



DEC 02 2014

Raymond W. Stephens, Jr.
[REDACTED]

Dear Mr. Stephens:

I am writing in reference to your claim for benefits under Part E of the Energy Employees Occupational Illness Compensation Program Act (EEOICPA).

On November 9, 2006, the Final Adjudication Branch (FAB) issued a decision that denied your Part E claim for chronic beryllium disease (CBD) because you were not employed by a Department of Energy (DOE) contractor at a DOE facility, and then also denied your request for reconsideration on March 13, 2007. You next petitioned for review of these denials in the U.S. District Court for the District of Columbia, which affirmed them in a September 11, 2008 decision. Then, you sought review of the district court's decision before the U.S. Court of Appeals for the District of Columbia Circuit, which affirmed the district court's decision on July 6, 2010. On May 4, 2011, I denied your January 18, 2011 request that I reopen your Part E claim because there was an insufficient basis to do so, and on April 9, 2012, I denied your March 7, 2012 reopening request on the same basis.

The regulations implementing EEOICPA provide that a claimant may file a written request asking the Director of the Division of Energy Employees Occupational Illness Compensation (DEEOIC) to reopen his or her claim, and that the decision whether or not to reopen a claim is solely within the discretion of the Director.

In a submission dated October 27, 2014, you again requested that I reopen your Part E claim for CBD. However, after reviewing the evidence and arguments that you submitted in support of your request, I have decided to deny this third request also, for the same reason that I denied your first and second requests. The attached Director's Order provides further explanation as to why I have not reopened your claim.

Your case file is being returned to:

U.S. Department of Labor, DEEOIC
Jacksonville District Office
400 West Bay Street, Room 722
Jacksonville, FL 32202

If you have any questions regarding this denial of your reopening request, you may contact the Policies, Regulations and Procedures Unit at 202-693-0081.

Sincerely,

A handwritten signature in cursive script that reads "Rachel P. Leiton".

Rachel P. Leiton
Director,
Division of Energy Employees
Occupational Illness Compensation



EMPLOYEE: Raymond W. Stephens, Jr.
CLAIMANT: Raymond W. Stephens, Jr.
FILE NUMBER: XXX-XX-6717
DOCKET NUMBER: 10035076-2006

DIRECTOR'S ORDER

The regulations implementing the Energy Employees Occupational Illness Compensation Program Act (EEOICPA) provide that a claimant may file a written request asking the Director of the Division of Energy Employees Occupational Illness Compensation (DEEOIC) to reopen his or her claim. The decision of whether or not to reopen a claim under the regulations is solely within the discretion of the Director.

For the reasons set forth below, your October 27, 2014 reopening request is denied, and both the Final Adjudication Branch's November 9, 2006 decision denying your Part E claim for chronic beryllium disease (CBD) and its March 13, 2007 decision denying your request for reconsideration remain in effect. The case file is returned to the Jacksonville district office of DEEOIC.

BACKGROUND

The history of your Part E claim for CBD through March 13, 2007 is set out in my May 4, 2011 denial of your first reopening request and need not be repeated here. In addition, the history of your litigation against DEEOIC in the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia Circuit is set out in my April 9, 2012 denial of your second request for reopening and also need not be repeated here.

After your litigation was over, you submitted a January 18, 2011 letter in which you requested that I reopen your Part E claim for CBD and submitted additional evidence and arguments in support of your contention that the Loral American Beryllium Company (LABC) Sarasota Plant is a DOE facility, and therefore you

should be awarded Part E benefits. After reviewing the evidence you submitted, which included a December 1, 2005 declaration by George M. Allen, Jr., an officer of LABC, I concluded that you had still not established that DOE entered into a contract with LABC for construction and denied your request on May 4, 2011.

In a submission dated March 7, 2012, you again requested that I reopen your Part E claim and submitted additional evidence and arguments in support of your contention that LABC's Sarasota Plant is a DOE facility. After reviewing the new evidence you submitted, which included four affidavits of former employees of LABC and documents related to construction work performed at the Sarasota Plant, I again concluded that you had not established that DOE had entered into a contract with LABC for construction and denied your request on April 9, 2012.

In your latest submission dated October 27, 2014, you again request that I reopen your Part E claim for CBD. However, after conducting a careful assessment of both the evidence and arguments submitted in support of your third reopening request, I find again that you have not established that DOE ever entered into a qualifying type of contract with LABC (or any other entity) related to its Sarasota Plant.

DISCUSSION

In support of your third reopening request, you submitted new evidence that you believe is sufficient to establish, either alone or in conjunction with evidence already in your case file, that LABC's Sarasota Plant (or some identifiable portion of the Plant) is a DOE facility, as that term is defined in § 7384l(12) of EEOICPA. In particular, you argue that this new evidence is sufficient to prove that there was a qualifying type of contract between DOE and LABC, or DOE and another entity, for the performance of work at LABC's Sarasota Plant such that it meets the definition of a DOE facility in § 7384l(12) of EEOICPA.

