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Ombudsman of the Energy Employees Occupational Illness Compensation Program, Part E

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2012 Annual Report to Congress

Abstract

[Excerpt] Public Law 108-375 not only repealed Part D and established Part E it also created the Office of the Ombudsman (the Office). The law urged the Secretary to ensure the independence of the Office within DOL, including independence from other officers and employees of DOL engaged in activities related to the administration of the provisions of EEOICPA.

Public Law 108-375 also contained an express sunset date, terminating the requirement for the Office on October 28, 2007. On October 22, 2007, shortly before the sunset provision was to take effect, former Secretary Chao issued a Memorandum determining that the Department of Labor should continue to have an Office of the Ombudsman in the event that the statutory requirement expired. This Memorandum took effect on October 28, 2007. Subsequently, on January 28, 2008, Section 3116 of the FY08 Defense Authorization Act, Public Law 110-181, effectively reinstated the statutory requirement for the Office by extending the sunset date until October 28, 2012. On October 24, 2012, shortly before the October 28, 2012 sunset date, former Secretary Solis signed a Memorandum continuing the Office under the authority of the previous Memorandum signed on October 22, 2007.

EEOICPA outlines three duties for the Office:

1. Provide information about the benefits available under Part B and Part E and on the requirements and procedures applicable to the provision of such benefits;
2. Make recommendations to the Secretary regarding the location of resource centers for the acceptance and development of claims under Part B and E; and
3. Carry out such other duties as the Secretary specifies.

See 42 U.S.C. §7385s-15(c).

In addition, 42 U.S.C. §7385s-15(e) requires the Office to submit an annual report to Congress setting forth:

- The number and types of complaints, grievances, and requests for assistance received by the Office during the preceding year, and
- An assessment of the most common difficulties encountered by claimants and potential claimants during the preceding year.

Keywords

Energy Employees Occupational Illness Compensation Program Act, radiation, toxic substances, claimants, workplace illness

Comments

Suggested Citation

United States Department of Labor, Ombudsman of the Energy Employees Occupational Illness Compensation Program, Part E. (2013). *2012 annual report to Congress* [Electronic version]. Washington,

DC: Author.



2012 Annual Report to Congress

The Office of the Ombudsman
for the Energy Employees Occupational
Illness Compensation Program



U.S. Department of Labor

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U.S. Department of Labor

Ombudsman
Energy Employees Compensation Program
Washington, D.C. 20210



JUN 05 2013

The Honorable Joseph R. Biden, Jr.
President of the Senate
Washington, DC 20510

Dear Mr. President:

I am pleased to present the 2012 Annual Report of the Ombudsman for the Energy Employees Occupational Illness Compensation Program of the United States Department of Labor. This Report is submitted in accordance with 42 U.S.C. §7385s-15(e).

Sincerely,

Malcolm D. Nelson
Ombudsman for the Energy Employees
Occupational Illness Compensation Program

Enclosure

U.S. Department of Labor

Ombudsman
Energy Employees Compensation Program
Washington, D.C. 20210



JUN 05 2013

The Honorable John A. Boehner
Speaker of the House
Washington, DC 20515

Dear Speaker Boehner:

I am pleased to present the 2012 Annual Report of the Ombudsman for the Energy Employees Occupational Illness Compensation Program of the United States Department of Labor. This Report is submitted in accordance with 42 U.S.C. §7385s-15(e).

Sincerely,

Malcolm D. Nelson
Ombudsman for the Energy Employees
Occupational Illness Compensation Program

Enclosure

History of EEOICPA

The U.S. nuclear weapons program unofficially began on August 2, 1939 with a letter signed by Albert Einstein to President Franklin D. Roosevelt. Einstein warned the President of recent research by University of Chicago and French scientists who were exploring nuclear chain reactions that could lead to the construction of extremely powerful and unimaginable weapons. He concluded the letter warning of potential uranium research in Germany.

Roosevelt reacted to the letter by forming the Advisory Committee on Uranium in October 1939. After the United States entered World War II, Roosevelt approved the development of an atomic bomb in August 1942 under the U.S. Army Corps of Engineers Manhattan Engineer District (MED), later known as the Manhattan Project.¹

The government operated the MED until 1947. Thereafter, the government transferred MED functions to the Atomic Energy Commission (AEC). The government abolished the AEC in 1974, when the Energy Research & Development Administration (ERDA) was created. ERDA became the Department of Energy (DOE) in 1977.

Starting with the MED and well into the 1960's, much of the work associated with the development of atomic weapons was contracted through private and academic entities. These efforts to develop atomic weapons grew into an industry employing hundreds of thousands of individuals in more than 350 facilities located in almost every state in the United States. Estimates suggest that at its peak, the U.S. nuclear weapons program employed more than 600,000 workers in the production and testing of nuclear weapons.²

The work performed at these sites often resulted in exposure to radioactive materials and/or other toxic substances. Accordingly, concerns for the health and safety of these workers led to the October 2000 enactment of the Energy Employees Occupational Illness Compensation Program Act (EEOICPA) as Title XXXVI of Public Law 106-398, the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001.

As enacted in October 2000, EEOICPA contained two parts, Part B and Part D. Part B provides compensation and/or medical benefits/medical monitoring to qualified employees (or eligible survivors of qualified employees) who suffer from chronic beryllium disease, beryllium sensitivity, chronic silicosis, or from cancers related to radiation exposure. The Department of Labor (DOL) administers Part B.

1. See *Linking Legacies, Connecting the Cold War Nuclear Weapons Production Processes To Their Environmental Consequences*, United States Department of Energy, January 1997.

2. See United States Government Accountability Office, Report to Congressional Requesters: ENERGY EMPLOYEES COMPENSATION – Additional Oversight and Transparency Would Improve Program's Credibility, March 2010, GAO-10-132.

Part D, on the other hand, directed DOE to provide assistance to claimants in obtaining state-based workers' compensation. In 2004, due to obstacles that prevented the efficient administration of Part D, Congress repealed Part D and enacted Section 3161 of Public Law 108-375 establishing Part E as a federal compensation scheme for DOE contractor and subcontractor employees. This new law directed the Energy Secretary to provide the Secretary of Labor (the Secretary) with all applicable records, files, and other data. The law also mandated DOL to prescribe regulations and begin the administration of Part E within 210 days of enactment. DOL prescribed interim final regulations on May 26, 2005, thereby meeting the 210 day deadline imposed by Congress. ■

The Office of the Ombudsman

Public Law 108-375 not only repealed Part D and established Part E it also created the Office of the Ombudsman (the Office). The law urged the Secretary to ensure the independence of the Office within DOL, including independence from other officers and employees of DOL engaged in activities related to the administration of the provisions of EEOICPA.

Public Law 108-375 also contained an express sunset date, terminating the requirement for the Office on October 28, 2007. On October 22, 2007, shortly before the sunset provision was to take effect, former Secretary Chao issued a Memorandum determining that the Department of Labor should continue to have an Office of the Ombudsman in the event that the statutory requirement expired. This Memorandum took effect on October 28, 2007. Subsequently, on January 28, 2008, Section 3116 of the FY08 Defense Authorization Act, Public Law 110-181, effectively reinstated the statutory requirement for the Office by extending the sunset date until October 28, 2012. On October 24, 2012, shortly before the October 28, 2012 sunset date, former Secretary Solis signed a Memorandum continuing the Office under the authority of the previous Memorandum signed on October 22, 2007.

EEOICPA outlines three duties for the Office:

1. Provide information about the benefits available under Part B and Part E and on the requirements and procedures applicable to the provision of such benefits;
2. Make recommendations to the Secretary regarding the location of resource centers for the acceptance and development of claims under Part B and E; and
3. Carry out such other duties as the Secretary specifies.

See 42 U.S.C. §7385s-15(c).

In addition, 42 U.S.C. §7385s-15(e) requires the Office to submit an annual report to Congress setting forth:

- The number and types of complaints, grievances, and requests for assistance received by the Office during the preceding year, and
- An assessment of the most common difficulties encountered by claimants and potential claimants during the preceding year.

In order to accomplish its statutory duties and in furtherance of the directive to submit an annual report to Congress, the Office:

- **Clarifies/explains documents and procedures:** Many of the documents associated with EEOICPA use technical, scientific, and/or legal concepts that can be difficult to understand. Claimants often contact the Office when they are unable to understand these documents. Claimants also contact our Office when they have questions concerning the procedures to follow in pursuing an EEOICPA claim.

In an effort to provide claimants with simplified information, the Office continues to develop brochures and other documents that address some of the more common questions that we receive. Moreover, since many of the claimants with whom we interact do not have access to the Internet, we ensure that copies of these documents are available for distribution, as well as available on the Web.

- **Engages in outreach:** The Office hosts and/or participates in meetings, conferences, and other events at locations around the country. Such events provide the opportunity to: (1) meet face to face with claimants who are encountering difficulties with the EEOICPA claims process, as well as, (2) to disseminate information concerning EEOICPA and the services provided by the Office to individuals previously unaware of the program. In the past, we focused much of our outreach on attendance at town hall meetings, traveling resource centers and conferences. This year we expanded our outreach to include attendance at two luncheons held for former workers. Based upon the positive response to our presence at these luncheons, we are actively searching for similar events where we can interact with current and former nuclear weapons workers.

During calendar year 2012, the Office participated in the following outreach events³:

| Location | Event |
|-------------------------|--|
| Ames Iowa | Two events specially held |
| Burlington, Iowa | Two events specially held |
| Ames, Iowa Laboratory | Town hall meeting |
| Amarillo, Texas | Traveling resource center |
| Lynchburg, Virginia | Town hall meeting and traveling resource center |
| Upton, New York | Town hall meeting |
| Augusta, Georgia | Town hall meeting and traveling resource center |
| Oak Ridge, Tennessee | Traveling resource center |
| Clarksville, Tennessee | Traveling resource center |
| Hamilton, Ohio | Town hall meetings |
| Pasco, Washington | Town hall meetings |
| Farmington, New Mexico | Traveling resource center |
| Kayenta, Arizona | Traveling resource center |
| Albuquerque, New Mexico | Town hall meetings |
| Amherst, New York | Traveling resource center |
| Rockville, Maryland | Annual meeting of Radiation Exposure Screening and Education Program |

3. A full list of all of the EEOICPA outreach events held in calendar year 2012 can be found at Table 3, see page 10.

- **Receives complaints and grievances:** Throughout the year, claimants, potential claimants, authorized representatives, congressional staff members, and others contact the Office with complaints, grievances, and other concerns involving their experience with EEOICPA. These matters involve virtually every aspect of the EEOICPA claims process from uncertainty on how to file a claim, to concerns involving the receipt of medical services following the acceptance of the claim. It is worth noting that the complaints and grievances that we receive do not always come from individuals whose claims were denied. In our experience, it is just as likely that the complaint or grievance comes to us while the claim is pending.
- **Provides assistance:** In most instances, individuals do not contact us simply to register a complaint or grievance. Rather, in addition to registering a concern, the individuals who contact us want assistance with their claim. This assistance includes, but is not limited to: explaining procedures and policies; directing individuals to the agency administering specific aspects of EEOICPA; and providing individuals with a hard copy of documents (these requests usually arise when materials are only available online and the individual does not have internet access). Within the limits of our statutory authority, we endeavor to assist claimants whenever and wherever we are able.
- **As we enter calendar year 2013, two areas of emphasis will be:** (1) to expand the Office's outreach and (2) to continue to develop documents and other tools that provide claimants with simplified information. Building on the positive response to our attendance this year at the two luncheons for former workers, we are already searching for other events where we will have the opportunity to interact with claimants and potential claimants. In addition, while we look forward to continuing our outreach efforts with DOL, DOE, and the National Institute for Occupational Safety and Health (NIOSH), efforts are underway to identify and contact other organizations that interact with potential EEOICPA claimants. Our goal is to coordinate outreach activities with some of these groups as well. ■

Tables

Consistent with our statutory mandate, Tables 1 and 2 set forth the number and types of complaints, grievances, and requests for assistance received during calendar year 2012. In reviewing these tables, please be mindful that:

1. Claimants often contact the Office to discuss an event or encounter, and each event or encounter has its own unique set of circumstances. As a result, many complaints and grievances do not neatly fit into a specific category. This helps to explain the large number of complaints counted in the miscellaneous category under “other.”
2. One claimant may have multiple complaints. Each complaint is counted separately.
3. In many instances, our assistance requires multiple contacts with a claimant. To the extent that it involves the same matter, multiple contacts count as one complaint.
4. Only inquiries related to EEOICPA are included in these tables.
5. There are many instances where it is impossible to effectively collect data. For example, the volume of claimants and the pace of the interactions at many outreach events are such that an accurate recording of each contact is impossible. In addition, there are some individuals who prefer to remain anonymous as well as others who prefer to limit the information that they provide.
6. While a complaint may focus on one claim, the impact of the complaint may potentially affect multiple claimants.

Table 3 sets forth the EEOICPA outreach events sponsored by the various agencies in calendar year 2012.

Table 1 – Complaints by Nature

| | CONCERN | NUMBER |
|----|---|---------------|
| 1 | Covered Employment | 50 |
| 2 | Covered Facility | 5 |
| 3 | Covered Illness | |
| | Difficulty confirming diagnosis (38) | 41 |
| | Take-home toxins (3) | |
| 4 | Eligibility of Survivors | 19 |
| 5 | Exposure to Toxins | |
| | Difficulty locating records (22) | 63 |
| | Questions accuracy of records (41) | |
| 6 | Dose Reconstruction | 42 |
| 7 | Special Exposure Cohorts | |
| | Difficulty establishing 250 days (4) | 49 |
| | Other issues (45) | |
| 8 | Causation | 57 |
| 9 | Impairment | 21 |
| 10 | Wage Loss | 9 |
| 11 | Medical Benefits | 74 |
| 12 | Processing of Claim Takes Too Long | 39 |
| 13 | Interactions with DEEOIC | |
| | Staff Rude (23) | 156 |
| | Calls/letters not answered (24) | |
| | Information provided is confusing (104) | |
| | Staff was helpful (5) | |
| 14 | Concerns with Representation | 10 |
| 15 | Issues involving RECA | 7 |
| 16 | Miscellaneous | |
| | FOIA request/request for documents (10) | 362 |
| | Offset/Coordination of benefits (2) | |
| | Maximum amount of compensation (7) | |
| | Is compensation subject to taxes (2) | |
| | Other issues (341) | |
| | TOTAL | 1004 |

Table 2 – Complaints by Facility

Table 2 provides the number of complaints, grievances, and requests for assistance received from various facilities. In reviewing this table, please be mindful that there are instances where the identification of the facility was not recorded. In some instances, the identification of the facility was not a relevant factor in the complaint. In other instances the claimant preferred not to provide this information. Accordingly, the actual number of complaints from any given facility may be higher than the numbers reported in this table.

| Facility | Location | # of Complaints |
|--|--------------------|-----------------|
| AC Spark Plug | Flint, MI | 2 |
| Albany Research Center | Albany, OR | 2 |
| Allied Chemical Corporation Plant | Metropolis, IL | 1 |
| Amchitka Island Nuclear Explosion Site | Amchitka Island | 1 |
| Ames Laboratory | Ames, IA | 5 |
| Argonne National Laboratory – East | Argonne, IL | 2 |
| Argonne National Laboratory – West | Scoville, ID | 2 |
| Armour Research Foundation | Chicago, IL | 1 |
| Battelle Laboratories – King Avenue | Columbus, OH | 1 |
| Bendix Aviation (Pioneer Division) | Davenport, IA | 1 |
| Bethlehem Steel | Lackawanna, NY | 5 |
| Blockson Chemical Company | Joliet, IL | 3 |
| Brookhaven National Laboratories | Upton, NY | 12 |
| BWX Technologies | Lynchburg, VA | 48 |
| Clarksville Modification Center | Clarksville, TN | 2 |
| Electro Metallurgical | Niagara Falls, NY | 3 |
| Feed Materials Production Center | Fernald, OH | 4 |
| General Electric Company | Evendale, OH | 6 |
| Grand Junction Operations Center | Grand Junction, CO | 1 |
| Hanford | Richland, WA | 22 |
| Huntington Pilot Plant | Huntington, WV | 1 |
| Idaho National Engineering Laboratory | Scoville, ID | 2 |
| Iowa Ordnance Plant | Burlington, IA | 17 |
| Kansas City Plant | Kansas City, MO | 12 |
| Lawrence Livermore National Laboratory | Livermore, CA | 6 |
| Linde Ceramics Plant | Tonawanda, NY | 5 |

| Facility | Location | # of Complaints |
|---|---------------------|------------------------|
| Los Alamos National Laboratory | Los Alamos, NM | 13 |
| Mallinckrodt Chemical Company | St. Louis, MO | 2 |
| Medina Modification Center | San Antonio, TX | 1 |
| Metals and Control Corporation | Attleboro, MA | 1 |
| Mound | Miamisburg, OH | 1 |
| National Bureau of Standards, Van Ness Street | Washington, DC | 2 |
| Nevada Site Office | North Las Vegas, NV | 1 |
| Nevada Test Site | Mercury, NV | 14 |
| Oak Ridge Gaseous Diffusion Plant (K-25) | Oak Ridge, TN | 7 |
| Oak Ridge National Laboratory (X-10) | Oak Ridge, TN | 3 |
| Oak Ridge (Y-12) | Oak Ridge TN | 7 |
| Oak Ridge (did not specify location) | Oak Ridge, TN | 16 |
| Ore Buying Station at Grants | Grants, NM | 2 |
| Pacific Northwest National Laboratory | Richland, WA | 2 |
| Pacific Proving Ground | Marshall Island | 4 |
| Paducah Gaseous Diffusion Plant | Paducah, KY | 11 |
| Pantex Plant | Amarillo, TX | 15 |
| Pinellas Plant | Clearwater, FL | 2 |
| Portsmouth Gaseous Diffusion Plant | Piketon, OH | 7 |
| Rocky Flats Plant | Golden, CO | 11 |
| SAM Laboratories, Columbia University | New York City, NY | 1 |
| Sandia National Laboratories | Albuquerque, NM | 3 |
| Savannah River Site | Aiken, SC | 40 |
| Spencer Chemical Co/Jayhawks Works | Pittsburg, KS | 1 |
| Stanford Linear Accelerator Center | Palo Alto, CA | 1 |
| Uranium Miners | Various sites | 19 |
| Wah Chang | Albany, OR | 2 |
| Weldon Spring Plant | Weldon Spring, MO | 2 |
| West Valley Demonstration Project | West Valley, NY | 1 |

Table 3 – Town Hall Meetings and Other Outreach Events in Calendar Year 2012

With the goal of informing potential claimants of EEOICPA and assisting current claimants with the EEOICPA claims process, there were 21 outreach events held during calendar year 2012 at sites around the country. These outreach events included:

- A town hall meeting sponsored by the Office and another town hall meeting co-sponsored by the Office.
- One town hall meeting sponsored by the Joint Outreach Task Group.⁴
- A total of 17 outreach events sponsored by the Department of Labor's Division of Energy Employees Occupational Illness Compensation (DEEOIC). These events drew more than 1670 individuals and resulted in the filing of 156 new claims.
- Two luncheons for former workers.
- The annual meeting of the Radiation Exposure Screening and Education Program

Here is a list of the 21 outreach events held between January and December 2012:

| Site of Meeting | Facility/Location | Date | Event |
|------------------------|-------------------------------|------------|--|
| Oak Ridge, Tennessee | Y-12 Plant (new SEC) | 01/18/2012 | DEEOIC Traveling Resource Center |
| Farmington, New Mexico | | 03/07/2012 | DEEOIC/Denver outreach |
| Kayenta, Arizona | | 03/07/2012 | DEEOIC/Denver outreach |
| Amarillo, Texas | Pantex Plant | 03/14/2012 | DEEOIC Town Hall Meetings |
| Augusta, Georgia | Savannah River Site (new SEC) | 04/17/2012 | DEEOIC Town Hall Meetings |
| Amherst, New York | Linde Ceramic Plant (new SEC) | 04/25/2012 | DEEOIC Traveling Resource Center |
| Lynchburg, Virginia | BWX Technologies | 05/23/2012 | Town Hall Meeting & Traveling Resource Center – sponsored by the Office of the Ombudsman |
| Ames, Iowa | Ames Laboratory | 06/06/2012 | Town Hall Meeting in partnership with the Former Worker Medical Screening Program of Iowa – sponsored by the Office of the Ombudsman |

4. In 2009, DOE teamed with DOL, the Office, NIOSH, the Ombudsman to NIOSH, and the DOE funded Former Worker Program (FWP) projects to create the Joint Outreach Task Group (JOTG). The JOTG was established under the premise that agencies/programs with common goals can work together by combining resources and coordinating outreach efforts for the EEOICPA and the Former Worker Medical Screening Program to better serve the current and former DOE workforce.

| Site of Meeting | Facility/Location | Date | Event |
|-------------------------|--|-------------|---|
| Farmington, New Mexico | | 06/08/2012 | DEEOIC/Denver outreach |
| Kayenta, Arizona | | 06/08/2012 | DEEOIC/Denver outreach |
| Upton, New York | Brookhaven National Laboratory | 07/17/2012 | JOTG Town Hall Meeting |
| Albuquerque, New Mexico | Sandia National Laboratory | 08/22/2012 | DEEOIC Town Hall Meetings |
| Burlington, Iowa | Iowa Ordnance Plant (Line 1 and Associated Activities) | 09/07/2012 | Luncheon for former employees of the Iowa Ordnance Plant (Line 1 and Associated Activities) |
| Farmington, New Mexico | | 09/2012 | DEEOIC/Denver outreach |
| Kayenta, Arizona | | 09/2012 | DEEOIC/Denver outreach |
| Ames, Iowa | Ames Laboratory | 09/21/2012 | Luncheon for former employees of the Ames Laboratory |
| Hamilton, Ohio | Feed Materials Production Center (new SEC) | 09/25/2012 | DEEOIC Town Hall Meetings |
| Pasco, Washington | Hanford Engineer Works (new SEC) | 10/23/2012 | DEEOIC Town Hall Meetings |
| Clarksville, Tennessee | Clarksville Modification Center (new SEC) | 11/08/2012 | DEEOIC Traveling Resource Center |
| Farmington, New Mexico | | 12/04/2012 | DEEOIC Traveling Resource Center and Meeting to provide information on home health care medical benefits provided under EEOICPA |
| Kayenta, Arizona | | 12/05/2012 | DEEOIC Traveling Resource Center and Meeting to provide information on home health care medical benefits provided under EEOICPA |

Preface to the Report

As required by the statute, this report sets forth the number and types of complaints, grievances, and requests for assistance received (during the preceding calendar year), and provides an assessment of the most common difficulties encountered by claimants and potential claimants during that year. Nevertheless, there are claimants, who are successful in their pursuit of compensation and/or benefits, and thus have no need to contact our Office.

| COMBINED PART B AND PART E SUMMARY | | | | |
|--|---------------|-----------------------------------|-----------------------------------|-----------------------------------|
| | | Cases as of 12/31/2010 | Cases as of 01/01/2012 | Cases as of 12/30/2012 |
| Applications filed | | 140,256* | 149,676** | 159,585*** |
| Covered Applications Filed | | 113,840 | 122,282 | 131,662 |
| Total Compensation Paid | Payments | 49,019 | 54,710 | 60,725 |
| | Total Dollars | \$5,915,139,362 | \$6,710,804,855 | \$7,546,725,245 |
| Total Medical Bills Paid | Total Dollars | \$659,674,597 | \$992,659,352 | \$1,344,088,687 |
| Total Compensation + Medical Bills Paid | | \$6,574,813,959 | \$7,703,464,207 | \$8,890,813,932 |

*A total of 82,373 unique individual workers are represented by the 140,256 cases reported.

