



JUL 19 2019

Ms. Terrie Barrie
Alliance of Nuclear Worker Advocacy Groups
175 Lewis Lane
Craig, CO 81625

Re: Petition for Rulemaking

Dear Ms. Barrie:

This is in response to your February 15, 2019 petition for rulemaking addressed to the Secretary of Labor on behalf of the Alliance of Nuclear Worker Advocacy Groups (ANWAG). Your petition specifically seeks repeal of the changes to the regulations that govern the administration of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended, (EEOICPA), 42 U.S.C. § 7384 *et seq.*, that were published in the *Federal Register* on February 8, 2019. In your petition, you assert that the explanations given for some of the actions taken in that rulemaking “are misleading,” that some changes made to the regulations “are more restrictive than [the] statute,” and that “suggestions from the public which could improve the compensation program” were ignored. Your petition contains eight arguments in support of your request for repeal.

I have conducted a thorough and considered review of your supporting arguments. The “Background” section below discusses the context of the recent regulatory changes at issue. This response then discusses each of your specific arguments, in the order presented in your petition.

Background

The Office of Workers' Compensation Programs (OWCP) published a Notice of Proposed Rulemaking (NPRM) on November 18, 2015, in the *Federal Register*.¹ In that publication, OWCP proposed changes to some of the 2006 regulations in order to better conform them to its current administrative practices (based on its experience administering the statute since 2001), to clarify the regulatory description of the claims adjudication process, and to improve its administration of EEOICPA. Most of the proposed changes consisted of routine updates to the 2006 regulations in order to remove obsolete terms, make changes to certain cross-references, and to accurately reflect recent judicial interpretations of some sections of EEOICPA. Most significantly, OWCP proposed to modify its 2006 regulations to describe the increased involvement of the National Institute for Occupational Safety and Health (NIOSH) in OWCP's consideration of objections raised to NIOSH's final radiation dose reconstruction reports. Since NIOSH had agreed to consider and address claimant concerns in the final dose reconstruction report it sends to OWCP, and also agreed to consider and respond to objections to the report raised while the claim was before the Final Adjudication

¹ 80 Fed. Reg. 72,296 (Nov. 18, 2015).

Branch (FAB), OWCP proposed modifying 20 C.F.R. § 30.318(a) to describe the potential for NIOSH's involvement. In addition, OWCP proposed regulatory changes in the NPRM to align the description of how medical bills are processed and paid with the systems that OWCP's designated bill processing agent uses, to update the administrative process used to exclude medical service providers, and to set out a simple, standardized process for authorizing home health care services.

OWCP originally allowed a 60-day period for interested parties to comment on the NPRM that was scheduled to close on January 19, 2016, but extended the comment period another 30 days through February 18, 2016. In addition, on April 5, 2016, OWCP reopened the comment period for the NPRM through May 9, 2016. During these comment periods, OWCP received 493 timely comments from the following 474 unique commenters: 272 identified individuals; 158 unknown persons or organizations; 25 physicians; six claimant representatives; five advocacy groups; three health care providers; one congressional representative; one labor organization; one federal employee from an agency other than OWCP; one law firm; and the Advisory Board on Toxic Substances and Worker Health established under § 7385s-16 of EEOICPA. Of the 493 timely comments, 348 did not address any of the proposed regulatory changes in the NPRM and thus were not discussed in Section III of the preamble (the "Section-by-Section Analysis") when the final rule was published. The remaining 145 comments referenced one or more changes to the 2006 regulations that were suggested in the proposed rule. OWCP considered all of the timely comments that it received, including the comments addressing the provisions you specifically referenced in your petition, and published the final rule containing the changes to the regulations, together with its analysis of the comments, in the *Federal Register* on February 8, 2019.² That publication had the effect of bringing the rulemaking that began in 2015 to a close, and the final rule went into effect on April 9, 2019.

