2016 Annual Report to Congress

OFFICE OF THE OMBUDSMAN

Energy Employees Occupational Illness Compensation Program

OFFICE OF THE OMBUDSMAN
UNITED STATES DEPARTMENT OF LABOR

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INTRODUCTION

Section 7385s-15 of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended, requires the Office of the Ombudsman for the Energy Employees Occupational Illness Compensation Program (the Office) to submit an annual report to Congress. *See* 42 U.S.C. § 7385s-15. In this annual report, we are to set forth: (a) the numbers and types of complaints, grievances, and requests for assistance received by the Office during the preceding year; and (b) an assessment of the most common difficulties encountered by claimants and potential claimants during that year. *See* 42 U.S.C. § 7385s-15(e). The following is the Office's annual report for calendar year 2016.

I. An Overview of the Energy Employees Occupational Illness Compensation Program Act (the EEOICPA)

Congress enacted the Energy Employees Occupational Illness Compensation Program Act as Title XXXVI of Public Law 106-398, the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, on October 30, 2000. The purpose of the EEOICPA is to provide for timely, uniform, and adequate compensation of covered employees, and where applicable, survivors of such employees, suffering from illnesses incurred by such employees in the performance of duty for the Department of Energy (DOE) and certain of its contractors and subcontractors. 42 U.S.C. § 7384d(b).

In enacting this program, Congress recognized that:

1. Since World War II, Federal nuclear activities have been explicitly recognized under Federal law as activities that are ultra—hazardous. Nuclear weapon production and testing have involved unique dangers, including potential catastrophic nuclear accidents that private insurance carriers have not covered and recurring exposures to radioactive substances and beryllium that, even in small amounts, can cause medical harm.

2. Since the inception of the nuclear weapons program and for several decades afterwards, a large number of nuclear weapons workers at sites of the Department of Energy and at sites of vendors who supplied the Cold War effort were put at risk without their knowledge and consent for reasons that, documents reveal, were driven by fears of adverse publicity, liability, and employee demands for hazardous duty pay.

3. Many previously secret records have documented unmonitored exposures to radiation and beryllium and continuing problems at these sites across the Nation, at which the Department of Energy and its predecessor agencies have been, since World War II, self-regulating with respect to nuclear safety and occupational safety and health. No other hazardous Federal activity has been permitted to be carried out under such sweeping powers of self-regulation.

See 42 U.S.C. § 7384(a)(1),(2), and (3).

As originally enacted in October 2000, the EEOICPA contained two parts, Part B and Part D. Part B which is administered by the Department of Labor (DOL) provides the following compensation and benefits:

- Lump—sum payment of $150,000 and the payment of medical expenses (for the covered illness starting as of the date of filing) for:
    - Employees of the DOE, as well as its contractors, subcontractors, and employees of atomic weapons employers (AWEs) with radiation— induced cancer if: (a) the employee developed cancer after working at a covered facility; and (b) the cancer is "at least as likely as not" related to covered employment.[1]
    - Employees who are members of Special Exposure Cohort (SEC) and who develop one of the specified cancers outlined in 42 U.S.C. § 7484l(17).[2]
    - All federal employees, as well as employees of the DOE, its contractors and subcontractors, or designated beryllium vendors who worked at a covered facility where they were exposed to beryllium and who develop Chronic Beryllium Disease (CBD).
    - Employees of the DOE or its contractors and subcontractors who worked at least 250 days during the mining of tunnels at underground nuclear weapons test sites in Nevada or Alaska and who develop chronic silicosis.

  If the employee is no longer living, eligible survivors of the employees listed above are entitled to $150,000 in lump sum compensation under Part B.
- Uranium miners, millers, and ore transporters, or their survivors, who are awarded $100,000 under Section 5 of the Radiation Exposure Compensation Act (RECA), 42 U.S.C. § 2210 note, are entitled under the EEOICPA to a lump-sum payment of $50,000 and to medical expenses for the covered illness.
- All federal employees, as well as employees of the DOE, as well as its contractors and subcontractors, whose claims for beryllium sensitivity are accepted under Part B are entitled to medical monitoring to check for the development of CBD.

Part D of the EEOICPA required the DOE to establish a system by which DOE contractor employees and their eligible survivors could seek assistance in obtaining state workers' compensation benefits if a Physician's Panel determined that the employee sustained a covered illness as a result of work-related exposure to a toxic substance at a DOE facility. On October 28, 2004, Congress abolished Part D and created Part E in Subtitle E of Title XXXI of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Public Law 108-375, 118 Stat. 1811, 2178 (October 28, 2004). Part E is administered by DOL.

The compensation and benefits allowable under Part E are as follows:

- DOE contractor and subcontractor employees who develop an illness due to exposure to toxic substances at certain DOE facilities are entitled to medical expenses and may receive monetary compensation of up to $250,000 for impairment and/or wage-loss.

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[1] An atomic weapons employer is an entity, other than the United States, that: (A) processed or produced, for use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining and milling; and (B) is designated by the Secretary of Energy as an atomic weapons employer for purposes of the compensation program [EEOICPA]. *See* 42 U.S.C. § 7384l(4).

[2] If a claimant qualifies for inclusion in a SEC class and develops one of the specified cancers, that claimant receives compensation for that specified cancer without the completion of a radiation dose reconstruction by the National Institute for Occupational Safety and Health, and without a determination by DOL of the probability of causation that the cancer was caused by exposure to radiation at a covered facility.

- Eligible survivors of DOE contractor and subcontractor employees receive compensation of $125,000 if the employee's death was caused, contributed to, or aggravated by the covered illness. If the employee had between 10 and 19 years of wage-loss, the survivor receives an additional $25,000. If the worker had 20 or more years of wage-loss, the survivor receives an additional $50,000.
- Uranium miners, millers, and ore transporters are eligible for medical benefits, as well as up to $250,000 in monetary compensation for impairment and/or wage-loss if they develop an illness as a result of toxic exposure at a facility covered under Section 5 of RECA. (These uranium miners, millers, or ore transporters are eligible for compensation and medical benefits under Part E even if they did not receive compensation under RECA).

DOL has primary authority for administering Part B and Part E of the EEOICPA. However, other federal agencies are also involved with the administration of this program.

- The DOE ensures that all available worker and facility records and data are provided to DOL. This includes: (1) providing DOL and/or the National Institute for Occupational Safety and Health (NIOSH) with information related to individual claims such as employment verification and exposure records; (2) supporting DOL, NIOSH, and the Advisory Board on Radiation and Worker Health with large-scale records research and retrieval efforts at various DOE sites; (3) conducting research, in coordination with DOL and NIOSH on issues related to covered facility designations; and (4) hosting the Secure Electronic Records Transfer (SERT) system, a DOE hosted environment where DOL, NIOSH, and DOE can securely share records and data.
- NIOSH conducts activities to assist claimants and supports the role of the Secretary of Health and Human Services (HHS) under EEOICPA. These activities include: (1) developing scientific guidelines for determining whether a cancer is related to the worker's occupational exposure to radiation; (2) developing methods to estimate worker exposure to radiation (dose reconstruction); (3) using the dose reconstruction regulations to develop estimates of which classes of workers can be considered for inclusion in a SEC class; and (4) providing staff support for the independent Advisory Board on Radiation and Worker Health that advises HHS and NIOSH on dose reconstructions and SEC petitions.
- The Ombudsman to NIOSH helps individuals with a variety of issues related to the SEC petition process and the dose reconstruction process. The Ombudsman to NIOSH also conducts outreach to promote a better understanding of the EEOICPA, as well as the claims process.

II. The Office of the Ombudsman

Public Law 108-375, which was enacted on October 28, 2004, also established within the DOL an Office of the Ombudsman. The EEOICPA outlines three (3) specific duties for the Office:

1. Provide information to claimants and potential claimants about the benefits available under Part B and Part E, and on the requirements and procedures applicable to the provision of such benefits.

2. Make recommendations to the Secretary of Labor regarding the location of resource centers for the acceptance and development of EEOICPA claims.

3. Carry out such other duties as the Secretary specifies.

See 42 U.S.C. § 7385s-15(c). The EEOICPA also requires the Office to submit an annual report to Congress which sets forth:

1. The number and types of complaints, grievances, and requests for assistance received by the Office during the preceding year; and

2. An assessment of the most common difficulties encountered by claimants and potential claimants during the preceding year.

See 42 U.S.C. § 7385s-15(e).

Most of the individuals who contacted the Office did not want to merely register a complaint or grievance. Rather, these individuals were usually looking for guidance/assistance with their claim. In our experience, the two most prominent reasons an individual contacts our Office are: (1) they did not know where else or who else to turn to for assistance and eventually he/she was provided with our contact information; or, (2) other efforts to resolve their concerns were unsuccessful.

Within the limits of our authority, we make every effort to assist claimants and individuals who contact our Office for information and assistance. This assistance may involve: (1) directing the claimant to the appropriate office or agency that can best provide the needed information and assistance; (2) explaining the benefits, as well as the requirements and procedures for obtaining these benefits; (3) answering questions about the program; (4) informing claimants about the various tools and resources developed to assist them, and providing guidance on how to access these tools and resources; and (5) providing an ear to listen to the concerns that claimants want someone to hear.

This report is a synthesis of the many e-mails, letters, telephone calls, facsimiles, and face-to-face conversations that the Office had with claimants, potential claimants, family members, authorized representatives, health care providers, and others during calendar year 2016.

The 2016 Annual Report to Congress

OFFICE OF THE OMBUDSMAN

for the Energy Employees Occupational Illness Compensation Program

TABLES

The Office of the Ombudsman is required to submit an annual report to Congress. In this annual report, we are to set forth the numbers and types of complaints, grievances, and requests for assistance that this Office received in the preceding calendar year and we are to provide an assessment of the most common difficulties encountered by claimants and potential claimants in that year. The tables below set forth the numbers and types of complaints, grievances and requests for assistance that the Office of the Ombudsman received in calendar year 2016. Following these tables is our assessment of the most common difficulties encountered by claimants and potential claimants in calendar year 2016.

Table 1 – Complaints by Nature

	CONCERN	NUMBER OF COMPLAINTS
1	Covered Employment	44
2	Covered Facility	19
3	Covered Illness	7
4	Survivor Eligibility	6
5	Exposure to a Toxic Substance	29
6	Dose Reconstruction Process	37
7	Issues Related to Special Exposure Cohorts	22
8	Causation	26
9	Impairment	11
10	Wage-loss	10
11	Home Health Care Issues	14
12	Issues Related to Payment of Medical Bills	22
13	Status Inquiries	41
14	Issues Related to Authorized Representatives and Attorney Fees	11
15	RECA	2
16	Interactions with the Division of Energy Employees Occupational Illness Compensation|	
	Communication	17
	Inappropriate Conduct	14
	Change in Claims Examiners	2
17	Delays	37
18	Did Not Know Where to File a Claim	14
19	Issues Related to Reopening/Reconsideration	24
20	Due Process Concerns	24
21	Assistance Even After Talking to CE/DEEOIC	121
22	General Requests for Assistance	390
	TOTAL	**944**

Table 2 – Complaints by Facility

Table 2 provides the number of complaints, grievances, and requests for assistance the Office received involving employment at various facilities. This table only reflects the complaints, grievances, or requests for assistance where the facility was identified. In many encounters, claimants do not identify the facility where they worked. This is especially true when claimants contact the Office via email or letter.

FACILITY	LOCATION	NUMBER OF COMPLAINTS
Albany Research Center	Albany, Oregon	1
Amchitka Island Nuclear Explosion Site	Amchitka Island, Alaska	1
American Machine and Foundry	Brooklyn, New York	1
Ames Laboratory	Ames, Iowa	1
Area IV of the Santa Susana Field Laboratory	Santa Susana, California	9
Bethlehem Steel	Lackawanna, New York	2
Blockson Chemical Company	Joliet, Illinois	3
Brookhaven National Laboratory	Upton, New York	3
Brush Beryllium Company	Cleveland, Ohio	1
Carborundrum Company	Niagara Falls, New York	1
Clarksville Modification Center	Clarksville, Tennessee	1
Dow Chemical Corporation (Madison Site)	Madison, Illinois	3
Feed Materials Production Center	Fernald, Ohio	2
General Electric Company (Ohio)	Cincinnati/Evendale, Ohio	1
General Steel Industries	Granite City, Illinois	5
Hanford	Richland, Washington	6
Idaho Nation Engineering Laboratory	Scoville, Idaho	1
Iowa Ordnance Plant (Line 1 and Associated Activities)	Burlington, Iowa	8
Kadlec Hospital	Richland, Washington	5
Kansas City Plant	Kansas City, Missouri	16
Lawrence Livermore National Laboratory	Livermore, California	3
Lindsey Light and Chemical Company	West Chicago, Illinois	1
Los Alamos National Laboratory	Los Alamos, New Mexico	3
Mound Plant	Miamisburg, Ohio	1
Nevada Test Site	Mercury, Nevada	7
Oak Ridge K-25 Y-12 X-10	Oak Ridge, Tennessee	5 (Site not specified) 11 20 9
Pacific Proving Ground	Republic of the Marshall Island	1
Paducah Gaseous Diffusion Plant	Paducah, Kentucky	9
Pinellas Plant	Clearwater, Florida	10
Portsmouth Gaseous Diffusion Plant	Piketon, Ohio	12
Rocky Flats Plant	Golden, Colorado	13
Sandia National Laboratory	Albuquerque, New Mexico	7
Savannah River Site	Aiken, South Carolina	8
Shippingport Atomic Power Plant	Shippingport, Pennsylvania	2
Various Uranium Mines		9

Table 3 – Contacts/Complaints at Outreach Events

During calendar year 2016, the Office attended 16 outreach events and hosted two events. When the attendance at an outreach event is low (or when the number of people who approach us at an event is low), we have the opportunity to count and record the nature of each contact. However, as the number of attendees grows, we often find it impossible to count and record each contact.[3]

Consequently, Table 3 does not include a count of every claimant, potential claimant, and individual we encountered at every outreach event. Nevertheless, these encounters are considered in developing our assessments of the most common difficulties encountered by claimants in 2016.

LOCATION	EVENT	APPROXIMATE # OF ATTENDEES	APPROXIMATE # OF INDIVIDUALS WHO APPROACHED THE OFFICE OF THE OMBUDSMAN
Idaho Falls, Idaho	JOTG[4] Event	70	12
Pocatello, Idaho	JOTG Event	12	2
Idaho Falls, Idaho	Town Hall Meeting Sponsored by Advocacy Group	20	5
Tampa, Florida	JOTG Event	120	30
Orlando, Florida	JOTG Event	41	20
Denver, Colorado	Rocky Flats Homesteader's Breakfast	90	8
Aiken, Georgia	Resource Fair	200	50
Aiken, Georgia	Town Hall Meeting Sponsored by Advocacy Group	25	10
Burlington, Iowa	JOTG Event	125	25
Ames, Iowa	JOTG Event	90	5
Oak Ridge, Tennessee	ABTSWH[5] Board Meeting	Undetermined	15
Paducah, Kentucky	Day of Remembrance Event	70	10
Flagstaff, Arizona	Outreach by the Ombudsman's Office	153	153
Tuba City, Arizona	Outreach Sponsored by the Ombudsman's Office	190	190
Huntington, West Virginia	DOL Medical Benefits Presentation and Traveling Resource Center	35	10
Albany, Oregon	DEEOIC Outreach	35	15

[3] For instance, at many outreach events, as soon as the formal presentations conclude people line up to talk to the representatives from our Office.
[4] Joint Outreach Task Group
[5] Advisory Board on Toxic Substances and Worker Health

Assessment of the Most Common Difficulties Encountered by Claimants and Potential Claimants During Calendar Year 2016

As in previous years, the complaints, grievances, and requests for assistance that the Office received in calendar year 2016 addressed every aspect of the EEOICPA claims process. We set forth the complaints, grievances, and requests for assistance that we received in calendar year 2016 in Tables 1, 2, and 3. In addition, consistent with Section 7385s-15(e)(2) of the Act, this annual report also sets forth an assessment of the most common difficulties encountered by claimants and potential claimants during calendar year 2016. *See* 42 U.S.C. § 7385s-15(e)(2). It is impossible to discuss every complaint, grievance, or request for assistance that we received. Thus, consistent with the directive of the Act, we limit our assessment to the most common difficulties brought to our attention in 2016.

In our experience, most claimants do not contact the Office as soon as (or the first time) they encounter a problem with their claim. Rather, we find that there are usually other factors that ultimately prompt a claimant to reach out. For instance, some claimants turn to us after other efforts to resolve the matter were unsuccessful. As a result, the complaints brought to our attention are sometimes compounded by the difficulties encountered by the claimant while trying to resolve the matter. However, the difficulties encountered when trying to resolve a matter is not the only factor that underlies the complaints, grievances, and requests for assistance that we received. Other factors that compound the complaints raised by claimants include:

1. Pursuing an EEOICPA claim is not the only challenge facing some claimants.

> *My mother recently passed away in XX and I had been trying to help her apply or reapply but because of her illness and my disabilities we did not get very far. Could you please find someone to help us see this through...*
>
> - **From a letter received October 2016.**
>
> *I'm writing this letter because I am extremely upset over a series of conversations I've had over the past few months with XXX, my late husband's claims examiner. During the time these conversations occurred, I was too distraught by the fact that my husband was dying...*
>
> - **From a letter received February 2016.**

Claimants often pursue their EEOICPA claim while confronting other challenges in their lives. For instance, it is common to encounter claimants who pursue an EEOICPA claim while undergoing treatment for, or recuperating from, an illness.[6] And while it might sound reasonable to suggest that a claimant facing other challenges first address these other challenges before filing his/her EEOICPA claim, it must be recognized that there are consequences that arise when claimants delay the filing of their EEOICPA claim. In particular, when a worker (or former worker) files an EEOICPA claim and that claim

[6] We also frequently encounter claimants who pursue an EEOICPA claim while assisting a family member who is ill, as well as claimants with limitations that affect their activities of daily living.

is accepted, the worker (or former worker) is eligible for medical benefits beginning the date the claim was filed. *See* 42 U.S.C. §§ 7384t(d) and 7385s-8.[7] Thus, delaying the filing of his/her EEOICPA claim impacts the date from which the worker is eligible for medical benefits.[8]

Claimants complain that DEEOIC is not always sensitive to the fact that they may be pursuing an EEOICPA claim while confronting other serious life challenges. This assertion is frequently raised by claimants who complain about the amount of time they are given to submit evidence in support of their claim. A common complaint is that the time given to claimants to submit evidence is woefully inadequate, especially considering the other challenges they are facing. For example, claimants question the reasonableness of giving a person who is currently undergoing medical treatment 30 days to develop and submit additional evidence.[9]

In an effort to address this concern, claimants have asked if it is possible to create a procedure where they can file their EEOICPA claim and yet delay the processing of that claim. Claimants believe that such a procedure would allow them to establish the date of filing (for purposes of entitlement to medical benefits) while also providing them with the time to focus on other matters that need their immediate attention. This was the precise request made by a claimant who wanted to file an EEOICPA claim, but knew that he would be away from home for an extended period of time. This claimant feared that if he immediately filed a claim, DEEOIC would come back and ask for documents that he would not have access to until he returned home months later. This claimant wanted the option to file his EEOICPA claim and yet to delay the processing of that claim until he returned home.

2. Some claimants are not familiar with the program and do not know where to turn for help.

Most of the inquiries we received came from claimants or from family members serving as their Authorized Representatives (ARs). Some of these claimants and/or family members have a basic understanding of the EEOICPA claims process or quickly become familiar with the process. However, it is common to encounter claimants and family members who are not familiar with the rules and procedures governing the EEOICPA program. And this can cause problems.

While there are tools and resources that have been developed to assist claimants with the EEOICPA claims process, in many instances, simply telling a claimant about the existence of a tool or resource is not sufficient. While there are instances when simply telling a claimant that an online tool is available is sufficient, some claimants must be shown how to find and how to use these online tools. There are also instances where the demands of the claims process are too much for the claimant. Some claimants do not know what to do when directed to submit additional evidence, while others are overwhelmed by the complexity of the medical, scientific, or legal issues that sometimes must be addressed in pursuing a claim. Consequently, when they approach our Office, some claimants come with an added level of frustration caused by the fact that they are not familiar with the EEOICPA claims process and do not know where to go for help, or have been unable to find anyone willing to provide the assistance they need.

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[7] Under EEOICPA, entitlement to medical benefits is limited to claims filed by workers and former workers.

[8] Claimants who are aware of 42 U.S.C. §§ 7384t(d) and 7385s-8 understand the importance of the date of filing and thus file their claims as soon as possible. However, even when they are not aware of 42 U.S.C. §§ 7384t(d) and 7385s-8, some claimants file their claim as soon as they learn of the program (and become sick) because they mistakenly believe there is a time limit within which EEOICPA claims must be filed.

[9] According to claimants, 30 days to develop and submit additional evidence appears to be the norm provided by DEEOIC. Claimant note that simply getting copies of existing medical records can often take more than 30 days, and that it often takes much longer to request and receive a causation report discussing the link between their employment and illness. While claimants can request an extension of time, in our experience many claimants are not aware that this possibility exists, or that such requests must be made in writing.

3. Claimants are sometimes hesitant to reveal confidential information.

Throughout their covered employment, workers in the nuclear weapons complex were constantly reminded not to discuss their employment with anyone, including their families. Our conversations with claimants have revealed that some workers are under the impression they still cannot openly discuss their employment. As a result, some claimants have confided to us that in pursuing their EEOICPA claim, they did not feel comfortable talking about their employment — and especially did not feel comfortable talking about their employment with someone who did not appear to have the proper security clearance.

According to DOE and DEEOIC, much of the information relating to the work performed at these covered facilities has been declassified. However, claimants usually are not in a position to know whether the information relating to their employment has been declassified. Moreover, since they gave their word not to discuss their employment, many workers are not comfortable assuming that the information has been declassified. Rather, before discussing information they agreed not to disclose, workers want to be certain that the information has been declassified. In this regard, it has been our experience that even when they are assured that information has been declassified, some workers are still hesitant to discuss the specifics of their employment. In light of their work at these facilities, workers sometimes still believe that they possess information that is more detailed and sensitive than the information that has been declassified. Consequently, workers worry about inadvertently disclosing information that has not been declassified.

In 2016, we were approached by EEOICPA claimants who asked about the procedures to follow if they were concerned that in discussing their employment, they might reveal classified information. NIOSH indicated that during the dose reconstruction process, a "classified" interview in a secure location could be arranged if a claimant wanted to discuss matters the claimant thought might be classified. DEEOIC's response to this Office noted that in many instances the information possessed by the claimant may have already been declassified. Claimants argue this response from DEEOIC places the burden on them to determine if information is declassified. Claimants also complain that this response does not tell them what to do if they are unsure if the information they need to discuss has been declassified.[10]

[10] The Office is unaware of any written DEEOIC procedure which informs claimants how they can discuss potentially classified information with the DEEOIC.

Statutory Complaints

We use the term "statutory complaints" to refer to complaints that directly challenge the statute as written. These complaints usually raise issues that can only be addressed by revising the statute. However, in some instances, claimants believe that there are actions that DEEOIC, or one of the other agencies involved in the administration of this program, could undertake to address (or at least lessen) their concerns.

A. Coverage — Who is covered and the illnesses covered under this program

The most common "statutory complaint" addresses coverage under this program, specifically who is covered and/or the illnesses covered under this program. Many of these concerns arise because:

(1) The EEOICPA does not cover every worker who was employed at a covered facility, and;

(2) There are differences in the compensation and benefits to which different employees are entitled to under the EEOICPA.

A chart outlining the key distinctions in coverage can be found in Appendix 2.

With respect to coverage, the most common complaint the Office received in 2016 came from employees of Atomic Weapons Employers (AWEs). Under the EEOICPA, employees of AWEs are covered under Part B of the Act, but are not covered under Part E. Moreover, AWE employees are only covered under Part B for cancer(s) caused by exposure to radiation. AWE employees are not covered for chronic beryllium disease, beryllium sensitivity, or chronic silicosis, the other illnesses covered under Part B. Thus, AWE employees cannot understand why the statute limits their coverage under the EEOICPA to cancers caused by exposure to radiation. Consequently, complaints arise when claims filed by AWE employees for illnesses other than cancer(s) caused by radiation exposure are summarily denied. AWE employees routinely assure us that in performing their jobs they were exposed to a host of toxic substances, both radiogenic toxins as well as non—radiogenic toxins, and thus question why their coverage under the EEOICPA is limited to cancers arising from exposure to radiation.

