

STATEMENT OF SHELBY HALLMARK
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OFFICE OF WORKERS' COMPENSATION PROGRAMS
U.S. DEPARTMENT OF LABOR
BEFORE THE SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CLAIMS
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

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Mr. Chairman, and Members of the Committee, my name is Shelby Hallmark. I am the Director of the Office of Workers' Compensation Programs (OWCP), a component of the Employment Standards Administration (ESA), Department of Labor (DOL).

I am pleased to appear before the Subcommittee today to discuss our efforts to fulfill the promise made to veterans of the cold war with the enactment of the Energy Employees Occupational Illness Compensation Program Act (EEOICPA). Since the initial implementation of this program, DOL staff have dedicated themselves to ensuring that we adjudicate claims and provide benefits to eligible workers and their survivors in a manner that is timely, fair, consistent, and according to the Law as enacted by Congress. We believe the results demonstrate that the promise of the statute is being kept.

There have been assertions made in previous hearings before this Subcommittee that the Department of Labor has been working to curtail the promise of the Act. That is not the case, and I will also present evidence that we are, in fact, administering the program in the best interest of the workers and survivors for which it was intended, and as outlined in the law.

Program Accomplishments

The EEOICPA has been and continues to be an interdepartmental activity, involving the coordinated efforts of the Department of Energy (DOE), Health and Human Services (HHS), Department of Justice (DOJ), as well as DOL. As the lead agency for EEOICPA, we are proud of the overall progress we've made in implementing both Parts of the Act.

The Department of Labor has administered Part B of the program since its inception in 2001. In October 2004, Congress chose to entrust DOL with a new facet of EEOICPA, Part E, to redress issues with the earlier Part D program. Throughout the brief history of the Act, DOL has worked hard to fairly and effectively administer these complex programs, according to the requirements of the statute. In doing so, we have set challenging performance targets to ensure that workers and their families, who have waited for so long, receive prompt and accurate decisions. Although we have much work still to do, we have consistently exceeded our performance goals and will continue to press ahead as quickly as possible until all backlogged cases are resolved.

The EEOICPA program is still new and evolving, but a great deal has been accomplished. Workers who haven't yet received a final decision, or who are unhappy with a decision, may

question our success in fulfilling its promise, but a full and fair analysis of the program indicates that it is moving forward effectively.

Since the inception of the program, claims have been filed for EEOICPA benefits on behalf of more than 58,000 individual workers. Of those, 43,000, or nearly 75%, have received at least one final decision from DOL (individuals can receive multiple decisions under Part B and Part E). More than 22,000 individuals have received in excess of \$2.25 billion in lump sum compensation under Part B, Part E or both, as well as \$133 million in medical benefits.

Part B Accomplishments

The EEOICPA was initially enacted on October 30, 2000. It established a federal payment program (Part B) under which DOE contractor employees and certain other employees and their eligible survivors are entitled to receive federal compensation and medical benefits for radiation-induced cancer, beryllium disease or silicosis. Executive Order 13179 of December 7, 2000, assigned primary responsibility for Part B administration to DOL. DOL's delegated responsibility included addressing issues raised in the claims process regarding dose reconstructions conducted by the National Institute for Occupational Safety and Health (NIOSH). DOL moved swiftly to issue Interim Final Regulations in May 2001, and established a fully functioning program on schedule. Secretary of Labor Elaine Chao presented the first EEOICPA check on August 9, 2001.

To date, more than 76% of Part B cases have received a final decision, and payouts are approaching \$1.75 billion. Another 11% of Part B cases are at various stages of dose reconstruction with NIOSH. The vast majority of the remaining 7,000 cases were received during the past year and are moving promptly through the various stages of the adjudicatory process. The Division of Energy Employees Occupational Illness Compensation (DEEOIC) has met its timeliness goals for processing Part B cases every year, and although the time to complete Part B actions has increased in 2006 due to the addition of the new Part E program, the average time to issue initial decisions was 175.2 days, less than the program standard of six months. In FY 2006, DEEOIC's Final Adjudication Branch achieved an 88% rate for issuing final Part B decisions within established program standards. Although these complex occupational disease claims take time, we are generally pleased with the speed of adjudication once dose reconstruction is completed.

Some have cited the approval rate for Part B cases, which are subject to the dose reconstruction process, as evidence that the intent of the statute is not being realized. To date, approximately 29% of such cases have received a final decision conferring benefits, and nearly 5,000 claimants have received over \$534 million in benefits via this process. To assess these outcomes, one must understand the choices Congress made in establishing the Part B program's approach to adjudication of radiogenic cancer claims.

