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## A MESSAGE FROM THE OMBUDSMAN

The Energy Employees Occupational Illness Compensation Program Act (EEOICPA) was passed by Congress in 2000, and amended in 2004, to compensate American workers who put their health on the line to help fight the Cold War. Many of these workers developed cancer and other serious diseases because, in the course of doing their jobs, they were exposed to radiation and other toxic substances. They and their families have paid dearly for their role in protecting our democracy; the purpose of this program is to acknowledge their sacrifice and to compensate them in some small way for their suffering and loss.

As originally enacted in 2000, EEOICPA included Part B (administered by the Department of Labor (DOL)) and Part D (administered by the Department of Energy (DOE)). When Congress repealed Part D and enacted Part E of the Energy Employees Occupational Illness Compensation Program Act in October 2004, effectively transferring responsibility for administration of contractor employee compensation from the DOE to the DOL, it also made provisions for creation of the Office of the Ombudsman for Part E. Congress directed that the Office of the Ombudsman be an independent office, located within the Department of Labor, and charged it with a three-fold mission:

- To conduct outreach to claimants and potential claimants;
- To make recommendations to the Secretary of Labor about where to locate resource centers for the acceptance and development of claims;
- To submit an Annual Report to Congress by February 15, setting forth the number and types of complaints, grievances and requests for assistance received by the Ombudsman, and an assessment of the most common difficulties encountered by claimants and potential claimants under Part E during the previous year.

See 42 U.S.C. § 7385s-15(e).

During 2006, the Office of the Ombudsman undertook outreach efforts to many claimants and potential claimants, principally focusing upon areas of the country to which we had not traveled during 2005. Throughout 2006, we also focused upon responding to the many letters, emails and telephone calls we received, requesting information or assistance, or expressing concerns about various aspects of the Part E compensation program. The concerns expressed to us ranged from issues with the statute itself, and/or the implementing regulations, policies and procedures, to general administrative issues.

In responding to complaints, grievances and requests for assistance, we regularly meet with and consult the staff of the Department of Labor's Division of Energy Employees

Occupational Illness Compensation (DEEOIC). These meetings and consultations are fruitful. During the course of 2007,<sup>1</sup> the Office of the Ombudsman expects to:

- Conduct additional outreach, traveling to meet with claimants and potential claimants to hear, firsthand, of their concerns and difficulties in obtaining Part E compensation.
- Respond to emails and telephone calls from claimants, potential claimants, and other members of the public.
- Continue our interactions with DEEOIC.

This report is a short summary of the comments that this Office has received as a result of the personal contacts, the emails, and the telephone conversations from claimants expressing their concerns about various aspects of the Part E compensation program.

I was appointed to the position of Ombudsman on December 10, 2006, after Donald G. Shalhoub, the first Ombudsman, accepted the position of Deputy Assistant Secretary for the Occupational Safety and Health Administration. At the time I was appointed, there were 68 days remaining before this report was due. The timely submission of this report is a testament to the efforts of Mr. Shalhoub, as well as to the professionalism and dedication of the staff of the Office of the Ombudsman. Thus, I want to take this opportunity to thank and commend Eileen McCarthy, John Lewis and Kim Holt for their service to this Office.

Sincerely,

Malcolm Nelson  
Ombudsman for Part E

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<sup>1</sup> Under Section 7385s-15(g) of EEOICPA, the statutory authority for the Office of the Ombudsman for Part E expires on October 28, 2007 and this Office will cease to exist.

## PREFACE

This report is Congressionally-mandated to contain "...complaints, grievances and requests for assistance." See 42 U.S.C. § 7385s-15(e)(2)(A). Consequently, this Office generally does not receive, and this report generally does not contain, comments that are complimentary of Part E program administration. However, to give this report balance, it is important to acknowledge a number of background facts surrounding the 2004 repeal of Part D and creation of Part E, and the ensuing transfer of Part D claims from DOE to DOL.

On the very first day that the transfer of responsibility from DOE to DOL for administering workers' compensation EEOICPA claims was effective, DOL opened its doors with a backlog of 25,000 new Part E (formerly Part D) claims, inherited from DOE. As a result, DOL did not have the luxury of developing a measured, sustained expansion of its Part B infrastructure to handle this new program. In addition to these 25,000 old claims, DOL received 11,000 new Part E claims during the course of its first year administering the program; as of December 29, 2006, DOL had received a total of 58,943 Part E claims.

Under Part E, some survivor claims were clearly payable based on guidance provided in the statute. Realizing that many claimants had been waiting for as long as three years to receive compensation, the Program Agency began paying these claims even before the Part E implementing regulations were promulgated. This approach was commendable, particularly in view of the fact that Congress did not expect the Program Agency to begin making payments until regulations were issued (the Program Agency was given 210 days to publish regulations).

In addition to paying certain claims, the Program Agency charted several other labor-intensive courses. Simultaneously with paying clear-cut survivor claims, it began developing an Interim Final Rule (IFR). The Agency prescribed the IFR on May 26, 2005, thus meeting the 210-day deadline set by Congress. Town Hall meetings were held in early 2005 to explain to claimants and potential claimants the differences between Parts D and E; a second round of meetings were held in the Spring, Summer and Fall of 2005, to review the Agency's newly promulgated regulations. On December 29, 2006, after review and consideration of 533 comments received on the IFR, the Agency prescribed the Final Rule, which will become effective on February 27, 2007.

DEEOIC also provides services through eleven resource centers, strategically located to assist potential claimants by supplying information about Part B and Part E of EEOICPA:

- California Resource Center (Livermore, California)
- Denver Resource Center (Westminster, Colorado)
- Espanola Resource Center (Espanola, New Mexico)
- Hanford Resource Center (Richland, Washington)
- Idaho Falls Resource Center (Idaho Falls, Idaho)

- Las Vegas Resource Center (Las Vegas, Nevada)
- New York Resource Center (Amherst, New York)
- Oak Ridge Resource Center (Oak Ridge, Tennessee)
- Paducah Resource Center (Paducah, Kentucky)
- Portsmouth Resource Center (Portsmouth, Ohio)
- Savannah River Resource Center (North Augusta, South Carolina)

DEEOIC's resource centers are located in the general vicinity of those nuclear weapons facilities which they anticipated would produce the highest numbers of claims. They also made an effort to fill resource center management and staff positions with former managers and personnel from contractors for these same nuclear facilities. As a result, resource center staff often have a pre-existing personal or professional relationship with claimants they serve or, at a minimum, an institutional knowledge of the facilities, which helps them to provide assistance.

The resource centers respond to questions about the process for applying for EEOICPA benefits; assist claimants with locating medical and work records and with medical payment reimbursement issues; conduct initial employment verification; take occupational histories; supply claimants with application forms; and provide assistance to claimants in completing these forms. The latter usually involves an intake interview with the claimant, often lasting more than two hours. Many claimants have made it clear to the Office of the Ombudsman that they have relied on the resource centers to help navigate the process of applying and being considered for compensation under Part E.

Also during 2006, DEEOIC developed a tool called the Site Exposure Matrices (SEM), which includes information from a variety of sources, such as DOE, former worker medical survey programs, and epidemiological studies about the particular toxic substances present at particular DOE facilities. DEEOIC personnel use the SEM in determining whether particular toxic substances were present at a DOE facility during a particular claimant's employment. DEEOIC also indicates that SEM currently includes information on twenty DOE and Atomic Weapons Employer sites, as well as 4,000 mines covered by the Radiation Exposure Compensation Act (RECA, whose claimants also may be entitled to Part E benefits). According to DEEOIC, lists of toxic substances at individual DOE facilities will be available to the public through the DOL Web Site shortly.

DEEOIC also issued procedural guidance for its claims examiners that provides significant help to claimants in establishing entitlement to Part E benefits: EEOICPA Bulletin No. 06-08 (April 2006), "Establishing causation for specific medical conditions under the Energy Employees Occupational Illness Compensation Program Act" (updated by EEOICPA Bulletin 06-13, issued in July 2006), identifies several illnesses for which the DEEOIC has developed criteria under which a claims examiner can find a causal link between a diagnosed medical condition and toxic substance exposure. For example, if the evidence establishes that a covered employee has laryngeal cancer, that they were exposed to asbestos for at least 250 aggregate work days in covered employment, and if a required 15-year latency period is met, the claims examiner can find that the employee's

cancer is causally related to their exposure to asbestos. The bulletin assists claimants in establishing causation under Part E by relieving them of the burden of producing medical evidence specifically establishing causation by work-related exposure.

Finally, in terms of production, as of December 29, 2006, the Program Agency had received 58,943 Part E claims and had issued 35,583 Part E recommended decisions (compared to 2,749 as of mid-December 2005); 28,594 of those recommended decisions had become final (compared to 2,380 as of mid-December 2005), including 8,861 claims decided in favor of the claimant (compared to 1,991 as of mid-December 2005). The result was payment of over \$534 million in Part E compensation by December 29, 2006 (compared to over \$254 million as of mid-December 2005). These challenges and accomplishments should be considered along with the issues outlined in this report.

## **EXECUTIVE SUMMARY**

### **Introduction**

While their claims are being processed, many claimants seek out this Office to inquire as to the status of their case -- about 13% of the claimants contacting our office seek assistance in this area. These inquiries are usually addressed, with the claimant's permission, by referral to DEEOIC.

In addition, this Office also receives inquiries from individuals who have EEOICPA Part B or RECA claims, but not EEOICPA Part E claims (as well as inquiries about other statutes administered by the Department of Labor or other agencies). Because our statutory authority directs us to provide assistance to Part E EEOICPA claimants, we cannot provide significant assistance to these other inquirers. We do, of course, try to ensure that they are referred to more appropriate sources of assistance; DEEOIC, the National Institute of Occupational Safety and Health (NIOSH) and the Department of Justice RECA staff have all been helpful in ensuring that the issues raised by RECA and Part B claimants are addressed. The creation of an Ombudsman by NIOSH, who will assist claimants in the dose reconstruction process and petitioners engaged in the Special Exposure Cohort (SEC) petitioning process, should be of great value to Part B claimants.

Concerns and inquiries from individuals can generally be categorized under one of three headings: (1) Statutory Issues; (2) Regulatory, Policy and Procedural Issues; and (3) Administrative or Miscellaneous Issues.

### **Statutory Issues**

***Limitations on Survivor Eligibility*** (52 comments): Under Part E, there are three general categories of eligible claimants: 1) covered living employees who have a covered illness; 2) surviving spouses of covered employees; and 3) surviving children of covered employees who, at the time of their parent's death, were younger than 18 years of age, younger than 23 years of age and full-time students, or any age and incapable of self-support. Survivors who meet these eligibility requirements qualify for benefits by showing that the employee would have been entitled to compensation under Section 7385s-4 for a covered illness and by showing that the employee's death was related to that covered illness. Claimants, primarily adult children who do not meet Part E's eligibility requirements, continue to contact the Office of the Ombudsman to express concern about the limitations imposed by the statute's eligibility requirements for survivors.

***Definition of a Covered DOE Facility*** (11 comments): Claimants contacted this Office to ask why the facility at which they (or, in the case of a survivor, the worker) worked is not a considered a covered DOE Facility for purposes of Part E. Atomic weapons employees and employees of beryllium vendors (both groups are covered by Part B, but

not Part E), for example, are not considered employees of DOE facilities. These workers have described their employment as characterized by exposure over time to the same hazards as those to which covered employees were exposed, and they question why others are entitled to compensation while they are not.

***The Statutory Provisions Governing Special Exposure Cohorts Result in Disparity*** (11 comments): Some covered workers were employed at a DOE facility with Special Exposure Cohort (SEC) status but do not qualify for benefits under Part B's SEC provisions because they either do not have one of the 22 statutorily-specified cancers to which the SEC provisions apply or they do not qualify for the SEC because they cannot establish the necessary employment history. Depending upon the specific findings supporting the SEC's creation, these workers may receive very limited dose reconstructions which, in turn, may yield very low probabilities of causation (PoC). By statute, a Part B award for cancer requires a PoC of 50% or higher; by regulation, DEEOIC requires a PoC of 50% or higher for radiogenic cancers under Part E. Thus, a low PoC may lead to denials of both Part B and Part E benefits.

