



July 12, 2017

Scott S. Dahl,
Inspector General
Office of Inspector General
200 Constitution Avenue, NW
Room S-5502
Washington, DC 20210

Dear Inspector General Dahl:

The Alliance of Nuclear Worker Advocacy Groups (ANWAG) is duty-bound to bring to your attention the flagrant disregard by the Department of Labor's Office of Workers Compensation Programs Division of Energy Employees Occupational Illness Compensation (DEEOIC) of the Administrative Procedures Act (APA) as well as the Department of Labor's (DOL) guidance report published by the three Administrations. DEEOIC has created changes within their new Procedure Manual which were proposed as Rule Changes on November 18, 2015. These proposed changes were never formally adopted through the rule making process. We do not take this step lightly.

ANWAG is an organization comprised of over 100 advocates from across the country whose purpose is to monitor the implementation of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA) and to assist the sickened nuclear weapons workers or their survivors in achieving the compensation that is their due.

Your website defines the responsibilities of your office,

The Inspector General Act of 1978, as amended, authorizes the Office of Inspector General (OIG) to conduct audits and investigations related to the programs and operations of the Department of Labor (DOL), including audits and investigations related to alleged fraud, waste, abuse, misconduct, or other wrongdoing concerning such programs and operations.

We believe government employees responsible for implementing EEOICPA have abused their power, ignored the laws of the land failed to comply with the Executive Orders requiring that agencies operate in a transparent manner.

DEEOIC Proposed Changes to Regulations

As you are aware, federal agencies are required to go through the rule making process before substantial changes can be made to existing regulations, as outlined in the APA. DEEOIC did publish a Federal Register Notice (FRN) on November 18, 2015.

DEEOIC minimized the effect that the proposed changes would have on the claimants under this program.

B. Overview of the Proposed Rule

The Department is proposing to amend certain of the existing regulations governing its

clarity to the regulatory description of the claims adjudication process, and to improve the administration of the Act. The following discussion describes the proposed changes to the existing regulations that currently appear in 20 CFR part 30. Since some of these proposed changes involve moving existing text to new sections, please refer to those new sections when submitting comments on the proposed changes.

DEEOIC received almost 500 comments from the concerned public before the public comment period ended on May 23, 2016. Many commenters voiced their objection to DEEOIC's proposal which they could deny a change in the choice of a personal physician. Other commenters submitted their opinions on a number of issues without the benefit of having the redlined version of the proposed rule. We share this account in order that you may understand DEEOIC's historical lack of transparency with the claimants and the advocates who represent them.

DEEOIC has not yet published the Final Rules nor has it withdrawn the proposed rules. Instead, it appears that several of the proposed changes were either memorialized in the FRN of November 18, 2015 or were incorporated into the latest version of the Procedure Manual (PM) which was released in April 2017.

EXAMPLE OF PROPOSED CHANGED INCORPORATED INTO PROCEDURE MANUAL

ANWAG compared seven of the more dramatic proposed changes issued in November of 2015. We compared the redlined version of the proposed rules given to the Advisory Board on Toxic Substances and Worker Health (ABTSWH) with the recent and previous versions of the PM.

<https://www.dol.gov/owcp/energy/regs/compliance/advboard/nprm.pdf>

https://www.dol.gov/owcp/energy/regs/compliance/PolicyandProcedures/procedure_manual_1.0-2017.04.pdf

<https://www.dol.gov/owcp/energy/regs/compliance/PolicyandProcedures/UnifiedProcedureManual.htm>

ANWAG found that four of the proposed substantial changes were already incorporated in the PM prior to the request for comments. The other three proposed changes were incorporated into the PM after the end of the of the public comment period. A comparison of the proposed changes which were incorporated into the PM is attached.

One of the most outrageous changes made to the PM which ignores the rule-making process concerns claims for wage-loss. The proposed rules require that a worker must identify the “trigger month” in which he first became disabled. The additional requirement is that the worker must be employed during that “trigger month”.

§ 30.805 What are the criteria for eligibility for wage-loss benefits under Part E?