The new evidence¹ you submitted consisted of: a copy of Subcontract No. C 83 1001222 27720001 between LABC and EG&G Idaho, Inc. (the DOE contractor at the DOE facility known as the Idaho National Laboratory in Scoville, Idaho); a copy of the management and operation (M&O) contract (and modifications) between the Energy Research and Development Administration (a predecessor agency of DOE) and EG&G Idaho, Inc., designated as Contract No. EY-76-C-07-

¹ You also submitted copies of documents in your case file that have already been considered by both DEEOIC and the U.S. District Court, as well as approximately 6000 pages of additional procurement contracting documents of the same type. Since you have been repeatedly informed that this type of factual evidence does not establish that LABC's Sarasota Plant is a DOE facility, I will not discuss them further in this order.

1570, pertaining to the Idaho National Laboratory; the M&O contract entered into by the Atomic Energy Commission (a predecessor agency of DOE) and the Rockwell International Corporation on January 8, 1975, which was then known as Contract No. AT(29-2)-3533, pertaining to the Rocky Flats Plant in Golden, Colorado, and 156 modifications to that particular contract; June 11, 2013 and September 11, 2013 letters from me to the Alliance of Nuclear Worker Advocacy Groups (ANWAG); a February 6, 2014 letter in which DOE's National Nuclear Security Administration informed ANWAG that it did not have any of the records ANWAG had requested under the Freedom of Information Act; a motion that was filed in *Merilyn Cook, et al. v. Rockwell International Corporation and the Dow Chemical Company*, Case No. 1:90-cv-00181-JLK, on October 26, 2005 in the U.S. District Court for the District of Colorado (with attachments consisting of extracts of a handwritten journal containing a single cryptic reference to LABC as a contractor); a copy of EEOICPA Fin. Dec. No. 10043931-2006 (Dep't of Labor, March 10, 2008); a partial copy of a state court decision regarding Indiana's workers' compensation statute; and two U.S. Supreme Court decisions — *United States v. New Mexico*, 455 U.S. 720 (1982), and *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954).

Based on the above-noted new evidence, you now contend that LABC was a subcontractor of EG&G Idaho, Inc., and I do not dispute your contention on this point. However, this does not establish that LABC entered into a *contract with DOE*, which is a critical aspect of the statutory definition of "DOE facility" in § 7384l(12) of EEOICPA, and therefore it is immaterial to your Part E claim. The same can be said of your argument that the Rockwell International Corporation was required, by the terms of the M&O contract it executed with the Atomic Energy Commission and its successor agencies, to obtain the permission of the Commission before it executed any subcontracts — while I do not dispute the existence of such a provision in the M&O contract, that fact does not, in any way, establish that DOE or any of its predecessor agencies executed a subcontract with LABC, as you contend.

Turning next to your argument that DOE "had a proprietary interest in" the beryllium components that LABC machined at its Sarasota Plant, I again do not disagree with this assertion. However, I fail to see how this adds anything to your argument that the Sarasota Plant is a DOE facility, because the statutory provision that mentions DOE's "proprietary interest," 42 U.S.C. § 7384l(12), only refers to a "building, structure, or premise" rather than to beryllium components. You have been repeatedly informed that this argument is of no avail to you by DEEOIC and both the district court and the court of appeals, and there is no basis for me to alter this conclusion now or in the future.

Finally, your reading of the *United States v. New Mexico* and *Kern-Limerick, Inc. v. Scurlock* cases cited above, with which I disagree, still ignores the clear statutory imperative that in order for *any* contract to satisfy the test of § 7384l(12)(B)(ii), DOE or one of its predecessor agencies has to be one of the executing parties. And since it has been the practice of DOE and its predecessor agencies to utilize official contracting offices to execute direct contracts, and no such office executed any contract with LABC (or any other entity that performed "operations" at the Sarasota Plant), no such direct contract exists. Accordingly, you cannot meet the definition of a DOE contractor employee who worked at a DOE facility for the purposes of Part E.

CONCLUSION

Based upon the foregoing discussion, I find there is no basis to warrant vacating the November 9, 2006 and March 13, 2007 decisions of FAB and reopening your Part E claim for CBD. Therefore, your October 27, 2014 request for reopening is hereby denied. However, should you obtain new and probative evidence that is material to your Part E claim, you may submit such evidence along with another request for reopening. But please be advised, merely submitting evidence of the same sort that has already been found to be insufficient to establish that you are eligible for Part E benefits will not result in a reopening of your claim.

Washington, D.C.



Rachel P. Leiton
Director, Division of Energy Employees
Occupational Illness Compensation