***Qualified Claimant's Death Prior to Payment of Award May Nullify Claim or Reduce Compensation*** (6 comments): Under Part E, successful claimants must be living at the time their claim is paid in order to receive compensation. Consequently, if a worker claimant or surviving spouse claimant files a claim but then dies before it is finally decided in his or her favor, the award due to the worker or survivor generally cannot be paid -- a new claim must be filed by a survivor who is eligible for benefits in his or her own right under Part E. In addition, in the case of a worker claimant, a surviving spouse or child may be eligible for benefits in his or her own right under Part E, but the amount of benefits awarded might well be reduced -- the maximum payable to a worker claimant is \$250,000; the maximum payable to a survivor is \$175,000. In addition, the death of the surviving spouse claimant often means that no Part E compensation will be paid to the worker's family, because many children are not considered "covered children" and so are not eligible to receive Part E compensation.

### **Regulatory, Policy and Procedural Issues**

***Difficulties Retrieving Employment, Exposure and Medical Records*** (64 comments): Because the burden of proving a case ultimately rests with the claimant (see 20 C.F.R. § 30.111), many claimants -- particularly survivor claimants -- have the onus of attempting to obtain employment, exposure and medical records from many years ago, or of developing new medical evidence based upon missing or incomplete records. While DEEOIC provides assistance to claimants in attempting to locate relevant records, we continue to hear from some claimants who believe this assistance is not sufficient. In any case, in many instances the necessary records are not located (or may not exist) and thus some claimants ultimately cannot successfully prove their cases. In addition, claimants must specifically ask for copies of the evidence developed by DEEOIC. Thus, claimants who are not aware that they can request this evidence do not realize that some of the records they need are already in DEEOIC's file. Ultimately, if neither DEEOIC nor the

claimant locates the records necessary to document employment, exposure or medical conditions, it may be impossible for a claimant to receive benefits. Many claimants have expressed their frustration with trying -- often unsuccessfully -- to locate necessary records.

***Difficulties in Proving Causation Issues*** (65 comments): Many claimants believe that they face great difficulties in proving causation issues -- for example, proving that a particular disease is related to toxic exposures, or proving that a worker's death was related to a covered illness. The most significant of these complaints involved EEOICPA Bulletin No. 06-10, which establishes criteria for claims examiners deciding claims "where there is no known relationship between certain illnesses and occupational exposure to toxic substances under Part E of the EEOICPA." EEOICPA Bulletin No. 06-10 informs claims examiners that DEEOIC "has identified certain illnesses with no known causal link to toxic substances." The illnesses are listed in an attachment to the bulletin and the bulletin instructs claims examiners in deciding claims which involve the identified illnesses.

***Regulatory Restrictions on Challenges to Dose Reconstruction*** (16 comments): Under 20 C.F.R. § 30.318, the Final Adjudication Branch's (FAB) review of a claimant's dose reconstruction, which is prepared by NIOSH and used by DEEOIC in both Part B and E claims to calculate PoC, is limited to a review of the factual findings upon which NIOSH based its dose reconstruction. The FAB does not consider NIOSH's dose reconstruction "methodology." See 20 C.F.R. § 30.318(b). Claimants are confused both about the distinctions between "methodology" and "application" of methodology, and about whether, given the restrictions on the FAB's review, there are any available means for challenging NIOSH's dose reconstruction methodology as part of the process of deciding an individual's claim.

### **Administrative or Miscellaneous Issues**

***Concerns about Claimant Interactions with DEEOIC Personnel*** (62): Claimants have expressed a variety of concerns about their interactions with DEEOIC personnel, such as difficulties in reaching a claims examiner or receiving a return call; and changes in claims examiners or district offices.

***Difficulties in Comprehending Communications from DEEOIC*** (53 comments): In the course of developing a claimant's case and in deciding claims, DEEOIC personnel correspond and speak with claimants on a regular basis. After developing a claim, DEEOIC also issues a recommended decision from the claims examiner, followed by a final decision from the FAB. Some claimants have significant difficulties in understanding the correspondence and decisions they receive, or in understanding what is said to them orally, and have contacted this Office for assistance.

***The Processing of Claims Has Taken and Will Take Too Much Time*** (57 comments): The delay attendant to the processing of claims is still a common complaint from

EEOICPA claimants. Many of the claimants are elderly; some are dying. This fact, combined with their recognition that their claim for compensation may die with them because their adult children will not be eligible survivors, leads to significant frustration.

***Locating Experts*** (26 comments): Some claimants have encountered problems in locating physicians who are able and willing to provide “fully rationalized” medical opinions on causation issues (for both “covered” and “consequential” illnesses), impairment ratings, and wage loss, particularly in more rural, remote areas of the country. DEEOIC does offer claimants the option of having their own physician or a DEEOIC district medical consultant provide an impairment rating. DEEOIC also sometimes obtains expert opinions on causation and on wage loss issues. Some claimants, however, believe that DEEOIC’s consultants are not objective and many claimants simply prefer to have a physician of their own choosing provide the opinion.

***DEEOIC Personnel and Resource Centers Sometimes Provide or Use Incorrect or Incomplete Information*** (23 comments): Some individuals indicate that they have been provided with incorrect or incomplete information by a resource center or DEEOIC, or that DEEOIC has used incorrect information in correspondence or decisions.

***Medical Benefits Issues*** (38 comments): Claimant complaints about medical benefits included unexplained rejections of pharmacy bills which had previously been paid by the program; DEEOIC’s requests for documentation which claimants believe they or their physicians previously provided; and difficulties with ICD-9 codes that have resulted in some treatments for a covered illness being covered, but the treatment of other related effects of an illness not being covered.

***Difficulties in Obtaining Copies of Evidence from DEEOIC*** (13 comments): In general, claimants can obtain copies of evidence developed by DEEOIC and considered in their cases simply by asking DEEOIC, in writing, for a copy of the evidence they want to see or for a copy of their entire file if they are unsure about what to request. Many claimants have been successful in obtaining evidence via this request procedure. Some claimants, however, report that their requests have been overlooked or delayed, or that they have received incomplete copies. Some claimants also have commented that DEEOIC should send copies of evidence (as well as copies of correspondence sent by DEEOIC to experts about individual claims, particularly correspondence to claimants’ physicians) to the claimants routinely, rather than requiring claimants to specifically request it.

## **REPORT**

The Office of the Ombudsman for Part E of EEOICPA was established in 2004 by Section 7385s-15 of EEOICPA, as part of Public Law 108-375, the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005. See 42 U.S.C. § 7385s-15. Section 7385s-15(e) requires this Office to submit to Congress an Annual Report addressing the number and types of complaints, grievances, and requests for assistance received by the Ombudsman under Part E during the preceding year, as well as an assessment of the most common difficulties encountered by Part E claimants and potential claimants during the preceding year. Please consult the Appendix for the number and types of comments received by the Office of the Ombudsman; numbers and types of comments received are also listed in the section headings of this report.

### **I. Background: Legislative History of EEOICPA**

Before the enactment of Part E in October 2004, Public Law 106-398, the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, authorized Parts B and D of the Energy Employees Occupational Illness Compensation Program. DEEOIC began administering Part B on July 31, 2001, and from that date through December 29, 2006, has paid over 22,000 Part B claims, with payments totaling \$1.79 billion.

Part D was enacted in 2000, and was administered by DOE. Under Part D, Congress directed DOE to provide claimants with assistance in obtaining state workers' compensation. By the end of 2003, more than 23,000 applications had been filed with DOE for benefits. Yet, after more than two years had passed, the Government Accountability Office (GAO) found that less than 10% of submitted claims had been fully processed and more than half had not been considered at all (General Accounting Office, *Energy Employees Compensation: Even with Needed Improvements in Case Processing, Program Structure May Result in Inconsistent Benefit Outcomes*, Report GAO 04-515, May 28, 2004). In late 2004, Congress repealed Part D and enacted Public Law 108-375, which established a new federal compensation scheme for DOE contractor employees in Part E, to be administered by the Secretary of Labor.

Public Law 108-375 also directed the Secretary of Energy to provide all applicable records, files and other data to the Secretary of Labor and mandated that the Department of Labor publish regulations and begin administering the new Part E program within 210 days of enactment. See Public Law 108-375, § 3681(e). The Conference Report accompanying the 2004 amendments to EEOICPA urged the Secretary of Labor to appoint an Ombudsman within 120 days of enactment. See Conference Report 108-767 accompanying H. R. 4200. On February 24, 2005, Secretary of Labor Elaine L. Chao made the required appointment.

## **II. The Office of the Ombudsman and this Report**

The Office of the Ombudsman's first report, covering Calendar Year 2005, was filed with Congress on February 15, 2006. Over the last year, this Office has continued to receive numerous inquiries and comments about EEOICPA, and about the difficulties encountered by Part E claimants and potential claimants; we have spent many hours talking to and corresponding with claimants and their families about their concerns. The Office of the Ombudsman was invited by and joined DEEOIC representatives at a Town Hall meeting in Ames, Iowa in March 2006, and we also held our own Town Hall meetings, in conjunction with the Navaho Nation's Office of Navajo Uranium Workers (ONUW), in Shiprock, New Mexico and Kayenta, Arizona in April 2006. These meetings were attended by over 500 people. DEEOIC and resource center representatives, as well as a representative of the Department of Justice's RECA program, were present to assist claimants at our April meetings as well. During this trip, we also met with staff from ONUW and the Department of Health and Human Services (HHS) Indian Health Service.

The information presented below is based on conversations the Ombudsman staff had with those who attended the Town Hall meetings, as well as phone calls, faxes, and written and electronic correspondence, over the past year. This report covers January 1 through December 31, 2006. For purposes of presenting this information to Congress in accordance with Public Law 108-375, the inquiries or concerns addressed in the following pages have been divided into three sections:

- 1) Statutory Issues (Section III);
- 2) Regulatory, Policy and Procedural Issues (Section IV); and
- 3) Informal Administrative or Miscellaneous Issues (Section V).

The division of issues into these categories is somewhat arbitrary -- for example, in the case of some statutory issues, some claimants believe that other interpretations of the statute are possible; some policy and procedural issues also touch on administrative concerns. Similarly, it should be understood that individuals who contact this Office do not limit the expression of their concerns to those aspects of the Energy Employees Occupational Illness Compensation Program that can be resolved by DEEOIC. This is particularly true of the Statutory Issues presented in Section III below, but may also apply to some of the concerns outlined in Sections IV and V. DEEOIC has provided comments on some issues and we have included these comments under the heading "DEEOIC's Comments" at the end of the sections to which the comments apply.

### **III. Statutory Issues**

#### ***Summary***

Claimants have contacted the Office of the Ombudsman about:

- Limitations on Survivor Eligibility (52 comments)
- Definition of a Covered DOE Facility (11 comments)
- The Statutory Provisions Governing Special Exposure Cohorts Result in Disparity (11 comments)
- Qualified Claimant's Death Prior to Award May Nullify Claim or Reduce Compensation (6 comments)
- Miscellaneous Inquiries and Comments (11 comments)

#### **A. *Limitations on Survivor Eligibility* (52 comments)**

Under Part E, there are three general categories of eligible claimants: 1) covered living employees who have a covered illness; 2) surviving spouses of covered employees; and 3) surviving children of covered employees who, at the time of the parent's death, were younger than 18 years of age, younger than 23 years of age and full-time students, or any age and incapable of self-support. Survivors who meet the eligibility requirements may qualify for benefits by showing that the employee would have been entitled to compensation under Section 7385s-4 for a covered illness and by showing that "it is at least as likely as not that exposure to a toxic substance at a Department of Energy facility was a significant factor in aggravating, contributing to, or causing the death of such employee." Additional compensation may be available if the survivor can establish that the worker had wage loss due to the covered illness. Under Part E, and in contrast to Part B, adult children who survive a covered employee or the spouse generally are not eligible to receive the compensation to which their parent would have been entitled if they had lived. See 42 U.S.C. §§ 7385s-3(c) and (d).

