TABLE OF CONTENTS

A Message from the Ombudsman iii

Preface iv

Executive Summary vii

Report 1

- I. Background: Legislative History of EEOICPA 1
- II. The Office of the Ombudsman and this Report 2
- III. Statutory Issues 3
  - A. Limitations on Survivor Eligibility 3
  - B. Definition of a Covered DOE Facility 4
  - C. Qualified Claimant's Death Prior to Award Nullifies Claim or Reduces Compensation 6
  - D. Miscellaneous Inquiries and Comments 7
- IV. Regulatory, Policy and Procedural Issues 9
  - A. Difficulties Retrieving Employment, Exposure and Medical Records 9
  - B. Difficulties in Proving Causation 13
  - C. Part B Issues 16
  - D. Miscellaneous Inquiries and Comments 16

V. Administrative or Miscellaneous Issues 17

A. Concerns about Claimant Interactions with DEEOIC Personnel 17

B. Requests for Assistance in Understanding Communications 20

C. The Processing of Claims Has Taken and Will Take Too Much Time 22

D. Locating Experts 22

E. Medical Benefits Issues 25

F. Offsets and Coordination of Benefits 26

G. Miscellaneous Inquiries and Comments 26

VI. Town Hall Meetings 28

VII. Emerging Issues and Conclusion 31

Appendix I: Compilation of Comments by Subject/Issue by the Office of the Ombudsman from January 1, 2007 through December 31, 2007 33

Appendix II: List of the current 11 resource centers 34

A MESSAGE FROM THE OMBUDSMAN

The Office of the Ombudsman is charged with submitting to Congress by February 15th of each year, a report setting forth:

A. The number and types of complaints, grievances, and requests for assistance received by the Ombudsman under this part during the preceding year.
B. An assessment of the most common difficulties encountered by claimants and potential claimants under this part during the preceding year.

See 42 U.S.C. §7385s-15 (e).

In order to carry out this charge, it is essential that the Office of the Ombudsman hear from claimants and potential claimants, and it must be recognized that no one is required to contact us. Therefore, I would like to take this opportunity to thank everyone who, during this preceding year, took the time to contact the Office of the Ombudsman or attend one of our town hall meetings. I sincerely hope that this report accurately reflects your concerns and comments.

Because many people are referred to us, I would also like to thank everyone who referred someone to this Office. I consider it an honor that there are people willing to assist us in advancing the awareness of this Office – I truly appreciate your assistance.

In addition, I want to thank the staff of the Division of Energy Employees Occupational Illness Compensation (DEEOIC). The prompt responses from DEEOIC to our inquiries and questions are truly appreciated. I also want to thank DEEOIC for ensuring that representatives from their office attended our town hall meetings – and a special thank you to the staff of DEEOIC who attended these meetings. The attendance by members of DEEOIC truly helped to make these meetings a success. Likewise, I would like to acknowledge the staffs of the Resource Centers. Staff members from some of these offices also attended our town hall meetings, and I would like to thank them for their contributions.

I want to thank Secretary Elaine L. Chao for extending the Office of the Ombudsman when the statutory requirement expired on October 28, 2007, and for extending my term as Ombudsman. It is an honor to serve the Department of Labor, as well as the American people, in this very fulfilling capacity. I will make every effort to live up to this honor.

Deleted: C

Last, but certainly not least, I want to thank the staff of the Office of the Ombudsman, Kim Holt, Patricia Louie, and James McQuade, as well as former staff members John Lewis, Eileen McCarthy and Nancy Rooney. The success of this Office is directly attributable to their dedication and devotion. I commend them for their efforts during the year.

PREFACE

The Energy Employees Occupational Illness Compensation Program Act (EEOICPA) was passed by Congress in 2000, and amended in 2004, to compensate American workers who put their health on the line to help fight the Cold War. In the course of doing their jobs, many of these workers were exposed to radiation and other toxic substances and, as a result, developed cancer and other serious diseases. The purpose of this program is to acknowledge the sacrifice of these workers and to compensate them in some small way for their suffering and loss.

As originally enacted in 2000, EEOICPA included Part B (administered by the Department of Labor (DOL)) and Part D (administered by the Department of Energy (DOE)). In October 2004, Congress repealed Part D and enacted Part E of the Energy Employees Occupational Illness Compensation Program Act, effectively transferring responsibility for administration of contractor employee compensation from the DOE to the DOL. The 2004 amendments also created the Office of the Ombudsman for Part E and directed that it be an independent office, located within the Department of Labor, charged with a three-fold mission:

- To conduct outreach to claimants and potential claimants to provide information on the benefits available under this part and on the requirements and procedures applicable to the provision of such benefits;
- To make recommendations to the Secretary of Labor about where to locate resource centers for the acceptance and development of claims;[1]
- To submit an Annual Report to Congress by February 15, setting forth the number and types of complaints, grievances and requests for assistance received by the Ombudsman, and an assessment of the most common difficulties encountered by claimants and potential claimants under Part E during the previous year.

See 42 U.S.C. § 7385s-15(e).

In 2007, the Office of the Ombudsman continued to build on its efforts to reach out to Part E claimants and potential claimants. Our primary emphasis focused on responding to the many letters, emails and telephone calls we received, requesting information or assistance, or expressing concerns about various aspects of the Part E compensation program. However, as in previous years, we also hosted and/or attended town hall meetings in locations around the country. These meetings which were very well attended provided us an opportunity to meet claimants and to "put a face" on many of the complaints that we had received. The presence at these meetings of representatives from the resource centers and the Program Office also offered the opportunity to immediately

[1] DEEOIC currently provides services through eleven resource centers strategically located to assist potential claimants by supplying information about Part B and Part E of EEOICPA. A listing of these eleven resource centers can be found at Appendix II.

address many complaints and concerns – especially status inquiries and requests to file claims. Moreover, because Denise Brock, the Ombudsman to NIOSH was present at some of these meetings, we were able to offer claimants immediate access to someone who could assist with some of their Part B questions. As a result of the success of these town hall meetings, we will continue to schedule them for the coming year. Overall, with respect to the Office of the Ombudsman, some of the highlights of the preceding year include:

- Received hundreds of telephone calls, e-mails and letters from claimants and potential claimants.
- Hosted town hall meetings in Kayenta, Arizona; Shiprock, New Mexico; and Augusta, Georgia.
- Accepted the invitation of Denise Brock, Ombudsman to NIOSH, to attend town hall meetings that she sponsored in Idaho Falls, Idaho and Calabasas, California, and invited Ms. Brock to join us in Augusta, Georgia. Because many claimants are potentially eligible under both Parts B and E, these joint efforts have been well received. I am happy that Ms. Brock has expressed a willingness to continue this coordination of efforts.
- Testified before the Senate's Health, Education, Labor and Pension Committee.
- Developed a database to better record and report the grievances and complaints received by the Office.
- Provided briefings to various organizations and congressional staff members.
- Developed facts sheets for distribution to claimants and potential claimants.
- Met periodically with staff of DEEOIC.

In addition, working with DEEOIC, the Office of the Ombudsman has provided hundreds of claimants with an updated status of their claim and provided guidance to many claimants on the processing of their claim. Where claimants with a terminal illness were brought to our attention, we worked with DEEOIC to ensure that these claims were expedited. And as noted earlier, DEEOIC's presence at our town hall meetings has been very effective. We look forward to continuing these efforts in the coming year.

Overall, our goal for the coming year is to further expand on our outreach – with a special emphasis on continuing to sponsor town hall meetings and to develop information that can be disseminated to the public.

With respect to the previous year, the chart below compares Part E statistics as of December 29, 2006 (the date used in the 2006 annual report) with January 8, 2008. As the chart illustrates, in every category where a comparison is permissible, DEEOIC has shown an increase during the course of the year – applications filed; recommended decisions approved; final decisions approved; payments and total dollars.

(Claims)	December 29, 2006	January 8, 2008	+/-
Applications Filed	58,943	69,269	+10,326

Recommended Decisions (Approved)	10,308	16,292	+5984
Recommended Decisions (Denied)	25,275	16,945*	N/A*
Final Decisions (Approved)	8,861	15,245	+6384
Final Decisions (Denied)	19,733	14,396*	N/A*
Payments	4,400	8,420	+4020
Total Dollars	$534,576,042	$950,447,566	+$415,871,514

*With regard to covered applications only.[2]

The statistics for January 8, 2008, also reflect an almost even balance between approved and denied claims.

Claims	January 8, 2008
Recommended Decisions (Approved)	16,292
Recommended Decisions (Denied)	16,945*
Final Decision (Approved)	15,245
Final Decision (Denied)	14,396*

*With regard to covered applications only.

However, these statistics do not include non-covered applications - claims that were denied because the applicant did not establish that the employee had covered employment or where the survivor did not meet the relationship or dependency requirements. DEEOIC statistics show that as of January 8, 2008 there were a total of 22,353 non-covered applications, of which 3,151 involved "non-covered employment," and 19,231 involved a survivor who was not covered.

Overall, these statistics generally coincide with what has been our experience – not just for the past year, but for the past few years - while many claimants have been awarded benefits, there is a greater number (when you include both covered and non-covered applications) who have not been successful in their pursuit of EEOICPA benefits.[3]

[2] Excludes non-covered applications – i.e., applications where the claimant did not establish that the employee had covered employment or where a survivor did not meet the relationship or dependency requirements.

[3] Our Office also hears from people who have not filed a claim because they believe that they are not covered under the Act. We generally encourage these individuals to contact the resource center.

EXECUTIVE SUMMARY

Introduction

In light of our mission, the Office of the Ombudsman generally does not receive, and thus this report generally does not contain, comments that are complimentary of the Part E program administration. Rather, throughout the year, individuals contact this Office in order to obtain information or to express their complaints and grievances. At one end of the spectrum, we hear from individuals trying to determine if they are eligible for Part E benefits. We have encountered individuals who while generally aware of EEOICPA, did not understand the distinction between Parts B and E, or did not know how to initiate a claim. Especially during our town hall meetings in Kayenta, AZ and Shiprock, NM we encountered individuals who did not realize that they were potentially eligible for compensation under the Radiation Exposure Compensation Act (RECA), as well as Parts B and E, or else, while aware of their potential eligibility, did not realize that they had to separately file for compensation under each program. On the other end of the spectrum, we are contacted by individuals who have been awarded benefits, yet have questions concerning the impact of a state workers' compensation or tort award; or want to determine if they must pay federal income tax on their EEOICPA award; or simply want to know how long it will take to actually receive benefits. We also receive calls from individuals – usually individuals who have had claims denied - inquiring if specific statutory provisions have been revised. Nevertheless, most of the individuals who contact our Office either have a pending claim, or were recently denied benefits. The concerns expressed by these individuals range from a request for the status of their claim, to assistance in acquiring medical help, to complaints concerning the burden of proof.

This Office also receives inquiries from individuals who do not have an EEOICPA Part E claim, but rather an EEOICPA Part B or RECA claims. Because our statutory authority directs us to provide assistance to Part E EEOICPA claimants, we cannot provide significant assistance to these inquirers. In these instances, we provide basic information and try to ensure that these individuals are referred to more appropriate sources of assistance; DEEOIC, the National Institute for Occupational Safety and Health (NIOSH) and the Department of Justice RECA staff have all been helpful in ensuring that the issues raised by these individuals are addressed. Where available, we also direct these individuals to relevant web-sites. In addition, the creation of the position of an Ombudsman to NIOSH has provided our Office with an excellent referral for those claimants who need assistance in the dose reconstruction process and for petitioners engaged in the Special Exposure Cohort (SEC) petitioning process.

