Division of Energy Employees Occupational Illness Compensation (DEEOIC)

Final Decisions of the Final Adjudication Board (FAB) -by Category

Atomic Weapons Employers

Contractors and subcontractors

EEOICPA Fin. Dec. No. 2158-2003 (Dep't of Labor, July 11, 2008)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch (FAB) concerning your claim for survivor benefits under Part B of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 et seq. For the reasons set forth below, your claim for survivor benefits based on acute myelocytic leukemia (acute myelomonocytic leukemia) is denied.

STATEMENT OF THE CASE

On August 7, 2001, you filed a claim for survivor benefits under Part B of EEOICPA, Form EE-2, as the spouse of [Employee], hereinafter referred to as the employee. On July 31, 2002, you also filed a claim for assistance under Part D of EEOICPA with the Department of Energy (DOE). You identified acute myelocytic leukemia (acute myelomonocytic leukemia) as the medical condition of the employee resulting from his employment at an atomic weapons facility.

On Form EE-3 you indicated that the employee worked as a laboratory technician for Lucius Pitkin at the Allied Chemical facility in Metropolis, Illinois from July 1978 to July 1985. The Allied Chemical Corporation Plant in Metropolis, Illinois is a covered atomic weapons employer (AWE) facility from 1959 to 1976 and covered for residual radiation contamination from 1977 to July 2006.[1]

On February 28, 2003, DOE denied your claim for assistance under Part D, because the employee's work at the Allied Chemical Corporation Plant was at an AWE rather than a DOE facility. On April 14, 2003, the FAB issued a final decision denying your claim for survivor benefits under Part B because the employee did not have covered employment under the EEOICPA. The FAB found that the employee's period of employment at the Allied Chemical Corporation Plant was outside the covered years for that facility.

Thereafter, on October 28, 2004, Congress repealed Part D of EEOICPA and enacted new Part E. Because of this, DEEOIC proceeded to adjudicate your Part D claim under Part E and on May 17, 2006, the FAB issued a final decision denying your claim for survivor benefits under Part E because the employee was not employed by a DOE contractor at a DOE facility. As part of the 2004 amendments to EEOICPA, Congress amended the definition of an "atomic weapons employee" to include employees of subsequent owners or operators of an AWE facility beyond the time period during which weapons-related work occurred, provided that the National Institute for Occupational Safety and Health (NIOSH) had found that there was the potential for residual radiation contamination at the facility. NIOSH subsequently determined that the Allied Chemical Corporation facility had the

potential for residual radiation contamination from 1977 to July 2006. This period of residual contamination resulted in the covered period at this particular facility being expanded.

On June 5, 2007, the Director of the Division of Energy Employees Occupational Illness Compensation (DEEOIC) issued a Director's Order vacating the FAB's April 14, 2003 final decision and reopening your claim for benefits under Part B. This order instructed the district office to determine if the employee's employment by Lucius Pitkin at the Allied Chemical Corporation facility qualified as employment by a "subsequent owner or operator" at that AWE facility under Part B of EEOICPA. As part of this further development, the district office received a June 20, 2007 letter from I. Boyarsky, the controller of Lucius Pitkin, Inc., in which he indicated that Lucius Pitkin, Inc. was hired as an independent observer at the facility to weigh and sample ore and was never a co-owner nor operator of the Allied Chemical Corporation facility.

On July 17, 2007, the district office issued a recommended decision to deny your claim for benefits under Part B because the employee was not employed by Allied Chemical or by a subsequent owner or operator of the Allied Chemical Corporation facility, and thus his employment was not covered under EEOICPA. On August 6, 2007, you objected to the recommended decision and attached a copy of the Director's Order. On August 20, 2007, the FAB issued a remand order returning your claim to the district office with instructions to refer the case file to the Branch of Policies, Regulations and Procedures (BPRP) within DEEOIC for a determination on whether the employee's work with Lucius Pitkin, Inc. at the Allied Chemical Corporation facility qualified him as an atomic weapons employee under Part B of EEOICPA. Pursuant to that remand order, the district office referred your case file to the BPRP. On November 26, 2007, the BPRP determined that the employee's employment with Lucius Pitkin, Inc. at the Allied Chemical Corporation facility did not qualify him as an atomic weapons employee because Lucius Pitkin, Inc. was not a subsequent owner or operator of that AWE facility.

On December 13, 2007, the district office issued another recommended decision to deny your claim for survivor benefits under Part B of EEOICPA, on the ground that the employee's employment by Lucius Pitkin, Inc. at the Allied Chemical Corporation facility did not qualify him as an "atomic weapons employee," as that term is defined in EEOICPA. Accompanying the recommended decision was a letter explaining your rights and responsibilities in regard to the recommended decision.

OBJECTIONS

On January 14, 2008, the FAB received your January 8, 2008 letter objecting to the recommended decision and requesting a hearing to air your objections, which was held on March 19, 2008 in Mount Vernon , Illinois. You and Virginia Griffey were present at this hearing and presented testimony. Your objections to the recommended decision are summarized below:

Objection No. 1: You indicated that the employee worked for Lucius Pitkin, Inc. but worked at the Allied Chemical Corporation facility, and because he was checking the moisture content of the dry uranium, which was an activity that was vital to the operation of the plant, then his employment should be covered because he should be considered an operator of the facility.

Objection No. 2: You indicated that Allied Chemical supplied the employees of Lucius Pitkin, Inc. with clothing, gloves, hard-hats and shoes, laundered their clothing and provided and maintained the respirators used by both Allied Chemical and Lucius Pitkin, Inc. employees.

Objection No. 3: You indicated that the employee's doctors advised that the employee's cancer was caused by him handling raw uranium.

Objection No. 4: You indicated that it is unfair to compensate employees of the United States Enrichment Corporation (USEC) who worked at the Paducah Gaseous Diffusion Plant or Allied Chemical Company employees who worked in the same building as the employee, had the same exposures as the employee and who also contracted cancer, but not to compensate the employee merely because he was not working for a covered employer.

Your first objection concerns whether the employee's work duties qualified him as an operator of this facility. The EEOICPA provides that an "atomic weapons employee" includes an individual who was employed by an AWE during a period when the employer was processing, or producing, for the use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining and milling. It also includes an individual employed by an AWE or subsequent owners or operators of an AWE facility during a period of significant residual radiation contamination outside of the period in which weapons-related production occurred. See 42 U.S.C. § 7384l(3).

The period of the employee's employment at this AWE facility is not during the period when weapons-related production occurred; however, it was during the residual radiation period when employees of the AWE, or subsequent owners or operators of the facility, are covered. There is no evidence that the employee was employed by the Allied Chemical Corporation or a subsequent owner or operation of this AWE facility. The employee was working for Lucius Pitkin, Inc. and his duties at the Allied Chemical Corporation facility were performed pursuant to a contract between the Allied Chemical Corporation and Lucius Pitkin, Inc. The controller of Lucius Pitkin, Inc. has confirmed that Lucius Pitkin, Inc. was not an operator or subsequent owner of the Allied Chemical Corporation facility. The determination of whether a contractor of an AWE is an owner or operator of an AWE facility is not based on the duties performed by an individual employee, but rather by the nature of the contract. The evidence of record does not establish that the employee worked for an AWE, a subsequent owner of the AWE facility or for a company that was contracted to operate this facility.

Your second objection concerns whether the employee should be considered an employee of Allied Chemical Corporation for purposes of EEOICPA. When it enacted EEOICPA, Congress provided specific criteria that must be met to establish that an individual qualifies as an "atomic weapons employee" in § 7384l(3). Those criteria do not include employees of contractors or subcontractors of an AWE, employees of wholly-owned subsidiaries of an AWE, or employees who are considered "shared," "on loan," "borrowed servants," or "statutory employees." See EEOICPA Fin. Dec. No. 4894-2004 (Dep't of Labor, March 8, 2005); EEOICPA Fin. Dec. No. 366-2002 (Dep't of Labor, June 3, 2003); EEOICPA Fin. Dec. No. 13183-2003 (Dep't of Labor, October 14, 2003). The evidence of record simply does not establish that the employee worked for an AWE. The Department of Labor must administer EEOICPA as enacted by Congress and cannot alter the necessary criteria to qualify as an atomic weapons employee under EEOICPA.

Your third objection concerns the cause of the employee's cancer. EEOICPA provides benefits for specific occupational illnesses like cancer for an employee (or his survivors) who is considered to be a "covered employee with cancer." See 42 U.S.C. §§ 7384l(9), 7384n. The cause of an employee's cancer does not determine if that employee has covered employment. The evidence of record does not establish that the employee had any employment that was covered under EEOICPA.

Your fourth objection concerns the distinguishing criteria set out by Congress that are prerequisites to qualify for benefits based on cancer for atomic weapons employees, DOE employees working at covered DOE facilities, or DOE contractor or subcontractor employees working at covered facilities under EEOICPA. The Department of Labor has no authority to alter those statutory criteria. EEOICPA regulations place the burden of establishing covered employment upon the claimant. You have not submitted evidence that establishes that the employee has covered employment under EEOICPA.

After reviewing the evidence of record in your claim file forwarded by the district office, I hereby make the following:

FINDINGS OF FACT

1. You filed a claim for survivor benefits under Part B of EEOICPA on August 7, 2001 as the spouse of the employee.

2. You alleged that the employee worked for Lucius Pitkin, Inc. at the Allied Chemical Corporation facility from July 1978 to July 1985.

3. The Allied Chemical Corporation facility is an AWE facility from 1959 to 1976, and also covered for residual radiation contamination from 1977 to July 2006.

4. Lucius Pitkin, Inc. is not an AWE, a subsequent owner of the Allied Chemical Corporation facility, or a subsequent operator of that AWE facility.

5. You have not submitted evidence that the employee was employed by an AWE at an AWE facility, or that the employee worked for DOE or for a DOE contractor or subcontractor at a DOE facility.

Based upon these facts, the undersigned makes the following:

CONCLUSIONS OF LAW

Part B of EEOICPA provides benefits to covered employees working at covered facilities who sustain an "occupational illness" as a result of exposure during the performance of duty at those facilities. See 42 U.S.C. §§ 7384l(1), 7384n and 7384s. In order to claim benefits under Part B of EEOICPA for cancer, the evidence must establish that the employee was either a DOE employee or a DOE contractor employee working at a DOE facility, or an atomic weapons employee working at an AWE facility who contracted cancer due to exposure to radiation in the performance of duty. See 42 U.S.C. §§ 7384l(9), 7384n and 7384s.

You claimed that the employee contracted cancer as a result of his employment at the Allied Chemical Corporation facility. However, EEOICPA sets out specific criteria for an employee to qualify as an "atomic weapons employee." An "atomic weapons employee" is defined an individual who was employed by an AWE during a period when the employer was processing or producing, for the use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining and milling. It is also defined as an individual employed by an AWE or a subsequent owner or operator of an AWE facility during a period of significant residual radiation contamination outside of the period in which weapons-related production occurred. 42 U.S.C. §

7384l(3). Further, EEOICPA defines an "an atomic weapons employer" as an entity (other than the United States) that processed or produced for use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining and milling, and is designated by the Secretary of Energy as an AWE for the purposes of EEOICPA. 42 U.S.C. § 7384l(4). The term "atomic weapons employer facility" means a facility owned by an AWE that is or was used to process or produce, for use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining or milling. 42 U.S.C. § 7384l(5).

A determination regarding your entitlement to benefits must be based on the totality of the evidence. You indicated that the employee worked at the Allied Chemical Corporation facility. That facility is a covered "atomic weapons employer facility" as defined by 42 U.S.C. § 7384l(5). You claimed that the employee worked for Lucius Pitkin, Inc. However, Lucius Pitkin, Inc is not an AWE because it has not been designated as such by the Secretary of Energy, nor is it a subsequent owner or operator of the Allied Chemical Corporation facility. Therefore, the employee does not qualify as an "atomic weapons employee" because he was not employed by an AWE during a period when that employer was processing or producing, for the use by the U.S., material that emitted radiation and was used in the production of an atomic weapon, nor was he employed by a subsequent owner or operator of the AWE facility during a period of residual radiation contamination. I have reviewed the evidence of record and it does not establish that the employee has employment covered under EEOICPA.

Section 30.110(c) of the EEOICPA regulations provides that any claim that does not meet all of the criteria for at least one of the categories including a "covered Part B employee" (as defined in § 30.5(p)) set forth in the regulations must be denied. See 20 C.F.R. §§ 30.5(p), 30.110(b), and 30.110(c). As you have not established that the employee is a covered Part B employee (because the evidence does not establish that the employee worked for an AWE), your claim for survivor benefits based on the employee's acute myelocytic leukemia (acute myelomonocytic leukemia) under Part B of EEOICPA must be denied.

Washington D.C.

William J. Elsenbrock

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 25833-2004 (Dep't of Labor, October 20, 2004)

NOTICE OF FINAL DECISION

This is the final decision of the Office of Workers' Compensation Programs (OWCP) on the above-designated 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 stated below, your claim for benefits is hereby denied.

STATEMENT OF THE CASE

You filed an EE-2 on March 18, 2002 claiming your spouse, the employee, was diagnosed with cancer and renal disease as a result of his employment at a DOE facility.

The Employment History Form you completed indicated he was employed with Emmett Lowry Construction Company at the Texas City Chemical Plant and "other construction companies" at the Texas City Chemical Plant. He worked out of Laborer's Local #116 from the 1950's to the 1960's.

You submitted a death certificate showing that he died on May 23, 1997 due to lung cancer and at the time of his death, you were his spouse. A pathology report dated April 2, 1997 established his diagnosis of lung cancer. On April 17, 2002 your EE-2 was faxed to the district office from Congressman Nick Lampson's office, and it is noted that on that EE-2, you checked "other lung condition" as well as cancer and renal disease.

On June 28, 2002, the U.S. Department of Energy responded to a request for confirmation that the employee worked at Texas City Chemicals, from the 1950's, 1960's and 1970's. They responded by stating that they had no information on the employee. An affidavit was received from Willie Williams stating he worked with the employee at Bellco Industrial Engineering American Oil Company and worked out of Labor Hall #116 for A.A. Pruitt Construction, American Oil Company, PG Bell Southwest Industrial Company, and for Amoco Chemical.

Another affidavit was received from Eligah Smith stating he worked at Amoco Chemical Company in 1957 to 1964 and saw the employee working with other construction workers. An affidavit from Lloyd C. Calhoun stated he worked for Bellco Industrial, American Oil Company out of Union Hall #116 from 1952 to 1954 with the employee and for Emmett Lowry Construction from 1954 to 1958. An affidavit from Henry Williams stated that he worked with the employee at Amoco Chemicals, Bellco Industrial Engineering in 1951 to 1955, and for A.A. Pruitt Construction at Amoco Chemical in the 1950's to the 1960's.

Amoco Chemical, *aka* Texas City Chemicals, Inc. was an Atomic Weapons Employer from 1952 to 1956.

Also received were your spouse's social security administration records. However none of the employment evidence showed the employee worked directly for Texas City Chemical. You submitted medical evidence that included a pathology report that diagnosed the employee with lung cancer on April 2, 1997. The district office erroneously forwarded your case to NIOSH for dose reconstruction.

On March 15, 2004 and March 22, 2004 the district office notified you by letter that contractors and subcontractors of Atomic Weapons Employers are not entitled to compensation under the EEOICPA and requested that you send evidence that the employee was directly employed with Texas City Chemicals. You were given 30 days to submit such evidence.

On March 22, 2004 and April 7, 2004 the claims examiner contacted you by telephone to discuss the EEOICPA and to explain that contractors and subcontractors at AWE facilities are not covered under the Act.

On April 15, 2004, the Denver district office recommended denial of your claim on the basis that the evidence submitted did not establish **[Employee]** was employed at a covered facility during a covered period.

Pursuant to the regulations implementing the EEOICPA, a claimant has 60 days from the date of issuance of the recommended decision to raise objections to that decision to the Final Adjudication Branch pursuant to 20 C.F.R. § 30.310(a). If an objection is not raised during the 60-day period, the Final Adjudication Branch will consider any and all objections to the recommended decision waived and issue a final decision affirming the district office's recommended decision pursuant to 20 C.F.R.§ 30.316(a).

On June 15, 2004 you filed an objection to the recommended decision, and stated you disagreed with the recommended decision. You requested an oral hearing.

A hearing was held on September 1, 2004 in Houston, Texas. You attended the hearing and were accompanied by Stephen Holmes, Galveston County Commissioner. At the hearing Mr. Holmes testified that the difference between atomic weapons employers and those that worked for the DOE is not very clear in the fact sheets provided by the Department of Labor. Also, contractors and subcontractor at other sites are covered. The contractors and subcontractors at the AWE facilities handled the same materials that employees of the DOE handled and they did the same type of work.

No exhibits were presented at the hearing. On October 3, 2004, the Final Adjudication Branch received a fax from you. The fax requested that I reconsider the recommendation of your claim. You stated that the EEOICPA Fact Sheet, the Federal Register and the list of Frequently Asked Questions stated that covered workers within Texas City Chemicals (American Oil Company, Borden, Inc. Smith-Douglas, Amoco Chemical Company) 1952-1956 will include contractors or subcontractors. You also stated that the district office sent your claim to NIOSH, your claim was in process before and after the amendment of October 27, 2003, that you were led to believe that EEOICPA had approved your claim.

After considering the case record of the claim, the recommended decision forwarded by the Denver district office, and your testimony at the hearing, the FAB hereby makes the following:

FINDINGS OF FACT

1. You filed a claim for survivor benefits under the EEOICPA on March 18, 2002.

2. You claimed the employee, **[Employee]**, contracted lung cancer as a result of his employment at a DOE facility, Texas City Chemicals.

3. You submitted medical evidence of lung cancer, a covered medical condition under the Act.

4. Texas City Chemicals is an Atomic Weapons Employer.

5. The employment evidence submitted does not establish **[Employee]** worked directly for Texas City Chemicals, rather, it shows he worked for subcontractors to Texas City Chemicals.

6. You submitted a marriage certificate establishing you are the eligible beneficiary of **[Employee]**. You also submitted a death certificate showing you were his spouse at the time of his death.

Based on the above-noted findings of fact in this claim, the FAB hereby also makes the following:

CONCLUSIONS OF LAW

1. The purpose of the EEOICPA, as stated in 42 U.S.C. § 7384d(b), is to provide for "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." Section 7384l(3) defines the term "atomic weapons employee" to mean an individual employed by an atomic weapons employer during a period when the employer was processing or producing, for the use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining and milling. In order to be afforded coverage as defined by 42 U.S.C. § 7384l(15) of the EEOICPA, a claimant must establish that the claimed employee was a covered employee who had been diagnosed with an "occupational illness" which means "a covered beryllium illness, cancer referred to in section 7384l(9)(B), specified cancer, or chronic silicosis, as the case may be." The evidence in your case establishes the employee was diagnosed with a covered condition, however, the evidence does not support he was a covered employee employed at a covered facility.

2. Chapter 2-500.6a (June 2002) of the Federal (EEOICPA) Procedure Manual states that subcontractors and contractors of AWE facilities are not covered.

3. 20 C.F.R. Parts 1 and 30, effective February 24, 2003 states that this new final rule will apply to all claims filed on or after this date, and all claims that are pending on February 24, 2003.

4. You have established that you are the eligible surviving beneficiary of the employee pursuant to 42 U.S.C. §7384s.

5. Other lung conditions and renal disease are not covered conditions under § 7384l(15) of the EEOICPA.

6. You not entitled to compensation pursuant to 42 U.S.C. § 7384l of the Energy Employees Occupational Illness Compensation Program Act.

Denver, CO
Janet R. Kapsin
Hearing Representative

EEOICPA Fin. Dec. No. 55211-2004 (Dep't of Labor, September 16, 2004)

NOTICE OF FINAL DECISION

This is the final decision of the Office of Workers' Compensation Programs (OWCP) on 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 reason discussed below, your claim for benefits is denied.

STATEMENT OF THE CASE

You filed a claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA), on March 8, 2004. You indicated your employment classification or type of

employment as Atomic Weapons Employer. On Form EE-3 (Employment History for Claim under EEOICPA) you stated that you had been employed as a supervisor for the installation of refrigeration equipment and other work while employed by the Way Engineering Company at Texas City Chemical, Inc., located in Texas City, Texas from 1952 until 1956. The Department of Energy (DOE) has identified Texas City Chemicals as an Atomic Weapons Employer (AWE) for the time period 1952 through 1956. You stated that as a result of your exposure at Texas City Chemicals while employed by Way Engineering Co. that you developed a skin disease that was possibly skin cancer.

The district office reviewed your application and evidence. In seperate letters dated March 15, 2004, the district office noted that you had not submitted medical or employment evidence in support of your claim. The letter addressing employment evidence indicated that while we had initiated a request for proof of employment with the DOE, they had been unable to verify your employment at Texas City Chemical, Inc. The district office asked you to provide evidence of your employment and listed a variety of documents such as time and attendance forms, wage statements, or other records that could be used to establish employment. The letter included Form EE-4 (Affidavit of Employment) that you could use to have other individuals complete statements in support of your employment allegations. The Social Security Administration (SSA) Form SSA-581, which can be used to verify your Social Security employment and employer history with your authorization, was included with the letter for your use if you wished the district office to request the information directly from SSA. A follow-up request for medical information was sent to you on May 26, 2004.

On June 8, 2004, you had a telephone conversation with a district office claims examiner. You stated that you had been employed by Way Engineering which was a contractor at the Texas City Chemical site and you were not employed directly by Texas City Chemical, Inc. The claims examiner informed you that employees of contractors or subcontractors of an Atomic Weapons Employer were not "covered employees" under the EEOICPA.

On June 9, 2004, the district office informed you in a letter that under the EEOICPA only employees hired directly by the AWE facility (such as Texas City Chemicals) were covered under the Act. The letter explained that the definition of an "atomic weapons employee" is an individual employed by an Atomic Weapons Employer during a period when the employer was processing or producing for the use by the United States material that emitted radiation and was used in the production of atomic weapons, excluding uranium mining and milling. The letter requested that you provide evidence that you were employed directly by Texas City Chemical, Inc. and explained that if additional employment evidence was not received within 30 days, a recommended decision would be issued based on the information in file.

On June 15, 2004, the district office received medical evidence provided by your physician, Dr. Anh V. Nguyen, M.D. This evidence included a pathology report describing a specimen from skin on your left forearm obtained on May 4, 2004 and provided a diagnosis of malignant melanoma (skin cancer).

On July 12, 2004, the district office issued a recommended decision to deny your claim. The recommended decision stated that the evidence of record did not establish that you could be considered a "covered employee" as that term is defined under 42 U.S.C. § 7384l. The file was transferred to the Final Adjudication Branch (FAB) on that date.

Pursuant to the regulations implementing the EEOICPA, a claimant has 60 days from the date of issuance of the recommended decision to raise objections to that decision to the Final Adjudication

Branch pursuant to 20 C.F.R. § 30.310(a). If an objection is not raised during the 60-day period, the Final Adjudication Branch will consider any and all evidence in the record and issue a final decision affirming the district office's recommended decision pursuant to 20 C.F.R.§ 30.316(a).

You have not raised any objections to the district office's recommended decision pursuant to § 30.310(a) of the implementing regulations and the 60-day period for filing such objections, as allowed under § 30.310(a) of the implementing regulations (20 C.F.R. § 30.310 (a)), has expired.

Based on the evidence contained in the case record, the Final Adjudication Branch makes the following:

FINDINGS OF FACT

1. You filed a claim for compensation on March 8, 2004.

2. You did not provide evidence sufficient to establish that you had covered employment with a DOE or AWE facility.

3. You provided medical evidence that established you had been diagnosed with malignant melanoma (skin cancer) on May 5, 2004.

Based on the above noted findings of fact in this claim, the Final Adjudication Branch makes the following:

CONCLUSIONS OF LAW

Section 7384l states:

(1) The term "covered employee" means any of the following:

(A) A covered beryllium employee.

(B) A covered employee with cancer.

(C) To the extent provided in section 7384r of this title, a covered employee with chronic silicosis (as defined in that section).

(2) The term "atomic weapon" has the meaning given that term in section 11 d.* of the Atomic Energy Act of 1954 (42 U.S.C. 2014(d)).

(3) The term "atomic weapons employee" means an individual employed by an atomic weapons employer during a period when the employer was processing or producing, for the use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining and milling.

(4) The term "atomic weapons employer" means an entity, other than the United States, that—

(A) processed or produced, for use by the United States, material that emitted radiation and was used

in the production of an atomic weapon, excluding uranium mining and milling; and

(B) is designated by the Secretary of Energy as an atomic weapons employer for purposes of the compensation program.

(5) The term “atomic weapons employer facility” means a facility, owned by an atomic weapons employer, that is or was used to process or produce, for use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining or milling.

Section 30.111(a) of the regulations (20 C.F.R. § 30.111(a)) states that, "Except where otherwise provided in the Act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category set forth in 20 C.F.R. § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing to the Office of Workers’ Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in these regulations."

You stated that you were employed by a subcontractor (The Way Engineering Co.) at an Atomic Weapons Employer facility (Texas City Chemicals, Inc.) and you were not an employee of Texas City Chemicals, Inc. EEOICPA coverage for Atomic Weapons Employers (AWE) is not extended to contractors and subcontractors of the AWE but only to individuals employed directly by the AWE. Your work at the AWE site is not qualifying because you worked for a company other than the AWE. Therefore, you are not a “covered employee” under the Act.

The undersigned has reviewed the recommended decision issued by the district office on July 12, 2004, and finds that it is in accordance with the facts and the law in this case. It is the decision of the Final Adjudication Branch that your claim for compensation is denied.

Denver, Colorado

September 16, 2004

Janet R. Kapsin

Hearing Representative

Designation by DOE

EEOICPA Fin. Dec. No. 10083-2007 (Dep’t of Labor, June 6, 2007)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch (FAB) concerning the above claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. Upon a careful review of the facts, FAB concludes that the evidence of record is insufficient to allow compensation. Accordingly, the claim for survivor

benefits under Part B is denied.

STATEMENT OF THE CASE

On July 31, 2001, **[Claimant]** filed a Form EE-2 claiming for survivor benefits under EEOICPA as the spouse of **[Employee]**, based on the condition of myelofibrosis. She submitted a certificate showing that she and **[Employee]** were married, and a copy of his death certificate identifying her as his spouse at the time he died on March 26, 1987 due to pneumonia, agnogenic myeloid metaplasia and chronic obstructive pulmonary disease.

[Claimant] submitted medical documentation including narrative reports, stating that her spouse had a diagnosis of myelofibrosis as early as the autumn of 1983. She also filed a Form EE-3 alleging that her spouse was employed at the National Bureau of Standards (NBS) Radioactivity Lab in Washington, D.C. from May 18, 1931 through May 1948. Her spouse's employment as a federal employee with the NBS was verified from May 26, 1931 to May 14, 1948. The NBS facility on Van Ness Street was initially designated as a covered Atomic Weapons Employer (AWE) under EEOICPA by the Department of Energy (DOE) from 1943 through 1952.

On November 30, 2005, the NBS was removed as a covered AWE by DOE per notice in the *Federal Register*.[1] DOE took this action when it determined that Congress established the NBS in 1901, and that Congress changed its name to the National Institute of Standards and Technology in 1988 as part of the Omnibus Trade and Competitiveness Act, and that it is a non-regulatory federal agency currently located within the Commerce Department's Technology Administration. DOE also determined that NBS never came under the organizational hierarchy of the Manhattan Engineer District (MED), the Atomic Energy Commission (AEC), or DOE itself. Hence, DOE concluded that the NBS facility on Van Ness Street was erroneously designated as an AWE facility because it is a facility of an agency of the United States, and the definition of an AWE specifically excludes agencies of the United States.

On March 1, 2006, the Cleveland district office advised **[Claimant]** that the NBS facility on Van Ness Street is not considered to be a covered AWE facility under EEOICPA, and requested that she submit any additional information she possessed that would lend itself to classifying this facility as an AWE facility within 30 days. **[Claimant]** responded to this request and submitted thirteen documents she believed would support a determination that this facility should be reclassified as a "DOE facility" under EEOICPA.

On September 25, 2006, after reviewing the evidence of record, the additional thirteen documents submitted, and historical research conducted on the NBS facility on Van Ness Street, the Chief of the Branch of Policies, Regulations and Procedures concluded that the NBS facility on Van Ness Street does not meet the definition of a DOE facility for the purposes of EEOICPA. While it was noted that this facility did perform valuable work for both the MED and the AEC, there was no evidence supporting that there was either a proprietary interest or the existence of a management and operation, management and integration, environmental remediation services, construction, or maintenance services contract between either the MED or the AEC and NBS. Based on this, it could not be considered a DOE facility.

On October 12, 2006, the Cleveland district office recommended denial of **[Claimant]**'s claim for survivor benefits, finding that the evidence of record did not establish that **[Employee]** was a covered employee with cancer under EEOICPA, as there was insufficient evidence that he was employed by

either an AWE or a DOE contractor at an AWE facility or a DOE facility, as those terms are defined in the statute. Accordingly, the district office recommended denial of **[Claimant]**'s claim for survivor benefits.

OBJECTIONS

On December 11, 2006, FAB received **[Claimant]**'s letter of objection to the recommended decision with her request for an oral hearing, which was held on March 13, 2007 in Seattle, Washington, attended by her daughter and authorized representative, **[Claimant's daughter]**, and her husband. In summary, **[Claimant]**'s letter of objection and her testimony at the hearing indicated that she disagreed with the recommended decision and that she has requested copies of the necessary contractual documents through a Freedom of Information Act (FOIA) to the U.S. Department of Labor (DOL), which has since been turned over to DOE for response, as DOL does not have the documents she requested. **[Claimant]** indicated that she is still waiting for a response from DOE with the documents she needs to support her objection to the delisting of this facility from the covered facilities list. **[Claimant]** believes the work done by NBS was more than just research and development, the employees were in charge of quality control, analyzed samples from production plants, devised more effective methods of analysis, furnished personnel and facilities, helped in start-up operations of major production plants and provided guidance for the control program. **[Claimant]** argued these responsibilities clearly fall into the areas of management and operations, which were the responsibilities of contractors.

In reviewing all of the evidence of record, including all of the documents submitted at the hearing, there remains insufficient evidence to establish that there was either a proprietary interest or the existence of a management and operation, management and integration, environmental remediation services, construction, or maintenance services contract between either the MED or the AEC and the NBS. While **[Claimant]** argued that the work done by employees of the NBS at its facility on Van Ness Street constitutes work related to "management and operations which were the responsibilities of contractors," she did not provide supporting documentation showing that a proprietary interest or contractual relationship existed between the NBS and the MED, or the AEC/DOE. Therefore, the NBS facility on Van Ness Street cannot be considered a "DOE facility" for the purposes of EEOICPA.

After considering the evidence of record, FAB hereby makes the following:

FINDINGS OF FACT

1. On July 31, 2001, **[Claimant]** filed a claim for survivor benefits under EEOICPA.

2. **[Claimant]** is the surviving spouse of the employee.

3. In 1983, the employee was diagnosed as having myelofibrosis, which is also known as agnogenic myeloid metaplasia.

4. **[Claimant]** did not submit sufficient evidence that **[Employee]**'s employment at the NBS facility on Van Ness Street meets the criteria to be considered "covered employment" under EEOICPA.

Based on the above-noted findings of fact, FAB hereby also makes the following:

CONCLUSIONS OF LAW

Although the NBS facility on Van Ness Street was once designated as an AWE facility by DOE, DOE later determined that this facility does not qualify as an AWE facility for the purposes of EEOICPA, and consequently removed its designation as an AWE facility in a notice published in the *Federal Register* on November 30, 2005.

