, requesting physician panel review of six illnesses: diabetes, sarcoma and gastrointestinal cancer, bone cancer, multiple bilateral renal cysts, pedal edema and hypertension. The Applicant asserted that his illnesses were the result of exposure to toxic and radioactive chemicals at the hospital. The Applicant also filed a Subpart B claim at the DOL. In that proceeding, he was awaiting the completion of a dose reconstruction by the National Institute of Occupational Safety and Health (NIOSH). The Applicant asked that the OWA send his case to the Physician Panel, rather than await the results of the dose reconstruction.[1] Accordingly, the OWA sent the case to the Panel without a dose reconstruction.

[1] Record at 13 (Case View History, entry for 11/06/03).

The Physician Panel rendered negative determinations with regard to the illnesses. The Panel found that the record did not contain evidence of exposure significant to conclude that Applicant's conditions were due to work-related toxic exposure. The Panel specifically cited the absence of industrial hygiene records or reports of accidental contamination. The OWA accepted the Physician Panel's negative determinations, and the Applicant filed the instant appeal.

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

In his appeal, the Applicant maintains that the Panel's negative determinations are incorrect. He asserts that during his time at the hospital, "numerous minor spills and sloppy handling of isotopes took place."[2] The Applicant also contends that he came into contact with toxic substances through the handling of debilitated patients' bodily fluids and that these instances of contamination remained unreported. Moreover, the Applicant argues that the rare form of cancer which he contracted is associated primarily with radiation exposure.

The Applicant has not demonstrated Panel error. The Physician Panel addressed the Applicant's claims, made its determinations, and explained its reasoning. As the Applicant recognizes, the record does not contain information concerning his alleged exposures and, therefore, the record does not support a finding of Panel error. We note that the NIOSH dose reconstruction, which was not completed when the case went to the Physician Panel, may provide further information that would support the Applicant's Subpart E claim.

In compliance with Subpart E, these claims will be transferred to the DOL for review. The DOL is in the

[2] Applicant's Appeal Letter.

process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0144 be, and hereby is, denied.

(2) The denial pertains only to the DOE claims and not to the DOL's review of these claims under Subpart E.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 31, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

October 7, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: July 20, 2004

Case No.: TIA-0145

XXXXXXXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy for assistance in filing for state workers' compensation benefits based on the employment of her deceased father, XXXXXXXXXXX (the worker). The DOE Office of Worker Advocacy determined that the applicant was not a contractor employee under the regulations at issue here and, therefore, was not eligible for DOE assistance. The applicant appeals that determination. As explained below, we have concluded that the determination is correct.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act creates two programs for workers.

The Department of Labor (DOL) administers the first EEOICPA program, which provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 73841(1). The DOL program also provides federal monetary and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 7384u.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, the DOE program provides for an independent physician panel assessment of whether a "Department of Energy contractor employee" has an illness related to exposure to a toxic substance at a DOE facility. 42 U.S.C. § 7385o. 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).

The DOE program is specifically limited to DOE contractor employees[1] who worked at DOE facilities.[2] The reason is that the DOE would not be involved in state workers' compensation proceedings involving other employers.

The regulations for the DOE program are referred to as the Physician Panel Rule and are set forth at 10 C.F.R. Part 852. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program.[3]

Pursuant to an Executive Order,[4] the DOE has published a list of facilities covered by the DOL and DOE programs, and the DOE has designated next to each facility whether it falls within the EEOICPA's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 69 Fed. Reg. 51,825 (August 23, 2004) (current list of facilities). The DOE's published list also refers readers to the DOE Worker Advocacy Office web site for additional information about the facilities. 69 Fed. Reg. 51,825.

II. The Appeal

This case involves the program administered by the DOE that provides access for eligible DOE contractor employees or their survivors to a Physician Panel Process. The Physician Panel established under the EEOICPA determines the validity of claims that a current or former DOE contractor employee's illness or death arose from his or her exposure to a toxic substance during the course of his or her employment at a DOE facility.

In the case at hand, the DOE Worker Advocacy Office declined to present the applicant's application to a Physician Panel because the office determined that the applicant's deceased father did not meet the eligibility requirements for the Physician Panel Process. *See* March 29, 2004 letter from DOE Worker Advocacy Office to the applicant.

In the claim that she submitted to the Office of Worker Advocacy, the applicant stated that her deceased father worked as a blaster and driller in the Homestead Mine #24 in Grant, New Mexico from 1959 to 1961. She further alleged that her deceased father's exposure to radiation during his work in the mine caused his silicosis and other medical conditions. In her appeal, the applicant states her belief that the Homestead Mine where her father worked was an attachment to the Ore Buying Station in Grants, New Mexico, a

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[1] A DOE contractor employee is defined as follows: (a) an individual who is or was in residence at a DOE facility as a researcher for one or more periods aggregating at least 24 months; (b) an individual who is or was employed at a DOE facility by (i) an entity that contracted with DOE to provide management and operation, management and integration, or environmental remediation at the facility; or (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility. 10 C.F.R. § 852.2.

[2] A DOE facility is defined as: any building, structure or premise, including the grounds upon which such building, structure, or premise is located: (a) in which operations are, or have been, conducted by, or on behalf of the DOE (except for buildings, structures, premises, grounds, or operations covered by Executive Order No. 12344 dated February 1, 1982 (42 U.S.C. § 7158 note), pertaining to Naval Nuclear Propulsion Program); and (b) with regard to which DOE has or had (i) a propriety interest; or (ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services. 10 C.F.R. § 852.2.

[3] *See* www.eh.doe.gov/advocacy.

[4] *See* Executive Order No. 13,179 (December 7, 2000).

site listed on DOE's facilities list as a "DOE facility." The applicant further advises that she and her siblings have already received compensation as survivors under the program administered by the Department of Labor, a fact which she believes establishes the validity of her claim before the DOE.

III. Analysis

A. Worker Programs

It is important to emphasize that the DOE Physician Panel Process is separate from any claims made under other statutory provisions. Thus, a DOE decision concerning the Physician Panel Process does not affect any claims made under other statutory provisions, such as programs administered by DOL and DOJ.

Similarly, we emphasize that the DOE Physician Panel Process is separate from state workers' compensation proceedings. A DOE decision that an applicant is not eligible for the DOE physician panel process does not affect (i) an applicant's right to file for state workers' compensation benefits or (ii) whether the applicant is eligible for those benefits under applicable state law.

We now turn to whether the applicant in this case is eligible for the DOE Physician Panel Process.

B. Whether the Applicant is Eligible for the DOE Physician Panel Process

As noted above, access to the DOE Physician Panel is limited to applications filed by or on behalf of a DOE contractor employee, *i.e.*, an individual who is or was employed at a DOE facility by a DOE contractor. *See* 10 C.F.R. § 852.1(b). To determine whether the worker in question worked at a DOE facility, we first consulted the DOE's published facilities list set forth at 69 Fed. Reg. 51,825. The Homestead Mine is not listed on the facilities list. While the Ore Buying Station in Grants, New Mexico is on the list, there are no documents that we could find to support the applicant's supposition that the Homestead Mine #24 was an attachment to the Ore Buying Station in question. Moreover, the Homestead Mine can not be characterized as a DOE facility because the mine was privately operated. *See* Memorandum dated May 1, 2003 from the Office of Worker Advocacy to the Office of Hearings and Appeals. One of the regulatory requirements for designation as a "DOE facility" under the subject regulations is that the DOE have a "propriety interest" in a site. The DOE did not have a "propriety interest" in the Homestead Mine. *Id.* The second regulatory requirement for designation as a "DOE facility" is that the DOE have a contract for the "management and operation, management and integration, environmental remediation services, construction or maintenance" of the site. *See* 42 U.S.C. 73841 (12), 10 C.F.R. § 852.2. The DOE never had any such contracts with regard to the Homestead Mine.

Now, we will consider the applicant's view that she should be allowed to use the DOE Physician Panel because she received a monetary award from the DOL for her deceased father's illnesses. The eligibility criteria for those seeking compensation from DOL under the EEOICPA differ from the eligibility criteria for those seeking assistance from the DOE in filing worker's compensation claims under Subpart D of the EEOICPA.

Therefore, the fact that the applicant received monetary compensation from the DOL under the EEOICPA is not relevant to the eligibility determinations that DOE must make under Subpart D of the EEOICPA. The pivotal question on appeal in this case is whether the applicant's deceased father was a DOE contractor employee. As discussed above, we have concluded that the applicant's deceased father (1) did not work at a DOE facility and (2) was not employed by a "DOE contractor" as that term is defined in the statute and regulations.

For all the reasons set forth above, we find that the Office of Worker Advocacy correctly decided not to present the applicant's claim to the DOE Physician Panel.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0145 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: October 7, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

September 24, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: July 22, 2004

Case No.: TIA-0147

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's late husband (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 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

[1] **The 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]

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. Procedural Background

The Worker was employed at DOE's Savannah River site. He worked at the site as a laborer, painter, and laundry worker from 1953 to 1982.

The Applicant filed an application with OWA, requesting physician panel review of three illnesses. They were circulatory problems in the lower legs, breathing problems and shortness of breath, and kidney problems. The Applicant claimed that her late husband's illnesses were a result of his duties as a laborer, painter, and laundry worker, which led to exposure to radiation and other occupational hazards. Record at 7.

The Physician Panel rendered a negative determination on each of the claimed illnesses. For the circulatory problem, the Panel agreed that the Worker had the illness; however, the Panel determined that the Worker's exposures were too low to be a factor in the illness. The Panel stated that the Worker's long documented history of hypertension, mild diabetes, and smoking all were contributing factors to the illness. The Panel also noted the Worker's long family history of coronary problems and blood vessel disease. For the breathing problems and shortness of breath, the Panel noted that at the Worker's last examination in 1982 and at previous annual workplace examinations, the Worker's chest x-ray was normal, his lungs were clear, and a pulmonary functions test showed that there was only mild chronic obstructive pulmonary disorder (COPD). The Panel stated that this "mild limitation" was not due to occupational exposures, but rather was consistent with the Worker's history of smoking. For the claimed kidney problems, the Panel noted that there is no

[2] *See* www.eh.doe.gov/advocacy.

documentation of any kidney problem other than a mildly elevated creatinine level, which the Panel stated was linked to the Worker's mild diabetes and hypertension.

The OWA accepted the Physician Panel's negative determination on each claimed illness. 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 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 her appeal, the Applicant expresses disagreement with the Panel's determinations and states that the Panel's report is inconsistent with the fact that other workers have become ill and died. The Applicant's statements do not provide a basis for granting the appeal. The purpose of physician panel review is to examine whether a particular worker's illness is related to his employment at DOE. The purpose of an appeal is to identify an error in the physician panel process. As mentioned above, the Panel considered each claimed illness, determined that the Worker's exposures were too low to be a factor in the illnesses, and cited the Worker's hypertension, diabetes, and smoking as factors. The Applicant's argument on appeal is merely a disagreement with the Panel's medical judgment. Accordingly, the appeal does not provide a basis for finding panel error and, therefore, should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0101 be, and hereby is, denied.

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[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.***

(2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 24, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

April 29, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **July 28, 2004**

Case No.: **TIA-0148**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illnesses were not related to his work at a DOE facility. The OWA accepted the Panel's determinations, 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.[1] Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.[2] Subpart E provides that all Subpart D claims will be considered as Subpart E claims.[3] OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Applicant was employed as a laborer at the DOE's Los Alamos National Laboratory (LANL) for approximately nine months, during the summers of 1976, 1977, and 1978.

The Applicant filed an application with OWA, requesting physician panel review of four illnesses —- beryllium sensitivity, hypothyroidism, skin lesions, and combined hyperlipidemia. The Applicant claimed exposure to beryllium and beryllium dust.

The two-member Panel issued a negative determination for each illness. The Panel determined that the Applicant did not have beryllium sensitivity. The Panel determined that the Applicant had the other conditions, but they were not related to exposure at DOE. In the course of the Panel report, the Panel stated that the Applicant's measured

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[1] Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).
[2] *See id.* § 3675.
[3] See id. § 3681(g).

radiation dose was zero. With respect to the claimed hypothyroidism, the Panel found that the Applicant had the condition, noted that the Applicant's measured radiation dose was zero, and found that other toxins at the site were not associated with this condition. With respect to the claimed skin lesions, the Panel noted actinic keratoses on the forehead, stated that such lesions are usually the result of sun exposure, and noted the 24 year lapse of time between the Applicant's employment and the appearance of the lesion. Finally, with respect to combined hyperlipidemia, the Panel noted the absence of medical literature associating that illness with the toxins that existed at the site.

The OWA accepted the Panel's negative determinations. Subsequently, the Applicant filed the instant appeal, challenging the negative determination.

In his appeal, the Applicant argues that he has beryllium sensitivity. With respect to the other illnesses, he Applicant states that his work as a laborer exposed him to plutonium and other unknown toxic exposures. He argues that the Panel should have discussed the fact that he had a child with birth defects about a year and one-half after his DOE employment. Finally, he argues that his application should have been reviewed by a three-member physician panel.

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 a 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 assertion that he has beryllium sensitivity does not establish Panel error. The assertion is simply a disagreement with the Panel's medical judgment concerning the significance of his test results. We note that the

Panel's judgment is consistent with judgment of the physician that performed the test. Record at 61.

The Applicant's argument that he was exposed to plutonium and toxic chemicals in the course of his employment also does not establish Panel error. These substances were not identified in the original application. Because these are new assertions, the Panel did not have a chance to consider them. Moreover, given the logic of the Panel's decision, we do not believe they would have affected the Panel decision. The Panel noted the Applicant's measured radiation dose of zero and found no relationship between his illnesses and the other chemicals at the site.

The Panel's failure to discuss the Applicant's child does not demonstrate error. The Physician Panel Rule requires that the Panel state the basis of its determination. The Panel discussed the Applicant's medical and exposure history, including his dosimetry, medical and occupational records. The Rule does not require that the Panel address everything that the Applicant, on appeal, claims is relevant.

Finally, the Applicant's argument that he was entitled to a three-member panel is incorrect. Two physicians reviewed the application and issued negative determinations. In that case, referral to a third physician is not required.[4]

As the foregoing indicates, the Applicant has not demonstrated Panel error. In compliance with Subpart E, these claims will be transferred to the DOL for review. OHA's denial of these claims does not purport to dispose of or in any way prejudice the DOL's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0148, and hereby is, denied.

(2) The denial pertains only to the DOE claims and not to the DOL's review of these claims under Subpart E.

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[4] ***See*** **69 Fed. Reg. 13709, *amending* 10 C.F.R. §§ 852.2, 852.11, 852.16.**

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 29, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

April 25, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **July 28, 2004**

Case No.: **TIA-0149**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illnesses were not related to his work at a DOE facility. 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.[1]

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.[2] Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.[3] Subpart E also provides that all Subpart D claims will be considered as Subpart E claims. OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Applicant was employed as a laborer at the DOE's Paducah Gaseous Diffusion plant (the plant) for approximately sixteen years, from 1977 to 1981 and 1993 to present.

The Applicant filed an application with the OWA, requesting physician panel review of three claims —- stomach ulcers, asbestos-related lung disease, and hearing loss. The Applicant asserted that his illnesses were the result of exposure to hazardous chemicals and radiation at the plant.

The Physician Panel rendered a negative determination on each illness. The Panel found evidence of stomach ulcers or asbestos-related lung disease. The Panel

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[1] *See* OWA website, *available at* http://www.eh.doe.gov/advocacy/index.html

[2] Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).

[3] *See id.* § 3675.

determined that the Applicant's hearing loss was attributable to noise exposure, not exposure to toxic substances. The OWA accepted the Physician Panel's negative determination, and the Applicant filed the instant appeal.

The Applicant disagrees with the Panel's determinations regarding asbestos-related lung disease and hearing loss. The Applicant states that he believes his lung problems are the result of asbestosis exposure at DOE and that his hearing loss was the result of noise exposure at DOE.

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 a 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 has not demonstrated Panel error. The Applicant's belief that his lung problems are the result of asbestos exposure is merely a disagreement with the Panel's medical opinion that he has no evidence of asbestos-related lung illness. The Applicant's belief that his hearing loss is attributable to noise is not disputed. Noise is not a toxic substance and, therefore, it is outside the scope of the Rule.[4]

As the foregoing indicates, the record shows that the Physician Panel complied with the Physician Panel Rule, i.e., it addressed the claimed illnesses, made a determination, and explained the reasoning for its conclusion. The arguments presented in the appeal are merely disagreements with the Panel's medical judgment or the scope of the Rule and, therefore, do not indicate error. Accordingly, the appeal should be denied.

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[4] *See* 42 U.S.C. § 7385o(d)(3); 67 Fed. Reg. 52843. *See also, e.g.*, *Worker Appeal*, Case No. TIA-0013, 28 DOE ¶ 80,262 (2003).

In compliance with Subpart E, this 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 Department of Labor's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0149 be, and hereby is, denied.

(2) The 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 25, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

January 6, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **July 28, 2004**

Case No.: **TIA-0150**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illnesses were not related to his 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. For the following reasons, 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 contactor 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, and its web site provides extensive information concerning the 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. OHA continues to process appeals until DOL commences Subpart E administration.

B. Procedural Background

The Applicant was employed as an electrical engineer and a supervisor at the Paducah Gaseous Diffusion Plant (the Plant). He worked at the Plant for approximately 36 years, from 1955 to 1991.

The Applicant filed an application with the OWA, requesting that a physician panel review his claims of Parkinson's disease and chronic bronchitis. The Applicant asserted that his illnesses were due to his exposure to toxic and hazardous materials and chemicals in the Plant buildings in which he worked. The Physician Panel rendered a negative determination with regard to both illnesses. The OWA accepted the Physician Panel's negative determinations. In his appeal, the Applicant challenges the negative determinations.

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.

With respect to his claim for Parkinson's disease, the Applicant provides a somewhat more detailed description of the work that he believes contributed to that disease. He states that, as an electrical engineer and supervisor, he worked in every process and auxiliary building in the plant and was exposed to welding fumes. The Applicant further states that he was unaware of all the hazardous materials to which he came in contact.

The Applicant's more detailed description of his duties does not provide a basis for finding panel error. The Panel examined the records of the Plant and considered the chemicals to which the Applicant was exposed during the course of his employment. It determined that the chemicals that were part of the Plant's exposure matrix were not the source of his illnesses.

With respect to his claim for chronic bronchitis, the Applicant asserts that the Panel "implied that [he] was heavy smoker, when in fact, [he] was never a heavy smoker."[1] He contends that, at most he smoked two packs of cigarettes per day and claimed that one pack "could be classified as burned rather than smoked."[2] Moreover, the Applicant states that he quit smoking in 1965 and that his bronchitis persists. In support of his claim, the Applicant points to the results of pulmonary tests.

The Applicant's description of his smoking also does not provide a basis for finding panel error. In its report, the Panel accurately described the information in the medical records that noted the Applicant's smoking history. The Panel referred to a July 1985 physical examination history from Lourdes Hospital which stated that the Applicant was a "heavy smoker until 1965."[3] The Panel also referenced the Plant's dispensary records which show that the Applicant complained of a cough on several different occasions, starting in November 1965. In any event, the Panel's determination did not turn on the Applicant's

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[1] Applicant's Appeal Letter.
[2] *Id.*
[3] *See* Record, at 62.

smoking history. The Panel found insufficient evidence to conclude that the Applicant's illnesses were related to toxic exposures. The Panel considered the chemicals with which the Applicant may have come in contact during his employment at the Plant. The Panel noted that the Applicant could have been exposed to "*ammonia*, hydrogen sulfide, mercury, *nitrogen dioxide, phosgene* and *TCE*."[4] However, the Panel also noted that there were "no reports of acute exposures in the industrial medical records," and "no indication that his doctors ever attributed his bronchitis to the work environment."[5] Accordingly, the Panel concluded that the Applicant's bronchitis was not related to toxic exposure at the DOE.

As the foregoing indicates, the appeal does not provide a basis for finding panel error and, therefore, should be denied. In compliance with Subpart E, these claims 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 these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0150 be, and hereby is, denied.

(2) The 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: January 6, 2005

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[4] ***See*** **Panel Report, at 2 (emphasis added by Panel).**
[5] ***Id.***

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January 7, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **August 2, 2004**

Case No.: **TIA-0151**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illnesses were not related to his 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 contactor 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, and its website provides extensive information concerning the 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. OHA continues to process appeals until DOL commences Subpart E administration.

B. Procedural Background

The Applicant was employed as an instrument mechanic at the Paducah Gaseous Diffusion Plant (the Plant). He worked at this Plant for approximately 25 years, from March 1974 to January 1999.

The Applicant filed an application with the OWA, requesting that a physician panel review his claims of a nodule on the right lung and heavy metal poisoning. The Applicant asserted that his illnesses were due to exposure to toxic and hazardous materials and chemicals. The Physician Panel rendered negative determinations with regard to both illnesses. The OWA accepted the Physician Panel's negative determinations, and the Applicant filed the instant appeal.

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.

In his appeal, the Applicant asserts that exposure to "different toxins, radiation, contamination, and heavy metals (beryllium, uranium, and plutonium) must have contributed to [his] current condition."[1] In support of this assertion, the Applicant states that he "performed cell changes without a respirator," later wore respirators that covered only one-quarter or one-half of his face, and worked during "releases" in the Plant building.[2] The Applicant also contends that he was a "healthy person" before working at the Plant and that these "illnesses were not a part of [his] life before [his] employment there."[3]

In the course of evaluating the Applicant's claim of a nodule on the right lung, the Physician Panel reviewed occupational clinical records and chest x-rays, dosimetry readings and personal medical records. Subsequent to its review of these materials, the Panel stated that a biopsy of the nodule "was reported as a benign caseating granuloma consistent with a history of a positive TB skin test."[4] The Panel further noted that the "only likely potential occupational candidate for producing this benign granuloma would have been beryllium exposure."[5] However, the Panel ruled out this possibility, concluding that the "negative lymphocyte proliferation test [performed in May 2002], argues against any significant inflammatory response that could conceivably develop into a granuloma."[6] For these reasons, the Panel ruled out the possibility that the Applicant's lung nodule resulted from occupational exposure at the Plant.

The Panel also addressed the Applicant's claim of heavy metal poisoning. It reviewed the results of a 2001 hair analysis test, but noted that the status of such analysis "in 2001 was unreliable as noted by a major article in the Journal of the American Medical Association."[7] In addition, the Panel also examined the results of March 2001 and April 2001 urine tests. In its report, the Panel provided a

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[1] Applicant's Appeal Letter.
[2] *Id.*
[3] *Id.*
[4] Panel Report.
[5] *Id.*
[6] *Id.*
[7] *Id.*

detailed review of these medical records. However, it ultimately determined that these tests did not support a diagnosis of heavy metal poisoning.

As the foregoing indicates, the Physician Panel addressed the Applicant's claims, made a determination, and explained the reasoning for its conclusion. Therefore, the Applicant's argument that his exposure to toxic substances caused his lung nodule and heavy metal poisoning is merely a disagreement with the Panel's medical judgment, rather than an indication of error on the part of the Panel. Accordingly, the appeal should be denied.

In compliance with Subpart E, these claims 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 these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0151 be, and hereby is, denied.

(2) The 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: January 7, 2005

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February 25, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **August 2, 2004**

Case No.: **TIA-0152**

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 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 granted.

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, and its web site provides extensive information concerning the program.[1]

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. 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.

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 as an electrical mechanic and supervisor at DOE's Paducah Gaseous Diffusion Plant. The Applicant worked at the site for 42 years, from 1952 to 1994.

The Applicant filed an application with OWA, requesting physician panel review of 3 illnesses — colon cancer, hearing loss, and cornea transplant.

The Physician Panel rendered a negative determination on three illnesses – colon cancer, hearing loss, and cataracts. The OWA accepted the Physician Panel's determinations on the illnesses. The Applicant filed the instant appeal.

[1] www.eh.doe.gov/advocacy

In his appeal, the Applicant does not challenge the determinations for colon cancer and hearing loss. Instead, the Applicant appeals the determination on cataracts. The Applicant argues that the Panel did not fully consider his ocular claims. The Appellant states that those claims included endothelial dystrophy and a cornea transplant. In addition, the Applicant maintains that the Panel understated his exposures.

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.

We agree with the Applicant's contention that the Panel did not fully consider his ocular claims. The record indicates that the Applicant claimed that toxic exposures to his eyes while working at Paducah led to his poor vision and resultant conditions of cataracts and endothelial dystrophy, and a cornea transplant. He listed cornea transplant on his application and then supplemented that claim to specify poor vision resulting in cataracts and endothelial dystrophy. OWA Record at 24, 662, 694. Accordingly, those claims should have been considered.

We also agree that the Panel understated the Applicant's exposures. The Panel described his radiation exposures as consistently below harmful levels. In doing so, the Panel failed to discuss numerous incidents in the OWA record. As indicated by the Applicant in his Appeal, the record shows the Applicant to have been placed on restrictive duty because of elevated levels of uranium in his urine. OWA Record at 123, 377-380. In addition, the Panel failed to mention exposures to UF6 gasses and multiple incidents of flash burns in the eyes from hydrofluoric acid. OWA Record at 4, 274. Because the Panel apparently overlooked the foregoing exposures, further consideration of the claim is warranted.

In summary, further review of this case should focus on the identified ocular conditions of poor vision, cataracts, and endothelial dystrophy, and resultant cornea transplant surgery.

The documented elevated uranium levels and exposures to hydrofluoric and UF6 gasses should also be considered.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0152 be, and hereby is, granted.

(2) The Physician's Panel Report did not consider all of the claimed eye conditions and understated the Applicant's exposure to toxic substances. Reconsideration is in order.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 25, 2005

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March 23, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **August 9, 2004**

Case No.: **TIA-0153**

XXXXXXX(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 granted.

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, and its web site provides extensive information concerning the program.[1]

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. 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.

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 as a secretary at the Portsmouth Gaseous Diffusion Plant (the plant). In her application, she stated that she worked at the plant for approximately 32 years -- from 1953 to 1985. She also claimed to have worked sporadically on part-time assignments at the plant from 1985 to 1994. She requested physician panel review of four illnesses – colon cancer, lung cancer, breast cancer, and tongue cancer. The OWA forwarded the application to the Physician Panel, indicating to the Panel that the Applicant worked at the plant for 19 years, from 1953 to 1972. The OWA apparently relied on a letter from the site to that effect. See OWA Record at 16.

[1] www.eh.doe.gov/advocacy

The Physician Panel rendered a negative determination on all illnesses. The OWA accepted the Physician Panel's determinations on the illnesses. The Applicant filed the instant appeal.

In her appeal, the Applicant challenges the determinations on each of the illnesses and argues that the Panel did not consider her complete employment period. The Applicant states that her employment history detailed within the OWA record verifies that she was exposed to toxic substances for a longer period than the Panel considered.

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.

We agree with the Applicant's contention that the Panel did not consider her entire employment period. The Panel report states that the Applicant was employed at the plant until 1972. Although that employment period is consistent with a letter from the site, see OWA Record at 16, there are numerous instances in the record that show the Applicant was employed full time at the plant through 1985 in a clerical position. OWA Record at 544, 549, 550. Accordingly, this additional period of employment should have received consideration. In addition, we believe further consideration should be given to the Applicant's claim that she was employed part time at the plant from 1985 to 1994. The Record provides some support for that assertion, OWA Record at 22, and, therefore, it is recommended that the Applicant be provided any opportunity to document that employment. OWA Record at 123.

As the foregoing indicates, the Panel based its determination on inaccurate information concerning the Applicant's dates of employment and, consequently, length of exposures, see OWA Record at 123 (exposure information). Accordingly, this application should receive further consideration.

In compliance with Subpart E, these claims 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 review of these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0153 be, and hereby is, granted.

(2) The Physician's Panel Report did not consider the Applicant's full period of employment. Reconsideration is in order.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 23, 2005

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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**

XXXXXXXXXXX (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

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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

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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

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September 16, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: August 6, 2004

Case No.: TIA-0155

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 employed as a janitor 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 granted and the application remanded to OWA.

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

[1] **The 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 as a janitor at DOE's Savannah River site. The Applicant worked at the site from 1992 to 1996. Record at 12.

The Applicant filed an application with OWA, requesting physician panel review of four illnesses. They were kidney disease, high blood pressure, sleep disorder, and asthma. The Applicant claimed that her illnesses were a result of her cleaning areas with "a lot of dust and other things," using cleaning chemicals, and cleaning areas with no ventilation. Record at 12.

The Physician Panel rendered a determination on three of the four illnesses. The Panel rendered negative determinations on the claimed kidney disease, hypertension, and sleep disorder. For the kidney disease, the Panel agreed that the Applicant had the problem, but found that there is no evidence of any exposures to any agents associated with renal failure.[3] With regard to the high blood pressure, the Panel agreed that the Applicant had the problem. However, the Panel found that the toxic exposures at the DOE facility did not contribute to the development of the Applicant's hypertension. For the sleep disorder, the Panel stated that it was unknown whether the problem was one of insomnia or sleep apnea. In any event, the Panel found that toxic exposures at the DOE facility did not contribute to the disorder. The Panel did not consider the Applicant's claim of asthma as an illness.

The OWA accepted the Physician Panel's negative determinations: the negative determination on the kidney disease, the negative determination on the high blood pressure, and the negative determination on the sleep disorder.

In her appeal, the Applicant maintains that the negative determinations are incorrect. The Applicant contends that her illnesses are a result of her cleaning at the Savannah River site.

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[2] *See* www.eh.doe.gov/advocacy.

[3] The Panel stated that "renal failure has been associated with occupational exposures to lead, copper, chromium, tin, mercury, welding fumes, silicon-containing compounds, grain dust and oxygenated hydrocarbons." *See* OWA Physician Panel Report at 2.

The Applicant also claims that the Panel failed to consider her asthma.

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 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,[4] applied the wrong standard,[5] or failed to explain the basis of its determination.[6] On the other hand, mere disagreements with the Panel's opinion are not a basis for finding Panel error.

In this case, the Applicant's argument on appeal—that her illnesses were a result of her cleaning the facility at Savannah River—is not a basis for finding Panel error. As mentioned above, the Panel addressed the claimed illnesses of kidney disease, high blood pressure, and sleep disorder, made a determination on each of those illnesses, and explained the basis of those determinations. The Applicant's argument on appeal is merely a disagreement with the Panel's medical judgment, rather than an indication of Panel error.

However, the Panel did not consider all of the claimed illnesses as required by the Rule. *See* 10 C.F.R. § 852.12. The Applicant claimed asthma in her application, but the Panel did not consider it. Accordingly, the application should be remanded to OWA for consideration of this claimed illness.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0155 be, and hereby is, granted as set forth in paragraph 2 below.

(2) The application that is the subject of this Appeal is remanded to the Office of Worker Advocacy for further processing consistent with this decision.

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

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

[6] ***Id.***

(3) This is the final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 16, 2004

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January 6, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: August 6, 2004

Case No.: TIA-0156

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee at a DOE facility. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the worker's illnesses were not related to his work at a DOE facility. 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 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 contactor 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, and its web site provides extensive information concerning the program.[1]

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

[1] **www.eh.doe.gov/advocacy**

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. In addition, under Subpart E, an applicant is deemed to have an illness related to a work related toxic exposure at DOE if the applicant received a positive determination under Subpart B.

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 at the DOE's Oak Ridge site. He worked at the site, primarily as a security guard, for nearly thirty years, from 1967 to 1996, at times intermittently.

The Applicant filed an application with the OWA, requesting physician panel review of two illnesses – colon cancer and a stroke. The Applicant asserted that his illnesses were the result of exposure to hazardous chemicals in the course of his employment. The Physician Panel rendered a negative determination for both of these illnesses. The Panel found that there was insufficient evidence establishing a link between the Applicant's workplace exposures and his colon cancer. The panel further determined that there was no documented evidence establishing a relationship between occupational exposures and the occurrence of a stroke.

The OWA accepted the Physician Panel's negative determinations and, subsequently, 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 exposure to toxic substances during employment at a DOE facility. The Rule requires that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at the DOE site, and state the basis for that finding.[2]

[2] 10 C.F.R. § 852.12.

The Applicant argues that the Physician Panel erred in determining that his illnesses were not related to his workplace exposures. The Applicant points to the DOL Subpart B determination that the Worker developed colon cancer after working at a DOE site. The Applicant also provides a list of several areas of the site where radiation was present in which he worked.

With regard to the claimed colon cancer, Subpart E has rendered moot the physician panel determination. A positive DOL Subpart B determination meets the Subpart E requirement that the illness be related to toxic exposure during employment at DOE. The Applicant received a positive DOL Subpart B determination for colon cancer. Accordingly, further consideration of alleged errors in the Panel report with regard to the claimed colon cancer is not necessary.

With regard to the claimed stroke, the Applicant's arguments do not provide a basis for finding panel error. The Panel addressed the illness, made a determination on the illness, and explained the basis of that determination. The Panel determined that there was no evidence of a relationship between the illness and exposure to toxic substances while in the course of the Applicant's employment. The Panel noted that the stroke occurred three years after the termination of the Applicant's employment. The Panel also noted the presence of strong non-occupational risk factors such as smoking and a family history of high blood pressure and stroke. The Applicant's argument is a mere disagreement with the Panel's medical judgment rather than an indication of panel error. Accordingly, the Applicant's appeal regarding the claimed stroke does not provide a basis for finding panel error.

As the foregoing indicates, the Applicant's claim does not provide 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 or in any way prejudice the Department of Labor's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0156 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: January 6, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

January 7, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: August 10, 2004

Case No.: TIA-0158

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's late husband (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 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 contactor 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, and its web site provides extensive information concerning the program.[1]

[1] **www.eh.doe.gov/advocacy**

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. 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.

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 as a chemical operator and laborer at DOE's Fernald site. The Applicant worked at the site for nearly 15 years, from 1954 to 1969.

The Applicant filed an application with OWA, requesting physician panel review of two illnesses – kidney cancer and brain cancer.

The Physician Panel rendered a negative determination on each claimed illness. For the kidney cancer, the Panel agreed that the Applicant had the illness but determined that the Worker did not have occupational exposures known to be related to kidney cancer. The Panel noted that kidney cancer is often associated with a history of smoking. For the brain cancer, the Panel agreed that the Worker had the illness but stated that the brain cancer represented metastasis of the kidney cancer.

The OWA accepted the Physician Panel's negative determinations on the claimed illnesses. The Applicant filed the instant appeal.

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.

In her appeal, the Applicant maintains that the negative determinations are incorrect. She advances several arguments. First, the Applicant argues that her husband worked in a very dirty work environment. Second, the Applicant provides an excerpt from a medical textbook which she says discusses kidney cancer. Third, the Applicant argues that her husband worked at four different plants at the Fernald site and was exposed to uranium and organic chemicals and acids over the course of his employment. Lastly, the Applicant argues that although her husband smoked, radiation and smoking are known to have a synergistic effect and, in any event, her husband stopped smoking in 1981.

The Applicant's arguments are not a basis for finding panel error. As mentioned above, the Panel addressed the claimed illnesses, made a determination on each illness, and explained the basis of that determination. Although the Panel listed smoking as a known factor related to kidney cancer, the key determination here was that the Applicant's illness was not related to any workplace exposures. Also, the excerpt from the medical textbook provided by the Applicant discusses radiation therapy for kidney cancer, not radiation as a cause of kidney cancer. In any event, the Applicant's arguments are a mere disagreement with the Panel's medical judgment rather than an indication of panel error.

As the foregoing indicates, the appeal does not provide 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 or in any way prejudice the Department of Labor's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0158 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: January 7, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

April 13, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **August 10, 2004**

Case No.: **TIA-0159**

XXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits for her late husband (the Worker). 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 did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Worker filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the Appeal should be dismissed as moot.

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 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) (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 welder and a general maintenance mechanic at the Paducah Gaseous Diffusion Plant (the plant). He worked at the plant for approximately 35 years, from 1952 to 1987.

The Applicant filed an application with OWA, requesting physician panel review of the following illnesses: lung cancer, respiratory failure, renal disease and renal failure. The Applicant claimed that these illnesses were due to exposures to toxic and hazardous materials at the plant.

The Physician Panel rendered a negative determination for each claimed illness. The Panel agreed that the Applicant had lung cancer but did not find that it was related to the Worker's employment with DOE. The Panel stated that the lung cancer was probably the result of smoking. The Panel indicated that there was no evidence of renal disease prior to the Worker's terminal illness from lung cancer. The Panel

found that the Worker's progressive decline in health was a direct result of the lung cancer. The Panel concluded that the renal failure was a terminal event secondary to the primary cancer and the resulting respiratory failure. *See* Physician's Panel Report. The OWA accepted the Physician Panel's determination. Subsequently, the Applicant filed the instant appeal.

In her appeal, The Applicant does not challenge the Panel's determination that the Worker had no evidence of renal disease prior to his terminal illness from lung cancer and that the renal and respiratory failure were associated with the terminal illness. Instead, the Applicant challenges the negative determination on the lung cancer. The Applicant's major objection is that there are notations in the OWA record that showed the Worker inhaled uranium and was burned by toxic chemicals during employment at the plant. *See* Applicant's Appeal Letter. Also included in the OWA record is a positive DOL Subpart B determination.

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.

A positive DOL Subpart B determination was received. A positive DOL Subpart B determination satisfies the Subpart E requirement that the illness be related to a toxic exposure during employment at DOE. Authorization Act § 3675(a). *See also Worker Appeal*, Case No. TIA-0228, 29 DOE ¶ 80,202 (2005). Accordingly, Subpart E has rendered moot the physician panel determination and consideration of any challenge to the Panel report is not necessary.

As the foregoing indicates, the appeal should be dismissed as moot. 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-0159 be, and hereby is, dismissed.

(2) This dismissal 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:

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

January 11, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **August 11, 2004**

Case No.: **TIA-0161**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illness was not related to his 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 contactor 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, and its web site provides extensive information concerning the 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. OHA continues to process appeals until DOL commences Subpart E administration.

B. Procedural Background

The Applicant was employed as a telecom engineer and a systems engineer at the Westinghouse Savannah River Site (the site). He worked at this site for approximately 16 years, from January 1989 to the present.

The Applicant filed an application with the OWA, requesting that a physician panel review his chronic dermatitis. The Applicant asserted that his illness was due to exposure to toxic and hazardous materials and chemicals, including ingesting water that was contaminated by trichloroethylene, in the site buildings in which he worked. The Physician Panel rendered a negative determination and the OWA accepted it. The Applicant subsequently filed the instant appeal.

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.

