

Final Adjudication Decision Writing

- If you use legal citations – they have to relate to a finding made within the context of the decision, and explain its relevancy to the decision outcome. This commonly overused citation has no meaning to a claimant on its own -

The term “covered employee” under Part B means either a covered beryllium employee, a covered employee with cancer or a covered employee with chronic silicosis. See 42 U.S.C. § 7384l(1). A covered employee with cancer or a covered beryllium employee includes a “Department of Energy contractor employee.” See 42 U.S.C. §§ 7384l(7), 7384l(11), and 7384l(11).

- Focus the decision outcome to the issue that is most relevant to your conclusion – avoid redundant, cyclical language in your decision -

A determination regarding your entitlement to benefits under Part B and Part E of the EEOICPA must be based on the totality of the evidence. Based on my review of the case record, I conclude that the evidence does not establish that you qualify as a “Department of Energy contractor employee” in accordance with 42 U.S.C. § 7384l(11).

Comment [J1]: Denial reference #1

Section 30.110(c) of the EEOICPA regulations provides that any claim that does not meet all of the criteria for at least one of the as set forth in the regulations must be denied. See 20 C.F.R. § 30.110(c) (2009). You have not established that you qualify as a “Department of Energy contractor employee” under Part B and Part E, therefore your claim for employee benefits based on cancer, beryllium sensitivity, and chronic beryllium disease under Part B and Part E of the EEOICPA must be denied.

Comment [J2]: Denial reference #2

Comment [J3]: Denial reference #3

Comment [J4]: Denial reference #4

- Relevancy of the citations or legal standard is important. Here, the FAB is denying the claim due to non-covered employment, but there is a reference to the Part E causation standard. If the issue is contractual employment – then the Part E causation threshold is inconsequential to the outcome of the claim.

In order to claim employee benefits under Part E of the EEOICPA a claimant must establish that a DOE contractor employee contracted a covered illness (with a specific medical diagnosis and initial diagnosis date), through exposure to a toxic substance at a DOE facility. This means that you must establish that it is 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 the claimed illness; and that such toxic substance exposure was related to employment at a DOE facility. See 42 U.S.C. § 7385s-4(c)(1).

A determination regarding your entitlement to benefits under Part B and Part E of the EEOICPA must be based on the totality of the evidence. Based on my review of the case record, I conclude that the evidence does not establish that you qualify as a “Department of Energy contractor employee” in accordance with 42 U.S.C. § 7384l(11).

- Repetitious lists of medical conditions doesn't read well.

This decision and order of the Final Adjudication Branch (FAB) concerns your claim for employee benefits under Part B and Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended, 42 U.S.C. § 7384 et seq. (EEOICPA or the Act). For the reasons set forth below, your claim for employee benefits based on the claimed conditions of multiple skin cancers (carcinoma of the right eyelid, basal cell carcinoma of the shoulder, basal cell carcinoma of the chest, squamous cell carcinoma of the right lower eyelid, squamous cell carcinoma of the cheek, squamous cell carcinoma of the nose, squamous cell carcinoma of the right preauricular, and squamous cell carcinoma of the left eyelid) and large B-cell lymphoma under Part B is denied. Your claim for employee benefits based on large B-cell lymphoma under Part E is denied. Your claim for impairment benefits based on the claimed conditions of carcinoma of the right eyelid, basal cell carcinoma of the shoulder, basal cell carcinoma of the chest, squamous cell carcinoma of the right lower eyelid, squamous cell carcinoma of the cheek, squamous cell carcinoma of the nose, squamous cell carcinoma of the right preauricular, and squamous cell carcinoma of the left eyelid is approved for \$60,000 under Part E. Your claim for wage loss benefits for the years 2005, 2006, 2007, and 2008 under Part E is remanded to the district office for further development.

- Minor contextual issues can come across poorly. For example, this implies that the survivor has COPD/interstitial lung disease – but its actually the employee who had the condition.

Example 1 - For the reasons set forth below, your claim for survivor wage loss benefits under Part E of the EEOICPA, based on the claimed conditions of chronic obstructive pulmonary disease (COPD) and interstitial lung disease (pulmonary fibrosis) is denied.