Numerous claimants have contacted this Office to register their complaint over what they view as the inherent inequity of defining adult children out of eligibility for Part E compensation, including both adult children who have received Part B compensation and adult children who were not eligible for Part B compensation. Where the worker parent's illness was compensable under Part B, many adult children have (or will) receive Part B compensation: Part B covers silicosis (in certain workers present during the mining of tunnels at DOE facilities in Alaska and Nevada), chronic beryllium disease (CBD), and radiogenic cancers; Part E, however, potentially compensates far more illnesses, including asbestosis and non-radiological cancers. Thus, the adult children of a worker

who had chronic beryllium disease might receive \$150,000 under Part B because CBD is a covered illness, but nothing under Part E if they do not meet the definition of an eligible child under Part E; the adult children of a worker who died of asbestosis would receive nothing under Part B because the illness is not covered, and nothing under Part E if they do not meet the definition of an eligible child under Part E.

Adult children have written and spoken of the hardship they endured in caring for their dying parent and the personal and financial sacrifices they made to care for their terminally ill mother or father. These adult children believe that because Part E compensation would have been available to them had they been minors when the parent died, it is all the more appropriate for them to be eligible in light of the care they provided and the sacrifices they made. In one case, for example, the family contacting this Office indicated that one of the children had been in school intermittently until he was 24. He left school on several occasions in order to provide support for his parents. Had he remained continuously enrolled in school, he might have been eligible for Part E benefits.

That the statute makes adult children ineligible for Part E benefits does not mitigate the injustice they perceive. In a few cases, some have also explained that Part E's provisions have driven a wedge between family members, because the youngest child was a minor at the time of the parent's death and is thus eligible to receive Part E compensation, but the older children are not. Several adult children with historical knowledge of EEOICPA have observed that "adult children" were ineligible under Part B, until Congress changed the statute to make them eligible. They question why this same situation has been repeated but not rectified under Part E.

In addition to adult children who do not meet Part E's eligibility requirements, we also have received a few complaints from survivors who meet the statutory eligibility requirements but who are not entitled to benefits because the worker's death was unrelated to a covered illness. Under Section 7385s-3 of EEOICPA,<sup>1</sup> a survivor must show not only that they meet EEOICPA's eligibility requirements (see discussion above), but also that:

- The worker would have been entitled to compensation under Section 7385s-4 for a covered illness; and
- "it is at least as likely as not that exposure to a toxic substance at a Department of Energy facility was a significant factor in aggravating, contributing to, or causing the death of such employee."

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<sup>1</sup> There is one exception to the requirements of Section 7385s-3. Under Section 7385s-1(2)(B), when a worker dies after applying for Part E benefits but before compensation is paid, and if the worker's death "occurred from a cause other than the covered illness of the employee," the law permits the worker's survivor(s) to "elect to receive" the amount of Part E compensation that the worker would have received if the worker had not died before compensation was paid.

42 U.S.C. § 7385s-3(a)(1). Sometimes, survivor claimants are able meet the first requirement -- that the worker had a covered illness -- but they cannot show that the worker's death was related to the covered illness. For example, in one case, the survivor spouse claimant received RECA and Part B awards for her husband's pulmonary fibrosis and lung cancer. He died, however, in a 1994 car accident and the limited records available did not show that his death was related to his covered illness or to exposure to toxic substances. Survivors who contact this Office about this issue believe that Part E should compensate them for the illness the worker suffered during life.

**B. *Definition of a Covered DOE Facility*** (11 comments)

Part E of EEOICPA provides benefits to “covered DOE contractor employees” and their eligible survivors. See 42 U.S.C. § 7385s-1. As we explain in more detail below, an employee must have worked at a “covered DOE facility” in order to be considered a “covered DOE contractor employee.” During 2006, eleven individuals contacted this Office to complain that the definition of a covered DOE facility excludes certain workers (or their survivors) from Part E compensation.

Section 7385s(1) of EEOICPA defines “covered DOE contractor employee” as including any DOE contractor employee with a covered illness. See 42 U.S.C. § 7385s(1). “Department of Energy contractor employee” is defined in Part B of EEOICPA:

The term “Department of Energy contractor employee” means any of the following:

(A) An individual who is or was in residence at a Department of Energy facility as a researcher for one or more periods aggregating at least 24 months.

(B) An individual who is or was employed at a Department of Energy facility by—

(i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or

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

42 U.S.C. § 7384l(11). Claimants have raised a variety of concerns about this definition and its application to their cases. For most of the claimants who contact us about this issue, the question raised is whether they worked “at a Department of Energy facility,” as required by subsection (B) above. This term is defined by EEOICPA as well:

The term “Department of Energy facility” means any building, structure, or premise, including the grounds upon which such building, structure, or premise is located—

(A) in which operations are, or have been, conducted by, or on behalf of, the Department of Energy (except for buildings, structures, premises, grounds, or operations covered by Executive Order No. 12344, dated February 1, 1982 (42 U.S.C. 7158 note), pertaining to the Naval Nuclear Propulsion Program); and

(B) with regard to which the Department of Energy has or had—

(i) a proprietary interest; or

(ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services.

See 42 U.S.C. § 7384l(12). DOE initially was responsible for identifying the various facilities covered by EEOICPA as “atomic weapons employers” (AWEs), “beryllium vendors,” and/or “DOE facilities” and published a “List of Covered Facilities,” most recently in August 2004. See 69 Fed. Reg. 51825-51831. Following the enactment of Part E, DEEOIC took over the responsibility of periodically reviewing and updating the listing of DOE facilities. See 20 C.F.R. § 30.5(x)(2). Part E does not cover employees of AWEs or beryllium vendors (unless they can establish additional employment at a covered DOE or RECA facility).

In the specific cases identified to us, DEEOIC initially indicated to the claimants that they do not qualify for Part E benefits because the facilities at which they worked are not identified as DOE facilities on the DOE List of Covered Facilities. Three of the claimants who contacted us asked DEEOIC to change the classification of the facilities involved. In two cases, DEEOIC reviewed evidence obtained from the claimants and from DOE and concluded that the facilities involved did not meet the Part E statutory definition. In both cases, DEEOIC found that while operations might have been conducted on behalf of DOE at the facility (as required by subsection (A) of the definition), the available evidence did not show that DOE had a “proprietary interest” in the “building, structure or premise” of the facility (see subsection (B)(1)) or that the employer was providing the types of services outlined in subsection (B)(2). The third case is still under consideration.

Most of the claimants who express concern about this issue believe the statutory definition should be broadened to include other workers who were exposed to the same hazards as those to which covered Part E employees were exposed, and they question why others are entitled to compensation while they are not.

**C. *The Statutory Provisions Governing Special Exposure Cohorts Result in Disparity* (11 comments)**

Under Part B of EEOICPA, living workers with cancer (or the survivors of workers who had cancer) are entitled to benefits if the worker:

- has or had one of the 22 “specified cancers,”<sup>2</sup> was a member of a Special Exposure Cohort, and meets certain other requirements set by the law; or
- has or had any cancer (whether “specified” or not) and the results of the dose reconstruction results in a probability of causation of fifty percent or higher.

42 U.S.C. §§ 7384l(9), 7384n(b). Under Part E, an award under Part B for a worker’s cancer -- whether based upon SEC membership or a qualifying probability of causation -- is treated as a determination that the worker’s cancer was contracted through exposure at a DOE covered facility. See 42 U.S.C. § 7385s-4(a). In addition, under DEEOIC’s regulations, a 50% or higher probability of causation is required for an award of benefits for a radiogenic cancer under Part E. See 20 C.F.R. § 30.213. Consequently, SEC and dose reconstruction determinations are important not only to Part B claimants, but to Part E claimants as well.

Four SECs were created by Section 7384l(14) of EEOICPA (42 U.S.C. § 7384l(14)); additional SECs have been created by HHS under Section 7384q of EEOICPA, which authorizes HHS to create additional SECs when HHS determines that:

- “it is not feasible to estimate with sufficient accuracy the radiation dose that the class received”; and
- “there is a reasonable likelihood that such radiation dose may have endangered the health of members of the class.”

See 42 U.S.C. § 7384q(b). The Office of the Ombudsman has been contacted by several claimants who face difficulty qualifying for benefits because the employee worked at a DOE facility with SEC status, but the employee either does not have one of the 22 statutorily-specified cancers to which the SEC provisions apply, or cannot establish the necessary employment history.

Depending upon the specific findings supporting the SEC’s creation, the dose reconstructions for these claims may be very limited and may lead to a low PoC and denial of benefits. This happens because SEC designations are based in part upon HHS’ finding that “it is not feasible to estimate with sufficient accuracy the radiation dose that the class received.” 42 U.S.C. § 7384q(b)(1). Once HHS has concluded that it cannot accurately estimate radiation doses, a full dose reconstruction cannot be completed.

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<sup>2</sup> “Specified cancer” is defined in Section 7384l(17) to include cancers specified under Section 4(b)(2) of the Radiation Exposure Compensation Act; bone cancer; renal cancer; and certain forms of leukemia.

NIOSH does attempt to perform partial dose reconstructions when possible (based, for example, upon exposure records from occupational health x-rays), but these partial reconstructions almost inevitably yield very low PoC results -- well under the 50% PoC required under Part B. Because the same dose reconstruction is used under Part E to determine whether the cancer is related to radiation exposure, the same statutory provisions lead to a denial under Part E, unless the claimant can show that the cancer is related to other (non-radiological) toxic exposures, or that they have another illness for which dose reconstruction is not required under Part E.

**D. *Qualified Claimant's Death Prior to Award May Nullify Claim or Reduce Compensation*** (6 comments)

Introduction

Under Part E, successful claimants must be living at the time their claim is paid in order to receive their payment of compensation. Consequently, if a worker claimant or surviving spouse claimant dies before the claim is fully decided and/or payment is made, the award due to the worker or survivor cannot be paid. Instead, a new claim must be filed by a survivor who is eligible for benefits in his or her own right under Part E. If there is no such survivor, no award can be made and the claim is nullified. Even if there is an eligible survivor, the death of the covered worker may result in a reduction of compensation.<sup>3</sup> Many claimants have been waiting for long periods of time to be awarded what once was Part D and is now Part E compensation. In some cases, the claimant's death has occurred shortly before payment was to be issued, heightening the frustrations felt by affected claimants.

Effect of Worker's Death on Contractor Employee's Claim

Section 7385s-1 of EEOICPA (42 U.S.C. § 7385s-1) outlines the compensation available to individuals under Part E. It provides that a "DOE contractor employee" (a living worker) is eligible for compensation under Section 7385s-2 (42 U.S.C. § 7385s-2), which provides compensation for impairment and/or wage loss suffered by the worker. The maximum compensation available to living workers is \$250,000. See 42 U.S.C. § 7385s-12. Section 7385s-1 also states that, "after the death" of a worker, contractor employee compensation "shall not be paid"; instead, section 7385s-1 directs, "the survivor of that employee shall receive contractor employee compensation under this part in accordance with section 7385s-3."<sup>4</sup> Section 7385s-3 provides a minimum survivor award (if the

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<sup>3</sup> In some cases, a survivor's compensation might exceed the compensation that would have been payable to the covered worker. This might happen, for example, if the worker's wage loss and impairment rating for the covered illness led to a compensation of less than \$125,000, the minimum available to a survivor.

<sup>4</sup> There is one exception to this provision: when a worker dies after s/he applied for Part E benefits but before compensation could be paid, and if the worker's death "occurred from a cause other than the covered illness of the employee," the law permits the worker's survivor(s) to "elect to receive" the amount of Part E compensation that the worker would have received if the worker had not died before

survivor's claim is successful) of \$125,000 and a maximum of \$175,000, depending upon the extent of the worker's wage loss while s/he was alive.<sup>5</sup>

Consequently, when a worker dies after filing a claim but before receiving payment, the worker's claim is nullified. A surviving spouse might be able to apply for benefits in his or her own right under Part E, but the potential benefits are reduced -- the maximum payable to a worker claimant is \$250,000; the maximum payable to a survivor is \$175,000. During 2006, the Office of the Ombudsman received two inquiries involving terminally ill workers who had died shortly before their claims were to be awarded.<sup>6</sup> In one case, the worker had lung cancer and had received a final decision awarding the maximum \$250,000, but he died before the payment could be made. Because of Section 7385s-1's wording, DEEOIC concluded that it could not make the \$250,000 payment to his widow. She then had to file her own claim under Section 7385s-3. Although DEEOIC concluded that her husband's death was related to his cancer, she was eligible for only \$125,000 rather than the \$250,000 he had been scheduled to receive.