In his appeal, the Applicant states that the date of the illness onset noted by the Panel is incorrect. He asserts that the onset of the chronic dermatitis coincided with his ingestion of contaminated water in 1989, rather than 2000 as noted by the Panel. The Applicant claims that he drank water which was "contaminated with trichloroethylene that was 4 times the standard domestic drinking water of 0.005ppm."[1] The Applicant also states that he has seen three dermatologists and one allergist for treatment of his condition. Although none of these doctors can determine the "etiology of the chronic dermatitis, when asked if ingesting trichloroethylene could be a significant factor in causing or contributing to this illness, [they stated that] the answer is yes."[2] In addition, the Applicant claims exposure to other chemicals and toxic substances in the course of working at the site, including asbestos and radiation. He asserts that "incidental exposure to radiation and asbestos while suffering from chronic dermatitis, an open wound, was a significant factor in aggravating [this] condition."[3]

In its report, the Panel wrongly listed the "date of onset" of the illness as 2000, instead of 1989. However, the narrative of the report shows that the Panel contemplated that the onset of the Applicant's chronic dermatitis occurred before 2000. The Panel cites a medical record documenting the Applicant's referral to a dermatologist in 1991 as evidence that he had the alleged condition.[4] In any event, the record does not provide any evidence that the Applicant ingested trichloroethylene-contaminated water at the site. Therefore, the Panel could not evaluate whether ingestion of contaminated water could have caused the Applicant's condition. In addition, the Panel could find no evidence supporting the Applicant's claims that exposure to radiation and asbestos aggravated his condition. The record did not contain dosimetry records, the National Institute for Occupational Safety and Health (NIOSH) dose reconstruction, site analysis, area sampling, or industrial hygiene records demonstrating such exposures. Accordingly, the Panel reasonably determined that in his position as

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[1] Applicant's Appeal Letter.
[2] *Id.*
[3] *Id.*
[4] *See* Physician Panel Report, at 1.

telecom and systems engineer, the Applicant's "job duties would not expose him to any chemical or radiation health hazards."[5]

As the foregoing indicates, the Physician Panel addressed the Applicant's claims, made a determination, and explained the reasoning for its conclusion. The Applicant's appeal merely expresses disagreement with the Panel's medical judgment, rather than an indication of error on the part of the Panel. Therefore, the appeal should be denied.

In compliance with Subpart E, this 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 Department of Labor's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0161 be, and hereby is, denied.

(2) The 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: January 11, 2005

[5] *Id; see also* Record, at 17-18.

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

January 6, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **August 11, 2004**

Case No.: **TIA-0162**

XXXXXXXXXX (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 XXXXXXXXXX (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illness was not related to his work at a DOE facility. 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 contactor 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, and its web site provides extensive information concerning the 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. OHA continues to process appeals until DOL commences Subpart E administration.

B. Procedural Background

The Worker was employed as a patrolman, raw material operator and machinist at the DOE's Savannah River site (the site). He worked at the site for approximately thirty-two years, from January 1953 to April 1985.

The Applicant filed an application with OWA, requesting physician panel review of prostate cancer. The Panel determined that the Worker's illness was not due to toxic exposure at the DOE site. The OWA accepted the Panel's negative determination. In her appeal, the Applicant challenges the negative determination.

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

In her original submission to the OWA, the Applicant asserted that the Worker worked with enriched uranium and the construction of target rods. In her appeal, the Applicant adds that the Worker was exposed to radiation which was not well-monitored in the early years of his employment at the site.[1]

In its report, the Physician Panel observed that "the claimant's history is significant for evidence of exposure to ionizing radiation."[2] However, the Panel also stated that the Worker's onset of prostate cancer occurred at "the expected age that malignancy occurs in the general population."[3] Moreover, the Panel stated that there is no association between ionizing radiation and prostate cancer. Therefore, the Panel concluded that the Worker's cancer was not related to exposure to radiation at the site.

As the foregoing indicates, the Physician Panel addressed the claimed illness, made a determination, and explained the reasoning for its conclusion. The Applicant's argument about the Worker's exposures is merely a disagreement with the Panel's medical judgment; it is not a basis for finding Panel error. Accordingly, the appeal should be denied.

In compliance with Subpart E, this 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 Department of Labor's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0162 be, and hereby is, denied.

(2) The denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.

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[1] *See* Applicant's Appeal Letter.
[2] Panel Report at 1.
[3] *Id.*

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 6, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

April 20, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **August 12, 2004**

Case No.: **TIA-0163**

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.[1]

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 in various capacities at the Oak Ridge Plant (the plant). He worked as a lab tech and scheduler from 1979 to 1995. From 1995 to 1996 he was employed as an illustrator in the Y-12 facility. He requested physician panel review of "blood clots," and "seizure/headache/stroke." The OWA forwarded the application to the Physician Panel.

The Physician Panel rendered a negative determination. The Panel described the blood clots as thrombophlebitis with a date of onset of 1994. The Panel described the seizure/headache/stroke as a cerebrovascular hemorrhage with accompanying headache and seizure. The Panel discussed some of

[1] www.eh.doe.gov/advocacy

the Applicant's exposures at the plant, but stated that the Applicant's illnesses were not known to be associated with occupational exposures to toxic substances.

The OWA accepted the Physician Panel's determinations on the illnesses. The Applicant filed the instant appeal.

In his appeal, the Applicant alleges factual errors in the Panel report. He contends that the Panel incorrectly identified the date of onset of his thrombophlebitis, the location of his cerebrovascular hemorrhage, and certain risk factors. Finally, the Applicant claims sensitivity to toxic substances not specifically mentioned in the Panel report.

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 has not alleged an error that is material to the Panel determination. The Panel stated that the Applicant's illnesses were not known to be associated with occupational exposure to toxic substances. Given that rationale, the Applicant's assertions of factual errors concerning the date of onset of his thrombophlebitis, the location of his cerebrovascular hemorrhage, his risk factors for those illnesses, and his sensitivity to certain substances, are not assertions of errors that are material to the determination. Accordingly, any further consideration of these assertions is not warranted.

In compliance with Subpart E, these claims 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 review of these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0163 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 20, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

February 23, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **August 17, 2004**

Case No.: **TIA-0164**

XXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' benefits for her late father (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illness was not related to his 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 dismissed as moot.

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, and its web site provides extensive information concerning the 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. OHA continues to process appeals until DOL commences Subpart E administration.

B. Procedural Background

The Worker was employed as a carpenter and construction worker at the Paducah Gaseous Diffusion Plant (the plant).

The Applicant filed an application with the OWA, requesting that a physician panel review the Worker's stomach cancer. The Applicant asserts that this illness was due to exposure to toxic and hazardous materials at the site. The Physician Panel rendered a negative determination which the OWA accepted. Subsequently, the Applicant filed the instant appeal.

In her appeal, the Applicant claims that the Worker's illness was caused by exposure to toxic substances at the plant. She asserts that contrary to the physician panel report and "based on site information, radiation sources and asbestos were present in many work areas"[1] during the time period of her father's employment. The Applicant also argues that the compensation which she received from the

[1] Applicant's Appeal Letter.

DOL program is evidence that her father contracted stomach cancer as a result of working at a DOE facility.

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 Applicant's positive DOL Subpart B determination satisfies the Subpart E requirement that the illness be related to toxic exposure during employment at DOE. Accordingly, Subpart E has rendered moot the physician panel determination and consideration of any challenge to the Panel report is not necessary.

As the foregoing indicates, the appeal should be dismissed as moot. 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 dismissal 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-0164 be, and hereby is, dismissed.

(2) This dismissal 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: February 23, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

February 24, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **August 18, 2004**

Case No.: **TIA-0165**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' benefits for her late husband (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illness was not related to his 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 dismissed as moot.

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, and its web site provides extensive information concerning the 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. OHA continues to process appeals until DOL commences Subpart E administration.

B. Procedural Background

The Worker was employed as a mechanic, repairman and truck driver at the Oak Ridge Gaseous Diffusion Plant (the plant). He worked at the plant for three years, from 1944 to 1947.

The Applicant filed an application with the OWA, requesting that a physician panel review the Worker's lung disease. The Applicant asserted that this illness was due to exposure to toxic and hazardous materials at the plant. The Physician Panel rendered a negative determination which the OWA accepted. Subsequently, the Applicant filed the instant appeal.

In her appeal, the Applicant asserts that the Worker's illness was caused by exposure to toxic chemicals at the plant. The Applicant attaches a positive DOL Subpart B determination, which finds that the Worker's lung disease was chronic beryllium disease.

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 Applicant's positive DOL Subpart B determination satisfies the Subpart E requirement that the illness be related to toxic exposure during employment at DOE. Accordingly, Subpart E has rendered moot the physician panel determination and consideration of any challenge to the Panel report is not necessary.

As the foregoing indicates, the appeal should be dismissed as moot. 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-0165 be, and hereby is, dismissed.

(2) This dismissal 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:February 24, 2005

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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 18, 2004**

Case No.: **TIA-0166**

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's late husband (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 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

[1] **The 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 Worker was employed as a laboratory attendant at DOE's Oak Ridge site. The Worker worked at the site for 15 years, from 1961 to 1976. Record at 8.

The Applicant filed an application with OWA, requesting physician panel review of one illness, myocardiopathy. The Applicant claimed that her late husband's illness was a result of his duties involving the care and feeding of animals used in radiation and chemical exposure experiments. Record at 8.

The Physician Panel rendered a negative determination on the claimed myocardiopathy. The Panel agreed that the Worker had cardiac valvular disease, but stated that the disease is not work related and is not considered an occupational disease.

The OWA accepted the Physician Panel's negative determination on the mycardiopathy.

In her appeal, the Applicant maintains that the negative determination is incorrect. The Applicant contends that her late husband's illness is a result of his caring for animals used in radiation and chemical exposure experiments at the Oak Ridge site. The Applicant also claims that she has no knowledge of her late husband having cardiac disease before he began working at the Oak Ridge site.

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 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

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[2] *See* www.eh.doe.gov/advocacy.

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

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 this case, the Applicant's argument on appeal—that her late husband's illness was a result of his caring for animals at the Oak Ridge site—is not a basis for finding Panel error. As mentioned above, the Panel addressed the claimed illness of myocardiopathy, made a determination on the illness, and explained the basis of that determination—that cardiac valvular disease is not an occupational illness. The Applicant's argument on appeal is merely a disagreement with the Panel's medical judgment, rather than an indication of Panel error. Accordingly, the appeal does not provide a basis for finding panel error and, therefore, should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0166 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

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

[5] ***Id.***

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

April 15, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **August 18, 2004**

Case No.: **TIA-0167**

XXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illness was not related to his 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 Applicant was employed as a lab technician, maintenance electrician and firefighter at the Oak Ridge Gaseous Diffusion Plant (the plant). He worked at the plant for approximately 28 years, in periods ranging from 1973 to 2002.

The Applicant filed an application with the OWA, requesting physician panel review of his prostate cancer. The Applicant claims that his illness was due to exposures to toxic and hazardous materials during the course of his employment. The Physician Panel listed a number of toxic substances and found that there was insufficient evidence establishing a link between the exposures and the Applicant's prostate cancer. The Panel cited references stating that they show that "radiation exposures to the prostate have demonstrated significant resistance to malignant change." *See* Panel Report at 2. The Panel also stated there was no established relationship between polychlorinated biphenyls (PCBs) and prostate neoplasm. *See* Physician's Panel Report at 2. The Panel rendered a negative determination, which the OWA accepted.

Subsequently, the Applicant filed the instant appeal. In his appeal, the Applicant alleges that his illness was caused by exposure to ionizing radiation, solvents, PCBs and other chemicals at the plant. With respect to radiation exposure, the Applicant indicates that the Panel determination is consistent with a National Institute of Occupational Safety and Health dose reconstruction. The Applicant claims, however, that the Panel's negative determination is based solely on exposures above set limits and does not take into account the fact that many studies have shown that low dose exposure plays a significant role in cell damage and mutation. The Applicant also states that research has shown that hormone levels are increased by PCBs and that testosterone is directly linked to prostate cancer growth. *See* Applicant's Appeal Letter.

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 Applicant's arguments do not provide a basis for finding Panel error. As mentioned above the Panel addressed the claimed condition, made a determination, and explained the basis of the negative determination. In making its determination, the Panel applied the correct standard, *i.e.*, "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." *See* Panel Report at 1; 10 C.F.R. 852.8. The Applicant's argument -- that the Panel's references to medical literature did not include certain studies -- is a disagreement with the Panel's medical judgment on the significance of radiation and PCB exposure in general and in this case. A disagreement with the Panel's medical judgment does not indicate Panel error.

As the foregoing indicates, 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-0167, 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 15, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

September 17, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: August 20, 2004

Case No.: TIA-0168

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 reimburse the contractor for any costs that it incurs if it contests

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

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 as a secretary at DOE's Oak Ridge site. The Worker worked at the site for 54 years, from 1944 to 1947 and from 1949 to 2000. Record at 9.

The Applicant filed an application with OWA, requesting physician panel review of one illness, breast cancer with metastasis to the left chest wall. The Applicant claimed that her illness was a result of working for many years in different buildings of the Oak Ridge site in which she may have been exposed to toxic substances. Record at 8.

The Physician Panel rendered a negative determination on the claimed breast cancer with metastasis to the left chest wall. The Panel agreed that the Applicant had the claimed illness but stated that the illness was not a result of a toxic exposure at DOE. Specifically, the Panel stated that although the Applicant worked in buildings where radioactivity was present and there was evidence of radioactivity detected via dosimeter and in her urine during the 1950's, there was insufficient evidence in the medical literature to establish a causal link between occupational radiation exposure as an adult and breast cancer. The Panel further stated that there are no reports of other workplace exposures involving secretarial duties that would suggest other workplace risk factors related to breast cancer.

The OWA accepted the Physician Panel's negative determination on the claimed breast cancer with metastasis to the left chest wall.

In her appeal, the Applicant maintains that the negative determination is incorrect. The Applicant contends that her illness was a result of her working for many years in different buildings at the Oak Ridge site. The Applicant also claims that for several years in the course of her duties, she walked back and forth between buildings alongside in-ground radioactive waste storage.

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

[2] *See* www.eh.doe.gov/advocacy.

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.

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 this case, the Applicant's argument on appeal—that her illness was a result of her working in various buildings at the Oak Ridge site—is not a basis for finding Panel error. As mentioned above, the Panel addressed the claimed illness of breast cancer with metastasis to the left chest wall, made a determination on the illness, and explained the basis of that determination. The Applicant's argument on appeal is merely a disagreement with the Panel's medical judgment, rather than an indication of Panel error. Accordingly, the appeal does not provide a basis for finding panel error and, therefore, should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0166 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

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[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.***

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

March 29, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **August 20, 2004**

Case No.: **TIA-0170**

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 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.[1]

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 as a process operator at the Portsmouth Gaseous Diffusion Plant (the plant). In his application, he stated that he worked at the plant for approximately six years -- from November 1954 to April 1961. He requested physician panel review of two illnesses -- prostate cancer and chronic obstructive pulmonary disorder (COPD). The OWA forwarded the application to the Physician Panel.

The Physician Panel rendered a negative determination on both illnesses. In reviewing the Applicant's prostate cancer, the Panel discussed actual and potential exposures at the plant, including an incident of uranium hexafluoride (UF6) exposure.

[1] www.eh.doe.gov/advocacy

The Panel concluded that the Applicant's occupational exposures were not a factor in his prostate cancer. In considering the Applicant's COPD, the Panel cited smoking and a diagnosis of asbestosis.

The OWA accepted the Physician Panel's determinations on the illnesses. The Applicant filed the instant appeal.

In his appeal, the Applicant states that his exposures at the plant resulted in his illnesses. He cites the incident of UF6 exposure and attributes concretions in his prostate to that exposure. He also contends that UF6 and asbestos exposure at the plant caused his COPD.

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 Applicant has not demonstrated Panel error in the prostate cancer determination. The Panel acknowledged the incident of UF6 exposure but rejected the Applicant's contention that the exposure caused concretions in the Applicant's prostate, stating that there is no medical literature to suggest that prostate concretions result from radiation exposure. The Applicant has not pointed to any part of the record that indicates Panel error concerning that statement.

Similarly, the Applicant has not demonstrated Panel error in the COPD determination. The Panel rejected radiation as a factor, citing smoking and pre-DOE asbestos exposure. The Applicant's assertion that radiation exposure contributed to his COPD is merely a disagreement with the Panel's judgment. The Applicant's assertion that asbestos exposure at DOE contributed to his COPD lacks support in the record, which did not reflect asbestos exposure at DOE.

As the foregoing indicates, the Panel based its determination on the record and provided a detailed explanation of its determinations. If the Applicant wishes DOL to consider his

assertion of asbestos exposure at the plant, he should raise the matter with DOL.

In compliance with Subpart E, these claims 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 review of these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0170 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: March 29, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

May 10, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 18, 2004**

Case No.: **TIA-0172**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illness was not related to his work at a DOE facility. The OWA accepted the Panel's determination, and the Applicant appealed to 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 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.[1] Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.[2] Subpart E provides that all Subpart D claims will be considered as Subpart E claims.[3] OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Applicant was employed as an engineer and auditor at the DOE's Rocky Flats site (the site) for many years. The Applicant filed an application with the OWA, requesting physician panel review of non-Hodgkin's lymphoma (NHL).

The Panel issued a negative determination. The Panel stated that the cause of NHL is being debated and that there are many proposed risk factors. The Panel noted some studies showing an increased risk among workers exposed to solvents, but found that the Applicant did not have significant solvent exposure. The Panel stated that the Applicant would not have spent the majority of his day on the production floor and, when there, would not have handled solvents frequently. The Panel concluded that "considering all of the available data . . . there is no evidence for a significant work contribution" to the Applicant's NHL. The Panel then speculated that the Applicant's brother might have had NHL involving the bone marrow.

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[1] Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).
[2] *See id.* § 3675(a).
[3] See id. § 3681(g).

The OWA accepted the determination, and the Applicant appealed. The Applicant disagrees with the Panel's statement that he would not have spent the majority of his day on the production floor and, when there, would not have handled solvents frequently. The Applicant also states that the Panel's reference to his brother is incorrect. Finally, the Applicant believes that the combination of radiation and solvent exposure should be sufficient to establish that "it is at least as likely as not" that exposures were a significant factor in his NHL.

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 a 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 disagreement with the Panel's statement concerning the extent of his exposure to solvents does not indicate Panel error. The record does not indicate that the Applicant spent more than half of his time on the production floor or that his work on the floor involved significant exposure. If the Applicant wishes to seek further consideration based on the description of his work set forth in his appeal, the Applicant should contact DOL on how to proceed.

The Applicant's argument that the Panel incorrectly stated that his brother had cancer does not indicate material Panel error. As indicated above, the Panel's speculation about the Applicant's brother was not a factor in its determination.

Finally, the Applicant's argument that radiation and solvent exposure, taken together, support a positive determination does not indicate panel error. That argument

is a disagreement with the Panel's medical judgment, not a basis for finding Panel error.

As the foregoing indicates, the Applicant has not identified Panel error. Accordingly, the appeal should be denied.

In compliance with Subpart E, this claim will be transferred to the DOL for review. OHA's denial of these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0172 be, and hereby is, denied.

(2) The denial pertains only to the DOE claims and not to the DOL's review of these claims 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 10, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

March 24, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **August 23, 2004**

Case No.: **TIA-0173**

XXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits for her late husband (the Worker). 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 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 dismissed as moot.

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 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) (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 welder at the Portsmouth Gaseous Diffusion Plant (the plant). He worked at the plant intermittently from 1956 to 1969.

The Applicant filed an application with OWA, requesting physician panel review of the Worker's prostate cancer with metastasis to the bone. The Applicant claimed that the illness was due to exposures to toxic and hazardous materials at the plant. The Physician Panel rendered a negative determination. The Panel stated that there was a strong family history of prostate cancer and that the Worker's prostate cancer was more likely the result of a familial susceptibility. *See* Physician's Panel Report.

The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal. In her appeal, the Applicant challenges the negative determination. The Applicant argues that the Panel erred when it concluded that the Worker's illness was not related to his employment at the plant. The Applicant indicated that she received a positive DOL Subpart B determination on behalf of her husband. *See* Applicant's Appeal Letter.

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.

A positive DOL Subpart B determination was received. That determination satisfies the Subpart E requirement that the illness be related to a toxic exposure during employment at DOE. Authorization Act § 3675(a). Accordingly, Subpart E has rendered moot the physician panel determination and consideration of any challenge to the Panel report is not necessary.

As the foregoing indicates, the appeal should be dismissed as moot. 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 dismissal 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-0173 be, and hereby is, dismissed.

(2) This dismissal 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: March 24, 2005

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April 1, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: August 24, 2004

Case No.: TIA-0174

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 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 as a project manager assistant and clerk/typist at DOE's Oak Ridge site (the site). The Applicant filed an application with OWA, requesting physician panel review of one illness – breast cancer.

The Physician Panel rendered a negative determination on the claimed breast cancer. The Panel determined that the Applicant's radiation exposure levels were insufficient to have caused, contributed to, or aggravated her illness.

The OWA accepted the Physician Panel's determinations on the claimed illnesses. The Applicant filed the instant appeal.

In her appeal, the Applicant maintains that the Panel's negative determination is incorrect. The Applicant states that the National Institute for Occupational Safety and Health (NIOSH) dose reconstruction information should have been a part of her file. She further states that the dates of employment discussed in the panel report were incorrect, and asserts that the corrected dates would have made a difference in the Panel's determination of her claim.

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 Applicant's argument that the NIOSH dose reconstruction report should have been part of her file does not indicate OWA or panel error. The case history shows that the NIOSH report indicated less than a 50% probability of causation. Record at 21. Accordingly, the record indicates that the inclusion of the NIOSH dose reconstruction would not have changed the result. If the Applicant believes that the NIOSH report supports her claim, she should contact the DOL on how to proceed.

The Applicant's assertion regarding her employment period also does not indicate panel error. In making its determination, the Panel used the dates 1985 to 1997. Those are the dates listed by the Applicant on her application. Record at 17-18. Although the Applicant now asserts that she worked at the site until 1998, there is nothing in the record that indicates that the Applicant worked at the site beyond 1997. Accordingly, the Panel's consideration of the dates listed in the record was not panel error. If the Applicant wishes to pursue her assertion that her employment ended in 1998, rather than 1997, she should contact DOL on how to proceed.

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 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-0174 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 1, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

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

[1] **The 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:

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[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

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

May 18, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **August 24, 2004**

Case No.: **TIA-0177**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that his illnesses were not related to 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). As explained below, we have concluded that the Appeal should be granted.

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 Applicant worked as a security guard at the Savannah River site (the site) for approximately 13 years – from 1983 to 1996. He filed a Subpart D application with OWA, claiming that two illnesses – scleroderma and chronic renal disease – were related to toxic exposures during employment at DOE. The OWA referred the application to the Physician Panel.

The Physician Panel issued a negative determination. The Panel found that the renal disease was a complication of the scleroderma. The Panel acknowledged that toxic exposures could cause scleroderma, but the Panel stated that it found no evidence of toxic exposures and, therefore, did not even reach the issue of causation.

The OWA accepted the negative determination, and the Applicant filed an appeal. In his appeal, the Applicant states that the Panel did not have the opportunity to consider information about

his exposures. The Applicant states that he requested information from the site and received it after the Panel issued its report, and the Applicant encloses the information. The Applicant further states that his job was to monitor construction workers in construction areas; he identifies those locations and the claimed toxic exposures. He states that the construction workers had personnel protective equipment, but he did not.

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.

Further consideration of this application is warranted. Although an applicant bears primary responsibility for documenting his claim, the DOE assists applicants as it is able. 67 Fed. Reg. 52841, 52844 (2002). In this case, the site had exposure information that was not provided to OWA and, therefore, not sent to the Physician Panel. This failure cannot be characterized as harmless error: the Panel report based its negative determination on the lack of exposure information. Accordingly, consideration of the site exposure information, as well as the Applicant's detailed description of his duties and his exposures, is warranted.

As the foregoing indicates, the application warrants further consideration. 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 grant of this appeal 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-0177, be, and hereby is, granted.

(2) Based on the exposure information provided with the appeal, further consideration of this application is warranted,

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 18, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

April 25, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **August 26, 2004**

Case No.: **TIA-0178**

XXXXXXXXXX (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 her late husband (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illnesses were not related to his work at a DOE facility. 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 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). 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).

B. Procedural Background

The Worker was employed as a chemical operator at the DOE's Oak Ridge site (the site) for approximately thirty-four years. The Applicant filed a Subpart B application with the DOL and a Subpart D application with OWA. The DOL issued a positive Subpart B decision on colon cancer. The OWA referred the Applicant's Subpart D application to the Physician Panel for consideration of colon cancer, rectal polyps, stomach ulcers, chronic obstructive pulmonary disease (COPD)-granulomatous, lipoma in the right arm, thyroid enlargement, testicular disorder, stroke, and heart disease.

The Physician Panel rendered a negative determination for each of the claimed illnesses. The Panel found that there was no evidence in the record to establish a diagnosis of stomach ulcers or COPD-granulomatous. With respect to the other illnesses, the Panel agreed that the Worker had the conditions, but found insufficient evidence to conclude that they were related to workplace exposures. The OWA accepted the Physician Panel's negative determinations and, subsequently, the Applicant filed the instant appeal.

On appeal, the Applicant does not challenge the Panel's determination concerning stomach ulcers. Instead, she

challenges the Panel's determinations on the other illnesses. The Applicant maintains that the Worker was exposed to toxic substances. She questions why "there were no badge readings included in the information that was reviewed by the physician panel."[1] She asserts that in the course of his duties, the Worker was exposed to "epoxy resins, amines, and carcinogenic materials."[2] She also relates two different incidents, which she contends demonstrate the relationship between workplace exposures and the Worker's illnesses. At some point after 1954, the Worker talked about a "spill at the plant" and said that "he had to scrub down to remove the chemicals from his body."[3] He also consulted a cancer doctor following an incident where he "hemorrhaged from his rectum while at work."[4]

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 a toxic exposure at the DOE site, and state the basis for that finding.[5] 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 overall thrust of the Applicant's arguments is that the Applicant had exposures that were not considered. To the extent that these general arguments apply to the colon cancer determination, the arguments are moot, since the Applicant's Subpart B positive determination on colon cancer satisfies the Subpart E requirement of a nexus between toxic exposures at DOE and an illness. Authorization Act § 3675(a). Moreover, as explained below, the Applicant's arguments do not indicate error on the other illnesses.

The Applicant's argument that the Physician Panel did not have the opportunity to review dosimetry records does not demonstrate error. The record indicates that the OWA requested exposure records, incident-accident records, personnel records,

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[1] Applicant's Appeal Letter, dated August 24, 2004.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] 10 C.F.R. § 852.12.

industrial hygiene reports, and radcon records.[6] There is no reason to believe that the site did not provide all available information.

The Applicant's argument that the Worker was exposed to certain hazardous materials in the workplace also does not indicate Panel error. The Panel clearly acknowledged the Worker's exposure to those substances. The Panel stated that as a chemical operator, the Worker was "involved in the 'physical and chemical processing of enriched uranium and worked around toxic materials in the lab area.'"[7] The Panel noted that the Worker was potentially exposed to "radiation, uranium hexafluoride, hydrogen fluoride, fluorine, asbestos, acids, solvents, mercury, nickel, and bases" as well as "epoxy resins, nickel carbonyl, technetium-99, transuranics, and uranium."[8] However, the Panel ultimately concluded that the illnesses were not related to exposure to these substances.

Finally, the Applicant's argument that the Panel should have discussed two incidents does not indicate Panel error. As mentioned above, the Panel found that the Worker was exposed to toxic materials. The Panel's failure to mention the cited incidents in the report does not diminish its clear acknowledgement of toxic exposures.

As the foregoing indicates, the Applicant has not demonstrated Panel error. In compliance with Subpart E, these claims will be transferred to the DOL for review. OHA's denial of these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0178 be, and hereby is, denied.

(2) The denial pertains only to the DOE claims and not to the DOL's review of these claims under Subpart E.

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[6] *See* Record, History of Charles Whaley sheet.
[7] Panel Report, at 1.
[8] *Id.*

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 25, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

May 16, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 25, 2004**

Case No.: **TIA-0179**

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 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 as a Manager of Finance at the Savannah River Site (the site). In his application, he stated that he worked at the plant for approximately two years -- from 1987 to 1989. He requested physician panel review of only one illness – "fibromyalgia." The OWA forwarded the application to the Physician Panel.

The Physician Panel rendered a negative determination on his illness. The Panel stated that there are no known associations between fibromyalgia and exposure to toxic substances. *See* Panel Report.

The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal.

In his appeal, the Applicant challenges the Panel's determination on his fibromyalgia. He believes that exposure at the site contributed to his fibromyalgia.

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 Applicant has not demonstrated Panel error in his appeal. The Applicant's argument that toxic exposures at the site caused his fibromyalgia is a disagreement with the Panel's medical opinion that there is no known association between toxic exposures and fibromyalgia. Mere disagreements with the Panel's medical opinion do not indicate Panel error.

In compliance with Subpart E, this application 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 review of these claims does not purport to dispose of or in any way prejudice the DOL's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0179 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 16, 2005

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May 25 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **August 30, 2004**

Case No.: **TIA-0180**

xxxxxxxxxxx (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits on behalf of her late husband (the Worker). 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. 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 Worker was employed as a laborer and cement mason at the Paducah Gaseous Diffusion Plant (the plant). The application stated that he worked at the plant for approximately 2 years -- from 1951 to 1953. The Applicant requested physician panel review of two illnesses -- colon cancer and liver cancer. The OWA forwarded the application to the Physician Panel.

The Physician Panel rendered a negative determination on each of the Worker's claimed conditions. For the colon cancer, the Panel cited a weak association between radiation exposure and colon cancer and the lack of significant radiation exposure data. Additionally, the Panel cited numerous non-occupational risk factors as being strongly related to the onset of colon cancer. Finally, the Panel determined that there was too great a

latency period between the Worker's employment at the plant and the onset of the cancer for the two to be related. For the liver cancer, the Panel found that it represented metastasis from the colon cancer. Because the Panel found that the liver cancer was a metastasis of the colon cancer, the Panel referred to its determination on the colon cancer claim. The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal.

In the appeal, the Applicant disagrees with the Panel determination on the Worker's conditions. The Applicant states that the Worker did not suffer from the claimed conditions prior to working at the plant. The Applicant also noted that many of the Worker's colleagues were diagnosed with similar conditions and passed away as a result. The Applicant alludes to a pulmonary condition that was not considered by the Panel.

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 has not demonstrated Panel error. As an initial matter, we note that the Applicant did not ask for physician panel review of a pulmonary illness and, therefore, the Panel's failure to consider it was not Panel error. For the claimed illnesses, colon and liver cancer, the Panel addressed each illness, made a finding, and explained the basis for that finding. To the extent that the Applicant disagrees with the Panel's assessment of the documented exposures, the Applicant's argument is a disagreement with the Panel's judgment, rather than an indication of Panel error. If the Applicant would like to claim a pulmonary condition, she should raise this issue with the DOL.

As the foregoing indicates, the Applicant has not identified Panel error and, therefore, the appeal should be denied. In

compliance with Subpart E, these claims 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 review of these claims does not purport to dispose of or in any way prejudice the DOL's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0180, 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 25, 2005

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May 20, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: August 31, 2004

Case No.: TIA-0181

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 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 as a laborer at DOE's Paducah site (the site). The Applicant worked at the site for approximately thirty-three years, from 1972 to the present. The Applicant filed an application with OWA, requesting physician panel review of one illness – benign pituitary tumor.

The Physician Panel rendered a negative determination on the claimed illness. The Panel stated that the Applicant did not have significant exposures to radiation while working at the site. The Panel noted that, according to medical literature, there is not a strong connection between radiation exposure and benign pituitary tumors and such tumors are "fairly common." *See* Panel Report at 2.

The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal. In his appeal, the Applicant disputed the Panel's characterization of pituitary tumors as being fairly common.

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 argument on appeal does not provide a basis for finding panel error. After examining the Applicant's record, the Panel determined that the Applicant's benign pituitary tumor was not related to his work at the site. The Panel's characterization of this type of tumor as "fairly common" was not necessary to its analysis, which was that there is not a strong connection between this type of tumor and radiation exposure and that the Applicant did not have significant radiation exposure. Accordingly, the Applicant's contention that the Panel erred in characterizing pituitary tumors as fairly common is a mere disagreement with a Panel statement, rather than an indication of Panel error in the facts underlying the determination.

As the foregoing indicates, the appeal does not present a basis for finding panel error. 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-0181 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 20, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

May 24, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **August 31, 2004**

Case No.: **TIA-0182**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits based on the employment of his late wife (the Worker). 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 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.[1]

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 Worker was employed as a clerk at the Savannah River Site (the site). The Worker is deceased.

The Applicant filed a Subpart D application with DOE, requesting physician panel review. The Applicant stated that the Worker was employed at the plant for approximately 32 years -- from 1951 to 1983. The Applicant requested physician panel review of one illness – ovarian cancer. At the same time, the Applicant filed a Subpart B application with DOL, which referred the application to the National Institute of Occupational Safety and

[1] www.eh.doe.gov/advocacy

Health (NIOSH) for a dose reconstruction. The Applicant elected to have OWA refer the Subpart D application to the Physician Panel without awaiting the results of the NIOSH dose reconstruction.

The Physician Panel rendered a negative determination on the Worker's ovarian cancer. The Panel stated that the Worker's ovarian cancer was unrelated to radiation exposure at the site. Specifically, the Panel cited the absence of medical literature documenting a relationship between the Worker's level of radiation exposure and ovarian cancer. Similarly, although one Panel member cited asbestos exposure as a possible contributory factor to ovarian cancer, the Panel found that the Worker's asbestos exposure was minimal and, therefore, not a factor. Finally, the Panel cited numerous non-occupational risk factors for ovarian cancer. The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal.

In his appeal, the Applicant states that the Worker's exposures at the plant resulted in her illness and death. The Applicant submitted 109 pages of information discussing the health effects of low level radiation.

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 Applicant has not identified an error by the Panel. The Applicant disagrees with the Panel's medical opinion that the Worker's level of radiation exposure was too low to be a factor in her illness. The Applicant's submission of material about the effects of low level radiation does not indicate Panel error. The Panel did not have an opportunity to consider this material, or its applicability to the Worker's situation. If the Applicant would like this material to be considered, the Applicant should raise the matter with DOL. More importantly, if the Applicant believes that the NIOSH dose reconstruction supports his claim, the Applicant should raise that matter with DOL.

As the foregoing indicates, the Applicant has not identified Panel error and, therefore, the appeal should be denied.

In compliance with Subpart E, these claims 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 review of these claims does not purport to dispose of or in any way prejudice the DOL's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0182, 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:

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May 11, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 3, 2004**

Case No.: **TIA-0184**

XXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits for her late husband (the Worker). The Worker 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 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 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) (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 machinist at the Oak Ridge Gaseous Diffusion Plant (the plant). He worked at the plant for approximately 13 years, from 1952 to 1965.

The Applicant filed a Subpart B application and a Subpart D application, claiming chronic obstructive lung disease, emphysema, heart disease and lung cancer with metastases to the brain. The DOL issued a positive Subpart B determination for the lung cancer. *See* OWA Record at 391. The OWA forwarded the Subpart D application to the Physician Panel, which issued a negative determination. The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal.

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 receipt of a positive DOL Subpart B determination for lung cancer satisfies the Subpart E requirement that the illness be related to a toxic exposure during employment at DOE. Authorization Act § 3675(a). *See also Worker Appeal*, Case No. TIA-0228, 29 DOE ¶ 80,202 (2005). Accordingly, the DOL Subpart B determination has rendered moot the Physician Panel determination on the claimed lung illness.

The Applicant's argument that the Worker's heart disease was related to toxic exposure at DOE does not indicate Panel error. The Panel found that the plant did not contain toxic substances associated with the Applicant's heart disease. Although the Applicant states that medical literature indicates that toxic exposures can be a significant cause of heart disease, she does not identify the toxic substance or the literature to which she refers. Accordingly, the Applicant has not demonstrated Panel error.

As the foregoing indicates, 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 dismissal of this appeal 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-0184, be, and hereby is, denied.

(2) This dismissal pertains only to the DOE appeal 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 11, 2005

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May 13, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: September 3, 2004

Case No.: TIA-0185

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. 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 as a patrolman, inspector, and supervisor at DOE's Savannah River site (the site) for approximately thirty-three years, from 1966 to 1999. The Applicant filed an application with OWA, requesting physician panel review of four illnesses – bursitis, osteoarthritis, fibromyalgia, and colon polyps.

The Physician Panel rendered a negative determination on the claimed illnesses. For the claimed bursitis and osteoarthritis, the Panel stated that the illnesses are caused by "abnormal mechanical stresses and/or trauma to various joints of the body." Panel Report at 3. The Panel stated that the Applicant's records do not indicate evidence of significant work-related trauma that would have caused the illnesses. For the claimed fibromyalgia and colon polyps, the Panel stated that there is no evidence that occupational exposures are a cause of the illnesses.

The OWA accepted the Physician Panel's negative determination. The Applicant filed the instant appeal. The Applicant makes two arguments on appeal. First, the Applicant contends that it is possible that his bursitis and osteoarthritis could have been caused by his work at DOE. He further states that heavy metals could affect the joints. Second, the Applicant argues that the Panel failed to address his hearing loss, precancerous lesion, and the results of his spirometer test.

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 do not present a basis for finding Panel error. First, the Applicant's contention that his osteoarthritis and bursitis could have been caused by his work at DOE is not an indication of Panel error. The Panel stated that the illnesses are caused by abnormal mechanical stresses and/or traumas to the joints. The Applicant's assertion that heavy metals could affect the joints is a mere disagreement with the Panel's medical judgment, rather than an indication of Panel error. Second, the Applicant's argument that the Panel did not address his hearing loss, precancerous lesion, and the results of his spirometer test is not an indication of Panel error. The Applicant did not claim these three conditions in his original application. If the Applicant wishes to pursue these additional illnesses, he should contact DOL on how to proceed.

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 appeal 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-0185 be, and hereby is, denied.

(2) This denial pertains only to the DOE appeal 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 13, 2005

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March 30, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 7, 2004**

Case No.: **TIA-0186**

XXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits for his late father (the Worker). 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 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 dismissed as moot.

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 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) (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 painter at the Paducah Gaseous Diffusion Plant (the plant). He worked at the plant for approximately three years, from 1951 to 1954.

The Applicant filed an application with OWA, requesting physician panel review of the Worker's colon cancer with metastasis to the liver and lymph nodes. The Applicant claimed that the illness was due to exposures to toxic and hazardous materials at the plant. The Physician Panel rendered a negative determination.

The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal. In his appeal, the Applicant challenges the negative determination. The Applicant indicated that, as a member of the Special Exposure Cohort, he received a positive DOL Subpart B determination for his father's lymphoma. *See* Applicant's Appeal Letter.

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.

A positive DOL Subpart B determination was received. That determination satisfies the Subpart E requirement that the illness be related to a toxic exposure during employment at DOE. Authorization Act § 3675(a). Accordingly, Subpart E has rendered moot the physician panel determination and consideration of any challenge to the Panel report is not necessary.

