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Advisory Board on Toxic Substances and Worker Health (ABTSWH)
U.S. Department of Labor
Frances Perkins Office Building
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SUBJECT: SANTA SUSANA FIELD LABORATORY / SEATTLE DISTRICT OFFICE

Dear Board Members,

Thank you for your dedication and expertise on behalf of sick nuclear workers under the Energy Employee Occupational Illness Compensation Program Act (EEOICPA, or "the Act").

I write to bring your attention to issues facing most Santa Susana Field Laboratory (SSFL) EEOICPA claimants, for whom the EEOICPA process appears to have been effectively derailed:

- Systemic failure among Claims Examiners (CE) to review Document Acquisitions Requests (DAR) dooms most claims to failure at the outset. Workers who clearly meet eligibility requirements are routinely disqualified. Provisions under EEOICPA intended to provide a course of corrective action consistently fail the claimants.

- Division of Energy Employee Occupational Illness Compensation (DEEOIC) Procedure Manual (PM) and various bulletins on SSFL are sidestepped, ignored, or selectively interpreted.

SSFL Area IV is currently considered to be the "covered area" under EEOICPA. However, it has been established that SSFL employees of the Department of Energy (DOE) contractor were employed in all areas of the site and routinely rotated between covered and non-covered areas to perform DOE-job duties, after using "clock-in" locations throughout the facility.

Failure to Review DARs

According to the PM, the DAR contains factual employment records that can verify a worker's presence onsite. They are especially useful when workers rotated between covered and non-covered areas, or "visited" a Department of Energy (DOE) facility. Based on the established practice of worker rotation among the majority of SSFL DOE contractor employees, *the DAR is required to reliably determine eligibility for any SSFL employee*. However, CE's are not sufficiently reviewing the DAR.

DOE and Boeing frequently withhold the DAR until at least 60 days into the claims process. By the time the DAR is received by the CE, the CE is already invested in an eligibility determination that has been based solely on the EE-5 Employment Verification process. However, the EE-5 has been acknowledged as unreliable, inaccurate, and unfit for use in determining eligibility among SSFL personnel.

In most cases, the CE informs the claimant that profound "conflicts" exist between the years of employment that have been "claimed," verses the years of employment that have been "verified" via the EE-5. Rather than review the DAR, the CE summarily disqualifies all claimed employment that doesn't "match" with the EE-5 verified dates, and informs the claimant of 30 days to provide sufficient evidence to the contrary. Most SSFL EEOICPA claimants have a significant amount of claimed employment that is summarily disqualified, without further review.

CE's refuse to review DAR records; there are indications they may have been instructed to ignore DAR records, or have been led to believe they have little bearing on the claim.

Under the Privacy Act, a claimant or Authorized Representative (AR) may request a copy of the DAR, which can take upwards of two months. Timeframes imposed by the CE to submit evidence may expire; reasonable requests for extensions are frequently denied. Many SSFL claims are recommended for denial based on insufficient evidence to establish eligibility, and the DAR has never been reviewed.

CORE Advocacy has questioned some CE's about the decision to disqualify employment that is clearly eligible under the Act. CE's demonstrate a lack of knowledge about DOE processes at the site, an inability to recognize eligibility when it is clearly depicted in employment records, an unwillingness to engage in comprehensive DAR review, and inconsistent, widely varying interpretations of established EEOICPA eligibility policy. In case after case, records of covered employment clearly contradict the EE-5, and the CE's decision to disqualify an eligible worker.

Once a claim goes before the Final Adjudication Branch (FAB), FAB assumes the CE's recommendation is based on sufficient review of the DAR. Thus, FAB is frequently known to apply a procedural interpretation as to what constitutes "new information," and summarily declare all DAR records to be inadmissible. Thus, the claimant's ability to rely on due process and to access his own employment history have been taken away. While the FAB is supposed to offer corrective measures, any determination that credible employment documentation becomes "inadmissible" because it was previously submitted is counterproductive; a CE's failure to review or recognize evidence establishing eligibility neither disqualifies nor discredits the record.

CORE Advocacy's ongoing evaluation of SSFL case files indicates that this problem is systemic. So far, every case file reviewed shows that all, or a portion, of eligible claimed employment has been disqualified in error. There appears to be sufficient evidence to warrant an investigation into every SSFL EEOICPA claim where conflicts exist between the claimed, verses verified, years of employment and/or some or all of a worker's employment has been disqualified on the basis of a presumed work location.

