

8/10/11

Amanda Stevens

From: Gary Vander Boegh
Sent: Wednesday, August 10, 2011 2:09 PM
To: Amanda Stevens
Subject: FW: STATUTES USURPED BY PROCEDURES FOR CBD CLAIMS
Attachments: JIM BIBEALT _ COPD PRECIDENT FOR CBD CLAIMS CRITERIA I.pdf; J. MARK NOLAN _ COPD PRECIDENT FOR CBD CLAIMS CRITERIA I.pdf; PROJECT DELIVERY TRAINING_ GVB.pdf

From: Gary Vander Boegh
Sent: Wednesday, August 10, 2011 2:07 PM
To: 'OMBUDSMAN'
Cc: Bill Campbell (BCampbell@usa.doj.gov); Jack Conway Kentucky Attorney General (jenkins@jackconway.org); Liz Natter (liz.natter@ag.ky.gov); Governor Steven Beshear (steven.beshear@ky.gov)
Subject: RE: STATUTES USURPED BY PROCEDURES FOR CBD CLAIMS

Malcolm,

Thanks for your reply. Let me help you better understand what I provided to you in my original emails below and why I asked for your assistance. The attached two EEOICPA decisions were evidence of DOL EEOICP officials considering "COPD" a lung abnormality consistent with and "Characteristic of CBD." Can you provide me with the name of a pulmonary doctor that does not believe that COPD is; 1) an lung abnormality, 2) may be caused by CBD?

Do you agree or are you indicating that you consider that a claims examiner/ hearing official (by the R. Leiton procedure you referenced) can actually choose/ determine which COPD claimants are "Characteristic" or not. If so, please provide the basis or legal reference for your interpretation. It is my understanding of the EEOICPA (as I noted below) that no DOL agency officials may "usurp the EEOICPA statutes by inserting "discretionary" policies and procedures.

You again have referenced guidance procedures listed in "Chapter 2-1000, subchapter 6 of the EEOICP Procedure Manual identifies", that define characteristic chest x-rays" for purposes of diagnosing CBD in claims filed prior to January 1, 1993 as follows: Characteristic Chest Radiograph (X-ray). In a chest X-ray, rays are emitted through the chest and the image is projected onto film, creating a picture of the image. Characteristic chest X-ray findings are identified by the following:

(1) Small round areas of opacity distributed throughout all of the lung fields. Mixtures of round and irregular areas of opacity are also often seen.

(2) Other characteristic X-ray findings include interstitial lung fibrosis, interstitial or pleural fibrosis (i.e., pleural fibrosis alone is not sufficient, as there has to be other findings present), and granulomas (i.e., non-calcified and non-caseating).

(a) Caseating granulomas are sometimes considered characteristic; however, the treating physician or a DMC

needs to review these findings for a determination. The term "caseating" identifies necrosis (i.e., decay) in the center of a granuloma. This term was originally applied to a granuloma associated with tuberculosis or a fungal infection. A non-caseating granuloma is one without necrosis and is characteristic of CBD.

(b) Calcification in a granuloma is usually associated with the healing of the granuloma. A calcified granuloma is not characteristic of CBD.

Correct me if you do not agree, but I believe you are confirming that a "CE is only trained to follow the procedures" and therefore compliance with the statutes is based upon their training, direction, and procedural guidance received from DOL EEOICPA Director Ms. Leiton? I can understand your position better since this philosophy/ DOL mindset was captured in a recent FAB hearing. Have you ever captured this apparent "discretionary" review process that supersedes the "Intent of Congress" in your "Annual Report to Congress?"

As a former Lockheed Martin project engineer, I am trained in "Project Delivery Systems" (see attachment). If you look at the EEOICPA program as a "Project" and evaluate the "Root Cause" of claims denials, an immediate problem can be identified." First of all, are you familiar with this process? I will assume you are and explain what appears to be the "Root Cause" of the inappropriate EEOICPA claims denials.

