UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CLAY SHEFF,

Petitioner,

vs. **No. _____**

UNITED STATES DEPARTMENT OF JUSTICE,
Civil Division, Radiation Exposure Compensation Program,

Respondent.

PETITION FOR REVIEW OF FINAL DECISION AND FOR DECLARATORY RELIEF

Comes now Petitioner, Clay Sheff, by and through his undersigned attorney, Roberto C. Armijo, and for his petition for review of a Final Decision and final agency action, and for Declaratory Relief, states:

Jurisdiction and Venue

1. This is a petition under the Radiation Exposure Compensation Act ("the RECA" or "the Act"), codified as amended in 42 U.S.C. § 2210 (note) (2012), and, to the extent it may apply, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.*, for an order to modify or set aside a final decision and final agency action issued by the U.S. Department of Justice, Civil Division, Radiation Exposure Compensation Program, denying "Downwinder" benefits to Petitioner, and other appropriate relief.

2. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701-706. Venue lies in this district under 28 U.S.C. § 1391(e) and under the RECA, § 6 (l). Petitioner is a person of modest means and is a resident of the State of New Mexico.

3. The RECA, 42 U.S.C. § 2210 (note) § 6 (l), provides that an individual whose claim under the Act is denied may seek judicial review in a United States District Court. The RECA further provides that the court shall review the denial on the administrative record and shall hold unlawful and set aside the denial if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.*

Procedural Background

4. On September 4, 2015, Petitioner filed a claim with the DOJ's Civil Division, Radiation Exposure Compensation Program seeking "Downwinder" compensation under the RECA.

5. Petitioner's claim was reviewed by the Radiation Exposure Compensation Program ("Radiation Program" or "the RECP"), and on July 8, 2016 the Assistant Director of the Torts Branch, Civil Division, Radiation Program issued a decision denying Petitioner's claim.

6. On August 31, 2016, Petitioner filed a timely administrative appeal of the RECP District Director's decision with RECP's Appeals Officer.

7. On November 14, 2016, RECP's Appeals Officer issued An Appeal Memorandum affirming the Assistant Director's denial of Petitioner's claim. The Appeals Officer noted in the Appeal Memorandum that the Appeal Memorandum represented the final Department of Justice Action on this matter, and that Section 6 (l) of the RECA afforded Petitioner the right to seek judicial review of such final action.

Petitioner's Claim

8. Petitioner filed a claim with RECP under Section 4 of RECA for a compensation payment of $50,000.00, alleging tht he contracted primary cancer of the pharynx following his exposure to radiation while physically present in an affected area downwind from the atmospheric nuclear tests conditioned by the United States government.

9. The RECA is administered by the RECP, a "component of the Constitutional and Specialized Torts Litigation Section of the torts Branch of the Civil Division of the United States." 28 C.F.R. § 79.2 (n).

10. After a claim for compensation is submitted and renders a decision on the claim. Id. at § 79.72. In reaching a decision, all reasonable doubt with regard to whether a claim meets the requirements of the RECA shall be resolved in favor of the claimant. § 6 (b) (1) of the RECA.

11. To establish eligibility for compensation Petitioner, in the context of his claim, was required to establish that he was physically present in a statutorily designated affected area for the entire period beginning on June 30, 1962 , and ending on July 31, 1962; and that after such physical presence in an affected area he contracted cancer of the pharynx. 42 U.S.C. §2210 note, §§ 4(a)(2)(A)-(B), (b)(1)(C)-(b)(2).

12. DOJ's Radiation Program found and concluded that Petitioner's evidence satisfied the medical eligibility criteria of the Act. Specifically Petitioner provided evidence establishing that he was diagnosed with primary cancer of the pharynx, a covered disease under Section 4 of the Act.

13. However the DOJ's Radiation Program issued a denial of Petitioner's claim as it also found and concluded that Petitioner failed to establish that he was physically present in an affected area, and that Petitioner's evidence therefore did not establish that he was physically present in an affected areas for the period of time required under Section 4 of the Act.

14. In support of his contention that he was physically present in an affected area, Petitioner presented evidence that he was present *in utero*[1] in the County of Coconino, Arizona, an affected area pursuant to § 4 (b) (1) (C), for the entire period beginning on June 30, 1962 and ending on

[1] *In utero* means "within the womb; not yet born." Stedman's Medical Dictionary 996 (28th ed. 2006).

July 31, 1962, as required by § 4 (a) (2) (B). Specifically Petitioner's evidence established that his date of birth fell on a date after July 31, 1962 such that he was present in an affected area, *in utero,* for the entire term of June 30, 1962 through July 31, 1962; that his mother was pregnant with him and she was physically present in Coconino County, Arizona for that entire time period; and that his mother was the recipient of Downwinder benefits under the Downwinder provisions of the RECA based on her own physical presence in Coconino County, Arizona for the entire specified period of June 30, 1962 through July 31, 1962.

15. Petitioner maintains that his physical presence *in utero* in an affected area, namely Coconino County, Arizona, for the entire term of June 30, 1962 through July 31, 1962 was sufficient to satisfy the physical presence criteria set forth by the Act such that his claim should have been accepted for compensation.

16. The Radiation Program refused to recognize Petitioner's *in utero* physical presence, and on July 8, 2016 the Radiation Program denied Petitioner's claim based on the Radiation Program's determination that exposure *in utero* is precluded by the language of the Act and/or as interpreted by the Radiation Program.

17. The Radiation Program rejected Petitioner's claim based on his *in utero* physical presence based in substantial part on its construction of the meaning of the RECA and based on its claimed long standing interpretation of the statute.