**A total of 88,174 unique individual workers are represented by the 149,676 cases reported.

***A total of 94,211 unique individual workers are represented by the 159,585 cases reported.

It is also noteworthy that each year we see a number of initiatives and efforts instituted by DEEOIC, as well as the other agencies involved in the administration of EEOICPA to assist claimants in the processing of claims. Just some of the initiatives and efforts unveiled (or completed) in 2012 include:

- 16 new classes of employees added to the Special Exposure Cohort (SEC). (There are now a total of 98 SEC classes of employees at 71 facilities).
- DEEOIC enrolled 208 new medical providers into the program.
- DEEOIC and DOE implemented the Secured Electronic Records Transfer (SERT) system, a web-based application which provides a secure and efficient means of electronically requesting and transferring employment, medical, and occupational history records.
- Web –Ex live-stream video conferencing capability was made available.
- DEEOIC launched the Energy Compensation System (ECS), an integrated and expanded case management system.
- More than 800 new toxic substances were added to SEM.
- DOL continued to provide funding to support further development and expansion of the National Library of Medicine's Haz-Map Occupational Health database.

- DEEOIC posted 2 policy bulletins and 18 final circulars concerning the administration of EEOICPA to its website, including:
 - o A circular announcing that 17 facilities associated with the Uranium Mill Tailings Radiation Control Act are DOE covered facilities under EEOICPA.
 - o A circular providing clarification that sarcoma of the lung and cancer of the fallopian tube can be considered specified cancers under the SEC.
 - o A circular announcing that chronic lymphocytic leukemia (CLL) is a radiogenic cancer.
 - o A circular providing instructions on the processing claims for which additional periods of residual radiation have been identified.
- DEEOIC began work on a new Integrated Voice Response (IVR) system.
- DEEOIC began work on imaging case files.

While the report that follows addresses the complaints, grievances, and requests for assistance received during the past year, we felt that it was important to also acknowledge the efforts undertaken to assist claimants. ■

Executive Summary

DOL, DOE and NIOSH each have a role in administering EEOICPA and during the course of the year, we hear from claimants, lay representatives, congressional staff members and others with concerns involving the role undertaken by each of these agencies. Moreover, these concerns address virtually every aspect of the EEOICPA claims process. With complaints and concerns from such a wide variety of individuals, and addressing such a wide range of issues, it is a challenge to summarize all of the complaints that we receive in a given year. This challenge is further complicated by the fact that many complaints simply are not easy to categorize. For instance, it is quite common for someone to contact us because of difficulties encountered establishing employment at a covered site, and in that same conversation also raise concerns involving their interactions with one of the agencies administering this program. As a result, it is impossible to acknowledge each and every concern that we received over the course of a year. Rather, as we reflected on the complaints, grievances, and requests for assistance that we received over the course of the year, there was one assertion continued to arise. This concern asserts that the EEOICPA program is not “claimant-friendly.” While “claimant-friendly” can be interpreted in many different ways, the assertions that we receive generally address one or more of the following matters: (1) the scope of the program; (2) the assistance provided to claimants; (3) the weighing of the evidence; and (4) an interaction with one of the agencies administering this program.

The Scope of the Program

Claimants question the extent to which this program covers employees who worked at facilities associated with the U.S. nuclear weapons program. Claimants contend that it is not claimant-friendly for this program to cover some, but not all of the employees who worked at these facilities. Similarly, claimants find it troubling that even where employees are covered under this program, there are instances where employees are only covered if they suffer from certain illnesses. Other claimants contend that in light of the maximum amounts of compensation set by the statute, there are instances where employees are not fully compensated for all of the illnesses they suffer as a result of their covered employment. Often adding to the frustration is the fact some claimants maintain that no one is able to provide them with an explanation for these distinctions and/or limitations.

The Assistance Provided to Claimants

Although DEEOIC and the other agencies involved in the administration of EEOICPA have a host of resources and tools designed to assist claimants with the processing of claims, we continue to hear from claimants suggesting that more needs to be done. Claimants argue that: (a) many resources/tools are only online and thus are not easily available to those without access to the internet, and (b) even where claimants have access to these resources/tools, the information is often presented using very complex scientific and/or legal terms, thus rendering the information difficult to understand. Another complaint that we hear suggests that where guidance is provided, this guidance is often insufficient and provided well after the claimant initially needed the guidance.

In addition, while many of the claimants who contact us cannot cite to the specific statutory provision, they are nevertheless aware of the existence of a provision that states that assistance shall be provided to claimants in connection with their claim. *See* 42 U.S.C. §7384v. A common complaint that we receive contends that the assistance provided to claimants does not fully meet the intentions of this provision.

The Weighing of Evidence

We receive complaints that question whether DEEOIC's weighing of the evidence is in keeping with a "claimant-friendly" program. A frequent complaint notes that there are many instances where the covered employment occurred many years before Congress created the EEOICPA program, and as a result, efforts to develop necessary evidence are often hampered by faded memories, destroyed records, as well as colleagues who moved or passed away. Many claimants believe that in weighing evidence, DEEOIC sometimes fails to give adequate consideration to the host of factors that can impact a claimant's ability to produce relevant evidence.

Interactions with One of the Agencies Administering EEOICPA

During the processing of their claim, claimants sometimes have need to contact one or more of the agencies charged with administering the various aspects of EEOICPA. Many of these contacts are productive and thus, do not lead to complaints or grievances. Nevertheless, there are instances where claimants approach us with concerns involving their interactions with these agencies. These concerns include allegations that telephone calls were not answered or that it took several days to receive a return telephone call; assertions questioning the length of time it takes to process a claim; and instances where claimants take exception with comments directed at them by staff members.

In the report that follows, we review various aspects of the EEOICPA claims process and discuss the complaints, grievances, and requests for assistance related to those processes. ■

The 2012 Annual Report to Congress

I. The Scope of the Program

A. Claimants not aware of the Program

I was given the link to your office by a friend whose father also worked for [name excluded] during those years. I would like to know what kind of information would be needed to file a claim with them.

At practically every outreach event that we attend, we meet claimants who assure us that they only recently learned of this program. While these claimants are thankful to finally know of this program, some of these claimants question why it took so long to hear of this program. Some of the more vocal comments on this subject come from individuals who maintain that their address is the same as it was when they (or their loved one) worked at the facility. These individuals ask why a notice announcing this program was never mailed directly to their homes. In response to these comments, both DOL and DOE cite to numerous projects undertaken to notify potential claimants of this program. One recent program initiated by DEEOIC in 2012 targets select areas for press releases.⁵ In spite of efforts such as this, we continue to encounter individuals who believe that more needs to be done to ensure that potential claimants are aware of this program.

We also receive inquiries from individuals, who after hearing of the program are unable to locate additional information. When we encounter individuals seeking basic information concerning this program, we often refer them to the information available online. Unfortunately, there are instances where individuals either do not have access to the internet or are not very proficient with computers. As a result, the information available online is not easily accessible to everyone. We further find that even where an individual has access to the internet their ability to locate information can be hampered by their unfamiliarity with the program. For example, while many claimants are generally aware of this program, we encounter claimants who do not realize that this program is entitled the “Energy Employees Occupational Illness Compensation Program Act” and/or do not recognize the program by the acronym, “EEOICPA.” For all of the reasons discussed above, we encounter claimants who either are not aware of, or have limited knowledge of the program.

B. This program does not cover everyone who worked at these facilities

Some individuals believe that in enacting EEOICPA, Congress intended to cover anyone who worked at a facility associated with the development of the U.S. nuclear arsenal and, that Congress intended to cover these employees for any illness (or death) associated with that employment. However, a

5. The areas targeted for these press releases were areas where to date DEEOIC had received a relatively low number of claims.

review of the statute reveals that as written EEOICPA only covers certain employees. Specifically EEOICPA covers:

| Employees covered under Part B | Employees covered under Part E |
|---------------------------------------|---|
| Department of Energy contractor | Department of Energy contractor |
| Department of Energy subcontractor | Department of Energy subcontractor |
| Approved RECA Section 5 claims | RECA Section 5 uranium miners, millers and ore transporters |
| Employees of Beryllium Vendors | |
| Employees of Atomic Weapons Employer | |
| Department of Energy Employees | |

Chart 1

As a result of the manner in which the statute is drafted, there are employees who worked at facilities associated with the nuclear weapons program who will not satisfy the eligibility requirements for a covered employee under EEOICPA. Complaints question why certain employees are not covered under EEOICPA. The individuals raising these complaints often emphasize how they (or their loved ones) worked at a facility associated with the nuclear weapons program, thus exposing them (or their loved one) to all of the toxins to which all other employees were exposed. It is difficult for these individuals to understand why the classification of one's job has bearing on one's eligibility under EEOICPA. Moreover, where the claim is denied on the ground that the worker is not a covered employee under EEOICPA, claimants often find it frustrating that no one is able to point them to a program that provides compensation to individuals who worked at one of these facilities, but is not covered under EEOICPA.⁶ Here are a few of the individuals we encountered this year who worked at covered facilities, yet did not qualify as a covered employee under EEOICPA:

- Active duty military personnel.
- Contractors and subcontractors of employers designated at Atomic Weapons Employers (AWEs).
- A former employee of the DOE contractor Mason and Hangar who worked at the credit union operated by Mason and Hangar at the Pantex Site in Texas.
- Employees of the federal government, other than employees of DOE (employees of DOE are covered under Part B).
- A couple of cases this year involved former employees of the Department of Defense (DOD), and specifically, former employees of the Nevada Test Site (NTS). The employees in question worked for EG&G Special Project. Without question, EG&G was a former DOE contractor at NTS. However, the response given to these claimants indicates that EG&G Special Project was a separate entity that did not have a contract with DOE and did not operate on land controlled by DOE. Accordingly, EG&G Special Project is not considered a covered employer for purposes of EEOICPA. Some claimants take exception with the

6. Employees of the federal government may be eligible to file claims under the Federal Employees Compensation Act (FECA). In prior years, eligible claimants reported mixed success pursuing a FECA claim for illnesses that arose while working at facilities associated with the nuclear weapons program.

determination that EG&G Special Projects did not operate on land controlled by DOE. These claimants contend that trying to distinguish between land controlled by DOE and land operated by other governmental agencies relies on a distinction that just did not exist at certain parts of NTS. Other claimants concede that it was never clear whether these employees worked for DOD, DOE, or some other governmental agency. Yet in spite of this uncertainty, these claimants believe that this work ought to be covered since it was performed in furtherance of the nuclear weapons program.

- The statute also excludes operations pertaining to the Naval Nuclear Propulsion Program. See 42 U.S.C. § 7384I (12)A. Consequently, a claim filed by the survivors of a former employee of BWX Technologies (BWX), in Lynchburg, Virginia was ultimately denied where: (1) the individual was employed by DOD and (2) the work was related to the Naval Nuclear Propulsion Program.

Another issue that continues to generate complaints concerns wholly owned subsidiaries of AWEs. According to DEEOIC, contractors and subcontractors of AWEs do not meet the definition of an “atomic weapons employer.” In reaching this determination, DEEOIC notes that the “...very separate and unique character of a wholly-owned subsidiary renders it, in effect, its own company with its own corporate identity.” Based on this reasoning, DEEOIC further holds that:

Any work performed by a wholly owned subsidiary of a DOE-designated AWE in the service of that AWE is therefore viewed as work performed by a contractor to that AWE. As such, employees of wholly-owned subsidiaries of DOE-designated AWEs are not considered “atomic weapons employees”...

See EEOICPA Bulletin 04-12. During the course of this year we received complaints from former employees of South Buffalo Railroad, a wholly owned subsidiary of Bethlehem Steel, as well as employees of Quaker Valley Constructors, a wholly owned subsidiary of Spencer Chemical. These claimants take exception with the determination that their respective employers operated as separate companies. Rather, these claimants believe that a review of the operations of these companies would show that the wholly owned subsidiary operated as an integral part of the larger company. They also argue that as employees of these wholly-owned subsidiaries, their status was the same as any other employee of the AWE – they note that they physically worked at these sites resulting in their exposure to all of the toxins to which any other employee was exposed.

C. Differences in Coverage

Part B and Part E have different criteria for covered employees. Similarly each Part has its own criteria for covered illnesses. Claimants question the rationale for these differences. In particular, employees of AWEs as well as DOE employees ask why they are covered under Part B if they suffer from a cancer caused by radiation exposure, yet are not covered under Part E for any illness or condition.⁷

- A former employee of Bethlehem Steel, an AWE, questions why he is not covered under Part E even though a physician opined that his aplastic anemia (a non-cancerous condition) is related to radiation exposure.

The charts below compare Part B and Part E for differences in coverage:

| Employee ⁸ | Covered under Part B | Covered Under Part E |
|------------------------------------|----------------------|----------------------|
| Department of Energy contractor | Yes | Yes |
| Department of Energy subcontractor | Yes | Yes |
| Beryllium Vendor | Yes | No |
| Atomics Weapon Employer | Yes | No |
| Department of Energy employee | Yes | No |

Chart 2

| Illnesses covered by Part B | Illnesses covered by Part E |
|--|--|
| <ul style="list-style-type: none"> • Any cancer that is at least as likely as not caused by radiation exposure. • Chronic Beryllium Disease • Beryllium Sensitivity • Chronic Silicosis (if employed during the mining of atomic weapon test tunnels in Nevada or Alaska). | Any occupational illness for which exposure to a toxic substance was at least as likely as not a significant factor that caused, aggravated, or contributed to such illness. |

Chart 3

7. Similarly, employees of beryllium vendors are covered under Part B (albeit for chronic beryllium disease and beryllium sensitivity) but not covered at all under Part E. See Chart 2, below.

8. Chart 2 does not include RECA Section 5 claimants. Nevertheless, under Part B an individual with an approved RECA Section 5 claim is entitled to an additional \$50,000 of compensation. Under Part E an individual who qualifies as a RECA Section 5 uranium miner, miller, or ore transporter may potentially be entitled to compensation and benefits.

Often adding to a claimant's confusion is the fact that the statute makes distinctions even among those covered under Part B:

| | Cancer caused by radiation exposure | Chronic Beryllium Disease | Beryllium Sensitivity | Chronic Silicosis |
|-------------------------|--|----------------------------------|------------------------------|--------------------------|
| DOE Employee | Yes | Yes | Yes | Yes |
| DOE Contractor | Yes | Yes | Yes | Yes |
| DOE Subcontractor | Yes | Yes | Yes | Yes |
| Atomic Weapons Employer | Yes | No | No | No |
| Beryllium Vendors | No | Yes | Yes | No |

Chart 4

Claimants complain that it is impossible to keep track of all of these distinctions. Claimants further contend that these distinctions are not always clearly outlined in the information available online (and elsewhere). As a result, many claimants tell us that it is frustrating (and a surprise) when their claim is denied because of some distinction that, prior to receiving the denial, they never knew existed.

D. Illnesses Suffered by Family Members (Take-Home Toxins)

Some individuals believe that family members are ill (or died) as a result of exposures originating from a covered site. These inquiries often suggest that a spouse or child is sick (or died) as a result of exposure to toxins brought home by the worker, or allege that a parent passed the illness on to an unborn child.

Eligibility under EEOICPA, however, is premised on the illness (or death) of a covered employee. Consequently, where the issue involves the illness (or death) of someone other than the covered employee, EEOICPA is not applicable. Many of the individuals who contacted us with concerns involving illnesses or deaths of family members (other than the covered worker) feel that there is no one willing to address the merits of these claims.

E. RECA Section 4 Claims

Section 7385j of the Act provides that claimants compensated for cancer under Section 4 of the Radiation Exposure Compensation Act (RECA) will not be eligible to receive compensation under EEOICPA for cancer, even though they may otherwise qualify for compensation and benefits under EEOICPA. See 42 U.S.C. § 7385j.⁹ During the course of this year, claimants contacted us to contend that:

- They were not aware that the acceptance of compensation under Section 4 of RECA could impact their eligibility under EEOICPA. The Department of Justice (DOJ) who administers RECA is adamant that, prior to the payment of Section 4 benefits, claimants are informed that receipt of these benefits might impact their eligibility under EEOICPA.
- It is unfair to bind claimants to decisions made when circumstances were so different. A common scenario involves situations where the claimant's chances of receiving EEOICPA compensation appeared remote when he/she opted to take RECA Section 4 benefits. However, in the ensuing years, a change in circumstances, such as the designation of a new SEC, greatly improved the claimant's chances of prevailing under EEOICPA. In these situations, claimants argue that since circumstances are now so different, they should have the option to repay the RECA benefits, thereby regaining their eligibility under EEOICPA. In response, DOJ maintains that it is not permissible to repay Section 4 benefits in an effort to qualify under EEOICPA.¹⁰

I just wondered if there was any change in any of the laws of late to compensate those of us who had to take what the Dept. of Justice offered because the Dept. of Labor kept turning us down time...¹¹ ■

9. A claimant who receives compensation under Section 4 of RECA is eligible for compensation and benefits under EEOICPA for non-cancerous conditions.

10. A claimant found eligible under Section 4 of RECA can reject those payments and pursue a claim under EEOICPA. If the EEOICPA claim is unsuccessful, the claimant can submit a new claim to DOJ for RECA benefits.

11. It appears that this claimant would otherwise now qualify for inclusion in a recently established SEC.

II. Issues Related to Survivor Eligibility

A. Survivor Eligibility Under Part E

We frequently receive comments that address the differences found in the survivor eligibility requirements of Parts B and Part E.

| Part B | Part E |
|--|--|
| <ol style="list-style-type: none"> 1. Eligible Spouse 2. Children (regardless of age) 3. Parents 4. Grandchildren 5. Grandparents | <ol style="list-style-type: none"> 1. Eligible Spouse 2. Children, who at the time of the employee's death were <ol style="list-style-type: none"> a. Under the age of 18, b. Under the age of 23 and a full time continuous student, or c. Any age if incapable of self-support |

Chart 5

Most of the comments that we receive concerning the eligibility of survivors address the eligibility requirements for children under Part E. Claimants complain that it is unfair that under Part B a child of any age qualifies as an eligible survivor, while only certain children qualify as eligible survivors under Part E. See Chart 5. These claimants question the rationale for defining “eligible child” differently under Part B and Part E. Some of the comments addressing these differences contend that:

- In some instances it was the older children who cared for the worker when he/she was sick. Although these older children concede that they cared for their loved one without expectation of compensation, they still consider it unfair that under Part E EEOICPA compensates children without consideration to the amount of sacrifice rendered by the children.
- To enact this legislation so many years after the work was performed and to then limit the eligibility of survivors effectively limits the number of potentially eligible claimants.
- The Part E eligibility requirements do not take into consideration the different paths that people chose. This was the argument raised by a child who questioned why a full time student under the age of 23 at the time of the covered parent's death was eligible under Part E, yet a child who served in the military before attending college is not eligible, if they are over the age of 23.
- There are instances where the payment of compensation to certain siblings, but not to others, results in animosity and family strife.