There are many ways that we could present the concerns and inquiries that we have received. However, the method that we utilized in our two previous reports and one that we find very effective is to categorize the concerns and inquiries under one of three headings: (1) Statutory Issues; (2) Regulatory, Policy and Procedural Issues; and (3) Administrative or Miscellaneous Issues. Nevertheless, it must be recognized that people do not express themselves using the categories and subcategories utilized in this

report. We also find that, when talking to us, most people take the opportunity to express more than one grievance or concern, and moreover, every claim has its own unique set of facts. Nevertheless, based on our experiences, these categories are an effective way to present the grievances and concerns that have been expressed to us. Therefore, we will continue to utilize these categories in our 2007 report. As a result, the discussion of some issues will be a "carry over" or a continuation of the discussion presented in previous years – this reflects that some issues continue to be a concern for many claimants. Yet, there are some issues where new concerns and problems have been added to previous issues. Below is a summary of the major issues discussed in this year's report – a fuller discussion of each issue is provided in the report itself.

Statutory Issues

Note: Claimants did not limit the expression of their concerns to just those aspects of EEOICPA which could be addressed administratively. Rather, some of their complaints concerned provisions of the legislation itself, which only Congress can address. Accordingly, the legislation-based concerns discussed in this Report are presented with the understanding that the Department of Labor has no authority to resolve any such concerns.

Limitations on Survivor Eligibility (57 comments): Under Part E, there are three general categories of eligible claimants: 1) covered living employees who have a covered illness; 2) surviving spouses of covered employees; and 3) surviving children of covered employees who, at the time of their parent's death, were younger than 18 years of age, younger than 23 years of age and full-time students, or any age and incapable of self-support. Individuals, primarily adult children who do not meet Part E's eligibility requirements, continue to contact the Office of the Ombudsman to express concern about the limitations imposed by the statute's eligibility requirements for survivors. Because a person can be potentially eligible under both Parts B and E, some claimants are aware that Part B and Part E have different eligibility requirements, and as a result, there are claimants who contact our Office seeking an explanation for this difference.

Definition of a Covered DOE Facility (18 comments): For purposes of Part E, the worker must have been employed at a covered DOE facility. Claimants have questioned, and in some instances, challenged, the failure to designate their worksite as a covered DOE facility.

Atomic weapons employees and employees of beryllium vendors, both who are covered under Part B but not under Part E, have contacted our Office asserting that their employment was characterized by exposure over time to the same hazards as those who are covered under Part E. Consequently, these atomic weapons employees and employees of beryllium vendors believe that they ought to be eligible for compensation under Part E.

Qualified Claimant's Death Prior to Payment of Award Nullifies Claim or Reduces Compensation (7 comments): Under Part E, successful claimants must be living at the time their claim is paid in order to receive compensation. Consequently, if a worker or surviving spouse dies before payment is made, the award due to the worker or survivor cannot be paid. Instead, a new Part E claim must be filed by a survivor who is eligible for benefits in his or her own right. Even if there is an eligible survivor, the death of the covered worker may result in a reduction of compensation. Claimants whose claims have been pending for an extended period of time have voiced their fear that if the process takes too much longer, their claim will in effect be nullified (by their death). Moreover, in a couple of instances, we were contacted by the families of terminally ill claimants who were very concerned that the claimant would die prior to the completion of the claims process.

Regulatory, Policy and Procedural Issues

Difficulties Retrieving Employment, Exposure and Medical Records (92 comments): Claimants have contacted us in order to express their frustration with trying – often unsuccessfully – to locate necessary records. Because the burden of proving a case ultimately rests with the claimant (see 20 C.F.R. § 30.111), some claimants, particularly survivor claimants, have the onus of attempting to obtain employment, exposure and medical records from many years ago, or of developing new medical evidence based upon missing or incomplete records. Claimants report to us that employment, as well as hospital and other medical records have been lost or destroyed. In some instances, because of their health, claimants do not have the capacity to assist their families in pursuing these claims. We have encountered family members who tell us that their loved ones (as instructed) never talked about their employment. Especially where the worker died prior to the promulgation of the Act, survivors have told us that it is virtually impossible to produce the quality or quantity of evidence required to meet their burden of proof.

While DEEOIC provides assistance to claimants in attempting to locate relevant records, we continue to hear from claimants who believe that this assistance does not go far enough. There are instances where the necessary records cannot be located (or may not exist) and thus some claimants ultimately cannot successfully prove their cases. In addition, claimants must specifically ask for copies of the evidence developed by DEEOIC. Thus, claimants who are not aware that they can request this evidence often do not realize that some of the records they need may already exist in DEEOIC's files. Ultimately, if neither DEEOIC nor the claimant locates the records necessary to document employment, exposure or medical conditions, it may be impossible for a claimant to receive any benefits.

Difficulties in Proving Causation Issues (96 comments): Many of the people who contact the Office of the Ombudsman report that they encounter great difficulties attempting to prove causation issues, i.e., that a particular disease is related to toxic exposures, or that a worker's death was related to a covered illness. These claimants

often believe that their evidence is required to meet very stringent standards. We also hear complaints concerning the lack of a clearly defined standard with respect to the evidence that claimants must produce. In addition, there have been claimants who found it especially troubling when their illness was listed on EEOICPA Bulletin No. 06-10 (updated 8/1/2006 with Bulletin 06-14) which informs claims examiners that DEEOIC "has identified certain illnesses with no known causal link to toxic substances." Some of these claimants have contacted this Office inquiring as to what they must do in order to overcome this bulletin.

Part B Issues (71 comments): While the Office of the Ombudsman does not have any statutory authority with respect to Part B claims, we nevertheless receive inquiries concerning that part. In most instances, we try to refer the inquirer to more appropriate sources of assistance. Nevertheless, there are a few common complaints regarding Part B that we hear.

Administrative or Miscellaneous Issues

Concerns about Claimant Interactions with DEEOIC Personnel (96 comments): Claimants have expressed a variety of concerns about their interactions with DEEOIC personnel. These concerns include difficulties in reaching a claims examiner or in having a telephone call returned; changes in claims examiners or district offices; DEEOIC losing evidence; repeated requests for the same evidence; and lengthy delays in obtaining requested information.

Requests for Assistance in Understanding Communications (193 comments): In the course of developing a claimant's case and in deciding claims, DEEOIC personnel correspond and speak with claimants on a regular basis. After developing a claim, DEEOIC also issues a recommended decision from the claims examiner, followed by a final decision from the Final Adjudication Branch (FAB). Some claimants have significant difficulties understanding the correspondence and decisions they receive, and thus contact this Office for assistance.

The Processing of Claims Has Taken and Will Take Too Much Time (52 comments): Claimants complain about the delays attendant to the processing of EEOICPA claims. The health of many claimants combined with their recognition that their claim for compensation may "die with them" because their adult children will not be eligible survivors, leads to significant frustration.

Locating Experts (34 comments): The inability to find a qualified physician willing to provide a medical opinions on causation issues (for both "covered" and "consequential" illnesses), as well as impairment ratings is a problem that affects some claimants, particularly those in more rural, remote areas of the country.

DEEOIC does offer claimants the option of having their own physician or a DEEOIC district medical consultant provide an impairment rating. DEEOIC also sometimes

obtains expert opinions on causation and wage loss issues. However, we hear from claimants who would prefer to utilize a physician of their own choosing. Other claimants have expressed to us their belief that the assistance offered by DEEOIC does not go far enough.

Medical Benefits Issues (12 comments): Claimants have complained that they are unable to locate providers who are willing to accept the medical card issued by DEEOIC. Claimants also report that difficulties with ICD-9 codes have resulted in some treatments for a covered illness being covered, but the treatment of other related effects of an illness not being covered. In addition, some claimants are not aware of how they should proceed if they wish to obtain coverage for consequential illnesses that develop after the award of benefits.

Offset and Coordination of Benefits (13 comments): Some claimants have contacted us with questions concerning offsets and coordination of benefits. Where there has been a workers' compensation or tort award, claimants may be asked to present information concerning that award. Where the award involved a class action or other multi-party law suit claimants have encountered difficulties obtaining the information requested by DEEOIC. In addition, there have been instances where the tort or compensation award was drafted in such a way that the information requested by DEEOIC was not readily apparent and/or impossible to discern.

Assessment

Hearings held by the Senate Health, Education, Labor and Pension Committee in October 2007 asked if this program was "claimant-friendly." This question pinpoints the essence of most of the complaints fielded by this Office – most complaints address fairness and transparency (i.e., the ability to clearly understand the process). Most of the people who contact this Office have had their claims denied. Yet, their complaints are not simply a request for money. Rather, most of the complaints that we hear involve the perception that the process is unfair or involve a request for assistance in navigating this process. Where evidence has been destroyed or is missing, and former colleagues are dead or scattered around the country, claimants believe that it is unfair to ask them to prove what the government cannot prove (or disprove). Claimants do not understand why opinions by their treating physicians are not deemed sufficient to meet their burden. In this environment, events such as the change in claims examiners (especially where advanced notice of the change was not provided) or the delay in the processing of a claim are viewed in a negative light.

For many of the people whom we encounter, the Office of the Ombudsman is not able to offer an immediate solution or remedy. In many instances, all that we can offer is a promise that we will listen to and record their complaints and grievances, and that at an appropriate time we will report these grievances and complaints to Congress. Within

these pages we have tried to accurately summarize the numerous complaints, grievances and requests for assistance directed to us throughout the year.

REPORT

The Office of the Ombudsman for Part E of EEOICPA was established in 2004 by Section 7385s-15 of EEOICPA, as part of Public Law 108-375, the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005. See 42 U.S.C. § 7385s-15. Section 7385s-15(e) requires this Office to submit to Congress an Annual Report addressing the number and types of complaints, grievances, and requests for assistance received by the Ombudsman under Part E during the preceding year, as well as an assessment of the most common difficulties encountered by Part E claimants and potential claimants during the preceding year. Please consult Appendix I for the number and types of comments received by the Office of the Ombudsman. (Numbers and types of comments received are also listed in the section headings of this report).

I. Background: Legislative History of EEOICPA

Before the enactment of Part E in October 2004, Public Law 106-398, the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, authorized Parts B and D of the Energy Employees Occupational Illness Compensation Program. DEEOIC began administering Part B on July 31, 2001.

Part D was enacted in 2000, and was administered by DOE. Under Part D, Congress directed DOE to provide claimants with assistance in obtaining state workers' compensation. By the end of 2003, more than 23,000 applications had been filed with DOE for benefits. Yet, after more than two years had passed, the Government Accountability Office (GAO) found that less than 10% of submitted claims had been fully processed and more than half had not been considered at all (General Accounting Office, *Energy Employees Compensation: Even with Needed Improvements in Case Processing, Program Structure May Result in Inconsistent Benefit Outcomes*, Report GAO 04-515, May 28, 2004). In late 2004, Congress repealed Part D and enacted Public Law 108-375, which established a new federal compensation scheme for DOE contractor employees in Part E, to be administered by the Secretary of Labor.

