



## **EECAP Special Report January 21, 2014**

### **Analysis of the 2012 Ombudsman's Annual Report to Congress and Office of Workers Compensation Program Response**

On June 5, 2013 the Office of the Ombudsman for the Energy Employees Occupational Illness Compensation Program sent its required report to Congress. The report discussed the following concerns that had been raised to their office in 2012.

#### **1. The Scope of the Program**

- a. This program does not cover everyone who worked at these facilities
- b. Differences in Coverage
- c. Illnesses Suffered by Family Members (Take-Home Toxins)
- d. RECA Section 4 Claims

#### **2. Issues Related to Survivor Eligibility**

- a. Survivor Eligibility Under Part E
- b. Non-spousal Children
- c. The Eligibility of Certain Survivors Cannot be Determined

#### **3. Issues Related to Establishing Employment Records do not exist**

- a. Records are incomplete
- b. Existing records are not deemed sufficient
- c. Issue concerning SSA records
- d. The Weighing of Evidence
- e. Affidavits
- f. There are limits to the assistance that is offered
- g. Establishing a contract between the employer and DOE
- h. Problems encountered by survivors endeavoring to establish employment

#### **4. Diagnosed Medical Condition**

- a. Diagnosed condition versus symptom
- b. Difficulties documenting a diagnosed condition

#### **5. Issues Related to Establishing Exposure to Toxins**

- a. SEM
- b. The accuracy of SEM:
- c. Difficult to update SEM
- d. Limitations of SEM
- e. Is DEEOIC properly utilizing SEM
- f. Records are missing or are inaccurate
- g. Other complaints involving difficulties establishing exposure
- h. Full body scanner

#### **6. Dose Reconstruction and Special Exposure Cohorts**

- a. Dose Reconstructions
- b. Dose reconstruction is a guess
- c. The length of time that it takes to process a dose reconstruction
- d. Methodology of dose reconstructions
- e. Data used to perform dose reconstructions
- f. Use of co-worker and surrogate data
- g. Dose reconstruction for chronic lymphocytic leukemia (CLL):
- h. Special Exposure Cohort
- i. Claimants do not understand the SEC criteria
- j. Claimants not aware when additional SECs added
- k. Why only 22 cancers
- l. SECs only assist those with one of the 22 cancers (Partial Dose Reconstructions)
- m. Establishing 250 days
- n. New SEC designation process takes too long
- o. Metastases
- p. Secondary cancers

## **7. Part E Cancers**

- a. Claimants do not understand SEM
- b. Evidence relied upon to establish a link is not accurate
- c. Difficult to locate medical/scientific evidence addressing causation
- d. Little guidance provided in developing evidence of causation

## **8. Issues Related to Chronic Beryllium Disease**

- a. Part B – Pre 1993 CBD
- b. Part B – Post 1993 CBD
- c. Establishing CBD under Part E
- d. Diagnoses of sarcoidosis and the presumption of CBD

## **9. The Evaluation of Evidence**

- a. The bar is set too high
- b. The evaluation of the evidence is not consistent with the Act
- c. Rules/Procedures not applied in a consistent manner
- d. Other concerns with the evaluation of evidence
- e. Decisions should contain adequate explanation

## **10. Impairment and Wage Loss**

- a. Claimants not aware of eligibility for impairment and/or wage loss
- b. Claimants not aware that they can seek re-evaluation of an impairment
- c. Confusion over whether prior approval of the physician is required
- d. Providing physicians with appropriate test results
- e. Locating physicians willing to perform an impairment rating

## **11. Medical Benefits**

- a. Fee Schedule
- b. Difficulty locating physicians
- c. Difficulty changing physicians
- d. Other issues involving providers
- e. Medical Bills
- f. Massage therapy

**12. Attorney Fees**

- a. Gaps/omissions in the attorney fee provision
- b. The Part B attorney fee provision is ill suited for Part E
- c. Attorneys and authorized representatives do not know the rules
- d. Issues concerning representation

**13. Complaints Involving the Administration of the Program**

- a. DOL
- b. Prefer face to face contact
- c. Change in claims examiners
- d. The period following the issuance of a recommended decision
- e. Processing of claims takes too long
- f. DMD and Toxicologist reports only provided on request
- g. Reasoned and explained decisions
- h. Inconsistent decisions and policies
- i. Errors in decisions
- j. Telephone calls not answered and/or not properly returned
- k. Rude/insensitive behavior
- l. No formal procedure for changing CEes
- m. No response to complaints
- n. NIOSH
- o. DOE

**14. Miscellaneous Issues**

- a. FOIA REQUESTS and STATISTICS
- b. Case files not delivered to PO boxes
- c. Use of social security numbers
- d. EEOICPA not given the same priority as other compensation programs
- e. Vow of secrecy impedes worker's willingness to discuss their employment

On December 18, 2013 OWCP responded as required to Congress. Of the 96 concerns the Ombudsman's Report identified, DEEOIC responded to eleven leaving 85 concerns unaddressed.