(a) In addition to satisfying the general eligibility requirements applicable to all Part E claims, a claimant seeking benefits for calendar years of qualifying wage-loss has the burden of proof to establish each of the following criteria:

- (1) He or she held a job at which he or she earned wages;*
- (2) He or she experienced a loss in those wages in a particular month (referred to as the “trigger month” in this section);*
- (3) The wage-loss in the trigger month was caused by the covered Part E employee’s covered illness, i.e., that he or she would have continued to earn wages in the trigger month from that employment but for the covered illness;*

ANWAG submitted the attached additional comments on the subject, as permitted, on April 21, 2016,

Since DOL regulations accepts that a worker was injured the last day he or she worked at a facility, it seems logical that DOL would only need to review the medical records they relied upon to accept a disease and compare those records (such as date of diagnosis or documentation of symptoms consistent with the disease before a formal diagnosis was rendered) to the Social Security Administration’s quarterly wages to determine when the worker first lost wages due to the covered disease.

DEEOIC revised the PM for wage loss claims in July 2015, *four full months before* they issued the proposed rules. The change, as documented in the attached Transmittal 15-07, includes the very language DEEOIC claimed they were only considering changing in November 2015. The Transmittal did not fully describe the changes to the wage-loss adjudication process. The Transmittal is vague and does not identify the substantial and restrictive modification to the adjudication for wage-loss claims.

ANWAG sent a letter to DEEOIC on November 21, 2016 strenuously objecting to this revision.

Additionally, ANWAG is aware that DEEOIC used this unauthorized wording, which was not incorporated into the 2015 procedure manual or published in the proposed rule change, to deny a claim on February 12, 2009, *almost seven years later*. Neither the regulations in place then and currently in place nor the PM in place at the time of the filing of the wage-loss claim or the final decision have this restrictive evidentiary requirement.

<https://www.dol.gov/owcp/energy/regs/compliance/Decisions/GenericDecisions/DecisionsRef/10002977-2006.htm>

Thus, the evidence must establish: (1) that the employee held a job at which he/she was earning wages; (2) that the employee experienced a loss in those wages in a particular month; (3) that the wage-loss in that one month was caused by the employee's covered illness, i.e., that he/she would have continued to earn wages in that month from that job but for the covered illness (this month is known as the "trigger month"); (4) his/her "average annual wage" (AAW) over the 36 months that immediately preceded the trigger month; (5) his/her normal retirement age and the calendar year (known as the "retirement year") in which he/she would reach that age; (6) beginning with the calendar year of the trigger month, the percentage of the AAW that was earned in each calendar year up to and including the retirement year; (7) the number of those calendar years in which the covered illness caused the employee to earn 50% or less of his/her AAW; and (8) the number of those calendar years in which the covered illness caused him/her to earn more than 50% but not more than 75% of his/her AAW. See 20 C.F.R. § 30.800 (2008). Rationalized medical evidence is needed to establish the third of these elements, as well as the causation aspects of the seventh and eighth elements. See 20 C.F.R. § 30.805(b)

ANWAG acknowledges we have not completed the full comparison between the proposed rules and the latest revision of the PM. The configuration of the new PM is different than the previous version and that makes it more difficult to compare. We also wish to note that there is at least one proposed change that could be beneficial to claimants (§ 30.318 How will FAB consider objections to HHS's NIOSH's reconstruction of a radiation dose?). However, that does not excuse DEEOIC's failure to follow the APA.

DECISIONS AND DOL POLICY.

On August 5, 2016, the United States District Court, District of New Mexico, rendered a decision in *Lucero v. DOL*.

Since any regulation promulgated with an interpretation contrary to the plain meaning of the statute would be ultra vires and precluded under Chevron, this Court need not reach the question of whether Chapter 2-1200.12b of the United States Department of Labor Federal (EEOICPA) Procedure Manual properly interprets 20 C.F.R. Section 30.509(a)–(b).

It is ANWAG's position that DEEOIC has, at least in the changes made for wage-loss claims, overstepped their authority by restricting the ability to claim loss of wages to a very narrow time-period. Congress understood that many workers suffered from occupational diseases which were often not correctly diagnosed for months after the symptoms appeared. The plain language of the statute demonstrates that Congress intended these workers receive wage loss for their covered conditions. The statute clearly lays out the manner which DEEOIC is to figure out the amount of wage loss. It does not give DEEOIC the authority to limit wage loss to only workers who were employed during the same month they were diagnosed with a covered condition.

On March 9, 2015, the United States Supreme Court issued a decision in *Perez v. Mortgage Bankers Association*. In that decision, the court ruled that agencies are not required to go through the rule-making process because a section of the APA "specifically exempts interpretative rules from the notice-and-comment requirements that apply to legislative rules".