The Administrative Procedure Act (APA) governs the different rulemaking processes that federal agencies use and contains a provision which states that "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."³ Because your February 15, 2019 petition explicitly invokes this particular statutory provision in connection with your request that the recent changes to the 2006 regulations be repealed, I have given careful consideration to the eight arguments that you included in your petition, and the discussion that follows includes my analysis of those arguments.

Discussion

1. "[OWCP] states that the Final Rules do not have any tribal implications. We strongly disagree with this position. The Navajo Nation alone had over one thousand uranium mines. These workers are directly affected by the Final Rules."

² 84 Fed. Reg. 3026 (Feb. 8, 2019).

³ 5 U.S.C. § 553(e).

As you indicated in your petition, this argument is based on Executive Order 13175.⁴ You specifically contend that the final rule should have included a narrative description of a tribal consultation for the final rule as specified in Sec. 5(b)(2)(B) of the Executive Order. However, this argument is based on a misinterpretation of the scope and applicability of Executive Order 13175, which only applies to “policies that have tribal implications.” In Sec. 1(a) of the Executive Order, the term “policies that have tribal implications” is defined to include regulations “that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.” Further, and most importantly, Sec. 3 makes clear that the focus of the Executive Order is on policy directives (like regulations) that burden or otherwise interfere with tribal self-government and sovereignty by limiting the administrative discretion of tribal governments.

You point out in your petition that there were over a thousand uranium mines on land within the boundaries of the Navajo Nation, and I do not disagree with this assertion. Nevertheless, I *do* disagree that this fact brings the final rule within the ambit of Executive Order 13175. I can identify no regulatory provision within 20 C.F.R. Part 30, either before or after the changes made by the final rule, that in any way impinges upon an aspect of tribal self-government or sovereignty. While the changes to the regulations may have an effect on the individual eligibility of tribal members or on the adjudication of their claims under EEOICPA, there are no aspects of the February 8, 2019 final rule that have tribal implications, as that term is used within Executive Order 13175. Accordingly, I stand behind my determination to that effect, which was reviewed by the Office of Management and Budget and other agencies during the rulemaking process. Moreover, Sec. 10 of Executive Order 13175 explicitly states that it is “intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.”

2. “[OWCP] asserts that the most significant change involves modifying the regulations to address objections to [NIOSH’s] dose reconstruction. This is not accurate. The most significant changes are the incorporation of the policy changes adopted between 12/31/2006 and 2/8/2019 by the Division of Energy Employees Occupational Illness Compensation (DEEOIC) into their Procedure Manual.”

This second argument appears to be presented as support for your contention that the explanations given in the preamble to the February 8, 2019 final rule are “misleading.” The real-world significance (for both claimants and FAB) of the regulatory changes to § 30.318 cannot be disputed. NIOSH’s increased involvement represents a sharp departure from the initial resolution of the debate between the Department of Labor and the Department of Health and Human Services over the extent of NIOSH’s involvement that was settled by the Office of Management and Budget in early 2001 and resulted in the version of § 30.318 that was replaced in the final rule. The final rule’s preamble at page 3026 sets out a detailed historical background and the practical reasons why, for both OWCP and for claimants, the changes to § 30.318 made by the final rule are significant:

⁴ 65 Fed. Reg. 65,249 (Nov 9, 2000).

Since the beginning of OWCP's administration of Part B of EEOICPA, Final Adjudication Branch (FAB) reviewers have struggled with their regulatory obligation in existing § 30.318 to consider objections to final dose reconstruction reports that have been prepared by NIOSH during its portion of the adjudication process for radiogenic cancer claims. The experience has also been frustrating for claimants, and convinced the Department that FAB reviewers are ill-suited to address objections that concern matters within the particular scientific expertise of NIOSH. Since NIOSH agreed to consider and address claimant concerns in the final dose reconstruction report it sends to OWCP, and also agreed to provide consultation at the request of FAB reviewers to address any objections raised while the claim is pending before FAB, the Department proposed modifying § 30.318(a). That proposed paragraph describes the potential for NIOSH to provide consultation in FAB's consideration of objections to final dose reconstruction reports, and this consultation process will provide for a more complete consideration of the claimant's objections.