#### Effect of Surviving Spouse's Death on Survivor's Claim

Section 7385s-3 (42 U.S.C. § 7385s-3) establishes the compensation due to survivors under Part E and provides between \$125,000 and \$175,000 (depending upon qualifying amounts of wage loss during the worker's life) to successful survivor claimants. Subsection (c) outlines when and to whom compensation is to be paid:

(c) DETERMINATION AND ALLOCATION OF SHARES.—The amount under subsection (a) shall be paid only as follows:

- (1) If a covered spouse is *alive at the time of payment*, such payment shall be made to such surviving spouse.
- (2) If there is no covered spouse described in paragraph (1), such payment shall be made in equal shares to all covered children who are *alive at the time of payment*.
- (3) Notwithstanding the other provisions of this subsection, if there is—

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compensation was paid. This provision has the potential effect of leading to a higher award of compensation to the survivor of a worker whose death is unrelated to a covered illness than is available to the survivor of a worker whose death is related to a covered illness: a survivor who can elect to receive the benefits due a worker would be eligible for up to \$250,000 in compensation.

<sup>5</sup> Part E limits total compensation payable under that Part to all claimants based upon exposure of a single covered worker to \$250,000. See 42 U.S.C. § 7385s-12.

<sup>6</sup> DEEOIC does attempt to give priority to development and (when appropriate) award of the claims of terminally ill claimants. At least in the two cases brought to our attention, however, they were not successful.

(A) a covered spouse described in paragraph (1); and

(B) at least one covered child of the employee who is *living at the time of payment* and who is not a recognized natural child or adopted child of such covered spouse,

then half of such payment shall be made to such covered spouse, and the other half of such payment shall be made in equal shares to each covered child of the employee who is *living at the time of payment*.

[emphasis added.] See also 20 C.F.R. § 30.101.

Because subsection (c) requires that survivors receiving compensation be “alive [or ‘living’] at the time of payment,” the death of a survivor after a claim is filed -- but before actual payment of compensation -- nullifies that survivor’s claim. Surviving children who qualify under Part E’s definition of “covered child” would potentially be eligible for the same amount of compensation as a deceased spouse, but many children (as discussed in Section IIIA above) are not “covered children” and so are not entitled to receive Part E compensation. The death of the surviving spouse claimant often means that no Part E compensation will be paid to the families in these cases.

Adult children whose surviving parent dies before payment can be made are shocked to discover that the approved compensation cannot be paid to them or to the parent’s estate. Although it appears to be a rare occurrence based upon the information this Office receives, this statutory provision sometimes leads DEEOIC to determine that there are no eligible survivors to whom compensation can be paid. Families of deceased claimants have complained that the long delay in establishing the compensation program, deciding cases, and paying benefits has caused the government to deny them compensation to which they feel entitled.

**E. *Miscellaneous Inquiries and Comments* (11 comments):**

During 2006, the Office of the Ombudsman also received the following miscellaneous inquiries and comments about statutory issues:

- Adequacy of Available Part E Benefits (6 comments): Part E sets a statutory maximum of \$250,000 for lump sum compensation paid “for each individual whose illness or death serves as the basis for compensation or benefits” under Part E. See 42 U.S.C. § 7385s-12. Covered employees can receive lump sum compensation of up to \$250,000 (see 42 U.S.C. §§ 7385s-2(a)); eligible survivors are eligible to receive lump-sum compensation of up to \$175,000. See 42 U.S.C. § 7385s-3. Medical benefits also are available under Part E to living worker claimants, and are not subject to the \$250,000 statutory cap. See 42 U.S.C. §§ 7384s, 7384t, 7385s-8. Medical benefits are, however, retroactive only to the

date the worker filed the claim. Both living worker and survivor claimants have expressed the view that Part E benefits will not fully compensate them for their loss. Living worker claimants with many years of wage loss state that the \$250,000 cap on Part E benefits will not fully compensate them for their total years of wage loss (and will not compensate them at all for their impairment) and that the available medical benefits do not compensate them for expenses incurred before they filed a claim. Survivor claimants state that the \$175,000 maximum does not fully compensate them for the wage loss the family suffered during the worker's life, medical bills during the worker's life which were not covered by health insurance, and other expenses.

- Legal Representative Fees (3 comments): Under EEOICPA, legal representative fees are paid by the claimant and are limited to two to ten percent of the amount of a lump-sum award. See 42 U.S.C. §§ 7385g, 7385s-9. Some claimants have commented that they believe legal representative fees should be paid by the government, rather than by the claimant. An attorney has noted that the statute's provision for limited contingent fees discourages representation in cases where the claimant's impairment and wage-loss may result in small lump-sum benefits.
- Part D Transfer (2 comments): Two claimants contacted us to discuss the effects of the repeal of Part D on their cases. One claimant stated that she had been told orally by DOE that there would be a positive physicians' panel finding on the covered illness. Part D was repealed, though, before the panel issued its finding and the claimant has been struggling to reprove her case under Part E. The claimant further complained that she had paid attorney fees in support of her Part D claim and that the evidence compiled by the attorney has been rejected by DEEOIC.<sup>7</sup>

#### **IV. Regulatory, Policy and Procedural Issues**

*Preliminary Note: DEEOIC published a Final Rule on December 29, 2006. The Rule takes effect on February 27, 2007. Individuals who contacted us with concerns about DEEOIC's regulations during 2006 were expressing concerns about the Interim Final Rule published on June 8, 2005 and effective until February 27, 2007, when the Final Rule takes effect. Therefore, specific references to the Code of Federal Regulations in this section are references to the IFR, unless otherwise noted. The Office of the Ombudsman began receiving concerns about the Final Rule shortly after its publication on December 29, 2006; for the most part, the concerns reiterate the comments received on the IFR.*

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<sup>7</sup> Unlike Parts B and E, Part D did not place limits on attorney fees.

## *Summary*

With respect to concerns about Part E Regulations, Policies and Procedures, individuals have contacted the Office of the Ombudsman in connection with:

- Difficulties Retrieving Employment, Exposure and Medical Records (64 comments)
- Difficulties in Proving Causation Issues (65 comments)
- Regulatory Restrictions on Challenges to Dose Reconstruction (16 comments)
- Miscellaneous Inquiries and Comments (15 comments)

### **A. *Difficulties Retrieving Employment, Exposure and Medical Records* (64 comments)**

#### Introduction

Under DEEOIC's regulations, claimants in general ultimately bear the burden of proving their claims by a preponderance of the evidence. Claimants also are responsible for providing DEEOIC with "all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits." See 20 C.F.R. § 30.111(a). Employment, exposure and medical records are among the types of evidence that claimants may be required to submit. As was true last year, claimants have continued to tell the Office of the Ombudsman about the difficulties they face in locating acceptable employment, exposure and medical evidence in support of their claims.<sup>8</sup>

DEEOIC does provide assistance to claimants in locating relevant records, but there are limits to this assistance. In addition, sometimes the necessary records simply do not exist (sometimes because they were not maintained or have since been discarded) and claimants ultimately cannot successfully prove their cases. Many former workers and their families question how, if the government and/or their employers do not have these records, anyone could expect the claimants to have the necessary records. One further complicating factor is that many claimants who contact us are not aware that they can obtain copies of the evidence in their case. (Claimants have to make a specific request to DEEOIC to obtain evidence in their claim files.) This can result in duplication of effort,

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<sup>8</sup> Some (4) of the complaints received by this Office during 2006 came in response to a letter DEEOIC mailed early in the year to numerous claimants. The letter asked the claimants to produce a doctor's narrative report outlining the claimant's exposure history (including type of toxic substance, and frequency and duration of exposure during covered employment) and then linking that history to the claimant's illness. The letter provided thirty days for claimants to respond. DEEOIC's National Office later indicated that the letters had been issued in error and that the claims examiners should be undertaking additional development of employment and exposure evidence before asking claimants for evidence; issuance of the letters was stopped at that point.

with the claimant locating and submitting the same records DEEOIC has already obtained, or making a fruitless search for records in places where DEEOIC has already searched and found nothing -- a frustration for claimants who are at a loss to figure out where to turn next. On the other hand, in some cases claimants are able to find evidence DEEOIC has not obtained and which is helpful to their case. For example, one survivor claimant found helpful employment records through a Freedom of Information Act request made to DOE. The discussion below outlines the relevance of these records and the types of problems claimants encounter in trying to locate records.

### Employment Records

In order to establish that they worked at a DOE facility and the duration of their employment, claimants may be required to submit documentary or other evidence (for example, social security records or co-worker affidavits) establishing their (or, in the case of survivors, the worker's) employment. Claimants may also be required to submit evidence that they worked in particular buildings or other locations at the site. Finding this evidence -- particularly evidence about a worker's presence in specific buildings on a site -- can be extremely difficult, particularly for survivor claimants who are attempting to reconstruct employment records for a spouse or parent who died long ago and/or whose job might have required travel to a variety of different sites.

### Exposure Records

Exposure records may help to establish that the worker has or had a Part E "covered illness" (defined by Section 7385s(2) of Part E as "an illness or death resulting from exposure to a toxic substance") by establishing that a worker was exposed to a particular toxic substance which was a "significant factor in aggravating, contributing to or causing" the worker's illness or death. See 42 U.S.C. §§ 7385s-3(a)(1)(B), 7385s-4(c)(A). In addition, under DEEOIC's regulations, a 50% or higher probability of causation is required for an award of benefits for a radiogenic cancer under Part E. See 20 C.F.R. § 30.213. Consequently, SEC and dose reconstruction determinations -- both of which depend to some degree on exposure records -- are important not only to Part B claimants, but to Part E claimants as well.

Some claimants simply never knew the substances to which they (or, in the case of a survivor, the worker) were exposed. Other claimants may have some information about some of the toxic substances present at their worksite, but not all; rarely can a claimant find documentary evidence of exposure, if that is required. Claimants have pointed out that many of the relevant facilities are no longer operational, and in some cases, have not been open for decades. If exposure records were kept at all, claimants often find that they were not well-maintained or preserved. Some claimants also maintain that records were sometimes destroyed. Even when records are available, there may be significant delays in obtaining them.

Cases in which a radiogenic cancer has been claimed are referred to NIOSH for a dose reconstruction of the worker's exposure to radiation. Both DEEOIC and NIOSH collect employment and radiation exposure information from DOE (and other sources); however, claimants continue to express grave reservations over whether it will be possible to establish a 50% or higher probability of causation. Moreover, some claimants regard the dose reconstruction process as significantly flawed, because they question the reliability of the records used in the process.

For cancers that are potentially related to both radiological and non-radiological exposures (or related solely to non-radiological exposures), DEEOIC's regulation indicates that a successful claim is possible even with a PoC of lower than 50%; DEEOIC will consider the potential relationship between the cancer and non-radiological toxic exposures. DEEOIC approaches illnesses other than cancer in the same way -- both non-radiological and radiological exposures are considered as potential significant factors in aggravating, contributing to, or causing the illness. See 20 C.F.R. §§ 30.213(c), 30.230. Information about a particular worker's exposure to a particular toxic substance can be critical to making these determinations.

Claimants do receive some assistance from DEEOIC in developing this evidence. Some claimants, for example, indicate that resource center staff have helped to research information. More significantly, as explained in the Preface, DEEOIC has developed Site Exposure Matrices covering DOE facilities; DEEOIC also has indicated that it continues to expand and update SEM. The SEM attempts to identify information concerning which toxic substances were present at particular locations at specific DOE facilities. DEEOIC's claims examiners use this information to determine whether particular claimants were exposed to particular toxic substances. The SEM is not available to the public at present, but the Preamble to DEEOIC's Final Rule states, "The matrices now being developed will be posted on our Web site and will be available to claimants and their representatives" (71 Fed. Reg. 78519, 78521). In addition, DEEOIC's claims examiners generally incorporate SEM information developed in a claimant's case into the claimant's file. Many of the claimants who contact our office are unaware that they may be able to obtain SEM information from the Department; in response, we suggest that, as a first step, they request a copy of their file.

