

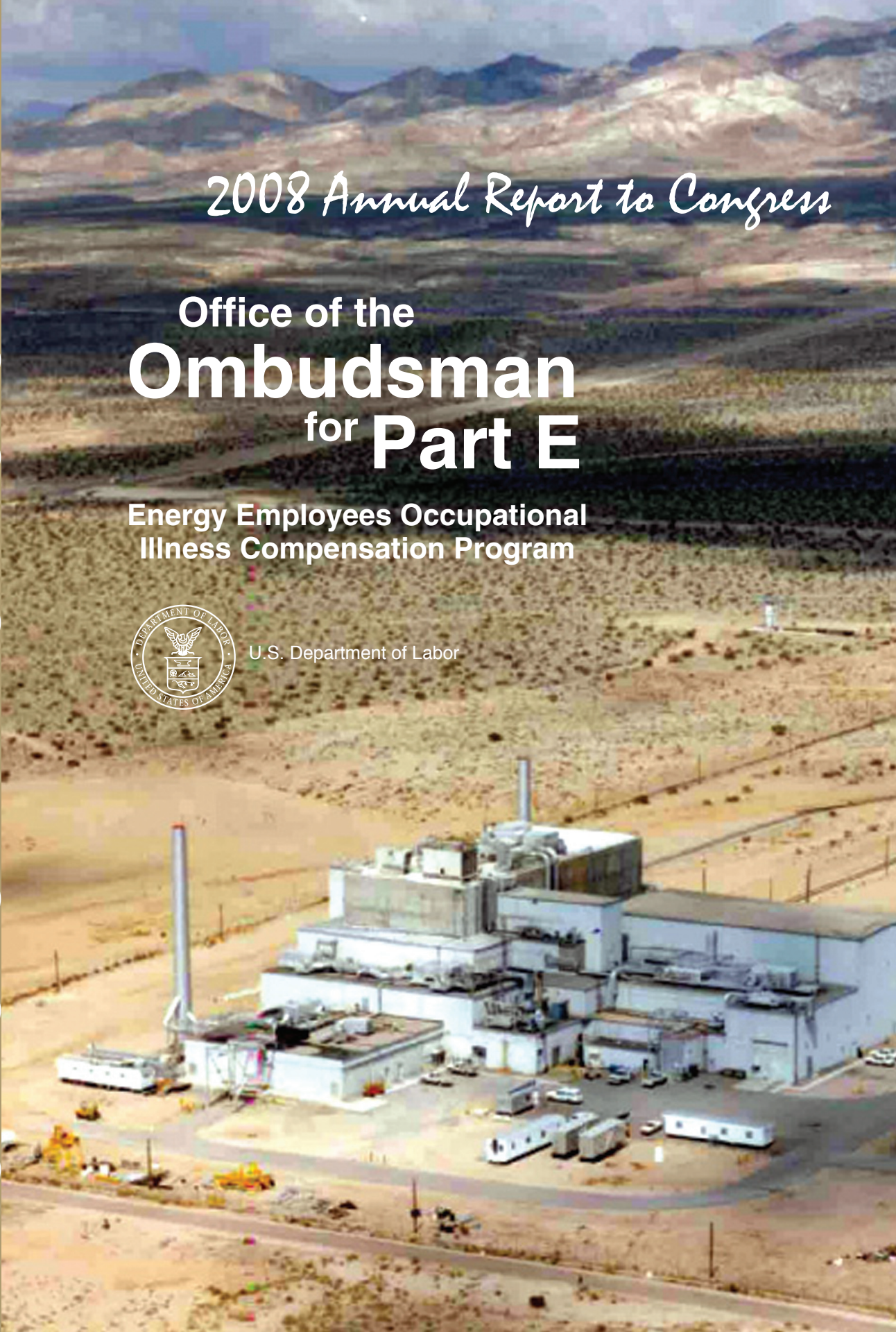
2008 Annual Report to Congress

Office of the
Ombudsman
for **Part E**

**Energy Employees Occupational
Illness Compensation Program**



U.S. Department of Labor



Cover photo credit: courtesy of National Nuclear Security Administration/Nevada Test Site Office.

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U.S. Department of Labor

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U.S. Department of Labor

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



February 13, 2009

The Honorable Joseph R. Biden Jr.
President of the Senate
Washington, DC 20515

Dear Mr. President:

I am pleased to present the 2008 Annual Report of the Ombudsman for Part E of the Energy Employees Occupational Illness Compensation Program of the U.S. Department of Labor. This Report is submitted in accordance with 42 U.S.C. § 7385s-15(e).

Sincerely,

A handwritten signature in black ink, appearing to read "Malcolm Nelson", with a long horizontal line extending to the right.

Malcolm Nelson
Ombudsman for Part E

Enclosure

U.S. Department of Labor

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



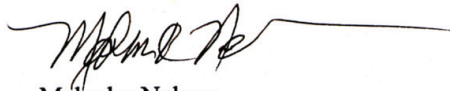
February 13, 2009

The Speaker
United States House of Representatives
Washington, DC 20515

Dear Madam Speaker:

I am pleased to present the 2008 Annual Report of the Ombudsman for Part E of the Energy Employees Occupational Illness Compensation Program of the U.S. Department of Labor. This Report is submitted in accordance with 42 U.S.C. § 7385s-15(e).

Sincerely,



Malcolm Nelson
Ombudsman for Part E

Enclosure

ACKNOWLEDGMENTS

The Office of the Ombudsman for Part E of the Energy Employees Occupational Illness Compensation Program Act (EEOICPA) is required to submit to Congress not later than February 15 of each year, a report which sets forth:

- (A) The number and types of complaints, grievances and requests for assistance received by the Ombudsman under this part during the preceding year.
- (B) An assessment of the most common difficulties encountered by claimants and potential claimants under this part during the preceding year.

42 U.S.C. §7385s-15(e).

The ability of this Office to collect this information and to submit an annual report is directly related to the willingness of claimants and potential claimants to contact us with their complaints, grievances, and requests for assistance – and we have come to appreciate that you cannot assume that claimants, even those who are encountering difficulties with their claim, will necessarily take the time to contact us. Consequently, I would like to thank all of the claimants, potential claimants, family members and representatives who contacted the Office of the Ombudsman during 2008. In addition, I would like to thank all of the individuals and organizations who referred others to our Office – your assistance is greatly appreciated. To everyone who contacted us during this year, as well as to those who made referrals to this Office, it goes without saying – this report could not have been completed without you.

Nevertheless, many of the people who contact our Office are seeking something more than a forum where they can register their complaints. Rather, many are in search of assistance with their claims, and in order to provide that assistance, we often turn to the Division of Energy Employees Occupational Illness Compensation (DEEOIC). Our ability to assist claimants is enhanced by the efforts exerted by DEEOIC to provide us with prompt and thorough responses to our inquiries. In addition, DEEOIC's cooperation throughout this year was a tremendous asset, especially with respect to assisting our Office with some of the more challenging inquiries. Consequently, I would like to thank DEEOIC for their assistance in 2008 and I look forward to building on these efforts in 2009! I would also like to thank the staffs of the District Offices and the Resource Centers for the information that they provided throughout the year and for their participation and assistance with our town hall meetings. At practically every town hall meeting that we sponsor, the staffs of the Resource Centers and the District Offices stay well beyond the appointed closing time to ensure that they talk to everyone who wishes to speak to them. In addition, I would be remiss if I did not acknowledge those DEEOIC staff members in Washington, D.C. for their general assistance, as well as for their many contributions to our town hall meetings.

Furthermore, there are some claimants who contact us with questions relating to Part B, and to ensure that these claimants receive accurate assistance, we often turn to others who are more familiar with that program. I would like to thank Laurie Breyer of the National Institute for Occupational Safety and Health (NIOSH) for extending an invitation for our Office to join her in Shoreham, New York and for her participation in our town hall meetings – her insights are always relevant and helpful. I would also like to extend a very heartfelt thank you to Denise Brock, the Ombudsman to NIOSH. Ms. Brock's willingness to serve as a resource and her open invitation allowing us to refer to her many of our Part B questions ensures that we are able to provide assistance with Part B and dose reconstruction questions.

As always, I must acknowledge the staff of the Office of the Ombudsman. I continue to be amazed by the effort and devotion put forth by Kim Holt, Patricia Louie and James McQuade. Thanks to each of you for all that you do.

Lastly, while I have already recognized the many claimants and potential claimants who took the time to contact our Office, I would like to especially acknowledge those people who contacted our Office, yet this Office could not provide the needed/requested assistance. As I often caution, the Office of the Ombudsman does not possess the authority to change or modify provisions of the Act; we do not make decisions on claims; and we do not have the power to authorize the payment of compensation or medical benefits. Thus, there are instances – many more than we would prefer - where this Office simply is not able to provide the necessary assistance. However, even in those situations where we are unable to provide meaningful assistance, we promise to listen to the complaints, grievances and requests for assistance, and, where appropriate, to include these concerns in our annual report. To those for whom we were not able to provide meaningful assistance, I hope that this report fulfills our promise.

INTRODUCTION

This is the fourth annual report prepared by the Office of the Ombudsman for submission to Congress. In our first report, which addressed calendar year 2005, we observed that as of mid-December 2005, the Division of Energy Employees Occupational Illness Compensation (DEEOIC) had issued 2,749 Recommended Decisions, and 2,380 Final Decisions (of which 1,991 had been decided in favor of the claimant), resulting in payment of over \$254 million in Part E compensation. When you compare those numbers with the same numbers as of December 21, 2008, it is clear that there has been progress in the adjudication of Part E claims:

	Mid-December 2005	December 21, 2008
Recommended Decisions	2,749	39,938
Final Decisions	2,380	37, 571
Final Decision (approvals)	1,991	20,049
Part E payments	Over \$254 million	Over \$1.3 billion ¹

[Note: all numbers represent Part E claims only].

In addition, since the inception of this program, DEEOIC has continued to implement initiatives designed to facilitate the processing of Part E claims. A few of the initiatives unveiled this year include: increasing the assistance offered by the Resource Centers; adding information about occupational diseases to the listings of toxic substances found on DEEOIC’s website; and providing claims examiners with access to an additional data base to assist in the verification of employment.

Nevertheless, in spite of the claims that have been approved; the monies that have been paid; and the initiatives that have been unveiled, each year the Office of the Ombudsman receives hundreds of complaints, grievances and requests for assistance – and this year was no exception. In any program such as this you should expect that some people will be disappointed with the decision issued in their case. Yet, there are many instances where claimants contact us with problems even before a decision issues in their case. Moreover, a vast majority of the complaints, grievances and requests for assistance that we receive address basic concerns/disagreements with the scope of the law as written; the interpretation or implementation of EEOICPA; or the administration of EEOICPA.

Therefore, the goal of this report is to provide the numbers and types of complaints, grievances and requests for assistance received by the Ombudsman during 2008 and to provide an assessment of the most common difficulties encountered by claimants during that year. In order to provide this information in a “logical” manner, it is necessary to structure this information. In our three prior annual reports, we categorized the issues that we discussed as either: statutory; regulatory; or administrative. As we compiled the data for this year’s report, we considered a number of “new” ways of presenting this information. However, in every instance, as we developed the issues, the discussion always eventually returned to a focus on the statute, the regulations or the administration of the program. Consequently, we believe that an effective way to structure our discussion is to categorize issues as statutory, regulatory or administrative, and these are the categories that we will use in this report.