The statement in the preamble that the changes represented by new § 30.318 are significant was not, in any way, misleading. Disagreement with the description *in the preamble* of one regulatory change, rather than with the change itself, does not form a basis for repeal of the entire final rule. In addition, I cannot respond to your argument regarding the other "policy changes" that were incorporated into the final rule, because you did not identify those changes. However, the descriptions of all such changes in the preamble accurately state that they merely imported into the regulations policy and procedural changes made since 2006. As such the descriptions are not misleading.

3. "§ 30.403 requires pre-authorization for home health care. It is not unusual for a worker to require emergency home health care. For instance, when being discharged from the hospital or when the worker's health deteriorates and is dying. DOL also changed the effective date of care to when DOL approved the care instead of when the worker applied for the services. This change of date directly violates the statute, § 7384t[(d).]"

As you state in your petition, § 30.403 requires pre-authorization before OWCP's bill processing agent can pay a bill submitted for home health care services. However, the requirement for pre-authorization is not new. As OWCP noted on page 3035 of the preamble, "the processes set forth in proposed § 30.403(c) were merely a compilation of the current processes for pre-authorization," because for more than a decade, OWCP's procedures have required that all requests for home health care services receive pre-authorization before a bill is submitted.

You also point out that "[i]t is not unusual for a worker to require emergency home health care," and I agree that circumstances can arise when claimants require home health care of an emergency nature. Again, however, for more than a decade OWCP's procedures have emphasized its discretion, in emergency situations, to authorize payment for home health

care services immediately while it undertakes its usual pre-authorization process. Home health care providers do not have to wait for permission before they can begin providing appropriate care prescribed by a treating physician. OWCP's procedures allow for authorization to pay for emergency home health care services for a preliminary 30-day period (e.g., for hospital releases), and for additional temporary 30-day extensions until the home health care provider obtains pre-authorization for subsequent care, and this flexibility will continue now that the final rule is effective.

Finally, you contend that "DOL also changed the effective date of care to when DOL approved the care instead of when the worker applied for the services" in violation of § 7384t(d) of EEOICPA. This is not accurate, and the text of new § 30.403 does not indicate any such change. The effective date of eligibility to receive appropriate medical benefits for an accepted illness has always been the date the claimant filed a claim for that illness, as provided for in § 7384t(d). Given that a claimant's eligibility can only be determined after a claim has been adjudicated, OWCP's bill processing agent can, and does, pay bills for home health care services retroactive to the date that the claim for the illness for which home health care services were provided was filed, as long as OWCP has found that there is sufficient medical evidence to support retroactive authorization. This has not changed now that new § 30.403 is effective.

4. "§[]30.405 limits the rights of claimants to change their personal physician. DOL denies this by stating the claimant still enjoys the right to originally choose their physician. However, the final rules require DOL to give permission to change physicians and that permission will only be given if the claimant provides sufficient evidence warranting the change."

This argument resembles the concern expressed in 54 comments on the proposed changes to § 30.405(b) and (c) of the 2006 regulations. However, the provisions in new § 30.405(b) and (c) neither conflict with the statute nor significantly depart from the prior regulatory language.

Section 7384t(b)(2) of EEOICPA states that an "individual may initially select a physician to provide medical services, appliances, and supplies under this [medical benefits section] in accordance with such regulations and instructions as the President considers necessary." OWCP has been delegated the President's authority in this area under § 7384t(b)(2), so it has the authority, once an individual has initially chosen a physician, to regulate a subsequent change to a different physician.

A request to have a different physician, after an initial choice has been made, has always been subject to review and approval. As noted on page 3035 of the preamble, the 2006 version of § 30.405(b) and (c) stated that OWCP may approve or deny a request for a *change* in a physician based on the sufficiency of the request. In § 30.405(b) and (c) as revised by the final rule, OWCP states that it will approve or deny a request to change physicians based on the credibility of the request and whether it is supported by a minimal amount of persuasive evidence. OWCP made this change to promote uniformity and consistency in the way it evaluates these requests, and to assist claimants by providing a more objective

decision-making standard that gives them guidance regarding the sort of evidence needed to support a request to change physicians.