From your prior and recent communications, including those testimonies in FAB hearings, the Director of DOL EEOICP has promoted and "trained" claims examiners to ignore prior case decisions, employee affidavits, and most importantly the statutory intent of Congress. By placing these obstacles before nuclear workers/ claimants, a systematic "claims denial process" has been promoted and implemented against certain Paducah Gaseous Diffusion Plant (PGDP) workers (at a minimum). Contractors employees have apparently been promoting disparate treatment of PGDP claimants. If CES, LLC has found evidence of this pattern of denials across the DOE/ DOL EEOICP complex, why has your Annual Report to Congress not mentioned these issues that have been confirmed by the "Root Cause Analysis" process?___

Root Cause Analysis Finding: EEOICPA Claims are denied based on EEOICPA procedures that allow FAB officials/ Claims Examiners to exert "discretionary" authority where none exists within the EEOICPA statutes and regulations.

By refusing to approve EEOICPA claims that have been found to be virtually identical to those approved for compensation and medical benefits, the Kentucky "tax payers" are being inappropriate "assessed" medical costs associated with Workers Compensation claims rather than the federal government.

Again, let me be very clear, if you have been aware of this "discretionary procedural bias" that supports a EEOICPA claims denial process (being utilized by the Obama DOL Agency Secretary Ms. Solis), that effectively "Usurps" the EEOICPA statutes, please provide me with additional legal justifications. Should the Secretary of Labor choose not to follow the "intent Congress", her inappropriate actions will have been documented in the "Root Cause Analysis" which is consistent with those same actions of the prior "Administration" that inappropriately denied claimants and disparately treated PGDP nuclear workers who filed EEOICPA claims?"

Please call me at (270) 559-1752, to further discuss the above!

Gary

From: Nelson, Malcolm - OMBUDSMAN [mailto:Nelson.Malcolm@dol.gov] **On Behalf Of** OMBUDSMAN
Sent: Wednesday, August 10, 2011 11:27 AM
To: Gary Vander Boegh
Cc: OMBUDSMAN
Subject: RE: STATUTES USURPED BY PROCEDURES FOR CBD CLAIMS

Mr. Vander Bough:

As I indicated in my earlier e-mail, for diagnoses made before the January 1, 1993, the EEOICPA statute refers to "Characteristic chest radiographic (or computed tomography (CT)) abnormalities. See 42 U.S.C. § 7384l(13)(B). In my experience, the Department of Labor has consistently interpreted this provision as requiring a chest radiographic abnormality consistent with CBD. Chapter 2-1000, subchapter 6 of the EEOICP Procedure Manual identifies "characteristic chest x-rays" for purposes of diagnosing CBD in claims filed prior to January 1, 1993 as follows:

Characteristic Chest Radiograph (X-ray). In a chest X-ray, rays are emitted through the chest and the image is projected onto film, creating a picture of the image. Characteristic chest X-ray findings are identified by the following:

(1) Small round areas of opacity distributed throughout all of the lung fields. Mixtures of round and irregular areas of opacity are also often seen.

(2) Other characteristic X-ray findings include interstitial lung fibrosis, interstitial or pleural fibrosis (i.e., pleural fibrosis alone is not sufficient, as there has to be other findings present), and granulomas (i.e., non-calcified and non-caseating).

(a) Caseating granulomas are sometimes considered characteristic; however, the treating physician or a DMC needs to review these findings for a determination. The term "caseating" identifies necrosis (i.e., decay) in the center of a granuloma. This term was originally applied to a granuloma associated with tuberculosis or a fungal infection. A non-caseating granuloma is one without necrosis and is characteristic of CBD.

(b) Calcification in a granuloma is usually associated with the healing of the granuloma. A calcified granuloma is not characteristic of CBD.