¹ Appendix II contains DEEOIC’s 2008 Part E statistics

LEGISLATIVE HISTORY OF PART E

The Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, authorizing Parts B and D of the Energy Employees Occupational Illness Compensation Program was passed in October 2000 and became effective on July 31, 2001.

Under Part D, the Department of Energy (DOE) provided 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 Accounting 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 October 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 DOL publish regulations and begin to administer 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 also 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.

EXECUTIVE SUMMARY

Over the past year, there have been many gains and accomplishments associated with the administration of Part E of the Energy Employees Occupational Illness Compensation Program Act. Nevertheless, the Office of the Ombudsman continues to receive complaints, grievances and requests for assistance from claimants and potential claimants.

In preparing this report, we considered “new” ways of presenting the issues that were brought to our attention over the course of this year. However, in the end, we decided, that as in previous reports, categorizing these issues as statutory, regulatory or administrative was an effective way to present this information. Thus, we will utilize these three categories in this report.

The Statutory Issues that we discuss are:

- A. **Covered Employee/Covered DOE Facility (17 comments):** Some claimants question the limitations imposed by Part E on the nuclear workers who are covered, as well as the location/type of work that is covered.
- B. **Causation Requirement (13 comments):** There are claimants who question the need for a causation requirement in Part E. Some claimants believe that exposure to toxins while working at a DOE facility coupled with the subsequent illness (or death) of the worker ought to be sufficient to establish entitlement to Part E compensation.
- C. **Limitation on Survivor Eligibility (46 comments):** Claimants have contacted us to question the limitation contained in Part E on the eligibility of survivors. In most instances, this concern focuses on the definition of “surviving children” found in Part E where in order to qualify as a survivor the child must, at the time of the worker’s death, have been either: (a) younger than 18 years of age; or (b) younger than 23 years of age and a full-time student; or (c) any age and incapable of self-support.
- D. **Qualified Claimant’s Death Prior to Award Nullifies Claim or Reduces Compensation (11 comments):** For many of the claimants and family members with whom we speak, the anxiety of the claims process is heightened by the knowledge that the death of the worker prior to an award and payment of compensation could, in some instances, nullify or reduce the compensation. Nevertheless, on the other hand, we were also contacted by survivors who were not aware of this provision, and thus were surprised to discover that the death of the worker impacted the payment of compensation.
- E. **Chronic Lymphocytic Leukemia (CLL) (4 comments):** The definition of “specified cancer” under 42 U.S.C. § 7384l(17) specifically excludes CLL. Some claimants potentially impacted by this provision have compiled information challenging the notion that CLL is not a radiogenic cancer, yet because this exclusion is contained in the statute (for SEC inclusion) and in NIOSH regulations (with respect to dose reconstructed cancer claims), this information cannot be considered.

The Regulatory Issues discussed in this report include:

- A. **The 50% Probability of Causation Requirement for Radiogenic Cancer (7 comments):** In order to be eligible under Part E, it must be established, in addition to other requirements, 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 illness...” See 42 U.S.C. § 7385s-4. With respect to radiogenic cancer claims only, DEEOIC interprets this standard as requiring a probability of causation of 50% or more based on a NIOSH dose reconstruction. However, some claimants argue that when viewed in the context of the entire statute, this provision signals Congress’s intent that the causation standard be something less than 50%.

- B. **Medical Benefits (19 comments):** There are claimants who assert that the system created by DEEOIC for the receipt of medical benefits can itself be a barrier to the receipt of these benefits.
- C. **Offset for Social Security (10 comments):** Some claimants believe that it is the intent of the EEOICPA statute to exclude their social security benefits from any offset as a result of the receipt of EEOICPA benefits. However, they cannot find anyone who will directly address this issue.
- D. **Part B and Dose Reconstruction (78 comments):** We receive a number of inquiries concerning Part B and/or dose reconstruction. The majority of these inquiries are either: (1) requests for the status of a Part B claim; (2) questions concerning Special Exposure Cohort status; or (3) questions relating to dose reconstruction – i.e., claimants do not understand the process or question the accuracy of the estimate.

Administrative Issues encompass a wide variety of inquiries that we receive ranging from complaints regarding interactions with DEEOIC personnel to requests for assistance in locating evidence to establish employment, exposure and/or causation. In fact, most of the inquiries that we received this year were in actuality requests for assistance – the claimant did not call simply to record his or her complaints about a statute, a regulation, or their interactions with DEEOIC, rather the claimant contacted us in hopes that we could offer assistance in pursuing their claim. Thus, the Administrative Issues discussed in this report are:

- A. **Burden of Proof/Difficulties Proving Employment, Exposure and Causation (192 comments):** Many claimants contact us in response to the difficulties that they encounter when attempting to locate evidence to substantiate employment, exposure or causation. With respect to employment and exposure, especially where records have been lost, destroyed or never kept in the first place, claimants approach us inquiring as to what else they can do to satisfy this burden. While there are some suggestions that can be provided (and are provided by this Office, as well as DEEOIC), there are instances where these suggestions are not fruitful. Many of these claimants believe that it is unfair to deny their claim because, through no fault of their own, relevant evidence is no longer available. Moreover, where evidence is available, some claimants assert that it would be more efficient if they knew, in advance, the criteria that would be used to evaluate their evidence - thus avoiding instances where claimants submit evidence and are then told that the evidence is lacking.
- B. **Processing of Claims Takes Too Much Time (66 comments):** While we see cases that are processed very expeditiously, we are nevertheless contacted by claimants who question the amount of time it takes to adjudicate their claims. There are many steps in the Part E process, and some claims take years to wind their way completely through this system. Moreover, some claimants become frustrated at what they perceive as unnecessary (or avoidable) delays. For instance, some claimants have told us that they become frustrated when their evidence is returned for further development – these claimants often

argue that they should have been provided better guidance in the beginning. Furthermore, while some claimants would appreciate an update when there are delays in the processing of their claim, others question why DEEOIC does not have time-limits imposed on it within which to develop evidence or respond to documents.

DEEOIC indicates that it imposes timeliness standards on itself as part of its operational plans and Government Performance and Results Act goals. However, the claimants with whom we spoke were not aware of these standards.

- C. **Concerns Involving Interactions with DEEOIC Personnel (108 comments):** A number of claimants continue to contact us to report unanswered telephone calls; claims impacted by changes in claims examiners; inconsistent advice and/or rude behavior. It is not within our authority to assess blame, assuming that there is blame to be assessed. Nevertheless, our Office continues to discuss these allegations with DEEOIC in an attempt to stem these allegations, and a process has been developed for referring such complaints to DEEOIC managers.
- D. **Locating Experts (7 comments):** It is acknowledged that in some areas of this country there are not many (and sometimes no) “qualified” doctors to perform impairment ratings and/or doctors who are willing to accept the Medical Benefits Identification Card issued by DEEOIC.

DEEOIC states that it is aware that some claimants have experienced difficulties locating experts and has contracted with nearly 100 specialists to provide impairment ratings and other evaluations upon the request of claimants or DOL. DEEOIC also indicates that it has stepped up its efforts to explain to providers the benefits of enrolling in this program.

However, in the meantime, claimants continue to complain that their ability to receive medical benefits is impacted by the inability to locate experts who will provide these services.

- E. **Area 51 (5 comments):** Available information did not list Area 51 as a covered DOE facility. [Note: this issue was addressed by EEOICPA Circular No. 08-06].
- F. **Sarcoidosis (3 comments):** It was argued that a history of beryllium exposure and a diagnosis of sarcoidosis were sufficient to meet the requirements for a diagnosis of chronic beryllium disease. [This issue was addressed by EEOICPA Circular No. 08-07].
- G. **General Requests for Assistance (1088 comments):** A large percentage of our contacts involve individuals who simply want assistance processing their claim. These claimants generally find this program to be very complicated, and many are: (1) not aware of assistance that is provided; (2) do not have access to the assistance that is available; or (3) based on the facts of their particular case, the assistance that is available is not sufficient. There are few places that these claimants can call for assistance, and specifically with respect to this Office, we are not always able to offer the assistance that is needed.

REPORT

The Office of the Ombudsman for Part E of EEOICPA (the Office) was established in 2004 by Section 7385s-15 of the Energy Employees Occupational Illness Compensation Program Act (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-15.² In addition to directing that the Office be an independent office, located within the Department of Labor, these amendments also charged the Office with three duties:

1. To provide information on the benefits available under Part E and on the requirements and procedures applicable to the provision of such benefits;
2. To make recommendations to the Secretary of Labor regarding the location of centers (to be known as “resource centers”) for the acceptance and development of claims for benefits; and
3. To submit not later than February 15 of each year a report setting forth the number and types of complaints, grievances, and requests for assistance received by the Ombudsman under Part E during the preceding year and an assessment of the most common difficulties encountered by claimants and potential claimants during the preceding year.³

The information presented below is our report to Congress setting forth the number and types of complaints, grievances, and requests for assistance received during calendar year 2008 and an assessment of the most common difficulties encountered by claimants and potential claimants during that year.

I. THE OFFICE OF THE OMBUDSMAN AND THIS REPORT

While our authorizing legislation only mentions Part E, we are contacted by Part B claimants, as well as by individuals searching for someone who can help them with their general “labor” questions. Where the question is not related to EEOICPA, we direct these individuals, to the extent that we can, to more relevant offices or agencies. Where the question or request for help involves Part B, this Office relies upon its working relationships with NIOSH; the Ombudsman to NIOSH; as well as DEEOIC to ensure that these claimants receive assistance.

The concerns that are brought to our attention and the requests for assistance that we receive involve every aspect of the claims process. Some of the assistance that we provide includes:

- Checking the status of claims,
- Defining legal, medical, and scientific terms and concepts,
- Reviewing and explaining documents and decisions,
- Directing claimants to other useful/relevant resources,
- Assisting claimants in understanding instructions, laws, regulations, as well as policies and procedures,
- Assisting claimants in obtaining answers to questions.

Furthermore, a trend that we began to notice last year, and one that we continue to see this year is that instead of complaints that focus on specific incidents, we are receiving more and more general requests for

² See Appendix for a discussion of the legislative history of EEOICPA and the Office of the Ombudsman.

³ The Office is also authorized to carry out such other duties with respect to this part as the Secretary (of Labor) shall specify for purposes of this section. To date, the Secretary has not authorized any other duties.

assistance. Thus, rather than focusing upon a particular statutory or regulatory provision, more claimants are contacting us because they simply want assistance processing their claim.