Public Law 108-375 also directed the Secretary of Energy to provide all applicable records, files and other data to the Secretary of Labor, and mandated that the Department of Labor publish regulations and begin to administer the new Part E program within 210 days of enactment. See Public Law 108-375, § 3681(e). The Conference Report accompanying the 2004 amendments to EEOICPA urged the Secretary of Labor to appoint an Ombudsman within 120 days of enactment. See Conference Report 108-767 accompanying H. R. 4200. On February 24, 2005, Secretary of Labor Elaine L. Chao made the required appointment.

II. The Office of the Ombudsman and this Report

Over the course of calendar year 2007, this Office received numerous inquiries and comments about EEOICPA, and about the difficulties encountered by Part E claimants and potential claimants and we spent many hours talking to and corresponding with claimants and their families about their concerns. In addition, this Office had the opportunity to meet with and to hear the concerns of many claimants and potential claimants at town hall meetings held around the country. The information presented below is based on the conversations the Ombudsman staff had with those who attended the town hall meetings, as well as phone calls, faxes, and written and electronic correspondence, over the past year. This report covers January 1, 2007 through December 31, 2007.[4] For purposes of presenting this information to Congress in accordance with Public Law 108-375, the inquiries or concerns addressed in the following pages have been divided into three sections:

1) Statutory Issues (Section III);

2) Regulatory, Policy and Procedural Issues (Section IV); and

3) Informal Administrative or Miscellaneous Issues (Section V).

[4] The Office of the Ombudsman's first annual report covering calendar year 2005 was filed with Congress on February 15, 2006. The second annual report, covering calendar year 2006 was filed with Congress on February 15, 2007.

III. Statutory Issues

Summary

Note: Claimants did not limit the expression of their concerns to just those aspects of EEOICPA which could be addressed administratively. Rather, some of their complaints concerned provisions of the legislation itself, which only Congress can resolve. The legislation-based concerns discussed in this Report are presented with the understanding that the Department of Labor has no authority to resolve any such concerns.

Claimants have contacted the Office of the Ombudsman about:

A. Limitations on Survivor Eligibility (57 comments)

B. Definition of a Covered DOE Facility (18 comments)

C. Qualified Claimant's Death Prior to Award May Nullify Claim or Reduce Compensation (7 comments)

D. Miscellaneous Inquiries and Comments (16 comments)

A. *Limitations on Survivor Eligibility* (57 comments)

Under Part E, there are three general categories of eligible claimants: 1) covered living employees who have a covered illness; 2) surviving spouses of covered employees; and 3) surviving children of covered employees who, at the time of the parent's death, were younger than 18 years of age, younger than 23 years of age and full-time students, or any age and incapable of self-support. Under Part E, and in contrast to Part B, adult children who survive a covered employee or the spouse generally are not eligible to receive the compensation to which their parent would have been entitled if they had lived. See 42 U.S.C. §§ 7385s-3(c) and (d).

Individuals have contacted this Office to register their complaint over what they view as the inherent inequity of defining adult children out of eligibility for Part E compensation. A common theme in these complaints is that it is unfair for the government to have waited until many of the workers were deceased before it established a compensation program, and then to limit the eligibility of the surviving children. Adult children have written and spoken of the hardship they endured in caring for their dying parent and the personal and financial sacrifices they made to care for their terminally ill mother or father. These adult children argue that because Part E compensation would have been available to them had they been minors when the parent died, it is all the more appropriate for them to be eligible in light of the care they provided and the sacrifices they made. Many of these adult children question the rationale for basing their eligibility simply on their age at the time of the parent's death. Illustrative of this complaint is the

situation presented by the child who stayed home to take care of his father, rather than continuing his education. Eventually the father passed away before this child was 23 years of ge. This child now argues that but for the decision to put off school to tend to the father, he would have been a full time student [under the age of 23] at the time of the father's death, and thus potentially eligible to receive compensation.

We have also encountered circumstances where the youngest child was a minor at the time of the parent's death, and thus is eligible to receive Part E compensation, while the older children, because of their age, are not eligible for compensation. Some adult children argue that it is unfair that they are the ones who made the sacrifices to care for the loved one – and yet they are the ones who are not eligible for benefits.

Some of the individuals who contact our Office are well aware that adult children are eligible under Part B - many claimants are potentially eligible under both Parts B and E – and thus we often hear from people asking for an explanation for why adult children are not eligible under Part E. In our experience, simply informing these claimants that the statute makes adult children ineligible for Part E benefits does not mitigate the injustice they perceive. We also receive telephone calls and e-mails inquiring if this provision has been revised.

B. ***Definition of a Covered DOE Facility*** (18 comments)

Pursuant to section 7384l(12):

> The term "Department of Energy facility" means any building, structure, or premise, including the grounds upon which such building, structure, or premise is located—
>
> (A) in which operations are, or have been, conducted by, or on behalf of, the Department of Energy (except for buildings, structures, premises, grounds, or operations covered by Executive Order No. 12344, dated February 1, 1982 (42 U.S.C. 7158 note), pertaining to the Naval Nuclear Propulsion Program); and
>
> (B) with regard to which the Department of Energy has or had—
>
>> (i) a proprietary interest; or
>>
>> (ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services.

See 42 U.S.C. § 7384l (12). Moreover, while atomic weapons employees and employees of beryllium vendors are covered under Part B, these workers are not covered under Part E unless they can establish additional employment at a covered DOE or RECA facility.

During the preceding year, we received inquiries: (1) attempting to verify the status of a facility; and (2) questioning why a facility was not listed as a DOE facility.

Those inquiring as to the status of a facility generally have been individuals who had been informed by a claims examiner or someone on the staff of a resource center that their worksite was not a DOE facility. These individuals usually contact us for verification and/or an explanation for this determination.

Our Office has also worked with individuals who disagree with the determination that their worksite was not a DOE facility. In many of these instances, while the individual performed work on behalf of DOE, their eligibility often turned on whether DOE has or had a proprietary interest (in the facility) or entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction or maintenance services. Based on the experiences that we are aware of, where individuals have endeavored to collect evidence to establish that their worksite, or at least their section of the worksite, ought to be classified as a DOE facility, these individuals have generally found the process to be very arduous and one for which very little assistance is available.

Some atomic weapons employees and employees of beryllium vendors, both who are covered under Part B but not under Part E, as well as some federal government employees (who worked at covered facilities), have contacted the Office of the Ombudsman asserting that they ought to be covered under Part E. These employees believe that their employment exposed them to the same hazards as those who are covered under Part E, and thus believe that they ought to be eligible for Part E compensation.

C. Qualified Claimant's Death Prior to Award May Nullify Claim or Reduce Compensation (7 comments)

Under Part E, successful claimants must be living at the time their claim is paid in order to receive their payment of compensation. Significant consequences attach if a worker claimant or surviving spouse claimant dies before the claim is fully decided and/or payment is made. For example, pursuant to Section 7385s-1, "[a]fter the death of a covered DOE contractor employee, compensation…shall not be paid. Instead, the survivor of that employee shall receive compensation as [permitted in the statute]." See 42 U.S.C. §7385s-1(2). If there are no eligible survivors then the claim is nullified. Moreover, even where there are eligible survivors, the death of the covered worker may result in a reduction of compensation.[5] While the maximum compensation available to living workers is $250,000, see 42 U.S.C. § 7385s-12, a successful survivor is entitled to a maximum of $175,000 (and a minimum of $125,000), depending upon the extent of the worker's wage loss while s/he was alive.[6] See 42 U.S.C. § 7385s-3.

During this year individuals have contacted this Office on behalf of claimants with terminal illnesses. The main concern in each instance was to ensure that these claimants had the opportunity to enjoy the compensation to which they were entitled. However, in each instance there was also a fear that the death of the claimant would mean that money that could have been used to pay medical and other (funeral) expenses would be lost. The fear that the death of a claimant would negatively impact a claim is clearly highlighted in a series of e-mails from a spouse [who was ultimately successful in having the claim expedited]. In the first e-mail, the spouse explains that even as they wrestle with the claimant's terminal illness, the claimant and the spouse also have to worry about how the spouse will survive after the death of the worker. Later, after DEEOIC expedites the claim, the spouse writes a second e-mail thanking everyone because "[t]he compensation would have been reduced by approximately $110,000 if [the claimant] had passed away prior to the money being deposited into the account." In those instances that have been brought to our attention, where notified of a claimant with a terminal illness, DEEOIC has expedited the claim.

[5] In some cases, a survivor's compensation might exceed the compensation that would have been payable to the covered worker. This might happen, for example, if the worker's wage loss and impairment rating for the covered illness led to a compensation of less that $125,000, the minimum available to a survivor.

[6] Part E limits total compensation payable under that Part to all claimants based upon exposure of a single covered worker to $250,000. See 42 U.S.C. § 7385s-12.

Nevertheless, even if a claimant is not terminally ill, the possibility that death could nullify a claim, or reduce the amount of compensation, is a source of concern for many claimants. Many of the claimants who contact our Office have claims that have been pending for several years. When claimants contact us to discuss the delays affecting their claims, they often question what will happen if they die before the payments are made on their claim. Some of these claimants have indicated that they believe that their claims are being intentionally delayed with a goal of ensuring that no one will ever receive benefits – these claimants are well aware that if they do not have a surviving spouse, and if their children are adults, then no one will be eligible to receive the benefits to which they (the workers) are otherwise entitled.

D. Miscellaneous Inquiries and Comments (16 comments)**:**

During 2007, the Office of the Ombudsman also received the following miscellaneous inquiries and comments about statutory issues:

- Legal Representative Fees: Under EEOICPA, legal representative fees are paid by the claimant and are limited to 2 percent for the filing of an initial claim for payment of lump-sum compensation; and 10 percent with respect to objections to a recommended decision denying payment of lump-sum compensation. See 42 U.S.C. §§ 7385g, 7385s-9. It has been suggested that this limitation on fees is one of the primary reasons that claimants are unable to obtain legal representation. Some claimants have told us that they are reluctant to obtain legal representation because they wish to avoid the legal fees. We have also received comments suggesting that legal representative fees ought to be paid by the government rather than by the claimants. In addition, some claimants have contacted this Office seeking a referral for legal representation. Others have asked us to provide legal representation – which we cannot do.

- Take-home Illnesses: Individuals approached us alleging that they (or a relative) were suffering from an illness contracted from a parent or other relative who worked at a covered site. During the preceding year, we heard from the spouses of some covered workers, who believe that they lost a child at birth as a result of toxins to which their husbands had been exposed while working at a covered site. Likewise, we also heard from others, usually parents, who believe that a birth defect or other disability suffered by a child is the result of work-related toxins to which one of the parents was exposed. These concerns, however, are outside of the scope of the statute.

- Special Exposure Cohort: Four SECs were created by Section 7384l(14) of EEOICPA (42 U.S.C. § 7384l(14)); additional SECs have been created by HHS under Section 7384q of EEOICPA, which authorizes HHS to create additional SECs when HHS determines that:

- “it is not feasible to estimate with sufficient accuracy the radiation dose that the class received”; and

- “there is a reasonable likelihood that such radiation dose may have endangered the health of members of the class.”

See 42 U.S.C. § 7384q(b). The Office of the Ombudsman has been contacted by claimants who face difficulty qualifying for benefits because the employee worked at a DOE facility with SEC status, but the employee either does not have one of the 22 statutorily-specified cancers to which the SEC provisions apply, or cannot establish the necessary employment history. During the preceding year, some claimants have encountered difficulties proving that they had the requisite 250 days at a specific location or building. For some people, the burden of collecting affidavits from co-workers has proved to be an enormous burden – especially where the work occurred years ago.