[Claimant]'s objection to the removal of this facility as an AWE facility by DOE relates to her belief that the NBS facility on Van Ness Street should be reclassified as a "DOE facility," and that the work completed by the employees of the NBS at this facility, namely **[Employee]**, was consistent with the work completed by other employees of DOE contractors. While this may be accurate, the type of work completed alone is not the determinative criteria required for a facility to be considered a "DOE facility" under EEOICPA. It must also be shown that the AEC/DOE has or had a proprietary interest, or entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services; the evidence of record is currently insufficient to meet this requirement.

It is the claimant's responsibility to establish entitlement to benefits under EEOICPA. The regulations at § 30.111(a) provide that the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in EDEOICPA and the regulations, the claimant also bears the burden of providing all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a). If **[Claimant]** obtains evidence in the future that she believes satisfies this criteria, she should submit this to the district office for consideration with a request for reopening of the claim.

FAB is bound by the criteria and provisions of EEOICPA and has no authority to depart from it or EEOICPA's implementing regulations. Therefore, **[Claimant]**'s claim must be denied for lack of evidence that **[Employee]** was a covered employee as defined by the statute.

Seattle, Washington

Kelly Lindlief

Hearing Representative

Final Adjudication Branch

[1] 70 Fed. Reg. 71815 (November 30, 2005).

Employees during period of residual contamination

EEOICPA Fin. Dec. No. 2158-2003 (Dep't of Labor, July 11, 2008)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch (FAB) concerning your claim for survivor benefits under Part B of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, your claim for survivor benefits based on acute myelocytic leukemia (acute myelomonocytic leukemia) is denied.

STATEMENT OF THE CASE

On August 7, 2001, you filed a claim for survivor benefits under Part B of EEOICPA, Form EE-2, as the spouse of **[Employee]**, hereinafter referred to as the employee. On July 31, 2002, you also filed a claim for assistance under Part D of EEOICPA with the Department of Energy (DOE). You identified acute myelocytic leukemia (acute myelomonocytic leukemia) as the medical condition of the employee resulting from his employment at an atomic weapons facility.

On Form EE-3 you indicated that the employee worked as a laboratory technician for Lucius Pitkin at the Allied Chemical facility in Metropolis, Illinois from July 1978 to July 1985. The Allied Chemical Corporation Plant in Metropolis, Illinois is a covered atomic weapons employer (AWE) facility from 1959 to 1976 and covered for residual radiation contamination from 1977 to July 2006.

On February 28, 2003, DOE denied your claim for assistance under Part D, because the employee's work at the Allied Chemical Corporation Plant was at an AWE rather than a DOE facility. On April 14, 2003, the FAB issued a final decision denying your claim for survivor benefits under Part B because the employee did not have covered employment under the EEOICPA. The FAB found that the employee's period of employment at the Allied Chemical Corporation Plant was outside the covered years for that facility.

Thereafter, on October 28, 2004, Congress repealed Part D of EEOICPA and enacted new Part E. Because of this, DEEOIC proceeded to adjudicate your Part D claim under Part E and on May 17, 2006, the FAB issued a final decision denying your claim for survivor benefits under Part E because the employee was not employed by a DOE contractor at a DOE facility. As part of the 2004 amendments to EEOICPA, Congress amended the definition of an "atomic weapons employee" to include employees of subsequent owners or operators of an AWE facility beyond the time period during which weapons-related work occurred, provided that the National Institute for Occupational Safety and Health (NIOSH) had found that there was the potential for residual radiation contamination at the facility. NIOSH subsequently determined that the Allied Chemical Corporation facility had the potential for residual radiation contamination from 1977 to July 2006. This period of residual contamination resulted in the covered period at this particular facility being expanded.

On June 5, 2007, the Director of the Division of Energy Employees Occupational Illness Compensation (DEEOIC) issued a Director's Order vacating the FAB's April 14, 2003 final decision and reopening your claim for benefits under Part B. This order instructed the district office to determine if the employee's employment by Lucius Pitkin at the Allied Chemical Corporation facility qualified as employment by a "subsequent owner or operator" at that AWE facility under Part B of EEOICPA. As part of this further development, the district office received a June 20, 2007 letter from I. Boyarsky, the controller of Lucius Pitkin, Inc., in which he indicated that Lucius Pitkin, Inc. was hired as an independent observer at the facility to weigh and sample ore and was never a co-owner nor operator of the Allied Chemical Corporation facility.

On July 17, 2007, the district office issued a recommended decision to deny your claim for benefits

under Part B because the employee was not employed by Allied Chemical or by a subsequent owner or operator of the Allied Chemical Corporation facility, and thus his employment was not covered under EEOICPA. On August 6, 2007, you objected to the recommended decision and attached a copy of the Director's Order. On August 20, 2007, the FAB issued a remand order returning your claim to the district office with instructions to refer the case file to the Branch of Policies, Regulations and Procedures (BPRP) within DEEOIC for a determination on whether the employee's work with Lucius Pitkin, Inc. at the Allied Chemical Corporation facility qualified him as an atomic weapons employee under Part B of EEOICPA. Pursuant to that remand order, the district office referred your case file to the BPRP. On November 26, 2007, the BPRP determined that the employee's employment with Lucius Pitkin, Inc. at the Allied Chemical Corporation facility did not qualify him as an atomic weapons employee because Lucius Pitkin, Inc. was not a subsequent owner or operator of that AWE facility.

On December 13, 2007, the district office issued another recommended decision to deny your claim for survivor benefits under Part B of EEOICPA, on the ground that the employee's employment by Lucius Pitkin, Inc. at the Allied Chemical Corporation facility did not qualify him as an "atomic weapons employee," as that term is defined in EEOICPA. Accompanying the recommended decision was a letter explaining your rights and responsibilities in regard to the recommended decision.

OBJECTIONS

On January 14, 2008, the FAB received your January 8, 2008 letter objecting to the recommended decision and requesting a hearing to air your objections, which was held on March 19, 2008 in Mount Vernon , Illinois. You and Virginia Griffey were present at this hearing and presented testimony. Your objections to the recommended decision are summarized below:

Objection No. 1: You indicated that the employee worked for Lucius Pitkin, Inc. but worked at the Allied Chemical Corporation facility, and because he was checking the moisture content of the dry uranium, which was an activity that was vital to the operation of the plant, then his employment should be covered because he should be considered an operator of the facility.

Objection No. 2: You indicated that Allied Chemical supplied the employees of Lucius Pitkin, Inc. with clothing, gloves, hard-hats and shoes, laundered their clothing and provided and maintained the respirators used by both Allied Chemical and Lucius Pitkin, Inc. employees.

Objection No. 3: You indicated that the employee's doctors advised that the employee's cancer was caused by him handling raw uranium.

Objection No. 4: You indicated that it is unfair to compensate employees of the United States Enrichment Corporation (USEC) who worked at the Paducah Gaseous Diffusion Plant or Allied Chemical Company employees who worked in the same building as the employee, had the same exposures as the employee and who also contracted cancer, but not to compensate the employee merely because he was not working for a covered employer.

Your first objection concerns whether the employee's work duties qualified him as an operator of this facility. The EEOICPA provides that an "atomic weapons employee" includes an individual who was employed by an AWE during a period when the employer was processing, or producing, for the use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining and milling. It also includes an individual employed by an AWE or

subsequent owners or operators of an AWE facility during a period of significant residual radiation contamination outside of the period in which weapons-related production occurred. *See* 42 U.S.C. § 7384l(3).

The period of the employee's employment at this AWE facility is not during the period when weapons-related production occurred; however, it was during the residual radiation period when employees of the AWE, or subsequent owners or operators of the facility, are covered. There is no evidence that the employee was employed by the Allied Chemical Corporation or a subsequent owner or operation of this AWE facility. The employee was working for Lucius Pitkin, Inc. and his duties at the Allied Chemical Corporation facility were performed pursuant to a contract between the Allied Chemical Corporation and Lucius Pitkin, Inc. The controller of Lucius Pitkin, Inc. has confirmed that Lucius Pitkin, Inc. was not an operator or subsequent owner of the Allied Chemical Corporation facility. The determination of whether a contractor of an AWE is an owner or operator of an AWE facility is not based on the duties performed by an individual employee, but rather by the nature of the contract. The evidence of record does not establish that the employee worked for an AWE, a subsequent owner of the AWE facility or for a company that was contracted to operate this facility.

Your second objection concerns whether the employee should be considered an employee of Allied Chemical Corporation for purposes of EEOICPA. When it enacted EEOICPA, Congress provided specific criteria that must be met to establish that an individual qualifies as an "atomic weapons employee" in § 7384l(3). Those criteria do not include employees of contractors or subcontractors of an AWE, employees of wholly-owned subsidiaries of an AWE, or employees who are considered "shared," "on loan," "borrowed servants," or "statutory employees." *See* EEOICPA Fin. Dec. No. 4894-2004 (Dep't of Labor, March 8, 2005); EEOICPA Fin. Dec. No. 366-2002 (Dep't of Labor, June 3, 2003); EEOICPA Fin. Dec. No. 13183-2003 (Dep't of Labor, October 14, 2003). The evidence of record simply does not establish that the employee worked for an AWE. The Department of Labor must administer EEOICPA as enacted by Congress and cannot alter the necessary criteria to qualify as an atomic weapons employee under EEOICPA.

Your third objection concerns the cause of the employee's cancer. EEOICPA provides benefits for specific occupational illnesses like cancer for an employee (or his survivors) who is considered to be a "covered employee with cancer." *See* 42 U.S.C. §§ 7384l(9), 7384n. The cause of an employee's cancer does not determine if that employee has covered employment. The evidence of record does not establish that the employee had any employment that was covered under EEOICPA.

Your fourth objection concerns the distinguishing criteria set out by Congress that are prerequisites to qualify for benefits based on cancer for atomic weapons employees, DOE employees working at covered DOE facilities, or DOE contractor or subcontractor employees working at covered facilities under EEOICPA. The Department of Labor has no authority to alter those statutory criteria. EEOICPA regulations place the burden of establishing covered employment upon the claimant. You have not submitted evidence that establishes that the employee has covered employment under EEOICPA.

After reviewing the evidence of record in your claim file forwarded by the district office, I hereby make the following:

FINDINGS OF FACT

1. You filed a claim for survivor benefits under Part B of EEOICPA on August 7, 2001 as the

spouse of the employee.

2. You alleged that the employee worked for Lucius Pitkin, Inc. at the Allied Chemical Corporation facility from July 1978 to July 1985.

3. The Allied Chemical Corporation facility is an AWE facility from 1959 to 1976, and also covered for residual radiation contamination from 1977 to July 2006.

4. Lucius Pitkin, Inc. is not an AWE, a subsequent owner of the Allied Chemical Corporation facility, or a subsequent operator of that AWE facility.

5. You have not submitted evidence that the employee was employed by an AWE at an AWE facility, or that the employee worked for DOE or for a DOE contractor or subcontractor at a DOE facility.

Based upon these facts, the undersigned makes the following:

CONCLUSIONS OF LAW

Part B of EEOICPA provides benefits to covered employees working at covered facilities who sustain an "occupational illness" as a result of exposure during the performance of duty at those facilities. *See* 42 U.S.C. §§ 7384l(1), 7384n and 7384s. In order to claim benefits under Part B of EEOICPA for cancer, the evidence must establish that the employee was either a DOE employee or a DOE contractor employee working at a DOE facility, or an atomic weapons employee working at an AWE facility who contracted cancer due to exposure to radiation in the performance of duty. *See* 42 U.S.C. §§ 7384l(9), 7384n and 7384s.

You claimed that the employee contracted cancer as a result of his employment at the Allied Chemical Corporation facility. However, EEOICPA sets out specific criteria for an employee to qualify as an "atomic weapons employee." An "atomic weapons employee" is defined an individual who was employed by an AWE during a period when the employer was processing or producing, for the use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining and milling. It is also defined as an individual employed by an AWE or a subsequent owner or operator of an AWE facility during a period of significant residual radiation contamination outside of the period in which weapons-related production occurred. 42 U.S.C. § 7384l(3). Further, EEOICPA defines an "an atomic weapons employer" as an entity (other than the United States) that processed or produced for use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining and milling, and is designated by the Secretary of Energy as an AWE for the purposes of EEOICPA. 42 U.S.C. § 7384l(4). The term "atomic weapons employer facility" means a facility owned by an AWE that is or was used to process or produce, for use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining or milling. 42 U.S.C. § 7384l(5).

A determination regarding your entitlement to benefits must be based on the totality of the evidence. You indicated that the employee worked at the Allied Chemical Corporation facility. That facility is a covered "atomic weapons employer facility" as defined by 42 U.S.C. § 7384l(5). You claimed that the employee worked for Lucius Pitkin, Inc. However, Lucius Pitkin, Inc is not an AWE because it has not

been designated as such by the Secretary of Energy, nor is it a subsequent owner or operator of the Allied Chemical Corporation facility. Therefore, the employee does not qualify as an "atomic weapons employee" because he was not employed by an AWE during a period when that employer was processing or producing, for the use by the U.S., material that emitted radiation and was used in the production of an atomic weapon, nor was he employed by a subsequent owner or operator of the AWE facility during a period of residual radiation contamination. I have reviewed the evidence of record and it does not establish that the employee has employment covered under EEOICPA.

Section 30.110(c) of the EEOICPA regulations provides that any claim that does not meet all of the criteria for at least one of the categories including a "covered Part B employee" (as defined in § 30.5(p)) set forth in the regulations must be denied. *See* 20 C.F.R. §§ 30.5(p), 30.110(b), and 30.110(c). As you have not established that the employee is a covered Part B employee (because the evidence does not establish that the employee worked for an AWE), your claim for survivor benefits based on the employee's acute myelocytic leukemia (acute myelomonocytic leukemia) under Part B of EEOICPA must be denied.

Washington D.C.

William J. Elsenbrock

Hearing Representative

Final Adjudication Branch

See DOE's Office of Health, Safety & Security facility list on the agency website at: http://www.hss.energy.gov/healthsafety/FWSP/advocacy/faclist/showfacility.cfm. (retrieved July 11, 2008).

EEOICPA Fin. Dec. No. 4898-2004 (Dep't of Labor, March 8, 2005)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This decision of the Final Adjudication Branch (FAB) concerns your claim for compensation under Part B of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended, 42 U.S.C. §7384 *et seq.* (EEOICPA). For the reasons stated below, your claim for benefits is denied.

STATEMENT OF THE CASE

On August 9, 2001, you filed a claim for benefits under Part B of the EEOICPA as the surviving spouse of >**[Employee]** and identified malignant melanoma as the diagnosed condition being claimed. You submitted an Employment History Form (EE-3) on which you stated that your husband was employed by Allegheny Ludlow Steel from March 27, 1966 to June 1, 1985, by Nuclear Materials and Equipment Corp. in February 1966, by Wilson Rearich Hauling from 1963 to 1964 and by MESLA Machine Co. (you did not provide dates or the name of a covered facility in regards to this employment). You stated that you did not know if your husband wore a dosimetry badge while employed by Nuclear Materials and Equipment Corp. and you stated that your husband did not wear a dosimetry badge while employed by the other employers. As medical evidence you submitted the following:

A copy of Dr. Harry Gerstbrein's final autopsy report in which he diagnosed your husband with

"malignant melanoma arising in right middle lobe of lung, metastatic melanoma to upper lobes of both lungs, and metastatic melanoma to terminal ileum and perirectal area (history)."

A copy of Dr. Allen T. Lefor's July 4, 1985 hospital admission report in which he states your husband was diagnosed with malignant melanoma by biopsy on May 24, 1985.

You submitted a copy of your marriage certificate which shows that you were married to **[Employee]** on October 27, 1964 and a copy of your husband's death certificate which shows that he died on January 16, 1986. As evidence of employment, you submitted a copy of your husband's 1966 W2 from Nuclear Decontamination Corp. On February 19, 2002, Department of Energy (DOE) representative Roger Anders advised the district office, via Form EE-5, that the DOE did not have employment information regarding your husband. On August 30, 2003, the district office obtained a copy of your husband's Social Security Administration statement of earnings which indicate that he received earnings from Nuclear Decontamination Corp. in the first quarter of 1966 and earnings from Allegheny Ludlum Corporation from 1979 to 1985.

Based upon the evidence of record, the district office issued a recommended decision on June 30, 2004, in which it concluded that you did not establish that **[Employee]** was a covered employee under 42 U.S.C. § 7384l(1), as he was not a DOE employee or contractor employee at a DOE facility, nor an atomic weapons employee at an atomic weapons employer facility, as those facilities are defined in 42 U.S.C. §§ 7384l(4), 7384l(11) and 7384l(12), respectively. It was the district office's recommendation that your claim be denied based on its conclusions.

OBJECTIONS

On August 13, 2004, you wrote to the FAB, advised that you disagreed with the recommended decision and requested a hearing. You stated in your letter that it was your position that Nuclear Decontamination Corp. was a covered facility because it merged with Nuclear Materials and Equipment Corp. on May 13, 1974. You stated that the merger was more than sufficient to show that "the two companies were initially operating out of the same Apollo facility and eventually became one and the same." You also stated that at the time your husband began work at Nuclear Decontamination Corp. the same person was doing the hiring for both companies.

A hearing was held on November 10, 2004 in Pittsburgh, PA. You testified at the hearing that Nuclear Decontamination Corp. and Nuclear Material Equipment Corp. (NUMEC) had the same address in Apollo, PA, worked on the same parcel of land, and used the same employment office. Hearing Transcript (HT)-8. You also testified that the merger documents between Decontamination Corp. and NUMEC show that the same person owned both companies because the same person signed as president of both companies in the merger documents. HT-10. You submitted the following exhibits as evidence to support your claim:

Exhibit 1 Commonwealth of Pennsylvania Department of State Corporation Bureau Articles of Merger which document the April 26, 1974 merger between NUMEC and Nuclear Decontamination Corp., June 23, 1959 Nuclear Decontamination Corp. Articles of Incorporation and Certificate of Incorporation.

Exhibit 2 Commonwealth of Pennsylvania Department of State Corporation Bureau Articles of Merger which document the January 9, 1975 merger between NUMEC and the Babcock & Wilcox

Company, January 9, 1975 NUMEC Certificate of Withdrawal from doing business in PA, April 12, 1967 NUMEC application for Certificate of Authority, and April 12, 1967 Certificate of Authority issued to NUMEC to transact business in PA.

Exhibit 3 Copy of Pennsylvania Department of State microfilm document showing that Nuclear Decontamination Corp. merged with NUMEC.

The merger documents you submitted indicate that Nuclear Decontamination Corp. (NDC) was a wholly-owned subsidiary of NUMEC. (The merger documents show that at the time of the merger, NUMEC owned all of NDC's outstanding shares of Common Stock.) Wholly-owned subsidiaries are companies in their own right that share an affiliation with a parent company, but operate as a separate functional entity and provide for employees in accordance with their own distinct corporate administrative policies and regulations. Due to the separate and distinct nature of a wholly-owned subsidiary and the strict regulatory and statutory definition of an Atomic Weapons Employer (AWE) facility, a wholly owned subsidiary of a DOE-designated AWE that is not itself designated as an AWE by the DOE can not be considered an AWE.

After considering the written record of the claim, your letter of objection and the testimony presented at the hearing, the FAB hereby makes the following:

FINDINGS OF FACT

1. You filed a claim for survivor benefits under Part B of the EEOICPA on August 9, 2001.

2. Your husband was employed at Nuclear Decontamination Corp. in the first quarter of 1966 and at Allegheny Ludlum Corporation from 1979 to 1985.

3. Your husband was employed at Allegheny Ludlum Steel subsequent to the period it was a designated covered atomic weapons employer. In its June 2004 *Report on Residual Radioactive and Beryllium Contamination at Atomic Weapons Employer Facilities and Beryllium Vendor Facilities*, the National Institute for Occupational Safety and Health (NIOSH) determined that there was little potential for significant residual contamination outside of the period in which weapons-related production occurred.

4. Nuclear Decontamination Corp. is not a covered facility under the EEOICPA. While NDC may have been a wholly-owned subsidiary of NUMEC, it was a separate, distinct corporation at the time of your husband's employment.

5. Your husband was diagnosed with malignant melanoma on May 24, 1985.

6. Your husband died on January 16, 1986 due to malignant melanoma.

7. You are the surviving spouse of **[Employee]**.

Based on the above-noted findings of fact in this claim, the FAB hereby makes the following:

CONCLUSIONS OF LAW

Section 30.310(a) of the EEOICPA implementing regulations provide that, "Within 60 days from the date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision, including the Health and Human Service's reconstruction of the radiation dose to which the employee was exposed (if any), and whether a hearing is desired." 20 C.F.R. § 30.310(a). At your request a hearing was held on November 10, 2004.

Part B of the Energy Employees Occupational Illness Compensation Program Act was established to provide compensation benefits to covered employees (or their eligible survivors) who have been diagnosed with designated occupational illnesses incurred as a result of their exposure to radiation, beryllium, or silica, while in the performance of duty for Department of Energy and certain of its vendors, contractors and subcontractors. "Occupational illness" is defined in § 7384l(15) of the EEOICPA, as a covered beryllium illness, cancer referred to in section 7384l(9)(B)[2] of this title, specified cancer, or chronic silicosis, as the case may. 42 U.S.C. §§ 7384l(15), 7384l(9)(B). To be eligible for compensation for cancer under Part B of the EEOICPA, an employee either must be: a DOE employee, a DOE contractor employee or an atomic weapons employee who contracted cancer (that has been determined pursuant to guidelines promulgated by Health and Human Services, "to be at least as like as not related to such employment"), after beginning such employment. *See* 42 U.S.C. § 7384l(9)(2); 20 C.F.R. § 30.210.

The evidence of record establishes that your husband was employed by Allegheny-Ludlum Steel from 1979 to 1985. Allegheny-Ludlum Steel was a covered Atomic Weapons Employer from 1950 to 1952.[3] Pursuant to 42 U.S.C. § 7384l(3), an "atomic weapons employee" is defined as:

> (A) An individual employed by an atomic weapons employer during a period when the employer was processing or producing, for the use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining and milling.
> (B) An individual employed—
> (i) at a facility with respect to which the National Institute for Occupational Safety and Health, in its report dated October 2003 and titled "Report on Residual Radioactive and Beryllium Contamination at Atomic Weapons Employer Facilities and Beryllium Vendor Facilities", or any update to that report, found that there is a potential for significant residual contamination outside of the period in which weapons-related production occurred;
> (ii) by an atomic weapons employer or subsequent owner or operators of a facility described in clause (i); and
> (iii) during a period, as specified in such report or any update to such report, of potential for significant residual radioactive contamination at such facility.

The June 2004 NIOSH *Report on Residual Radioactive and Beryllium Contamination at Atomic Weapons Employer Facilities and Beryllium Vendor Facilities*, does not support a period for potential significant residual contamination at Allegheny Ludlum Steel subsequent to the covered period; therefore your husband's employment at that facility is not covered employment under the EEOICPA. Any work performed by NDC for NUMEC during the period your husband was employed, by NDC, would be viewed as work performed by a contractor of a designated AWE.[4] AWE contractor employees are not covered under the EEOICPA. *See* 42 U.S.C. §§ 7384l(1), 7384l(3), 7384l(4) and 7384l(5).

Because you did not submit evidence that establishes your husband was a “covered employee with cancer” as defined at § 7384l(9) of the EEOICPA, your claim for benefits is denied. 42 U.S.C. § 7384l(9).

Washington, DC

Thomasyne L. Hill

Hearing Representative

Final Adjudication Branch

[1] EEOICPA Bulletin No. 04-12 (issued September 16, 2004).

[2] §7384l(9)(B). An individual with cancer specified in subclause (I), (II), or (III) of clause (ii), if and only if that individual is determined to have sustained that cancer in the performance of duty in accordance with section 7384n(b). Clause (ii) references DOE employees, DOE contractor employees and atomic weapons employees who contract cancer after beginning employee at the required facility.

[3] U.S. Department of Energy. *Allegheny-Ludlum Steel*. Time period: 1950-1952. Worker Advocacy Facility List. Available: http://tis.eh.doe.gov/advocacy/faclist/showfacility.cfm. [retrieved November 9, 2004].

[4] EEOICPA Bulletin No. 04-12 (issued September 16, 2004).

EEOICPA Fin. Dec. No. 114870-2011 (Dep’t of Labor, July 1, 2011)

EMPLOYEE:	**[Name Deleted]**
CLAIMANTS:	**[Name Deleted]**
	[Name Deleted]
	[Name Deleted]
	[Name Deleted]
	[Name Deleted]
FILE NUMBER:	**[Number Deleted]**
DOCKET NUMBERS:	**114870-2011**
	114872-2011
	114873-2011

114874-2011

114875-2011

DECISION DATE: **July 1, 2011**

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch (FAB) concerning the above-noted claims under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons stated below, these claims for survivor benefits under Part B of EEOICPA are denied.

STATEMENT OF THE CASE

On November 15, 2001, **[Employee]** filed a claim in which he alleged that he had contracted a "stroke" and an unspecified heart condition due to his employment. As part of his claim, the employee also completed a Form EE-3, stating that he was employed at the Bethlehem Steel plant in Lackawanna, New York, from 1959 to 1997. The case file includes **[Employee]**'s earnings report from the Social Security Administration (SSA), which shows that he was employed by Bethlehem Steel from 1959 to 1997. The Bethlehem Steel facility in Lackawanna, New York, is recognized as a covered Atomic Weapons Employer (AWE) facility from 1949 to 1952.[1]

On January 22, 2003, FAB issued a final decision denying **[Employee]**'s claim under Part B of EEOICPA for a stroke and heart problems, concluding that the evidence did not establish that he had been diagnosed with a compensable "occupational illness." After the employee died, FAB also issued an August 1, 2007 final decision denying **[Employee's Spouse]**'s claim for benefits as the surviving spouse of **[Employee]**. In that final decision, FAB determined that the evidence showed that **[Employee]** was employed at the Bethlehem Steel facility in Lackawanna for the period 1959 to 1997, which was not within the covered period for that facility.

On July 26, 2010, the claimants filed Forms EE-2 claiming benefits as surviving children of **[Employee]** and identified large B-cell lymphoma as the condition being claimed as work-related. They also completed employment history forms indicating that **[Employee]** was employed at the Bethlehem Steel facility in Lackawanna from 1958 to 1995. The case file contains a copy of **[Employee]**'s death certificate, which shows that he died on November 30, 2006, and lists diffuse large B-cell lymphoma as the cause of his death.

The district office subsequently advised each of the five claimants of the covered period for the Bethlehem Steel facility (1949-1952), and afforded them the opportunity to provide evidence showing that **[Employee]** was employed at another covered facility, or to provide evidence indicating that the covered period at the Bethlehem Steel facility should be expanded to include periods after 1952. In response, they submitted letters questioning the 1949-1952 covered period and also submitted a newspaper article discussing the history of the Bethlehem Steel plant in Lackawanna, a chronology of significant events concerning Bethlehem Steel, and a copy of work regulations governing the use of ionizing radiation, which are dated 1972.

On December 2, 2010, the district office issued a recommended decision to deny these claims for

survivor compensation under Part B, concluding that the evidence was not sufficient to show that **[Employee]** was a covered employee with cancer because he was not employed at the Bethlehem Steel facility during the covered period of 1949-1952.

OBJECTIONS

On January 11, 2011, the claimants objected to the recommended decision and requested a hearing. At the hearing held on March 23, 2011, the claimants questioned the basis for the covered period for the Bethlehem Steel facility. Although they acknowledged that their father's SSA records show that his employment with Bethlehem Steel began in 1959, they questioned whether the Lackawanna facility had been fully decontaminated by that time, and argued that the covered period of the facility should be expanded to include his period of employment during this period of alleged residual radioactive contamination.

Subsequent to the hearing, the claimants submitted a portion of a document entitled "Residual Radioactive Summary," which identifies the Bethlehem Steel Lackawanna facility as one in which "there is potential for significant residual contamination outside the period in which weapons production occurred." This document was obtained from a website published by an advocacy group called F.A.C.T.S., Inc. ("For a Clean Tonawanda Site").[2]

FINDINGS OF FACT

1. The claimants filed claims for benefits as surviving children of **[Employee]**.

2. **[Employee]** was employed at the Bethlehem Steel facility in Lackawanna New York, from 1959 to 1997.

CONCLUSIONS OF LAW

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision. 20 C.F.R. § 30.310 (2011). In reviewing any objections submitted, FAB will review the written record, to include any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. 20 C.F.R. § 30.313. I have reviewed the record in this case, to include the hearing testimony and the written objections submitted, and conclude that no further investigation is warranted.

Part B of EEOICPA was established to provide benefits to covered employees diagnosed with designated occupational illnesses incurred as a result of their exposure to radiation, beryllium or silica while in the performance of duty for the Department of Energy (DOE) and certain of its vendors, contractors and subcontractors. To be a "covered employee" for purposes of EEOICPA, the evidence must establish that the employee worked at a DOE facility, a beryllium vendor facility, or at an AWE facility.

The term "AWE facility" means a facility, owned by an atomic weapons employer, that is or was used to process or produce, for use by the United States, material that emitted radiation and was used in the production of an atomic weapon. 42 U.S.C. § 7384l(5). The term "atomic weapons employer" means an entity that: (a) processed or produced, for use by the United States, material that emitted radiation and was used in the production of an atomic weapon; and (b) is designated by the Secretary of Energy

as an atomic weapons employer for purposes of the compensation program. 42 U.S.C. § 7384l(4).

For purposes of coverage under Part B, an "atomic weapons employee" is an individual who: (1) was employed by an AWE during the period when it was producing or processing material for use in an atomic weapon; or (2) was employed at an AWE facility after production ceased but during a period when the facility has been determined by the National Institute for Occupational Safety and Health (NIOSH) to have the potential for significant residual contamination. 42 U.S.C. § 73841(3). NIOSH was required to submit a report on whether or not significant contamination remained at any AWE facility after that facility discontinued nuclear weapon production activities. NIOSH issued the original report, entitled "Report on Residual Radioactive and Beryllium Contamination at Atomic Weapons Employer Facilities and Beryllium Vendor Facilities," in November 2002 and updated the report multiple times. In all of these reports, NIOSH determined that there was no potential for significant residual radioactive contamination at the Bethlehem Steel facility outside of the weapons-related production period. *See* NIOSH, Office of Compensation Analysis and Support, *Report on Residual Radioactive and Beryllium Contamination at Atomic Weapons Employer Facilities and Beryllium Vendor Facilities* (October 2009).[3]

The claimants are seeking benefits based on **[Employee]**'s employment at the Bethlehem Steel facility during the period 1959 to 1997. The Secretary of Energy has designated the Bethlehem Steel facility in Lackawanna, New York, as an AWE facility, and the period during which it processed or produced material that emitted radiation was 1949 through 1952. Since **[Employee]** was not employed during the 1949-1952 production period at the facility, and NIOSH has determined that there is no potential for significant residual radioactive contamination at the facility after 1952, he does not qualify as a covered employee as defined under Part B. Accordingly, these claims for compensation under Part B must be denied.

Cleveland, OH

Greg Knapp

Hearing Representative

Final Adjudication Branch

[1] The facility list is available at: http://www.hss.energy.gov/healthsafety/FWSP/advocacy/faclist/ showfacility.cfm (retrieved June 28, 2011).

[2] *See* http://www.factsofwny.com (retrieved June 28, 2011).

[3] The report can be downloaded from the Department of Health and Human Services web site at http://www.cdc.gov/niosh/ocas/pdfs/tbd/rescon/rcontam1009.pdf (retrieved June 28, 2011).