Example 2 - For the reasons set forth below your claim for survivor benefits for the claimed conditions of prostate cancer, bone cancer, colon cancer, and asbestosis under Part B of the EEOICPA is denied.

Comment [J5]: Claimant is a female

Example 3 - For the reasons set forth below, each of your claims for survivor benefits based on the employee's lymphoma under Part B and Part E of the EEOICPA are denied.

Comment [J6]: Simple fix

- **Prescribing a specific course of action can lead to unintended consequences – here the issue is the sufficiency of the exposure evidence – but the HR is saying that a conflict in medical evidence exists. The question is how can a conflict exist between to medical reports based on insufficient toxic substance exposure? The solution is to merely explain the defect in the exposure analysis and leave it to the district office to find the solution for overcoming the problem.**

Example 1 - The district office should conduct additional development of the evidence in regard to the employee's exposures to toxic substances during the employee's employment and refer questions regarding the routes and extent of potential exposures and the plausibility of those exposures to a DEEOIC Industrial Hygienist pursuant to Federal (EEOICPA) Procedure Manual Chapter 2-0700.12b (issued January 2010).

The evidence of record contains a conflict regarding the cause of the employee's COPD between the opinions of the employee's treating physicians (Dr. Long and Dr. Young) and the opinion of the DMC. This conflict involves reports which are of virtually equal weight and rationale and reach the opposite conclusion. Section 30.411 of the EEOICPA regulations provides that where there is a difference in medical opinion sufficient to be considered a conflict of virtually equal weight and rationale to reach the opposite conclusion, the OWCP shall appoint a third physician who conforms to the standards regarding conflicts of interests adopted by OWCP to make a referee examination. 20 C.F.R. § 30.411 (2011). Therefore, after obtaining information from a DEEOIC Industrial Hygienist regarding the route, extent and plausibility of the employee's occupational exposures to toxic substances, the district office shall request that a referee examination be conducted to provide an opinion regarding the causation issue.

Example 2 - Based on the above findings, the FAB is not issuing a final decision for vocal cord cancer under Part E of the Act, and the case is remanded to the district office.¹ Upon remand, the district office should review the evidence; take appropriate development actions to determine the nature and extent of your potential toxic substance exposures at the SRS.

Example 3 - Accordingly, the FAB remands your compensation claim to the Jacksonville district office for further development of the evidence as warranted. If the district office determines that a

Comment [j7]: What if the district office can assess the extent and duration of exposure on its own.

Comment [j8]: The exposure analysis may result in BOTH prior medical opinions becoming invalid so a referee exam is not really appropriate.

Comment [j9]: Non-specific guidance is generally more appropriate.

conflict of medical opinion exists, it should obtain a referee medical opinion from a duly qualified medical specialist.

Comment [J10]: While you can mention something, don't require it.

- **Apply discretion in the regulatory relevancy of citations –**

Part B of the EEOICPA provides benefits to covered employees and their eligible survivors for the employees' occupational illnesses sustained by those employees in the performance of duty at Department of Energy facilities, atomic weapons employer facilities, beryllium vendor and certain uranium mines and mills. Those illnesses are specifically limited to the occupational illnesses of cancer, beryllium sensitivity, chronic beryllium disease, and chronic silicosis, and consequential conditions resulting from those illnesses. See 42 U.S.C. §§ 7384l(1), 7384l(9), 7384l(15), and 7384n. The evidence of record shows that the employee worked at a covered DOE facility and was diagnosed with cancer.

