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U.S. Department of Labor

Office of Workers' Compensation Programs
Washington, DC 20210



DEC 27 2017

The Honorable Michael R. Pence
President of the Senate
Washington, DC 20510

Dear Mr. President:

Enclosed is the Secretary's response to the Office of the Ombudsman's 2015 Annual Report. Pursuant to 42 U.S.C. § 7385s-15(e)(2), the Ombudsman's report provides Congress with the number and types of complaints, grievances, and requests for assistance received by his office during each calendar year, and an assessment of the most common difficulties encountered by claimants and potential claimants under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA). The Secretary is required to provide a response to Congress regarding the Annual Report that includes a statement of whether he agrees or disagrees with the specific issues raised by the Ombudsman, and if he agrees, the response is to include a description of the corrective actions that will be taken. If he disagrees, he is required to respond with reasons for the non-concurrence.

The administration of EEOICPA involves the coordinated efforts of four federal agencies: the Department of Labor (DOL), the Department of Energy (DOE), the Department of Health and Human Services (HHS), and the Department of Justice (DOJ). DOL, through its Office of Workers' Compensation Programs (OWCP), Division of Energy Employees Occupational Illness Compensation (DEEOIC or the program), has primary responsibility for administering the EEOICPA, including adjudicating claims for compensation and paying benefits for illnesses covered under both Part B and Part E of the statute. The Ombudsman's 2015 report highlights ten areas of concern.

Sincerely,

Julia K. Hearthway
Director
Office of Workers' Compensation Programs

Enclosure

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WASH. DC 20210

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RESPONSE TO THE OFFICE OF THE OMBUDSMAN'S 2015 ANNUAL REPORT

1 - Notification About the Program

The Ombudsman's summary states: "We continue to encounter claimants who contend that they only recently learned of this program. These claimants often question why it took so long for them to learn of this program. Some of these claimants find it troubling that the government never notified them of this program and instead, they only learned of this program from a friend or neighbor. Regardless of how they learned of the program, claimants who feel that there was a delay in notifying them of this program often believe that the adjudication of their claim was negatively impacted by this delay. Some believe that due to the delay evidence was destroyed. There are also claimants who believe that the amount of compensation paid on their claim was impacted by a delay in receiving notice of this program. Based on our observations, we believe that there are potential claimants who still do not know about this program."

Response: I agree that widespread direct notification to all those individuals potentially impacted by the nuclear weapons program has been challenging. OWCP understands the critical importance of outreach to the nuclear weapons community and welcomes ideas and suggestions on how to increase awareness.

Since the onset of the program, OWCP has utilized its network of Resource Centers (RCs) to provide an initial point-of-contact for workers interested in filing claims. These RCs, located at or near 11 major DOE sites across the country, frequently meet with various organizations in an effort to inform the community about the program. A travelling resource center was implemented to further these efforts and reach an even larger geographical area. Town Hall Meetings have also been conducted, and, more recently, OWCP has developed an informational campaign involving teleconferences and a subscription email service, specifically targeting physicians and home health care providers who are likely to come into contact with potential claimants. OWCP also meets with advocacy groups and attends a host of conferences/meetings aimed at informing workers and unions about the program.

A Joint Outreach Task Group (JOTG) was formed to allow representatives from DOL, DOE, HHS, the Office of the Ombudsman for EEOICPA, and the Office of the Ombudsman for HHS's National Institute for Occupational Safety and Health (NIOSH), plus representatives from DOE's Former Worker Medical Screening Program, the opportunity to exchange ideas, share resources, and develop outreach strategies for targeting current and potential claimants. All four federal agencies publicize EEOICPA via their websites and provide links to the other three sites to ensure easy access of information and resources. OWCP's EEOICPA website links to DOE's

web listing containing descriptions of the covered DOE facilities, Atomic Weapons Employer facilities, and beryllium vendor facilities, in order to assist workers in identifying a possible covered employer. Information is also disseminated through brochures, pamphlets, and other printed material and publicized in press releases, newspaper articles, radio advertisements, and via social media.

