

Individual Training Exercise – Recommended Decisions
Short Answer

1. Identify the most relevant citation to be included in the Recommended Decision to deny for the following scenario -

An AEC employed manager at the Iowa Army Ammunition Plant files a claim under Parts B and E. He is found to be a member of the SEC, but does not qualify for benefits under Part E given his federal employment.

1. Procedure Manual. EEOICPA PM E-300.9(1) - Covered employment under Part B includes DOE contractor/subcontractor, DOE federal, Section 5 RECA, BV, and AWE employment. Part E coverage extends to DO contractor/subcontractor and Section 5 RECA employment, as well as certain onsite participants of atomic weapons testing covered under Section 4 of the RECA. Part E also covers certain periods of employment at AWE and BV facilities only during a period those facilities were designated as DOE facilities for remediation. Part E does not cover employment for beryllium vendors or AWE facilities outside of the time they were considered DOE facilities.
2. Online Decisional Database. Claimant was denied benefits under Part E of EEOICPA because she was a federal employee of DOE rather than a DOE contractor. Part E does not extend coverage to individuals who were directly employed by the federal government. EEOICPA Fin. Dec. No. 10024530-2006 (Dep't of Labor, November 16, 2006).
3. Regulation. 20 C.F.R § 30.5(w) - Department of Energy contractor employee means any of the following:
 - (1) An individual who is or was in residence at a DOE facility as a researcher for one or more periods aggregating at least 24 months.
 - (2) An individual who is or was employed at a DOE facility by:
 - (i) An entity that contracted with the DOE to provide management and operating, management and integration, or environmental remediation at the facility; or
 - (ii) A contractor or subcontractor that provided services, including construction and maintenance, at the facility.

Answer-

Decisional Database is most relevant, but they all are correct.

2: Is this an acceptable case history paragraph to include in a Statement of the Case? Explain response. (Assume this is a decision to approve an additional \$25,000 for wage loss, and this history is the background information).

On July 26, 2007, the District Office issued a recommended decision accepting the claim for benefits under Part B and Part E of the Act, finding that the employee is a “covered employee with cancer” and a member of the Special Exposure Cohort in accordance with 42 U.S.C. §§ 7384l (9)(A) and (14)(A). The district office further concluded that the employee was diagnosed with lung cancer, which is a specified cancer in accordance with 42 U.S.C. §§ 7384l (14)(A)(ii) and (17)(A); therefore, compensation in the amount of \$150,000 pursuant to 42 U.S.C. § 7384s(a), was paid to the claimant as the surviving spouse of the employee and under 42 U.S.C. § 7385s-3(d)(1) as a “covered spouse” of the employee, and entitled to the survivor lump-sum compensation amount of \$125,000 based on the employee’s death from the covered condition of lung cancer.

Answer-

Complicated with too many citations.

3. Rewrite the Statement of the Case in #2 in one or two “Plain English” sentences.

Answer-

On July 26, 2007, the District Office issued a recommended decision accepting the claim for benefits under Part B and Part E of the Act.

4. What is unusual about the following Conclusions of Law [one case]?

- The employee is a DOE contractor employee, in accordance with 42 USC § 7384(11)B(i), employed at a DOE facility, as defined in 42 USC § 7384i(12)
- The employee was diagnosed with skin cancer, an occupational illness as defined in 42 USC § 7384i(15)
- The Probability of Causation was completed in accordance with 42 USC § 7384n(c)(3) and returned a value of 61.74.
- The employee does meet the criteria of an “individual with cancer...to have sustained the cancer in the performance of duty” as defined in 42 USC §7384n(b)
- The evidence is insufficient to establish that it is as least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to or causing the illness of skin cancer and pulmonary nodule and that it is not as least as likely as not that the exposure to such toxic substance was related to employment at a DOE facility in accordance with 42 USC § 7385s-4(c)(1).
- The employee is entitled to compensation for his skin cancer in the amount of \$150,000 and medical benefits pursuant to 42 USC § 7385s(a) and § 7384t.

Answer-

You can't have a Part B accept and a Part E denial for causation.

