U.S. DEPARTMENT OF LABOR

OFFICE OF WORKERS' COMPENSATION PROGRAMS
DIVISION OF ENERGY EMPLOYEES OCCUPATIONAL ILLNESS COMPENSATION
FINAL ADJUDICATION BRANCH

EMPLOYEE: **[Name Deleted]**

CLAIMANT: **[Name Deleted]**

CASE ID: **[Number Deleted]**

DOCKET NUMBER: **20200831-56092-1**

DECISION DATE: **January 19, 2021**

NOTICE OF FINAL DECISION AFTER A HEARING

This decision of the Final Adjudication Branch (FAB) concerns the above-noted claim for benefits under Part B and Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons stated below, your claim under Part B and Part E based on chronic beryllium disease (CBD) is denied.

STATEMENT OF THE CASE

On August 9, 2005, **[Employee]** initially filed a claim for benefits under Part E of EEOICPA with the Division of Energy Employees Occupational Illness Compensation's (DEEOIC) Las Vegas Resource Center, alleging that he had developed chronic obstructive pulmonary disease (COPD) due to his work at a Department of Energy (DOE) facility. In support of that claim, **[Employee]** submitted a work history in which he alleged that he was employed as a security officer by "EG&G Special Projects" at the Nevada Test Site's (NTS) "Air Force Facility" from January 1981 through October 1990. On August 10, 2005, the resource center requested verification of **[Employee]**'s claimed employment from DOE, and on August 11, 2005, it also sought to verify his employment by searching a database maintained by the Oak Ridge Institute for Science and Education, but no results were obtained from that search. DOE verified on August 30, 2005 that **[Employee]** was employed by EG&G Special Projects, but pointed out in its response that "[t]his was not a DOE funded project and was not associated with the DOE Nevada Test Site Work."

On several dates, the Seattle district office of DEEOIC asked **[Employee]** to submit the required medical and employment evidence to establish a claim under Part E; no response was received. On February 4, 2007, a claims examiner in the district office asked DOE to conduct a search and provide her with copies of any work-related records it might have for **[Employee]**; no response was received from DOE. With respect to **[Employee]**'s claimed employment, another claims examiner noted in a June 15, 2007 "Memo to File" that despite DOE's August 30, 2005 verification, an attachment to an internal May 2, 2007 email sent by the chief of operations in the

Seattle district office appeared to list contractors and subcontractors that worked at the NTS, and since EG&G Special Projects was included on that list, further employment verification would have to be conducted to determine whether **[Employee]** had covered employment, but only if he submitted medical evidence to support his claimed illness. The file contains a copy of the May 2, 2007 email regarding the subject "Nevada Test Site Contractors PDF file," which states:

> Attached is a listing of contracts and listings of employers and contractors that did business with DOE at the Nevada Test Site. There are some contractors that [] may have worked at other areas as well. The contractors on this list were identified from records and verified by DOE. . .DOE has informed me that this list is not comprehensive.[1]

On June 15, 2007, the district office issued a recommended decision to deny **[Employee]**'s Part E claim on the ground that he had not submitted medical evidence to establish that he had been diagnosed with COPD. In its recommendation, the district office found that **[Employee]** had worked at the NTS for EG&G Special Projects for an unspecified time period as verified by DOE, but noted that "[i]n the absence of medical records, additional employment development was not pursued." **[Employee]** subsequently objected to the recommended decision and requested a hearing, which was held on August 28, 2007. During the hearing, **[Employee]** submitted medical reports in support of his claimed COPD, along with documents relating to the Air Force's work at the Nellis Air Force Range. In addition, in response to the FAB hearing representative's question of whether he worked for a DOE or Department of Defense (DOD) contractor or subcontractor, he stated that he had been issued "a Department of Energy badge [that] allowed [him] access to that particular area" and that EG&G Special Projects was both a DOE and DOD subcontractor. On December 20, 2007, FAB issued a remand order stating that further development of the new medical evidence was required, and returned the claim to the district office to pursue such development. FAB did not mention any specific development actions for the district office to take regarding **[Employee]**'s claimed employment in the remand order.