2 - Claimants' Understanding of EEOICPA

The Ombudsman's summary states: "Some claimants go through the entire adjudication process without ever acquiring a good understanding of how this program works, and in some instances this can have an impact on a claimant's ability to develop his/her claim. For example, while a lot of useful information can be found on DEEOIC's website, we encounter claimants who do not know that this website exists, or do not appreciate the value of information found on this website. Moreover, even when they are aware of DEEOIC's website, some claimants find it hard to use this website because: (1) they do not have access to the internet, (2) they are unable to navigate this website, and/or (3) they do not understand the information that they locate. A common complaint suggests that in developing tools and providing information, DEEOIC often appears to assume that claimants fully understand the program. However, we frequently encounter claimants whose understanding of EEOICPA is cursory at best. Claimants suggest that it would help if more effort was made to show them how to access and use the various tools/resources that have been developed. They have also indicated that they could benefit from a better guide or index directing them where to locate information."

Response: I agree there are claimants who do not have access to information via the internet and many others who may not understand the information that is provided. EEOICPA is a complicated statute, and more can be done to make both the law and the process understandable. OWCP is undertaking a review of its website and printed material with the end goal of better communication and usability of available information.

Improved written material, which answers more questions and minimizes confusion, will also have the added benefit of allowing OWCP staff to concentrate its attention on specific claimant issues. OWCP and Resource Center staff provide assistance both in person and via telephone to help claimants understand the claims process and what happens once their claims are transferred to a District Office. The claims examiners (CEs) at the District Offices also serve as contacts for any claimant questions, concerns, and "next steps." The Final Adjudication Branch (FAB) hearing representatives and CEs assist with reconsideration requests, the hearing process, remands, and final acceptances or denials. Once a claimant is awarded benefits under EEOICPA, OWCP provides additional guidance on the payment process, the award of medical benefits and medical care authorization, and the medical billing process. OWCP provides toll-free numbers for claimants to use if they have questions or concerns and responds promptly to phone calls.

3 - Statutory Eligibility under EEOICPA

The Ombudsman's summary states: "Questions arise concerning coverage under this program – specifically who is covered, the facilities covered, and the illnesses covered under EEOICPA. Claimants would like someone to explain the rationale for covering some employees and some illnesses, while other employees and other illnesses are not covered under this program. Similarly, claimants would like a better understanding as to why certain facilities are not covered under this program. Since Congress has already recognized that state workers' compensation programs oftentimes do not provide a uniform means of ensuring adequate compensation for the types of occupational illnesses and diseases related to these sites, individuals who are not covered under this program would also like someone to direct them to a program that will compensate them for the illnesses that arise from employment at these facilities."

Response: The issue raised here, regarding the rationale behind the enactment of various specific eligibility provisions of EEOICPA, is not an issue with which I can appropriately agree or disagree. The statute sets out the numerous criteria for the various facilities that are covered, the employees who are covered, and the types of illnesses that are covered. OWCP's role is to impartially and accurately apply the law as written. OWCP works to faithfully execute the statute and to provide a fair approach to the adjudication of claims and the delivery of benefits under the existing law which fully considers the information provided by the claimant and the requirements of the statute. OWCP will look for ways of improving its communication when a claim is denied and look into other resources that might be of assistance to claimants.

4 - OWCP's Obligation to Provide Assistance in Connection with a Claim

The Ombudsman's summary states: "Another common issue involves the problems encountered by claimants when trying to locate evidence. Section 7384v of the statute states that the President shall 'provide assistance to the claimant in connection with a claim . . .' 42 U.S.C. § 7384v(a). We routinely talk to claimants who believe that this provision was passed because Congress realized that there would be instances when relevant evidence had been destroyed and other relevant information was never collected. In response to claimant's complaints that there needs to be more assistance, DEEOIC has indicated that under EEOICPA, the burden of proof is on the claimant. Claimants understand that they bear the burden of proof. Nevertheless, they also believe that 7384v must have some meaning. Therefore, claimants would like clarification as to the assistance anticipated by this provision, as well as clarification as to who is expected to provide this assistance."