When Congress was considering the legislation that became Part B of EEOICPA, it was confronted with a difficult choice concerning how the government should determine whether a cancer was sufficiently work-related to justify compensation under the new compensation program. Decades of experience demonstrated that requiring medical evidence that an individual cancer was related to radiation exposure was not a workable solution because of the inability of scientists or doctors to determine the specific cause of any particular cancer. Therefore, Congress chose to use a statistical epidemiological approach requiring a claimant to establish that a worker's cancer was "at least as likely as not" related to workplace exposure when that probability was calculated using a version of statistical tables previously developed by the government. Since there was substantial evidence that recordkeeping at many covered facilities was less than comprehensive, it was understood by the sponsors of the legislation that the process would not be perfect but would be based upon estimation and probability.

In view of previous experience with such statistical tables, the fact that some types of cancer

have been found not to be significantly radiogenic, and the fact that the National Cancer Institute estimates that the incidence of cancer in the general population is over 40%, it was clear that many cancers would be found to have less than a 50% probability of work-related causation and would thus not lead to a decision to compensate the claimant. However, Congress did specify in the legislation that a 99 percent confidence interval be used in the calculation. (For each specific dose reconstruction there is a range of possible resulting probabilities of causation. This means that if only one percent of these possible outcomes are 50 percent or more, the claim is awarded benefits.) This provides a very large margin for error in favor of claimants. Nevertheless, the DOE initially estimated, based on their knowledge of exposures in the complex and epidemiological studies of cancer incidence, that less than 5% of nuclear weapons workers who incurred cancer would reach the 50% probability of causation threshold.

In practice, the strenuous efforts of NIOSH to be fair to claimants and resolve ambiguities in their favor have resulted in the current approval rate of 29% for such claims, far in excess of any predictions when the legislation was being considered. Those whose claims are denied often feel strongly that the cancers involved were caused by work-related exposure to radiation, and one cannot help but sympathize with individuals diagnosed with cancer, and with their families. However, DOL must make determinations consistent with the requirements of the statute.

Part E Accomplishments

In addition to administering Part B of the Program, DOL has responsibility as the lead agency for Part E (which replaced Part D) of the Act. Congress initially included a second program in EEOICPA, Part D, which required DOE to establish a system by which DOE contractor employees and their eligible survivors could seek assistance in obtaining state workers' compensation benefits. In the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108-375 (October 28, 2004), Congress abolished Part D of the EEOICPA, created a new Part E in its place, and assigned administration of Part E to DOL. Part E established a new system of federal payments for DOE contractor employees and eligible survivors of such employees. Part E benefits were also extended to uranium miners, millers and ore transporters covered by Section 5 of the Radiation Exposure Compensation Act (RECA). Congress specified that DOL prescribe Interim Final Regulations implementing the amendments to EEOICPA with 210 days of enactment.

When the amendment was passed in October 2004, there were more than 25,000 cases pending with the old Part D program, many for more than four years, thus creating an instant backlog for the new program. Within two months of enactment, DOL began providing compensation under the newly established Part E of the EEOICPA, using preliminary procedural guidance. Interim final regulations were implemented by May 2005, within the deadline established by Congress. Since its inception, the DEEOIC has provided more than 4,000 employees or their families with Part E compensation payments exceeding half a billion dollars. In addition, DOL set specific Part E targets for fiscal year 2005 and fiscal year 2006, to issue payments and make initial decisions on backlogged cases. DOL exceeded these goals in both years, issuing over 1,500 payments in fiscal year 2005, and issuing initial decisions on more than 75% of the backlogged cases by the end of fiscal year 2006. By the end of 2007, the new program will have eliminated the backlog and will be current in processing all incoming claims.

Aside from the cases inherited from Part D, during FY 2006 DOL was able to reach initial determinations on new Part E claims within program standards 73% of the time, with the average time required being 132 days.

For greater efficiency, simplicity, and speed, DEEOIC now adjudicates all claims for benefits

under Parts B and E of the EEOICPA as one EEOICPA claim. Where possible, decisions are issued that address both Parts B and E simultaneously. However, partial decisions may also be issued in cases where benefits under some provisions can be awarded but claims under other provisions require further development. Once the backlog of inherited claims has been fully resolved, we will direct maximum attention on driving down the time to process each step of these claims, while continuing to work to improve the quality of our decisions. We are focused on doing everything we can to speed the processing of claims under this program, and to getting compensation and benefits to all eligible injured workers and their families.