This is the precise argument raised by former employees of Dow Chemical Corporation (Madison Site) in Madison, Illinois. These employees are adamant that in the course of their covered employment they were exposed to beryllium, a toxic substance that the Act itself describes as a substance "...that, even in small amounts, can cause medical harm." *See* 42 U.S.C. § 7384(a)(1). Since there is no doubt that exposure to beryllium can be dangerous, former employees of Dow Chemical Corporation (Madison Site) question why they are not covered under the EEOICPA for illnesses arising from their exposure to beryllium.

During the course of the year, AWE employees from other facilities also argued that it was not fair to limit their coverage under the EEOICPA to cancers caused by radiation. Other AWE employees raising this concern were former employees of Bethlehem Steel in Lackawanna, New York, as well as former employees of the Allied Chemical Corporation Plant in Metropolis, Illinois.

Questions concerning coverage under the EEOICPA are also raised by former military personnel, as well as by former employees of the Department of Defense (DOD).[11] Former military personnel question why they are not covered at all under the EEOICPA for illnesses related to exposures sustained while on active duty working at a covered facility. Former DOD employees cannot understand why federal employees of the DOE are covered for radiogenic cancer and chronic silicosis under Part B, yet employees of other federal agencies (including DOD) are not.

When we encounter such claimants not covered under the EEOICPA, they frequently ask two questions:

1. Since their work at a covered facility exposed them to the same toxic substances as everyone else who was present, they want to know why they are excluded from coverage under the EEOICPA. And in asking this question, claimants emphasize that they want an answer that goes beyond telling them that this how the statute is written. Claimants want to know why the statute is written in this manner. In our experience, it has been difficult to locate documents that can adequately answer this question.
2. They want to be directed to a program that will adequately compensate them for the illnesses arising from their employment at these covered facilities.[12]

   Note: The Office of Workers' Compensation Programs' (OWCP) homepage contains a link for those who worked for private companies or state governments. This is another example of a tool that many individuals do not know exists.

B. Commencement date for medical benefits

Section 7384t(d) provides that an individual receiving benefits shall be furnished with medical benefits as of the date on which the claim was submitted. *See* 42 U.S.C. § 7384t(d). Claimants argue that this provision fails to recognize that:

- **Some claimants did not receive prompt notice of this program.** It frustrates claimants when they realize that they did not receive prompt notice of this program. This frustration is compounded when claimants discover that the delay in being notified of this program impacted their commencement date for medical benefits. A frequent argument contends that had the claimant received prompt notice of this program, he/she would have filed his/her claim sooner, thereby establishing an earlier commencement date for medical benefits.
- **Medical testing is sometimes necessary in order to receive a diagnosis.** Emphasizing the fact that a diagnosed condition is a necessary criterion for an EEOICPA claim, claimants contend that Section 7384t(d) fails to recognize that an expensive medical procedure(s) is sometimes necessary in order to obtain the required diagnosis.[13] Claimants complain that it is unfair to require a diagnosed condition in order to pursue a claim, and yet to impose a rule that often results in denying reimbursement for the medical procedure(s) necessary to obtain this diagnosis.

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[11] Federal employees of the Department of Energy are covered under Part B. They are not covered under Part E.

[12] Some claimants complain that when they try to file a claim under State worker compensation programs, they find that these programs do not ensure adequate compensation for the types of occupational illnesses and diseases that are diagnosed in employees of these sites. *See generally*, 42 U.S.C. § 7384(a)(7). For instance, some claimants reported that when they tried to file a claim, they discovered that statute of limitations for the State workers' compensation program had expired. Others complained that the State program did not have access to the information needed to verify their employment and/or their exposure to toxic materials.

[13] Under EEOICPA, the worker must have a diagnosed illness/condition. Claimants maintain that there are instances when it is only after undergoing a medical procedure or medical treatment that they receive a diagnosis.

C. The cap on compensation

The statute outlines the maximum amounts of monetary compensation to which claimants can be awarded under Part B and Part E.[14] Most claims accepted under Part B are entitled to a lump sum payment of $150,000.[15] On the other hand, the maximum aggregate compensation under Part E is $250,000. *See* 42 U.S.C. § 7385s-12. Claimants complain when, in their opinion, because of one or both of these caps, they were not adequately compensated for their illnesses. These complaints usually arise when:

1. The covered condition continues to worsen even after the employee is paid the statutory maximum(s).

2. An employee who received the statutory maximum subsequently develops additional illnesses.

A claimant who has already received the statutory maximum amount of compensation under the EEOICPA can file claims for additional illnesses. If the additional claim is accepted, the claimant is entitled to medical benefits for the accepted illness. However, once the claimant receives the maximum amount of compensation, the acceptance of additional claims does not result in additional monetary compensation.

D. Chronic Lymphocytic Leukemia (CLL)

There continues to be confusion surrounding claims for CLL. Section 7384l(17) specifically excludes CLL from the list of specified cancers.[16] *See* 42 U.S.C. § 7384l(17). At one time, NIOSH regulations regarded CLL as non-radiogenic and therefore automatically assigned CLL a probability of causation of zero. Taken together, the EEOICPA provision excluding CLL from the list of specified cancers and NIOSH's regulation which automatically assigned CLL a probability of causation of zero meant that no claim for CLL could be accepted under Part B.

In 2012, NIOSH announced a new rule which stated that CLL is a radiogenic cancer and therefore, claims for CLL would undergo a radiation dose reconstruction. Thus, claims for CLL are now potentially compensable under Part B. However, when NIOSH designated CLL as potentially caused by radiation, claimants assumed that CLL would also be added to the statutory list of specified cancers, thereby permitting claimants with CLL to be compensated as members of a SEC if they met the other requirements for inclusion in a SEC class. However, NIOSH's announcement did not impact the exclusion of CLL in the EEOICPA. Consequently, Section 7384l(17) of the statute still excludes CLL from the list of specified cancers.

Since NIOSH regulations now recognizes CLL as potentially caused by radiation, claimants believe that CLL should be added to the statutory list of specified cancers.

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[14] These maximum amounts only apply to monetary compensation. Medical benefits are not included in these caps.

[15] Under Part B, an employee with an accepted claim for beryllium sensitivity is entitled to medical monitoring, but no monetary compensation. In addition, an individual with an approved claim under Section 5 of the Radiation Exposure Compensation Act, 42 U.S.C. § 2210 note (2012), is entitled under Part B to an additional $50,000 lump sum payment.

[16] The term "specified cancer" means any of the following:

- A specified disease, as that term is defined in section 4(b)(2) of the Radiation Exposure Compensation Act (42 U.S.C. 2210 note).
- Bone cancer.
- Renal cancers.
- Leukemia (other than chronic lymphocytic leukemia), if initial occupational exposure occurred before 21 years of age and onset occurred more than two years after initial occupational exposure.

42 U.S.C. 7384l(17).

E. Attorney Fees

Claimants and authorized representatives (ARs) complain that the statutory provision addressing attorney fees leaves as many questions unanswered as it answers. Pursuant to Section 7385g(a), the representative of an individual may not receive more than the percentages outlined in subsection (b) for services rendered in connection with a claim for lump sum compensation under Part B. The percentages outlined in subsection (b) are:

(1) 2 percent for the filing of an initial claim for payment of lump-sum compensation; and

(2) 10 percent with respect to objections to a recommended decision denying payment of lump-sum compensation.

See 42 U.S.C. § 7385g. The attorney fee provisions outlined in Section 7385g are incorporated into Part E by 42 U.S.C. § 7385s-9.

- **The benefits and procedures for Part E are different.** – The procedures and benefits outlined for Part B are not the same as those outlined for Part E. As a result, the attorney fee provision established for Part B claims is not always easily applied to Part E claims. As a general rule, if a Part B claim is accepted, the claimant receives lump-sum compensation of $150,000. Moreover, when a Part B claim filed by a worker is accepted, in addition to monetary compensation, the worker receives a medical benefits card entitling him/her to medical benefits for the covered illness.[17] On the other hand, Part E claims filed by workers follow what many call a two-step process. If the Part E claim filed by a worker is accepted, the worker receives a medical benefits card entitling him/her to medical benefits for the covered illness. To receive monetary compensation under Part E, the worker must separately file and be accepted for wage-loss and/or impairment compensation.[18]

  Because the fee schedule is written for Part B, we encounter claimants and ARs who want to know the proper basis for determining the fee that is to be paid when a Part E claim is accepted entitling the worker to medical benefits, but the worker is not entitled to monetary compensation for wage-loss or impairment. In raising this question, it is noted that as it is currently written, the fee schedule does not address whether a fee can be charged, and if so, the amount of the fee to be paid in such circumstances.

- **The fee schedule does not address other valuable services.** As applied to both Part B and Part E, the fee schedule does not address whether a fee can be charged when the AR engages in a variety of other services related to a claim. Two of the most common services mentioned in these complaints are: (1) services related to the payment of medical bills; and (2) services related to the receipt of medical benefits. The uncertainty surrounding whether (and how much) an AR can charge for these services is often cited as one of the reasons some ARs are unwilling to assist claimants with these services.

- **No consideration is given for the difficulty of the case**. Some claimants firmly believe that some ARs avoid the more complex cases because the complexity of a case, as well as the length of time needed to adjudicate a case are not considered in the statutory fee schedule. Thus, claimants believe that there are times when the fee schedule actually works against them because it discourages ARs from assisting with complex cases — the very cases where help is most needed.

[17] The exception is Part B claims for beryllium sensitivity. If such a claim is accepted, the worker is entitled to medical monitoring – there is no monetary compensation for beryllium sensitivity under Part B.

[18] If an eligible survivor files a Part E claim pursuant to § 7385s—3 and that claim is accepted, the survivor is entitled to a lump-sum payment. *See* U.S.C. § 7395s-3.

- **Little guidance.** Claimants and ARs complain that it can be difficult to find meaningful guidance when they have questions regarding the attorney fee schedule. For example, the fee schedule does not address the fee for services related to resolving medical billing issues or issues related to medical benefits. Consequently, it has been suggested that some ARs have developed their own fee structure for these services. Claimants complain that when they approached DEEOIC to ask if the fees charged by some ARs were proper DEEOIC simply repeated the wording of the statute or stated it does not have enforcement authority. Likewise, ARs complained that when they tried to obtain guidance before setting a fee for those services not addressed in the fee schedule, they could not find anyone willing to provide guidance, and DEEOIC simply provided them with the wording of the statute.

ASSESSMENT

The resolution of most statutory complaints will require revisions to the statute. However, there are some instances where claimants maintain that more and better guidance would also be helpful. For instance:

- Claimants and ARs suggest that they could benefit from more and better guidance concerning when and how much they can charge (or be charged) for representation in a variety of circumstances.
- This year we received complaints questioning the status of certain facilities –*i.e.*, whether the facility was a covered facility under the Act, as well as whether certain facilities classified as an AWE should have been classified as a DOE facility. In raising these concerns, claimants complained that they did not understand the procedures for challenging a facility's designation. This is an example where claimants argued that it was difficult to locate relevant information.

Lack of and/or Belated Awareness of the EEOICPA

Hello my name is XXX and I am looking to get some help regarding my exposure to chemicals and radiation during my employment with XX and a contractor which I also worked for at the mill and lab in Moab UT...

- **From an email received September 2016.**

Received your letter...providing information of presentations in Flagstaff and Tuba City, AZ. We live in Santa Fe, NM and would like to know when presentations are going to be made in our area.[19]

- **From an email received May 2016.**

The EEOICPA was enacted in 2000. Yet, we continue to encounter claimants who are only now learning of the program. In its response to our 2014 Annual Report, DOL agrees that "despite OWCP's significant efforts to inform potential claimants about the EEOICPA, there are individuals who may have only recently become aware of the program and others who remain unaware of its existence." To summarize the concerns that we commonly hear:

- Claimants find it troubling when: (1) they only now learn of the existence of the EEOICPA, and (2) they only learn of the program from a friend or former colleague, and not through a notice from the government.
- When claimants hear about this program from a friend or colleague, what they learn about the program is often cursory at best. For some claimants, obtaining more information about this program can be difficult. In some instances, the level of effort they must put forth to learn more about this program ensures that even before a claim is filed, the claimant has already developed negative attitudes or perceptions of this program.
- Some claimants believe that the delay in receiving notice of this program (or the failure to receive notice) impacted their compensation and/or their entitlement to medical benefits.[20]
- The delay (or failure) to notify them of this program causes some claimants to question the government's commitment to this program.
- There is a belief that the government's efforts to notify potential claimants of this program have focused mainly on the geographic areas surrounding a few select covered facilities, usually those facilities that employed large numbers of employees. With over 350 covered facilities, claimants argue that outreach should not be limited to a few select sites.

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[19] This claimant had received a letter notifying them of public town-hall meetings hosted by this Office in Flagstaff and Tuba City, and was not aware that the Espanola Resource Center routinely holds Traveling Resource Centers in Los Alamos, NM, which is 36 miles away from Santa Fe and in Albuquerque, NM, which is 64 miles away from Santa Fe.

[20] When an EEOICPA claim filed by a worker is accepted, the worker is usually entitled to medical benefits as of the date of the filing of the claim. *See* 42 U.S.C. §§ 7384t(d) and 7385s-8. Some claimants complain that the delay in being notified of this program caused them to have a later filing date, thereby limiting the medical benefits to which they were entitled. In addition, under Part E, a worker with an accepted claim is entitled to monetary compensation of up to $250,000, while a Part E survivor is entitled to monetary compensation ranging from $125,000 to $175,000 depending upon the amount of wage-loss encountered by the worker. We encounter Part E claimants who believe that because of a delay in being notified of this program: (1) the worker passed away without ever knowing about this program; and, (2) there was a reduction in the amount of compensation which was ultimately paid.

- Limiting outreach to the immediate area around a facility fails to recognize that over the years potential claimants may have moved to other areas of the country.
- AWEs were expected to inform their former employees of this program. Some former employees of AWEs question the efforts undertaken by some AWEs to notify them. This was the precise complaint raised by former employees of Wah Chang, an AWE facility in Albany, Oregon. These former employees questioned the efforts undertaken to notify their colleagues of this program.

ASSESSMENT

In its response to our 2014 Annual Report, DOL agreed that despite the Office of Workers' Compensation Programs' significant efforts to inform potential claimants of the EEOICPA, there are claimants who may have only recently become aware of the existence of the program. DOL further observed that since the inception of this Act, OWCP had used a variety of methods for making the existence of this program known to the widest possible audience.[21]

We agree that OWCP has used a variety of methods for making the existence of this program known to the widest possible audience. We further note that the DOE, as well as its Former Worker Medical Screening Program (FWP), is also engaged in notifying potential claimants of the EEOICPA. However:

- Press releases regarding outreach events are not always picked up by the local media, or are only picked up on the day of the event, making it difficult for some to attend these events.
- Publicizing the EEOICPA via OWCP's website and social media only reaches those with access to the internet, and then only those who seek out these sites.
- There is never one newspaper that everyone reads, or one radio station that everyone listens to. And it can be costly to run notices in every newspaper and on every radio station in an area. Moreover, regardless of how extensive notices are circulated in newspapers and/or broadcasted on radio stations, there will be potential claimants who live just beyond that circulation or broadcast area (or otherwise will not see or hear the notice).

Thus, while we commend the efforts undertaken by DOL to increase awareness of the EEOICPA, we believe that more should be, and can be done. For example:

- As press releases are not always picked up or picked up in a timely fashion, notices of upcoming events should be directly posted in newspapers (and other media).
- Hosting an outreach event may not always be the most effective approach for contacting potential claimants. Other methods of outreach, such as posting notices in the media, sending letters, and disseminating information to local groups and organizations that may have interactions with potential claimants should be explored.[22] Some Resource Centers already interact with local groups and organizations. For instance, some Resource Centers regularly attend events sponsored by or on behalf of retirees, as well as local health fairs. Nevertheless, claimants believe there needs to be more efforts such as this.

[21] The Department of Labor's response to our 2014 Annual Report can be found in Appendix 4.

[22] The JOTG is currently planning to send letters to at least one area.

In addition, we continue to believe that there needs to be better use of the employee rosters that DOE has compiled. Our conversations with the DOE confirmed that the DOE has compiled rosters (or listings) that contain the names and addresses of some of the workers who were employed at various sites.[23] To be clear, it is our understanding that the DOE does not have rosters for every site and where these rosters do exist, they may not list every worker who was ever employed at the site. Moreover, these rosters do not always contain current addresses. Nevertheless, the DOE and its FWP have successfully used web-based programs to obtain updated addresses. And the DOE routinely utilizes these rosters to notify former workers of its free medical screening program and of upcoming outreach events, including events sponsored by the Joint Outreach Task Group.[24]

Claimants who feel that they were impacted by a delay in receiving notice of this program (or from a lack of notice of this program) adamantly believe that the government should have used all of the means at its disposal to promptly inform them of this program. We recognize that utilizing these rosters will not assure that every potential claimant is aware of this program. Nevertheless, utilization of these rosters by DEEOIC will help to ease the concerns of those who question the government's commitment to this program. And when combined with the other methods used by DEEOIC to notify potential claimants, utilizing these rosters will greatly increase the chances of reaching many of the potential claimants who still are not aware of the EEOICPA, something that becomes more critical each year as this claimant population continues to age.

[23] It is our understanding that the rosters compiled by the DOE do not necessarily contain every worker who worked at a site. In addition, the DOE has not compiled rosters for every site covered under EEOICPA.

[24] The DOE's letter informing former workers of the existence of the medical screening program contains a few sentences discussing the EEOICPA. If a former worker undergoes a DOE sponsored medical screening and that screening has any positive results, the former worker is advised to follow up with a physician and is advised to file an EEOICPA claim. In our experience, there are many instances where these letters from the DOE are not sufficient to alert claimants to the existence of the EEOICPA.

Difficulties Using Tools

DEEOIC, as well as the other agencies involved in the administration of the EEOICPA, have developed a variety of tools, mostly online, that can assist claimants with the EEOICPA claims process. Appendix 3 contains a listing of some of the tools that have been developed. Claimants who are aware of these tools, and who have the ability to access these tools, usually find these tools to be useful. The complaints the Office received tended to come from individuals who: (a) did not know that these tools exist; (b) did not have access to what are mostly online tools; and (c) found these tools difficult to use.

In its response to our 2014 Annual Report, DOL agrees and understands that "despite the continuous efforts of OWCP and its partners in NIOSH, DOE, the NIOSH Ombudsman, and the DOL Ombudsman to engage in proactive communications and outreach, and the vast amount of information that is made available to the public regarding the EEOICPA, there are some claimants who do not have access to information via the Internet and/or may not understand the information that is provided to them."

A. Claimants are not aware of the tools that have been developed

- Most of the claimants who contact our Office do not have prior experience with the EEOICPA claims process.
- When filing a claim, many claimants receive neither an oral nor written overview of the program.[25]
- When claimants receive an overview of the program, such as when they attend an outreach event sponsored by DOL, the JOTG, or our Office, they tend to focus on the issues immediately confronting them, and do not give as much attention to issues that are not relevant at that moment.
- Because most of the tools that have been developed to assist claimants are found only online, claimants who do not have access to, or limited access to, the internet are not always aware that these tools exist.
- Even though a tool may have been frequently mentioned throughout the claims process, some claimants never access these tools because they do not appreciate the value of the information provided by these tools, or know that they are accessible by the public.

The "Subcontractor Database (BT Comp)" is a good example of a tool to which some claimants are not aware, and which others never make an attempt to access. In our 2014 Annual Report, we suggested that claimants would benefit from access to a database that listed the contractors and subcontractors who were known to have a contractual relationship with the various DOE facilities covered under the EEOICPA. *See* 2014 Annual Report to Congress, January 8, 2016, pg. 37, footnote 40. In 2016, DEEOIC added a link to its homepage entitled, "Subcontractor Database (BT Comp)."[26] This database, which provides a listing of contractors and subcontractors with a known contractual relationship with various facilities covered under the EEOICPA, can be very helpful, especially to survivors who do not always know the names of the companies that employed the worker. However, because this database is only available online, claimants who do not have access to the internet may not be aware that this database was added to DEEOIC's homepage. Moreover, even when claimants have access to the internet, we

[25] The exception is often claimants who contact one of the Resource Centers to file their claim. Claimants who contact one of the Resource Centers tend to find the staff very informative. Note: a claimant can also file his/her claim by mail or over the telephone.

[26] Interestingly, although this database is entitled, "Subcontractor Database," it contains a listing of contractors and subcontractors with a known contractual relationship with various DOE facilities that are covered under the EEOICPA.

find that: (1) because there is so much information on DEEOIC's homepage, it is easy to overlook this database when reviewing DEEOIC's homepage, or (2) some claimants never access this database because they do not appreciate how the information provided by this database can assist them with their claim.

B. Some claimants do not have access to online tools

> *Hello my name is XXX and I am looking to get some help regarding my exposure to chemicals and radiation during my employment…I'm not able to get online very often so I'd like to get all the information I can sent to me by mail…*
>
> - **From an email received September 2016.**

- Many of the tools developed by DEEOIC, DOE, and NIOSH are only found online.[27]
- Some claimants do not have access to, or have limited access to the internet.
- Some claimants with access to the internet are not very comfortable using the internet.

Thus, for some claimants the ability to access information through a source other than the internet is not a preference — it is their only (or best) option. Claimants who find it difficult to access information on the internet believe that DEEOIC and the other agencies administering EEOICPA ought to: (1) provide instructions on how those who do not have access to the internet can obtain the information found online; and, (2) circulate these instructions in a manner that ensures that those without access to the internet can find these instructions.

C. Websites are difficult to navigate

Claimants complain that while tools are supposedly developed to assist them, some tools prove difficult to use. This concern is frequently directed at many of the online tools that have been developed. In this regard, there are instances when simply telling a claimant that information is available online is not sufficient. In some instances, claimants need guidance locating these tools and/or assistance using these tools. For example, in our 2014 Annual Report we stated that a list of enrolled providers could be accessed from DEEOIC's website or directly from the website of the Affiliated Computer Services, Inc. (ACS).[28] *See* 2014 Annual Report to Congress, Office of the Ombudsman, January 8, 2016, page 35. A few months later, we received a letter asking,

> *…The [annual] report states that on the DEEOIC's website is a tool where claimants can search for medical equipment providers who will sell equipment. Do you know where that tool is…*
>
> - **From an email received March 2106.**

Instances such as this remind us that:

- Some claimants are not comfortable accessing a website and then opening links to find information. Some claimants end their search if they go to a website and do not immediately find the information they are seeking.
- Searching for information is sometimes hindered by the claimant's inability to understand the terminology and/or abbreviations used by the program. For instance, claimants searching for a list of the specified cancers may not know that this information is found in the "Special Exposure Cohorts – Approved SECs" link on DEEOIC's homepage.

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[27] In some instances, such as with SEM database, some information is so extensive that it is impossible to provide this information in a format other than the internet.

[28] ACS/Xerox is the bill-pay agent for OWCP, as well as hosts and maintains the Web Bill Processing Portal for the DEEOIC.