B. Non-spousal Children

As a general rule under EEOICPA, if the covered employee is deceased and there is a surviving eligible spouse, DEEOIC pays compensation to that eligible spouse. Normally, this rule applies even where the covered employee dies leaving an eligible spouse and children. The exception to this rule arises when the covered employee dies leaving an eligible spouse plus at least one child who is living and who is not a recognized natural child or adopted child of the surviving spouse. In such instances, DEEOIC pays one half of the compensation to the eligible surviving spouse and divides the other half among each child of the covered employee who is living and meets the other eligibility requirements outlined in the statute.¹²

- In our experience, this exception is not widely known. We hear of instances where surviving spouses pursue an EEOICPA claim assuming that they will receive all of the compensation awarded, only to be shocked when they receive one half of the compensation expected. Some of these surviving spouses tell us that it is even more shocking to discover that this reduction in compensation is the result of the existence of a non-spousal child (i.e., a child who is neither the natural or adopted child of the surviving spouse).

C. The Eligibility of Certain Survivors Cannot be Determined

Another issue that generates concern involves situations where the eligibility of one or more potential survivors cannot be determined. This situation arises not only when a worker passes away leaving an eligible spouse plus at least one child who is not the recognized natural or adopted child of the spouse, but also arises when the worker passes away leaving multiple children. In these situations, those survivors who establish their eligibility receive a percentage of the compensation while DEEOIC holds the remaining compensation in abeyance pending a determination of the eligibility of the remaining survivors. Unfortunately, these situations can also give rise to the fear that if the eligibility of these other survivors is not resolved DEEOIC will hold portions of the compensation in abeyance forever.

- A worker with four (4) children from a first marriage subsequently marries someone with six (6) children. Following the worker's death, DEEOIC accepts the claims filed by the four children from the first marriage and pays each child a 1/10th share of the compensation. Since the eligibility of the other six children is not resolved, the remaining compensation is held in abeyance. The children from the first marriage believe that the evidence strongly indicates that the other children are not eligible survivors and thus question the need to continue to hold the remaining money in abeyance. In support of their argument they note the total lack of evidence suggesting that the worker ever adopted or had a parental relationship with these children; the joint tax returns for two of the four years of this second

12. Under Part B, if there is a surviving spouse plus at least one child of the covered employee who is living and who is not the recognized child or adopted child of the surviving spouse, then one half of the compensation is paid to the surviving spouse and the other half is paid to each child of the covered employee who is living and a minor at the time of payment. 42 U.S.C. §7384s(f). On the other hand, under Part E one half of the payment is made to the covered spouse and the other half is made in equal shares to each child who meets the requirements for Part E coverage who is living at the time of payments. 42 U.S.C. §7385s-3(c)(3).

marriage made no mention of any children; the divorce decree dissolving the second marriage made no mention of children; and when the worker applied for work at the covered facility, he made no mention of these other children on the extensive job application.¹³ These children further note that the private investigator who they hired was unable to turn up any leads on these six children. Consequently, the eligible children fear that this is an instance where DEEOIC will never resolve the eligibility of these remaining six children.

Claimants also suggest that DEEOIC's policy of holding compensation in abeyance until a determination is made on the eligibility of other survivors unwittingly gives too much leverage to individuals who, in the end, may not be eligible for EEOICPA compensation. There is a fear that, with nothing to gain from cooperating with DEEOIC, an ineligible survivor could attempt to exploit the situation. Some claimants note that where animosity already exists (or where animosity arises because some survivors are eligible for compensation while others are not), the ineligible survivor might refuse to respond to DEEOIC simply out of spite. Two situations brought to our attention this year underscore this fear:

- The children from the subsequent marriage are eligible survivors, while the eligibility of the children from a previous marriage is under consideration. The only response from the children of the previous marriage came from a person purporting to be their representative and in this response the representative asked for money to "settle" these claims.
- A worker passes away leaving five children. Two children established eligibility as survivors, while two others established that they were not eligible survivors. The fifth child informed the siblings, as well as the claims examiner (CE) that he/she did not intend to provide DEEOIC with a written response to this inquiry.

In the recommended decision the CE notes that EEOICPA PM Chapter 2-1600,4e(c)(2), addresses situations where the non-filing survivor communicates to the CE that they will not file (a claim) "as they consider themselves ineligible." Pursuant to this provision, if written confirmation cannot be obtained, the CE is to document that the survivor does not intend to file. The PM further provides that unless the CE has reason to doubt the accuracy of the survivor's ineligibility, the non-filing survivor is not a party to the decision and no money is held in abeyance. Citing this provision, the CE found no basis to doubt the accuracy of the survivor's acknowledgement of ineligibility, and thus issued a decision awarding the remaining compensation to the two children who established eligibility. Subsequently, one of these children contacted us inquiring into the status of this claim. When informed that the case was with the National Office for further review instead of at FAB where the claims adjudication process typically proceeds, this claimant questioned why no one ever informed her of this action and never provided her with an explanation for this action. In a response to our inquiry, DEEOIC indicated that the case is under review and additional development is necessary.

13. The worker's employment at the covered site began after the dissolution of the second marriage. On the application for this job, the worker listed both spouses, but only listed the children from the first marriage.

In response to situations where portions of the compensation is held in abeyance, some claimants suggest that when potential survivors cannot be located, instead of placing the burden on the other claimants to locate these survivors, the government ought to utilize its resources to assist in searching for these survivors. In addition, while claimants appreciate that DEEOIC has an obligation to try to determine the eligibility of potential survivors, some believe that DEEOIC ought to place a limit on the amount of time given to a potential survivor to respond to DEEOIC's inquiries. Especially where it is clear that the survivor received notification, claimants contend that compensation should not be held in abeyance forever simply because a survivor fails to respond. ■

III. Issues Related to Establishing Employment

To be eligible under EEOICPA, the worker must qualify as a covered employee and must have worked at a covered facility. Whenever a claim is filed, in order to assist the claimant in establishing covered employment, in addition to the information provided on the employment verification form, DEEOIC contacts DOE for employment verification. Moreover, as dictated by the situation, DEEOIC also endeavors to verify employment through the Oak Ridge Institute for Science and Education, the Center for Construction Research and Training, Social Security Administration wage data and corporate verifiers.

For many claimants, the efforts undertaken by DEEOIC are sufficient to establish covered employment. However, there are other instances where even with the assistance offered by DEEOIC claimants are unable to locate sufficient evidence to establish covered employment, and some of these claimants contact our Office. Some claimants question the thoroughness with which DOL and DOE reviews for records. Yet in our experience DOL and DOE generally conducts a thorough review of the records in their possession. Rather when it comes to establishing employment, the issue that often confronts claimants is the fact that some records cannot be located. In many instances, the frustration of not being able to locate employment records is compounded by the fact that the lack of records does not mean that the employee did not work at a site – it simply means that records documenting this employment cannot be located. Consequently, we encounter claimants who are absolutely certain that they worked at a covered site, and who can sometimes describe in detail the work that they performed, and yet these claims are denied since no one can locate sufficient records to verify this employment. Some of the problems encountered by claimants endeavoring to establish employment include:

A. Records do not exist

In light of the security surrounding these facilities, claimants generally assume that verifying their employment will be relatively easy. Thus, it often comes as a surprise when claimants discover that records were destroyed or lost, or that no one ever collected the relevant data. For example, many claimants are surprised to discover that some contractors and/or subcontractors did not provide DOE with complete rosters of the employees working at certain sites. While DOE and DOL have made great strides locating employment records, we continue to encounter instances where establishing employment is hampered because complete rosters are not available. In our experience, a large percentage of these instances involve employment with subcontractors (as opposed to contractors).

Where employment records cannot be located, some claimants inquire about the logs they signed in order to enter and leave these facilities. Claimants are often disappointed to discover that these logs were destroyed in the course of normal record retention.¹⁴

14. There are a few instances where gate records were located. However, in most instances these records were destroyed, usually after seven years.

B. Records are incomplete

Where records are available, complaints suggest that these records are not always complete (or are not accurate). There are instances where claimants suggest that official records do not list all of the sites where an employee worked and/or do not give credit for all of the years that an employee worked at a facility.

C. Existing records are not deemed sufficient

Claimants find it frustrating that when they locate records addressing their employment, yet DEEOIC determines that these records are not sufficient to establish covered employment. For example:

- Many facilities required a “Q” clearance to gain entry. Some claimants believe that if they document the issuance of a “Q” clearance, this ought to verify employment at a covered facility. However, DEEOIC holds that the mere issuance of a “Q” clearance does not verify that an individual worked at a covered facility.
- There are times when the earning records confirm the payment of wages from a potentially covered employer, but do not identify the specific work site. A common scenario arises where the earning records list the employer’s corporate address and do not mention where the work was performed. In many instances, these documents are not very helpful in establishing employment at a specific site.
- A couple of claimants encountered difficulties verifying employment because the company operated under various names. In one instance, the claimant initially identified his employer as “HSA.” After repeated denials of the claim, the claimant located the Vice President of the company who explained that the company previously operated under at least four other names.¹⁵

In instances where only limited employment information is available, some claimants argue that if the limited records that are available are not sufficient to establish employment, then there is nothing else they can do to establish this requirement.

D. Issue concerning SSA records

In 2009 DEEOIC issued new policy guidance designed to allow for more expeditious interaction with SSA to obtain vital employment verification and wage-loss information. See 2009 Annual Report to Congress, March 4, 2010, page 20, footnote 12. In spite of this guidance, individuals contacted us this year asserting that they experienced a delay in the processing of their claim when DEEOIC did not promptly receive necessary records from SSA.

- In one instance, prior to receiving the SSA records, DEEOIC issued a recommended decision denying the claim on the ground that there was insufficient evidence to establish covered

15. While the employee initially identified the employer as “HSA,” the Vice President was able to provide four other names under which this company had operated.

employment. DEEOIC subsequently obtained the earning records when SSA forwarded the records to DEEOIC, and when the authorized representative obtained the records via a Freedom of Information Act request. Consequently, the Final Adjudication Branch remanded the case for consideration of these records.

In light of situations such as this, claimants ask: (1) how often do CEs deny claims finding no covered employment without obtaining earning records from SSA, and (2) what happens if DEEOIC forwards a case to FAB without the SSA records and FAB never receives the records?

DEEOIC recently informed us that there is a new agreement in place with SSA that addresses this issue.

E. The Weighing of Evidence

A frequent complaint suggests that in weighing evidence of employment, DEEOIC sets the bar too high. Claimants note that while Congress established this program in 2000, the employment at issue often occurred many years before. Claimants contend that when weighing evidence of employment, DEEOIC does not give adequate consideration to the fact that where the employment occurred years before, in endeavoring to establish employment claimants encounter faded memories; colleagues who cannot be located (or who passed away); and documents created years ago that do not adequately address issues that only became relevant with the enactment of this program.

- One complaint this year involved a situation where the dates of employment cited in the affidavits prepared by colleagues did not coincide with the dates alleged by the claimant. This claimant maintains that it is unrealistic to expect people to be precise about events that occurred years ago. In furtherance of his argument, this claimant notes that although he eventually established covered employment, the dates he ultimately established did not precisely coincide with the dates provided in his original claim.
- Another instance involved an attempt to establish 250 days of employment with the Ames Lab. In finding that the claimant did not establish 250 days, DEEOIC reasoned that since work in the Physics Lab did not require security clearance (whereas work in the Ames Lab required a clearance), the work performed in the Physics Lab was not covered employment. This worker believes that a subsequent letter from an official at the Lab challenges DEEOIC's reasoning. In light of this letter, this claimant also questions whether DEEOIC reached its determination based on its own deductions or whether DEEOIC sought the input of the Lab before reaching its conclusion.

F. Affidavits

Another issue that continues to generate complaints concerns the use of affidavits to establish employment. A number of complaints find fault with DEEOIC's policy that permits affidavits to assist in placing employees at certain locations, but requiring affidavits to be reviewed in conjunction with other supporting documentation. Many claimants note that they only turn to affidavits to verify employment when other evidence cannot be located. Thus, these claimants believe that DEEOIC's policy effectively negates the use of affidavits in instances where affidavits are most needed.

Although DEEOIC characterizes this policy (of requiring affidavits to be reviewed in conjunction with other supporting documentation) as a means of judging evidence within the context of the entire body of evidence, there are claimants who believe that this policy demonstrates a lack of trust of claimants. These claimants consider it a personal affront when DEEOIC does not accept, or otherwise questions, the affidavits that they prepare. Some of these former workers note that the government entrusted them with some of its most vital secrets and further point out that true to their word, they kept these secrets – often refusing to discuss their employment with their own families. Consequently, workers believe that they deserve some level of trust, and thus do not understand why DEEOIC requires supporting documentation before accepting the affidavits that they prepare – especially when there is no evidence contradicting these affidavits.

G. There are limits to the assistance that is offered.

DEEOIC relies upon a variety of resources to verify employment. These resources include: (a) the DOE employment verification form; (b) the Oak Ridge Institute for Science and Education; (c) the Center for Construction Research and Training (CPWR); (d) corporate verifiers; (e) SSA wage data; as well as (f) other sources which may include affidavits and documents created by state and federal agencies. Without a doubt there are instances where the assistance provided by DEEOIC enables a claimant to establish covered employment. However, there are other instances where even with DEEOIC's assistance it ultimately falls on the claimant to develop the necessary evidence.

- Claimants complain that they were initially led to believe (or allowed to believe) that they could rely on DEEOIC's assistance to establish covered employment, and only later discovered the limits to DEEOIC's assistance.
- Although most claimants cannot cite to the specific provision, they are aware of the existence of a statutory provision instructing that assistance be provided in developing evidence. See 42 U.S.C. §7384v(a).¹⁶ Some claimants question whether the assistance provided by DEEOIC fully complies with this statutory provision. Claimants often argue that with the manpower and the other resources at its disposal, the government ought to do more to assist claimants in developing evidence.

16. Section 7384v(a) provides that, "The President shall . . . provide assistance to the claimant in connection with the claim, including . . . (2) such other assistance as may be required to develop facts pertinent to the claim. 20 C.F.R. §7384v(a)(2).

H. Establishing a contract between the employer and DOE

In order to establish that a worker was a DOE contractor or subcontractor, the claimant must:

- (a) Verify employment with a covered DOE contractor or subcontractor;
- (b) Verify that the employee was on-site at a covered facility; and
- (c) Verify that a contract existed between the contractor/subcontractor and a covered facility.

We hear from claimants who find it difficult to verify employment with a contractor/subcontractor, as well as some who find it difficult to verify that the employee was on-site. Nevertheless, with respect to establishing employment, some of the most vocal comments that we receive concern the need to verify that a contract existed between the contractor/subcontractor and a covered facility. Claimants assert that since they were not a party to these contracts, they never saw these contracts, never had to reason to ask about these contracts, and often never even knew that these contracts existed. Accordingly, claimants argue that it is not reasonable to now expect them to establish the existence of these contracts.

Claimants contend that attempting to verify that a contract existed is another instance where DEEOIC sets the bar too high. Claimants argue that where the employer and/or the government cannot produce the contract, the fact that the claimant establishes employment at the covered site (during a covered time period) ought to be sufficient to establish the existence of a contract.

I. Problems encountered by survivors endeavoring to establish employment

Survivors frequently stress that, in accordance with the instructions of the government and/or the employer, their loved ones never discussed their employment with their families and friends. Some of these family members argue that it is unfair (and unreasonable) to have instructed these workers not to discuss their employment and then, when a survivor files a claim, to penalize the survivor when he/she is unable to answer questions (and/or locate records) addressing this employment. ■

IV. Diagnosed Medical Condition

To pursue a claim under EEOICPA, there must be a diagnosed medical condition/ illness.

A. Diagnosed condition versus symptom

There are instances where DEEOIC determines that the medical condition alleged in a claim is in fact a symptom. In response, some claimants question whether DEEOIC has the expertise to determine whether a physician diagnosed a condition or identified a symptom. Claimants also contend that locating the physician who wrote the report in order to obtain clarification can sometimes be difficult, especially when the report was written years ago. Claimants further note that asking another physician to provide clarification is often futile since many physicians are reluctant to address matters with which they were not initially involved. Moreover, even where he/she is available, claimants note that physicians are not happy when asked to clarify a report that they previously prepared, especially when they believe that the existing report is sufficient.

B. Difficulties documenting a diagnosed condition

Claimants assert that due to the passage of time it can be difficult to document a diagnosed condition. A major concern for claimants is that hospitals and physicians are only required to maintain records for seven to ten years. Consequently, if the illness arose, or if the death occurred, more than seven to ten years ago, there may not be any medical records to produce. We also hear of situations where due to the dire condition of the loved one, the family chose to forego the testing needed to confirm a diagnosis.¹⁷

- The same physician removed skin cancers from a worker in the early 1980's and later in 2006. With respect to the skin cancer removed in 2006, the physician was able to submit the pathology report. However, with respect to the skin cancer removed in the early 80's, because he destroyed the pathology and other related records, the physician was only able to provide a letter confirming the removal of this cancer, and explaining his destruction of the related records. DEEOIC determined that this letter was not sufficient to establish a diagnosis of cancer in the early 80's.¹⁸ Since the pathology report is no longer available, the claimant questions what else she can produce.

17. Many of these instances involve situations where the illness or death arose prior to the creation of this program. Accordingly, these families note that when they made the decision to forego further testing, they had no way to foresee that this testing would someday be important. On the other hand, there were other instances where the claimant asserted that the required testing was so severe that the family simply refused to put the loved one through this testing.

18. According to DEEOIC, the letter from this physician does not identify the type of skin cancer (SCC, BCC, or melanoma) and does not refer to a pathology report that diagnosed the skin cancer.

- Although the worker passed away over twenty years ago, existing records mention “possible ovarian cancer.” Hoping that records with the state cancer registry might be helpful, the claimant requested these records. However, while he/she is a child of the worker, the claimant is not the representative of the worker’s estate. Consequently, the state refused to release any records to the claimant. Rather the state indicated a willingness to release the records to DOL. Claimants asserts that when he/she suggested that DEEOIC request the records, DEEOIC declined asserting that it was claimant’s burden to obtain these records.
- A worker was diagnosed with “undifferentiated adenocarcinoma metastatic to skin.” DEEOIC forwarded the case to a district medical consultant (DMC) who opined that this condition “...most likely involved a poorly differentiated aggressive adenocarcinoma of the colon (or possibly in the G.I. tract) which spread rapidly resulting in metastatic lesions in the brain, bone, skin and other organs.” Claimant assumed that this opinion was sufficient to establish that it was at least as likely as not that the worker had an SEC cancer.¹⁹ Instead, DEEOIC referred the case to its Policy, Regulations & Procedure unit, who interpreted 20 C.F.R. 30.211 as requiring contemporaneous evidence that a physician diagnosed an employee with a (SEC) specified cancer.²⁰ Accordingly, DEEOIC concluded that it is not permissible for a physician to re-evaluate medical records to ascertain probable primary sites, without contemporaneous evidence identifying the likely primary sites. Thus, the claim was denied.
- The claimant questions the medical basis for DEEOIC’s requirement for contemporaneous evidence, and questions whether this interpretation gives proper consideration to advances in medicine. The claimant further notes that it is not always reasonable to expect a medical report prepared years before this program was established to adequately address issues that only became relevant with the enactment of this program.
- The employee was diagnosed with probable lymphoma. However, since the oncologist recommended against any invasive diagnostic measures, claimant found it impossible to confirm the diagnosis. ■

19. The list of the 22 specified SEC cancers is interpreted by DEEOIC as including metastatic or secondary lung, bone, and kidney cancer. The claimant believes that the report by the DMC is sufficient to establish that this cancer metastasized to the lung and bone.

20. Section 30.211 provides that:

A claimant establishes that the employee has or had contracted a specified cancer...or other cancer with medical evidence that sets forth an explicit diagnosis of cancer and the date on which that diagnosis was first made.

20 C.F.R. §30.211.

Chapter 2-0600,7(h) of the EEOICPA Procedure Manual provides that:

Spread of Cancer. Where cancer has spread to various sites (organs) it may be difficult to identify the site of origin for the cancer. If the pathology report (or medical report) lists several alternatives and at least one site is considered a SEC cancer, the claim should be processed first as a SEC cancer claim.

