

Gary Vander Boegh

From: Gary Vander Boegh
Sent: Monday, April 29, 2013 3:56 PM
To: 'markowitz@qc.cuny.edu'; Malcolm Nelson (nelson.malcolm@dol.gov)
Cc: Gary Vander Boegh (gvandy@cesllc.net); Bill.Campbell@usdoj.gov; Michael Pape (Michael.Pape@mail.house.gov); Jack Kolar (john.kolar@usdoj.gov); U. S. Attorney General Eric Holder (askdoj@usdoj.gov)
Subject: Waiver of BeLPT if Claimant Was Prescribed Steroids
Importance: High

Dr. Markowitz,

I want to thank you for your return phone call on Wednesday of last week regarding my email below. I further appreciate you having Dr. Pepper from your staff discussing the characteristics of "chronic beryllium disease" (CBD), especially as related to the presence of "calcified granulomas" in nuclear workers that meet the statutory criteria of CBD. The issue before the Department of Labor OWCP Director is how to address the issue that the Director of DEEOCP does not have the authority to adopt procedures that effectively become more stringent than the EEOICPA itself and whether these DOL program Director's decisions led to the unwarranted dismissal of legitimate claims that met CBD Pre-1993 CBD Criteria I (noted below), "Characteristic chest radiographic (or computed tomography (CT) abnormalities." It was refreshing to hear from Dr. Pepper that calcified granulomas can be associated with CBD and therefore, if they can be associated with/ a characteristic CBD abnormality, the injured nuclear worker has met his statutory obligation under the act.

Ms. Leiton has taken my personal interpretation of her ability to limit CBD claims by adopting procedures that conflict with the EEOICPA ("the Act") as a personal attack on her authority. When in fact, Ms. Leiton should simply understand that even with my limited experience with the law, it is my understanding that ONLY statutes may override the implementing regulations, and any and all procedures may not be more strict than the regulations or the statutes, especially since Congress must oversee and correct any Agency's abuse of procedural application.

As I respectfully hope you will agree, any Agency official who is found to have installed procedures that effectively eliminated a claimant's statutory rights should be held accountable to Congress for their actions. The procedures were implemented after President Obama took office and these officials should answer to him. In addition, those DOL contractors that would have demonstrated their support of DOL's abuse of due process, should also be held accountable since they were to follow the federal laws, not subjective procedures. Again, please thank Dr. Pepper for his support of my position that calcified granulomas may also be a characteristic of chronic beryllium disease and therefore can be used to document compliance with CBD pre-1993 Criteria No. I. I would also request that this email be considered as a "protected disclosure" should DOE or anyone from the DOL consider my and Dr. Pepper's position as adverse to the DOL's procedural claims process.

Regards,

Gary S. Vander Boegh

§ 7384d. Establishment of Energy Employees Occupational Illness Compensation Program

(a) PROGRAM ESTABLISHED—There is hereby established a program to be known as the "Energy Employees Occupational Illness Compensation Program" (in this subchapter referred to as the "compensation program"). The President shall carry out the compensation program through one or more Federal agencies or officials, as designated by the President.

(b) PURPOSE OF PROGRAM—The purpose of the compensation program is to provide for timely, uniform, and adequate compensation of covered employees and, where applicable, survivors of such employees, suffering from illnesses incurred by such employees in the performance of duty for the Department of Energy and certain of its contractors and subcontractors.

(c) ELIGIBILITY FOR COMPENSATION—The eligibility of covered employees for compensation under the compensation program shall be determined in accordance with the provisions of part B of this subchapter as may be modified by a law enacted after the date of the submittal of the proposal for legislation required by section 7384f of this title.

Pub. L. 106-398, Title XXXVI, § 3611

(13) The term "established chronic beryllium disease" means chronic beryllium disease as established by the following:

(A) For diagnoses on or after January 1, 1993, beryllium sensitivity (as established in accordance with paragraph (8)(A)), together with lung pathology consistent with chronic beryllium disease, including—

- (i) a lung biopsy showing granulomas or a lymphocytic process consistent with chronic beryllium disease;
- (ii) a computerized axial tomography scan showing changes consistent with chronic beryllium disease; or
- (iii) pulmonary function or exercise testing showing pulmonary deficits consistent with chronic beryllium disease.

(B) For diagnoses before January 1, 1993, the presence of—

- (i) occupational or environmental history, or epidemiologic evidence of beryllium exposure; and**
- (ii) any three of the following criteria:**

(I) Characteristic chest radiographic (or computed tomography (CT)) abnormalities.

(II) Restrictive or obstructive lung physiology testing or diffusing lung capacity defect.

(III) Lung pathology consistent with chronic beryllium disease.

(IV) Clinical course consistent with a chronic respiratory disorder.

(V) Immunologic tests showing beryllium sensitivity (skin patch test or beryllium blood test preferred).

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Dr. Markowitz,

Although we have not communicated in a while, I must share with you a concern I am running into. First I must provide you with a web link that you might want to visit.

[www.commonwealthenvironmentalservices.com](http://www.commonwealthenvironmentalservices.com)

The following web link will take you to the documents that reflect disparate treatment of PGDP claimants most likely because the Paducah Gaseous Diffusion Plant workers reported safety and health violations that led to Congress establishing the program we now both participate

in. <http://www.commonwealthenvironmentalservices.com/documents.php>

My question is a simple one perhaps for you to answer. During a recent FAB hearing for a claimant with Chronic Beryllium Disease, the hearing official admitted that if a claimant was being treated with steroids, the claimant would be awarded "Criteria No. 5" because the steroids could mask the true results. During my hearings, I have made several references to your similar comments on your medical reports.

My question is, if a living claimant can be "advanced" CBD pre-1993 Criteria No. 5, wouldn't that also apply to a survivorship claim if the individual had passed away and no Belpt could be performed after his death? **GVB-Correct me if I misinterpreted your agreement with my understanding of my position that a "candidate" claimant (or his survivor) should not be penalized by withholding Criteria V, if the claimant was documented before his death to have been prescribed "steroids" that could have effectively concealed a "positive" BelPT?**

Your response would be very much appreciated, especially if you have been aware this has already been the case at other DOE sites.

With Regards,

Gary S. Vander Boegh  
"Authorized Representative"/ Nuclear Worker Advocate!  
(270) 559-1752

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