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DEEOIC – Advisory Board on Toxic Substances and Worker Health

To the Advisory Board:

My name is Tyler Bailey and I have been assisting former Department of Energy employees for the last several years under the DEEOIC program as an Authorized Representative. My comments today will review 2 topics; the first being a trend I have observed where claims are being inappropriately sent to Contract Medical Consultants (CMCs); and second, I will share information that occurs during the adjudication of claims where treating physicians and CMCs are asked to base their medical opinions solely on the exposure information contained in the Industrial Hygienist's (IH) reports and not any other documentation.

1: Misuse of CMC Referrals & Proposed Solution

When claims for primary illnesses are adjudicated by DEEOIC, the Policy & Procedure Manual (PPM) states that Claims Examiners (CEs) should view the treating physician as the primary source of medical evidence before consideration of a CMC referral; and that the CE should typically give the treating physician the first opportunity to review medical evidence from the file for the purpose of responding to claim questions. PPM additionally states the CE should *not* view a medical referral to a CMC as an automatic requirement for each claim. It also states the function of the CMC is *not* to validate probative input by the claimant's chosen treating physician. PPM further states that an obvious defect in the case must exist for which a medical opinion is necessary for a CMC referral; and is available in situations where no other reasonable option exists.

I represent many clients whose cases have been inappropriately sent to a CMC when the justification for doing so, according to the PPM, was not met. This occurs quite regularly with my clients and once it does, the case is corrupted as a whole. Some CEs, supervisors and/or District Offices exhibit a pattern of sending claims to the CMCs in direct violation of the PPM which results in denied claims. Once a CMC opinion is issued, it is viewed to be of equal or more probative value than the treating physician's, regardless of content and rationale. Written objections to these denials from inappropriate CMC referrals will generally result in the case being sent to a Referee Specialist, however, the Referee opinions are simply another CMC contracted by DOL and, as such, they simply side with the original CMC. Additionally, I have noticed that CMCs and Referee Specialists are drawn from the same pool of physicians and this week's CMC may be next week's Referee and vice versa.

I have numerous examples I can provide to the Board if requested. On point is one of my cases involving a client of mine who submitted medical records with their treating physician's initial assessment of the claimed illness. The physician specifically requested a copy of the IH report when it was completed. The CE immediately dispatched a return letter stating that the next step would be for the IH report to be sent to a CMC. As the AR, I requested the IH report be sent to the treating physician and not a CMC, to which the CE complied. I submitted the treating physician's second assessment that reviewed the IH report, however, shortly thereafter the CE sent the case to a CMC without identifying any defects in the case nor making efforts to ask clarifying questions with the treating physician. The CE followed through with exactly what they intended to do in their first letter, which was to send the case to a CMC regardless of the PPM. This resulted in a Recommended Decision (RD) to deny the claim to which I objected. After reviewing the objection, the reviewing officer from the Final Adjudication Branch (FAB) identified 6 deficiencies and violations committed by the CE, and the case was remanded to the District Office for further adjudication.

At that point the CE gave the treating physician, who is trained in Occupational Medicine, the opportunity to respond to the CMC report as the FAB officer suggested. Per the CE's request, the treating physician respectfully identified several material errors in the CMC's assessment. The treating physician then used current health science information and rationale to discuss how the claimant's exposures were likely a contributing factor to the claimed illness. One would presume at that point, that a new RD to accept the claimed illness would have been issued given the PPM and the FAB officer's directions that the treating physician was to be viewed as the "primary source of medical evidence."

Instead, the CE doubled down and for a second time sent the case to another CMC for a Referee opinion even though the treating physician's response identified material defects in the original CMC report, which was inappropriately obtained in the first place. As one would suspect, the Referee CMC did not address any of the material deficiencies found in the original CMC report, and quickly sided with the CMC which resulted in a subsequent Final Decision to deny the claim. The Board may be disheartened to learn that this claimant, as we speak, has still not been approved under the program. Since my client does not have the means to take their case to U.S. District Court, their claim will likely remain denied until changes are implemented into the PPM.