As the foregoing indicates, the appeal should be dismissed as moot. 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 dismissal 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-0186 be, and hereby is, dismissed.

(2) This dismissal 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: March 30, 2005

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April 19, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 8, 2004**

Case No.: **TIA-0187**

XXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illness was not related to his 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 Applicant was employed as a computer programmer/analyst at the Rocky Flats Plant (the plant). He worked at the plant from 1980 to 1981.

The Applicant filed a Subpart B application with the DOL and a Subpart D application with OWA. In those applications, the Applicant claimed that his colon cancer was related to exposures to toxic substances during his DOE employment.

The DOL denied the Subpart B application, based on a National Institute of Occupational Safety and Health (NIOSH) radiation dose reconstruction. The NIOSH dose reconstruction showed that the likelihood that the Applicant's colon cancer was related to radiation exposure at DOE was less than 50 percent. *See* OWA Report at 193.

The OWA denied the Subpart D application. The Physician Panel found that there was insufficient evidence linking the Applicant's workplace exposures to his colon cancer. The Panel noted the Applicant's display of colon problems prior to his

DOE employment and his familial history of colon cancer. *See* OWA Record at 38. The Panel rendered a negative determination, which the OWA accepted.

Subsequently, the Applicant filed the instant appeal. The Applicant states that he was exposed to radiation during his employment. The Applicant states that the Panel could not rule out radiation exposure at the plant as the cause of his colon cancer. *See* Applicant's Appeal Letter.

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 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. 10 C.F.R. § 852.8.

The Applicant has not demonstrated panel error. Although the Applicant disagrees with the Panel's negative finding with respect to radiation exposure, the Applicant's disagreement is based on a misunderstanding of the applicable standard. The Panel was not required to "rule out" radiation as a factor in the Applicant's colon cancer. Instead, the Panel was required to consider whether it was at least as likely as not that radiation exposure was "a significant factor in aggravating, contributing to, or causing" the cancer. 10 C.F.R. § 852.8. The Panel applied this standard. Accordingly, the Applicant's statement that the Panel could not "rule out" radiation as a factor does not demonstrate Panel error.

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 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-0187, 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 19, 2005

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April 19, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 10, 2004**

Case No.: **TIA-0188**

XXXXXXXXXXXXXX (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 her late husband. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illness was not related to his 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 granted.

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 Applicant filed a Subpart B application with DOL and a Subpart D application with OWA, claiming that the Worker's metastatic prostate cancer was related to toxic exposures during employment at DOE. The Applicant stated that the Worker was employed as a machinist at the Oak Ridge Y-12 site from 1943 to 1944 and at the Paducah Gaseous Diffusion Plant (the Paducah site) from 1951 to 1964. *See* OWA Record at 8. The DOL referred the Subpart B application to the National Institute of Occupational Safety and Health (NIOSH) for a radiation dose reconstruction. Record at 18.

The Applicant requested that OWA send her case to the Panel without awaiting the completion of the NIOSH dose reconstruction. Record at 18. The OWA forwarded the application to the Physician Panel, asking it to review the Worker's employment at the Paducah site.

The Physician Panel rendered a negative determination. The Panel stated that there is no epidemiologic evidence of increased prostate cancer risk from exposure to occupational radiation. *See* Panel Report. The OWA accepted the determination, and the Applicant filed the instant appeal.

In her appeal, the Applicant states that the Panel did not consider the Worker's complete employment history, i.e., it did not consider the claimed employment at the Oak Ridge Y-12 site. *See* Applicant's Appeal Letter.

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 record indicates that the OWA did not consider the Applicant's claim that the Worker was employed at the Y-12 site. The record contains no information indicating that OWA asked the site to confirm this employment. Instead, the record indicates that the OWA limited its processing of the application to the Worker's employment at the Paducah site.

The Applicant's claim of Y-12 employment should have been considered, because it might have involved toxic exposures not considered by the Panel. *See Worker Advocacy,* Case No. TIA-0153 (2005). Accordingly, further consideration of this claim should include a request that the site confirm the claimed employment and provide any relevant records.

As the foregoing indicates, the appeal should be granted. 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-0188, be, and hereby is, granted as set forth in paragraph 2 below.

(2) The OWA did not process the Applicant's claim of employment at the Oak Ride Y-12 site. Consideration of that claim is in order.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 19, 2005

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March 31, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 8, 2004**

Case No.: **TIA-0189**

XXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits for her late father (the Worker). 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 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 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 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) (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 maintenance supervisor at the Oak Ridge Gaseous Diffusion Plant (the plant). He worked at the plant for approximately 36 years, from 1945 to 1981.

The Applicant filed an application with OWA, requesting physician panel review of the Worker's renal failure and congestive heart failure (CHF). The Applicant claimed that these illnesses were due to exposures to toxic and hazardous materials at the plant. The Physician Panel rendered a negative determination on both illnesses. In reviewing the Worker's renal failure, the Panel discussed the fact that it developed after his retirement and was related to his CHF. In considering the Worker's CHF, the Panel cited abnormalities in the structure of the blood supply system to his heart. The Panel discussed the potential exposures at the plant, and concluded that the Worker's occupational exposures were not a factor in his renal failure or CHF. *See* Physician's Panel Report.

The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal. In her appeal, the Applicant challenges the negative determination. The Applicant argues that the Panel erred when it concluded that the Worker's illness was not related to his employment at the plant. The Applicant asserts that the Panel determination was based on her father's stay at the Oak Ridge Hospital and did not consider exposures over his 36 years of employment. *See* Applicant's Appeal Letter.

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 Applicant's argument - that the Panel did not take into account the Worker's entire work history - is inconsistent with the Panel report. The Panel acknowledged that the Worker was "undoubtedly exposed to many toxins." *See* Report at 1. The Panel determined, however, there was no relationship between the occupational exposures and the Worker's condition. Thus, the Applicant's disagreement with that determination is merely a disagreement with the Panel's medical judgment, rather than an indicator of Panel error.

As the foregoing indicates, 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-0189 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: March 31, 2005

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April 22, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 8, 2004**

Case No.: **TIA-0192**

XXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. 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 his 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 Applicant was employed as a feed and pump shop worker and a maintenance mechanic at the Paducah Gaseous Diffusion Plant (the plant). He worked at the plant for approximately 26 years, from 1972 to 1998.

The Applicant filed an application with the OWA, requesting physician panel review of his lung nodule and squamous cell skin cancer. The Applicant claims that his conditions were due to exposures to toxic and hazardous materials during the course of his employment.

The OWA referred the matter to the Physician Panel, which issued a negative determination. The Panel found that there was insufficient evidence establishing a link between the Applicant's workplace exposures and his conditions. The Panel cited the absence of diagnostic information concerning the lung nodule, and the Panel attributed the Applicant's skin cancer to a strong exposure to natural, ultraviolet sunlight. The OWA accepted the determination, and the Applicant appealed.

In his appeal, the Applicant alleges that he was exposed to asbestos, nickel, lead, radiation and other toxic substances during his employment at the plant. He states that precautions and safety regulations were ignored, subjecting him to the toxic exposures. *See* Applicant's Appeal Letter.

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 argument that he was exposed to toxic substances does not indicate Panel error. The Panel report specifically mentioned the toxic substances referred to in the Appeal. Thus, the Applicant's disagreement with the determination is merely a disagreement with the Panel's medical judgment, rather than an indicator of Panel error.

As the foregoing indicates, 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-0192 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 22, 2005

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April 22, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 8, 2004**

Case No.: **TIA-0193**

XXXXXXXXXXX (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 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 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 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 as a maintenance mechanic at the Paducah Gaseous Diffusion Plant (the plant). He worked at the plant for approximately nine years, from 1967 to 1976.

The Applicant filed an application with the OWA, requesting physician panel review of claims of chronic bronchitis and emphysema. The OWA forwarded the application to the Physician Panel, which issued a negative determination.

The Physician Panel acknowledged the Applicant's exposure to uranium dust. The Panel further found, however, that the Applicant's records did not support his claim of chronic bronchitis, nor a finding of clinically significant emphysema. Instead, the Panel stated that the records indicated treatment for episodes of bronchitis and early, mild symptoms of emphysema. Noting that the Applicant's employment ended in 1976, the Panel concluded that Applicant's occupational exposures were not a significant factor in those conditions. The Panel cited the Applicant's smoking history as the likely factor. The OWA accepted the Physician Panel's determination, and the Applicant filed the instant appeal.

In his appeal, the Applicant maintains that he has chronic bronchitis. He attributes the chronic bronchitis and emphysema to daily exposures to uranium dust. *See* Applicant's Appeal Letter.

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 has not demonstrated Panel error. Although the Applicant asserts that he has chronic bronchitis, he has not addressed the Panel's detailed explanation of why it finds that he does not have that illness. Similarly, although the Applicant asserts that uranium dust caused his lung conditions, he does not address the Panel's detailed explanation of why it finds that the uranium dust was not a significant factor. The Applicant's objections appear to be mere disagreement with the Panel's medical opinion than an indication of Panel error. Accordingly, we have determined that the appeal should be denied.

In compliance with Subpart E, these claims 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 review of these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0193, 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 22, 2005

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April 5, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: September 8, 2004

Case No.: TIA-0194

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'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 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 Worker was employed as a machinist at DOE's Oak Ridge site (the site). The Applicant filed an application with OWA, requesting physician panel review of one illness – dermatofibrosarcoma on the left leg.

The Physician Panel rendered a negative determination on the claimed illness. The Panel determined that there was insufficient evidence establishing a relationship between the Worker's occupational exposures and the dermatofibrosarcoma.

The OWA accepted the Physician Panel's determination on the claimed illness. The Applicant filed the instant appeal.

In her appeal, the Applicant maintains that the Panel's negative determination is incorrect. She states that the Worker was exposed to various types of dangerous materials. She notes that the Worker went to work with an open sore on his leg and could have easily hit his leg against contaminated equipment or materials.

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 Applicant's arguments do not present a basis for finding panel error. As mentioned above, the Panel addressed the claimed illness, made a determination on the illness, and explained the basis of that determination. Specifically, the Panel determined that there was no evidence establishing a relationship between the Worker's occupational exposures and the development of the dermatofibrosarcoma on his leg. The Applicant's arguments are mere disagreements with the Panel's medical judgment rather than an indication of panel error.

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 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-0194 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 5, 2005

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April 19, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 9, 2004**

Case No.: **TIA-0195**

XXXXXXXXXXX (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 her late husband (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illness was not related to his 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 general maintenance laborer at the Paducah Gaseous Diffusion Plant (the plant). He worked at the plant for approximately 7 years, from 1955 to 1962.

The Applicant filed an application with the OWA, requesting physician panel review of the Worker's prostate cancer with metastasis to the bone, bladder, and blood. The Applicant alleges the prostate cancer was caused by exposures to toxic and hazardous materials during the course of the Worker's employment at the Plant. The Physician Panel found there was insufficient evidence linking workplace exposures to the Worker's prostate cancer. The Panel discussed the lack of an epidemiologic relationship between toxic exposures and prostate cancer. Additionally, the Panel referenced the high incidence of prostate cancer in men in the general population. *See* Physician's Panel Report. The Panel rendered a negative determination, which the OWA accepted.

Subsequently, the Applicant filed the instant appeal. In her appeal, the Applicant alleges that the Worker's illness was caused by exposure to toxic chemicals at the plant. The Applicant states that she feels the Panel's findings were in error. See Applicant's Appeal Letter.

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 Applicant has not demonstrated panel error in the prostate cancer determination. The Panel rejected the Applicant's contention that the Worker's prostate cancer was due to toxic exposure from his employment at the plant. As mentioned above, the Panel addressed the claimed illness, made a determination on the illness, and explained the basis of that determination. Specifically, the Panel determined that there was no evidence establishing a relationship between the Worker's occupational exposures and the development of the prostate cancer. *See* Physician's Panel Report. The Applicant's stated belief that the Panel's finding is incorrect is a mere disagreement with the Panel's medical judgment rather than an indication of Panel error.

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 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-0195, 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 19, 2005

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March 10, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: September 09, 2004

Case No.: TIA-0196

XXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker'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 dismissed.

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, and its web site provides extensive information concerning the program.[1]

[1] **www.eh.doe.gov/advocacy**

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. OHA continues to process appeals until DOL commences Subpart E administration.

B. Procedural Background

The Applicant was employed as clerk and librarian at the Portsmouth Gaseous Diffusion Plant (the plant). She worked at the plant from 1976 to 1994.

The Applicant filed an application with the OWA, requesting that a physician panel review her breast cancer. The Applicant asserts that her illness was due to exposure to toxic and hazardous materials at the site. The Physician Panel rendered a negative determination which the OWA accepted. The Panel determined that the Applicant's illness was not due to toxic exposure at the DOE site. Subsequently, the Applicant filed the instant appeal.

In her appeal, the Applicant claimed that her illness was caused by exposure to radiation at the plant and that the Physician Panel erred when it concluded that her breast cancer was not related to her work at the site. The Applicant indicated that, as a member of the Special Exposure Cohort, she received a positive DOL Subpart B determination for breast cancer.[1]

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[1] **Applicant's Appeal Letter.**

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 Worker is a member of the Special Exposure Cohort of the Department of Labor Program, *i.e.*, she worked at the Portsmouth Gaseous Diffusion Plant, and contracted a specified cancer after the beginning of her employment there. *See* 20 C.F.R. § 30.210. As a result, she received a positive DOL Subpart B determination. A positive DOL Subpart B determination satisfies the Subpart E requirement that the illness be relate to a toxic exposure during employment at DOE. Accordingly, Subpart E has rendered moot the physician panel determination and consideration of any challenge to the Panel report is not necessary.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0196 be, and hereby is, dismissed.

(2) This dismissal 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: March 10, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

May 17, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 10, 2004**

Case No.: **TIA-0197**

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.[1]

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 as a production operator at the Savannah River Site (the site). In his application, he stated that he worked at the site for approximately 21 years -- from 1975 to 1996. He requested physician panel review of two illnesses – hypertension and ischemic heart disease. The OWA forwarded the application to the Physician Panel.

The Physician Panel rendered a negative determination on both illnesses. The Panel discussed actual and potential exposures at the plant, but rejected the Applicant's contention that those exposures caused his hypertension and ischemic heart disease. The Panel stated that stress caused the hypertension and that

[1] www.eh.doe.gov/advocacy

hypertension caused the ischemic heart disease. Finally, the Panel stated that stress is not a toxic substance as defined by the Rule, because it is not radiological, chemical, or biological in nature.

The OWA accepted the Physician Panel's determinations on the illnesses. The Applicant filed the instant appeal.

In his appeal, the Applicant claims to have more information about his illnesses that the Panel did not see. Included in his appeal is (i) a July 15, 2002 physician's letter providing the results of an examination and (ii) a document detailing his prescribed medications. See OWA Record at 609, 610.

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 Applicant has not alleged any specific Panel error, and the two documents submitted with the appeal are not relevant to the Panel determination. The documents merely describe the Applicant's illnesses and medications and have no bearing on the issue of the cause of the illnesses. Accordingly, the Applicant has not demonstrated Panel error.

In compliance with Subpart E, this application 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 consideration of the appeal does not purport to dispose of or in any way prejudice the DOL's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0197 be, and hereby is, denied.

(2) This denial pertains only to the DOE appeal 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 17, 2005

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May 19, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 13, 2004**

Case No.: **TIA-0198**

XXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits based on the employment of her late father (the Worker). 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 granted.

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.[1]

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 Worker was employed as a machinist at the Oak Ridge Plant (the plant). The Worker is deceased. The application stated that he worked at the plant for approximately 25 years -- from 1959 to 1984. The Applicant requested physician panel review of two illnesses -- melanoma and asbestosis. The OWA forwarded the application to the Physician Panel.

The Physician Panel rendered a negative determination on each of the claimed conditions. The Panel found no evidence of melanoma, but it did find evidence of the diagnosis and removal of basal cell carcinomas. The Panel issued a negative

[1] www.eh.doe.gov/advocacy

determination on the melanoma, but did not issue a determination on the basal cell carcinomas. For the asbestosis claim, the Panel found that the Worker did not have the condition nor the precursor condition of pleural plaques. The Panel attributed the Worker's pulmonary condition to smoking.

The OWA accepted the determination, and the Applicant appealed.

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 Panel's failure to issue a determination on the basal cell carcinomas was Panel error. As a rule, physician panels are not required to consider conditions not specifically claimed by the Worker. On the other hand, where the claimed illness is clear, the panel should consider it. *See Worker Advocacy,* Case No. TIA-0047, 28 DOE ¶ 80,333 (2004) (claim of asbestosis includes pleural plaques). In this case, the Worker claimed melanoma rather than basal cell carcinoma. The Panel found that the Worker had basal cell carcinomas and, therefore, should have issued a determination on whether the condition was related to his work at DOE. [2]

The Applicant has not demonstrated Panel error on the asbestosis determination. The Panel found no evidence of the disease or the precursor condition of pleural plaques, and the Applicant has not addressed that finding other than to express general disagreement. Accordingly, we find no Panel error regarding this claimed condition.

In compliance with Subpart E, these claims 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 review of these claims does not purport to dispose of or in any way prejudice the DOL's review of the claims under Subpart E.

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[2] **If the Worker also had melanoma, the Applicant should ask the DOL how to submit information on that condition.**

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0198 be, and hereby is, granted.

(2) The Physicians Panel should have issued a determination on the Worker's basal cell carcinoma. Consideration of this illness is in order.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 19, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

February 1, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: September 13, 2004

Case No.: TIA-0200

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's late husband (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 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, and its web site provides extensive information concerning the program.[1]

[1] **www.eh.doe.gov/advocacy**

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. 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.

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 construction painter at DOE's Savannah River site. The Worker worked at the site for a period of about 20 months, between 1955 and 1962.

The Applicant filed an application with OWA, requesting physician panel review of five illnesses – asbestosis, lung cancer, chronic obstructive pulmonary disease (COPD), skin cancer, and mycosis fungoides.

The Physician Panel rendered a negative determination on each claimed illness, but it rendered a positive determination on pleural plaques, a condition associated with asbestos exposure. For the lung cancer, the Panel found that it was unlikely that it was related to asbestos exposure because of the short period of time the Worker was employed at DOE. The Panel cited the Worker's 44-year history of smoking as a likely cause of his lung cancer. For the asbestosis, the Panel determined that the Worker did not have the illness because there was no evidence of the presence of fibrosis or nodular infiltrates. For the COPD, the Panel agreed that the Worker did have COPD. However, the Panel noted that there was no evidence that the Worker had any respiratory problems during his short period of employment at DOE. The Panel cited the Worker's long smoking history as the likely cause of his COPD. For the skin cancer, the Panel noted that the record does not contain information on the type or location of any skin

cancer the Worker may have had, although there is a mention that skin cancer was treated in 2000. The Panel stated that outdoor painters are prone to certain types of skin cancer on certain parts of the body due to sun exposure. However, the Panel stated that it was unlikely that the illness was a result of the Worker's employment at DOE given that the Worker's period of employment at DOE was only a small portion of his total work history and sun exposure history. For the mycosis fungoides, the Panel stated that the illness is not caused by occupational exposures to toxic substances.

The OWA accepted the Physician Panel's negative determinations on the claimed illnesses. The Applicant filed the instant appeal.

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.

In her appeal, the Applicant maintains that the negative determinations are incorrect. First, the Applicant argues that the Worker worked at DOE for a longer period of time than that mentioned by the Panel. Second, the Applicant argues that she does not understand how the Panel can give a positive determination for pleural plaques and a negative determination for asbestosis. For the reasons stated below, the Applicant's arguments do not present a basis for finding panel error.

First, the Panel considered the dates of the Worker's employment as they were found in the record. According to DOE employment records, the Worker's dates of employment were as follows: 5/2/55 – 7/15/55; 12/27/55 – 3/23/56; 3/8/57 – 5/17/57; 8/7/61 – 10/26/62. Record at 10. The Panel's failure to consider a longer period of employment was not error. If the Applicant has evidence that establishes a longer period of employment, she should contact the DOL for information on how to proceed.

Second, the Panel was not inconsistent when it rendered a positive determination for pleural plaques consistent with asbestos exposure and a negative determination for asbestosis. Pleural plaques are considered a precursor to asbestosis; the two illnesses are not synonymous. The Panel explained why it found that the Worker did not have asbestosis and the Applicant has failed to challenge the accuracy of that explanation. Accordingly, the Panel's finding that the Worker had pleural plaques but not asbestosis does not indicate panel error.

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 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-0200 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: February 1, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

April 25, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 20, 2004**

Case No.: **TIA-0201**

XXXXXXXXXXXXXX (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 granted.

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 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) (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 Applicant was employed as a process specialist, chemical operator, process and operations specialist and a hazard reduction technician at the Rocky Flats Plant (the plant). He worked at the plant for approximately 18 years, from 1984 to 2002.

The Applicant filed an application with OWA, requesting physician panel review of a brain tumor. The Applicant claimed that his illness was due to exposures to toxic and hazardous materials at the plant.

The Physician Panel rendered a negative determination for the brain tumor. The Panel stated that the type of tumor at issue is associated with "severe head trauma, frequent full mouth dental x-rays, and metal dust and fumes." Panel Report at 2. The Panel then went on to state that this type of brain tumor was not associated with ionizing radiation and that, in any event, the Applicant's radiation exposure was low. *Id.* at 2-3.

The OWA accepted the Physician Panel's determination. The Applicant's father filed the instant appeal on the Applicant's behalf. In his appeal, the Applicant challenges the negative determination regarding his brain tumor.

The Applicant disagrees with the Physician Panel's exclusive focus on radiation data. The Applicant states that, although the Panel identified exposures to "metal dust and fumes" as risk factors, the Panel did not discuss whether the Applicant had such exposures. The Applicant asserts that exposures to metal dust and fumes occurred and provides a supporting description. *See* Applicant's Appeal Letter. He states that exposures included concentrated nitric acid, hydrofluoric acid, hydrochloric acid, hydrogen peroxide, and sodium hydroxide.

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.

We agree with the Applicant that the Panel did not adequately explain the basis of its determination. The record contains a description of the job of chemical control operator, which identifies the materials involved as follows: "Process chemicals, *i.e.*, acids, bases, calcium metals, hydrogen peroxide, fluoride, fluorine, diesel fuel, methane gas, cleaning solvents, and cryogenic materials. Fissile and radioactive materials, *i.e.*, plutonium, americium, uranium and other metals used, *i.e.*, tantalum, calcium, and beryllium." OWA Record at 32. *See also id.* at 34 (process specialist). Accordingly, given the Panel's recognition of "metal fumes and dust" as risk factors, the Panel should have addressed these descriptions of the Applicant's job and whether it is at least as likely as not that the identified substances were a significant factor in causing, contributing to, or aggravating the Applicant's brain tumor. *See* Worker Appeal, Case No. TIA-0127 (2005).

As the foregoing indicates, the appeal should be granted. 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 decision grant 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-0201, be, and hereby is, granted.

(2) The Physician Panel Report failed to explain adequately the basis of its determination. Consideration of the materials associated with the Applicant's job category is in order.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 25, 2005

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April 13, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: September 14, 2004

Case No.: TIA-0202

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 husband (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 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 granted.

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 Worker was employed as a security guard at DOE's Oak Ridge site (the site). The Applicant filed an application with OWA, requesting physician panel review of three illnesses – colon polyps, prostatitis, and pancreatic cancer.

The Physician Panel rendered a negative determination on the claimed colon polyps and prostatitis. The Panel determined that there was insufficient evidence establishing a relationship between the Worker's occupational exposures and those illnesses. The Panel did not address pancreatic cancer.

The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal.

In her appeal, the Applicant maintains that the Panel did not consider the Worker's pancreatic cancer. She states that the case file contained information relating to the pancreatic cancer, but that the information appears not to have been reviewed by the Panel.

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.

We agree with the Applicant's contention that the Panel should have considered the Worker's pancreatic cancer. Although the Applicant did not list pancreatic cancer on her initial application, the case history contains a reference to gastrointestinal cancer. Record at 24. Accordingly, that claim should have been referred to the Panel for its consideration.

We note that, in conjunction with her appeal, the Applicant provided several documents referencing the Worker's pancreatic cancer. Those documents should be made a part of the record and be considered with the Applicant's claim.

As the foregoing indicates, the Panel should have considered the Worker's pancreatic cancer. Accordingly, this application should be given further consideration.

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-0202 be, and hereby is, granted as set forth in paragraph 2 below.

(2) The Physician's Panel report did not consider all of the claimed illnesses. Reconsideration is in order.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 13, 2005

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May 25, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 14, 2004**

Case No.: **TIA-0203**

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 granted.

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 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) (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 Applicant was employed as a records clerk and a cubicle operator at the Oak Ridge Gaseous Diffusion Plant (the plant). She worked at the plant approximately 14 years, intermittently from 1945 to 1959.

The Applicant filed an application with OWA, requesting physician panel review of two claimed illnesses: chronic sinus infection and hand tremors. The Applicant claimed that these conditions were due to exposures to toxic and hazardous materials at the plant.

The OWA referred the matter to the Physician Panel, which issued a negative determination for the claimed illnesses. The Panel found that the Applicant had no significant exposure to any hazardous substances. See Physician's Panel Report at 1. Further, the Panel found no medical documentation of the claimed illnesses.

The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal.

In her appeal, the Applicant contends that (i) the Panel incorrectly found that she was not exposed to toxic substances, (ii) the Panel incorrectly stated that the file contained no evidence of headaches, and (iii) she has additional exposure information and medical documentation that was not included in the record. *See* Applicant's Appeal Letter.

In response to the appeal, we requested that OWA submit a copy of the record in this case. The OWA has not submitted a copy, and we understand that attempts to locate the record have been unsuccessful.

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.

We are unable to evaluate the Applicant's appeal. As stated above, the OWA was unable to locate the record for this case. Accordingly, further consideration of this application and the appeal at the DOL is in order.

As the foregoing indicates, the appeal should be granted. 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 granted of this appeal 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-0203, be, and hereby is, granted.

(2) The OWA record was not available for review. Reconsideration of the application is in order.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 25, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

April 15, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: September 16, 2004

Case No.: TIA-0204

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 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 as a scientist at DOE's Hanford site (the site) for nearly 40 years. The Applicant filed an application with OWA, requesting physician panel review of one illness – rectal cancer.

The Physician Panel rendered a negative determination on the claimed illness. The Panel examined the record and determined that the only toxin present at the site which could be related to the Applicant's illness was radiation. The Panel determined that the Applicant's dosimetry recordings for his entire career, with the exception of one year, were "either negligible or within accepted limits." See Panel Report at 1. Consequently, the Panel determined that the Applicant's occupational exposures were insufficient to have caused, contributed to, or aggravated his illness.

The OWA accepted the Physician Panel's determination on the claimed illness. The Applicant filed the instant appeal.

The Applicant presented several arguments in his appeal. First, the Applicant argued that the panel report contained a statement by the Applicant, made during a physical examination, that although he worked with radioactive materials he did not consider his job hazardous. The Applicant contends such a statement has no bearing on whether radiation exposure was a factor in his illness and that it appeared that the statement "may have had a significant influence on the physician's evaluation." See Applicant's Appeal Letter. Second, the Applicant contends that the fact that radiation exposure is within accepted limits does not preclude it being a "causative factor in cancer induction." *Id*. Third, the Applicant contends that the means of preventing, detecting, and measuring radiation exposure have significantly improved in the 40 years since he began working at the

site and, therefore, it is possible that the dosimetry recordings do not present an accurate estimate of his radiation exposure. The Applicant notes that a National Institute for Occupational Safety and Health (NIOSH) dose reconstruction report was not completed prior to the Panel's review of his claim.

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.

It is undisputed that the Panel considered the claimed illness, determined that it was not related to toxic exposures at DOE, and explained the basis of the determination. In making its determination, the Panel applied the correct standard, *i.e.*, "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." *See* Panel Report at 1; 10 C.F.R. 852.8.

The Applicant's arguments do not indicate Panel error. First, the Panel did not rely on the Applicant's statement that his job was not hazardous. Instead, the Panel relied on the Applicant's exposure records. Specifically, the Panel found the Applicant's occupational exposure to radiation was too low to have been a significant factor in causing, contributing to, or aggravating the Applicant's illness. There is nothing in the Panel report to indicate that the Panel would have arrived at a different conclusion absent the Applicant's statement that his job was not hazardous. Second, the Applicant's argument that low radiation exposure may be a "causative factor in cancer induction" is a mere disagreement with the Panel's medical judgment, not an indication of Panel error. Third, the Applicant's argument that the dosimetry record may not reflect the extent of his exposure does not indicate panel error since the Panel bases its determination on its review of the exposure data in the record. We note that the NIOSH dose reconstruction report, which was not completed at the time the Applicant's claim was reviewed by the Panel, may provide further information that would support the Applicant's claim.

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 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-0204 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 15, 2005**

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

March 10, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 17, 2004**

Case No.: **TIA-0205**

XXXXXXXXXXX (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 her late father (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illness was not related to his 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 dismissed.

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, and its web site provides extensive information concerning the program.[1]

[1] **www.eh.doe.gov/advocacy**

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. OHA continues to process appeals until DOL commences Subpart E administration.

B. Procedural Background

The Worker was employed as an electrician at the Paducah Gaseous Diffusion Plant (the plant). He worked at the plant for approximately two years, from 1952 to 1954.

The Applicant filed an application with the OWA, requesting that a physician panel review the Worker's metastatic cancer of the lung. The Panel stated that there were no medical records to support the validity of the alleged condition in the file.[2] The Panel rendered a negative determination which the OWA accepted. Subsequently, the Applicant filed the instant appeal.

In her appeal, the Applicant claims that the Worker's illness was caused by exposure to radiation and toxic materials at the plant. The Applicant also argues that her positive DOL Subpart B award is evidence that her father contracted metastatic cancer of the lung as a result of working at a DOE facility.[3]

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[2] Applicant's Appeal Letter.

[3] Physician Panel Report at 1.

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 Worker is a member of the Special Exposure Cohort under DOL Subpart B, *i.e.*, he worked at the Paducah Gaseous Diffusion Plant, and contracted a specified cancer after the beginning of his employment there. *See* 20 C.F.R. § 30.210. As a result, he received a positive DOL Subpart B determination. A positive DOL Subpart B determination satisfies the Subpart E requirement that the illness be related to a toxic exposure during employment at DOE. Accordingly, Subpart E has rendered moot the physician panel determination and consideration of any challenge to the Panel report is not necessary.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0205 be, and hereby is, dismissed.

(2) This dismissal 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: March 10, 2005

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April 15, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 20, 2004**

Case No.: **TIA-0206**

Charlene Myers (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 her late father (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illness was not related to his 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 dismissed.

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 laborer and carpenter's helper at the Paducah Gaseous Diffusion Plant (the plant). He worked at the plant for approximately two years, from 1952 to 1954.

The Applicant filed an application with the OWA, requesting physician panel review of two illnesses - chronic obstructive lung disease (COPD) and chronic beryllium disease (CBD). The Physician Panel rendered a negative determination for both illnesses, which the OWA accepted. Subsequently, the Applicant filed the instant appeal.

In her appeal, the Applicant claims that the Worker's lung disease and CBD was due to exposure to radiation and toxic materials at the plant. The Applicant asserts that the Worker was exposed to beryllium and had symptoms of CBD. The Applicant also argues that the DOL's determination under Subpart B that the Worker had CBD supports her position. *See* Applicant's Appeal Letter.

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 Applicant's positive DOL Subpart B determination for CBD satisfies the Subpart E requirement that the illness be related to a toxic exposure during employment at DOE. Authorization Act § 3675(a). *See also Worker Appeal*, Case No. TIA-0228, 29 DOE ¶ 80,202 (2005). Accordingly, Subpart E has rendered moot the physician panel determination and consideration of any challenge to the Panel report is not necessary.

As the foregoing indicates, the appeal should be dismissed as moot. 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 dismissal 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-0206, be, and hereby is, dismissed.

(2) This dismissal 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 15, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

April 22, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 20, 2004**

Case No.: **TIA-0207**

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 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 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 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 appeals 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 Applicant was employed as a process operator and chemical operator at the Oak Ridge Gaseous Diffusion Plant (the plant). She has worked at the plant intermittently, from 1975 to the present.

The Applicant filed a Subpart B application with DOL and a Subpart D application with DOE. In both applications, she claimed breast cancer with metastases to the lung, rib, and liver, and skin cancer. The DOL approved the Applicant's breast cancer claim and referred the skin cancer claim to the National Institute of Occupational Safety and Health (NIOSH) for a dose reconstruction. *See* OWA Record at 1130. The OWA referred the Subpart D claim to the Physician Panel. The Physician Panel rendered a negative determination and the OWA accepted the determination.

The Applicant filed the instant appeal. In her appeal, the Applicant challenges the negative determination. She states that the Panel misstated the date of diagnosis of her breast cancer. She also states that, when the Panel referred to theories about

the risk factors for her type of skin cancer, the Panel mistakenly stated that she had diabetes.

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 received a positive DOL Subpart B determination on her breast cancer claim. A positive DOL Subpart B determination satisfies the Subpart E requirement that the illness be related to a toxic exposure during employment at DOE. Authorization Act § 3675(a). *See also Worker Appeal*, Case No. TIA-0228, 29 DOE ¶ 80,202 (2005). Accordingly, Subpart E has rendered moot the physician panel determination on that illness and further consideration of the Applicant's challenge to that determination is unnecessary.

The Applicant's contention that she does not have diabetes does not indicate any material error in the negative determination on skin cancer. The Panel stated that the cause of the type of skin cancer at issue – syringoma – is not known. The Panel stated that no studies had identified radiation as a risk factor, and the Panel discussed studies looking at other possible risk factors, including diabetes. Given the Panel's statement that the cause of syringoma is unknown and that no studies have identified radiation as a risk factor, the Panel's statement that the Applicant had a condition being studied as a risk factor was not material to the determination. Accordingly, the Applicant has not identified any material Panel error.

As the foregoing indicates, 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-0207, 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 22, 2005

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April 18, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 20, 2004**

Case No.: **TIA-0208**

XXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' benefits. The OWA referred the application to an independent Physician Panel (the Physician Panel and the Panel), which determined that the Worker's illness was not related to his 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). 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.

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 as an apprentice carpenter at the Oak Ridge Plant (the plant). He worked at the plant for approximately 1 year, from 1950 to 1951.

The Applicant filed an application with the OWA, requesting physician panel review of his breast and bone cancers. The Applicant claims that his conditions were due to exposures to toxic and hazardous materials during the course of his employment.

In reviewing the Applicant's breast cancer, the Panel cited dust and asbestos exposure at the plant, but concluded that those exposures were not a factor in his breast cancer. The Panel determined that the development of the bony metastases was from the primary breast cancer. Accordingly, the Panel rendered negative determinations on both conditions, which the OWA accepted.

Subsequently, the Applicant filed the instant appeal. The Applicant argues that the Panel did not take into account that he may have had additional, undocumented toxic exposures during his employment and in his other activities near the plant. The Applicant also objects to the Panel's statement that chest x-rays that he had in conjunction with a separate illness were a risk factor for his breast cancer; the Applicant states that his physician told him that the x-rays were not a risk factor. *See* Applicant's Appeal Letter.

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.

As an initial matter, we note that the Applicant does not challenge the Panel's determination that the bone cancer represented a metastatis of the breast cancer. Accordingly, we turn to the Applicant's objections to the Panel's determination on breast cancer.

The Applicant has not demonstrated Panel error in the breast cancer determination. The Applicant's argument that he may have other unknown exposures does not indicate Panel error. A physician panel bases its determination on the record, and the Panel specifically considered the Applicant's exposure to dust and asbestos. Similarly, the fact that his physician disagrees with the Panel's identification of the Applicant's chest x-rays as a risk factor does not indicate Panel error. The Panel addressed the documented exposures; whether the Applicant's chest x-rays were a risk factor was not part of that analysis.

As the foregoing indicates, 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-0208 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 18, 2005

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April 20, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: September 21, 2004

Case No.: TIA-0209

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 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 as a secretary and administrative assistant at DOE's Savannah River site (the site) for nearly 27 years. The Applicant filed an application with OWA, requesting physician panel review of three illnesses – right breast cancer, left breast cancer, and hyperthyroidism. The Applicant claimed that these illnesses were related to radiation exposure at the site.

The Physician Panel rendered a negative determination on the claimed illnesses. For each illness, the Panel determined that the Applicant's radiation exposure was insufficient to have been a significant factor in causing, contributing to, or aggravating the illness. The Panel stated that the Applicant's dosimetry monitoring data fell well below both the annual radiation dose limit for radiation workers and the average exposure level of the general public. *See* Panel Report at 2.

The OWA accepted the Physician Panel's determination on the claimed illnesses. The Applicant filed the instant appeal.

In her appeal, the Applicant argues that the Panel based its negative determination on the fact that she had a positive family history of breast cancer. The Applicant further argues that several doctors told her that her illnesses probably resulted from her working at the site.

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 Applicant's arguments do not provide for finding panel error. First, the Panel's reference to the Applicant's history of breast cancer does not indicate Panel error. Although the Panel discussed a positive family medical history of breast cancer as a possible risk factor for the illness, the key determination here was that the Applicant's occupational exposures were too low to have been a significant factor in her illnesses. Second, the Applicant's argument that other doctors told her that her illnesses were probably related to her employment at the site is a mere disagreement with the Panel's medical judgment, rather than an indication of Panel error.

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 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-0209 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 20, 2005

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May 18, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: September 21, 2004

Case No.: TIA-0210

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the illnesses were not related to work at the DOE. The OWA accepted the Panel's determination. The Applicant's son and authorized representative (the Appellant) filed an Appeal with the DOE's Office of Hearings and Appeals (OHA), stating that the Applicant had died and that he (the son) was in the process of preparing a request to become the applicant. As explained below, we have determined 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 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 Applicant filed Subpart B and Subpart D applications, claiming colon cancer and skin cancer. The Applicant worked at the Oak Ridge Y-12 plant for 32 years, from 1944 to 1976. The DOL referred the Subpart B application to the National Institute of Occupational Safety and Health (NIOSH) for a radiation dose reconstruction. The Applicant elected to have his Subpart D application referred to the Physician Panel without awaiting the results of the dose reconstruction.

The Physician Panel issued a negative determination on both illnesses. The Panel stated that the Applicant was exposed to mercury, lithium hydroxide, beryllium, and radiation, but found that his exposures were not a significant factor in his illnesses. The Panel stated that colon cancer is the third most common cancer in the United States, and the Panel discussed various risk factors. The Panel explained its negative determination as follows: "Based on the tumor location, pathological diagnosis and 23 year post retirement primary occurrence, this colon cancer is most likely not related to his employment at the Y-12 facility." With respect to the claimed skin cancer, the Panel stated the

condition is most often found in sun exposed areas and that toxic exposures are not risk factors. The Panel found that the Applicant's skin cancer, which was on his scalp, was "triggered by sun exposure and unrelated" to his DOE employment.