V. Issues Related to Establishing Exposure to Toxins

In order to be entitled to benefits under EEOICPA, the covered employee must have been exposed to toxins while working at a covered facility. Although DEEOIC developed the Site Exposure Matrix (SEM) to assist claimants in establishing exposure to toxins, the burden ultimately rests with claimants to establish exposure to a toxin linked to his/her covered illness. Similar to the problems encountered when attempting to verify employment, claimants contend that in endeavoring to verify exposure they find that records are missing or destroyed, and that existing records are sometimes incomplete. Issues involving exposure to radiation in claims for cancer are discussed in the next section. In this section we discuss the most common complaints that we receive concerning efforts to establish exposure to toxins other than radiation.

A. SEM

SEM is a repository of information on toxic substances known to be present at DOE and RECA sites covered under Part E. One of the features of SEM is its listing of all of the toxins known to have been used onsite at a facility. In 2010, DOL and DOE unveiled an expanded public SEM that provides additional information, including a listing of the known toxins used at particular buildings, areas, and by specific labor categories. (The expanded SEM is located at: www.sem.dol.gov). Since the unveiling of the expanded SEM, we receive fewer complaints involving SEM, and in particular, fewer complaints suggesting that SEM is too unwieldy.²¹ Nevertheless, there are concerns with SEM.

- 1. The accuracy of SEM:** Relying upon information gained while working at these facilities, or upon documents that they uncovered, claimants question the accuracy of SEM. A frequent complaint suggests that the expanded SEM does not accurately identify all of the areas where particular toxins were used and/or does not identify all of the toxins to which certain categories of employees were exposed. In addition, we encounter claimants who sincerely question whether some of the documents available to the public addressing the use of toxins at certain facilities were purposely altered in order to limit potential liability and/or avoid public scrutiny.
- 2. Difficult to update SEM:** We receive complaints alleging that information submitted to update/correct SEM is ignored or never acted upon. There are some instances where the submitted information is not identified, thus rendering it difficult to verify these allegations. One instance this year where the claimant documented his/her allegation involved the following situation:

21. Prior to the unveiling of the expanded SEM, SEM simply provided a listing of all of the toxins known to have been used at a facility. Since many of these listings contained hundreds of toxins, claimants often found SEM to be overwhelming.

- In spite of a letter from DEEOIC indicating that there was no known link between bladder cancer and methylenebis (2-chloraniline) (MBOCA), the claimant brought to our attention numerous documents addressing such a link, including a report prepared and submitted to DEEOIC sometime around 2002 or 2003. When claimant asked why this report was not addressed in the adjudication of his/her claim, he/she was informed that DEEOIC is reviewing the claim.

Another issue brought to our attention involves the fact that SEM is updated from time to time. Claimants question whether DEEOIC reviews previously denied claims to determine if updates to SEM impact previously denied claims. This was the question raised in a complaint addressing a claim denied on the ground that there was no known link between myelodysplastic syndrome and any toxic substance.

- When the authorized representative reviewed the 2011 denial of the claim, he/she noticed that SEM listed myelodysplastic syndrome as another name for leukemia. When the authorized representative informed DEEOIC of this discovery, he/she was told that while there is now a known link, there was no known connection when the recommended decision was issued.²² In light of this occurrence, the authorized representative questions whether updates to SEM automatically trigger a review of previously denied claims (to determine the potential impact of the update) or whether the burden is on the claimant to somehow stay abreast of updates. Assuming that the burden is on claimants to seek a review of a claim following an update to SEM, this authorized representative contends that it is unreasonable to expect claimants to know of these updates.

- 3. Limitations of SEM:** There are people who are under the impression that if the worker establishes employment at a covered facility and if SEM shows exposure to a toxin (or toxins) linked to the illness, then exposure to the toxin is verified.²³ Unfortunately, this is not necessarily true. Even where SEM shows a link between a toxic substance and a condition (or illness), the level of exposure sustained by the worker must be assessed. In our experience, this aspect of SEM is not widely known. As a result, we continue to hear from people who note that SEM shows a link between a toxin to which they were exposed and their illness, and thus question why they must submit additional evidence in order to establish exposure.
- 4. Is DEEOIC properly utilizing SEM:** Chapter 02-0700, 8, of the EEOICPA PM provides that “[u]nder no circumstances is SEM used as a stand alone tool to deny a claim...” Claimants continue to allege that claims are in fact denied solely on the basis of a review of SEM. This year a few claimants provided us with examples that they believe show that in looking for a link, the CE only reviewed SEM:

22. Subsequent to the recommended decision, a final decision also denied the claim on the ground that there was no known link between myelodysplasia and exposure to toxic substances. [Myelodysplasia is also referred to as myelodysplastic syndrome].

23. In fact if SEM shows a link between an illness and a toxin to which the employee was exposed, some people believe that they have established entitlement under EEOICPA.

*The...Office reviewed the evidence or record and determined that the SEM database did not find any toxic substances that are known to cause congestive heart failure for a janitor, service attendant/mechanic & dispatcher employed at the Rocky Flats Plant; that it is "**not** at least as likely as not" that your exposure to a toxic substance was a significant factor in causing, contributing to or aggravating your congestive heart failure.*

Decision issued January 2012.

The U.S. Department of Labor maintains a data base called the Site Exposure Matrices (SEM). The district office performed a search of the SEM and was not able to find any toxic substances that have the potential health effect of esophagus cancer. Decision issued March 2008.

While DEEOIC is aware of the concern, some claimants believe more needs to be done. There are some claimants who argue that where a decision suggests that a claim was denied solely based on a review of SEM, someone needs to determine (on an individual basis) whether the denial was in fact based solely on a review of SEM, or whether the CE simply used a poor choice of words, and in fact properly evaluated the evidence for exposure. Claimants also question how often DEEOIC issues decisions suggesting that the finding of no exposure was solely based on a review of SEM.

B. Records are missing or are inaccurate

Since exposure is usually dependent on where the employee worked, claimants contend that their ability to establish exposure is often hampered by inaccurate or missing employment records. For example claimants routinely assert that no one ever took the time to record every task or to document every site where work was performed, and as a consequence, certain records simply do not exist. Claimants further note that where written documentation does not exist, the only way to establish exposure is to rely on their own recollections. Yet, the efforts to rely on their own recollection are often stymied by DEEOIC's requirement for supporting documentation before accepting affidavits prepared by workers.²⁴

Even where exposure records are available, claimants question the accuracy of these records. In some instances, claimants recognize that the inaccuracy of some exposure records may be attributable to the challenges faced trying to remember (and record) each and every toxin used in a process. There are other claimants, however, who contend that some of the inaccuracies are intentional. Former employees of sites from around the country continue to provide us with materials that address assertions that exposure records were altered. In some of these instances, the allegation is that records were altered in an effort to avoid alarming the surrounding communities and/or to minimize potential liability.

24. While claimants are often encouraged to submit affidavits prepared by colleagues, many claimants note that due to the passage of time colleagues have moved or passed away. In addition, there are occasions when former colleagues no longer have the capacity to complete an affidavit.

In many instances the issue is whether exposure records are accurate. However, we also encounter instances where it is recognized that the information addressing exposure is not complete:

- One instance involved a claimant exposed to a “release incident” while working at the Hanford Site.” Since the dosimeters used at the facility were not sensitive to the radiation emitted during this release, it is impossible to determine the accurate external dose of radiation received during this incident.²⁵ To overcome this lack of monitoring information, claimant requested DEEOIC to forward his records to NIOSH for a more accurate dose evaluation. This request was denied since the statute only permits dose reconstructions for diagnosed radiogenic cancer, and the claimant did not have cancer. Instead, the claim was reviewed by both a health physicist and a toxicologist. Based upon this review, the claim was denied. While the health physicist noted the “release incident” and made allowances for the lack of records, the claimant questions the ability of DEEOIC to determine that he did not have sufficient exposure to cause his illnesses when no one knows the actual amount of exposure that he sustained. The claimant also finds it troubling that while this release involved exposure to promethium 147, the report prepared by the toxicologist referred to exposure to promethium 145.
- A similar situation arises when employees worked at a facility (and during years) covered by a SEC, yet the claim does not qualify for inclusion in the SEC because he/she did not have one of the 22 covered cancers and/or did not have the requisite 250 days of work. In these situations, while a covered claimant with a non-SEC cancer may be provided a dose reconstruction, claimants question the value of a dose reconstruction when it is recognized that it is not feasible to estimate with sufficient accuracy the radiation dose received.

C. Other complaints involving difficulties establishing exposure

Not all of the complaints involving difficulties establishing exposure to a toxic substance concern SEM. For example, this year we received complaints concerning the accuracy of the site profiles established for certain facilities. Attendees at an outreach event for former employees of the Brookhaven National Laboratory expressed serious concerns with the exposure information found on that site profile. Similar concerns with the accuracy of exposure information were raised by former employees of the Portsmouth Gaseous Diffusion Plant, the Rocky Flats Plant, the Fernald facility, and General Steel Industries. Often adding to the frustration of these individuals is the belief that their efforts to correct these inaccuracies are not taken seriously.

25. Differing records identify the internal or the external dose as the dose that could not be assigned.

D. Full body scanner:

Former Brookhaven employees inquired as to other technologies that might better detect exposure to toxins. In particular these employees are of the opinion that whole body scanners would better measure exposure to toxins. In response, DOE notes that due to the biological and physical elimination of the radioactive material from the body over time, the monitoring conducted while individuals are working for DOE, as well as the types of radioactive material commonly used at DOE facilities, whole body counting for participants (of the DOE screening program) would not provide useful information for assessing previous exposures to radioactive material from DOE activities.²⁶ ■

26. The Former Worker Medical Screening Program is independent of EEOICPA. Nevertheless, the claimants who brought this concern to our attention believe that full body scanners will assist in accurately identifying the toxins to which they were exposed.

VI. Dose Reconstruction and Special Exposure Cohorts

A. Dose Reconstructions

As a general rule, DEEOIC forwards claims for cancer to NIOSH for a radiation dose reconstruction. The exception to this rule is where the claim involves a covered employee who is a member of the Special Exposure Cohort (SEC). The intent of a dose reconstruction is to characterize the occupational radiation environment to which workers were exposed using available worker and/or workplace monitoring information. Where a dose reconstruction is performed, entitlement to compensation is based on the probability that the worker's cancer was at least as likely as not (50% or greater probability of causation) caused by exposure to ionizing radiation during employment at a covered facility.

- 1. Dose reconstruction is a guess:** After reviewing their dose reconstruction report, claimants sometimes contact us to complain that the dose reconstruction is merely a guess. These claimants argue that DOL (and NIOSH) should not deny a claim based on a guess. In response, we note that it is readily understood that a dose reconstruction is, “...*the scientific process of estimating a worker's past exposure to radiation...*” [Emphasis added]. See NIOSH's “Frequently Asked Questions.”

In addition, with respect to claims for cancer caused by radiation under Part B, the statute only provides two means for determining eligibility: (1) a dose reconstruction; or (2) where the claimant is eligible for a SEC. Consequently, in claims for cancer caused by radiation exposure, if the claimant is not eligible for a SEC, a dose reconstruction is necessary in order to establish eligibility under Part B.

- 2. The length of time that it takes to process a dose reconstruction:** By far the most common complaint that we receive concerning dose reconstructions involves the amount of time required to process a dose reconstruction.

Second...what bothers me is the fact that the dose reconstruction might take almost a year to complete. It's hypothetical, so there must be a formula that will allow it to be completed much sooner.

The good news is that the average number of days to process a dose reconstruction has steadily declined from 1024 days in FY2002 to 204 days in FY2008.²⁷ Similarly, whereas on January 1, 2005, there were 5345 cases that remained at NIOSH for more than two years, as of January 1, 2009, that number was down to 503 cases.²⁸

27. FY2008 is the last year for which there is a reported average.

28. These are the most recent figures provided by NIOSH on its web site.

In spite of these declines, claimants still find it troubling that forwarding a claim to NIOSH for a dose reconstruction adds approximately one year to the processing of that claim.

- o Claimants contend that there should be an expedient alternative to a dose reconstruction.
- o We also hear from individuals who believe that it is not always necessary to forward a Part E cancer claim to NIOSH for a dose reconstruction. These individuals contend that where no one alleges that radiation caused the cancer and/or where it is obvious that the dose reconstruction will not result in a PoC of 50% or greater, it is not necessary to await the results of the dose reconstruction before adjudicating the Part E claim.

3. Methodology of dose reconstructions: Some claimants believe that they have a sufficient basis to challenge the methodology utilized in performing their dose reconstruction. However, 20 C.F.R. §30.318(b) provides that the methodology used by HHS (NIOSH) in arriving at reasonable estimates of the radiation doses received by an employee is binding on DOL's Final Adjudication Branch. Consequently, DEEOIC will not entertain challenges to the methodology used by NIOSH in performing dose reconstructions. While some claimants raise their concerns directly with NIOSH, others would prefer to have DEEOIC adjudicate their concerns.

4. Data used to perform dose reconstructions: Where workers wore dosimetry badges, the readings from these badges are a valuable resource in performing a dose reconstruction. Claimants contact our office questioning the accuracy of their dosimetry records, as well as the accuracy of the other documents that recorded radiation levels at these facilities.²⁹

- o Former workers routinely tell us of efforts undertaken to minimize or under-report radiation exposure. For instance, claimants frequently assure us that during the course of the day it was not unusual to receive instructions to remove their badges. In another instance, a group of former employees recently brought to our attention the discovery of an unabridged version of a report addressing radiation exposure at the Portsmouth Gaseous Diffusion Plant. These employees firmly believe that this unabridged document seriously challenges many of the accepted assumptions concerning radiation exposure at Portsmouth.³⁰
- o Claimants frequently contend that while their job descriptions may not suggest exposure to radiation, it was quite common in the course of the day, to have someone direct them, or simply have the need, to enter areas where radiation was present.

29. Where radiation exposures in the workplace environment cannot be fully characterized based on available data, default values based on reasonable scientific assumptions are used as substitutes.

30. According to the allegations, a recently discovered unabridged version gives rise to concerns that doses may have been changed.

- o Employees at both Rocky Flats in Colorado, as well as General Steel Industries in Illinois maintain that there are several outstanding issues concerning the site profiles for these facilities. These employees contend that these outstanding issues not only impact the accuracy of dose reconstructions, but also impede the consideration of the pending SEC petitions involving these sites.
 - o In an instance involving a former employee of AC Spark Plug, the few available records verify employment during a time period when a small amount of thorium was used. Since no one can produce records specifically discussing where the employee worked or his specific job duties, the family questions the accuracy of the dose reconstruction performed by NIOSH.
- 5. Use of co-worker and surrogate data:** Claimants are often concerned when they review the dose reconstruction and discover that instead of personal information, the dose reconstruction utilizes co-worker or surrogate data. Claimants believe that such data has little bearing on their claim. Therefore, claimants often have little, if any, confidence in the results of such dose reconstructions. In response to these concerns NIOSH notes that,

If there is little or no personal exposure information, we use information from technical documents (e.g., technical basis documents, site profile documents, technical information bulletins), and data from other workers at the site to fill in the areas where the personal exposure information is lacking. The assumptions used in conducting dose reconstructions are designed to give the claimant the benefit of the doubt whenever estimated radiation dose levels are used.³¹

- 6. Dose reconstruction for chronic lymphocytic leukemia (CLL):** Regulations initially promulgated by NIOSH excluded CLL from dose reconstructions. This changed on March 7, 2012 with a new rule instructing that CLL is now treated as potentially caused by radiation and therefore as potentially compensable under EEOICPA. In light of this new rule, DEEOIC initiated a process of identifying previously denied CLL claims, and forwarding these claims to NIOSH for a dose reconstruction.
- o Some individuals believe that: (1) DEEOIC ought to expedite the review of previously denied CLL claims, and (2) NIOSH ought to expedite the processing of the dose reconstruction for these previously denied CLL claims. In support of these arguments some claimants note that DEEOIC denied their initial CLL claim years ago.

31. A similar response is provided to those who generally question the accuracy of dose reconstructions – NIOSH notes that in conducting dose reconstructions, where appropriate it applies assumptions designed to give the claimant the benefit of the doubt. Unfortunately, these assurances do not always ease claimant's concerns.

B. Special Exposure Cohort (SEC)

Generally, a dose reconstruction is conducted on all claims for cancer. The exception to this rule arises where the employee qualifies for inclusion in a SEC class. If the employee qualifies for inclusion in a SEC class, the eligible claimant can be compensated without the completion of a dose reconstruction and without a determination of the probability of causation (PoC). To qualify for inclusion in a SEC class, the covered employee must have worked for a specified period of time at an SEC facility and must have been diagnosed with at least one of the 22 specified cancers.

EEOICPA originally established four (4) SEC classes: DOE employees as well as DOE contractors and subcontractors employed prior to January 1, 1974 on Amchitka Island, Alaska; and DOE contractor and subcontractor employees employed for an aggregate of at least 250 work days prior to February 1, 1992, at the gaseous diffusion plants in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee. EEOICPA also authorizes the Secretary of Health and Human Services (HHS) to add other classes of employees to the SEC. Since the inception of this program HHS has added over 70 additional classes.

The designation of a SEC class lessens the burden on claimant by negating the need for a dose reconstruction (and a PoC) in claims for cancer caused by radiation exposure. While SECs are intended to lessen the burden placed on claimants, some people still encounter difficulties with the SEC process. Here are the most common complaints that we received this year involving the SEC process:

- 1) Claimants do not understand the SEC criteria:** A common misperception about SECs is the belief that that the level of radiation exposure is the determining factor in designating a new SEC class. As a result of this misperception, when questioning why a facility does not have a designated class of employees, some claimants emphasize the level of exposure at the facility. The statute, however, permits the addition of new SEC classes if: (1) it is not feasible to estimate with sufficient accuracy the radiation dose that the class received, and (2) there is a reasonable likelihood that such radiation dose may have endangered the health of member of the class. 42 U.S.C. §7384q(b). [Emphasis added].

Nevertheless, some claimants continue to believe that the level of radiation exposure ought to be a factor in designating new SEC classes. It is the opinion of these claimants that the current process for designating additional SEC classes does not necessarily assist the workers who suffered the most from radiation exposure.

- 2) Claimants not aware when additional SECs added:** When a new SEC class is added, a notice is posted in the Federal Register and an announcement is posted on DEEOIC's web site. On many occasions, DEEOIC also sponsors an outreach event near the facility. In addition, whenever a new SEC class is added, DEEOIC automatically identifies the previously denied claims potentially impacted by the new SEC class and re-reviews these claims for inclusion in this class. However, DEEOIC does not notify claimants of this review. Rather DEEOIC contacts the claimant if its review determines that the claim is impacted by the new SEC class. This process continues to generate complaints:
- o We hear from claimants who believe that whenever there is a new SEC class that might impact their claim, DEEOIC ought to contact them and advise them of this development.
 - o Similarly, some claimants question why DEEOIC only contacts them if its review determines that the new SEC class impacts their claim. Claimants contend that this policy fails to provide them with the opportunity to uncover errors if DEEOIC determines that the claim is not impacted by the new SEC class. These claimants maintain that regardless of the outcome, DEEOIC should inform them of its determination.
 - o Claimants believe that the efforts undertaken to notify people of new SEC classes tend to focus on areas close to the facility. Claimants believe that more needs to be done to notify those who no longer live near these areas.
 - o Claimants also question whether DEEOIC's review accurately identifies every case impacted by the new SEC class. In support of this concern, claimants notified us of instances where in spite of a new SEC class that impacted the claim, DEEOIC referred claims to NIOSH for a dose reconstruction.³²
- 3) Why only 22 cancers:** In order to qualify as a covered employee with cancer for purposes of inclusion in a SEC class, the covered worker must establish the diagnosis of at least one of the 22 specified cancers.
- o Claimants question why the list is limited to the 22 specified cancers. Arguments suggest that there are additional cancers that ought to be added to this list. One cancer frequently raised is chronic lymphocytic leukemia (CLL). The Act specifically excludes CLL as a specified cancer. See 42 U.S.C. §7384l(17). However, some claimants maintain that there is recent literature indicating that CLL is a radiogenic cancer.
 - o The recent change that now designates CLL as a radiographic cancer for purposes of radiation dose reconstructions by NIOSH continues to cause confusion. Some

32. These referrals generally occurred immediately following the designation of the new SEC. As a result, it is not clear if these referrals preceded DEEOIC's review.

people mistakenly assumed that as a result of this change CLL was added to the list of specified cancer for purposes of SECs. These individuals are disappointed when they learn that this new rule simply means that a dose reconstruction will now be performed on claims for CLL.