In addition, some claimants have expressed doubt about whether the information in SEM is accurate and complete. Because SEM is not yet publicly available, claimants who question its accuracy cannot determine whether their doubts are valid. The same doubts hold true more generally: some claimants who have contacted the Office of the Ombudsman have questioned the credibility of information collected from covered facilities. In some cases, this is due to reservations they harbor about the truthfulness or conscientiousness of managers and supervisors at facilities who were entrusted with collecting and maintaining exposure information.

Even where SEM information is available to the claimant and is accurate, some claimants face difficulty in gathering exposure evidence because they did not regularly work in a single location. For example, one claimant drove a bus to transport workers from one

destination to another at a covered facility at which mining, construction, and excavation, among other activities, were conducted. The claimant was rarely in one building or location for any substantial length of time. He believes that, instead, the contaminants in the air that he breathed changed as frequently as the dust and particles carried by workers onto his bus. This claimant believes that he was exposed to almost all the chemicals known to be present at the covered facility because he transported workers from all areas of the covered facility while wearing no breathing protection of his own. He does not know for certain, however, what he was exposed to, because nobody has told him.

***DEEOIC Comments:** DEEOIC states that the posting of SEM information referenced in the Preamble to the Final Rule will occur shortly.*

### Medical and Other Records

Medical records documenting that a worker was diagnosed with a particular illness are critical to both living worker and survivor claims, which depend upon evidence of an illness related to exposure to toxic substances. Medical and other records (marriage or birth certificates, for example) also can be crucial to establishing other elements of a survivor's eligibility for benefits under Part E. For example, Section 7385s-3(d) of EEOICPA states that a child survivor who, "as of the employee's death...had been incapable of self-support" is eligible for survivor's benefits. See 42 U.S.C. § 7385s-3(d). In order to meet this requirement, a child survivor claimant may need both the parent's medical records showing cause of death, as well as medical records showing their own physical or mental condition at the time of the parent's death.

Claimants tell us that they have difficulty obtaining medical records, due to physicians retiring or dying, or clinics and hospitals moving or closing. This is a particularly pressing problem for survivor claimants, because the worker's death sometimes occurred many years ago and the relevant medical records either have been destroyed or are not helpful because the physicians involved often did not consider the possible contributions of toxic substances to the illnesses they diagnosed. In cases in which the worker had yearly medical screenings at work, claimants report that the results of those screenings are sometimes not available, or claimants are distrustful of the results.

## **B. *Difficulties in Proving Causation* (65 comments)**

### Introduction

During 2006, claimants continued to complain about the difficulties they face in proving causation issues -- for example, proving that a particular disease is related to toxic exposures, or proving that a worker's death was related to toxic exposures. Many of these complaints involved EEOICPA Bulletin No. 06-10 (June 6, 2006, updated by

Bulletin No. 06-14 (August 1, 2006)),<sup>9</sup> which is titled, “Illnesses that presently have no known causal link to toxic substances,” and establishes criteria for handling claims “where there is no known relationship between certain illnesses and occupational exposure to toxic substances under Part E of the EEOICPA.” Bulletin No. 06-10 informs claims examiners that DEEOIC “has identified certain illnesses with no known causal link to toxic substances.” The illnesses (over 75 medical conditions as of the end of 2006) are listed in an attachment to the bulletin.<sup>10</sup> This section of the report discusses Bulletin No. 06-10 first, followed by a short discussion of other issues which have been raised.

## Bulletin No. 06-10

### *Introduction*

Bulletin No. 06-10 instructs claims examiners on how to decide a case in which a covered worker has been determined to have one of those conditions that DEEOIC considers to have no known link to a toxic substance. The claims examiner is directed to send a letter to the claimant stating this finding and telling the claimant that “it is necessary to submit factual or medical documentation to show a relationship between the claimed medical condition(s) and exposure to a toxic substance” within thirty days.<sup>11</sup>

If a claimant responds to DEEOIC’s letter and submits evidence, Bulletin No. 06-10 instructs DEEOIC’s claims examiners to first determine whether the claimant has submitted evidence that provides a “compelling or probative basis for DEEOIC specialist review.” “Compelling or probative” evidence is not defined, but general guidance is provided: “human epidemiological studies or other scientific findings suggesting a causal relationship” or a “well-rationalized opinion from a board-certified physician or other specialist attesting to” a causal relationship between a medical condition and a toxic substance would warrant referral to a DEEOIC specialist. On the other hand,

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<sup>9</sup> Bulletins No. 06-10 and No. 06-14 are available on DEEOIC’s Web Site at: [http://www.dol.gov/esa/regs/compliance/owcp/eoicp/PolicyandProcedures/finalBulletinshtml\\_06.htm](http://www.dol.gov/esa/regs/compliance/owcp/eoicp/PolicyandProcedures/finalBulletinshtml_06.htm) .

<sup>10</sup> As discussed in the Preface, during 2006, DEEOIC also issued Bulletin No. 06-08 (updated by Bulletin No. 06-13), which established criteria for the presumption of a causal relationship between particular toxic substances and specific medical conditions. This bulletin assists some claimants in proving causation of the illnesses identified in the bulletin. The Office of the Ombudsman has received several inquiries about Bulletin No. 06-08, generally relating to which conditions are covered by the bulletin and the criteria for applying the bulletin’s claimant-favorable presumptions. These bulletins also are available on the DEEOIC Web Site provided in footnote 9.

<sup>11</sup> There is one exception to this general rule: certain forms of cancer appear on the “no known causal link” list, but DEEOIC’s letter does inform the claimant it will “process the claim for a determination of causation based on radiation exposure” by determining whether the claimant is a member of an SEC with a specified cancer or via NIOSH dose reconstruction and PoC calculation. If neither of these methods establishes that the cancer is related to radiation, the letter tells the claimant that it will be necessary to submit evidence of a causal link between the cancer and biological and/or chemical exposure. See Bulletin No. 06-10, Attachment 2.

“unsubstantiated statements of causal relationship; speculative or equivocal medical/specialist opinions; scientific literature or other documents that do not reference the illness under evaluation; and general news articles from print or the Internet” generally would not warrant referral. If the claimant’s evidence is not “compelling or probative,” the bulletin generally instructs the claims examiner to conclude that “exposure to a toxic exposure was not as least as likely as not a significant factor in aggravating, contributing to or causing the diagnosed illness” and to deny the claim for the condition involved (unless there are other reasons for delaying a decision, such as a pending dose reconstruction for a cancer).

Bulletin No. 06-10 has led to many inquiries and/or complaints from claimants, their legal representatives, medical practitioners, and Congressional staff, about the difficulties claimants and their experts face both in understanding the bulletin and in understanding what claimants need to do in order to overcome the bulletin’s “no known causal link” finding.

#### *Claimants Find Bulletin No. 06-10’s Language Confusing or Inconsistent*

One concern expressed by claimants and other individuals is about the meaning of some of the language in Bulletin No. 06-10 (as well as some of DEEOIC’s correspondence), particularly the meaning of the terms “toxic substances” and “no known causal link.”

#### “Toxic Substances”

Under DEEOIC’s regulations, a “toxic substance” includes any radioactive, chemical or biological substance that has the potential to cause illness or death. See 20 C.F.R. § 30.5(ii). The title of the bulletin -- “Illnesses that presently have no known causal link to toxic substances” -- implies that it applies to all toxic radioactive, chemical and biological substances. On the other hand, Attachment 1 to the bulletin, which identifies the particular illnesses to which the bulletin applies, is called, “Medical Conditions with No Readily Known Associations to Occupational Chemical Exposures.” Unlike the title of the bulletin itself, the attachment’s title appears to confine the bulletin’s application to chemical substances, excluding radioactive and biological toxic substances. The term “toxic substances” also is used in other places in both the bulletin and in DEEOIC’s correspondence with claimants. However, at other times the bulletin and letter refer only to “biological” and/or “chemical” substances, excluding radioactive substances. Although these distinctions are sometimes explained, explanations are missing at other points and this leads to confusion for some individuals.

An example may be helpful in understanding the questions claimants raise about the language in the bulletin and DEEOIC’s associated correspondence: A widow filed Part B and Part E claims based upon her deceased husband’s pancreatic cancer. NIOSH had performed a dose reconstruction, but the PoC calculated by DOL was 44.01%, which is below the 50% or higher PoC required by Part B of EEOICPA and by DEEOIC’s regulations for Part E. Pancreatic cancer is one of the illnesses identified by Bulletin No.

06-10's attachment as having "no readily known associations to occupational chemical exposures." She received a letter from DEEOIC stating, "Initial assessment of your survivor's claim for pancreatic cancer indicates that the claimed condition of pancreatic cancer is not scientifically recognized as having any known link to exposure to a toxic substance. There is also no scientific link between exposure to radiation and pancreatic cancer."

When she called our office, the claimant asked for help in understanding the letter's overall meaning, but she was particularly perplexed about why she was being told that there is no scientific link between exposure to radiation and pancreatic cancer, when EEOICPA identifies pancreatic cancer as a specified radiogenic cancer and NIOSH had performed a dose reconstruction for the illness.

***DEEOIC Comments:** DEEOIC states that the letter discussed above was incorrect and, in view of the fact that EEOICPA Bulletin No. 06-10 has apparently caused confusion, DEEOIC will clarify the bulletin.*

#### "No Known Causal Link"

The use of the word "known" in Bulletin No. 06-10 ("no known causal link"), the attachment identifying specific conditions ("no readily known associations"), or DEEOIC's letter ("no known relationship to toxic substance exposure") also has caused confusion for some individuals. The bulletin does not define "known," but it appears that it means that the available scientific evidence establishes some level of certainty that there is a causal relationship between a toxic/chemical substance and a condition identified on the bulletin. Absent that level of certainty, DEEOIC finds "no known causal link" between toxic exposures and particular conditions.

Some individuals who read the bulletin and/or DEEOIC's correspondence, however, interpret "known" to mean that DEEOIC was unable to find any evidence at all, not that DEEOIC is aware that some evidence exists, but does not believe it is strong enough to support a causation finding in the claimant's favor. Consequently, these individuals respond to DEEOIC's letter -- which simply asks for "factual or medical documentation to show a relationship between the claimed medical condition(s) and exposure to a toxic substance" -- by submitting medical articles or other scientific evidence, physician opinions, information from websites, or other information they have located. Sometimes the evidence submitted by claimants is referred to DEEOIC's specialists for review, but to date we have not been made aware of any success in convincing DEEOIC to make a positive causation finding in an individual case and the list of conditions subject to the bulletin remains unchanged.

***DEEOIC Comments:** DEEOIC states that it will review EEOICPA Bulletin No. 06-10 to clarify that its purpose is to guide claims examiners and to expedite consideration of cases and that DEEOIC will review and adjudicate any evidence supplied by claimants of*

*such a link in an objective manner, referring such evidence to outside experts as necessary and modifying the bulletin should such a link be shown.*

*Bulletin No. 06-10 does not specifically identify the evidence DEEOIC considered or explain how DEEOIC reached conclusions about particular illnesses*

Bulletin No. 06-10 indicates that it was developed based upon the research of DEEOIC's own specialists into "authoritative scientific publications, medical literature, and occupational exposure records for information to identify medical illnesses for which current scientific knowledge does not show a relationship or an etiology due to biological or chemical exposure." We have received complaints, however, that the bulletin does not identify by name the specific scientific publications, medical literature or occupational exposure records searched in identifying the particular conditions listed on the bulletin's attachment. There also is concern that the bulletin does not explain how DEEOIC's review of the available evidence about particular conditions and/or chemicals led it to the conclusions it reached.

Without knowing the specific scientific publications, medical literature or occupational exposure records DEEOIC researched, claimants and their representatives (and experts) point out that they cannot review that evidence. Without understanding DEEOIC's reasons for concluding that particular medical conditions are unrelated to toxic exposures, claimants and their representatives assert that they are left guessing at what evidence or argument they might be able to make to change DEEOIC's conclusions.