However, the difficulties encountered when trying to find information are not limited to the internet. Claimants also encounter difficulties finding information in documents such as the EEOICP Procedure Manual (PM), the EEOICP Final Bulletins, the EEOICP Final Circulars, and other programmatic guidance.[29]

- Claimants complained that because the rules and procedures applicable to the EEOICPA are disbursed among the statute, the applicable regulations, the EEOICP Final Bulletins; the EEOICP Final Circulars; and the PM, it is difficult to know where to look for specific information.
- Claimants contend that locating information is sometimes made harder because they do not understand DEEOIC's logic for placing some information in a bulletin, while placing other information in a circular, and placing still other information in the PM. The discussion of durable medical equipment is an example of this concern. The discussion entitled, "Authorizing Oxygen Therapy Durable Medical Equipment (DME) and Oxygen Supplies" is found in EEOICP Bulletin 15-02. Yet, the discussion entitled, "Requiring estimates for Durable Medical Equipment or Supplies" is found in EEOICP Circular 15-03. Claimants question the logic for placing the discussion of authorizing oxygen therapy DME in a bulletin while the discussion of the requirement to obtain an estimate for such DME is found in a circular. Claimants point to this as an example where because they do not understand DEEOIC's logic, it is difficult to know where to look for information.
- Claimants find it frustrating when a provision in a bulletin, circular, or PM chapter addresses an issue but does not refer the reader to other bulletins, circulars, or PM provisions that directly bear on the same subject. The discussion of chronic obstructive pulmonary disease (COPD) exemplifies this concern. EEOICP PM Chapter 2-1000.16 which specifically addresses COPD does not refer the reader to EEOICPA Bulletin No. 16-05, which creates presumptions for the acceptance of claims for COPD. One explanation for this may be because PM Chapter 2-1000.16 was released prior to the issuance of Bulletin No. 16-05. However, even if this explains why PM Chapter 2-1000.16 does not refer to Bulletin 16-05, claimants argue that this does not explain why Bulletin 16-05, which was issued later, does not refer the reader to PM Chapter 2-1000.16. Citing to situations such as this, claimants contend that it can be difficult to know if and when they located all of the rules and procedures relevant to an issue.
- Another complaint contends that it is difficult to be aware of all of the changes/updates to the PM, bulletins, and circulars. Changes to a PM provision are announced in Transmittals and these Transmittals are found on DEEOIC's website under the link to the PM. However, most of the claimants we encounter are not aware of the existence of these Transmittals.[30] Changes to bulletins and circulars, on the other hand, are announced on DEEOIC's webpage. In our experience, most claimants only visit DEEOIC's webpage on an "as needed" basis. Thus, we find that many claimants are not aware of changes to the PM, bulletins or circulars.

The discussion of hearing loss is an example of an instance where claimants found the revisions to the PM confusing. It is also an example of an instance where claimant's inability to understand DEEOIC's logic made it difficult to locate information. Prior to September 2015, the discussion of hearing loss was found in the PM at Chapter 2-1000.18(a). In September 2015, the discussion of hearing loss was revised and relocated to PM Chapter 2-0700.16, where it is listed at the end of the chapter in Exhibit 3. Following this revision, we were contacted by claimants who complained when they were unable to locate the

[29] The PM, as well as Bulletins and Circulars are only found online.

[30] When a claimant clicks on the link to Transmittals, they find that the Transmittals are identified by a number. If the claimant does not know the number of a particular Transmittal, he/she would need to open each Transmittal in order to locate the one he/she is looking for because no description of the content accompanies the Transmittal. As of the end of 2016, there were 57 Transmittals on the DEEOIC website.

discussion of hearing loss in the PM. When the Office directed these claimants to the new location, some questioned the logic for placing a discussion entitled, "Establishing Causation for Asbestosis and Hearing Loss," (emphasis added) as an exhibit in a PM Chapter entitled "Establishing Toxic Substance Exposure." (Emphasis added). *See* EEOICPA PM Chapter 2-0700.16, Exhibit 3. These claimants also found it confusing that the discussion of hearing loss had been removed from a PM Chapter entitled, "Eligibility Criteria for Non-Cancerous Conditions" in PM Chapter 2-1000, and moved to the chapter entitled, Establishing Toxic Substance Exposure" particularly when non-cancerous conditions are still discussed in PM Chapter 2-1000.

ASSESSMENT

The websites maintained by DEEOIC, DOE, and NIOSH contain a variety of useful tools and resources. However, some claimants find it difficult to access these tools. In the opinion of the claimants who approach us, the keys to addressing the difficulties encountered trying to access these tools include: (1) ensuring that claimants are aware that these tools exist; (2) advising claimants of the existence of these tools in a manner that helps them appreciate the value of these tools; (3) instructing those who do not have access to the internet on how to obtain the information found on the internet; and (4) advising claimants where and how they can obtain assistance using these tools.

In an effort to ensure that they are aware of these tools, claimants maintain that it would be helpful if DEEOIC and the other agencies that administer the EEOICPA developed a brochure, or other document that briefly described some of the more frequently accessed tools and provided the web address for these tools.

Moreover, while there is a volume of information on DEEOIC's website, the website generally does not explain or provide any context for this information. This makes it difficult for claimants to assess and prioritize where to look for the information they are seeking. Claimants also believe that a brochure or other written guidance should contain a brief description of the available tools. They believe that this would help ensure that they appreciate the value of these tools. Claimants contend that information provided in a tangible, written format would be extremely helpful especially if it was distributed to them early in the claims process, preferably around the time they filed their claim.

Claimants would also benefit from Frequently Asked Questions (FAQs). This year the Joint Outreach Task Group discussed the development of FAQs. In spite of these discussions, NIOSH already has FAQs which are available on its website. When claimants come to us with concerns regarding dose reconstructions and/or the SEC petition process, as part of our response, we often refer claimants to these FAQs. Claimants have told us that they found NIOSH's FAQs to be very helpful. At one time, DEEOIC also had FAQs available online, as well as in hard copy. When they were available, we often provided claimants with copies of DEEOIC's FAQs, and in our experience, claimants found DEEOIC's FAQs to be helpful as well. However, the FAQs developed by DEEOIC are no longer available online or in hard copy. If available, FAQs could address many of claimants' more common concerns and questions.

A frequent concern raised by claimants involves the difficulties they encounter when trying to determine if the information they seek is found in the PM, a bulletin, a circular, or in the regulations. Although it is possible to search for information using the search function found on DEEOIC's webpage, claimants question the effectiveness of this search function. According to some claimants,

using this function can result in a long list of hits, many of which have little, if any relevance to what they are seeking, and are not limited to DEEOIC information. Others complain that the effectiveness of the search function is contingent on one's familiarity with the terms identified by DEEOIC as key words. To address these concerns, claimants contend that as much as possible there should be cross-referencing, i.e., the discussion of an issue in one policy document ought to refer the reader to relevant discussions of the same issue found in other documents. In addition, claimants suggest that it would help if they were provided a more detailed explanation of the difference between bulletins and circulars.

Assistance During the Adjudication Process

There are instances where minimal effort is required by claimants to pursue their claim for EEOICPA benefits. However, in other instances, and for other claimants, the EEOICPA claims process can be very demanding. In our experience, whether a claim requires minimal effort or proves to be demanding oftentimes is not related to the merits of the claim. Rather, the relative ease of a claimant's success often depends on factors over which the claimant has little control. Three of the most common factors that affect the effort the claimant will have to put forth are: (1) the complexity of the case; (2) the claimant's familiarity with the EEOICPA claims process; and (3) the physical and cognitive abilities of the claimant.

Establishing covered employment is an example of an instance where the effort required of the claimant can be impacted by factors beyond his/her control. The DOE has had success obtaining employee rosters (or lists) from DOE contractors. Therefore, the DOE can often provide DOL with the documentation necessary to verify the employment of DOE contractor employees. However, the DOE has not experienced the same success obtaining rosters from DOE subcontractors. Consequently, there are instances when the DOE is unable to provide DOL with the documentation necessary to verify employment of DOE subcontractor employees. When DOL is unable to verify employment, the onus is on the claimant to locate and submit this evidence. Some claimants find it extremely difficult to locate the necessary evidence.

In addition, when a claim proves to be demanding, claimants are sometimes surprised at the effort they have to put forth. A common complaint contends that when some claims were filed, the government agencies, such as the DOE and DEEOIC, emphasized the assistance they would provide in locating records. Yet, as the claims proceeded, there came a time when the DEEOIC stopped emphasizing the assistance that it provided and instead started to remind the claimant that he/she bore the burden of proof, and that it was the claimant's responsibility to submit evidence to support his/her claim. Claimants often come away feeling misled as to the assistance they could expect from the DOE and DEEOIC.

When it comes to assistance, the most common complaint involves assistance developing evidence. Because the development of evidence is such a crucial step in the claims process, we discuss this issue separately in Chapter 5. In this chapter, we address the other common complaints involving assistance to claimants.

A. How much assistance will the government provide?

In questioning the assistance (or lack of assistance) that is provided, most claimants do not specifically mention 42 U.S.C. § 7384v. Nevertheless, claimants are generally aware that the government is to provide assistance in connection with a claim.

Section 7384v(a) reads as follows:

> *ASSISTANCE FOR CLAIMANTS – The President shall, upon the receipt of a request for assistance from a claimant under the compensation program, provide assistance to the claimant in connection with the claim, including –*
>
> > *(1) assistance in securing medical testing and diagnostic services necessary to establish the existence of a covered beryllium illness, chronic silicosis, or cancer; and*
> >
> > *(2) such other assistance as may be required to develop facts pertinent to the claim.*

42 U.S.C. § 7384v(a).[31] Without a doubt, the agencies that administer the EEOICPA provide claimants with some assistance. The complaints to our Office questioned the sufficiency of this assistance. In particular, claimants questioned what Congress meant by the phrase, "[s]uch other assistance as may be required to develop facts pertinent to the claim." A common comment suggests that when this program was created, Congress was well aware of the challenges claimants might face in pursuing EEOICPA claims. Thus, claimants believe that in directing that assistance be provided, Congress specifically intended assistance that would address these foreseeable challenges. In this regard, claimants believe that at the top of any list of foreseeable challenges are situations where: (1) the claimant is at an advanced age or is severely ill, often as a result of exposure to toxic substances; and/or (2) records cannot be located.

B. Claimants do not always know that assistance is available or where to turn for assistance.

In its response to our 2014 Annual Report, DOL outlines some of the assistance that it provides to claimants. In spite of this list many claimants: (1) do not know that this assistance is available, and/or (2) do not know how to obtain this assistance. As a result, throughout the year, claimants contact our Office asking for assistance that they could obtain by directly contacting DEEOIC or one of the other agencies involved in the administration of this program. We are always more than happy to refer these claimants to the appropriate agency. Nevertheless, because they are not aware that assistance is available, we often find that claimants unnecessarily struggle with a problem until they reach out to our Office. As an example, this year we encountered claimants who complained about the difficulties they faced trying to forward materials, such as medical records, to DEEOIC. In talking to these claimants it quickly became evident that they did not realize that a Resource Center could forward their documents to the relevant District Office or Final Adjudication Branch (FAB) office.

In fact, we find that many claimants are not aware of the wide range of assistance that they can receive from the Resource Centers. Many claimants believe that the primary job of the Resource Center is to help with the initial filing of a claim and to engage in outreach. In our experience, once their claim is filed, many claimants do not think to approach the Resource Center for other assistance (other than if/when they want to file a new claim or reopen an old claim).

However, this lack of awareness goes beyond the assistance provided by the Resource Centers. At every step of the claims process we see instances where because they do not know that assistance is available (or did not know how to obtain the assistance), claimants did not utilize the assistance that is available.

The examples discussed above also highlight our experience that when claimants do not know that assistance is available there is a good chance they will not ask for this assistance. Although they were experiencing difficulties forwarding materials to DEEOIC, when they initially contacted our Office, many of these claimants did not specifically ask us if DEEOIC would assist them forwarding these materials. Rather, in the course of our conversation with these claimants, it became clear that they needed this type of assistance as well.

[31] In its response to our 2014 Annual Report, DOL notes that OWCP is only required to provide claims assistance under Part B, but chooses to apply the same standards of assistance to claimants under Part E.

C. The types of assistance sought by claimants

The types of assistance sought by claimants includes:

- **Assistance locating colleagues and former employers** — The Office is routinely contacted by claimants who were notified that DEEOIC was unable to verify their employment. This notification instructs the claimant to submit the evidence necessary to verify their claimed employment. In response to DEEOIC's request for records, claimants remind us that the work at these facilities was usually classified. They also assure us that they oftentimes did not have access to the documents addressing their employment at these facilities. Furthermore, claimants question the reasonableness of asking them to verify their employment when the government often concedes that, in the course of business, relevant records, such as gate records, were destroyed.[32] A frequent argument contends that if the government cannot locate the necessary employment records, there is little chance claimants will be able to locate these records. As a result, there are instances where a claimant's best (and sometimes only) option for verifying employment is to locate former colleagues and/or former employers. Claimants complain that they receive little, if any, assistance in searching for former colleagues and former employers. This lack of assistance is especially troubling since claimants often believe that the government has the resources to assist them in searching for former colleagues and former employers.

  Another complaint that we heard is that it is not fair to force claimants to search for colleagues they have not seen in years when government agencies already possesses the contact information for some of these colleagues. To address this concern, some claimants questioned if the government agencies could provide them with the contact information for former colleagues. However, due to privacy concerns, the government agencies have said they cannot share this information with others. As an alternative, claimants asked if there may be other ways the government agencies could assist in locating former colleagues and former employers. For instance, since it cannot share contact information, claimants asked if the agencies could directly contact former colleagues on their behalf. [33]

- **Guidance/instructions/help –**

  My siblings and I [need] help applying again for the compensation for losing our father. My mother recently passed away in XXX and I had been trying to help her apply or reapply but because of her illness and my disabilities we did not get very far. Could you please find someone to help us see this through…

  - **From a letter received in October 2016**

  ...I am an elderly man on oxygen and trying to go back and forth to medical records departments to bring medical evidence to another facility to drop off several different times...is ludicrous.

  - **From a letter received January 2016**

We are aware of instances where DEEOIC or one of the other agencies involved in the administration of this program attempted to provide the claimant with assistance. However, there are instances when this assistance is not sufficient. A common problem involves instances where due to physical, cognitive, or

[32] At many covered facilities, workers signed in and signed out at the beginning and end of their shifts. In many instances, years before this program was created, these documents were destroyed in the normal course of business.

[33] Many of the claimants who raise this suggestion believe that government agencies have lists of former workers. These claimants want the agencies to review these lists and contact former employees who might be able to verify their employment. In a few instances in the past, claimants wanted to provide the agencies with a name and have the agencies search for the individual.

other challenges, simply telling a claimant what to do is not sufficient. Some claimants need more guidance and/or more assistance. As a result, even after talking to DEEOIC (or one of the other agencies involved in the administration of this program) some claimants turn to us because they still need assistance. For instance, claimants who are aware that a tool is available sometimes contact us because they need someone to show them how to access the tool or how to use the tool. Similarly, we are approached by claimants who need someone to explain the legal, scientific, or medical answers provided by DEEOIC, or to explain the legal, scientific, or medical concepts addressed in a recommended or final decision.

Another complaint contends that in some instances, claimants are only advised of the existence of tools and other assistance if they specifically inquire about the tool or assistance. Claimants feel that there needs to be more emphasis on recognizing their needs and not waiting until they ask for a tool or assistance to tell them where to find it. A similar complaint is raised regarding the options available to claimants during the adjudication process. We encounter claimants who allege that, in spite of numerous interactions with DEEOIC, they were never advised of all of their options (or rights). For instance, we talk to claimants who complain that following the issuance of their final decision, they were advised of their right to file a motion for reconsideration and/or a motion to reopen the claim, but were not advised of their right to appeal to federal district court. [34]

An example that illustrates the ongoing need that some claimants have for assistance involves a claimant and an AR we first encountered two years ago, who in 2016 continued to contact us for assistance. The claimant is the surviving spouse of a worker. The AR is a family member who did not have any prior experience with the EEOICPA when he/she agreed to help the claimant.[35] Throughout the claims process this AR has approached us with questions. Many of these questions were in follow-up to conversations with, or correspondence received from DEEOIC — conversations and correspondence which often generated more questions than they answered. In assisting this AR, our Office frequently found it useful to begin by providing this AR with an overview of where he/she was in the adjudication process.[36]

When initially approached by this survivor, he/she was trying to locate documents to verify the worker's employment at the covered facility. As with many claims filed by survivors, since the worker only casually discussed his/her work with his/her family, the surviving spouse did not know how to locate information about this employment. Further complicating the search for employment records was the fact that the worker had been employed by a number of companies. Thus, it was difficult for the claimant to identify the companies that had performed work at the covered facility.[37] In spite of these challenges, the claimant was able to submit co-worker affidavits attesting to the worker's presence at the job site. The AR again contacted us when in response to the submission of the affidavits, the claimant was informed that he/she needed to verify the existence of a contract between the worker's employer and the DOE (or a DOE contractor). In this conversation, the AR stressed that they did not know where to search for evidence of a contract between the employer and the DOE, and no one seemed able to assist them in such a search. In an effort to assist them, we provided this AR with the contact information for a representative from BT-Med who lived in the relevant area (and who had worked at the same facility).[38]

[34] More than telling a claimant about his/her rights and options, in many instances it is equally as important to tell claimant his/her rights and options at a relevant time in the claims process.

[35] According to the AR, initially another family member was assisting the claimant. The current AR stepped in when that family member became unavailable.

[36] Regardless of the specific request for assistance, our Office almost always finds it necessary to discuss where a claim is in the adjudication process in order for any of the information or answers we provide the claimant to make any sense to them.

[37] This case arose before DEEOIC posted BT Comp's Subcontractor Database on its homepage.

[38] It is unclear if DEEOIC provided this claimant with examples of evidence that would be sufficient to verify the existence of a contract.

Claimants have the right under the EEOICPA to utilize the services of an authorized representative (AR). *See* 42 U.S.C. §§ 7385g and 7385s-9. Consequently, it is frequently suggested that claimants who need assistance should seek the services of an AR. However, we have also talked to claimants who choose to proceed without an AR. Two of the more common reasons claimants proceed without an AR are: (1) they cannot find anyone willing to serve as their AR; and (2) they do not want to spend the money to pay an AR.

ASSESSMENT

Claimants understand that under EEOICPA, they ultimately bear the burden of proof. Yet even if they are not specifically aware of 42 U.S.C. § 7384v(a), some claimants are aware that Congress directed that assistance be provided in connection with their claims. Thus, while they acknowledge that they bear the burden of proof, claimants contend that this does not negate (or lessen) the government's obligation to provide assistance.

In assessing the assistance that is provided to them, claimants question what Congress meant by the phrase, "[s]uch other assistance as may be required to develop facts pertinent to the claim." *See* 42 U.S.C. § 7384v(a)(2). In the opinion of some claimants, since Congress was well aware that records would not always be available, claimants believe that in directing that other assistance be provided, Congress intended the government to provide assistance locating former colleagues and former employers.[39] Similarly, since Congress was well aware that some claimants would be ill or advancing in age when they pursued a claim, there is the belief that Congress intended any other assistance be mindful of these factors, as well.[40]

We frequently find that claimants are only aware of assistance or tools that are available if: (1) someone tells him/her that the assistance or tool is available; or (2) the claimant reviews the website and sees that the assistance or tool is available. Moreover, some claimants never utilize the tools that have been developed to assist them because they do not understand the value of these tools or how to use them. The development of a brochure, or other relevant written guidance, that describes the assistance and tools available and explains how to obtain this assistance (or how and when to use a tool) would increase the chances that claimants utilize the assistance and tools that are available. It would further help if this document was widely distributed and not just posted online. Such a document would also be a help to claimants who do not believe in asking for anything to which they are not entitled, and thus would not ask for assistance unless they knew they were entitled to it.

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[39] Claimants note that in enacting this program Congress found that,

Since the inception of the nuclear weapons program for several decades afterwards, a large number of nuclear weapons workers…were put at risk without their knowledge and consent…

42 U.S.C. § 7384(1)(2). Claimants also note that Congress found that,

Many previously secret records have documented unmonitored exposures to radiation and beryllium and continuing problems at these sites…

42 U.S.C. §7384(a)(3).

[40] Claimant note that in enacting this program, Congress found that,

Since World War II, Federal nuclear activities have been explicitly recognized under Federal Law as activities that are ultra—hazardous…

42 U.S.C. § 7384(a)(1) and that,

Over the past 20 years, more than two dozen scientific findings have emerged that indicate that certain of such employees are experiencing increased risk of dying from cancer and non-malignant diseases. Several of these studies have also established a correlation between excess diseases and exposure to radiation and beryllium.

42 U.S.C. § 7384(a)(5).

There is a particular lack of awareness of the assistance provided by the Resource Centers. The current discussion of the Resource Centers on DEEOIC's website states,

> *The U.S. Department of Labor's Division of Energy Employees Occupational Illness Compensation (DEEOIC) established 11 Resource Centers nationwide to assist workers and their families apply for benefits under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA). Resource Centers are located in Livermore, California; Westminster, Colorado; Idaho Falls, Idaho; Paducah, Kentucky; Espanola, New Mexico; Las Vegas, Nevada; Buffalo, New York; Portsmouth, Ohio; North Augusta, South Carolina; Oak Ridge, Tennessee; and Richland, Washington.*
>
> *The Resource Centers provide valuable information about the claims process to claimants, assist claimants in completing the necessary forms, and transmit documents to the DEEOIC District Offices. The Resource Centers can provide assistance either in person or over the telephone, and thus are able to service individuals who are outside the immediate geographical area. The Resource Centers are tasked with taking initial employment verification steps for all new EEOICPA claims and occupational history development for certain employees.*
>
> *The resource centers also conduct outreach activities to inform the public of benefits and requirements of the EEOICPA.*

We encounter claimants who believe that the role of the Resource Centers is limited to filing claims, helping to verify employment, helping to send documents to the district offices, and engaging in outreach. Claimants have suggested that it would help if efforts were undertaken to better describe and to better publicize the assistance offered by the Resource Centers — and again to widely disseminate this information.

Claimants who utilize the Resource Centers generally find them to be helpful. However, a common complaint contends that as the claim moves from the Resource Center to the District Office, there is a change in emphasis. Some claimants believe that as their claim moved from the Resource Center to the District Office, DOL's emphasis went from helping the claimant to adjudicating the claim. Thus, while the District Office provides some help, there is a belief that helping the claimant is not the District Office's primary emphasis. Claimants believe that the emphasis that the District Office places on the adjudication of claims helps to explain many of their encounters with the District Office. For instance, in the opinion of claimants, the District Office's emphasis on adjudication, rather than on helping claimants, explains why they are not always promptly informed of all of the options available to them. Similarly, claimants believe that this focus on adjudicating the claim helps to explain why claimants are only provided a copy of the reports prepared by DEEOIC specialists after the issuance of the recommended decision. Claimants concede that there are claims examiners (CEs) and hearing representatives (HRs) who provide timely and helpful advice while meeting their obligations to adjudicate a claim. However, this is not always the case. To address this issue, claimants contend that throughout the claims process there needs to be someone whose primary job is to: (1) assist them; (2) advise them of their options and rights; and (3) take the time to clearly answer their questions and explain the legal, medical, and/or scientific concepts they encounter.

Home health care providers have also raised concerns regarding the assistance provided to claimants. Home health care providers do not want to violate DEEOIC's conflict of interest policy.[41] Yet, it concerns them when they encounter claimants who do not receive the compensation and/or care to which they may be entitled. Providers tell us that they encounter instances where simply instructing the

[41] DEEOIC's conflict of interest policy prevents home health care providers from serving as ARs for claimants.

claimant to contact DEEOIC does not resolve the problem. In particular, providers contend that they encounter instances where claimants cannot articulate their concern and/or where DEEOIC did not understand what the claimant was asking.[42] Home health providers would like DEEOIC to clarify the assistance that they can give to claimants when they encounter these situations. In making this request, providers stress that they do not want to become the AR, nor do they want to become intricately involved in the claims process. Rather, they want to be able to provide information to DEEOIC that may be helpful in clarifying the claimant's needs.

[42] Such concerns often involve medical benefits and medical billing issues.

Developing Evidence

Some claimants are able to successfully pursue a claim while only submitting minimal evidence. However, this is not true for every claim. In other instances, claimants are overwhelmed by the evidence they must submit, as well as by the effort needed to develop this evidence. In some instances, the challenge of developing evidence is further complicated by the claimant's lack of familiarity with the program, as well as by the short of period of time the claimant believes he/she has to submit the evidence.[43]

A. Claimants do not know that DEEOIC will search for certain evidence.

There are claimants who start to develop (or accumulate) evidence in support of their claim before filing their claim, or very soon thereafter. Complaints arise when claimants delay filing their claim while searching for evidence only to later learn that after a claim is filed, DEEOIC performs its own search for evidence. For instance, we talk to claimants who complain that it was only after they invested time searching for employment records that they discovered that when a claim is filed DEEOIC obtains employment records from DOE. We also encounter claimants who paid the Social Security Administration (SSA) for copies of SSA earning records only to later learn that DEEOIC could request these records in the routine course of developing their claim. This was the precise argument raised by former employees of the Wah Chang facility. These claimants complained that they were never informed that DEEOIC could request their SSA earnings records, and were frustrated when they learned this only after they had already paid for their own copies. A similar concern was raised by claimants who invested time trying to identify the toxic substances to which they were exposed only to later discover that when a claim is filed, DEEOIC performs in its own search of the Site Exposure Matrices (SEM) database. In many instances, these claimants also did not know of the existence of the SEM database. Claimants argue that it would have saved time, energy, and sometimes money, if they knew in advance that DEEOIC searched for certain records.