Part E of the EEOICPA provides benefits to DOE contractor employees and their eligible survivors as applicable for the illnesses of those employees that result from occupational exposure to toxic substances at a DOE facility. In order to claim survivor benefits under Part E of the EEOICPA a claimant must establish that a DOE contractor employee contracted a covered illness (with a specific medical diagnosis and initial diagnosis date), through exposure to a toxic substance at a DOE facility. This means that you must establish that it is 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 the claimed illness; and that such toxic substance exposure was related to employment at a DOE facility. See 42 U.S.C. § 7385s-4(c)(1), 20. C.F.R. §§ 30.230, 30.231, and 30.232 (2011), Federal (EEOICPA) Procedure Manual, Chapter 2-1000.17(c) (October 2009), and EEOICPA Fin. Dec. No. 10036412-2006 (Dep't of Labor, June 13, 2007). Additionally, you must establish that it is at least as likely as not that the employee's exposure to toxic substances at a DOE facility was a significant factor in aggravating, contributing to or causing the employee's death. 42 U.S.C. § 7385s-3. The EEOICPA defines a "covered illness" as an illness or death resulting from exposure to toxic substances. 42 U.S.C. § 7385(s)

The EEOICPA provides that except in accordance with § 7384u of the EEOICPA, an individual may not receive compensation under the EEOICPA for cancer and also receive compensation under the RECA. 42 U.S.C. § 7385j. Section 7384u of the EEOICPA deals with uranium workers and their eligible survivors who receive an award under section 5 of the RECA. Section 4 of the RECA is a separate provision within RECA which provides benefits for individuals with cancer who were either proximate to atomic tests at the Nevada Test Site (downwinder) or participated at the site of an atmospheric atomic weapon test (onsite participant). If the employee or surviving spouse accepted an award of \$75,000 under section 4 of RECA for the employee's cancer, then neither the employee or surviving spouse or surviving children of the employee may

receive compensation under Part B or Part E of the EEOICPA for a cancer contracted by that employee. EEOICPA Fin. Dec. No. 15686-2007 (Dep't of Labor, April 23, 2007), EEOICPA Fin. Dec. No 20971-2002 (Dep't of Labor, March 15, 2004), EEOICPA Bulletin No. 06-07 (issued May 18, 2006). Federal (EEOICPA) Procedure Manual Chapter 2-1100.8 (issued May 2009).

A decision on your entitlement to benefits must be based on the totality of the evidence. The evidence of records shows that Vera Aas accepted an award of \$75,000 under section 4 of the RECA as the employee's surviving spouse for the employee's cancer. Therefore, neither she nor any other survivor of the employee is eligible to receive benefits under Part B or Part E of the EEOICPA for any cancer of the employee including lymphoma.

Comment [j11]: This is the relevant information – but review paragraph #1 & 2 – what's the point of including them.

- Open-ended inference – letting the reader “guess” or assume what you mean can result in poorly explained outcomes. .

However, as found above, the evidence of record does not establish that the employee worked at a DOE facility – Area IV of the SSFL – as alleged. Thus, the claimants have not established the necessary criteria for eligibility under EEOICPA and their claims for survivor benefits under Parts B and E are denied.

Comment [j12]: No explanation of how the evidence doesn't establish it, or what the criteria are for making a decision.

On review of the Toxicologist report, I find that it fully addresses the relationship that is alleged between heart disease and ionizing radiation, and provides a rationalized opinion stating that sufficient evidence does not exist to establish that your husband's exposure to ionizing radiation would have been is a significant factor in causing, contributing to or aggravating his heart disease.

Comment [j13]: No enough explanation as to what analysis led to the reviewer's finding.

I find that evidence is not sufficient to establish that your husband experienced wage loss resulting from his covered illness of metastatic lung cancer for at least ten years prior to his normal retirement age. The evidence shows that your husband was diagnosed with metastatic lung cancer in August 1996, and died as result of this covered illness in September 1996 at the age of 58. Thus, he is presumed to have experienced compensable wage loss for calendar years 1997 (the year following his death) through 2003, a period of seven years. If the year of his diagnosis is added, he would have experienced wage loss for eight years. There is no medical evidence in the record, however, indicating that your husband was disabled from working as a result of his covered illness of metastatic lung cancer prior to 1996, Although you stated that your husband's disability began in 1991 and attributed this to his other respiratory problems, your claim based on these conditions (COPD, emphysema, CBD) was denied. Since these other conditions are not covered illnesses, they cannot form the basis for an award of wage loss compensation. Accordingly, your claim for survivor compensation under Part E based on your husband's wage loss is denied.

Comment [j14]: Explain the basis for making a decision for the finding to make sense.

