ANWAG
Alliance of Nuclear Worker Advocacy Groups

Written Comments to Advisory Board on Toxic Substances and Worker Health
October 17-19, 2016

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Proposed Rules – Lucero v. DOL

I want to thank DOL for extending the public comment period on the proposed rules in order for the Board to submit their suggestions. DOL received over 450 comments on the proposed changes. A few months ago, a federal district court ruled against DOL in a complaint filed by a survivor, Lucero v. DOL. The main reason the judge ruled in favor of the claimant was because DEEOIC did not follow the plain language of the statute. While the judge's order only addresses the section of the legislation which deals with survivor claims, DEEOIC's habit of ignoring the plain language of the statute can be applied to other areas of their policies and procedures. One example is the long standing issue of not considering radiation as a contributing factor in a cancer if the POC is < 50%. I know, I've been harping on this for about ten years. But the fact remains that Congress specifically instructed DEEOIC that radiation must be considered for Part E cancer claims. How much plainer can it get? I call for DEEOIC to withdraw the proposed rule changes and encourage them to work with the stakeholders to develop new rules that reflect the intent of the legislation.

New CMC contract –

I'm not sure if the Board is aware that DEEOIC put out a Request for Proposal for the Contract Medical Consultants' services. If the new contract is awarded to a different company, will that affect the board's ability to review reports from QTC's medical consultants? The reason I ask this is because of QTC's position that the training materials are proprietary and cannot be shared with the Board. Please bear in mind that the advocates have concerns with DEEOIC awarding the original contract to QTC in the first place because it is owned by Lockheed, a Department of Energy contractor. We feel there is a conflict of interest with QTC holding that contract.

There's another serious concern included in this contract proposal. Currently, according to Final bulletin 03-01, it' is DEEOIC's policy to allow for a sick worker to travel up to 100 miles one way from their home for a second medical opinion examination. This proposed contract would double the miles a sick worker might have to travel for the exam. I have provided the link to this RFP in my written statement.

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https://www.fbo.gov/index?s=opportunity&mode=form&id=2f9d4bf615617bf81d97808a42c82e5b&tab=core&_cview=1

I understand second medical opinions are mainly required for workers who currently have home health care. DEEOIC accepts that these workers are sick. Otherwise medical benefits would not have been approved in the first place. Obviously, DEEOIC is questioning the level of home health care a worker needs. I don't have a problem with DEEOIC validating that the appropriate amount of medical benefits was prescribed by the treating physician – whether it is home health care, durable medical equipment or modifications to a worker' home. However, I have a real problem with DEEOIC forcing a sick worker to travel up to 200 miles to participate in a second medical opinion examination. Can you imagine the stress traveling 400 mile round trip places on the sick worker, especially if the worker is on oxygen 24/7?

I know the Former Worker Programs offer the opportunity for workers to travel to a facility to be evaluated for chronic beryllium disease. The difference between that and the DEEOIC's second medical opinion examination is that the workers do not risk losing future medical screening if they choose not to travel for the CBD evaluation.

This is not my original idea but I would like to pass it along– instead of DEEOIC requiring a sick worker to travel up to 200 miles one way, give them the option to have the exam performed in their home. DEEOIC could amend the Request for Proposal so that a physician or nurse practitioner travel to the residence of the sick worker to assess the level of care the patient needs. There are many agencies that provide for doctors and nurses to visit people who are homebound. Utilizing these programs could possibly reduce the administrative costs. But more importantly it will reduce the stress level for a worker, already harmed by the government, and which could adversely impact the worker's health even more.

Streamlining claims

One of the easiest and probably the least controversial way to streamline the claims process is for DEEOIC to provide the Statement of Accepted Facts and Document Acquisition Request automatically to claimants and their authorized representatives. The current process is for the claimant or AR to file a Privacy Act Request for these documents and that is done only if the claimant knows these documents have been prepared or, as in the case of the DARs, if the claims examiner received the employment history from the Department of Energy. Providing these documents automatically as soon as they are available will allow the claimant to immediately alert the claims examiner to any inaccuracies or missing information. This will allow corrections to be made early on in the adjudication process or prior to second medical opinion examinations.

Site Exposure Matrix – cost of SEM and inaccuracies –

I am very happy that the board is considering a recommendation to DEEOIC that the CEs utilize other federal agencies databases, in addition to the Site Exposure Matrix, to determine the potential health

effects of exposure to toxic substances. The SEM is too restrictive when it comes to health effects. I submitted the paper on benzene exposure and the development of Non-Hodgkin's Lymphoma to the SEM Administrator for Dr. Jay Brown's review. The response was,

> *"Agent-occupational cancer links in Haz-Map are based on those published by the International Agency for Research on Cancer (IARC). Although IARC has reported a positive association between exposure to benzene and NHL, it has not established benzene as a **cause** of NHL in humans*." (Emphasis added)

I fail to understand why Dr. Brown refuses to accept the plain language of the law and expand at least some health effects to include that a toxic substance contributed to a disease. I also don't understand why the SEM contractor has not corrected the discrepancies the DEEOIC Interim Advisory Board identified in their report submitted to DEEOIC two and a half years ago. I continue to be concerned with the millions of dollars invested each year by DEEOIC for an inaccurate database.