5. Read the following section of a Statement of the Case. Do you feel that the analysis is appropriate to lead to an acceptance of the *exposure*? Explain

On April 3, 2002, Mr. Smith filed a claim for lung cancer under Part B of the Act, and a claim for chronic obstructive pulmonary disease (COPD) under Part E (formerly Part D). Subsequently, on August 6, 2005, the Final Adjudication Branch (FAB) issued a final decision to deny the lung cancer under Part B because the Probability of Causation was <50%. The case subsequently underwent assessment for Part E eligibility.

A June 25, 2004 NIOSH dose reconstruction report notes the employee had been exposed to some gas as a result of a processing accident in the 1960s that burned his lungs. The employee had stated it may have been radioactive, but wasn't sure. An EE-3 (Employment History) form submitted with the original claim documents also references an accident that occurred four or five years after the employee working at the DOE plant in 1960. After the employee passed away in 2006, his family was asked in an Occupational History Questionnaire to clarify the accident and exposures the employee may have sustained. No further information was obtained. Research of employment records from DOE contained no reference to any accident involving the employee, but a medical report from 1971 included a single reference in the employee's medical history for "lithium intoxication."

DOL searched the DEEOIC Site Exposure Matrix (SEM), a research database tool used to identify specific toxic materials that existed at covered facilities. SEM can identify illnesses that may be linked to occupational toxic exposure(s). The information available in SEM generally identifies toxic exposure which occurred by location, job type, or production process. A thorough examination of SEM for any link between "lithium" and the diagnosed lung cancer and COPD was not successful. SEM also did not show that a person in the employee's work location or job type would have any contact with lithium gas. No information was found on a lithium event occurring prior to 1971. However, additional research of SEM did show that exposure to certain types of lithium gases, in particular lithium hydride or lithium deuteride, could cause toxic pneumonitis, an lung disorder

The evidence in this case is sufficient to accept the employee was exposed to lithium hydride/deuteride during his employment at the DOE facility. The employee started working at the plant in the early 1960s. Medical evidence of a lithium event (lithium intoxication), along with repeated references in the case evidence to a gas event in the mid 1960s, are reasonably suggestive that an occupational exposure to the gas occurred. Moreover, lithium hydride/deuteride are chemical agents known to cause pulmonary problems.

Answer-

Yes - the parts of the assessment are used by the CE to lead to causation. The CE made an logical leap that lithium intoxication could be associated with a toxic pneumonitis

and took the case to where he or she wanted to go. Note the explanation of how the CE makes the pieces fall together.

6. Using the same scenario from #5, the following information is then reported in the Statement of the Case. Do you feel that this is an acceptable basis to deny the case? Explain your response.

The case file along with all the relevant medical evidence was referred to an Occupational Medical Specialist to opine on whether the accepted exposure was sufficient to meet the causation standard which exists under Part E of the EEOICPA. For compensability, the evidence must meet the following standard:

Evidence must establish that there is a relationship between exposure to a toxic substance and an employee's illness or death. The evidence must show that it is "at least as likely as not" that such exposure at a covered DOE facility during a covered time period was a significant factor in aggravating, contributing to, or causing the employee's illness or death, and that it is "at least as likely as not" that exposure to a toxic substance(s) was related to employment at a DOE facility.

In this case, a DMC reviewed the case in accordance with the above standard and opined in a report of August 28, 2007:

This employee has been diagnosed with COPD and this is a disease that can be affiliated with numerous airborne contaminants. The record establishes that the employee was likely occupationally exposed to a lithium gas in an acute event that occurred at some point during his employment between 1965 and 1971. A single medical entry identifies a history of "lithium intoxication" but no further information is available on the extent or permanency of any damage. An acute exposure to lithium hydride could very well have resulted in lasting damage to this employee's lungs. However, the record is clear that he also was a smoker for a good portion of his working life. Smoking is generally accepted as a primary etiology for a variety of pulmonary diseases, including COPD. In my opinion, the accepted lithium exposure was likely not a significant factor in causing the employee's pulmonary problems.

Given the finding of the DMC, sufficient evidence to establish that an occupational toxic exposure was a significant factor in aggravating, contributing to, or causing the employee's COPD does not exist.