On January 7, 2008, a different Seattle claims examiner received another internal email with the subject line "Special Project[s] at NTS (Area 51)." That email included a trail that contained a message from the former Seattle District Director stating that **"EG&G Special [P]rojects had no connection to DOE and no connection to the Nevada Test Site."** (emphasis in original) The originating email on that trail was written by a policy analyst in DEEOIC's Policy Branch on November 3, 2006, who stated, in part:

> I have talked with **[DOE employee]** – the archivist who does almost all of the employment verification/dose records retrieval and IH work for [EEOICPA] for the Nevada Test Site. She said [] EG&G Special Projects does not receive any money from DOE. The Special Projects people work for DOD. She said

[1] As the operations chief indicated, the list attached to her email was an incomplete, preliminary "working" list by DOE. Thereafter, DOE continued to collect more information regarding who was at the site and what they were doing there. A fuller and more complete description of the DOE contractors and subcontractors at the NTS contained in the case file supports DOE's October 17, 2008 letter discussed below, which confirmed that EG&G Special Projects was not a DOE contractor or subcontractor.

> generally that list had good information about what companies worked out there, but she was quite emphatic the EG&G Special [P]rojects had NO connection to the DOE and no connection to the Nevada Test Site and probably should not be on that list.

Along with an undated letter that the district office received on February 14, 2008, **[Employee]** submitted new evidence, including: (1) two employment history affidavits indicating that he worked for EG&G Special Projects in Area 51 at the NTS during the claimed time period; (2) a November 8, 1983 "Letter of Commendation" by Sgt. John H. Melancon regarding a work-related occurrence involving **[Employee]**; (3) a June 4, 1984 "EG&G Special Projects Division Interoffice Memorandum" to **[Employee]** regarding facilitating work between EG&G Special Projects employees and Air Force personnel; (4) a March 2, 2007 letter addressed to **[Employee]** from former U.S. Senator Harry Reid regarding correspondence he had received from **[Employee]**; and (5) other documents indicating that he worked for EG&G Special Projects at the NTS, including a copy of his work badge.

On February 29, 2008, the district office issued a new recommended decision to deny **[Employee]**'s Part E claim for COPD on the ground that there was insufficient evidence to establish that he was present at a covered facility while working for DOE or any of its covered contractors or subcontractors during a covered time period.[2] On March 12, 2008, FAB received **[Employee]**'s objection to the recommendation, and on August 14, 2008, it sent his case file to the Director of DEEOIC to address questions that had arisen regarding the employment evidence in the file. Specifically, in an August 6, 2008 memorandum, a FAB hearing representative set out the evidence described above and pointed out the following two additions, and her questions:

> [A] copy of the employee's badge which states, "United States Department of Energy Nevada Operations EG&G ONLY. **[Employee]** EG&G SP."
>
> [The] employee's March 12, 2008 letter of objection. . .which states in part, "Also, the general manager for all projects at Area 51, that person's name was Vincent Gong, who was in charge of all subcontractors at Area 51. Mr. Gong was employed by [REECo], the prime contractor at the NTS, a company owned by EG&G."
>
> Given the contradictory evidence in the case file, the employee's statement that REECo was owned by EG&G, and the language in Circular 08-06 that "other DOE contractors or sub-contractor employment in Area 51" qualifies an employee for inclusion in the NTS SEC class, I am seeking clarification regarding this individual[']s DOE contractor/subcontractor employment status under the EEOICPA. (emphasis in original)

[2] At that time, DEEOIC did not consider Area 51 to be part of the NTS. However, on August 5, 2008, DEEOIC issued EEOICPA Circular No. 08-06, recognizing that Area 51 was part of the NTS for the period 1958 through 1999 because DOE had a "proprietary interest" in the premises of Area 51, and noting the DOE contractors (Reynolds Electrical and Engineering Company (REECo) and Bechtel Nevada, Inc.) who worked there.