- Adequacy of Available Part E Benefits: Part E sets a statutory maximum of $250,000 for lump sum compensation paid “for each individual whose illness or death serves as the basis for compensation or benefits” under Part E. See 42 U.S.C. § 7385s-12. Covered employees can receive lump sum compensation of up to $250,000 (see 42 U.S.C. §§ 7385s-2(a)); eligible survivors are eligible to receive lump-sum compensation of up to $175,000. See 42 U.S.C. § 7385s-3. We have heard from claimants who believe that as a result of these statutory maximums, they will not be fully compensated for their illnesses. This is the precise argument presented to us by a claimant who had already received $250,000 in Part E compensation. Although this claimant is now developing additional illnesses which may be related to exposure to toxins at work, because of the statutory maximum this claimant is not eligible for additional compensation under EEOICPA. Likewise, living worker claimants with many years of wage loss have stated to us that the statutory maximum of $250,000 on Part E benefits will not fully compensate them for their total years of wage loss (and/or will not fully compensate them for their impairment).

  Under Part E, medical benefits are also available to living worker claimants and are not subject to the $250,000 statutory cap. See 42 U.S.C. §§ 7384s, 7384t, 7385s-8. Medical benefits are, however, retroactive only to the date that the worker filed the claim. We have heard from claimants who argue that because they can only be reimbursed for medical benefits going back to the filing date of the claim, they will not be compensated for expenses incurred prior to the filing of the claim. This frustration is exacerbated where a claimant who incurred medical expenses prior to the filing of a claim also faces an offset (or coordination of benefits) as the result of a tort action (or a workers’ compensation claim) awarded prior to the filing of the DEEOIC claim - while the claimant can only be reimbursed for the medicals back to the date of filing of the claim, in determining the amount to be offset or the coordination of benefits, DEEOIC will consider

monies paid to the claimant prior to the filing of the EEOICPA claim. One illustration of this problem involved a claimant who sustained injuries to both eyes. Because she had already received a workers' compensation award for the right eye, the claimant asserts that she approached the resource center with the intention of simply filing an EEOICPA claim for the left eye. However, this claimant alleges that she was encouraged to file a claim for both eyes (the worker's complaint regarding the guidance provided by the resource center is discussed at Section V (A) (Concerns about Claimant's Interactions with DEEOIC Personnel). Ultimately, although this claimant was awarded Part E compensation, she considers it unfair that her award was reduced by the state worker's compensation benefits that she received prior to filing her Part E claim, yet DEEOIC will not reimburse her for the medicals expenses that she incurred prior to the filing of the claim.

IV. Regulatory, Policy and Procedural Issues

Summary

With respect to concerns about Part E Regulations, Policies and Procedures, individuals have contacted the Office of the Ombudsman in connection with:

A. Difficulties Retrieving Employment, Exposure and Medical Records (92 comments)

B. Difficulties in Proving Causation (96 comments)

C. Part B Issues (71 comments)

D. Miscellaneous Inquiries and Comments (16 comments)

A. *Difficulties Retrieving Employment, Exposure and Medical Records* (92 comments)

Introduction

Under DEEOIC's regulations, claimants in general ultimately bear the burden of proving their claims by a preponderance of the evidence. Thus, while 42 U.S.C. §7384v places an obligation on the government to provide assistance to claimants, in the end, claimants are responsible for providing DEEOIC with "all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits." See 20 C.F.R. § 30.111(a). Where the evidence is deemed not to be sufficient to establish all criteria for benefits, the claim is denied. Cases are brought to our attention where, even with the assistance of DEEOIC, the claimant is unable to

locate sufficient employment, exposure and/or medical records. As has been true in previous years, claimants tell the Office of the Ombudsman about the difficulties they face in locating acceptable employment, exposure and medical evidence in support of their claims – difficulties which are even greater when it is a spouse or child attempting to find records concerning a deceased employee.

One further complicating factor is that many claimants who contact us are not aware that they can obtain copies of the evidence in their case. Claimants have to make a "written" specific request to DEEOIC to obtain a complete copy or portions of their claim file. Some claimants, upon belatedly discovering that DEEOIC had relevant evidence in its file, argue that if they had known that they could have obtained this evidence from DEEOIC (or if this information had been provided to them), it would have saved them the time and expense of locating these records, or of engaging in a fruitless search when DEEOIC had already searched and found nothing. On the other hand, we have also heard from claimants who report that they have been able to locate potentially helpful records that even DEEOIC had been unable to obtain. For example, claimants tell us that Freedom of Information Act (FOIA) requests made to DOE have yielded documents that DEEOIC had been unable to locate. [Note: one congressional office contacted us to report that it had been notified by DOE that there is now a huge backlog on FOIA requests].

The discussion below outlines the relevance of these records and the types of problems claimants encounter in trying to locate records.

Employment Records

In order to establish employment at a covered DOE facility and the duration of their employment, claimants may be required to submit documentary or other evidence (for example, social security records or co-worker affidavits) establishing their (or, in the case of survivors, the worker's) employment. Claimants may also be required to submit evidence that they worked in particular buildings or other locations at the site. While DEEOIC offers assistance in locating these records, we are contacted by claimants who question the depth and sufficiency of this assistance. Claimants who contact this Office are particularly troubled where employment records cannot be located and the claim is ultimately denied based on the failure to establish covered employment. In these circumstances, claimants have approached us asserting that where employment records have been lost or destroyed, it is not reasonable to place the burden on them to prove employment. In addition, family members have told us that it is virtually impossible to reconstruct employment records where the worker is unable or unavailable to assist with the research. We also encounter family members who argue that it is unfair to ask them to locate employment records, where the worker, honoring her/his promise to the government, never discussed their employment with the family. Where records have been lost or destroyed, as well as where the worker is deceased, claimants call us seeking guidance on where and how to locate the necessary records. In many of these instances, the Office of the Ombudsman is not able to provide an adequate answer.

Claimants have assured us that the resource centers were helpful in attempting to locate employment records. Yet, even where employment records can be located, many claimants question the accuracy of these records. We also hear from claimants who assert that either all of their employment is not recorded, or that the recorded information is not accurate.

Exposure Records

Exposure records may help to establish that the worker's illness as "covered" (as defined by Section 7385s(2) of Part E as "an illness or death resulting from exposure to a toxic substance") by establishing that a worker was exposed to a particular toxic substance at a covered facility which was a "significant factor in aggravating, contributing to or causing" the worker's illness or death. See 42 U.S.C. §§ 7385s-3(a)(1)(B), 7385s-4(c)(A). In addition, under DEEOIC's regulations, a 50% or higher probability of causation is required for an award of benefits for a radiogenic cancer under Part E. See 20 C.F.R. § 30.213. Consequently, SEC and dose reconstruction determinations -- both of which depend to some degree on the availability of exposure records -- are critical for Part B claimants, as well as Part E claimants.

The Office of the Ombudsman hears from claimants who question why exposure and/or medical records, which private employers are mandated by law to maintain, were not maintained by DOE. According to the complaints that we hear, it is especially difficult for claimants to locate exposure records where their employer was a small or family business, or where relevant facilities are no longer operational, and in some instances have not been operational for decades. Claimants tell us that they never knew the substances to which they (or, in the case of a survivor, the worker) were exposed. In other instances, while some claimants can name some of the toxins, they cannot identify all of the toxins present at the worksite.

Where exposure records were maintained, some claimants believe that they are not accurate and/or were not well-preserved. We have talked to claimants who are confident that their exposure records do not include all of the toxins that were present at the worksite. In addition, we have heard assertions that existing exposure records do not adequately account for chemical mishaps and accidents – some of which were recorded, others for which there are no records. Some claimants have also complained that existing exposure records do not adequately reflect the realities of their job – that while records indicate that they worked exclusively at one site, in reality they were required (or instructed) to work at sites all around the facility. In our experience, this complaint is especially prominent among security guards and transportation workers who often assert that their jobs took them all around the facility. Some security guards have also indicated that their jobs required them to be some of the first to respond to chemical accidents.

In addition, where records are available, we encounter claimants who believe that exposure records were manipulated or altered. A common assertion that we hear is that

claimants were periodically told by their supervisors to take off their dosimetry badges. One claimant told us that he was routinely "asked" to shred records for "security reasons." Moreover, claimants have reported encountering significant delays in obtaining these records.

Claimants do receive assistance from DEEOIC in developing this evidence. More significantly, DEEOIC has developed Site Exposure Matrices (SEM) covering DOE facilities. While the SEM attempts to identify information concerning which toxic substances were present at specific DOE facilities, the public online version of SEM does not provide exposure information based on the location of the building or operation performed, for security reasons. (The internal version of SEM available for claims examiners does contain this greater level of detail). Claimants have contacted our Office to express doubts as to whether the information in the SEM is accurate. One claimant who maintains that she worked in the environmental branch is adamant that the SEM did not include all of the chemicals present at her worksite. In addition, we hear from claimants who are unaware that SEM information is available on the DEEOIC website.

Where the claim was denied prior to the posting of the SEM on the DEEOIC website, claimants have approached us questioning the accuracy of their denial. These claimants question whether DEEOIC had an accurate listing of the toxins present at the worksite when it denied their claim and, assuming that DEEOIC had this listing, they question why this listing was not available to them. These claimants want their claims re-reviewed now that the SEM is available to all.

Medical and Other Records

Medical records documenting that a worker was diagnosed with a particular illness are critical to both living worker and survivor claims, which depend upon evidence of an illness related to occupational exposure to toxic substances. In addition, other records, such as a marriage license, or a birth certificate, can be crucial to establishing other elements of a survivor's eligibility for benefits under Part E. We hear grievances concerning the difficulties encountered by claimants as they attempt to obtain necessary medical and other records.

Claimants tell us that they have difficulty obtaining medical records, due to physicians retiring or dying, or clinics and hospitals moving or closing. This is a particularly pressing problem for survivor claimants, because the worker's death sometimes occurred many years ago and the relevant medical records either have been lost or destroyed. Moreover, we have heard from survivor claimants that where the worker died many years before this program was initiated, the physicians involved did not consider the possible contributions of toxic substances to the illnesses they diagnosed, and thus even if medical records exist, these records are of little relevance. In one instance brought to our attention, although the claim was denied due to a history of smoking, the surviving spouse is certain that the worker only smoked for a few years. However, because the treating doctor is deceased and medical records are no longer available this surviving spouse is having a hard time challenging this denial of benefits.

Even where the worker had yearly medical screenings at work, claimants report that the results of those screenings are sometimes not available, or claimants are distrustful of the results. Claimants have also reported that their doctors are hesitant, and sometimes simply refuse, to become involved with a federal workers' compensation claim.

However, it is not simply medical records that pose a problem for claimants. For example, Section 7385s-3(d) of EEOICPA states that a child survivor who, "as of the employee's death…had been incapable of self-support" is eligible for survivor's benefits. See 42 U.S.C. § 7385s-3(d). Especially where the parent died years ago, children have found it difficult to establish that at the time of the worker's death, they were incapable of self-support. In one instance, two children suffered the same illness. Even though these illnesses initially manifested themselves years ago, the child who sought "traditional" medical treatment has been able to locate medical records and thus establish eligibility as a survivor, while the child who sought "non-traditional" treatment has encountered difficulties finding acceptable records to establish his eligibility. We also hear from children who find it difficult to prove an adoption, and in some instances, a legal adoption was never sought. In one such instance, the worker supported a grandchild. Yet, because there was never a legal adoption, this grandchild is not eligible to receive compensation under Part E.