18. In his timely Administrative Appeal, dated August 31, 2016, Petitioner respectfully took exception to the arguments, authority and reasoning of the Radiation Program's Assistant Director as contained the Final Decision, dated July 8, 2016. And Petitioner, by this Petition for Judicial Review, respectfully takes exception to the reasoning of the Radiation Program's Appeals Officer as contained in its Appeal Memorandum, dated November 14, 2016.

19. In due respect for the rules of pleading Petitioner does not set forth the substance of the parties arguments, authorities and reasoning at length in this Petition. In addition Petitioner maintains that the Review Process under § 6 (l) of the Act and under the APA, which contemplates a review of the administrative record, does not call for a detailed recitation of the arguments, authorities and reasoning at the initial Petition stage of this proceeding. See: Olenhouse v. Commodity Credit Corporation, 42 F.3d 1560, 1579-80 (10th Cir. 1994).

20. Petitioner maintains that the Radiation Program's denial of his claim for Downwinder compensation was arbitrary, capricious, an abuse of discretion or not in accordance with law and that this Court should therefore set aside the Final Decision denying his claim. Petitioner's reasons in support of his claim include the following:

A. The RECA does not specifically exclude *in utero* physical presence. § 4(a)(i) (1) of the Act.

B. The Assistant Director of RECP's citation to the definition of "individual" in the Dictionary Act, 1 U.S.C. § 8(a) as support or RECP's position fails to take into account the Dictionary Act's additional statement " that "(c) Nothing in this section shall be construed to affirm, deny, expand, or contract any legal status or legal right applicable to any member of the species homo sapiens at any point prior to being "born alive" as defined in this section." Id. at § 8 (c).

C. The Assistant Director's reasoning that the Act, by providing compensation to three classes of claimants, namely onsite participants, uranium workers, and "downwinders" by parallel reasoning means that the term individual means the same thing in each context and precludes *in utero* exposure, is misplaced in that unlike the provisions of the Act covering claims by onsite participants and uranium workers, the provision of the Act covering

"downwinders" simply requires physical presence as opposed to participation in activity or uranium mine employment during a specified time.

D. While the Act delegates authority to the agency to make rules to carrying the force law, the Assistant Director did not cite a single instance where the concept of *in utero* exposure is mentioned in RECP's governing regulations or any instance where it RECP has adopted a written rule disallowing the consideration of *in utero* exposure in cases of individuals seeking benefits under the "downwinder" provisions of the Act.

E. RECP's Appeals Officer acknowledges that there is no district court decision directly addressing the issue of "downwinder" *in utero* exposure as a basis for claim acceptance.

Issues Presented

21. The issues presented in this matter center on whether DOJ's findings and conclusions that Petitioner's physical presence in an statutorily designated affected area and exposure *in utero* do not satisfy RECA's exposure eligibility requirements.

22. Petitioner respectfully takes exception to the reasons for rejection based on arguments and authorities presented to DOJ's Radiation Program and its Appeals Officer.

Documents addressing recommended and final decision

23. A copy of DOJ's Decision denying Petitioner's claim, dated July 8, 2016, with redacted information per court rules, is attached hereto as Exhibit "A", to the extent that it forms the basis for this action.

24. A copy of DOJ's Denial of Petitioner's administrative appeal, dated November 14, 2016, representing final agency action, with redacted information per court rules, is attached hereto as Exhibit "B", to the extent that it forms the basis for this action.

Grounds on which relief is sought

25. Petitioner respectfully contends that DOJ's actions in denying his claim for downwinder benefits was arbitrary, capricious, an abuse of discretion or not in accordance with law in the following particulars:

A. In making its decisions DOJ relied on factors which Congress has not intended it to consider;

B. In making its decisions DOJ entirely failed to consider an important aspect of the issues related to Petitioner's downwinder claim, including important aspects related to its decision;

C. In making its decisions DOJ offered explanations for its decisions that run counter to the evidence before the agency; or

D. DOJ's decisions are so implausible that they could not be ascribed to a difference in view or the product of agency expertise.

E. Upon information and belief Petitioner asserts that the actions of DOJ in the denial of this claim and/or the interpretation of RECA statute are in violation of the substantive and procedural due process and equal protection rights of Petitioner under the Fifth Amendment of the Constitution of the United States of America.

WHEREFORE, Petitioner prays that this Court grant the following relief:

1. That this Court issue an order directing the U.S. Department of Justice to transmit a true and correct copy of the administrative record to the clerk of this court for review by this Court;

2. That this Court issue an order establishing a schedule for the submission of arguments and authorities by the parties addressing the issues raised by this petition to modify or set aside the decision denying downwinder benefits to Petitioner under the Radiation Exposure Compensation Act;

3. That this Court, following review of the administrative record, render a final order holding and declaring that DOJ's failure to award Petitioner downwinder benefits under the Radiation Exposure Compensation Act and/or to remand this matter under Petitioner's administrative appeal for further development was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

4. That this Court render an order construing the RECA and remanding this matter to the U.S. Department of Justice for further proceedings consistent with the final order of this Court, including, but not limited to a remand to the district office for acceptance of this claim;

5. That this Court grant Petitioner his reasonable costs and attorneys fees for the services of his attorneys in the action before this court in accordance with 28 U.S.C. § 2412; and

6. That this Court grant such other and further relief as may be just and proper.

Dated this 9th day of January, 2017.

Respectfully Submitted,

Roberto C. Armijo, Esq.

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