**1. Claimants not aware of, or have limited knowledge, EEOICPA--**

- a. The OWCP Response states that they held eight town hall meetings, traveling resource centers, and joint outreach events in 2012, reaching out to the public with press releases. They also hold monthly meetings to find new ways to reach out to the public but did not comment on what new methods have been implemented from these meetings.
- b. The Ombudsman's Report provides more specific, and different, numbers for outreach events than the OWCP response provided:
  - i. 21 Outreach events, 17 of which were sponsored by DOL with 1670 individuals attending and 156 new claims being filed.
  - ii. 2 former worker luncheons
  - iii. Annual Radiation Exposure Screening and Education Program meeting

It is interesting that the Ombudsman's Report and DEEOIC's Response give different outreach event numbers. Also interesting is that the Ombudsman's office is concerned, even while reporting more outreach events, that there are still workers who do not know of the program. The OWCP Response does not mention whether or not DEEOIC shares this concern or what their plan is for improving the situation.

**2. The holding of compensation in abeyance while survivorship is confirmed--**

- a. The OWCP Response answered this concern by quoting 20 C.F.R. §30.505(c) which states that, No payment shall be made until OWCP has made a determination concerning the survivors related to a respective claim for benefits."
- b. The Ombudsman's Report raises issues that concern survivor claimants about this policy and provided examples from 2012 of situations where
  - i. One or more potential survivors cannot be determined.
  - ii. The possibility of an ineligible survivor behaving spitefully to stop compensation.

Claimants who experienced some of the above wanted to know why DEEOIC could not help find the missing claimants and why a time limit could not be given for response to potential survivors who chose not to respond even with evidence that they have been properly notified. The OWCP Response did not answer these questions.

**3. DEEOIC sets the bar of weighing employment evidence higher than a claimant can meet--**

- a. The OWCP Response replies that they do not have an unusually high standard for establishing covered employment and that they have a numerous resources to assist claimants with proving employment but did not offer a list of the resources.
- b. The Ombudsman Report gives examples of workers who could not prove employment because their employment records no longer existed, employment logs had been destroyed, records are incomplete, and DEEOIC deemed what records still existed were not sufficient to prove their employment including acceptance of:
  - i. Q security clearance not proving a person worked at a covered facility;
  - ii. Social Security records listing a contractor's corporate address but not naming the specific facility or location.
  - iii. The contractor working under different names and DEEOIC not recognizing the company.
  - iv. Survivors lacking knowledge because the DOE sites were secret and their family members did not discuss their work.

**4. The need for claimants to provide proof that a contract existed between a contractor/subcontractor and DOE facility when DOL is unable to do so--**

- a. The OWCP Response answered this concern by quoting 42 U.S.C. § 7384 (11) which DEEOIC feels says that DEEOIC is required to verify that a contractual relationship existed between the contractor/subcontractor

and DOE. The OWCP Response stated that program resources existed to handle these problems but did not identify the resources, or whether they are available to claimants. The OWCP Response did verify that if they do not find contractual evidence it is up to the claimant to prove it existed.

- b. The Ombudsman's Report pointed out that the workers feel it is unreasonable to expect private individuals to locate contracts when the government could not as the workers:
  - i. Were not party to the contracts
  - ii. Never saw the contracts
  - iii. Never had reason to ask the company about the contracts
  - iv. Did not even know the contract existed

## 5. Problems with SEM and DEEOIC not responding to submitted information--

- a. The OWCP Response acknowledges that SEM is not complete and ever-changing and mentions the IOM SEM Review. The OWCP Response also says DEEOIC evaluates all claimant/public submissions regarding health effects and toxic substances:
  - i. Where DEEOIC deems the information scientifically valid the information is incorporated into SEM.
  - ii. 2,345 chemicals were added to the SEM in 2012 but no mention is made of how many chemicals which were removed.
  - iii. The labor category of Boilermaker and unnamed toxic substances were added to the Oak Ridge National Lab SEM in 2012.
  - iv. The Dayton Project was added as a DOE facility based on information EECAP sent them.
    - 1. Okay, this is an issue I actually know about. The experience of the Dayton Project becoming a DOE facility was not typical of a worker submitting information to the SEM administrator. I found a document where the government had taken the Dayton Project properties by eminent domain. This proved that the site was indeed a DOE site. This proof was submitted with several exchanges of letters with a DOL administrator and not through the usual SEM contact webpage. Then the SEM administrator contacted ME and asked for the list of chemicals I had created by searching Dayton Project AEC documents rather than me submitting them to the SEM administrator. I gave him access to my Dropbox account to get the list and documentation. Again, this was a very atypical exchange. About this same time I also submitted documentation proving the existence of over 500 labor categories to the SEM administrator for Mound Laboratory. Only 116 of these were added to the SEM. This exchange was typical in that I never heard back on why the other 400 labor categories were not added to the SEM. I don't find this experience helpful to the OWCP Response's

point as the reality actually boosts the complaints reported to the Ombudsman's office.

