

**Proposed Changes in DOL EEOICP Regulations
Comments and Recommendations
DOL Toxic Substances and Worker Health Advisory Board**

1. §30.231 (a) Proof of employment (p. 40)

The Board finds that the proposed new language is vague and contradictory. The Board notes that the proposed new language contradicts Section 30.111 (c) in a manner that limits the value of affidavits. If the goal is to increase the likelihood that affidavits are valid, then guidelines on what elements need to be included in an affidavit should be issued to clarify the claimants' task of proving an employment history in the absence of other evidence.

The Board recommends that the proposed rule changes not be made.

2. §30.112 (b) (3) Evidence of covered employment (p. 27)

The Board proposes the following language for this section:

If the only evidence of covered employment is a written affidavit or declaration subject to penalty of perjury by the employee, survivor or any other person, and DOE or another entity either disagrees with the assertion of covered employment or cannot concur or disagree with the assertion of covered employment, then OWCP will evaluate the probative value of the affidavit under § 30.111.

3. §30.231 (b) Proof of exposure to a toxic substance (p. 40)

The Board recommends that DOL issue guidelines on how OWCP determines reliability of information under this section.

The Board recommends that the following language be added to this section:

- (3) Occupational history or affidavit obtained from the claimant and/or co-workers; or
- (4) Occupational history obtained by a health care provider other than those who are part of a DOE-sponsored Former Worker Program; or
- (5) Any other entity or source that is deemed by OWCP to provide reliable information to establish that the employee was exposed to a toxic substance at a DOE facility or RECA section 5 facility.

4. §30.232(a) (1) and (2) Establishing diagnosis of covered illness (pp. 40-41)

The Board believes that sufficient expertise in the causation of occupational illness is unlikely to be available in DOE communities and the time commitment of physicians to produce such a documented report on causation makes this requirement unrealistic and places too great a burden on claimants.

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The Board recommends that DOL remove the requirement that the claimant must produce written medical evidence wherein the physician describes the “reasoning for his or her opinion regarding causation.” The Board recommends that, if the claimant submits an opinion of a qualified physician as defined in section 30.230(d)(2) (iii) that provides a rationale for determining that the employee’s illness was caused, contributed to, or aggravated by the exposure, then that opinion should be assessed for its probative value by OWCP.

In addition, the Board is concerned that “Any other evidence OWCP may deem necessary...” is overly broad, unnecessary, and may form the basis for adversarial interactions between OCWP and claimants. The Board is concerned that the change in language from “an illness that may have arisen from exposure to a toxic substance” to “an illness that resulted from an exposure to a toxic substance” places an unnecessary burden on the claimant.

5. §30.230(d)(2)(iii) Physician opinion about contribution or causation (p. 39)

The Board notes that the phrase: “An opinion of a qualified physician with expertise in treating, diagnosing or researching the illness claimed to be caused or aggravated by the alleged exposure” differs from §30.230(d)(1)(ii) “... was a significant factor in aggravating, contributing to, or causing the illness” and should be made consistent with language in §30.230(d)(1)(ii).

6. §30.405(b) and (c) Change of physicians (p. 55)

The Board believes that claimants should be able to change physicians without approval of the OWCP. The Board notes that the added language does not clarify what the claimants need to produce and finds it implausible that claimants can provide medical or factual evidence in support of requests to change physicians.

The Board recommends that the proposed changes in §30.405(b) be eliminated and be replaced by the following: “The claimant may cite personal preference as a valid reason to change physicians.” The language of 30.405(c) should be changed in accordance with this recommendation.

7. §30.206(a) Proof of employment with regards to beryllium use (p. 31)

The Board is uncertain about the reason for the apparent narrowing of beryllium-using sites and is concerned that the change might unnecessarily limit benefits to beryllium-exposed workers who should be eligible for the program.

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This same comment applies to §30.5 (j) (p. 14)

8. §30.509(c) Use of AMA Guides (p. 65)

The Board notes that codifying the 5th edition in a regulation may reduce OWCP’s flexibility in using future editions of the AMA Guides. Citation to a specific edition of the AMA Guides in the DEEOIC procedures manual will obviate the need for new regulations to adopt updated Guides.

9. §30.805 and §30.806 Evidence of wage-loss (p. 96)

The Board recommends that wage loss should be compensated if the covered illness contributed to retirement; e.g., a worker was told that work was no longer available due to his covered illness and that worker took early retirement.

The Board recommends that the phrases “was caused” and “but for” in Section 30.805 (a) (3) be replaced by the language of the standard of “aggravated, contributed to or caused” that appears in the EEOICA Act. That is, if the covered illness aggravated, contributed to or caused the health problems associated with wage loss in the trigger month, then that wage loss should qualify for benefits.

The Board recommends that the phrase that contains the term “rationalized” in line 1 of 30.806 be changed to “OWCP requires submission of medical evidence based on a physician’s fully explained and reasoned decision...” The Board recommends that the phrase “convince the fact finder” in line 2 be replaced with the phrase “allow the fact finder to determine.”

10. §30.5(ee) Definitions – definition of “physician” (p. 17)

9. The Board recommends that “includes” should be restored so the definition reads “Physician includes surgeons...” in order to be more inclusive of physicians who typically treat patients with work-related illnesses (e.g., family practice physicians, internists, etc)

11. §30.5 (x)(2)(iii) Delivery or removal of goods (p.16)

The Board recognizes that workers who were exposed to hazardous materials in the course of delivery or removal of goods or materials from a DOE facility should be included in coverage by the EEOICP. The Board recommends that the sentence beginning with “The delivery or removal of goods...” be eliminated.

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12. The Board notes that the regulations make frequent reference to causation. The Board also notes that the EEOICPA Act refers to “aggravation, contribution to, and causation.” The Board therefore recommends that the proposed changes in the regulations reflect the language of the Act.