However, it is obvious that DEEOIC determined, eight months after the court's decision, that the proposed changes to the current regulations were not interpretative but are changes which involve legislative rules. Otherwise, they would not have gone through the lengthy rule-making process. This included extending the comment period to May 23, 2016 to give the newly created Advisory Board on Toxic Substances and Worker Health to ample time to weigh in on the issues.

DOL's Policy, "PLAN FOR RETROSPECTIVE ANALYSIS OF EXISTING RULES", was released in August 2011.

<https://obamawhitehouse.archives.gov/sites/default/files/other/2011-regulatory-action-plans/departmentoflaborregulatoryreformplanaugust2011.pdf>

Transparency and Clarity. As a part of the Department's efforts to ensure high levels of transparency within its rulemaking processes, agencies will be encouraged to review regulations in order to identify provisions that have proven confusing, inconsistent, or

duplicative. For example, OWCP published proposed FECA regulatory revisions (20 CFR Parts 1, 10, and 25) to improve the clarity of that regulation. (Emphasis added)

The Executive Order issued on February 27, 2017 confirms that DEEOIC is required to comply with this directive, <https://www.whitehouse.gov/the-press-office/2017/02/24/presidential-executive-order-enforcing-regulatory-reform-agenda>

Each RRO shall oversee the implementation of regulatory reform initiatives and policies to ensure that agencies effectively carry out regulatory reforms, consistent with applicable law. These initiatives and policies include... (iii) section 6 of Executive Order 13563 of January 18, 2011 (Improving Regulation and Regulatory Review), regarding retrospective review...

This is the policy that DEEOIC was required to follow during the rule-making process as well as the revisions to the PM. DEEOIC failed to comply with this directive, too. DEEOIC asserted in the November 18, 2015 FRN that,

As part of the development of the proposed rule, the Department hosted a telephonic listening session during which interested parties provided their views, ideas and concerns to Departmental leadership on the provisions of the existing regulations. The Department found the listening session to be helpful and considered relevant information raised during the session in developing the proposed regulations.

However, ANWAG noted in their public comment submitted on February 18, 2016 that DEEOIC misrepresented the stakeholders' engagement in the process and failed to comply with DOL's policy to "ensure high level of transparency" with those stakeholders.

Yet ANWAG and other stakeholders have not been afforded a meaningful opportunity to engage with DEEOIC in developing the proposed rule. The listening session mentioned in the proposed regulation is misleading...DEEOIC provided no details of the proposed changes to the rules during that call..."

CONCLUSION

DEEOIC has failed to follow numerous laws and court decisions. These include,

- Failure to complete the rule-making process, as required by the APA, either by issuing the Final Rule or withdrawing the proposed rule.
- Incorporated major changes into the PM which should have been done only *after* the Final Rule was published.

- Ignoring the plain language of EEOICPA as it applies to wage-loss claims.
- Failure to ensure that a high level of transparency was maintained.

ANWAG asks that you immediately mount a full investigation into the practices of the DEEOIC to determine if unethical or illegal regulatory procedures occurred which may have resulted in unjustified denial of claims. We ask that if your office confirms our allegations that all corrective actions be implemented immediately.

Sincerely,



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The Honorable Jeff Sessions, U.S Attorney General
Members of Congress

2 enclosures



COMPARISON OF PROPOSED RULE CHANGES WITH NEW PROCEDURE MANUAL

July 2017

Black – Proposed changes

Red – Procedure manual

§ 30.207 How does a claimant prove a diagnosis of a beryllium disease covered under Part B?

(d) OWCP will use the criteria in either paragraph (c)(1) or (2) of this section to establish that the employee developed chronic beryllium disease as follows: (1) If the earliest dated medical evidence shows that the employee was either treated for or diagnosed with a chronic respiratory disorder before January 1, 1993, the criteria set forth in paragraph (c)(2) of this section may be used; (2) If the earliest dated medical evidence shows that the employee was either treated for or diagnosed with a chronic respiratory disorder on or after January 1, 1993, the criteria set forth in paragraph (c)(1) of this section must be used; and (3) If the employee was treated for a chronic respiratory disorder before January 1, 1993 and medical evidence verifies that such treatment was performed before January 1, 1993, but the medical evidence is dated on or after January 1, 1993, the criteria set forth in paragraph (c)(2) of this section may be used.