Subsidiaries

EEOICPA Fin. Dec. No. 4898-2004 (Dep't of Labor, March 8, 2005)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This decision of the Final Adjudication Branch (FAB) concerns your claim for compensation under Part B of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended, 42 U.S.C. §7384 *et seq.* (EEOICPA). For the reasons stated below, your claim for benefits is denied.

STATEMENT OF THE CASE

On August 9, 2001, you filed a claim for benefits under Part B of the EEOICPA as the surviving spouse of **[Employee]** and identified malignant melanoma as the diagnosed condition being claimed. You submitted an Employment History Form (EE-3) on which you stated that your husband was employed by Allegheny Ludlow Steel from March 27, 1966 to June 1, 1985, by Nuclear Materials and Equipment Corp. in February 1966, by Wilson Rearich Hauling from 1963 to 1964 and by MESLA Machine Co. (you did not provide dates or the name of a covered facility in regards to this employment). You stated that you did not know if your husband wore a dosimetry badge while employed by Nuclear Materials and Equipment Corp. and you stated that your husband did not wear a dosimetry badge while employed by the other employers. As medical evidence you submitted the following:

A copy of Dr. Harry Gerstbrein's final autopsy report in which he diagnosed your husband with "malignant melanoma arising in right middle lobe of lung, metastatic melanoma to upper lobes of both lungs, and metastatic melanoma to terminal ileum and perirectal area (history)."

A copy of Dr. Allen T. Lefor's July 4, 1985 hospital admission report in which he states your husband was diagnosed with malignant melanoma by biopsy on May 24, 1985.

You submitted a copy of your marriage certificate which shows that you were married to **[Employee]** on October 27, 1964 and a copy of your husband's death certificate which shows that he died on January 16, 1986. As evidence of employment, you submitted a copy of your husband's 1966 W2 from Nuclear Decontamination Corp. On February 19, 2002, Department of Energy (DOE) representative Roger Anders advised the district office, via Form EE-5, that the DOE did not have employment information regarding your husband. On August 30, 2003, the district office obtained a copy of your husband's Social Security Administration statement of earnings which indicate that he received earnings from Nuclear Decontamination Corp. in the first quarter of 1966 and earnings from Allegheny Ludlum Corporation from 1979 to 1985.

Based upon the evidence of record, the district office issued a recommended decision on June 30, 2004, in which it concluded that you did not establish that **[Employee]** was a covered employee under 42 U.S.C. § 7384l(1), as he was not a DOE employee or contractor employee at a DOE facility, nor an atomic weapons employee at an atomic weapons employer facility, as those facilities are defined in 42 U.S.C. §§ 7384l(4), 7384l(11) and 7384l(12), respectively. It was the district office's recommendation that your claim be denied based on its conclusions.

OBJECTIONS

On August 13, 2004, you wrote to the FAB, advised that you disagreed with the recommended decision and requested a hearing. You stated in your letter that it was your position that Nuclear Decontamination Corp. was a covered facility because it merged with Nuclear Materials and Equipment Corp. on May 13, 1974. You stated that the merger was more than sufficient to show that

"the two companies were initially operating out of the same Apollo facility and eventually became one and the same." You also stated that at the time your husband began work at Nuclear Decontamination Corp. the same person was doing the hiring for both companies.

A hearing was held on November 10, 2004 in Pittsburgh, PA. You testified at the hearing that Nuclear Decontamination Corp. and Nuclear Material Equipment Corp. (NUMEC) had the same address in Apollo, PA, worked on the same parcel of land, and used the same employment office. Hearing Transcript (HT)-8. You also testified that the merger documents between Decontamination Corp. and NUMEC show that the same person owned both companies because the same person signed as president of both companies in the merger documents. HT-10. You submitted the following exhibits as evidence to support your claim:

Exhibit 1 Commonwealth of Pennsylvania Department of State Corporation Bureau Articles of Merger which document the April 26, 1974 merger between NUMEC and Nuclear Decontamination Corp., June 23, 1959 Nuclear Decontamination Corp. Articles of Incorporation and Certificate of Incorporation.

Exhibit 2 Commonwealth of Pennsylvania Department of State Corporation Bureau Articles of Merger which document the January 9, 1975 merger between NUMEC and the Babcock & Wilcox Company, January 9, 1975 NUMEC Certificate of Withdrawal from doing business in PA, April 12, 1967 NUMEC application for Certificate of Authority, and April 12, 1967 Certificate of Authority issued to NUMEC to transact business in PA.

Exhibit 3 Copy of Pennsylvania Department of State microfilm document showing that Nuclear Decontamination Corp. merged with NUMEC.

The merger documents you submitted indicate that Nuclear Decontamination Corp. (NDC) was a wholly-owned subsidiary of NUMEC. (The merger documents show that at the time of the merger, NUMEC owned all of NDC's outstanding shares of Common Stock.) Wholly-owned subsidiaries are companies in their own right that share an affiliation with a parent company, but operate as a separate functional entity and provide for employees in accordance with their own distinct corporate administrative policies and regulations. Due to the separate and distinct nature of a wholly-owned subsidiary and the strict regulatory and statutory definition of an Atomic Weapons Employer (AWE) facility, a wholly owned subsidiary of a DOE-designated AWE that is not itself designated as an AWE by the DOE can not be considered an AWE.[1]

After considering the written record of the claim, your letter of objection and the testimony presented at the hearing, the FAB hereby makes the following:

FINDINGS OF FACT

1. You filed a claim for survivor benefits under Part B of the EEOICPA on August 9, 2001.

2. Your husband was employed at Nuclear Decontamination Corp. in the first quarter of 1966 and at Allegheny Ludlum Corporation from 1979 to 1985.

3. Your husband was employed at Allegheny Ludlum Steel subsequent to the period it was a designated covered atomic weapons employer. In its June 2004 *Report on Residual Radioactive and*

Beryllium Contamination at Atomic Weapons Employer Facilities and Beryllium Vendor Facilities, the National Institute for Occupational Safety and Health (NIOSH) determined that there was little potential for significant residual contamination outside of the period in which weapons-related production occurred.

4. Nuclear Decontamination Corp. is not a covered facility under the EEOICPA. While NDC may have been a wholly-owned subsidiary of NUMEC, it was a separate, distinct corporation at the time of your husband's employment.

5. Your husband was diagnosed with malignant melanoma on May 24, 1985.

6. Your husband died on January 16, 1986 due to malignant melanoma.

7. You are the surviving spouse of **[Employee]**.

Based on the above-noted findings of fact in this claim, the FAB hereby makes the following:

CONCLUSIONS OF LAW

Section 30.310(a) of the EEOICPA implementing regulations provide that, "Within 60 days from the date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision, including the Health and Human Service's reconstruction of the radiation dose to which the employee was exposed (if any), and whether a hearing is desired." 20 C.F.R. § 30.310(a). At your request a hearing was held on November 10, 2004.

Part B of the Energy Employees Occupational Illness Compensation Program Act was established to provide compensation benefits to covered employees (or their eligible survivors) who have been diagnosed with designated occupational illnesses incurred as a result of their exposure to radiation, beryllium, or silica, while in the performance of duty for Department of Energy and certain of its vendors, contractors and subcontractors. "Occupational illness" is defined in § 7384l(15) of the EEOICPA, as a covered beryllium illness, cancer referred to in section 7384l(9)(B)[2] of this title, specified cancer, or chronic silicosis, as the case may. 42 U.S.C. §§ 7384l(15), 7384l(9)(B). To be eligible for compensation for cancer under Part B of the EEOICPA, an employee either must be: a DOE employee, a DOE contractor employee or an atomic weapons employee who contracted cancer (that has been determined pursuant to guidelines promulgated by Health and Human Services, "to be at least as like as not related to such employment"), after beginning such employment. *See* 42 U.S.C. § 7384l(9)(2); 20 C.F.R. § 30.210.

The evidence of record establishes that your husband was employed by Allegheny-Ludlum Steel from 1979 to 1985. Allegheny-Ludlum Steel was a covered Atomic Weapons Employer from 1950 to 1952. [3] Pursuant to 42 U.S.C. § 7384l(3), an "atomic weapons employee" is defined as:

> (A) An individual employed by an atomic weapons employer during a period when the employer was processing or producing, for the use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining and milling.
> (B) An individual employed—

(i) at a facility with respect to which the National Institute for Occupational Safety and Health, in its report dated October 2003 and titled “Report on Residual Radioactive and Beryllium Contamination at Atomic Weapons Employer Facilities and Beryllium Vendor Facilities”, or any update to that report, found that there is a potential for significant residual contamination outside of the period in which weapons-related production occurred;
(ii) by an atomic weapons employer or subsequent owner or operators of a facility described in clause (i); and
(iii) during a period, as specified in such report or any update to such report, of potential for significant residual radioactive contamination at such facility.

The June 2004 NIOSH *Report on Residual Radioactive and Beryllium Contamination at Atomic Weapons Employer Facilities and Beryllium Vendor Facilities*, does not support a period for potential significant residual contamination at Allegheny Ludlum Steel subsequent to the covered period; therefore your husband’s employment at that facility is not covered employment under the EEOICPA. Any work performed by NDC for NUMEC during the period your husband was employed, by NDC, would be viewed as work performed by a contractor of a designated AWE.[4] AWE contractor employees are not covered under the EEOICPA. *See* 42 U.S.C. §§ 7384l(1), 7384l(3), 7384l(4) and 7384l(5).

Because you did not submit evidence that establishes your husband was a “covered employee with cancer” as defined at § 7384l(9) of the EEOICPA, your claim for benefits is denied. 42 U.S.C. § 7384l(9).
Washington, DC

Thomasyne L. Hill

Hearing Representative

Final Adjudication Branch

[1] EEOICPA Bulletin No. 04-12 (issued September 16, 2004).

[2] §7384l(9)(B). An individual with cancer specified in subclause (I), (II), or (III) of clause (ii), if and only if that individual is determined to have sustained that cancer in the performance of duty in accordance with section 7384n(b). Clause (ii) references DOE employees, DOE contractor employees and atomic weapons employees who contract cancer after beginning employee at the required facility.

[3] U.S. Department of Energy. *Allegheny-Ludlum Steel*. Time period: 1950-1952. Worker Advocacy Facility List. Available: http://tis.eh.doe.gov/advocacy/faclist/showfacility.cfm. [retrieved November 9, 2004].

[4] EEOICPA Bulletin No. 04-12 (issued September 16, 2004).

Beryllium Illnesses

Beryllium sensitivity

EEOICPA Fin. Dec. No. 12177-2002 (Dep't of Labor, September 17, 2004)

NOTICE OF FINAL DECISION

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

STATEMENT OF THE CASE

On April 1, 2004, you submitted a Form EE-1 (Claim for Employee Benefits under the EEOICPA), to the Portsmouth Resource Center, based on chronic beryllium disease (CBD). You had previously submitted a claim for beryllium sensitivity on October 16, 2001. A previous recommended decision granting medical monitoring for beryllium sensitivity effective October 16, 2001, was issued by the Cleveland district office on April 24, 2002, and a prior final decision affirming this recommended decision was issued by FAB on June 11, 2002.

You also had previously submitted a Form EE-3 (Employment History) that indicated that you worked at the Rocky Flats Plant in Golden, Colorado from 1990 to 1992 and the Feed Materials Production Center (FMPC) in Fernald, Ohio from 1992 to the present. Both of these facilities are designated by the Department of Energy (DOE) as Department of Energy facilities from 1951 to present and both throughout the course of their operations had the potential for beryllium exposure at the site, due to beryllium use, residual contamination and decontamination activities. *See* The DOE, Office of Worker Advocacy Facility List.

On November 13, 2001, DOE verified your employment at the FMPC from June 1, 1992 to present. The DOE had no records to confirm that you were employed directly by the Rocky Flats Plant.

You submitted medical records, including a lymphocyte transformation test dated August 25, 1995 that showed an abnormal response to beryllium sulfate. A medical report from Lee S. Newman, M.D., F.C.C.P., at National Jewish Medical Center and Research Center, dated February 24, 2004, described a pulmonary function test which demonstrated a progressive gas exchange abnormality which had worsened since 2002 and a CT scan of the thorax that indicated parenchymal findings consistent with chronic beryllium disease. There is also a medical consultation from Milton D. Rossman, M.D., at the University of Pennsylvania Medical Center, dated August 1, 2004, who opined that the findings from the CT scan and the pulmonary function tests performed in February 2004 are both consistent with chronic beryllium disease. Dr. Rossman stated that the specific CT scan findings were that of nodular lesions consistent with granulomas, air trapping and evidence of ground glass abnormalities and that the specific pulmonary function test finding was that of an abnormality of the diffusion capacity.

On August 31, 2004, the Cleveland district office issued a recommended decision concluding that you are a covered beryllium employee as that term is defined by 42 USC § 7384l(7), you were exposed to beryllium in the performance of duty, pursuant to 42 U.S.C. § 7384n, and are shown to have a covered beryllium illness shown in 42 USC § 7384l(8)(B), as you have chronic beryllium disease per the evidentiary criteria shown in 42 U.S.C. § 7384l(13). The district office further concluded that as a covered employee, you are entitled to compensation in the amount of $150,000, pursuant to 42 U.S.C. § 7384s(a)(1). The district office also concluded that pursuant to 42 U.S.C. § 7384s(b), you are also

entitled to medical benefits for chronic beryllium disease, effective June 11, 2002, as those benefits are described in 42 U.S.C. § 7384t.

On September 8, 2004, the Final Adjudication Branch received written notification from you, indicating that you waive any and all rights to file objections to the recommended decision.

FINDINGS OF FACT

1. You filed a claim for employee benefits for chronic beryllium disease on April 1, 2004.

2. You were employed at the Feed Materials Production Center in Fernald, Ohio, a Department of Energy facility, from June 1, 1992 to at least November 13, 2001.

3. You are a covered beryllium employee who worked at Feed Materials Production Center in Fernald, Ohio, during a period when beryllium dust particles or vapor may have been present.

4. On February 24, 2004, you were diagnosed with chronic beryllium disease. The August 25, 1995, results of the beryllium lymphocyte proliferation test in addition to the February 2004 CT scan showing changes consistent with CBD and the February 2004 pulmonary function testing showing pulmonary deficits consistent with CBD, indicate that you have chronic beryllium disease meeting the statutory criteria for a diagnosis on or after January 1, 1993.

5. The effective date of medical benefits for the CBD is October 16, 2001, the same date as the effective date of medical benefits for the beryllium sensitivity.

CONCLUSIONS OF LAW

In order to be afforded coverage as a "covered beryllium employee," you must show that you were exposed to beryllium while in the performance of duty while employed at a DOE, or under certain circumstances, while present at a DOE facility or a facility owned and operated by a beryllium vendor, during a period when beryllium dust, particles, or vapor may have been present at such a facility. *See* 42 U.S.C. §§ 7384l(7); 7384n(a). Based on your covered employment at the FMPC during a period when beryllium dust, particles or vapor may have been present, you were exposed to beryllium in the performance of duty.

In addition, there must be medical documentation of the condition in order to be eligible for benefits based on chronic beryllium disease. The requirements for diagnoses on or after January 1, 1993 are: the employee must have beryllium sensitivity [based on a positive lymphocyte proliferation test], together with lung pathology consistent with chronic beryllium disease, including—a lung biopsy showing granulomas or a lymphocytic process consistent with chronic beryllium disease; a computerized axial tomography scan (CT) showing changes consistent with chronic beryllium disease; or pulmonary function or exercise testing showing pulmonary deficits consistent with chronic beryllium disease. *See* 42 U.S.C. § 7384l(13)(A).

The record contains the results of your BeLPT test showing an abnormal response to beryllium sulfate, and the findings from the CT scan and pulmonary function test which are consistent with a diagnosis of CBD. *See* 42 U.S.C. § 7384l(13)(A).

You are a "covered beryllium employee" as defined in § 7384l(7) of the Act, who was exposed to beryllium in the performance of duty as defined in § 7384n(a) of the EEOICPA. *See* 42 U.S.C. §§ 7384l(7); 7384n(a). Further, the medical evidence shows the presence of CBD, as provided for in § 7384l(13)(A) of the Act. *See* 42 U.S.C. § 7384l(13)(A).

For the foregoing reasons, the undersigned hereby approves your claim for CBD. You are entitled to compensation in the amount of $150,000, pursuant to § 7384s(a) of the EEOICPA. *See* 42 U.S.C. § 7384s(a).

The Final Adjudication Branch notes that the district office in their recommended decision concluded that you were entitled to medical benefits for CBD from June 11, 2002, the date of the Final Decision which affirmed your entitlement to medical monitoring for beryllium sensitivity. The Final Adjudication Branch finds that you are entitled to medical benefits for CBD from October 16, 2001, which is the same medical status effective date for the beryllium sensitivity. Therefore, you are entitled to reimbursement of medical expenses related to your condition of CBD, retroactive to October 16, 2001. *See* 42 U.S.C. § 7384t; 20 C.F.R. § 30.400(a).

Cleveland, Ohio

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Debra A. Benedict

Acting District Manager

Final Adjudication Branch

EEOICPA Fin. Dec. No. 12177-2002 (Dep't of Labor, September 17, 2004)

NOTICE OF FINAL DECISION

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

STATEMENT OF THE CASE

On April 1, 2004, you submitted a Form EE-1 (Claim for Employee Benefits under the EEOICPA), to the Portsmouth Resource Center, based on chronic beryllium disease (CBD). You had previously submitted a claim for beryllium sensitivity on October 16, 2001. A previous recommended decision granting medical monitoring for beryllium sensitivity effective October 16, 2001, was issued by the Cleveland district office on April 24, 2002, and a prior final decision affirming this recommended decision was issued by FAB on June 11, 2002.

You also had previously submitted a Form EE-3 (Employment History) that indicated that you worked at the Rocky Flats Plant in Golden, Colorado from 1990 to 1992 and the Feed Materials Production Center (FMPC) in Fernald, Ohio from 1992 to the present. Both of these facilities are designated by the

Department of Energy (DOE) as Department of Energy facilities from 1951 to present and both throughout the course of their operations had the potential for beryllium exposure at the site, due to beryllium use, residual contamination and decontamination activities. *See* The DOE, Office of Worker Advocacy Facility List.

On November 13, 2001, DOE verified your employment at the FMPC from June 1, 1992 to present. The DOE had no records to confirm that you were employed directly by the Rocky Flats Plant.

You submitted medical records, including a lymphocyte transformation test dated August 25, 1995 that showed an abnormal response to beryllium sulfate. A medical report from Lee S. Newman, M.D., F.C.C.P., at National Jewish Medical Center and Research Center, dated February 24, 2004, described a pulmonary function test which demonstrated a progressive gas exchange abnormality which had worsened since 2002 and a CT scan of the thorax that indicated parenchymal findings consistent with chronic beryllium disease. There is also a medical consultation from Milton D. Rossman, M.D., at the University of Pennsylvania Medical Center, dated August 1, 2004, who opined that the findings from the CT scan and the pulmonary function tests performed in February 2004 are both consistent with chronic beryllium disease. Dr. Rossman stated that the specific CT scan findings were that of nodular lesions consistent with granulomas, air trapping and evidence of ground glass abnormalities and that the specific pulmonary function test finding was that of an abnormality of the diffusion capacity.

On August 31, 2004, the Cleveland district office issued a recommended decision concluding that you are a covered beryllium employee as that term is defined by 42 USC § 7384l(7), you were exposed to beryllium in the performance of duty, pursuant to 42 U.S.C. § 7384n, and are shown to have a covered beryllium illness shown in 42 USC § 7384l(8)(B), as you have chronic beryllium disease per the evidentiary criteria shown in 42 U.S.C. § 7384l(13). The district office further concluded that as a covered employee, you are entitled to compensation in the amount of $150,000, pursuant to 42 U.S.C. § 7384s(a)(1). The district office also concluded that pursuant to 42 U.S.C. § 7384s(b), you are also entitled to medical benefits for chronic beryllium disease, effective June 11, 2002, as those benefits are described in 42 U.S.C. § 7384t.

On September 8, 2004, the Final Adjudication Branch received written notification from you, indicating that you waive any and all rights to file objections to the recommended decision.

FINDINGS OF FACT

1. You filed a claim for employee benefits for chronic beryllium disease on April 1, 2004.

2. You were employed at the Feed Materials Production Center in Fernald, Ohio, a Department of Energy facility, from June 1, 1992 to at least November 13, 2001.

3. You are a covered beryllium employee who worked at Feed Materials Production Center in Fernald, Ohio, during a period when beryllium dust particles or vapor may have been present.

4. On February 24, 2004, you were diagnosed with chronic beryllium disease. The August 25, 1995, results of the beryllium lymphocyte proliferation test in addition to the February 2004 CT scan showing changes consistent with CBD and the February 2004 pulmonary function testing showing pulmonary deficits consistent with CBD, indicate that you have chronic beryllium disease meeting the statutory criteria for a diagnosis on or after January 1, 1993.

5. The effective date of medical benefits for the CBD is October 16, 2001, the same date as the effective date of medical benefits for the beryllium sensitivity.

CONCLUSIONS OF LAW

In order to be afforded coverage as a "covered beryllium employee," you must show that you were exposed to beryllium while in the performance of duty while employed at a DOE, or under certain circumstances, while present at a DOE facility or a facility owned and operated by a beryllium vendor, during a period when beryllium dust, particles, or vapor may have been present at such a facility. *See* 42 U.S.C. §§ 7384l(7); 7384n(a). Based on your covered employment at the FMPC during a period when beryllium dust, particles or vapor may have been present, you were exposed to beryllium in the performance of duty.

In addition, there must be medical documentation of the condition in order to be eligible for benefits based on chronic beryllium disease. The requirements for diagnoses on or after January 1, 1993 are: the employee must have beryllium sensitivity [based on a positive lymphocyte proliferation test], together with lung pathology consistent with chronic beryllium disease, including—a lung biopsy showing granulomas or a lymphocytic process consistent with chronic beryllium disease; a computerized axial tomography scan (CT) showing changes consistent with chronic beryllium disease; or pulmonary function or exercise testing showing pulmonary deficits consistent with chronic beryllium disease. *See* 42 U.S.C. § 7384l(13)(A).

The record contains the results of your BeLPT test showing an abnormal response to beryllium sulfate, and the findings from the CT scan and pulmonary function test which are consistent with a diagnosis of CBD. *See* 42 U.S.C. § 7384l(13)(A).

You are a "covered beryllium employee" as defined in § 7384l(7) of the Act, who was exposed to beryllium in the performance of duty as defined in § 7384n(a) of the EEOICPA. *See* 42 U.S.C. §§ 7384l(7); 7384n(a). Further, the medical evidence shows the presence of CBD, as provided for in § 7384l(13)(A) of the Act. *See* 42 U.S.C. § 7384l(13)(A).

For the foregoing reasons, the undersigned hereby approves your claim for CBD. You are entitled to compensation in the amount of $150,000, pursuant to § 7384s(a) of the EEOICPA. *See* 42 U.S.C. § 7384s(a).

The Final Adjudication Branch notes that the district office in their recommended decision concluded that you were entitled to medical benefits for CBD from June 11, 2002, the date of the Final Decision which affirmed your entitlement to medical monitoring for beryllium sensitivity. The Final Adjudication Branch finds that you are entitled to medical benefits for CBD from October 16, 2001, which is the same medical status effective date for the beryllium sensitivity. Therefore, you are entitled to reimbursement of medical expenses related to your condition of CBD, retroactive to October 16, 2001. *See* 42 U.S.C. § 7384t; 20 C.F.R. § 30.400(a).

Cleveland, Ohio

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Debra A. Benedict

Acting District Manager

Final Adjudication Branch

EEOICPA Fin. Dec. No. 57708-2004 (Dep't of Labor, October 25, 2004)

NOTICE OF FINAL DECISION

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 for benefits is denied.

STATEMENT OF THE CASE

On May 20, 2004, 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 an Atomic Weapons Employer (AWE) at an AWE facility. You stated on the Form EE-1 that you were filing for asbestosis, kidney failure, heart disease and beryllium sensitivity.

On the Form EE-3, Employment History, you stated you were employed as a yard and garage foreman by Bethlehem Steel Company at Bethlehem Steel, Lackawanna, New York, from 1949 to 1983.

In letters dated May 28, 2004 and July 20, 2004, the district office informed you of the covered medical conditions under the Act, the medical requirements to establish these conditions, and requested you to submit such medical evidence and evidence of employment at Bethlehem Steel. The letters also informed you that beryllium sensitivity is not compensable in cases where the only employment claimed is with an Atomic Weapons Employer (such as Bethlehem Steel), and provided you time to respond. The district office did not receive any response to the letters.

On August 19, 2004, the Cleveland district office issued a recommended decision denying your claim, finding no evidence to establish a covered occupational illness under the Act.

Attached to the recommended decision was a notice of claimant rights, which stated that you had 60 days in which to file an objection to the recommended decision and/or request a hearing. You were also advised that, if there was no timely objection filed, the recommended decision would be affirmed and you would be deemed to have waived the right to challenge the decision. This 60-day period expired on October 18, 2004.

The implementing regulations provide that "Within 60 days from the date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision, including HHS's reconstruction of the radiation dose to which the employee was exposed (if any), and whether a hearing is desired." 20 C.F.R. § 30.310(a). The implementing regulations further state that, "If the claimant does not file a written statement that objects to the recommended decision and/or requests a hearing with the period of time allotted in section 30.310, or if the claimant waives any objections to all or part of the recommended decision, the FAB will issue a decision accepting the recommendation of the district office, either in

whole or in part." 20 C.F.R. § 30.316(a). In this case, you did not file any objections to the recommended decision or a request for a hearing.

FINDINGS OF FACT

1. On May 20, 2004, you filed a Form EE-1, Claim for Benefits under the EEOICPA, based on asbestosis, kidney failure, heart disease and beryllium sensitivity.

2. You claimed employment at Bethlehem Steel, Lackawanna, New York, from 1949 to 1983. Bethlehem Steel is designated an Atomic Weapons Employer under the Act.

3. No medical evidence was submitted in support of the claim.

4. On August 19, 2004, the Cleveland district office issued a recommended decision denying your claim, finding no evidence to establish a covered occupational illness under the Act.

CONCLUSIONS OF LAW

Based on my review of the evidence of record and the recommended decision, I find that the recommended decision is correct and I accept those findings and the recommendation. I further find that no medical evidence was submitted of beryllium sensitivity or other covered occupational illness, and beryllium sensitivity is not compensable with employment only for an Atomic Weapons Employer. 42 U.S.C. §§ 7384l(8), 7384l(15), 7384l(7), 7384n(a).
Jacksonville, FL

J. Mark Nolan

Hearing Representative

EEOICPA Fin. Dec. No. 58229-2004 (Dep't of Labor, September 17, 2004)

NOTICE OF FINAL DECISION

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

STATEMENT OF THE CASE

On June 7, 2004, you submitted Form EE-1, Claim for Employee Benefits under the EEOICPA, based on beryllium sensitivity. You also submitted Form EE-3, Employment History for Claim under the EEOICPA, based on your employment at the Nevada Test Site (NTS), indicating you worked for EG&G from 1990 to 1991.
A representative of the Department of Energy (DOE) verified your employment at NTS from September 17, 1990 to November 4, 1991. NTS is recognized as a covered Department of Energy (DOE) facility from 1951 to the present. Throughout the course of its operations, the potential for beryllium exposure existed at NTS, due to beryllium use, residual contamination, and decontamination

activities. *See* DOE, Office of Worker Advocacy, Facility List.
You submitted the results of an abnormal beryllium lymphocyte proliferation test performed by National Jewish Medical and Research Center, dated March 27, 2004, which confirms your sensitivity to beryllium.
On August 11, 2004, the Seattle district office issued a recommended decision concluding that you are a covered beryllium employee, as defined in § 7384l(7) of the EEOICPA, who has been diagnosed with beryllium sensitivity, a covered occupational illness as defined by § 7384l(8)(A) of the Act. *See* 42 U.S.C. § 7384l(7), (8)(A). The recommended decision also concluded that, pursuant to § 7384s(c) of the EEOICPA, you are entitled to medical benefits for the treatment and monitoring of beryllium sensitivity retroactive to June 7, 2004. *See* 42 U.S.C. § 7384s(c)(1) and (2), 20 C.F.R. §§ 30.506, 30.507.
On September 7, 2004, the Final Adjudication Branch received written notification that you waive any and all rights to file objections to the recommended decision.

FINDINGS OF FACT

1. You filed a claim for employee benefits on June 7, 2004.

2. You were employed at NTS, a covered DOE site, from September 17, 1990 to November 4, 1991.

3. You are a covered beryllium employee who was present at NTS during a period when beryllium dust, particles or vapor may have been present.

4. You were diagnosed with beryllium sensitivity on March 27, 2004.

5. The onset of beryllium sensitivity occurred after your initial exposure to beryllium during a period of covered employment.

CONCLUSIONS OF LAW

In order to be afforded coverage as a "covered beryllium employee," you must show that you sustained occupational exposure to beryllium while employed at a DOE facility, or under certain circumstances, while present at a DOE facility or a facility owned, operated, or occupied by a beryllium vendor, during a period when beryllium dust, particles or vapor may have been present at such a facility. *See* 42 U.S.C. §§ 7384l(7) and 7384n(a)(1).
In addition, under § 7384l(8) of the Act, the covered beryllium employee must have medical evidence to show a diagnosis of beryllium sensitivity using an abnormal beryllium lymphocyte proliferation test (LPT) performed on either blood or lung lavage cells. *See* 42 U.S.C. § 7384l(8); 20 C.F.R. § 30.205(b).
Based on your employment with a DOE contractor or subcontractor at NTS, you are a covered beryllium employee and, in the absence of substantial evidence to the contrary, you are determined to have been exposed to beryllium in the performance of duty. *See* 42 U.S.C. §§ 7384l(7), 7384n.

You provided the results of a lymphocyte proliferation test conducted on March 27, 2004 showing that you have an abnormal lymphocyte transformation to beryllium sulfate. Therefore, you have a covered beryllium illness as defined in § 7384l(8)(A) of the EEOICPA. *See* 42 U.S.C. § 7684l(8)(A).

For the foregoing reasons, the undersigned hereby accepts your claim for beryllium sensitivity. You are

a covered beryllium employee as defined in § 7384l(7) of the EEOICPA, diagnosed as having beryllium sensitivity, which is a covered occupational illness as defined by § 7384l(8)(A) of the Act. *See* 42 U.S.C. § 7384l(7), (8)(A).

The EEOICPA provides that a covered employee shall receive, in the case of beryllium sensitivity:

(1) A thorough medical examination to confirm the nature and extent of the individual's established beryllium sensitivity.

(2) Regular medical examinations thereafter to determine whether that individual has developed established chronic beryllium disease.

See 42 U.S.C. § 7384s(c)(1) and (2).

No monetary compensation is available for beryllium sensitivity. *See* 42 U.S.C. § 7384s(a)(2). At this time, you are not entitled to any lump sum payment provided under the Act. *See* 20 C.F.R. §§ 30.506, 30.507 and 30.508.

The record indicates that you filed your claim for beryllium sensitivity on June 7, 2004. The date your claim was filed is the date you became eligible for beryllium sensitivity monitoring, as well as medical benefits for the treatment of beryllium sensitivity. *See* 42 U.S.C. § 7384t(d). Therefore, you are entitled to medical monitoring benefits retroactive to June 7, 2004.