The information presented in this report is based on our interactions with the individuals who attended our town hall meetings sponsored during 2008, as well as the claimants, potential claimants, family members and those representing claimants who telephoned, faxed, e-mailed and/or mailed us during the period from January 1, 2008 through December 31, 2008.⁴

However, before proceeding with the report, there are four factors that impact this report that we would like to acknowledge:

1. The Office of the Ombudsman only interacts with a percentage of the Part E claimant population. Claimants who do not encounter problems, as well as those who are satisfied with the program, have no reason to contact us. Moreover, some claimants are not aware of this Office – an issue that we continue to address. In addition, some claimants admit that they had reservations about contacting this Office – some were hesitant to lodge a complaint, while others admit that they had doubts as to the benefits of contacting us. Thus, even among claimants who are encountering difficulties, we only hear from those who know of our existence and are willing to contact us.
2. This year's report addresses all of the most common complaints, grievances and requests for assistance that we received during 2008, including issues discussed in prior reports. It was decided that since claimants and potential claimants had taken the time to contact our Office, we should not omit an issue simply because it was addressed in a previous report.
3. This Office is charged with providing an assessment of the most common difficulties encountered by those claimants who contact us. This assessment is not an attempt to assess blame. The assessing of blame, assuming that there is blame to be assessed, is beyond the scope of this Office.
4. Most claimants who contact us have broad concerns that overlap (or do not fit neatly into) the categories and subcategories used in this annual report. Thus, we fully recognize that many issues transcend specific categories (or could just as well have been listed in other categories).

**** CLAIMANTS SHOULD NOT RELY UPON THE STATEMENTS OF LAW AND/OR CASE EXAMPLES PROVIDED IN THIS REPORT IN REACHING ANY CONCLUSIONS CONCERNING ACTUAL CLAIMS.** The case examples and discussions of law contained in this report are included solely for the purpose of providing Congress with the number and types of complaints, grievances and requests for assistance received by this Office during this year. EEOICPA is a complicated statute and its applicability varies depending upon the facts of each individual case. Thus, individual claimants should not rely upon the case examples and/or discussions of law contained in this report in reaching any conclusions concerning actual claims. **ANY QUESTIONS CONCERNING INDIVIDUAL EEOICPA CASES OUGHT TO BE REFERRED TO THE RESOURCE CENTER, THE DISTRICT OFFICE OR THIS OFFICE** [Contact information for this Office is provided on the back cover of this report].

⁴ During the course of this year, the Office of the Ombudsman held town hall meetings in St. Petersburg, Florida; Las Vegas, Nevada; and Shoreham, New York.

II. STATUTORY ISSUES

As in past years, we received complaints, grievances and requests for assistance involving the EEOICPA statute. Initially, it must be recognized that where the issue involves the statute, the Department of Labor is without authority to resolve such issues. Rather, any resolution of these issues will have to be addressed by Congress.

Many claimants view EEOICPA as a broad program designed to compensate those who worked at nuclear facilities. As a result, some claimants, especially those who were involved in the efforts to pass this legislation, become disappointed when they realize the limited scope of Part E – Part E only extends to covered Department of Energy (DOE) contractors and subcontractors, as well as employees covered by Section 5 of the Radiation Exposure Compensation Act (and qualified survivors of such employees), for covered illnesses that are the result of exposure to toxic substances at a DOE facility. Consequently, Part E does not cover all workers who were involved with the nuclear program.

In addition, the EEOICPA statute is divided into two parts, Part B and Part E. Because many EEOICPA claimants are potentially eligible for benefits under both parts, some claimants are keenly aware of the requirements of both programs. Some claimants have contacted us to lodge complaints concerning certain provisions of Part E which they believe are more “limiting” than similar provisions in Part B. The table below outlines the differences between Part B and Part E that have been the subject of complaints during the year:

Part B	Part E
Covers atomic weapons employees; beryllium vendor employees; DOE employees; DOE contractors and subcontractors; Section 5 RECA employees	Covers DOE contractors and subcontractors; Section 5 RECA employees
Eligible employee entitled to \$150,000. If employee dies before receipt of benefits, eligible survivor entitled to \$150,000.	Eligible employee entitled to up to \$250,000. If employee dies before receipt of benefits, under most circumstances, survivor must file survivor’s claim where potential benefits range between \$125,000 and \$175,000.
Eligible survivors are spouse; child; parent; grand-child; grand-parent	Eligible survivors are spouse and child, but is limited to a child who at the time of the employee’s death was either: under 18; or under 23 and a full time student; or incapable of self-support.

The specific statutory issues that generated concern this year include:

- A. Covered Employee/Covered DOE Facility – 17 comments
- B. Causation Requirement – 13 comments
- C. Limitation on Survivor Eligibility – 46 comments
- D. Qualified Claimant’s Death Prior to Award Nullifies Claim or Reduces Compensation – 11 comments
- E. Chronic Lymphocytic Leukemia (CLL) – 4 comments

A. Covered Employee/Covered DOE Facility⁵

Some DOE facilities employed a large number of employees. Nevertheless, Part E only covers those employees who qualify as employees of DOE contractors and subcontractors. See 42 U.S.C. § 7384l(10) and §7385s(1). During the course of this year, we heard from members of the military; employees of the federal government; as well as employees whose employer had contracts with governmental agencies other than DOE. These employees generally raise the same arguments - they cannot understand why they are excluded from coverage under Part E, especially since (1) they worked at a DOE facility; (2) they performed the same or similar work to that performed by the employees of DOE contractors and subcontractors; and (3) they were exposed to the same toxins as the employees of DOE contractors and subcontractors.

Where the employee worked for an atomic weapons employer or a beryllium vendor, there is the added question of why this employee is covered under Part B, but not covered under Part E. Once assured that they are not covered under Part E, many of these employees ask if there is a program similar to Part E specifically designed to compensate them for their illnesses caused by exposure to toxins while working at these nuclear facilities. Unfortunately, this Office is not aware of any program similar to Part E designed for these other employees, other than State workers' compensation or tort action.

The requirement that an employee have worked at a covered DOE facility is also a source of complaints. One issue that we encountered involves facilities such as the Santa Susana Field Laboratory and the Iowa Ordnance Plant where the DOE facility only occupied a portion of the grounds. Some individuals who worked at the "other parts" of these facilities argue that limiting Part E coverage to those who worked at the DOE facility ignores the fact that the toxin used at these DOE facilities often affected those working nearby. In addition, claimants have argued that this limitation does not take into account the realities of the work - i.e., even though an employee may not have been assigned to work at the DOE facility, employees were often "instructed" to enter these areas. With respect to one facility, at least one claimant has compiled evidence that she believes shows that DOE work was performed at areas other than those currently identified as the DOE facility.⁶

The statutory definition of "Department of Energy contractor employee," has also been the source of complaints. Pursuant to Section 7384l(11), 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.

⁵ The problems encountered by claimants when attempting to establish covered employment is discussed at Section IV(1).

⁶ DEEOIC has a process for evaluating evidence regarding the possible addition of new DOE facilities or expansion of existing sites and has done so on a few occasions.

Some claimants assert that under the facts of their particular case, this definition proves to be too narrow [or too technical]. In particular, we have been informed of instances where even though the employer had a contract with DOE and the employee worked at a DOE facility, claims were denied on the ground that the contract was not one to provide management and operations, management and integration, environmental remediation, or construction and maintenance at a facility.

For all of the reasons discussed above, individuals who were potentially exposed to toxins while working at or near DOE facilities continue to question why the identity of their particular employer, the exact location of their job, or the specifics of a contract should determine whether they are eligible for Part E benefits.

B. Causation Requirement

In order to be eligible under Part E, the claimant must establish 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 illness.” See 42 U.S.C. § 7385s-4(c).

Prior reports have discussed the difficulties encountered by claimants attempting to prove that an illness is related to exposure to toxins while working at a DOE facility. We continue to hear similar complaints, and discuss those complaints at Section IV (1). However, many of the claimants who contact us with “causation problems” actually have a more basic problem – they do not understand (or agree with) the need for a causation requirement. Many claimants argue that their employment which exposed them to known toxins coupled with the fact that they now suffer from an illness ought to be sufficient to qualify them for benefits. Take for example a claimant who called suffering from pulmonary fibrosis. In light of the fact that that this claimant was exposed to plutonium while working at a DOE facility, this claimant questions the need for additional documentation in order to prove that the pulmonary fibrosis is associated with exposure to plutonium.

The belief that the causation requirement is unnecessary is exacerbated when the claimant is also aware of literature suggesting a relationship between toxins at the facility and the illness that they suffer. This was the situation with a former Nevada Test Site (NTS) employee now suffering from contact dermatitis. Because there was medical literature (the American Journal of Medicine) that linked contact dermatitis to toxins at the workplace, this claimant could not understand the need to invest further time establishing that this illness was related to exposure to toxins at work. The belief that it was not necessary to develop additional evidence was buttressed when this employee reviewed the Site Exposure Matrices (SEM) for NTS.⁷ The SEM contains a listing of 720 toxins known to have been used at NTS and also lists 359 toxic substances with an established link to contact dermatitis. In light of the fact that he has contact dermatitis and DEEOIC’s website contains information linking contact dermatitis to a number of toxins known to have been used at NTS, this employee could not understand why he was being asked to submit additional evidence indicating that it was at least as likely as not that his exposure to a particular toxin at NTS was a significant factor in

⁷ The Site Exposure Matrices (SEM) is a tool developed by DEEOIC that contains information about particular toxic substances present at particular DOE facilities. The SEM is updated to include additional toxic substances which have established links to certain occupational illnesses.

aggravating, contributing to, or causing his contact dermatitis.⁸

The Office has had similar conversations with many other claimants. These claimants focus on their exposure to toxins, and view the inclusion of a “causation requirement” as an unnecessary and oftentimes difficult, if not impossible obstacle.

C. Limitation on Survivor Eligibility

Most of the problems with this provision involve the definition of “surviving children.” Under Part E, in order for a child to qualify as a survivor, that child must, at the time of the worker’s (parent’s) death, have been either:

- a. younger than 18 years of age; or
- b. younger than 23 years of age and a full-time student; or
- c. any age and incapable of self-support.

Claimants contact our Office to offer their opinion as to why this provision is unfair. Moreover, we continue to receive inquiries asking if this provision has been amended or revised.

The complaints that we receive argue that:

1. It is not fair that this program was only created after many of the workers were deceased and many of the children were adults, and then to impose an age restriction on the eligibility of the surviving children.
2. This definition does not recognize the hardships endured and the sacrifices often made by adult children in caring for their parents. (This frustration is most evident in situations where the adult child cared for the parent, yet upon the death of the worker/parent, the adult child is not eligible for benefits, while other children, simply because of their age, are eligible.
3. The requirements for establishing “incapable of self-support” are not clear. The phrase “incapable of self-support” is not defined in the statute, thus we are contacted by claimants who argue that since they were not working at the time of the worker’s death, they have met the definition of “incapable of self-support.” In addition, some children note that while they were in fact incapable of self-support at the time of the worker’s death, prior to the passage of this statute, there was no reason to obtain documentation of their condition. Thus, for some of these claimants it is difficult to now obtain records addressing their condition many years ago.

In addition, because this is an instance where Part B differs from Part E (under Part B there is no limitation on the eligibility of children), some claimants ask why this limitation was inserted in Part E, but not inserted in Part B.

