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November 4, 2020

U.S. Department of Labor, Office of Workers' Compensation Programs
Advisory Board on Toxic Substances and Worker Health
Room S-3522, 200 Constitution Ave. NW
Washington, DC 20210.
EnergyAdvisoryBoard@dol.gov

RE: Public Comments for ABTSWH Meeting November 5 – 6, 2020

Dr. Markowitz:

Attached are my public comments for this meeting. As I am traveling I may not be available to present these. In that event I have asked Terrie Barrie to read them to the Board.

If you have any questions regarding these comments please feel free to contact me.

Sincerely,

A handwritten signature in black ink that reads "Faye Vlieger". The signature is written in a cursive, flowing style.

Faye Vlieger
Former Member ABTSWH, Claimant & Authorized Representative

Attached: Public Comments, 3 pages

Dr. Markowitz & Advisory Board Members:

I provide these comments today because of the need to make the Board aware of recent actions by the Division of Energy Employees Occupational Illness Compensation Program (DEEOICP), Director Rachel Pond, and Medical Director (MD), Dr. Armstrong, which are not defined to the Procedure Manual, and represent significant undue influence, and intrusion into the claim administration process.

I wrote a letter to EEOICP Director Rachel Pond on September 23, 2020 with my concerns about the actions of Dr. Armstrong and received a non-reply dated October 1, 2020. In her letter Director Pond did not answer any of my questions or concerns. I sent a follow up letter requesting that my questions be answered on November 4, 2020 and I am awaiting a reply. A copy of my letters and Director Pond's first reply have been sent to the ABTSWH's email address.

As the ABTSWH has the authority to oversee the position of the MD I request that you review his opinions and insertion of himself into the claims adjudication process, and make recommendations to correct these situations.

In approximately March of this year I was made aware that Impairment Rating (IR) reports from an independent physician were being sent to Dr. Armstrong per his request. Initially it appeared that Dr. Armstrong was focusing his attention on one physician, but I have now been made aware that he has instructed the Claims Examiners (CE) in all of the District and the National Offices to send any and all IR reports to him that contain specific words and phrases that Dr. Armstrong contends makes the reports not done in accordance to the AMA Guides 5th edition.

I made a Freedom of Information Act (FOIA) request on June 26, 2020 for emails between Dr. Armstrong OWCP's DEEOICP Chief Medical Officer, CEs, and Medical Benefits Unit for the period of 3/12/2020 to 6/22/2020, in order to understand what was happening and determine if there was anything that could be done to correct the situation. I received a response to my FOIA dated July 9, 2020. In the response DEEOICP stated that they could not release the documents, even if redacted because they are part of the claimant's case files and are protected by the Privacy Act (PA). The DEEOICP made no effort to provide the requested documents for those claimant files for which I am the Authorized Representative, and have PA authority to view.

The issue is that Dr. Armstrong has been providing opinions and directing the independent IR physicians on his interpretation of the AMA Guides. He is also dictating what opinions he will allow and will not allow, regardless of the medical evidence. He is doing this through direct letters, directives, emails, memos, and communications to independent IR physicians, and CEs on IR claims. Dr. Armstrong is inserting himself into the claims adjudication process by writing medical opinions that become part of the claims process. These written opinions by Dr. Armstrong are then a part of the claim file and used in further adjudication processes. There is no mention of this authority to interpose the MD's opinions in the PM.

As the Board knows Dr. Armstrong conducts audits of the Contract Medical Consultants (CMC) reports. When a CMC, or Referee CMC are requested to provide an opinion for a claim and they receive records that contain a differing opinion by the DEEOICP MD, they are improperly influenced to not disagree with the MD. This influence is to the detriment of the claimant because it unfairly influences the outcome of the situation in favor of the MD's opinion regardless of its merit. The insertion of Dr. Armstrong's opinions into a claim file represents undue influence.

The American Bar Association in a February 1, 2014 paper defines undue influence as: "excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity".

https://www.americanbar.org/groups/law_aging/publications/bifocal/vol_35/issue_3_feb2014/defining_undue_influence/

In the DEEOICP Director's response to me on October 1, 2020 she stated that: "The DEEOIC Medical Director does not have relationships with any particular physicians that treat DEEOIC claimants, either inside or outside of DEEOIC, nor does he have any authority over the CMCs. He simply provides his personal medical opinion based on his expertise".

However, the MD does have audit authority over the CMC's reports for quality assurance, and to changes in their job performance instructions under the CMC contract. As such the MD does have authority over the CMCs and their opinions. It is mere hubris for the MD or the DEEOICP Director to state otherwise.

Since Director Pond stated in letter that these are the MD's personal opinions they should have no part of the claims adjudication process. Further any of the MD's opinions that have been inserted into to claim files should not be used for claims adjudication.

The MD is also significantly delaying claims with his insertion into the process. In discussions with various CEs the IR reports that are sent to the MD are done so with no timeline of when there will be a response. In fact the MD does not have any timeliness criteria because he is not part of the claims process. In a number of instances claims have been delayed in excess of five months because the MD has created a difference of opinion even though his opinion is not part of the adjudication process. Because the MD is operating outside the PM he is not accountable to timeliness standards.

The delays caused by the injection of the MD's personal opinion into a claim come from the CEs using the MD's opinion, as a differing opinion which forces the claim into additional adjudication. If the MD wants to institute changes to the DEEOICP claims process he should go through the rule making process. The DEEOICP Director is allowing the MD to operate outside the program parameters. The DEEOICP Director should ensure that the MD's personal opinions are not used in claims adjudication.

I agree that the MD should review and improve the claims adjudication process, but it is not in his prevue to replace the program adjudication process in the PM, nor to supersede the equitable provisions of the claims process. While the MD may have his personal opinions they are not part of the DEEOICP claims process.

I ask the ABTSWH to investigate this situation by reviewing Dr. Armstrong's directives, communications, and his personal opinions on specific IR claims. If needed the advocates can provide specific Case Identification information to ensure that when you query DEEOICP for applicable claims you receive accurate information. I also ask the ABTSWH to offer recommendations to resolve this issue.

Thank you,

Faye Vlieger