Seattle, Washington

James T. Carender

Hearing Representative, Final Adjudication Branch

EEOICPA Fin. Dec. No. 60001-2005 (Dep't of Labor, March 25, 2005)

NOTICE OF FINAL DECISION

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

On July 26, 2004, you each filed a claim for benefits under the EEOICPA listing beryllium sensitivity and severe lung disease as the medical conditions on which your claim is based. You stated on your employment history form (EE-3) that your father worked for Norton Company in Worchester, Massachusetts from April 10, 1943, to June 30, 1978.

With your claim you submitted various treatment records for your father that covered the time period from October 1993 to August 1998. The majority of these records showed treatment for your father's heart failure. The earliest report is a discharge summary from the Medical Center of Central Massachusetts for the period October 20, 1993 to October 28, 1993, which indicates that your father had a history of coronary artery disease, congestive heart failure, cerebrovascular accident, and chronic obstructive pulmonary disease (COPD). A discharge summary from the Medical Center of Central Massachusetts for the period November 6, 1995 to November 7, 1995, indicates your father had

shortness of breath, bilateral pleural effusions, and interstitial edema, and these findings were felt to be compatible with his congestive heart failure. A chest x-ray dated February 26, 1998, identified focal fibrosis in the right lung base. A chest x-ray dated April 9, 1998, showed bibasal infiltrates, and a small nodule in the left lung. You also submitted a copy of the employee's death certificate showing he died on September 1, 1998, and listed his immediate cause of death as congestive heart failure, and listed diabetes as a contributory cause of death.

On August 9, 2004, and September 10, 2004, the district office informed you that there was insufficient evidence for your claim. You were advised that your claim for beryllium sensitivity is not compensable to survivors, and that the claimed severe lung disease is not an occupational illness covered by the Act. You were advised of the medical evidence required to establish a diagnosis of cancer and chronic beryllium disease under the Act. You were asked to provide medical evidence showing that your father had chronic beryllium disease or cancer. In each letter, the district office requested that you provide such evidence within 30 days.

On September 23, 2004, the district office received a letter from your father's physician, Dr. Tanquay. Dr. Tanquay indicated in this statement, dated September 15, 2004, that your father had been under his care for multiple myeloma prior to his death, and that your father died from this disease on September 1, 1998.

On September 23, 2004, the district requested that Dr. Tanquay provide copies of your father's medical reports and pathology reports that form the basis for the diagnosis of multiple myeloma. The district office requested a reply within 30 days of the letter, but no response was received.

On October 28, 2004, and November 29, 2004, the district office requested that you provide medical evidence sufficient to establish that your father had multiple myeloma. You were also advised of the district office's attempt to obtain the records from Dr. Tanquay, and of his lack of reply. In each letter, you were requested to submit the requested medical evidence within 30 days. There is no evidence in the file to indicate that you responded to the district office's requests.

On January 7, 2005, the district office issued a recommended decision that concluded you did not submit medical evidence sufficient to demonstrate that your father had been diagnosed with an occupational illness as defined in 42 U.S.C. § 7384l(15), specifically multiple myeloma. The recommended decision also concluded that the claim for severe lung disease does not establish that your father is a covered employee, as this condition is not a compensable occupational illness. The recommended decision also concluded that you, as survivors, are not eligible for benefits related to beryllium sensitivity, as outlined under 42 U.S.C. § 7384s. Therefore, it was recommended that benefits under the EEOICPA be denied.

The Department of Labor's regulations provide that: "Within 60 days from the date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision, including HHS's reconstruction of the radiation dose to which the employee was exposed (if any), and whether a hearing is desired." *See* 20 C.F.R. § 30.310(a).

I find that you have not filed any objections to the recommended decision within the 60 days allowed by 20 C.F.R. § 30.310(a). Based on my review of your case record, I find that you did not provide sufficient medical evidence to establish that your father had been diagnosed with an occupational illness covered under Part B of the Act; specifically, the medical evidence submitted was not sufficient to establish a diagnosis of multiple myeloma. In addition, I find that as survivors you are not eligible for benefits related to beryllium sensitivity, as outlined under 42 U.S.C. § 7384s. Therefore, I find that you are not entitled to benefits under Part B of the Act, and that your claims for compensation must be denied.

Cleveland, OH

Debra A. Benedict

District Manager

Final Adjudication Branch

CBD, pre-1993

EEOICPA Fin. Dec. No. 18283-2004 (Dep't of Labor, September 17, 2004)

NOTICE OF FINAL DECISION

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 stated below, this decision reverses the July 20, 2004 recommended denial of benefits, and awards lump sum compensation payment.

STATEMENT OF THE CASE

On December 28, 2001, 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 prostate cancer and asbestosis. Although you did not file a claim for chronic beryllium disease (CBD), the office developed the case to include this covered condition.

On the Form EE-3, Employment History, you stated you were employed as a Pipefitter by B.F. Shaw at the Savannah River Site (SRS). Your employment was verified from August 1, 1952 to October 31, 1954 and from November 1, 1956 to December 31, 1961.

I have reviewed the medical evidence in this case and I find that it is sufficient to establish that you have chronic beryllium disease. For diagnoses before January 1, 1993, according to § 7384l(13) of the Act, the term "established chronic beryllium disease" means chronic beryllium disease as established by the presence of occupational or environmental history, or epidemiologic evidence of beryllium exposure; and, any three of the following criteria:

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

(2) Restrictive or obstructive lung physiology testing or diffusing lung capacity defect;

(3) Lung pathology consistent with chronic beryllium disease;

(4) Clinical course consistent with a chronic respiratory disorder;

(5) Immunologic tests showing beryllium sensitivity.

Applying these specific statutory requirements to this case, the district office determined that the employee had over eight years of potential exposure to beryllium at the Savannah River Site. They also determined that you established criteria (2) and (4) by submitting an April 17, 1995 spirometry test, which showed mild obstruction, and a medical report showing that you had been treated for coughing and chronic bronchitis prior to 1993.

You had also submitted x-ray reports; however, the district office was unable to determine whether the x-ray results showed abnormalities characteristic of CBD. Therefore, the x-ray results were referred to the district medical consultant (DMC) for review and opinion. On October 17, 2003, the DMC opined that the chest x-ray reports were consistent with, but not classic for CBD. He further opined that the most likely etiology to explain the interstitial markings seen on the chest x-ray is asbestosis, not CBD.

The Act's statutory requirement is that the x-ray findings only show abnormalities characteristic of CBD. Therefore the district office accepted the DMC's opinion that the x-rays were consistent with CBD. On April 14, 2004, the district office issued a recommended decision to deny the claim for prostate cancer and asbestosis, and to award you compensation in the amount of $150,000 for chronic beryllium disease (CBD) based on the criteria for a diagnosis prior to January 1, 1993.

On June 30, 2004, the Final Adjudication Branch (FAB) issued a final decision affirming denial of the claim for prostate cancer and asbestosis. However, the FAB found that you had only met 2 of the required 3 criteria necessary to establish a diagnosis of pre-January 1, 1993 CBD. The FAB determined that the medical evidence was sufficient to meet criteria (2) and (4), as noted above, however, they found that the chest x-ray was not consistent with CBD. Therefore, the case was remanded to the district office for them to review the medical evidence and apply the criteria for CBD as set forth in the Act.

On July 20, 2004, the district office issued a recommended decision finding that you had not provided sufficient evidence to establish that you met the criteria for a diagnosis of chronic beryllium disease (CBD) as defined in 42 U.S.C. § 7384l(13). In re-evaluating the evidence of record, and without further development, the district office found that the medical evidence did not show you had a chest x-ray consistent with CBD. This meant you had only met 2 of the required 3 criteria necessary to establish a diagnosis of pre-January 1, 1993 CBD and, consequently, the claim was denied.

The issue in this case is whether the findings on chest x-ray are sufficient to meet the statutory requirement of a characteristic chest x-ray. For a pre-January 1993 diagnosis, the Act very clearly prescribes that criterion (1) is met if the chest x-ray show abnormalities characteristic of CBD. The Act does not require that abnormalities be classic for CBD.[1] The office's medical consultant clearly opined that the x-ray findings are consistent with CBD. Therefore, I find that the chest x-ray establishes the third requirement necessary for a pre-1993 CBD diagnosis.

FINDINGS OF FACT

1. You filed a Form EE-1, Claim for Benefits under the EEOICPA, on December 28, 2001.

2. The medical evidence is sufficient to establish that you have chronic beryllium disease pursuant to § 7384l(13) of the Act. 42 U.S.C. § 7384l(13).

3. You were employed at the Savannah River Site from August 1, 1952 to October 31, 1954 and from November 1, 1956 to December 31, 1961. 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 § 7384l(7) of the Act. 42 U.S.C. § 7384l(7).

4. The district office issued the recommended denial of benefits on July 20, 2004.

5. This decision reverses the July 20, 2004 recommended denial of benefits, and awards lump sum compensation payment.

CONCLUSIONS OF LAW

I find that you are a covered beryllium employee, as that term is defined in § 7384l(7) of the Act; and that your chronic beryllium disease is a covered condition under § 7384l(13) of the Act and § 30.207 of the implementing regulations. 42 U.S.C. §§ 7384l(7), 7384l(13), 20 C.F.R. § 30.207.

This decision reverses the July 20, 2004 recommended denial of benefits, and awards lump sum compensation payment. You are entitled to $150,000 and medical benefits, effective December 28, 2001, for chronic beryllium disease, pursuant to §§ 7384s(a) and 7384t of the EEOICPA. 42 U.S.C. §§ 7384s(a), 7384t.

Jacksonville, FL

James Bibeault

Hearing Representative

[1] In a policy conference call of October 29, 2003, the Branch of Policies, Regulations, and Procedures has clarified that there is no legal difference between the terms "characteristic of" and "consistent with."

EEOICPA Fin. Dec. No. 50214-2005 (Dep't of Labor, March 2, 2005)

FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under Part B of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On October 16, 2003, you filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA) claiming benefits as the spouse of **[Employee]**. You identified the diagnosed condition being claimed as liver cancer (hepatocellular carcinoma). The medical documentation of record shows that your husband was diagnosed with liver cancer on September 15, 2003. Those records also show findings of cirrhosis of the liver. You also indicated that your husband was a member of the Special Exposure Cohort (SEC) based on his employment at the gaseous diffusion plant in Portsmouth, OH.

You submitted a copy of your marriage certificate which shows that you and your husband were wed on February 16, 2000. You also submitted a copy of your husband's death certificate showing that he died on September 20, 2003, and identifying you as his surviving spouse. The death certificate shows the cause of death as respiratory failure due to cirrhosis of the liver and cancer of the liver.

You also provided a Form EE-3 (Employment History) in which you stated that your husband worked for GAT, Lockheed Martin Marietta, and USEC from April 19, 1976, to September 20, 2003. You did

not indicate the location of your husband's employment. The Department of Energy (DOE) verified that he worked at the Portsmouth Gaseous Diffusion Plant (GDP) from April 19, 1976, to September 20, 2003. The Portsmouth GDP is recognized as a covered DOE facility from 1954 to July 28, 1998; from July 29, 1998 to the present for remediation; and from May 2001 to the present in cold standby status. *See* DOE, Office of Worker Advocacy, Facility List.

To determine the probability of whether your husband sustained cancer in the performance of duty, the Cleveland district office referred your claim to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction in accordance with 20 C.F.R. § 30.115. On November 29, 2004, you signed Form OCAS-1, indicating that you had reviewed the NIOSH Draft Report of Dose Reconstruction and agreeing that it identified all of the relevant information provided to NIOSH. On December 9, 2004, the district office received the final NIOSH Report of Dose Reconstruction. Using the information provided in this report, the district office utilized the Interactive RadioEpidemiological Program (IREP) to determine the probability of causation of your husband's cancer and reported in its recommended decision that there was a 42.16% probability that liver cancer was caused by radiation exposure at the Portsmouth GDP.

On December 20, 2004, the Cleveland district office recommended denial of your claim for compensation finding that the employee's cancer was not "at least as likely as not" (a 50% or greater probability) caused by radiation doses incurred while employed at the Portsmouth GDP. The district office concluded that the dose reconstruction estimates were performed in accordance with 42 U.S.C. § 7384n(d). Further, the district office concluded that the probability of causation was completed in accordance with 42 U.S.C. § 7384n(c)(3). The district office also concluded that your husband does not qualify as a covered employee with cancer as defined in 42 U.S.C. § 7384l(9)(B). The district office noted that your husband's liver cancer cannot be a "specified cancer" because cirrhosis is also indicated by the evidence of record. Lastly, the district office concluded that you are not entitled to compensation, as outlined under 42 U.S.C. § 7384s.

FINDINGS OF FACT

1. You filed a claim for benefits on October 16, 2003.

2. Your husband worked at Portsmouth GDP, a covered DOE facility, from April 19, 1976, to September 20, 2003.

3. Your husband was diagnosed with liver cancer on September 15, 2003. The medical evidence also indicated findings of cirrhosis.

4. The NIOSH Interactive RadioEpidemiological Program indicated a 42.16% probability that your husband's liver cancer was caused by radiation exposure at the Portsmouth GDP.

5. Your husband's cancer was not at least as likely as not related to his employment at a DOE facility

6. You are the surviving spouse of **[Employee]** and were married to him for at least one year immediately prior to his death.

CONCLUSIONS OF LAW

I have reviewed the recommended decision issued by the Cleveland district office on December 20, 2004. I find that you have not filed any objections to the recommended decision and that the sixty-day period for filing such objections has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

You filed a claim based on liver cancer. Under the EEOICPA, a claim for cancer must be demonstrated by medical evidence that sets forth the diagnosis of cancer and the date on which the diagnosis was made. *See* 20 C.F.R. § 30.211. Additionally, in order to be afforded coverage as a "covered employee with cancer," you must show that your husband was a DOE employee, a DOE contractor employee, or an atomic weapons employee, who contracted cancer after beginning employment at a DOE facility or an atomic weapons employer facility. *See* 42 U.S.C. § 7384l(9). The cancer must also be determined to have been sustained in the performance of duty, *i.e*., at least as likely as not related to employment at a DOE facility or atomic weapons employer facility. *See* 42 U.S.C. § 7384n(b).

Using the information provided in the Report of Dose Reconstruction for liver cancer, the district office utilized the NIOSH Interactive RadioEpidemiological Program to determine a 42.16% probability that your husband's cancer was caused by radiation exposure while employed at the Portsmouth GDP. The Final Adjudication Branch (FAB) also analyzed the information in the NIOSH report, confirming the 42.16% probability.

You also claimed entitlement to compensation due to your husband's status as a member of the SEC. The FAB finds that the medical evidence of record indicates the presence of cirrhosis of the liver. Based on that finding, your husband's liver cancer cannot be considered a "specified cancer" as defined by 42 U.S.C. § 7384l(17)(A). For that reason, although your husband's employment is sufficient to establish that he is a member of the SEC, he cannot be considered to be a covered employee with cancer as defined by 42 U.S.C. § 7384l(9)(A).

Therefore, your claim must be denied because the evidence does not establish that your husband is a "covered employee with cancer," because his cancer was not determined to be "at least as likely as not" (a 50% or greater probability) related to radiation doses incurred in the performance of duty at the Portsmouth GDP. Additionally, the evidence does not establish that your husband is a "covered employee with cancer," based on SEC membership and liver cancer, because cirrhosis is indicated by the medical evidence of record. *See* 42 U.S.C. § 7384l(1)(B), (9)(A) and (B), and (17)(A).

For the above reasons, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under Part B of the Act. Accordingly, your claim for benefits is denied.

Cleveland, OH

Tracy Smart

Acting FAB Manager

Final Adjudication Branch

EEOICPA Fin. Dec. No. 56382-2004 (Dep't of Labor, 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.

EEOICPA Fin. Dec. No. 59062-2004 (Dep't of Labor, September 13, 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 (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the Final Adjudication Branch accepts and approves your claims for survivor compensation for the condition of chronic beryllium disease.

STATEMENT OF THE CASE

On June 2, 2003, the employee filed a claim for compensation under the EEOICPA based on asbestosis and other lung condition. That claim was recommended for denial by the Seattle district office; however, additional medical documentation was received by the Final Adjudication Branch, who vacated the recommended decision by Remand Order dated September 8, 2003. The district office performed additional development of the medical evidence and recommended acceptance of the claim and medical benefits for chronic beryllium disease and denial of the claim for asbestosis, which was

affirmed by Final Decision of the Final Adjudication Branch on July 6, 2004. Before payment could be issued, however, the employee passed away on June 12, 2004, and the claim was administratively closed. On June 25 (**[Claimant 1, Claimant 2, and Claimant 3]**) and June 28 (**[Claimant 4]**), 2004, you filed claims for survivor benefits under the EEOICPA based on chronic beryllium disease (CBD). A Form EE-3 (Employment History) previously filed by the employee indicated he worked at the Idaho National Environmental and Engineering Laboratory (INEEL) for Keiser Construction from January 1, 1954 to August 30, 1954 and for Phillips Petroleum, Idaho Nuclear, Aerojet General, and EG&G Idaho from October 1, 1954 to March 1, 1992. A representative of the Department of Energy (DOE) verified the worker's employment at INEEL from October 7, 1957 to March 2, 1992. INEEL is recognized as a covered DOE facility, from 1949 to the present, where the potential for beryllium exposure existed throughout the course of its operations because of beryllium use, residual contamination, and decontamination activities. *See* DOE, Office of Worker Advocacy, Facility List.

Medical evidence of record includes a chest x-ray and a CT scan, both dated October 13, 1992, that indicated the employee had multiple pleural plaques, and a chest x-ray, dated May 1, 2002, that indicated emphysematous changes within his lungs, densely calcified pleural plaques on the left lung, and scarring and associated bullous changes within the right lung base. In addition, the record includes a history of a clinical course of treatment of the employee for asbestosis and chronic obstructive pulmonary disease (COPD) dating from October 1992 to March 2003. The employee's pulmonary function test results, from October 13, 1992, showed an FVC of 3.62 and an FEV1 of 1.57, with an FEV1/FVC ratio of 43% before bronchodilators, and an FVC of 4.6 and FEV1 of 1.59 after bronchodilators. The employee's DLCO was markedly diminished at 11.77 or 35% of predicted.

District Medical Consultant Robert E. Sandblom, M.D., reviewed the employee's medical records, in a report dated January 5, 2004, and indicated the claimant had chest radiographic (or CT) abnormalities characteristic of CBD, restrictive or obstructive lung physiology testing or diffusing lung capacity defect, and a clinical course consistent with a chronic respiratory disorder.

You provided copies of your birth certificates that indicate each of you is the natural child of the employee, and copies of the certificates of marriage of **[Claimant 1]** and **[Claimant 4]** documenting your name changes. The file also contains a copy of the employee's certificate of death that indicates the employee was widowed when he passed away on June 12, 2004.

The Seattle district office determined that the employee was a covered beryllium employee as defined in § 7384l(7) of the EEOICPA. *See* 42 U.S.C. § 7384l(7). Further, the Seattle district office determined that the evidence submitted meets the criteria necessary to establish a diagnosis of chronic beryllium disease as defined by § 7384l(13), a covered occupational illness as defined by § 7384l(8)(B). *See* 42 U.S.C. § 7384l(8)(B) and (13). Also, the district office determined that you are the survivors of the employee, as defined by § 7384s(e)(3), and that you are entitled to compensation in the amount of $37,500.00 each pursuant to §§ 7384s(a)(1) and (e)(1) of the EEOICPA. *See* 42 U.S.C. § §7384s(a)(1) and (e)(1). In addition, the district office concluded that you are entitled to reimbursement of medical expenses for the employee's chronic beryllium disease, retroactive to the date he filed his claim, June 2, 2003, through June 12, 2004, the date he passed away.

FINDINGS OF FACT

1. The employee filed a claim for asbestosis and other lung condition, on June 2, 2003.

2. You filed claims for survivor benefits for chronic beryllium disease on June 25 (**[Claimant 1, Claimant 2, and Claimant 3]**) and June 28 (**[Claimant 4]**), 2004.

3. The employee was employed at INEEL, a covered DOE facility, from October 7, 1957 to March 2, 1992.

4. INEEL is recognized as a covered DOE facility, from 1949 to the present, where the potential for beryllium exposure existed throughout the course of its operations because of beryllium use, residual contamination, and decontamination activities.

5. The employee is a covered beryllium employee who worked at INEEL during a period when beryllium dust, particles or vapor may have been present.

6. The findings in the medical evidence are consistent with a diagnosis of chronic beryllium disease based on the statutory criteria for a diagnosis before January 1, 1993.

7. The onset of the employee's chronic beryllium disease on October 13, 1992, occurred after his exposure to beryllium in the performance of duty.

8. The employee passed away on June 12, 2004, and was not survived by a spouse.

9. You are the natural children and survivors of the employee.

CONCLUSIONS OF LAW

On August 20 (**[Claimant 4]**), August 23 (**[Claimant 2 and Claimant 1]**), and September 1 (**[Claimant 3]**), 2004, the Final Adjudication Branch received your written notifications that you waive any and all rights to file objections to the recommended decision.

In order to be afforded coverage under § 7384n(a) of the EEOICPA as a "covered beryllium employee," the employee must have worked for a beryllium vendor and sustained occupational exposure to beryllium while:

(1) employed at a Department of Energy facility; or

(2) present at Department of Energy facility, or a facility owned and operated by a beryllium vendor, because of employment by the United States, a beryllium vendor, or a contractor or subcontractor of the Department of Energy;

during a period when beryllium dust, particles, or vapor may have been present at such a facility. Further, the requisite exposure must be shown to have been "in the performance of duty," which is presumed, absent substantial evidence to the contrary. *See* 42 U.S.C. § 7384n(a); 20 C.F.R. § 30.205(1), (2) and (3).

In addition, there must be medical documentation of the condition in order to be eligible for survivor's benefits based on 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 radiograph (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 chronic respiratory disorder.

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

See 42 U.S.C. § 7384l(13)(B). Based on the employee's covered employment at a DOE facility, he was exposed to beryllium in the performance of duty. *See* 42 U.S.C. § 7384n(a).

The record contains medical evidence to show a diagnosis of CBD. Medical reports include a chest x-ray and a CT scan that are characteristic of chronic beryllium disease showing that the employee had multiple pleural plaques. The employee also had an abnormal pulmonary function test, and he was treated for lung disease over a period of years. A review of the employee's medical records by District Medical Consultant Robert E. Sandblom, M.D., dated January 5, 2004, indicated the claimant had abnormal chest radiographs characteristic of CBD, restrictive or obstructive lung physiology testing or diffusing lung capacity defect, and a clinical course consistent with a chronic respiratory disorder. This evidence satisfies a required three of five criteria for a diagnosis of chronic beryllium disease before January 1, 1993. *See* 42 U.S.C. § 7384l(13)(B). The medical evidence indicates that a diagnosis of chronic beryllium disease existed at least by October 13, 1992. Consequently, the Final Adjudication Branch has determined that sufficient evidence of record exists to accept your claims for chronic beryllium disease based on the statutory criteria for a diagnosis of chronic beryllium disease before January 1, 1993.

The record includes copies of each of your birth certificates indicating you are each a natural child of the employee, documentation showing the legal change of names of **[Claimant 1]** and **[Claimant 4]**, and a copy of the employee's death certificate that indicates he was widowed at the time of his death.

The employee was a "covered beryllium employee" as defined in § 7384l(7) of the Act, and was exposed to beryllium in the performance of duty as defined in § 7384n(a) of the EEOICPA. *See* 42 U.S.C. §§ 7384l(7); 7384n(a). Further, the medical evidence shows the presence of chronic beryllium disease, as provided for in § 7384l(13)(B) of the Act. *See* 42 U.S.C. § 7384l(13)(B).

For the foregoing reasons, the undersigned hereby accepts your claims for chronic beryllium disease. You are each entitled to compensation in the amount of $37,500.00 pursuant to § 7384s(e)(A) of the Act. *See* 42 U.S.C. § 7384s(e)(A). Further, you are entitled to reimbursement of medical expenses the employee may have incurred, retroactive to the date of his application on June 2, 2003, for the condition of chronic beryllium disease. *See* 42 U.S.C. § 7384t.

Seattle, Washington

James T. Carender

Hearing Representative, Final Adjudication Branch

EEOICPA Fin. Dec. No. 57973-2005 (Dep't of Labor, January 7, 2005)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under Part B of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended, 42 U.S.C. § 7384 *et seq.* (EEOICPA or the Act). This decision affirms the recommended acceptance issued on November 30, 2004.

STATEMENT OF THE CASE

On May 28, 2004, you filed a claim for survivor benefits, as the widow of **[Employee]**, Form EE-2, under Part B of the EEOICPA. You identified 'breathing problems" and chronic beryllium disease (CBD) as the claimed conditions. You also filed a Form EE-3 indicating that your husband was employed by F.H. McGraw at the Paducah Gaseous Diffusion Plant in Paducah, Kentucky from 1951 to "I don't remember." The Department of Energy (DOE) was unable to verify employment, however, they did confirm that F.H. McGraw held a number of contracts, during this time, at the Paducah Site. You submitted Social Security records indicating that your husband was employed by F.H. McGraw from the fourth quarter of 1951 to the third quarter of 1954. Social Security reported maximum reportable earnings ($3600.00) for 1952, 1953 and 1954. The DOE also submitted a "Personnel Clearance Master Card" from F.H. McGraw and Company that indicated **[Employee]** was terminated on December 17, 1954 due to a reduction in force; this notice also indicated that a Q Clearance was granted on February 14, 1952.[1]

Based upon the DOE response that F.H. McGraw held a number of contracts from 1951 to 1954 and the security Q clearance notification, the district concluded that the DOE had a business or contractual arrangement with F.H. McGraw. The district office further concluded that your husband worked with F.H. McGraw at the Paducah Gaseous Diffusion Plant for at least one day on December 17, 1954 based upon the reduction in force notice.[2]

The death certificate submitted showed that **[Employee]** died on October 12, 1999, and the immediate cause of death as congestive heart disease. The death certificate indicated that the surviving spouse was **[Claimant]**. You submitted a marriage certificate showing that **[Employee]** and **[Claimant]** were married on March 23, 1940.

You submitted a medical report dated February 23, 1991, from Lowell F. Roberts, M.D., which indicates a history of chronic obstructive pulmonary disease (COPD), shortness of breath, and dyspnea. A February 23, 1991 X-ray report, from D.R. Hatfield, M.D., indicates a diagnosis of COPD. A February 25, 1991 CT-scan, from Barry F. Riggs, M.D., indicates abnormal nodular densities of the right lower lobe and a diagnosis of COPD. A February 26, 1991 medical report from M.Y. Jarfar, M.D. indicated that pulmonary function tests showed mild obstructive defects and mild diffusing lung capacity defects. You also submitted an X-ray report dated September 6, 1994, from Robert A. Garneau, M.D., that indicated diagnoses of COPD and Interstitial Fibrosis. A November 27, 1994 medical report from David Saxon, M.D., indicated findings of rales and wheezing. A December 2, 1994 medical report from Dr. Saxon, indicates hypoxemia to the left lower lung. A December 2, 1994 medical report from Lowell F. Roberts, M.D., indicated diagnoses of shortness of breath, congestive

heart failure, dyspnea and cough, and rales in the lung base. An August 13, 1995 X-ray report from Charles Bea, M.D., indicates a diagnoses of bibasilar infiltrates. A December 30, 1996 X-ray report from Sharron Butler, M.D., indicates an increase of lung markings since the September 14, 1992 study. In the March 1, 1998 X-ray report from Dr. Butler diagnoses of "advanced chronic lung changes, mild interstitial prominence diffusely, and patch density of the posterior right lung" are indicated. An August 19, 1998 CT-scan from James D. Van Hoose, indicates diagnoses of pleural thickening and pulmonary calcifications. An August 6, 1999 pulmonary function test from William Culberson, M.D. indicates a diagnosis of moderately severe restrictive disease. An October 12, 1999 discharge summary from Eric B. Scowden, M.D. indicates diagnoses of progressive shortness of breath, congestive heart disease, COPD, and history of right-sided empyema complicating pneumonia necessitating prolonged chest tube drainage with a continued open sinus tract." Based upon these reports the district office concluded that you had CBD prior to January 1, 1993.[3]

On November 30, 2004, the district office issued a recommended decision concluding that your husband was a covered beryllium employee, that he was exposed to beryllium, and that he had symptoms and a clinical history similar to CBD prior to January 1, 1993. They further concluded that you are entitled to compensation in the amount of $150,000 pursuant to § 7384s of the EEOICPA.

Section 30.316(a) of the EEOICPA implementing regulations provides that, "if the claimant does not file a written statement that objects to the recommended decision and/or requests a hearing within the period of time allotted in 20 C.F.R. § 30.310, or if the claimant waives any objection to all or part of the recommended decision, the Final Adjudication Branch (FAB) will issue a decision accepting the recommendation of the district office, either whole or in part." 20 C.F.R. § 30.316(a). On December 1, 2004, the FAB received your signed waiver of any and all objections to the recommended decision. After considering the evidence of record, your waiver of objection, and the NIOSH report, the FAB hereby makes the following:

FINDINGS OF FACT

1. You filed a claim for benefits under Part B of the EEOICPA on May 28, 2004.

2. Your husband was employed at the Paducah Gaseous Diffusion Plant for at least one day on December 17, 1954.

3. Medical evidence has been submitted establishing a diagnosis of chronic beryllium disease before January 1, 1993.

4. You were married to the employee from March 23, 1940, until his death on October 12, 1999.

Based on these facts, the undersigned makes the following:

CONCLUSIONS OF LAW

Section 7384s of the Act provides for the payment of benefits to a covered employee, or his survivor, with an "occupational illness," which is defined in § 7384l(15) of the EEOICPA as "a covered beryllium illness, cancer. . .or chronic silicosis, as the case may be." 42 U.S.C. §§ 7384l(15) and 7384s. 42 U.S.C. § 7384l.

Pursuant to § 7384l(13)(B) of the EEOICPA, to establish a diagnosis of CBD before January 1, 1993, the employee must have had "an occupational or environmental history, or epidemiologic evidence of beryllium exposure; and (iii) 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)." 42 U.S.C. § 7384l(13)(B).

The evidence of record establishes that the employee was a covered beryllium employee who had at least three of the five necessary medical criteria to establish pre-1993 CBD under the EEOICPA. Therefore, you have provided sufficient evidence to establish that your husband was diagnosed with pre-1993 CBD, pursuant to § 7384l(13)(B) of the EEOICPA.

The undersigned has reviewed the facts and the district office's November 30, 2004 recommended decision and finds that you are entitled to $150,000 in compensation.

The decision on the claim that you filed under Part E of the EEOICPA is being deferred until issuance of the Interim Final Regulations.

Washington, DC

Tom Daugherty

Hearing Representative

Final Adjudication Branch

[1] The Paducah Gaseous Diffusion Plant was a DOE facility from 1952 to July 28, 1998 and July 29, 1998 to present (remediation) where radioactive and beryllium material were present, according to the Department of Energy Office of Worker Advocacy Facility List (http://www.hss.energy.gov/HealthSafety/FWSP/Advocacy/faclist/findfacility.cfm).

[2] Per Chapter 2-100.3h (January 2002) of the Federal (EEOICPA) Procedure Manual, "The OWCP may receive evidence from other sources such as other state and federal agencies" to support a claim under the EEOICPA.

[3] Per Chapter 2-700.4 (September 2004) of the Federal (EEOICPA) Procedure Manual, "To determine whether to use the Pre or Post 1993 CBD criteria, the medical evidence must demonstrate that the employee was either treated for, tested or diagnosed with a chronic respiratory disorder. If the earliest dated document is prior to January 1, 1993, the pre-1993 CBD criteria may be used. Once it is established that the employee had a chronic respiratory disorder prior to 1993, the CE is not limited to use of medical reports prior to 1993 to meet the three of five criteria."