Chapter 8, Section 6 page 213, and also Chapter 2-1000 Revised September 2015

If the earliest dated document showing a chronic respiratory disorder lists a date after January 1, 1993, the post-1993 CBD criteria should be used. If the employee sought treatment before 1993, but the medical documentation relating to the treating document is dated on or after January 1, 1993, the pre-1993 CBD criteria should be used. In this situation, the medical evidence is to clearly communicate the fact that treatment occurred prior to 1993.

§ 30.307 Can one recommended decision address the entitlement of multiple claimants?

(a) When multiple individuals have filed survivor claims under Part B and/or Part E of EEOICPA relating to the same deceased employee, the entitlement of all of those individuals shall be determined in the same recommended decision, except as described in paragraph (b) of this section.

(b) If another individual subsequently files a survivor claim for the same award, the recommended decision on that claim will not address the entitlement of the earlier claimants if the district office recommended that the later survivor claim be denied.

Chapter 24 5a page 297. Also in PM 2—1600, revised August 2014

Multiple Claimant RDs. All claimants who have filed a claim under Parts B and/or E, and have not had their claim administratively closed, are to be parties to any RD deciding a benefit entitlement. This is necessary to ensure that any decision comprehensively addresses the entitlement for all claimants with an interest in the claim. Each claimant is provided with the information necessary to understand the outcome for all claims. Moreover, it grants all claimants equal opportunity to present objections, should they disagree with any particular aspect of the decision. A CE should not issue a RD determining any single individual claimant's eligibility to receive benefits in a multiple person claim, except in the circumstance of a newly filing ineligible survivor.

§ 30.314 How is a hearing conducted?

The FAB reviewer may mail a hearing notice less than 30 days prior to the hearing if the claimant and/or representative waives the above 30-day notice period in writing.

Chapter 25, d Page 314, also in PM 2-1700, revised December 2012

Scheduling. Each claimant is provided written notice of the hearing at least 30 days prior to the scheduled date (unless waived by the claimant);

§ 30.318 How will FAB consider objections to HHS's NIOSH's reconstruction of a radiation dose,

- (a) If the claimant objects to HHS's NIOSH's reconstruction of the radiation dose to which the employee was exposed, either in writing or at the oral hearing, the FAB will evaluate reviewer has the factual findings upon which discretion to consult with NIOSH as part of his or her consideration of any objection. However, the HHS based its dose reconstruction. If these factual findings do not appear to be supported by substantial evidence, the claim will be returned to the district office for referral to HHS regulation, which provides guidance for further consideration.

14. Comments to Dose Reconstruction Submitted to FAB. A claimant may choose to present comments regarding the findings reported in the NIOSH dose reconstruction. Claimant comments may be submitted for consideration as part of the following circumstances: a request for a review of the written record, oral hearing, or reconsideration; testimony or presentation of exhibits for an oral hearing; or a request for reopening or other post-adjudication action. In these situations, the DEEOIC HP serves as the initial point of contact for addressing claimant-related comments to a NIOSH dose reconstruction. The CE or assigned DEEOIC FAB staff person takes the following steps to track dose reconstruction comments submitted for DEEOIC HP review:

§ 30.320 Can a claim be reopened after the FAB has issued a final decision?

(b) At any time after the FAB has issued a final decision pursuant to § 30.316, a claimant may file a written request that the Director for Energy Employees Occupational Illness Compensation reopen his or her claim, provided that the claimant also submits new evidence of either a diagnosed medical condition, covered employment, or exposure to a toxic substance, or identifies. A written request to reopen a claim may also be supported by identifying either a change in the PoC guidelines, a change in the dose reconstruction methods or an addition of a class of employees to the Special Exposure Cohort.

Chapter 27, Section 3, page 343 and 344 also in 2-1900, revised February 2016

Provided that the claimant also submits new evidence of either covered employment or exposure to a toxic substance, or identifies either a change in the PoC guidelines, a change in the dose reconstruction methods or an addition of a class of employees to the SEC.

Proposed changes does not include new evidence of #6 below but it is reflected in both versions of the PMs

(6) Change in Law, Regulations or Policies. If the initial review reveals that the claimant has identified a change in the law, regulations, or policies governing the EEOICPA, the DD determines whether the nature and extent of such information satisfies the requirements of 20 C.F.R. § 30.320, and whether it is sufficient to warrant reopening.

§ 30.500 What special statutory definitions apply to survivors under EEOICPA?