To resolve the question of whether EG&G Special Projects was either a DOE contractor or a subcontractor at the NTS, the Director contacted DOE and in an October 17, 2008 letter, DOE's Director of the Office of Health and Safety explicitly stated that "this letter confirms that 'EG&G Special Projects' was not a DOE contractor. Consequently, the DOE does not have records relating to that work." In a November 7, 2008 response to FAB, the Director stated "[g]iven the DOE's response, EG&G Special Projects cannot be identified as a DOE contractor [or subcontractor] and employment for the company is not covered under [EEOICPA]." Then, on November 12, 2008, FAB issued a final decision denying **[Employee]**'s Part E claim on the ground that there was insufficient evidence to prove that he was a "DOE contractor employee." **[Employee]** requested reconsideration of this final decision; FAB denied the request on December 31, 2008.

In a single-sentence letter dated June 1, 2012, **[Employee]** requested reopening of his Part E claim for COPD based on "new information," but he did not submit any documentation in support of his request. On August 2, 2012, **[Employee]** called the district office and told a claims examiner that he had obtained evidence that in 1972 EG&G had bought REECo and became a DOE contractor, but he did not submit any evidence in support of this allegation to the district office. Thus, the District Director of the Seattle district office issued a denial of the reopening request on August 7, 2012.

In a five-page August 20, 2015 letter to DEEOIC, **[Employee]**'s authorized representative recited historical information regarding Area 51 at the NTS, and at the end, asked if DEEOIC would recognize workers at Area 51 as DOE contractor or subcontractor employees based on the "new information" she had provided. Also in her recitation, she alleged that "[t]he previous prime contractor, EG&G Energy Measurements, Inc. (EG&G), managed and operated a portion of the Nevada Test Site. . .under Prime Contract No. DE-AC08-93NV[]11265." In addition, she submitted a letter dated August 30, 2015, in which she requested reopening of **[Employee]**'s Part E claim on the basis that he was an employee of either a DOE contractor or subcontractor at Area 51 based on "the definitions" in EEOICPA and her "new information," including her unsupported allegation that "EG&G had several divisions and owned several companies, REECo was just one of them."

On January 21, 2016, the acting District Director of the Seattle district office issued an order that denied the request to reopen **[Employee]**'s Part E claim. In this order, the acting District Director acknowledged that Area 51 was a part of the NTS from 1958-1999; however, she stated that in addition to establishing *presence* at a DOE facility, a claimant must prove that he is a "covered DOE contractor employee," and in **[Employee]**'s case, the evidence did not establish that EG&G Special Projects was a DOE contractor or subcontractor at Area 51. Rather, DOE had confirmed that EG&G Special Projects was *not* a DOE contractor or subcontractor in the October 17, 2008 letter. Lastly, the acting District Director concluded that none of the information the representative had submitted in her letters actually refuted DOE's position, and noted that non-DOE government contractors such as contractors for the Air Force had reason to enter Area 51, but a presence in that area during the covered time period was not sufficient to establish covered employment without evidence that the employee was working for a DOE contractor or subcontractor.

By letter dated November 17, 2016, the representative submitted a second request to reopen **[Employee]**'s Part E claim based on her unsupported allegations that DOE had a contractual agreement with EG&G Special Projects at Area 51. In a February 2, 2017 denial of that request, the Director of DEEOIC stated that there was insufficient evidence to establish that **[Employee]**'s employer, EG&G Special Projects, was a DOE contractor or subcontractor. In addition, the Director stated that the representative's contention in her reopening request that Edgerton, Germeshausen, and Grier, Inc. changed its name to "EG&G EM" in October of 1992 and had multiple contracts over the years with DOE at the NTS under that name, was unsubstantiated. Thus, the Director concluded that there was no justification to reopen **[Employee]**'s claim.

On March 18, 2020, **[Employee]**'s representative signed another claim form on his behalf for CBD, COPD, chronic bronchitis and work-related asthma. In a March 20, 2020 letter, a Seattle claims examiner notified **[Employee]** of DEEOIC's prior determinations that there was insufficient evidence that he had worked for a DOE contractor or subcontractor at the NTS, and requested that he submit the required evidence to establish that claim. The representative responded on March 25, 2020, and stated that **[Employee]**'s case file already contained sufficient evidence to support that he worked for a DOE subcontractor. After **[Employee]**'s case was reassigned to the Jacksonville district office on April 29, 2020, another claims examiner notified **[Employee]** that his representative did not have authority to sign a claim form on his behalf. On May 6, 2020, **[Employee]** filed another claim form without identifying any alleged illnesses.