CBD, 1993 forward

EEOICPA Fin. Dec. No. 30568-2005 (Dep't of Labor, September 16, 2005)

FINAL DECISION FOLLOWING A REVIEW OF THE WRITTEN RECORD

This is a decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000. 42 U.S.C. § 7384 *et seq.* Since your attorney-in-fact submitted a letter of objection, but did not specifically request a hearing, a review of the written record was performed, in accordance with the implementing regulations. 20 C.F.R. § 30.312.

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, in accordance with the implementing regulations. 20 C.F.R. § 30.310. In reviewing any objections submitted, the Final Adjudication Branch will review the written record, any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. 20 C.F.R. § 30.313.

For the reasons set forth below, your claim is denied.

STATEMENT OF THE CASE

On May 30, 2002, you filed a Form EE-1, Claim for Benefits under the EEOICPA, for emphysema, and on February 23, 2004, you filed a Form EE-1 for chronic beryllium disease (CBD) and removal of lung in 1958. On the Form EE-3, Employment History, you stated you were employed in Oak Ridge, Tennessee, at the K-25 gaseous diffusion plant with Maxon Construction as an ironworker from 1950/51 to 1954; at the Y-12 plant as a machinist from December 1954 to mid-1955; and at the Oak Ridge National Laboratory (X-10) as a chemical operator from mid 1955 to June 1982. The district office verified employment at Y-12 as December 20, 1954 to October 9, 1955 and at X-10 from October 10, 1955 to July 31, 1982.

On December 2, 2004, the Jacksonville district office recommended acceptance of the claim for CBD based on the statutory criteria for a pre-1993 diagnosis and recommended denial of the claimed emphysema. On January 3, 2005, the Final Adjudication Branch (FAB) issued a remand order, which returned the case to the district office for further development.

In accordance with the remand order, the district office obtained a copy of a lymphocyte proliferation test (LPT) verbally reported to have been normal, and forwarded the evidence of record to a district medical consultant for an opinion whether a finding of pulmonary fibrosis was a characteristic abnormality of CBD on a chest x-ray.

A person exposed to beryllium during the course of employment in specified facilities qualifies as a "covered beryllium employee," as defined in the Act. 42 U.S.C. § 7384l(7). Due to confirmation of your employment in a facility where beryllium was present, you are considered to be a "covered beryllium employee." However, in order for you to receive compensation, you must be diagnosed with a covered beryllium illness, in accordance with § 7384 of the Act and implementing regulations. 42 U.S.C. § 7384l(8), 20 C.F.R. § 30.205. "Covered beryllium illness" is defined in the Act as beryllium sensitivity as established by an abnormal beryllium lymphocyte proliferation test (LPT) performed on either blood or lung lavage cells *or* established chronic beryllium disease. 42 U.S.C. § 7384l(8).

According to § 7384 of the Act, chronic beryllium disease is 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

(iii) 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).

42 U.S.C. § 7384l(13).

On April 29, 2005, the district office received a copy of the lymphocyte proliferation test conducted on January 23, 2003, which contained a finding of a normal response to beryllium sulfate. In light of the report from your physician stating that your steroid use could affect the outcome of the testing, the district office noted that the only situation where a normal LPT could be overridden for acceptance of a post-1993 CBD diagnosis was when a lung tissue biopsy revealed the presence of granulomas consistent with CBD. The lung biopsy on file, from 1958, did not include a finding of granulomas.

Therefore, the claim was also considered under the pre-1993 criteria. The evidence consisted of x-rays denoting abnormalities, obstructive lung physiology testing, and a medical history showing a clinical course consistent with a chronic respiratory condition. However, the chest x-rays which revealed abnormalities were referred to a district medical consultant (DMC), in accordance with policy, to determine if they were characteristic of CBD. In his report of

March 26, 2005, Dr. Robert Sandblom opined that the x-ray reports on file did not show any abnormalities consistent with CBD.

On May 9, 2005, the Jacksonville district office issued a recommended decision to deny the claim for

CBD, emphysema, and a lung abscess, since there was insufficient medical evidence to establish a diagnosis of a covered occupational illness under § 7384 of the Act.

42 U.S.C. § 7384l(15).

Attached to the recommended decision was a notice of claimant rights, which stated that you had 60 days in which to file an objection to the recommended decision and/or request a hearing. These 60 days expired on July 8, 2005. On July 5, 2005, the Final Adjudication Branch received a letter of objection, dated June 30, 2005, from your attorney-in-fact.

OBJECTIONS

In the objection letter, the attorney-in-fact stated that she disagreed with the office procedures which allowed pulmonary fibrosis to be considered characteristic and then not characteristic. She stated that changes such as this should not be implemented in a retroactive manner, since the clarifications of policy appeared to be more restrictive in order to deny claims. She questioned whether the LPT on record would be investigated further since your physician said that your steroid use could alter the results. She said a phone call to the FAB had not been returned; however, there are no records of any telephone calls after the recommended decision was issued.

The district office and Final Adjudication Branch are bound by the policies and procedures in place at the time a claim is adjudicated and are required to review such a claim in light of those current policies. The issue for determination is whether the chest x-rays meet the pre-1993 criteria for a statutory diagnosis of CBD. Since Dr. Sandblom did not specifically mention the chest x-ray report of February 13, 1967 (which the district office used as support for their recommended acceptance in the original decision) in his earlier response, the Final Adjudication Branch requested clarification. In an addendum dated September 15, 2005, Dr. Sandblom explained that the pulmonary fibrosis noted in February 1967 was due to localized scarring “consistent with the prior lobectomy for lung abscess” and stated that “these changes are definitely not consistent with CBD.”

Furthermore, the procedures address the use of a normal LPT in a living claimant: a lung biopsy that confirms the presence of granulomas may override a normal LPT. The district office thoroughly addressed this requirement in the recommended decision, as discussed above. Telephone records in the case file indicate a test kit was to be forwarded to you in May by ORISE. The results of that testing have not been received.

FINDINGS OF FACT

1. On May 30, 2002, you filed a Form EE-1, Claim for Benefits under the EEOICPA, for emphysema, and on February 23, 2004, you filed a Form EE-1 for chronic beryllium disease (CBD) and removal of lung in 1958

2. The district office verified employment at Y-12 as December 20, 1954 to October 9, 1955 and at X-10 from October 10, 1955 to July 31, 1982.

3. The medical evidence does not establish that the employee was diagnosed with a “covered beryllium illness” as defined in the Act.

4. On May 9, 2005, the Jacksonville district office issued a recommended decision to deny compensation and medical benefits for chronic beryllium disease, emphysema, and a lung abscess.

5. On July 5, 2005, the Final Adjudication Branch received a letter of objection from your attorney-in-fact, dated June 30, 2005, and conducted a review of the written record. The objections are insufficient to warrant a change to the recommended decision.

CONCLUSIONS OF LAW

The undersigned has reviewed the facts and the recommended decision issued by the Jacksonville district office on May 9, 2005, and finds that the evidence submitted does not establish that you meet the statutory criteria for a diagnosis of chronic beryllium disease, as defined in the Act, or any other covered occupational illness, as defined in the Act and implementing regulations. 42 U.S.C. §§ 7384l(13), 7384l(15), 20 C.F.R. § 30.5(z). I find that the decision of the district office is supported by the evidence and the law, and cannot be changed based on the objections submitted. As explained in the implementing regulations, "Any claim that does not meet all of the criteria for at least one of these categories as set forth in these regulations must be denied." 20 C.F.R. § 30.110(b). Therefore, I find that you are not entitled to compensation or medical benefits under the Act, and that your claim for compensation must be denied.

Jacksonville, FL

Sidne M. Valdivieso

Hearing Representative

EEOICPA Fin. Dec. No. 30568-2005 (Dep't of Labor, September 16, 2005)

FINAL DECISION FOLLOWING A REVIEW OF THE WRITTEN RECORD

This is a decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000. 42 U.S.C. § 7384 *et seq.* Since your attorney-in-fact submitted a letter of objection, but did not specifically request a hearing, a review of the written record was performed, in accordance with the implementing regulations. 20 C.F.R. § 30.312.

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, in accordance with the implementing regulations. 20 C.F.R. § 30.310. In reviewing any objections submitted, the Final Adjudication Branch will review the written record, any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. 20 C.F.R. § 30.313.

For the reasons set forth below, your claim is denied.

STATEMENT OF THE CASE

On May 30, 2002, you filed a Form EE-1, Claim for Benefits under the EEOICPA, for emphysema, and on February 23, 2004, you filed a Form EE-1 for chronic beryllium disease (CBD) and removal of lung

in 1958. On the Form EE-3, Employment History, you stated you were employed in Oak Ridge, Tennessee, at the K-25 gaseous diffusion plant with Maxon Construction as an ironworker from 1950/51 to 1954; at the Y-12 plant as a machinist from December 1954 to mid-1955; and at the Oak Ridge National Laboratory (X-10) as a chemical operator from mid 1955 to June 1982.
The district office verified employment at Y-12 as December 20, 1954 to October 9, 1955 and at X-10 from October 10, 1955 to July 31, 1982.

On December 2, 2004, the Jacksonville district office recommended acceptance of the claim for CBD based on the statutory criteria for a pre-1993 diagnosis and recommended denial of the claimed emphysema. On January 3, 2005, the Final Adjudication Branch (FAB) issued a remand order, which returned the case to the district office for further development.

In accordance with the remand order, the district office obtained a copy of a lymphocyte proliferation test (LPT) verbally reported to have been normal, and forwarded the evidence of record to a district medical consultant for an opinion whether a finding of pulmonary fibrosis was a characteristic abnormality of CBD on a chest x-ray.

A person exposed to beryllium during the course of employment in specified facilities qualifies as a "covered beryllium employee," as defined in the Act. 42 U.S.C. § 7384l(7). Due to confirmation of your employment in a facility where beryllium was present, you are considered to be a "covered beryllium employee." However, in order for you to receive compensation, you must be diagnosed with a covered beryllium illness, in accordance with § 7384 of the Act and implementing regulations. 42 U.S.C. § 7384l(8), 20 C.F.R. § 30.205. "Covered beryllium illness" is defined in the Act as beryllium sensitivity as established by an abnormal beryllium lymphocyte proliferation test (LPT) performed on either blood or lung lavage cells *or* established chronic beryllium disease. 42 U.S.C. § 7384l(8).

According to § 7384 of the Act, chronic beryllium disease is 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
>
> (iii) 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).

42 U.S.C. § 7384l(13).

On April 29, 2005, the district office received a copy of the lymphocyte proliferation test conducted on January 23, 2003, which contained a finding of a normal response to beryllium sulfate. In light of the report from your physician stating that your steroid use could affect the outcome of the testing, the district office noted that the only situation where a normal LPT could be overridden for acceptance of a post-1993 CBD diagnosis was when a lung tissue biopsy revealed the presence of granulomas consistent with CBD. The lung biopsy on file, from 1958, did not include a finding of granulomas.

Therefore, the claim was also considered under the pre-1993 criteria. The evidence consisted of x-rays denoting abnormalities, obstructive lung physiology testing, and a medical history showing a clinical course consistent with a chronic respiratory condition. However, the chest x-rays which revealed abnormalities were referred to a district medical consultant (DMC), in accordance with policy, to determine if they were characteristic of CBD. In his report of

March 26, 2005, Dr. Robert Sandblom opined that the x-ray reports on file did not show any abnormalities consistent with CBD.

On May 9, 2005, the Jacksonville district office issued a recommended decision to deny the claim for CBD, emphysema, and a lung abscess, since there was insufficient medical evidence to establish a diagnosis of a covered occupational illness under § 7384 of the Act.

42 U.S.C. § 7384l(15).

Attached to the recommended decision was a notice of claimant rights, which stated that you had 60 days in which to file an objection to the recommended decision and/or request a hearing. These 60 days expired on July 8, 2005. On July 5, 2005, the Final Adjudication Branch received a letter of objection, dated June 30, 2005, from your attorney-in-fact.

OBJECTIONS

In the objection letter, the attorney-in-fact stated that she disagreed with the office procedures which allowed pulmonary fibrosis to be considered characteristic and then not characteristic. She stated that changes such as this should not be implemented in a retroactive manner, since the clarifications of policy appeared to be more restrictive in order to deny claims. She questioned whether the LPT on record would be investigated further since your physician said that your steroid use could alter the

results. She said a phone call to the FAB had not been returned; however, there are no records of any telephone calls after the recommended decision was issued.

The district office and Final Adjudication Branch are bound by the policies and procedures in place at the time a claim is adjudicated and are required to review such a claim in light of those current policies. The issue for determination is whether the chest x-rays meet the pre-1993 criteria for a statutory diagnosis of CBD. Since Dr. Sandblom did not specifically mention the chest x-ray report of February 13, 1967 (which the district office used as support for their recommended acceptance in the original decision) in his earlier response, the Final Adjudication Branch requested clarification. In an addendum dated September 15, 2005, Dr. Sandblom explained that the pulmonary fibrosis noted in February 1967 was due to localized scarring "consistent with the prior lobectomy for lung abscess" and stated that "these changes are definitely not consistent with CBD."

Furthermore, the procedures address the use of a normal LPT in a living claimant: a lung biopsy that confirms the presence of granulomas may override a normal LPT. The district office thoroughly addressed this requirement in the recommended decision, as discussed above. Telephone records in the case file indicate a test kit was to be forwarded to you in May by ORISE. The results of that testing have not been received.

FINDINGS OF FACT

1. On May 30, 2002, you filed a Form EE-1, Claim for Benefits under the EEOICPA, for emphysema, and on February 23, 2004, you filed a Form EE-1 for chronic beryllium disease (CBD) and removal of lung in 1958

2. The district office verified employment at Y-12 as December 20, 1954 to October 9, 1955 and at X-10 from October 10, 1955 to July 31, 1982.

3. The medical evidence does not establish that the employee was diagnosed with a "covered beryllium illness" as defined in the Act.

4. On May 9, 2005, the Jacksonville district office issued a recommended decision to deny compensation and medical benefits for chronic beryllium disease, emphysema, and a lung abscess.

5. On July 5, 2005, the Final Adjudication Branch received a letter of objection from your attorney-in-fact, dated June 30, 2005, and conducted a review of the written record. The objections are insufficient to warrant a change to the recommended decision.

CONCLUSIONS OF LAW

The undersigned has reviewed the facts and the recommended decision issued by the Jacksonville district office on May 9, 2005, and finds that the evidence submitted does not establish that you meet the statutory criteria for a diagnosis of chronic beryllium disease, as defined in the Act, or any other covered occupational illness, as defined in the Act and implementing regulations. 42 U.S.C. §§ 7384l(13), 7384l(15), 20 C.F.R. § 30.5(z). I find that the decision of the district office is supported by the evidence and the law, and cannot be changed based on the objections submitted. As explained in the implementing regulations, "Any claim that does not meet all of the criteria for at least one of these categories as set forth in these regulations must be denied." 20 C.F.R. § 30.110(b). Therefore, I find

that you are not entitled to compensation or medical benefits under the Act, and that your claim for compensation must be denied.

Jacksonville, FL

Sidne M. Valdivieso

Hearing Representative

EEOICPA Fin. Dec. No. 55006-2005 (Dep't of Labor, December 7, 2004)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under Part B of 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 in part and deferred in part.

STATEMENT OF THE CASE

On March 3, 2004, you filed a Form EE-1, Claim for Benefits under Part B of 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 lung cancer. On the Form EE-3, Employment History, you stated you were employed at the K-25 gaseous diffusion plant (GDP) in Oak Ridge, Tennessee, for the period of February 24, 1992 to present. The Department of Energy verified this employment as February 24, 1992 and continuing.

Although you did not claim that condition, the district office found that the medical evidence disclosed findings consistent with the diagnosis of chronic beryllium disease (CBD). On November 3, 2004, the Jacksonville district office issued a decision recommending that you are entitled to compensation in the amount of $150,000 for chronic beryllium disease. The district office's recommended decision also concluded that you are entitled to medical benefits effective March 3, 2004 for chronic beryllium disease. The district office deferred a recommendation on the claimed lung cancer, pending dose reconstruction by the National Institute for Occupational Safety and Health (NIOSH). On November 12, 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 that you have chronic beryllium disease. According to 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).

A pathology report dated October 1, 2001, reporting results of a lung biopsy performed on September 28, 2001, revealed focal non-caseating granuloma. Three beryllium lymphocyte proliferation tests (LPT) from mid-2004 were interpreted as being normal. However, Dr. Charles Bruton opined on August 10, 2004 that, even though your LPTs were normal, your open lung biopsy with noncaseating granulomas was consistent with chronic beryllium disease. Based on the post-1993 criteria, the medical evidence supports a finding of chronic beryllium disease.[1]

FINDINGS OF FACT

1. You filed a Form EE-1, Claim for Benefits under Part B of the EEOICPA, on March 3, 2004.

2. The medical evidence is sufficient to establish that you have chronic beryllium disease pursuant to Part B of the Act. 42 U.S.C. § 7384l(13).

3. You were employed at the K-25 GDP for the period of February 24, 1992 and continuing. 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 Part B of the Act. 42 U.S.C. § 7384l(7).

4. The Jacksonville district office issued the recommended decision on November 3, 2004.

5. On November 12, 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 that term is defined in Part B of the Act; and that your chronic beryllium disease is a covered condition under Part B of 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 are entitled to $150,000 and medical benefits effective March 3, 2004, for chronic beryllium disease, pursuant to Part B of the Act. 42 U.S.C. §§ 7384s(a), 7384t.

Jacksonville, FL

Sidne M. Valdivieso

Hearing Representative

[1] Federal (EEOICPA) Procedure Manual, Chapter 2-700.4b(2) (September 2004) states that in claims that contain a normal or borderline LPT and the lung tissue biopsy confirms the presence of granulomas consistent with CBD, the CE may accept the claim for CBD if the treating physician provides a detailed narrative report detailing the history of the claimant's LPT results and steroid use.

EEOICPA Fin. Dec. No. 20120308-50279-1 (Dep't of Labor, May 22, 2012)

EMPLOYEE: **[Name Deleted]**

CLAIMANT: **[Name Deleted]**

FILE NUMBER: **[Number Deleted]**

DOCKET NUMBER: **20120308-50279-1**

DECISION DATE: **May 22, 2012**

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning the above-noted claim for benefits under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons stated below, this claim for survivor benefits under Part B of EEOICPA based on chronic beryllium disease (CBD) is denied.

STATEMENT OF THE CASE

On September 13, 2010, the claimant filed a Form EE-2 claiming survivor benefits as the alleged surviving spouse of **[Employee]**, and alleged that the employee had contracted bladder cancer, colon

cancer, chronic obstructive pulmonary disease (COPD), chronic renal failure, coronary artery disease, and CBD due to his work. On July 1, 2011, FAB issued a final decision accepting this claim under Part E of EEOICPA as the surviving spouse of **[Employee]**. In that decision, FAB found that **[Employee]** was a covered Department of Energy (DOE) contractor employee at the Portsmouth Gaseous Diffusion Plant from March 1, 1954 to September 22, 1954, and awarded the claimant compensation of $125,000.00 under Part E based on the employee's death due to his covered illnesses of COPD and chronic renal failure. On July 12, 2011, FAB issued a second final decision denying the claim for survivor benefits under Part B for bladder cancer and colon cancer, and under Part E based on coronary artery disease and CBD.

The medical evidence submitted in support of the claim included a series of records documenting the employee's treatment history for COPD and other respiratory problems dating back to 2005. A beryllium lymphocyte proliferation test (BeLPT) performed on May 5, 2005 was negative for beryllium sensitivity. The records also contain a series of chest x-rays, computerized tomography (CT) scans and pulmonary function tests, which formed the basis for his diagnosis of COPD. In a report dated November 6, 2008, Dr. Elie Saab raised the issue of whether the employee may have had beryllium sensitivity, but stated that further test data was necessary. A brief one-page report from Dr. Saab dated January 13, 2009 also provides a "problem list" indicating "chronic berylliosis." A coronary consultation report dated April 8, 2009 from Dr. Aaron Adams states that the employee "had tested positive per Dr. Saab for berylliosis" but did not otherwise indicate that such a diagnosis had been confirmed, nor did he cite any test results supporting this diagnosis.

By letters dated December 5, 2011 and January 20, 2012, the district office advised Dr. Saab of the statutory criteria necessary to support a diagnosis of CBD, and asked him to provide a supplemental report explaining whether the employee was diagnosed with CBD. Specifically, Dr. Saab was advised that for diagnoses on or after January 1, 1993, the record must contain a positive LPT performed on either blood or lung lavage cells, as well as lung pathology results consistent with CBD, which may include: (i) a lung biopsy showing granulomas or a lymphocytic process consistent with CBD; (ii) a computerized axial tomography scan showing changes consistent with CBD; or (iii) pulmonary function or exercise testing showing pulmonary deficits consistent with CBD. The district office received no further medical evidence in response to these requests.

On March 8, 2012, the Cleveland district office issued a recommended decision to deny the claim for survivor benefits under Part B based on CBD, concluding that the evidence did not establish a diagnosis of CBD under the post-1993 statutory criteria.

FINDINGS OF FACT

1. The claimant filed a claim for benefits as the surviving spouse of **[Employee]** based on CBD.

2. On July 1, 2011, FAB issued a final decision accepting the claim under Part E of EEOICPA as the surviving spouse of **[Employee]**, based on the employee's death due to the covered illnesses of chronic renal failure and COPD.

3. **[Employee]** was a DOE contractor employee at the Portsmouth Gaseous Diffusion Plant from March 1, 1954 to September 22, 1954.

4. **[Employee]** died on August 28, 2010. The claimant is his surviving spouse.

CONCLUSIONS OF LAW

I have reviewed the evidence of record and the recommended decision issued by the district office on March 8, 2012. I find that no objections to the recommended decision have been filed, and that the 60-day period for filing such objections has expired.

To be entitled to survivor compensation under Part B on the basis of CBD, the evidence must establish that the employee was a DOE contractor employee who was exposed to beryllium in the performance of duty while present at a DOE facility during a period when beryllium dust, particles or vapor may have been present at such a facility. The evidence must also show that the employee was diagnosed with "established chronic beryllium disease." 42 U.S.C. § 7384l(13).

Part B of EEOICPA provides two sets of criteria for meeting the definition of "established chronic beryllium disease." CBD diagnosed after January 1, 1993 is established by abnormal BeLPT results consistent with beryllium sensitivity, together with lung pathology consistent with chronic beryllium disease. Such pathology may be demonstrated by the following: (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. 42 U.S.C. § 7384l(13)(A). CBD diagnosed before January 1, 1993 is established by evidence satisfying any three of the following diagnostic criteria: (i) characteristic chest radiographic (or CT) abnormalities; (ii) restrictive or obstructive lung physiology testing or diffusing lung capacity defect; (iii) lung pathology consistent with chronic beryllium disease; (iv) a clinical course consistent with a chronic respiratory disorder; or (v) immunologic tests showing beryllium sensitivity (skin patch test or beryllium blood test preferred). 42 U.S.C. § 7384l(13)(B).

Under the Program's procedures, the determination as to whether a claim is to be evaluated using the pre-1993 or post-1993 criteria must be based on the totality of the evidence, taking into account when the employee was tested for, diagnosed with or treated for a chronic respiratory disorder. Federal (EEOICPA) Procedure Manual, Chapter 2-1000.6 (October 2009). On review of the evidence in the file, I find that the file lacks any evidence that the employee underwent treatment for a chronic respiratory disorder prior to 1993. Therefore, the post-1993 criteria are applicable to this case. Since the record lacks any abnormal BeLPT results showing that the employee was diagnosed with beryllium sensitivity, it is not sufficient to support a diagnosis of established chronic beryllium disease under Part B.

Accordingly, this claim for survivor benefits under Part B based on CBD is denied.

Cleveland, OH

Greg Knapp

Hearing Representative

Final Adjudication Branch

Consequential conditions

EEOICPA Fin. Dec. No. 19516-2004 (Dep't of Labor, 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).

Burden of Proof

Acceptance under former Part D

EEOICPA Fin. Dec. No. 10000216-2005 (Dep't of Labor, March 4, 2005)

NOTICE OF FINAL DECISION

This decision of the Final Adjudication Branch (FAB) concerns 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). Your claim for medical benefits under Part E of the Act is hereby accepted.

On February 24, 2005, the Jacksonville district office issued a recommended decision finding that you are a covered employee and were employed at a Department of Energy (DOE) facility by a DOE contractor in accordance with 42 U.S.C. § 7385s(1); and that you are entitled to medical benefits in accordance with 42 U.S.C. § 7385s-8 for the condition of lung scarring related to asbestosis. Consequently, the district office concluded that you are entitled to medical benefits in accordance with 42 U.S.C. § 7385s-4(b). On March 3, 2005, the Final Adjudication Branch received your written notification that you waive any and all objections to the recommended decision.

The evidence of record establishes that your application meets the statutory criteria for compensability for medical benefits as defined in Part E of the EEOICPA. In this instance, the evidence confirms that you had covered employment with Union Carbide Corporation and Martin Marietta Energy Systems in Oak Ridge, Tennessee at the Y-12 plant from July 13, 1970 to March 30, 1975; at the K-25 gaseous diffusion plant from March 31, 1975 to July 31, 1982; and at the Y-12 plant from August 1, 1982 to September 15, 1994, and supports a causal connection between your condition and your work-related exposure to a toxic substance at a DOE facility. Specifically, the evidence of record establishes that a Physicians Panel review under former Part D of the EEOICPA has been completed, and that the

Secretary of Energy accepted the Panel's affirmative determination of your covered illness at a DOE facility. This evidence establishes your entitlement to medical benefits under Part E of the EEOICPA.

The Final Adjudication Branch hereby finds that **[Employee]** is a covered employee as defined in 42 U.S.C. § 7385s(1), and contracted lung scarring related to asbestosis due to work-related exposure to a toxic substance at a DOE facility. Therefore, the Final Adjudication Branch hereby concludes that you are entitled to medical benefits effective November 8, 2001 under Part E of the EEOICPA for lung scarring related to asbestosis. Adjudication of your potential entitlement to additional compensation (based on wage loss and/or impairment) is deferred until after the effective date of the Interim Final Regulations.

Jacksonville, FL

Sidne M. Valdivieso

Hearing Representative

EEOICPA Fin. Dec. No. 10002490-2005 (Dep't of Labor, July 8, 2005)

FINAL DECISION FOLLOWING A REVIEW OF THE WRITTEN RECORD

This is a 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.* For the reasons set forth below, your claim is accepted in part and deferred in part. Since you submitted a letter of objection, but did not specifically request a hearing, a review of the written record was performed, in accordance with the implementing regulations. 20 C.F.R. § 30.312.

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, in accordance with the implementing regulations. 20 C.F.R. § 30.310. In reviewing any objections submitted, the Final Adjudication Branch will review the written record, any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case.

STATEMENT OF THE CASE

On December 16, 2001, according to the Paducah Resource Center, you filed a Claim for Benefits under the EEOICPA, for beryllium sensitivity, chronic beryllium disease, brain tumor, bronchitis, and pneumonia. On the Form EE-3, Employment History, you stated you were employed as a senior lab analyst by Union Carbide and Martin Marietta at the gaseous diffusion plant in Paducah, Kentucky, for the period of January 7, 1975 to January 19, 1986. The evidence of record establishes you worked for Union Carbide and Martin Marietta at the gaseous diffusion plant in Paducah, Kentucky, for the period of January 7, 1975 to January 19, 1986.
A previous Final Decision was issued by the Department of Labor on May 29, 2002, denying your claim for compensation because you did not provide medical evidence sufficient to establish a diagnosis of an occupational illness under the Act. 42 U.S.C. § 7384l(15).

You submitted medical evidence establishing you were diagnosed with bronchitis and pneumonia. A Physicians Panel review under former Part D of the Act has been completed. The Secretary of Energy accepted the Panel's affirmative determination that your bronchitis and pneumonia were due to exposure to a toxic substance at a DOE facility. This supports a finding that you contracted your illnesses through your exposure to a toxic substance at the gaseous diffusion plant in Paducah,

Kentucky, a DOE facility. 42 U.S.C. § 7385s-4(b). On September 28, 2004, the DOE advised you of the Panel's affirmative determination.

On January 31, 2005, you were contacted by the Jacksonville district office and requested to provide additional information. You indicated that you had not received any settlement or award from a lawsuit or workers' compensation claim in connection with the accepted condition.

On March 7, 2005, the Jacksonville district office issued a recommended decision concluding that you are entitled to medical benefits for bronchitis and pneumonia beginning December 16, 2001.

Attached to the recommended decision was a notice of claimant rights, which stated that you had 60 days in which to file an objection to the recommended decision and/or request a hearing. These 60 days expired on May 6, 2005. On April 8, 2005, the Final Adjudication Branch received your letter of objection dated March 29, 2005.

OBJECTIONS

In the letter of objection, you stated that you agreed with the positive determination for bronchitis and pneumonia but disagreed with the negative determination for brain tumor. However, the recommended decision did not address your claim for brain tumor and noted that conditions not accepted by the physicians' panel will be deferred for additional development. The information you submitted will be included in your case file for future reference during development and adjudication of any additional entitlement.

FINDINGS OF FACT

1. On December 16, 2001, you filed a Form EE-1, Claim for Benefits under the EEOICPA, for beryllium sensitivity, chronic beryllium disease, brain tumor, bronchitis, and pneumonia.

2. The evidence of record establishes you worked for Union Carbide and Martin Marietta at the gaseous diffusion plant in Paducah, Kentucky, for the period of January 7, 1975 to January 19, 1986.

3. You submitted medical evidence establishing you were diagnosed with bronchitis and pneumonia. A Physicians Panel review under former Part D of the Act has been completed. The Secretary of Energy accepted the Panel's affirmative determination that your bronchitis and pneumonia were due to exposure to a toxic substance at a DOE facility. This supports a finding that you contracted your illnesses through your exposure to a toxic substance at the gaseous diffusion plant in Paducah, Kentucky, a DOE facility. On September 28, 2004, the DOE advised you of the Panel's affirmative determination.

4. You indicated that you had not received any settlement or award from a lawsuit or workers' compensation claim in connection with the accepted condition.

5. On March 7, 2005 the Jacksonville district office issued a recommended decision.

6. On April 8, 2005, the Final Adjudication Branch received your letter of objection dated March 29, 2005. The objections are insufficient to warrant a change to the recommended decision.

CONCLUSIONS OF LAW

The undersigned has reviewed the record, the recommended decision issued by the Jacksonville district office on March 7, 2005, and the subsequently submitted objections. I find that the decision of the Jacksonville district office is supported by the evidence and the law, and cannot be changed.

The Final Adjudication Branch has reviewed the record and the recommended decision of March 7, 2005 and concludes that you were a DOE contractor employee with bronchitis and pneumonia due to exposure to a toxic substance at a DOE facility. 42 U.S.C. §§ 7385s(1), 7385s-4. Therefore, the Final Adjudication Branch hereby concludes that you are entitled to medical benefits for bronchitis and pneumonia effective December 16, 2001. 42 U.S.C. § 7385s-8.

Jacksonville, FL

Sidne M. Valdivieso

Hearing Representative

EEOICPA Fin. Dec. No. 10002490-2005 (Dep't of Labor, July 8, 2005)

FINAL DECISION FOLLOWING A REVIEW OF THE WRITTEN RECORD

This is a 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.* For the reasons set forth below, your claim is accepted in part and deferred in part. Since you submitted a letter of objection, but did not specifically request a hearing, a review of the written record was performed, in accordance with the implementing regulations. 20 C.F.R. § 30.312.