If the Board is interested in reviewing the specifics of this case, I would be willing to provide a redacted copy of the claimant's case file. There are several other clients whose claims have been inappropriately sent to a CMC in similar fashion. The example provided is the tip of the iceberg.

Solution:

Over the last two decades I have worked with various government agencies involved in gathering evidence to support cases presented to the courts, both civil and criminal. In both systems, illegally or improperly obtained evidence cannot be used in a court case, no matter how incriminating. Furthermore, plaintiffs and defendants are allowed challenge evidence presented in a case against them if they can prove that the evidence was obtained through such actions that violate their rights.

DEEOIC PPM is issued to protect the rights of the claimants and ensure that claims are adjudicated fairly and according to official policy. Yet the current version of the PPM does not address what actions are to be taken when a CE or other DEEOIC personnel violates policy and procedure. There is no point in issuing policies in the PPM, such as those declaring when a CMC referral can be solicited, when evidence gained through the violation of those policies is allowed to remain in the case file and be used to deny the claim. FAB officers already exclude evidence submitted by claimant's which they deem to be untimely or improperly submitted but they do not do the same when the evidence is an improperly obtained CMC report.

It is my request to the Board that the following recommendation be submitted to DEEOIC for inclusion in the next version of the PPM: CMC reports obtained in violation of the directives contained in this policy manual, shall be excluded from consideration in the record.

2: Inclusion of All Exposure Evidence

The PPM indicates that CEs are to send all relevant exposure data such as employment history documents, EE-3 work history claim forms, EE-4 coworker affidavits, Occupational History Questionnaires completed by the Resource Centers, and the Site Exposure Matrix (SEM) searches to the Industrial Hygienist for inclusion in the IH report. Through experience I have learned that the IH report is considered "The Bible", so to speak, when it comes to establishing exposure to toxic substances during covered employment. Claimant affidavits, co-worker affidavits, and Occupational History Questionnaires are most often disregarded by the Industrial Hygienists. In addition, if the treating physician reviews these documents in their opinion reports the case is generally sent to a CMC. This appears to be contrary to program guidelines that allows for probative evidence to be reviewed by the physicians.

When a claim is first initiated, CEs will generally send development letters to claimants asking them to provide information describing their exposures during covered employment. Later in the claims process; however, when claimants submit the requested documentation, it is more often than not viewed as self serving and not given probative weight. Why would the DEEOIC ask for information, only to dismiss it when it's provided?

Approximately 2 years ago I had several clients involved in underground mining at U1a Complex within the Nevada Test Site. My clients filed claims for chronic lung disease after they were able to obtain leaked on-site IH reports indicating their work environment contained crystalline silica particles significantly beyond existing regulatory standards. IH equipment was found to be defective and IH personnel were fired from the project due to their errors. My clients provided this "smoking gun" documentation to their CEs along with coworker affidavits describing how they were given the wrong filters for their respirators that were not able to adequately filter the silica particles. All of their IH reports were returned by DEEOIC as quote, "their exposures did not exceed existing regulatory standards." Post 1995 employees take the brunt if this in their IH reports and if leaked IH documents from active mining are not sufficient to persuade the CE or contracted Industrial Hygienists to conclude that exposures occurred beyond the regulatory standard then I am unsure if anything would persuade them.

Solution:

It is my request to the Board that the following recommendation be submitted to DEEOIC for inclusion in the next version of the PPM: "In addition to the IH report, the treating physician and CMC may take into consideration for their medical opinions the exposure information provided in the employment history documents, claim forms, affidavits, and other probative exposure data."

Summary:

Of the two issues I have brought to the Board, the first topic is my primary concern. Claimants whose cases have been sent to a CMC in violation of policy in the PPM have no recourse except through a long, costly legal battle in U.S. District Court. I again request that the Board, after thoughtful consideration, make the recommendation to DEEOIC that they include in their next version of the PPM: CMC reports obtained in violation of the directives contained in this policy manual, shall be excluded from consideration in the record

Sincerely,

Tyler Bailey