It appears this problem is not exclusive to those claims that have been denied. In some cases, a portion of the claim may have actually been accepted/approved. For example, an employee may have been paid under EEOICPA based on eligibility to the SEC and diagnosis with a specified cancer, but denied under Part E for lack of evidence of exposure. DAR records may show the worker had 30 years of additional employment that had not been considered, wherein a new job process and labor category are discovered, with direct links to another claimed condition. Ultimately, it appears most SSFL claims are being adjudicated based on a severely diminished perception of covered employment and exposures, resulting in only the most obvious (SEC) claims being accepted.

CORE Advocacy's evaluation suggests that misleading information in the EE-5 is constructed for the purpose of obscuring eligibility, limiting and controlling the number of eligible claimants, downplaying

the perception of DOE operations and worker exposure at the site, and severely diminishing the number of accepted claims under EEOICPA.

DEEOIC's 2005 eligibility decision was the result of a 3-year "disagreement" between DOE and DEEOIC. DEEOIC took the position that it could not distinguish which employees were specifically tasked with DOE job duties in Area IV because DOE's original contract had been with the entire corporate entity; North American Aviation (NAA). In addition, NAA was permitted to use its discretion in using the entirety of its facility *or* those leased by the DOE in order to fulfill government contracts. Thus, DEEOIC found that any employee of NAA or its corporate successors that could demonstrate employment by the company in a location where DOE operated could potentially be eligible for EEOICPA.

As a result of its decision, DEEOIC determined that more workers would be eligible under EEOICPA than previously anticipated, and DOE / Boeing would be required to provide "more detail" during the EE-5 process to aid DEEOIC in establishing a worker's presence in Area IV.[1] Boeing was then provided the latitude to define exactly what types of information should be provided with the EE-5.[2]

Upon first glance, the EE-5 seems to be very detailed. However, upon close examination, it appears that under an illusion of compliance, the EE-5 effectively obscures years or even decades of eligible employment, while perpetuating DOE and Boeing's original intention of limiting eligibility to a small subset of employees. It appears to be an attempt to undermine DEEOIC's eligibility decision by constructing employment verification data that is more in alignment with what DOE and Boeing wanted at the outset: to limit EEOICPA eligibility to a very small subset of employees.

Since 2014, the EE-5 has been determined to be consistently unreliable and inaccurate; unfit for use to establish eligibility without review of the DAR. DEEOIC, DOE, the National Institute for Occupational Safety and Health (NIOSH), and even Boeing have acknowledged the problem. But nobody seems to have shared the information with the CE's who are responsible for making eligibility determinations by relying solely on the EE-5. New claims are still being disqualified.

In 2010, worker rotation after "clock-in" and the importance of the DAR were addressed in Item 8 of EEOICPA Bulletin 10-10.[3] Because this bulletin was issued to guide CE's in establishing eligibility during a Special Exposure Cohort (SEC) time period, CE's are under the impression that no part of the bulletin could potentially apply to any employee that is not a member of the SEC. However, Item 8 verifies the reality of worker rotation and "time-clock" use, and validates the need to rely on the DAR to establish a worker's presence in Area IV. This is a step that is required to establish eligibility whether a worker qualifies under the SEC, or not. CE's will not even review the bulletin to verify that worker rotation is an established problem at the site, because it supports review of the DAR.

SSFL workers have died while pleading with CE's to review their records. It is not unusual to discover handwritten letters in case files wherein a worker expresses despair and confusion as to why years - or

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[1] DEEOIC eligibility decision, 9/7/05, Turcic.

[2] Freedom of Information Act (FOIA) Request #790488

[3] Please see EEOICPA Bulletin 10-10, Item 8. Verifying Area IV employment is required to prove eligibility during any covered time period.

even decades - of DOE contractor employment has been disqualified. The CE's responses often question the quality of the worker's recollection and, in some cases, the worker's integrity. Workers are repeatedly challenged to "prove it" within the specified timeframe. But, the evidence the worker needs to substantiate his claim has been in the CE's possession the entire time - *the DAR*. In the time it took the CE to write such a disparaging letter, the CE could have reviewed the DAR and likely discovered that the worker was being truthful. When a worker dies with his truth buried in the DAR, survivors must begin again. They, too, assume the CE will engage in sufficient records review.