There are also occasions when we encounter potential claimants who tell us that they have not filed an EEOICPA claim because they are still developing evidence. Similarly, we are approached by potential claimants who want to know how much evidence they should obtain before filing a claim. Potential claimants are surprised to learn that evidence does not have to accompany the filing of a claim, and that DOL initially searches for some relevant evidence. It would help if potential claimants were aware of the specific searches DEEOIC will conduct on their behalf so they could focus their efforts where needed.

B. The thoroughness of the search for evidence.

When a claim is filed, DEEOIC searches for employment records related to the claim. Some claimants question the thoroughness of this search. It has been noted that in discussing the records it provides to DEEOIC, the DOE states that it searches for virtually anything that has the claimant's name on it. This statement causes concerns because some claimants believe that there are records which may not have the worker's name on them that nevertheless are relevant to the claim. Therefore, when supporting evidence cannot be located, some claimants question if there was a thorough search for relevant records, including relevant records that did not specifically have the worker's name on them.

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[43] Claimants are typically provided 30 days to submit evidence, and then another 30 days if nothing is submitted during the first 30 day period. We frequently find that claimants are unaware from the outset that they will be afforded what amounts to 60 days, or that they can request an extension of time to submit evidence so long as the request is in writing.

Claimants also question the effort undertaken to obtain classified records. DEEOIC has suggested that over the years many records were declassified. In response to this assertion, claimants argue that DEEOIC's assertion does not indicate that all relevant information has been declassified. In particular, even though general information relating to their employment may have been declassified, many claimants question whether the detailed information relating to their specific employment and possible exposures was declassified.

Another question is whether former employers have turned over to the government all relevant information. Among the claimants who raised this issue are former employees of Area IV of the Santa Susana Field Laboratory. While employment information has been turned over to the government, former Santa Susana employees argue that the government has not obtained the documents necessary to accurately interpret this employment information. Claimants maintain that without this additional documentation, DEEOIC cannot make accurate determinations regarding employment status or verification.

Claimants who question DEEOIC's efforts to obtain relevant evidence sometimes undertake their own efforts to obtain relevant evidence. As a result, we are approached by claimants who encounter difficulties obtaining what they believe to be relevant evidence. For example, some claimants file a Freedom of Information Act (FOIA) request for records. Claimants often do this because they believe that a FOIA request will yield additional documents. Complaints arise when, in response to the FOIA request, the claimant is informed that a monetary fee must be paid before the information is released. Claimants argue that imposing a fee for information related to their employment is not consistent with the statutory directive to provide assistance to develop facts pertinent to the claim. *See generally*, 42 U.S.C. § 7384v(a)(2). Some claimants also argued that the fee was excessive.

On the other hand, we also encounter claimants who indicate that they only filed a FOIA request when advised by DEEOIC or DOE that such a request was needed to obtain the documents they were seeking. These claimants view being told to file a FOIA request to obtain relevant evidence as the "run around." These claimants could not understand why they had to file a FOIA request in order to obtain information that had a bearing on their claim, and complain that these requests take a long time to receive a response.

Employees of Wah Chang contacted us when former employees were told they would have to pay a fee in order to obtain verification of their employment from the corporate verifier.[44] Former employees of this facility expressed frustration that they were being charged a fee for something that other corporate verifiers in the nuclear weapons complex provided to DOL as a matter of routine business.[45] They also feared that this fee would cause some claimants to pursue their claims without obtaining this document, which is often necessary to confirm employment. Former employees of Wah Chang were relieved when this policy was eventually rescinded by the corporation. However, some believe that this policy was only rescinded when it received bad publicity in the media and was criticized by elected officials.[46]

In their efforts to ensure that all relevant information is available, claimants frequently remind us that because they ultimately bear the burden of proof, it is essential that they have access to the relevant records and documents.

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[44] Wah Chang is an AWE, and as such, the corporation that owns the facility provides employment verification for claimants, and is known as the "corporate verifier."

[45] Corporate verifiers confirm an employee's employment at the facility.

[46] According to some claimants, when they initially complained to DEEOIC about the fee, DEEOIC responded with a letter essentially stating that there was nothing that could be done. Yet, in the opinion of these claimants, after the negative publicity and criticism from elected officials, DEEOIC played a role in encouraging the corporation to reverse its position on charging this fee.

C. Lack of guidance and/or assistance.

When it comes to developing evidence, a frequent concern focuses on the lack of guidance and/or assistance provide to claimants. Claimants complain that when a claim is filed, they do not receive specific guidance on the evidence they will need to submit. Some claimants further noted that when they asked DEEOIC for better guidance on developing evidence, the guidance they received was not very helpful. In asking for better guidance, claimants noted that they hoped to be provided with concise written guidance, or with a sample of the evidence that needed to be submitted. Instead, claimants complained that the guidance they received merely repeated the language of the statute (or regulation); was the same language that initially prompted them to ask for better guidance; or was otherwise vague.

o Lack of guidance/assistance developing medical evidence.

Similar complaints concerning the lack of guidance/assistance in developing evidence are raised by and on behalf of treating physicians. Claimants believe that the lack of guidance provided to treating physicians when preparing medical reports tends to ensure that DEEOIC will deem the report prepared by the treating physician to be inadequate.[47] Claimants also complain that asking a treating physician for a medical opinion without providing that physician with adequate guidance often leads to tension between the treating physician and the claimant. According to claimants, when the treating physician needs additional guidance, the physician frequently turns to the claimant for this guidance. And in turning to the claimant for this guidance, the physician sometimes reminds the claimant that the report is being written on his/her behalf. Tensions arise when the claimant is unable to provide any guidance to their doctor or health care provider.

This is a frequent complaint that we hear when a treating physician prepares an initial medical report and DEEOIC determines that the report is insufficient. Claimants tell us that before trying to revise his/her initial report, the treating physician often wants a better understanding of why the initial report is insufficient. The inability to provide the treating physician with a satisfactory explanation often leads to tension, and/or the physician's refusal to revise his/her current report or to write an addendum report.

In light of the problems they encountered obtaining guidance, some claimants were encouraged by statements made by DEEOIC during various meetings of the Advisory Board on Toxic Substances and Worker Health (ABTSWH).[48]

> *Well, we will look at the SEM exposure information to help us frame a basis for exposure information. And if there's a connection in SEM between certain toxic substances that we see in the SEM and the condition that's being claimed, that could further frame the evidence. But what we have to do with that from there, is we would refer that to the treating physician, usually first, and say, here's what we have determined is a likely exposure related to this condition, can you provide us with your medical*

[47] Some claimants noted that the only guidance they could give to the treating physician was the "development letter" they received from DEEOIC. Even then, these claimants stressed that they were not able to elaborate on the information that DEEOIC was seeking. However, in many other situations we encountered claimants who did not keep a copy of the "development letter," or did not think to provide the treating physician with a copy of this letter.

[48] The ABTSWH was mandated by the National Defense Authorization Act of 2015. The President delegated responsibility to establish and maintain this Board to the Secretary of Labor. This Board advises the Secretary of Labor with respect to technical aspects of the EEOICPA program. These technical aspects are:

- The site exposure matrices of DOL;
- Medical guidance for claims examiners for claims under Part E with respect to the weighing of the medical evidence of claimants;
- Evidentiary requirements for claims under Part B related to lung disease; and
- The work of industrial hygienists and staff physicians and consulting physicians of DOL and reports of such hygienists and physicians to ensure quality, objectivity, and consistency.

opinion regarding whether it was a significant factor and causing it to lead to an aggravating condition. [Emphasis added].

- **From the ABTSWH meeting April 26, 2016, transcript pages 185 – 186.**

We will look at the evidence and say, 'Well, actually, this person was employed there for a couple of years. We don't have a lot of evidence of exposure, heavy exposure to certain toxic substances this doctor might have said.

What we would normally do in that circumstance, especially if it was a treating doctor, is go back and say, 'Here's the evidence that we have,' if we have evidence to the contrary or we have specific evidence we can share with that doctor and say, you know, 'This is the amount of exposure.' Because oftentimes they'll assume they worked there for 20 years, when maybe they only worked there for two. That's one kind of very objective thing that we can tell them we know.

- **From the ABTSWH meeting April 27, 2016, transcript pages 139 – 140.**

Claimants are hopeful that these statements by DEEOIC indicate that treating physicians will now be provided with the opportunity to review the results of DEEOIC's SEM searches or other exposure evidence in the claimant's file. Claimants further hope that this opportunity is extended to treating physicians as early in the claims process as possible. Claimants argue that it would be even better if, in addition to the results of DEEOIC's SEM searches, DEEOIC provided the treating physician with the opportunity to review the reports prepared by DEEOIC's specialists — and that treating physicians were given this opportunity prior to the issuance of the recommended decision. These hopes are often raised by claimants who complain that both they and their treating physician first learned of DEEOIC's SEM searches and/or the reports prepared by DEEOIC's specialists when they read about these searches and reports in the recommended decision denying their claim.

A continuing source of complaints is situations where the claimant submits the medical causation report of his/her treating physician and DEEOIC determines that the claim should still be forwarded to other specialists. Claimants argue that it is unfair to forward the claim to DEEOIC specialists, such as industrial hygienists (IHs) and toxicologists, and to then allow a physician selected by DEEOIC to comment on the reports by these specialists without providing the treating physician with the same opportunity.[49] Since the physician selected by DEEOIC is given the opportunity to review the reports prepared by the specialist, as well as the exposure evidence, and this same opportunity is not extended to the treating physician, claimants do not find it surprising when the CE decides to rely upon the medical opinion of the physician selected by DEEOIC over the opinion of the treating physician.[50] Claimants who disagree with a recommended decision can file objections and in doing so, can use that opportunity to have their treating physician review the SEM database searches and the reports prepared by specialists as long as they ask for copies of the SEM database searches. However, claimants do not believe that this corrects the damage done by providing DEEOIC's physician with such an advantage in the first place. Claimants strongly believe that once a CE recommends denial of a claim, it is a long, uphill battle to change the decision.

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[49] Claimants often complain that both they and their treating physician first learned that the claim had been forwarded to a specialist and/or Contract Medical Consultant when they read about it in the recommended decision.

[50] Claimants also complain that while the physician selected by DEEOIC was given the opportunity to review the report prepared by the treating physician, prior to the issuance of the recommended decision, claimant's treating physician was not extended the same opportunity to review the exposure evidence and specialist's reports.

Claimants hope that the recent statements made during various meetings of the ABTSWH indicate that CEs will provide treating physicians with copies of DEEOIC's SEM reports, exposure records, and the reports of DEEOIC's specialists; and that they will be provided before the CE issues their recommended decision.

- **The information presented to a DEEOIC specialist.**

Another concern involves the reports prepared by specialists retained by DEEOIC. In particular, it concerns some claimants that the CE develops the questions and determines the specific evidence that is presented to these specialists.[51] While the CE may have a working knowledge of the EEOICPA claims process and of the critical issues that must be addressed, claimants question whether CEs have the medical and/or scientific expertise to develop questions for specialists and physicians; and claimants question whether CEs have the requisite knowledge to determine the evidence that ought to be provided to the specialist.[52]

In furtherance of these concerns, claimants made sure that our Office was aware that the ABTSWH recently recommended that instead of being restricted to the information that the CE believes is relevant, the entire case file should be made available to both the IHs and the contract medical consultants (CMCs) when a referral is made for an expert opinion and report. In bringing this recommendation to our attention, claimants noted that the ABTSWH's rationale for this recommendation was precisely what they had argued:

> Claims examiners typically do not have a medical, occupational health, or industrial hygiene background…Claims examiners may inadvertently omit important medical and/or exposure details from the material selected for industrial and medical review and thus fail to facilitate a comprehensive and pertinent evaluation of the claim. For some claims, a more complete view of available medical and exposure information may lead to improved decision-making.
>
> - **Recommendation #8 by the Advisory Board on Toxic Substances and Worker Health – Adopted at October 17 – 19, 2016 Meeting.**

ASSESSMENT

There is no doubt that there is assistance available that can help claimants with the development of evidence. However, while assistance is available, as with most of the resources available to claimants: (1) claimants are not aware that this assistance is available; (2) if they are aware that this assistance is available, claimants do not always know how to access or use this assistance; and (3) the available assistance is not always sufficient to meet the needs of claimants. To address their concerns with assistance developing evidence, claimants have the following suggestions:

1. It would save time, energy, and sometimes money if claimants knew in advance the evidence DEEOIC will attempt to obtain from DOE and other sources. Claimants believe that knowing this would help avoid situations where they search for evidence only to later discover that DEEOIC conducted its own search for this same evidence.

2. Claimants and treating physicians would greatly benefit from early and better guidance

[51] DEEOIC employs and/or contracts with the following specialists to generate reports and opinions on specific cases: contract medical consultants (CMCs); Industrial Hygienists (IHs); toxicologists; nurse consultants; and SEM contractors.

[52] Per DEEOIC policy, the claim file is not provided to the DEEOIC specialists. Instead, the CE determines which medical, employment, and exposure evidence from the claim file is relevant and then sends only that evidence to the specialists.

in developing evidence. In this regard, claimants stress the need for written guidance. A recurring complaint involves situations where a treating physician who needs more guidance wants DEEOIC to call him/her to provide this guidance, while DEEOIC takes the position that if the physician wants more guidance the physician needs to call DEEOIC.[53] Claimants believe that these standoffs could be avoided if they could provide the physician with specific written information, guidance, or examples of sufficient evidence.

3. Claimants believe that both they and their treating physicians should be given an opportunity to review DEEOIC's SEM search results, their employment records, and the reports prepared by DEEOIC's specialists prior to the issuance of the recommended decision. In the past, claimants complained that they had to file a written request for a copy of the reports prepared by specialists and relied upon in recommended decisions. This caused problems, especially for claimants who did not know that they had the right to request a copy of these reports or other documents from their claim file, and who only learned of this right at a later time, usually after a denial was issued in their case. In its response to our 2014 Annual Report, DOL stated that in FY 2015 it began to include with the recommended decisions copies of specialist reports. Claimants see it as an improvement that DEEOIC now states that it will include copies of these reports with the recommended decision to deny a claim when the decision relied upon that report. Nevertheless, in calendar year 2016, we talked to claimants who alleged that they received a recommended decision that did not include a copy of the specialist reports that were relied upon to deny their claim. In addition, since the physicians selected by DEEOIC are given the opportunity to review the SEM searches, exposure and employment records, as well as the reports prepared by DEEOIC's specialists prior to writing their reports, claimants believe that their treating physician should have the same opportunity.

Claimants also find it difficult to reconcile DEEOIC's recently stated policy of including copies of specialists' reports with the recommended decision, and the statement made by DEEOIC (during various ABTSWH meetings) that suggests a policy of first providing the treating physician with the results of the SEM search and the report by the IH. Therefore, claimants would like clarity as to when in the claims process they and their treating physician will be provided with SEM searches and the reports prepared by IHs (as well as with the reports prepared by the other specialists).

In its response to our 2014 Annual Report, DOL also stated that it was important:

> …to assist claimants early in the adjudication process; thus OWCP is committed to providing claimants – prior to any written decision— an explanation and/or copies of the policies and procedures that are relevant to their cases. Likewise, in FY 2015, OWCP began including with the recommended decision copies of specialist reports (e.g., industrial hygienist, toxicology and Contract Medical Consultant [CMC] reports) that were relied upon in issuing a recommended decision.

See DOL Response to EEOICPA Ombudsman's Report (Calendar Year 2014—Most Recent Final Report/Response) page 3, in Appendix 4.

[53] Many of these situations involved instances where the physician had written an initial report and DEEOIC determined that the initial report was insufficient.

Claimants are pleased to hear that OWCP is committed, prior to **any** written decision, to providing an explanation and/or copies of the policies and procedures that are relevant to their cases. Still, claimants question how this will work. Are claimants required to request a copy of these policies and procedures? Or will someone contact the claimant to identify and explain the policies and procedures that are relevant to his/her claim? There is a fear that claimants will be expected to know the policies and procedures relevant to their claim, and if this is true, claimants who are not familiar with the program will not know what to ask for.

Weighing Evidence

We are routinely approached by claimants who disagree with the CE's or HR's assessment of the evidence in their case. Concerns with the CE's or HR's assessment of the evidence are often raised in conjunction with the denial of a claim. Nevertheless, in our experience, it would be wrong to conclude that the only basis for these complaints is the claimant's disagreement with the outcome of the claim. Rather, we encounter instances where claimants question the rationale (or lack of a rationale) for crediting certain evidence over other evidence.

A. The weight given to affidavits prepared by claimants and family members.

The federal regulations state that,

> If the only evidence of covered employment is a self-serving affidavit and DOE or another entity either disagrees with the assertion of covered employment or cannot concur or disagree with the assertion of covered employment, then OWCP may reject the claim based upon the lack of evidence of covered employment. 20 C.F.R. § 30.112(b)(3).

Claimants raised a number of concerns with this provision.

1. Claimants take exception with the phrase "self-serving," as they find it insulting.

2. Claimants further report that they are equally troubled by DEEOIC's practice of rejecting affidavits prepared by claimants and family members solely because these affidavits are not supported by other evidence. In explaining this approach to affidavits prepared by claimants and family members, DEEOIC notes that additional evidence must be submitted in order for a claimant to meet his/her burden of proof. In response to this statement, claimants complain that this blanket rule adopted by DEEOIC means that affidavits prepared by claimants and family members are not reviewed on their own merit to determine if they constitute credible evidence. In the opinion of some claimants, DEEOIC's approach to affidavits prepared by claimants and family members is a reflection of DEEOIC's mistrust of claimants.

3. Claimants also complain that DEEOIC's approach to affidavits prepared by claimants and family members fails to recognize that there are instances where through no fault of the claimant, relevant records are not available. Thus, it has been suggested that DEEOIC's approach to affidavits prepared by claimants and family members takes what is already a difficult burden and makes it that much harder.

4. Some claimants contend that DEEOIC's approach to affidavits prepared by claimants and family members is part of an effort by DEEOIC to make the adjudication process easier for CEs and HRs. This view is based on the belief held by some claimants that in developing its approach to affidavits prepared by claimants and family members, DEEOIC realized that there would be instances where CEs and/or HRs would not be familiar with the facility in question, and thus would not be in a good position to judge the credibility of affidavits prepared by former workers. We especially hear this view from claimants who assure us that in preparing affidavits, they purposefully included information that only someone who worked at the facility would know. It troubles these claimants when their affidavits are not accepted merely because there

is no supporting outside evidence. These claimants strongly believe that if these affidavits were reviewed by someone with knowledge of the facility, they would be deemed credible evidence.

5. Claimants also find it troubling that documents prepared by the facilities are usually accepted by DEEOIC, and this is true even when there is evidence suggesting that the facility was not always forthright in providing accurate or complete information. Yet affidavits prepared by claimants are deemed suspect simply because they are prepared by the claimant.

B. More than a preponderance of the evidence.

The federal regulations state that, except as otherwise provided, the claimant bears the burden of providing each necessary criterion by a preponderance of the evidence. *See* 20 C.F.R. § 30.111(a). Claimants complain that there are times when they are required to meet a burden of proof that is greater than the preponderance of the evidence standard. In particular, claimants argue that there are times when they are required to prove certain elements of their claim with near certainty. This concern is frequently raised by subcontractor employees who must verify the existence of a contractual relationship between their employer and DOE (or a DOE contractor). In a common scenario that we encounter, subcontractor employees cannot understand why establishing that they worked onsite at a covered facility during a period when the facility was under DOE control is not sufficient to infer that their employer had a contract with DOE (or a DOE contractor). In the opinion of these claimants, the evidence DEEOIC is willing to accept as verification of a contractual relationship often means that claimants must verify this criterion with near certainty by producing the actual contract.

Another instance where claimants question the evidence needed to verify a fact involves the level of exposure sustained by Part E claimants. Claimants and ARs have complained that they are seeing an increased emphasis by DEEOIC on the level of exposure sustained by Part E claimants. With respect to Part E of the Act, claimants must establish:

(A) It is at least as likely as not that exposure to a toxic substance at a Department of Energy facility was a significant factor in aggravating, contributing to, or causing the illness; and

(B) It is at least as likely as not that the exposure to such toxic substance was related to employment at a Department of Energy facility.

See 42 U.S.C. § 7384s-4(c). Claimants and ARs understand that it is necessary to establish that the worker was exposed to the toxic substance(s) at work and that such exposures were at least as likely as not that this exposure was a significant factor in aggravating, contributing to, or causing the illness (and that it is at least as likely as not that the exposure was related to DOE employment). Still, claimants and ARs have concerns with what they feel is a new over-emphasis on being required to prove the level of exposure.

The concerns we hear suggest that:

1. Claimants usually were not privy to such information. Thus, it is unreasonable to expect claimants to produce evidence establishing the level of exposure.

2. To ascertain levels of exposure, DEEOIC often refers to manuals and other documents prepared by employers. These manuals often outline how operations were intended to run, not how operations actually ran.

3. In emphasizing levels of exposure, DEEOIC often focuses on whether exposure to a toxic substance caused the illness, and gives little or no consideration to whether the exposure aggravated or contributed to the illness.

In the March 27, 2013, *Review of the Department of Labor's Site Exposure Matrices Database,* issued by the Institute of Medicine (IOM) of the National Academies, the IOM recognized that the toxic substance—disease links in SEM only analyzed whether the toxic exposure caused an illness, **and that SEM cannot be used to analyze whether toxic substance exposure aggravated or contributed to an illness**. This finding by the IOM further supports the concern by some claimants that the focus by DEEOIC in its exposure analysis is on whether exposure caused an illness and gives little, if any, attention to whether exposure to a toxic substance aggravated or contributed to an illness. *See IOM Report, page 4.* (Emphasis added).

Claimants hope that this lack of emphasis on the contribution and aggravation levels of exposure is addressed by the ABTSWH.

C. Claimant's evidence is more carefully scrutinized.

Some claimants believe that the evidence they develop is more closely scrutinized than the evidence developed by or on behalf of DEEOIC (as well as more closely scrutinized than evidence submitted by the facilities). A common complaint contends that some CEs and HRs give more weight to certain experts simply because they were selected by DEEOIC. Claimants also complain that there are instances where little, if any, consideration is given to factors such as the credentials of the various physicians, or the length of time (or whether) the physician personally examined the patient. It is also suggested that DEEOIC rarely, if ever, questions the credibility of the documents prepared by facilities/employers.

D. Decisions not well reasoned.

DEEOIC states that it continues to take steps to ensure that decisions contain adequate reasoning and documentation for the conclusions reached. Still, the Office received complaints questioning the reasoning and/or thoroughness in decisions.

- **Older decisions** — In some instances, claimants encounter problems because of previously- issued recommended and/or final decisions that were not well reasoned. For example, because the previously issued decision was not well reasoned, it can sometimes be difficult for the claimant to determine the evidence needed to support a request for reopening of his/her claim. And when they encounter this problem, claimants contend that it can be difficult to find someone willing to help them understand the vague reasoning provided in these earlier decisions.[54]
- **Variations in the quality of decisions** — Relying on their experience with multiple claims, we talk to ARs who suggest that the quality of decisions can vary from CE to CE (and from HR to HR). Thus, while some recently issued decisions show improvement, ARs suggest that this improvement is not agency-wide.
- **Unexplained use of policy determinations in decisions** — Many of the complaints alleging that decisions were not well-reasoned involve claims that were decided by relying upon policy determinations. In particular, complaints arise when DEEOIC relies upon a policy determination to make its decision and the claimant never knew that this policy existed, or did not realize that his/her claim was impacted by the policy. Claimants find it troubling when little, if any, explanation is provided for these policies, and/or there is little, if any, explanation for how the claim was impacted by the policy. Moreover, in instances where an explanation is

[54] Most claimants do not contact us specifically asking for help understanding a previously issued decision. Rather, in asking questions about his/her request to reopen their claim it becomes clear that the claimant does not understand the basis for the earlier denial.

provided, some claimants complain that they do not understand the explanation, or that the explanation makes no sense to them. Claimants argue that it is difficult to determine if they agree or disagree with a policy (or to determine if the policy is properly applied) when there is little, if any, explanation for the policy.