- Explanation is necessary to allow the reader to understand the argument –

Example 1 - Under the regulations governing the Act, if a claimant submits a certified statement, by a person with knowledge of the facts, that the medical records containing a diagnosis and date of diagnosis of a covered medical condition no longer exist, then the FAB may consider other evidence to establish a diagnosis and date of diagnosis of a covered medical condition. However, if the certified statement is a self-serving document, the FAB may reject the claim based upon lack of evidence of a covered medical condition. 20 C.F.R. § 30.113(c) (2012).

The FAB has determined that because Dr. Smith will not personally benefit from any payment of compensation, his statement is not self-serving, even though he is related to the claimants. Based upon his professional experience and employment at the time of the employee's death, Dr. Winokur would be in a unique position to recollect the circumstances of the situation and offer insight into the matter. He is unequivocal in the presentation of his remembrance of the events, and clearly identifies two specified qualifying cancers as likely primaries. Therefore the FAB finds that this evidence is sufficient to establish the diagnosis of a specified cancer.

Example 2 - In the case at hand, you have provided a medical report stating that your thyroid cancer was caused by toxic exposure at Area IV of SSFL; however, it is impossible to juxtapose two such reports from different physicians and assesses the probative value of their respective opinions because, in this case, there is only one medical opinion, that is, the opinion of Dr. Blackhouse. The DEEOIC toxicologist is not a physician and cannot provide a "medical opinion" nor could she provide a "referee medical review." Therefore, it cannot be said that the district office considered, as envisioned by the implementing regulations, "two reports of virtually equal weight ..." in making its recommendation to deny your compensation claim. 20 C.F.R. § 30.411(a)-(b)

Example 3 - In your case, the record shows that you were employed as a janitor and laundry worker at the Portsmouth GDP in 1974-1975, and a chemical operator at the facility from 1975 to 2009. A review of the SEM database shows that persons performing the duties of a chemical operator would have been exposed to monel and potassium permanganate, which are substances listed in SEM as being associated with Parkinson's disease. The SEM does not indicate that persons working as chemical operators would have significant exposure to any other substances linked to Parkinson's disease, such as welding fumes, engine exhaust, bronze, or carbon steel. Although you testified at the hearing that you worked in areas in which these substances were present, this testimony alone is not sufficient to warrant further review by a program industrial hygienist, since the evidence does not indicate any direct or significant exposure. Similarly, there is no evidence in the record to indicate any acute exposure to carbon monoxide that is sufficient to warrant an inference of a causal relationship between it and your Parkinson's disease.

In response to your authorized representative's objections, and your testimony at the hearing, concerning your exposure to trichloroethylene, I note that the SEM does not indicate the existence of a causal link between trichloroethylene and Parkinson's disease. Although the SEM indicates that exposure to trichloroethylene and other solvents may be linked to the condition of chronic solvent encephalopathy, there is no medical evidence in the record to indicate that you have been diagnosed with this condition. In his report of May 23, 2011, Dr. Jones states that the relationship between Parkinson's disease and such exposure is "well known," but he does not cite any published studies or other authority that would establish such a relationship. In the absence

of such evidence, I find that Dr. Jones' report is not of sufficient probative value to warrant further review by a DEEOIC specialist. Moreover, since Dr. Jones' opinion does not address any substances other than organic solvents/trichloroethylene, there is no conflict of opinion with respect to the issue of the relationship between Parkinson's disease and your exposure to monel, manganese and potassium permanganate. Since the report of the DMC is well rationalized, based on a thorough review of the records and an accurate exposure history, I find that it represents the weight of medical evidence in the case.

I therefore conclude that there is insufficient evidence to establish that exposure to a toxic substance at a DOE facility was a significant factor in causing, contributing to or aggravating your Parkinson's disease. As a result, the evidence fails to satisfy the criteria for determining that you contracted a covered illness as a result of toxic exposure at a DOE facility, as required under 42 U.S.C. § 7385s-4. Accordingly, you do not qualify as a covered DOE contractor employee under Part E based on Parkinson's disease, and your claim based on this condition under Part E is denied.