Violations of the Procedure Manual

The following procedures are routinely sidestepped or selectively interpreted, compounding the problems identified above.

PM Chapter 0-100, Section 4(b) defines the role of the CE. It verifies that sufficient claim development and review of factual evidence (DAR) is the responsibility of the CE.

PM Chapter 0-100, Section 4(c) defines the role of the FAB. It clearly indicates that sufficient claim development is not the FAB's responsibility.

PM Chapter 2-0300, Section 6(c) acknowledges that obtaining employment information can be difficult, and instructs the CE to grant reasonable extensions to the timeframe when the claimant or AR request it. However, by refusing to grant such an extension for claimants awaiting receipt of the DAR pursuant to the Privacy Act, the procedural/administrative process is orchestrated to effectively work against the claimant.

PM Chapter 2-0500, Section 8(i) emphasizes that DAR records can contribute to the evidence of covered employment, especially in cases involving employees who rotated between areas/facilities, or employees who were considered to be "visiting," both of which are established scenarios among the majority of SSFL employees.

PM Chapter 2-0400, Section 4 and Section 6 defines the role of the AR and the CE. The CE is directed to only communicate directly with a claimant if the AR is unresponsive or unclear in providing direction or guidance. The CE is instructed to copy the AR on all written interaction intended for the claimant, and the PM specifies that DEEOIC considers any communication sent to the AR to be the same as communication sent to the claimant. However, some CE's undermine the AR's role by failing to copy them on correspondence (including a Recommended Decision containing a Statement of the Case), and by contacting the claimant directly without notifying the AR.

Conclusion

CORE Advocacy is appreciative of the productive relationship with many courteous and dedicated representatives in every branch of EEOICPA. There are many who arrive to this process engaged in making accurate and appropriate decisions under the Act, and it is a privilege to work together on these issues.

Based on the longstanding awareness of these issues, acknowledgment by every agency, and sufficient evidence to indicate that these problems are systemic as opposed to isolated, it is time for corrective action.

DEEOIC has acknowledged the facility contract, worker rotation, potential eligibility of workers who "clocked-in" outside the covered area, and the importance of the DAR. In addition, is is accepted that DOE was the only entity to use radiological materials at SSFL that required radiation monitoring. It is also currently accepted that all DOE operations were confined to Area IV. Thus, when DAR records show evidence of dosimeter issuance, radiation monitoring or exposure, and/or worker participation in DOE processes, Area IV employment is established. [The only other logical alternative would be for DOE to admit to operations outside Area IV].

New directives should be issued that embody the following corrective actions:

- End CEs' reliance on EE-5 information to establish EEOICPA eligibility
- Enable CE's to cross-reference DAR records to resolve conflicts in dates of covered employment
- Provide CE's with basic training in recognizing DAR records that document SSFL employee participation in DOE processes and/or dosimeter issuance that can verify an employee's presence in Area IV, and prove eligibility under the Act.

DOE and Boeing should be kept from this process. They share conflicting interests in minimizing the perception of DOE operations and exposures at SSFL, which will limit fiscal obligations to an ongoing and controversial environmental cleanup. These interests may have had some bearing on the creation of EE-5 policy that has effectively led to the summary disqualification of an unknown number of SSFL workers based on a diminished perception of eligibility and exposure. In addition, the same conflicting interests may have led to 50+ radiological facilities and all corresponding environmental data being omitted from the SSFL Site Profile, calling into question the integrity of dose reconstruction among SSFL workers. CORE Advocacy presented information on the SSFL Site Profile to NIOSH in August, 2016.

Given the circumstances, it may be both wise and reasonable to limit DOE and Boeing's involvement in making recommendations or any changes to policy going forward. Additionally, due to the wide reaching problems created by both the EE-5 debacle and the SSFL Site Profile, there is what appears to be an established need for DEEOIC to review (and potentially reopen) a number of SSFL claims that may have been wrongfully denied. DOE and Boeing should be accountable for all administrative costs associated with that task.

Not all claimants will meet established eligibility criteria or receive a favorable claim outcome under EEOICPA. A reasonable expectation of error in any program of such complexity exists. However, every claimant is deserving of due process, critical analysis, and ethical right action under EEOICPA.

It is a privilege to work with you on behalf of SSFL EEOICPA claimants. Please contact me if I may provide any additional information.

Sincerely,
D'Lanie Blaze
Advocate
CORE Advocacy for Nuclear & Aerospace Workers