A good example of this concern involves hearing loss. We are approached by claimants who complain that in spite of having more than ten consecutive years of exposure to organic solvents related to bilateral sensorineural hearing loss prior to 1990, their claims were denied because they were not employed in one of the labor categories outlined in Exhibit 3 of PM Chapter 2-0700. In raising their complaints, these claimants note that while the decision issued by DEEOIC cites to Exhibit 3, neither Exhibit 3, nor the decision explains the rationale for this denial. This was the precise concern raised by a claimant who worked as a laborer and had more than ten consecutive years prior to 1990, of exposure to toluene, one of the specific organic solvents identified in Exhibit 3. In complaining to us this claimant noted that, pursuant to the policy outlined in Exhibit 3, a claim for bilateral sensorineural hearing loss filed by a janitor who was exposed to toluene for more than ten consecutive years prior to 1990 would be accepted. Thus, it troubled this claimant that neither Exhibit 3, nor DEEOIC's decision explained why his claim, where he worked as a laborer and was exposed to this same toxic substance for more than ten consecutive years prior to 1990 was summarily denied because of his labor category. In the opinion of this claimant, merely citing to the policy did not satisfactorily explain why his claim was denied.

- **Claimant evidence not acknowledged/discussed** — Our Office was contacted by claimants who expressed frustration that the evidence they submitted to support their claim was not acknowledged when received by DEEOIC; was not acknowledged, discussed, or weighed in their decisions; and/or was not acknowledged or discussed in their Request for Reconsideration or Reopening. Claimants consistently contact our Office seeking assistance in determining if DEEOIC received their evidence, and if so, inquiring as to how they can find out exactly why it was determined to be insufficient.

ASSESSMENT

- Claimants hope that the reference to "self-serving" is deleted from the regulations. Moreover, claimants contend that affidavits prepared by workers and close family members ought to be reviewed and judged on their credibility — as opposed to being summarily denied unless they are supported by other evidence in the record. In its response to our 2014 Annual Response, DEEOIC states that "[t]he claimant must provide some evidence of their employment..." Claimants argue that a credible affidavit ought to be sufficient, without other supporting evidence, to verify employment.[55]
- DEEOIC has outlined the efforts undertaken to address the concerns involving the weighing of evidence. As we note, there has been improvement. We hope that this improvement continues and is consistent, particularly as it related to acknowledging, discussing, and weighing all of the evidence submitted by claimants.

[55] The concerns about the value of affidavits prepared by the worker are usually raised in conjunction with efforts to verify employment.

Due Process

The use of the Procedure Manual (PM), bulletins, circulars, and other policy guidance.

In response to the concerns raised in our 2014 Annual Report addressing the use of the PM, bulletins and circulars, DOL stated, in part, that,

> While these documents do not have the 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 or law, and they provide the foundation for program implementation and operations...
>
> - DOL Response to 2014 Annual Report to Congress, pg. 6 (October 14, 2016). (Emphasis added). *See* Appendix 4.

In spite of DOL's response, claimants maintain that there are instances when these documents are given the weight and force of law. In support of this argument, claimants contend that there are instances when the only reason given by DEEOIC for reaching a legal conclusion is a citation to a PM provision, bulletin, or circular. Claimants also believe that there are instances when the issuance of the PM provision, bulletin, or circular effectively increased the burden of proof on their claim.

- **Circular No. 15-06**

One instance where claimants argued that a circular increased their burden of proof was EEOICP Circular No. 15-06. This Circular addressed post-1995 occupational toxic exposure guidance and announced that in light of significant improvements that occurred throughout DOE facilities after 1995, absent compelling data to the contrary, it was unlikely that covered Part E employees working after 1995 would have been significantly exposed to any toxic agents at a covered facility. [The text of EEOICPA Circular 15-06 can be found in Appendix 6]. Claimants began to object to this Circular as soon as it was announced. In particular, claimants:

- Questioned DEEOIC's basis for concluding that after 1995 there had been significant improvements regarding exposures to all toxic substances throughout all DOE facilities.
- Noted that the Part E burden of proof, by statute, only requires that it be at least as likely as not that exposure to a toxic substance was a significant factor in aggravating, contributing to, or causing the illness. Claimants argued that the requirement in Circular No. 15-06 for "... compelling probative evidence of exposures beyond any threshold level..." significantly increased their burden of proof beyond the statutory requirements.
- Complained that the EEOICPA claims process did not have an effective mechanism for challenging this Circular. Based on their experience with other policies, claimants questioned if a CE or HR would independently review the validity of Circular 15-06. In particular, claimants felt that if a CE or HR were to address the validity of Circular 15-06, the CE or HR would find this Circular to be valid simply because it was issued by DEEOIC and they were required to follow it.

On February 20, 2015, DEEOIC issued an EEOICPA Program Memorandum explaining that Circular 15-06 was based on the issuance of DOE Order 440.1, "Worker protection Management for DOE Federal and Contractor Employees" in 1995. In justifying its reliance on this Order, DEEOIC explained that: (1) after years of effort to improve worker safety with the issuance of Order 440.1 DOE established a standardized Occupational Safety and Health protocol for all DOE federal and contractor employees;

(2) DOE began a series of enforcement actions known as "Tiger Teams;" and (3) September 30, 1992 marked the end of underground weapons testing and with it, the operational focus of DOE shifted from nuclear weapons production to one of site closures and remediation.

For many claimants, the rationale outlined in DEEOIC's Program Memorandum did not sufficiently explain Circular No. 15-06. In particular, claimants argued that simply because guidelines had been issued by DOE did not mean that these guidelines had been fully (or successfully) implemented or enforced. Moreover, in light of abundant evidence of toxic accidents and other problems at some of these facilities after 1995, including incidents that only became known when reported in the newspaper or revealed by a whistleblower, claimants questioned whether it was reasonable to conclude that absent compelling evidence it was unlikely that covered Part E employees working after 1995 would have been significantly exposed to any toxic agents.

Claimants felt vindicated in raising these concerns when the ABTSWH adopted a recommendation at its October 17 – 19, 2016, meeting that DEEOIC rescind Circular No. 15-06. Claimants were especially pleased that the ABTSWH's rationale for this recommendation mirrored the concerns they had raised (although they conceded that the ABTSWH articulated their recommendation in more scientific terms). Nevertheless, claimants were happy to see that in its rationale, the ABTSWH concluded that an empirical basis for Circular No. 15-06 had not been provided and that it was highly unlikely that an empirical support for this circular could be provided.

- **Hearing Loss**

Claimants argue that the discussion of hearing loss outlined in Exhibit 3 of Chapter 2-0700 of the PM is treated as a law or regulation, and not simply as policy guidance.

According to Exhibit 3 of PM Chapter 2-0700, Part E causation for hearing loss can be presumed if:

1. The file contains a diagnosis of bilateral sensorineural hearing loss,
2. The claimant has verified covered employment within at least one of the specified job categories for a period of 10 consecutive years completed prior to 1990, and
3. Evidence establishes that the employee was concurrently exposed to at least one of the specified organic solvents.

See Federal EEOICPA Procedure Manual Chapter 2-0700, Exhibit 3. In asserting that this PM Exhibit is given the effect of law, claimants note that Exhibit 3 states, in part,

> This policy guidance represents the **sole evidentiary basis** a CE is to use in making a decision concerning whether it is "at least as likely as not" that an occupational exposure to a toxic substance was a significant factor in aggravating, contributing to or causing a diagnosed bilateral sensorineural hearing loss. Claims filed for hearing loss that do not satisfy the conditions for acceptance **outlined in this procedure cannot be accepted**, because these standards represent the only scientific basis for establishing work-related hearing loss due to a toxic substance. [Emphasis added].

Exhibit 3 further states that claims for hearing loss related to solvents other than those outlined in the Exhibit can be forwarded to the National Office for specialist review. However, based on claims brought to our attention, the same option for referral to the National Office for specialist review is not available for claimants who wish to challenge the requirement that they have ten consecutive years of employment prior to 1990, or that they must have worked during that time period in one of the specified labor categories.

Claimants question the scientific basis for: (1) limiting hearing loss claims to 22 specific labor categories; and, (2) requiring 10 consecutive years of employment prior to 1990 in order for bilateral sensorineural hearing loss to be related to exposure to organic solvents.[56] They also question whether there is a medical and/or scientific rationale for distinguishing between workers who were employed in one of the specified job categories, and those who did not work in one of these job categories. Moreover, another concern notes that in adjudicating hearing loss claims DEEOIC focuses on job categories, and does not consider work processes and/or buildings/areas. In questioning this focus on labor categories when adjudicating hearing loss claims, claimants point out that in the discussion of SEM database searches, the PM states that,

> In order to effectuate a thorough and proper search, it is necessary for the CE to develop SEM queries from multiple criteria, including: labor category; process and health effect. While labor category is the preferred field to begin a search, it is not the only field that should be investigated. *See* Federal (EEOICPA) Procedure Manual, Chapter 2-0700.10 (November 2015).

Claimants find it troubling that while DEEOIC recognizes that when using the SEM, labor categories is not the only field that should be investigated, DEEOIC's policy on hearing loss focuses on labor categories and does not consider other variables such as work process or building/area where the employee worked.

- **Other Hearing Loss Examples**

In one particular case from 2016, the claim filed by a claimant with verified covered employment at a covered DOE facility for approximately 40 years was denied when his argument that his labor categories were analogous to those listed in Exhibit 3 was rejected. His final decision stated in the Conclusions of Law,

> The FAB has no authority to consider jobs that may be similar to the ones specified in the EEOICPA Procedural Manual. **This policy guidance represents the sole evidentiary basis a CE is to use in making a decision regarding whether it is "at least as likely as not"** that an occupational exposure to a toxic substance was a significant factor in aggravating, contributing to, or causing a diagnosed bilateral sensorineural hearing loss. [Emphasis added].

The statement above by the FAB indicating that it has no authority to consider labor categories that may be similar to the ones specified in the Procedure Manual is the norm for the majority of these cases that are brought to our attention. However, in at least one case brought to this Office's attention, the claimant proved that his job duties were similar to one of the listed labor categories despite the fact that his job title was not on the labor category list. In this one instance, the claim was accepted.

Another case involved a claimant who worked in one of the labor categories included on the list found in Exhibit 3, but because he worked from January 2, 1981 through 1990, his claim was denied because he did not have 10 consecutive years of employment prior to 1990. This claimant found it frustrating that the overtime work he performed during this time period was not taken into consideration and was rejected without explanation. This claimant noted that the FAB decision simply concluded,

> You have not submitted evidence that would establish two additional years of employment prior to 1990 to satisfy the criteria for hearing loss. Thus, the evidence you submitted is not sufficient to establish that you meet the **programmatic requirements** for hearing loss under Part E of the Act. [Emphasis added].

[56] To date, we have not received any complaints challenging the types of organic solvents identified in Exhibit 3.

Claimants also complain that Exhibit 3 makes it very difficult to challenge determinations made in claims for hearing loss. Specifically, claimants note that Exhibit 3 states that claimants can challenge the scientific underpinning of the DEEOIC hearing loss policy. In the opinion of claimants, having the right to challenge the scientific underpinning of DEEOIC's policy on hearing loss is very different from having the right to submit medical and/or scientific evidence establishing that, in a particular claim, a worker's bilateral sensorineural hearing loss is related to toxic exposures sustained while engaged in covered employment. Claimants question the necessity for challenging the scientific underpinning of DEEOIC's hearing loss policy in cases where the evidence may not meet the hearing loss "presumption" in the PM, but should otherwise be analyzed under the Part E causation standard. Claimants believe that failure to meet the presumptive criteria should not serve as a bar to compensation where the criteria in Exhibit 3 is strictly policy guidance and is not part of a regulatory or statutory change. This issue arises when workers have exposure to a toxic substance linked to hearing loss and submitted medical evidence linking their illness to this exposure. Claimants argue that asking them to challenge the scientific underpinning of DEEOIC's hearing loss policy: (1) increases the burden of proof placed on them; (2) is oftentimes beyond their capabilities; and (3) because of the need to develop/locate scientific evidence, can be a great financial burden.

According to DEEOIC, documents such as Exhibit 3 are meant to provide guidance to staff and the public on how DEEOIC interprets the statutes and regulations. Claimants would like DEEOIC to identify the law or rule being interpreted when it issues PM guidance foreclosing certain workers who are diagnosed with bilateral sensorineural hearing loss and otherwise meet the Part E standard of causation from presenting evidence to establish that their illness is significantly related to their exposure to organic solvents at a DOE facility. This is precisely where claimants allege that policy is given the force and effect of law by prohibiting them from having the evidence analyzed under the Part E causation standard.

In light of their concerns with DEEOIC's policy on hearing loss, claimants are pleased that the ABTSWH has a Working Group on Presumptions and that among the presumptions being considered by this Working Group is the hearing loss presumption. Although this Working Group has not, as of yet, made recommendations, claimants were pleased to hear various members of the Board indicate that in their experience with other presumptions, individuals who did not meet a presumption had the opportunity to meet alternative criteria. *See* ABTSWH Meeting, Tuesday, October 18, 2016, transcript pages 114 and 134. Claimants look forward to ABTSWH's recommendations addressing hearing loss.

- **Part E claims for chronic beryllium disease (CBD)**

In 2011, claimants began to complain of what they saw as an inconsistency in DEEOIC's approach to Part E claims for CBD. The complaints alleged that in order to prevail in Part E claims for CBD, some CEs required a positive or abnormal BeLPT test (Beryllium lymphocyte proliferation test), while other CEs accepted Part E claims for CBD without a positive or abnormal BeLPT.[57] After initially receiving conflicting answers, the Office was finally advised that if a claimant wanted a specific CBD determination under Part E, a confirming BeLPT test was needed. *See* 2011 Annual Report to Congress, April 16, 2012, page 39.

[57] A beryllium lymphocytic proliferation test is a blood test that can detect an individual's sensitization to the toxic substance, beryllium.

In response to this new policy, claimants:

1. Noted that while Part B of the Act outlines specific criteria for CBD claims, Congress did not outline any criteria for Part E CBD claims. Thus, claimants argue that had Congress wanted specific criteria to establish CBD in Part E claims, Congress would have included such criteria in the Act.

2. Questioned whether DEEOIC's policy on Part E claims for CBD was based on a review of current medical literature.[58]

In October 2016, during its discussion of CBD, the ABTSWH specifically discussed BeLPTs. Claimants are hopeful that the ABTSWH will issue recommendations specifically addressing DEEOIC's policy that a positive BeLPT is necessary in order to prevail in Part E CBD cases.

DEEOIC's policy on establishing CBD in Part E claims is also an example of an instance where claimants find it difficult to locate a relevant rule. In 2011, DEEOIC announced that a positive or abnormal BeLPT was necessary in order to prevail in Part E CBD cases. Following that announcement, we were approached by claimants who complained that they could not locate any documents that articulated this policy. For a while, we were not able to help these claimants because we also could not locate any documents that outlined this policy. Subsequently, the version of EEOICP PM Chapter 2-1000.9(b), which became effective September 2015, contained a statement indicating that a positive BeLPT or BeLTT is required to establish CBD in Part E claims.[59] However, as with many other rules and procedures, some claimants are not aware that this language was added to the PM. Thus, some claimants continue to approach us to ask if a positive BeLPT is required in order to establish CBD in Part E claims.[60]

ASSESSMENT

According to DOL, the PM, bulletins, and circulars are not law. Rather, these documents 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 provide the foundation for program implementation and operations. In spite of this response, claimants find it troubling when the PM, a bulletin, or a circular is the sole basis for denying a claim. In particular, it concerns claimants when the PM, bulletin or circular is purportedly interpreting the statute or a rule, and yet the statute or the rule is not mentioned in the decision.

Claimants who question the reasonableness and/or the legality of the PM, bulletin, or circular often complain that they do not have an effective way, short of appealing to federal district court, to challenge the validity of these policies and procedures. Claimants view it as futile to challenge the validity of the PM, bulletin, circular, or other DEEOIC policy in proceedings before a CE or HR. Claimants believe that when such challenges are raised, the CE or HR will accept the provision as valid simply because it was issued by DEEOIC (and because the CE or HR is bound by the policy). Claimants argue that CEs and HRs do not make any effort to independently review the legality or

[58] For instance, claimants wondered if DEEOIC would require a positive or abnormal BeLPT if the record contained a biopsy confirming the presence of granulomas consistent with CBD.

[59] Chapter 2-1000.9(b) of the PM once read, "[h]owever, if there is no Part B decision, a positive LPT result is required to establish a diagnosis of beryllium sensitivity and a rationalized medical report including a diagnosis of CBD…is required to establish CBD under Part E." EEOICP Procedure Manual, Chapter 2-1000.9(b). This provision now reads, "[h]owever, if there is no Part B decision, in addition to a positive BeLPT or BeLTT, the claimant is to submit a rationalized medical report including a diagnosis of CBD…to establish CBD under Part E." EEOICP Procedure Manual, Chapter 2-1000.9(b) (September 2015).

[60] In December 2016, DEEOIC submitted a document to the ABTSWH entitled, "Developing Claims Part 2." This document contains training material focusing on CBD and beryllium sensitivity. Slide 27, which addresses the requirements for CBD under Part E does not mention the need for a positive or abnormal BeLPT. Slide 28 states that to approve CBD under Part E, "[t]he Part B statutory requirements need not be present."

reasonableness of these documents. For example, in response to a challenge to a recommended decision denying one claim for hearing loss, the FAB specifically stated that it did not have the authority to consider jobs that may be similar in everything but name to the ones specified in the EEOICP Procedure Manual. Decisions like this reinforce the belief by claimants that the only effective way to challenge the application of the PM, bulletin, circular, or policy is to appeal to U.S. district court. Yet, there are hurdles that can severely hamper a claimant's ability to appeal to federal district court. Two of the hurdles frequently mentioned by claimants are: (1) their lack of legal representation; and (2) the financial costs that may be associated with an appeal.

To avoid these hurdles, claimants argue that there should be another way to obtain independent review of policies. In support of this argument, claimants point to their experience with Circular 15-06. Claimants note that in spite of their objections to this circular, DEEOIC justified this circular by citing to a Program Memorandum that it prepared. Yet, when this circular was reviewed by the ABTSWH, an entity which is independent of DEEOIC, the ABTSWH concluded that, "...an empirical basis for this policy is not provided. It is furthermore highly unlikely that an empirical support could be provided..." *See* Advisory Board on Toxic Substances and Worker Health Recommendations – Adopted at October 17 – 19 Meeting, Recommendation #1. [Appendix 5].

In the opinion of claimants, it is also important to recognize that the ABTSWH completed its review of, and issued a recommendation on Circular 15-06 in about six months. Claimants argue that had they appealed this matter to federal court, the appeals process would likely have taken much longer. They further noted that the appeals process would have been costly — especially since the onus would have been on the claimant to obtain the scientific and medical evidence necessary to show that there was no empirical support for Circular 15-06.[61] Claimants also doubt that they would have had access to all of the information made available to the ABTSWH.

Thus, in the opinion of many claimants, the ABTSWH's recommendations addressing Circular 15-06 demonstrates the value of independent review, and where their concerns regarding due process have not been heard.

[61] Claimants also note that pursuing an appeal in federal district court can be difficult when they do not have an attorney.

Issues Related to Medical Benefits

A. Hard to find/lack of enrolled medical providers

Since some claimants are not aware that they can access an online database of health care providers who have enrolled in the program,[62] and who have agreed to have their information shared with public, we are routinely contacted by claimants with accepted claims for benefits who need assistance locating an enrolled medical provider.[63] There are also occasions when we are approached by claimants who know that this listing is available online, but because they do not have access to the internet, cannot access this online tool. These claimants oftentimes are not aware that the Resource Center will provide them with this information upon request.

When it comes to searching for medical providers, claimants also complain that:

1. In some instances, the Resource Center is unable to identify a provider located close to where the claimant lives. Some claimants find it difficult to travel long distances, and this is true even when DEEOIC is willing to pay the claimant's travel costs. Concerns with the distance they must travel to see a provider are frequently raised by claimants who rely on others for transportation, as well as those who want a family member to accompany them to these appointments.

2. In response to their request for a copy of the list of enrolled providers, some Resource Centers provided the claimant with a long list that contained every provider in the area, including providers who did not have the necessary specialty, as well as some who no longer accepted the EEOICPA medical benefits card.

Another common complaint is that in some areas of the country it is difficult to find any medical provider willing to accept the EEOICPA medical benefits card (and/or willing to treat EEOICPA patients). According to the claimants we encountered, when they ask physicians why they do not accept the EEOICPA medical benefits card (or why they do not accept EEOICPA patients), the reasons frequently given are:

1. A desire to avoid workers' compensation claims.

2. The belief that the EEOICPA claims process requires too much paperwork.

3. Providers resent being second guessed by DEEOIC. According to claimants, physicians are not happy when their opinions are second guessed by someone who is not a physician, or second guessed by a physician who did not examine the patient.

4. Providers do not want to be limited by EEOICPA's fee schedule.

5. Providers had issues getting reimbursed for treatment rendered to DEEOIC claimants.

In response to the concerns about paperwork, DEEOIC notes that providers can usually bill for some of the time utilized completing certain paperwork associated with claims. However, claimants assure us that this does not always ease the concerns of physicians. We are told that when it comes

[62] An enrolled provider is one who has filled out the proper paperwork and filed it with DEEOIC in order to receive electronic payment for services rendered to DEEOIC claimants. A medical provider must enroll in order to receive payment from DEEOIC.

[63] This database can be found by going to DEEOIC's webpage and clicking on the link to, "Medical Provider Search."

to paperwork, money is not always the issue. In some instances, the physician is more concerned with his/her time. Physicians do not want to take time completing what they deem to be unnecessary paperwork, especially when they could have used that time for other work, or when they believe that the paperwork they previously submitted sufficiently addressed DEEOIC's concerns.

In addition, claimants question whether DEEOIC is correct when it asserts that the fee schedule outlined for this program is on par, if not better than, the fee schedule for other federal programs. This question is raised by claimants who contend that while their physician would not accept the EEOICPA medical benefits card, the physician was willing to treat them if they had coverage under other programs, including other federal programs.

B. Processing requests for medical benefits

Over the past couple of years, a large percentage of the complaints that we received concerning medical benefits involved requests for authorization to receive home health care (HHC). DEEOIC has undertaken a number of steps to address many of these concerns. Thus, after a period when there was a decrease in the number of complaints alleging a delay in responding to requests for authorization and/or reauthorization to receive HHC, towards the end of the calendar year, we began to notice an increase in these complaints. These concerns were brought to our attention by both home health care providers and claimants. In particular, some providers noted that they were motivated to bring these matters to our attention as delays became more frequent. In bringing these matters to our attention, it was stressed that:

1. Our Office was only contacted after multiple attempts (by the provider and/or the claimant) to contact ACS/Xerox[64] and/or the DEEOIC had been unsuccessful.

2. The delay in receiving a response to a request for authorization or reauthorization for HHC benefits created situations where both the claimant and the provider did not know how to proceed. While waiting for DEEOIC's response to the request for HHC, the claimant did not know what to do to receive the care ordered by their physician. On the other hand, health care providers stress that while they do not want to refuse care, from a business standpoint, they have to weigh the pros and cons of providing care while they await DEEOIC's response, knowing that there is chance DEEOIC will not authorize payment for the care.

One instance brought to our attention this year involved a provider who was also the claimant's spouse.[65] Although the spouse had been providing care for some time, she contacted our Office upon learning that the bills for the past few months were not going to be approved, and that the employee's authorization for HHC had expired. The spouse/provider explained that the previous CE would send her the paperwork in advance of the reauthorization deadline, and she would have the employee's doctor complete the paperwork so that the reauthorization of HHC could be approved. This time, after initially encountering difficulties contacting the CE, she found out that a new CE was assigned to the case, and it further frustrated her when she learned that the new CE would not send the paperwork to her. Instead, she now had to find and print the paperwork for the doctor to complete. This spouse/provider complained that she had not been notified of the change in CE, nor told that the paperwork would no longer be sent to her in advance of the HHC authorization's expiration date. She was further confused by the rejection of the HHC bills for the prior few months, and was not notified

[64] ACS/Xerox is the third-party bill processor and payer for DEEOIC.

[65] Family members of claimants can be compensated for providing home health care when they are approved to do so by DEEOIC. *See* PM Chapter 3-1000.3 (December 2016).

if it was an issue to address with the CE or the third-party bill pay company, Xerox. DEEOIC provided written information to our Office that we shared with the claimant's spouse/provider. Nevertheless, this spouse/provider expressed ongoing frustration with the reauthorization and bill pay process, and in doing so, stressed the fact that she was an individual provider operating without the benefit of a health care company's billing department of her own.