Response: I understand that claimants may have varying understandings of OWCP's actual statutory obligations under § 7384v of EEOICPA, and I offer the following by way of clarification. Under the EEOICPA, unless otherwise specified in the statute, the claimant bears the burden of proving by a preponderance of the evidence the existence of each criterion necessary to establish their eligibility. To help them meet this burden, OWCP is required by § 7384v to provide claims assistance under Part B; specifically, assistance in securing medical testing and diagnostic services for covered beryllium illnesses, chronic silicosis or radiogenic cancer; and such other assistance as may be required to develop facts pertinent to the claim. In

other words, OWCP can assist claimants in gathering facts or finding evidence under Part B, but it is then incumbent upon claimants to utilize the available evidence to prove their case.

To meet its statutory obligation to assist claimants, OWCP has implemented a number of policies and processes. OWCP has further chosen to voluntarily apply the same standards of assistance to claimants under Part E. The following descriptions are some of the resources that OWCP has developed to assist claimants.

OWCP, with the assistance of DOE, conducted extensive research and investigation into sites, facilities, groups of workers (i.e., job categories, job duties, etc.), exposures, diseases, and exposure links. Based on this research, OWCP developed a relational database called the Site Exposure Matrices (SEM). The SEM contains information about the types of known toxic substances at the DOE facilities (and uranium mines and mills) covered under the EEOICPA, the associated job categories likely exposed to the toxic substances, and the possible health effects of exposure. This assistance goes a long way toward helping claimants meet their burden of proof to establish work-related exposure to toxic substances under Part E.

OWCP provides the services of contract medical consultants (CMCs) to assist claimants in establishing work-related causes of illnesses, particularly in cases where a claimant's treating physician may not be able to provide the necessary medical support for the claim.

OWCP also contracted for the services of industrial hygienists to conduct individual exposure assessments for Part E claims. This is particularly important when claimants may not have been aware of the extent of their exposure to toxic substances while performing their jobs.

OWCP works closely with DOE, DOE's Former Worker Medical Screening Program, and the Center for Construction Research and Training to help claimants verify their employment. OWCP has implemented interagency agreements with both DOE and the Social Security Administration (SSA) for access to employment/earnings records, and in the case of DOE, any retained health records or other work-related documents.

5 - Weighing of Evidence

The Ombudsman's summary states: "While DEEOIC has made strides in providing well-reasoned decisions, the weighing of evidence continues to generate complaints. Claimants still complain that decisions (or letter decisions) merely informed them of the outcome of the claim. As one would expect, these complaints are most frequently raised when decisions merely inform the claimant that the claim was denied. Claimants contend that merely being informed that the claim was denied is not sufficient. According to claimants it is critical to know why the claim was denied – this not only helps to explain the decision, it also provides guidance as to what the claimant needs to do to further develop his/her claim. Claimants also complain that there are instances when relevant factors are not considered when evidence is weighed. These relevant factors include, the qualifications of the respective physicians; the length of time or the number of times a physician saw the claimant; the documents the physician reviewed in making his/her determination; as well as the physician's familiarity with the facility in question. When these factors are not even

mentioned by the CE or HR, claimants question the extent to which they were recognized and/or considered.”

Response: I agree that the clarity of OWCP’s decisions initially needed improvement. Significant improvements were implemented, and claimants are now provided with written decisions that include a more detailed explanation of why a claim was denied, information on how the evidence was weighed, and DEEOIC’s rationale for the decision. I further agree it is critically important that we continue to strive for decisions that are clear, well-reasoned, and solidly supported by the law.

The Federal (EEOICPA) Procedure Manual, which guides the actions of OWCP’s claims staff, states that in writing decisions, staff must address all facets of the evidence that led to a conclusion, including any interpretive analysis relied upon to justify the acceptance or denial of a claim. Beginning in 2015, OWCP set a higher bar in terms of performance, providing additional training to claims examiners and hearing representatives, specifically to improve the quality of written decisions. OWCP has implemented an ongoing improvement process that includes feedback, editing, and rewriting of decisions. The training stresses the importance of providing a full explanation regarding the adequacy or inadequacy of evidence submitted, i.e., how each piece of medical evidence was reviewed and weighed, including the medical evidence, reports, and determinations provided by the claimant’s physician. Staff are instructed that a written decision must identify that a CMC may have assisted in the adjudication of medical issues or causation and why studies or other reports may have been used or rejected in adjudicating the claim. OWCP also implemented a procedure requiring claims examiners to provide claimants with any underlying supporting documents upon which s/he relied in reaching his/her recommended decision. For example, when any recommended decision to deny a case is based, in part, on the decision of a CMC, the CMC report is provided to the claimant along with the recommended decision. The claimant then has the opportunity to object to any findings in the report at the FAB level before a final decision on his/her claim is issued.