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, in accordance with the implementing regulations. 20 C.F.R. § 30.310. In reviewing any objections submitted, the Final Adjudication Branch will review the written record, any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case.

STATEMENT OF THE CASE

On December 16, 2001, according to the Paducah Resource Center, you filed a Claim for Benefits under the EEOICPA, for beryllium sensitivity, chronic beryllium disease, brain tumor, bronchitis, and pneumonia. On the Form EE-3, Employment History, you stated you were employed as a senior lab analyst by Union Carbide and Martin Marietta at the gaseous diffusion plant in Paducah, Kentucky, for the period of January 7, 1975 to January 19, 1986. The evidence of record establishes you worked for Union Carbide and Martin Marietta at the gaseous diffusion plant in Paducah, Kentucky, for the period of January 7, 1975 to January 19, 1986.
A previous Final Decision was issued by the Department of Labor on May 29, 2002, denying your claim for compensation because you did not provide medical evidence sufficient to establish a diagnosis of an occupational illness under the Act. 42 U.S.C. § 7384l(15).

You submitted medical evidence establishing you were diagnosed with bronchitis and pneumonia. A

Physicians Panel review under former Part D of the Act has been completed. The Secretary of Energy accepted the Panel's affirmative determination that your bronchitis and pneumonia were due to exposure to a toxic substance at a DOE facility. This supports a finding that you contracted your illnesses through your exposure to a toxic substance at the gaseous diffusion plant in Paducah, Kentucky, a DOE facility. 42 U.S.C. § 7385s-4(b). On September 28, 2004, the DOE advised you of the Panel's affirmative determination.

On January 31, 2005, you were contacted by the Jacksonville district office and requested to provide additional information. You indicated that you had not received any settlement or award from a lawsuit or workers' compensation claim in connection with the accepted condition.

On March 7, 2005, the Jacksonville district office issued a recommended decision concluding that you are entitled to medical benefits for bronchitis and pneumonia beginning December 16, 2001.

Attached to the recommended decision was a notice of claimant rights, which stated that you had 60 days in which to file an objection to the recommended decision and/or request a hearing. These 60 days expired on May 6, 2005. On April 8, 2005, the Final Adjudication Branch received your letter of objection dated March 29, 2005.

OBJECTIONS

In the letter of objection, you stated that you agreed with the positive determination for bronchitis and pneumonia but disagreed with the negative determination for brain tumor. However, the recommended decision did not address your claim for brain tumor and noted that conditions not accepted by the physicians' panel will be deferred for additional development. The information you submitted will be included in your case file for future reference during development and adjudication of any additional entitlement.

FINDINGS OF FACT

1. On December 16, 2001, you filed a Form EE-1, Claim for Benefits under the EEOICPA, for beryllium sensitivity, chronic beryllium disease, brain tumor, bronchitis, and pneumonia.

2. The evidence of record establishes you worked for Union Carbide and Martin Marietta at the gaseous diffusion plant in Paducah, Kentucky, for the period of January 7, 1975 to January 19, 1986.

3. You submitted medical evidence establishing you were diagnosed with bronchitis and pneumonia. A Physicians Panel review under former Part D of the Act has been completed. The Secretary of Energy accepted the Panel's affirmative determination that your bronchitis and pneumonia were due to exposure to a toxic substance at a DOE facility. This supports a finding that you contracted your illnesses through your exposure to a toxic substance at the gaseous diffusion plant in Paducah, Kentucky, a DOE facility. On September 28, 2004, the DOE advised you of the Panel's affirmative determination.

4. You indicated that you had not received any settlement or award from a lawsuit or workers' compensation claim in connection with the accepted condition.

5. On March 7, 2005 the Jacksonville district office issued a recommended decision.

6. On April 8, 2005, the Final Adjudication Branch received your letter of objection dated March 29, 2005. The objections are insufficient to warrant a change to the recommended decision.

CONCLUSIONS OF LAW

The undersigned has reviewed the record, the recommended decision issued by the Jacksonville district office on March 7, 2005, and the subsequently submitted objections. I find that the decision of the Jacksonville district office is supported by the evidence and the law, and cannot be changed.

The Final Adjudication Branch has reviewed the record and the recommended decision of March 7, 2005 and concludes that you were a DOE contractor employee with bronchitis and pneumonia due to exposure to a toxic substance at a DOE facility. 42 U.S.C. §§ 7385s(1), 7385s-4. Therefore, the Final Adjudication Branch hereby concludes that you are entitled to medical benefits for bronchitis and pneumonia effective December 16, 2001. 42 U.S.C. § 7385s-8.

Jacksonville, FL

Sidne M. Valdivieso

Hearing Representative

Claimant's responsibilities

EEOICPA Fin. Dec. No. 366-2002 (Dep't of Labor, June 3, 2003)

NOTICE OF FINAL DECISION - REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq.* The recommended decision was to deny your claim. You submitted objections to that recommended decision. The Final Adjudication Branch carefully considered the objections and completed a review of the written record. *See* 20 C.F.R. § 30.312. The Final Adjudication Branch concludes that the evidence is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On July 31, 2001, you filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA), stating that you were the daughter of **[Employee]**, who was diagnosed with cancer, chronic silicosis, and emphysema. You completed a Form EE-3, Employment History for Claim under the EEOICPA, indicating that from December 2, 1944 to May 30, 1975, **[Employee]** was employed as a heavy mobile and equipment mechanic, for Alaska District, Corps of Engineers, Anchorage, Alaska.

On August 20, 2001, a representative of the Department of Energy (or DOE) indicated that "none of the employment history listed on the EE-3 form was for an employer/facility which appears on the Department of Energy Covered Facilities List." Also, on August 29, 2001, a representative of the DOE stated in Form EE-5 that the employment history contains information that is not accurate. The information from the DOE lacked indication of covered employment under the EEOICPA.

The record in this case contains other employment evidence for **[Employee]**. With the claim for benefits, you submitted a "Request and Authorization for TDY Travel of DOD Personnel" Form DD-1610, initiated on November 10, 1971 and approved on November 11, 1971. **[Employee]** was approved for TDY travel for three days to perform work on Amchitka Island, Alaska, for the Department of Defense, Alaska District Corps of Engineers beginning on November 15, 1971. He was employed as a Mobile Equipment Mechanic WG-12, and the purpose of the TDY was noted "to examine equipment for potential use on Blair Lake Project." The security clearance was noted as "Secret." You also submitted numerous personnel documents from **[Employee]**'s employment with the Alaska District Corp of Engineers. Those documents include a "Notification of Personnel Action" Form SF-50 stating that **[Employee]**'s service compensation date was December 2, 1944, for his work as a Heavy Mobile Equipment Mechanic; and at a WG-12, Step 5, and that he voluntarily retired on May 30, 1975.

The medical documentation of record shows that **[Employee]** was diagnosed with emphysema, small cell carcinoma of the lung, and chronic silicosis. A copy of **[Employee]**'s Death Certificate shows that he died on October 9, 1990, and the cause of death was due to or as a consequence of bronchogenic cancer of the lung, small cell type.

On September 6 and November 5, 2001, the district office wrote to you stating that additional evidence was needed to show that **[Employee]** engaged in covered employment. You were requested to submit a Form EE-4, Employment History Affidavit, or other contemporaneous records to show proof of **[Employee]**'s employment at the Amchitka Island, Alaska site covered under the EEOICPA. You did not submit any additional evidence and by recommended decision dated December 12, 2001, the Seattle district office recommended denial of your claim. The district office concluded that you did not submit employment evidence as proof that **[Employee]** worked during a period of covered employment as required by § 30.110 of the EEOICPA regulations. *See* 20 C.F.R. § 30.110.

On January 15 and February 6, 2002, you submitted written objections to the recommended denial decision. The DOE also forwarded additional employment information. On March 20, 2002, a representative of the DOE provided a Form EE-5 stating that the employment history is accurate and complete. However, on March 25, 2002, a representative of the DOE submitted a "corrected copy" Form EE-5 that indicated that the employment history provided in support of the claim for benefits "contains information that is not accurate." An attachment to Form EE-5 indicated that **[Employee]** was employed by the Army Corps of Engineers for the period July 25, 1944 to August 11, 1952, at Fort Richardson, Alaska; and from August 11, 1952 to May 30, 1975 at Elmendorf Air Force Base, Alaska. Further, the attachment included clarifying information:

Our records show that the Corps of Engineers' was a prime AEC contractor at Amchitka. **[Employee]**'s Official Personnel Folder (OPF) indicates that he was at Forth Richardson and Elmendorf AFB, both in Alaska. The OPF provided no indication that **[Employee]** worked at Amchitka, Alaska. To the best of our knowledge, Blair Lake Project was not a DOE project.

Also, on April 3, 2002, a representative of the DOE submitted a Form EE-5 indicating that Bechtel Nevada had no information regarding **[Employee]**, but he had a film badge issued at the Amchitka Test Site, on November 15, 1971. The record includes a copy of Appendix A-7 of a "Manager's Completion Report" which indicates that the U. S. Army Corps of Engineers was a prime AEC (Atomic Energy Commission) Construction, Operations and Support Contractor, on Amchitka Island, Alaska.

On December 10, 2002, a hearing representative of the Final Adjudication Branch issued a Remand Order. Noting the above evidence, the hearing representative determined that the "only evidence in the record with regard to the Army Corps of Engineers status as a contractor on Amchitka Island is the DOE verification of its listing as a prime AEC contractor . . . and DOE's unexplained and unsupported verification [of **[Employee]**'s employment, which] are not sufficient to establish that a contractual relationship existed between the AEC, as predecessor to the DOE, and the Army Corps of Engineers." The Remand Order requested the district office to further develop the record to determine whether the Army Corps of Engineers had a contract with the Department of Energy for work on Amchitka Island, Alaska, and if the work **[Employee]** performed was in conjunction with that contract. Further the Remand Order directed the district office to obtain additional evidence to determine if **[Employee]** was survived by a spouse, and since it did not appear that you were a natural child of **[Employee]**, if you could establish that you were a stepchild who lived with **[Employee]** in a regular parent-child relationship. Thus, the Remand Order requested additional employment evidence and proof of eligibility under the Act.

On January 9, 2003, the district office wrote to you requesting that you provide proof that the U.S. Army Corps of Engineers had a contract with the AEC for work **[Employee]** performed on his TDY assignment to Amchitka Island, Alaska for the three days in November 1971. Further, the district office requested that you provide proof of your mother's death, as well as evidence to establish your relationship to **[Employee]** as a survivor.

You submitted a copy of your birth certificate that indicated that you were born **[Name of Claimant at Birth]** on October 4, 1929, to your natural mother and natural father **[Natural Mother]** and **[Natural Father]**. You also submitted a Divorce Decree filed in Boulder County Court, Colorado, Docket No. 10948, which showed that your biological parents were divorced on October 10, 1931, and your mother, **[Natural Mother]** was awarded sole custody of the minor child, **[Name of Claimant at Birth]**. In addition, you submitted a marriage certificate that indicated that **[Natural Mother]** married **[Employee]** in the State of Colorado on November 10, 1934. Further, you took the name **[Name of Claimant Assuming Employee's Last Name]** at the time of your mother's marriage in 1934, as indicated by the sworn statement of your mother on March 15, 1943. You provided a copy of a Marriage Certificate to show that on August 19, 1949, you married **[Husband]**. In addition, you submitted a copy of the Death Certificate for **[Name of Natural Mother Assuming Employee's Last Name]** stating that she died on May 2, 1990. The record includes a copy of **[Employee]**'s Death Certificate showing he died on October 9, 1990.

You also submitted the following additional documentation on January 20, 2003: (1) A copy of **[Employee's]** Last Will and Testament indicated that you, **[Claimant]**, were the adult daughter and named her as Personal Representative of the Estate; (2) Statements by Jeanne Findler McKinney and Jean M. Peterson acknowledged on January 17, 2003, indicated that you lived in a parent-child relationship with **[Employee]** since 1945; (3) A copy of an affidavit signed by **[Name of Natural Mother Assuming Employee's Last Name]** (duplicate) indicated that at the time of your mother's marriage to **[Employee]**, you took the name **[Name of Claimant Assuming Employee's Last Name]**.

You submitted additional employment documentation on January 27, 2003: (1) A copy of **[Employee]**'s TDY travel orders (duplicate); (2) A Memorandum of Appreciation dated February 11, 1972 from the Department of the Air Force commending **[Employee]** and other employees, for their support of the Blair Lake Project; (3) A letter of appreciation dated February 18, 1972 from the Department of the Army for **[Employee]**'s contribution to the Blair Lake Project; and (4) Magazine and newspaper articles containing photographs of **[Employee]**, which mention the work performed by the

U.S. Army Corps of Engineers in Anchorage, Alaska.

The record also includes correspondence, dated March 27, 2003, from a DOE representative. Based on a review of the documents you provided purporting that **[Employee]** was a Department of Energy contractor employee working for the U.S. Army Corps of Engineers on TDY in November, 1971, the DOE stated that the Blair Lake Project was not a DOE venture, observing that "[i]f Blair Lake Project had been our work, we would have found some reference to it."

On April 4, 2003, the Seattle district office recommended denial of your claim for benefits. The district office concluded that the evidence of record was insufficient to establish that **[Employee]** was a covered employee as defined under § 7384l(9)(A). *See* 42 U.S.C. § 7384l(9)(A). Further, **[Employee]** was not a member of the Special Exposure Cohort, as defined by § 7384l(14)(B). *See* 42 U.S. C. § 7384l(14)(B). Also, **[Employee]** was not a "covered employee with silicosis" as defined under §§ 7384r(b) and 7384r(c). *See* 42 U.S.C. §§ 7384r(b) and (c). Lastly, the recommended decision found that you are not entitled to compensation under § 7384s. *See* 42 U.S.C. § 7384s.

On April 21, 2003, the Final Adjudication Branch received your letter of objection to the recommended decision and attachments. First, you contended that the elements of the December 10, 2002 Remand Order were fulfilled because you submitted a copy of your mother's death certificate and further proof that **[Employee]** was your stepfather; and that the letter from the district office on April 4, 2003 "cleared that question on page three – quote 'Our records show that the Corps of Engineers was a prime AEC contractor at Amchitka.'"

Second, you stated that further clarification was needed as to the condition you were claiming. You submitted a death certificate for **[Employee]** showing that he died due to bronchogenic cancer of the lung, small cell type, and noted that that was the condition you alleged as the basis of your claim on your first Form, associated with your claim under the EEOICPA.

Third, you alleged that, in **[Employee]**'s capacity as a "Mobile Industrial Equipment Mechanic" for the Army Corps of Engineers, "he was required to work not only for the DOD (Blair Lake project) but also for DOE on the Amchitka program. For example: on March 5, 1968 he was sent to Seward, Alaska to 'Inspect equipment going to Amchitka.' He was sent from the Blair Lake project (DOD) to Seward for the specified purpose of inspecting equipment bound for Amchitka (DOE). Thus, the DOE benefited from my father's [Corp of Engineers] expertise/service while on 'loan' from the DOD. Since the closure of the Amchitka project (DOE), the island has been restored to its original condition. . . . Therefore, my dad's trip to Amchitka to inspect equipment which might have been used at the Blair Lake project benefited not only DOD but also DOE. In the common law, this is known as the 'shared Employee' doctrine, and it subjects both employers to liability for various employment related issues."

On May 21, 2003, the Final Adjudication Branch received your letter dated May 21, 2003, along with various attachments. You indicated that the U.S. Army Corps of Engineers was a contractor to the DOE for the Amchitka Project, based upon page 319 of an unclassified document you had previously submitted in March 2002. Further, you indicated that **[Employee]** had traveled to Seward, Alaska to inspect equipment used at on-site operations for use on Amchitka Island by the Corps of Engineers for the DOE project, and referred to the copy of the Corps of Engineers TDY for Seward travel you submitted to the Final Adjudication Branch with your letter of April 18, 2003. Also, you indicated that **[Employee]** traveled to Amchitka, Island in November 1972 to inspect the equipment referenced above, which had been shipped from Seward, Alaska. You indicated that **[Employee]** was a mobile industrial equipment mechanic, and that his job required him to travel. You attached the following documents in support of your contention that the equipment **[Employee]** inspected could have included equipment belonging to the Corps of Engineers: Job Description, Alaska District, Corps of Engineers (previously submitted), and an Employee Performance Appraisal.

In addition, you indicated **[Employee]** was required to travel to remote sites throughout Alaska in order to perform his job with the Corps of Engineers, and in support of this you referred to your electronic mail sent to the Seattle District Office on January 7, 2003. You indicated that, since **[Employee]** was required to travel to Amchitka as a part of his regular duties as a mobile industrial equipment mechanic, it was possible that the equipment he inspected on the November 15, 1971 trip to Amchitka included equipment owned by the Corps as well as inspection of equipment owned by private contractors. You attached a copy of a document entitled, "Affidavit," dated May 21, 2003, signed by Erwin L. Long. Mr. Long stated that he was head of the Foundations Material Branch for the Corps of Engineers at the time of his retirement, and that in 1971 he had been Head of the Rock Design Section. Mr. Long indicated that he did not spend any time on Amchitka Island, that he had known **[Employee]** since 1948, and that he "believe[d]" **[Employee]**'s travel to Amchitka for his job would have required him to track equipment belonging to the Corps of Engineers, and that **[Employee]** would also have "performed required maintenance on the equipment before preparing [it] for shipping off Amchitka Island." Mr. Long also stated that **[Employee]** would not talk about his work on Amchitka since it was classified. Finally, you attached a TDY dated March 4, 1968, as well as a travel voucher/subvoucher dated March 15, 1968, to support that **[Employee]**'s mission to Amchitka had been completed.

FINDINGS OF FACT

1. On July 31, 2001, **[Claimant]** filed a claim for survivor benefits under the EEOICPA as the daughter of **[Employee]**.

2. **[Employee]** was diagnosed with small cell bronchogenic carcinoma of the lung and chronic silicosis.

3. **[Employee]** was employed by the U.S. Army Corps of Engineers for the period from July 25, 1944 to August 11, 1952, at Fort Richardson, Alaska; and from August 11, 1952 to May 30, 1975 at Elmendorf Air Force Base, Alaska.

4. **[Employee]**'s employment for the U.S. Army Corps of Engineers on TDY assignment at the Amchitka Island, Alaska site in November 1971 was in conjunction with a Department of Defense venture, the Blair Lakes Project.

CONCLUSIONS OF LAW

The EEOCIPA implementing regulations provide that a claimant may object to any or all of the findings of fact or conclusions of law, in the recommended decision. 20 C.F.R. § 30.310. Further, the regulations provide that the Final Adjudication Branch will consider objections by means of a review of the written record. 20 C.F.R. § 30.312. The Final Adjudication Branch reviewer will review the record forwarded by the district office and any additional evidence and/or argument submitted by the claimant. 20 C.F.R. § 30.313. Consequently, the Final Adjudication Branch will consider the overall evidence of record in reviewing the written record.

In order to be awarded benefits under the Energy Employees Occupational Illness Compensation Program Act, the covered employee (or his/her eligible survivors), must first establish that the employee has been diagnosed with beryllium illness, cancer, or chronic silicosis. *See* 42 U.S.C. § 7384l(15), 20 C.F.R. § 30.110(a). The evidence to show proof of an occupational illness is not in dispute in this case. The medical evidence establishes that **[Employee]** was diagnosed with cancer (bronchogenic cancer of the lung, small cell type) and chronic silicosis. Consequently, **[Employee]** was diagnosed with two illnesses potentially covered under the Act.

Employees of a DOE contractor (or their eligible survivors) are entitled under the EEOICPA to seek compensation for a cancer as a member of the Special Exposure Cohort (SEC) or through a determination that they incurred cancer that was at least as likely as not related to employment at a DOE facility. 42 U.S.C. §§ 7384l(14), 7384l(9)(B)(ii)(II). To be included in the SEC, a DOE employee, DOE contractor employee, or atomic weapons employee must have been employed for an aggregate of 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee or employed before January 1, 1974, by the DOE or a DOE contractor or subcontractor on Amchitka Island, Alaska, and have been exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests. 42 U.S.C. § 7384l(14). To qualify as a covered employee with cancer, members of the SEC need only establish that they contracted a "specified cancer", designated in section 7384l(17) of the EEOICPA, after beginning employment at a DOE facility or atomic weapons employer facility.

While the EEOICPA does not contain a specific definition of a DOE contractor, it does contain a definition of a DOE contractor employee that, in effect, defines what a DOE contractor is. Section 7384l(11) of the EEOICPA defines a DOE contractor employee as:

(A) An individual who is or was in residence at a Department of Energy facility as a researcher for one or more periods aggregating at least 24 months.
(B) An individual who is or was employed at a Department of Energy facility by-
    (i) an entity that contracted with the Department of Energy to provide

management and operating, management and integration, or environmental remediation at the facility; or
(ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

The question presented in this case is whether **[Employee]**, an employee of the U.S. Army Corps of Engineers was, during the time he spent on Amchitka Island, providing management and operation, management and integration or environmental remediation services under a contract between the DOE and the Army Corps of Engineers.

The undersigned notes that the Atomic Energy Commission's Managers Completion Report refers to the U.S. Army Corp of Engineers, as a prime contractor for work on Milrow and Cannikin. The work to be performed under that contract consisted of "engineering, procurement, construction administration and inspection."

[Employee]'s "Request and Authorization for TDY Travel of DOD Personnel," initiated on November 10 and approved on November 11, 1971, was for the purpose of three days work on Amchitka Island, Alaska, for the Department of Defense, Alaska District Corps of Engineers. The purpose of the TDY was to "examine equipment for potential use on Blair Lake Project."

You submitted the following new documents along with your letter to the Final Adjudication Branch dated May 21, 2003: Employee Performance Appraisal for the period February 1, 1966 to January 31, 1967; Affidavit of Erwin L. Long dated May 21, 2003; Request and Authorization for Military Personnel TDY Travel and Civilian Personnel TDY and PCS Travel, dated March 4, 1968; and Travel Voucher or Subvoucher, dated March 15, 1968. None of the documents submitted establish that **[Employee]** was on Amchitka Island providing services pursuant to a contract with the DOE.

The preponderance of the evidence in this case supports the conclusion that **[Employee]** was on Amchitka Island in November 1971 for the sole purpose of inspecting equipment to be used by the Department of Defense on its Blair Lake Project. The documentation of record refers to the Blair Lake Project as a Department of Defense project, and the DOE noted in correspondence dated March 27, 2003, that research was not able to verify that Blair Lake was a DOE project.

While the DOE indicated that **[Employee]** was issued a dosimetry badge, such evidence may be used to establish that he was present on Amchitka Island, not to establish that he was a covered DOE employee. Therefore, **[Employee]**'s presence on Amchitka Island was to perform work for the Department of Defense, and not pursuant to a contract between the DOE and the U.S. Army Corps of Engineers.

The evidence is also insufficient to show covered employment under § 7384r(c) and (d) of the EEOICPA for chronic silicosis. To be a "covered employee with chronic silicosis" it must be established that the employee was:

A DOE employee or a DOE contractor employee, who was present for a number of workdays aggregating at least 250 work days during the mining of tunnels at a DOE facility located in Nevada or Alaska for test or experiments related to an atomic weapon.

See 42 U.S.C. § 7384r(c) and (d); 20 C.F.R. § 30.220(a). Consequently, even if the evidence showed DOE employment (which it does not since **[Employee]** worked for the DOD), he was present only

three days on Amchitka, which is not sufficient for the 250 days required under the Act as a covered employee with silicosis.

The undersigned notes that in your objection to the recommended decision, you referred to a "shared employee" doctrine which you believe should be applied to this claim. You contend that on March 5, 1968, **[Employee]** was sent to Seward, Alaska to "Inspect equipment going to Amchitka, which might have been used at the Blair Lake project [to benefit] not only DOD but also DOE." No provision in the Act refers to a "shared employee" doctrine. Given the facts of this case, coverage could only be established if **[Employee]** was on Amchitka Island providing services pursuant to a contract with the DOE, evidence of which is lacking in this case.

It is the claimant's responsibility to establish entitlement to benefits under the EEOICPA. The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of each and every criterion under any compensable claim category set forth in section 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing the Office of Workers' Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

Although you submitted medical evidence to show covered illnesses due to cancer and chronic silicosis, the evidence of record is insufficient to establish that **[Employee]** engaged in covered employment. Therefore, your claim must be denied for lack of proof of covered employment under the EEOICPA.

Seattle, Washington

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA Fin. Dec. No. 10568-2003 (Dep't of Labor, June 16, 2003)

NOTICE OF FINAL DECISION - REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch (FAB) 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). On March 29, 2003, you wrote to the FAB and filed an objection to the March 11, 2003 recommended decision of the Cleveland district office. Your objection has been considered by means of a review of the written record.

STATEMENT OF THE CASE

On September 24, 2002, you filed a claim (Form EE-2), for survivor benefits under the EEOICPA and identified bladder cancer as the diagnosed condition being claimed. You submitted an employment history form (EE-3) in which you stated that Morrison Knudson Co. employed your husband from

September 29, 1974 to February 28, 1976, General Dynamics employed your husband from September 26, 1976 to November 24, 1976, and that Cleveland Wrecking employed your husband until May 31, 1988[1]. You stated that your husband wore a dosimetry badge while employed. You submitted a copy of your husband's death certificate which indicates he died on April 9, 1998 due to bladder cancer and renal failure. You submitted a copy of your marriage certificate which shows that you were married to the deceased employee on June 14, 1956. You submitted medical evidence which included Dr. Karen Harris' December 30, 1997 needle aspirate report in which she diagnosed your husband with transitional cell carcinoma. The medical evidence also included a copy of the Sewickley Valley Hospital discharge summary in which Dr. Scott Piranian diagnosed your husband with transitional cell carcinoma of the bladder with bony metastases and lymphatic metastases.

On November 14, 2001, Department of Energy (DOE) representative Roger Anders advised the district office via Form EE-5 that the employment history you provided contained information that was not accurate. In an attachment, Mr. Anders advised that your husband worked at a portion of a facility whose activities came under the auspices of the DOE's Naval Nuclear Propulsion Program. The Cleveland district office issued a recommended decision on March 11, 2003, in which it concluded that the evidence of record did not establish that your husband was a covered employee with cancer under § 7384l(9) of the EEOICPA because he was not a DOE employee or contractor employee at a DOE facility, nor an atomic weapons employee at an atomic weapons employer facility as those facilities are defined in §§ 7384l(4) and 7384l(12) of the EEOICPA. 42 U.S.C. §§ 7384l(4), 7384l(9), 7384l(12).

OBJECTIONS

Section 30.310(a) of the EEOICPA implementing regulations provides that, "[w]ithin 60 days from the date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision, including HHS's reconstruction of the radiation dose to which the employee was exposed (if any), and whether a hearing is desired." 20 C.F.R. § 30.310(a). Section 30.312 of the EEOICPA implementing regulations provides that, "[i]f the claimant files a written statement that objects to the recommended decision within the period of time allotted in § 30.310 but does not request a hearing, the FAB will consider any objections by means of a review of the written record." 20 C.F.R. § 30.312. On March 29, 2003, you wrote to the FAB and advised that you objected to the recommended decision of the Cleveland district office. You stated that your husband worked as a laborer dismantling the old atomic power plant at Shippingport, PA and he worked side by side with employees that were covered. You stated that it was discrimination for your husband not to be considered covered under the EEOICPA. Your objection has been considered by means of review of the written record.

STATEMENT OF THE LAW

The EEOICPA was established to provide compensation benefits to covered employees (or their eligible survivors) that have been diagnosed with designated illnesses incurred as a result of their exposure to radiation, beryllium, or silica, while in the performance of duty for the DOE and certain of its vendors, contractors and subcontractors. The EEOICPA, at § 7384l(1), defines the term "covered employee" as (A) a covered beryllium employee, (B) a covered employee with cancer, and (C) to the extent provided in § 7384r, a covered employee with chronic silicosis (as defined in that section). 42 U.S.C. §§ 7384l(1), 7384r. To establish entitlement to benefits under the EEOICPA due to cancer, you must establish that the deceased employee contracted the cancer after beginning work at a DOE or atomic weapons employer facility. 42 U.S.C. § 73841(9). The EEOICPA, at § 7384l(12)(A), defines the term DOE facility "as any building, structure, or premise, including the grounds upon which such

building, structure, or premise is located…in which operations are, or have been, conducted by, or on behalf of, the Department of Energy (except for buildings, structures, premises, grounds, or operations covered by Executive Order No. 12344, dated February 1, 1982 (42 U.S.C. § 7158 note), pertaining to the Naval Nuclear Propulsion Program)." 42 U.S.C. § 7384l(12).

It is the claimant's responsibility to establish entitlement to benefits under the EEOICPA. The EEOICPA regulation at § 30.111(a) states, "the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and these regulations, the claimant also bears the burden of providing to OWCP all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in these regulations." 20 C.F.R. §§ 30.110, 30.111(a).

After considering the written record of the claim and after conducting further development of the claim as was deemed necessary, the FAB hereby makes the following:

FINDINGS OF FACT

1. You filed a claim for survivor benefits under the EEOICPA on September 24, 2001.

2. Your husband was employed at the Shippingport Atomic Power Plant with the portion of the facility whose activities came under the auspices of the Department of Energy's Naval Nuclear Propulsion Program.

3. Dr. Karen Harris diagnosed your husband with transitional cell carcinoma on December 30, 1997.

4. Your husband died on April 9, 1998, due to bladder cancer and renal failure.

5. You are the surviving spouse of **[Employee]**.

Based on the above-noted findings of fact in this claim, the FAB hereby also makes the following:

CONCLUSION OF LAW

Pursuant to § 7384l(12)(A) of the EEOICPA and § 30.5(v)(1) of the implementing regulations, employees engaged in Naval Nuclear Propulsion Program activities are excluded from coverage under the EEOICPA. The evidence of record establishes that your husband was a Naval Nuclear Propulsion Program employee; therefore he does not meet the definition of a covered employee with cancer as defined in § 7384l(9) of the EEOICPA and § 30.210 of the implementing regulations. Because your husband was not a covered employee with cancer, your claim for benefits is denied.

Washington, DC

Thomasyne L. Hill

Hearing Representative

Final Adjudication Branch

[1] The beginning date indicated on the employment history form was distorted during the creation of the claim record.

EEOICPA Fin. Dec. No. 22675-2002 (Dep't of Labor, April 21, 2004)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On February 19, 2002, you filed a Form EE-1 (Claim for Benefits under the EEOICPA), based on prostate cancer. You also filed a Form EE-3 (Employment History) that indicated, from 1944 to 1945, you were "assigned to grade work sites when [the] Hanford project was started," that you were "a conscientious objector," and treated as a prisoner at a camp near Hanford. You indicated that you are unsure if you wore a dosimetry badge.

You also signed and submitted a Form EE-4 (Employment History Affidavit) that provided additional employment information. You wrote that you worked, from May 15, 1944 to May 15, 1945, for the "United States Dept. of Corrections, Columbia Road Camp, Hanford Area, WA." You continued that you were a "Grader operator in and around all of the atomic energy facilitys and surrounding area." A representative of the Department of Energy (DOE) reported that it had searched various employment records, including the records of General Electric (GE), Hanford Environmental Health Foundation (HEHF) and DuPont, and the Hanford Site contractor records contained no employment information regarding you.

By letters dated March 6, June 18, and August 27, 2002, the Seattle district office advised you that they had completed the initial review of your claim, and that additional employment and medical evidence was needed. Subsequently, you provided a pathology report dated November 9, 1993, signed by L. K. Hatch, M.D., that indicated a diagnosis of moderately differentiated prostatic adenocarcinoma; and copies of your medical records relating to possible cancer from Spokane Urology were received.