For example, several claimants who have claimed prostate cancer (which was added to Bulletin No. 06-10's Attachment 1 by Bulletin No. 06-14)<sup>12</sup> as a covered illness have contacted our office after receiving DEEOIC's letter. Some individuals have located medical articles or other evidence that they believe support their position that there is a relationship between toxic substances and prostate cancer, and have questioned whether DEEOIC considered this evidence before placing the illness on the bulletin. One claimant noted that, in awarding compensation for Agent Orange-related conditions, the Veterans Administration (VA) adopted a presumption that prostate cancer may be related to Agent Orange, a herbicide.<sup>13</sup> Because Agent Orange is a chemical, the claimant questions how DEEOIC could reach the conclusion that there is no "known" causal link between *any* chemical and prostate cancer in the face of the VA's seeming conclusion to the contrary. Because Bulletin No. 06-10 does not specifically identify any of the evidence considered, the claimant cannot tell whether DEEOIC considered the VA's findings (or any of the scientific evidence underlying the VA's findings) before placing prostate cancer on the "no known causal link" list.

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<sup>12</sup> Claimants or their representatives have contacted us about several different illnesses identified by the bulletin as having "no known causal link" to toxic substances, including prostate cancer, breast cancer, and pancreatic cancer. Prostate cancer is the most commonly cited illness.

<sup>13</sup> See <http://www1.va.gov/agentorange/docs/D10AOBRIEF82005.doc> .

*DEEOIC Comments: DEEOIC states that it has not located any studies which establish, for purposes of entitlement under EEOICPA, a causal connection between Agent Orange and prostate cancer, but it continues to research this matter.*

*The Burdens Placed on Claimants by Bulletin No. 06-10 are  
Too High and are Inconsistent with the Law*

Some claimants simply find the task of responding to DEEOIC's Bulletin No. 06-10 letter overwhelming -- the physician who treated the covered employee may be retired or dead, or unable to provide an expert analysis of the available medical literature, and many claimants do not have the knowledge and/or resources to find other experts, or relevant literature. Lack of easy access to information about the particular toxic substances present at their worksites (discussed in Section IVA above) further increases their burden because it is extremely difficult to locate medical evidence linking a particular illness to a particular substance when you do not know which substances were present at your worksite or you believe the available information is unreliable.

Other claimants and their representatives tell us that they do attempt to compile -- as requested by the letter they receive from DEEOIC -- "factual or medical documentation" showing "a relationship" between the claimed medical condition and exposure to a toxic substance. Some, for example, have submitted letters from their physicians, some have obtained letters from toxicologists or other experts, some have submitted scientific publications or medical literature which they believe supports their case. In each of the cases brought to our attention, the claimants and their representatives have so far been unsuccessful in either having their case referred to a DEEOIC specialist or in convincing DEEOIC to remove any particular illness from the "no known causal link" list. As a consequence, some claimants have begun to ask whether DEEOIC either is not properly considering the evidence they submit and/or whether it is possible to find and submit evidence that would persuade DEEOIC to remove any particular illness from the "no known causal link" list.

For example, during a conversation with our office, a legal representative who is trying to gather evidence that would persuade DEEOIC to remove prostate cancer from the list has noted a disparity in how some claims are treated under Part E: one of his clients received a Part E approval for prostate cancer because he originally filed a Part D claim, a Part D physician panel found that his prostate cancer was related to his exposure to toxic substances, and the findings of that panel were accepted by the Secretary of Energy, thus conclusively establishing, for purposes of Part E, that "the employee contracted the covered illness through exposure at a Department of Energy facility." See 42 U.S.C. § 7385s-4(b). This is because Part E specifically provides that a former Part D claimant with a positive panel finding accepted by the Secretary of Energy would receive Part E benefits for prostate cancer without having to persuade DEEOIC that there is a "known" causal link between prostate cancer and toxic substances, while a former Part D claimant whose case never went to a panel (or any other Part E claimant) would only receive

benefits if they are able to submit evidence persuading DEEOIC that there is such a causal link.

In discussions with our office, the representative questioned whether the two sets of claimants are being treated fairly and consistently. In the case involving the former Part D claimant, the panel had referenced scientific studies in making its finding under DOE's regulation -- that it was "at least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing" the claimant's prostate cancer. See 10 C.F.R. § 852.8. The representative questioned whether DEEOIC is imposing too significant a burden on Part E claimants, given the "at least as likely as not" standard that generally applies to causation inquiries under Part E. See 42 U.S.C. §§ 7385s-3(a)(1)(B) and 7385s-4(c)(A).

*DEEOIC's Comments: DEEOIC states that Bulletin No. 06-10 simply notes those conditions for which DEEOIC has been unable to discover probative evidence sufficient to establish a link to a toxic substance. DEEOIC intends to clarify the role and function of that bulletin.*

#### Other Causation Issues

Beyond Bulletin No. 06-10, individuals have raised several concerns about the difficulties claimants face in proving causation issues:

- Even when an illness is not on the Bulletin No. 06-10 list of illnesses not found by DEEOIC to be related to any toxic exposures, some claimants report receiving DEEOIC expert opinions finding the available scientific evidence insufficient to establish a connection between a particular toxic exposure and a particular condition. For example, one survivor claimant states that she has been trying to show that her deceased father's heart disease is related to radiation exposure; she consulted two experts, and obtained and submitted opinions from them support of her position. Her case has been rejected in part because DEEOIC's expert does not find the scientific evidence underlying the experts' opinions persuasive. Like those who question Bulletin No. 06-10, this claimant has questioned whether DEEOIC's decisions are consistent with the statute.
- Some survivor claimants have encountered difficulties in proving that "it is at least as likely as not that exposure to a toxic substance at a Department of Energy facility was a significant factor in aggravating, contributing to, or causing the death" of the worker. These difficulties often involve problems with medical records (discussed in Section B, above), but also difficulties claimants and their experts encounter in understanding the statutory standard and how it is applied by DEEOIC.

- During 2006, individuals continued to complain that the 50% or greater PoC requirement set for radiogenic cancers by DEEOIC's Part E regulations (see 20 C.F.R. § 30.213) is too high and/or contrary to the statutory language directing DEEOIC to accept Part E claims if, among other things, it is "at least as likely as not that exposure to a toxic substance was a significant factor in aggravating, contributing to, or causing the illness." See 42 U.S.C. § 7385s-4(c)(1)(A). As was true last year, the individuals who question the regulation's consistency with the statute maintain that the "significant factor" language in Part E indicates that Congress intended the Agency to use a lower threshold than in Part B, which includes the "at least as likely as not" language but not the "significant factor" clause. These individuals suggest that the "significant factor" language was added by Congress to reflect the standard of causation used in Part D, and that Congress intended the Agency to use a 10%-40% threshold in Part E rather than 50%.<sup>14</sup>

**C. *Regulatory Restrictions on Challenges to Dose Reconstruction* (16 comments)**

Under 20 C.F.R. § 30.318, the Final Adjudication Branch's review of a claimant's dose reconstruction is limited to a review of the factual findings upon which NIOSH based its dose reconstruction. See 20 C.F.R. § 30.318(a). For example, if NIOSH incorrectly bases its dose reconstruction on an assumption that a worker had lung cancer, but the worker actually had bone cancer, the FAB will, if otherwise appropriate, return the case to NIOSH for review. On the other hand, under Section 30.318(b), the FAB will not consider the "methodology" underlying NIOSH's dose reconstruction. See 20 C.F.R. § 30.318(b). For example, some claimants have told us that they have tried to identify inaccuracies in NIOSH Site Profiles as an issue on appeal to the FAB, but that the FAB has declined to consider the issue because they viewed the claimants' arguments as a challenge to NIOSH's "methodology" because use of the information in facility site profiles is considered part of NIOSH's dose reconstruction methodology.

Claimants have expressed confusion both about the distinctions between "methodology" and "application" of methodology, and about whether, given the restrictions on the FAB's review, there are any available means for challenging NIOSH's dose reconstruction methodology as part of the process of deciding an individual's claim. A claimant might appeal the FAB's denial to Federal court and ask the court to consider all of the issues the claimants seeks to raise; however, for many claimants, understanding and making judgments about how to raise issues to a court which have not been (or will not be) considered by the FAB is a significant challenge which further complicates their cases.

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<sup>14</sup> DOL's Preambles to both the IFR and the Final Rule state the Agency's reasons for deciding to utilize the 50% or higher PoC requirement for radiogenic cancers in Part E as well as Part B. See 70 Fed. Reg. 33590, 33593-594 (June 8, 2005); 71 Fed. Reg. 78519, 78522-524 (December 29, 2006).

**D. *Miscellaneous Inquiries and Comments* (15 comments)**

During 2006, the Office of the Ombudsman also received the following miscellaneous inquiries and comments relating to regulations, policies, and procedures:

- Inquiries about DEEOIC Bulletin No. 06-11 (3 comments): A few individuals contacted this Office about a bulletin issued by DEEOIC in June 2006 -- Bulletin No. 06-11, "Supplemental Guidance for Processing Claims for the Special Exposure Cohort (SEC) Class for the Y-12 Plant, March 1943 -- December 1947." This Y-12 SEC covered certain employees who worked at the Oak Ridge Y-12 plant during 1943-1947 for at least 250 days in "uranium enrichment operations" or "other radiological activities." DEEOIC initially issued a bulletin providing instructions for claims examiners considering claims from Y-12 in November 2005; after that bulletin was issued, claimants apparently received recommended decisions awarding benefits which, in accordance with DEEOIC's regulations, then went to the FAB for final review. In June 2006, DEEOIC issued Bulletin No. 06-11, which changed the instructions to claims examiners and resulted in many of the recommended awards being remanded by the FAB to the district offices for further consideration and development of evidence. The new bulletin provided extensive guidelines for claims examiners about how to determine whether an individual worked in "uranium enrichment operations" or "other radiological activities." The Office of the Ombudsman subsequently received inquiries from individuals who expressed their dismay at the reversal of the recommended awards and/or sought assistance in understanding the meaning of the decisions they received and the steps they would need to take in response.
- Reopening Regulations (5 comments): Some claimants complain that DEEOIC's regulations governing reopening of a claim (see 20 C.F.R. § 30.320) are burdensome. DEEOIC's regulations permit claimants to ask for reopening if they submit new evidence of covered employment or exposure to a toxic substance, or identify a change in PoC guidelines, NIOSH's dose reconstruction method, or an addition of a new class of SEC employees.
- Part D Physician Panels (5 comments): Some claimants have contacted this Office to ask how a positive physician panel finding under Part D affects their claims, or to express concern that a positive Part D finding was not properly treated by DEEOIC or its experts. Under Part E, a positive physician panel conclusively establishes causation for Part E purposes only if accepted by the Secretary of Energy. Similarly, while such a finding may establish causation of an illness if a covered worker subsequently dies, a claimant would have to establish that the death was due to a covered condition to receive survivor benefits.
- Publication of Final Rule (2 comments): Two individuals contacted us to ask when DEEOIC's Final Rule would be published.

## **V. Administrative or Miscellaneous Issues**

### *Summary*

Claimants have contacted the Office of the Ombudsman in connection with:

- Concerns about Claimant Interactions with DEEOIC Personnel (62 comments)
- Requests for Assistance in Understanding Communications (56 comments)
- The Processing of Claims Has Taken and Will Take Too Much Time (57 comments)
- Locating Experts (26 comments)
- DEEOIC Personnel and Resource Centers Sometimes Provide or Use Incorrect (or Incomplete) Information (23 comments)
- Medical Benefits Issues (38 comments)
- Difficulties in Obtaining Copies of Evidence from DEEOIC (13 comments)
- Miscellaneous Inquiries and Comments (795 comments)

#### **A. *General Concerns about Claimant Interactions with DEEOIC Personnel*** (62 comments)

Many claimants continue to express general concerns about their interactions with DEEOIC personnel. This includes frustration about their routine attempts to contact their claims examiners or other DEEOIC personnel, with some claimants reporting that it is difficult to reach their claims examiner or to obtain more than cursory information about the status of their claims; that their calls are not always being returned; or that their claims examiner has openly discouraged them from calling. When calls are returned, it is sometimes by a different claims examiner, only recently assigned to the claim, who has no in-depth familiarity with the file.