The Appellant filed an appeal. The Appellant states that the Panel incorrectly stated that (i) the Applicant did not have toxic exposures and (ii) he had a "probable" history of colon cancer. The Appellant also states that (i) he believes there is additional exposure information and (ii) he wants to claim two additional illnesses.

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 Appellant has not identified Panel error. Contrary to the Appellant's argument, the Panel acknowledged that the Applicant was exposed to the identified toxic chemicals, but stated that toxic exposures were not a risk factor for his prostate cancer or his skin cancer. Moreover, the Panel's reference to a "probable" family history of colon cancer is, at most, harmless error. The Panel's view was that exposure to toxic substances was not a risk factor and that the location, pathology, and timing of the Applicant's prostate cancer was consistent with that view. The Appellant's objections are ultimately a disagreement with the Panel's medical judgment, rather than an indication of Panel error.

The Appellant's arguments about additional exposure information and additional illnesses also do not indicate Panel error. As stated above, the Panel did not view toxic exposures as risk factors for the claimed illnesses and, therefore, additional information on exposures would not affect its determination. If the Appellant wishes to claim additional illnesses, he should contact the DOL concerning how to proceed.

As the foregoing indicates, the Appellant has not identified 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 grant of this appeal 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-0210, be, and hereby is, denied.

(2) The denial pertains only to the DOE appeal and not to the DOL's review of these claims 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 18, 2005

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April 19, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 21, 2004**

Case No.: **TIA-0211**

XXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Physician Panel and the Panel), which determined that the Worker's illness was not related to his 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 granted.

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 Applicant was employed as a technical specialist and a science and engineering associate at the Hanford Plant (the plant). He worked at the plant for approximately 28 years, from 1977 to the present.

The Applicant filed an application with the OWA, requesting physician panel review of a blood disorder. The Applicant claims that his condition was due to exposures to toxic and hazardous materials during the course of his employment at the plant.

Upon review of the record, the Panel determined that the Applicant had no evidence of a blood disorder. *See* Physician's Panel Report. Accordingly, the Panel rendered a negative determination, which the OWA accepted.

Subsequently, the Applicant filed the instant appeal. In his appeal, the Applicant does not challenge the Panel's determination that his records do not show a blood disorder. Instead, the Applicant refers to his recent diagnosis of Crohn's disease and ulcerative colitis and maintains that the Panel should have considered those illnesses. *See* Applicant's Appeal Letter.

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 Applicant's claim of Crohn's disease and ulcerative colitis should have been considered by the Panel. Although the Applicant initially claimed a blood disorder, the Applicant later added these conditions to his application.[1] Accordingly, these conditions should receive further consideration.

As the foregoing indicates, the appeal should be granted. 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 review 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-0211, be, and hereby is, granted.

(2) The Physician's Panel report did not consider all of the claimed illnesses. Reconsideration of the Applicant's claimed Crohn's disease and ulcerative colitis is in order.

[1] See March 17, 2004 letter to OWA.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 19, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

April 25, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: September 21, 2004

Case No.: TIA-0212

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 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 granted.

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 as a machinist at DOE's Oak Ridge site (the site). The Applicant filed an application with OWA, requesting physician panel review of three illnesses – colon cancer, skin cancer, and prostate cancer.

The Physician Panel rendered a negative determination on the claimed illnesses. For the claimed colon cancer, the Panel stated that without a completed National Institute for Occupational Safety and Health (NIOSH) dose reconstruction report, it was difficult to assess the probability that the Applicant's radiation exposure was a factor in the illness. However, the Panel considered the relatively high occurrence of colon cancer in the general population, the Applicant's smoking history, the epidemiologic data that did not indicate that workers at the site were at a higher risk for colon cancer, and the moderate levels of measured radiation exposure. Based on this information, the Panel determined that it was "less likely than not that potential hazardous exposures at [the site] were a significant contributor" to the Applicant's colon cancer. Panel Report at 1. For the claimed skin cancer, the Panel stated that the Applicant's dispensary records and sick slips from treating physicians throughout the course of his employment at the site do not make any reference to skin cancer. The Panel further stated that the only indication that the Applicant had skin cancers removed is a section of a hospital summary under the heading of "past surgical history." The Panel determined that given the lack of information in the record regarding this illness, there was "little reason to conclude that the [Applicant's] DOE work exposures significantly contributed to this undocumented condition." Panel Report at 3. For the claimed prostate cancer, the Panel stated that there was no conclusive diagnosis of prostate cancer for the Applicant.

The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal.

The Applicant provided several arguments on appeal. First, the Applicant argued that he did not recall saying that he wanted his claim to move forward prior to completion of the NIOSH report. Second, the Applicant argued that he had multiple skin cancers on his face. He stated that he was unable to obtain medical records regarding the condition because his treating physician is deceased. Third, the Applicant argues that records regarding his prostate cancer should have been included in the record.

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 first argument on appeal – that he did not recall stating that the claim should proceed without the completed NIOSH dose reconstruction report – is not a basis for finding panel error. The case history indicates that the Applicant gave permission for his claim to proceed to panel review without the NIOSH report. Record at 17. If the Applicant receives a NIOSH dose reconstruction that he believes supports his claim, he should raise the matter with DOL in connection with his Subpart E claim.

The Applicant's argument that he had skin cancer does not indicate Panel error. The Panel recognized the reference to skin cancer in the Applicant's records but found that the lack of any documentation precluded a determination that the cancers were related to toxic exposures at DOE. The Applicant may wish to have his personal physician examine the sites of the surgery and provide a supporting letter. If the Applicant obtains any further information, he should contact DOL on how to proceed.

We agree with the Applicant that the Panel erred when it stated that the record did not contain evidence of a positive diagnosis of prostate cancer. The record contains a letter from the Applicant's treating physician indicating that the Applicant had the illness. Record at 24. The case history also indicates that the Applicant underwent prostate surgery. *Id*. at 17. We note that, in conjunction

with his appeal, the Applicant provided several documents indicating a positive diagnosis of prostate cancer and the treatment he underwent for the illness. Those documents should be considered in the Applicant's Subpart E claim.

As the foregoing indicates, the Panel incorrectly stated that the record contained no evidence of prostate cancer. Accordingly, this application should be given further consideration.

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 grant 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-0212 be, and hereby is, granted as set forth in paragraph 2 below.

(2) The Physician's Panel report incorrectly concluded that the record did not contain evidence of prostate cancer. Reconsideration is in order.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 25, 2005

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April 22, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 22, 2004**

Case No.: **TIA-0213**

XXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' benefits. The OWA referred the application to an independent Physician Panel (the Physician Panel or the Panel), which determined that his illness was not related to his 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). As explained below, we have concluded that the Appeal should be dismissed.

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, and its web site provides extensive information concerning the 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).

B. Procedural Background

The Applicant was employed as a janitor and laundry worker at the Rocky Flats Plant (the plant) for approximately 16 years, from 1974 to 1990.

The Applicant filed an application with the OWA, requesting that a physician panel review his emphysema and chronic obstructive pulmonary disease (COPD). The Applicant asserted that these illnesses were due to exposure to toxic and hazardous materials at the site. The Physician Panel rendered a negative determination, which the OWA accepted. Subsequently, the Applicant filed the instant appeal.

In his appeal, the Applicant does not dispute the negative determination, but rather states that he intends to be tested for chronic beryllium disease (CBD) and may add that as a claimed illness. *See* Applicant's Appeal Letter.

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.

Since there is no challenge to the panel determination for the claimed illnesses, the appeal should be dismissed. If the Applicant wishes to amend his claim to add CBD, the Applicant should contact DOL on how to proceed.

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 dismissal 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-0213 be, and hereby is, dismissed.

(2) This dismissal 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 22, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

October 29, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 22, 2004**

Case No.: **TIA-0214**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illnesses were not related to his 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 granted and the application remanded to the OWA.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (the EEOICPA or 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

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

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 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 as an operator, supervisor and an administrator at Paducah Gaseous Diffusion Plant (the Plant). He worked at this Plant for approximately 28 years, from 1976 to the present.

The Applicant filed an application with the OWA, requesting that a physician panel review his claims of asbestosis and masses in the upper and lower left lung. The Applicant asserted that his illnesses were due to his exposure to toxic and hazardous materials and chemicals in the Plant buildings in which he worked. The Physician Panel rendered a negative determination with regard to both illnesses. The OWA accepted the Physician Panel's negative determinations, and the Applicant filed the instant appeal challenging the negative determination regarding asbestosis.

II. Analysis

The Physician Panel Rule provides for OWA submission to the panel of records gathered during the case development process. 10 C.F.R. §§ 852.4 to 852.6. In his appeal, the Applicant contends that the Physician Panel did not review all the medical records that he submitted and, in particular, the records of his March 2002 thoracotomy at Vanderbilt

[2] *See* www.eh.doe.gov/advocacy.

University Medical Center. The Applicant is correct. The file indicates that the Applicant provided the Vanderbilt documents, but that they were not included in the record.[3] Therefore, the Physicians Panel did not review these records. Moreover, the record indicates that these medical documents were potentially relevant to the Panel's evaluation. The Panel noted the absence of the Vanderbilt records. Further, the panel stated that although there was "no medical evidence supporting the disease of asbestosis," "more information" or "future testing [providing] more definitive results" would warrant reevaluation.[4]

Based on the foregoing, the application should be remanded to the OWA for further processing. We will forward a copy of the Vanderbilt records to the OWA so that the application, supplemented with this material, may receive further consideration. If the Applicant possesses new medical records with respect to his claim of asbestosis, he should consider submitting them to the OWA.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0214 be, and hereby is, granted as set forth in Paragraph 2 below.

(2) The Application that is the subject of this Appeal is remanded to the Office of Worker Advocacy for further processing.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 29, 2004

[3] *See* Statement by Applicant Reviewing the Record of an Office of Worker Advocacy Application (Form 350.8).
[4] *See* OWA Physician Panel Report, at 3.

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May 18, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Date of Filing: **September 23, 2004**

Case No.: **TIA-0215**

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 from 1970 to 1997. An independent physician panel (the Panel) issued a determination (the 2003 determination) that the Applicant's illnesses were not related to his work at DOE, and the OWA accepted that determination. The Applicant appealed to the Office of Hearings and Appeals (OHA), which granted the appeal and remanded the application for further consideration. *See Worker Advocacy,* Case No. TIA-0032, 28 DOE ¶ 80,322 (2004) (the Remand Order). The Panel issued a second negative determination (the 2004 determination), which the OWA accepted. The Applicant appealed the 2004 determination. As explained below, we have determined that the appeal should be granted.

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 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 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 Applicant was employed at a DOE facility as a janitor and structural group tradesman from 1970 to 1997. In 1997, the Applicant retired on disability. In his application, he identified a number of claimed illnesses – toxic encephalopathy, chronic sinisitis, induced food intolerance, gastrointestinal symptoms, difficulty concentrating, fibromyalgia, chronic fatigue syndrome, pulmonary fibrosis, obstructive sleep apnea, and depression. He attributed the illnesses to working around toxic dusts and

chemicals at DOE, and he specifically mentioned a 1985 incident involving exposure to fumes. The OWA referred to application to the Panel.

The Panel issued the 2003 determination. Two physicians found insufficient evidence of illnesses related to DOE employment. The third physician found sufficient evidence that the Applicant's lung illness and psychological impairment were related to DOE employment. The OWA accepted the majority Panel determination, and the Applicant appealed.

In response to appeal of the 2003 determination, we issued the Remand Order. In the Remand Order, we found that the Panel had not complied with the Rule in two ways. First, we found that the Panel applied a more stringent standard than the Rule permits. We cited the following language in the 2003 determination:

> Two panelists thought there was insufficient documentation to support any work relatedness to the claims. [The worker] was very thoroughly evaluated by multiple specialists from the mid 1980's to the mid 1990's none of whom could arrive at any definitive association between work conditions and his symptoms, nor could they substantiate his claimed illnesses.

Remand Order, slip op. at 3, 28 DOE at 80,961-62, *citing* 2003 Determintion. We stated that the wording was problematic in two ways.

> First, the panel's reference to the worker's evaluation by medical specialists suggests that the panel did not make its own independent determination, but rather relied on the medical specialists. Second, the panel's reference to the lack of a "definitive" association between the worker's symptoms and his work reflects a higher standard than the "at least as likely as not" standard.

Id. Second, we found that the Panel had not adequately explained the basis of its determination. We noted the Panel's statement that "none" of the specialists could substantiate an illness or its work-relatedness. We stated that some of the specialists did diagnose pulmonary disease, brain dysfunction, and multiple chemical sensitivities. Based on the foregoing, we remanded the application for further consideration.

In response to the Remand Order, the Panel issued the 2004 determination. In the 2004 determination, the Panel addressed four

illnesses - toxic encephalopathy, fibromyalgia, sleep apnea, and diabetes. The Panel found insufficient information to conclude that the Applicant had toxic encephalopathy, fibromyalgia, or diabetes. The Panel found evidence of a medical diagnosis of sleep apnea but found insufficient evidence to conclude that it was related to exposure to a toxic substance. The OWA accepted the 2004 determination, and the Applicant filed the instant appeal.

In his appeal, the Applicant argues that he has submitted sufficient information to establish that "it is at least as likely as not" that he has the claimed illnesses and that they are related to his employment at DOE. In the alternative, he states that he is currently seeing specialists for his illnesses and has additional records.

II. Analysis

The 2004 determination was not responsive to the Remand Order. The Remand Order's finding that the 2003 determination applied an overly stringent standard was not limited to a subset of illnesses. Accordingly, the Remand Order required that the Panel reconsider its determination on all the claimed illnesses. The 2004 determination did not do that. Instead, the 2004 determination considered three of the claimed illnesses - toxic encephalopathy, fibromyalgia, sleep apnea – and a fourth illness – diabetes - that the Applicant never claimed. Because the Applicant did not receive the comprehensive second review contemplated by the Remand Order, such a comprehensive review is in order.

Further consideration of the application should provide an opportunity to the Applicant to submit additional medical records. The general thrust of the 2004 determination is that the records submitted by the Applicant do not represent clinical characterization of, or treatment for, the claimed conditions. In his appeal, the Applicant indicates that he has such records. Accordingly, the Applicant should consult with the DOL on the procedure for submitting this evidence.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0215 be, and hereby is, granted as set forth in Paragraph (2) below.

(2) The application warrants further consideration based on the applicable standard and additional evidence to be provided by the Applicant.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 18, 2005

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April 22, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 23, 2004**

Case No.: **TIA-0216**

XXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Physician Panel or the Panel), which determined that the Applicant's illness was not related to his 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 Applicant was employed as a maintenance planner at the Pinellas Plant (the plant). He worked at the plant for approximately 21 years, from 1976 to 1997.

The Applicant filed an application with the OWA, requesting physician panel review of his skin cancer, specifically basal cell carcinoma. The Applicant claims that his skin cancer was related to exposures to toxic substances during the course of his employment at the plant. The OWA referred the claim to the Physician Panel, which issued a negative determination. The Panel stated that there was insufficient evidence of exposures to support a conclusion that the Applicant's skin cancer was related to his employment at the plant. *See* Physician's Panel Report. The OWA accepted the determination, and the Applicant appealed.

In his appeal, the Applicant states that exposure to toxic substances, even without permissible limits, could increase the risk of skin cancer. *See* Applicant's Appeal Letter.

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 has not demonstrated Panel error. The Applicant's general argument that exposure to toxic substances at permissible levels could increase the risk of skin cancer does not indicate Panel error. The Applicant states a more lenient standard than the Panel was required to apply. The Panel was required to consider "whether it was at least as likely as not" that a toxic exposure at DOE was a "significant factor" in aggravating, contributing to, or causing an illness. *Id.* § 852.8. The Panel applied that standard. Accordingly, the Applicant's argument is ultimately a disagreement with the Panel's medical opinion, rather than an indication of Panel error.

As the foregoing indicates, 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-0216 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 22, 2005

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April 27, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 4, 2004**

Case No.: **TIA-0217**

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 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.[1]

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 as an engineer at the Idaho National Engineering Lab (the Lab) from 1969 to 1996. He requested physician panel review of "bladder cancer."

The Physician Panel rendered a negative determination. The Panel stated that the record did not contain documentation of toxic exposures that could contribute to bladder cancer.

The OWA accepted the Physician Panel's determination on the illness. The Applicant filed the instant appeal.

[1] www.eh.doe.gov/advocacy

In his appeal, the Applicant does not challenge the bladder cancer determination. Instead, he argues that the Panel also should have issued a determination on ureteric cancer.

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 Panel's failure to consider ureteric cancer was not panel error. The Applicant did not request review of that condition. If the Applicant seeks review of the condition, he should contact DOL on how to proceed.

As the foregoing indicates, the Applicant has not identified Panel error. Accordingly, the Appeal should be denied.

In compliance with Subpart E, these claims 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 review of these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0217 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 27, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

April 26, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 23, 2004**

Case No.: **TIA-0218**

XXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. 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 his 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 granted.

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 Applicant filed a Subpart B application with the DOL and a Subpart D application with the DOE, based on kidney cancer. The Applicant stated that he was employed as a first class insulator at the Idaho National Engineering Laboratory (INEEL). The Applicant stated that he worked at the Naval Reactor Facility from 1976 to 1992 and at various other parts of INEEL from 1992 to the present. Record at 9. The DOL asked the National Institute of Occupational Safety and Health (NIOSH) to undertake a dose reconstruction. The Applicant requested that OWA send his case to the Panel without awaiting the completion of the dose reconstruction. *See* OWA Record at 19.

The OWA found that the Applicant's employment at the Naval Reactor Facility was outside the scope of the Physician Panel Rule. Record at 13. Accordingly, the OWA forwarded the application to the Physician Panel for consideration of the Applicant's employment from 1992 to the present.

The Panel issued a negative determination. The Panel explained its determination in the following sentence: "No history of

compatible exposure or occupational history compatible with known risk for renal carcinoma." Report at 1. The OWA accepted the determination, and the Applicant appealed.

In his appeal, the Applicant questions why the Panel did not consider his employment at the Naval Research Facility. The Applicant also argues that the Panel's one-sentence explanation is insufficient to explain the basis of its determination. For example, the Applicant states, it is unclear whether the Panel considered his exposure to cadmium.

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 argument that the Panel should have considered his employment at the Naval Reactor Facility does not indicate OWA or Panel error. The Act excludes, from the definition of DOE facility, facilities operated by the Naval Nuclear Propulsion Program. 42 U.S.C. § 7384l(12). Accordingly, the Applicant's employment at the Naval Reactor Facility does not fall under the Physician Panel Rule.

The Applicant's argument that the Panel did not provide a sufficient explanation of its determination has considerable merit. It is unclear whether the Panel found that the Applicant was not exposed to any substances that are risk factors for kidney cancer or whether the Panel found that the Applicant was exposed to such substances but that the level of exposures was insignificant. The record reflects exposure to asbestos, radiation and cadmium. *See, e.g.*, Record at 256 (asbestos), 354-367 (radiation), 368 (cadmium). The Panel should have addressed those exposures in its determination, including the Applicant's assertion in his application that he had an acute radiation exposure. See Record at 9. Accordingly, reconsideration of the Applicant's claim is in order.

As the foregoing indicates, the appeal should be granted. 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 grant 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-0218 be, and hereby is, granted as set forth in paragraph 2 below.

(2) The Physician Panel Report failed to explain adequately the basis of its determination. Further consideration is in order.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 26, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

April 28, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 24, 2004**

Case No.: **TIA-0219**

XXXXXXXXXXX (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 her late husband (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 his 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 janitor, laborer, maintenance mechanic, and mailroom worker at the Savannah River Site (the plant). He worked at the plant for approximately 18 years, intermittently from 1962 to 1983.

The Applicant filed an application with the OWA requesting physician panel review of the Worker's throat mass, severe dilated congestive cardiomyopathy and renal insufficiency. The Applicant alleges that the Worker's conditions were caused by exposures to toxic and hazardous material during the course of the Worker's employment at the Plant.

The Physician Panel rendered negative determination for all of the claimed illnesses. The Panel found that there was no evidence of a throat mass and insufficient evidence linking workplace exposures to the Worker's other conditions. The OWA accepted the determination, and the Applicant filed the instant appeal.

In her appeal, the Applicant contends that (i) the record lacks exposure records for at least one year, and employment records for 1952, and (ii) the record contains evidence that the Worker had the sensation of a throat mass. *See* Applicant's Appeal Letter.

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 OWA or Panel error. In her application, the Applicant claimed that the Worker was employed from 1962 to 1991, and the records contains exposure records for that period, see Record at ___. If the Applicant wishes to claim employment during prior years, she should contact the DOL on how to proceed. Finally, the Applicant's argument that the Worker had a sensation of a throat mass does not indicate Panel error. The Panel acknowledged that the Worker reported the sensation, but found that the record lacked evidence that he actually had a throat mass. The Applicant has not alleged, let alone demonstrated, Panel error on that issue.

As the foregoing indicates, 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-0219, 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 28, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

April 25, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 24, 2004**

Case No.: **TIA-0220**

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. 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 his 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 dismissed as moot.

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 Applicant was employed as an electrician and instrument mechanic at the Oak Ridge Gaseous Diffusion Plant (the plant). He has worked at the plant for approximately 30 years, from 1975 to the present.

The Applicant filed a Subpart B application with the DOL and a Subpart D application with OWA, claiming colon cancer. The OWA referred the application to the Physician Panel which issued a negative determination. The Panel found that the Applicant had colon cancer, but that the cancer was not related to toxic exposure at DOE. The OWA accepted the determination, and the Applicant file an appeal. In his appeal, the Applicant states that the decision is inconsistent with a DOL Subpart B positive determination for his colon cancer.

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 DOL's Subpart B positive determination renders the appeal moot. The determination satisfies the Subpart E requirement that the claimed illness be related to toxic exposure during employment at DOE. *See* Authorization Act §3675 (a). See also Worker Appeal, Case No. TIA-0228, 29 DOE ¶80,202 (2005). Accordingly, Subpart E has rendered moot the physician panel determination and consideration of any challenge to the Panel report is not necessary.

As the foregoing indicates, the appeal should be dismissed as moot. 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-0220 be, and hereby is, dismissed as moot.

(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 25, 2005

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May 3, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 24, 2004**

Case No.: **TIA-0221**

XXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits based on the employment of her late husband (the Worker). 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 Worker was employed as a lab analyst at the Paducah Gaseous Diffusion Plant (the plant). The Worker is deceased. The application stated that he worked at the plant for approximately two years -- from 1960 to 1962. The Applicant requested physician panel review of two illness – kidney failure and radiation nephritis. The OWA forwarded the application to the Physician Panel.

The Physician Panel rendered a negative determination on each of the Worker's claimed conditions. The Panel cited the Worker's cumulative radiation exposure while at the plant as being well below acceptable background levels. The Panel stated that the record contained insufficient evidence of any toxic

exposures that could have caused kidney failure. The Panel stated that the record contained no diagnostic evidence of radiation nephritis. The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal.

In her appeal, the Applicant states that the Worker was exposed to a release of Uranium Hexaflouride (UF6) in 1962. She states that this "release" forced the Worker to be relocated out of Building C-410. The Applicant cites various external sources regarding the dangers of uranium in the body and the harm it may cause to kidneys. The Applicant closes by stating that the Worker developed severe kidney problems with no known etiology shortly after his termination at the plant.

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 Applicant's appeal is not supported by the record. The record contains no evidence of a UF6 release in Building C-410. Additionally, the record contains no evidence of the etiology of the Applicant's conditions. Some of his physicians stated that the Worker suffered from a severe kidney condition of no known cause. Thus, the record does not contain information to support a conclusion that toxic exposures at DOE were a significant factor in the Worker's kidney conditions. Accordingly, the Appeal has not identified Panel error and should be denied.

In compliance with Subpart E, these claims 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 review of these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0221 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 3, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

April 25, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: October 4, 2004

Case No.: TIA-0222

XXXXXXXXXX (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 her late husband (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illness was not related to his work at a DOE facility. 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, and its web site provides extensive information concerning the program.[1]

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.[2] Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.[3] Subpart E provides that all Subpart D claims will be considered as Subpart E claims.[4] OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Worker was employed as a machinist at the DOE's Rocky Flats plant (the plant). He worked at the plant for approximately thirty-six years, from September 1952 to January 1988.

The Applicant filed an application with the OWA, requesting physician panel review of the Worker's diffuse large cell lymphoma. The Applicant asserted that the Worker's illness was the result of exposure to hazardous chemicals and radiation at the plant.

The Physician Panel rendered a negative determination with regard to the illness. The Panel agreed that the Worker

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[1] *See* OWA website, *available at* http://www.eh.doe.gov/advocacy/index.html

[2] Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).

[3] *See id.* § 3675(a).

[4] *See id.* § 3681(g).

had lymphoma, but two members of the Panel concluded that it was not due to toxic exposure, i.e., radiation and metalworking fluids. One member of the Panel determined that the Worker's lymphoma was associated with his exposure to metalworking fluids during the course of his employment.

The OWA accepted the Physician Panel's negative determination, and the Applicant filed the instant appeal.

In her appeal, the Applicant advances three arguments. First, she argues that the Physician Panel concentrated on dosimetry records belonging to another person. She refers to a place in the Physician Panel report where the Worker was referred to by the wrong name. Second, the Applicant argues that the Worker could have been exposed to a number of toxic substances which were not considered by the Panel. She notes a letter from the DOE's Rocky Flats field office which states that "portions of several documents in [the Worker's] employment record were blacked out at some time in the past."[5] In addition, she notes the National Institute for Occupational Safety and Health (NIOSH) is in the process of completing a dose reconstruction. Third, the Applicant argues that radiation and metalworking fluids caused the Worker's illness. The Applicant submits a physician's opinion to that effect, as well as a complete copy of a January 1998 NIOSH report entitled "Occupational Exposure to Metalworking Fluids."

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 a 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 is correct that one place in the report refers to a person other than the Worker. Nonetheless, the

[5] DOE Rocky Flats Field Office Letter dated November 20, 2001.

record indicates that the Physician Panel reviewed the correct records. The record contains only the Worker's medical and employment records and the Panel discussed these records in its report. Accordingly, the Panel's reference to a different name is harmless error.

Although the Applicant refers to the possibility of additional exposure information, the record indicates that the Panel reviewed all available records. While portions of the Worker's records contain deletions, there is no indication that the plant did not supply all the available information related to the Worker. As the Applicant recognizes, the DOE field office pointed out the deletions, stated that they occurred sometime in the past and that the site provided copies of the documents "exactly as they appear in our files."[6] In any event, the deletions do not appear to relate to exposure information.[7] As to the pending status of a NIOSH dose reconstruction, the Physician Panel makes its determination based on the records presented to it. When the NIOSH does reconstruction is completed, it may warrant reconsideration of the claim.

Finally, the Applicant's argument that the Worker's illness was related to radiation and metalworking fluids does not indicate Panel error. The Panel considered exposure to radiation and metalworking fluids and found that they were not a significant factor in causing, aggravating, or contributing to the Worker's illness. In the view of the two-member majority, there was insufficient evidence to find a link between the Applicant's exposure and his illness, and it was much more likely associated with genetic factors. Given the Panel's discussion on this issue, the Applicant's argument about the role of radiation and metalworking fluids is a disagreement with the Panel's medical opinion, rather than an instance of Panel error. Again, if the NIOSH dose reconstruction indicates additional radiation exposure, reconsideration may be warranted.

As the foregoing indicates, the Applicant has not demonstrated material error. Accordingly, the appeal should be denied.

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[6] DOE Rocky Flats Field Office Letter dated November 20, 2001.

[7] For example, personal data supplied by the Worker, such as weight, height, date of birth, place of birth, marital status was deleted. *See* Record at "Employment Application."

In compliance with Subpart E, this 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 Department of Labor's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0222 be, and hereby is, denied.

(2) The 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 25, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

April 29, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 24, 2004**

Case No.: **TIA-0223**

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. 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 his 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 Applicant was employed as a lab technician at the Savannah River Site (the plant). He worked at the plant for approximately 39 years, from 1954 to 1993.

The Applicant filed an application with the OWA, requesting physician panel review of his blood disorder and degenerative arthritis of the hip leading to a hip replacement. The Applicant claims that his conditions were due to exposures to toxic and hazardous materials during the course of his employment.

The OWA referred the matter to the Physician Panel, which issued a negative determination. As an initial matter, the Panel acknowledged radiation exposure but stated that it was not in excess of permissible limits. Turning to the claimed conditions, the Panel found that there was insufficient evidence establishing a link between the Applicant's workplace exposures and his conditions. In reference to the claimed blood disorder, the Panel stated that a low platelet count, unaccompanied by other blood abnormalities, was not associated

with radiation exposure. The Panel noted the Applicant's intermittent use of Naproxen has an association with hematologic abnormalities. With respect to his degenerative arthritis claim, the Panel stated that the condition is not associated with exposure to chemicals and radiation. *See* Physician's Panel Report. The OWA accepted the determination, and the Applicant appealed.

In his appeal, the Applicant contends that the Panel was in error when it stated that his dosimetry records never exceeded annual limits. The Applicant also contends that the Panel did not review all of his blood abnormalities and provided blood work lab results from 2003. *See* Applicant's Appeal Letter.

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 contentions do not indicate material Panel error. The Panel found that neither of the Applicant's conditions was known to be associated with radiation exposure. Accordingly, whether the Applicant's radiation exposure ever exceeded annual permissible limits is not relevant to the Panel's analysis. The Applicant's argument that recent blood tests show additional blood abnormalities also does not indicate Panel error. Those test results were not part of the record that went to the Panel for review. If the Applicant wishes to have this new information considered, the Applicant should contact the DOL on how to proceed.

As the foregoing indicates, 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-223 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

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March 9, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 24, 2004**

Case No.: **TIA-0224**

XXXXXXXXXXX (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 her late father (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illness was not related to his 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 dismissed as moot.

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, and its web site provides extensive information concerning the program. [1]

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. OHA continues to process appeals until DOL commences Subpart E administration.

B. Procedural Background

The Worker was employed as a carpenter and in maintenance at the Paducah Gaseous Diffusion Plant (the plant). He worked at the plant for approximately 20 years, from 1955 to 1975.

The Applicant filed an application with the OWA, requesting that a physician panel review the Worker's lymphoma. The Applicant asserted that this illness was due to exposure to toxic and hazardous materials at the plant. The Physician Panel rendered a negative determination which the OWA accepted. Subsequently, the Applicant filed the instant appeal.

In her appeal, the Applicant presented several arguments that the Worker's illness was caused by exposure to toxic chemicals at the plant. The Applicant indicated that, as a member of the Special Exposure Cohort, she received a positive DOL Subpart B determination for lymphoma.

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[1] www.eh.doe.gov/advocacy

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 Applicant's positive DOL Subpart B determination satisfies the Subpart E requirement that the illness be related to toxic exposure during employment at DOE. Accordingly, Subpart E has rendered moot the physician panel determination and consideration of any challenge to the Panel report is not necessary.

As the foregoing indicates, the appeal should be dismissed as moot. 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-0224 be, and hereby is, dismissed.

(2) This dismissal 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: March 9, 2005

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May 9, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 22, 2004**

Case No.: **TIA-0225**

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 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.[1]

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 as a laborer, an auto mechanic, and a truck driver at the Rocky Flats Plant (the plant). In his application, he stated that he worked at the site for a total of 23 years -- from 1969 to 1992. He requested physician panel review of "colon cancer." The OWA forwarded the application to the Physician Panel.

The Physician Panel rendered a negative determination on colon cancer. The Panel remarked that the Applicant had radiation exposure, but that exposure was not enough to be a significant factor in his illness. The Panel stated that the Applicant had a genetic disposition to the disease.

[1] www.eh.doe.gov/advocacy

The OWA accepted the Physician Panel's determination on the illness. The Applicant filed the instant appeal.

In his appeal, the Applicant states that his exposures at the plant accelerated the onset of his colon cancer. He states that his exposure records are incomplete, citing the absence of radiation exposure data for his first two years at the plant. The Applicant also states that he has consulted numerous physicians who remarked that his exposures (radiation and chemical) at the plant could have increased his susceptibility to colon cancer.

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 argument that the record does not contain radiation exposure data for the first two years of his employment does not indicate Panel error. The Panel bases its decision on the record, and we do not see any indication that the record is incomplete. The OWA asked the plant to provide relevant records. Record at 6, 7. The plant responded to that request, and we have no reason to believe that the plant's response was inadequate or that OWA somehow misplaced the records. It may be that radiation exposure was not measured in the first two years of the Applicant's employment or that the plant did not retain the records.

Similarly, the Applicant's argument that his physicians have stated that his exposures to radiation could have increased his susceptibility to colon cancer does not indicate Panel error. As an initial matter, we note the absence of any such physician statements in the record. More importantly, the Panel Rule requires a closer nexus between exposures and an illness. The

Panel Rule does not provide for a positive determination where an exposure "could" be a factor; instead, the Panel Rule requires that it be "at least as likely as not" that the exposure "was a significant factor in aggravating, contributing to or causing the illness." 10 C.F.R. § 852.8. Accordingly, evidence that an exposure "could" have increased susceptibility to an illness does not satisfy the standard set forth in the Panel Rule.

Finally, we note that the Applicant filed a Subpart B claim, and that the DOL referred the application to the National Institute of Occupational Safety and Health (NIOSH) for a radiation dose reconstruction. *See* Record at 17. If the Applicant believes that the results of the NIOSH dose reconstruction support his claim, he should raise the matter with the DOL.

In compliance with Subpart E, this claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on Subpart E claims. The OHA's denial of this appeal does not purport to dispose of or in any way prejudice the DOL's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0225 be, and hereby is, denied.

(2) This denial pertains only to the DOE appeal 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 9, 2005

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February 28, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 29, 2004**

Case No.: **TIA-0227**

XXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illness was not related to his 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). The OHA remanded the application for further consideration. *See Worker Appeal,* TIA-0126, 28 DOE ¶ 80, 295 (2003). Upon reconsideration, the Panel again issued a negative determination, and the Applicant filed the instant appeal. As explained below, we have concluded that the Appeal should be dismissed as moot.

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, and its web site provides extensive information concerning the 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. OHA continues to process appeals until DOL commences Subpart E administration.

B. Procedural Background

The Applicant was employed as a general laborer at the Amchitka Island Nuclear Explosion Site (the site). The Applicant filed for, and received, a positive DOL Subpart B determination for colon cancer.

The Applicant also filed an application with the OWA, requesting that a physician panel review the Applicant's colon cancer. The Applicant asserted that this illness was due to exposure to toxic and hazardous materials at the site. The Physician Panel rendered a negative determination which the OWA accepted. The Applicant appealed, and the OHA remanded the application for further consideration. *See Worker Appeal,* TIA-0126, 28 DOE 80,295 (2003). The Panel issued a second negative determination and the Applicant filed the instant appeal.

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 Applicant's positive DOL Subpart B determination satisfies the Subpart E requirement that the illness be related to toxic exposure during employment at DOE. Accordingly, Subpart E has rendered moot the physician panel determination and consideration of any challenge to the Panel report is not necessary.

As the foregoing indicates, the appeal should be dismissed as moot. 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 dismissal 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-0227 be, and hereby is, dismissed.

(2) This dismissal 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: February 28, 2005

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January 14, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: September 29, 2004

Case No.: TIA-0228

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's late husband (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 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 dismissed as moot.

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 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, and its web site provides extensive information concerning the program.[1]

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

[1] **www.eh.doe.gov/advocacy**

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. In addition, under Subpart E, an applicant is deemed to have an illness related to a work related toxic exposure at DOE if the applicant received a positive determination under Subpart B.

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 welder and welder inspector at the DOE's Oak Ridge site. He worked at the plant for nearly 36 years, in 1944 and from 1946 to 1981.

The Applicant filed an application for chronic beryllium disease (CBD) with the DOL under Subpart B and received a positive determination.

The Applicant also filed an application with the OWA, requesting physician panel review of CBD. The Physician Panel rendered a negative determination on the claimed illness. The Panel did not find that the Worker was exposed to beryllium or that his illness was consistent with beryllium disease. The OWA accepted the Panel's negative determination, and the Applicant appealed. We granted the appeal. We found that the Panel's explanation of its determination lacked sufficient detail. Accordingly, we remanded the application for further consideration.

In response to the remand, the Panel issued a new determination. The Panel stated that the Worker's medical records did not provide evidence of CBD. The Panel further stated that the Worker had a febrile illness of unknown origin and that such an illness was not consistent with CBD.

The OWA accepted the Physician Panel's negative determinations and, subsequently, the Applicant filed the instant appeal.

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 a toxic exposure at the DOE site, and state the basis for that finding.[2]

Subpart E has rendered moot the physician panel determination. A positive DOL Subpart B determination meets the Subpart E requirement that the illness be related to toxic exposure during employment at DOE. The Applicant received a positive DOL Subpart B determination for CBD. Accordingly, further consideration of alleged panel errors is not necessary.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0228 be, and hereby is, dismissed.

(2) This is a final order of the Department of Energy

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 14, 2005

[2] 10 C.F.R. § 852.12.

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May 13, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 25th, 2004**

Case No.: **TIA-0229**

XXXXXXXXXXX (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 granted.

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 as a maintenance welder at the Paducah Gaseous Diffusion Plant (the plant). In his application, he stated that he worked at the plant for approximately four months -- from June 1976 to October 1976. He requested physician panel review of two illnesses — asbestosis and colitis. The OWA forwarded the application to the Physician Panel.

The Physician Panel rendered a negative determination on all illnesses. The Panel stated that the Applicant's asbestosis arose out of his 20 years of work as a boilermaker. Further, the Panel stated that the Applicant's period of exposure at the plant was not significant enough to contribute to his condition of asbestosis or his colitis.

The OWA accepted the Physician Panel's determinations on the illnesses. The Applicant filed the instant appeal.

In his appeal, the Applicant challenges the Panel's determination on his asbestosis. He claims that asbestos-related conditions can arise out of periods of exposure as brief as one or two months.

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 record lends support to the Applicant's argument that exposure at the site was a significant factor in aggravating, contributing to, or causing his asbestosis. The record contains a letter from Dr. Steven Markowitz, a physician in the Former Worker Program. The letter discusses the results of the Applicant's medical examination and states:

> **The chest x-ray finding of some irregular opacities is consistent with the diagnosis of asbestosis of the lungs. *The asbestosis was caused by occupational exposure to asbestos, including the exposure that you had at the gaseous diffusion plant. . . .***

Record at 25 (emphasis added). Given Dr. Markowitz's statement that the cause of the Applicant's asbestosis included his exposure at the plant, it was incumbent upon the Panel to explain the basis of its contrary finding. Accordingly, the application should receive further consideration.

In compliance with Subpart E, the application 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 review of this appeal does not purport to dispose of or in any way prejudice the DOL's review of the application under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0229 be, and hereby is, granted.