B. *Difficulties in Proving Causation* (96 comments)

During 2007, claimants continued to complain about the difficulties they face in proving causation issues -- proving that a particular disease is related to toxic exposures, or proving that a worker's death was related to toxic exposures. The complaints and grievances that we hear include:

- Evidence submitted by claimants relating their illness (or the death of a covered worker) to toxins found at work is rejected by DEEOIC on the grounds that the available scientific evidence is insufficient to establish a connection between a particular toxic exposure and a particular condition. Some claimants rely on

treating physicians to support their claim and these claimants are sometimes surprised to discover that the opinion of their treating physician is not deemed sufficient to meet their burden of proof. Claimants have approached us to question the basis for not accepting their medical evidence. Because they believe that they retained the services of physicians who are well qualified in their respective field, these claimants question (and often state that they do not see) the basis for not accepting the opinion of their doctor. Claimants also contact us to question why the opinion of a physician who never examined them is credited over the opinion of a qualified doctor who actually examined them and who often is far more knowledgeable of their health status.

- There is a “piece-meal” approach to the process. We have heard from claimants who complain that they are instructed to submit medical reports relating their illness (or the death of a covered worker) to toxins at work, and yet when they submit their reports, they are then told that their evidence is not sufficient or that they need additional evidence. A number of these claimants have complained that where their evidence was deemed insufficient, they were not provided a full explanation and thus were at a lost as to how to rehabilitate their evidence. These claimants also profess that they have no idea of what constitutes a “fully rationalized medical opinion,” and little guidance is provided. Many of the claimants who have expressed an opinion on this subject state that it would be preferable to know in advance all of the criteria and standards that will be used to evaluate their medical evidence. Because of the time involved in scheduling medical appointments, and because many doctors do not want to invest a lot of time writing reports, some claimants have complained that it is difficult to return to a doctor and ask them to revise a report/letters that DEEOIC has deemed insufficient. In addressing this issue, we have been asked by claimants if it is possible for DEEOIC to provide examples of acceptable letters from physicians.

- Survivor claimants have reported to us that they have a difficult time proving causation – especially in those instances where the worker died years ago. We hear from survivors who discover that medical records have been destroyed or find that existing records are not helpful because at the time of death the physicians had no reason to address the possible contributions of toxic substances to the death, or had no knowledge of occupational exposures and therefore, occupational-related illnesses were not documented.

- The 50% or greater PoC requirement set for radiogenic cancers by DEEOIC’s Part E regulations (see 20 C.F.R. § 30.213) is too high and/or contrary to the statutory language directing DEEOIC to accept Part E claims if, among other things, it is “at least as likely as not that exposure to a toxic substance was a significant factor in aggravating, contributing to, or causing the illness.” See 42 U.S.C. § 7385s-4(c)(1)(A). The individuals who question the regulation's consistency with the statute maintain that the “significant factor” language in Part E indicates that Congress intended the Agency to use a lower threshold than in Part B, which includes the “at least as likely as not” language but not the

"significant factor" clause. These individuals suggest that the "significant factor" language was added by Congress to reflect the standard of causation used in Part D, and that Congress intended the Agency to use a 10%-40% threshold in Part E rather than 50%.[7]

- Bulletin No. 06-10/ 06-14 provides guidance to claims examiners with respect to cases in which a covered worker has a condition which has been identified by DEEOIC as one with no known link to a toxic substance. Claimants have reported to us that the burden of proving that their illness (or the death of a worker) is related to exposure to toxins at work is even greater where the illness (or death) is a condition listed on Bulletin No. 06-10/06-14.

  Claimants contact our Office to question the basis for including conditions in this bulletin. Because Bulletin 06-10/06/14 does not identify by name the specific publications, medical literature or occupational exposure records that were researched in compiling this bulletin, we have heard from claimants who feel that they are at a disadvantage when trying to challenge this bulletin. Moreover, claimants tell us that they do not understand what they need to submit to overcome this bulletin. These claimants are often dismayed when they are able to find a doctor – and one who from all appearances is qualified - who is willing to relate their condition to exposure to toxins at work and yet their claims are still denied.

  Prostate cancer (which was added to Bulletin No. 06-10's Attachment 1 by Bulletin No. 06-14)[8] is a condition for which we continue to receive inquiries. Some individuals have located medical articles or other evidence that they believe support their position that there is a relationship between toxic substance exposure and prostate cancer, and have questioned whether DEEOIC considered this evidence before placing the illness on the bulletin. Claimants are also aware that, in awarding compensation for Agent Orange-related conditions, the Veterans Administration (VA) adopted a presumption that prostate cancer has a related link to Agent Orange, a herbicide.[9] Because Agent Orange is a chemical, these claimant questions how DEEOIC could reach the conclusion that there is no "known" causal link between *any* chemical and prostate cancer in the face of the VA's presumption linking prostate cancer and Agent Orange exposure. Moreover, since Bulletin No. 06-10 does not specifically identify any of the evidence considered, claimants cannot tell whether DEEOIC considered the VA's

---

[7] DOL's Preambles to both the IFR and the Final Rule state the Agency's reasons for deciding to utilize the 50% or higher PoC requirement for radiogenic cancers in Part E as well as Part B. See 70 Fed. Reg. 33590, 33593-594 (June 8, 2005); 71 Fed. Reg. 78519, 78522-524 (December 29, 2006).

[8] Claimants or their representatives have contacted us about several different illnesses identified by the bulletin as having "no known causal link" to toxic substances, including prostate cancer, breast cancer, and pancreatic cancer. Prostate cancer is the most commonly cited illness.

[9] See http://www1.va.gov/agentorange/docs/D10AOBRIEF82005.doc .

findings (or any of the scientific evidence underlying the VA's findings) before placing prostate cancer on the "no known causal link" list. Recently, some claimants have informed us that they are following a study by scientists at Boston University, the University of Massachusetts and Lowell University linking prostate cancer to pesticides and metal working fluids.

C. ***Part B Issues:*** (71 comments)

While the Office of the Ombudsman does not have statutory authority with respect to Part B, some claimants and potential claimants call us with their complaints and grievances. In most instances, we are able to refer these inquirers to more appropriate sources of assistance; DEEOIC, NIOSH, the Department of Justice RECA staff and the Ombudsman for NIOSH have all been extremely helpful in ensuring that the issues raised by RECA and Part B claimants are addressed. Nevertheless, a review of these inquiries indicates that there are a few common issues that continue to be raised. Some claimants want information regarding the SEC process or question why their facility is not a SEC. We have also encountered claimants who were having difficulty establishing the necessary employment history. In addition, claimants continue to express grave reservations over whether it will be possible to establish a 50% or higher probability of causation. These claimants believe that the 50% requirement is too high.

D. ***Miscellaneous Inquiries and Comments*** (16 comments)

During 2007, the Office of the Ombudsman also received the following miscellaneous inquiries and comments relating to regulations, policies, and procedures:

- Reopening Claims: DEEOIC's regulations permit claimants to ask for reopening if they submit new medical evidence, new evidence of covered employment or exposure to a toxic substance, or identify a change in PoC guidelines, NIOSH's dose reconstruction method, or an addition of a new class of SEC employees. See 20 C.F.R. § 30.320. The Office of the Ombudsman has encountered claimants who either were not aware that they had the right to reopen their claim, or while aware of this right, did not know the procedures to follow in order to seek a reopening of their claim. Moreover, some claimants have complained that DEEOIC's regulations governing reopening of a claim are burdensome.

- Remanding Claims: The remand of a case has caused claimants to contact this Office. Some claimants simply did not understand the concept of a remand while others sought an explanation for the remand. Especially where the case has been pending for an extended period of time, some claimants view a remand as simply another means of prolonging the case. In recent months, this Office has talked to claimants whose claims have been remanded to NIOSH for re-examination of the dose reconstruction because the employee was exposed to highly insoluble forms of plutonium. The claimants with whom we spoke were not happy with another

delay, but were at least hopeful that this delay would inure to their benefit. While we cannot predict the outcome of these re-examinations, it is certain that these claimants will not be happy if they are denied benefits even after this extended delay.

- Part D Physician Panels: We continue to hear from claimants who are confused about Part D and Part E.

V. Administrative or Miscellaneous Issues

Summary

Claimants have contacted the Office of the Ombudsman in connection with:

A. Concerns about Claimant Interactions with DEEOIC Personnel (96 comments)

B. Requests for Assistance in Understanding Communications (193 comments)

C. The Processing of Claims Has Taken and Will Take Too Much Time (52 comments)

D. Locating Experts (34 comments)

E. Medical Benefits Issues (12 comments)

F. Offsets and Coordination of Benefits (13 comments)

G. Miscellaneous Inquiries and Comments (1962 comments)

A. *Concerns about Claimant Interactions with DEEOIC Personnel* (96 comments)

Claimants continue to express general concerns about their interactions with DEEOIC personnel. Claimants have contacted us to voice their frustration with attempting to contact their claims examiners or other DEEOIC personnel. Some claimants report that they never get to talk to a "live" person – rather they simply leave messages, for which there is either a delayed response or no response at all. Some claimants also report that it is difficult to receive anything more than cursory information and others state that they believe that efforts were made to discourage them from calling. The inability to talk to a "live" person (or the failure to receive a return telephone call) is even more stressful when the claimant is under time constraints. Claimants have recounted to us instances where a large portion of their response time (i.e., the time allotted to them to respond to a document) was "wasted" waiting for an answer from DEEOIC. Claimants also think that

it is unfair that DEEOIC can take months (or years) to act, and yet claimants are often afforded very short time frames within which to respond.

Transferring claims examiners

We hear complaints concerning the changes in claims examiners. In order to expeditiously process claims, DEEOIC sometimes finds it necessary to transfer cases between claims examiners. Most claimants to whom we speak understand that DEEOIC may need, at times, to reallocate work between claims examiners. However, these claimants become upset when they first learn of this transfer when they (the claimant) call the claims examiner – these claimants would prefer to be apprised of these transfers when they occur. In addition, claimants have expressed their belief that transfers have been excessive or unnecessary. Some claimants have expressed their dismay at having had 4 or 5 different claims examiners. More importantly, many of the claimants who expressed an opinion on this subject strongly believe that the transfer of their claim to different claims examiners had a negative impact on their case. These claimants sometimes complain that a claims examiner who was familiar with the intricacies of the evidence and who had a good rapport with the claimant was replaced by someone unfamiliar with the case or claimant. Claimants have also recounted instances where they received one set of instruction by one claims examiner, only to receive completely opposing instructions by the new examiner. Likewise, claimants have reported that when the case was transferred to a new claims examiner, they were required to resubmit evidence or again answer questions that they had provided to the previous claims examiner.

Not provided sufficient information

Another complaint that we hear is that claimants believe that they are not provided a sufficient explanation as to why their evidence is not deemed sufficient to meet their burden – an occurrence that some claimants allege is part of an intentional attempt to mislead them. As discussed in Section IV (B) (Difficulties in Proving Causation) claimants have complained that they are not given clear guidance on the quality or quantity of evidence needed to satisfy their burden. As a result, we encounter claimants who become very frustrated when they submit evidence and that evidence is deemed insufficient to meet their burden. These claimants argue that if they knew in advance the standards by which their evidence would be measured, then they would be in a better position to ensure that their evidence was sufficient.