Answer-

No – the doctor report is clearly using the wrong standard and is applying the smoking history as the basis for the decision.

7. From the following case information, do you feel there is sufficient basis to accept Part E causation or not? Assume no further evidence is obtainable. Explain your answer.

- Anne Taylor files an EE-2 in December, 2006 under Part E on behalf of her deceased husband. The claimed medical condition is, “unknown pulmonary disease causing death.”
- Employee death certificate lists cause of death as “angioimmunoblastic lymphadenopathy.” Date of death is June 28, 1996.
- Marriage certificate establishes the employee & claimant were married for 20 years prior to the employee’s death.
- DOE employment verification establishes employment at the Hanford Plant 07/16/1981 to 06/28/1996.
- Medical evidence contained in the file shows that the employee began having severe pulmonary problems in the summer 1994 requiring hospitalization. None of the doctor’s reports identify a clear diagnosis. A single reference in one narrative dated August 16, 1994 states “patient says that he was working on his 1957 Chevy and came into contact with rat feces that he was vacuuming out.” Medical documentation shows continuing problems requiring numerous hospitalizations for breathing, lymphatic anomalies, and other autoimmune problems. The employee dies while hospitalized for severe respiratory distress.
- A 2006 DMC report in the file lists the diagnosed condition as “angioimmunoblastic T. Cell lymphoma because the patient had 5 out of 7 markers for the condition.
- Dr. Elaine D. Havre, Chief of the Hematopathology Section at NIOSH, presents a report from a 1996 autopsy of the employee. In her report, she states:

The primary pathologic process appears to be an unexplained histocytic proliferation that is cytologically benign. Given that all specimens are benign this suggests severe reaction to foreign material in the body. The most likely cause of this lung process is exposure to pigeon feces (or other environmental hazards).
- Occupational History Questionnaire indicates the employee worked as a Millwright in Area 200 East at a location the claimant called the “Powerhouse.” No reference is made relating to an exposure to animal feces.
- SEM search shows the following:
 - Building 234 is in Area 200E and is identified “Powerhouse.”
 - Millwrights worked in Area 200E, but are not listed for building 234.
 - No data is listed showing animal feces as a toxin in any area of 200E
 - A non-specific search of SEM for bird feces shows that exposure is linked to “histoplasma capsulatum (AKA histoplasmosis)

- Several incident reports dated from 1985 to 1992 list the employee suffering minor injuries such as lacerations and periodic illness. All identify Area 200E as the employee's work location.
- An undated, handwritten letter signed by the "Powerhouse Crew" states the following:

This is a letter the IH put out after the company final admitted there was a problem. Jimmy was exposed to this stuff many times before we got them to admit there was a problem. The pigeon droppings were an inch thick in some places.

- Attached to the Power Crew letter is a March 15, 1999 communication from Nicholas Richardson, Hanford Environmental Industrial Hygienist which states the following:

Employees are concerned with working above the Power Houses because of the bird droppings there. Pictures taken above 200E powerhouse show a definite problem that needs to be addressed for any employee continuing to work on or near this contamination. Recommend appropriate biohazard protection for workers proximate to this location.

- A February 26, 2007 letter from the claimant in response to a DOL development letter states:

Jimmy died as a result of exposure to bird droppings. He continually had to scrape off the stuff from one of the buildings at the Hanford facility. He complained out it all the time. They knew that contact with this material was dangerous. The doctor who did the autopsy says she's never seen anything like what happened to Jimmy and based on her tissue analysis it had to be a disease linked to exposure to bird feces. I have already sent you a memo from Nick Richardson which clearly shows that workers were coming into contact with bird droppings. The workers that gave me that memo still are employed at the plant and refuse to sign anything as they don't want to get into trouble. I can't send any further affidavits per your request. There is nothing more I can give you about this. I don't expect anything out of this, but I would like DOE to admit that his work played a role in putting him in his grave.

Answer-

Yes - use the evidence that will lead you to the acceptance. The autopsy report lists the relationship to bird droppings. The fact that the employee says rat feces is inconsequential. While there is no proof that the employee

actually ever got on top of building 234 there are enough pieces to suggest that he did do work that brought him into contact with the contamination.