More generally, frequent changes in claims examiners also continues to be a concern for some claimants. As DEEOIC outlined in its response to this Office's 2005 Annual Report, the Agency has found that it is necessary in practice to transfer cases between claims examiners in order to expeditiously process claims. Most claimants to whom we speak do understand that DEEOIC may need, at times, to reallocate work between examiners; a transfer to another claims examiner also may be welcomed by a claimant, if they have experienced difficulties with a particular claims examiner. However, in some

cases, the claimants feel that transfers have been excessive or unnecessary. Particularly in complicated cases, they question why an examiner who is familiar with the intricacies of the evidence and who has a good rapport with the claimant should be replaced by someone who is unfamiliar with the case or claimant.

In one case, the claimant reported that he had had 8-10 different examiners over the life of his claim, with 4-5 changes in the past year. The most recent change had involved not only a change in claims examiners, but a transfer of the file to a different district office. Further complicating this claimant's experience was the fact that, the month before his claim transferred, he had asked for an extension of time in which to respond to a development letter from DEEOIC and had asked for a copy of his file. The claimant was notified of the change in district offices, but his requests for an extension and copy of his file were never acknowledged. He was only able to confirm that the extension would be granted and the copy of the file provided when he called the new district office to track down his new claims examiner, whom he found to be helpful, but not familiar with his case due to the recent transfer of many new cases.

Beyond concerns about returning calls and transfers between claims examiners, claimants have complained about a number of other general issues that arise in their interactions with DEEOIC personnel including a perceived lack of courtesy (11 comments) by some DEEOIC personnel in public settings, written documents, or telephone conversations; and apparent losses of documents or duplicative requests (17 comments) by claims examiners or other DEEOIC personnel, which required the claimant to copy and re-submit the same documents again. Claimants without ready access to photocopy or fax machines view these requests as a hardship.

**B. *Requests for Assistance in Understanding Communications* (56 comments)**

In the course of developing a claimant's case and in deciding claims, DEEOIC personnel correspond and speak with claimants on a regular basis. After developing a claim, DEEOIC also issues a recommended decision by the claims examiner, followed by a final decision by the FAB (which may follow an oral hearing). Many individuals report having significant difficulties in understanding the correspondence and decisions they receive from DEEOIC (and, occasionally, NIOSH) or in understanding what is said to them over the telephone or at oral hearings and have contacted this Office for assistance.

Claimants, for example, are sometimes confused by "development" letters they receive from DEEOIC. A typical development letter might indicate that the claims examiner has reviewed the claimant's file to see whether the evidence supports an award of benefits for a particular disease, and has tentatively concluded that the evidence is insufficient to support an award. The development letter then invites the claimant to submit additional evidence and provides a period of time to do so. Claimants report that these letters are confusing because they do not always clearly explain why the evidence already submitted by the claimant does not meet the claimant's burden of proof.

One living worker claimant submitted several doctor's reports indicating that the conditions he claimed (including prostate cancer and pulmonary disease) were related to his employment. His claims examiner sent a letter indicating that the evidence the claimant submitted did not establish that his illnesses were related to employment, but did not specifically explain why this was the case -- why the doctors' opinions were not sufficient. The letter provided the claimant with thirty days to submit more evidence, but without knowing why the previous evidence was not good enough, the claimant did not know what to do in response.

Some claimants also have physical or mental impairments, difficulties with reading comprehension or limited English proficiency, which impair their ability to understand communications from DEEOIC. One adult child claimant, for example, e-mailed the Office of the Ombudsman because she was having difficulty understanding the eligibility requirements that apply to a child who was "incapable of self-support" at the time of the parent's death. See 42 U.S.C. § 7385s-3(d)(2)(C). She told the Office that, during a telephone conversation, she had asked her claims examiner to send her an explanation of the law's requirements in writing, because she has a cognitive impairment and memory problems which makes it very hard for her to understand and remember what she is told orally. The difficulties she was facing were relayed to DEEOIC.

Some claimants also continue to be confused about whether they have a Part B claim, a Part E claim, or both, and find the two parts of the program difficult to distinguish. For instance, claimants with claims pending under both Parts B and E have noted that when they receive written correspondence from district offices, it is not always clear whether the correspondence pertains to Part B or Part E. Similarly, recommended decisions sometimes do not clearly state whether they are being rendered under Part B or E. Other claimants have expressed surprise upon being notified in writing that they have been enrolled in Part E, of which they knew nothing before getting the correspondence, and knowing little more than the fact of their enrollment after receiving the correspondence.

Some claimants also continue to find confusing the 60-day limitations period for challenging recommended decisions, and its accompanying waiver provisions. The waiver provision gives claimants who are satisfied with the benefits they have been awarded in their recommended decisions the opportunity to forego their appeal rights, and not wait 60 days before receiving payment. In some cases, though, claimants agree with parts of the decision, but disagree with other parts -- for example, a claimant might agree with DEEOIC's decision that a particular illness is covered, but disagree with DEEOIC's finding that another illness is not covered. Claimants indicate that the standard waiver language included in recommended decisions does not make it clear how a claimant can accept some findings and appeal others.

Claimants have also stated that recommended decisions and the instructions for appealing cannot be fully understood without assistance. These decisions sometimes include complicated discussions of the medical evidence (some of which may not be in the claimant's possession), as well as the statute or regulations, and cannot be easily understood by some laypersons. In addition, in some cases, individuals have questioned

whether DEEOIC personnel are consistently applying DEEOIC policy. For example, DEEOIC does not require that a physician preparing an impairment rating apportion the causes of an impairment of an organ between compensable and non-compensable causes. A legal representative drew this Office's attention to two cases in which the FAB had issued remand orders requiring an apportionment. The representative's inquiry was relayed to DEEOIC, and the orders were corrected soon after.

***DEEOIC's Comments:** DEEOIC states that it acknowledges that developmental letters and communications with claimants are areas where there is a necessity to provide additional training to its claims examiners and is in the process of providing such training. DEEOIC also indicates that it has already instructed claims examiners to clearly distinguish communications and decisions relating to Part E from those relating to Part B. Finally, with respect to concerns about the standard waiver language included in recommended decisions, DEEOIC states that while the language in question does distinguish between the box to be checked by a claimant waiving any objection to an entire decision and the box to be checked by a claimant waiving any objection only to part of a decision, DEEOIC will review the language to determine if that distinction could be made clearer.*

**C. *The Processing of Claims Has Taken and Will Take Too Much Time* (57 comments)**

A recurring concern for claimants is the amount of time it takes to process a claim. In particular, claimants who originally filed with the Department of Energy under Part D are frustrated at the years that have gone by without their claim being finally decided. While DEEOIC's initial adjudication of claims increased significantly over the past year, many living worker claimants are still waiting for impairment ratings, wage-loss determinations, and the related lump-sum compensation. Some claimants and family members have complained that the government's delays have, or could result in, an entitlement ending because of the claimant's death.

**D. *Locating Experts* (26 comments)**

Some claimants have encountered problems locating physicians who are able and willing to provide "fully rationalized" medical opinions on causation issues (for both "covered" and "consequential" illnesses), impairment ratings, and wage loss, particularly in more rural, remote areas of the country. This frequently occurs in areas that already suffer from shortages of medical care providers of all types, and they also happen to be the areas where the nuclear weapons facilities that exposed workers to radiation and toxic substances were and are located. Some claimants also report that their treating physicians are unwilling to provide opinions, or that their physicians charge several hundred dollars to prepare an opinion. It is possible for a claimant to be reimbursed for such charges, if the claim is approved, but the initial payment of the physician's fee nonetheless can be a

significant financial burden for some claimants and, if the claim is disapproved, there is no reimbursement.

DEEOIC does offer claimants the option of having their own physician or a DEEOIC district medical consultant provide an impairment rating. DEEOIC also may obtain expert opinions on causation and wage loss issues in some cases. However, some claimants believe that DEEOIC's consultants are not objective and many claimants simply prefer to have a physician of their own choosing provide the opinion. Some claimants have also asked about the circumstances under which DEEOIC obtains and pays for consultant opinions, and about the evidence the consultant reviews in reaching conclusions.

**E. *DEEOIC Personnel and Resource Centers Sometimes Provide or Use Incorrect (or Incomplete) Information* (23 comments)**

During 2006, this Office received comments from individuals indicating that they had been provided with incorrect or incomplete information by a resource center or DEEOIC. These comments cover a variety of subjects and generally are unique to the particular cases involved; two examples should serve to illustrate some of the concerns expressed:

- A living worker claimant who sought assistance from a resource center in submitting evidence following a hearing before the Final Adjudication Branch was mistakenly told that he needed to file a new claim and submit his evidence to the district office, because he had not claimed the illness to which the evidence was relevant. When notified, DEEOIC clarified that the claimant's evidence should go to the FAB.
- Accompanying a final FAB decision denying benefits is a standard FAB letter that provides information about the possibilities of asking the FAB for reconsideration or asking the DEEOIC Director to reopen the claims. Three individuals who received this letter asked us for assistance in understanding their options. As part of providing assistance to them, we noted that there is an additional right to judicial review under Part E of the EEOICPA statute (see 42 U.S.C. § 7385s-6(a)), and provided the statutory information to them. The claimants expressed concern that the FAB's letter had not included these judicial appeal rights.

Finally, in addition to those claimants who believe they have received incorrect or incomplete information from DEEOIC, some claimants note that DEEOIC has used incorrect information in correspondence or other documents, including recommended or final decisions. For example, some claimants report that DEEOIC has used the wrong social security number or name, or has referenced the wrong DOE facility. In one case, DEEOIC unintentionally sent a letter intended for a survivor to a living claimant, upsetting both the claimant and his wife. To its credit, as soon as the error was brought to DEEOIC's attention, the claimant was telephoned and an apology was made.

*DEEOIC's Comments: DEEOIC has determined to respond to the concern about the FAB's standard letter by changing the letter to clearly inform claimants of the right to judicial review of Part E decisions.*

**F. Medical Benefits Issues** (38 comments)

Living worker claimants who are awarded benefits under Part B or Part E of EEOICPA are entitled to medical benefits as well. See 42 U.S.C. §§ 7384s, 7384t and 7385s-8. Under Part E, claimants who qualify receive medical benefits for any medical condition contracted through exposure to toxic substances at a DOE facility (a covered illness or condition) as well as medical benefits for any medical condition which is consequential to the covered condition. As with covered conditions, under DEEOIC's regulations, claimants bear the burden of proving that a "consequential" condition is related to their covered condition. As of December 29, 2006, almost \$125 million in medical benefits had been paid on behalf of Part B and Part E claimants. During 2006, claimants and other individuals made a variety of inquiries about the medical benefits available under EEOICPA.

Among these inquiries were complaints about prescription drugs that had been previously approved and paid for as medical benefits, but which were suddenly no longer covered. Our understanding is that this happened because, early in 2006, DEEOIC refined its medical bill processing system to more accurately determine whether prescriptions are related to covered (or consequential) conditions. One of the biggest frustrations for claimants was that, following these system changes and the resulting rejection of pharmacy bills, the claimants were not contacted directly by their claims examiners to explain the changes or the reasons for the changes. They only learned of the changes when going to the pharmacy to pick up the medication and then discovering that the cost of a drug needed for treatment was no longer covered by DEEOIC. In one case, for example, DEEOIC had been paying for the claimant's medications for three years before the system began rejecting the pharmacy bill, and notification was further delayed because neither DEEOIC nor the pharmacy notified the claimant when the bill was first rejected. He did not find out about the changes, and the need to submit additional medical evidence supporting payment for the prescriptions to DEEOIC, until many months later, when he received a collection notice for almost \$1,200.

More generally, claimants have complained to this Office about what they perceive as burdensome requirements to prove and reprove their consequential medical conditions. One claimant, for example, indicated to us that he and his physician had been asked repeatedly to provide justifications to the claims examiner for the treatment of consequential illnesses that had been previously approved and for which medical benefits had been paid. The claimant also provided letters from his physician expressing dismay at having "to answer the same questions for you time and time again."

Other claimants have contacted the Office of the Ombudsman to complain about difficulty with ICD-9 codes that have resulted in some treatments for a covered illness being covered, but other related effects of an illness not being covered. For example, sufferers of chronic beryllium disease have contacted this Office to say that they can use their medical-benefits card for general respiratory-related care, but often not for the systemic effects of chronic beryllium disease -- such as fatigue or severe cramping, or a claimant may have problems related to the long-term use of steroids, such as osteoporosis -- for which claimants have had difficulty getting coverage. Some claimants have noted having difficulty in communications with district offices over whether treatment for a consequential illness is covered, and whether payments that have already been made by claimants will be reimbursed.