⁸ This case has a long procedural history. However, this claimant initially contacted us after he was advised that he needed to establish that his contact dermatitis arose during a specific latency period. The claimant also felt that it was unfair to ask him in 2008 to find medical records dating back to the mid 1980’s.

D. Qualified Claimant's Death Prior to Award Nullifies Award or Reduces Compensation

Under Part E, the death of the covered employee or survivor prior to the payment of benefits may result in a reduction or nullification of compensation. For example, Section 7385s-1(2)(A) provides that, “[a]fter the death of a covered DOE contractor employee, compensation...shall not be paid.” Rather, with one exception, after the death of covered employee, the survivor of that employee shall receive compensation under the compensation schedule for survivors found at 42 U.S.C. § 7385s-3. What many claimants find troubling is that while the maximum compensation available to a living worker under Part E is \$250,000, the compensation schedule for survivors range from a minimum of \$125,000 to a maximum of \$175,000 depending upon the extent of the worker’s wage loss. See 42 U.S.C. § 7385s-3.⁹ Moreover, we continue to encounter situations where in light of the age of the children, the death of the worker and the spouse prior to the payment of benefits results in no member of the family being eligible for Part E benefits.

In many of the instances that have been brought to our attention, the fear of a possible reduction/nullification of compensation is coupled with a concern over the amount of time that it takes to process the claim. The desire to have their claim adjudicated as quickly as possible is often heightened by the age and/or the health of the Part E claimants and it is this “combined” concern that prompts some claimants to contact our Office.

Nevertheless, there are other instances where families do not become aware of the possibility of a reduction/nullification of compensation until after the death of the covered employee. Take for example this situation that was brought to our attention: When the covered employee passed away, the family was aware that this employee had been found eligible for compensation. However, this family was not aware that since their loved one passed away prior to the actual receipt of compensation, the compensation awarded to this worker would not be paid. Consequently, this family incurred (additional) funeral expenses on the belief that compensation was forthcoming and it was only later that the family discovered that this compensation would not be paid. While some members of this family have applied for survivor benefits, they nevertheless question the need for a statutory provision in Part E that reduces/nullifies benefits upon the death of the covered worker and they are upset that they were impacted by a provision that they were not aware of until after they had incurred the additional expenses.

DEEOIC has procedures for expediting claims where the claimant is terminal and we are aware of instances where these procedures have been effective. Nevertheless, based on our conversations, some claimants are either not aware of these procedures or do not know how to initiate these procedures. In addition, we have been told of instances where the worker’s condition progressed way too quickly to inquire about or to utilize these procedures. Moreover, the processing of the EEOICPA claim often is not the primary concern when a family member is terminally ill.

⁹ The one exception is found at section 7385s-1(2)(B) and provides that, “[I]n a case in which the employee’s death occurred after the employee applied under [Part E] and before [contractor employee] compensation was paid, and the employee’s death occurred from a cause other than the covered illness of the employee, the survivor of that employee may elect to receive, in lieu of [survivor compensation], the amount of contractor employee compensation that the employee would have received...if the employee’s death had not occurred before compensation was paid...” 42 U.S.C. §7385s-1(2)(B).

E. Chronic Lymphocytic Leukemia (CLL)

In defining the term “specified cancer,” Section 7384l (17) specifically excludes chronic lymphocytic leukemia (CLL). See 42 U.S.C. § 7384l (17). Consequently, Part B claims for CLL are denied and claims for CLL are not forwarded to NIOSH for dose reconstruction.

There are claimants who have uncovered medical literature that challenge the notion that CLL is not a radiogenic cancer (in fact in one case, the claimant has compiled volumes of literature). What concerns these claimants is that since the exclusion of CLL is statutory with regard to SEC inclusion and based on NIOSH regulations with regard to dose reconstruction, their Part B claims for CLL are denied without any real consideration of their medical literature (and without any refuting of this medical literature) and their claims are not forwarded for a dose reconstruction which could potentially assist both their Part B and Part E claims.

It is our understanding that NIOSH is currently reviewing the status of CLL, although we are not aware of a timetable for the completion of this review. In the meantime, Part B claims for CLL are not forwarded to NIOSH for dose reconstruction and CLL is not viewed as a radiogenic cancer.

III. REGULATORY ISSUES

In order to implement the statute enacted by Congress, the Department of Labor (DOL) issued regulations. 20 C.F.R. Part 30. There are claimants who believe that some of the regulatory provisions issued by DOL are not consistent with Congress’ intent in passing EEOICPA. Unfortunately, where these disagreements exist, claimants generally do not have the resources to challenge these regulations in federal court. In addition, many claimants argue that the regulations impose a very difficult, if not impossible burden.

Over the course of this year, claimants and potential claimants have contacted our Office to provide us with their complaints, grievances and requests for assistance with respect to the following regulatory issues:

- The 50% Probability of Causation Requirement for Radiogenic Cancer – 7 comments
- Medical Benefits – 19 comments
- Offset for Social Security Benefits – 10 comments
- Part B and Dose Reconstruction Only Provided for Radiogenic Cancers – 78 comments

A. The 50% Probability of Causation Requirement for Radiogenic Cancer

Under Part B, section 7384n(b) provides that:

An individual with cancer...shall be determined to have sustained that cancer in the performance of duty for purposes of the compensation program if, and only if, the cancer...was at least as likely as not related to employment... (emphasis added).

42 U.S.C. § 7384n(b).

Turning to Part E, section 7385s-4 provides that except for cases determined under Part B and cases determined under former Part D,

...a Department of Energy contractor employee shall be determined...to have contracted a covered illness through exposure at a Department of Energy facility if –

- (A) 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 illness; and
- (B) it is at least as likely as not that the exposure to such toxic substance was related to employment at a Department of Energy facility. (emphasis added).

42 U.S.C. § 7385s-4(c).

Claimants have and continue to note that the language “at least as likely as not” as used in Part B has been interpreted to mean 50% or more. Thus, these claimants argue that the phrase “at least as likely as not a significant factor” (emphasis added) as used in Part E signals Congress’ intent that the causation standard at Part E be a lesser standard than that used at Part B (i.e., that “at least as likely as not a significant factor” means less than 50%).

B. Medical Benefits

Pursuant to section 7385s-9, eligible covered DOE contractor employees are to be furnished medical benefits for their covered illness. Claimants continue to contact us with problems associated with medical benefits. In addition to the specific problems associated with locating doctors [which we discuss at Section IV (4)], some claimants have voiced their displeasure with the procedures established by DEEOIC for obtaining medical benefits.

Pursuant to procedures established by DEEOIC, when claimants are accepted for medical benefits, they are issued a Medical Benefits Identification Card. The claimant can then present this Medical Benefits Identification Card to medical providers whenever they seek treatment for their accepted condition. Unfortunately, some claimants encounter medical providers who refuse to “accept” the Medical Benefits Identification Card, and in those parts of the country where there is either a lack of doctors, or more specifically, a lack of doctors who accept the “card,” the ability of claimants to obtain medical treatment is impacted.

Some claimants “view” these procedures established by DEEOIC as just another health insurance program where doctors can choose whether to participate. These claimants argue that it was not the intent of this program to create a system where doctors could opt out of participation. Rather they argue that the intent of this program is to furnish eligible claimants with medical benefits – an intent that they believe is not fulfilled under the current system.

The Office has discussed this matter with DEEOIC. DEEOIC believes that the issuance of the Medical Benefits Identification Card is an effective way to expedite the furnishing of medical benefits. DEEOIC further notes that when the medical provider is enrolled in the program, this ensures that the provider is paid directly by DOL. DEEOIC also notes that this “card” informs the provider of the services covered by DOL, thus avoiding potential billing issues. DEEOIC does acknowledge that there are providers who do not accept the “card” and is now placing special emphasis on educating providers on the benefits of enrollment in the program. In addition, DEEOIC notes that any claimant who encounters a provider who does not accept the “card” should contact DEEOIC, and DEEOIC will work to enroll that provider. However, DEEOIC has no authority to force a private medical provider to provide services to EEOICPA claimants.

Nevertheless, we continue to receive complaints concerning the difficulties that claimants encounter attempting to locate doctors and other providers.

C. Offsets for Social Security Benefits

Pursuant to section 7385e(2), compensation and benefits provided under EEOICPA “shall not be included as income or resources for purposes of determining eligibility to receive benefits described in section 3803(c)(2)(C) of Title 31, or the amount of such benefits.” See 42 U.S.C. § 7385(e)(2). Section 3803(c)(2)(C) of Title 31 in turn provides a list of 16 benefit programs.

This Office has been approached by claimants who state that their social security benefits were offset as a result of their receipt of EEOICPA benefits. Citing section 7385e(2), some of these claimants question whether an offset was appropriate. Some claimants also complain that when they approached DEEOIC for assistance with matters relating to offsets of their social security benefits, they were referred to the Social Security Administration. However, when they eventually spoke to Social Security, that agency did not give any affect to the EEOICPA legislation – rather the Social Security staff relied upon their own rules and regulations in reaching their determinations on the need for an offset.

DEEOIC responds asserting that it does not have any authority over the manner in which Social Security interprets its regulations and policies, and thus has no authority over determinations involving the awarding or offsetting of social security benefits.

The claimants with whom we spoke simply wanted a definitive answer as to whether their social security benefits are subject to an offset based upon receipt of EEOICPA benefits.

D. Part B and Dose Reconstruction

Although our authority is limited to Part E claims, we continue to receive complaints, grievances and requests for assistance concerning Part B claims. A majority of the Part B issues that we encounter either involve: a status request; questions concerning the Special Exposure Cohort process; or questions concerning dose reconstruction.

Status Inquiries: Many claimants have filed both a Part B and Part E claim and, thus, ask us to inquire on the status of both claims. Others simply know that they have filed a claim and are unsure whether it is a Part B or a Part E claim, or both. In these instances, to resolve any confusion, our Office will seek the status of all claims filed by these claimants. Moreover, because they do not know who else to call, some claimants with Part B claims contact us when they need assistance determining the status of their claim.

Special Exposure Cohort (SEC): Some claimants contact us to inquire why their facility has not been granted SEC status, while others contact us to gain more information on the procedures for filing a SEC petition. In addition, there are claimants who contact us seeking the status of SEC petitions that have been filed. Our Office refers the bulk of these inquiries to the Denise Brock, Ombudsman to NIOSH.

Dose Reconstruction: When it comes to inquiries concerning dose reconstructions, the usual scenario that we encounter involves situations where the case is forwarded to NIOSH for a dose reconstruction and months later the claimant contacts us because they have not received any updates on their claim. In fact some claimants have suggested that their wait for the completion of a dose reconstruction was close to one year.

The website maintained by NIOSH's Office of Compensation and Analysis and Support (OCAS) provides instructions for obtaining the status of one's dose reconstruction. However, most of the claimants with whom we interacted did not appear to be aware of this website or this service.

- Many claimants find the dose reconstruction process to be a mystery. A number of claimants contacted us to inquire if we could explain the process used by NIOSH to arrive at the final estimate of the workers' exposure to radiation. Denise Brock continues to be a tremendous resource who we turn to, and to whom we refer claimants who have questions concerning dose reconstruction.
- Some claimants believe that NIOSH utilized incomplete information in performing their dose reconstruction.