5. “§[]30.5(x)(2)(iii) excludes workers who deliver or remove ‘goods’ from the premises of a DOE facility.

...the delivery or removal of goods from the premises of a DOE facility does not constitute a service for the purposes of determining a worker’s coverage under the Act. Four advocacy groups, one claimant representative, two individuals and the labor organization objected to the added language. . .However, that language memorializes a policy that has been followed by OWCP since it issued EEOICPA Bulletin No. 03-27 in 2003[.]

Please note the number of entities which objected to this regulation. Also note that this Bulletin was issued in 2003. The previous Final Rule[] was not published until December 2006. This exclusion was not in the 2006 publication.”

As an example of a change made by the final rule that is purportedly more restrictive than the statute, you point to the second sentence of § 30.5(x)(2)(iii). This particular sentence codifies OWCP’s longstanding policy that the mere delivery or removal of goods from the premises of a Department of Energy (DOE) facility does not constitute the type of “services” that are referred to in the pertinent eligibility provision of the statute that defines DOE contractor and subcontractor employees. That provision, 42 U.S.C. § 7384l(11)(B)(ii), defines a “Department of Energy contractor employee,” in relevant part, as an employee of “a contractor or subcontractor that provided services. . .at the facility.” From the beginning of its administration of the statute, OWCP was faced with the question of how to interpret the ambiguous phrase “provided services . . . at the facility.” After obtaining a legal analysis of the statute that considered its legislative history and the rules of statutory construction, OWCP concluded that it would exercise its discretion to interpret ambiguous statutory language such that an employee would have to establish that the “services” performed were for the benefit of DOE, and that they could not consist merely of picking up or delivering goods on the premises of a DOE facility. This policy was announced in EEOICPA Bulletin No. 03-27 (issued May 28, 2003), and it has governed the adjudication of this type of claim ever since.

You ask that I note the “the number of entities [that] objected to this regulation,” and it is so noted. All eight of the comments submitted on the second sentence of proposed § 30.5(x)(2)(iii) were carefully considered during the rulemaking process, but none of them provided a persuasive reason why OWCP should not memorialize, in § 30.5(x)(2)(iii), a legally supportable interpretation of the statute. In support of the positions espoused by these commenters, you provide a timeline of the development of OWCP’s policy regarding the delivery or removal of goods and its *prior* rulemaking leading up to the 2006 regulations. The implication appears to be that because this policy was not both proposed and incorporated into the regulations during that prior rulemaking, it could not properly be incorporated into the regulations as part of the rulemaking that ended on February 8, 2019.

However, there is no such prohibition. OWCP's decision to incorporate this policy into the implementing regulations through the recent rulemaking reflected its desire to bring greater transparency to its existing regulatory framework.

6. “[§]30.5[(ii)(2)] adversely changes the definition of the time of injury for a survivor claim to be the date of the employee's death. This is a huge departure from the current regulations. Currently, the policy for the time of injury is basically the last day of employment for both the survivor and a worker.”

This argument involves a regulatory change necessary for the proper application of the forfeiture provision of 42 U.S.C. § 7385i(a). It must first be noted that § 30.5(hh) of the 2006 regulations did not specify that the “time of injury” is the last day of employment for the purpose of determining when survivors forfeit their eligibility. Rather, the 2006 regulations were silent on this point. In the new version, OWCP has added text that speaks to the event that gives rise to a survivor's eligibility—namely, the death of the employee—in order to specify the date upon which the required forfeiture of a convicted survivor's eligibility under EEOICPA will begin. Regarding the assertion that this represents a “huge departure,” the legal reach of § 7385i(a) was not, and could not have been, modified by the regulatory language of the prior version. The new version of § 30.5(ii) recognizes the full range of persons potentially subject to this forfeiture provision and the beginning dates for their respective forfeitures.