- 4) SECs only assist those with one of the 22 cancers (Partial Dose Reconstructions):** As noted above, to qualify for inclusion in a SEC, the covered employee must have, at least, one of the 22 specified cancers. There are instances where an employee with cancer worked at a SEC facility during a covered time period, yet because the employee does not have one of the 22 specified cancers, the employee does not qualify for inclusion in the SEC. When this occurs, although NIOSH conducts a dose reconstruction, NIOSH can only reconstruct a portion of the dose – i.e., a partial dose reconstruction. NIOSH considers these partial dose reconstructions as a complete and best estimate given the use of all reliable available data.

Where a partial dose reconstruction is performed, claimants often question the accuracy of these estimates, especially since in establishing the SEC it was acknowledged, that it was not feasible to estimate with sufficient accuracy the radiation dose received.

- A similar issue arises when the employee worked at SEC sites during covered time periods and has one of the 22 specified cancers, but cannot establish the requisite number of days at SEC sites. These employees also do not qualify for inclusion in the SEC, thus necessitating a partial dose reconstruction.
- 5) Establishing 250 days:** While 250 days may not sound like a lot, there are instances where claimants find it difficult to establish this prerequisite. For example, couriers often find that while existing records establish their presence at SEC sites, these records often do not indicate the amount of time spent at the various sites, thus hindering their efforts to establish 250 days of employment.

This year we also encountered instances where lab workers found it difficult to establish 250 days of employment. Many lab workers assert that while working on a project it was not unusual to work more than eight hours per day and/or more than 5 days in the week.³³ Even though these workers are unable to locate records documenting their actual hours of work, they contend that it is not reasonable to calculate their hours based on estimates of 8 hour days and a 5 day weeks when anyone familiar with these labs knows that these estimates are not realistic.

- One case that highlights this issue involves a former worker at the Iowa Ordnance Plant. Utilizing a five day work week DEEOIC determined that the employee did not establish 250 days of employment. In response, the claimant contends that the employment occurred during the Korean War and notes that during wartime the plant increased production. In the opinion of this claimant, since the site profile

33. Pursuant to EEOICPA's Procedural Manual, Chapter 2-0600,6(a), "A workday is considered equivalent to a work shift. Additional hours worked as overtime will not add up to additional workdays..."

for the Plant recognizes that the typical workweek was 40-50 hours, and since he/she submitted numerous affidavits from other former employees attesting that they worked 6 or 7 day work weeks during the Korean War, this ought to be sufficient to establish that he/she worked a 6 day work week during the time period in question.³⁴

- In light of his work schedule, a fire fighter at the Nevada Test Site also encountered difficulties establishing 250 days of employment.

6) New SEC designation process takes too long: Claimants complain that there are instances where the SEC takes too long. A review of the SEC petitions that received final action in 2012 reveals a wide range in the amount of time needed to address a SEC petition.

| Site | Petition file | Final action | Effective date (if applicable) |
|--|---------------|--------------|--------------------------------|
| Brookhaven National Lab | 11-03-2011 | Approved | 06-10-2012 |
| Clarksville Modification Center | 05-24-2012 | Approved | 09-22-2012 |
| Clinton Engineering Works | 07-28-2010 | Approved | 06-10-2012 |
| Electro-Metallurgical | 12-05-2008 | Approved | 06-10-2012 |
| Feed Materials Production Center | 12-12-2005 | Approved | 07-27-2012 |
| Hanford | 05-03-2012 | Approved | 09-22-2012 |
| Hangar 481 | 02-27-2009 | Denied | 06-01-2012 |
| Medina Modification Center | 05-30-2012 | Approved | 09-27-2012 |
| Sandia National Laboratories | 07-18-2011 | Approved | 06-10-2012 |
| Titanium Alloys | 07-28-2011 | Denied | 09-20-2012 |
| Ventron Corporation | 12-05-2011 | Approved | 11-11-2012 |
| Winchester Engineering and Analytical Center | 03-13-2012 | Approved | 09-22-2012 |

During the course of this year, individuals specifically contacted us with concerns involving the time needed to process the SEC petitions for the following facilities:

- o Weldon Spring Plant, MO - petition filed April 29, 2009
- o United Nuclear Corporation, MO – petition filed June 19, 2008
- o General Steel Industries, IL – petition filed February 25, 2008

34. The authorized representative was unable to locate any records specifically addressing whether the covered production employee worked six day work weeks. The authorized representative was, however, able to locate others who worked during the same time period, including other production workers who stated that they worked 6 and 7 day work weeks during this period of time.

In addition, since the death of the claimant can impact the amount of compensation ultimately paid, we received inquiries from family members asking what consideration is given if the claimant passes away while the SEC is pending.³⁵

- 7) **Metastases:** The list of the 22 specified SEC cancers includes metastatic/secondary bone, lung and kidney cancer, regardless of the type of primary cancer diagnosed. Many claimants are not aware that metastatic/secondary lung, bone and kidney cancers are specified cancers. Accordingly, we encounter situations where claimants only became aware of this interpretation years after the denial of their claim. In these situations, some claimants argue that the delay in becoming aware of this fact negatively impacted any chance of locating evidence of the metastases.

- 8) **Secondary cancers:** The Act allows for acceptance of certain metastatic/secondary cancers under Part B, but not the primary cancer if it is not one of the 22 specified cancers. Where the metastatic/secondary cancer is an accepted specified cancer, DEEOIC also allows the primary cancer to be covered for medical benefits only under Part B. However, the acceptance of the metastatic/secondary cancer under Part B does not constitute an automatic determination that the primary cancer is a covered illness under Part E, as is usually the case.³⁶ Instead, the non-specified primary cancer must be referred to NIOSH for radiation dose reconstruction. Since some claimants are not aware of this exception, claimants contact our Office questioning why a dose reconstruction is necessary in adjudicating their Part E claim for the non-specified primary cancer when their Part B claim for a specified secondary cancer, as well as medical benefits for the non-specified primary cancer was previously accepted under the Part B SEC process. ■

35. If a worker passes away, eligible survivors can file a survivor's claim. The bigger concern arises when the eligible worker (or survivor) passes away before compensation is paid, leaving no eligible surviving family members. In these circumstances neither the statute nor the regulation provides for any accommodation.

36. Section 7385s-4 provides that, a determination under Part B that a DOE contractor employee is entitled to compensation under Part B for an occupational illness shall be treated for purposes of Part E as a determination that the employee contracted that illness through exposure at a DOE facility. *See* 42 U.S.C. §7385s-4.

VII. Part E Causation

To establish eligibility under Part E, the evidence must establish that there is a relationship between exposure to a toxin and the employee's illness or death. This relationship defines the intensity, duration, and route of exposure, which is characteristic of that specific toxin and illness or death. The evidence must demonstrate that it is "at least as likely as not" that exposure to a toxic substance at a covered DOE or RECA section 5 facility during a covered time period was a significant factor in aggravating, contributing to, or causing the employee's illness or death, and that it is "at least as likely as not" that exposure to a toxic substance(s) was related to employment at a covered DOE or RECA section 5 facility. Every year we receive numerous complaints concerning problems encountered by claimants attempting to establish the link between the illness (or death) and the exposure to a toxic substance (causation).

A. Claimants do not understand SEM

Where SEM establishes a potential link between a toxin used at a facility and the employee's illness (or death), in most instances claimants must still submit medical evidence showing a link between his/her diagnosis and the work related exposure. Unfortunately, we encounter people who are not aware of this fact. We hear from claimants and authorized representatives who assert that DEEOIC ought to provide better instructions on how to use SEM.

B. Evidence relied upon to establish a link is not accurate

Claimants question the accuracy of SEM, as well as the accuracy of the other data relied upon by DEEOIC in determining a link between a toxin and an illness. See Section X (A) for a discussion of instances where claimants question the accuracy of SEM.

C. Difficult to locate medical/scientific evidence addressing causation

Claimants contend that it is often difficult to locate medical evidence addressing a link between a particular toxin and a specific illness. Some of the most challenging situations arise where SEM does not show a link between the toxic substance and the specific illness (or death).³⁷ When confronted with such situations some claimants contact our Office for assistance. Our ability to assist these claimants is usually dependent upon the amount of information otherwise available addressing this toxin and/or the specific illness.

- Citing to the claimant-friendly intent of the program, claimants argue that where there is no evidence (at all) addressing the potential link between a toxin and an illness (or death), it should be presumed that exposure to that toxin was at least as likely as not a significant factor in aggravating, contributing to, or causing the illness (or death).

37. To be clear, just because SEM shows a link between a toxin and a particular illness (or death) does not indicate that the claim will be accepted.

- Claimants also argue that the government ought to do more to sponsor the studies needed to explore the potential link between various toxins and specific illnesses.

D. Little guidance provided in developing evidence of causation

A frequent comment suggests that when it comes to establishing causation, DEEOIC does not provide sufficient guidance outlining what a claimant needs to submit to establish this fact. Claimants assert that the guidance provided by DEEOIC is often too vague and often provided way too late in the claims process.

One common complaint notes that when claimants review DEEOIC's website, there is not a lot of guidance addressing the evidence needed to establish causation, and rather that it is only after they file their claim and submit their medical evidence that they receive guidance outlining what is needed to establish causation.³⁸

- For example, claimants note that DEEOIC's website makes no mention of the need for a medical opinion that provides a sound rationale and objective findings that includes references to scientific or medical literature in support of the physician's opinion. Rather, claimants contend that it was only after submitting their medical evidence that DEEOIC informed them of the need for a medical opinion that contained references to scientific or medical literature.³⁹ Claimants complain that the receipt of this guidance after the development of their medical evidence means that they must return to their physicians for a new report (or for clarification of the previous report), and that this in turn simply adds to the costs and the delay of a claim. In addition, claimants assure us that physicians usually are not happy when asked to rewrite or clarify reports that they previously prepared. ■

38. Some claimants suggest that prior to filing a claim the only guidance that they could locate suggested that the evidence needed to establish that it was at least as likely as not that exposure to a toxic substance at a covered facility during a covered period was a significant factor in aggravating, contributing to, or causing the claimed illness. While this is the legal standard under Part E, claimants contend that this standard does not fully describe the evidence that DEEOIC ultimately looked for in determining whether they met their burden of proof.

39. Many claimants strongly believe that they should only file a claim if they have a basis for concluding that their illness is related to covered exposures. Consequently, many of the claimants whom we encounter first develop their medical evidence and then file a claim if this evidence suggests a link between their illness and their employment.

VIII. Issues Related to Chronic Beryllium Disease

A. Part B – Pre 1993 CBD

Pursuant to Section 7384I(13)(B), in order to establish a diagnosis of chronic beryllium disease (CBD) before January 1, 1993, in addition to an occupational or environmental history, or epidemiologic evidence of beryllium exposure, the claimant must establish any three of the following five criteria: (1) characteristic chest radiographic or CT abnormalities; (2) restrictive or obstructive lung physiology testing or diffusing lung capacity defect; (3) lung pathology consistent with CBD; (4) clinical course consistent with a chronic respiratory disorder; and (5) immunologic tests showing beryllium sensitivity. 42 U.S.C. §7384I(13)(B).

- Although the statute outlines specific criteria, some claimants believe that they ought to be able to establish a diagnosis of CBD before January 1, 1993, utilizing evidence other than that specifically outlined in the statute. [DEEOIC adheres to the criteria outlined in the statute].
- Some claimants take exception with DEEOIC's requirement that the x-ray evidence used to establish pre-1993 CBD must be consistent with CBD. These claimants contend that since the statute only refers to "[c]haracteristic chest radiographic abnormalities" it was not Congress' intent to require that these x-rays be consistent with CBD. See 42 U.S.C. §7384I(13)(B)(ii)(I). Claimants argue that had Congress intended these x-rays to be consistent with CBD, much as was done with lung pathologies under 42 U.S.C. §7384I(13)(B)(ii)(III), Congress would have specifically inserted this clause.
- Another issue concerning characteristic chest radiographic abnormalities involves the fact that the EEOICP PM lists findings that are characteristic of CBD. It troubles some claimants that even when the x-ray evidence contains findings that the PM recognizes as characteristic of CBD, DEEOIC still requires the claimant to provide a statement from a physician asserting that the findings are characteristic of CBD. See EEOICP Procedure Manual, Chapter 2-1000, subchapter 6(a).

B. Part B – Post 1993 CBD

To diagnose CBD under Part B on or after January 1, 1993, the claimant must establish beryllium sensitivity along with: (1) a lung biopsy showing granulomas or a lymphocytic process consistent with CBD; (2) a computerized axial tomography scan showing changes consistent with CBD; or (3) pulmonary function or exercise testing showing pulmonary deficits consistent with CBD. 42 U.S.C. §7384l(13)(A).

- Some claimants take exception with the requirements outlined in the statute for establishing a diagnosis of post 1993 CBD in Part B claims. In particular, claimants question the need for an abnormal beryllium lymphocyte proliferation test (BeLPT) to establish CBD on or after January 1, 1993. This, however, is another instance where DEEOIC adheres to the language of the statute, and the statute specifically states that in order to diagnose CBD on or after January 1, 1993 there must be beryllium sensitivity along with lung pathology consistent with chronic beryllium disease. 42 U.S.C. §7384l(13)(A). The statute further provides that beryllium sensitivity is established by “an abnormal beryllium lymphocyte proliferation test performed on either blood or lung lavage cells.” 42 U.S.C. §7384l(8)(A). In spite of this language some claimants contend that it ought to be possible to establish post 1993 CBD under Part B without a qualifying BeLPT.

C. Establishing CBD under Part E

As noted above, under Part B the statute outlines specific criteria for diagnosing both pre 1993 and post 1993 CBD. With respect to diagnosing CBD under Part E, the statute does not set forth similar specific criteria. In 2011, DEEOIC informed the Office that a positive or abnormal BeLPT test was now necessary in order to prevail in a claim for CBD under Part E. This determination by DEEOIC continues to generate comments:

- Claimants question DEEOIC’s authority to impose new specific criteria for CBD under Part E, especially since Congress did not set forth any specific criteria in the statute.
- Claimants cite to the requirement for a positive BeLPT to diagnose CBD under Part E as another example of a rule that is not widely distributed, and thus not widely known.⁴⁰
- In addition to requiring a positive BeLPT to diagnose CBD under Part E, claimant also brought to our attention cases where DEEOIC held that a biopsy of lymph nodes was not sufficient to diagnose CBD. These claimants assert that they were told that they needed

40. Claimants note the EEOICP Procedure Manual states that,

However, if there is no Part B decision, a positive LPT result is required to establish a diagnosis of beryllium sensitivity and a rationalized medical report including a diagnosis of CBD from a qualified physician is required to establish CBD under Part E. Chapter 2-1000, subchapter 9(b).

In the opinion of some claimants, this provision does not state that a positive LPT is required to establish CBD under Part E.

In fact one claimant notes that in addressing the consideration of mediastinal lymph node biopsy as medical evidence of lung pathology consistent with CBD, EEOICPA Circular No. 11-02 states that, “[w]ith reference to claims under Part E, as there is no statutory requirement regarding the diagnostic criteria necessary to substantiate diagnosed CBD...”

to submit a lung biopsy. In one instance, the claimant's physician specifically questions the medical basis for accepting the results of a lung tissue biopsy in diagnosing beryllium disease, but not accepting the results of a biopsy of the lymph nodes.⁴¹

- In a discussion of DEEOIC's requirement for a qualifying BeLPT under Part E, one medical provider questioned if DEEOIC would accept a claim for CBD under Part E if the record contained a biopsy confirming the presence of granulomas consistent with CBD, but did not contain a normal or borderline BeLPT.

D. Diagnoses of sarcoidosis and the presumption of CBD

There is a continuing controversy surrounding EEOICPA Circular NO. 08-07 entitled "Presumption of chronic beryllium disease in situations with a diagnosis of sarcoidosis and a history of beryllium exposure." With respect to claims for CBD under Part E this circular states, "...whenever the case file contains medical evidence of diagnosed sarcoidosis, a diagnosis of CBD is to be presumed and the claim is to be accepted."

Claimants continue to bring to our attention claims where in spite of a diagnosis of sarcoidosis, DEEOIC denies the claim on the ground that the requirements for CBD were not met. Citing EEOICPA Circular NO. 08-07, claimants believe that since the record contained a diagnosis of sarcoidosis, a diagnosis of CBD was to be presumed and as a result, DEEOIC should have accepted the claim.

In response, DEEOIC notes that according to Circular NO. 08-07, where there was exposure to beryllium, a diagnosis of sarcoidosis may not be accurate. Rather, a diagnosis of CBD may be appropriate if the medical requirements for CBD under Part E are met. [EEOICP Circular NO. 08-07 further refers to the requirements in the PM for claims for beryllium illnesses under Part E – although this circular makes reference to a chapter of the PM that was since revised].⁴²

41. EEOICPA Circular NO. 11-02 provides that a mediastinal lymph node biopsy interpreted by a physician as evidence of "lung pathology consistent with CBD" may be used to satisfy the diagnostic criteria for pre-1993 CBD. (The criteria for diagnosing pre-1993 CBD include a lung pathology consistent with CBD). This circular also provides that a mediastinal lymph node biopsy interpreted by a physician as evidence of "lung pathology consistent with CBD" may be used to establish CBD in addition to the existing criteria identified for diagnoses of CBD after January 1, 1993. (The criteria for diagnosing post-1993 CBD includes a lung biopsy showing granulomas or a lymphocytic process consistent with CBD). The circular states that a mediastinal lymph node biopsy is not the equivalent of a "lung biopsy, and as such does not substitute for a lung biopsy in the assessment of post-1993 CBD.

In addition, as noted earlier, this circular further provides that "[w]ith reference to claims under Part E, there is no statutory requirement regarding the diagnostic criteria necessary to substantiate diagnosed CBD..." See EEOICPA Circular NO. 11-02.

42. EEOICP Procedure Manual, Chapter 2-1000, subchapter 10(b) further provides that:

Whenever the evidence of record contains medical evidence of a diagnosed sarcoidosis and the potential for occupational exposure to beryllium exists, a diagnosis of CBD is presumed. However, the medical requirements for CBD claims under Part E must be met before the claim may be approved.

In response to DEEOIC's interpretation:

- Claimants question why the Circular and the PM refer to a “presumption” of CBD if claimants are actually required to produce evidence that meets the requirements for CBD.
- Claimants argue that this is as an example where one must search various DEEOIC sources in an effort to fully grasp the rule. In addition, claimants argue that the statement in the Circular indicating that “a diagnosis of CBD is to be presumed and the claim is to be accepted” is so definitive that it never occurred to them to look elsewhere for further clarification of this rule.
- One physician notes that “sarcoid” is a diagnosis of exclusion, which means that a physician diagnoses sarcoidosis by ruling out other potential causes of the granulomatous disease. This physician does not believe that it is reasonable to ask for a specific diagnosis of CBD when a diagnosis of sarcoidosis was previously made on the basis of excluding other causes.
- We hear from individuals who contend that DEEOIC is (or has been) inconsistent in its approach to sarcoidosis claims. These individuals believe that there are (or were) claims where the diagnosis of sarcoidosis was sufficient to support acceptance of a claim for CBD, even without evidence that met the requirements for CBD under Part E. These claimants believe that if there was a mechanism for reviewing prior decisions, they could verify their suspicions that DEEOIC is inconsistent in its application of this policy. ■

IX. The Evaluation of Evidence

A frequent concern found in many of the complaints that we receive involves the evaluations of the evidence. A large percentage of these complaints can be reduced to three concerns: (1) the bar is set too high; (2) the evaluation of evidence is not consistent with the Act; and (3) rules/procedures are not applied in a consistent manner.

A. The bar is set too high

Claimants contend that in weighing evidence, DEEOIC does not give adequate consideration to the realities that often confront them as they endeavor to develop evidence necessary to establish entitlement.

- As discussed in Section VIII and X, claimants note that due to the passage of time, it can be difficult, if not impossible, to locate evidence verifying employment and/or exposure. Claimants assert that it is not unusual to find that, through no fault of the claimant, records were destroyed and colleagues cannot be located. Moreover, where other evidence cannot be located, the only option available to some former employees is to prepare an affidavit attesting to their employment. Nevertheless, in the opinion of some claimants, DEEOIC's requirement that affidavits be reviewed in conjunction with the other supporting documentation effectively negates the use of affidavits in instances where they are most needed – i.e., in instances where there is no other evidence.
- Claimants also contend that DEEOIC's evaluation of medical evidence does not always give adequate consideration to the fact that hospitals and physicians are only required to maintain medical records for a maximum of ten years. Therefore, claimants approach us with instances where the illness (or death) occurred more than ten years before the creation of this program (or more than ten years before the filing of the claim) and argue that, through no fault of their own, it is impossible to locate the evidence that DEEOIC requires.
 - o One such situation involved a diagnosis of cancer.⁴³ We initially discussed this case last year. At that time the case was under review following submission of a letter from a physician confirming his removal of an earlier skin cancer and explaining that, due to the passage of time, those records were destroyed. This year DEEOIC informed the claimant that this letter was not sufficient to confirm this diagnosis of skin cancer. This claimant questions what else she can produce to establish this cancer.⁴⁴

43. According to the PM a tissue examination (pathology report, surgical pathology report, autopsy report, or post-mortem examination report) are the most conclusive methods for making a diagnosis of cancer. Nevertheless, the PM further states that a diagnosis of cancer can sometimes be made by cytology report or imaging (x-ray, CAT scan or MRI) and provides that if the employee is deceased and none of the listed tests are available, a diagnosis of cancer in a survivor's claim can be based on hospital admission/discharge report, hospice records or death certificate. See EEOICP Procedure Manual, Chapter 2-0900, subchapter 3.