You can also find the following chart in the EEOICP Procedure Manual:

Radiographic Patterns. The following list represents radiographic (X-ray/CT) patterns characteristic of CBD:

<u>Chest X-ray</u>	<u>CT/*HRCT</u>
<i>Alveolar Patterns</i>	<i>Alveolar Patterns</i>
- Consolidation	- Consolidation
- Ground glass	- Ground glass
<i>Interstitial Patterns</i>	<i>Interstitial Patterns</i>
- Reticular (irregular lines)	- Septal thickening
- Diffuse Nodules	- Diffuse Nodules
- Reticulonodular	(different distributions)
	- Ground glass
<i>Interstitial Fibrosis</i>	<i>Interstitial Fibrosis</i>
- Honeycombing	- Traction Bronchiectasis
- Upper lobe retraction	- Honeycombing

*HRCT = high-resolution computed tomography

In your e-mail you provide a partial statement that you attribute to Jim Bibeault and you ask if I agree that parenchymal lung disease is in fact a consequential illness "with" CBD.

1. You only provide a portion of the statement that you attribute to Jim Bibeault. Without the benefit of the entire statement, and more importantly, without knowing the context in which this statement was made, it is impossible to comment on this statement.
2. The partial statement that you cite questions whether, in a particular case, COPD was a consequential illness of CBD. There is no mention of parenchymal lung disease in the statement that you provide.
3. Whether an illness is a consequential illness of another illness depends upon the specific evidence in that case.

In your e-mail, you also indicate your belief that claims for consequential conditions of CBD are not handled consistently by DEEOIC and you reference some cases where claimants were denied coverage. However, because I do not have all of the facts surrounding these cases, I am unable to comment on your allegation.

Sincerely,

Malcolm Nelson, Ombudsman
Energy Employees Occupational Illness Compensation Program

From: Gary Vander Boegh [mailto:gvandy@cesllc.net]
Sent: Tuesday, August 02, 2011 8:23 PM
To: Nelson, Malcolm - OMBUDSMAN; Ed Whitfield (john.sparkman@mail.house.gov); Patrick_Foster@mccconnell.senate.gov
Cc: Gary Vander Bough
Subject: STATUTES USURPED BY PROCEDURES FOR CBD CLAIMS
Importance: High

Malcolm,

Hope this email finds you well. Please understand that I am just trying to ensure consistency in the EEOICPA process. Congressman Ed Whitfield and I are very good friends and my mother has consistently mentions Mr. Whitfield in our family discussions as being very helpful. Although politics should never enter into the EEOICPA process, it does make me wonder why some consistently identical CBD claims get approved while identical claims are denied, even when the ACT regarding these statutes do not allow “discretionary” reviews to occur. In other words, when the act says **shall** compensate, a procedure developed by Ms. Leiton must not be written in a manner to circumvent the law. **If you do not agree, please indicate such!**

§ 7384s. Compensation and benefits to be provided

(a) COMPENSATION PROVIDED—(1) Except as provided in paragraph (2), a covered employee, or the survivor of that covered employee if the employee is deceased, **shall receive compensation for the disability** or death of that employee from that employee’s occupational illness in the amount of \$150,000.

Although it has been several months since we last communicated regarding the statutory issues involving CBD claims, your email that I believe agreed with my understanding of the statutes usurping the regulations that ultimately usurping the procedures, again is in need of your interpretation/ assistance. Your prior comments are noted as follows:

From: Nelson, Malcolm - OMBUDSMAN [<mailto:Nelson.Malcolm@dol.gov>] **On Behalf Of** OMBUDSMAN
Sent: Wednesday, December 15, 2010 9:50 AM
To: Gary Vander Bough
Cc: Vance, John - OWCP; OMBUDSMAN
Subject: RE: REQUEST STATUS OF EEOICPA CBD CLAIM NO. XXX-XX-2764?

Mr. Vander Bough:

I think you may have misunderstood what I said.

- I did indicate that a regulation (or procedure) cannot overrule a statute. However, I did not state that the procedures written by DEEOIC relating to CBD claims were inconsistent with the statute.
- Rather, with respect to x-ray evidence of CBD, as I noted in earlier e-mails, it is my opinion the statute requires more than just any chest radiographic abnormality. The statute specifically requires a characteristic chest radiographic abnormality. The Department of Labor has interpreted this as requiring a chest radiographic abnormality consistent with CBD.
- Consequently, this is a matter of interpreting the word “characteristic” – not a situation where DOL is attempting to “trump” the statute. [And it is my understanding that in interpreting a statute, you are to give meaning to every word in that statute].