I am also concerned that, as of the September teleconference, the Board has not been given access to the private SEM. The procedure manual, Chapter 2-0700, paragraph 9 provides "a **basic outline** of SEM and its use as a developmental tool. See the "Site Exposure Matrices Website User Reference Guide" (available on the Shared Drive, Part E folder, SEM subfolder, or accessed through the SEM menu) for complete and detailed instructions as to the use of SEM." (Emphasis added)

It appears that the private SEM may include additional guidance than what is available to the public. That suspicion was confirmed in an email from the SEM administrator to an advocate for the Santa Susanna Field Lab (SSFL). The advocate questioned the lack of building locations in SEM for SSFL where the labor category of welder was listed. The SEM administrator responded,

> *Maintenance welding is performed at Area IV of the SSFL ("Area IV"), as it is at all large DOE sites, at many locations on the site. It is understood by the DOL Claims Examiners that the SEM welding profile for the work process "welding" applies all over Area IV. We do not indicate in SEM every location where maintenance welding occurred. The locations shown in SEM are where concentrated welding (not necessarily maintenance welding) is known to have been performed.*

This implies that the private SEM includes special guidance to the claims examiners in the use of SEM. I urge DEEOIC to provide access to the private database so the Board can fulfill its responsibility in advising the Secretary on SEM.

Weighing of medical evidence

A. Presumptive diseases for consequential diseases

I would like to ask the board to consider offering advice to the Department of Labor's Secretary regarding the presumption of conditions that are consequential to the covered disease or the treatment of the disease. I recently became aware of a claim where the worker was approved for neck surgery due to osteopenia a couple of years ago. The worker's problem with his spinal column has progressed and

his treating physician ordered and MRI. DEEOIC denied the hospital bill because they only approved the degeneration of the neck due to osteopenia, not the thoracic or lumbar spine. In order for the hospital to be paid for the MRI, the worker must file a claim for the thoracic and lumbar spine. The treating physician now needs to provide a fully rationalized report that the degeneration of the thoracic and lumbar spine is probably the natural progression of the accepted condition of osteopenia. Is it really necessary? The sick worker has opted to have Medicare pay for the MRI and surgeon's visit instead of going through the hassle of another adjudication process.

The procedure manual does provide a list of consequential diseases that develop from the treatment of a covered disease.
https://www.dol.gov/owcp/energy/regs/compliance/PolicyandProcedures/proceduremanualhtml/unifiedpm/Unifiedpm_part2/Chapter2-1500Exhibit1.htm

Most of these are for lung conditions. Is it really necessary for a treating physician to provide a fully rationalized letter explaining how hypoxia could be the result of a worker having chronic beryllium disease?

B. Wage Loss Claims

One would think that this would be one of the easier claims to adjudicate. A worker develops a disease. DEEOIC accepts that disease is the result of toxic exposure at the workplace. Now, many of the covered conditions are very serious. The worker, after developing the disease, cannot work anymore. That would appear to be an easy claim to approve, especially since the procedure manual allows for the approved condition to merely contribute to wage-loss,

> 9. Medical Evidence to Establish Wage-Loss. The claimant is required to submit medical evidence of sufficient probative value to establish that the period of wage-loss claimed is causally related to the employee's covered illness.
>
> There are instances when the medical evidence shows multiple conditions contributing to the wage-loss***. As long as the evidence establishes that a covered illness contributed to the employee's wage-loss, then the medical evidence is sufficient to prove causal relationship.*** (Emphasis added)

I ask the Board to review the wage-loss claims to determine if the claims examiners fully understood the medical evidence and if they followed the directions in the procedure manual.

Board Not Consulted by DEEOIC on Policy Changes Which Fall Under the Board's Charter

Last week, DEEOIC changed their Procedure Manual for chapter 2-0600 concerning SEC claims. Previously, DEEOIC allowed,

- *Bulletin No. 02-15 which added chondrosarcoma of the cricoid cartilage of the larynx as a specified cancer.*

- *Bulletin No. 02-16 which added cancer of the ureter as a specified cancer.*

- *Bulletin No. 03-32 which added cancer of the urethra as a specified cancer.*

- *Bulletin No. 10-08 which added cancer of the larynx as a specified cancer.*

- *Circular No. 12-13 which added cancer of the fallopian tubes as a specified cancer.*

DEEOIC rescinded these policies.

In July, DEEOIC issues Final Bulletin16-03 which provides guidance to the claims examiners in using the Direct Disease Link Work Process to adjudicate claims under Part E.

These are major policy changes. These changes clearly fall under the board's charter of weighing of medical evidence and the review of the Site Exposure Matrix. ANWAG respectfully insists that DEEOIC confer with this Board before making any changes to DEEOIC's policies. DEEOIC must take special care to determine which proposed policy changes need to be submitted to the Board for the Board's evaluation and recommendation and then do so.