6 - Evidentiary Burdens in Proving Claims

The Ombudsman’s summary states: “There are concerns with the application of the burden of proof. One concern involves the fact that claimants are not always certain when the ‘at least as likely as not’ standard applies and when the ‘more likely than not’ standard applies. Another concern involves the fact that some claimants believe that there are instances when the burden placed on them is greater than either the ‘at least as likely as not’ or the ‘more likely than not’ standards. For example, claimants argue that DEEOIC’s refusal to rely solely on the affidavit of the worker, and to insist that there be documents in the record to support the affidavit, results in placing a higher evidentiary burden on them than that used in criminal proceedings. We also continue to hear from claimants who believe that they were required to prove facts with almost near certainty. Some claimants have suggested that the requirement to prove facts with documentary evidence often means that they must prove the fact with near certainty.”

Response: I disagree that OWCP applies a higher evidentiary burden on claimants in substantiating their claims than that required by the statute. I do, however, understand the

frustrations of claimants in trying to meet their burden of proof. The claimant bears the burden of proving by a preponderance of evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category. One criteria is causation, and the legal test for showing compensable causation is the "at least as likely as not" standard. While program staff seek to aid claimants in establishing their entitlement to an award of benefits, the program does have a legal responsibility to apply the law. The following brief summary of the review and appeal process may prove instructive:

- Once the district office issues a recommended decision, the case file is automatically transferred to the FAB. The FAB will review the entirety of the case and may issue a final decision affirming the findings made by the district office, remand the case to the district office for issuance of a new recommended decision, or reverse the recommended decision. Reversal, however, may occur only when the recommended decision was to deny and the FAB determines that the record contains sufficient evidence to warrant accepting the case.
- Following the final decision, the claimant has the right to request reconsideration, in which instance a new hearing representative will review the case and may either deny the reconsideration request or accept it and remand the case to either the district office for a new recommended decision or to the FAB for a new final decision.
- The claimant may also request a reopening of the case at any time following a final decision, or in the alternative, file suit in District Court.
- To provide a general sense in terms of the number of final decisions issued compared to the number of reconsiderations received, I offer the following additional information. In FY2016, approximately 20,250 final decisions were issued by the FAB, including those requiring a hearing. That same year, 930 requests for reconsideration were received and completed. Thus, less than 4.5 percent of decisions received a request for reconsideration.

7 - The Ombudsman's summary states: "Claimants continue to have questions concerning the weight given to PM provisions, bulletins, circulars and teleconference policy notes. In particular, concerns arise when these documents are the only basis cited in drawing conclusions of law in decisions. Claimants question DEEOIC's interpretation of the word 'presumption,' particularly as it relates to policy guidance for Part E claims. Claimants assume that if a presumption exists under Part E, should they fail to meet the presumption, their case will still be fully adjudicated under the Part E standard of causation. Thus, claimants have expressed frustration and confusion when they are informed that presumptions under Part E must be met or their claim must be denied.

Response: I disagree that OWCP is improperly relying on its policies and bulletins in deciding claims or otherwise improperly adjudicating Part E claims where a presumption is implicated. I nevertheless understand how this may be an area of confusion for some claimants. I offer the following explanation.

Federal agencies like OWCP use procedure manuals, bulletins, and circulars to disseminate policy and procedures to their staffs. While these documents do not have legal force, per se, they are meant to advise program staff and the public of how an agency interprets the statutes and

rules that *do* have the force of law, and they provide the foundation for program implementation and operations. OWCP conducts research to develop its procedural manuals, bulletins, and circulars and works with the department's Solicitor's Office to ensure that those and other program documents are consistent with the program's statute and regulations. OWCP publishes the material on its website, making it available to the public.