There are claimants who assert that exposure information either was not recorded or severely "downplayed" accidents and spills to which the worker was exposed. In response to such assertions, claimants are generally assured that in calculating the dose reconstruction NIOSH over-estimates radiation exposure based on the highest levels of exposure observed or possible for the facility. Some claimants have indicated that they are skeptical of this response.¹⁰

OCAS's website also informs claimants that a video on dose reconstruction and the dose reconstruction process is available. Nevertheless, the claimants who contact us tend to have little understanding of (or confidence in) the dose reconstruction process.

¹⁰ The response is that because accurately estimating the exposure that the worker received is time-consuming, in order to complete the reconstruction as timely and efficiently as possible, NIOSH may make assumptions on dose reconstruction that are favorable to the claimant. Thus, instead of completing a dose reconstruction which precisely estimates the worker's exposure, NIOSH will significantly over-estimate the exposure based on the highest levels of exposure observed or possible for the facility.

- Claims by security guards and transportation workers continue to be a source of complaints. Security guards and transportation workers often note that they were not required to wear dosimetry badges (thus accurate records of their exposure are not available) and that contrary to employment records, their jobs often required them to travel throughout the facility where they came into contact with a wide range of employees. Moreover, security guards have recounted instances where they were the first to arrive and the last to leave chemical spills, or were assigned to guard “hot” locations (and yet were not given protective gear or a dosimetry badge).
- Another issue that has been brought to our attention is the fact that dose reconstructions are only performed on cancers. Under DEEOIC’s policies and procedures, all claims for radiogenic cancer, including Part E claims, are referred to NIOSH for dose reconstruction. There are claimants who believe that there is a link between their non-cancerous condition and radiation, and thus believe that their claims ought to be referred for dose reconstruction. This specific argument has been raised by claimants who suffer from thyroid problems (as opposed to thyroid cancer), as well as claimants with pulmonary fibrosis and diabetes. These claimants are certain that their DOE employment exposed them to radiation, and they assert that there is medical literature linking their non-cancerous condition to radiation exposure. Consequently, these claimants argue that their claims ought to be referred to NIOSH for dose reconstruction.

DEEOIC responds that NIOSH’s role under EEOICPA does not extend to evaluation of the possible impact of radiation on non-cancerous conditions. Cases in which such a linkage is asserted are handled by DEEOIC under Part E utilizing medical opinions. The SEM contains information on links between radiogenic substances and non-cancerous conditions for use in adjudicating Part E claims.

IV. ADMINISTRATIVE ISSUES

As the numbers reflect, most of the people who contacted our Office have concerns that we categorize as “Administrative Issues.” More specifically, as the numbers reflect, most of the people who contacted our Office over the course of the last year specifically sought assistance with processing of their claim. The requested assistance ranged from requests for us to explain documents to requests that we provide advice concerning an EEOICPA case pending before district court.¹¹

A general assessment of the many administrative complaints, grievances and requests for assistance that we received over the last year would be that:

- EEOICPA in general and Part E in particular, is a complicated program where the adjudication of the claim often turns on medical, scientific, and/or legal concepts. Thus, for some claimants the processing of a Part E claim is a challenge.

¹¹ It was beyond the scope of our authority, beyond the scope of our individual capabilities and potentially a conflict of interest to assist a claimant with an EEOICPA claim pending before a district court.

- Many claimants do not have immediate access to persons or organizations that can answer questions and/or provide guidance.
- While DEEOIC provides assistance developing evidence, the burden is ultimately on the claimant to satisfy the elements necessary to establish entitlement. Thus, where the assistance offered by DEEOIC is not sufficient, some claimants are at a loss as to where else to turn.
- Some claimants are not aware of, or do not have access to, the resources that may be available to assist them in developing evidence. Moreover, the assistance that is available does not “address” every situation.
- Some claimants believe that Part E was intended to be a “claimant-friendly” non-adversarial program and believe that the actual program does not live up to these standards.

The “Administrative Issues” that we discuss are:

1. Burden of Proof/Difficulties Proving Employment, Exposure and Causation – 192 comments
2. Processing of Claims Takes Too Much Time – 66 comments
3. Concerns Involving Interactions with DEEOIC Personnel – 108 comments
4. Locating Experts – 7 comments
5. Area 51 (Nevada Test Site) – 5 comments
6. Sarcoidosis versus Chronic Beryllium Disease – 3 comments
7. General Requests for Assistance – 1088 comments

1. Burden of Proof/ Difficulties Proving Employment, Exposure and Causation

Issues surrounding the burden of proof could be classified as statutory, regulatory or administrative. Nevertheless, the vast majority of the complaints, grievances and requests for assistance that we receive regarding the burdens of proof involve situations where, in the end, the claimant wanted assistance developing evidence to meet one or more of their burdens.

EMPLOYMENT: In order to establish entitlement to benefits, the worker must have been a covered employee working at a covered DOE facility. Thus work records can be essential. Unfortunately, some claimants encounter difficulties locating employment records, especially where the employment occurred years ago. [Note: over the course of this year, we encountered instances where claimants had to substantiate employment dating back as early as the mid 1940’s]. As we have acknowledged, DEEOIC, mainly through its Resource Centers, does offer assistance to claimants with obtaining employment and exposure records, and in fact DEEOIC continues to work with outside organizations to improve the information available regarding potential DOE contractors and subcontractors. However, there are instances where the efforts expended by DEEOIC simply are not sufficient to locate the necessary employment records.

- A common problem that we encounter involves situations where employment evidence has been lost, destroyed, or was never kept in the first place. Even though it is through no fault of the claimant that this evidence is no longer available, the burden of proof nevertheless remains on the claimant. In such instances, some claimants question the reasonableness of requiring them to shoulder these burdens. Consider the case of two gentlemen who we met in Shoreham, New York. These gentlemen assert that

their companies were hired to work on the “Isabelle Project” performed at the Brookhaven facility.¹² Unfortunately, while there is evidence confirming that these men worked for their respective employers, they cannot locate evidence establishing that their employers performed work at Brookhaven. [These gentlemen have a very plausible explanation for their dilemma – they believe that Brookhaven contracted with general contractors who in turn subcontracted with their respective employers. The problem confronting these gentlemen is to find the general contractor and/or the records of these general contractors.] In response to the suggestion that these gentlemen submit affidavits prepared by colleagues, they indicate that most have passed away. They have attempted, to no avail, to provide affidavits for each other, and thus, they continue their search for evidence which will establish that they performed work at Brookhaven.¹³

- When records cannot be located, or where available records are incomplete, in some instances suspicions arise that records were intentionally destroyed or altered. In fact, at almost every town hall meeting that we sponsor, at least one participant provides the audience with their personal account of destroyed/altered records – at our meeting in Las Vegas it was the claimant who recounted driving records from site to site because no one wanted to take possession of them, and eventually accepting the “recommendation” to drop these records off in the desert.
- The problems encountered when establishing employment are compounded where the worker has passed away. Workers at these facilities were instructed not to discuss their employment with their families. Thus, because these workers honored these instructions, many survivors are at a loss when asked to substantiate their loved one’s employment. One case that we encountered involved a claim where the covered employment occurred in the mid 1940’s – before the survivor who contacted us was even born. In attempting to establish covered employment this survivor has continued to run into obstacles: social security records do not record any employment for the years in question; an older sibling simply remembers the father coming home from a construction job, the father never talked about the job; the union destroyed all records prior to 1951; most of the people with knowledge of this worker’s employment are deceased; and one relative who is still living and who might have personal knowledge, does not have the capacity to complete an affidavit.
- Under Part B, the SEC process is designed to assist claimants. However, we are still contacted by claimants who find it difficult to establish the required 250 working days.
- There are suggestions and recommendations that can be provided to claimants to assist them when they encounter difficulties locating records. However, in some instances, these suggestions are not fruitful. During the town hall meeting in Las Vegas, the suggestion was offered that survivors encountering difficulties locating employment records could seek affidavits from colleagues and other relatives. Almost in unison, the audience replied that colleagues who had worked with their parents had passed away. Subsequently, a few revised their statement to add that the few colleagues who were still alive did not have the capacity to complete an affidavit.

¹² You can go on the internet and confirm that there was an “Isabelle Project” at the Brookhaven facility.

¹³ One of these gentlemen is following a lead that he hopes will direct him to his employer’s general contractor, and the other gentleman hopes that he can locate other evidence that might confirm that he worked at this facility.

However, whether it is a claimant attempting to find the records of a general contractor or a child trying to establish their parent's employment, many of the claimants with whom we speak become frustrated when they are told that they have the burden of establishing employment, yet records cannot be found and all of the suggestions offered to them have been tried to no avail.

EXPOSURE: In addition to establishing that the worker was a covered employee who worked at a covered DOE facility, in order to establish entitlement, it also must be established that the worker contracted a covered illness through exposure at a DOE facility. To assist claimants in establishing exposure, DEEOIC offers assistance locating exposure records and provides the SEM which were recently updated to include information addressing the association between certain covered diseases and certain toxins.¹⁴ Nevertheless, claimants inform us of problems they encounter establishing causation. Many of these problems are similar to the problems encountered locating employment records – records have been destroyed, lost or were never kept in the first place. Moreover, as with employment records, these problems are often made worse where the worker has passed away and it is the survivor who is asked to establish this fact. However, there are other problems which specifically involve exposure.

- Claimants do not always know the name of the substances used at the work site. These were “secret” facilities – you did not ask a lot of questions. Recently, the wife of a worker called our Office to discuss the problems that she was encountering as she attempted to identify the toxins to which her husband had been exposed. When a reference was made to working around substances contained in barrels simply marked “X,” the wife assured us that the husband, who was listening on the speaker, was smiling and nodding in agreement.
- Many claimants question the accuracy of the exposure records. Claimants often complain that records do not list all of the toxins and/or do not accurately record all of the spills to which they were exposed. A specific complaint that we continue to hear comes from claimants who find it inconsistent that when they were exposed to a spill, their clothes and tools were taken away and destroyed, yet exposure records either do not mention these spills or now “treat” these spills as minor events.

CAUSATION: In order to be eligible under Part E, the claimant must establish 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 illness...” In practical terms, in order to prove “causation” under Part E, the claimant must not only establish a link between the illness and a toxin to which they were exposed while working at the DOE facility, the claimant must also present evidence establishing that it is at least as likely as not that exposure to a particular toxic substance was a significant factor in aggravating, contributing to, or causing that claimant's illness.

As we have noted, the SEM developed by DEEOIC provides assistance in linking certain illnesses to certain toxins. However, even with DEEOIC's assistance, some claimants are unable to establish the necessary link between their illness and exposure to a work-related toxin.

¹⁴ The Site Exposure Matrices (SEM) contains information on toxic substances present at certain DOE (and Radiation Exposure Compensation Act) sites covered under Part E. As noted, these matrices were recently updated to include information about certain occupational diseases associated with toxic substances found at facilities covered under Part E.