Difficulties obtaining copies of evidence from DEEOIC

In general, claimants can obtain copies of evidence developed by DEEOIC and/or considered in their cases simply by asking DEEOIC, in writing, for a copy of the evidence they want to see or for a copy of their entire file if they are unsure what to specifically request. Some claimants have commented that DEEOIC ought to send copies of evidence (as well as copies of correspondence sent by DEEOIC to claimants' physicians and/or DMCs) to the claimants routinely, rather than requiring claimants to

specifically request this information. Some claimants are not aware that they can make a request to DEEOIC for these documents. In addition, some claimants report that they have encountered difficulties in obtaining evidence from DEEOIC. Claimants report of not receiving a response to their request, receiving an incomplete response, and/or of significant delays in receiving evidence from DEEOIC.

DEEOC personnel and resource centers sometimes provide or use incorrect (or incomplete) information

Some claimants continue to become particularly upset when DEEOIC (or a resource center) provides them with incorrect or incomplete information. These complaints cover a variety of subjects and generally are unique to the particular cases involved. Likewise, some claimants contend that DEEOIC used incorrect information in correspondence or other documents, including recommended or final decisions. For example, some claimants report that DEEOIC used the wrong social security number or name, referenced the wrong DOE facility, or referred to an illness that is not part of the claim at hand. A claimant who lives in "Largo" complained about correspondence that was sent instead to "Key Largo," and which he did not receive until after the expiration of the deadline.

Claimants also tell us of situations were it did not appear that the claims examiner forwarded all of the medical evidence to the DMC. Moreover, we have received complaints concerning the questions developed by claims examiners and forwarded to the DMCs – some claimants have questioned the qualifications of the claims examiner to prepare questions for the DMC and have asserted that the questions that were prepared were not germane to or failed to address the relevant issues in their case. Some claimants also complain that claims examiners do not always address all of the evidence in their claim.

The claimants who contact us are especially troubled where the incorrect (or incomplete) information concerns something more than basic information. In one instance (already referred to at Section III (D) (Qualified Claimant's Death Prior to an Award May Nullify Claim or Reduce Compensation)), the claimant avers that because she was cognizant that she had already received a state worker's compensation award for one eye, she approached the resource center with the intention of filing an EEOICPA claim for the other eye. However, this claimant asserts that she was "encouraged" to file a claim for both eyes. When this claimant contacted the Office of the Ombudsman she was highly upset that her EEOICPA award was being reduced by the state worker's compensation award, and was specifically annoyed that during the discussions concerning her filing of a claim, no one had ever discussed the possibility of a reduction as a result of the worker's compensation award. This claimant was also troubled by the fact that when she questioned the reduction, no one informed her of the possibility of withdrawing the claim for one of the eyes. Similarly, we have heard from other claimants who report of asking for specific guidance and receiving inadequate answers.

DEEOIC's use of incorrect information is cited by some claimants as a major reason for their lack of trust in this program – where the program cannot accurately cite basic information or fails to address all of the evidence, there are claimants who question the ability of the program to accurately analyze the volume of documents contained in many case files.

Other concerns

The apparent lost of documents is another issue that concerns some claimants. The resubmission of documents can mean that the claimant will incur additional expenses mailing or faxing documents.

In addition, while the policy of DEEOIC is to allow claimants to file a claim, there are some claimants who believe that they were encouraged to file unnecessary claims. These claimants contend that this encouragement resulted in a "waste" of their time or in misleading them on their claim. One instance of this involved the caller who reported that in a discussion with the resource center he specifically identified his mother's worksite and asked if his mother could file a Part E claim. According to the caller, he was told "yes" his mother could file a claim. However, once the claim was filed he was informed that his mother did not work at a covered worksite. Although this Office was able to specifically cite to statutory language excluding the mother from Part E coverage, this caller still felt that he had wasted his time and had been misled – he felt that he had specifically inquired about this issue and wish that he had been provided with an accurate (or a full) explanation when he made his initial inquiry.

Lastly, while it has not been wide-spread, some claimants have expressed a concern with a perceived lack of courtesy by some DEEOIC personnel.

B. ***Requests for Assistance in Understanding Communications*** (193 comments)

In the course of developing a claimant's case and in deciding claims, DEEOIC personnel communicate with claimants on a regular basis. After developing a claim, the claims examiner issues a recommended decision, followed by a final decision issued by the FAB (which may follow an oral hearing). Some individuals have reported significant difficulties understanding the correspondence and decisions they receive from DEEOIC (and NIOSH), or in understanding what is said to or requested of them over the telephone or at oral hearings. As a result, some of these individuals have contacted this Office for assistance – which often means explaining the document in "plain" language.

Moreover, decisions issued by DEEOIC or FAB are formal documents that often require a response by claimant (and in some instances, the failure to respond has a consequence). Because they realize that their response will affect their claim, some claimants are reluctant to respond without first consulting/conferring with someone. For example, recommended decisions offer claimants two options – one option if they disagree and the other if they agree with the decision. If they agree with the recommended decision and

want it to be affirmed in a final decision without change, the claimant is asked to submit in writing a statement waiving their right to object. During this year, several claimants who had received recommended decisions awarding benefits contacted the Office of the Ombudsman to discuss their options. In every instance, the claimant did not have any objections to the award of benefits – rather it was the word "waiver" and the requirement to put this "waiver" in writing that concerned these claimants. These claimants simply wanted verification that they were taking the right course of action.

Many of the documents forwarded to claimants are long and complex. Many are written using legal and medical terminology. There are instances where claimants simply do not have the capacity to fully understand these documents. As noted in Section IV (D) (Remanding of Claims) people have contacted us seeking an explanation for the remand of their claim. We have encountered some claimants who were unable to appreciate that in one decision, their claim for certain illnesses had been denied, while their claim for other illnesses had been granted (or was still under consideration). Similarly, where one decision addressed both the Part B and the Part E claims, we have encountered instances where claimants were not aware that there had been separate rulings on each claim. Recent DEEOIC and FAB decisions do a much better job identifying whether they are addressing a Part B or a Part E claim. Nevertheless, some claimants still find it confusing to distinguish Part B and Part E, especially where the claimant has filed a claim under both parts.

Some claimants have physical or mental impairments, difficulties with reading comprehension, or limited English proficiency, which impair their ability to understand communications from DEEOIC. We met with close to 1000 people during our town hall meetings in Kayenta, AZ and Shiprock, NM. It is safe to say that for close to half of the people who attended these meetings, English was not their first language – and many did not speak English at all. In fact, we continue to receive telephone calls where in response to our questions, we can hear the caller translating our questions into the Navajo language.

Some claimants also find confusing the 60-day limitations period for challenging recommended decisions, and its accompanying waiver provisions. As stated above, a recommended decision provides the claimant with two options. Beyond the concern with "waiving" their rights, claimants are unsure of what to do when they agree with parts of the decision, but disagree with other parts. For example, a claimant might agree with the decision that a particular illness is covered, but disagree with the finding that another illness is not covered. It has been suggested that the waiver language included in recommended decisions does not explain what to do if a claimant agrees with some findings, but disagrees with other findings.

Some claimants have also complained that the instructions for appealing a decision cannot be fully understood without assistance. These decisions sometimes include complicated discussions of medical evidence (some of which may not be in the claimant's possession), as well as the statute or regulations, and cannot be easily understood by some laypersons. Some claimants appear to be uncertain of all of their

options if they disagree with a FAB decision – and especially are uncertain if and how they can pursue these matters in federal court – many of the claimants to whom we spoke were unaware that they had the option of pursuing the matter in federal court.

C. *The Processing of Claims Has Taken and Will Take Too Much Time* (50 comments)

We receive complaints concerning the amount of time it takes to process a claim. Whether they have been waiting one year or seven years, some claimants strongly believe that under a claimant-friendly program they should not experience such extensive delays. While DEEOIC's adjudication of claims increased significantly over the past years, many living worker claimants are still waiting for impairment ratings, wage-loss determinations, and the related lump-sum compensation. These delays are a source of real frustration for some claimants. There are some claimants who suggest to us that these delays are designed to "wait until [the claimant's] die." Other claimants tell us that they believe that these delays are simply a way for the government to create work for itself, and we have encountered claimants who wonder if it would be "cheaper" to end the bureaucracy and use the money to pay claims.

As discussed earlier, the anxiety that claimants experience when their claims are delayed is often exacerbated by the fact that many claimants also have concerns regarding their health and their age. Claimants have expressed their concern that if they are to enjoy their benefits, they need to receive these benefits as quickly as possible. Moreover, the claimant to whom we have spoken are not concerned with which agency caused the delay – rather, these claimants view this as a governmental program and thus believe that it is the government's obligation to ensure that the various agencies work together to expedite these claims.

D. *Locating Experts* (34 comments)

A number of claimants have contacted our Office with complaints concerning difficulties locating experts [to prove causation and for medical impairment issues].

<u>Causation Issues:</u>

Claimants have contacted our Office to complain and ask for assistance in finding a medical expert to help them establish a link between their claimed illness and work-related exposures. When claimants are advised that they have not provided DEEOIC with sufficient evidence to prove that an exposure from their DOE work environment was a significant factor in causing, contributing to, or aggravating their claimed illness, some claimants tell us that they have no idea of how to rehabilitate the evidence that they have already submitted, or where to find additional evidence. Based on our conversations, some claimants believe that the recommended and final decisions do not satisfactorily

explain why their evidence is insufficient and complain that claims examiners do not provide sufficient guidance.

To claimants attempting to develop evidence addressing causation, our Office usually recommends that they acquire a copy of the publicly available, online version of SEM to provide to their experts. Although the public SEM lists toxic substances known to be located at each covered DOE facility, this version does not provide a breakdown by building or operation. Because there can be 50 or more toxins listed at some facilities, some claimants have reported that it is extremely difficult to research every substance on these extensive lists. Some of the other suggestions that we have provided to claimants include: contacting a medical library to search for medical journal and research articles on the subject of the claimed illness and toxic exposure; and getting copies of Material Safety Data Sheets to review health effects. Yet, as one can see, our suggestions require some level of research by the claimant (or someone working on the claimant's behalf), and some claimants inform us that they simply do not have the capacity or the assistance to engage in this level of research.

Medical Impairment Issues:

Impairment is defined as a loss, loss or use, or derangement of any body part, organ system, or organ function. A DEEOIC impairment award is monetary compensation for a permanent impairment where the impairment is due to an accepted covered illness and that has reached maximal medical improvement (MMI). The compensation is determined by a physician who meets the DEEOIC criteria to perform an impairment rating.

In 2007, our Office received more questions and complaints from claimants than in previous years, which may, in part, be due to a larger number of claimants receiving Part E benefits and requesting impairment ratings/evaluations for compensation of their approved covered illness. The complaints we logged fall into two categories: (1) Difficulties finding a qualified physician, and (2) Questions and complaints about how impairment ratings are derived and calculated.

1) Difficulties finding a qualified physician

We were contacted by claimants who voiced their frustration and difficulty in finding a qualified physician to perform the medical impairment rating/evaluation. We have heard from claimants that board-certified specialists who are medically treating them are not deemed sufficient by DEEOIC even though these physicians are considered experts in their field. Claimants also tell us that their physicians often do not want to get involved with (federal) compensation claims. As a result, some claimants are not able to rely on their treating physicians – the physicians who have direct knowledge about their illnesses and their ability to perform daily functions.