**6. Some claimants state that when a decision seems to be denied solely on a SEM review the decision needs to be reviewed to determine if this is actually what happened--**

- a. The OWCP Response does not address how to determine if decisions have actually been made solely on a SEM review. It does say that the SEM is not meant to be used this way and that Claims Examiners are told to also use other sources, Contract Medical Contract Medical Consultants **opinions on causation** (my emphasis), DOE site records, co-worker affidavits, and Industrial Hygienists' reviews. The OWCP Response also states that if a claimant disagrees with the Decision he may file an objection and present new evidence as part of the process. It also says that DEEOIC conducts Accountability Reviews on case files annually.
  1. There are a couple concerning elements with OWCP's Response:
    - a. Hopefully Mr. Steinberg misspoke when he only mentions the CMCs evaluating claims for causation. Causation is only one element that needs to be looked at. A claim is to be approved if the evidence shows that the DOE worksite toxic exposure caused, aggravated, or contributed to a worker's illness. If the CMCs are only evaluating medical records based on causation this is a huge concern.
    - b. I'm not sure what new evidence a claimant would be able to find to prove that the decision had been made solely on the SEM.
    - c. I'm not sure how useful reviewing random claims for an Accountability Review would be to any specific claim.
    - d. I feel an Advisory Board is necessary to determine whether claims are being denied based solely on the SEM.
  - b. The Ombudsman's Report provides quotes from claimant Decisions which read like the claim was decided solely on the SEM in direct opposition to DEEOIC's Procedure Manual, Chapter 02-0700, 8 which states, “[u]nder no circumstances is SEM used as a stand alone tool to deny a claim...”
    - i. The...Office reviewed the evidence or record and determined that the SEM database did not find any toxic substances that are known to cause congestive heart failure for a janitor, service attendant/mechanic & dispatcher employed at the Rocky Flats Plant; that it is “not at least as likely as not” that your exposure to a toxic substance was a significant factor in causing, contributing to

- or aggravating your congestive heart failure. (Decision issued January 2012)
- ii. The U.S. Department of Labor maintains a data base called the Site Exposure Matrices (SEM). The district office performed a search of the SEM and was not able to find any toxic substances that have the potential health effect of esophagus cancer. (Decision issued March 2008)

**7. Reports are still being received about decisions are not well written or clearly reasoned--**

- a. The OWCP Response states that DEEOIC is “committed to improving the decision process by refining our guidance to further simplify written correspondence, while ensuring that claimants receive a thorough explanation for the basis of the decision.” and that an Accountability Review of files from the Denver and Jacksonville FAB offices had been held in 2012.
  - i. If I were writing for clarity I would rephrase the above quote to, “DEEOIC is working hard to give claims examiners the training they need to provide claimants with a clear, easily read, and thorough, Final Decision.” Editing for clarity is hard, time consuming and very, very necessary.
- b. The Ombudsman’s Report commends DEEOIC on its efforts to improve making its decisions well written and clearly reasoned and hope it will continue in its recommendations.

**8. The limited number of significant decisions posted on the DEEOIC website-**

- a. The OWCP Response says that the decisions on its website are chosen because they have wide programmatic implications for EEOICPA claims and that there are 202 final decisions arranged into 24 major topics, with eight new decisions added recently.
- b. The Ombudsman’s Report recommends expanding the number of decisions published to help claimant’s understanding of EEOICPA laws, regulations, and rules.
  - i. The OWCP Response does not seem to address the Ombudsman’s recommendation. Rather it just states what decisions they post on the website.

**9. A list of physicians taking the EEOICPA medical card is not easy to find on DEEOIC’s website--**

- a. The OWCP Response says that there is a link on the webpage to a list of doctors enrolled through DEEOIC’s medical billing contractor under the heading “Get Help with My Medical Bills”.
- b. The Ombudsman’s Report says many claimants are unable to find the link and recommends placing a more obvious link to the physician’s list.

- i. The OWCP Response did not address this suggestion although it should be very simple to implement.

**10. Policy determinations need to be available to the public--**

- a. The OWCP Response to this is that all **published** (my emphasis) policy directives are available to the public on the DEEIOC website. The response does not address the unpublished policies or how the public is to access these.
- b. The Ombudsman's Report said in its recommendations that DEEOIC policy determinations should be available to the public, especially when policy is applied to similar cases.
- c. The Ombudsman's Report mentions several instances where published/unpublished policies have created problems for individual claims.

**11. DEEOIC needs to implement procedures for reporting rude or unprofessional behavior--**

- a. The OWCP Response states that DEEOIC is committed to providing professional and courteous customer service and that any inappropriate customer services should be reported immediately but did not provide the phone number/email address for this. DEEOIC did an online customer satisfaction survey in 2012 and will be expanding this to a phone survey soon.
- b. The Ombudsman's Report recommended DEEOIC institute procedures for reporting rude and unprofessional behavior and provide the public with the procedures as well as reporting back to claimants with a response to individual complaints.