On September 30, 2002, the district office recommended denial of your claim for benefits. The district office concluded that the DOE did not confirm you worked for a covered facility, subcontractor or vendor and you did not submit employment evidence to support that you are a covered employee. The district office also concluded that you are not entitled to compensation as outlined in 42 U.S.C. § 7384s. *See* 42 U.S.C. § 7384s.

On October 7, 2002, you submitted additional employment information related to your work. You indicated that Walter J. Hardy worked with you "in irrigation," for the U.S. Department of Corrections as an irrigation and grader operator, from 1944 to 1945. An affidavit, signed by Walter J. Hardy, indicated he worked, with you, from late 1944 to late 1945, with the U.S. Department of Corrections at

Hanford, Washington, and that your work consisted of irrigation repair and operation of a road grader. He further affirmed that your work covered most areas of the restricted Hanford project. Also, an affidavit, by Don Hughart, affirmed that he was acquainted with you at the Hanford camp, called "Columbia Camp," from sometime in 1944 to late 1945. He further affirmed that he worked in the orchards with you and that you operated a grader "in and around the Hanford Atomic Bomb Projects."

On December 20, 2002, the Final Adjudication Branch remanded your claim for further development of the employment evidence, to determine whether you were an employee of the U.S. Department of Corrections in your status as a "prisoner" and if so, whether a contractual agreement existed between the U.S. Department of Corrections and the DOE.

By letter dated December 31, 2002, the district office posed certain questions to you regarding your claimed employment on the Hanford Site. The questions inquired whether you received earnings from your work, whether you had individual liberty, if you were in a "prisoner status" under the U.S. Department of Corrections, if the Columbia Camp was on the Hanford Site, and if you were on the Hanford Site all the time. You responded to the questions that you earned nine cents per hour for your labor, that you were followed to the Hanford gate and at night were free to go anywhere in the camp area, that you were in a "prisoner status," that the Columbia Camp was just outside the Hanford gate, that you were not always on the Hanford Site but were there during the day in order to work, and that you returned to the camp at night.

On February 17, 2004, the district office again recommended denial of your claim for benefits. The district office concluded that the evidence of record is insufficient to establish that you were present at a covered facility as defined under § 7384l(12) while working for the Department of Energy or any of its covered contractors, subcontractors or vendors as defined under section 7384l(11) during a covered time period. *See* 42 U.S.C. § 7384l(11) and (12) The district office further concluded that you are not entitled to compensation pursuant to 42 U.S.C. § 7384s.

FINDINGS OF FACT

1. You filed a claim for employee benefits on February 19, 2002.

2. You submitted medical documentation adequate to establish a diagnosis of prostate cancer.

3. You did not provide sufficient evidence to establish that you engaged in covered employment under the EEOICPA.

CONCLUSIONS OF LAW

The undersigned has reviewed the recommended decision issued by the Seattle district office on February 17, 2004. I find that you have not filed any objections to the recommended decision as provided by § 30.316(a) of the regulations, and that the 60-day period for filing such objections, as provided for in § 30.310(a) has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

In order to be afforded coverage under the Energy Employees Occupational Illness Compensation Program Act, you must establish that you were diagnosed as having a designated occupational illness incurred as a result of exposure to silica, beryllium, and radiation: *cancer, beryllium sensitivity, chronic beryllium disease*, and *silicosis*. *See* 42 U.S.C. § 7384l(15); 20 C.F.R. § 30.110(a). Further, the illness

must have been incurred while in the performance of duty for the Department of Energy and certain of its vendors, contractors, and subcontractors, or for an atomic weapons employer or facility. *See* 42 U.S.C. § 7384l(4)-(7), (9), (11).

In order to be afforded coverage under § 7384l(9) of the EEOICPA as a "covered employee with cancer," the claimant must show the employee met any of the following:

(I) A Department of Energy employee who contracted that cancer after beginning employment at a Department of Energy facility;

(II) A Department of Energy contractor employee who contracted that cancer after beginning employment at a Department of Energy facility;

(III) An Atomic weapons employee who contracted that cancer after beginning employment at an atomic weapons facility.

42 U.S.C. § 7384l(9); 20 C.F.R. § 30.210(b). The record lacks proof that you worked in covered employment under the Act. Federal prison inmates who worked at a DOE facility for Federal Prison Industries, Incorporated (FPI), are not "employees" within the meaning of the EEOICPA and, therefore, not eligible for benefits under the Act. The question of prisoners' employment status for purposes of EEOICPA is properly resolved by focusing on the nature of the relationship between the prisoner and FPI. The relationship between an inmate worker and FPI is a compulsory assignment to work rather than a traditional contractual employer-employee relationship in which an employee bargains to provide his labor in return for agreed upon compensation and is free to quit at will. Not even FPI's payments to prison laborers are a matter of a contractual right. Instead, they are remitted to the prisoner solely by congressional grace and governed by the rules and regulations promulgated by the Attorney General. Prisoners working for prison-run industries are not considered employees.

The record shows that, by letters dated March 16, June 18, and August 27, 2002, you were requested to provide the required information to prove covered employment under the Act. You did not provide sufficient evidence to prove covered employment.

It is the claimant's responsibility to establish entitlement to benefits under the Act. The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of every criterion under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means it is more likely than not that a given proposition is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing to the Office of Workers' Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

The record in this case shows that although you submitted medical documentation showing a diagnosis of prostate cancer, you did not submit proof of covered employment under the Act. Federal prison inmates who worked at a DOE facility for Federal Prison Industries, Incorporated are not "employees" within the meaning of the EEOICPA and, therefore, not eligible for benefits under the Act. Therefore, your claim must be denied for lack of evidence of proof of covered employment under the EEOICPA.

For the above reasons the Final Adjudication Branch concludes that the evidence of record is

insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

Seattle, WA

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA Fin. Dec. No. 27798-2003 (Dep't of Labor, June 20, 2003)

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 (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq.* Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claims for benefits are denied.

STATEMENT OF THE CASE

On April 11, 2002, **[Claimant 1]** filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA), stating that he was the son of **[Employee]**, who was diagnosed with pharyngeal cancer. An additional claim followed thereafter from **[Claimant 2]** on October 20, 2002. **[Claimant 1]** also completed a Form EE-3, Employment History, indicating that **[Employee]** worked for Standard Oil Company, from 1950 to 1961; the State of Alaska as Deputy Director of Veterans Affairs, from 1961 to 1964; the State of Alaska Department of Military Affairs, Alaska Disaster Office, from 1965 to 1979 (where it was believed he wore a dosimetry badge); and, for the American Legion from 1979 to 1985.

In correspondence dated June 24, 2002, a representative of the Department of Energy (DOE) indicated that they had no employment information regarding **[Employee]**, but that he had been issued film badges at the Amchitka Test Site on the following dates: October 28, 1965; September 30, 1969; and, September 21, 1970. You also submitted a completed Form EE-4 (Employment Affidavit) signed by Don Lowell, your father's supervisor at the State of Alaska, Department of Public Safety, Division of Civil Defense. According to Mr. Lowell, your father was a radiological officer for the State of Alaska and accompanied him to Amchitka Island for Project Longshot on November 29, 1965, and the Milrow Test on October 2, 1969, as a representative of the State of Alaska.

Additional documentation submitted in support of your claim included copies of your birth certificates, a marriage certificate documenting **[Name of Claimant 2 at Birth]**'s marriage to **[Husband]**, and the death certificate for **[Employee]**, indicating that he was widowed at the time of his death on May 10, 1993. In addition, you provided medical documentation reflecting a diagnosis of squamous cell carcinoma of the pharyngeal wall in November 1991.

On November 8, 2002, the Seattle district office issued a recommended decision that concluded that **[Employee]** was a covered employee as defined in § 7384l(9)(A) of the Act and an eligible member of the Special Exposure Cohort as defined in § 7384l(14)(B) of the EEOICPA, who was diagnosed as having a specified cancer, specifically cancer of the hypopharynx, as defined in § 7384l(17) of the Act. *See* 42 U.S.C. 7384l(9)(A), (14)(B), (17). The district office further concluded that you were eligible

survivors of **[Employee]** as outlined in § 7384s(e)(3) of the Act, and that you were each entitled to compensation in the amount of $75,000 pursuant to § 7384s(a)(1) and (e)(1) of the EEOICPA. *See* 42 U.S.C. §§ 7384s(a)(1) and (e)(1).

On December 20, 2002, the Final Adjudication Branch issued a Remand Order in this case on the basis that the evidence of record did not establish that **[Employee]** was a member of the "Special Exposure Cohort," as required by the Act. The Seattle district office was specifically directed to determine whether the Department of Energy and the State of Alaska, Department of Public Safety, Division of Civil Defense, had a contractual relationship.

In correspondence dated January 17, 2003, Don Lowell elaborated further on your father's employment and his reasons for attending the nuclear testing on Amchitka Island. According to Mr. Lowell, the Atomic Energy Commission (AEC) invited the governors of Alaska to send representatives to witness all three tests on Amchitka Island (Longshot, Milrow, and Cannikin). As such, **[Employee]** attended both the Longshot and Milrow tests as a guest of the Atomic Energy Commission, which provided transportation, housing and food, and assured the safety and security of those representatives.

On February 4, 2003, the district office received an electronic mail transmission from Karen Hatch, Records Management Program Officer at the National Nuclear Security Agency. Ms. Hatch indicated that she had been informed by the former senior DOE Operations Manager on Amchitka Island that escorts were not on the site to perform work for the AEC, but were most likely there to provide a service to the officials from the State of Alaska.

In correspondence dated February 11, 2003, a representative of the State of Alaska, Department of Public Safety, Division of Administrative Services, indicated that there was no mention of Amchitka or any sort of agreement with the Department of Energy in **[Employee]**'s personnel records, but that the absence of such reference did not mean that he did not go to Amchitka or that a contract did not exist. He further explained that temporary assignments were not always reflected in these records and suggested that the district office contact the Department of Military and Veterans Affairs to see if they had any record of an agreement between the State of Alaska and the DOE. By letter dated March 13, 2003, the district office contacted the Department of Military and Veterans Affairs and requested clarification as to **[Employee]**'s employment with the State of Alaska and assignment(s) to Amchitka Island. No response to this request was received.

On April 16, 2003, the S eattle district office recommended denial of your claims. The district office concluded that you did not submit employment evidence as proof that **[Employee]** was a member of the "Special Exposure Cohort" as defined by § 7384l(14)(B) of the Act, as the evidence did not establish that he had been present at a covered facility as defined under § 7384l(12) of the Act, while working for the Department of Energy or any of its covered contractors, subcontractors or vendors as defined under § 7384l(11) of the Act, during a covered time period. *See* 42 U.S.C. § 7384l(11), (12). The district office further concluded that you were not entitled to compensation as outlined under § 7384s(e)(1) of the Act. *See* 42 U.S.C. § 7384s(e)(1).

FINDINGS OF FACT

1. On April 11 and October 20, 2002, **[Claimant 1]** and **[Claimant 2]**, respectively, filed claims for survivor benefits under the EEOICPA as the children of **[Employee]**.

2. **[Employee]** was diagnosed as having squamous cell carcinoma of the hypopharynx.

3. **[Employee]** was employed by the State of Alaska, Civil Defense Division, and was present on Amchitka Island for Project Longshot on November 29, 1965, and the Milrow Test on October 2, 1969.

4. **[Employee]**'s employment with the State of Alaska, Civil Defense Division, on assignment to Amchitka Island, Alaska, was as a representative of the governor of Alaska.

CONCLUSIONS OF LAW

The undersigned has reviewed the recommended decision issued by the Seattle district office on April 16, 2003. I find that you have not filed any objections to the recommended decision as provided by § 30.316(a) of the regulations, and that the 60-day period for filing such objections, as provided for in § 30.310(a) has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

In order to be awarded benefits under the Energy Employees Occupational Illness Compensation Program Act, the covered employee (or his/her eligible survivors), must first establish that the employee has been diagnosed with beryllium illness, cancer, or chronic silicosis. *See* 42 U.S.C. § 7384l(15), 20 C.F.R. § 30.110(a). The evidence to show proof of an occupational illness is not in dispute in this case. The medical evidence establishes that **[Employee]** was diagnosed as having squamous cell carcinoma of the hypopharynx. Consequently, **[Employee]** was diagnosed with an illness covered under the Act.

Employees of a DOE contractor (or their eligible survivors) are entitled under the EEOICPA to seek compensation for a cancer as a member of the Special Exposure Cohort (SEC) or through a determination that they incurred cancer that was at least as likely as not related to employment at a DOE facility. 42 U.S.C. §§ 7384l(14), 7384l(9)(B)(ii)(II). To be included in the SEC, a DOE employee, DOE contractor employee, or atomic weapons employee must have been employed for an aggregate of 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, or employed before January 1, 1974, by the DOE or a DOE contractor or subcontractor on Amchitka Island, Alaska, and exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests. 42 U.S.C. § 7384l(14). To qualify as a covered employee with cancer, members of the SEC need only establish that they contracted a "specified cancer," designated in § 7384l(17) of the EEOICPA, after beginning employment at a DOE facility or atomic weapons employer facility.

While the EEOICPA does not contain a specific definition of a DOE contractor, it does contain a definition of a DOE contractor employee that, in effect, defines what a DOE contractor is. Section 7384l(11) of the EEOICPA defines a DOE contractor employee as:

(A) An individual who is or was in residence at a Department of Energy facility as a researcher for one or more periods aggregating at least 24 months.
(B) An individual who is or was employed at a Department of Energy facility by-
    (i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or

(ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

The question presented in this case is whether **[Employee]**, an employee of the State of Alaska, was, during the time he spent on Amchitka Island, providing management and operation, management and integration or environmental remediation services under a contract between the DOE and the State of Alaska.

The undersigned notes that the Atomic Energy Commission's Managers Completion Report refers to the State of Alaska as a prime contractor for work on Milrow and Cannikin. The work to be performed under that contract consisted of police protection.

According to Don Lowell, **[Employee]**'s supervisor at the time of his assignment to Amchitka Island, your father was not an employee of any contractor or the AEC at the time of his visit to Amchitka Island. Rather, he was an invited guest of the AEC requested to witness the atomic testing as a representative of the governor of Alaska.

The preponderance of the evidence in this case supports the conclusion that **[Employee]** was on Amchitka Island for the sole purpose of witnessing the atomic testing as a representative of the governor of Alaska. While the DOE indicated that **[Employee]** was issued a dosimetry badge on three occasions, such evidence may be used to establish that he was present on Amchitka Island, not to establish that he was a covered DOE employee. Therefore, **[Employee]**'s presence on Amchitka Island was to perform work for the State of Alaska, as a representative of the governor, and not pursuant to a contract between the DOE and the State of Alaska.

It is the claimant's responsibility to establish entitlement to benefits under the EEOICPA. The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of each and every criterion under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing the Office of Workers' Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

Although you submitted medical evidence to show a covered illness manifested by squamous cell carcinoma of the hypopharynx, the evidence of record is insufficient to establish that **[Employee]** engaged in covered employment. Therefore, your claims must be denied for lack of proof of covered employment under the EEOICPA.

Seattle, Washington

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA Fin. Dec. No. 1704-2003 (Dep't of Labor, February 10, 2003)

NOTICE OF FINAL DECISION - REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA). On January 22, 2003, Attorney Mike G. Nassios, your authorized representative, wrote to the FAB and filed objections to the November 27, 2002 recommended decision of the Jacksonville district office. Your objections have been considered by means of a review of the written record.

STATEMENT OF THE CASE

On August 9, 2001, you filed a claim (Form EE-1) for benefits under the EEOICPA. You identified lung cancer as the diagnosed condition being claimed. You stated that Paul Rankin employed you as a pipe layer and laborer at the K-25 and Y-12 Plants at Oak Ridge from 1958 to 1964. Based upon the evidence of record, the Jacksonville district office issued a recommended decision on November 27, 2002, in which it concluded that you were not employed as a contracted or subcontracted employee at an atomic weapons employer or facility, nor at a Department of Energy facility, as those terms are defined in § 7384l of the EEOICPA and § 30.5 of the EEOICPA regulations. 42 U.S.C. § 7384l. 20 C.F.R. § 30.5. The district office also concluded that you are not a covered employee as that term is defined in § 7384l(1) of the EEOICPA. 42 U.S.C. § 7384l(1).

OBJECTIONS

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, pursuant to § 30.310 of the EEOICPA regulations. 20 C.F.R. § 30.310. On January 22, 2003, your attorney filed objection to the recommended decision of the district office. Your attorney stated it was your position that you have proven by a preponderance of the evidence that you were employed as a contracted or subcontracted employee at an atomic weapons employer or facility or a Department of Energy (DOE) facility as those terms are defined in §§ 7384l of the EEOICPA and 30.5 of the EEOICPA regulations. 42 U.S.C. § 7384l. 20 C.F.R. § 30.5. He also stated it was your position that you had presented more evidence than a self-serving affidavit of yourself, in that you presented the affidavit of other individuals and the DOE cannot legitimately rebut this proof in that the DOE records are not always all inclusive. On January 30, 2003, your attorney submitted an affidavit from Fay Webb in which she stated that you were employed by Paul Rankin from February 1958 until December 1958 at the Y-12 Plant and from October 1964 to December 1964 at the K-25 plant. Mrs. Webb identified herself as the wife of your co-worker.

You stated in your employment history (Form EE-3) that Paul Rankin employed you as a pipe layer and laborer from 1958 to 1964 at the K-25 and Y-12 Plants in Oak Ridge, TN. You submitted a copy of the Social Security Administration (SSA) statement of earnings which show Paul Rankin employed you in the third quarter of 1958 and the fourth quarter of 1964. Mr. Franklin Whetsell, who identified himself as a work associate, and your wife signed affidavits (Form EE-4) stating that you were employed by Paul Rankin from 1958 to 1964. On June 7, 2002, you advised the district office in writing that you worked for Paul Rankin at Oak Ridge for two different jobs. You stated that the first job began around February 1958 and ended December 1958 at Y-12 and the second job at K-25 began and ended in 1964. On September 5, 2002, Frank Whetsell wrote to the district office in regards to the affidavit he submitted and advised that “his father” worked for Paul Rankin during the years 1958 through 1964. Mr. Whetsell explained that he was a “kid” at the time so he doesn’t remember specific dates but he does recall his father “talking about working out there.”

ANALYSIS

The DOE has advised that it has no employment information regarding you. There has been no evidence submitted that establishes that Paul Rankin, the employer for whom you claim you worked, was a contractor at the Y-12 or K-25 plant. The employment history (Form EE-3) you submitted conflicts with the SSA earnings statement and the information in your letter of June 7, 2002. You stated in your employment history that you worked for Paul Rankin at the Y-12 and K-25 plants from 1958 to 1964 but you stated in your June 7, 2002 letter to the district office that you worked at Oak Ridge on two different jobs. You stated that the first job was at the Y-12 plant and began around February 1958 and ended December 1958. The second job was at the K-25 plant and it began and ended in 1964. You also stated in your June 7, 2002 letter that you have no exact recollection of the dates. The SSA earnings statement only shows earnings for the third quarter in 1958 and the fourth quarter in 1964 which would not total the 250 days required to establish that you are a member of the Special Exposure Cohort. You submitted an affidavit from Franklin Whetsell in which he identified himself as a "work associate" and in response to the question to describe his knowledge of your employment history, he stated you were employed by Paul Rankin from 1958 to 1964 at the DOE facilities in Oak Ridge, TN (K-25 and Y-12). However, on September 5, 2002, Mr. Whetsell advised the district office, by letter, that his father worked with you during the years 1958 through 1964. He also stated that he was a kid at the time and he did not remember specific dates. Mr. Whetsell's letter conflicts with the information provided on his affidavit. Your wife submitted an affidavit in which she stated that you worked for Paul Rankin at the Oak Ridge Facilities from 1958 to 1964 which conflicts with the information that you provided as clarification in your June 7, 2002 letter. The information provided by Mrs. Webb in her affidavit is in conflict with the SSA earnings statement.

The EEOICPA regulations at § 30.111(c) allows for the acceptance of written affidavits or declarations as evidence of employment history for the purpose of establishing eligibility. Pursuant to the EEOICPA regulations at § 30.111(a), the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. 20 C.F.R. §§ 30.111(a), 30.111(c). A claimant will not be entitled to any presumption otherwise provided for in the EEOICPA regulations if substantial evidence exists that rebuts the existence of the fact that is the subject of the presumption. *See* 20 C.F.R. § 30.111(d). The evidence of record is not sufficient to establish you are a covered employee as defined in the EEOICPA. *See* 42 U.S.C. §§ 7384l(1), 7384l(4), 7384l(7), 7384l(9), 7384l(11), 7384l(14). The evidence of record is not sufficient to establish that Paul Rankin was a contractor for the DOE.

CONCLUSION:

Based on my review of your case record and pursuant to the authority granted by § 30.316(b) of the EEOICPA regulations, I find that the district office's November 27, 2002 recommended decision is correct and I accept those findings and the recommendation of the district office.

Therefore, I find that you are not entitled to benefits under the Act, and that your claim for compensation must be denied.

Washington, DC

Thomasyne L. Hill

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 1704-2003 (Dep't of Labor, February 10, 2003)

NOTICE OF FINAL DECISION - REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA). On January 22, 2003, Attorney Mike G. Nassios, your authorized representative, wrote to the FAB and filed objections to the November 27, 2002 recommended decision of the Jacksonville district office. Your objections have been considered by means of a review of the written record.

STATEMENT OF THE CASE

On August 9, 2001, you filed a claim (Form EE-1) for benefits under the EEOICPA. You identified lung cancer as the diagnosed condition being claimed. You stated that Paul Rankin employed you as a pipe layer and laborer at the K-25 and Y-12 Plants at Oak Ridge from 1958 to 1964. Based upon the evidence of record, the Jacksonville district office issued a recommended decision on November 27, 2002, in which it concluded that you were not employed as a contracted or subcontracted employee at an atomic weapons employer or facility, nor at a Department of Energy facility, as those terms are defined in § 7384l of the EEOICPA and § 30.5 of the EEOICPA regulations. 42 U.S.C. § 7384l. 20 C.F.R. § 30.5. The district office also concluded that you are not a covered employee as that term is defined in § 7384l(1) of the EEOICPA. 42 U.S.C. § 7384l(1).

OBJECTIONS

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, pursuant to § 30.310 of the EEOICPA regulations. 20 C.F.R. § 30.310. On January 22, 2003, your attorney filed objection to the recommended decision of the district office. Your attorney stated it was your position that you have proven by a preponderance of the evidence that you were employed as a contracted or subcontracted employee at an atomic weapons employer or facility or a Department of Energy (DOE) facility as those terms are defined in §§ 7384l of the EEOICPA and 30.5 of the EEOICPA regulations. 42 U.S.C. § 7384l. 20 C.F.R. § 30.5. He also stated it was your position that you had presented more evidence than a self-serving affidavit of yourself, in that you presented the affidavit of other individuals and the DOE cannot legitimately rebut this proof in that the DOE records are not always all inclusive. On January 30, 2003, your attorney submitted an affidavit from Fay Webb in which she stated that you were employed by Paul Rankin from February 1958 until December 1958 at the Y-12 Plant and from October 1964 to December 1964 at the K-25 plant. Mrs. Webb identified herself as the wife of your co-worker.

You stated in your employment history (Form EE-3) that Paul Rankin employed you as a pipe layer and laborer from 1958 to 1964 at the K-25 and Y-12 Plants in Oak Ridge, TN. You submitted a copy of the Social Security Administration (SSA) statement of earnings which show Paul Rankin employed you in the third quarter of 1958 and the fourth quarter of 1964. Mr. Franklin Whetsell, who identified himself as a work associate, and your wife signed affidavits (Form EE-4) stating that you were employed by Paul Rankin from 1958 to 1964. On June 7, 2002, you advised the district office in

writing that you worked for Paul Rankin at Oak Ridge for two different jobs. You stated that the first job began around February 1958 and ended December 1958 at Y-12 and the second job at K-25 began and ended in 1964. On September 5, 2002, Frank Whetsell wrote to the district office in regards to the affidavit he submitted and advised that "his father" worked for Paul Rankin during the years 1958 through 1964. Mr. Whetsell explained that he was a "kid" at the time so he doesn't remember specific dates but he does recall his father "talking about working out there."

ANALYSIS

The DOE has advised that it has no employment information regarding you. There has been no evidence submitted that establishes that Paul Rankin, the employer for whom you claim you worked, was a contractor at the Y-12 or K-25 plant. The employment history (Form EE-3) you submitted conflicts with the SSA earnings statement and the information in your letter of June 7, 2002. You stated in your employment history that you worked for Paul Rankin at the Y-12 and K-25 plants from 1958 to 1964 but you stated in your June 7, 2002 letter to the district office that you worked at Oak Ridge on two different jobs. You stated that the first job was at the Y-12 plant and began around February 1958 and ended December 1958. The second job was at the K-25 plant and it began and ended in 1964. You also stated in your June 7, 2002 letter that you have no exact recollection of the dates. The SSA earnings statement only shows earnings for the third quarter in 1958 and the fourth quarter in 1964 which would not total the 250 days required to establish that you are a member of the Special Exposure Cohort. You submitted an affidavit from Franklin Whetsell in which he identified himself as a "work associate" and in response to the question to describe his knowledge of your employment history, he stated you were employed by Paul Rankin from 1958 to 1964 at the DOE facilities in Oak Ridge, TN (K-25 and Y-12). However, on September 5, 2002, Mr. Whetsell advised the district office, by letter, that his father worked with you during the years 1958 through 1964. He also stated that he was a kid at the time and he did not remember specific dates. Mr. Whetsell's letter conflicts with the information provided on his affidavit. Your wife submitted an affidavit in which she stated that you worked for Paul Rankin at the Oak Ridge Facilities from 1958 to 1964 which conflicts with the information that you provided as clarification in your June 7, 2002 letter. The information provided by Mrs. Webb in her affidavit is in conflict with the SSA earnings statement.

The EEOICPA regulations at § 30.111(c) allows for the acceptance of written affidavits or declarations as evidence of employment history for the purpose of establishing eligibility. Pursuant to the EEOICPA regulations at § 30.111(a), the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. 20 C.F.R. §§ 30.111(a), 30.111(c). A claimant will not be entitled to any presumption otherwise provided for in the EEOICPA regulations if substantial evidence exists that rebuts the existence of the fact that is the subject of the presumption. *See* 20 C.F.R. § 30.111(d). The evidence of record is not sufficient to establish you are a covered employee as defined in the EEOICPA. *See* 42 U.S.C. §§ 7384l(1), 7384l(4), 7384l(7), 7384l(9), 7384l(11), 7384l(14). The evidence of record is not sufficient to establish that Paul Rankin was a contractor for the DOE.

CONCLUSION:

Based on my review of your case record and pursuant to the authority granted by § 30.316(b) of the EEOICPA regulations, I find that the district office's November 27, 2002 recommended decision is correct and I accept those findings and the recommendation of the district office.

Therefore, I find that you are not entitled to benefits under the Act, and that your claim for compensation must be denied.

Washington, DC

Thomasyne L. Hill

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 9855-2002 (Dep't of Labor, August 26, 2002)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) 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 stated below, your claim for benefits is denied.

On September 20, 2001, you filed Form EE-2, Claim for Survivor Benefits under the Energy Employees Occupational Illness Compensation Program, with the Denver district office. You stated that your husband, **[Employee]**, had died on May 15, 1991 as a result of adenocarcinoma in the liver, and that he was employed at a Department of Energy facility. You included with your application, a copy of your marriage certificate, **[Employee]**'s resume/biography, and his death certificate. You submitted a letter dated January 5, 2000, from Allen M. Goldman, Institute of Technology, School of Physics and Astronomy, and a packet of information which included the university's files relating to your husband based on your request for his personnel, employee exposure, and medical records. Also submitted was a significant amount of medical records that did establish your husband had been diagnosed with adenocarcinoma in the liver.

On March 1, 2002, Loretta from the Española Resource Center telephoned the Denver district office to request the status of your claim. The claims examiner returned her telephone call on the same date and explained the provision in the Act which states that in order to be eligible for compensation, the spouse must have been married to the worker for at least one year prior to the date of his death. Your marriage certificate establishes you were married on, May 30, 1990. **[Employee]**'s death certificate establishes he died on May 15, 1991.

On March 5, 2002, the Denver district office issued a recommended decision finding that the evidence of record had not established that you were married for one year prior to your husband's death, and therefore you were not entitled to compensation benefits under the EEOICPA.

Pursuant to § 30.316(a) of the implementing regulations, a claimant has 60 days in which to file objections to the recommended decision, as allowed under § 30.310(b) of the implementing regulations (20 C.F.R. § 30.310(b)).

On April 12, 2002, the Final Adjudication Branch received a letter from you that stated you objected to the findings of the recommended decision. You requested a hearing and a review of the written record.

You stated that the original law signed by President Clinton provided you with coverage, but when the law changed to include children under 18, the change in the law adversely affected you. You stated that you had documents that demonstrated you had a 10-year courtship with your spouse. You also stated you presented testimony as an advocate in Española. Included with your letter of objection were the following documents:

- a copy of Congressman Tom Udall's "Floor Statement on the Atomic Workers Compensation Act";

- an e-mail from Bob Simon regarding the inclusion of Los Alamos National Laboratory workers in the Senate Bill dated July 5, 2000;

- an e-mail from Louis Schrank regarding the Resource Center in Española;

- a "Volunteer Experience Verification Form", establishing you volunteered as a "Policy Advisor and Volunteer Consultant to the Department of Energy, Members of Congress, Congressional Committees, and many organizations on critical health issues effecting nuclear weapons workers with occupational illnesses";

- a transcript of proceedings from the March 18, 2000 Public Hearing in Española , New Mexico;

- a letter from you to John Puckett, HSE Division Leader, Chairperson, "Working Group Formed to Address Issues Raised by Recent Reports of Excess Brain Tumors in the Community of Los Alamos" and dated June 27, 1991;

- a letter to you from Terry L. Thomas, Ph.D., dated July 31, 1991, regarding the epidemiologic studies planned for workers at Los Alamos National Laboratory; a memorandum entitled "LANL Employee Representative for Cancer Steering Committee", dated September 25, 1991;

- a copy of the "Draft Charter of the Working Group to Address Los Alamos Community Health Concerns", dated June 27, 1991;

- an article entitled "Register of the Repressed: Women's Voice and Body in the Nuclear Weapons Organization"; and

- a psychological report from Dr. Anne B. Warren; which mentions you and **[Employee]** had a "10 or 11 year courtship".

On May 20, 2002, you submitted a copy of the Last Will and Testament of **[Employee]**, wherein he "devises to you, his wife, the remainder of his estate if you survive him for a period of seven hundred twenty (720) hours." You stated you believed this provided you with common law marriage rights for the 720 hours mentioned in the will.

An oral hearing was held on June 18, 2002 at the One-Stop Career Center in Española, New Mexico. You presented additional evidence for consideration that included: a copy of a house "Inspection Report" by Architect Steven G. Shaw, addressed to both you and **[Employee]**, dated August 11, 1989

(exhibit one); a copy of a Quitclaim Deed (Joint Tenants) for you and **[Employee]**, dated October 27, 1989 (exhibit two); a Los Alamos County Assessor Notice of Valuation or Tentative Notice of Value (undated), for a home on Walnut Street, and addressed to both you and **[Employee]** (exhibit three); and a Power of Attorney dated August 5, 1989, between you and **[Employee]** (exhibit four).

Pursuant to § 30.314(f) of the implementing regulations, a claimant has 30 days after the hearing is held to submit additional evidence or argument.