44. In asking for additional evidence, DEEOIC noted that the letter did not identify the type of skin cancer, which is necessary for referral to NIOSH for dose reconstruction. Note: while the claim for the additional skin cancer was denied, a claim for yet another cancer was approved.

B. The evaluation of the evidence is not consistent with the Act

Claimants approach us questioning whether DEEOIC's evaluation of the evidence is consistent with the Act:

- While the statute contains specific criteria for diagnosing CBD under Part B, it does not contain any criteria for establishing CBD under Part E. Nevertheless, DEEOIC holds that in order to establish a diagnosis of CBD under Part E there must be a "confirming" BeLPT. Some claimants argue that since Congress did not outline specific criteria for diagnosing CBD under Part E, this indicates that Congress did not intend specific criteria for diagnosing CBD under Part E.
- On the one hand, the Act defines DOE contractor or subcontractor employee as a contractor or subcontractor that provided services at the facility. 42 U.S.C. §7384(11)(B). On the other hand, EEOICP Bulletin NO. 03-27 holds that the delivery and loading or unloading of goods alone is not a service and is not covered for any occupation. Claimants complain that Bulletin 03-27 is more restrictive than the statute. Claimants further assert that this bulletin does not give consideration to the amount of time engaged in the loading (or delivery) of goods, nor does it consider the extent to which the loading (or delivery) of goods is essential to the operations of the facility.
- In one instance, in addition to arguing that the statute did not exclude those engaged in the transportation of goods, the claimant also took exception with the determination that his/her job of transporting workers around the site constituted the "transporting of goods." Ultimately, this case was remanded and a subsequent decision issued recommending acceptance of the claim.

C. Rules/Procedures not applied in a consistent manner

There are some claimants who do not believe that DEEOIC always applies its own rules in a consistent manner. Here are a few instances where claimants question DEEOIC's consistency:

- The EEOICPA Procedure Manual, Chapter 2-1000, 18(d)(2), provides that,

Claims for hearing loss due to organic solvent exposure where the employee has less than 10 years of employment completed prior to 1990 must likewise be forwarded to the NO for specialist review. (Emphasis added).

Citing to this provision, claimants brought to our attention instances where claims for hearing loss due to organic solvent exposure were not substantively reviewed by a specialist even though the claim involved an employee with less than 10 years of employment completed prior to 1990. In one instance, the employee had five (5) years of potentially covered employment, followed by a three (3) year break and then six (6) more years of potentially covered employment. According to DEEOIC, while it forwarded this claim to the National Office, there was no review by a specialist since the general requirement that the employee

have 10 years of consecutive employment was not “close to being met.” In response, this claimant notes that the PM provides that where the employee has less than 10 years of employment completed by 1990, the claim for hearing loss due to organic solvent exposure “must likewise be forwarded to the NO for specialist review.” [Emphasis added]. In light of this language, the claimant questions DEEOIC’s determination that this case did not require review by a specialist. This claimant does not understand how, without substantive review by a specialist, DEEOIC determined that the covered employment did not cause, aggravate, or contribute to the hearing loss.⁴⁵

- Pursuant to the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment 5th Edition, if there is evidence of a tumor one year after the diagnosis of lung cancer, the patient can be rated as severely impaired. *See AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, 2001, page 106.* When DEEOIC refused to apply this approach to claims for leukemia and pancreatic cancer, one medical provider produced prior decisions showing that there were instances where DEEOIC utilized this approach in rating impairments for cancers other than lung cancer. This provider not only believes that DEEOIC is not being consistent in its approach, but also believes that there is medical evidence that supports the use of this approach to cancers other than lung cancer.
- Although the PM defines “physician” to include, “osteopathic practitioners within the scope of their practice as defined by State law,” see EEOICP Procedure Manual, Chapter 0-0500,2(pp), a claimant contacted us when a medical report by an osteopath was rejected on the ground that it was not prepared by a physician.
- According to Chapter 3-0300, 2(p) of the PM which addresses in-home health care, if the employee’s physician does not provide sufficient details concerning: (1) the employee’s physical condition, (2) the relationship to the accepted conditions or (3) the specific reasons for in-home health care, the CE must refer the case to the DMC for review. Claimants do not believe that DEEOIC is consistent in referring cases to the DMC when the report by the physician is not sufficiently detailed.
- A CE informed a claimant that if he/she chose to have his/her physician perform the impairment rating, the physician had to personally examine the claimant. This concerned the claimant since it was his/her understanding that an impairment rating could be based on a review of appropriate test results. When this matter was brought to DEEOIC’s attention, DEEOIC clarified that a personal examination was not required.

45. Claimants question the ultimate purpose of providing for this review.

- In addition to the specific instances addressed above, claimants also contacted us alleging that there were other rules/procedures that were not applied in a consistent manner. Since most cases issued by DEEOIC are not available for review, claimants tend to find it difficult to document their allegations of inconsistency. For this reason, some claimants believe that there needs to be a mechanism to ensure that DEEOIC applies the rules/procedures in a consistent manner.

D. Other concerns with the evaluation of evidence

- **Decisions should contain adequate explanation:**

Claimants often complain that decisions do not explain (or do not sufficiently explain) the underlying findings and conclusions. Where their claim is denied, claimants want to understand the basis for this determination, and this is especially true where DEEOIC does not credit evidence submitted by the claimant. Claimants assert when DEEOIC does not inform them as to why previously submitted evidence was insufficient, they worry that any new evidence they submit will contain the same deficiencies.

In our experience, recent decisions issued by DEEOIC generally provide a reasoned discussion of findings and conclusions. Nevertheless, some claims have extended histories, and while the more current decision may contain findings and conclusions that are well reasoned, earlier decisions that contain findings and conclusions that were not as well explained may continue to trouble the claimant.⁴⁶

The failure of claimants to obtain a copy of reports prepared by a DMC or (or other specialist) relied upon in deciding their claim can also have an impact on the ability of a claimant to fully understand the findings made in his/her claim. Throughout the year it was common to encounter claimants struggling to understand a decision, and to find that these claimants had never requested a copy of the report prepared by the DMC (or other specialist) in the adjudication of their claim. On a number of occasions, once these claimants received and reviewed a copy of these reports, they had a better understanding of DEEOIC's decision. ■

⁴⁶ In some instances, because the earlier decisions addressed other issues, the more current decision may not necessarily clarify all of the issues addressed in the earlier decision.

X. Impairment and Wage Loss

IMPAIRMENT: Monetary compensation for the permanent loss of function of a body part or organ, specific to the accepted illness/condition. Impairment is determined by a qualified physician using the AMA Guide to the Evaluation of Permanent Impairment, 5th Edition.

WAGE LOSS: Is payable for those years worked before Social Security Administration regular retirement age during which wage loss occurred as a result of the accepted condition/illness.

A. Claimants not aware of eligibility for impairment and/or wage loss

Ordinarily, if a claim is accepted, where applicable, DEEOIC informs the claimant of their potential eligibility for impairment and/or wage loss. We occasionally encounter claimants who are not aware of their potential eligibility for impairment and/or wage loss. In most instances, it is impossible to determine if DEEOIC advised the claimant of his/her potential eligibility and the claimant simply failed to pursue a claim, or whether DEEOIC never advised the claimant of his/her potential eligibility. However, this year there was one instance where it is clear that the claimant never received any notice of his/her potential eligibility for impairment and/or wage loss.

B. Claimants not aware that they can seek re-evaluation of an impairment

Once entitled to an award for impairment, a claimant may request re-evaluation every two years from the date of the final decision unless they have a new accepted covered illness or consequential condition, in which case they may seek a new whole person impairment evaluation at any time. Some claimants, previously awarded impairment compensation, are not aware that they can request re-evaluation every two years, or in the event of a new covered illness or consequential condition.⁴⁷

C. Confusion over whether prior approval of the physician is required

The PM states that a physician qualified to perform an impairment rating must hold a valid medical license and Board certification/eligibility in their field of expertise. See EEOICP Procedure Manual, Chapter 2-1300, subchapter 4(d)(2). Some people assume that this means that they must obtain DEEOIC's approval (acknowledging that the physician meets the quality standards) prior to undergoing an impairment evaluation. Contrary to this assumption, DEEOIC maintains that prior approval is not necessary in order to obtain an impairment rating. Rather the physician can submit his/her qualifications when they submit the rating.

⁴⁷ Compensation for impairment and wage loss under Part E is subject to the maximum aggregate compensation outlined in 42 U.S.C. §7385s-12.

- Claimants contend that it would be beneficial if the fact that prior approval is not necessary were clearly articulated for all to see.
- Since an impairment rating performed by an unqualified physician is not reimbursable, some claimants contend that the current procedure places them at risk for having to personally pay for the rating if DEEOIC subsequently determines that the physician is not qualified. Some claimants contend that this risk could be avoided if DEEOIC provided prior approval of physicians.
- Some claimants, believing that prior approval was necessary, submitted the qualifications of their physician to DEEOIC for approval. We were subsequently contacted by these claimants when DEEOIC never provided approval. When informed that prior approval was not necessary, these claimants asked why DEEOIC never responded to these submissions advising them that prior approval was not required.

D. Providing physicians with appropriate test results

Claimants and medical providers contend that when employees opt to use their own physicians to perform impairment ratings, it sometimes takes a long time for DEEOIC to provide these physicians with the test results necessary to perform these ratings. Some claimants contend that as a result of these delays, it is not unusual to find that physicians who initially agreed to perform impairment ratings are no longer available or have now lost interest.

E. Locating physicians willing to perform an impairment rating

Claimants contact us asking for assistance in locating a physician willing to perform an impairment rating. Some claimants contend that there are no physicians in their vicinity qualified to perform these ratings. These claimants assert that it would help if DEEOIC provided a listing of qualified physicians living nearby.⁴⁸ Other claimants note that the physicians who they approach have no interest in involving themselves with EEOICPA. DEEOIC is willing to discuss the program with providers and to assist providers in enrolling in the program. Consequently, we encourage claimants to contact DEEOIC if their physician is unwilling to perform the impairment rating. However, since some physicians are adamant in their refusal to enroll in this program, claimants generally are not very optimistic that DEEOIC's intervention will succeed.

- While the Radiation Employees Screening and Education Program (RESEP), created by the RECA program has no direct connection with EEOICPA, some of the employees treated by the RESEP are also potentially eligible under EEOICPA. This year personnel from RESEP noted that they received requests from personnel associated with DEEOIC asking them to perform pulmonary testing for impairment ratings. The RESEP personnel felt that performing these expensive tests for EEOICPA claimants was not within the scope of their grant. ■

48. A listing of physicians enrolled in EEOICPA can be found online, however, this listing is very hard to locate. Many claimants contend that no one ever advised them or assisted them in locating this listing

XI. Medical Benefits

A. Fee Schedule

OWCP maintains a schedule of maximum allowable fees for professional medical services performed in a given locality. DEEOIC's most recent adjustment to this schedule resulted in a decrease in the maximum allowable fee for many services. Claimants and authorized representatives note that prior to this most recent adjustment it was already difficult to find physicians willing to enroll in EEOICPA. These individuals fear that this recent decrease will aggravate the problem by causing physicians currently enrolled in the program to discontinue their participation.

B. Difficulty locating physicians

Doctors don't like to get involved since they're convinced it's a lawsuit with lawyers involved...

There is something wrong with the medical benefits because most doctors will not accept them. The words "workers compensation" seems to be a dirty word among doctors.

Claimants continue to complain of difficulties encountered locating physicians willing to treat EEOICPA patients and/or willing to accept the EEOICP medical benefits card.

- Many claimants are not aware that if notified, DEEOIC will contact a physician to explain the program and assist in enrolling the physician.⁴⁹
- A number of claimants believe that DEEOIC ought to make a listing of qualified physicians easily available for review.⁵⁰

C. Difficulty changing physicians

This year, claimants complained of problems encountered attempting to obtain approval to change physicians. Pursuant to 20 C.F.R. §30.405(b), OWCP will approve a request to change physicians if it determines that the reasons submitted are sufficient. Some claimants believe that this regulation gives DEEOIC too much discretion and results in claimants not receiving the level of care they need (or want). Two instances brought to our attention highlight the concerns raised by claimants.

- One instance involved a claimant receiving treatment at a Veterans' Hospital. The other instance involved a claimant treated by the Indian Health Service. In both instances, the

49. Some claimants contend that this is a waste of time since their physicians are adamant that they do not want to get involved specifically with EEOICPA, or more generally with worker's compensation.

50. A listing of EEOICPA providers is available on DEEOIC's web site, however, this listing can be difficult to locate.

original physician treating the claimant left the respective facility, and as a result the claimants were assigned new physicians.⁵¹ These claimants preferred to choose their own physician and thus sought a change of physicians. In each instance the claimant encountered difficulties attempting to obtain approval for this change.

D. Other issues involving providers

This year there were complaints voicing concerns with some of the practices utilized by certain medical providers and/or people purporting to represent certain companies. In particular, claimants complained that:

- In an effort to solicit claimants to utilize the services of certain home health medical providers, there were people engaging in overly aggressive practices. At one outreach event several claimants complained of telephone calls and visits at all hours of the day and night during which there were attempts to convince them to change providers. Claimants emphasized how frustrating it was when these callers (or visitors) refused to take “no” for an answer.
- Claimants talked of instances where medical appliances and devices that they did not order, mysteriously arrived at their homes. In one instance, the claimant noted that a medical device that ran on electricity showed up at his house. Claimant found this strange since his house does not have electricity.
- In another case, when discussing the claimant’s health care, DEEOIC noted that the claimant submitted a signed letter naming a particular company as his/her home health provider. The authorized representative (AR) questions the authenticity of this letter since it is written in English. The AR maintains (and one of the claimant’s physicians observed) that the claimant does not speak English.⁵²
- One medical provider questions whether all of the companies offering home health care services to claimants are properly licensed and otherwise qualified.⁵³ This provider fears that due to the lack of rules requiring medical providers (not just those directly paid by DEEOIC) to be licensed and because there are no quality standards, claimants may not always receive quality care.

51. In one instance, the claimant preferred a physician who spoke Navajo and thus would be able to communicate directly to him/her.

52. According to the AR, the claimant can simply sign his/her name in English.

53. While medical providers who wish to enroll in EEOICPA must submit licensure information in order to be paid, there does not appear to be a requirement for a license in order to provide home health care services.

E. Medical Bills

I work for...and have been having the most ridiculous time getting claims paid.

With respect to medical services, a frequent complaint by claimants and providers concerns problems with the bill paying process. Some complain that DEEOIC does not provide sufficient guidance detailing how to complete the necessary paperwork. Claimants and providers contend that this lack of guidance is critical since DEEOIC (as well as the entity that processes EEOICPA bills) is very specific in terms of how it wants the paperwork completed. Some of the most vocal complaints come from health providers, who describe themselves as small businesses. These providers assert that as small businesses it is extremely time consuming when they have to re-create and/or resubmit bills. These providers also maintain that the delays that ensue when bills must be resubmitted have a direct and detrimental impact on their cash flow. Many of the claimants and providers who contacted us with problems involving the bill paying process emphasized that they were not trying to change DEEOIC's procedures. Rather they noted that they simply wanted guidelines to follow, so that they could ensure that bills were properly prepared the first time. Just a few instances where claimants contend that guidance could have prevented subsequent problems include:

- The worker files a claim but passes away before the payment of compensation. Thereafter, the survivor files a claim. In processing this claim, DEEOIC uses the survivor's name to identify the case, but assigns the claim the number previously given to the claim filed by the deceased worker. Thus, when submitting bills for payment, where the form asks for the claimant's name, the survivor inserts his/her name. Where the form asks for the claim number, the survivor inserts the number that DEEOIC assigned to the claim. Subsequently, these bills are returned to the claimant with a notation indicating that the name does not match the claim number. It is only then that DEEOIC informs the claimant that when submitting bills for payment he/she should use his/her social security number, not the number assigned to the claim.
- The claimant submits separate bills for travel by the claimant and the claimant's companion, only to have some of the bills denied. It is only after submission of these bills that DEEOIC informs the claimant that all associated travel, including approved companion travel, should be presented as a single bill.
- A provider notes that where there are multiple pages to the bill, all charges are totaled on the last page. This provider assures us that bills submitted to other agencies are accepted using this format. Following the denial of the bills, DEEOIC instructs the provider on how it wants charges totaled.
- Where there were multiple bills, a provider submits all associated attachments under the last bill in the batch. DEEOIC advises the provider that all associated attachments should be placed behind the corresponding bill.

Providers contend that many of these problems, as well as the resultant delays, could be avoided if there were better guidance. Providers also believe that the lack of written guidelines results in inconsistent application of the rules and procedures for submitting bills.⁵⁴

Some of the complaints alleging inconsistent rules include:

- Provider complains that a bill with the notation, “authorized signature [was] on file” is returned with a request for the patient’s authorized signature. This provider contends that DEEOIC paid prior bills containing this same notation.
- Provider notes that after submitting numerous bills using a 12-hour clock to document hours of service, he is instructed to use a 24-hour clock.
- In one instance, although DEEOIC did not identify the directions, DEEOIC found that the provider was given different directions from different sources.

A big concern for many providers is the fact that whenever bills are returned for further action, this results in a delay in payment. We have already discussed some of the delays encountered by providers. Here are some other reasons that providers encounter delays with the bill process:

- Occasions where DEEOIC did not submit the authorization letter issued by the CE with the bills.
- Instances where the eligibility date for medical coverage or other necessary codes were not entered (or were incorrectly entered) into the system.
- In an effort to address the concerns with the bill paying process DEEOIC recently met in Denver, Colorado with some health care providers. DEEOIC also developed a brochure on home health care that is now available online and recently added a discussion on home health care to the presentation that it makes at some outreach events. The extent to which these and other efforts address the matter remains to be seen.

F. Massage therapy

This year, claimants approached us when they began to experience difficulties obtaining re-approval for massage therapy ordered by their treating physicians. In response to our inquiries DEEOIC informed us of the existence of recent guidance requiring massage therapy to be prescribed by a physician for treatment of an accepted condition and requiring that the medical condition or level of function be expected to improve significantly within a reasonable and generally predictable period of time with treatment. This guidance also required recertification for any period of time beyond six (6) weeks and only allowed recertification in six (6) week increments.

54. While medical providers who wish to enroll in EEOICPA must submit licensure information in order to be paid, there does not appear to be a requirement for a license in order to provide home health care services.

- Claimants complained that they did not receive prior notice of any changes affecting the procedures for massage therapy. Claimants asserted that they only became aware of these changes when they applied to re-authorize approval for massage therapy.
- Some claimants argued that it was unfair to apply this new guidance to therapy rendered before they received notice of the new guidance.
- Providers and claimants also complain that requiring recertification every six (6) weeks is unduly burdensome. One provider argued that requiring recertification for massage therapy every six (6) weeks meant that he would spend as much time completing paperwork as he spent treating patients.
- In addition, claimants maintained that it is not consistent with the statute to require that the condition or level of function be expected to improve significantly within a reasonable and generally predictable period of time with the massage treatment. Claimants note that 42 U.S.C. §7384t(a) provides that the services, appliances, and supplies furnished to individuals receiving medical benefits include those likely to cure, **give relief**, or reduce the degree or the period of that illness. [Emphasis added]. Claimants contend that contrary to the language of the statute, this new guidance appears to foreclose the possibility of receiving massage therapy if the treatment only gives relief. ■

On January 2, 2013, DEEOIC issued EEOICPA Bulletin No. 13-01 which addressed the authorization of massage therapy. Pursuant to this bulletin, DEEOIC views the possible benefits derived from massage therapy as, “reducing pain and muscle tension; increasing flexibility and range of motion; and improving blood circulation.” The bulletin further held that the initial authorization period could be fewer than, but should not exceed 8 weeks and that at the end of the initial 8-week authorization period, where appropriate, the CE could grant authorization for continuing massage therapy of no more than two visits per week and a maximum of 60 visits per year.

This bulletin appears to address a number of the concerns raised by claimants addressing DEEOIC’s earlier guidance. We will continue to monitor this issue.

XII. Attorney Fees

The statute at 42 U.S.C. §7385g, outlines a schedule for attorney fees under Part B:

- 1) 2 percent for the filing of an initial claim for payment of lump-sum compensation; and
- 2) 10 percent with respect to objections to a recommended decision denying payment of lump-sum compensation.