Malcolm

- Characteristic chest radiographic (or computed tomography (CT) abnormalities;

Per your email dated 12/15/11 above, you indicated that you felt the statute requires more than a x-ray but, “a **characteristic** chest radiographic abnormality.” So it appears the question then becomes does the x-ray depict an abnormality that is consistent with CBD, as you state in

your last sentence of the above (bullet 2). You then indicate in bullet No. 3 that it is a matter of interpreting the word "characteristic."

If that is the case and the DOL must give meaning to the every word as you have indicated, would you not agree that "Characteristic" x-ray means "a medical condition/ illness identified in the x-ray that is consistent with CBD?" If you agree with this statement, do you agree with Mr. Bibeault's statement below that the district office considers COPD a consequential injury of CBD?

I also find that the case must be remanded for a determination regarding the claimed chronic obstructive pulmonary disease (COPD). The district office determined that COPD consequential injury of CBD. However, the implementing regulations are clear in stating

Since DOL's (Mr. Bibeault's) decision noted below considered COPD as a "consequential illness of CBD", would you not agree that parenchymal lung disease IS in fact, a consequential illness with CBD? Of course as the facts continue to support a lack of consistency, it becomes more evident each day that CBD claimants represented by CES, LLC throughout the nation are being exposed to an inappropriate "Spin" of the facts. With the information provided above, it is apparent that the only reason a claimant is not considered to have met pre-1993 CBD criteria is being determined in a manner that allows the CE's to chose who they wish complies with the Act. When DOL officials do not allow the FAB hearing officials to use previous case decisions as precedents, DOL can no longer defend the disparate treatment policies that are not allowed by the ALJ process.

Of course the details of these matters will not be provided due to the investigative aspects associated with each case. However, I do want to make sure you are aware of CBD claims denials that are currently pending for the following at a minimum:

1/ Dave Green – diagnosed with "parenchymal lung disease (interstitial lung disease) (LUNG ABNORMALITY) prior to 1993 with x-ray report included."

2/ Greg Lahndorff - COPD

3/ Ann Vander Boegh – Oak Ridge incident report documented exposure to process gas that contained transuranics and beryllium metal. Diagnosed with chronic bronchitis in 1986. COPD IS CHRONIC BRONCHITIS according to her medical doctor AND HER CLAIM MEETS THE CRITERIA ESTABLISHED IN THE BELOW DECISION BUT CLAIM IS DENIED.

4/ Everitt Bradford – COPD/ chronic bronchitis

5/ Fred Armstrong – COPD AND LUNG DISEASE BEFORE 1993! CLAIM DENIED EVEN AFTER DOCUMENTATION WAS PRESENTED IN SUPPORT OF PRE-1993 CRITERIA NO. 1.

19 Chronic Beryllium Disease, we haven't
20 entered a date because we just filed this. All the
21 evidence there, the X-ray reports, he has fibrosis in
22 the lung bases. That was in 1985, which was before
23 1993. Martin Marietta x-ray report where he had
24 lungs that were expanding and had small calcified
25 granulomas, which are lung abnormalities before 1993

6/ Robert Jeffords - Severe COPD

7/ Joe Tilley – Severe COPD

8/ William Walker (diagnosed with COPD before 1993)

Interstitial lung disease (ILD), also known as *diffuse parenchymal lung disease (DPLD)*,^[1] refers to a group of lung diseases affecting the interstitium (the tissue and space around the air sacs of the lungs).^[2] It concerns alveolar epithelium, pulmonary capillary endothelium, basement membrane, perivascular and perilymphatic tissues.

The term ILD is used to distinguish these diseases from obstructive airways diseases.