DOL Claimant Assistance and Outreach

The complexity involved in EEOICPA -- the exposures and diseases involved and the science required to relate them to one another, the multiple benefits available and separate eligibility rules under the two Parts, and the multiple agencies engaged in delivering the program -- as well as the advanced age of many current and potential claimants, necessitate extraordinary effort to inform and assist the affected community. DOL has utilized a wide range of methods to educate the public and provide specific assistance in completing forms and navigating through the process of submitting evidence and other information.

DOL has undertaken significant outreach activities in an effort to provide detailed information to the employees or survivors who may be eligible for benefits. As a first step, DOL established resource centers (now 11 in number) located throughout the country, in which knowledgeable staffs work one-on-one with claimants to file appropriate forms and submit information to DOL relevant to those claims.

Information is provided face-to-face and via toll-free telephone service. Resource center staffs provide all relevant information at the initial stages of claim submission and personally answer any questions that arise. They also participate in numerous community events in their jurisdictions to get the word out to various groups that may include potential claimants.

To attract maximum attention to the program, DOL held well-publicized Town Hall meetings throughout 2001-2005 in various locations throughout the country where there was a significant population of individuals currently or formerly employed at covered facilities. DOE and NIOSH also participated in most of these meetings, providing information and answering questions about their responsibilities under the statute. These meetings were well attended by employees, survivors and special interest group members. DOL continued to conduct these meetings during 2006 as new regulations and procedures were developed.

In addition to educating the public about benefits, DOL has forged key relationships with various entities that have information that may be pertinent in the successful adjudication of claims. DOL understands the difficulties claimants may have in locating employment and exposure records needed to issue fair decisions. As a result, DOL has contracted with the Center to Protect Workers Rights (CPWR) to track down information about construction workers who may have been exposed at DOE sites but whose employment information was not captured in DOE prime contractor datasets. We also work with the DOE Former Workers Program, and with other contractors, to locate appropriate records which are not immediately available through DOE. These valuable relationships help relieve the burden on the claimants to locate these records. In addition, DOL has developed a site exposure matrix, which is a detailed database containing information concerning the types of chemicals that may be found at a given covered facility. This matrix is utilized by claims staff in the district offices to determine toxic exposures. These relationships and tools have been significant in reducing the amount and types of information required to be submitted by claimants.

In an effort to further assist claimants in the processing of claims, DOL has contracted with over 200 physicians throughout the country to provide medical evidence for use in issuing

decisions related to causation and impairment issues. These district medical consultants work with DOL to review particularly difficult claims, or where claimants have no access to physicians able to provide the necessary medical evaluations, and to assist DOL staff in issuing accurate and thorough decisions.

Each of the four DEEOIC district offices and its Final Adjudication Branch maintain toll-free telephone lines and receive and promptly respond to thousands of inquiries each year.

These efforts demonstrate DOL's dedication to reaching out to the public, and to alleviating burden on claimants by assisting them in perfecting their claims at all stages of the adjudication process. Those who have experienced difficulties in navigating this complex program may be disappointed that we have not done more, but we are working continuously to further improve that assistance, and we urge claimants and family members who are confused or uncertain about the meaning of program documents or how they should proceed to contact us directly to address those concerns.

DOL Coordination with other Agencies

Given DOL's role as lead agency in the administration of the EEOICPA, significant coordination is required with other federal agencies, including NIOSH, DOE, and DOJ. NIOSH (a component of HHS) supports the program by conducting radiation dose reconstruction and handling requests for expansion of the Special Exposure Cohort (SEC). The DOE and many of its contractors supply employment and exposure information. The DOJ coordinates the coverage of certain uranium workers also covered under the Radiation Exposure Compensation Act (RECA). We've worked from the beginning to coordinate all these agencies' EEOICPA activities so that the program functions as it was intended.

A key element in processing a great number of Part B claims is the NIOSH dose reconstruction process. Although NIOSH is responsible for conducting the research necessary to provide claimants and DOL with a detailed dose reconstruction report estimating work-related radiation exposure, the ultimate responsibility for issuing recommended and final decisions rests with DOL, utilizing the NIOSH dose reconstruction and other evidence in the file. (See the discussion below on cases returned to NIOSH for rework.) NIOSH requests input and claimant signatures on dose reconstruction documents, but the signature only acknowledges receipt of the document and does not constitute concurrence or objection. DOL's Final Adjudication Branch (FAB) is a claimant's only opportunity, prior to issuance of the DOL decision, to contest a dose reconstruction. Consequently, it is imperative that DOL thoroughly review and understand the dose reconstruction reports provided by NIOSH such that we may issue fair and equitable decisions to the claimants.