(2) The Physician Panel Report did not adequately explain the basis of its determination. Reconsideration is in order.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 13, 2005

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May 11, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: September 29, 2004

Case No.: TIA-0230

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. 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 as a chemical coordinator, control room operator, and supervisor at DOE's Savannah River site (the site) for approximately thirty-six years, from 1953 to 1989. The Applicant filed an application with OWA, requesting physician panel review of six illnesses – skin cancer, actinic keratosis, pulmonary disease, cataracts, rosacea, and enlarged prostate.

The Physician Panel rendered a negative determination on each of the claimed illnesses. For the claimed skin cancer and actinic keratosis, the Panel determined that the illnesses were not caused by the Applicant's occupational exposures. The Panel stated that those conditions are overwhelmingly caused by sun exposure. For the claimed pulmonary disease, the Panel stated that while the Applicant was diagnosed with a pulmonary embolus, there is no evidence in the record of an occupational lung disease. For the claimed cataracts, the Panel stated that occupationally-induced cataracts occur primarily in response to intense exposure to radar, microwave, or infrared radiation. The Panel stated that there is no evidence in the Applicant's record of prolonged exposure to these types of radiation. For the claimed rosacea, the Panel stated that there is no evidence linking the illness to any of the Applicant's occupational exposures. For the claimed enlarged prostate, the Panel stated that the condition is very common in older men.

The OWA accepted the Physician Panel's negative determination and the Applicant filed the instant appeal. In his appeal, the Applicant contends that Panel was unknowledgeable about the procedures and working conditions at the site. The Applicant provides a detailed discussion of his toxic exposures during the course of his employment at DOE.

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 Applicant's appeal does not present a basis for finding Panel error. In making its determination, the Panel considered the Applicant's occupational exposures and determined that they were not a significant factor in his illnesses. Consequently, the Applicant's discussion of his occupational exposures represents a mere disagreement with the Panel's medical judgment, rather than an indication of Panel error.

As the foregoing indicates, the appeal does not provide 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 appeal 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-0230 be, and hereby is, denied.

(2) This denial pertains only to the DOE appeal 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 11, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

April 1, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 1, 2004**

Case No.: **TIA-0231**

XXXXXXX XXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits for her late mother (the Worker). 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 dismissed as moot.

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 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) (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 welder and a process operator at the Portsmouth Gaseous Diffusion Plant (the plant). The Worker is deceased. The application stated that she worked at the plant for approximately 17 years -- from 1975 to 1992. The Applicant requested physician panel review of one illness – breast cancer. The OWA forwarded the application to the Physician Panel.

The Physician Panel rendered a negative determination the Worker's breast cancer. The Panel cited the Worker's cumulative radiation exposure while at the plant as being well below acceptable background levels. The Panel also cited numerous non-occupational risk factors for breast cancer. The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal.

In her appeal, the Applicant states that the Worker's exposures at the plant resulted in her illness and death. The Applicant's appeal includes a document from the record showing an incidence of high exposure to nickel and subsequent work restriction.

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.

A positive DOL Subpart B determination was received. That determination satisfies the Subpart E requirement that the illness be related to a toxic exposure during employment at DOE. Authorization Act § 3675(a). *See also Worker Appeal, Case No. TIA-0228,* 29 DOE ¶ 80,202 (2005). Accordingly, Subpart E has rendered moot the physician panel determination and consideration of any challenge to the Panel report is not necessary.

As the foregoing indicates, the appeal should be dismissed as moot. 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 dismissal 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-0231 be, and hereby is, dismissed.

(2) This dismissal 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 1, 2005

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January 27, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: October 1, 2004

Case No.: TIA-0232

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 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, and its web site provides extensive information concerning the program.[1]

[1] **www.eh.doe.gov/advocacy**

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. 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.

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 as a process operator at DOE's Oak Ridge site. The Applicant worked at the site for nearly 22 years, from 1974 to 1996.

The Applicant filed an application with OWA, requesting physician panel review of six illnesses — basal cell carcinoma, melanoma, stroke, hypertension, cerebral vascular disease, and heart disease.

The Physician Panel rendered a positive determination for basal cell carcinoma and melanoma. The Panel rendered a negative determination on the remaining illnesses, finding no relationship between the illnesses and the Applicant's occupational exposures. For the claimed hypertension, the Panel cited smoking and other lifestyle factors as possible contributing factors. For the claimed cerebral vascular disease and heart disease, the Panel cited the predisposing medical conditions of hypertension and hyperlipidemia as probable causes and noted that those conditions were not related to the Applicant's occupational exposures.

The OWA accepted the Physician Panel's negative determinations on the claimed illnesses. The Applicant filed the instant appeal.

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.

In his appeal, the Applicant maintains that the negative determinations are incorrect. The Applicant argues that his employment-related stress at DOE contributed to his stroke. He does not advance any arguments concerning the other illnesses.

The Applicant's arguments do not provide a basis for finding panel error. As mentioned above, the Panel addressed the claimed illnesses, made a determination on each illness, and explained the basis of that determination. For each illness on which it gave a negative determination, the Panel determined that there was no evidence establishing a relationship between the illnesses and the Applicant's occupational exposures. The Applicant's only argument — that employment-related stress contributed to his stroke — does not indicate panel error. Assuming *arguendo* that the Applicant is correct concerning the role of stress in his stroke, "stress" is not a "toxic substance" and, therefore, is outside the scope of the Physician Panel Rule. *See* 10 C.F.R. § 852.2; *Worker Appeal*, Case No. TIA-0013 (January 16, 2003).

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 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-0232 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: January 27, 2005

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April 27, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: October 4, 2004

Case No.: TIA-0234

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 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.[1]

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 as a journeyman machinist at the Oak Ridge site (the site) from 1982 to 1986. He requested physician panel review of "high levels of toxic elements in body" and lymphocytic thyroiditis.

The Physician Panel rendered a negative determination. The Panel stated that the record did not contain documentation to support his claim that he had high levels of toxic elements in his body from the Oak Ridge facility. The Panel appeared to indicate that it was unable to find any evidence of harmful levels of toxic elements in the Applicant's body. The Panel accepted the Applicant's claim that he had lymphoctyic

[1] www.eh.doe.gov/advocacy

thyroiditis but concluded that medical literature did not support a determination that the condition was related to his work at Oak Ridge.

The OWA accepted the Physician Panel's determinations on the illnesses. The Applicant filed the instant appeal.

In his appeal, the Applicant appeals only the Panel's decision on his claim of high levels of toxic elements in his body. The Applicant contends that the OWA Record contains statements from his personal physicians substantiating his claimed condition.

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.

In response to the Applicant's argument, we undertook a thorough review of the record. We did not find any physician statements that discussed levels of toxic elements in the Applicant's body. All the physician statements applied only to his lymphocytic thyroiditis. Accordingly, the record does not support the Applicant's claim of supporting physician statements and, therefore, the Appeal should be denied. If the Applicant has such statements, he should contact the DOL about the process for submitting them.

In compliance with Subpart E, these claims 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 review of these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0234 be, and hereby is, denied.

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(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 27, 2005

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April 25, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 4, 2004**

Case No.: **TIA-0235**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation. 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 dismissed as moot.

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 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) (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 Applicant was employed as a maintenance mechanic at the Paducah Gaseous Diffusion Plant (the plant). He worked at the plant from 1976 to 1979.

The Applicant filed an application with OWA, requesting physician panel review of his lung cancer. The Applicant claimed that the illness was due to exposures to toxic and hazardous materials at the plant. The Physician Panel rendered a negative determination. The Panel stated that there was no substantial evidence of any occupational chemical or radiation exposure causing, contributing to, or aggravating the Applicant's lung cancer. The Panel also cited the Applicant's extensive smoking history as a contributor to his lung cancer. *See* Physician's Panel Report.

The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal. In his appeal, the Applicant challenges the negative determination. The Applicant

states that he received a positive DOL Subpart B determination. *See* Applicant's Appeal Letter.

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.

A positive DOL Subpart B determination was received. That determination satisfies the Subpart E requirement that the illness be related to a toxic exposure during employment at DOE. Authorization Act § 3675(a). Accordingly, Subpart E has rendered moot the physician panel determination and consideration of any challenge to the Panel report is not necessary.

As the foregoing indicates, the appeal should be dismissed as moot. 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 dismissal 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-0235 be, and hereby is, dismissed.

(2) This dismissal 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 25, 2005

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May 11, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: October 6, 2004

Case No.: TIA-0236

XXXXXXXXXXXXXXX (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 husband (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 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 as a carpenter at DOE's Savannah River site (the site) for approximately three years, from 1951 to 1954. The Applicant filed an application with OWA, requesting physician panel review of one illness – chronic obstructive pulmonary disease (COPD).

The Physician Panel rendered a negative determination on the claimed COPD. The Panel determined that the Worker's occupational exposures were too low to have caused his illness. The Panel stated that "[the Worker] was a smoker until he quit in 1964, smoking one to four packs per day, but oftentimes not smoking the entire cigarette." Panel Report at 1.

The OWA accepted the Physician Panel's negative determination and the Applicant filed the instant appeal. In her appeal, the Applicant contends that the Panel's statement regarding the Worker's smoking is incorrect.

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 argument does not present a basis for granting the appeal. Based on our review of the record, it appears that the Applicant is correct that the Panel misstated the extent of the Worker's smoking. The only reference to the Worker's smoking is a statement noted in the case history. According to that statement, the Worker "stopped smoking in 1964, but [the Applicant] did not know when he started. He also smoked about 1/4 pack per day and did not smoke the entire cigarette." Record at 20. This statement seems to indicate that the Worker smoked *one-quarter* of a pack per day rather than *one to four* packs per day. However, even if the Panel overstated the extent of the Worker's smoking, the error does not present a basis for granting the appeal. The Panel report included a discussion of the Worker's exposures. The key determination here was that the Panel considered the Worker's exposures to be too low to have been related to the Worker's COPD. Accordingly, 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 appeal 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-0236 be, and hereby is, denied.

(2) This denial pertains only to the DOE appeal 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 11, 2005

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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**

XXXXXXXXXXX (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

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April 29, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 6, 2004**

Case No.: **TIA-0238**

XXXXXXXXXXX (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 her late husband (the Worker). The OWA referred the application to an independent Physician Panel (the Physician Panel and the Panel), which determined that the Worker's illness was not related to his 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 dismissed as moot.

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 an electrician at the Paducah Gaseous Diffusion Plant (the plant). He worked at the plant for approximately two years, from 1952 to 1954.

The Applicant filed a Subpart B application with the DOL and a Subpart D application with OWA, claiming lung cancer. The DOL issued a positive Subpart B determination. The OWA referred the application to the Physician Panel which issued a negative determination. The Panel found that the Worker had lung cancer, but that the cancer was not related to toxic exposure at DOE. The OWA accepted the determination, and the Applicant file an appeal.

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 DOL's Subpart B positive determination renders the appeal moot. The determination satisfies the Subpart E requirement that the claimed illness be related to toxic exposure during employment at DOE. *See* Authorization Act §3675 (a). *See also Worker Appeal*, Case No. TIA-0228, 29 DOE ¶ 80,202 (2005). Accordingly, Subpart E has rendered moot the physician panel determination and consideration of any challenge to the Panel report is not necessary.

As the foregoing indicates, the appeal should be dismissed as moot. 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-0238 be, and hereby is, dismissed as moot.

(2) This dismissal 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

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May 3, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 6, 2004**

Case No.: **TIA-0239**

XXXXXXXXXXXXXX (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. 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.

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 as a chemical operator and a laborer at the Fernald Plant (the plant). In his application, he stated that he worked at the plant for approximately 6 years -- from 1953 to 1959. He requested physician panel review of five illnesses – melanoma, prostate cancer, Parkinson's disease, colon polyps, and heart problems. The OWA forwarded the application to the Physician Panel.

The Physician Panel rendered a negative determination on all illnesses. The Panel found that the Applicant had melanoma but concluded that it was not related to his employment at DOE. For the rest of the illnesses, the Panel cited the lack of clinical confirmation or characterization of the illnesses. The OWA accepted the Physician Panel's determinations on the illnesses. The Applicant filed the instant appeal.

In his appeal, the Applicant objects to the Panel statements about the lack of clinical confirmation or characterization of the illnesses. The Applicant states that he understood that he needed to submit physician reports concerning melanoma and prostate cancer, and the Applicant states that he did submit those reports.

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.

As indicated above, the Appeal concerns the Panel's statements that the record lacks clinical confirmation or characterization of various illnesses. Since the Panel did not make that statement in its melanoma determination, there is no objection to consider concerning that claimed illness.

With respect to the remaining claimed illnesses - prostate cancer, Parkinson's disease, colon polyps, and heart problems – the Applicant has not identified OWA or Panel error. We reviewed the record concerning the Applicant's claim that he submitted information on prostate cancer. We found only two references to the Applicant's prostate cancer, which were contained in letters from the DOL. See OWA Record at 117, 118. While the letters acknowledge the presence of the Applicant's prostate cancer and existing medical evidence supporting prostate cancer, the record does not contain those records. Accordingly, the Panel had no way of reviewing the condition and its possible occupational etiology. If the Applicant wishes to pursue his claims of prostate cancer, Parkinson's disease, colon polyps, and heart problems, the Applicant should pursue the issue of documentation with the DOL.

As the foregoing indicates, the Applicant has not identified OWA or Panel error and, therefore, the appeal should be denied.

In compliance with Subpart E, these claims 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 review of these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0239 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: May 3, 2005

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May 4, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 6, 2004**

Case No.: **TIA-0240**

XXXXXXXXXXXXXXX (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 dismissed as moot.

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 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) (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 Applicant was employed as a spectrometer operator, a laboratory trainee and a laboratory analyst at the Paducah Gaseous Diffusion Plant (the plant). She worked at the plant from 1959 to 1960.

The Applicant filed a Subpart B application and a Subpart D application, claiming colon cancer. The DOL issued a positive Subpart B determination. *See* OWA Record at 16. The OWA forwarded the Subpart D application to the Physician Panel, which issued a negative determination. The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal.

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 receipt of a positive DOL Subpart B determination for colon cancer satisfies the Subpart E requirement that the illness be related to a toxic exposure during employment at DOE. Authorization Act § 3675(a). *See also Worker Appeal*, Case No. TIA-0228, 29 DOE ¶ 80,202 (2005). Accordingly, the DOL Subpart B determination has rendered moot the Physician Panel determination.

As the foregoing indicates, the appeal should be dismissed as moot. 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 dismissal of this appeal 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-0240, be, and hereby is, dismissed.

(2) This dismissal pertains only to the DOE appeal 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 4, 2005

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May 10, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 6, 2004**

Case No.: **TIA-0241**

XXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. 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 his 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 Applicant was employed as an auditor for the Pacific Northwest National Laboratory (the plant) at Hanford. He worked at the plant from 1977 to 1978.

The Applicant filed a Subpart B application and a Subpart D application, claiming bladder cancer. The DOL issued a negative Subpart B determination. The OWA forwarded the Subpart D application to the Physician Panel, which also issued a negative determination for the bladder cancer. The Panel considered the Applicant's smoking history, epidemiologic data, the OWA record, and his occupational exposures. The Panel found that there was no evidence establishing a link between the Applicant's workplace exposures to his bladder cancer. *See* Physician's Panel Report at 1. The OWA accepted the determination, and the Applicant appealed.

In his two letters of appeal, the Applicant states he was exposed to radionuclides, enriched uranium, plutonium, lead, strontium, iodine and other ionized radiation at the plant. The Applicant asserts that 30 percent of bladder cancers are caused by exposure to ionized radiation such as his exposures at the plant. Also, the Applicant challenges the Panel's discussion of his smoking history as an associated risk factor with his illness. The Applicant states that he ceased smoking 29 years prior to his diagnosis and that studies have proven the latency period for bladder cancer for smokers is 20 years. *See* Applicant's Appeal Letters.

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's task was to determine that it was "at least as likely as not" that hazardous exposures at the site were a significant contributor to the Applicant's bladder cancer. The Applicant's arguments that he was exposed to radiation and that his smoking was not a risk factor are simply disagreements with the Panel's medical opinion.

As the foregoing indicates, 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-241, 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 10, 2005

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May 3, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 8, 2004**

Case No.: **TIA-0242**

XXXXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits for his late father (the Worker). The Worker 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 dismissed as moot.

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 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) (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 machine specialist, production machinist, utilities supervisor and maintenance mechanic at the Oak Ridge Gaseous Diffusion Plant (the plant). He worked at the plant intermittently, from 1970 to 1990.

The Applicant filed a Subpart D application, claiming beryllium sensitivity, chronic beryllium disease (CBD), chronic obstructive pulmonary disease (COPD), dyspnea, stroke, hyperlipidemia, mental depression and a spinal disorder.

The OWA forwarded the Subpart D application to the Physician Panel, which issued a negative determination for all conditions. The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal. The Applicant challenges the determination on CBD, stating that the decision is inconsistent with a DOL Subpart B positive determination for CBD.

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 receipt of a positive DOL Subpart B determination on CBD satisfies the Subpart E requirement that the illness be related to a toxic exposure during employment at DOE. Authorization Act § 3675(a). *See also Worker Appeal*, Case No. TIA-0228, 29 DOE ¶ 80,202 (2005). Accordingly, the DOL Subpart B determination has rendered moot the Physician Panel determination.

As the foregoing indicates, the appeal should be dismissed as moot. 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 dismissal 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-0242, be, and hereby is, dismissed.

(2) This dismissal pertains only to the DOE appeal 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 3, 2005

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March 30, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 6, 2004**

Case No.: **TIA-0243**

XXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits for her late father (the Worker). 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 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 dismissed as moot.

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 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) (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 welder and a general maintenance mechanic at the Portsmouth Gaseous Diffusion Plant (the plant). He worked at the plant intermittently from 1953 to 1960.

The Applicant filed an application with OWA, requesting physician panel review of the Worker's colon cancer with metastasis to the peritoneum. The Applicant claimed that the illness was due to exposures to toxic and hazardous materials at the plant. The Physician Panel rendered a negative determination. *See* Physician's Panel Report.

The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal. In her appeal, the Applicant challenges the negative determination. The Applicant indicates that a positive DOL Subpart B determination was received. *See* Applicant's Appeal Letter.

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.

A positive DOL Subpart B determination was received. That determination satisfies the Subpart E requirement that the illness be related to a toxic exposure during employment at DOE. Authorization Act § 3675(a). Accordingly, Subpart E has rendered moot the physician panel determination and consideration of any challenge to the Panel report is not necessary.

As the foregoing indicates, the appeal should be dismissed as moot. 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 dismissal 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-0243 be, and hereby is, dismissed.

(2) This dismissal 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: March 30, 2005

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May 3, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: October 21, 2004

Case No.: TIA-0244

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that she did not have an illness related to toxic exposure during 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). 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 Applicant filed a Subpart D application with OWA, claiming kidney stones, osteoarthritis, and eye injury/cataracts. The OWA referred the claims to the Physician Panel. The Physician Panel issued a negative determination. The OWA accepted the determination, and the Applicant filed an appeal.

In her appeal, the Applicant challenges the determination on eye injury/cataracts. She states that her records support an association of that claim and toxic exposures. She cites an eye injury at work and a July 2004 hospitalization for eye and gallbladder complications.

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 argument that her records support a positive determination of her claim of eye injury/cataracts does not indicate Panel error. The Panel specifically discussed the claimed eye injury, a 1990 eye irritation from Lysol and chrome cleaning sprays, and the Panel states that the irritation was resolved. The Applicant's view of the significance of that event is a disagreement with the Panel's medical judgment, not a basis for finding Panel error. The June 2004 hospitalization occurred after the Panel report and, therefore, was not a matter that the Panel could have considered. If the Applicant wishes to have records on that hospitalization considered, the Applicant should contact the DOL on how to proceed.

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 appeal 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-0244, 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 3, 2005

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April 28, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 8, 2004**

Case No.: **TIA-0245**

XXXXXXXXXX (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 her late husband, Leon F. Arnett (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illness was not related to his work at a DOE facility. 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 dismissed.

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.[1] Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.[2] Subpart E provides that all Subpart D claims will be considered as Subpart E claims.[3] OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Worker was employed as a machinist at the DOE's Paducah Gaseous Diffusion Plant (the plant) for approximately thirty-one years, from September 1968 to June 1999.

The Applicant filed a Subpart B application with DOL and a Subpart D application with the OWA, based on colon cancer. The DOL granted the Subpart B application. The Physician Panel rendered a negative determination which the OWA accepted. The Applicant filed the instant appeal, arguing that the Panel's negative determination is incorrect.

II. Analysis

The Applicant's receipt of a positive DOL Subpart B determination satisfies the Subpart E requirement that the Worker's illness be related to toxic exposure during

[1] Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).
[2] *See id.* § 3675(a).
[3] *See id.* § 3681(g).

employment at the DOE.[4] Accordingly, consideration of alleged errors in the Panel report is not necessary.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0245 be, and hereby is, dismissed.

(2) The dismissal of this claim does not purport to dispose of or in any way prejudice the Department of Labor's review of the 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 28, 2005

[4] *See id.* § 3675(a).

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May 16, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **September 30, 2004**

Case No.: **TIA-0246**

Xxxxxxxxxxx (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance with filing for state workers' compensation benefits for her late husband (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illnesses were not related to his work at a DOE facility. 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.[1] Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.[2] Subpart E provides that all Subpart D claims will be considered as Subpart E claims.[3] OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Worker was employed as an electrician at the DOE's Oak Ridge Y-12 Plant (plant) for approximately 26 years, from 1971 to 1997.

The Applicant filed an application with the OWA, requesting physician panel review of two illnesses, prostate cancer and autoimmune hepatitis. The Applicant claimed that the Worker's illnesses were the result of being exposed to toxic substances without adequate protective equipment during his work at the plant.

The Physician Panel rendered a negative determination with regard to the claimed illnesses. The Panel agreed that the Worker had prostate cancer, but stated that the prostate cancer was not likely related to toxic exposure at the DOE

[1] Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).
[2] *See id.* § 3675(a).
[3] See id. § 3681(g)

site.[4] Citing the NIOSH dose reconstruction, the Panel concluded that the Worker's exposure was low and "would not result in a probability of causation of 50 percent or greater."[5] The Panel noted that some medical literature supports a link between prostate cancer and exposure to cadmium, but stated that this evidence is inconclusive. With respect to autoimmune hepatitis, the Panel determined that "there is no known toxic exposure or radiation which causes [this illness]."[6] Therefore, the Panel concluded that the autoimmune hepatitis was not likely related to exposures at the plant.

The OWA accepted the Physician Panel's negative determination, and the Applicant filed the instant appeal. In her appeal, the Applicant disagrees with the methodology of the NIOSH dose reconstruction and states that it should have taken into account other exposures. In addition, the Applicant argues that the Panel should have considered the plant doctor's recommendation to limit the Worker's further exposure to heavy metals, as evidence of overexposure.

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 a 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 disagreement with the NIOSH dose reconstruction does not demonstrate Panel error. The Physician Panel reviews and bases its medical conclusion on the information that is contained in the record. The Panel specifically considered the NIOSH dose reconstruction and other available exposure information. If the Applicant wishes to challenge the NIOSH dose reconstruction, she should raise the matter with the DOL.

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[4] Physician Panel Report at 1.
[5] *Id.* at 1.
[6] *Id.* at 2.

In addition, the Applicant's argument that the plant's dispensary records show overexposure to heavy metals does not indicate Panel error. Although the plant physician noted that the Worker should not be exposed to heavy metals, the physician stated that he did not see where the Worker's duties involved such exposure. Accordingly, the physician's statement does not indicate overexposure to heavy metals.[7]

In compliance with Subpart E, these claims will be transferred to the DOL for review. OHA's denial of this appeal does not purport to dispose of or in any way prejudice the DOL's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0246 be, and hereby is, denied.

(2) The denial pertains only to this appeal and not to the DOL's review of these claims 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 16, 2005

[7] ***See*** **Record at 121, 158, 233.**

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

May 6, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 13, 2004**

Case No.: **TIA-0248**

XXXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits for her late father (the Worker). The Worker 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 dismissed as moot.

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 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) (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 laborer at the Paducah Gaseous Diffusion Plant (the plant). He worked at the plant intermittently, from 1951 to 1955.

The Applicant filed a Subpart B application and a Subpart D application, claiming lung cancer and Alzheimer's disease. The DOL issued a positive Subpart B determination on lung cancer. The OWA forwarded the Subpart D application to the Physician Panel, which issued a negative determination. The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal, objecting to the lung cancer determination.

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 receipt of a positive DOL Subpart B determination for lung cancer satisfies the Subpart E requirement that the illness be related to a toxic exposure during employment at DOE. Authorization Act § 3675(a). *See also Worker Appeal*, Case No. TIA-0228, 29 DOE ¶ 80,202 (2005). Accordingly, the DOL Subpart B determination has rendered moot the Physician Panel determination.

As the foregoing indicates, the appeal should be dismissed as moot. 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 dismissal of this appeal 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-0248, be, and hereby is, dismissed.

(2) This dismissal pertains only to the DOE appeal 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 6, 2005

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May 6, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 13, 2004**

Case No.: **TIA-0249**

XXXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits for her late husband (the Worker). 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 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 dismissed as moot.

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 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) (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 truck driver at the Paducah Gaseous Diffusion Plant (the plant). He worked at the plant from 1951 to 1953.

The Applicant filed a Subpart B application and a Subpart D application, claiming colon cancer. The DOL issued a positive Subpart B determination. The OWA forwarded the Subpart D application to the Physician Panel, which issued a negative determination. The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal.

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 receipt of a positive DOL Subpart B determination for colon cancer satisfies the Subpart E requirement that the illness be related to a toxic exposure during employment at DOE. Authorization Act § 3675(a). *See also Worker Appeal*, Case No. TIA-0228, 29 DOE ¶ 80,202 (2005). Accordingly, the DOL Subpart B determination has rendered moot the Physician Panel determination.

As the foregoing indicates, the appeal should be dismissed as moot. 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 dismissal of this appeal 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-0249, be, and hereby is, dismissed.

(2) This dismissal pertains only to the DOE appeal 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 6, 2005

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February 9, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: October 13, 2004

Case No.: TIA-0251

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 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, and its web site provides extensive information concerning the program.[1]

[1] **www.eh.doe.gov/advocacy**

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. 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.

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 as a mailroom clerk, janitor, and chemical operator at DOE's Oak Ridge site. The Applicant worked at the site for nearly 13 years, from 1987 to 2000.

The Applicant filed an application with OWA, requesting physician panel review of several illnesses.

The Panel rendered a positive determination on two of the illnesses, and a negative determination on each of the remaining illnesses. The OWA accepted the Physician Panel's determinations. The Applicant filed the instant appeal, requesting review of three illnesses – lung nodule, heavy metal poisoning, and chronic fatigue.

For the claimed lung nodule, the Panel determined that although the Applicant's records show a "small area of ground glass changes," there was no evidence of the presence of a lung nodule. For the claimed heavy metal poisoning, the Panel determined that the Applicant's heavy metal exposure records were within acceptable limits and, therefore, there was insufficient evidence to establish the presence of the illness. For the claimed chronic fatigue, the Panel determined that there is no evidence to establish occupational exposures as possible causes of the illness. The Panel noted the difficulties in diagnosing chronic fatigue. The Panel also stated that there is often significant overlap between chronic fatigue and other illnesses.

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.

In her appeal, the Applicant maintains that the negative determinations are incorrect. The Applicant argues that she was subject to various chemical and radiation exposures during the course of her employment at DOE and became seriously ill as a result of those exposures.

The Applicant's arguments do not provide a basis for finding panel error. As mentioned above, the Panel addressed the claimed illnesses, made a determination on each illness, and explained the basis of that determination. For the lung nodule, the Panel determined that the Applicant did not have the illness. For the heavy metal poisoning, the Panel determined that the Applicant's exposure records did not indicate abnormally high level of exposures and, therefore, the illness could not be substantiated. For the chronic fatigue, the Panel determined that there was insufficient evidence establishing a relationship between the illness and occupational exposures. The Applicant's arguments are mere disagreements with the Panel's medical judgment rather than indications of panel error.

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 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-0251 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: February 9, 2005

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May 6, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 13, 2004**

Case No.: **TIA-0252**

XXXXXXXXXXXXXX (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 had an illness related to a toxic exposure at DOE. The OWA accepted the Panel determination but described it as a negative determination. 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 granted.

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 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) (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 Applicant was employed as an ironworker at the Savannah River Site (the plant). He worked at the plant for approximately 16 years, from 1974 to 1990.

The Applicant filed an application with OWA, requesting physician panel review of his pleural plaques. The Worker claimed that his illness was due to exposures to toxic and hazardous materials at the plant.

The Physician Panel issued a positive determination, attributing his pleural plaques to asbestos exposure. The OWA accepted the determination, but described it as a negative determination.

The Applicant filed the instant appeal. In the appeal, the Applicant argues that the OWA mistakenly referred to the Panel determination as negative. S*ee* Applicant's Appeal Letter.

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 has demonstrated OWA error. The Panel report contains a clear, positive determination for pleural plaques. The OWA's reference to the determination as a negative one is a simple clerical error.

As the foregoing indicates, the appeal should be granted. 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 decision grant of this appeal 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-0252, be, and hereby is, granted.

(2) The Physician Panel rendered a positive determination. Further consideration is in order.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 6, 2005

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May 11, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 14, 2004**

Case No.: **TIA-0253**

XXXXXXXXXXX (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 granted.

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 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) (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 Applicant was employed as a filter testing technician, power operator and laborer at the Savannah River Site (the plant). He worked at the plant for approximately 20 years, from 1983 to 2003.

The Applicant filed an application with DOL under Subpart B. The DOL referred the matter to the National Institute of Occupational Safety and Health (NIOSH) for a radiation dose reconstruction.

The Applicant filed an application with OWA, requesting physician panel review of his laryngeal cancer. The Applicant claimed that his illness was due to exposures to toxic and hazardous materials at the plant. The Applicant elected to have his claim presented to the Panel without awaiting the results of the NIOSH dose reconstruction.

The Physician Panel rendered negative determination for the Applicant's laryngeal cancer. The Panel cited the lack of exposure information and cited the "site analysis" as "non-contributory." The Panel attributed the condition to the Applicant's smoking history. *See* Physician's Panel Report.

The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal. In his appeal, the Applicant disagrees with the Panel's finding that he was not exposed to toxic substances. He states that he was exposed to acid mists, coal dust and asbestos. The Applicant also states that his cancer is a rare type of cancer not associated with smoking. *See* Applicant's Appeal Letter.

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 has demonstrated error. Although the Panel referred to the "site analysis" as "non-contributory," the record contains a description of the duties and possible exposures associated with the Applicant's job titles. *See* Record at 87-89. The description cites exposures, including acid mists, coal dust and asbestos. Accordingly, the Panel's reference to the "site analysis" as non-contributory suggests that the Panel did not consider the Applicant's potential exposures. Accordingly, further consideration of this application is warranted. Further consideration should also include review of (i) the site profile, (ii) the NIOSH dose reconstruction if it is complete, and (iii) the Applicant's argument that his type of cancer is rare and not associated with smoking.

As the foregoing indicates, the appeal should be granted. 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 decision grant of this appeal 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-0253, be, and hereby is, granted.

(2) The Physician Panel Report did not consider all documents. Reconsideration of the Applicant's claimed laryngeal cancer is in order.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 11, 2005

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March 23, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 15, 2004**

Case No.: **TIA-0254**

XXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits for her late husband (the Worker). 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 dismissed as moot.

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 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) (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 truck driver at the Paducah Gaseous Diffusion Plant (the plant). He worked at the plant from 1953 to 1955.

The Applicant filed an application with OWA, requesting physician panel review of the Worker's colon cancer. The Applicant claimed that the illness was due to exposures to toxic and hazardous materials at the plant. The Physician Panel rendered a negative determination. The Panel stated that in epidemiological studies colon cancer has not been associated with ionizing radiation exposure. *See* Physician's Panel Report.

The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal.

In her appeal, the Applicant challenges the negative determination. The Applicant argues that the Panel erred when it concluded that the Worker's illness was not related to his employment at the site. The Applicant indicated that a positive DOL Subpart B determination was received on behalf of the Worker. *See* Applicant's Appeal Letter.

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.

A positive DOL Subpart B determination was received. A positive DOL Subpart B determination satisfies the Subpart E requirement that the illness be related to a toxic exposure during employment at DOE. Authorization Act § 3675(a). Accordingly, Subpart E has rendered moot the physician panel determination and consideration of any challenge to the Panel report is not necessary.

As the foregoing indicates, the appeal should be dismissed as moot. 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 dismissal 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-0254 be, and hereby is, dismissed.

(2) This dismissal 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: March 23, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

May 18, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: October 18, 2004

Case No.: TIA-0255

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits based on the employment of her late mother (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker did not have an illness related to work at the DOE. The OWA accepted the Panel's determination. The Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have determined 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 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 at the DOE's Oak Ridge K-25 plant during 1945. The Worker died in 2003, at the age of 80. The Applicant filed Subpart B and Subpart D applications, claiming that the Worker died from lymphoma and lung cancer and that those illnesses were related to toxic exposures at DOE. The DOL referred the Subpart B application to the National Institute of Occupational Safety and Health (NIOSH) for a radiation dose reconstruction. The Applicant elected to have her Subpart D application referred to the Physician Panel without awaiting the results of the dose reconstruction.

The Physician Panel issued a negative determination. The Panel stated that the Worker was employed at the site for four months, from June 1945 to October 1945. The Panel found that the Worker had one illness, lymphoma; the Panel stated that the claimed lung cancer was also lymphoma. Based on the clerical nature of the Worker's position and the absence of any evidence of exposures, the Panel found that the Worker's illness was not related to her DOE employment.

The Applicant filed an appeal. The Applicant argues that (i) the Worker's autopsy identified the lung cancer as a separate primary

cancer, (ii) the Worker was employed at the site for eight months, rather than four months, and (iii) the absence of documented exposures should not result in a negative determination.

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 argument that the Worker's lung cancer was a separate cancer does not indicate Panel error. The Panel cited the autopsy report's finding of "lung tissue and spleen malignant lymphoma," as meaning that the cancer in the lung was lymphoma, not a separate primary cancer. The Applicant has not provided any medical opinion to the contrary.

The Applicant's argument that the Worker was employed for eight months is not substantiated. The Applicant has documented one additional month of employment, May 1945. This difference is not significant. The Panel's determination turned on the clerical nature of the Worker's employment and the absence of any evidence of exposures. Accordingly, the one-month difference is harmless error.

Finally, the Applicant's argument that the absence of documented exposures should not result in a negative determination ignores the applicable standard. The Panel was required to apply the standard set forth in the Rule. The Rule did not require the Panel to rule out the possibility of exposures. Instead, the Rule required that the Panel consider whether "it is at least as likely as not" that toxic exposures at DOE were "a significant factor" in the illness. The Panel applied that standard here and found that the nature of the Worker's employment and the absence of documented exposures indicated that no exposures occurred. Accordingly, the Applicant's argument does not indicate Panel error.

As the foregoing indicates, 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 grant of this appeal 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-0255, be, and hereby is, denied.

(2) The denial pertains only to the DOE appeal and not to the DOL's review of these claims 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 18, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

January 25, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 18, 2004**

Case No.: **TIA-0256**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illnesses were not related to his work at a DOE facility. The OWA accepted the Panel's determinations, 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 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, and its web site provides extensive information concerning the 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. OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Applicant was employed as a chemical, barrier and utility operator at the DOE's Oak Ridge Plant (the plant). He worked at the plant for approximately twenty-four years, from January 1973 to September 1997.

The Applicant filed an application with the OWA, requesting physician panel review of beryllium sensitivity, simple partial seizures and hypertension. The Panel issued a positive determination for beryllium sensitivity and negative determinations for seizures and hypertension. The OWA accepted the Panel's determinations. The Applicant filed the instant appeal challenging the negative determinations.

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

The Applicant disagrees with the Panel's negative determination. The Applicant contends that, during the course of his employment at the K-25 site, he was exposed to "virgin wastes, mixed wastes, low level wastes, hazardous wastes, asbestos, polychlorinated biphenyls, [and] radiological hazards including alpha, beta, gamma and neutron radiation." [1] He asserts that these exposures were the cause of his simple partial seizures and hypertension.

The Physician Panel found that the Applicant suffered from partial seizures. However, it concluded that since there was no evidence of chronic lead or acute organophosphate intoxication, the Applicant's condition was not related to workplace exposures at the plant. With respect to his hypertension claim, the Panel examined the Applicant's work history and could find no mention of lead or "any other chemical agent which would cause hypertension via renal toxicity."[2] Accordingly, the Panel concluded that the Applicant's work at the plant did not cause, aggravate, or contribute to his hypertension.

As the foregoing indicates, the Physician Panel addressed the claimed illnesses, made its determinations, and explained the reasoning for its conclusions. The Applicant's argument that exposure to toxic substances caused his illnesses is merely a disagreement with the Panel's medical judgment; it is not a basis for finding Panel error. Accordingly, the appeal should be denied.

In compliance with Subpart E, these claims 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 these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claims under Subpart E.

[1] Applicant's Appeal Letter, at 1.
[2] Physician Panel Report, at 2.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0256 be, and hereby is, denied.

(2) The 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: January 25, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

January 12, 2005
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 18, 2004**

Case No.: **TIA-0257**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illness was not related to her work at a DOE facility. 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 dismissed.

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 contactor 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, and its web site provides extensive information concerning the 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. OHA continues to process appeals until DOL commences Subpart E administration.

B. Procedural Background

The Worker was employed at the DOE's Oak Ridge plant (the plant). She worked at the plant for approximately twenty-nine years, from 1976 to the present.

The Applicant filed an application with OWA, requesting physician panel review of thyroid cancer and lung cancer. The Panel issued a positive determination for thyroid cancer. With respect to the lung cancer claim, the Panel determined that the Worker's illness was not due to toxic exposure at the DOE site. The OWA accepted the Panel's determinations. In her appeal, the Applicant challenges the negative determination.

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

The Applicant argues that the Physician Panel erred when it concluded that her lung cancer was not related to her work at the site. The Applicant indicated that, as a member of the Special Exposure Cohort, she received a positive DOL Subpart B determination for lung cancer.

Subpart E has rendered moot the physician panel determination. The Applicant's positive DOL Subpart B determination satisfies the Subpart E requirement that the illness be related to toxic exposure during employment at DOE. Accordingly, consideration of any challenge to the Panel report is not necessary.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0257 be, and hereby is, dismissed.

(2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 12, 2005

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April 28, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 18, 2004**

Case No.: **TIA-0258**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illnesses were not related to his work at a DOE facility. The OWA accepted the Panel's determinations, 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 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.[1] Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.[2] Subpart E provides that all Subpart D claims will be considered as Subpart E claims.[3] OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Applicant was employed as a welder and an inspector welder at the DOE's Oak Ridge plant (the plant) for approximately twenty-one years.