Prolonged ILD may result in pulmonary fibrosis, but this is not always the case. Idiopathic pulmonary fibrosis is one form of "interstitial lung disease".

Causes

ILD may be classified according to the cause.^[3] One method of classification is as follows:

1. Inhaled substances
 - Inorganic
 - Silicosis
 - Asbestosis
 - Berylliosis

COPD CONSISTENT WITH CBD! WHY DOES THE BELOW DOL DECISION NOT APPLY TO THE CLAIMANTS ABOVE?

U.S. DEPARTMENT OF LABOR

EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMPENSATION PROGRAMS
DIVISION OF ENERGY EMPLOYEES OCCUPATIONAL
ILLNESS COMPENSATION
FINAL ADJUDICATION BRANCH

EMPLOYEE: [Name Deleted]
CLAIMANT: [Name Deleted]
FILE NUMBER: [Number Deleted]
DOCKET NUMBER: 19516-2004
DECISION DATE: October 15, 2004

NOTICE OF FINAL DECISION AND REMAND ORDER

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended, 7384 *et seq.* (EEOICPA or the Act). For the reasons set forth below, your claim is accepted.

STATEMENT OF THE CASE

On January 15, 2002, you filed a Form EE-1, Claim for Benefits under the EEOICPA. The claim is based, in part, on the assertion that you were an employee of a Department of Energy (DOE) facility. You stated on the Form EE-1 that you were filing for chronic obstructive pulmonary disease (COPD).

The district office found that the medical evidence disclosed findings consistent with chronic beryllium disease (CBD). On August 20, 2004, the Jacksonville district office recommended that you are entitled to compensation of \$150,000 for chronic beryllium disease. COPD is a consequential obstructive lung injury of CBD. The district office's recommendation also concluded that you are entitled to medical benefits effective January 15, 2002 for CBD and the consequential injury of COPD.

CONCLUSIONS OF LAW

I find that you are a covered beryllium employee as defined in the Act and that your chronic beryllium disease is a covered condition under the Act and the implementing regulations. 42 U.S.C. §§ 7384l(13).

I find that the recommended decision is in accordance with the facts and the law in this case, and you are entitled to \$150,000 and medical benefits effective January 15, 2002, for chronic beryllium disease pursuant to §§ 7384s(a) and 7384t of the EEOICPA. 42 U.S.C. §§ 7384s(a), 7384t.

Your claimed condition of chronic obstructive pulmonary disease is remanded to the district office for determination on your eligibility for benefits for this condition. After obtaining the appropriate information and reviewing the facts in accordance with the EEOICPA and the implementing regulations, the district office should issue a new decision in accordance with office procedure.^[2]

Jacksonville, FL

James Bibeault
Hearing Representative

^[1] 20 CFR § 30.207(d)

^[2] Federal (EEOICPA) Procedure Manual, Chapter 2-1000.5a (June 2002).

Would you have time to call me to discuss further? If so, please call (270) 559-1752. I have also attached a memorandum for your consideration regarding discretionary reviews!

No virus found in this message.

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U.S. DEPARTMENT OF LABOR

EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMPENSATION PROGRAMS
DIVISION OF ENERGY EMPLOYEES OCCUPATIONAL
ILLNESS COMPENSATION
FINAL ADJUDICATION BRANCH



EMPLOYEE: [Name Deleted]
CLAIMANT: [Name Deleted]
FILE NUMBER: [Number Deleted]
DOCKET NUMBER: 19516-2004
DECISION DATE: October 15, 2004

NOTICE OF FINAL DECISION AND REMAND ORDER

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended, 42 U.S.C. § 7384 *et seq.* (EEOICPA or the Act). For the reasons set forth below, your claim is accepted.

STATEMENT OF THE CASE

On January 15, 2002, you filed a Form EE-1, Claim for Benefits under the EEOICPA. The claim was based, in part, on the assertion that you were an employee of a Department of Energy (DOE) contractor at a DOE facility. You stated on the Form EE-1 that you were filing for chronic obstructive pulmonary disease (COPD).