C. Providers not sure if they can assist claimants

EEOICP PM Chapter 3-0300.2(f) provides that requests for in-home health care do not have to be initiated by claimants. Rather, requests for in-home assessments of a patient's needs and/or requests for in-home health care can be initiated by an AR, or any licensed doctor or medical provider. In spite of this provision, many of the home health care providers we encounter firmly believe that DEEOIC does not want them to initiate requests for an in-home assessment or to request in-home health care for claimants. Providers fear that their efforts to initiate a request for in-home health care on behalf of claimants will be met with insinuations from DEEOIC that they are manufacturing needs/illnesses in an effort to increase their business. They also fear that their efforts to initiate a request for in-home health care for a claimant will cause the request for care to undergo greater scrutiny, further delaying the request (and further delaying claimant's care).

In discussing their concerns, HHC providers routinely assure us that they are well aware of the difference between serving as a medical provider and serving as an AR. In fact, most of the providers we talk to assure us that they do not want to serve as the AR for the claimant. Rather, the problem arises when providers encounter claimants who need help and all too often, there is no one around who is willing (or able) to provide the claimant with the necessary help navigating the HHC authorization process.

DEEOIC often notes that claimants who need help should be directed to them. Providers generally respond to this by indicating that they encounter instances where referring the claimant to DEEOIC did not resolve the problem.

- Providers tell us of instances where in spite of their encouragement, the claimant did not call DEEOIC. In some instances, the claimant did not call because he/she did not feel comfortable articulating his/her concern. In other instances, the claimant did not call because he/she was confronting other challenges in his/her life and thus, could not focus sufficient time and resources trying to determine how to navigate this particular aspect of their EEOICPA claim.
- Providers are unsure of what to do when they encounter claimants who try to initiate an action with DEEOIC, and yet it is apparent to the provider that: (1) the claimant is not clearly articulating his/her concerns; or (2) DEEOIC does not fully understand what the claimant is saying. During the year, providers told us of instances where they encountered claimants who needed to request reimbursement for an out-of-pocket expense, or needed to file a claim for a consequential condition, and yet because of miscommunication, the necessary action with DEEOIC was not proceeding.
- Some claimants do not have the physical and/or cognitive ability to communicate his/her concerns and/or to follow the instructions that are provided. In many such instances, merely telling the claimant what to do is not sufficient.

Providers indicate that they feel compelled to become involved when a claimant has been advised to initiate a request for care, but is unable to follow the instructions telling him/her how to do so, or when the claimant's request for assistance from the Resource Center or CE does not resolve the issue.

ASSESSMENT

- Although there is a database of enrolled providers on DEEOIC's website, some claimants are not aware of this online database. In addition, even if they are aware of this database, some claimants find it difficult to use this database. In the opinion of claimants, it would help if there was a brochure or handout that identified and provided the web address for tools such as the database of enrolled providers. In addition, claimants feel that this brochure would be most effective if it was available to them at an early stage in the claims process.
- The Resource Center will, upon request, provide claimants with a hard copy of a search for enrolled providers. Claimants have asked if it is possible, when they request a hard copy of this list, to limit the information to physicians who possess the specialty (or specialties) relevant to their claim.
- Ideally there would not be delays in the processing of requests for authorizations or reauthorizations for in-home health care. However, to the extent delays occur, claimants and ARs would appreciate receiving periodic updates on the status of these requests. Requests for authorizations can technically be tracked online. However, claimants complain that the information provided online is not sufficiently detailed to ensure them that their request has not been lost or overlooked.
- Consistent with the language of PM Chapter 3-0300.2(f), providers want to ensure that everyone is aware that they are not doing anything wrong when they initiate requests for in-home assessments of a patient's needs and/or requests for in-home health care.
- As will be discussed in more in-depth in Chapter 11, claimants repeatedly note that it would be very helpful for them to be permitted to have a medical benefits AR. In our experience, many of the ARs who assist claimants in obtaining compensation and medical benefits for their claimed illness(es) do not assist claimants with medical benefits or bills, and thus claimants find themselves without anyone to provide assistance with these matters.[66]

[66] In some cases, claimants acknowledge that their AR is assisting them in having an illness accepted, or in obtaining impairment or wage-loss compensation, for which the statute allows them to collect a fee, but is not assisting them with the ongoing and concurrent medical benefits and/or medical bill issues. Claimants seem unaware that medical benefits and medical bills are issues for which their AR should/could provide assistance.

Complaints Regarding Medical Billing and Reimbursement

> *...Dealing with the London Ky office has been a nightmare with continual non-payments and [l]ack of feedback for denial reasons, etc. My Dr XX, who has been trying to deal with them for years has had enough and will no long[er] accept them because of the problems described in the attached letter...*[67]
>
> - **From an e-mail received September 2016.**

When a claim filed by a worker is accepted, that worker is generally entitled to medical benefits (and may also be entitled to monetary compensation). If the worker utilizes an enrolled provider to obtain medical benefits, the enrolled provider directly submits all bills to DEEOIC and ACS, and payment is made directly to that provider pursuant to the OWCP fee schedule. Therefore, when the worker utilizes an enrolled provider and the process operates as it should, the claimant is not involved in the bill pay process and has no out-of-pocket expenses. Many of the complaints concerning medical bills that we received came from claimants who were required to become involved in the bill pay process. In our experience, the two main reasons claimants become involved in the bill pay process are: (1) the claimant is notified of an unpaid bill, or is advised that medical services will be terminated due to an unpaid bill; or (2) the claimant is seeking reimbursement for a medical expense he/she paid out-of-pocket.

A. Claimants Notified of Pending Medical Bill or Termination of Services

When a claimant utilizes an enrolled provider, he/she normally is not involved in the bill pay process. Thus, claimants who utilize an enrolled provider are often shocked when they: (1) receive a collection notice arising from an unpaid bill; or (2) are notified that due to an unpaid bill, medical services will be terminated. As soon as they learn of billing problems, claimants usually set out to immediately resolve these matters. However, because they often have little, if any, experience with the bill pay process, claimants frequently do not know what to do, or who to contact to resolve these matters. Moreover, since the enrolled provider is responsible for submitting bills to DEEOIC and/or ACS, and ACS is responsible for paying these bills, much to their dismay claimants frequently discover that they are not in a position to accurately identify or resolve billing problems. This leads to complaints contending that in their efforts to resolve billing issues, claimants sometimes become the messenger, relaying messages back and forth between DEEOIC, ACS, and the provider, with each side pointing to the other as the source of the problem. Claimants who feel they became the messenger often question why more was not done to directly work with the provider to resolve these matters.[68]

B. Claimants Seeking Payment of a Medical Bill

Some claimants encounter problems trying to obtain reimbursement for medical services they paid out-of-pocket. A common scenario involves medical services that were provided to the claimant subsequent

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[67] In the attached letter written to the claimant, the physician states, "Due to inconsistent communication, and lack of payment, I have made the choice to no longer network with your insurance."

[68] For instance, claimants routinely complain of instances where a bill is not paid because the form requesting payment is not properly completed. According to claimants, in many of these instances, while ACS/DEEOIC insists that the provider was given instructions on how to complete the form, the provider insists that it followed the instructions to no avail. After unsuccessfully attempting to resolve these matters, claimants have often suggested that it would be easier, and more efficient, if DEEOIC or ACS called the provider and directly worked with the provider to properly complete the form.

to the filing of the claim, but prior to the receipt of his/her medical benefits card.[69] In these situations, the claimant must submit the documentation necessary to support the request for reimbursement. Once again, because of a lack of experience with the bill pay process, some claimants are quickly overwhelmed by the process. A frequent complaint comes from claimants who maintain that each time they submitted a request for reimbursement, DEEOIC and/or ACS found a problem with the documentation. These claimants argued that rather than simply telling them of the problem, it would have helped if someone had assisted them in ensuring that their paperwork was properly prepared. To be clear, there are individuals associated with DEEOIC who will assist claimants with the bill pay process. The problem is ensuring that claimants are put in touch with these individuals. In addition, DEEOIC's website contains a link entitled, "Get Help with my Medical Bills." This link contains a lot of helpful information. However, as with many of the online tools, claimants are not always aware that this tool exists.

Another scenario that causes claimants to become involved in the bill pay process arises when after undergoing a medical procedure or hospitalization the claimant receives a host of bills from different providers, all related to this one procedure or admission. It often comes as a surprise to claimants when some of these bills are directly paid by DEEOIC, while other bills arising from this same procedure or admission require the claimant to pay out-of-pocket, and then seek reimbursement directly from DEEOIC. This can occur when one or more of the providers were enrolled with DEEOIC, and other providers were not enrolled with DEEOIC.[70] Claimants often struggle to understand and resolve these billing issues. The challenge is to ensure that, in a timely fashion, claimants are put in touch with the people who can help them resolve these billing issues.

C. The OWCP Fee Schedule and Out-of-Pocket Expenses

A claimant is only partially reimbursed for medical expenses if the amount he/she paid out-of-pocket to the provider for the service exceeds the maximum allowable charge set by OWCP's fee schedule. *See* 20 C.F.R. § 30.702(e). Claimants complain when they are not fully reimbursed by DEEOIC for medical services that they paid out-of-pocket to the provider, particularly when they live in an area of the country where few enrolled providers are located.

ASSESSMENT

With respect to medical billing issues, a common complaint involves the lack of assistance. We receive complaints from claimants trying to obtain reimbursement for out-of-pocket expenses, as well as from claimants trying to avert a collection action or avoid the termination of services. In many instances, before contacting us, these claimants tried to resolve the issue on their own but were hampered by their lack of familiarity with the bill pay process. Thus, when they approach us, claimants are usually looking for someone who can provide immediate assistance in resolving these matters.

On its website DEEOIC has a link called, "Get Help with my Medical Bills." This link takes the user to the Web Bill Processing Portal. DEEOIC also has a link on its website to a brochure entitled, "How Will My EEOICP Medical Benefits Be Paid." This link and brochure contain useful information. However, as with other tools, many claimants are not aware that this information exists. To find this brochure on DEEOIC's webpage, one has to first recognize that the "Brochures" link contains the information they are seeking, and then click on the link to "Brochures." Claimants who do not know that this brochure exists usually overlook it when reviewing DEEOIC's webpage. As discussed with other tools, claimants would benefit from a document that identified and explained the tools that have been developed to assist them.

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[69] Reimbursement is also sought by claimants who utilize a provider who is not enrolled in the program.

[70] This frequently occurs when claimants have inpatient hospital or rehabilitation bills.

Resolving issues related to medical bills is one of many areas where some claimants require assistance that goes beyond merely telling them what to do. Many of the claimants who approach us with bill pay issues only approach us after efforts to work with DEEOIC and/or ACS have not been fruitful. As a result, when they come to us, claimants are often tired of being told what to do, or of being passed off to someone else. Rather, when they approach us, claimants are looking for someone who will work with them to resolve the issue.[71] DEEOIC has personnel who will work with claimants to resolve bill pay issues. We are aware of instances where claimants were directed to this assistance. However, it does not appear that every claimant who needs this assistance is immediately directed to it.

In the end, many of the bill pay issues brought to our attention are ultimately resolved. However, there is a belief by some claimants that these matters were only resolved when the matter was escalated to the attention of the National Office (of DEEOIC) and/or to our Office. To avoid collection notices and/or threats of termination of services, claimants wish there was a way to seek timely, meaningful assistance in order to expedite the resolution of bill pay issues.

[71] In order for reimbursement to be issued, the district office and/or ACS/Xerox play a role in approving payment. Both use forms and a host of acronyms unfamiliar to many claimants. Claimants become frustrated when it is assumed they have an understanding of the different roles of the district office and ACS/Xerox, or the forms and acronyms used by each.

Impairment and Wage-Loss

A. Not aware that they are eligible for additional impairment compensation

When the claim filed by a worker is accepted under Part E, the worker receives a medical benefits card entitling him/her to medical benefits for the covered illness. In addition, a worker with an accepted Part E claim can, if the circumstances warrant, file for monetary compensation for impairment and/or wage-loss.

Claimants may request a re-evaluation of their impairment rating every two years from the date of their last impairment award. *See* 20 C.F.R. § 30.912. Some claimants lose track of time, or do not understand that they can request re-evaluation of their impairment every two years. As a result, there are times when in the course of a discussion with a claimant, oftentimes a discussion about other issues, it becomes evident that the claimant is eligible for re-evaluation of his/her impairment. We advise these claimants of their right to request re-evaluation every two years and recommend that they contact the Resource Center for additional guidance. Many claimants with accepted covered illnesses are also not aware that they do not have to wait two years if they have a new illness or consequential condition accepted during the two-year period.

B. Cannot find a qualified physician who is willing to perform the impairment rating

Impairment evaluations can be performed by a physician selected by the claimant, or if the claimant chooses, DEEOIC will ask the claimant to produce the appropriate medical records and tests results, and will select a qualified physician, known as a CMC, to complete the impairment evaluation.

Claimants who select their own physician to perform the impairment evaluation complain that it is sometimes difficult to find a qualified physician located nearby.[72] Because many of these claimants are not aware that DEEOIC has an online database of enrolled providers or that they can seek assistance from a Resource Center, they sometimes spend many hours trying to locate a qualified physician.

Another problem claimants raised involved instances where the claimant initially indicated a preference to have his/her physician perform the impairment rating, and then discovered that their physician was not qualified and there were no physicians in their area who were qualified and/or willing to perform this rating/evaluation. Some claimants mistakenly believe that once they indicate a preference to use their own physician for the impairment rating, they cannot change their minds and ask to have the rating performed by a CMC.[73]

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[72] To be considered by DEEOIC, the impairment evaluation must be performed by a physician who is:

- Board certified in the medical specialty relevant to the covered illness; and
- Trained and certified to perform impairment ratings using the American Medical Association's Guides to the Evaluation of Permanent Impairment, or experience in using the Guides. *See* PM Chapter 2-1300.4 (November 2016).

[73] If a claimant is eligible for an impairment rating and the rating has not been performed, the claimant can change his/her mind and allow DEEOIC to select a CMC to perform the rating. A different situation arises when a claimant opts to have the impairment evaluation performed by a physician of his/her choosing and then disagrees with the rating provided by this physician. In this instance, the claimant cannot then ask for a second rating by a physician selected by DEEOIC.

C. Issue with Wage-loss

An issue that was brought to the Office's attention this year was, in calculating wage-loss, what happens when the worker did not earn wages before the trigger month? The Act instructs the Secretary to determine,

> *the average annual wage of the employee for the 36—month period immediately preceding the calendar month referred to in clause (i), excluding any portions of that period during which the employee was unemployed...* (Emphasis added).[74]

42 U.S.C. § 7385s-2(a)(2)(A)(ii). Yet, Chapter 2-1400.5(e) of the EEOICP PM states that the wage-loss benefit is to be denied when the employee did not earn wages before the trigger month. Claimants question if this PM provision is consistent with the language of the statute. It concerns claimants that while the statute requires a review of the entire 36 months prior to the calendar month now called the "trigger month," the PM indicates that a claim for wage-loss is to be denied if the employee did not earn wages before the trigger month. Thus, claimants find this PM provision to be vague. This PM provision does not specify what period of time prior to the trigger month is to be considered, or the basis for the lack of wages. Is the claim to be denied if the worker did not earn wages the month before the trigger month, even if he/she earned wages for the other 36 months before the trigger month? Does the PM envision consideration of the 36 months prior to the trigger month?

ASSESSMENT

Obtaining a list of enrolled providers who can perform claimant's impairment rating/evaluation continued to be a source of concern. Claimants believe that more needs to be done to let them know that this list is available. And claimants who do not have access to the internet have asked if it is possible to limit the printed list provided to them to providers with the relevant specialty.

In addition, claimants continue to have issues with application of the wage-loss chapter in the PM. In particular, claimants question whether DEEOIC's current application of trigger month is consistent with the statute and the current regulations, which do not mention trigger month. This is an issue where claimants believe that review by an independent body is warranted.

[74] Clause (1) refers to the calendar month during which the employee first experienced wage-loss as the result of any covered illness contracted by that employee through exposure to a toxic substance at a Department of Energy facility. *See* 42 U.S.C. § 7385s-2(a)(2)(A)Chapter (ii).

Complaints Concerning Authorized Representatives and Home Health Care Providers

A. Authorized Representatives (ARs)

Claimants complain that it is sometimes difficult to find someone who is both willing and able to serve as their AR. Many claimants believe that one of the reasons people do not serve as ARs is because of the statutory fee schedule. Specifically, claimants believe that people are hesitant to serve as ARs because the fee schedule does not always fully compensate ARs for the time needed to adjudicate a claim. There is also a belief that as written, the fee schedule encourages ARs to handle easy cases and to avoid the difficult cases. Claimants see this as a particularly significant problem because they are more likely to need assistance with the difficult cases.

Complaints also arise because some ARs only assist with certain aspects of the claimant's EEOICPA claim. In our experience, arrangements where the AR is only assisting with certain aspects of a claim generally do not cause as many problems when the claimant is able, whenever necessary, to directly communicate with DEEOIC. Rather, problems arise when there is a need to communicate with DEEOIC on a matter that the AR is not addressing, and the claimant is unable to communicate with DEEOIC. When these situations arise, we are frequently contacted by family members who are trying to assist the claimant. These family members often complain that because they are not the AR, DEEOIC is unwilling to talk to them. It further troubles these family members when they are advised that to pursue the matter with DEEOIC, the claimant needs to terminate the services of the AR and appoint the family member as the AR. This advice puts the claimant and the family member in a quandary. On the one hand, the claimant can terminate the services of the experienced AR who is assisting with certain issues and appoint a family member with little, if any experience with the program; or, the claimant can continue to utilize the services of the AR and risk an unfavorable outcome on the issue(s) where the AR is not providing assistance.

As a general rule, family members understand the concept of only allowing a claimant to have one AR at a time. However, they question the need to rigidly apply this policy when the claimant is incapacitated or limited in their ability to effectively communicate with DEEOIC. Family members especially question the rigid application of this policy where they are attempting to resolve matters in which there is no financial benefit to the family member – such as where they are trying to help the claimant resolve unpaid medical bills.

To resolve this problem, claimants suggest that they should be allowed to have both an AR and a home health care/medical bill pay AR. Claimants understand that the role and responsibilities of these two individuals would have to be clearly defined. Yet, claimants believe that this would address those situations, particularly where authorization for durable medical equipment (DME), travel, and other ancillary benefits are involved, where the AR is only assisting with the specific aspects of the claim that result in monetary compensation.

B. Home Health Care Providers

In previous reports, we discussed complaints alleging that representatives of some home health care providers badgered claimants to use their services. Many of the complaints that we received in previous years referred to instances where representatives of home health providers repeatedly telephoned claimants or knocked on doors all hours of the day and night. *See* 2013 Annual Report to Congress, August, 12, 2014, pages 64–65. Complaints alleging such excessive behavior have diminished. Nevertheless, we continue to receive complaints addressing the actions of a few home health care providers.[75] This year:

1. Claimants questioned how some home health care providers obtained their contact information. Claimants complain of unsolicited telephone calls from home health care providers. In some instances, claimants alleged that the home health care provider obtained their contact information from other organizations. Claimants do not appreciate that, without their consent, these other organizations provided their name and telephone number to a home health care provider.

   However, it is more common to talk to claimants who do not know how the home health care provider obtained his/her contact information. It concerns claimants when they receive unsolicited telephone calls or visits from home health care providers, or from someone suggesting that he/she was associated with a home health care provider. Claimants question how these home health care providers knew they had filed a claim, and sometimes knew that the claim had been accepted.

   > *Recently we have been contacted by a representative of [a home health care provider]...I'm wondering if this company is legitimate...*
   >
   > - **Letter received July 2016.**

2. Some home health care providers do not always use qualified personnel. The Office received complaints alleging that some home health care providers use untrained and/or unskilled workers to provide services that should be performed by trained and/or skilled personnel. According to these complaints, this practice not only poses a risk to the claimant, but allows some providers to underbid competitors.

ASSESSMENT

- Concerns involving the attorney fee structure must be addressed through revisions of the statute. DOL cannot resolve these concerns.
- There are instances where ARs limit the services that they will provide to a claimant. Thus, we encountered many instances where claimants who have an AR nonetheless find it necessary to directly communicate with DEEOIC concerning certain matters. This occurs because while some ARs assist claimants with issues related to acceptance of the claim, as well as impairment and/or wage-loss, they do assist claimants with issues related to medical benefits and medical bills. Consequently, we find that some claimants struggle to process issues related to home health care and medical bills. And in our experience, these struggles become even harder when the claimant is not in a position to directly communicate with DEEOIC or ACS. There needs to

[75] In a few instances, complaints addressing the actions of home health providers were brought to our attention by claimants. However, a majority of these complaints were raised by someone other than the claimant – oftentimes by someone else involved in the home health care industry.

be a mechanism that provides assistance when the AR is not helping the claimant with certain issues in their claim, as these issues can arise frequently for the same claimant, and tend to have an immediate impact on the claimant's health.

- Moreover, when the claimant is incapacitated (or otherwise unable to communicate with DEEOIC), efforts should be undertaken to try to work with family members to ensure that medical services are not terminated, and that medical bills are paid or the outstanding issues are resolved.
- When claimants received unsolicited telephone calls and/or visits by home health care providers, they sometimes contacted our Office seeking information regarding how these providers knew they had filed a claim and obtained their contact information. We assure these claimants that the government does not share their information with outside companies. Yet, these unsolicited contacts are a source of concern. At the least, claimants wonder if these companies are legitimate. Claimants would like to know to whom they should direct their complaints about these unsolicited contacts, as well as their other concerns involving home health care providers.

Issues Related to the Administration of the Program

A. Cannot get through on the telephone and/or calls not returned

I have called the Adjudication center twice, the first time over 2 weeks ago and I have not received a call from them. You cannot speak to a person at that office, you can leave a message and I have done that twice...

- **From an e-mail received January 2016.**

...The first 6 weeks my case was assigned to someone on sick leave and after many many phone calls I finally was able to get through to a supervisor who did reassign my case but to someone who then went out on leave...

- **From an e-mail received May 2016.**

In the past XX weeks, I've sent 3 faxes requesting a status update, as well as having left 4 voice mails requesting the same, without a returned phone call or written response...

- **From an e-mail received May 2016.**

We often find that claimants turn to our Office for assistance only after other efforts to resolve the matter were unsuccessful. In the past, claimants complained that their telephone calls to DEEOIC were not answered at all. DEEOIC responded to these complaints by stating that it implemented technological improvements to ensure that telephone calls were promptly answered, and that when staff was unavailable telephone calls were returned within a reasonable amount of time.

Recent complaints allege that when claimants telephoned DEEOIC, the claimant was unable to talk to the CE. Rather, the claimant left a message and the CE never returned their call. DEEOIC responded to some of these complaints by indicating that it had returned the claimant's call. To obtain further clarity, we again talked to some of these claimants who voiced complaints. Upon further discussion, claimants explained that while DEEOIC had returned their telephone call, DEEOIC called when they were not at home (or otherwise unavailable) and thus, DEEOIC had only left a message on the claimant's voice mail.[76] Consequently, when claimants complain that they called DEEOIC and did not receive a return call, claimants often mean that they called DEEOIC hoping to directly talk to the CE, and instead, they received a message from the CE on their voice mail. Claimants believe that a message left on a voice mail is a poor substitute for directly talking to the CE. This argument is especially stressed by claimants who note that when they called the CE and left a message, they did not fully outline their concerns, thus there was no way the CE could leave a message that fully answered their questions/concerns. In addition, claimants complain that once the CE returns a call and leaves a message on the claimant's voice mail, if the claimant still needs to talk to the CE, the onus is on the claimant to again telephone the CE. As a result, some claimants describe the process of calling DEEOIC as a continuing cycle where step one is for the claimant to call DEEOIC and leave a message, step two is for DEEOIC to return the claimant's call and leave a message, and step 3 is to start the process all over again.[77]

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[76] Many of the claimants we encounter were under the impression that when they left a message, DEEOIC had 48 hours to return the telephone call. These claimants stressed that they could not just sit by the telephone for the next 48 hours waiting for DEEOIC to call back.