- Some claimants report that the SEM does not contain all of the chemicals (toxins) known to be present at some facilities and/or does not contain information on all illnesses, while others report that information is not available on all DOE facilities. Thus, some claimants find the SEM to be of limited benefit.
- There are instances where although information is now available on the SEM, this information was not available (or not fully available) when the decision on their claim was rendered. In these instances, some claimants question the soundness of the decision issued on their claim.

DEEOIC notes that the SEM was available to claims examiners and other DEEOIC officials prior to the time it was made available to the public. While acknowledging that this may be true, some claimants question the extent to which this information was available throughout DEEOIC. Moreover, some claimants argue that since the SEM was not available to the public, they did not have a fair opportunity to develop their case.

- Some claimants complain that the information contained in the SEM is not presented in the most useful manner. The SEM lists every substance known to have been present at a facility – the SEM that is available to the public does not categorize these substances by the date when the substance was present or by the specific location or job site where the substance was utilized.¹⁵ For this reason, some claimants find the SEM too overwhelming. For example, the SEM lists 720 substances at the Nevada Test Site; 2167 substances at Hanford; and 964 at the X-10 facility at Oak Ridge. Some claimants find it extremely difficult to go through these lists to determine the substances to which they may have been exposed and which may be linked to their illness.
- There are claimants who suggest that the government ought to be more directly involved in studying the possible link between illnesses and particular toxins. These claimants assert that it is not fair to deny their claims simply because no one has explored the possibility of a link between their illness and the toxins to which they were exposed, and believe that the government ought to initiate such studies.
- Claimants report that it can be difficult to get a doctor to express an opinion stating that it was “at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing [their] illness.” Claimants indicate that when it comes to issues of exposure to toxins, doctors are often reluctant to be so specific.
- Where the worker previously passed away, some survivors report that it is difficult to find a doctor who will address the possibility of a link between the death and exposure to particular toxins, especially where this possible link was never addressed at the time of death. [Note: where the claimant passed away prior to the development of the SEM, there is often little, if any, discussion of exposure to specific toxins].

¹⁵ The SEM also lists toxins by their chemical name whereas some claimants only know these toxins by the common name used at the facility.

- The following survivor’s claim highlights many of the problems encountered while attempting to establish causation. The worker in question died in 1983 from pancreatic cancer. Although the worker was employed at a DOE facility from the mid 1950’s to the mid 1970’s, records after 1963 cannot be located. According to the SEM, “[n]o toxic substances in the SEM database show an established link to [pancreatic cancer] at this time.” Furthermore, the SEM provides a list of 818 “toxic substances verified as having been onsite and used at ...Y-12’ at some time,” and another 1200 “toxic substances verified as having been onsite and used at ...K-25”, another facility which employed this worker. This worker is troubled by the fact that certain employment records are missing and believes that in establishing causation he needs more than a mere list of the 2000 toxins used at these facilities.

2. Processing of Claims Takes Too Long

To fully appreciate the complaints involving the time it takes to process Part E claims, it is necessary to appreciate the steps involved in processing a Part E claim. In light of the many variables and possibilities that exist, it is hard to plot the course of a “normal” Part E claim, yet here is a very broad overview of the Part E process [This example assumes a claim filed by a living claimant. A survivor’s claim would have a somewhat different path]:

Claim filed with Resource Center → Initial Development of Claim → Claim forwarded to District Office → Recommended Decision → Claim forwarded to Final Adjudicatory Branch (FAB) → FAB issues Final Decision.

At this point, if there is a finding of entitlement, a living worker claimant would receive a medical benefits identification card. However, in order to receive compensation, the claimant would have to file for and be found eligible for wage loss and/or impairment. In such an instance, the process would continue:

Claimant files for wage loss and/or impairment → [If claim is for impairment, claimant undergoes impairment rating] → Recommended Decision → Claim forwarded to FAB → FAB issues Final Decision.

Overall, DEEOIC has made strides in its processing of claims. In fact, we encounter instances where a Recommended Decision issues within months of the filing. For example, in one case the claim was filed in August 2007 and the Recommended Decision denying entitlement issued in April 2008 and in another instance, the claim was filed in February 2008 and a Recommended Decision finding entitlement issued in September 2008.

Nevertheless, most claimants who contact us with concerns involving the processing time of their claims either: (1) are focused on the overall processing time – i.e., the time from the filing of the claim until, if applicable, they receive a final decision addressing wage loss and/or impairment, and (2) are encountering specific delays with their claims. Below is an example that illustrates the fact that the “path” of a claim is not always direct.

- 10/2003 – Survivor’s claim filed.
- 12/2006 – Recommended decision concludes that evidence does not establish that death was caused by covered illness.
- 12/2006 – Claimant files objections to recommended decision.
- 09/2007 – Claim remanded for further development and issuance of new recommended decision.
- 12/2007 – Claimant informs this Office of recommended decision accepting claim. However, only a portion of the compensation is paid to this claimant, the other portion is held in abeyance pending development of additional survivor issues.
- ??/2007 – Claimant objects to recommended decision – claimant objects to decision to hold a portion of the compensation in abeyance.
- 06/2008 – Final Decision affirms the acceptance of the claim.

Note: as of our last contact, this claimant is still awaiting a determination on that portion of the compensation that was held in abeyance.¹⁶

We encounter a fair number of cases where the claim was actually filed some years ago, yet because of the development of additional evidence or claimant’s disagreement with the issued decisions, these claims are still pending – thus leading to the complaints involving the length of time.

- Unexplained and under-explained delays generate a lot of anxiety. We are contacted by claimants who tell us that the last “thing” they heard was that their claim had been “sent to Washington,” or was with someone for review. The passage of time without an update often causes these claimants to contact our Office. In other instances, claimants assert that they have absolutely no idea of the status of their claim. There have been instances where in response to an inquiry on the status of a case, it is suggested that certain claims need additional time because they raise complex issues. When advised of this “status,” some claimants question why no one ever provided them with an explanation for the “delay.”
- Another delay that continues to concern claimants involves requests for additional evidence. Claimants complain that it was only after they submitted evidence that they were informed of criteria (or additional criteria) that their evidence had to satisfy. These claimants argue that it would expedite the process if, prior to their development of evidence, someone fully explained to them the criteria and standards which their evidence had to meet. [Some claimants also note that doctors become frustrated when asked to continuously revise reports in order to meet criteria mandated by DEEOIC].
- As noted in section III (D), the forwarding of a claim to NIOSH can significantly add to the time it takes to process a claim. Similarly, as information is developed and refined, a rework of the dose reconstruction may be required. For instance, a number of claims are impacted by OCAS-PER-012, Evaluation of Highly Insoluble Plutonium Compound (Super S at Savannah River). As a result of this document, a number of claims have been remanded for a rework of the dose reconstruction. In one instance, the case was forwarded to NIOSH for a rework of the dose reconstruction in December 2007.

¹⁶ As with all of the examples provided in this report, this example is not inserted to assess blame. In fact, from what we can determine, there is no reason to question DEEOIC’s decision to hold a portion of the compensation in abeyance. The fact remains that this claim was filed in 2003 and this claimant is still waiting for the resolution of all of the issues involved in this case.

When we last heard from this claimant in September 2008, this claimant was still awaiting the results of this reworked dose reconstruction.¹⁷

- Some claimants see an element of unfairness associated with the delays involving their claim. Some claimants argue that it is unfair that they are provided very definitive (and often very short) time-frames within which to respond to or submit evidence, yet there are no time-frames imposed on DEEOIC within which it has to respond to or submit evidence.¹⁸

3. Interactions with DEEOIC Personnel

In the course of our conversations with claimants, we receive allegations that: (1) telephone calls are not answered; (2) the processing of the claim is impacted by changes in the claims examiner; (3) claimants receive different answers from different DEEOIC personnel, and (4) allegations of rude behavior. Our Office is not authorized to, and does not have the resources to investigate such complaints. In most instances, our inquiries into these matters disclose a “gap” between what the claimant heard and what DEEOIC said. Nevertheless, what is clear is that we continue to receive complaints concerning interactions with DEEOIC personnel, and while these allegations do not involve the same individuals, the nature of these complaints is often very similar.

Our Office continues to address this issue with DEEOIC. DEEOIC states that it is committed to providing customers with excellent service and, in furtherance of that goal, recently updated sections of its Procedural Manual, including those sections that address interactions with claimants. We will continue to monitor these allegations and will continue to bring to DEEOIC’s attention those allegations that we receive.

The most common complaints that we receive concerning interactions with DEEOIC personnel include:

- Many claimants prefer to speak directly to a person, as opposed to leaving messages. Many of the claimants who live near Resource Centers take advantage of this opportunity to go to these offices and discuss their cases. Some of these claimants are disappointed when their case is forwarded to District Office, where there is not much, if any, opportunity for face-to face contact.
- A number of claimants allege that their telephone calls went unanswered.
- The assignment of different claims examiner during the processing of a claim can be disconcerting.

¹⁷ This survivor’s claim was filed in February 2002. The initial dose reconstruction was returned from NIOSH in October 2003. Also in October 2003, a recommended decision was issued denying the claim, and a final decision issued in March 2004. A recommended decision denying the Part E claim was issued in July 2006 and a final decision issued in January 2007. In December 2007, in light of OCAS-PER-012 a Director’s Order was issued vacating the Final Decisions under Parts B and E and thus the case was forwarded to NIOSH for a rework of the dose reconstruction.

¹⁸ There have been instances, where in the opinion of this Office, the additional time taken to develop (or review) evidence could be seen as an effort to assist the claimant. Unfortunately, in many of these instances, even with the additional review, the claimant did not prevail.

Many claimants argue that the assignment of a new claims examiner means that their case will be delayed while the new examiner “comes up to speed” – in fact, some claimants indicate that they quickly develop no confidence in newly assigned claims examiners who do not appear to understand the facts and issues in their case. Claimants who contact us found it particularly troublesome that they were not advised of the change in claims examiner and only discovered the change when inquiring on their claim. Moreover, some claimants believe that the processing of their claim was negatively impacted by the change of claims examiner. Claimants refer to situations where because of a change in examiners it was necessary to resubmit evidence or to again explain concepts that they had already explained to the previous examiner. In addition, some claimants assert that the first claims examiner provided positive feedback and after a new claims examiner was assigned, the feedback became negative.

- A number of claimants allege that they were provided inaccurate or inconsistent advice, and some become really frustrated if they believe that the inconsistent information may have been the result of the change in claims examiners. There are claimants who believe that the advice given to them completely changed when a new claims examiner was assigned to their case. In some of these instances, the claimants go so far as to question the motives for the assignment of a new claims examiner.

We have also received inquiries suggesting that DEEOIC personnel “permitted” claimants to file EEOICPA claims even though DEEOIC should have recognized that these claimants did not meet the eligibility requirements. In response, DEEOIC asserts that it does not “tell” anyone whether to file or not a claim. Rather, if a claimant wishes to file a claim, that claimant has the right to file, regardless of the perceived outcome of the claim.

In a related matter, some claimants question why it took so long to receive a decision in cases where the ultimate outcome was foreordained by the statute and/or regulations.