Regarding the use of a "presumption" under Part E, OWCP has conducted significant research which supports the creation of certain presumptions regarding *exposure* (e.g., if an individual worked in a particular labor category for at least 250 days prior to 1995, it can be presumed that the worker had *significant exposure* to asbestos). Research also supports OWCP's creation of certain presumptions regarding *causation* (e.g., if the employee was significantly exposed to asbestos and was diagnosed with asbestosis, laryngeal cancer, ovarian cancer, or mesothelioma and had a particular latency period, OWCP can presume that the *condition was causally related to the exposure* to asbestos). We have been able to make such presumptions through research for a number of different conditions under Part E.

The fact that a claimant may not have a designated presumptive illness, however, does not mean his/her claim will be denied. Lack of a presumptive illness is never justification, standing alone, for denial of a claim. A claimant is always legally entitled to prove his/her case, regardless of any presumption. The case will still be fully adjudicated, but exposure and/or a causal relationship must be proven by the claimant without the use of a presumption. Awards of benefits are routinely entered based on the strength of the evidence alone, without applying any legal presumption.

8 - Home Health Care Benefits & Medical Billing

The Ombudsman's summary states: "In recent years, a large number of the complaints that we received involved issues related to home health care and medical billing. In a general sense, claimants believe that decisions concerning home health care need to be better explained. For instance claimants believe that if after previously approving the same level of care DEEOIC subsequently decides it needs more information, DEEOIC ought to explain why more information is needed and needs to be specific as to what it is seeking. In addition, claimants and providers believe that if they respond to a request for information and DEEOIC determines that the information provided is not adequate, DEEOIC should not simply resend the same request for information. Rather, claimants and providers suggest that if additional information is submitted and DEEOIC determines that this information still is not sufficient, DEEOIC ought to make an effort to better explain what is being sought."

Response: I agree that additional clarity and communication regarding the requirements for home health care (HHC) medical benefits under EEOICPA would be helpful.

In FY 2016, DEEOIC took steps to create a centralized unit responsible for the review and adjudication of all HHC and other ancillary medical benefits requests. The new unit is staffed by Medical Benefits Examiners (MBEs) who specialize in the review and adjudication of HHC requests and operate under the direction of the National Office. This centralization of staff

allows DEEOIC to provide a more efficient and consistent decision-making process with respect to HHC requests and provides better communication between claimants, their doctors, and HHC providers.

All HHC authorizations require review and updated medical information prior to reauthorization. Sixty (60) days prior to expiration, MBEs send notification letters to providers and claimants reminding them of the need for updated medical information. A failure to provide updated information can result in a reminder letter, again stating the need for updated medical information. A failure to produce updated medical evidence may ultimately result in a denial letter advising that care cannot be reauthorized due to the lack of necessary medical evidence. If the physician or claimant is not clear about the exact information that is needed, s/he may contact the MBE, and the MBE will seek to provide the physician or claimant with an explanation of what is required and why.

Upon receipt of medical evidence, it is the MBE's responsibility to evaluate any such evidence and determine if the information provided is sufficient to authorize the care requested. If the medical information is deficient or unclear, the MBE is to explain the nature of the deficient evidence and the specific information needed by DEEOIC in order to proceed with adjudication of the HHC request.

9 - Assistance with Medical Billing Issues

The Ombudsman's summary states: "With respect to medical billing, claimants contend that it would be useful if more assistance was provided. If a claimant utilizes a provider enrolled in the program, that provider is able to directly submit his/her bill for payment. However, there will be instances where claimants are seeking reimbursement for bills that he/she paid out-of-pocket – such as instances where the claimant paid bills out-of-pocket while the claim was pending. Claimants believe that it is not reasonable to expect them to be intimately familiar with the bill paying process and the various forms that must be filed. Consequently, claimants contend that it would help if instead of simply rejecting a bill, they received an explanation, in terms they could understand, outlining why the claim was denied, and where appropriate, explaining what needed to be done to correct any deficiencies. Similar concerns are raised by some providers who contend that the process for paying bills can be burdensome and that assistance is not always easy to locate."