In response, on June 26, 2020, **[Employee]** filed yet another claim form, in which he alleged that he had developed COPD[3] and CBD. On July 8, 2020, the Jacksonville district office informed **[Employee]** and his representative that his employment with EG&G Special Projects has been evaluated several times and found to be employment with a DOD contractor or subcontractor. Accordingly, they were requested to submit any new employment evidence to support **[Employee]**'s claim within 30 days of the district office's letter.

On July 14, 2020, the Jacksonville district office received the representative's response, which included her argument that **[Employee]**'s alleged employment had been sufficiently verified by factual documentation already in the case file. Once again, however, she did not include any new evidence with her response.

On August 31, 2020, the Jacksonville district office issued a recommended decision to deny **[Employee]**'s claim for CBD under Part B and Part E of EEOICPA, based upon the conclusion that the evidence of record was insufficient to establish that he was a covered DOE contractor or subcontractor employee.

[3] FAB has no authority to re-adjudicate **[Employee]**'s second Part E claim for COPD because FAB's November 12, 2008 decision, which became final on December 31, 2008, denied that illness under Part E and the claim has not been reopened.

OBJECTIONS

[Employee]'s representative filed a timely objection to the recommended decision and requested a hearing, which was held on November 4, 2020. At that telephone hearing, the representative submitted testimony in support of her objection to the recommended decision. Following the hearing, a copy of the hearing transcript was mailed to **[Employee]** and his representative, but they did not submit any corrections or amendments to that transcript. The evidence of record also does not show that they submitted any additional employment evidence for FAB to consider.

After conducting an independent review of the evidence of record, I hereby make the following:

FINDINGS OF FACT

1. On November 12, 2008, FAB issued a final decision denying **[Employee]**'s Part E claim for COPD on the ground that there was insufficient evidence to establish that he was a DOE contractor or subcontractor employee.

2. On June 26, 2020, **[Employee]** filed a new claim for benefits under Part B and Part E based on CBD.

3. The employment evidence of record shows that **[Employee]** was employed by EG&G Special Projects at the NTS.

4. A letter dated October 17, 2008 from DOE's Director of the Office of Health and Safety explicitly stated that "this letter confirms that 'EG&G Special Projects' was not a DOE contractor."

5. A memorandum dated November 7, 2008 from the Director of DEEOIC affirmed that EG&G Special Projects cannot be identified as a DOE contractor or subcontractor, and employment for the company is not covered under EEOICPA.

Based on the above-noted findings of fact, I also hereby make the following:

CONCLUSIONS OF LAW

The benefits available under Parts B and E of EEOICPA are only payable to claimants who satisfy the eligibility requirements set out in the statute. Pursuant to 20 C.F.R. § 30.111(a) (2019), the claimant has the burden of providing all documentation necessary to establish eligibility for benefits and of proving "by a preponderance of the evidence the existence of each and every criterion," required for eligibility, except as provided in the regulations or the statute. In this claim for CBD under Parts B and E, **[Employee]** alleges that he qualifies as a "Department of Energy contractor employee" under § 7384l(11) of EEOICPA because he worked at the NTS, a DOE facility, for EG&G Special Projects, which he believes is a DOE contractor or subcontractor. However, FAB concludes otherwise, and accordingly, **[Employee]** is not entitled to benefits under Parts B and E.

As stated above, **[Employee]**'s representative alleges that documentation in his case file supports that he is a "Department of Energy contractor employee" as defined in § 7384l(11). However, to date, neither **[Employee]** nor his representative have provided evidence in support of their belief that **[Employee]**'s verified employer, EG&G Special Projects, was a DOE contractor or subcontractor. Rather, the employment evidence in the case file shows that he worked for a DOD contractor or subcontractor at the NTS. Thus, because the evidence in the case file does not prove that his employer was a DOE contractor or subcontractor, **[Employee]** has failed to meet his burden of proof to establish that he is a DOE contractor employee under Parts B and E of EEOICPA. Under these circumstances, he is not entitled to any benefits he has claimed under Parts B and E.

Denver, Colorado

Sandra Vicens-Pecenka
Hearing Representative
Final Adjudication Branch