(c) For the purposes of paying compensation to survivors under Part E of EEOICPA, OWCP will use the following additional definitions: (1) Covered child means a child that is, as of the date of the deceased covered Part E employee's death, either under the age of 18 years, or under the age of 23 years and a full-time student who was continuously enrolled in one or more educational institutions since attaining the age of 18 years, or any age and incapable of self-support. A child's marital status or dependency on

the covered employee for support is irrelevant to his or her eligibility for benefits as a covered child under Part E. (2) Incapable of self-support means that the child must have been physically and/or mentally incapable of self-support at the time of the covered employee's death.

Chapter 20, page 246. Also 2-1200 revised June 2016

(b) Incapable of Self-Support. To establish eligibility for benefits as a covered child who was incapable of self-support at the time of the employee's death, the child must have been physically or mentally incapable of self-support, regardless of marital status or dependency on the employee for support, regardless of the temporary or permanent nature of the incapacity.

(i) A child is incapable of self-support if, at the time of the employee's death, his/her physical or mental condition was such that he/she was unable to obtain and retain a job or engage in self-employment that could provide him/her with a sustainable living wage.

§ 30.805 What are the criteria for eligibility for wage-loss benefits under Part E?

(a) In addition to satisfying the general eligibility requirements applicable to all Part E claims, a claimant seeking benefits for calendar years of qualifying wage-loss has the burden of proof to establish each of the following criteria: (1) He or she held a job at which he or she earned wages; **(2) He or she experienced a loss in those wages in a particular month (referred to as the "trigger month" in this section);** **(3) The wage-loss in the trigger month was caused by the covered Part E employee's covered illness, i.e., that he or she would have continued to earn wages in the trigger month from that employment but for the covered illness;** (4) His or her average annual wage; (5) His or her normal retirement age and the calendar year in which he or she would reach that age; (6) Beginning with the calendar year of the trigger month, the percentage of the average annual wage that was earned in each calendar year up to and including the retirement year; (7) The number of those calendar years in which the covered illness caused the covered Part E employee to earn 50% or less of his or her average annual wage; and (8) The number of those calendar years in which the covered illness caused him or her to earn more than 50% but not more than 75% of his or her average annual wage.

(b) OWCP will discontinue development of a request for wage-loss benefits, during which the claimant must meet his or her burden of proof to establish each of the criteria listed in paragraph (a) of this section, at any point when the claimant is unable to meet such burden.

Current regulations § 30.806 What kind of medical evidence must the claimant submit to prove that he or she lost wages due to a covered illness? OWCP requires the submission of rationalized medical evidence of sufficient probative value to convince the fact-finder that the covered Part E employee experienced a loss in wages in his or her trigger month due to a covered illness, i.e., medical evidence

based on a physician's fully explained and reasoned decision (see § 30.805(a)(3)). A loss in wages in the trigger month due solely to non-covered illness matters, such as a reduction in force or voluntary retirement, is not proof of compensable wage-loss under Part E.

Chapter 22 5 (e), also in PM 2-1400, revised July 2015

Employee did not earn wages before the trigger month. For example, if the employee did not work and was not earning wages before the trigger month, wage-loss is to be denied because the employee did not earn wages prior to the trigger month to be able to establish a reduction in wages.

RELEASE - TRANSMISSION OF REVISED MATERIAL TO BE INCORPORATED INTO THE FEDERAL (EEOICPA) PROCEDURE MANUAL: CHAPTER 2-1400, WAGE-LOSS DETERMINATIONS.

EEOICPA TRANSMITTAL NO. 15-07

July 2015

EXPLANATION OF MATERIAL TRANSMITTED:

This material is issued as procedural guidance to update, revise and replace the text of the EEOICPA Procedure Manual (PM) Chapter 2-1400, Wage-Loss Determinations. This version incorporates changes that have arisen since the last publication of Chapter 2-1400 to include:

- Removes reference to the Resource Center role in handling wage-loss claims.
- Revises procedures in requesting and obtaining Social Security earnings records.
- Explains the use of Form EE-11B/EN-11B in developing wage-loss claims.
- Provides time limits for claimant to submit wage-loss claims, and to submit required medical and wage-loss evidence.

The following exhibit has been removed from the previous version of Chapter 2-1400:

- Development Letter for Wage-Loss with Attachments.

The following exhibits have been added:

- Form EE-11B/EN-11B, Development Form for Wage-Loss.
- Form EE-10/EN-10, Development Form for Subsequent Wage-Loss
- Revised Form SSA-581.
- Cover sheet for rejected SSA-581.

Rachel P. Lester