The Applicant filed an application with the OWA, requesting physician panel review of several illnesses: chronic obstructive pulmonary disease (COPD), emphysema, asbestosis, hiatal hernia, hearing loss, diabetes, congestive heart failure, and arthritis.

The Panel issued a positive determination for COPD, emphysema and asbestosis. With respect to the other illnesses, the Panel determined that there was no basis for

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[1] Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).
[2] *See id.* § 3675(a).
[3] *See id.* § 3681(g).

finding that these conditions were related to toxic exposure at a DOE site.

The Applicant disagrees with the Physician Panel's negative determinations. He states that his hiatal hernia and hearing loss were caused by physical exertion, and noise, respectively, at DOE. He also states that the Panel report incorrectly indicated a short break in his employment and incorrectly referred to a family history of spina bifida and arthritis. Finally, he states that he is unable to locate some medical information from former doctors.

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 a 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 that physical exertion at DOE caused his hiatal hernia and that noise at DOE caused his hearing loss, do not indicate Panel error. The Physician Panel Rule required that the Panel consider whether a claimed illness was related to exposure to a "toxic substance". Under 10 C.F.R. § 852.1(a)(3), "toxic substance" is defined as "any material that has the potential to cause illness or death because of its radioactive, chemical or biological nature." Physical exertion and noise are not toxic substances and, therefore, outside the scope of the Rule.[4]

The Applicant's contentions of factual errors concerning his period of employment and medical history are not supported by the record. The record indicates the break in employment,[5] and the Panel's discussion of the Applicant's

[4] *See* 67 Fed. Reg. 52843. Because his claim of hiatal hernia is outside the scope of the Rule, we need not consider the argument that the Panel misidentified the doctor who diagnosed that condition.
[5] *See* Record, at 512-519.

medical history was based on his medical records.[6] Contrary to the Applicant's assertion, the Panel report contains no reference to a family history of arthritis.

Finally, the Applicant's arguments that he has been unable to obtain some medical records from prior doctors does not indicate Panel error. The Applicant has failed to explain how those records would have changed the Panel's determination, and the absence of those records does not indicate Panel error.

As the foregoing indicates, the Applicant has not identified Panel error. Accordingly, the appeal should be denied.

In compliance with Subpart E, these claims will be transferred to the DOL for review. OHA's denial of these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0258 be, and hereby is, denied.

(2) The denial pertains only to the DOE claims and not to the DOL's review of these claims 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 28, 2005

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[6] ***See id.*** **at 47.**

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March 24, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 18, 2004**

Case No.: **TIA-0259**

XXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits for her late husband (the Worker). 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 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 dismissed as moot.

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 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) (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 barrier operator, building services employee, materials clerk, and courier at the Oak Ridge Gaseous Diffusion Plant (the plant). He worked at the plant intermittently from 1976 to 1991.

The Applicant filed an application with OWA, requesting physician panel review of the Worker's prostate cancer with bone metastasis. The Applicant claimed that the illness was due to exposures to toxic and hazardous materials at the plant. The Physician Panel rendered a negative determination. The Panel stated that there was no substantial evidence of any occupational chemical or radiation exposure causing, contributing to, or aggravating the Worker's prostate cancer. *See* Physician's Panel Report.

The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal. In her appeal, the Applicant challenges the negative determination. The Applicant states that she received a positive DOL Subpart B determination. *See* Applicant's Appeal Letter.

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.

A positive DOL Subpart B determination was received. That determination satisfies the Subpart E requirement that the illness be related to a toxic exposure during employment at DOE. Authorization Act § 3675(a). Accordingly, Subpart E has rendered moot the physician panel determination and consideration of any challenge to the Panel report is not necessary.

As the foregoing indicates, the appeal should be dismissed as moot. 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 dismissal 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-0259 be, and hereby is, dismissed.

(2) This dismissal 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: March 24, 2005

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May 9, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 18, 2004**

Case No.: **TIA-0260**

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. 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 his 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 Applicant was employed as a machine operator and machine specialist at the Oak Ridge National Lab (the site). He worked at the site for approximately 19 years, intermittently from 1970 to 1989.

The Applicant filed an application with the OWA, requesting physician panel review of the Applicant's multiple sclerosis (MS) and hyperthyroidism. The Applicant claims that these conditions were due to exposures to toxic and hazardous materials during the course of the Applicant's employment. The OWA referred the matter to the Physician Panel, which issued a negative determination for the claimed illnesses. The Panel stated the cause of MS is unknown. The Panel also stated that the mainstream medical and toxicological literature show no established association between MS and exposures to ionizing radiation or chemical toxins. See Physician's Panel Report at 1. In reference to the claimed hyperthyroidism, the Panel discussed possible exposures that could be linked to the condition, but the Panel did not find evidence of substantial

or prolonged exposures to which the Applicant's hyperthyroidism could plausibly be attributed. *Id.* at 2. The OWA accepted the determination, and the Applicant appealed.

In his appeal, the Applicant disagrees with the Panel's determination and makes two arguments. First, the Applicant contends that it seems like more than an coincidence that he knows of several people who worked at the plant that have MS. Second, the Applicant asserts that since the Panel report states that hyperthyroidism is linked to toxic exposures, his workplace exposures could have caused that condition. *See* Applicant's Appeal Letter.

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. The Applicant's contention that other employees have been diagnosed with MS does not mean that it is "at least as likely as not" that the occupational exposures were a significant factor in his illness. Similarly, the possibility that occupational exposures have not been ruled out as risk factors in hyperthyroidism does not mean that it is "at least as likely as not" that the Applicant's exposures were a significant factor in his hyperthyroidism.

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 appeal 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-260, 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 9, 2005

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March 28, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 18, 2004**

Case No.: **TIA-0261**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illness was not related to his 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 dismissed.

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).

B. Procedural Background

The Applicant was employed as an electrician at the Oak Ridge Gaseous Diffusion Plant (the plant). He worked at the plant intermittently form 1975 to 1999.

The Applicant filed an application with the OWA, requesting physician panel review of two illnesses – bladder cancer and colon cancer. *See* Physician's Panel Report. The Physician Panel rendered a negative determination for both illnesses, which the OWA accepted. Subsequently, the Applicant filed the instant appeal.

In his appeal, the Applicant challenges the negative determination. The Applicant argues that the Panel erred when it concluded that his illnesses were not related to his employment at the site. The Applicant indicates that he received a positive DOL Subpart B determination. *See* Applicant's Appeal Letter.

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.

A positive DOL Subpart B determination was received. A positive DOL Subpart B determination satisfies the Subpart E requirement that the illness be related to a toxic exposure during employment at DOE. Authorization Act § 3675(a). Accordingly, Subpart E has rendered moot the physician panel determination and consideration of any challenge to the Panel report is not necessary.

As the foregoing indicates, the appeal should be dismissed as moot. 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 dismissal 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-0261 be, and hereby is, dismissed.

(2) This dismissal 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: March 28, 2005

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April 25, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 18, 2004**

Case No.: **TIA-0262**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illness was not related to his work at a DOE facility. 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.[1]

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.[2] Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.[3] Subpart E provides that all Subpart D claims will be considered as Subpart E claims.[4] OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Applicant was employed as an expediter, truck driver and material handler at the DOE's K-25 Oak Ridge plant (the plant) for approximately forty years, from June 1945 to June 1949 and March 1951 to the December 1987.

The Applicant filed an application with the OWA, requesting physician panel review of asbestosis and prostate cancer. The Panel issued a positive determination for asbestosis. With respect to the prostate cancer claim, the Panel determined that the Worker's illness was not due to toxic exposure at the DOE site. The Panel noted that the record did not "evidence any substantial or prolonged workplace

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[1] *See* OWA website, *available at* http://www.eh.doe.gov/advocacy/index.html

[2] Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).

[3] *See id.* § 3675(a).

[4] *See id.* § 3681(g).

hazard exposures to which [the Applicant's] prostate cancer may be plausibly attributed."[5]

The OWA accepted the Panel's determinations. In his appeal, the Applicant challenges the negative determination.

In his appeal, the Applicant disagrees with the Panel's decision. He asserts that in addition to prostate cancer, he also has kidney problems and diabetes and believes that all of these conditions are related to his work at the site.

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 a 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 argument that his kidney problems and diabetes are related to his prostate cancer is not a basis for finding Panel error. The Panel addressed the Applicant's claim of prostate cancer, made a determination, and explained the reasoning for its conclusion. The Applicant's appeal is, at best, a disagreement with the Panel's medical judgment and, accordingly, does not indicate Panel error. Therefore, the appeal should be denied.

Finally, we note that new information may be available concerning the Worker's toxic exposures. The record indicates that, at the time the Panel considered the claim, the National Institute for Occupational Safety and Health (NIOSH) was in the process of performing a dose reconstruction.[6] This NIOSH dose reconstruction may provide

[5] Physician Panel Report at 2.
[6] *See* Record (Case History).

further information that would support the Applicant's Subpart E claim.

In compliance with Subpart E, this claim will be transferred to the DOL for review. OHA's denial of this claim does not purport to dispose of or in any way prejudice the Department of Labor's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0262, and hereby is, denied.

(2) The 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 25, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

May 11, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 18, 2004**

Case No.: **TIA-0263**

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 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 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 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) (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 Applicant was employed as a secretary and a clerk at the Savannah River Site (the plant). She worked at the plant for approximately three years, from 1954 to 1957.

The Applicant filed an application with OWA, requesting physician panel review of three illnesses – lung cancer, atherosclerotic heart disease and hyperthyroidism. The Applicant claimed that her conditions were due to exposures to toxic and hazardous materials at the plant. The Applicant also filed an application with the DOL, based on her lung cancer. The DOL sent the application to the National Institute of Occupational Safety and Health (NIOSH) for a dose reconstruction. NIOSH issued a report which established the probability of causation less than 50 percent for the lung cancer.

The Physician Panel rendered negative determination for all claimed conditions. The Panel stated that the Applicant was diagnosed with the conditions but they were not caused by her workplace exposures. The panel attributed the Applicant's lung

cancer and atherosclerotic heart disease to her smoking history. In reference to the hyperthyroidism, the Panel found no evidence that the Applicant had any substantial toxic exposures that may be associated with her condition. *See* Physician's Panel Report.

The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal. In her appeal, the Applicant contends that she was not monitored for radiation exposure during her employment. The Applicant also alleges that she was not informed of the possible health hazards from the plant. *See* Applicant's Appeal Letter.

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 Applicant's argument that she was not monitored for radiation exposure does not indicate Panel error. The Panel makes its determination based on the record, and the Panel's determination is consistent with the NIOSH dose reconstruction. Similarly, the Applicant's argument that she was not informed of the possible health hazards while employed at the plant does not indicate Panel error. Again, the record does not contain evidence of toxic exposures that would have been a "significant factor in aggravating, contributing to or causing" her illness and therefore, there is no basis for a positive finding from the Panel.

As the foregoing indicates, 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 appeal 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-0263, 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 11, 2005

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May 25, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 18, 2004**

Case No.: **TIA-0264**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits on behalf of her late husband (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the illness was not related to work at the DOE. The OWA accepted the Panel's determination. The Applicant's son and authorized representative (the Appellant) filed an Appeal with the DOE's Office of Hearings and Appeals (OHA), stating that the Applicant had died and that he (the son) was filing the appeal. As explained below, we have determined 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.[1] Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.[2] Subpart E provides that all Subpart D claims will be considered as Subpart E claims.[3] OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Worker was employed as a supervisor of the technical services support group and senior project engineer at the DOE's Fernald site (the site) for approximately 34 years, from 1952 to 1986.

The Applicant filed a Subpart D application with the OWA, requesting physician panel review of one illness, kidney cancer. The Applicant claimed that the Worker's illness was the result of being exposed to radiation and toxic substances during his work at the site. The Applicant also filed a Subpart B claim at the DOL. The DOL referred the application to the National Institute of Occupational Safety and Health (NIOSH) for a radiation dose reconstruction. The Applicant elected to send her Subpart D application to the Physician Panel without waiting for

[1] Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).
[2] *See id.* § 3675(a).
[3] See id. § 3681(g)

the results of the dose reconstruction.[4] Accordingly, the OWA sent the case to the Panel without a dose reconstruction.

The Physician Panel rendered a negative determination with regard to the claimed illness. The Panel agreed that the Worker had kidney cancer, but concluded that it was not related to exposure to toxic substances at the DOE site. The Panel found that the Worker was exposed to relatively low levels of radiation, stating "he sustained 11.6 rem (shallow dose equivalent) and 1.2 rem (deep dose equivalent)." The Panel stated that kidney cancer has been associated with exposure to lead, cadmium, petroleum products and polycyclic aromatic hydrocarbons, but determined that the Worker did not have significant occupational exposure to these substances.

The OWA accepted the Physician Panel's negative determination, and the Appellant filed the instant appeal. In his appeal, the Appellant asserts that the Worker was exposed to far more radiation than the amount documented in the record. In support of his assertion, the Appellant provided newspaper articles, Congressional testimony, excerpts from investigative reports, and case studies involving Fernald workers. The Appellant also stated that the Applicant received compensation from the Fernald workers' settlement fund.

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 a 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 Appellant's argument that the Worker's exposure records were inaccurate does not demonstrate Panel error. The

[4] *See* Record at 6 (Case view history, entry for April 14, 2004).

Panel evaluates the exposure information in the record. Based on the available dosimetry reports and other occupational exposure records, the Panel concluded that the Worker's radiation exposure was not a factor in his kidney cancer. If the Appellant receives a NIOSH dose reconstruction that he believes supports the application, he should raise the matter with the DOL.

Finally, the fact that the Applicant was compensated through the Fernald workers' settlement fund does not indicate Panel error. The Panel applied the "at least as likely as not" standard required by the Rule and determined that the claimed illness was not related to workplace exposures. The Fernald workers' settlement fund is a separately-administered settlement program and, therefore, is not a basis for concluding that the Worker meets the standard of the Physician Panel Rule.

As the foregoing indicates, the Appellant has not identified Panel error and, therefore, the appeal should be denied. In compliance with Subpart E, this claim will be transferred to the DOL for review. OHA's denial of this appeal 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-0264, be, and hereby is, denied.

(2) The denial pertains only to this appeal 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 25, 2005

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May 10, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 18, 2004**

Case No.: **TIA-0265**

XXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits for her late father (the Worker). 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 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 dismissed as moot.

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 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) (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 maintenance mechanic at the Argonne National Lab (the plant). He worked at the plant for approximately 24 years, from 1957 to 1981.

The Applicant filed a Subpart B application and a Subpart D application, claiming chronic beryllium disease (CBD), chronic obstructive pulmonary disease (COPD) and a colon tumor. The DOL issued a positive Subpart B determination for the Applicant's CBD. *See* OWA record at 370. The OWA forwarded the Subpart D application to the Physician Panel, which issued a negative determination for all conditions. The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal, objecting the negative determination on his lung illness.

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 receipt of a positive DOL Subpart B determination for CBD satisfies the Subpart E requirement that the Applicant's lung illness be related to a toxic exposure during employment at DOE. Authorization Act § 3675(a). *See also Worker Appeal*, Case No. TIA-0228, 29 DOE ¶ 80,202 (2005). Accordingly, the DOL Subpart B determination has rendered moot the Physician Panel determination.

As the foregoing indicates, the appeal should be dismissed as moot. 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 dismissal of this appeal 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-0265, be, and hereby is, dismissed.

(2) This dismissal pertains only to the DOE appeal 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 10, 2005

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May 16, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 18, 2004**

Case No.: **TIA-0266**

XXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits for his 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 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 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 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) (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 cement mason at the Paducah Gaseous Diffusion plant (the plant). He worked at the plant in 1953.

The Applicant filed an application with OWA, requesting physician panel review of the Worker's pancreatic cancer. The Applicant claimed that the Worker's condition was due to exposures to toxic and hazardous materials at the plant. The Applicant also filed an application with the DOL. The DOL sent the application to the National Institute of Occupational Safety and Health (NIOSH) for a dose reconstruction. NIOSH issued a report which established the probability of causation as less than 50 percent for the pancreatic cancer.

The Physician Panel rendered a negative determination for the claimed condition. The Panel stated that the Applicant was diagnosed with pancreatic cancer, but the Panel found no evidence

to support a relationship between his condition and his workplace exposures. The Panel stated there is no known cause of pancreatic cancer. The Panel listed the risk factors as family history, age, race, smoking history and alcohol consumption. *See* Physician's Panel Report.

The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal. In his appeal, the Applicant disagrees with the negative determination. The Applicant contends that the Worker did not smoke or drink and that there is no family history of cancer. The Applicant also enclosed a copy of the NIOSH dose reconstruction with his appeal. *See* Applicant's Appeal Letter.

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 argument that the Worker did not have the risk factors for pancreatic cancer does not indicate Panel error. The Panel stated that the cause of pancreatic cancer is not known. Accordingly, whether the Worker had the risk factors does not affect the determination. Similarly, the Applicant's reference to the NIOSH dose reconstruction does not indicate Panel error. The Applicant's contention that the Worker was shown to have been exposed to toxic materials verified by the NIOSH dose reconstruction does not indicate Panel error. The NIOSH report reflects a less than 50 percent probability of causation. Accordingly, the NIOSH report is not evidence that toxic exposures were a "significant factor in aggravating, contributing to or causing" the illness.

As the foregoing indicates, 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 appeal 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-0266, 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 16, 2005

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May 16, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 18, 2004**

Case No.: **TIA-0267**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance with filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illness was not related to his work at a DOE facility. 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.[1] Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.[2] Subpart E provides that all Subpart D claims will be considered as Subpart E claims.[3] OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Applicant was employed as a lead estimator at the DOE's Portsmouth Gaseous Diffusion Plant (plant) for approximately 6 years, from 1979 to 1983 and 1995 to 1997.

The Applicant filed an application with the OWA, requesting physician panel review of one illness, mitochondrial disease. The Applicant claimed that his illness was the result of being exposed to radiation and toxic substances during his work at the plant.

The Physician Panel rendered a negative determination. The Panel agreed that the Applicant had mitochondrial disease, but concluded that the disease was not likely related to toxic exposure at the DOE site. The Panel stated that "widespread distribution [of the disease] argues strongly against an external source of mutations in mitochondrial

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[1] Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).
[2] *See id.* § 3675(a).
[3] See id. § 3681(g)

DNA and for an inborn genetic condition present from birth."[4] The Panel also stated that "the problem dates from conception, although the external manifestations of mitochondrial disease are often delayed."[5]

The OWA accepted the Physician Panel's negative determination, and the Applicant filed the instant appeal. In his appeal, the Applicant refers to a medical article contained in the record, stating that it indicates that "the disease is rare and there is little known about it, but that it can be caused by exposures to toxic chemicals."[6] The Applicant's principal argument is that since there is so little known about mitochondrial disease the Panel could not know for certain "what chemicals could cause the disease and what exposure levels are safe and how much is dangerous."[7] He also argues that the Panel incorrectly found that his mitochondrial disease was present from birth. Finally, the Applicant argues that the Panel incorrectly stated that he worked at DOE's Oak Ridge site.

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 a 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 argument that mitochondrial disease could be caused by exposure to toxins at the plant is not a basis for finding Panel error. The Panel was not required to rule out the possibility that exposures or a combination of exposures could cause the claimed illness. As stated above, the Physician Panel Rule required that the Panel evaluate whether it is "at least as likely as not" that an exposure was a "significant factor" in aggravating

[4] Physician Panel Report at 1.
[5] *Id.* at 2.
[6] Applicant's Appeal Letter at 1.
[7] *Id.* at 1.

contributing to, or causing the illness. The Panel applied that standard, and it determined that external sources, such as toxins, did not cause, aggravate or contribute to the Applicant's mitochondrial disease.

The Applicant's argument that the Panel incorrectly stated that he had the illness at birth does not indicate Panel error. The Panel correctly identified the date of onset of his illness. The Panel's statement that the disease probably exists at birth was in the context of its view that the disease is probably of genetic origin and, therefore, not related to toxic exposures.

Finally, although the Panel incorrectly stated that the Applicant worked at the DOE's Oak Ridge site, the error is harmless. The record contained the Applicant's records, and the Panel found that mitochondrial disease was not related to toxic substances.

In compliance with Subpart E, this claim will be transferred to the DOL for review. OHA's denial of this appeal 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-0267 be, and hereby is, denied.

(2) The denial pertains only to this appeal 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 16, 2005

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DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 18, 2004**

Case No.: **TIA-0268**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance with filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illness was not related to his work at a DOE facility. 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.[1] Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.[2] Subpart E provides that all Subpart D claims will be considered as Subpart E claims.[3] OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Applicant was employed as a machinist, tradesman and technologist at the DOE's Sandia National Laboratories (SNL) for approximately 29 years, from 1976 to the present.

The Applicant filed an application with the OWA, requesting physician panel review of one illness, loss of lung capacity. The Applicant claimed that his illness was the result of being exposed to toxic substances during his work at SNL.

The Physician Panel rendered a negative determination. The Panel stated that "[m]edical records do not show any credible evidence of a health detriment."[4] The Panel rejected the Applicant's stated perception of a lung

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[1] Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).
[2] *See id.* § 3675(a).
[3] See id. § 3681(g)
[4] Physician Panel Report at 1.

impairment, his pulmonary function tests, and an inhalation incident as being sufficient evidence of an illness.

The OWA accepted the Physician Panel's negative determination, and the Applicant filed the instant appeal. In his appeal, the Applicant asserts that his pulmonary function tests demonstrate a loss of lung capacity. He also states that he became violently ill after inhaling toxic fumes during an incident at SNL in August 1995.

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 a 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 disagreement with the Panel's assessment of the pulmonary function tests and its evaluation of a specific incident of exposure does not demonstrate Panel error. The Panel clearly acknowledged both of these issues and ultimately concluded that neither was sufficient evidence of a lung illness. Therefore, the Applicant's appeal merely expresses a disagreement with the Panel's medical judgment and does not indicate error.

In compliance with Subpart E, this claim will be transferred to the DOL for review. OHA's denial of this appeal 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-0268 be, and hereby is, denied.

(2) The denial pertains only to this appeal 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 18, 2005

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April 19, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 18, 2004**

Case No.: **TIA-0269**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits for her late father (the Worker). 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 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 dismissed as moot.

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 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) (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 construction worker at the Paducah Gaseous Diffusion Plant (the plant). He worked at the plant from 1951 to 1955.

The Applicant filed an application with OWA, requesting physician panel review of metastatic cancer and beryllium disease. The Applicant claimed that the illnesses were due to exposures to toxic and hazardous materials at the plant. The Physician Panel rendered a negative determination on each illness.

The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal. In her appeal, the Applicant challenges the negative determination on metastatic cancer. The Applicant cites the lack of familial history of cancer and the young age (47 years) of the Worker's death.

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.

A positive DOL Subpart B determination was received for cancer. That determination satisfies the Subpart E requirement that the illness be related to a toxic exposure during employment at DOE. Authorization Act § 3675(a). *See also Worker Appeal, Case No. TIA-0228,* 29 DOE ¶ 80,202 (2005). Accordingly, Subpart E has rendered moot the physician panel determination and consideration of any challenge to the Panel report is not necessary.

As the foregoing indicates, the appeal should be dismissed as moot. 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 dismissal 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-0259 be, and hereby is, dismissed.

(2) This dismissal 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 19, 2005

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May 6, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 20, 2004**

Case No.: **TIA-0270**

XXXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. 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 his 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 Applicant was employed as journeyman, wireman, and an electrician at the Portsmouth Gaseous Diffusion Plant (the plant). He worked at the plant intermittently, from 1979 to 1984.

The Applicant filed an application with the DOL, based on melanoma. The DOL sent the application to the National Institute of Occupational Safety and Health (NIOSH) for a dose reconstruction. NIOSH issued a report which established the probability of causation less than 50% for the melanoma skin cancer. The DOL denied the claim.

The Applicant filed an application with the OWA, requesting physician panel review of the Applicant's melanoma skin cancer and coronary artery disease. The Applicant claimed that these conditions were due to exposures to toxic and hazardous materials during the course of his employment. The OWA referred the matter to the Physician Panel, which issued a negative determination for the claimed illnesses. The Panel discussed the Applicant's

possible and actual exposures that could be associated with his melanoma skin cancer. The Panel found no evidence of substantial or prolonged workplace hazard exposures to which the condition could plausibly be attributed. *See* Physician's Panel Report at 1. In reference to the claimed coronary heart disease, the Panel stated the risk factors and possible workplace exposures. Again, the Panel found no evidence that the Applicant had any substantial toxic exposures that may be associated with his condition. *Id.* at 2. The OWA accepted the determination, and the Applicant filed the instant appeal, objecting to the melanoma skin cancer determination.

In his appeal, the Applicant contends that the Panel's determination is in error and he makes the following arguments. First, the Applicant argues that melanoma is not an ordinary type of skin cancer and its cause has not been determined. Accordingly, the Applicant reasons, his workplace exposures could have caused this condition. Second, the Applicant contends that his record does not reflect all of his exposures. Accordingly, the Applicant reasons, the record is insufficient for the Panel to make a determination. *See* Applicant's Appeal Letter.

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 Applicant's argument that the cause of melanoma is unknown does 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 that the cause of an illness is unknown do not meet that standard. Similarly, the Applicant's argument that he had exposures that are not documented in the record does not indicate Panel error. The Panel bases its decision on the record presented to it. Finally, we note that the NIOSH dose reconstruction did not support a finding that his melanoma was related to toxic exposures at DOE.

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 appeal 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-270, 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 6, 2005

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May 4, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 20, 2004**

Case No.: **TIA-0271**

XXXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits for her late father (the Worker). The Worker 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 dismissed as moot.

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 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) (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 laborer and a custodian at the Paducah Gaseous Diffusion Plant (the plant). He worked at the plant for approximately two years, from 1951 to 1953.

The Applicant filed a Subpart B application and a Subpart D application, claiming squamous cell carcinoma of the left cheek with metastases to the neck and lymph nodes. The DOL issued a positive Subpart B determination. The OWA forwarded the Subpart D application to the Physician Panel, which issued a negative determination. The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal.

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 receipt of a positive DOL Subpart B determination for cancer satisfies the Subpart E requirement that the illness be related to a toxic exposure during employment at DOE. Authorization Act § 3675(a). *See also Worker Appeal*, Case No. TIA-0228, 29 DOE ¶ 80,202 (2005). Accordingly, the DOL Subpart B determination has rendered moot the Physician Panel determination.

As the foregoing indicates, the appeal should be dismissed as moot. 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 dismissal of this appeal 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-0271, be, and hereby is, dismissed.

(2) This dismissal pertains only to the DOE appeal 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 4, 2005

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May 11, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: October 20, 2004

Case No.: TIA-0272

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's late mother (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 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 as a laboratory technician at DOE's Savannah River site (the site) for approximately twenty-eight years, from 1954 to 1982. The Applicant filed an application with OWA, requesting physician panel review of two illnesses – emphysema and chronic obstructive pulmonary disease (COPD).

The Physician Panel rendered a negative determination on the claimed illnesses. The Panel considered the claimed emphysema and COPD as one illness, stating that the two are essentially synonymous. After considering the Worker's record, the Panel agreed that the Worker was likely exposed to various toxins during the course of her employment at the site, but that those occupational exposures were not the cause of her illness. The Panel stated that it was "not aware of any specific toxins that would produce the degree of emphysema [the Worker] developed." Panel Report at 1. The Panel stated that the most likely cause of the Worker's illness was her long history of smoking. The OWA accepted the Physician Panel's negative determination and the Applicant filed the instant appeal.

In his appeal, the Applicant contends that the Worker was exposed to several toxic substances during her long period of employment at the site. The Applicant acknowledges that the Worker's smoking may have contributed to the seriousness of her illness, but contends that the smoking was not the direct cause of the illness.

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 Applicant's appeal does not present a basis for finding Panel error. In making its determination, the Panel considered the length of the Worker's employment and the Worker's occupational exposures. Consequently, the Applicant's contention that smoking was not the direct cause of the Worker's illness is a mere disagreement with the Panel's medical judgment, rather than an indication of Panel error.

As the foregoing indicates, the appeal does not provide 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 appeal 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-0272 be, and hereby is, denied.

(2) This denial pertains only to the DOE appeal 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 11, 2005

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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

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 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

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

May 16, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 22, 2004**

Case No.: **TIA-0274**

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 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 granted.

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 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) (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 Applicant was employed as a computer analyst at the Oak Ridge Gaseous Diffusion Plant (the plant). He stated that he had worked at the plant since 1983.

The Applicant filed an application with OWA, requesting physician panel review of his prostate cancer. The Applicant claimed that his condition was due to exposures to toxic and hazardous materials at the plant. The Applicant also filed an application with the DOL, based on his prostate cancer. The DOL sent the application to the National Institute of Occupational Safety and Health (NIOSH) for a dose reconstruction. NIOSH issued a report. The NIOSH report stated that the Applicant had worked at the plant from 1983 to 1991. The NIOSH report established a probability of causation of less than 50 percent for the prostate cancer.

The Physician Panel rendered a negative determination for the claimed condition. The Panel stated that the Applicant was

diagnosed with prostate cancer, but the Panel found no evidence to support a relationship between his condition and his workplace exposures. The Panel attributed the Applicant's prostate cancer to normal risk factors such as family history, age, race, geographic location and dietary fat intake. *See* Physician's Panel Report.

The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal. In his appeal, the Applicant contends that (i) the Panel report makes reference to Los Alamos and that he was only employed at the Oak Ridge plant, (ii) his dosimeter readings were understated, and (iii) the Panel did not consider his 1991 to 2003 employment. *See* Applicant's Appeal Letter.

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 contention that the Panel report mistakenly refers to Los Alamos as his workplace is correct, but is a harmless error. A review of the report indicated that the Panel's reference to Los Alamos was an isolated clerical error and that the Panel considered Oak Ridge to be his workplace.

The Applicant's argument that his dosimeter readings were understated does not indicate Panel error. The Panel makes its determination based on the dosimetry information provided in the record, and the Panel's determination was consistent with the NIOSH dose reconstruction.

The Applicant's argument that his employment dates are incorrect is valid. The application claims employment with Oak Ridge K-25 from 1983 to 1999, and elsewhere at Oak Ridge from 1999 to the present. *See* OWA Record at 19. In his appeal, the Applicant states that his employment ended in 2003. A dosimeter reading history to 1996 is included in the record. *See* OWA Record at 290. Accordingly, the OWA should request records concerning his full

length of employment at the site. The additional employment years could contain evidence of toxic exposures that were a "significant factor in aggravating, contributing to or causing" the Applicant's illness.

As the foregoing indicates, the appeal should be granted. 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 grant of this appeal 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-0274, be, and hereby is, granted.

(2) This grant 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 16, 2005

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May 17, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 20, 2004**

Case No.: **TIA-0275**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance with filing for state workers' compensation benefits for the Worker. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illnesses were not related to his work at a DOE facility. 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.[1] Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.[2] Subpart E provides that all Subpart D claims will be considered as Subpart E claims.[3] OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Applicant was employed as a mechanical engineer at the DOE's Pinellas Plant (plant) for approximately 36 years, from 1956 to 1992.

The Applicant filed a Subpart D application with the OWA, requesting physician panel review of several illnesses: melanoma, colon cancer with metastasis, squamous cell carcinoma, prostate cancer, and basal cell carcinoma. The Applicant claimed that the Worker's illnesses were the result of being exposed to radiation and toxic substances during his work at the plant. The Applicant also filed a Subpart B claim at the DOL. The DOL referred the application to the National Institute of Occupational Safety and Health (NIOSH) for a radiation dose reconstruction. The Applicant elected to send her Subpart D application to the Physician Panel without waiting for

[1] Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).
[2] *See id.* § 3675(a).
[3] See id. § 3681(g)

the results of the dose reconstruction.[4] Accordingly, the OWA sent the case to the Panel without a dose reconstruction.

The Physician Panel rendered a negative determination with regard to the claimed illnesses. The Panel agreed that the Worker had each of the claimed illnesses, but concluded that the illnesses were not likely related to exposure to toxic substances at the DOE site.

The OWA accepted the Physician Panel's negative determination, and the Applicant filed the instant appeal. In her appeal, the Applicant states that "NIOSH has not finished its dose reconstruction, so it is unfair to say that [the Worker] was not exposed to toxic chemicals."[5]

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 a 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 argument that the Panel did not review the NIOSH dose reconstruction does not demonstrate Panel error. The Applicant elected to submit the claim to the Panel before the NIOSH dose reconstruction was completed. If the Applicant believes that the NIOSH dose reconstruction supports her application, she should raise the matter with the DOL.

In compliance with Subpart E, these claims will be transferred to the DOL for review. OHA's denial of this appeal does not purport to dispose of or in any way prejudice the DOL's review of the claims under Subpart E.

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[4] Record at 25 (Case View History, entry for 1/16/04).
[5] Applicant's Appeal Letter at 1.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0275 be, and hereby is, denied.

(2) The denial pertains only to this appeal and not to the DOL's review of these claims 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 17, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

May 4, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: September 21, 2004

Case No.: TIA-0276

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 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 as a laborer at DOE's Rocky Flats site (the site). The Applicant worked at the site for approximately two years, from 1953 to 1955. The Applicant filed an application with OWA, requesting physician panel review of one illness – squamous cell carcinoma.

The Physician Panel rendered a negative determination on the claimed illness. The Panel stated that there were no significant toxic exposures documented in the Applicant's record. Accordingly, the Panel determined that toxic exposures at the site did not cause, contribute to, or aggravate the Applicant's illness.

The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal.

In his appeal, the Applicant claimed that he worked in an area with considerable exposures to various toxic substances including radiation, asbestos, and beryllium.

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 argument on appeal does not provide a basis for finding panel error. After examining the Applicant's record, the Panel determined that toxic exposures at DOE did not cause, contribute to, or aggravate the Applicant's illness. Specifically, the Panel stated that the Applicant's record lacked documentation of any significant toxic exposures. The Applicant's assertion to the contrary is unsubstantiated by the record.

As the foregoing indicates, the appeal does not present a basis for finding panel error. 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-0276 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 4, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

May 9, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 21, 2004**

Case No.: **TIA-0277**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance with filing for state workers' compensation benefits for her late husband (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illnesses were not related to his work at a DOE facility. 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 granted.

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.[1] Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.[2] Subpart E provides that all Subpart D claims will be considered as Subpart E claims.[3] OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Worker was employed as a manager, supervisor and technician at the DOE's Nevada Test Site (NTS) for approximately 35 years, from 1958 to 1993.

The Applicant filed an application with the OWA, requesting physician panel review of four illnesses, hypertension, hearing loss, hyperglycemia, and renal failure. The Applicant claimed that the Worker's illnesses were the result of being exposed to toxic substances during his work at DOE sites.

The Physician Panel rendered a negative determination with regard to the claimed illnesses. The Panel noted that although the Worker's employment history form states that he was temporarily assigned to Johnson Island, Los Alamos and Sandia National Laboratories, there was no exposure

[1] Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).
[2] *See id.* § 3675(a).
[3] See id. § 3681(g)

information related to these sites in the record. Based on the available information regarding the Worker's exposure to toxic substances and ionizing radiation at NTS, the Panel concluded that his hypertension and renal failure did not arise out of his DOE employment. With respect to the claims of hyperglycemia and hearing loss, the Panel noted that there was insufficient information in the record to establish that the Worker had these illnesses.

The OWA accepted the Physician Panel's negative determination, and the Applicant filed the instant appeal. She states that due to the nature of his work, the Worker was likely exposed to more radiation than what is noted in the record. The Applicant states that she is in the process of gathering additional medical and occupational records from the sites.

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 a 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.

In processing applications, the OWA requests that the site provide relevant information. In this case, the OWA requested information from NTS, but no other sites. Since the Worker was involved in various phases of nuclear testing at other sites, it is possible that additional exposure information exists. Accordingly, the OWA should determine whether other locations might contain information for the Worker's temporary duty assignments. Finally, if the Applicant has identified additional information, she should consult the DOL as to how to submit it.

As the foregoing indicates, the appeal should be granted. In compliance with Subpart E, this claim will be transferred to the DOL for review. OHA's grant of this appeal does not purport to dispose of or in any way

prejudice the Department of Labor's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0277 be, and hereby is, granted.

(2) Further consideration of the application is warranted.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 9, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

May 3, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: October 21, 2004

Case No.: TIA-0278

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that one illness was related to work at the DOE and the remaining illnesses were not. 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 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 Applicant filed a Subpart B application with DOL for prostate cancer. The DOL referred the application to the National Institute of Occupational Safety and Health (NIOSH) for a radiation dose reconstruction.

The Applicant filed a Subpart D application with OWA, claiming lichens planus, prostate cancer, skin cancer, lung nodules, hepatitis, and enlarged thyroid. The OWA referred the claims to the Physician Panel. The Physician Panel issued a positive determination on the lichens planus and negative determinations on the remaining illnesses. The OWA accepted the positive and negative determinations, and the Applicant filed an appeal.

In his appeal, the Applicant challenges the determinations on prostate cancer, skin cancer, and enlarged thyroid. The Panel states that he does not believe that the Panel took full account of his radiation exposure. He also objects to the Panel's statement that the record lacks evidence of an enlarged thyroid.

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 argument that the Panel did not take full account of this radiation exposure does not indicate Panel error. The Applicant does not elaborate on this argument, and it appears to be a disagreement with the Panel's medical judgment that his radiation exposure was not a significant factor in any of his illnesses. If the Application receives a NIOSH dose reconstruction that he believes supports his position, he should raise the matter with DOL.

The Applicant's objection to the Panel's statement that the record lacks evidence of an enlarged thyroid does not indicate OWA or Panel error. The case history contains a notation indicating that the Applicant told OWA he had no records on that illness. Record at 18. If the Applicant wishes to have records on that illness considered, he should ask the DOL how to proceed.

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 appeal 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-0278, 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 3, 2005

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May 3, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 21, 2004**

Case No.: **TIA-0279**

XXXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits for his late father (the Worker). 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 dismissed as moot.

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 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) (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 sheet metal worker at the Paducah Gaseous Diffusion Plant (the plant). He worked at the plant for approximately two years, from 1952 to 1954.

The Applicant filed a Subpart B application and a Subpart D application, claiming pancreatic cancer with metastasis and chronic obstructive pulmonary disease (COPD). The DOL issued a positive Subpart B determination. The OWA forwarded the Subpart D application to the Physician Panel, which issued a negative determination. The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal, challenging the determination on pancreatic cancer.

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 receipt of a positive DOL Subpart B determination for pancreatic cancer satisfies the Subpart E requirement that the illness be related to a toxic exposure during employment at DOE. Authorization Act § 3675(a). *See also Worker Appeal*, Case No. TIA-0228, 29 DOE ¶ 80,202 (2005). Accordingly, the DOL Subpart B determination has rendered the appeal moot.

As the foregoing indicates, the appeal should be dismissed as moot. 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 dismissal of this appeal 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-0279, be, and hereby is, dismissed.