- Another complaint that we hear involves the amount of information provided to claimants. Some claimants question why DEEOIC will not answer inquiries regarding the taxability of benefits or the offsetting of social security. Moreover, we receive complaints suggesting that the information provided in decisions is insufficient – some claimants complain that their decision simply informed them that their evidence was insufficient – the decision did not explain why the evidence was not sufficient, and as a result the claimant had no idea of how to rehabilitate their evidence (or how to avoid again making the same mistake).
- Claimants raise questions when their recommended decision finds entitlement, yet the final decision issued by FAB amends, remands or reverses the recommended decision. In such instances, claimants have questioned how and why two different DOL employees, often looking at the same evidence could come to different conclusions.

Consider the following case:

- 05/2002 – claim filed
- 03/2007 – Recommended decision accepted some of the claims and denied others. Moreover it is concluded that coordination with the claimant’s workers’ compensation is not necessary.¹⁹
- 03/2007 – Claimant waives right to object to recommended decision.
- 04/2007 FAB remands case to determine the amount of coordination to be deducted.
- 08/2007 – Recommended decision finds a “surplus” of \$2,520 that must be absorbed prior to the payment of EEOICPA medical benefits.
- 08/2007 – Claimant objects to the recommended decision asserting that the coordination calculation was erroneous and questioning the decision to coordinate benefits.
- 02/2008 – FAB remands case for further development of the claim.
- 3/2008 – Recommended decision finds surplus of \$127,520 that must be absorbed.
- 04/2008 – Per request, claimant is provided a copy of the legal opinion relied upon in determining that coordination of benefits is warranted.
- 05/2008 – Attorney retained by claimant submits letter challenging the legal conclusion that coordination of benefits is warranted in this case.

An oral hearing was held on this claim in June 2008, and the claimant informs us that he was told that the “matter [was] taken by a higher authority.” When we spoke to this claimant on October 29, 2008, he was still awaiting a response. Nevertheless, this claimant questions how in an instance where the facts remained the same, the decision on coordination of benefits could go from no coordination to \$2,520 to \$127,520.²⁰

4. Locating Experts

The problems associated with locating experts can arise anytime during the processing of a Part E claim, however, these problems are often encountered when claimants are seeking someone to perform an impairment rating. Once eligibility under Part E is determined, then that worker may be eligible (depending upon the facts of the individual case) to apply for compensation for wage loss and/or impairment. If the worker applies for impairment, then an impairment rating is required, and in obtaining that rating, the worker has the option of choosing their own qualified doctor or DEEOIC can have a qualified doctor complete the impairment.

- Many claimants prefer to utilize their own doctors, but discover that their doctors do not possess the qualifications required by DEEOIC.
- It is acknowledged that in some areas of the country, there are few (or no) doctors qualified to perform impairment ratings, and in such instances, DEEOIC will, with prior approval, pay travel expenses. This procedure has, however, been the source of complaints. Although DEEOIC’s procedures provide that a claimant may be reimbursed for approved travel expenses, we were contacted by a couple of claimants

¹⁹ This Office was initially contacted by this claimant in 2007 when he had questions with the decision concerning the coordination of benefits.

²⁰ The question of whether coordination of benefits is appropriate in this case turns on the specific illnesses compensated in the state workman’s compensation award.

who did not want to pay these costs and then await reimbursement. In one instance, the claimant lived in Alaska and had to travel to Seattle to be evaluated by a qualified doctor. This claimant questioned whether the travel costs could be advanced (or billed directly to DEEOIC). Unfortunately, advancing travel costs are not permitted.

However, the problem of locating experts is not limited to impairment ratings.

- Claimants find it difficult to locate doctors to address causation. Occupational exposure to toxins can be a complex issue, and claimants report that it is difficult to locate doctors who are qualified and willing to address this issue.
- There are some claimants, especially some who live near DOE facilities, who believe that doctors are (still) reluctant to “take on” these big corporations.
- As discussed in Section III (B), many claimants encounter doctors who do not accept the medical card. DEEOIC acknowledges that there are doctors who refuse to accept the medical benefits card, and has increased its efforts to educate doctors on this program. Moreover, DEEOIC suggests that claimants notify them if they encounter doctors who do not accept the medical benefits card. DEEOIC indicates that it will contact these doctors in an attempt to enroll them. Unfortunately, not all claimants are aware of these services.

5. Taxability of EEOICPA Benefits

A number of claimants have contacted this Office in search of a clear and concise statement addressing the federal taxability of EEOICPA benefits. Generally in response to questions concerning the taxability of EEOICPA benefits, claimants who are referred to the statute, which provides that:

Compensation or benefits provided to an individual under this chapter –

- (1) shall be treated for purposes of the internal revenue laws of the United States as damages for human suffering

42 U.S.C. §7385e(1). Many claimants, however, are looking for something stated in lay terms.

While the intent of section 7385e(1) appears to be to exclude EEOICPA benefits from taxation under federal law, because of the uncertainties as to how the Internal Revenue Service will approach individual cases, DEEOIC simply provides a reference to section 7385e.

6. Area 51 (Nevada Test Site)

Earlier in the year, we received an inquiry concerning the status of Area 51 –specifically inquiring about our understanding of the status of Area 51 as a DOE facility. Our follow-up disclosed that Area 51 was not

listed at a DOE facility²¹, but we were assured by DEEOIC they were making their own inquiries into this matter.

On August 5, 2008, DEEOIC issued Circular NO. 08-06 indicating that Area 51 is part of the Nevada Test Site for the years 1958-1999, which means that employees of Reynolds Electrical and Engineering Company and Bechtel Nevada, Inc., who worked at the Nevada Test Site, including Area 51, are DOE contractor employees.

During a town hall meeting sponsored in Las Vegas in late August, we had the opportunity to meet with former workers of Area 51. In spite of the issuance of Circular 08-06, some of these workers question whether (and to what extent) employment and/or exposure records from Area 51 will be available.

7. Sarcoidosis versus Chronic Beryllium Disease

A physician who provides services to claimants contacted our Office with a number of cases where in spite of documented exposure to beryllium and a diagnosis of sarcoidosis, the claim had been denied. This doctor vigorously disagreed with these denials arguing that in many of these cases, the diagnosis met the criteria for a diagnosis of chronic beryllium disease.

On September 4, 2008, DEEOIC issued Circular No. 08-07, which states that a diagnosis of sarcoidosis is not medically appropriate if there is a documented history or beryllium exposure. Rather, in these situations, the claims examiner is to consider the diagnosis of sarcoidosis to be a diagnosis of chronic beryllium disease.

Recognizing that a number of claims may benefit from Circular 08-07, some claimants have asked how DEEOIC intends to approach claims where there is a history of exposure to beryllium and a diagnosis of sarcoidosis and yet the claims were denied. DEEOIC has indicated that it will review these claims to determine if they are impacted by Circular 08-07.

8. General Requests for Assistance and Miscellaneous

As the numbers display, the bulk of our contacts involve requests for assistance. As we have noted earlier in this report, while some people call us with specific complaints on particular matters, most people contact us seeking general assistance with their claim. The assistance requested can be anything from a simple request to define a word to a request to assist in identifying toxins which could be linked to an illness. Time does not permit us to list every request that we received during this year (and thus we apologize to those claimants whose concerns are not discussed). Here is a discussion of some of the requests for assistance received during the year:

²¹ Our Office was contacted by staff members from the office of Senator Harry Reid who were diligently pursuing this matter. When contacted by Senator Reid's office, we had only received one inquiry on this matter. However, later that year, we held a town hall meeting in Las Vegas at which time we encountered a number of former Area 51 workers who were directly impacted by this issue.

- We communicated with two claimants who have (or had) EEOICPA claims pending in federal district court. In both instances these claimants could not find an attorney to represent them and thus had to pursue very technical matters before the court without the assistance of legal representation. In one instance, the claimant was quite disturbed when included in its motion for summary judgment the Department of Justice added a request for the awarding of costs. This claimant viewed the insertion of this request for costs as an attempt to “bully him” (since it was known that he did not have counsel and was struggling to represent himself). This claimant called our Office seeking guidance – which we were unable to provide.
- Many claimants simply ask us to explain documents/decisions. At town hall meetings, as well as in other exchanges, claimants have approached us thinking that their claims were denied, yet when we reviewed their case, we were able to inform them otherwise. This often incurs where one decision addresses multiple claims – i.e., one decision addresses the Part B as well as the Part E claim; or one decision addresses claims for a number of different illnesses.

Moreover, many documents and decisions are written using legal, medical and/or scientific terms and claimants simply find it difficult to understand these terms. For example, when a claimant receives a recommended decision, attached to the recommended decision is a waiver letter. This letter provides the claimant with two options: (1) “...waive [the right to object] only as those rights pertain to the benefits awarded” and “...reserve [the] right to object to the findings of fact and/or conclusions of law contained in the recommended decision that deny other claimed benefits” or (2) to waive the right to object to any of the findings of fact and/or conclusions of law contained in the recommended decision. On the one hand, claimants have contacted us to ask to explain the concept of waiver. On the other hand, claimants have contacted us for guidance on how to complete this form.²²

In another instance, the claimant received a letter discussing wage loss and impairment, but because she did not understand the letter, the claimant did not respond within the allotted time, and her claim was closed. The claimant contacted our Office because she wished to file a claim for wage loss and/or impairment.

- Claimants often call us asking for information that is otherwise available. For example, while there is information available on both DEEOIC’s and NIOSH’s websites, some claimants do not have access to the internet, while others are not adept at “surfing” the internet. Moreover, even where claimants have access to the internet and are adept at “surfing the net,” because the webpage does not always highlight the availability of these resources, some claimants are not aware that this information is available. In addition, when they encounter problems, many claimants do not think to (or want) to go to the internet to find the answer.

²² Many claimants are aware of instances where claimants waived all objections to a recommended decision and yet when the case was forwarded to FAB, FAB altered the recommended decision. Therefore, some claimants inquired if waiving all objections to a recommended decision would impact their right to challenge findings by FAB which were contrary to findings contained in the recommended decision. We inform claimants that the signing of the waiver does not impact their ability

This Office has discussed with DEEOIC the fact that its webpage does not readily identify some of the resources which are available on its site. For example, while there is a listing of (some) qualified providers, it takes diligence to find this information. DEEOIC note that the design of its webpage is not entirely within its control. Nevertheless, they agreed that there was room for improvement and assured us that this would be considered.