On the Form EE-3, Employment History, you stated you were employed at the Paducah gaseous diffusion plant (PGDP) in Paducah, Kentucky from 1951 to 1954 and 1957 to 1963. The Department of Energy verified this employment as June 6, 1952 to December 23, 1954 and January 20, 1958 to January 11, 1963.

The district office found that the medical evidence disclosed findings consistent with the diagnosis of chronic beryllium disease (CBD). On August 20, 2004, the Jacksonville district office issued a decision recommending that you are entitled to compensation of \$150,000 for chronic beryllium disease and that COPD is a consequential obstructive lung injury of CBD. The district office's recommended decision also concluded that you are entitled to medical benefits effective January 15, 2002 for chronic beryllium disease and the consequential injury of COPD.

On September 20, 2004, the Final Adjudication Branch received your written notification that you waive any and all objections to the recommended decision.

I have reviewed the medical evidence and find that it is sufficient to establish a diagnosis of pre-January 1, 1993 chronic beryllium disease. According to § 7384l(13)(B) of the Act, the term "established chronic beryllium disease" means chronic beryllium disease as established by occupational or environmental history, or epidemiologic evidence of beryllium exposure; and, any three of the following criteria:

- Characteristic chest radiographic (or computed tomography (CT) abnormalities;
- Restrictive or obstructive lung physiology testing or diffusing lung capacity defect;
- Lung pathology consistent with chronic beryllium disease;
- Clinical course consistent with a chronic respiratory disorder;
- Immunologic tests showing beryllium sensitivity.

According to the Department of Energy's Covered Facilities List, exposure to beryllium was possible during your employment at the PGDP. Your verified work for at least one day between 1952 and 1963 is sufficient to establish that you were exposed to beryllium. You have also submitted sufficient evidence to meet 3 of the above criteria: (1) Radiological reports of the chest from 1991, 1993, 1997 and 2001 show lung fibrosis, interstitial markings and chronic inflammatory changes; these findings are characteristic of CBD; (2) a 1993 pulmonary function test report contains a finding of a severe obstructive airway disease; this finding shows obstructive lung physiology testing; (3) medical reports from 1989 to 2001 contain findings of COPD, oxygen dependency and the use of bronchodilators; these findings show a clinical course consistent with a chronic respiratory disorder such as CBD. The evidence of record is sufficient to establish a diagnosis of pre-January 1, 1993 chronic beryllium disease.

I also find that the case must be remanded for a determination regarding the claimed condition of chronic obstructive pulmonary disease (COPD). The district office determined that COPD was a consequential injury of CBD. However, the implementing regulations are clear in stating that an injury, illness, impairment or disability sustained as a consequence of beryllium sensitivity or established chronic beryllium disease must be established with a fully rationalized medical report by a physician that shows the relationship between the injury, illness, impairment or disability and the beryllium sensitivity or established chronic beryllium disease. Neither the fact that the injury, illness, impairment or disability manifests itself after a diagnosis of beryllium sensitivity or established chronic beryllium disease, nor the belief of the claimant that the injury, illness, impairment or disability was caused by the beryllium sensitivity or established chronic beryllium disease is sufficient in itself to prove a causal relationship.^[1] The medical evidence does not contain the required medical opinion.

FINDINGS OF FACT

1. On January 15, 2002, you filed a Form EE-1, Claim for Benefits under the EEOICPA.
2. The medical evidence is sufficient to establish that you have chronic beryllium disease. 42 U.S.C. § 7384l(13).
3. You were employed at the Paducah gaseous diffusion plant, Paducah, Kentucky, from June 6, 1952 to December 23, 1954 and January 20, 1958 to January 11, 1963. Beryllium was present at this facility during the time you were employed. Since you were exposed to beryllium in the performance of duty, you are a covered beryllium employee as defined in the Act. 42 U.S.C. § 7384l(7).
4. The Jacksonville district office issued the recommended decision on August 20, 2004.
5. On September 20, 2004, the Final Adjudication Branch received your written notification that you waive any and all objections to the recommended decision.