Medical benefits also include certain travel expenses, for which the claimant is reimbursed. Some claimants have reported difficulty in understanding how to obtain, and receive, approval for travel expenses. Finally, late in 2006, the Office of the Ombudsman began receiving complaints from claimants who had been receiving in-home nursing/attendant services from a firm that provides such services to claimants who are approved to receive care related to specific conditions. DEEOIC had been paying for these services for several years in some cases, and these claimants contacted the Office of the Ombudsman because they were receiving letters from the firm stating that services would be cut off because DEEOIC had stopped paying the firm's bills. By the close of the workweek in which the Office of the Ombudsman began receiving calls, DEEOIC made it clear that, while certain issues between DEEOIC and the firm would need to be addressed, claimants' services would not be discontinued.

**G. *Difficulties in Obtaining Copies of Evidence from DEEOIC*** (13 comments)

In general, claimants can obtain copies of evidence developed by DEEOIC and considered in their cases simply by asking DEEOIC, in writing, for a copy of the evidence they want to see or for a copy of their entire file if they are unsure about what to request. Some claimants have commented that DEEOIC should send copies of evidence (as well as copies of correspondence sent by DEEOIC to claimants' physicians) to the claimants routinely, rather than requiring claimants to specifically request it. In addition, some claimants report that they have encountered difficulties in obtaining evidence from DEEOIC. In these cases, either the claimant has received no response to a request, has received an incomplete response, and/or there has been a significant delay in sending the evidence to the claimant. In some cases, DEEOIC has advised claimants that the evidence is not available from the Department of Labor.

For example, in one case, the facility at which the claimant worked was not classified as a "DOE Facility" (see discussion in Section IIIB above for background) and a claims examiner found the claimant ineligible for Part E benefits. The claimant challenged the classification, and DEEOIC reviewed evidence obtained from the claimant and other sources and concluded that the facility did not meet EEOICPA's definition of a DOE facility. DEEOIC's review was undertaken separately from the claimant's appeal; a

memorandum memorializing DEEOIC's findings was provided to the claimant and incorporated into the claimant's file. When the claimant requested copies of the evidence reviewed by DEEOIC in reaching its decision, DEEOIC advised him that the evidence in question belonged to the DOE and he would have to make a Freedom of Information Act request to DOE in order to see it. The claimant believes that, since DEEOIC considered the DOE evidence in reaching its decision that he is not covered by Part E, he has a right to expect DEEOIC to provide him with the evidence. Similar issues raised by claimants include access to the evidence underlying DEEOIC's findings in Bulletin No. 06-10, discussed in Section IVB above), and access to the names and credentials of district medical consultants providing opinions in individual cases.

#### **H. *Miscellaneous Inquiries and Comments* (795 comments)**

During 2006, the Office of the Ombudsman also received inquiries or comments of various types which are not reflected in the above categories. The vast majority of these inquiries involved requests for information about Part E of EEOICPA (602) and claim status requests (116). Of the remainder, the most significant fall into the following categories:

- Inquiries about the Impact of EEOICPA Benefits on Other Government Benefits/Taxability of EEOICPA Benefits (20 comments): Some individuals contacted this Office during 2006 to ask whether EEOICPA benefits are taxed under Federal and/or State law; to ask about coordination between EEOICPA and state workers' compensation; or to ask whether an award of EEOICPA benefits will affect their benefits under Medicare, Medicaid, Social Security Disability, or similar programs. It is not possible for either this Office or DEEOIC to predict exactly how another Federal or State agency will treat EEOICPA benefits; however, we have provided to the claimants language from EEOICPA addressing the points raised when possible (for example, benefits are clearly exempt from Federal income tax under Section 7385e (42 U.S.C. § 7385e)) and we have begun to bring these issues to the attention of the other Federal agencies involved.
- Inquiries about Office of the Ombudsman (15 comments): Fifteen individuals contacted this Office during 2006 to comment on the Office's 2005 Annual Report; to ask about the responsibilities of the Office of the Ombudsman; or to ask whether the Office will be continued past its statutory sunset date of October 2007.
- Accuracy of Site Profiles and Site Exposure Matrices (8 comments): Site profiles are documents developed by NIOSH, to assist health physicists in completing dose reconstructions, which are required under both Part B and Part E (by DEEOIC's regulation) for radiogenic cancers. SEM, discussed earlier in this report, is a database developed by DEEOIC, which compiles information from a variety of sources, including DOE, former worker medical survey programs, and epidemiological studies about the particular toxic substances present at particular

DOE facilities. Claimants have contacted the Office of the Ombudsman to express their reservations about the accuracy of both site profiles and SEM. A former worker who attended a meeting held by DEEOIC about SEM, for example, indicated that it did not appear to him that DEEOIC was listening closely to the input they received from former workers at the meeting.

***DEEOIC Comments:** DEEOIC states that it has contracted for complete transcripts of these meetings and that these transcripts are reviewed as information from the meetings is added to SEM.*

- Wage-Loss Issues (5 comments): Several individuals contacted us concerning difficulties they faced in obtaining required wage data from the Social Security Administration or to ask more general questions about wage loss issues, including the meaning of some of the material in DEEOIC's Procedure Manual.
- Resource Center/District Office Staffing Issues (5 comments): One of the Ombudsman's specified duties is to make recommendations to the Secretary of Labor regarding the location of resource centers. 42 U.S.C. § 7385s-15(c)(2). During 2006, the Office of the Ombudsman did receive two comments suggesting that one resource center may be understaffed for the territory it serves. We also have received one similar comment about the staffing of one district office. We will be taking a closer look at these points and discussing them with DEEOIC during 2007. In addition, a few commenters have expressed dissatisfaction with the services provided by a few of the resource centers.
- Requests for Extensions of Time (4 comments): Several individuals contacted this Office to ask whether it is possible to obtain extensions of time to submit evidence to DEEOIC or NIOSH, or to report difficulties encountered in obtaining extensions.
- Power of Attorney (3 comments): Two children of a surviving spouse claimant contacted us to complain that DEEOIC, after accepting a power of attorney and treating one of the children as representative of the parent while Part B and E claims were being processed (that is, since 2002), had concluded that review of the power of attorney by the Office of the Solicitor (SOL) was required before the daughter's signature on a payment transfer form (Form EN-20) could be accepted and payment made. Unfortunately, the surviving spouse claimant died while the document was under review, and no compensation could be paid because of the statute's requirement that claimants be "living" at the time of payment; the children themselves did not meet the law's eligibility requirements for survivor claimants. (See also discussion in Sections IIIA and IIID above.) Although legal review is required by DEEOIC's policies, this review apparently is not required until the very end of the claims process, when payment is to be made. Because the statute's limits on payment and DEEOIC policies combined to deny payment of benefits which the family believes were long overdue, the timing of the legal

review exacerbated the frustration felt by the children. This same issue has arisen in at least one other case which has been brought to our attention.

***DEEOIC Comments:** DEEOIC states that legal review of powers of attorney is required by the EEOICPA regulation at 20 C.F.R. § 30.600(c)(2). DEEOIC also states that, while legal review of powers of attorney is undertaken at the end of the claims process, DEEOIC and SOL policy is to expedite both adjudication of the case and review of any power of attorney in any case where it is informed that a claimant may be nearing death. DEEOIC and SOL will continue to attempt to identify all cases in which processing must be expedited because of imminent death of the claimant.*

- Congressional Hearings/Legislative Issues (8 comments): Eight claimants contacted this Office during 2006 to express concern about the Office of Management and Budget “Passback Memo” that surfaced in the press; about the 2006 hearings held by the House Committee on the Judiciary, Subcommittee on Immigration, Border Security, and Claims; and about various other legislative issues.
- Inquiries about RECA-EEOICPA Coordination (9 comments): Section 5 RECA claimants are entitled to Part B and E EEOICPA benefits as well. Other (non-Section 5) RECA claimants may also be eligible for EEOICPA benefits based upon employment at a DOE facility, but the law does not permit them to receive both RECA and EEOICPA benefits for cancer. This office has received inquiries from both RECA Section 5 and non-Section 5 claimants who want a better understanding of their options.

## **VI. Assessment of Common Difficulties and Conclusion**

Congress has directed that the Annual Report contain “an assessment of the most common difficulties encountered by claimants and potential claimants under Part E.” See 42 U.S.C. § 738s-15(e)(2)(B). In addition, the legislative history to Part E provides that “[t]he conferees also expect the Ombudsman to make recommendations the Ombudsman considers appropriate for the improvement of the practices of DOL in administering subtitle E of EEOICPA.” Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 Conference Report to accompany H.R. 4200, H.R. Rep. No. 108-767 (2004). The assessment required by Congress, as well as recommendations to improve the administration of Part E, as required by the conferees, follows.

All of the comments and concerns discussed in this report have been communicated by telephone, telefax, e-mails and letters to this Office, as well as in personal conversations the Office staff have had with claimants at meetings. A common thread in these comments is general confusion regarding a complex statutory program. This Office would encourage the administrators of the EEOICPA program to continue their outreach efforts and invite them to participate in our outreach efforts in the coming year.

This Office would also encourage DEEOIC to continue to work to improve communications with claimants and provide more information to the public about how the program works and, in particular, about the reasons underlying decisions DEEOIC is making that have widespread impact. Similarly, routinely providing copies of evidence developed (and correspondence sent to physicians or others) by DEEOIC would help to keep claimants informed about developments in their cases and allow them the opportunity to see and respond to negative evidence before a denial is issued. This Office would also recommend that DEEOIC promptly notify affected claimants when changes in medical benefits coverage take place and explain the reasons for those changes -- particularly claimants who need specific medications or medical treatments.

Over the past year, the Office of the Ombudsman has regularly met and consulted with DEEOIC's staff in order to address the complaints, grievances and requests for assistance received by this Office. These meetings and consultations have been fruitful. Between now and October 28, 2007, when the statutory authority for this Office will sunset (see 42 U.S.C. § 7385s-15(g)), our Office looks forward to continuing to work cooperatively and collegially with the Program Agency, within the bounds of our independence, to improve the delivery of services to Part E claimants, in the timely and uniform manner envisioned by Congress.

## APPENDIX

### Compilation of Comments by Subject/Issue by the Office of the Ombudsman from January 1, 2006 through December 31, 2006

#### **STATUTORY ISSUES** (91 comments)

Limitations on Survivor Eligibility	52 comments
Definition of a Covered DOE Facility	11 comments
The Statutory Provisions Governing Special Exposure Cohorts Result in Disparity	11 comments
Qualified Claimant's Death Prior to Award May Nullify Claim or Reduce Compensation	6 comments
Miscellaneous Inquiries and Comments	11 comments

#### **REGULATORY, POLICY AND PROCEDURAL ISSUES** (160 comments)

Difficulties Retrieving Employment, Exposure and Medical Records	64 comments
Difficulties in Proving Causation Issues	65 comments
Regulatory Restrictions on Challenges to Dose Reconstruction	16 comments
Miscellaneous Inquiries and Comments	15 comments

#### **ADMINISTRATIVE OR MISCELLANEOUS ISSUES** (1070 comments)

Concerns about Claimant Interactions with DEEOIC Personnel	62 comments
Requests for Assistance in Understanding Communications	56 comments
The Processing of Claims Has Taken and Will Take Too Much Time	57 comments
Locating Experts	26 comments
DEEOIC Personnel and Resource Centers Sometimes Provide or Use Incorrect or Incomplete Information	23 comments
Medical Benefits Issues	38 comments
Difficulties in Obtaining Copies of Evidence from DEEOIC	13 comments
Miscellaneous Inquiries and Comments	795 comments

**TOTAL** 1,321 comments

Note: Some of the comments we receive come from individuals such as attorneys and other authorized representatives, Former Worker Program grantee staff, Congressional staff, and claimants who are trying to help their fellow claimants with claims. It should be understood that these individuals are raising issues which potentially affect many people beyond themselves and that information provided to them reaches an even wider audience.