- In one situation, although the evidence established that the company performed work at a DOE facility, there were no records indicating that the claimant had been employed at this DOE facility. This claimant insisted that he had bills that established that he worked at the DOE facility, yet at first glance the bills simply verified that supplies had been purchased. Finally, this claimant made a statement that clarified the whole confusion – the claimant states that this was his company and it was a “one-man shop.” With this revelation, this claimant was able to move forward with his claim.²³
- Claimants question their impairment ratings. For instance where the doctor stated that the claimant’s condition rendered him “unproductive” the claimant questioned why this did not signify that he was 100% impaired. Moreover, many claimants find it hard to distinguish the concept of impairment and wage loss.
- In denying a claim, DEEOIC did not credit the opinion of the treating physician who opined that death was caused by exposure to toxins at work. The claimant believes that the opinion of the treating physician should carry more weight than the district medical consultant who never personally examined the worker. Further bolstering this claimant’s belief is a recent article in the local newspaper suggesting that there were chemicals at this DOE facility which have been associated with Parkinson’s disease.
- Claimant was a student under the age of 23 when the worker/parent passed away. However, finding that this child was not a full-time student, it was determined that this child did not meet the statutory definition of eligible child. At issue was three semesters when this child did not take a full course load. This child noted that he worked while in school and had designed his course load in order to maintain his grade point average. Thus, this child argued that simply focusing on these three semesters was not fair – rather one needed to consider that he had maintained a high grade point average and, in spite of the three semesters, had attended summer sessions and thus graduated “on-time.”
- An attorney for an employer called when he received a copy of a FAB decision. This attorney could not understand why he had received this decision and wanted to be sure that there was nothing for him to do.²⁴
- We received an inquiry asking whether creditors can attach or garnish EEOICPA benefits.
- The facility is listed as an atomic weapons facility and thus not covered under Part E. Claimant asserts that she has evidence showing that remediation occurred at this facility, and believes that the government ought to bear the burden of proving that this was not DOE remediation.

²³ Unfortunately, the confirmation of this employment did not proceed quickly enough and this claimant passed away before a decision issued.

²⁴ DEEOIC does not serve copies of FAB decisions on employers. Thus, it is not clear who forwarded this decision to this attorney.

- Claimant is attempting to establish a link between amyotrophic lateral sclerosis (ALS) and toxins at Savannah River Facility, and in furtherance of this pursuit, wants to know the number of former and current Savannah River employees with ALS.

V. TOWN HALL MEETINGS

Regardless of where we are, many of the issues that we hear at our town hall meetings remain the same. Nevertheless, our meetings also reveal that some issues are more prevalent in certain areas. Therefore, we would like to take a moment to provide a summary of the three town hall meetings that we sponsored during this year.

- St. Petersburg, Florida: The Office scheduled this town hall meeting in response to a number of specific requests for such a meeting. Most of the attendees had already filed claims, and thus their concerns focused on the evidence needed to establish exposure and/or causation, and the impact of this evidence (or lack thereof) on their dose reconstructions, as well as their overall claim. Some claimants questioned the accuracy of the information contained in the SEM, while others believed that exposure decisions had been premised on an erroneous “model” of the Pinellas facility – i.e., that some of the walls assumed in the model did not exist, or did not rise to the ceiling. [Note: on the day following our meeting, DEEOIC was scheduled to visit this facility].

Moreover, while the Resource Center and the District Office periodically visited this area, there were claimants who believed that a greater presence by DEEOIC was needed.

- Las Vegas, Nevada: Locating sufficient evidence to establish exposure and causation was also a major concern for many of the individuals who attended our town hall meetings in Las Vegas. Some of these claimants were certain that relevant records had been destroyed and thus questioned the reasonableness of placing the burden on them in circumstance where records could not be located. Furthermore, in spite of the inability to locate medical literature linking their illness to any of the toxins known to have been present at NTS, there were many attendees who were nevertheless certain that their exposures to toxins at NTS, was a factor, if not the cause of their illness.

When we hosted our meeting, in attendance were a number of former Area 51 workers. At the time of our meeting, most of these workers were aware that Circular 08-06 expanded NTS to include Area 51. However, many of these attendees were skeptical as to whether they would be able to locate sufficient records to establish entitlement.

- Shoreham, New York: In spite of our mailing and an advertisement in the local newspaper, only a handful of claimants attended this meeting, and this itself is a problem. We continue to believe that there may be former workers of the Brookhaven facility who are not aware of their potential eligibility for Part E benefits. Consequently, we will continue to explore other ways to expand our outreach effort to these potential claimants.

As to the claimants who did attend our meeting, most were encountering problems trying to establish covered employment – while they could establish employment with their particular employer, these claimants could not locate sufficient records to establish that their employer (or they) performed work at the Brookhaven facility.

- Shiprock, New Mexico: Although our Office did not sponsor any town hall meetings in Shiprock during this calendar year, we attended a round table discussion sponsored by the Office of Navajo Uranium Miners to discuss Native American tradition and culture. While time only permitted a general overview of this subject, this overview made it clear that there are facets of Navajo tradition and culture that have a direct bearing on the processing of a Part E claim. Most of the attendees agreed that these issues will have to be discussed in more detail.

VI. ASSESSMENT OF THE COMPLAINTS, GRIEVANCES AND REQUESTS FOR ASSISTANCE

Any assessment of the complaints, grievances and requests for assistance that this Office received in 2008 must start with the recognition that some of the issues brought to our attention concern the Part E statute as written. There are claimants who argue that provisions of Part E effectively exclude certain nuclear workers from coverage. In addition, some people continue to ask why certain provisions of Part E are narrower in scope than similar provisions in Part B. Nevertheless, while many of these statutory complaints are directed at DEEOIC, it must be recognized that neither DEEOIC nor this Office can resolve these complaints. Thus, where claimants collect data that “questions” the underlying basis of a statutory provision, these claimants are oftentimes unsure of the procedures to follow to have this data considered.

In addition to the statutory complaints that we receive, we also receive regulatory and administrative complaints. Some claimants argue that certain of the regulations promulgated by DEEOIC are not in accord with the statute (and/or the intent of Congress). However because many of these claimants lack the resources, as well as because of the complexity of some of these issues, pursuing these matters in federal court often is not a viable option.

Overall, as in previous years, the majority of the complaints, grievances, and requests for assistance received by the Office of the Ombudsman concerned administrative issues, and more specifically involved requests for assistance in the processing of a claim. Our experiences over the past year confirm that Part E can be a complicated program, and that in some instances, even with the assistance that is offered, some claimants find it difficult to “navigate” this process. In fact, it is not just that some claimants call our Office for assistance – rather some of the claimants who call our Office are extremely frustrated to the point that they question whether the real intent of this program was ever to compensate them for their illnesses. We do our best to assist these claimants.

No one can doubt that over the years, a large number of Part E claims have been adjudicated, a good number of claimants have been found eligible, and an impressive amount of compensation has been paid. Nevertheless, based upon the telephone calls, e-mails, faxes, letters and personal input this Office received over the past year, it is obvious that more can be done to assist claimants.

Based upon our experiences over the past year, here are just a few of our suggestions:

- While DEEOIC, as well as this Office, already holds town hall meetings all around the country, we continue to encounter potential claimants who have not filed claims. Thus, more efforts need to be made to contact potential claimants for whom the “normal” methods of contact have not been successful.
- Although many of the documents and decisions issued by DEEOIC have been revised in order to clarify possible confusion, we are still contacted by individuals who do not understand these documents. As we came to recognize for ourselves this year, if you work with this program on a daily basis, you may understand terms such as “waiver” and “tort,” but others may not fully understand these terms, especially in the context they are used with this program. Moreover, there are some people who even if they understand the document or decision, still want a second opinion before “acting,” especially where their action/inaction may impact their claim. Thus, efforts to ensure that claimants fully understand the documents and decisions that they receive must be ongoing.
- Every effort should be made to ensure that decisions are well reasoned and fully explained. While copies of medical evidence (specifically the reports of District Medical Consultants) are provided, if the claimants makes the specific request, it goes without saying the more information that is provided to claimant, the more informed the claimant is and shows transparency of what is transpiring or what the claimant may need to do if they disagree with the decision that has been rendered.
- Because claimants and potential claimants need advice and guidance, efforts should be made to ensure that advice and guidance is easy to obtain.
 - o DEEOIC’s website contains a lot of useful information, but not everyone is aware of the existence of this information. While DEEOIC may not have full control over the design of its web-page, we nevertheless hope that more effort can be made to ensure that information available on the web-site is prominently highlighted so that claimants are aware of its existence.
 - o Nevertheless, one also must be mindful that not all claimants have access to a computer.
- Claimants need to know where to go to receive information concerning issues such as the taxability of EEOICPA benefits and the impact of the receipt of EEOICPA benefits on Social Security benefits.
- We sincerely hope that efforts are made to stem even the allegations of rude and negative interactions with DEEOIC personnel.

This list above is by no means an exhaustive list of all of the steps that can or should be taken to address the complaints, grievances and requests for assistance received by this Office, but it is a start.

The Office of the Ombudsman hopes that this report has shed some light on some of the complaints, grievances, and requests for assistance that we received during the past year. To the extent that this report is beneficial in assisting claimants in their pursuit of compensation, we will be happy. However, our real goal is to improve, within the bounds of our authority, the delivery of services to Part E claimants, in the timely and efficient manner envisioned by Congress.

APPENDIX I

Compilation of Comments by Subject/Issue Received by the Office of the Ombudsman From January 1, 2008 Through December 31, 2008

STATUTORY ISSUES 91 comments

Covered Employee/Covered DOE Facility	17 comments
Causation Requirement	13 comments
Limitation of Survivor Eligibility	46 comments
Qualified Claimant's Death Prior to Award Nullifies Claim or Reduces Compensation	11 comments
Chronic Lymphocytic Leukemia	4 comments

REGULATORY ISSUES 114 comments

50% Probability of Causation Requirement for Radiogenic Cancer	7 comments
Medical Benefits	19 comments
Offset for Social Security	10 comments
Part B and Dose Reconstruction	62 comments
SEC	16 comments

ADMINISTRATIVE ISSUES 1469 comments

Burden of Proof	
Burden of Proving Employment	48 comment
Burden of Proving Exposure	99 comments
Burden of Proving Causation	45 comments
Processing of Claim Takes Too Long	66 comments
Concerns Involving Interactions with DEEOIC Personnel	108 comments
Locating Experts	7 comments
Area 51	5 comments
Sarcoidosis	3 comments
General Requests for Assistance	1088 comments*

*The 1088 comments under General Requests for Assistance includes:

Attendees at Las Vegas town hall meetings	500
Attendees at Pinellas town hall meetings	250
Attendees at Ombudsman town hall meeting in Shoreham, NY	5
Attendees at NIOSH meeting in Shoreham, NY	5
Other requests	328

Note 1: The same person may have made more than one comment in a single contact with this Office. In these cases, separate comments were counted individually.

Note 2: Some of the comments that we receive are from attorneys, authorized representatives, Congressional staff members and individuals representing organizations and interest groups. In some instances, these individuals raise issues on behalf of a group of claimants or raise issues which potentially affect a large number of claimants.

APPENDIX II

PART E

[December 22, 2008]

	CLAIMS	CASES
Applications Filed	77,150	55,089
Non Covered Applications	25,498	10,035
Covered Applications Filed	51,652	45,054
Recommended Decisions*		
Approved	20,983	19,824
Denied	18,955	17,991
Total	39,938	37,815
Final Decisions*		
Approved	20,049	19,108
Denied	17,522	16,779
Total	37,571	35,887
Compensation Paid		
Payments	13,047	12,430
Total Dollars	\$1,405,716,750	

* With regard to covered applications only

NOTES



U.S. DEPARTMENT OF LABOR
OFFICE OF THE OMBUDSMAN
ENERGY EMPLOYEES OCCUPATIONAL ILLNESS
COMPENSATION PROGRAM, PART E

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