CONCLUSIONS OF LAW

I find that you are a covered beryllium employee as defined in the Act and that your chronic beryllium disease is a covered condition under the Act and the implementing regulations. 42 U.S.C. §§ 7384l(7), 7384l(13).

I find that the recommended decision is in accordance with the facts and the law in this case, and that you are entitled to \$150,000 and medical benefits effective January 15, 2002, for chronic beryllium disease pursuant to §§ 7384s(a) and 7384t of the EEOICPA. 42 U.S.C. §§ 7384s(a), 7384t.

Your claimed condition of chronic obstructive pulmonary disease is remanded to the district office for a determination on your eligibility for benefits for this condition. After obtaining the appropriate information and reviewing the facts in accordance with the EEOICPA and the implementing regulations, the district office should issue a new decision in accordance with office procedure.^[2]

Jacksonville, FL

James Bibeault
Hearing Representative

^[1] 20 CFR § 30.207(d)

^[2] Federal (EEOICPA) Procedure Manual, Chapter 2-1000.5a (June 2002).

U.S. DEPARTMENT OF LABOR

EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMPENSATION PROGRAMS
DIVISION OF ENERGY EMPLOYEES OCCUPATIONAL
ILLNESS COMPENSATION
FINAL ADJUDICATION BRANCH



EMPLOYEE: [Name Deleted]

CLAIMANTS: [Name Deleted]
[Name Deleted]
[Name Deleted]
[Name Deleted]

FILE NUMBER: [Number Deleted]

DOCKET NUMBERS: 56382-2004
56845-2004
56847-2004
56955-2004

DECISION DATE: November 18, 2004

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claims for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended, 42 U.S.C. § 7384 *et seq.* (EEOICPA or the Act). For the reasons set forth below, your claims are accepted.[1]

STATEMENT OF THE CASE

On April 8, 2004, [Claimant 1] filed a Form EE-2, Claim for Survivor Benefits under the EEOICPA.
On April 20, 2004, [Claimant 2] filed a Form EE-2, Claim for Survivor Benefits under the EEOICPA.
On April 21, 2004, [Claimant 3] filed a Form EE-2, Claim for Survivor Benefits under the EEOICPA.
On April 21, 2004, [Claimant 4] filed a Form EE-2, Claim for Survivor Benefits under the EEOICPA.

The claims were based, in part, on the assertion that your late father was an employee of a Department of Energy (DOE) contractor at a DOE facility. You stated on the Forms EE-2 that you were filing for the employee's COPD. On the Form EE-3, Employment History, you stated the employee was employed by the K-25 gaseous diffusion plant (GDP) at Oak Ridge, Tennessee, for the period of July 7, 1944 through February 15, 1946. On April 13, 2004, the Jacksonville district office verified this employment using information from the Oak Ridge Institute for Science and Education website database.

The district office found that the medical evidence disclosed findings consistent with the diagnosis of chronic beryllium disease (CBD). On October 15, 2004, the Jacksonville district office issued a decision recommending that you, as eligible survivors of the employee, are entitled to compensation in the amount of \$37,500 each, for the employee's chronic beryllium disease.

You each submitted written notification that you waive any and all objections to the recommended decision. I have reviewed the medical evidence and find that it is sufficient to establish that the

employee had chronic beryllium disease. According to § 7384l(13) of the Act, 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.
- 42 U.S.C. § 7384l(13).

The employee died on June 19, 1988. Since all medical evidence in the case file is prior to January 1, 1993, the criteria in § 7384l(13)(B) of the Act are used. The employee is shown to have had an occupational exposure to beryllium during his verified period of employment at the K-25 GDP. Three of the five criteria necessary to establish pre-1993 CBD have also been met: the various chest x-ray reports, dated between September 16, 1974 and May 8, 1983, show opacities which establish that the employee had characteristic chest x-ray abnormalities; the September 16, 1974 pulmonary function test by Dr. Domm, establishes that the employee had an obstructive lung physiology test; and the November 28, 1978 medical report by Dr. William K. Swann, providing a history of seven years of respiratory problems, establishes that the employee had a clinical course consistent with a chronic respiratory condition. Therefore, the criteria for a diagnosis of CBD under the EEOICPA have been met.