[77] DEEOIC has suggested that when we encounter claimants who complain that they cannot talk to anyone who can answer their questions, we should simply encourage these claimants to contact the District Office (or the National Office). Unfortunately, many claimants only contact our Office after their own repeated efforts to contact DEEOIC were unsuccessful. Thus, by the time we encounter many claimants, these individuals have already concluded that trying to directly contact DEEOIC is a waste of time. Understanding this fact often guides our interactions with claimants — we are mindful that many claimants will be turned off if they feel they are getting the run-around. Claimants have made it abundantly clear to us that asking them to again try to contact DEEOIC when their earlier efforts were unsuccessful would be the run-around.

B. Delays in the adjudication of claims

> *...I guess I could deal with delays...It's the lack of any response or communication at all that castes [sp] negativity and poor service on the {EEOICPA claims] experience...*
>
> - **From an e-mail received May 2016.**

When it comes to delays, the complaints the Office received in 2016 involved: (1) claims that were forwarded to a DEEOIC specialist; (2) requests for authorization (or reauthorization) for in-home health care; and (3) issues related to the bill pay process. The concerns raised in these complaints contend that:

- In many instances, claimants are not notified of the reasons for the delays. As a result, we are approached by claimants who became concerned when weeks or months passed by without receiving any communication from DEEOIC regarding their claim. Some claimants also noted that when they asked DEEOIC about their claim, they received a vague response, which typically causes increased anxiety for claimants.
- There is little appreciation of the impact that a delay can have on the compensation and/or benefits that may be awarded. Delays are especially troubling to claimants who have an immediate need for the monetary compensation and/or medical benefits.

Towards the end of 2015, the Office noticed an increase in the number of complaints alleging a delay in the processing of claims that had been forwarded to an IH. In subsequent conversations, DEEOIC acknowledged that they were experiencing delays with cases that were forwarded to IHs. Subsequently, at the first meeting of the ABTSWH, DEEOIC announced it had just entered into a contract with a company to perform industrial hygienist work on DEEOIC's behalf. *See* Transcript of the Advisory Board on Toxic Substances and Worker health, April 28, 2016, page 24. Everyone hoped that the execution of this contract would resolve the delays that claimants experienced when their claims were forwarded for an IH report. And for a while following this announcement, there was a decrease in the number of complaints alleging a delay in cases that were forwarded to an IH. However, as 2016 came to an end, we began to again receive complaints alleging a delay in the processing of claims forwarded to IHs.

Moreover, towards the end of 2016 we began to notice an increase in complaints alleging a delay in receiving a response to requests for home health care benefits.

C. Inappropriate customer service

DEEOIC consistently asserts its commitment to providing professional and courteous customer service. Still, we are approached by claimants who complain of rude or insensitive encounters with DEEOIC. Most claimants who complain about rude or insensitive encounters are quick to emphasize that their complaints are directed at a particular staff member, and is not a reflection of the service provided by DEEOIC as a whole. Thus, in bringing complaints of insensitivity or rudeness to our attention, many claimants make it a point not just to tell us of their negative encounters with DEEOIC, they also take the time to contrast this behavior with the professional and helpful service they received from other staff.[78]

A frequent concern raised by claimants questions how to respond to inappropriate customer service, and in particular, how to report this behavior. In its response to our 2014 Annual Report, DEEOIC stated

[78] As some claims proceed through the DEEOIC adjudication process, multiple CEs or HRs may at various times have worked on the claim. Thus, the claimants who come to us with complaints concerning the behavior of a CE or HR are often in a position to compare the behavior and service that he/she received from these various CEs and HRs.

that "[c]omplaints about inappropriate customer service should be directed to Deeoic-public@dol.gov." This guidance, which was provided in the response to our annual report, does not appear to be found anywhere else on the DEEOIC website. Thus, unless they read DEEOIC's response to our 2014 Annual Report, claimants do not know that they are to direct their complaints of inappropriate customer service to Deeoic-public@dol.gov.

In addition, when we tell claimants they can report inappropriate customer service directly to DEEOIC, claimants often respond that they do not want to report these incidents because they fear retaliation. In spite of DEEOIC's assurances to the contrary, some claimants believe that, as long as DEEOIC is in a position to make determinations on their claim or benefits, it is not wise to directly contact DEEOIC to register a complaint about DEEOIC personnel, or the service provided. This fear of retaliation is often compounded when the claimant learns that DEEOIC does not grant requests for a change of CEs or HRs in a particular case.

In addition, while DEEOIC often refers to the customer service survey that is available to claimants after any phone call with DEEOIC claims staff, the claimants we heard from had serious reservations as to whether this survey was really anonymous.

In our experience, most claimants do not contact us specifically to complain of inappropriate customer service. Rather, claimants tend to contact us to address other complaints, and in the course of discussing these other complaints the claimant will mention the inappropriate customer service. There are also some instances, where after talking to us about other matters, the claimant ends the conversation with a statement such as, "That CE (or HR) was the meanest (or the most unhelpful) person I ever talked to."

D. Not advising claimants of their rights or options

Claimants find it troubling when, in spite of previous conversations with their CE or HR, they discover that they were not fully advised of their rights or not advised of all of their options. For instance, claimants complain when nothing contained in or accompanying a final decision advises them of their right to appeal to federal district court. Claimants cannot understand why DEEOIC is able to advise them of their right to request reconsideration and their right to request reopening, but does not advise them of their right to appeal a final decision to federal district court. In addition, they are not advised that there is a firm deadline by which they can appeal to federal district court.

Similarly, we encounter claimants who struggle to develop and submit evidence within the 30 days allotted to them, as well as claimants who concede that they did not try to develop evidence because they knew they would not be able to develop and submit this evidence within 30 days. When advised of their right to request an extension of time, these claimants question why no one ever brought this to their attention.

Claimants question the motives behind these omissions.

E. Hostility to claimants

In 2016, we were approached by a worker-advocate who argued that a recent decision issued by the U.S. District Court in New Mexico illustrated DEEOIC's hostility towards claimants. In this case, *Lucero v. United States Department of Labor*, the district court found the Department of Labor's procedures for adjudicating claims of certain survivors under 42 U.S.C. § 7385s-1(2)B to be arbitrary and capricious, ultra vires, and void. This worker-advocate argued that the *Lucero* decision reflected a conscious effort by DEEOIC to find a reason to deny this claim.

Other claimants have raised similar arguments. In particular, some claimants believe that when DEEOIC is faced with options, there are many instances when DEEOIC chooses the option that is the least claimant-friendly. For instance, this concern is raised by claimants who question DEEOIC's approach to affidavits prepared by workers and close family members. These claimants do not believe that the statute specifically requires other supporting evidence in order to accept these affidavits as trustworthy and credible. Rather, they believe that DEEOIC simply chooses to require other supporting evidence before affidavits prepared by workers and close family members are accepted.

Similarly, we encounter claimants who question the motives behind some of their encounters with DEEOIC. For example, claimants cannot understand why DEEOIC is able to tell them about their right to request reconsideration and reopening, but does not advise them of their right to appeal a final decision to federal district court.

Pointing to the *Lucero* decision, there are some claimants who believe that if other policies and procedures established by DEEOIC were reviewed by federal court or some other independent body, many of these policies and procedures would also be found to be arbitrary and capricious, ultra vires, and void.

ASSESSMENT

Based on the complaints the Office received:

1. Some claimants continue to have encounters with DEEOIC staff, that in the opinion of these claimants, exhibits customer service that is less than professional and courteous.

2. Some claimants are hesitant (or refuse) to report inappropriate customer service to DEEOIC because they fear retaliation from DEEOIC.

In its response to our 2014 Annual Report, DEEOIC reasserted its commitment to providing professional and courteous service, and stated that "[c]omplaints about inappropriate customer service should be directed to Deeoic-public@dol.gov." It would help if the procedure for reporting complaints of inappropriate customer service was communicated to claimants, and not just found in the response to our annual report.

In addition, many claimants are more comfortable talking to someone about their concerns, as opposed to sending a letter or e-mail. We believe that this applies to reporting instances of inappropriate customer service.[79]

Many of the complaints that we received alleging inappropriate customer service arose from telephone conversations. We believe this helps to explain why some claimants do not report these incidents. When incidents occur during telephone conversations, there oftentimes is no documentation of these incidents. And without supporting documentation, claimants question the value of reporting these incidents. In addition, with or without documentation, some claimants believe there is little chance that action will be taken to address their complaints. As a result, many claimants do not immediately report incidents of inappropriate customer service. Rather, they simply add these incidents to their list of complaints. We finally hear about these complaints when the claimant has had enough, and at that time, the incident of inappropriate behavior is just one of the many complaints that we hear from these claimants.

[79] In our experience, when claimants fax or mail materials to our office they often want to: (1) send their correspondence to a particular person, not just to the Office; and (2) to talk to that person to ensure that he/she received the correspondence. Similarly, claimants who e-mail materials to our Office often ask for contact information so that, if needed, they can call us or contact us by mail.

SUMMARY OF ISSUES

Throughout this annual report, we discussed the most common complaints, grievances and requests for assistance that we received in calendar year 2016. Following is a summary of the specific issues raised in the report:

Awareness of the program

DEEOIC and the other agencies involved in the administration of the EEOICPA continue to make efforts to increase awareness of this program. Yet, in spite of these efforts there are potential claimants who remain unaware of this program.

- In some instances, press releases are not picked up by the local media. There have also been instances where press releases only became available on the day of the event. In order to attend events most claimants need some advanced notice.
- We continue to encounter those who allege that DEEOIC's efforts at outreach mainly focuses on areas around facilities that employed (or once employed) large numbers of employees. There are benefits to returning to an area to hold additional outreach events. Yet claimants complain that other areas of the country are being overlooked.
- As a general rule the employee lists/rosters compiled by DOE/FWP contain more names than the mailing lists developed by DEEOIC. Although the lists/rosters developed by DOE and its FWP do not always contain updated addresses, we are aware that effort is undertaken to update the mailing addresses on these rosters.[80]
- While the Resource Centers attend events sponsored by local groups and organizations we received complaints suggesting that at some of these events the Resource Center simply focused on its role in assisting with the filing of claims and did not discuss the other assistance that it could provide.

Knowledge of the tools and assistance that are available, as well as help utilizing these tools

A host of tools have been developed to assist claimants with the EEOICPA claims process. In addition, DEEOIC and the other agencies involved in the administration of this program will provide some assistance to claimants. However, there are still complaints about assistance for claimants.

- In spite of the efforts undertaken by DEEOIC, we continued to encounter claimants who were not aware of many of the tools and resources that could have assisted them with their claim.
- While DEEOIC has increased the amount of literature available for distribution, most information is still only available online.
- Even though a tool or resource is available online or is brought to a claimant's attention, many claimants do not appreciate the value of these tools/resources. As a result, some claimants never make an effort to review these tools/resources because they do not understand how to use them or how they could assist with their claim.

[80] The mailing list developed by DEEOIC to notify individuals of upcoming outreach events usually consists of individuals who have already filed an EEOICPA claim. The lists compiled by DOE and its FWPs often includes the names of individuals who worked at the facility but who have not filed an EEOICPA claim. This Office and the JOTG have previously worked with DOE/FWP to utilize the DOE/FWP lists/rosters to inform claimants and potential claimants of outreach events.

Statutory complaints

There are complaints that directly question the statute as it is currently written. Changes to the statute will have to be initiated by Congress. However, there are some questions about the statute that involve the administration of the program:

- Claimants complain that there is little, if any guidance, to assist them when they endeavor to challenge a facility's designation (or lack of designation) as a covered facility.
- Claimants and ARs complain that they do not know who to contact when they have questions concerning the interpretation or application of the attorney fee schedule.
- The date of filing establishes the date from which workers are entitled to medical benefits. Some claimants have indicated that this statutory provision presented them with a serious dilemma. On the one hand, they realized that in order to maximize the medical benefits to which they could be entitled they needed to file a claim as soon as they were diagnosed with an illness. However, this often meant pursuing a claim while undergoing medical treatment or while recuperating from an illness. On the other hand, they could wait until they recuperated to file their claim. However, in this scenario they would not be entitled to medical benefits for the services rendered prior to the date that the claim was filed. Claimants have asked if it is possible to establish a procedure where they could file their claim, and yet postpone the processing of that claim as a way to resolve the dilemma presented by this statutory provision. Claimants argue that such a procedure would allow them to establish a date of filing while also giving them time to address the other life challenges that they faced.

Development of evidence

Some claimants find it very difficult to independently develop the evidence needed to support their claim for benefits.

- After taking time to search for evidence claimants find it frustrating when they later discover that DEEOIC has conducted its own search for the same evidence. Claimants have asked if early in the claims process DEEOIC could identify the searches that it would initially undertake as a way to avoid this source of frustration.
- DEEOIC has undertaken steps to improve the guidance given to claimants when they are asked to submit additional evidence. Nevertheless, we continue to encounter instances where claimants complained that it was not clear what DEEOIC was looking for when it asked for additional evidence.
- While DEEOIC has indicated that treating physicians will be provided with SEM searches and reports by the IH, claimants complain that they do not understand the procedures for carrying this out.
- DEEOIC indicated that it will include with recommended decisions copies of specialist reports relied upon in issuing the recommended denial. We continued to talk to claimants who told us that they did not receive copies of specialist reports with the recommended decision to deny their claim.
- DEEOIC also stated that prior to any written decision, it would provide to claimants an explanation and/or copies of the policies and procedures that are relevant to their claim. Claimants complain that they do not know the procedures they should follow in order to receive this information.

Home health care and medical billing issues

Some of the requests for assistance the Office received involved issues relating to home health care or medical billing issues. What often makes these situations problematic is the fact that claimants are trying to resolve these home health care issues or medical bill pay issues on their own; and this is true even when the claimant has an AR. As has been noted, many ARs do not assist their clients with issues related to home health care and medical bill pay.

- Claimants can access a list of enrolled providers via the internet. Claimants who do not have access to the internet oftentimes are unable to access this list.
- Some claimants noted that when they asked the Resource Center to provide them with a list of enrolled providers, they were provided a long list that included physicians whose specialty bore no relation to their claim. These claimants wondered if in providing these lists the Resource Center could work with them to refine these lists.
- Claimants, ARs, and home health providers complained of lapses in home health care as they awaited a response to a request for authorization or reauthorization of care.
- Home health care providers complained that they did not know how to proceed when they encountered claimants who needed help/assistance with an EEOICPA claim. In particular, providers noted that while they were frequently advised to refer these claimants to DEEOIC and/or the Resource Center, they needed more guidance on what to do when: (1) the claimant was having trouble articulating his/her concerns to DEEOIC or; (2) DEEOIC and/or the Resource Center was having trouble understanding what the claimant was requesting.

Issues related to the administration of the program

- In its response to the Ombudsman's 2015 Annual Report, DEEOIC outlined the ways a claimant can report inappropriate customer service. Many claimants have not read DOL's response to Ombudsman's 2015 Annual Report and thus are not aware of these options.
- Because they fear retaliation, many claimants are hesitant to report incidents of inappropriate customer service directly to the office handling their claim for benefits. Likewise, we encounter claimants who are uncomfortable submitting a complaint about inappropriate customer service to a general e-mail address. It concerns some claimants that they do not know to whom this e-mail is being sent. Rather many claimants expressed a preference for reporting incidents of inappropriate customer service to a specific person.[81]
- Many of the claimants we encountered did not believe that the customer satisfaction survey was totally anonymous. They believed that DEEOIC had the ability, if it desired, to identify individuals who left negative comments.
- A number of claimants and home health care providers complained that they do not receive updates when their claims or requests for authorization/reauthorization for HHC were delayed. They noted that while there is an online tool that will provide them with a general status of their claim, this tool did not provide sufficient information to assure them that the claim has not been lost or misplaced.

[81] In this regard, claimants often view it as futile to call the district office to report the actions of personnel associated with that district office. A few claimants told of situations where in the course of a conversation with a CE, the claimant voiced his/her displeasure with the tone of what was being said and in response the CE allegedly told the claimant that reporting the incident to their supervisor would not lead to them receiving any disciplinary action.

Issues related to weighing evidence and due process

Claimants continue to argue that there is a need for independent review of determinations made by DEEOIC. In the opinion of these claimants, the FAB does not provide the level of independent review that they deem necessary. For instance, claimants argue that the FAB does not independently review the validity of procedures and policies announced by DEEOIC. Rather, claimants contend that because the procedure or policy was established by DEEOIC, the FAB automatically accepts the procedure or policy as valid. Claimants adamantly believe that some of the policies and procedures announced by DEEOIC would not be found valid if reviewed by an independent entity. In support of this belief claimants point to the work of the ABTSWH as they advise the Secretary of Labor on the technical aspect of some of the scientific and medical policy issues of this program. In particular, claimants point to the ABTSWH recommendation to rescind Circular 15-06.

In the view of some claimants, expanding the ABTSWH and its mission to include advising the Secretary on legal issues facing this program would be an effective way to provide the independent review that they believe is necessary. In particular, claimants believe that the mission of the ABTSWH should be expanded to include providing broader guidance on the weighing of evidence and on the due process issues.

APPENDIX 1

Acronyms (Abbreviations) Used in this Report

ABTSWH	Advisory Board on Toxic Substances and Worker Health
ACS	Affiliated Computer Services
AEC	Atomic Energy Commission
AR	Authorized Representative
AWE	Atomic Weapons Employer
BeLPT	Beryllium Lymphocyte Proliferation Test
CBD	Chronic Beryllium Disease
CE	Claims Examiner
CLL	Chronic Lymphocytic Leukemia
CMC	Contract Medical Consultant (formerly known as District Medical Consultant)
CPWR	Center for Construction Research and Training
DEEOIC	Division of Energy Employees Occupational Illness Compensation
DME	Durable Medical Equipment
DOD	Department of Defense
DOE	Department of Energy
DOJ	Department of Justice
DOL	Department of Labor
EEOICPA	Energy Employees Occupational Illness Compensation Program Act
FAB	Final Adjudication Branch
FECA	Federal Employees Compensation Act
FOIA	Freedom of Information Act
FWP	Former Worker Medical Screening Program
HHS	Department of Health and Human Services
HR	Hearing Representative
ICD—10	International Classification of Diseases, 10th Edition

IOP	Iowa Ordnance Plant
IH	Industrial Hygienist
IOM	Institute of Medicine of the National Academies
JOTG	Joint Outreach Task Group
MED	U.S. Army Corps of Engineers Manhattan Engineer District
NDAA	National Defense Authorization Act
NIOSH	National Institute for Occupational Safety and Health
NO	National Office
OWCP	Office of Workers' Compensation Programs
PM	Procedure Manual
PoC	Probability of Causation
RECA	Radiation Exposure Compensation Act
RESEP	Radiation Employees Screening and Education Program
SEC	Special Exposure Cohort
SEM	Site Exposure Matrix
SSA	Social Security Administration
The Act	Energy Employees Occupational Illness Compensation Program Act
The Office	Office of the Ombudsman, Department of Labor

EEOICPA Coverage

Chart 1 identifies the employees covered under Part B and Part E.

EMPLOYEES COVERED UNDER PART B	EMPLOYEES COVERED UNDER PART E
• DOE contractor	• DOE contractor
• DOE subcontractor	• DOE subcontractor
• Beryllium Vendor	• Uranium miners, millers, and ore transporters covered under Section 5 of the Radiation Exposure Compensation Act (RECA)[82]
• Atomics Weapons Employer	
• DOE employees	
• Approved RECA Section 5 Claimants	

Chart 2 identifies the illnesses covered under Part B and Part E.

POTENTIAL PART B ILLNESSES	POTENTIAL PART E ILLNESSES
• Radiation induced Cancer • Chronic Beryllium Disease • Beryllium Sensitivity • Chronic Silicosis (if mining of atomic weapon test tunnels in Nevada or Alaska) • "Supplement" for RECA Section 5 uranium workers	• Any illnesses or death (including illness or death related to cancer or beryllium) where it is at least as likely as not that exposure to a toxic substance at a covered facility was a significant factor in aggravating, contributing to, or causing the employee's illness or death.

Chart 3 outlines the employees covered under Part B and the illnesses for which these employees are covered under Part B.

PART B COVERED EMPLOYEES	CANCER CAUSED BY RADIATION EXPOSURE	CHRONIC BERYLLIUM DISEASE	BERYLLIUM SENSITIVITY	CHRONIC SILICOSIS
DOE Employee	YES	YES	YES	YES
DOE Contractor	YES	YES	YES	YES
DOE Subcontractor	YES	YES	YES	YES
Atomic Weapons Employer	YES	NO	NO	NO
Beryllium Vendor	NO	YES	YES	NO

[82] A claimant with an approved RECA Section 5 claim is eligible for additional compensation under Part B. In addition, a claimant who qualifies as a RECA Section 5 uranium miner, miller, or ore transporter may be eligible for compensation and benefits under Part E. Unlike Part B, under Part E, there is no requirement that the RECA Section 5 miner, miller, or ore transporter have an approved RECA claim.

APPENDIX 3

Tools and Resources

TOOL OR RESOURCE	AVAILABILITY TO CLAIMANTS/PUBLIC
DEEOIC Resource Centers (11)	In-person and written materials
Brochures (14)	Online DEEOIC homepage — www.dol.gov/owcp/energy/
Claimant Status Page	Online only at DEEOIC homepage
How to File a Claim	Resource Center or online at DEEOIC homepage
DEEOIC Forms	Resource Center or online at DEEOIC homepage
Energy Document Portal	Online only at DEEOIC homepage
Web Bill Processing Portal	Online only at DEEOIC homepage
Medical Provider Search	Online only at DEEOIC homepage
Medical Reimbursement through ETF	Online only at DEEOIC homepage
Site Exposure Matrices (SEM) database	Online only at DEEOIC homepage
Special Exposure Cohort (SEC) facility list	DEEOIC homepage and NIOSH homepage
BTComp subcontractor database	Online only at DEEOIC homepage
Department of Energy Covered Facility List	DEEOIC homepage and DOE homepage
EEOICPA statute	Online only at DEEOIC homepage
EEOICPA regulations	Online only at DEEOIC homepage
EEOICP Final Bulletins (2002 – date)	Online only at DEEOIC homepage
EEOICP Final Circulars (2003 – date)	Online only at DEEOIC homepage
EEOICP Procedure Manual	Online only at DEEOIC homepage
EEOICP Program Memoranda	Online only at DEEOIC homepage
Significant EEOICP Decisions	Online only at DEEOIC homepage
Common-Law Marriage Handbook	Online only at DEEOIC homepage
Public Reading Room	Online only at DEEOIC homepage
Program News	Online only at DEEOIC homepage
Upcoming Events	Resource Center or online at DEEOIC homepage
Advisory Board on Toxic Substances and Worker Health	Online only at DEEOIC homepage
HHS/NIOSH: What is Radiation Dose Reconstruction?	Online only at DEEOIC homepage and NIOSH website at www.cdc.gov/niosh/ocas/default.html
Radiation Exposure Compensation Act information	Brochure; DEEOIC homepage; and DOJ website at www.justice.gov/civil/common/reca

APPENDIX 4

DOL Response to the 2014 Annual Report to Congress

DOL provides a response to the President of the Senate and a response to the Speaker of the House. The content of these responses is the same. Following is the letter forwarded to the President of the Senate written by DOL in response to the Office of the Ombudsman's 2014 Annual Report to Congress.

SECRETARY OF LABOR
WASHINGTON, D.C. 20210

OCT 14 2016

The Honorable Joseph R. Biden
President of the Senate
Washington, DC 20510

Dear Mr. President:

This letter is written in response to the Office of the Ombudsman's 2014 Annual Report that was filed with Congress on January 8, 2016. 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 who have filed claims under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). The Secretary is required to provide to Congress a response to the Annual Report that includes a statement as to 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 the reasoning for the non-concurrence (42 U.S.C. § 7385s-15(e)(4)(A-C)).

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. DOL, through our Office of Workers' Compensation Programs (OWCP), Division of Energy Employees Occupational Illness Compensation (DEEOIC), has primary responsibility for administering the EEOICPA, including adjudicating claims for compensation and paying benefits for conditions covered under both Parts B and E of the statute. The Ombudsman's report contains no formal recommendations; however, it provides a summary of nine common themes/concerns on pages 84-85. I have carefully reviewed those topics of discussion and offer the following responses:

Informing Potential Claimants about the Program

The Ombudsman's summary states: "Some claimants find it troubling that although Part B was created in 2000 and Part E was created in 2004, they are just learning of the program. Claimants find it even more troubling when they first learn of the program years after its creation and then only learn of the program because of a passing comment made by a relative or friend. Some claimants continue to question why efforts were never undertaken to directly inform them of this program."