(2) This dismissal pertains only to the DOE appeal 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 3, 2005

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April 25, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 22, 2004**

Case No.: **TIA-0280**

XXXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits for her late husband (the Worker). The Worker 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 dismissed as moot.

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 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) (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 pipe fitter and plumber technician at the Paducah Gaseous Diffusion Plant (the plant). He worked at the plant for approximately 3 years, from 1951 to 1954.

The Applicant filed a Subpart B application and a Subpart D application, claiming pancreatic cancer, large cell anaplastic carcinoma/lung cancer, small intestine cancer, and liver cancer. DOL issued a positive Subpart B determination for pancreatic cancer. *See* OWA Record at 39. The OWA forwarded the Subpart B application to the Physician Panel, which issued a negative determination. The Panel indicated that the Worker had pancreatic cancer with metastases. The Panel stated that the Worker "may have had" a second primary cancer of the lung. The Panel discussed the Applicant's exposures and determined that there was insufficient evidence to establish a relationship between the exposures and the claimed illnesses. Accordingly, the Panel rendered a negative determination. *See* Physician's Panel Report.

The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal. In her appeal, the Applicant contends that the Panel incorrectly attributed the Worker's pancreatic cancer to his smoking history. *See* Applicant's Appeal Letter.

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.

We need not consider the Applicant's argument that the Panel incorrectly attributed the Worker's pancreatic cancer to his smoking history. The Applicant's receipt of a positive DOL Subpart B determination for pancreatic cancer satisfies the Subpart E requirement that the illness be related to a toxic exposure during employment at DOE. Authorization Act § 3675(a). *See also Worker Appeal*, Case No. TIA-0228, 29 DOE ¶ 80,202 (2005). Accordingly, the DOL Subpart B determination has rendered moot the Applicant's argument about the role of smoking in the Applicant's pancreatic cancer.

As the foregoing indicates, the appeal should be dismissed as moot. 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 dismissal 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-0280, be, and hereby is, dismissed.

(2) This dismissal 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 25, 2005

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May 6, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 22, 2004**

Case No.: **TIA-0281**

XXXXXXXXXXX (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 granted.

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 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) (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 Applicant was employed as a clerk and a secretary at the Paducah Gaseous Diffusion Plant (the plant). She worked at the plant for approximately 2 years, from 1967 to 1969.

The Applicant filed an application with OWA, requesting physician panel review of 3 illnesses - hyperthyroidism, kidney problems and breast cancer. The Applicant claimed that her illnesses were due to exposures to toxic and hazardous materials at the plant.

The Physician Panel rendered negative determinations for the hyperthyroidism and kidney problems. The Panel stated that the Applicant was diagnosed with an enlargement of the thyroid one month prior to beginning work at the Plant and therefore her hyperthyroidism was not caused by workplace exposures. *See* Physician's Panel Report at 1. In reference to the Applicant's claim of kidney problems, the Panel stated that there was a lack of documentation to support the kidney problem claim. *Id.* at 2. Finally, the Panel did not address the breast cancer claim.

The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal. In her appeal, the Applicant does not challenge the negative determination on hyperthyroidism or kidney problems but contends that the Panel did not consider her claim of breast cancer. *See* Applicant's Appeal Letter.

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.

We agree with the Applicant that the Panel should have reviewed her breast cancer claim. The record supports the Applicant's contention that she claimed that illness. *See* OWA Record at 1. Accordingly, this condition should receive consideration.

As the foregoing indicates, the appeal should be granted. 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 decision grant of this appeal 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-0281, be, and hereby is, granted.

(2) The Physician Panel Report did not consider all of the claimed illnesses. Consideration of the Applicant's claimed breast cancer is in order.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 6, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

May 25, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 25, 2004**

Case No.: **TIA-0282**

XXXXXXXXX (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 granted.

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. 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.

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 as a general service operator, utility operator, auxiliary operator, and maintenance mechanic at the Savannah River Site (the site). In his application, he stated that he worked at the site for approximately 15 years -- from 1972 to 1987. He requested physician panel review of six illnesses -- restrictive pulmonary function, pleural thickening, colon polyps, prostate strictures, pleural thickening, diabetes and erectile dysfunction. The OWA forwarded the application to the Physician Panel.

The Physician Panel rendered a negative determination on all illnesses. For the restrictive pulmonary function and pleural thickening, the Panel found that he had the condition but did not find evidence of "substantial or prolonged exposures to asbestos or to agents that can cause restrictive lung disease." *See* Panel Report. For the colon polyps and prostate strictures, the Panel cites a lack of conventional medical knowledge linking these conditions to workplace exposures. For the diabetes, the Panel stated that this condition could be linked to pesticides, but the Panel found no evidence of pesticide exposure and

concluded that the diabetes arose from non-occupational factors. Finally, for the erectile dysfunction, the Panel determined that the main causative factors were the Applicant's diabetes, medications, depression, and post traumatic stress disorder. The OWA accepted the Physician Panel's determinations on the illnesses. The Applicant filed the instant appeal.

In his appeal, the Applicant argues that the Panel did not thoroughly review his record. He claims that toxic exposures at the site are the only possible cause of his illnesses. Finally, the Applicant states that the record does not properly document all the buildings where he worked at the site.

In response to the appeal, we requested that OWA submit a copy of the record in this case. The OWA has not submitted a copy, and we understand that attempts to locate the record have been unsuccessful.

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.

We are unable to evaluate the Applicant's appeal. As stated above, the OWA record was not submitted. Accordingly, further consideration of this appeal at DOL is in order. We note that the Applicant may wish to consider whether he has additional information concerning asbestos exposure. The Panel found that the Applicant had pleural thickening, but stated that the record did not contain evidence of significant and prolonged exposure to asbestos. Although we did not have a record to review in this case, we did review the site profile, which indicates the presence of asbestos in the areas where the Applicant claims to have worked. If the Applicant believes that there is more information to submit regarding asbestos exposure, he should raise the issue with the DOL.

As the foregoing indicates, given our inability to obtain the OWA record, we have concluded that further consideration of the Applicant's appeal arguments is warranted and, therefore, the appeal should be granted.

In compliance with Subpart E, these claims 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 review of these claims does not purport to dispose of or in any way prejudice the DOL's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0282 be, and hereby is, granted.

(2) The OWA record was not submitted. Further consideration of the Applicant's appeal arguments is in order.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 25, 2005

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May 11, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: October 25, 2004

Case No.: TIA-0283

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's late husband (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 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 as a security guard at DOE's Rocky Flats site (the site) for approximately twenty-six years, from 1951 to 1977. The Applicant filed an application with OWA, requesting physician panel review of one illness – colon cancer.

The Physician Panel rendered a negative determination on the claimed colon cancer. The Panel determined that the Worker's records did not indicate exposures to toxic substances sufficient to have been linked to the Worker's illness. In making this determination, the Panel stated that physician notes do not mention an association between the Worker's illness and work activities. The OWA accepted the Physician Panel's negative determination. The Applicant filed the instant appeal.

In her appeal, the Applicant contends that the Panel's reference to physician notes is incorrect. She states that the record does not contain any physician notes stating that the Worker's illness was unrelated to toxic exposures.

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 Applicant's appeal does not present a basis for finding Panel error. The Panel report refers to hospital notes written by the Worker's treating physicians. See Record at 24-29, 34-35, and 40. These notes do not mention an association between the Worker's illness and work activities, and the Panel report correctly mentions that. Contrary to the Applicant's assertion, the Panel report does not characterize the notes as an affirmative finding of no association between the Worker's illness and occupational exposures. Accordingly, the Applicant's objection to the Panel's discussion of the notes 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 appeal 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-0284 be, and hereby is, denied.

(2) This denial pertains only to the DOE appeal 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 11, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

May 4, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: October 25, 2004

Case No.: TIA-0284

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 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 as a machinist at DOE's Oak Ridge site (the site) for approximately thirty-six years, from 1969 to the present. The Applicant filed an application with OWA, requesting physician panel review of three illnesses – leukemia, lymphoma, and renal insufficiency.

The Physician Panel rendered a positive determination on the leukemia and lymphoma and a negative determination on the renal insufficiency. The Panel examined the record and determined that the only toxin present at the site which could be related to the Applicant's illness was radiation. The Panel determined that the Applicant's occupational exposures, although not the only factor in the Applicant's illnesses, contributed to the leukemia and lymphoma. The Panel also determined that the Applicant's occupational exposures were not related to his renal insufficiency. Rather, the Panel indicated that the Applicant's age and sleep apnea may have been contributing factors.

The OWA accepted the Physician Panel's positive determinations and negative determination. The Applicant filed the instant appeal.

In his appeal, the Applicant disagreed with the Panel's negative determination. He included with his appeal a pathology report to demonstrate that the condition was ongoing.

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 Applicant's appeal and the pathology report he included with his appeal do not present a basis for finding Panel error. It is undisputed that the Applicant suffered from renal insufficiency; however, the Panel found that the condition was not related to his exposures at DOE. Therefore, the Applicant's argument is a mere disagreement with the Panel's medical judgment, rather than an indication of Panel error.

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 appeal 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-0284 be, and hereby is, denied.

(2) This denial pertains only to the DOE appeal 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 4, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

April 8, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 25, 2004**

Case No.: **TIA-0285**

XXXXXXXXXXXXX (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 late father (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illness was not related to his 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 dismissed as moot.

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, and its web site provides extensive information concerning the 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 store housekeeper at the Oak Ridge Gaseous Diffusion Plant (the plant) from 1946 to 1947.

The Applicant filed an application with the OWA, requesting that a physician panel review the Worker's lung cancer. The Applicant asserts that this illness was due to exposure to toxic and hazardous materials at the site. The Physician Panel rendered a negative determination, which the OWA accepted. Subsequently, the Applicant filed the instant appeal.

In his appeal, the Applicant challenges the negative determination. The Applicant states that he received a positive DOL Subpart B determination. *See* Applicant's Appeal Letter.

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.

A positive DOL Subpart B determination was received. A positive DOL Subpart B determination satisfies the Subpart E requirement that the illness be related to a toxic exposure during employment at DOE. Authorization Act § 3675(a). *See also Worker Appeal*, Case No. TIA-0228, 29 DOE ¶ 80,202 (2005). Accordingly, Subpart E has rendered moot the physician panel determination and consideration of any challenge to the Panel report is not necessary.

As the foregoing indicates, the appeal should be dismissed as moot. 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 dismissal 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-0285 be, and hereby is, dismissed.

(2) This dismissal 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 8, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

May 3, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: October 25, 2004

Case No.: TIA-0286

XXXXXXXXXX and XXXXXXXXXX (the Applicants) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits, based on the employment of their late father (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the claimed illnesses were not related to work at the DOE. The OWA accepted the Panel's determination, and the Applicants 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 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 Applicants seek 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 Applicants' 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 Applicants filed a Subpart B application with DOL. The DOL rendered a positive Subpart B determination on lung cancer.

The Applicants also filed a Subpart D application with OWA, claiming lung cancer, chronic obstructive lung disease (COPD), prostate cancer, and heart disease. The OWA referred the claims to the Physician Panel.

The Physician Panel issued a negative determination on the claims, and the Applicants appealed. In their Appeal, they state that they disagree with the determination and intend to submit additional medical records.

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.

As an initial matter, we note that the positive DOL Subpart B determination on lung cancer renders moot the Panel's determination on that illness. A positive DOL Subpart B determination satisfies the Subpart E requirement of a nexus between a claimed illness and a toxic exposure at DOE. Authorization Act § 3675(a).

With respect to the remaining illnesses, the Applicants have not identified Panel error. The Applicants' disagreement with the Panel determination and intention to submit additional information is not a basis for finding Panel error. If the Applicants believe that they have additional information relevant to their Subpart E claim, they should contact the DOL on how to proceed.

As the foregoing indicates, the Applicants have 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 appeal 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-0286, 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 3, 2005

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May 17, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 25, 2004**

Case No.: **TIA-0287**

XXXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits for her late husband (the Worker). 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 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 dismissed as moot.

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 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) (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 janitor and a laborer at the Oak Ridge Gaseous Diffusion Plant (the plant). He worked at the plant approximately 18 years, intermittently from 1970 to 1989.

The Applicant filed an application with OWA, requesting a physician panel review of the Worker's non-hodgkin's lymphoma (NHL). The Applicant claimed that the Worker's condition was due to exposures to toxic and hazardous materials at the plant. The Applicant also filed an application with the DOL. The DOL issued a positive Subpart B determination for the Worker's NHL. The OWA forwarded the Subpart D application to the Physician Panel, which issued a negative determination for the condition. The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal, objecting the negative determination on his NHL.

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 receipt of a positive DOL Subpart B determination for NHL satisfies the Subpart E requirement that the Applicant's illness be related to a toxic exposure during employment at DOE. Authorization Act § 3675(a). *See also Worker Appeal*, Case No. TIA-0228, 29 DOE ¶ 80,202 (2005). Accordingly, the DOL Subpart B determination has rendered moot the Physician Panel determination.

As the foregoing indicates, the appeal should be dismissed as moot. 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 dismissal of this appeal 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-0287, be, and hereby is, dismissed.

(2) This dismissal pertains only to the DOE appeal 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 17, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

March 10, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 26, 2004**

Case No.: **TIA-0288**

XXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits on behalf of her late husband (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illness was not related to his 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 dismissed as moot.

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, and its web site provides extensive information concerning the program.[1]

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. OHA continues to process appeals until DOL commences Subpart E administration.

B. Procedural Background

The Worker was employed as an electrician at the Paducah Gaseous Diffusion Plant (the plant). He worked at the plant from 1953 to 1954.

The Applicant filed an application with the OWA, requesting that a physician panel review the Worker's brain cancer. The Applicant asserted that this illness was due to exposure to toxic and hazardous materials at the plant. The Physician Panel rendered a negative determination, which the OWA accepted. Subsequently, the Applicant filed the instant appeal.

In her appeal, the Applicant disagrees with the Panel's determination and claims "that they did not consider the work place, work conditions or work environment".[2] She asserts that the Worker's illness was caused by exposure to ionizing radiation at the plant. The Applicant filed for, and received, a positive DOL Subpart B determination for the Worker's brain cancer.

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1 www.eh.doe.gov/advocacy.

2 Applicant's Appeal Letter.

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 Applicant's positive DOL Subpart B determination satisfies the Subpart E requirement that the illness be related to toxic exposure during employment at DOE. Accordingly, Subpart E has rendered moot the physician panel determination and consideration of any challenge to the Panel report is not necessary.

As the foregoing indicates, the appeal should be dismissed as moot. 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 dismissal 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-0288 be, and hereby is, dismissed.

(2) This dismissal 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: March 10, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

April 5, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 26, 2004**

Case No.: **TIA-0289**

XXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits for her late father (the Worker). 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 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 dismissed as moot.

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 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) (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 bus/truck operator, chauffeur and patrolman at the Oak Ridge Gaseous Diffusion Plant (the plant). He worked at the plant for approximately 24 years, from 1943 to 1967.

The Applicant filed an application with OWA, requesting physician panel review of the Worker's skin cancer and chronic beryllium disease (CBD). The Applicant claimed that the illnesses were due to exposures to toxic and hazardous materials at the plant. The Physician Panel rendered a negative determination.

The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal. In her appeal, the Applicant challenged the negative determinations. The Applicant indicated that she received a positive DOL Subpart B determination for CBD. *See* Applicant's Appeal Letter.

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.

A positive DOL Subpart B determination was received for CBD. A positive DOL Subpart B determination satisfies the Subpart E requirement that the illness be related to a toxic exposure during employment at DOE. Authorization Act § 3675(a). *See also Worker Appeal*, Case No. TIA-0228, 29 DOE ¶ 80,202 (2005). Accordingly, Subpart E has rendered moot the physician panel determination and consideration of any challenge to the Panel report is not necessary.

As the foregoing indicates, the appeal should be dismissed as moot. 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 dismissal 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-0289 be, and hereby is, dismissed.

(2) This dismissal 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 5, 2005

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May 13, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: October 26, 2004

Case No.: TIA-0290

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's late mother (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 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 Worker was employed at DOE's Rocky Flats site (the site) for approximately twenty-four years, from 1970 to 1994. The Applicant filed an application with OWA, requesting physician panel review of one illness – gallbladder cancer.

The Physician Panel rendered a negative determination on the claimed illnesses. The Panel stated that there is no evidence establishing a relationship between the gallbladder cancer and toxic chemicals and/or radiation. The OWA accepted the Physician Panel's negative determination and the Applicant filed the instant appeal.

In her appeal, the Applicant states that she disagrees with the Panel's decision and that she needs further proof that the Worker's illness was not related to occupational exposures.

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 argument does not present a basis for finding Panel error. The Panel determined that there is no evidence establishing a

relationship between the claimed illness and exposure to toxic chemicals and/or radiation. The Applicant's argument that she needs further proof reflects a misunderstanding of the applicable standard and is ultimately a mere disagreement with the Panel's medical judgment. The Panel is not required to prove the absence of a relationship; the Panel is required to consider whether there is sufficient evidence of a relationship. The Panel stated that there was insufficient evidence of a relationship and the Applicant has not provided evidence to the contrary.

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 appeal 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-0290 be, and hereby is, denied.

(2) This denial pertains only to the DOE appeal 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 13, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

May 3, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 27, 2004**

Case No.: **TIA-0291**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant did not have an illness related to 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). 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 Applicant worked at the Oak Ridge K-25 for about 12 months, from October 1944 to June 1945, and from August 1945 to December 1945. The Applicant filed a Subpart B application with DOL, claiming skin cancer. The Applicant filed a Subpart D application with OWA, claiming skin cancer, rash-skin condition on legs, back pain due to being injected with plutonium, arthritis, hearing loss and chronic bronchitis.

The OWA referred the application to the Physician Panel, which issued a negative determination. The Panel found that the Applicant had skin cancer (on her cheek) but found that the skin cancer was not related to her DOE employment. The Panel found insufficient evidence of the other claimed conditions.

The OWA accepted the negative determination, and the Applicant filed an appeal. The Applicant objects to site records showing treatment in the infirmary, stating that she was never treated in the infirmary. The Applicant also argues that the Panel

determination is inconsistent with "expert medical opinions" that her illnesses are related to her DOE employment.

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 argument that she was never treated at the site infirmary does not indicate OWA or Panel error. The site infirmary records clearly state the Applicant's name, *see* Record at 73-102, and the Applicant herself claims that she received treatment at the infirmary, *see id.* at 11, 39. More importantly, the absence of the infirmary records would not have affected the Panel determination. The Panel discusses the records in its discussion of the Applicant's claims of "back pain due to being injected with plutonium" and chronic bronchitis. For both illnesses, the Panel found a lack of documentation to support the claimed diagnoses.[1] That lack of documentation would continue to exist even in the absence of the infirmary records.

The Applicant's argument that the Panel decision is inconsistent with expert medical opinions is not supported by the record. Two physicians opined that various complaints "may" or "could" be related to toxic exposures, *see* Record at 36-38, a more relaxed causation standard than the Rule's "at least as likely as not" standard. 10 C.F.R. § 852.8. A third physician, rather than giving an opinion, stated that the Applicant should be evaluated by a specialist. *See id.* at 39. Finally, a fourth physician reported on "badly sun-damaged" skin, *id.* at 40, which is consistent with the Panel finding that the Applicant's skin cancer was not related to toxic exposure at DOE.

As the foregoing indicates, the Applicant's arguments do not indicate panel error. Accordingly, the appeal should be denied.

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[1] **For the claimed back pain due to being injected with plutonium, the Panel suggested that the Applicant have her urine tested for plutonium.**

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-0291, 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 3, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

April 1, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 27, 2004**

Case No.: **TIA-0292**

XXXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits for his late father (the Worker). 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 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 dismissed as moot.

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 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, and its web site provides extensive information concerning the 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 welder and a general maintenance mechanic at the Oak Ridge Gaseous Diffusion Plant (the plant). He worked at the plant for approximately 33 years, from 1951 to 1984.

The Applicant filed an application with OWA, requesting physician panel review of the Worker's kidney cancer (metastatic to the lungs and prostate). The Applicant claimed that the illness was due to exposures to toxic and hazardous materials at the plant. The Physician Panel rendered a negative determination. *See* Physician Panel Report.

The OWA accepted the Physician Panel's determination on the illness. The Applicant filed the instant appeal. In his appeal, the Applicant challenges the negative determination. The Applicant states that he received a positive DOL Subpart B determination. *See* Applicant's Appeal Letter.

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.

A positive DOL Subpart B determination was received. A positive DOL Subpart B determination satisfies the Subpart E requirement that the illness be related to a toxic exposure during employment at DOE Authorization Act § 3675(a). *See also Worker Appeal*, Case No. TIA-0228, 29 DOE ¶ 80,202 (2005). Accordingly, Subpart E has rendered moot the physician panel determination and consideration of any challenge to the Panel report is not necessary

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0292 be, and hereby is, dismissed.

(2) This dismissal 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 1, 2005

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May 19, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 28, 2004**

Case No.: **TIA-0293**

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 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 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 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) (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 Applicant was employed as a health protection technician and a health protection supervisor at the Savannah River Site (the plant). He worked at the plant for approximately 37 years, from 1954 to 1989 and again from 1990 to 1992.

The Applicant filed a Subpart B application with DOL and a Subpart D application, claiming bladder cancer. The DOL forwarded the application to the National Institute of Occupational Safety and Health (NIOSH) for a radiation dose reconstruction. The Applicant elected to have his claim presented to the Panel without awaiting the results of the NIOSH dose reconstruction. The OWA forwarded the Subpart D application to the Physician Panel, which issued a negative determination for the bladder cancer. The Panel considered the Applicant's smoking history, epidemiologic data, and his occupational exposures. The Panel found that there was no evidence establishing a link between the Applicant's workplace exposures and his bladder cancer. *See* Physician's Report. The OWA accepted the determination, and the Applicant appealed.

In his appeal, the Applicant disagrees with the Panel's finding. The Applicant contends that the Panel based its findings on a small internal radiation dose and gave little credence to penetrating radiation that may cause cell deformities that could lead to cancerous growths. *See* Applicant's Appeal Letter.

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 argument that the Panel did not give sufficient weight to certain radiation data does not indicate Panel error. The Applicant's argument is a disagreement with the Panel's medical opinion, rather than an indication of Panel error. If the Applicant receives a NIOSH dose reconstruction that he believes supports his claim, he should raise the matter with the DOL.

As the foregoing indicates, the Applicant has not demonstrated Panel error. Accordingly, 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 decision denial of this appeal 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-0293, be, and hereby is, denied.

(2) The denial pertains only to the DOE appeal 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

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

May 6, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 28, 2004**

Case No.: **TIA-0294**

XXXXXXXXXXX (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 her late husband (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 his 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 janitor at the Oak Ridge National Lab (the plant). He worked at the plant for approximately nine years, from 1953 to 1962.

The Applicant filed an application with the OWA, requesting physician panel review of the Worker's chronic obstructive lung disease (COPD), diabetes, nephropathy, and renal disease. The Applicant claims that these conditions were due to exposures to toxic and hazardous materials during the course of the Worker's employment.

The OWA referred the matter to the Physician Panel, which issued a negative determination for all the claimed illnesses. The Panel found that there was no evidence of COPD and insufficient evidence establishing a link between the workplace exposures to the Worker's other conditions. *See* Physician's Panel Report at 1. The OWA accepted the determination, and the Applicant appealed.

In her appeal, the Applicant references her difficulty in obtaining supporting medical documentation because it has been discarded by the hospital and the physicians. *See* Applicant's Appeal Letter.

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 appeal does not indicate Panel error. The Panel bases its decision on the record presented to it. Accordingly, the Applicant's difficulty in obtaining supporting medical documentation does not indicate Panel error. If the Applicant wishes to submit additional medical documentation, she should contact the DOL on how to proceed.

As the foregoing indicates, 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-294, 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 6, 2005

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May 24, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 28, 2004**

Case No.: **TIA-0295**

XXXXXXXXXXXXXX (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 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 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) (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 Applicant was employed as a senior engineering technician, metal handler, engineering assistant and technician at the Savannah River Site (the plant). He worked at the plant for approximately 32 years, from 1953 to 1985.

The Applicant filed an application with the OWA, requesting physician panel review of three illnesses – Parkinson's disease, diabetes, and polyneuropathy. The Applicant claimed that his conditions were due to exposures to toxic and hazardous materials at the plant.

The Physician Panel rendered a negative determination for all claimed illnesses. In respect to the Applicant's Parkinson's disease, the Panel discussed the condition, discussing (i) the epidemiology of the illness, (ii) the Applicant's lack of significant or potential occupational exposures associated with its development, and (iii) the Applicant's age at the time of onset of the illness. *See* Physician's Panel Report at 3. The Panel concluded that the Applicant's employment at the plant did

not cause, contribute to or aggravate the Applicant's Parkinson's disease. *See* Physician's Panel Report at 1. Similarly, the Panel stated that diabetes was not associated with toxic exposures, and the Panel attributed the Applicant's diabetes to his family history. The Panel stated that the Applicant's polyneuropathy was a complication of his diabetes. *Id.* at 5. The OWA accepted the determination, and the Applicant appealed.

In his appeal, the Applicant disagrees with the Panel's finding. The Applicant claims that his illnesses were caused by exposures to radiation, beryllium, solvents, lasers, heavy metals and chemicals at the plant. The Applicant contends that toxic exposures were not well controlled at the plant and industrial hygiene monitoring was not performed during his employment. *See* Applicant's Appeal Letter.

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 argument that occupational exposures caused his conditions does not indicate Panel error. The Panel addressed the Applicant's claimed illnesses, made a determination, and explained the reasoning for its conclusion. The Applicant's argument is a disagreement with the Panel's medical opinion, rather than an indication of Panel error.

As the foregoing indicates, the Applicant has not demonstrated Panel error. Accordingly, 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 decision denial of this appeal 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-0295, be, and hereby is, denied.

(2) The denial pertains only to the DOE appeal 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 24, 2005

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DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 29, 2004**

Case No.: **TIA-0296**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illnesses were not related to his work at a DOE facility. 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.[1] Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.[2] Subpart E provides that all Subpart D claims will be considered as Subpart E claims.[3] OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Worker was employed as a sheet metal worker at the DOE's Rocky Flats Plant (the plant) for approximately 26 years, from 1969 to 1995.

The Applicant filed an application with the OWA, requesting physician panel review of two illnesses, skin cancer and lung granulomas. The Applicant claimed that his illnesses were the result of being exposed to toxic substances during his work at the plant.

The Physician Panel rendered a negative determination with regard to the claimed illnesses. The Panel agreed that the Applicant had skin cancer, but found that it was not related to toxic exposures at the plant. Although the Panel stated that skin cancer has been associated with polycyclic aromatic hydrocarbons and arsenic compounds, the

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[1] Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).
[2] *See id.* § 3675(a).
[3] See id. § 3681(g)

Panel found that the record indicated insignificant or no exposure to these substances. The Panel also found that the Applicant's lung granulomas were not related to exposure at the plant. The Panel acknowledged that granulomas can be caused by toxic substances. However, the Panel found that since the Applicant's granuloma was a single lesion, it was most likely the result of an old tubercular or fungal infection.

The OWA accepted the Physician Panel's negative determination, and the Applicant filed the instant appeal. In his appeal, the Applicant states that the Panel should reevaluate several of the medical and incident reports contained in the record. He asserts that the incident reports show radiation contamination and, therefore, support his skin cancer claim. With respect to the lung granuloma claim, the Applicant believes that his condition was caused by inhalation of plutonium and americium. In support of this assertion, he refers to an occupational exposure record that documents positive lung counts.

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 a 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 disagreement with the Panel's review of the information contained in the record does not demonstrate Panel error. The Panel identified a number of toxic substances, including radiation, to which the Applicant was potentially exposed. However, the Panel concluded that these substances were not occupational causes of skin cancer. Moreover, the Panel stated that although certain toxic chemicals have been linked to skin cancer, there was little or no evidence in the record to demonstrate that the Applicant was exposed to these substances. Similarly, although the Panel recognized that granulomas can be caused

by toxic substances, such as beryllium, it determined that the nature of Applicant's granulomas was not indicative of such exposure. Accordingly, although the Applicant's appeal expresses disagreement with the Panel's medical judgment, the appeal does not indicate Panel error.

In compliance with Subpart E, these claims will be transferred to the DOL for review. OHA's denial of this appeal does not purport to dispose of or in any way prejudice the DOL's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0296 be, and hereby is, denied.

(2) The denial pertains only to this appeal and not to the DOL's review of these claims 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 18, 2005

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May 24, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 27, 2004**

Case No.: **TIA-0297**

XXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. 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 as an instrument mechanic and a maintenance mechanic at the Paducah Gaseous Diffusion Plant (the plant). The application stated that he worked at the plant for approximately 30 years -- from 1953 to 1983. The Applicant requested physician panel review of three illnesses -- nasopharyngeal tumor, squamous cell skin cancer, and tremors. The OWA forwarded the application to the Physician Panel.

The Physician Panel rendered a negative determination on each of the Applicant's claimed conditions. For the nasopharyngeal tumor, the Panel cited very specific but rare substances that are linked to its etiology. The Panel found no evidence of exposure to these toxins at the plant. For the squamous cell skin cancer, the Panel did not find evidence of significant

exposures at the plant that could have caused this condition. For the tremors, the Panel stated that this condition of mild Parkinson's disease is linked mostly to age and family history. The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal.

In his appeal, the Applicant disputes the Panel determination on his conditions. He argues that his prolonged exposure to airborne toxins such as "uranium dust and green salt" as well as trichloroethylene and other chemicals caused his illnesses.

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.

We do not find any error in the Panel report. The Panel addressed each illness, made a finding, and explained the basis for that finding. To the extent that the Applicant disagrees with the Panel's assessment of the documented exposures, the Applicant's argument is a disagreement with the Panel's judgment, rather than an indication of Panel error. To the extent that the Applicant's appeal contains new exposure information, the Applicant is providing information that the Panel did not have a chance to consider. The Applicant should consider asking the DOL how to have this additional information considered.

As the foregoing indicates, the Applicant has not identified Panel error and, therefore, the appeal should be denied. In compliance with Subpart E, these claims 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 review of these claims does not purport to dispose of or in any way prejudice the DOL's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0297, 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 24, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

April 8, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 29, 2004**

Case No.: **TIA-0298**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illness was not related to his 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 dismissed as moot.

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).

B. Procedural Background

The Applicant was employed as a maintenance supervisor and materials dispatcher at the Oak Ridge Gaseous Diffusion Plant (the plant). He worked at the plant for approximately 25 years, from 1967 to 1992.

The Applicant filed an application with the OWA, requesting physician panel review of his multiple myeloma. The Physician Panel rendered a negative determination, which the OWA accepted. The Panel found no reasonable medical evidence to relate the disease to a toxic chemical or radiological exposure. *See* Physician's Panel Report. Subsequently, the Applicant filed the instant appeal.

In his appeal, the Applicant argues that the Panel erred when it concluded that his illness was not related to his employment at the plant. The Applicant states that there have been many studies that have determined a link between low level, long term exposure to radiation and multiple myeloma. The Applicant also indicates that he received a positive DOL Subpart B determination. *See* Applicant's Appeal Letter.

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.

A positive DOL Subpart B determination was received. A positive DOL Subpart B determination satisfies the Subpart E requirement that the illness be related to a toxic exposure during employment at DOE. Authorization Act § 3675(a). *See also Worker Appeal*, Case No. TIA-0228, 29 DOE ¶ 80,202 (2005). Accordingly, Subpart E has rendered moot the physician panel determination and consideration of any challenge to the Panel report is not necessary.

As the foregoing indicates, the appeal should be dismissed as moot. 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 dismissal 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-0298, be, and hereby is, dismissed.

(2) This dismissal 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 8, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

May 19, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 29, 2004**

Case No.: **TIA-0299**

XXXXXXXXXXX (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 granted.

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 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) (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 Applicant was employed as an electronics technician at the Pantex plant (the plant). He worked at the plant for approximately 36 years, from 1961 to 1997.

The Applicant filed an application with OWA, requesting physician panel review of his kidney damage and deafness. The Applicant claimed that these conditions were due to exposures to toxic and hazardous materials at the plant.

The OWA referred the matter to the Physician Panel, which issued a negative determination for the claimed illnesses. The Panel unanimously found that the Applicant's kidney disease, polycystic renal disease, was a congenital malformation and not related to exposure to a toxic substance. The Panel opinion on the hearing loss was not unanimous. All three members agreed that exposure to solvents can cause hearing loss. They disagreed, however, on whether the Applicant's hearing loss was caused by exposure to

solvents. The two-member majority distinguished the Applicant's hearing loss, stating that solvent-induced hearing loss is "usually" more pronounced in a certain range. The two members also stated that they saw no documentation of significant solvent exposure. The third member disagreed, finding that the Applicant's pattern of hearing loss was consistent with solvent-induced hearing loss and that there was sufficient evidence of solvent exposure.

The OWA accepted the Physician Panel's determination on both illnesses. The Applicant filed the instant appeal.

In his appeal, the Applicant alleges that (i) his records were destroyed and, (ii) he was exposed to many toxic substances.

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 argument that he was exposed to toxic substances does not indicate Panel error on the claimed kidney disease. Because the Panel found that polycystic renal disease is congenital and not related to toxic exposures, the level of his exposures is irrelevant. Accordingly, his argument about undocumented exposures, even if correct, does not indicate Panel error on the claimed kidney illness.

On the other hand, we find Panel error on the hearing loss claim. The Rule required that the Panel explain the basis of its finding. 10 C.F.R. § 852.12(b)(5). The majority and minority clearly disagreed on whether the Applicant's pattern of hearing loss was consistent with solvent-induced hearing loss and whether the Applicant had significant solvent exposure. In such a case, it was incumbent upon the Panel to clearly explain the basis for the divergent views. In the absence of such an explanation, the application warrants reconsideration. In this regard, we note

that the record contains evidence of solvent exposure. *See* OWA Record at 226, 230, 252. There may be additional evidence of solvent exposures in the record; some of the pages in the record are illegible and, therefore, the original submissions should be reviewed.

As the foregoing indicates, the appeal should be granted. 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 granted of this appeal 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-0299, be, and hereby is, granted.

(2) The Physician Panel Report did not adequately explain the basis of its determination. Reconsideration of the Applicant's hearing loss claim is in order.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 19, 2005

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May 17, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 29, 2004**

Case No.: **TIA-0300**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance with filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illness was not related to his work at a DOE facility. 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.[1] Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.[2] Subpart E provides that all Subpart D claims will be considered as Subpart E claims.[3] OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Applicant was employed as a laborer, data analyst and a quality control specialist at the DOE's Rocky Flats Plant (plant) for approximately 26 years, from 1966 to 1992.

The Applicant filed a Subpart D application with the OWA, requesting physician panel review of one illness, prostate cancer. The Applicant claimed that his illness was the result of being exposed to radiation and toxic substances during his work at the plant. The Applicant also filed a Subpart B claim with the DOL. The DOL referred the application to the National Institute of Occupational Safety and Health (NIOSH) for a radiation dose reconstruction. The NIOSH report found a probability of causation of less than 50 percent.

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[1] Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).
[2] *See id.* § 3675(a).
[3] See id. § 3681(g)

The Physician Panel rendered a negative determination with regard to the claimed illness. The Panel agreed that the Applicant had prostate cancer, but concluded that the disease was not likely related to toxic exposure at the DOE site. Citing information contained in the NIOSH report, the Panel concluded that the Applicant was exposed to a relatively small amount of radiation. It also noted that the association between prostate cancer and radiation is weak.

The OWA accepted the Physician Panel's negative determination, and the Applicant filed the instant appeal. In his appeal, the Applicant asserts that the dosimetry records at the plant were incorrect and underreported his radiation exposure. He also contends that the Panel erred in stating that he was a quality certification specialist for the duration of his employment at the plant. The Applicant states that he was only employed in that capacity from 1989 to 1992.

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 a 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 disagreement with the accuracy of his dosimetry records does not demonstrate Panel error. The Panel bases its medical conclusion on the information that is contained in the record. The Panel explained the reasoning for its conclusion and its conclusion is consistent with the NIOSH report. If the Applicant wishes to challenge the NIOSH dose reconstruction, he should raise the matter with the DOL.

The Applicant's assertion that the Panel incorrectly characterized his employment at the plant does not demonstrate Panel error. The Panel listed the Applicant's

job titles and the dates of his employment at the plant. Accordingly, the Panel considered the job duties of the Applicant in his various positions, not simply his duties as a quality certification specialist.

In compliance with Subpart E, this claim will be transferred to the DOL for review. OHA's denial of this appeal 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-0300 be, and hereby is, denied.

(2) The denial pertains only to this appeal 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 17, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

May 6, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: October 29, 2004

Case No.: TIA-0301

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE 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 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 dismissed as moot.

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 laborer at the Paducah Gaseous Diffusion Plant (the plant). He worked at the plant for nearly three years, from 1951 to 1954.

The Applicant filed a Subpart B application with the DOL and a Subpart D application with OWA. The DOL issued a positive Subpart B determination for bone cancer. The OWA referred the application to the Physician Panel which issued a negative determination. The OWA accepted the determination, and the Applicant file an appeal, contending that the Panel should have rendered a positive determination on bone cancer.

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 DOL's Subpart B positive determination for bone cancer renders this appeal moot. The determination satisfies the Subpart E requirement that the claimed illness be related to toxic exposure during employment at DOE. *See* Authorization Act §3675 (a). *See also Worker Appeal*, Case No. TIA-0228, 29 DOE ¶ 80,202 (2005). Accordingly, Subpart E has rendered moot the Physician Panel

determination and consideration of any challenge to the Panel report is not necessary.

As the foregoing indicates, the appeal should be dismissed as moot. 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 dismissal 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-0301 be, and hereby is, dismissed as moot.

(2) This dismissal 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 6, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **November 1, 2004**

Case No.: **TIA-0302**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illnesses were not related to his work at a DOE facility. 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.[1] Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.[2] Subpart E provides that all Subpart D claims will be considered as Subpart E claims.[3] OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Applicant was employed as a barrier operator, operator, building services employee, and stationary engineer at the DOE's Oak Ridge site (site) for approximately twenty-seven years, from 1969 to 1996.

The Applicant filed an application with the OWA, requesting physician panel review of several illnesses: supraventricular tachycardia (heart disease), hearing loss, lung nodules, burning feet sensation (peripheral neuropathy), and ulcerated tonsils. The Applicant claimed that these illnesses were the result of being exposed to toxic substances without adequate personal protective equipment during his work at the site.

The Physician Panel rendered a negative determination with regard to each of the claimed illnesses. The Panel agreed

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[1] Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).
[2] *See id.* § 3675(a).
[3] See id. § 3681(g)

that the Applicant had lung nodules and ulcerated tonsils, but concluded that it was unlikely that these illnesses were related to toxic exposure at the DOE site. The Panel stated that the Applicant's lung nodule may be attributable to histoplasmosis. The Panel stated that histoplasmosis is common in Tennessee, where the Applicant resides, and "frequently results in calcified pulmonary granuloma."[4] With respect to the heart disease, hearing loss, and peripheral neuropathy, the Panel found that there was insufficient evidence in the record to fully evaluate these claims.