Allegations that Attribute Cost-Cutting Motives to DOL

In testimony provided at previous hearings before this Subcommittee, it has been alleged that DOL has attempted to carry out a covert budget cost containment effort. As I testified on March 1, 2006, this is simply not the case. This issue initially arose in the context of an Office of Management and Budget (OMB) 2007 budget passback document which outlined various options related to the NIOSH SEC and dose reconstruction processes. As the Administration has previously testified, it is not pursuing any of these options.

As indicated above, DOL, as lead agency in the administration of the EEOICPA, is ultimately responsible for issuing fair and equitable decisions to claimants. This requires close coordination and analysis of activities undertaken by other agencies involved in the process, including NIOSH. DOL's only goal in reviewing NIOSH dose reconstructions is to ensure that final decisions are accurate, fair and consistent.

Performance at the DOL and NIOSH technical staff level provides significant insight into the workings of both agencies on day-to-day program coordination activities and DOL's effort to ensure fairness and uniformity in program decisions, while further demonstrating that DOL is in no way attempting to administer EEOICPA in a manner that is driven by cost containment. Two areas that are demonstrative of program performance are DOL decisions requesting NIOSH reworks of completed dose reconstructions, and DOL decisions in addressing claimants' technical objections to NIOSH dose reconstructions. The latter is of utmost importance since the only avenue for claimants to object to the NIOSH dose reconstruction procedures is through the DOL claims adjudication process.

Reworks of NIOSH Dose Reconstructions

As part of the DOL claims process, upon receipt of a dose reconstruction report from NIOSH, claims staff reviews the reports for accuracy and consistency prior to issuing recommended or final decisions on cases. Sometimes they recognize anomalies in the reports which require further analysis. For example, a dose reconstruction may have been conducted based on an incorrect diagnosis code, or additional evidence received after the dose reconstruction was completed by NIOSH may reveal expanded employment, or medical evidence has been submitted revealing that an employee had an additional cancer. In these instances, the claims staff either at the district office level or at the Final Adjudication Branch must determine whether a claim should be returned to NIOSH for a "rework." The DEEOIC Procedures, (EEOICPA Bulletin No. 04-01, issued in 2003) state the following:

"The DEEOIC Health Physicist serves as the central liaison between NIOSH and DOL on all dose reconstruction related issues. All requests for reworks of dose reconstruction reports must be forwarded to the DEEOIC Health Physicist for review.

The DEEOIC Health Physicist will review the request for rework and determine whether a rework is required. The DEEOIC Health Physicist will contact the claims examiner if additional information is needed to make a determination, which may include requesting the case file. If the information would change the outcome of the dose reconstruction or affects the accuracy of the case, the request for rework will be referred to NIOSH. If the information would not change the outcome of the dose reconstruction, the DEEOIC Health Physicist will send an e-mail to the claims examiner and the district office NIOSH liaison explaining the rationale for not continuing the review of the dose reconstruction report. When the claims examiner receives this response, he/she must [proceed with the appropriate calculation for adjudication of the claim]."

Between July 25, 2003 and November 16, 2006, DOL has returned 1,891 cases to NIOSH to have the dose reconstruction redone. The vast majority (1,677 or 88 percent) of these "reworks" have been cases in which the probability of causation (PoC) based on the NIOSH dose reconstruction was below 50 percent and thus would result in a denial of benefits. In these cases, the issues to be addressed by NIOSH would have the potential to increase the dose and thus may result in a PoC greater than 50 percent resulting in eligibility for benefits. There were only 224 cases returned for rework in which the PoC was initially over 50 percent with only 10 of these returned due to technical issues related to NIOSH's application of methodology. These statistics reveal that, if anything, DOL's analysis of dose reconstruction reports leans towards the side of the claimant, generally resulting in the potential for a more favorable decision.

FAB Remands

In addition to reworks, DOL also reviews dose reconstruction reports at the final adjudication level if a claimant raises a technical objection to a dose reconstruction, or if the Final Adjudication Branch hearing representative identifies a possible error. Claimants may either raise these objections in a written statement to the hearing representative or through an oral

hearing. If a hearing representative receives such an objection or otherwise identifies a dose reconstruction issue, the case is forwarded to a DEEOIC Health Physicist to determine whether the objection merits returning the case to NIOSH for revision of the dose reconstruction.

Statistics regarding the resulting remand orders issued by the Final Adjudication Branch (FAB) also demonstrate the absence of any cost-cutting motive in the DOL process. From the program's inception, FAB has issued 3,149 remands of Part B cases, of which 70 percent (2,198 cases) were cases in which a recommended decision had been issued to deny benefits. Following the remand, the district office reviews the case and issues a new recommended decision. Since denials make up 63% of all recommended decisions on Part B cases, but 70% of all remands involve denied cases, FAB remands a higher ratio of denials than approvals. Only 30 percent (951 cases) of remanded cases had a recommended decision to approve benefits initially, of which only 17 percent were remanded due to issues with a dose reconstruction.

