U.S. Department of Labor

Office of Workers' Compensation Programs
Division of Energy Employees Occupational
Illness Compensation
Washington, DC 20210

AUG 24 2018

Ms. Donna Hand
3900 64th Street, North Apartment #66
St Petersburg, FL 33709

Dear Ms. Hand:

This is in response to your recent letter regarding what you believe is the Division of Energy Employees Occupational Illness Compensation's (DEEOIC or Division) failure to follow the Energy Employees Occupational Illness Compensation Program Act (EEOICPA) or its regulations. In your inquiry, you identified instances in which you believe the adjudication of claims resulted in fraudulent procedures, omission of material facts, and our Division's use of "interpretive rules" as binding law. Your inquiry touched on agency-wide operations, governance, and infrastructure; the status of the Advisory Board on Toxic Substances and Worker Health (Advisory Board or Board); DEEOIC's collaboration with stakeholders; and DEEOIC's processes for claims review, adjudication, payments, and resolution of issues. In your correspondence, you cited the mission statements of the Department of Justice and the Department of Labor (DOL) Solicitor, Inspector General, and Office of Workers' Compensation Programs (OWCP) as you believe they relate to the work being done by our Division. You requested a hearing before the Administrative Division of DOL that oversees the DEEOIC in order to challenge the reconsideration process and the reopening process used for EEOICPA claims.

My responses below are not necessarily given in the order in which you presented them in your inquiry; however, I will try to address your concerns.

On August 3, 2018, DOL announced 12 appointees to the Advisory Board for the EEOICPA consisting of four new members and eight returning members who served on the initial board appointed in 2016. The Board members will serve 2-year terms. Dr. Steven Markowitz will continue to serve as Chair. It is our understanding that the Board will resume its meetings in fiscal year 2019, and we look forward to our continued interaction with the Board. As you may know, the President delegated responsibility to establish and maintain the Advisory Board to the Secretary of Labor (by Executive Order 13699 of June 26, 2015). The Board reports directly to the Secretary of Labor, not to OWCP/DEEOIC.

You also believe that the Site Exposure Matrices (SEM) were mandated by law under 42 U.S.C. § 7384w-1. This belief is wrong. First, there is nothing in the language of the EEOICPA that required the creation of the SEM. Second, the particular section of EEOICPA that you reference does not concern the SEM; rather, it states that under *Part B* of the EEOICPA, which does not involve work-related exposures to toxic substances other than beryllium, silica, and

ionizing radiation, the Secretary of Labor shall, "to the extent that the Secretary of Labor determines it useful and practicable," direct the Director of the National Institute for Occupational Safety and Health (NIOSH) to prepare "site profiles" for Department of Energy (DOE) facilities based on records, files, and data provided by the Secretary of Energy and the DOE Former Worker Medical Screening Program. The Secretary of Labor has never determined that it would be "useful and practicable" to invoke this particular statutory provision. The term "site profile" in § 7384w-1(a) is defined in subsection (b) as an exposure assessment of a facility that identifies the toxic substances or processes that were commonly used in each building or process of the facility, and the time frame during which the potential for exposure to toxic substances existed. "Site profiles" may include information about the facility's general activities, the physical appearance and layout of the work site, the work processes used there, the types of materials used, potential sources of radiation, the exposure monitoring practices employed by the site over time, its radiation protection practices, and other important details related to the work site. A "site profile" is used to assist NIOSH in completing radiation dose reconstructions related to Part B cancer claims when there is a need to further understand or add to the personal exposure information for a worker. NIOSH has established "site profiles" for DOE facilities, as directed in this provision, and they can be accessed on the NIOSH website at: https://www.cdc.gov/niosh/ ocas/worksite.html. "Site profiles" are also explained in NIOSH's Frequently Asked Questions found at: https://www.cdc.gov/niosh/ocas/faqstd.html.