The OWA accepted the Physician Panel's negative determination, and the Applicant filed the instant appeal. In his appeal, the Applicant asserts that he has worked in extremely contaminated buildings and that his illnesses all post-date his employment at the site. The Applicant also disputes the Panel's suggestion that histoplasmosis is the cause of his lung nodules, stating that he has never heard of it. Finally, the Applicant states that, since his physician has indicated the possibility that his peripheral neuropathy is related to beryllium exposure, the Panel should have rendered a positive determination.

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 a 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 that he worked in contaminated buildings and that he did not have these illnesses prior to his employment at the site do not demonstrate Panel error. The Panel properly considered the specific occupational exposures and medical records of the Applicant with respect to the claimed illnesses. The Panel applied the "at least

[4] Physician Panel Report at 4.

as likely as not" standard required by the Rule and determined that two of the claimed illnesses were not related to workplace exposures. With respect to the other three illnesses, the Panel found that there was insufficient information in the record to evaluate the claims. The Applicant's argument that he did not have the claimed illnesses before working at the site ignores the possibility that other factors may have caused, contributed to, or aggravated the illnesses. Accordingly, the Applicant's appeal merely expresses disagreement with the Panel's medical judgment and does not indicate Panel error.

The Applicant's statement that he is unfamiliar with histoplasmosis also does not indicate Panel error. The Panel specifically considered the Applicant's potential toxic exposures, but found that his pulmonary function test "did not show changes compatible with asbestosis or other fibrotic lung diseases."[5] Accordingly, the Panel concluded that the Applicant's lung nodules were not related to workplace exposures. Its speculation about the cause of the lung nodules was not necessary to that analysis.

Finally, the Applicant's argument that the Panel should have found that his peripheral neuropathy was related to beryllium exposure does not demonstrate Panel error. The fact that his physician stated that beryllium had not been ruled out does not mean that it is "at least as likely as not" that beryllium exposure was a significant factor in aggravating, contributing to, or causing his neurological disorder. Based on medical records and a normal beryllium lymphocyte proliferation test, the Panel found that the Applicant "did not have symptoms or findings suggestive of pulmonary berylliosis."[6] The Panel acknowledged that the Applicant's work "could have exposed him to a number of toxic metals and other materials that could have been associated with peripheral neuropathy,"[7] but stated that it was unable to determine whether the Applicant's illness was related to workplace exposures "without a more complete evaluation of his peripheral neuropathy-like symptoms."[8] If the Applicant has additional information about his neurological disorder or his exposure to toxic substances, he may wish to bring this information to the attention of the DOL.

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[5] *Id.* at 5.
[6] *Id.* at 6.
[7] *Id.*
[8] *Id.*

In compliance with Subpart E, these claims will be transferred to the DOL for review. OHA's denial of these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0302 be, and hereby is, denied.

(2) The denial pertains only to the DOE claims and not to the DOL's review of these claims 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 20, 2005

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May 24, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **November 3, 2004**

Case No.: **TIA-0303**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illnesses were not related to her work at a DOE facility. 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.[1] Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.[2] Subpart E provides that all Subpart D claims will be considered as Subpart E claims.[3] OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Applicant was employed as a secretary at the DOE's Savannah River site (site) for approximately two years, from 1992 to 1994.

The Applicant filed an application with the OWA, requesting physician panel review of several illnesses: peptic ulcer disease, lung problems, hearing loss, and white blood cells in urine. The Applicant claimed that these illnesses were the result of being exposed to toxic substances during her work at the site.

The Physician Panel rendered a negative determination with regard to each of the claimed illnesses. The Panel agreed that the Applicant had these illnesses, but concluded that it was unlikely that they were related to toxic exposure at the DOE site. The Panel stated that the Applicant's total

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[1] Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).
[2] *See id.* § 3675(a).
[3] See id. § 3681(g)

exposure to ionizing radiation was "far below" the acceptable limits and that there was no information in the record indicating overexposure to toxic chemicals.[4] One member of the Panel stated that since the Applicant's hearing loss was only in her right ear, it was likely attributable to impact on that side, firearm use, or other organic causes, rather than occupational exposures.[5]

The OWA accepted the Physician Panel's negative determination, and the Applicant filed the instant appeal. In her appeal, the Applicant asserts that (i) she claimed gallbladder disease, rather than peptic ulcer disease, (ii) her respiratory problems post-date her employment at the site, (iii) her hearing loss was not caused by firearm use, and (iv) she has new medical information to be considered.

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 a 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 Panel did not error in its consideration of the peptic ulcer disease, rather than gallbladder disease. The Applicant's original application lists peptic ulcer disease as a claimed illness.[6] Although the record contains information about the Applicant's gallbladder disease, the Applicant did not claim that illness. Accordingly, the Panel was not required to consider it.

The Applicant's argument that she did not have these illnesses prior to her employment at the site does not demonstrate Panel error. The Panel considered the specific occupational exposures and medical records of the Applicant with respect to the claimed illnesses. The Panel applied

[4] Physicians Panel Report, addendum of second reviewer.
[5] *See* Physician Panel Report at 3.
[6] *See* Record at 1.

the "at least as likely as not" standard required by the Rule and determined that the claimed illnesses were not related to workplace exposures. The Applicant's argument that she did not have the claimed illnesses before working at the site ignores the possibility that other factors may have caused, contributed to, or aggravated the illnesses. Accordingly, the Applicant's appeal merely expresses disagreement with the Panel's medical judgment and does not indicate Panel error.

The Applicant's disagreement with the Panel's suggestion that her hearing loss could have been caused by firearm use also does not indicate Panel error. The Panel specifically considered the Applicant's potential toxic exposures. The Panel stated that the Applicant's job description "indicates that she would not have had any significant exposure to ionizing radiation or toxic substances" during her employment at the site.[7] It also stated that hearing loss related to high-level solvent exposure is "nearly always bilateral and relatively symmetrical."[8] Accordingly, the Panel concluded that the Applicant's right-sided hearing loss was not related to workplace exposures. The Panelist's speculation about the cause of the hearing loss was not necessary to that analysis.

Finally, the existence of additional medical records does not demonstrate Panel error. The Panel bases its determination on the information contained in the record. If the Applicant believes that additional materials support her application, she should raise the matter with the DOL.

In compliance with Subpart E, these claims will be transferred to the DOL for review. OHA's denial of these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0303 be, and hereby is, denied.

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[7] Physicians Panel Report, addendum of second reviewer.
[8] *Id.*

(2) The denial pertains only to the DOE claims and not to the DOL's review of these claims 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 24, 2005

- The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

May 10, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **November 3, 2004**

Case No.: **TIA-0305**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance with filing for state workers' compensation benefits for her late husband (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illnesses were not related to his work at a DOE facility. 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.[1] Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.[2] Subpart E provides that all Subpart D claims will be considered as Subpart E claims.[3] OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Worker was employed as a laboratory machinist, machinist, and tool and die maker at the DOE's Rocky Flats Plant and Los Alamos National Laboratory for approximately twelve years, from 1955 to 1967.

The Applicant filed an application with the OWA, requesting physician panel review of two illnesses, colon cancer and renal failure. The Applicant claimed that the Worker's illnesses were the result of being exposed to toxic substances during his work at DOE sites.

The Physician Panel rendered a negative determination with regard to the claimed illnesses. The Panel agreed that the Worker had colon cancer, but stated that there was insufficient evidence to conclude that it was "more likely than not" that the colon cancer was related to toxic exposure at the DOE sites.[4] The Panel stated that the

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[1] Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).
[2] *See id.* § 3675(a).
[3] See id. § 3681(g)
[4] Physician Panel Report at 1.

"occupational links [for colon cancer] are weak."[5] The Panel noted that some medical literature supports a link between colon cancer and asbestos exposure, but stated that "as a machinist [the Worker] would have had minimal asbestos exposure."[6] With respect to the renal failure claim, the Panel stated that the record lacked "clinical confirmation or characterization of renal failure, urinary retention, or the disease process underlying them."[7] Rather, the Panel noted that the "only information about [the condition] in the record was the statement that his renal failure was caused by obstruction."[8] Therefore, the Panel concluded that there insufficient evidence to evaluate this claim.

The OWA accepted the Physician Panel's negative determination, and the Applicant filed the instant appeal. In her appeal, the Applicant states that the Worker did not have risk factors for colon cancer; she states that he was active and did not have a weight problem. The Applicant also states that she worked in one of the same buildings as the Worker and that she experienced health problems soon after her employment at the site.

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 a 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.

At the outset, we note that the Panel stated that there was insufficient evidence to find that it was "more likely than not" that the Worker's colon cancer was related to toxic exposures.[9] This language is of potential concern, since it

[5] *Id.* at 2.
[6] *Id.* at 1.
[7] *Id.* at 2.
[8] *Id.* at 2.
[9] *Id.* at 1.

could indicate that the Panel applied a slightly higher causation standard than the "at least as likely as not" standard specified in the Rule. However, when read as a whole, it is clear that the Panel determined that it was less likely than not that the illnesses were related to exposures at DOE. For the colon cancer, the Panel found that an occupational link was weak and that, although some literature supports a link with asbestos exposure, the Applicant's job would have involved minimal exposure. With respect to the renal failure, the Panel found that the records were inadequate to evaluate the claim. Accordingly, the Panel's incorrect wording of the standard was harmless error.

Turning to the Applicant's arguments, we find that they do not indicate Panel error. The Applicant's reference to medical literature discussing an association between colon cancer and asbestos exposure ignores the Panel's finding that the Worker had minimal asbestos exposure. Similarly, the Applicant's reference to her own health problems ignores the finding of minimal asbestos exposure.

In compliance with Subpart E, these claims will be transferred to the DOL for review. OHA's denial of this appeal does not purport to dispose of or in any way prejudice the DOL's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0305 be, and hereby is, denied.

(2) The denial pertains only to this appeal and not to the DOL's review of these claims 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 10, 2005

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May 17, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **November 3, 2004**

Case No.: **TIA-0306**

XXXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits for her late husband (the Worker). 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 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 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 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) (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 janitor and a laborer at the Savannah River Site (the plant). He worked at the plant approximately 9 years, from 1956 to 1957 and again from 1960 to 1968.

The Applicant filed an application with OWA, requesting physician panel review of the Worker's acute myelomonocytic leukemia (AML). The Applicant claimed that the Worker's condition was due to exposures to toxic and hazardous materials at the plant. The Applicant also filed an application with the DOL. The DOL sent the application to the National Institute of Occupational Safety and Health (NIOSH) for a dose reconstruction. NIOSH issued a report which established a probability of causation of less than 50 percent.

The Physician Panel rendered a negative determination for the claimed illness. The Panel stated that (i) the Worker had low dosimetry readings, (ii) the Worker had normal blood counts during his employment at the plant with no benzene hematotoxicity, and (iii) the latency period between benzene exposure and AML is usually 9 to 15 years, less than the 34 years between the Worker's exposure and his AML. *See* Physician's Panel Report.

The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal. In her appeal, the Applicant maintains that the Worker's physician stated that some type of toxic exposure caused the AML. *See* Applicant's Appeal Letter.

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 argument that the Worker's physician attributed his AML to some type of toxic exposure does not indicate Panel error. The Panel's determination that radiation exposure was not a factor is consistent with the NIOSH dose reconstruction, and the Panel explained the basis for its rejection of benzene exposure as a factor. The statement of the Worker's physician that some type of toxic exposure caused the AML, even if correct, does not mean that the exposure occurred at DOE and is ultimately a disagreement with the Panel's medical opinion, rather than an indication of Panel error.

As the foregoing indicates, 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 appeal 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-0306, 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 17, 2005

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May 18, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: November 4, 2004

Case No.: TIA-0307

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits based on the employment of her late husband (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker did not have an illness related to work at the DOE. The OWA accepted the Panel's determination. The Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have determined 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 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 at the Paducah Gaseous Diffusion Plant (the site) for 11 years. The Applicant filed a Subpart D application, claiming that renal failure, a lung condition, and skin cancer/Karposi sarcoma resulted from toxic exposures at DOE. The Applicant stated that the illnesses arose after a workplace explosion in which the Worker broke his hip.

The Physician Panel issued a negative determination. The Panel found that the Worker's conditions were complications of vasculitis. The Panel stated that the site and accident descriptions did not list any toxic substances that are associated with vasculitis. The Panel stated that the condition can be a response to an infection.

The Applicant filed an appeal. The Applicant challenges the renal failure determination. She reiterates that the condition arose after the explosion in which the Worker broke his hip. She states that uranium can cause renal failure and that it was a major radiological concern in the old feed plant (C-410) building.

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 argument – that the renal failure followed the explosion in which the Worker broke his hip - does not indicate Panel error. The Applicant does not challenge the diagnosis of vasculitis, the lack of an association between vasculitis and the Worker's exposures, and the association of vasculitis with the Worker's conditions. The fact that toxic exposure can cause renal failure does not mean that it did so in this instance.

As the foregoing indicates, 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 grant of this appeal 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-0307, be, and hereby is, denied.

(2) The denial pertains only to the DOE appeal and not to the DOL's review of these claims 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 18, 2005

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April 29, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **November 3, 2004**

Case No.: **TIA-0308**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits, based on the employment of her late husband (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the claimed illness was not related to 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). 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 Applicant filed a Subpart B application with DOL and a Subpart D application with OWA, claiming prostate cancer related to toxic exposures during employment at DOE. The DOL denied the claim, based on a National Institute of Occupational Safety and Health (NIOSH) dose reconstruction. The NIOSH dose reconstruction showed a less than 50 percent probability that the prostate cancer was related to radiation exposure at DOE. The OWA referred a claim of prostate cancer to the Physician Panel, which issued a negative determination. The determination discussed the Worker's medical records, exposure records, the NIOSH dose reconstruction, and medical literature on prostate cancer and risk factors.

The OWA accepted the negative determination, and the Applicant filed an appeal. In her appeal, the Applicant states that she disagrees with the determination.

II. Analysis

Although the Applicant states that she disagrees with the decision, she does not give any reason for the disagreement. We see no Panel error.

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 Panel complied with the Rule. The Panel considered the claimed illness – prostate cancer, found that it was not related to toxic exposures at DOE, and gave a lengthy explanation of the basis of that decision. The Applicant's disagreement is, at best, a disagreement with the Panel's medical judgment, rather than an indication of Panel error. Accordingly, 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-0308, 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

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May 18, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: November 4, 2004

Case No.: TIA-0309

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits based on the employment of her late husband (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker did not have an illness related to work at the DOE. The OWA accepted the Panel's determination. The Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have determined 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 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 at the DOE's Oak Ridge Y-12 plant from 1971 to 1992. He worked as a process operator for one year and a garage mechanic for the others. The Applicant filed Subpart B and Subpart D applications, claiming that the Worker's cancer of the epiglottis was related to toxic exposures at DOE. The DOL referred the Subpart B application to the National Institute of Occupational Safety and Health (NIOSH) for a radiation dose reconstruction. The Applicant elected to have her Subpart D application referred to the Physician Panel without awaiting the results of the dose reconstruction.

The Physician Panel issued a negative determination. The Panel found that the Worker was exposed to asbestos, solvents, and radiation at "less than background" levels. The Panel noted a possibly weak association between asbestos exposure and radiation exposure, and laryngeal cancer. Accordingly, the Panel found that exposures at DOE were not a significant factor in the Worker's illness. The Panel stated it was "more likely than not" that the Worker's illness was related to a 50 year smoking history.

The Applicant filed an appeal. The Applicant states that the Worker smoked for over 40 years, but argues that his smoking was

not "necessarily" the cause of his cancer. She argues that the Worker had significant radiation exposure.

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 not required to determine what "necessarily" caused a claimed illness. Instead, the Panel is required to consider whether it is at least as likely as not that exposure to a toxic substance at DOE was a "significant factor" in the illness. In this case, the Panel acknowledged only a weak association between two substances, asbestos and radiation, and the Worker's illness. Although the Applicant argues that the Worker received significant radiation exposure, the Applicant does not disagree with the Panel's description of the Worker's documented radiation exposure. Accordingly, the Applicant appears to believe that the Worker had undocumented exposures. The possibility of undocumented exposures does not indicate Panel error. We note that, at the time the case went to the Panel, NIOSH was undertaking a radiation dose reconstruction. If the dose reconstruction supports her claim, the Applicant should raise the matter with the DOL.

As the foregoing indicates, 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 grant of this appeal 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-0309, be, and hereby is, denied.

(2) The denial pertains only to the DOE appeal and not to the DOL's review of these claims 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 18, 2005

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May 19, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: November 4, 2004

Case No.: TIA-0310

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 granted.

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 as a maintenance mechanic at DOE's Paducah Gaseous Diffusion Plant (the plant) for approximately five years, from 1975 to 1980. The Applicant filed a Subpart B application with the DOL, claiming melanoma. The Applicant also filed a Subpart D application with the OWA, requesting physician panel review of melanoma. The DOL sent the application to the National Institute of Occupational Safety and Health (NIOSH) for a radiation dose reconstruction. The Applicant chose to proceed with her Subpart D claim prior to the completion of the NIOSH dose reconstruction report, and the OWA forwarded her case to the Physician Panel. Record at 16.

The Physician Panel rendered a negative determination on the claimed illness. The Panel determined that melanoma is associated with intense exposure to ultra-violet light and is not associated with radiation. The Panel stated that the Applicant's condition is consistent with sun damage to the skin.

The OWA accepted the Physician Panel's negative determination and the Applicant filed the instant appeal. In her appeal, the Applicant contends that the Panel did not understand the nature of her job at the plant. In describing her duties at the plant, the Applicant stated:

> My job was to remove tubes from converters ... these tubes contained UF6 powder, which would get on my skin after we hosed down the tubes with water – particularly on the area of my leg where the melanoma was located ... my pants leg always stayed wet from the yellow water.

Applicant's Appeal Letter. The Applicant further stated that the part of her leg where the melanoma was located was never exposed to excessive sunlight.

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 record does not contain support for the Panel's finding that the Applicant's melanoma was consistent with sun exposure. The Applicant's melanoma was on her inner right thigh. The only reference to sun exposure in the Applicant's records is a physician's note which states that the Applicant had "sun change on her distal upper and lower extremities." Record at 54. No reference is made to sun exposure on any other part of the body. Because the record does not support the Panel's finding that sun exposure was the cause of the Applicant's melanoma, further consideration of the application, including the Applicant's description of her exposures and the Panel's view that melanoma is not associated with radiation, is warranted.

As the foregoing indicates, the appeal should be granted. 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 grant of this appeal 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-0310 be, and hereby is, granted as set forth in paragraph 2 below.

(2) The Panel's finding that the Applicant's melanoma is consistent with sun damage is unsubstantiated by the Applicant's record. Reconsideration is in order.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 19, 2005

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May 3, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **November 4, 2004**

Case No.: **TIA-0311**

XXXXXXXXXX (the Applicant), through her husband and court-appointed guardian, applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant did not have an illness related to 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). 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 Applicant filed a Subpart B application with DOL, claiming beryllium sensitivity and chronic beryllium disease (CBD). The DOL granted the Subpart B application for CBD.

The Applicant filed a Subpart D application with OWA, claiming beryllium sensitivity, CBD, chronic obstructive pulmonary disease (COPD), Parkinson's disease, and a thyroid nodule. The Applicant stated that she worked as a clerk in the C720 building and was exposed to radioactive dust and beryllium dust.

The OWA referred the application to the Physician Panel, which issued a negative determination. Based on the negative results of a beryllium sensitivity test, the Panel determined that the Applicant did not have beryllium sensitivity or CBD. The Panel further determined that the Applicant had COPD, Parkinson's disease, and a thyroid nodule, but the Panel found insufficient evidence to find that the illnesses were related to toxic

exposures at DOE. For each illness, the Panel discussed the Applicant's medical records, industrial hygiene records, and medical literature on the risk factors for the illnesses. The Panel described the industrial hygiene records as follows: "Dosimetry: less than normal background radiation dosing; NIOSH dose reconstruction: unavailable; Site analysis: non-contributory; Area Sampling: unavailable; Industrial hygiene assertions: unavailable."

The OWA accepted the negative determination, and the Applicant filed an appeal. The Applicant reiterates her assertion that she was exposed to radioactive dust and beryllium dust. She states that dust from machine shops located in her building contaminated the other areas of the building.

II. Analysis

We need not consider the Applicant's challenge to the Panel's determination on beryllium sensitivity, CBD, and COPD. The DOL's Subpart B determination that the Applicant has CBD has rendered moot the Panel's determination on the lung illnesses. Authorization Act § 3675(a).

With respect to the remaining illnesses – Parkinson's disease and thyroid nodule, we find no Panel error. 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 Panel complied with the Rule. The Panel considered the illnesses - Parkinson's disease and a thyroid nodule - found that they were not related to toxic exposures at DOE, and gave a lengthy explanation of the basis of that decision. The Panel cited the Applicant's dosimetry as showing below background radiation and, in any event, does not include the claimed exposures in its list of risk factors. Accordingly, the Applicant's disagreement is, ultimately a disagreement with the Panel's medical judgment, rather than an indication of Panel error. Accordingly, 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-0311, 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 3, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

December 17, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: November 5, 2004

Case No.: TIA-0312

XXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits based on the employment of her deceased father, XXXXXXXXXX (the worker). The applicant's late father worked at several facilities, including Argonne National Laboratory in Argonne, Illinois. The OWA determined that the worker did not meet the eligibility criteria for coverage under the regulations that were in effect at the time the determination was made. The OWA therefore determined that the applicant was not eligible for DOE assistance. The applicant appeals that determination. As explained below, we have concluded that the OWA prematurely denied the applicant's claim.

I. 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 programs. *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. The DOE program was specifically limited to DOE contractor employees[1] who worked at DOE facilities.[2] The reason for this

[1] A DOE contractor is defined as follows: (a) an individual who is or was in residence at a DOE facility as a researcher for one or more periods aggregating at least 24 months; (b) an individual who is or was employed at a DOE facility by (i) an entity that contracted with DOE to provide management and operation, management and integration, or environmental remediation at the facility; or (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility. 10 C.F.R. § 852.2.

[2] A DOE facility is defined as: any building, structure or premise, including the grounds upon which such building, structure, or premise is located: (a) in which operations are, or have been, conducted by, or on behalf of the DOE (except for buildings, structures, premises, grounds, or operations covered by Executive Order No. 12344 dated February 1, 1982 (42 U.S.C. § 7158 note), pertaining to Naval Nuclear Propulsion Program); and (b) with regard to which DOE has or had (i) a propriety interest; or (ii) entered into a

limitation was that the DOE could not be involved in state workers' compensation proceedings involving other employers. Under the DOE program, the OWA first had to decide whether a claim filed under Subpart D was submitted by or on behalf of a person who was or had been a DOE contractor employee who worked at a DOE facility. [3] If the OWA found that the person met the threshold eligibility criteria, the OWA sent the claim to an independent physician panel whose job it was to assess 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).

On October 28, 2004, 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. OHA continues to process appeals which were pending when Congress repealed Subpart D, such as the one at issue here, until DOL commences Subpart E administration.

II. The Appeal

In the case at hand, the OWA declined to present the applicant's application to a Physicians Panel because the office determined that the applicant did not meet the eligibility requirements for the Physicians Panel Process. *See* October 6, 2004 letter from the OWA to the applicant.

In the original application that she filed with the OWA, the applicant stated that her deceased father worked at "The Metallurgical Laboratory, University of Chicago/Argonne National Laboratory" from October 1, 1943 to September 30, 1945 and at The University of Chicago from June 1941 to June 1949. The applicant further claims that her deceased father was exposed to beryllium, uranium, boron and mercury while conducting research for the Manhattan Project at these facilities.[4]

In her appeal, the applicant argues that OWA incorrectly determined that her father did not work for a DOE contractor at a DOE facility during a period covered by the Subpart

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contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services. 10 C.F.R. § 852.2.

[3] Pursuant to an Executive Order,[3] the DOE published a list of facilities covered by the DOL and DOE programs, and the DOE designated next to each facility whether it fell within the EEOICPA's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 69 Fed. Reg. 51,825 (August 23, 2004) (current list of facilities). The DOE's published list also refers readers to the DOE Worker Advocacy Office web site for additional information about the facilities. 69 Fed. Reg. 51,825.

[4] The applicant advised OHA during a telephone conversation that she had submitted approximately 200 pages of documentation to OWA to support her claim. *See* Record of Telephone Conversation between Ann S. Augustyn, OHA Deputy Assistant Director, and XXXXXXXXXX (November 16, 2004).

D regulations. She states that her deceased father worked for The University of Chicago at a time when that university was a DOE contractor, and that her father worked at the Argonne National Laboratories at a time when that institution was considered a DOE facility. To support her argument, the applicant submits copies of her late father's personnel records that she obtained from Argonne National Laboratory.

III. Analysis

The pivotal question on appeal is whether the applicant's deceased father was employed at a DOE facility by a DOE contractor. *See* 10 C.F.R. § 852.1(b). To determine whether the worker in question was a DOE contractor employee under the applicable statute and regulations, we consulted the DOE's published facilities list set forth at 69 Fed. Reg. 51,825. On that list, Argonne National Laboratory - East [5] is listed as a "DOE" facility. We next reviewed the OWA web site for additional information. There, we learned that the University of Chicago has operated Argonne National Laboratory-East continuously as a DOE facility from 1946 until the present time.

We next contacted representatives from the DOE's Environment, Safety and Health Office (EH) who possessed historical knowledge about the DOE's contractors at sites throughout the country. The EH representatives advised us that prior to 1946, the Metallurgical Laboratory was housed in and run exclusively by the University of Chicago. *See* Record of Telephone Conversation between Ann S. Augustyn, OHA Deputy Assistant Director, and Roger Anders and Caroline Anders, EH representatives (November 10, 2004). According to the EH representatives, all the people and equipment associated with the Metallurgical Laboratory were transferred to the newly formed Argonne National Laboratory sometime in the summer or fall of 1946. *Id.* At that time, the University of Chicago became the DOE's Management and Operating (M&O) contractor for the Metallurgical Laboratory at the Argonne National Laboratory. *Id.*

At the recommendations of EH representatives, OHA contacted Argonne National Laboratory directly for additional information. OHA learned from Argonne National Laboratory that the OWA had contacted the laboratory and asked it to do an "employment verification" for the worker in question. *See* Record of Telephone Conversation between Ann S. Augustyn, OHA Deputy Assistant Director, and Georgette Lang, Argonne National Laboratory. Argonne National Laboratory informed us that it has not yet completed its employment verification, and that it had not provided any documentation to the OWA before OWA denied the applicant's claim.

Based on the telephonic information that we received from Argonne National Laboratory, it appears that the OWA prematurely denied the applicant's claim. [6] We will, therefore, remand the applicant's application for appropriate processing.

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[5] Argonne National Laboratory – East denotes Argonne National Laboratory's operations in Chicago, Illinois. Argonne National Laboratory-West refers to Argonne National Laboratory's operations in Idaho.

[6] Our independent review of the personnel records provided on appeal supports the applicant's contention that her deceased father worked as a consultant under a subcontract with the University of Chicago during the period of time that the University of Chicago acted as an M&O contractor to the DOE.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0312 be, and hereby is, granted as set forth in paragraph 2 below.

(2) The Applicant's claim warrants further consideration.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: December 17, 2004

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

May 2, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **November 5, 2004**

Case No.: **TIA-0313**

XXXXXXXXXXXXXX (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 dismissed as moot.

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 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) (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 Applicant was employed as a janitor at the Oak Ridge Gaseous Diffusion Plant (the plant). She worked at the plant for approximately 27 years, from 1976 to 2003.

The Applicant filed a Subpart B application and a Subpart D application, claiming breast cancer. DOL issued a positive Subpart B determination. *See* OWA Record at 14. The OWA forwarded the Subpart D application to the Physician Panel, which issued a negative determination. The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal.

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 receipt of a positive DOL Subpart B determination for breast cancer satisfies the Subpart E requirement that the illness be related to a toxic exposure during employment at DOE. Authorization Act § 3675(a). *See also Worker Appeal*, Case No. TIA-0228, 29 DOE ¶ 80,202 (2005). Accordingly, the DOL Subpart B determination has rendered moot the Physician Panel determination.

As the foregoing indicates, the appeal should be dismissed as moot. 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 dismissal 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-0313, be, and hereby is, dismissed.

(2) This dismissal 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 2, 2005

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May 20, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: November 8, 2004

Case No.: TIA-0314

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 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 Paducah Gaseous Diffusion Plant (the plant). The Applicant worked as an engineering inspector at the plant for approximately thirty-nine years, from 1955 to 1994. The Applicant filed an application with OWA, requesting physician panel review of five illnesses – skin cancer, chronic beryllium disease (CBD), lung tumor, pituitary tumor, and heart disease.

The Physician Panel rendered a negative determination on the claimed illnesses. For the claimed skin cancer, the Panel determined that there was insufficient evidence in the record to establish that the illness was caused, contributed to, or aggravated by exposure to toxic substances while working at the plant. The Panel noted that the illness is among the most common cancers and is generally secondary to sun exposure. For the claimed CBD, the Panel stated that the Applicant's lymphocyte proliferation test results were normal and there was insufficient information to support the diagnosis of the illness. For the claimed lung tumor, the Panel determined that the Applicant's lung tumor was not related to his work at DOE. The Panel noted that the Applicant's records did not show any significant pleural plaquing or any evidence of malignancy. For the claimed pituitary tumor, the Panel determined that the condition was not caused, contributed to, or aggravated by the Applicant's work at the plant. For the claimed heart disease, the Panel determined that the illness was not related to the Applicant's work at the plant, but rather was related to the Applicant's family history of heart disease, his heavy smoking, and his history of elevated cholesterol.

The OWA accepted the Physician Panel's determinations on the claimed illnesses and the Applicant filed the instant appeal. The Applicant presented several arguments on appeal. First, the Applicant disputed

the Panel's determination on the skin cancer claim. The Applicant stated that in the early years of his employment at the plant the safety measures were inadequate and he was exposed to radiation and Cobalt 60. Second, challenging the Panel's determination on the claimed CBD, the Applicant argued that he worked with beryllium. Third, the Applicant disputed the Panel's findings regarding his lung tumor. The Applicant argued that he "worked in a heavy asbestos area for about three years." Applicant's Appeal Letter.

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, the Applicant's discussion of his exposures to radiation and Cobalt 60 does not present a basis for finding Panel error. The Panel considered the Applicant's exposures and did not find them sufficient to have caused, contributed to, or aggravated the Applicant's skin cancer. The Applicant's argument is a mere disagreement with the Panel's medical judgment, rather than an indication of Panel error.

Second, the Applicant's assertion that he worked with beryllium does not indicate Panel error. The Panel determined that, given that the Applicant's lymphocyte proliferation test results were normal, there was insufficient documentation in the record to support a diagnosis of CBD. If the Applicant has further documentation regarding the illness that he believes will support his claim, he should contact the DOL on how to proceed.

Third, the Applicant's assertion that he worked in a "heavy asbestos area" does not present a basis for finding Panel error. The Panel determined that the condition was not related to the Applicant's employment at DOE. The Panel did not find evidence either of asbestosis or of pleural plaquing, which is a precursor to asbestosis. If the Applicant has any further documentation to support a claim for an asbestos-related lung condition, he should contact the DOL on how to proceed.

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-0314 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 20, 2005

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

April 26, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **November 8, 2004**

Case No.: **TIA-0315**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illnesses were not related to her work at a DOE facility. The OWA accepted the Panel's determination, and the Applicant appealed to 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 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.[1] Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.[2] Subpart E provides that all Subpart D claims will be considered as Subpart E claims.[3] OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Applicant was employed as a clerk typist at the DOE's Idaho National Engineering Laboratory (the site). The Applicant filed a Subpart B application with the DOL and a Subpart D application with the OWA. The Applicant claimed that her bilateral breast cancer, endometrial cancer, and skin cancer were associated with radiation exposure at DOE. The DOL requested that the National Institute of Occupational Safety and Health (NIOSH) undertake a radiation dose reconstruction. The Applicant elected to go forward with her Subpart D claim without waiting for the dose reconstruction, Record at 23, and the OWA forwarded her case to the Physician Panel.

The Panel addressed the claimed illnesses. The Panel discussed the Applicant's 1987 diagnosis of bilateral breast cancer, and the 1996 diagnoses of endometrial cancer and skin cancer on the nose and lip. The Panel found that it was unlikely that the Applicant was exposed to radiation, citing her employment as a clerk typist, her

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[1] Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).
[2] *See id.* § 3675(a).
[3] See id. § 3681(g).

brief period of employment, and reports of dosimetry records showing no radiation exposure. Based on the lack of evidence of radiation exposure, the Panel found insufficient evidence to demonstrate that her cancers were related to her DOE employment.

The OWA accepted the determination, and the Applicant appealed. The Applicant maintains that she has no family history or other risk factors for these cancers. Accordingly, the Applicant concludes that radiation exposure is the "only plausible explanation."

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 a 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 argument that radiation is the "only plausible explanation" for her cancers does not indicate Panel error. As an initial matter, we note that the Applicant's contention that she has no risk factors lacks specificity and, therefore, cannot be evaluated. More importantly, however, the absence of other risk factors does not establish that "it is at least as likely as not" that the cancers were related to radiation exposure at DOE. The Panel considered the Applicant's job description, her period of employment, and the occupational radiation records showing no radiation exposure. Panel Report at 1, 3, 4; Record at 152, 153. The Applicant has failed to allege, let alone demonstrate, Panel error on those matters. Instead, the Applicant merely disagrees with the Panel's judgment, which is not a basis to grant the Appeal.

As indicated above, NIOSH is undertaking a dose reconstruction for the Applicant. If NIOSH issues a report that supports the Applicant's claim of exposure, she should

raise the matter with the DOL in conjunction with her Subpart E claim.

In compliance with Subpart E, this claim will be transferred to the DOL for review. OHA's denial of these claims does not purport to dispose of or in any way prejudice the DOLS's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0315 be, and hereby is, denied.

(2) The denial pertains only to the DOE claims and not to the DOL's review of these claims 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 26, 2005

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May 25, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **November 8, 2004**

Case No.: **TIA-0316**

XXXXXXXXXXX (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 dismissed as moot.

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 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) (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 Applicant was employed as a janitor, utility worker, driver, air filter technician, and radiation monitor at the Rocky Flats plant (the plant). He worked at the plant approximately 18 years, from 1978 to 1996.

The Applicant filed an application with OWA, requesting a physician panel review of his skin cancer. The Applicant claimed that his condition was due to exposures to toxic and hazardous materials at the plant. The Applicant also filed an application with the DOL. The DOL issued a positive Subpart D determination for the Applicant's skin cancer. The OWA forwarded the Subpart D application to the Physician Panel, which issued a negative determination for the illness. The OWA accepted the Physician's Panel determination. The Applicant filed the instant appeal, objecting to the negative determination on his skin cancer.

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 receipt of a positive DOL Subpart B determination for skin cancer satisfies the Subpart E requirement that the Applicant's illness be related to toxic exposure during employment at DOE. Authorization Act § 3675(a). *See also Worker Appeal*, Case No. TIA-0228, 29 DOE ¶ 80,202 (2005). Accordingly, the DOL Subpart B determination has rendered moot the Physician Panel determination.

As the foregoing indicates, the appeal should be dismissed as moot. 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 dismissal of this appeal 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-0316 be, and hereby is, dismissed.

(2) This dismissal pertains only to the DOE appeal 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 25, 2005

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May 24, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **November 8, 2004**

Case No.: **TIA-0317**

XXXXXXXXX (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 filed on behalf of her late husband, a DOE contractor employee (the Worker) 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 granted.

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.[1]

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. 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.

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 machinist at the Oak Ridge plant, Y-12 (the plant). The Application states that he worked at the plant for 32 years, from 1957 to 1989. The Applicant requested physician panel review of two illnesses – emphysema and acute respiratory failure.

The Physician Panel rendered a negative determination. The Panel was not unanimous. All three Panel members agreed that the Worker was a machinist and was exposed to toxic substances. All three also agreed that he had an extensive smoking history, which was a factor in his illness. The disagreement among the Panel members concerned the role of toxic exposures associated

[1] www.eh.doe.gov/advocacy

with his work as a machinist. The majority stated that his exposures did not "cause" his COPD. The minority stated that his exposures "contributed" to his COPD.[2] The OWA accepted the majority opinion, and the Applicant appealed.

In her appeal, the Applicant acknowledges that smoking played a role in the Worker's illnesses but maintains that exposures at the plant also played a role. The Applicant states that the Worker machined uranium and was involved in a mercury spill. The Applicant also claims that the Worker was in perfect health until the age of 45 when he was suddenly struck with myriad illnesses, including problems with the kidney, colon, thyroid, heart, and brain.

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 Panel report – both the majority and minority opinions – did not clearly apply the Rule's standard. The majority appeared to apply an overly stringent standard, describing whether toxic exposures "caused" the COPD. The minority appeared to apply an overly lenient standard, describing whether the exposures "contributed" to the illnesses, rather than whether they were "a significant factor" in such contribution. Accordingly, we have concluded that reconsideration of the application is warranted. We note that, in the appeal, the Applicant states that the Worker became ill at an early age with a number of other illnesses and she mentions those illnesses. The Applicant should consider asking that those illnesses be included in any future consideration of her claim.

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[2] **The minority provided a detailed discussion of the toxic exposures of machinists at the site, as well as the risk of lung illness for that job.**

In compliance with Subpart E, the application 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 review of these claims does not purport to dispose of or in any way prejudice the DOL's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-317, be, and hereby is, granted.

(2) Further consideration of the claimed illnesses, using the correct standard, is warranted.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 24, 2005

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April 22, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 15, 2004**

Case No.: **TIA-0389**

xxxxxxxxxx (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits on behalf of XXXXXXXXXX (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the illness was not related to 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 negative determination. As explained below, we have concluded that the Appeal should be dismissed as moot.

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 Applicant filed a Subpart B application with DOL and a Subpart D application with OWA, claiming cervical and lung cancer. The OWA referred the application to the Physician Panel, which issued a negative determination. The Panel found that the Applicant had cervical cancer with metastasis to the lung, but that the cancer was not related to toxic exposure at DOE. The OWA accepted the determination, and the Applicant filed an appeal. In her appeal, the Applicant states that the decision is inconsistent with a DOL Subpart B positive determination on cancer.

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 DOL's Subpart B positive determination renders the appeal moot. The determination satisfies the Subpart E requirement that the claimed illness be related to toxic exposure during DOE employment. *See* Authorization Act § 3675(a).

As the foregoing indicates, the appeal should be dismissed at moot. 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-0389, be, and hereby is, dismissed as moot.

(2) This dismissal 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 22, 2005