Director's Orders to Reopen

Finally, a review of Director's Orders issued to reopen claims also reveals a careful attention to, and concern for, claimants' interests. A Director's Order is issued after a final decision by the FAB when a review of the claim or additional evidence reveals that the final decision should be vacated. This can occur based on a claimant's request for a reopening, or based on the Director's review of the claim for any reason. For example, information provided in a subsequent dose reconstruction report for another claimant may indicate that dose was missed for previously decided cases, and the Director has reopened such cases so that NIOSH can determine if the additional exposures also apply to those cases. DOL's performance relative to Director's Orders for reopening claims clearly demonstrates that DOL is committed to paying benefits when claimants are entitled. Since the inception of EEOICPA, 548 Director's Orders have been issued. With a very few exceptions, all Director's Orders to date have been issued on cases that have been denied by the FAB, vacating the decision and returning the case to the district office for further development or acceptance. The only approved cases that have been reopened have occurred when an employee dies before receipt of benefits. In these cases, a Director's Order is issued to vacate the final decision and offer the opportunity for an eligible survivor to apply for benefits. Additionally, most Director's Orders (269 cases) were issued without the claimant requesting such action, demonstrating the program's commitment of the program to ensure accuracy and deliver all benefits to which claimants are entitled.

SEC Class Determinations

The creation of new SEC classes requires close coordination between DOL and NIOSH to determine which cases at the site in question have been affected by the new class and which continue to require dose reconstruction. Since NIOSH and the Advisory Board began discussions about the declaration of new classes, DOL has continually worked to ensure that the definitions of the class membership and the rationales presented as the basis for the new classes are clear, consistent, and fair.

Prior testimony before this Subcommittee asserted that DOL opposed SEC classes or sought to narrow them out of a purely "budget driven" agenda. Again, as I testified in March, this is not the case. Although DOL has a fiduciary responsibility with respect to the EEOICPA program, our efforts have been aimed at ensuring consistency and replicability of SEC declarations across the whole DOE complex and over time. Further, we have sought to ensure that SEC class declarations are undertaken with full knowledge of their implications – that is, while a class declaration makes eligibility presumptive for claimants with one of the listed 22 cancers, those who have an unlisted cancer may have their chances for eligibility reduced or expunged depending on the basis for the SEC class. In some cases, even those with a listed cancer may suffer negative impacts from the declaration. Finally, because each new SEC class designation

has been unique in its rationale and in its impact on how (or if) dose reconstruction can be done for cancers that are not granted presumptive coverage, DOL and NIOSH have had to work out unique procedures for each class to determine how these cases will be processed. The return of large numbers of SEC cases from NIOSH also creates a large, unanticipated workload in DOL's district offices, and DEEOIC leadership has had to respond to those challenges by shifting caseloads among the four district offices. DOL clearly has an important need to participate in the SEC class declaration process, and our efforts to do so have been, and continue to be motivated by, these program imperatives.

Summary

In summary, we believe the record of DOL's administration of EEOICPA demonstrates that promises made to the cold war veterans with enactment of EEOICPA are indeed being kept. Nearly \$2.4 billion in monetary and medical benefits have been distributed to over 22,000 eligible workers and their survivors. Backlogs of cases generated at the inception of Parts B and E have been aggressively addressed and are rapidly diminishing: 76% of Part B cases have been decided by DOL, with another 11% (under 6,000) are awaiting NIOSH dose reconstruction; more than 75% of the old Part D backlog inherited by DOL from DOE has received an initial determination under Part E, and the remainder will be processed to that point in 2007. Approval rates far exceed those originally projected for the Part B program, and litigation remains remarkably low. A review of DOL's administrative handling of cases involving dose reconstruction show that in the great majority of cases remanded or returned to NIOSH for reconsideration of dose reconstructions, DOL was supporting the claimant's opportunity to achieve a better outcome.

This is not to say that there is not much left to be done. DOL will continue to drive towards backlog elimination, strengthen its processes and procedures, improve training for its staff, maintain its ongoing outreach efforts, extend access to information about the program in numerous ways, and continue to provide extensive assistance to claimants in obtaining critical employment, exposure, and medical evidence to support their claims. NIOSH is similarly engaged in clearing out its oldest cases and reaching a steady-state situation, and the Department of Energy has redoubled its commitment to support both NIOSH and DOL information needs. On balance, the EEOICPA program is unfolding as promised, and can be expected to continue to do so.