With respect to attorney fees under Part E, the statute simply incorporates the provisions applicable to Part B. See 42 U.S.C. §7385s-9.⁵⁵

A. Gaps/omissions in the attorney fee provision

- The attorney fee schedule is premised on the assumption that the claimant obtains monetary compensation. Authorized representatives (ARs) complain that the schedule does not address situations where the claimant is only awarded medical benefits – which can sometimes be worth as much, if not more, than monetary compensation. ARs specifically note that under Part E it is possible to accept a claim, thus entitling the claimant to medical benefits, and yet the claimant may not be entitled to compensation for impairment and/or wage loss. Similarly, ARs note that under Part B the acceptance of a claim for beryllium sensitivity only entitles the claimant to medical monitoring.
- Another issue that arose this year involves expenses. We received inquiries asking if an attorney or AR can seek reimbursement for his/her expenses and if so, when and under what circumstances can this reimbursement be sought. Unfortunately, the statute does not address this situation.
- According to the fee schedule, an attorney/AR is entitled to 10 percent with respect to objections to a recommended decision denying payment. A common complaint asserts that this provision fails to recognize that favorable recommended decisions (that do not require the filing of objections) are often the result of services rendered by attorneys/ARs. For instance, attorneys/ARs note that where DEEOIC cannot verify employment or where the initial evidence does not link the illness to a work-related toxin, they are often the ones who develop this evidence. Therefore, these attorneys/ARs do not think that it is fair that where their work results in a favorable recommended decision their fee is nevertheless limited to the statutory 2 percent for the filing of an initial claim. Rather, attorneys/ARs contend that the fee schedule ought to give consideration to the amount of time invested and/or whether the work results in a favorable decision.

55. While the Act outlines the attorney fees that can be charged, the corresponding regulations state that a claimant may authorize any individual to represent him or her in regard to a claim under EEOICPA, and such authorized representative is entitled to compensation as outlined in the Act for attorneys. See 20 C.F.R. §30.601 and §30.603.

In addition, there are those who fear that because an attorney/AR is only entitled to the additional 10 percent compensation following objections to a recommended decision this could create an environment where someone might consider withholding relevant evidence in order to ensure an initial denial of the claim.

- Another complaint alleges that the current attorney fee schedule does not adequately address instances where the attorney/AR provides assistance that does not directly result in additional compensation. For example, following a determination of eligibility, it is not uncommon for issues to arise concerning medical benefits or the coordination of benefits. Unfortunately, the statute does not address the process for compensating an attorney/AR for assisting a claimant with these matters.⁵⁶
- An attorney/AR is entitled to the two percent for filing the initial claim *“provided that representative was retained prior to the filing of the initial claim.”* 20 C.F.R. §30.603. Attorneys/ARs find fault with the fact that pursuant to Section 30.603, if they are retained subsequent to the filing of the initial claim, yet succeed in establishing entitlement in a recommended decision they are not entitled to any fee. Some claimants believe that this provision impedes their ability to locate attorneys/ARs willing to handle EEOICPA claims.

B. The Part B attorney fee provision is ill suited for Part E

A lot of the complaints that we receive involving the fee schedule for attorneys/ARs address the belief that the Part B attorney fee provision is ill suited for Part E. Starting with the fact that Part E claims filed by former workers generally do not involve lump sum compensation, claimants contend that there are numerous differences in the procedures for processing Part B and Part E claims. As a result, claimants contend that the fee schedule outlined for the payment of attorney fees under Part B does not always neatly apply to Part E claims.

- As previously noted, while the fee schedule is premised on the assumption that a successful claimant receives monetary compensation, it is not unusual under Part E for a claimant to be eligible for medical benefits, but not eligible for impairment or wage loss compensation. Attorneys/ARs contend that it is not fair to limit their fee to the two percent associated with the filing of the fee when the claimant receives medical benefits oftentimes worth more than any monetary compensation the claimant could have received.

56. While we do not fully know the reasons why, during the course of the year we encountered instances where even though the claimant had an attorney/AR, the claimant chose to pursue certain issues without the assistance of that attorney/AR. Based upon our observations, it appears that where this occurs, claimants utilize the attorney/AR to address issues directly related to the award of compensation and proceed without the attorney/AR on other issues.

C. Attorneys and authorized representatives do not know the rules

Attorneys and ARs note that the attorney fee provision of the statute does not adequately address all of the circumstances that they encounter. Consequently, we are sometimes contacted by attorneys and ARs with questions concerning the appropriateness of a fee in circumstances not addressed by the statute.

D. Issues concerning representation

Claimants, as well as others, contacted our Office this year with concerns involving interactions with attorneys/ARs.

- In light of the uncertainty with the rules, claimants contacted us to verify that the fee charged by the attorney/AR was consistent with the statute.
- We heard from some individuals who felt that certain attorneys/ARs took advantage of the fact that claimants did not always have a firm grasp of the program. For instance, some individuals questioned the fact that whenever DEEOIC established a new SEC, some attorneys/ARs signed up clients from the areas around these new SECs without informing these claimants that DEEOIC automatically reviewed previously denied claims to determine if the new SEC impacted these claims.
- Similarly, some individuals believe that there may be a few attorneys/ARs who do not always limit their fees to the amounts outlined in the fee schedule.⁵⁷ ■

57. While there are suggestions that some attorneys/ARs do not limit the fee charged to the amount outlined in the fee schedule, to date no one has provided us with specific documentation of this occurrence.

XIII. Complaints Involving the Administration of the Program

Most of the complaints involving the administration of the program concern DEEOIC's role with the program. Nevertheless, we also receive comments addressing NIOSH's and DOE's administration of the program as well.

A. DOL

Over the course of the year personnel associated with DEEOIC interact with thousands of claimants, potential claimants, and authorized representatives. Most of these interactions do not result in complaints. In fact, there are some instances where even though a claimant comes to us with a complaint, the claimant takes the time to recognize that there were DEEOIC staff members who were helpful. We also wish to note that in the course of the year, our participation at outreach events sponsored by DEEOIC provided us with the opportunity to observe DEEOIC personnel interacting with claimants. We were constantly amazed at the depth of knowledge, as well as the patience displayed by DEEOIC personnel as they assisted what was sometimes overwhelming numbers of claimants.

Nevertheless, some encounters with DEEOIC raise concerns, and these are often the encounters that claimants bring to our attention. These complaints involve every aspect of the EEOICPA claims process. Moreover, we do not simply receive complaints from those whose claims were denied. The complaints that we receive are just as likely to come from someone whose claim for benefits is pending, or someone still in the process of filing a claim.⁵⁸

- 1. Prefer face to face contact:** When issues arise with their claim, many claimants prefer to speak directly to someone, as opposed to discussing the matter over the telephone or communicating via letters. Unfortunately, once a claim is assigned to a district office, there is little, if any, opportunity for face to face discussions. The situation is often worse for those claimants who, whenever they had questions during the initial processing of their claim, were able to physically visit one of the eleven resource centers located around the country. After enjoying the face-to-face interactions with the staff of the resource centers, it can be difficult when claimants subsequently find themselves in a situation that offers little, if any face-to-face interaction. DEEOIC endeavors to ensure that the district offices fully serve claimants. Nevertheless, for some claimants this lack of direct contact is troubling.

58. Complaints from those who have not filed a claim usually concern the fact that the claimant was not aware of the program and/or the fact that the claimant cannot find information about the program.

- 2. Change in claims examiners:** In previous years, claimants contacted us to say that they found it unsettling when, in the midst of the claims process, they experienced a change in the CE handling their claim. This year there has been a decrease in the number of such complaints. Still, there are times when claimants complain that they find it troubling when DEEOIC changes the CE handling the claim. Claimants argue that such changes disrupt the processing of their claim, oftentimes resulting in a delay as the new CE comes up to speed, and/or as they must explain to the new CE concepts previously explained to the earlier CE. Some claimants firmly believe that the introduction of a new CE altered the outcome of their claim. For example, we hear allegations suggesting that the new CE raised issues (or asked for additional evidence on issues) that the previous CE considered settled.

Claimants also note that it is unsettling when they are not notified of the change in CE and thus only discover the change when a document comes to them signed by the new CE. It also bothers claimants that generally no reason is provided for these changes. Accordingly, claimants maintain that at the least, it would be nice if they were informed whenever there was a change in the CE.

In response to these complaints, DEEOIC notes that the resignation, retirement, or promotion of a CE compels the reassignment of the case.

- 3. The period following the issuance of a recommended decision:** When a district office issues a recommended decision, the claimant has 60 days from the date that the recommended decision issues, to state in writing whether he/she objects to any of the findings, and whether he/she wants a hearing. This written statement should be filed with FAB. See 20 C.F.R. §30.310(a). This procedure is the source of several complaints:
- Claimants complain of instances where upon receiving the recommended decision they had questions, yet when they contacted the district office CE, they were told that he/she forwarded the case to FAB and cannot speak to them about their claim. However, when they contacted FAB, they were told that FAB had not received the case. Since they only have 60 days to respond to the recommended decision, claimants contend that it is extremely frustrating when they cannot locate anyone to answer their questions.
 - Claimants point out that the current procedures do not provide an opportunity to ask the CE for reconsideration of recommended decisions – rather, if a claimant objects to any of the findings in the recommended decision, the claimant submits their response to FAB. Some claimants argue that this procedure results in additional delay since it requires them to go to FAB in order to correct even obvious errors by CEs.

- o In one instance, the claim was not processed as an SEC case even though a medical report diagnosed squamous cell carcinoma of the tongue and indicated “rt posterior base of tonsil (base of tongue).” The claimant felt that having to go to FAB to raise his objection, whereupon FAB remanded the case back to the CE for further consideration of EEOICPA Bulletin NO. 02-28 simply added an unnecessary step to this process.⁵⁹

4. Processing of claims takes too long

Many claimants have concerns with the amount of time needed to process EEOICPA claims. In a general sense, these concerns have two focuses: (a) the overall time needed to process claims, and (b) the fact that in some cases, obstacles add to the delay in the processing of a claim.

- **The overall time needed to process a claim:** While the statistics found on DEEOIC’s website are limited, they indicate the following average processing times (as of December 31, 2011)⁶⁰:

| | Recommended Decision | Final Decision |
|--|----------------------|----------------|
| Part B Chronic Silicosis Cases | 220 days | 84 days |
| Part B Beryllium Sensitivity and Chronic Beryllium Disease Cases | 187 days | 79 days |

In our experience we now encounter many cases where DEEOIC issues a recommended decision within months of the filing of the claim and thereafter issues a final decision within months of FAB’s receipt of the recommended decision. DEEOIC is to be commended for these turn-around times. However, most of the claimants who contact our Office are not concerned with the amount of time needed to issue one specific decision. Rather, these claimants are concerned with the overall time that it takes to process a claim. The following example illustrates the concern that we hear from many claimants:

- The Part E claim was filed in March 2011. A recommended decision issued in November 2011; FAB remanded the case back to the CE in March 2012; a new recommended decision issued in June 2012; and FAB again remanded the case in October 2012. This claimant is not concerned with the amount of time needed to issue any one of these specific decisions. Instead, it concerns this claimant that after a year and a half, he is still endeavoring to establish entitlement to Part E and assuming that his Part E claim is accepted, only then can he file a claim for impairment and/or wage loss.

59. In pertinent part, EEOICPA Bulletin No. 02-28 provides that:

...the pharynx has three parts. One of these parts is the oropharynx, which includes “the soft palate (the back of the mouth), the base of the tongue, and the tonsils.” Based on this definition from NCI, we consider that a cancer of the tonsils is a cancer of the pharynx. As the tonsils are part of the pharynx, tonsil cancer should be considered a specified cancer for SEC cases.

60. When preparing this report, the charts for Average Processing Time for Part B Cases and Average Days from Filing Date to Final Decision for Part B Cases were out of service. The website did not address charts for Part E cases.

Moreover, while many of the claims that we now see were filed within the last few years, we continue to encounter some cases that were originally filed years ago. Some claimants are troubled by all of the back and forth that transpired with their claim. Take for example this case filed in May 2010.

- o Claim filed May 2010
 - o October 2010 – recommended decision denies claim because claimant fails to establish that he was a covered employee
 - o June 2011 – final decision denies claim
 - o August 2011 – FAB denies request for reconsideration
 - o November 2011 – DEEOIC denies request for reconsideration
 - o March 2012 – DEEOIC vacates final decision and reopens claim
 - o July 2012 – DEEOIC accepts that claimant was a covered employee, but denies the claim because there is insufficient evidence to link the illness to occupational exposure to a toxic substance
- **Obstacles that further delay the claims process:** Claimants often find it troubling when delays impact the processing of their claim. Some of the more common reasons that delays arise in the processing of claims include:
 - o **Dose reconstructions** – Can add approximately one year to the processing of a claim. See discussion at Section XI (A)(2).
 - o **Delay in receipt of SSA earning records** – This year we received complaints suggesting that certain claims were delayed while DEEOIC awaited earning records from SSA.⁶¹ See discussion at Section VIII (D).

Even though the D.O. staff including my claims examiner works as quickly as they can on their part the wait on S.S.A. causes several months delay

- o **Evidence is returned for further development:** Claimants believe that delays often ensue when evidence is returned for further development. These claimants further believe that many of these delays could be avoided if DEEOIC provided clearer guidance earlier in the claims adjudication process.
- o **Matters forwarded to National Office (NO):** Beyond the fact that cases are forwarded to the NO, oftentimes without any notice to the claimant, it further troubles claimants that when cases are forwarded to the NO, there does not appear to be any time limit within which the NO must act.
- o **Claims not acted upon:** There were a few occasions during the year where, for various other reasons the processing of a claim stalled. Take for instance one claim where the claimant was initially informed that a final decision would issue by the end

61. DEEOIC indicates that a new agreement with SSA addressing this matter is now in place.

of November. The claimant called us in mid-March when he/she was unable to gain any additional insight into the status of the claim. Although a decision issued within weeks of claimant's inquiry, the claimant is still troubled by this delay.

- o **Telephone calls not answered or returned:** Some claimants contend that it delays the processing of their claims when they cannot receive answers to their questions.

5. DMC and Toxicologist reports only provided upon request

In some claims DEEOIC seeks the opinion of a DMC and/or a toxicologist. Although the CE often relies upon these reports in adjudicating the claim, a copy of the DMC and/or toxicologist report is not automatically provided to claimants. Instead, claimants must request in writing for a copy of these reports.

- We continuously encounter claimants struggling to understand a decision who are not aware of their right to request a copy of the DMC (or toxicologist) report or other claim file information. In some instances, these claimants had a better appreciation of the decision once they had the opportunity to review these documents.
- Some claimants believe that requiring them to request a copy of the DMC and/or toxicologist report is just another unnecessary hurdle placed in their way. These claimants believe that DEEOIC ought to automatically provide them with a copy of these reports, especially where the CE relies on these reports in adjudicating the claim.

6. Reasoned and explained decisions

Claimants often contact us when they find it difficult to understand the reasoning underlying a decision issued by DEEOIC. As we noted in our 2011 annual report, our recent experiences reveal a significant improvement in the drafting of recommended (and final) decisions. These improvements include providing more and better reasoning for the determinations made in a decision. Nevertheless:

- Where a claim has a long history, we sometimes find that while the recent decision is well reasoned, some claimants continue to have questions that stem from determinations made in earlier decisions which are not always as well reasoned and explained.
- Claimants argue that the inability to fully understand the reasoning for a denial impedes their ability to develop a response to the denial. For example, claimants contend that where they do not understand the basis for the denial, it is difficult to develop evidence that addresses DOL's concerns.

7. Inconsistent decisions and policies

As discussed in Section XIV(C), claimants believe that there are instances where DEEOIC is not consistent in its application of policies and procedures. Some claimants believe that some of these inconsistencies are prompted by a desire to reach a specific outcome in a particular case. Other claimants contend that these inconsistencies reflect the lack of guidance given to those who draft decisions. Some of the allegations of inconsistency that we received this year include:

- Report by osteopath not accepted even though 20 C.F.R §30.5(dd) includes an osteopathic practitioner within the definition of “physician.”
- Concerns addressing Chapter 2-01900, subchapter 4 of the PM. This provision outlines the procedures to follow when a claimant submits “non-specific correspondence” following a final decision. Included in these procedures is a requirement that the claimant be “notified.” In one instance the authorized representative sent a letter to DEEOIC following a final decision stating her desire to “appeal” the decision. DEEOIC states that it did not provide a written response to this letter. The authorized representative assures us that she did not receive any response, written or oral, to her letter.
- Questions involving the application of deadlines. Claimants frequently note that when it comes to evidence that they must submit or responses they must provide, they are given specific time limits within which to act. These claimants further contend that it is usually very difficult, if not impossible, to obtain an extension of one of these time limits. Therefore, some claimants find it inconsistent that whenever DEEOIC needs more time, it will grant itself more time - even where this results in a delay in the processing of the claim. Further troubling claimants is the fact when their claims are delayed (due to action taken by DEEOIC) it oftentimes occurs without notice, without explanation, and without any time limit imposed on DEEOIC within which to act. In this regard:
 - o One claimant noted that in response to his request for a copy of his file, DEEOIC informed him that because it was extensive, it would take months to provide the copy. Nevertheless, when the claimant asked to reschedule his hearing until after receipt of the case file, DEEOIC denied his request.
 - o Another claimant described his concern as, “[n]o time limit on responses from claims manager, but I am expected to respond within 30 days.”
- Other instances that claimants believe display an inconsistent application of the rules and procedures are discussed in Section XIV(C). Claimants who contact us with such allegations believe that a review of DEEOIC decisions would uncover other instances of inconsistent application of rules and procedures.

There is also at least one situation where claimants believe that the inconsistent application of a policy is a result of the discretion given to the CE:

- DEEOIC allows priority processing to end-stage terminally ill claimants. See EEOICPA Procedure Manual, Chapter 0-0300, subchapter 13. DEEOIC indicates that there is no standard definition for end-stage terminally ill, rather the determination is made by the CE. Claimant believe that this leeway given to the CEs results in inconsistent interpretations of this rule. Claimants contend that certain CEs require the physician to state that the patient has less than 6 months to live, while others ask for 12 months.

8. Errors in decisions

The presence of errors in a decision (or in other documents associated with a claim) causes some claimants to question the thoroughness with which DEEOIC reviews claims. Once a claimant encounters one error, there is oftentimes an assumption that there must be other errors as well. For example after finding documents in his claim file unrelated to his claim, one claimant questioned whether he could be confident that his decision was solely based on a review of documents relating to his claim. In another instance, a claimant was upset when the recommended decision mistakenly identified a condition that he did not have and suggested that it was one of the claimed conditions.

9. Telephone calls not answered and/or not properly returned

A continuing complaint that we receive alleges that when claimants (or authorized representatives) telephone DEEOIC, no one answers the telephone and/or when claimants leave messages, it takes a long time for anyone to return the call. In fact, some of the individuals who contact our Office indicate that they called us only after they could not get through to DEEOIC. In the opinion of many claimants not having their telephone calls answered is especially frustrating since they only have a limited amount of time to respond to DEEOIC. This Office discussed this matter with DEEOIC. We were informed that there are procedures in place to ensure the prompt answering of the telephones and ensure that when messages are left, someone responds to that message in an expeditious manner.

Some authorized representatives believe that while there are procedures in place for answering telephone calls, there are also instances where DEEOIC staff members take it upon themselves to screen calls.

- In one instance, an authorized representative documented his/her concern by providing us with a list detailing the dates and times of his/her telephone calls to DEEOIC, as well as the number of times the telephone rang without an answer.

Most claimants and authorized representatives, however, do not provide us with such documentation. Rather, we receive comments addressing the difficulties encountered attempting to telephone DEEOIC:

Very difficult to talk to claims manager-takes 10 times of calling to actually talk to him.

After the first call, I was not able to get another human on the phone no matter how often I tried.

When calling... toll free number I am immediately sent to voice mail. There is no way to get a live person. I even speed dialed at 8 in the morning, your start time to no avail.

10. Rude/insensitive behavior

[The CE]...does not know how to communicate in a professional manner, and has also been very disrespectful to me...

The Customer services reps at the...office are extremely rude and today I was on hold without any answer from customer service for 8, 9 and 15 minutes...

We frequently receive complaints questioning the manner in which personnel associated with DEEOIC interacted with claimants and/or authorized representatives. Many of these complaints involve allegations of rude or snide remarks. Expressing a fear of reprisal, some claimants decline to provide us with specifics concerning their allegations and/or ask that we not forward their concerns to DEEOIC. Here are some samples of the complaints that we received:

- A claimant maintains that when he went to a district office no one offered him a chair, causing him to stand for over an hour. The claimant notes that he was only offered a chair when he finally met with the supervisor.
- Claimants and ARs contend that there are physicians threatening to terminate their treatment of EEOICPA patients, or who have stopped treating EEOICPA patients, due to rude conversations with DEEOIC representatives.
- A pharmacy clerk prepared a letter asserting that a DEEOIC staff member called the pharmacy questioning the dispensing of a medical device even though the claimant had a prescription for the device from his treating physician. The clerk contends that when she indicated that she was simply following the physician's order, the DEEOIC staff member questioned her common sense and stated that he/she (the DEEOIC staff member) would not want to be tax payer in that neighborhood.