You also reference 42 U.S.C. § 7385s-4, saying that it "only requires that exposure to a toxic substance be a factor in aggravation, contributing to, or causing the claimed illness, and that the exposure be work related." However, the language in that section reads as follows:

> (c) OTHER CASES.—(1) In any other case, a Department of Energy contractor employee shall be determined for purposes of this part to have contracted a covered illness through exposure at a Department of Energy facility if—
>
> > (A) it is at least as likely as not that exposure to a toxic substance at a Department of Energy facility was a significant factor in aggravating, contributing to, or causing the illness; and
> >
> > (B) it is at least as likely as not that the exposure to such toxic substance was related to employment at a Department of Energy facility.
>
> (2) A determination under paragraph (1) shall be made by the Secretary.

The term "at least as likely as not" means at a minimum that "something is at least as probable as it is not probable," or that there is at least a 50% chance or more. Thus, claims under Part E of the EEOICPA must be backed by empirical and persuasive evidence that establishes not only the potential for exposure, but also both the significance and probability of exposure in aggravating, contributing to, or causing a claimed illness.

You voiced several concerns about my management of the Division, focusing on the updates we have made to the Federal (EEOICPA) Procedure Manual, the review of claims by an Industrial Hygienist and/or Contract Medical Consultant, assistance with claims provided by nurse

consultants, Final Adjudication Branch (FAB) assignments and changes to the CE-2 Unit, the way in which phones are answered and messages relayed in the District Offices, and costs related to the Program. As Director of the Program, not only do I have managerial discretion in these matters, but I also work in consultation with and/or under the advisement of others who also have years of experience in the administration of the EEOICPA. We work as a team across-the-board and are careful to consider the benefits, implementation, costs, and impact of any decision made in regard to the Program.

You continue to state that as DEEOIC Director I have "sole authority" to reopen a claim, pointing to the regulatory language of 20 C.F.R. § 30.320. However, an individual acting under a properly delegated authority issued by the Director of DEEOIC can also reopen a final decision or letter decision by issuing a Director's Order. A District Director with jurisdiction over the case file, who has been granted just such delegated authority, for example, can review evidence to determine whether there is a sufficient basis to warrant a reopening. Any referral of a reopening request to a delegated authority is appropriate, within my authority, and consistent with all regulatory and other applicable directives.

You have expressed the concern that DEEOIC uses "interpretative rules" that do not conform to the implementing statutes and regulations under the EEOICPA. However, as has been explained to you on multiple occasions, Federal agencies are allowed to develop and use procedural manuals, bulletins, and circulars to disseminate policy and procedures to internal staff and the public. While these documents do not themselves have legal force or effect, they are meant to advise program staff and the public of how an agency interprets the statutes and rules that do have the force of law.

The idea of having some form of "administrative review" of EEOICPA claims outside of DEEOIC has been rejected by DOL for several reasons. First, there is no congressional requirement for this type of review of EEOICPA claims. Moreover, this type of external review would increase the overall cost of claims adjudication for all parties by adding another layer of review, slow the end-to-end claims process because an administrative review body would not be able to move as quickly as DEEOIC does on adjudication of claims, and finally, slow a claimant's ability to get court review of an unfavorable DEEOIC decision because courts would require claimants to exhaust their administrative remedies before seeking judicial review. The Division's adjudication processes, as they stand now, are based on properly promulgated regulations and are entirely consistent with EEOICPA and pertinent federal laws.

Regarding the specific cases and illnesses you mentioned, the Division has responded to you under separate cover regarding each of these cases. However, if you have additional questions related to any case, please submit them to the District Office that is handling the claim. Please note that it is best to inquire about one case in each of your letters (rather than mentioning several cases) due to privacy concerns.

Our Division has maintained an open dialogue with stakeholders since the onset of the program, and we have always welcomed the opportunity to hear and respond to the public's concerns. Whether it has been through face-to-face meetings, listening sessions, medical teleconferences,

outreach events sponsored by DEEOIC and its partner agencies, meetings of the advisory boards of both DOL and the National Institute for Occupational Safety and Health, the website, or written correspondence, our goal has always been to convey accurate information regarding the Program and to look for ways to strengthen our mutual commitment to workers who were injured or became ill on the job.

I hope this information is helpful.

Sincerely,

Rachel P. Leiton

Rachel P. Leiton
Director
Division of Energy Employees Occupational Illness Compensation