In general, there have been claimants who have communicated their distrust of DEEOIC selected physicians. Some of this distrust is that claimants do not feel

that they will get a fair objective evaluation/rating from the doctor provided by DEEOIC. Moreover, for some claimants the impairment rating by the DEEOIC provided doctor will be based on a review of medical evidence, and there are claimants who question the validity of an evaluation/rating that is simply based on a review of records. When claimants are unable to find a qualified physician on their own (and no one is able or willing to provide them with a list of qualified physicians not affiliated with the Department), some claimants have conveyed to us their feelings of being forced into agreeing to permit the DEEOIC selected physician to perform the impairment rating.

Other factors which impact a claimant's ability to locate a physician include access to information and mobility. While there are claimants who have been successful performing internet searches to find certified physicians, this option is not available to claimants who do not have access to computers. Moreover, some claimants have mobility and severe disabilities which make it difficult to travel distances to see a qualified physician. During our outreach in Shiprock, NM and Kayenta, AZ, Navajo claimants complained of being asked to travel to Grand Junction or Denver, Colorado to receive an impairment evaluation. For many of these claimants, this distance was too far. Other reported traveling to these evaluations only to discover that no one in the office spoke their (Navajo) language.

2) Questions and complaints about how impairment ratings are derived and calculated.

We are contacted by claimants who want a better understanding of how impairment ratings are determined. We have received questions regarding the need and understanding for responding to activities of daily living (ADL) that claimants sometimes feel have no relationship to their covered illness. For example, one claimant inquired how bowel and bladder habits had any relationship when the claimed illness was respiratory-related.

In addition, some claimants request our assistance to obtain the credentials of DEEOIC physicians, as well as copies of their medical notes/opinions for both causation (DMC) and impairment evaluations. These claimants have indicated that they were not aware they needed to make a formal written request to receive this information.

We have also received complaints regarding the requirement of reaching the MMI before they can be compensated for impairment. Some claimants have complained that it could be years before the illness reaches a permanent stage. There have also been complaints about low impairment percentage ratings evaluated by the DEEOIC selected physician.

Whether it is to prove causation or to evaluate impairment, locating an expert can be extremely challenging in more rural, remote areas of the country – which happen to be the areas where most of the nuclear weapons production and testing that exposed workers to radiation and toxic substances are (were) located. In addition, claimants have told us that they are stymied by physicians who charge several hundred dollars to prepare an opinion. It is possible for a claimant to be reimbursed for such charges, if the claim is approved, but the initial payment of the physician's fee can be a significant financial burden for some claimants and, if the claim is disapproved, there is no reimbursement.

E. ***Medical Benefits Issues*** (10 comments)

Living worker claimants who are awarded compensation under Part B or Part E of EEOICPA are entitled to medical benefits as well. See 42 U.S.C. §§ 7384s, 7384t and 7385s-8. Under Part E, claimants who qualify receive medical benefits for the approved medical condition contracted through exposure to toxic substances at a DOE facility (a covered illness or condition) as well as medical benefits for consequential conditions related to the approved covered illness. Under DEEOIC's regulations, claimants also bear the burden of proving that a "consequential" condition is related to their covered illness.

There have been complaints filed with the Office of the Ombudsman involving the inability of claimants to locate providers who were willing to accept the medical cards for treatment related to the covered illness. These claimants are annoyed that after receiving their medical card, they cannot find a health provider who will accept the medical card, and no one is able to provide them with, a list of providers who will accept the medical card. As a result, some of these claimants have referred to the card as "useless."

Claimants have also complained to this Office about burdensome requirements to prove and reprove their consequential medical conditions. We have heard from claimants who were not aware of DEEOIC's process for approval of a consequential medical condition – many claimants are under the impression that once approved for the claimed illness and receipt of the medical card, they can obtain all medical treatment and associated medications including consequential conditions. Some claimants believe their consequential medical conditions are so closely associated with their covered illness that they question the need (or the reasonableness) of requiring medical documentation to prove that the consequential condition is directly related the covered illness.

Other claimants have contacted the Office of the Ombudsman to complain about difficulty due to ICD-9 codes resulting in treatments for a covered illness being covered, but related effects of that illness not being covered.

Medical benefits also include certain travel expenses, for which the claimant is reimbursed. Claimants have reported difficulty in understanding how to obtain, and receive, approval for travel expenses.

F. *Offsets and Coordination of Benefits* (13 comments):

DEEOIC compensation is "offset" under 42 U.S.C. § 7385 by payments from awards and settlements in non-workers' compensation claims, based on injuries which have been compensated under EEOICPA. See also 20 C.F.R. § 30.505. Compensation is also subject to "coordination" under 42 U.S.C. § 7835s-11, whereby compensation is reduced by state workers' compensation claim benefits received for the same covered illness. See also 20 C.F.R. § 30.625-30.627. During the preceding year, this Office has received inquiries seeking guidance or an explanation concerning the application of one of these concepts. For example one claimant called to inquire if his EEOICPA award for an illness caused by exposure to toxins at a covered site should be offset by monies received for a settlement stemming from a similar illness arising from non-covered employment. It was this claimant's belief that these two illnesses were not the same – one was an illness arising from his covered work while the other was an illness arising from non-covered employment. Another claimant contacted us when she encountered difficulties providing DEEOIC with pertinent information concerning a previous law suit. Because the law suit had been a class action, the claimant found it difficult to obtain information that simply addressed her individual award.

Questions pertaining to offsets and coordination of benefits have been especially challenging both to claimants and to this Office.

H. *Miscellaneous Inquiries and Comments* (1962 comments)

During 2007, the Office of the Ombudsman also received the following inquiries or comments which are not reflected in the above categories. The vast majority of these inquiries (1562) involved general requests for information, status inquiries and includes those who attended the town hall meetings. These inquiries include:

- Inquiries about Office of the Ombudsman: During 2007, individuals contacted this Office to comment on the Office's 2006 Annual Report (or to ask for a copy of the report); to ask about the responsibilities of the Office of the Ombudsman; or to inquire on the status of the Office which was scheduled to sunset in October 2007. In addition, we received telephone calls and e-mails inquiring about this Office's testimony before the Senate Health, Education, Labor and Pension and inquiring as to why claimants had not been invited to testify before this Committee.

- Wage-Loss Issues: We have heard from individuals concerning difficulties they faced in obtaining required wage data from the Social Security Administration or to ask more general questions about wage loss issues, including the meaning of some of the material in DEEOIC's Procedure Manual.

- Resource Center/District Office Staffing Issues: One of the Ombudsman's specified duties is to make recommendations to the Secretary of Labor regarding the location of resource centers. 42 U.S.C. § 7385s-15(c)(2). Over all, most claimants who contact us have a favorable opinion of the Resource Centers. When claimants are recounting their experiences with the program, most have high praise for the staffs of the Resource Centers. For many claimants, the Resource Centers are accessible and claimants appreciate that they can actually go to the Resource Center and talk to the staff. There is, however, a general complaint by some claimants concerning the limited role of the resource centers. These claimants are dismayed that the resource centers are not authorized to assist with matters that go beyond the application process – such as causation issues. Some claimants believe that they benefit from the close working relationship that they establish with staff of the resource centers and wish that they could enjoy this type of relationship throughout the claims process.

  During 2007, the Office of the Ombudsman did receive comments suggesting that one resource center may be understaffed for the territory it serves. This Resource Center covers a very large territory and the population has unique needs. Likewise, we have heard comments concerning two of the district offices. These concerns generally focus on the inability to receive a prompt response to telephone inquiries. We will continue to forward these concerns to DEEOIC.

- Requests for Extensions of Time : Some individuals contacted this Office to ask whether it is possible to obtain extensions of time to submit evidence to DEEOIC or NIOSH. Many of these inquiries come from individuals who had been instructed to provide additional medical information, but have been unable to schedule an appointment with a doctor (or the earliest available appointment is well after the expiration of the time frame). Although many documents from DEEOIC provide instructions on the process for seeking an extension of time, when faced with an expiring time limit, many claimants focus on the time limit and thus have to be reminded that they can request an extension of time. Moreover, some claimants have contacted our Office simply for verification that requesting an extension of time is the proper course of action.

- Power of Attorney: An attorney for the Office of the Solicitor reviews power of attorneys before payments are made. The fact that this review occurs at the very end of the claims process continues to be a source of concern for some families. In a case that has been discussed earlier, the claimant was terminally ill and the family was in constant contact with DEEOIC, as well as the Office of the Ombudsman, to expedite the claim. Just when the family thought that it had done everything that they needed to do, the family was informed that DEEOIC would have to review the power of attorney. Fortunately for this family DEEOIC expedited the claim (and expedited review of the power of attorney), but this family had a few anxious moments when, in light of claimant's critical condition,

they questioned what would happen if this power of attorney was now deemed to be insufficient.

- Congressional Hearings/Legislative Issues: Some claimants have contacted this Office to inquire about proposed legislation. We are also contacted by claimants who inform us that they have submitted inquiries regarding their claim to their legislator, or have registered complaints with their representative or senator. A few claimants called to inquire about the 2007 hearing held by the Senate Health, Education, Labor and Pension Committee. One caller expressed his dissatisfaction that no claimants had been invited to testify.

- Inquiries about RECA-EEOICPA Coordination: Section 5 RECA claimants are entitled to Part B and E EEOICPA benefits as well. Other (non-Section 5) RECA claimants may also be eligible for EEOICPA benefits based upon employment at a DOE facility, but the law does not permit them to receive both RECA and EEOICPA benefits for cancer. This office has received inquiries from both some RECA Section 5 and non-Section 5 claimants who want a better understanding of their options.

- Inquiries Concerning the Taxability of EEOICPA Benefits: Some individuals contacted this Office during 2007 to ask whether EEOICPA benefits are taxed under Federal law and/or have asked for a citation to the statutory provision addressing the taxability of EEOICPA benefits. Our Office refers these inquirers to Section 7385e (1) which states that:

  Compensation or benefits provided to an individual under this subchapter –

  > (1) shall be treated for purposes of the internal revenue laws of the United States as damages for human suffering…

  42 U.S.C. § 7385e (1). Some claimants have indicated that they would prefer a statement that is more straightforward. Unfortunately, the Office of the Ombudsman believes that it is beyond our authority to provide a specific statement regarding the taxability of EEOICPA benefits.

  We have also received general inquiries concerning coordination between EEOICPA and state workers' compensation or asking whether an award of EEOICPA benefits would affect a claimant's benefits under Medicare, Medicaid, Social Security Disability, or similar programs. Unfortunately, it is not possible for either this Office or DEEOIC to predict exactly how another Federal or State agency will treat EEOICPA benefits; however, we have provided to the claimants language from EEOICPA addressing the points raised when possible and we have begun to bring these issues to the attention of the other Federal agencies involved.

VI. ***Town Hall Meetings***

Because of the large attendance at many of our town hall meetings, and because of the flow of information, it was impossible to fully collect the data (i.e., names, addresses, etc.) necessary to include all of the complaints and comments in our database. Nevertheless, based on our notes from these meetings, we would like to take a moment to highlight the major issues raised at these meetings:

Kayenta, AZ and Shiprock, NM

The obvious issue which immediately confronted us was the language barrier – a majority of the attendees at these meetings were Navajo and many were not proficient in English. This creates problems for these workers at every step in the process. Most of these workers were miners or millers, and thus are potentially eligible for RECA benefits, as well as Part B and Part E benefits. Yet many of these individuals did not realize that they had to separately file for benefits under each of these programs. Consequently, we encountered individuals who had received RECA benefits, but had never filed for EEOICPA benefits, as well as those who had received both RECA and Part B benefits and thought that they were automatically entitled to Part E benefits.