This claimant is not only bothered by the tone and the words used by this DEEOIC staff member, it is also troubling to this claimant that when the matter was brought to DEEOIC's attention, DEEOIC's response was to question the reasonableness of the prescription and not address the CE's comments.

11. No formal procedure for changing CEs

Claimants and ARs contacted us inquiring if there are procedures for requesting a new CE. These individuals recognize that changing CEs should be the exception and not the rule, yet they maintain that there are times when personalities clash, or people do not connect. In many of the instances when claimants raise this concern, they note that they worked well with the other personnel assigned to their claim, and thus emphasize that their problem is with one particular staff member. Claimants also point out that since there are no formal procedures for requesting a change of CEs, their only option is to submit their request for a change directly to the current CE and/or his/her supervisor. In the opinion of some claimants, the prospect of having to raise one's request for a change of CEs directly with the current CE and/or supervisor effectively discouraged them from raising their concerns.

12. No response to complaints

A number of claimants feel that DEEOIC does not always take their concerns seriously. Whether it is a concern with a delay in the processing of a claim; a complaint concerning a telephone call that was not answered, or an allegation of rude behavior, many claimants question DEEOIC's response to their concerns. Some claimants note that when they voice concerns to DEEOIC, they never receive a response, or the response that they receive does not directly address their concern. For example, claimants and ARs commonly assert that when they complain that their telephone calls are not returned, they may finally get a return call, but never receive an explanation (or apology) for the many calls that were not returned. One claimant wrote that,

Requests sent to claims manager not answered-my representative sent a letter with concerns that many things not being done correctly with my claim and this was never responded to in writing.

Comments from a number of ARs also suggest that even if they raise a concern and those concerns are addressed in one claim, they often encounter the same concern in other cases.

B. NIOSH

- As discussed in Section XI (2), many claimants believe that on a whole, NIOSH takes too long to perform dose reconstructions.
- Although a lot of information is available on NIOSH's website, a few claimants commented that this information is not always helpful. A couple of claimants asserted that the video prepared by NIOSH to explain the dose reconstruction process did not answer all of their questions. In addition, while a few claimants thought that the video was too complicated, one former employee thought that the video was too cursory.

C. DOE

- Former employees of facilities designated as AWE's question why unlike other employees involved with the atomic weapons program, DOE does not provide them with free medical screenings.⁶²
- A couple of complaints this year questioned DOE's helpfulness in locating employment records. ■

62. The National Defense Authorization Act of FY 1993, Section 3162, charges DOE with providing ongoing medical screening exams to all former DOE federal, contractor, and subcontractor employees who may be at risk for occupational disease based on their exposures at DOE sites. In 2005, DOE expanded its beryllium screening program to include former employees of now defunct DOE beryllium vendors who were employed with these companies while they performed work for DOE. This change was made to ensure that workers who no longer have an employer to turn to for beryllium testing could receive this important screening.

XIV. Miscellaneous Issues

A. FOIA REQUESTS and STATISTICS

There are both individuals, as well as interested groups, who desire information concerning EEOICPA that is not readily available to the public. In some instances, the claimants seek information that they believe will assist in the successful processing of their individual claim. In other instances, the request seeks information concerning the general administration of the program. Two of the requests brought to our attention this year include:

| REQUEST | RESPONSE TO THE REQUEST |
|---|---|
| Documents relating to DEEOIC's bi-monthly policy teleconferences. | DEEOIC estimated that the search would take four (4) hours. Thus the requester must pay a fee of \$80.00 for the search. ⁶³ Ultimately, DEEOIC determined the information was privileged and exempt from disclosure. |
| All reports provided by DMCs to the Jacksonville District Office's claims examiners from December 1, 2010 to November 30, 2011. | DMC reports are maintained in individual case files in paper format, thus no searchable native format and metadata exist for these records. Therefore, the primary method of collecting these reports is to physically retrieve each case file. DEEOIC provided the requester with an original fee estimate of \$12,560. A subsequent estimate after discussions with DEEOIC's central bill pay contractor was \$49,100.00 to search for and provide copies of the requested reports. |

In both of these instances, the requester maintains that the request is in furtherance of their effort to provide oversight to EEOICPA. Therefore, these individuals take issue with the fees imposed by DOL to address these requests. Noting that they are the only people providing independent oversight of this program, these requesters argue that they ought to be accorded a waiver of any potential fee.

In other instances, even though a formal FOIA request was not initiated, individuals contacted us to express their concern that information/statistics that they deemed relevant were not available to the public.

- One individual contacted us seeking statistics on the total number of death (survivor) claims awarded and the total amount paid on death claims to date.

63. The initial estimate to provide these documents was \$160.00. Following a subsequent conversation with DEEOIC, the requester narrowed the dates of the request with the hope of limiting the time needed to search for the documents to less than the two (2) hours of free search allowable under FOIA. To the requester's dismay, in response to the modified request it was determined that the information was "privileged inter agency" documents exempt from disclosure

- In other instances, requesters sought additional information or expressed their concern that the statistics supplied by DEEOIC were inadequate. For example:
- The EEOICP Program Statistics, under “Combined Part B and E Summary,” first provides the number of “Applications Filed,” then records the number of “Covered Application Filed,” followed by “Total Compensation Paid.” One comment suggested that before providing the total compensation paid, it would be helpful to first indicate the total number of applications awarded.
- The EEOICP Program Statistic outlines the total number of cases filed and then with an asterisk provides the total number of unique individuals represented by these cases. Some claimants contend that it would be helpful if DEEOIC also provided the total number of unique individuals represented by the total number of cases both awarded and denied.

B. Case files not delivered to PO boxes

A claimant requested a copy of her file and subsequently encountered difficulties when DEEOIC insisted that the claimant provide a “home address” as opposed to a PO Box. DEEOIC explained that the carrier used to send file copies did not deliver to PO boxes.⁶⁴ While the claimant provided an alternative address, the claimant questioned DEEOIC’s use of a carrier who does not deliver to PO Boxes, especially since in some parts of the country many residents only have PO Boxes.⁶⁵

C. Use of social security numbers

A couple of claimants expressed serious reservations with the policy of using social security numbers as the claim number. These claimants fear the harm that could result from an inadvertent release of this information. This year there were a couple of instances brought to our attention where documents relating to a claim were inadvertently released to another claimant.

- When reviewing his claim file one claimant uncovered a document addressing another claim. This document provided the individual’s full name; social security number; and date of birth.
- In another instance, the claimant received two almost identical copies of a letter from DEEOIC. The only difference in the letters was that one copy contained a notation at the end referring to another claimant (by name) and providing the last four digits of that person’s claim number.

64. DEEOIC explained that it used this carrier in order to have a tracking number. DEEOIC further noted this concern only arose with file copies. For other correspondence, DEEOIC did not use the same carrier and as a result it was possible to send other correspondence to a PO Box.

65. In the instant case, due to issues concerning the security of his/her mail, the claimant preferred to have his/her mail go to a PO Box.

D. EEOICPA not given the same priority as other compensation programs

A few comments suggest that while the government is being generous in compensating the victims of the 9/11 tragedy, the government does not display that same generosity towards those who toiled at these nuclear facilities. The individuals raising these concerns strongly emphasize that their comments are not meant as a criticism of the government's actions to compensate the victims of the 9/11. Rather, they wish that the government displayed that same attitude in administering EEOICPA.⁶⁶

E. Vow of secrecy impedes worker's willingness to discuss their employment

I am concerned about my legal status whether or not I would be making any incriminating declarations if I admit to being a former...DOE contractor...

During their employment, most employees were instructed not to discuss their work with others. In fact, there are older pictures of facilities where in the background one can see posters and signs encouraging employees not to discuss their work.



Some claimants have indicated to us that in pursuing their claim, they did not provide DEEOIC with all of the information that they knew. These claimants usually justify this action by suggesting that the information that they withheld was too sensitive to discuss. Although there is a process whereby claimants can request to be interviewed by a government employee with appropriate security clearance, claimants often are not aware of this process. Moreover, when informed of this process, some claimants display little interest in utilizing this process. ■

66. Some of these comments were prompted by a news article suggesting that the compensation program for 9/11 victims would cover "50 cancers."

XV. Summary and Recommendations

A. Summary

Some of the complaints that we receive raise issues directly addressed by a provision of the Act. While this does not diminish the significance of these complaints, the fact that a complaint is directly addressed by a statute does mean that in order to resolve these complaints it may be necessary to revise the Act - something that the Department of Labor, as well as the other federal agencies involved in the administration of EEOICPA is not authorized to undertake. Some of the complaints that we received this year involving issues directly addressed by the statute include:

- Whether a specific category of employees is covered under the Act.
- Whether claimants bear the burden of proof to establish their claim for benefits.
- Whether CLL is an SEC cancer.
- The maximum amounts of compensation that can be paid under Parts B and E.
- Whether all children should be considered eligible survivors under Part E.

On the other hand, there are some complaints that directly challenge a regulation or policy. In most instances, the complaints that we receive addressing a regulation or policy involve regulations and/or policies established by DEEOIC. Claimants question whether certain regulations and policies issued by DEEOIC are consistent with the Act and/or Congress' intent in establishing EEOICPA. We also receive complaints suggesting that regulations and policies established by DEEOIC do not give adequate consideration to the circumstances confronting claimants when pursuing EEOICPA claims. For instance, claimants take exception with policies that require them to produce evidence that no one could reasonably expect a claimant to possess. Similarly some claimants believe that in establishing regulations and policies, DEEOIC does not give adequate consideration to the fact that memories fade, colleagues move away, records are destroyed, and that in many instances documents prepared years ago do not address issues that only became relevant when this program was created.

Claimants who wish to challenge a regulation or policy generally have the option of appealing these matters to federal court. However, very few claimants pursue this option. In our conversations with claimants and ARs, many cite to the costs and time associated with such an appeal, as well as a lack of experience appealing matters to federal courts in explaining why they do not avail themselves of this option. Claimants also note that the current attorney fee structure with its limits discourages attorneys from taking on these cases. Consequently, some claimants believe that there needs to be another, cost effective and expeditious method for challenging (and reviewing) the regulations and policies governing the administration of EEOICPA.

Lastly, many of the complaints that we receive address the administration of the program. These complaints address a wide range of interactions that claimants and ARs have with the various agencies involved in the administration of DEEOIC (mostly DEEOIC). Just a few of the complaints that we receive include:

- Not enough has been done to advise claimants of this program, thus there are instances where it is totally fortuitous that claimant learned of this program.
- There has been little follow up on the many allegations suggesting that exposure information is not adequate.
- Many of the tools developed to assist claimants do not provide the level of assistance that some claimants were led to believe would be provided.
- Telephone calls are not answered.
- Clear guidance is needed, or needs to be provided earlier in the claims adjudication process, on a number of issues/procedures relating to the EEOICPA claims process.

With respect to many of these administrative complaints, there are those who believe that DEEOIC and the other agencies involved in the administration of EEOICPA could, if they wish, effectuate change. Accordingly, it is extremely frustrating to claimants when they feel that their concerns are not taken seriously. As a result, some claimants believe that there needs to be an avenue/forum outside of DEEOIC, where, in addition to raising complaints, they can seek effective resolutions of their complaints.

B. Recommendations

We continue to see efforts by DEEOIC and the other agencies involved in the administration of EEOICPA to provide resources and tools designed to assist claimants in processing their EEOICPA claims. We commend DEEOIC and the other agencies for these efforts. Accordingly, as these agencies consider new initiatives and projects, we would like to offer a few suggestions that arise from the comments that we received:

1. While the numbers are far fewer, we still receive complaints from claimants asserting that decisions are not well written and/or that clear reasoning is not provided for conclusions. As we note in this report, our experiences indicate that DEEOIC has invested time and energy addressing these concerns. We hope that these efforts continue.
2. The DEEOIC web site contains copies of certain significant EEOICPA decisions. Unfortunately, at the present time there are only limited cases available on this web site. Greater use of this web site to post decisions could significantly enhance a person's appreciation of the laws, regulations, and rules governing EEOICPA.
3. A lot of claimants contact us asking for assistance locating physicians, especially physicians who will accept the EEOICPA medical benefits card. These claimants do not want the government to recommend a physician. Rather, we are usually contacted by individuals who cannot locate a physician willing to accept the EEOICPA medical card and who simply want suggestions on where to look for such a physician. Using DEEOIC's web site, there is such a list, but the availability of this list is not clearly noted.⁶⁷ It would be a tremendous help to claimants if the availability of this resource were clearly noted on DEEOIC's web site.

67. As with some other resources noted on DEEOIC's web site, to access this information the user is forwarded to another web site.

4. DEEOIC should consider making policy determinations available to the public. This is especially true in those instances where the policy is to be applied to all similar cases.
5. As a way of emphasizing its commitment to providing professional and courteous service, DEEOIC ought to institute procedures for reporting rude and unprofessional behavior and should ensure that these procedures are clearly available to the public. In addition, as a means of assuring claimants that their complaints are taken seriously, DEEOIC ought to provide claimants with a response to their complaints. ■

Appendix 1

ACRONYMS (Abbreviations) used in this report

| | |
|-------------------|---|
| AR | Authorized representative |
| AWE | Atomic Weapons Employer |
| BeLPT | Beryllium lymphocyte proliferation test |
| CBD | Chronic beryllium disease |
| CE | Claims examiner |
| CLL | Chronic lymphocytic leukemia |
| DEEOIC | Division of Energy Employees Occupational Illness Compensation |
| DOD | Department of Defense |
| DOE | Department of Energy |
| DOJ | Department of Justice |
| DOL | Department of Labor |
| DMC | District medical consultant |
| EEOICPA | Energy Employees Occupational Illness Compensation Program Act |
| FECA | Federal Employees Compensation Act |
| FOIA | Freedom of Information Act |
| FWP | Former Worker Medical Screening Program |
| FY | Fiscal year |
| HHS | Department of Health and Human Services |
| JOTG | Joint Outreach Task Group |
| MBOCA | Methylenebis (2-Chloraniline) |
| NO | National Office |
| NIOSH | National Institute for Occupational Safety and Health |
| PM | Procedure Manual |
| PoC | Probability of causation |
| RECA | Radiation Exposure Compensation Act |
| RESEP | The Radiation Employees Screening and Education Program |
| SEC | Special Exposure Cohort |
| SEM | Site Exposure Matrix |
| SSA | Social Security Administration |
| The Act | The Energy Employees Occupational Illness Compensation Program Act |
| The Office | The Office of the Ombudsman, Energy Employees Occupational Illness Compensation Program |

Appendix 2

DEEOIC Statistics as of December 2012

Data as of 12/30/2012

Statistical data updated weekly on Mondays

COMBINED PART B AND E SUMMARY

| | | CLAIMS | CASES |
|---|---------------|-----------------|----------|
| Applications Filed | | 250,041 | 159,585* |
| Covered Applications Filed | | 201,636 | 131,662 |
| Total Compensation Paid | Payments | 83,298 | 60,725 |
| | Total Dollars | \$7,546,725,245 | |
| Total Medical Bills Paid | Total Dollars | \$1,344,088,687 | |
| Total Compensation + Medical Bills Paid | | \$8,890,813,932 | |

*A total of 94,211 unique individual workers are represented by the 159,585 cases reported.

PART B

| | | CLAIMS | CASES |
|--|--|---------|--------|
| Applications Filed | | 135,757 | 84,824 |
| <u>Not Covered Applications</u> (show details) | | 20,212 | 15,769 |
| Not Covered Employment | | 6,925 | 5,148 |

| | | | |
|--|------------------------------|-----------------|---------------|
| Condition Not Covered | | 13,287 | 10,621 |
| Applications Filed | | 115,545 | 69,055 |
| Recommended Decisions* ¹ | | | |
| | Approved | 62,749 | 40,200 |
| | <u>Denied</u> | <u>38,038</u> | <u>24,381</u> |
| | Total | 100,787 | 64,581 |
| Final Decisions* ¹ | | | |
| | Approved | 61,312 | 39,557 |
| | (show details) <u>Denied</u> | <u>36,307</u> | <u>23,641</u> |
| Survivor Not Eligible | | 6,668 | 1,695 |
| Cancer Not Work Related* ² | | 21,230 | 15,822 |
| Medical Info Insufficient to Support Claim | | 8,409 | 6,124 |
| | Total | 97,619 | 63,198 |
| Compensation Paid | | | |
| | Payments | 57,156 | 36,561 |
| | Total Dollars | \$4,738,994,477 | |

*1 With regard to covered applications only.

*2 Probability of Causation is less than 50 percent.

Part E

| | CLAIMS | CASES |
|--|-----------------|---------------|
| Applications Filed | 114,284 | 74,761 |
| <u>Non Covered Applications (show details)</u> | 28,193 | 12,154 |
| Non Covered Employment | 5,197 | 4,131 |
| Survivor Not Covered ^{*5} | 22,996 | 8,023 |
| Covered Applications Filed | 86,091 | 62,607 |
| Recommended Decisions ^{*3} | | |
| Approved | 41,245 | 33,997 |
| <u>Denied</u> | <u>27,265</u> | <u>23,205</u> |
| Total | 68,510 | 57,202 |
| Final Decisions ^{*3} | | |
| Approved | 40,129 | 33,290 |
| <u>(show details) Denied</u> | <u>25,669</u> | <u>22,238</u> |
| Cancer Not Work Related ^{*4} | 8,093 | 6,786 |
| Medical Info Insufficient to Support Claim | 17,576 | 15,452 |
| Total | 65,798 | 55,528 |
| Compensation Paid | | |
| Payments | 26,142 | 24,164 |
| Total Dollars | \$2,807,730,768 | |

^{*3} With regard to covered applications only

^{*4} Probability of Causation is less than 50 percent

^{*5} Per EEOICPA amendments of 2004, adult children are not covered under Part E.

Part B Cancer Cases – NIOSH and SEC Statistics

PART B - STATUS AND LOCATION OF NIOSH REFERRALS

| | |
|--|--------|
| Cases Referred to NIOSH for Dose Reconstruction (DR) | 38,939 |
| Cases Returned by NIOSH | |
| With Dose Reconstruction (DR) | 31,004 |
| Without Dose Reconstruction (DR) ^{*6} | 5,531 |
| Total | 36,535 |
| Cases that are Currently at NIOSH ^{*7} | |
| Initial Referral to NIOSH | 1,625 |
| Reworks or Returns to NIOSH | 779 |
| Total | 2,404 |

^{*6} Most cases without a DR are cases withdrawn from NIOSH for DOL review and approval based on a new SEC designation. Other reasons for withdrawal include administrative closure, death of claimant.

^{*7} A recent update to our claims processing application has shifted the manner in which NIOSH reworks and returns are calculated. The Cases that are currently at NIOSH counts have decreases, and the Cases Returned by NIOSH have increased from previous reports

PART B - CASES WITH DOSE RECONSTRUCTION (DR) AND FINAL DECISION

| | |
|--|--------|
| Final Decision to Accept and Probability of Causation (POC) 50% or Greater | 9,050 |
| Final Decision to Deny and POC Less Than 50% | 16,410 |
| Total | 25,460 |

PART B CANCER CASES WITH FINAL DECISION TO ACCEPT*⁸

*⁸ Accepted Part B Cancer cases are defined by either a NIOSH or SEC approval; additional medical conditions could also be included within the Final Decision.

Accepted DR Cases

| | |
|------------------------------|-----------------|
| Cases Approved | 8,456 |
| Cases Paid | 8,430 |
| Individuals (Claimants) Paid | 11,951 |
| Amount Paid | \$1,255,658,467 |

Accepted SEC Cases

| | |
|------------------------------|-----------------|
| Cases Approved | 17,999 |
| Cases Paid | 17,721 |
| Individuals (Claimants) Paid | 29,597 |
| Amount Paid | \$2,646,061,489 |

Cases Accepted Based on SEC Status and POC 50% or Greater*⁹

| | |
|------------------------------|--------------|
| Cases Approved | 594 |
| Cases Paid | 593 |
| Individuals (Claimants) Paid | 724 |
| Amount Paid | \$88,875,000 |

*⁹ For these cases at least one specified cancer was approved based on SEC employment and at least one other cancer was approved based on the DR process resulting in a POC of 50% or greater.

TOTALS: All Accepted SEC and DR Cases

| | |
|------------------------------|-----------------|
| Cases Approved | 27,049 |
| Cases Paid | 26,744 |
| Individuals (Claimants) Paid | 42,272 |
| Total Amount Paid | \$3,990,594,956 |



UNITED STATES DEPARTMENT OF LABOR
Office of the Ombudsman Energy Employees
Occupational Illness Compensation Program

200 Constitution Avenue, N.W. Room N-2454 • Washington, D.C. 20210