Response: I agree the medical billing approval process can be confusing, and we are working on ways to improve the system.

OWCP/DEEOIC currently utilizes a three-tiered system for medical billing. The first tier of communication involves bills that are received with deficiencies that prevent them from being processed. In these instances, the bills are returned with a letter that outlines the deficiencies that must be fixed prior to resubmission. If there are no upfront deficiencies, OWCP moves on to the second tier and either issues a payment or denial. Details concerning the denial are communicated to the submitter including the reasons for denial. OWCP will review current explanations of benefits to ensure reasons for denial are clearly articulated to ensure better understanding by claimants. The third tier involves the medical bill pay contractor call center.

Resource Centers, and District Office staff, all of which are available to provide further assistance on any denials. Within the last two years, DEEOIC has begun sending out email blasts to subscribers that provide ongoing and new information about the medical bill process and related issues. The program also now has quarterly calls with physicians and physicians' staff to answer questions about the process.

10 - Procedures for Reporting Inappropriate Customer Service

The Ombudsman's summary states: "We encounter claimants who have concerns with some of their interactions with DEEOIC. Most claimants who come to us with complaints alleging inappropriate behavior are adamant that their concerns reflect the actions of just one or two employees, and stress that their complaints are not meant to reflect on the DEEOIC staff as a whole. In fact, claimants who come to us with complaints alleging inappropriate behavior usually go out of their way to emphasize that they also encountered other staff members who were very helpful. Yet, it concerns claimants that they encounter instances where certain staff members are rude or not very helpful. What really troubles claimants is the feeling that there does not appear to be any formal mechanism for addressing their concerns. Because DEEOIC is usually reluctant to grant a request to change CEs, claimants feel 'stuck' with a CE regardless of how inappropriately that CE may conduct him or herself. Moreover, claimants find the suggestion that they report such conduct to be useless since there is no established procedure for reporting such conduct. Claimants are usually reluctant to call a telephone number to discuss a complaint about one staff member when they do not know who they are talking to or how their complaint will be handled. Claimants frequently tell us that they fear that when they call to report an incident of inappropriate behavior, the person who is the subject of their complaint will be sitting in the next cubicle (or they will report their complaint to someone who immediately tells the subject of the complaint everything that was said). For some claimants it would help if there was a designated procedure for reporting such complaints. Other claimants have suggested that recording all telephone conversations between CEs and claimants would ensure that DEEOIC had an accurate account of these conversations."

Response: I agree that reporting and resolving any inappropriate customer service issues is of the utmost importance. Our reporting process will be reviewed, and we will examine additional ways to publicize the process to the claimant community.

Customer service complaints may be submitted to OWCP in writing, by phone, via public email, or by using the customer satisfaction surveys that are available on the OWCP website and through the OWCP IVR phone system. Claimants are encouraged to complete the phone survey after a call is conducted with their CE or other member of the EEOICPA office. The survey is anonymous. The public email for complaints is Deeoic-public@dol.gov. Claimants may also direct their complaints to a supervisory CE, unit manager, assistant district director, or district director. Every complaint will be reviewed and appropriate action taken.

CONCLUSION

OWCP administers its responsibilities under the EEOICPA with the intent of following the will of Congress in enacting the EEOICPA: to pay compensation and medical benefits to all eligible nuclear weapons workers (or their eligible survivors) who incurred illnesses in the performance of duty at a covered facility. Our statistics show that as of November 26, 2017, DEEOIC has awarded compensation and medical benefits totaling more than \$14.37 billion under both Part B and Part E of the EEOICPA. During this time, 117,723 workers or their families have received more than \$10.60 billion in compensation and more than \$3.76 billion in medical expenses associated with the treatment of accepted medical conditions.

Feedback from EEOICPA stakeholders is central to our collective success. Whether feedback is received via the thousands of phone calls fielded by CEs, the concerns brought to the attention of DEEOIC leadership, or the recommendations from the Advisory Board on Toxic Substances and Worker Health, all input is important to ensuring that OWCP/DEEOIC carries out its Congressional mandate. The Ombudsman's 2015 Annual Report provides OWCP with valuable information that we will use to further improve the administration of EEOICPA.