Response: I agree that, despite OWCP's significant efforts to inform potential claimants of the EEOICPA, there are claimants who may have only recently become aware of the existence of it. We remain steadfast in looking for ways to increase awareness of the EEOICPA.

Since the Act's inception, OWCP has understood the critical importance of outreach to the nuclear weapons community of the EEOICPA's enactment and the potential benefits the Act could provide for the patriotic men and women and their survivors who, through their work efforts, made a vital contribution to this country's defense. Toward that end, OWCP has used a variety of cost-effective methods for making the existence of the compensation program known to the widest possible audience. OWCP has publicized the EEOICPA via its website and in press releases, brochures, pamphlets, claims kits, newspaper articles, radio ads, a video series, via social media, in its attendance at conferences, communication with advocacy groups, and Congressional briefings. It has conducted Town Hall Meetings and provided Traveling Resource Centers since 2001 for Part B and since 2005 for Part E. In 2009, the Joint Outreach Task Group was formed to allow representatives from DOL, DOE, HHS, the Office of the Ombudsman for EEOICPA, the Office of the Ombudsman for the National Institute for Occupational Safety and Health (NIOSH), and representatives from DOE's Former Worker Medical Screening Program to share resources and combine outreach efforts to target both current and potential claimants. In FY2015, we translated our most frequently accessed brochures on our website into Spanish. Additionally, OWCP utilizes its network of Resource Centers at 11 major DOE sites to provide an initial point-of-contact for workers interested in filing claims. Unfortunately, neither DOL nor DOE has access to the current addresses of many employees who worked for the hundreds of contractors and subcontractors in the nuclear weapons complex starting in 1942. In fact, no such compilation of updated addresses is known to exist so direct outreach to potential claimants could not be done.

Statutory Eligibility Requirements

The Ombudsman's summary states: "We continue to receive complaints that address the statute, especially the limitations in coverage outlined in the statute. Specifically, claimants question why: (1) some employees who worked at covered facilities are covered under the Act while others are not; (2) some employees are covered under both Part B and Part E, while others are only covered under Part B; and (3) why some employees covered under Part B are covered for cancers caused by radiation, CBD (chronic beryllium disease), beryllium sensitivity, and chronic silicosis, while other employees covered under Part B are covered for some but not all of these illnesses."

Response: I agree that some claimants question statutory eligibility requirements. DOL works to faithfully execute the statute and to provide a balanced 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.

Claimants' Access to Tools and Resources

The Ombudsman's summary states: "We encounter claimants who are not aware of the various tools/resources developed by DEEOIC and/or do not know the various agencies involved in the administration of EEOICPA. These claimants often question why more is not done to inform them of the existence of these tools. Claimants find it especially troubling when, in spite of numerous conversations with the staff of DEEOIC involving a particular issue, they were never advised of the existence of a relevant tool or resource. We

also find that even when they are aware of these tools/resources, some claimants find it difficult to access and/or utilize these tools/resources. Claimants often contend that it would be helpful if the agencies were more forthcoming in offering assistance (and letting claimants know that the agencies will provide assistance)."

Response: I agree that the program could do a better job of communicating in this area. OWCP is implementing initiatives to enhance customer service training for agency staff, with particular focus on the staff's responsibility to guide claimants toward access and use of brochures, forms, waiver forms, the index of terms, the Federal (EEOICPA) Procedure Manual, bulletins, circulars, the Site Exposure Matrices (SEM), the health care provider list, the medical billing website, agency websites, and online resources.

OWCP has also established 11 Resource Centers nationwide to assist workers and their families in applying for benefits under the EEOICPA. Resource Centers are located in Dublin, California; Westminster, Colorado; Idaho Falls, Idaho; Paducah, Kentucky; Espanola, New Mexico; Las Vegas, Nevada; Amherst, New York; Portsmouth, Ohio; North Augusta, South Carolina; Oak Ridge, Tennessee; and Richland, Washington. The Resource Centers provide valuable information about the claims process, assist claimants in completing the necessary forms, and transmit documents to the DEEOIC District Offices. The Resource Centers provide assistance either in person or over the telephone, and thus are able to service individuals outside the immediate geographical area. The Resource Centers accept new claims and perform Occupational History Questionnaire interviews. They also conduct outreach activities to inform the public of benefits and requirements of the EEOICPA. The Resource Centers engage in approximately 85,000 claimant contacts (incoming and outgoing) per year.

Informing Claimants of Policies, Procedures and Specialist Reports during the Adjudication Process

The Ombudsman's summary states: "A frequent concern that we hear suggests that while this program is often characterized as claimant-friendly, there are many instances where DEEOIC appears to assume that claimants have a working knowledge of the program. We encounter claimants who stress that they know very little about this program. These claimants contend that it would be very helpful, and would be consistent with a claimant-friendly program, if the program advised claimants of relevant policies and procedures and advised them of these policies and procedures when this information had some relevance in their case. For instance, advising a claimant of his/her right to request a copy of the report of a specialist when DEEOIC obtains the report."

Response: Again, I agree. The agency believes that it is important to assist claimants early in the adjudication process; thus OWCP is committed to providing claimants – prior to any written decision – an explanation and/or copies of the policies and procedures that are relevant to their cases. Likewise, in FY 2015, OWCP began including with the recommended decision copies of specialist reports (e.g., industrial hygienist, toxicology and Contract Medical Consultant [CMC] reports) that were relied upon in issuing a recommended denial. These documents should give claimants a better understanding of how their claims are evaluated. OWCP provides ongoing training to staff to ensure they fully understand the policies and procedures established for the program. OWCP has established a comprehensive accountability review process that is

implemented on an annual basis to assess the quality of work performed by program staff and to validate that policies and procedures are being followed. The program's District Offices have done well on these accountability reviews, typically receiving scores above 90% with respect to compliance with policies and procedures and quality of work performed.

Failure to Provide Claimant Assistance

The Ombudsman's summary states: "Claimants question whether the government is fully meeting its requirement to provide assistance in connection with a claim. We especially hear this concern in connection with the development of evidence, as well as in connection with the delivery of durable medical equipment and the resolution of medical billing issues. This concern is also frequently raised in instances where claimants believe that the government is in a much better position to locate evidence."

Response: I agree that claimants question whether the government is fully meeting its requirement to provide assistance in connection with a claim. OWCP is only required to provide claims assistance under Part B, but chooses to apply the same standards of assistance to claimants under Part E. For example, OWCP contracts with a medical provider broker to make physicians available to claimants whose doctors are unwilling or unable to provide the types of medical opinions required by the statute. OWCP also provides Industrial Hygienists (both staff and contractors) who can provide either a claimant or a contract provider with scientific support in order to help facilitate medical opinions.

OWCP has also implemented interagency agreements with both DOE and the Social Security Administration (SSA) for access to employment records and in the case of DOE any retained health or other work-related documents.

Finally, OWCP has made significant efforts to assist claimants by providing access to information and claim forms using a variety of media and sources. Most information about the program is available via the OWCP website. Claimants who prefer to not use the web can contact Resource Center staff who will provide the same information by phone, mail, or in person. Also, OWCP has made all of the paper files available electronically and in 2015, began providing claimants with the ability to submit most forms and supporting information through either the mail or electronic data upload. In addition, OWCP conducted regular outreach to claimants, providers, and physicians in an effort to educate them about medical benefits (including durable medical equipment) and billing. The Program works closely with these stakeholders to assist them with obtaining the necessary equipment and by working with OWCP's medical bill contractor as necessary.

Weighing of Evidence

The Ombudsman's summary states: "Claimants continue to approach us with complaints concerning DEEOIC's weighing of evidence. In particular, we continue to receive complaints asserting that DEEOIC does not always explain why evidence is or is not credited, and/or does not always provide a reasoned and documented explanation of its decisions. In addition, there continue to be those who contend that DEEOIC's expectations

are sometimes unrealistic when it comes to the evidence that claimants must submit in order to meet their burden of proof."

Response: I agree that claimants have complained about DEEOIC's weighing of evidence. The Federal (EEOICPA) Procedure Manual 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, DEEOIC provided extensive training to claims examiners and hearing representatives to improve the quality of written decisions. The training stressed the importance of providing an explanation regarding the adequacy or inadequacy of evidence submitted, i.e., how each piece of medical evidence was reviewed and weighed. The training also emphasized the importance of explaining DEEOIC's use of the SEM, a database which provides exposure data for a facility and may establish a link between toxic substances and a claimant's occupational illness. The staff was also instructed that a written decision must explain that a contract medical consultant (CMC) may have been used to provide assistance on medical issues or causation and why studies or other reports may have been used or rejected in the adjudication of 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 will then have the opportunity to object to any findings in the report at the Final Adjudication Branch (FAB) level before a final decision on his/her claim is issued. OWCP also conducts an annual Accountability Review of cases to ensure staff compliance with published policy and procedures. The review also assesses the quality of written narratives and clear communication regarding weight of medical evidence assessment.

OWCP is cognizant of claimant frustration about meeting their "burden of proof," in situations where information is not accessible. Under the EEOICPA, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category, as set forth in 20 CFR § 30.111. OWCP takes its responsibility to assist claimants seriously, establishing policies and practices which provide significant assistance to claimants to help them meet their burden of proof. The agency works closely with DOE, DOE's Former Worker Medical Screening Program, and the Center for Construction Research and Training to verify employment and has an agreement with the SSA to obtain earnings information on behalf of claimants. Additionally, in an ongoing effort to assist claimants in meeting this burden, OWCP constructed and maintains the SEM, a database that provides a repository of information on toxic substances present at DOE and Radiation Exposure Compensation Act sites covered under Part E, and information about scientifically established links between toxic substances and recognized occupational illnesses. Further, the agency uses CMCs to assist claimants in proving their entitlement to medical benefits and to help establish a work-related cause of illness. In adjudicating claims, OWCP also relies on the facility and exposure information provided by HHS/NIOSH in its site profiles, technical basis documents, technical bulletins, Program Evaluation Reports, radiation dose reconstruction reports, and its Special Exposure Cohort determinations. The agency is

committed to doing everything possible to assist the claimant through our communications and outreach activities as well as the work of our Resource Centers.

Due Process

The Ombudsman's summary states: "This year, there were instances where claimants question whether they were afforded due process. In particular, there were instances where provisions of the Federal (EEOICPA) Procedure Manual (PM), a bulletin, or a circular were given the weight of law, and thus cited as the basis for resolving a claim. Without the documentation used to support these provisions, claimants often found it difficult, if not impossible, to develop a credible challenge to these provisions."

Response: Federal agencies routinely use procedural manuals, bulletins, and circulars, to disseminate policy and procedures. While these documents do not have legal force, they are meant to advise program staff and the public of how an agency interprets the statues and rules that do have the force of law, and they provide the foundation for program implementation and operations. OWCP uses certain source documents from a variety of sources including the DOE to develop its procedural manuals, bulletins, and circulars. OWCP works with the solicitor's office to ensure that its procedural manuals, bulletins, circulars and other program documents are consistent with the program's statute and regulations. Procedural manuals, bulletins, and circulars are available on OWCP's website. OWCP will endeavor to include source documents on the website, as appropriate.

Procedures for Reporting Inappropriate Customer Service

The Ombudsman's summary states: "There is a belief that DEEOIC needs to outline specific procedures for reporting inappropriate customer service, and that these procedures should be sensitive to the fears that claimants have regarding retaliation."

Response: I agree that no claimant should ever have any fear retaliation for submitting a complaint about the program or the handling of his or her claim. Complaints about inappropriate customer service should be direct to Deeoic-public@dol.gov. OWCP encourages claimants to submit comments and/or complaints in writing, by phone, via public email, or by using any of the three customer satisfaction surveys available on the OWCP/DEEOIC websites and via phone. Any complaints registered through the surveys are totally anonymous. OWCP is committed to providing professional and courteous customer service, and OWCP's management teams at the National Office and the District and FAB offices strive to work with claimants and staff to resolve all complaints. Further, DEEOIC analyzes stakeholders' concerns in order to continually improve the program.

Independent Administrative Review

The Ombudsman's summary states: "Claimants are excited that Congress approved the creation of an Advisory Board on Toxic Substances and Worker Health. The hope is that this board will help resolve many of the concerns that arise with issues related to exposure and causation under Part E of the EEOICPA. Nevertheless, we continue to hear from

claimants who believe that it would help if there was an independent review of the decisions of DEEOIC. While DEEOIC maintains that the Final Adjudication Branch provides an independent review of recommended decision, we talk to claimants who question the extent of FAB's independence and the adequacy of its review."

Response: I acknowledge that claimants have expressed concerns about FAB's independence. I must, however, respectfully disagree with the suggestion that claims/cases be reviewed outside the current process.

The FAB issues final agency decisions on benefit entitlement. The current structure of the EEOICPA program maintains the necessary independence of the FAB, and allows for an independent and objective review of the claimant's claim. It maintains a National Office in Washington, D.C. and four district FAB offices geographically located with the District Offices. The FAB maintains separate operational management and its performance is measured separately from the District Offices. The FAB independently reviews each recommended decision to ensure adherence to the EEOICPA and established program policies and procedures. Claimant objections are considered by way of review of the written record or oral hearings. Oral hearings are scheduled by FAB and are conducted at a location near the claimant. After due consideration of any argument or evidence presented by the claimant, the FAB issues a written final decision that discusses the finding of FAB and addresses any specific objection brought forth by a claimant.

After a final decision, the claimant may request a reconsideration of the final decision or a reopening of the claim. However, claimants are not required to request any of these types of administrative review. Under the Act, claimants are afforded independent review of their claims in the federal court system. Those adversely affected or aggrieved by a final decision of the FAB can seek judicial review of that decision in United States district court.

Finally, the Act specifically provided the Secretary the flexibility to develop administrative review procedures through regulations, which resulted in the FAB's creation and authority (42U.S.C. § 7385s-6(b)).

CONCLUSION

OWCP administers its responsibilities under the EEOICPA with the intent of following the will of Congress in enacting the EEOICPA: to pay all eligible nuclear weapons workers (or their eligible survivors) who incurred illnesses in the performance of duty at a covered facility. The 2014 Ombudsman's report provides OWCP with valuable data we will use to further improve the administration of EEOICPA.

Sincerely,

THOMAS E. PEREZ

ABTSWH Recommendations Adopted in October 2016

Advisory Board on Toxic Substances and Worker Health Recommendations —Adopted at October 17 - 19, 2016 Meeting

Recommendation #1

We recommend that DEEOICP Circular 15-06, Post-1995 *Occupational Toxic Exposure Guidance*, issued on December 17, 2014, be rescinded.

Rationale

We reviewed this Circular, its subsequent EEOICPA Program Memorandum, and associated Note of Explanation. We recognize that working conditions that impact safety and health in the workplace likely improved in many Department of Energy facilities over time. We recognize that the Department of Energy took concrete steps over the past few decades through investigations, changes in working conditions and practices, and issuance of orders and guidance documents.

However, a policy that uses a single time period, 1995, to demarcate a moment after which DOE employees would be assumed that a) they would be unlikely to be significantly exposed to toxic materials, and b) potential exposures would be within regulatory standards, is faulty in several respects. First, an empirical basis for this policy is not provided. It is furthermore highly unlikely that an empirical support could be provided. It is doubtful that sufficient industrial hygiene monitoring was performed throughout the DOE complex from 1995 to the present to substantiate a broad claim that all exposures were routinely kept below existing standards. Even if such monitoring was performed periodically, it would be unlikely to accurately capture intermittent and variable work processes, including accidental exposures.

We note, as well, there are no OSHA or DOE regulations for many workplace exposures, and existing workplace standards unfortunately do not entirely protect against illness and injury. Most OSHA standards, for example, have not been updated since the 1970's. Prominent OSHA standards that have been updated, such as the asbestos standard and the recently promulgated silica standard, are explicit in declaring that working at the designated permissible exposure levels will reduce but not eliminate consequential diseases. This consensus finding would appear to be acknowledged in the last paragraph of the DEEOICP Circular, which states that "even minimal exposure" to some toxins may lead to illness. If so, then this opinion of the Circular mitigates and even contradicts its own principal conclusion, i.e., that post-1995 exposures are to be considered, as a rule, insignificant.

Recommendation #2

We recommend that the Division of Energy Employees Occupational Illness Compensation ensure that the disease exposure links identified by the sources listed in Table 3-1 of the Institute of Medicine (IOM) report, Review of the Department of Labor's Site Exposure Matrix Database (2013), are included in the Site Exposure Matrix database (SEM).

Rationale

The IOM provided a detailed rationale for using other information sources beyond Haz-Map for exposure-disease links and for updating the SEM with publicly available data sources developed by consensus processes that are both transparent and comprehensive.

This rationale includes, but is not limited to:

- Haz-Map is developed and updated by a single expert without peer review or transparency.
- Haz-Map was developed to provide ready access for primary care physicians to exposure-disease links, and not to support a compensation system.

Consensus reports by scientific agencies that have undergone peer review represent readily available and reliable information that can be used to ensure that the exposure-disease links in SEM represent generally accepted knowledge. The sources listed by the IOM in Table 3-1 do not require DEEOIC to conduct an independent peer review of the literature.

Recommendation #3

We recommend that former workers from Department of Energy (DOE) facilities be hired to administer the Occupational Health Questionnaire.

Rationale

Important information in an occupational history originates in a description of tasks within a specific job, facility or industry. The worker may not know or recall all the hazards to which he was exposed in his/her career, but other data sources may identify, or experts will know, which exposures are associated with certain tasks. Therefore, a detailed list of tasks performed by an individual can be invaluable. In addition, an interviewer can ask about a full range of exposures, important exposure incidents, changes in exposure or protection over time, and buildings where the individual worked.

Given the complexity of the DOE sites, workers with long experience at these facilities are best positioned to help workers adequately report their tasks. Better capture and description of tasks, exposure, incidents, and buildings will allow a more complete assessment of claimant exposures.

Recommendation #4

We recommend that the Division of Energy Employees Occupational Illness Compensation (DEEOIC) establish a process whereby the industrial hygienist may interview the claimant directly.

Rationale

The Institute of Medicine recommended that the DEEOIC add the nature and extent of exposure to the Site Exposure Matrix (SEM) database. In response, DEEOIC has set up a process to attain customized employee-specific evaluations of the route and level of exposure through their new contract with Banda International group, in lieu of adding the nature and extent of exposure within the SEM. The Advisory Board agrees with establishing a process for an individualized assessment. However, as the contract with Banda is conceived, the industrial hygienists do not speak directly with the claimant but rather rely on the information in the file. For exposure, information in the file generally consists of SEM and the occupational history questionnaire, neither of which assesses intensity, frequency or duration of exposure.

To complement the occupational health questionnaire and SEM, direct interview of the claimant by an industrial hygienist will in many circumstances facilitate a better understanding of exposure details.

Recommendation #5

We recommend DOL review policy teleconference notes, redact confidential information, and post the information in a publicly available database searchable by topic area.

Rationale

The policy teleconferences generate extremely useful information about case determinations and practical guidance in the form of written notes. This information would help claimants and authorized claimant representatives understand how the DEEOICP applies its policies.

While it is important to maintain the free exchange of information this internal mechanism allows, a thoughtful redaction to exclude identifiable information of claimants as well as material not broadly applicable would allow the program to post useful guidance and improve transparency.

Recommendation #6

We recommend that the Department of Labor explore the feasibility of prospectively having new case files made accessible to the claimant through a password-protected electronic portal.

Rationale

Claimants already have the right to access their records by written request, although the current system may be limited in timeliness.

Access to case files in real time would promote transparency and may offer the opportunity to decrease misunderstandings and allow claimants to offer additional information at an earlier stage in the claims process, when needed. This would assist in timely resolution of claims.

Recommendation #7

We recommend that the Department of Labor re-organize its occupational physicians into an office comparable in organizational structure to the Office of the Solicitor of the Department of Labor, with physicians organized in groups to support OSHA, MSHA, OWCP, and other units, as well as to provide overall support to the Department of Labor.

Rationale

The Board has identified the need for more substantive and consistent medical input into the development of DEEOICP procedures, policies, and practices.

The gap between the current DEEOICP and the medical community reflects serious communication issues that require in-house expertise. However, physicians and other health care professionals, similar to attorneys, face challenges when working in isolation. The Office of Occupational Medicine in OSHA is an example of how professionalism, consistency, and quality can be achieved. We believe, however, that it would be more efficient for the Department of Labor to develop an office of occupational medicine that reports directly to the Secretary and that can offer the same quality service across the

Department of Labor, including for smaller units. Such an arrangement would allow cross-coverage and avoid the gaps that have been problematic with the EEOICP. Such an organizational structure would also assist with physician recruitment and retention.

Recommendation #8

We recommend that the entire case file should be made available to both the industrial hygienists and the contract medical consultants when a referral is made to either and not be restricted to the information that the claims examiner believes is relevant. The claims examiner should map the file to indicate where relevant information is believed to be.

Rationale

Claims examiners typically do not have a medical, occupational health, or industrial hygiene background. They play a key role in decision-making about many aspects of claims development and resolution, including the selection of information that is reviewed by industrial and medical experts, when referral is indicated. Claims examiners may inadvertently omit important medical and/or exposure details from the material selected for industrial and medical review and thus fail to facilitate a comprehensive and pertinent evaluation of the claim. For some claims, a more complete view of available medical and exposure information may lead to improved decision-making.

Access to complete medical and exposure information by the industrial hygiene and medical experts may serve as a second-level check on the accuracy and completeness of the Statement of Accepted Facts and the "questions to be answered." When corrections to the Statement of Accepted Facts are made as a result of medical and industrial hygiene review, the exercise will also serve as useful feedback for the claim examiners.

Mapping the case will assist the industrial hygienist and the consulting physician find information more readily and increase the timeliness and efficiency of the claims process.

EEOICP Circular 15-06 and Circular 17-04

EEOICPA CIRCULAR NO.15-06 December 17, 2014

SUBJECT: Post-1995 Occupational Toxic Exposure Guidance

After 1995, significant improvements in occupational safety and health programs, engineering controls, and regulatory enforcement existed throughout Department of Energy (DOE) facilities. These measures would have served to limit employees' exposures to toxic materials. Therefore, in the absence of compelling data to the contrary, it is unlikely that covered Part E employees working after 1995 would have been significantly exposed to any toxic agents at a covered DOE facility. As a result, the claims examiner (CE) can accept the following:

For employees diagnosed with an illness with a known health effect associated with any toxic substance present at a DOE facility after 1995, it is accepted that any potential exposures that they might have received would have been maintained within existing regulatory standards and/or guidelines.

If there is compelling, probative evidence that documents exposures at any level above this threshold or measurable exposures in an unprotected environment, the CE is to contact the Division of Energy Employees Occupational Illness Compensation (DEEOIC) Lead Industrial Hygienist (IH) for guidance on whether a formal IH referral is required.

Any findings of exposure, including infrequent, incidental exposure, require review of a physician to opine on the possibility of causation. This is necessary as even minimal exposure to some toxins may have a significant "aggravating or contributing" relationship to the diagnosed illness.

RACHEL P. LEITON
Director, Division of Energy Employees
Occupational Illness Compensation

Distribution List No. 1: Claims Examiners, Supervisory Claims Examiners, Technical Assistants, Customer Service Representatives, Fiscal Officers, FAB District Managers, Operation Chiefs, Hearing Representatives, District Office Mail & File Sections

EEOICPA CIRCULAR NO. 17-04 Date: February 2, 2017

SUBJECT: Rescinding EEOICPA Circular No. 15-06, Post-1995 Occupational Toxic Exposure Guidance and its corresponding Program Memorandum dated February 20, 2015.

The purpose of this Circular is to notify all Division of Energy Employees Occupational Illness Compensation (DEEOIC) staff that EEOICPA Circular No. 15-06, Post-1995 Occupational Toxic Exposure Guidance, and its corresponding Program Memorandum of February 20, 2015, are hereby rescinded. Accordingly, the potential for toxic substance exposure in all claims must be evaluated based upon established program procedure and the evidence presented in support of a claim.

RACHEL P. LEITON
Director, Division of Energy Employees
Occupational Illness Compensation

Attachments

Distribution List No. 1: Claims Examiners, Supervisory Claims Examiners, Technical Assistants, Customer Service Representatives, Fiscal Officers, FAB District Managers, Operation Chiefs, Hearing Representatives, District Office Mail & File Section

UNITED STATES DEPARTMENT OF LABOR

Office of the Ombudsman
Energy Employees Occupational Illness Compensation Program

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