The limitation on the eligibility of surviving children was a very common concern raised by many of the attendees. As noted above, many of these workers are potentially eligible for both Part B and Part E benefits, and thus are aware of the differing eligibility requirements of these two parts. Workers question why survivors are not treated the same under Parts B and E. The complaints concerning the perceived unfairness of this limitation are addressed at Section III (A) (Limitation on Survivor Eligibility).

Problems locating doctors was another grievance raised by a number of attendees. A major grievance concerned being instructed to travel to Grand Junction or Denver, Colorado for impairment ratings. Many people stated that this was simply too far to travel. Others reported of going to these appointments only to find that no one in the medical office could speak Navajo. Workers also questioned the value of their medical cards – reporting that they could not find providers in their communities willing to accept the card. (In general, there was a request for more Navajo speaking assistance).

Beyond the language barrier, communications in general was a source of many concerns. Many people live in rural areas – they may not have a telephone in their homes and cell phone service can be "spotty." The imposition of (short) deadlines to respond to documents is a serious burden on these workers, as well as on those who try to assist these workers.

Augusta, GA

The Office of the Ombudsman held two meetings in Augusta, GA for workers and former workers of the Savannah River Site. Again the limitation on the eligibility of adult children was an issue raised by many of the people in attendance. However, we also heard from the spouses of some former workers who strongly believed that the death of a

child at birth was the result of toxins to which their husbands had been exposed. These women are very anxious to have someone consider their assertions.

The main issue at these meetings, however, concerned causation, and specifically the feeling by claimants that the burden placed on them to establish that their illness was caused by exposure to toxins at a covered facility is too high. Claimants complained of not being able to find physicians who would agree to become involved with a federal workers' compensation claim, and where they were able to find a physician, that the reports prepared by these physicians were all too often deemed insufficient to establish the required link. Moreover, where the physician's report was deemed insufficient, claimants complained of not receiving adequate guidance on how to rehabilitate or supplement these reports.

We met some claimants who while willing to acknowledge that there was little medical evidence linking their illness to toxins, nevertheless, questioned the need for medical evidence. A number of claimants believe that the rarity of their illness (or at least the rarity for someone of their age, gender, or age), or the fact that no one can determine the cause of the illness, or the fact that a large percentage of similarly situated workers all suffer the same illness ought to be sufficient to establish that their illness was caused by toxins at work. One claimant noted that as a hunter he was continually warned to inspect any deer that he shot near the facility. Thus, this claimant, who had worked for years at a covered facility, could not understand why everyone was willing to acknowledge that deer that had never worked at the facility might be affected by toxins, yet his claim for two separate cancers had been denied on the ground that he did not have sufficient exposure.

A number of claimants also expressed concerns with DEEOIC – complaints ranging from never being able to talk to a "live" voice, to concerns regarding lost records and documents.

Idaho Falls, ID and Calabasas, CA

These were meetings sponsored by Denise Brock to which the Office of the Ombudsman was invited to attend. Although the stated purpose of these meetings was to review the SEC petition process, there were people in attendance who had Part E questions and complaints. At each meeting we provided fact sheets (prepared for the particular audience), and distributed copies of our annual report and brochure. We also were available to answer questions.

Plans for 2008

In 2008, the Office of the Ombudsman will continue its outreach efforts. We already have outstanding requests to host town hall meetings in a number of cities and our goal is to visit as many localities as possible. Once finalized, a schedule of our upcoming town hall meetings will be posted on our website. With our newly developed database, which we continue to enhance, we now have the capacity to better identify particular issues

arising in specific localities and thus can better tailor our presentations to the audience at hand. It is also our goal to place more emphasis on developing brochures and pamphlets to address some of the more common questions and issues raised by claimants and potential claimants. Based on the volume of inquiries we have received to date, 2008 promises to be another busy year.

VII. Emerging Issues and Conclusion

Emerging Issues

At some of the town hall meetings that we sponsored during this year the attendance exceeded our expectations, and in fact at Shiprock, NM and at our first meeting in Augusta, GA, there was "standing room" only. In addition, we have outstanding invitations to host town hall meetings in a number of cities around the country. Based on these responses, as well as the telephone calls, e-mails and letters that we received during the preceding year, there are some issues, such as the statutory issues addressed in this report, which will, for the foreseeable future, continue to be the subject of complaints and grievances directed to this Office. Nevertheless, as we evaluate the comments that we have received, there are some areas where we anticipate new (or an increase in) comments.

When a Part E claim is filed, the claimant must first establish an approved claim. If the claim is approved, then the claimant can file for wage loss and/or impairment. At the present time, a majority of the medical evidence complaints directed to us concern causation (which must be established in order to have an approved claim). However, as more claims are processed and accepted, we expect to see more questions and concerns involving wage loss and impairment. And, as more claimants pursue wage loss and impairment claims, we also anticipate that more complaints will arise concerning the statutory maximums on the amount of compensation that a claimant can receive.

Likewise, as more claims are processed and accepted, we expect more questions and complaints concerning offsets and coordination of benefits. As stated in Section V (F) (Offsets and Coordination of Benefits), offsets and coordination of benefits can pose very difficult questions (especially where a class action or multi party action is involved) and oftentimes claimants simply will not have access to the information requested by DEEOIC. We believe that this will be an area where claimants will definitely feel the need to seek assistance. Additionally, as more claims are accepted, we expect more questions concerning the taxability of benefits.

Where a claimant receives an impairment rating, that claimant can seek an increase in the rating every two years. As time progresses, we anticipate an increase in inquiries concerning the procedures for modifying an impairment rating. An issue that is already emerging concerns the calculation of two years. For fairness sake, should it be two years from the date of the final decision, or should it be two years from the date of the medical evidence that formed the basis of the impairment rating. Where the medical impairment

rating was based upon a review of medical evidence (and no physical exam was conducted), we are already hearing suggestions that the two years should run from the date of the evidence that formed the basis for the impairment rating.

This year, claimants have contacted out Office seeking the status of proposed legislation, as well as general inquiries asking if there had been any changes in existing legislation. We expect to continue to receive inquiries of this nature.

Lastly, as claims are denied and claimants feel that they have exhausted all of their other options, we anticipate more requests for general assistance – i.e., rather than filing a complaint on one or two particular issues, claimants will contact us seeking a referral to someone who can assist them, or asking if our Office can provide the assistance that they need. For example, directing claimants to the SEM often is not sufficient – some claimants need someone to perform the research for them. Unfortunately, the assistance required by many claimants is beyond that which the Office can provide.

Conclusion

The Office of the Ombudsman believes that more (timely) information is critical if we wish to alter the perception that many hold about this program. Therefore we hope that the administrators of the EEOICPA program will continue their outreach efforts. We also encourage DEEOIC to continue to work to improve communications with claimants and provide more information to the public about how the program works and, in particular, more information concerning the reasons underlying decisions made by DEEOIC. Similarly, routinely providing copies of evidence developed by DEEOIC or making it plainly clear to claimants that such evidence is available would help to keep claimants informed about developments in their cases and allow them the opportunity to see and respond to negative evidence before a denial is issued. Prompt notification to claimants, on all issues ranging from a change in the claims examiner to changes in medical benefits coverage would take away the shock that many claimants experience when they discover these changes "on their own."

Over the past year, the Office of the Ombudsman has met and consulted with DEEOIC's staff in order to address the complaints, grievances and requests for assistance received by this Office. The Office of the Ombudsman looks forward to continuing to work cooperatively with the Program Agency, within the bounds of our independence, to improve the delivery of services to Part E claimants, in the timely and efficient manner envisioned by Congress.

In conclusion, I want to again thank everyone who during this year took the time to contact the Office of the Ombudsman and I want to thank you for taking the time to read this report.

APPENDIX I

Compilation of Comments by Subject/Issue by the Office of the Ombudsman from January 1, 2007 through December 31, 2007

STATUTORY ISSUES (98 comments)

Limitations on Survivor Eligibility	57 comments
Definition of a Covered DOE Facility	18 comments
Qualified Claimant's Death Prior to Award Nullifies Claim or Reduces Compensation	7 comments
Miscellaneous Inquiries and Comments	16 comments

REGULATORY, POLICY AND PROCEDURAL ISSUES (275 comments)

Difficulties Retrieving Employment, Exposure and Medical Records	92 comments
Difficulties in Proving Causation Issues	96 comments
Part B Issues	71 comments
Miscellaneous Inquiries and Comments	16 comments

ADMINISTRATIVE OR MISCELLANOUS ISSUES (1962 comments)

Concerns about Claimant Interactions with DEEOIC Personnel	96 comments
Requests for Assistance in Understanding Communications	193 comments
The Processing of Claims Has Taken and Will Take Too Much Time	52 comments
Locating Experts	34 comments
Medical Benefits Issues	12 comments
Offsets and Coordination of Benefits	13 comments
Miscellaneous Inquiries and Comments	1562 comments

Note: This 1562 includes general inquiries and status requests, as well as those who attended the various town hall meetings.

TOTAL 2335 comments

Note: Some of the comments we receive come from individuals such as attorneys and other authorized representatives, Former Worker Program grantee staff, Congressional staff, and claimants who are trying to help their fellow claimants with claims. It should be understood that these individuals are raising issues which potentially affect many people beyond themselves and that information provided to them reaches an even wider audience.

Moreover, the same person may have made more than one comment in a single contact with this Office. In these cases, separate comments were counted individually.

APPENDIX II

DEEOIC also provides services through eleven resource centers, strategically located to assist potential claimants by supplying information about Part B and Part E of EEOICPA:

- California Resource Center (Livermore, California)
- Denver Resource Center (Westminster, Colorado)
- Espanola Resource Center (Espanola, New Mexico)
- Hanford Resource Center (Richland, Washington)
- Idaho Falls Resource Center (Idaho Falls, Idaho)
- Las Vegas Resource Center (Las Vegas, Nevada)
- New York Resource Center (Amherst, New York)
- Oak Ridge Resource Center (Oak Ridge, Tennessee)
- Paducah Resource Center (Paducah, Kentucky)
- Portsmouth Resource Center (Portsmouth, Ohio)
- Savannah River Resource Center (North Augusta, South Carolina)

DEEOIC's resource centers are located in the general vicinity of those nuclear weapons facilities which they anticipated would produce the highest numbers of claims. They also made an effort to fill resource center management and staff positions with former managers and personnel from contractors for these same nuclear facilities. As a result, the staff members of the resource centers often have a pre-existing personal or professional relationship with claimants they serve or, at a minimum, an institutional knowledge of the facilities, which helps them to provide assistance.

The resource centers respond to questions about the process for applying for EEOICPA benefits; assist claimants with locating medical and work records and with medical payment reimbursement issues; conduct initial employment verification; take occupational histories; supply claimants with application forms, and provide assistance to claimants in completing these forms. The latter usually involves an intake interview with the claimant, often lasting more than two hours. Many claimants have made it clear to the Office of the Ombudsman that they have relied on the resource centers to help navigate the process of applying and being considered for compensation under Part E.