7. “Sixteen times DOL mentions in the Preamble that a ‘comment did not refer to a change that was proposed in the NPRM, [therefore] no amendment was made.’ Some of these comments provided by the stakeholders were offered to improve the adjudication process. ANWAG realizes that adopting any of the sixteen suggestions may have resulted in reissuing the proposed rules. DOL had ample time to consider and adopt any of these suggestions considering it took them more than three years to publish the Final Rules [*sic*]. If DOL were sincere in improving the program and ensuring that it is a [*sic*] claimant friendly as possible, then they would have accepted, or at least been willing to discuss, the well[-]thought out concerns and suggestions of ANWAG, experienced advocates and home health care providers.”

You did not specify in your petition the “sixteen times” comments were made that requested a change to regulatory text for which proposed changes were not suggested in the NPRM. As a result, I am not sure which comments you think were meritorious and should have been adopted by OWCP, because there are dozens of times when a comment suggested changes to regulatory text for which a proposed change was not suggested in the November 18, 2015 NPRM (all of them are noted and rejected in the preamble in a manner consistent with your argument). This argument appears to be about OWCP's discretionary decision to *not* modify its ongoing rulemaking to accommodate the issuance of a second NPRM, because by doing so you assert that OWCP ignored these unsolicited comments. However, OWCP was required to refrain from making any of the requested changes because the November 18, 2015 NPRM did not give (and temporally could not have given) any notice of those requested changes to the public, as required by § 553(b) of the APA.

Members of the public sometimes submit a comment on existing regulatory text for which no proposed changes have been described in a NPRM. Comments of this sort can, and often do, inform an agency's plans for other, *future* rulemakings, and it is possible the comments you are concerned about may have such an effect. But they could not, under the circumstances, result in any of the requested changes appearing in the February 8, 2019 final rule.

8. "The serious concerns brought by three advocacy groups and three home health care agencies regarding § 30.701(c)(1)(ii) were summarily dismissed. If OWCP implements certain aspects of the Home Health Prospective Payment System, which was devised by CMS as a cost savings measure, thousands of sick and dying claimants will be without the home health care they need and deserve. This action would add to the burdens already borne by the sick and dying workers and their families. That [*sic*] does not represent the intent of this program that acknowledged the sacrifices of hundreds of thousands of workers who were made ill or died because of their exposures."

The comments submitted by three health care providers and three advocacy groups on § 30.701(c)(1)(ii) were not summarily dismissed. I agree with your characterization that "serious concerns" were put forward, and the gravity of those concerns necessarily, and rightly, caused OWCP to give them careful consideration.

After such careful consideration, OWCP decided not to make any changes because the six commenters focused on an action (the adoption of certain provisions contained within the Home Health Prospective Payment System (HHPPS)) that OWCP has not yet taken, and most of the comments presumed that OWCP intended to adopt the strict limits on the *amount* of care allowed that are contained in HHPPS. OWCP had no such intention, and legally could not incorporate that aspect of HHPPS into its bill processing procedures. However, OWCP can, as it has with the other Prospective Payment Systems that it has referenced in regulations, adopt the "Pricer" software programs from those systems for its own use in calculating an appropriate amount to *pay* for a unit of service. OWCP has no intention to limit the amount of home health care that an eligible beneficiary is able to receive and for which its bill processing agent would pay. OWCP's only intent with respect to the *possible* adoption of the Pricer program from HHPPS would be to make its methodology for calculating the amount to pay for a unit of home health care service more rational and more consistent with the methodology OWCP uses to calculate the price of a unit of inpatient or outpatient medical services.

Conclusion

I have given careful consideration to the eight arguments you raised, but did not find any persuasive reason to grant your request to repeal the regulatory changes made by the final rule by initiating another rulemaking. Therefore, and for all of the reasons set out above, I hereby deny your petition under 5 U.S.C. § 553(e).

Sincerely,



JULIA K. HEARTHWAY
Director
Office of Workers' Compensation Programs