FINDINGS OF FACT

1. On April 8, 2004, **[Claimant 1]** filed a Form EE-2, Claim for Survivor Benefits under the EEOICPA. On April 20, 2004, **[Claimant 2]** filed a Form EE-2, Claim for Survivor Benefits under the EEOICPA. On April 21, 2004, **[Claimant 3]** filed a Form EE-2, Claim for Survivor Benefits under the EEOICPA. On April 21, 2004, **[Claimant 4]** filed a Form EE-2, Claim for Survivor Benefits under the EEOICPA.
2. The medical evidence is sufficient to establish that the employee had chronic beryllium disease pursuant to the Act. 42 U.S.C. § 7384l(13).
3. The employee was employed at the K-25 gaseous diffusion plant in Oak Ridge, TN for the period of July 7, 1944 through February 15, 1946. Beryllium was present at this facility during the time of employment. Due to this exposure to beryllium in the performance of duty, the employee meets the criteria of a covered beryllium employee as defined in the Act. 42 U.S.C. § 7384l(7).

4. In proof of survivorship, you submitted copies of birth certificates, documentation of name changes, and death certificates of the employee and the employee's spouse. Therefore, you have established that you are survivors as defined by the implementing regulations. 20 C.F.R. § 30.5(ee).
5. The district office issued the recommended decision on October 15, 2004.
6. You each submitted written notification that you waive any and all objections to the recommended decision.

CONCLUSIONS OF LAW

I have reviewed the record on this claim and the recommended decision issued by the district office on October 15, 2004. I find that the employee is a covered beryllium employee, as that term is defined in the Act; and that the employee's chronic beryllium disease is a covered condition under the Act and implementing regulations. 42 U.S.C. §§ 7384l(7), 7384l(13); 20 C.F.R. § 30.207.

I find that the recommended decision is in accordance with the facts and the law in this case, and that you, as eligible survivors of the employee as defined by the Act, are each entitled to one fourth of the maximum \$150,000 award, in the amount of \$37,500 each, pursuant to the Act on the basis of the employee's chronic beryllium disease. 42 U.S.C. §§ 7384s(e)(1)(B), 7384s(a).

Jacksonville, FL

J. Mark Nolan
Hearing Representative

[1] This is the second decision by the Final Adjudication Branch. On September 17, 2004, the case was remanded to the Jacksonville district office for additional development to establish that all claimants were eligible survivors.

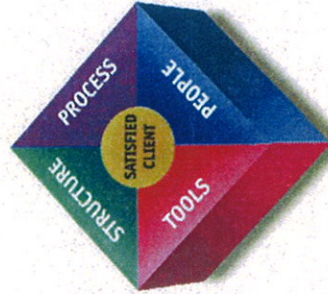
PROJECT DELIVERY SYSTEM

CERTIFICATE OF COMPLETION

THIS CERTIFIES THAT

Gary Vander Boegh

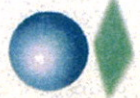
HAS COMPLETED COMPREHENSIVE TRAINING IN THE CONCEPTS OF THE PROJECT DELIVERY SYSTEM,
AND IS COMMITTED TO APPLYING THIS KNOWLEDGE IN THE EXECUTION OF PROJECTS
AND TO SHARING THIS KNOWLEDGE WITH OTHERS.



GIVEN THIS 5 DAY OF August, 1997

S. David Ellison

S. DAVID ELLISON, P.E.
SENIOR VICE PRESIDENT
MANAGEMENT CONSULTANT



CH2M-HILL
Celebrating
50 Years

LOCKHEED MARTIN



L.A. Felton

L.A. FELTON
VICE PRESIDENT
ENVIRONMENTAL MANAGEMENT
AND ENRICHMENT FACILITIES