No further evidence was submitted for consideration within that time period.

Section 30.111(a) of the regulations (20 C.F.R. § 30.111(a)) states that, "Except where otherwise provided in the Act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and these regulations, the claimant also bears the burden of providing to OWCP all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in these regulations."

The undersigned has carefully reviewed the hearing transcript and additional evidence received at the hearing, as well as the evidence of record and the recommended decision issued on March 5, 2002.

The record fails to establish that you were married to **[Employee]** one year prior to his death, as required by the EEOICPA. The entire record and the exhibits were thoroughly reviewed. Included in Exhibit One, was the August 11, 1989 inspection report of the home located on Walnut Street, a copy of a bill addressed to both you and **[Employee]** for the inspection service, and an invoice from A-1 Plumbing, Piping & Heat dated August 14, 1989. Although some of these items were addressed to both you and **[Employee]**, none of the records submitted are sufficient to establish that you were married to your husband for one year prior to his death as required under the Act. 42 U.S.C. § 7384s(e)(3)(A).

The evidence entered into the record as Exhibit Two, consists of a Quitclaim Deed dated October 27, 1989, showing **[Employee]**, a single man, and **[Claimant]**, a single woman living at the same address on Walnut Street as joint tenants. Exhibit Three consists of a Notice of Valuation of the property on Walnut Street in Los Alamos County and is addressed to both you and **[Employee]**. Although this evidence establishes you were living together in 1989 in Los Alamos County, New Mexico, it is not sufficient evidence to establish you were married to your husband for one year prior to his death as required under the Act. 42 U.S.C. § 7384s(e)(3)(A).

Exhibit Four consists of a copy of a Power of Attorney between you and **[Employee]** regarding the real estate located on Walnut Street. This evidence is not sufficient to establish you were married for one year prior to his death. 42 U.S.C. § 7384s(e)(3)(A).

The Act is clear in that it states, “the “spouse” of an individual is a wife or husband of that individual who was married to that individual for at least one year immediately before the death of that individual.”

During the hearing you stated that there is a federal law, the Violence Against Women Act, that acknowledges significant other relationships and provides protection for a woman regardless of

whether she is married to her husband one year or not. You also stated that you believed there was "a lack of dialogue" between the RECA program and the EEOICP concerning issues such as yours. Additionally, on August 15, 2002, you sent an email to the Final Adjudication Branch. The hearing transcript was mailed out on July 23, 2002. Pursuant to § 30.314(e) of the implementing regulations, a claimant is allotted 20 days from the date it is sent to the claimant to submit any comments to the reviewer. Although your email was beyond the 20-day period, it was reviewed and considered in this decision. In your email you stated the issue of potential common law marriage was raised. You stated that you presented the appropriate documentation that may support a common law marriage to the extent permitted by New Mexican law. You stated that the one-year requirement was adopted from the RECA and that you have not been able to determine how DOJ has interpreted this provision. Also, you stated that the amendments of December 28, 2001 should not apply to your case because you filed your claim prior to the enactment of the amendments. You stated you did not believe the amendments should be applied retroactively.

Section 7384s (e)(3)(A), Compensation and benefits to be provided, states:

The "spouse" of an individual is a wife or husband of that individual who was married to that individual for at least one year immediately before the death of that individual."

Section 7384s(f) states:

EFFECTIVE DATE—This section shall take effect on July 31, 2001, unless Congress otherwise provides in an Act enacted before that date.

There is no previous enacted law that relates to compensation under the EEOICPA. Therefore, the amendments apply retroactively to all claimants.

A couple cannot become legally married in New Mexico by living together as man and wife under New Mexico's laws. However, a couple legally married via common law in another state is regarded as married in all states. The evidence of record does not establish you lived with **[Employee]** in a common law state. Because New Mexico does not recognize common law marriages, the time you lived with **[Employee]** prior to your marriage is insufficient to establish you were married to him for one year prior to his death.

Regarding your reference to the difference between how Native American widows are treated and recognized in their marriages, and how you are recognized in your marriage, Indian Law refers primarily to that body of law dealing with the status of the Indian tribes and their special relationship to the federal government. The existing federal-tribal government-to-government relationship is significant given that the United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection and has affirmed the Navajo Nation's sovereignty. The laws that apply to the Native Americans do not apply in your case.

The undersigned finds that you have not established you are an eligible survivor as defined in 42 U.S.C. § 7384s(e)(3)(A). It is the decision of the Final Adjudication Branch that your claim is denied.

August 26, 2002

Denver, CO

Janet R. Kapsin

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 10568-2003 (Dep't of Labor, June 16, 2003)

NOTICE OF FINAL DECISION - REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch (FAB) 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). On March 29, 2003, you wrote to the FAB and filed an objection to the March 11, 2003 recommended decision of the Cleveland district office. Your objection has been considered by means of a review of the written record.

STATEMENT OF THE CASE

On September 24, 2002, you filed a claim (Form EE-2), for survivor benefits under the EEOICPA and identified bladder cancer as the diagnosed condition being claimed. You submitted an employment history form (EE-3) in which you stated that Morrison Knudson Co. employed your husband from September 29, 1974 to February 28, 1976, General Dynamics employed your husband from September 26, 1976 to November 24, 1976, and that Cleveland Wrecking employed your husband until May 31, 1988[1]. You stated that your husband wore a dosimetry badge while employed. You submitted a copy of your husband's death certificate which indicates he died on April 9, 1998 due to bladder cancer and renal failure. You submitted a copy of your marriage certificate which shows that you were married to the deceased employee on June 14, 1956. You submitted medical evidence which included Dr. Karen Harris' December 30, 1997 needle aspirate report in which she diagnosed your husband with transitional cell carcinoma. The medical evidence also included a copy of the Sewickley Valley Hospital discharge summary in which Dr. Scott Piranian diagnosed your husband with transitional cell carcinoma of the bladder with bony metastases and lymphatic metastases.

On November 14, 2001, Department of Energy (DOE) representative Roger Anders advised the district office via Form EE-5 that the employment history you provided contained information that was not accurate. In an attachment, Mr. Anders advised that your husband worked at a portion of a facility whose activities came under the auspices of the DOE's Naval Nuclear Propulsion Program. The Cleveland district office issued a recommended decision on March 11, 2003, in which it concluded that the evidence of record did not establish that your husband was a covered employee with cancer under § 7384l(9) of the EEOICPA because he was not a DOE employee or contractor employee at a DOE facility, nor an atomic weapons employee at an atomic weapons employer facility as those facilities are defined in §§ 7384l(4) and 7384l(12) of the EEOICPA. 42 U.S.C. §§ 7384l(4), 7384l(9), 7384l(12).

OBJECTIONS

Section 30.310(a) of the EEOICPA implementing regulations provides that, "[w]ithin 60 days from the

date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision, including HHS's reconstruction of the radiation dose to which the employee was exposed (if any), and whether a hearing is desired." 20 C.F.R. § 30.310(a). Section 30.312 of the EEOICPA implementing regulations provides that, "[i]f the claimant files a written statement that objects to the recommended decision within the period of time allotted in § 30.310 but does not request a hearing, the FAB will consider any objections by means of a review of the written record." 20 C.F.R. § 30.312. On March 29, 2003, you wrote to the FAB and advised that you objected to the recommended decision of the Cleveland district office. You stated that your husband worked as a laborer dismantling the old atomic power plant at Shippingport, PA and he worked side by side with employees that were covered. You stated that it was discrimination for your husband not to be considered covered under the EEOICPA. Your objection has been considered by means of review of the written record.

STATEMENT OF THE LAW

The EEOICPA was established to provide compensation benefits to covered employees (or their eligible survivors) that have been diagnosed with designated illnesses incurred as a result of their exposure to radiation, beryllium, or silica, while in the performance of duty for the DOE and certain of its vendors, contractors and subcontractors. The EEOICPA, at § 7384l(1), defines the term "covered employee" as (A) a covered beryllium employee, (B) a covered employee with cancer, and (C) to the extent provided in § 7384r, a covered employee with chronic silicosis (as defined in that section). 42 U.S.C. §§ 7384l(1), 7384r. To establish entitlement to benefits under the EEOICPA due to cancer, you must establish that the deceased employee contracted the cancer after beginning work at a DOE or atomic weapons employer facility. 42 U.S.C. § 73841(9). The EEOICPA, at § 7384l(12)(A), defines the term DOE facility "as any building, structure, or premise, including the grounds upon which such building, structure, or premise is located…in which operations are, or have been, conducted by, or on behalf of, the Department of Energy (except for buildings, structures, premises, grounds, or operations covered by Executive Order No. 12344, dated February 1, 1982 (42 U.S.C. § 7158 note), pertaining to the Naval Nuclear Propulsion Program)." 42 U.S.C. § 7384l(12).

It is the claimant's responsibility to establish entitlement to benefits under the EEOICPA. The EEOICPA regulation at § 30.111(a) states, "the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and these regulations, the claimant also bears the burden of providing to OWCP all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in these regulations." 20 C.F.R. §§ 30.110, 30.111(a).

After considering the written record of the claim and after conducting further development of the claim as was deemed necessary, the FAB hereby makes the following:

FINDINGS OF FACT

1. You filed a claim for survivor benefits under the EEOICPA on September 24, 2001.

2. Your husband was employed at the Shippingport Atomic Power Plant with the portion of the

facility whose activities came under the auspices of the Department of Energy's Naval Nuclear Propulsion Program.

3. Dr. Karen Harris diagnosed your husband with transitional cell carcinoma on December 30, 1997.

4. Your husband died on April 9, 1998, due to bladder cancer and renal failure.

5. You are the surviving spouse of **[Employee]**.

Based on the above-noted findings of fact in this claim, the FAB hereby also makes the following:

CONCLUSION OF LAW

Pursuant to § 7384l(12)(A) of the EEOICPA and § 30.5(v)(1) of the implementing regulations, employees engaged in Naval Nuclear Propulsion Program activities are excluded from coverage under the EEOICPA. The evidence of record establishes that your husband was a Naval Nuclear Propulsion Program employee; therefore he does not meet the definition of a covered employee with cancer as defined in § 7384l(9) of the EEOICPA and § 30.210 of the implementing regulations. Because your husband was not a covered employee with cancer, your claim for benefits is denied.

Washington, DC

Thomasyne L. Hill

Hearing Representative

Final Adjudication Branch

[1] The beginning date indicated on the employment history form was distorted during the creation of the claim record.

EEOICPA Fin. Dec. No. 13183-2003 (Dep't of Labor, October 15, 2003)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch (FAB) 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 discussed below, your claim for compensation is denied.

STATEMENT OF THE CASE

You filed a claim, Form EE-2, on October 23, 2001, seeking benefits pursuant to the Energy Employees Occupational Illness Compensation Program Act. You indicated on the claim form that you were filing for your spouse's cancer, specifically, acute myelogenous leukemia, diagnosed approximately on January 1, 1995. You also submitted Form EE-3, employment history, indicating that your spouse was employed by Fercleve Corporation, Manhattan Project, Oakridge, Tennessee, as a project technician from 1944 through 1946. Along with the claim forms, you submitted:

- your spouse's death certificate, noting the immediate cause of death as Mucormycosis Brain Abcess(s) due to or as a consequence of acute myelogenous leukemia;

- your marriage certificate;

- several listings of prescriptions/medications;

- several listings of medical expenses;

- a copy of your spouse's honorable discharge certificate dated March 14, 1946;

- a copy of your spouse's enlisted record and report of separation;

- a copy of a letter to Senator Bunning from **[Authorized Representative]** dated February 2, 2001;

- a copy of a letter to The Christ Hospital from Philip D. Leming, M.D. dated December 5, 1997;

- a copy of a hematology consultation and admission note signed by Philip D. Leming dated October 2, 1997, noting a diagnosis of acute myelocytic lueukemia with pancytopenia;

- a copy of a Ohio State University James Cancer Hospital and Research Institute medical document signed by Michael A. Caligiuri dated September 10, 1998;

- a copy of a letter signed by Philip D. Leming, M.D dated September 24, 2001, noting that it was at least as likely as not that the patient's acute leukemia was related to the radiation exposure in the past from his work on the atomic bomb project (Manhattan Project) in Oakridge, TN as any additional exposures;

- a copy of United States of America, War Department Army Service Forces Corps of Engineers Manhattan District certificate that states, "This is to certify that **[Employee]** Fercleve Corporation has participated in work essential to the production of the Atomic Bomb, thereby contributing to the successful conclusion of World War II. This certificate is awarded in appreciation of effective service." Signed by the Secretary of War, dated August 6, 1945;

On November 15, 2001, the Cleveland, Ohio, district office received a letter from Droder & Miller CO., L.P.A. indicating that on your original application for benefits under the EEOICPA it indicated that your spouse's diagnosis of cancer was in January of 1995, but Mr. Miller believes the records indicate that the diagnosis was sometime in mid to late 1997.

On February 12, 2002, the Cleveland District Office requested that additional medical evidence be provided within 30 days from the date of the letter. On February 27, 2002, the District Office received a letter from you dated February 25, 2002, stating that your spouse's diagnosis was 10/97, not 1/95, and that you received only the February 12, 2002, letter from the District Office. You also submitted:

- a duplicate copy of a letter dated September 24, 2001, signed by Philip D. Leming, M.D.;

- a duplicate copy of the Ohio State University James Cancer Hospital and Research Institute medical document signed by Michael A. Caligiuri dated September 10, 1998;

- an unsigned December 6, 1999, Christ Hospital progress note indicating that acute myeloid leukemia was initially diagnosed September 30, 1997;

- an unsigned December 3, 1999, Christ Hospital progress note, a November 29, 1999, follow up note from Cincinnati Hematology – Oncology, INC.;

- an October 3, 1997, surgical pathology report indicating a diagnosis of Bone marrow, clot section and aspirate smears involved by acute myeloid leukemia, seen microscopic description, signed by Cindy Westermann, M.D. and;

- a September 30, 1997, bone marrow clinical summary indicating a diagnosis of acute undifferentiated leukemia.

On November 30, 2001, the District Office received information from the Department of Energy regarding your spouse's claimed employment. The EE-5 form signed by Roger Holt stated "See Attached." The attached information indicated that **[Employee]**'s address was **[Employee's address],** birthplace Ft. Thomas, Kentucky, date of birth **[Date of Birth]**; under the clearance status section, the section titled "report rec'd" indicated file Chk. Neg.; the section "restriction removed" on December 14, 1944 and notes at the bottom stated, "Loyalty Ck. Reg. November 24, 1944" and "Ref. Ltrs. November 27, 1944."

On March 12, 2002, the Cleveland District Office advised you that your case file was transferred to the Jacksonville District Office.

On June 20, 2002, the Jacksonville District Office advised you that they reviewed all the evidence presented with your claim and that the evidence was not sufficient to make a decision. They indicated that the discharge papers you submitted indicated that your spouse was on active duty service with the U.S. Army from May 3, 1943 to March 14, 1946 and that the EEOICPA does not list the U.S. Army as one of the covered facilities under the Act. The District Office advised you of the criteria for employment at a covered facility and requested that you provide the name and location of the company and employment dates and any information that shows that your spouse worked at a Department of Energy facility or a Department of Energy contractor/subcontractor and/or atomic weapons facility. You were requested to provide the employment evidence within 30 days from the date of the letter.

On June 24, 2002, the District Office received a letter from you authorizing your brother in law **[Authorized Representative]** to act as your authorized representative concerning your claim under the EEOICPA. On July 18, 2002, the District Office received an employment history affidavit signed by **[Authorized Representative]**, your spouse's brother. **[Authorized Representative]** indicated employment at Fercleve Corp, Manhattan Project, Oak Ridge, TN from November 1944 to February 1946.

On August 5, 2002, the District Office received another EE-5 form from the Department of Energy stating that the employment history contains information that is not accurate. An attachment to the form indicated that at the request of the Department of Energy, Bechtel Jacobs Company, LLC performed a search for certain records regarding dates and locations of employment relating to special

exposure claimant **[Employee]**. The document included a statement, "we have searched payroll/radcon records in the possession of BJC to verify whether the claimant was employed at the K-25, Portsmouth or Paducah GDP, as appropriate, for more than 250 days prior to February 1, 1992. We were unable to locate any records for the claimant."

On August 26, 2002, the District Office requested you complete the SSA-581 and return it. On September 11, 2002, your completed SSA form was sent to the Department of Labor. On November 1, 2002, the District Office received Social Security Administration records regarding your spouse's employment from January 1942 thru December 1947. The records indicate that your spouse was employed at Cincinnati Gas and Electric Co. in 1942 and 1943; at PJ Erdal General Merchandise in 1942; at AT&T Corporation, in 1946 and 1947.

On December 27, 2002, the Jacksonville District Office issued a Recommended Decision regarding your claim for compensation under the EEOICPA. The decision concluded that there is no evidence to support that **[Employee]** was a covered employee pursuant to 42 U.S.C. § 7384l(1) and 20 C.F.R. § 30.5(u) of the implementing regulations.

Attached to the recommended decision was an explanation of your appeal rights, which stated that you had 60 days in which to file an objection to the recommended decision and/or request a hearing. You were also advised that, if there was no timely objection filed, the recommended decision would be affirmed and you would be deemed to have waived your right to challenge the decision.

On February 7, 2003, the Final Adjudication Branch received a letter from **[Authorized Representative]** advising that you object to the recommended decision and your request for an oral hearing. The letter stated that the reason you disagree with the decision is because the summary of events, most of which are documented in the file, clearly show that **[Employee]** was a covered employee under the EEOICPA. **[Authorized Representative]** stated, "**[Employee]** and I are brothers. In 1944 we were attending Ohio State University in Columbus, OH and were involved in an Army Specialized Training Program. We were both majoring in Electrical Engineering. While at Ohio State University he was recruited by representatives of Fercleve Corporation regarding work in Oak Ridge, TN. He accepted the offer to go to work for them to be on loan from the Army. In the Fall of 1944 he went to Oak Ridge, TN to work for Fercleve Corporation. **[Employee]**'s work with Fercleve Corporation turned out to involve nuclear activity on the first atomic bomb program, referred to as the Manhattan Project. He worked for Fercleve Corporation from 1944 until 1946. During this time he reported for work everyday for Fercleve. He worked under Fercleve supervision. He worked with equipment and tools provided by Fercleve. He worked in the Gaseous Diffusion Process where they pumped nuclear gases through a series of diaphragms over and over until the proper isotope was isolated. He also worked in the thermal diffusion process where they cooked the nuclear solutions, similar to a distilling process, over and over again until the just right isotope was isolated. He told me that in the gaseous diffusion process there were leaks where the nuclear gases would contaminate the immediate atmosphere. They were provided with little or no protection against the effect of these gases. In the thermal diffusion process they encountered numerous spills of extremely corrosive liquids. They would immediately flush these spills with water to minimize the corrosive damage that would otherwise occur on human flesh and equipment. After the war ended and we were all home, he told me a lot about his activity at Oak Ridge. In summary, all the time he worked for Fercleve he told me that he worked as a civilian on loan from the Army. There is no disputing the following facts: 1).Everyday in Oak Ridge, TN he went to work for Fercleve. 2).He worked with and under Fercleve supervision. 3).He worked with tools furnished for Fercleve. 4).He worked with equipment and processing machinery provided by Fercleve. 5).And most importantly, he received a formal certificate

of merit awarded in appreciation of effective service with Fercleve Corporation, signed by Henry L. Stinson, Secretary of War, who was the overall chief of the Manhattan Project."

On March 4, 2002, the Final Adjudication Branch advised you that your hearing would be held on April 22, 2003, at 2:00pm. Also, on March 4, 2002, you signed an Authorization for Representation authorizing **[Authorized Representative]** to serve as your representative in all matters pertaining to the adjudication of your claim under the EEOICPA.

On April 22, 2003, your hearing was held. Present were yourself, and **[Authorized Representative]**. You discussed the fact that your spouse went for a physical in September 1997. You indicated that his blood was taken and they got the test results back and that your spouse was told to see an oncologist immediately. You indicated that after he saw the oncologist, he told you that he had leukemia. **[Authorized Representative]** discussed the history of his brother's employment and the specifics of the letter filed on February 7, 2003, during the hearing.

On May 1, 2003, the Final Adjudication Branch sent the hearing transcripts to you for comment. On May 20, 2003, the Final Adjudication Branch received your comments on the transcript and your comments are included as a part of the record in this case and have been considered.

FINDINGS OF FACT

- You filed a claim for survivor benefits on October 23, 2001.

· You claimed a diagnosis of your spouse's acute myelogenous leukemia as a result of occupational exposure during his employment.

· You claimed that your spouse worked at Fercleve Corporation, in Oak Ridge, TN from 1944 to 1946.

· Your spouse served on active duty in the United States Army from May 3, 1943 to March 1946.

· The Department of Energy was unable to verify the claimed employment history.

· Cancer is a covered occupational illness under the EEOICPA. The medical evidence of record substantiates that your spouse had leukemia.

· Your spouse was diagnosed with leukemia in 1997.

· You were advised that you needed to provide employment evidence establishing proof that your spouse was employed at a covered facility during a covered time period.

· You did not provide employment evidence to substantiate that your spouse was a Department of Energy employee or contractor employee at a Department of Energy facility, nor an atomic weapons employee at an atomic weapons employer facility.

· Social Security Administration Records from 1942 to 1947 list Cincinnati Gas and Electric Company, PJ Erdal General Merchandise and AT&T Corporation as **[Employee]**'s employers.

· The Jacksonville, District Office recommended denial of your claim for benefits as you did not provide evidence that your spouse was a covered employee under the EEOICPA.

· You objected to the recommended denial of your claim.

· You did not submit additional employment evidence that would substantiate that your spouse was a covered employee under the EEOICPA.

CONCLUSIONS OF LAW

The EEOICPA established a compensation program to provide compensation to covered employees suffering from specifically designated occupational illnesses incurred as a result of their exposure to radiation, beryllium, or silica while in the performance of duty for the Department of Energy and certain of its vendors, contractors and subcontractors. The term "occupational illness" is defined by 42 U.S.C. §7384l(15) and 20 CFR § 30.5(z) as a covered beryllium illness, cancer, or chronic silicosis. You claimed leukemia as your spouse's diagnosed illness on your claim form. You presented medical evidence that establishes that your spouse has been diagnosed with leukemia. Although leukemia is a covered condition under the EEOICPA, in order to establish entitlement to compensation under the EEOICPA, the evidence must demonstrate the existence of an occupational illness related to a period of employment specified by the Act. While you have provided medical evidence to establish a diagnosis of leukemia, you have not provided sufficient employment evidence to show that your spouse was a covered employee under the EEOICPA. To be a "covered employee with cancer," the employee must meet the requirements of 42 U.S.C. § 7384l(9) and 20 C.F.R. § 30.210. Those provisions of the Act and implementing regulations require that the employee must have been an employee of the Department of Energy (DOE) at a DOE facility, of a DOE contractor at a DOE facility, or of an atomic weapons employer.

The term "covered employee" is defined by 42 U.S.C. § 7384l(1) and means any of the following: (A) A covered beryllium employee; (B) A covered employee with cancer; (C) To the extent provided in section 7384r of this title, a covered employee with chronic silicosis (as defined in that section).

The term "atomic weapons employee" is defined by 42 U.S.C. § 7384l(3) as an individual employed by an atomic weapons employer during a period when the employer was processing or producing, for the use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining and milling.

The term "atomic weapons employer" is defined by 42 U.S.C. § 7384l(4) as any entity, other than the United States that (A) processed or produced, for use by the United States, material that emitted radiation and was used in production of an atomic weapon, excluding uranium mining and milling: and (B) is designated by the Secretary of Energy as an atomic weapons employer for purposes of the compensation program.

The term "atomic weapons employer facility" is defined by 42 U.S.C. § 7384l(5) as a facility owned by an atomic weapons employer, that is or was used to process or produce, for use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining or milling.

The term "Department of Energy facility" under 42 U.S.C. § 7384l(12) means any building, structure,

or premise, including the grounds upon which such building, structure, or premise is located-

(A) in which operations are, or have been, conducted by, or on behalf of, the Department of Energy (except for buildings, structures, premises, grounds, or operations covered by Executive Order No. 12344, dated February 1, 1982 (42 U.S.C. 7158 note), pertaining to the Naval Nuclear Propulsion Program); and

(B) with regard to which the Department of Energy has or had-

(i) a proprietary interest; or

(ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction , or maintenance services.

Section 30.111(a) of the regulations states that, "Except where otherwise provided in the Act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and these regulations, the claimant also bears the burden of providing to OWCP all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in these regulations." 20 C.F.R. § 30.111(a).

The record in this case demonstrates that you did not provide the requested employment evidence to show that your spouse was a Department of Energy employee or contractor employee at a Department of Energy facility, nor an atomic weapons employee at an atomic weapons employer facility, as those facilities are defined in 42 U.S.C. § 7384l(4) and (12).

You were advised of the deficiencies in your claim. Based on my review of the evidence in your case record, your objections and pursuant to the authority granted by § 30.316(b) of the EEOCIPA regulations, I find that the district office's December 27, 2002, recommended decision is correct in the denial of your claim. The recommended decision denied your claim, because although you had submitted medical evidence showing that your spouse was diagnosed with leukemia, you did not submit the requested employment evidence showing that your spouse was a Department of Energy employee or contractor employee at a Department of Energy facility, nor an atomic weapons employee at an atomic weapons employer facility, as those facilities are defined in 42 U.S.C. § 7384l(4) and (12). Thus the undersigned finds that you were given the opportunity but have not established that your spouse was employed at a covered facility. You reported on the employment history form that your spouse was employed by the Fercleve Corporation, Manhattan Project in Oak Ridge, TN from 1944 to 1946. The evidence of record to date does not show that your spouse was a Department of Energy employee or contractor employee at a Department of Energy facility, nor an atomic weapons employee at an atomic weapons employer facility, as those facilities are defined in 42 U.S.C. § 7384l(4) and (12). Therefore you have not established that your spouse is a covered employee with cancer as defined under the EEOICPA. You objected and indicated that your spouse worked for Fercleve Corporation on loan from the United States Army. The employment evidence of record does not substantiate that your spouse is a covered employee as defined under the EEOICPA. In order to be potentially eligible under the EEOICPA, an employee must have had covered employment. The

evidence of record does not show that your spouse had covered employment.

Upon review of the entire case file, I find that you have not submitted evidence to substantiate that your spouse is a covered employee as defined by 42 U.S.C. § 7384l(1) nor a covered employee with cancer as defined under 42 U.S.C. § 7384l(9), as the evidence of record does not substantiate that your spouse was a Department of Energy employee, Department of Energy contractor employee or an atomic weapons employee who contracted the cancer after beginning such employment. I also find that the district office's recommended decision is supported by the evidence and the law, and cannot be overturned based on the additional information you submitted. For the reasons stated above, your claim for benefits for the claimed condition of leukemia is therefore denied.

Cleveland, Ohio

Tracy Smart, Hearing Representative

EEOICPA Fin. Dec. No. 55793-2004 (Dep't of Labor, September 22, 2004)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq.* Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On March 22, 2004, you filed a Form EE-1 (Claim for Benefits under the EEOICPA), based on the conditions of prostate cancer, emphysema and possible lung cancer. You also provided a Form EE-3 (Employment History), on which you indicated that you worked at the Weldon Spring Plant from 1956 to 1967, and that you wore a dosimetry badge.

Information obtained from a Department of Energy (DOE) representative and the Oak Ridge Institute for Science and Education database indicated that you worked as a contractor employee at the Weldon Spring Plant from July 17, 1956 to June 30, 1966. The Weldon Spring Plant is recognized as a covered DOE facility from 1957 to 1967 and 1985 to the present (for remediation). *See* Department of Energy, Office of Worker Advocacy, Facility List.

By letters dated March 31, May 5, and June 14, 2004, the Seattle district office notified you that they had completed the initial review of your claim for benefits under the EEOICPA, but additional medical evidence was needed in order to establish a claim. You were requested to provide documentation of a covered occupational illness, specifically, cancer.

You provided medical documentation which indicated that you received treatment for conditions including hypertension, diabetes mellitus, bronchitis and emphysema. In addition, a hospital discharge summary report from a hospital stay from April 15 to April 16, 1993, indicated that you were admitted to the hospital for a medical procedure following a radical prostatectomy, which was performed "in order to allow the patient to be treated for his cancer of the prostate." The date of diagnosis of prostate

cancer was not noted.

The record also includes several telephone messages, which indicate that you, with the assistance of your authorized representative, have been trying to obtain the medical records pertaining to your diagnosis of prostate cancer and the date of diagnosis, but that you have not yet received the medical records.

On July 16, 2004, the Seattle district office recommended denial of your claim for benefits. The district office concluded that you did not provide sufficient evidence as proof that you were diagnosed with a covered occupational illness as defined by § 7384l(15) of the Act. *See* 42 U.S.C. § 7384l(15). The district office further concluded that you were not entitled to compensation as outlined under § 7384s of the Act. *See* 42 U.S.C. § 7384s.

FINDINGS OF FACT

1. You filed a claim for employee benefits on March 22, 2004.
2. You worked at the Weldon Spring Plant, a covered Department of Energy facility, from July 17, 1956 to June 30, 1966.
3. You did not submit sufficient medical evidence establishing a date of diagnosis of a covered occupational illness under the EEOICPA.

CONCLUSIONS OF LAW

The undersigned has reviewed the recommended decision issued by the Seattle district office on July 16, 2004. I find that you have not filed any objections to the recommended decision as provided by § 30.316(a) of the regulations and that the sixty-day period for filing such objections, as provided for in section 30.310(a) has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

In order to be afforded coverage under Part B of the EEOICPA, you must establish that you were diagnosed with a designated occupational illness incurred as a result of exposure to silica, beryllium, and/or radiation: *cancer, beryllium sensitivity, chronic beryllium disease, and silicosis.* *See* 42 U.S.C. § 7384l(15), 20 C.F.R. § 30.110(a).

You filed a claim based on the condition of emphysema, which is not a compensable illness under Part B of the Act. You also filed a claim based on prostate cancer and possible lung cancer. Under the EEOICPA, a claim for cancer must be demonstrated by medical evidence that sets forth the diagnosis of cancer and the date on which the diagnosis was made. *See* 20 C. F. R. § 30.211.

The record in this case shows that by letters dated March 31, May 5, and June 14, 2004, you were requested to provide the required information to prove a medical condition. While a hospital discharge report dated April 16, 1993, contains a reference to your treatment for prostate cancer, the evidence of record does not contain a date of diagnosis of this cancer. Without the date of prostate cancer diagnosis, it is not possible to determine if this cancer was related to your employment at the Weldon Spring Plant. In regard to you claim for possible lung cancer, the medical documentation of record does not indicate a diagnosis of lung cancer.

It is the claimant's responsibility to establish entitlement to benefits under the Act. The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by the preponderance of the evidence, the existence of each and every criterion under any compensable claim category set forth

in section 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing to the Office of Workers' Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

The record in this case shows that you did not provide sufficient medical documentation of a covered occupational illness under the Act. Therefore, your claim must be denied.

For the above reasons, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

Seattle, WA

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

Consequential conditions

EEOICPA Fin. Dec. No. 19516-2004 (Dep't of Labor, 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).

EEOICPA Fin. Dec. No. 10032182-2006 (Dep't of Labor, March 3, 2008)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, your claim is approved for impairment benefits in the amount of $195,000.00 based on lung cancer under Part E of EEOICPA, approved for $55,000.00 in wage-loss benefits under Part E, and approved for the consequential illness of coronary artery disease under Part E. You received state workers' compensation benefits of $126,173.60 for your covered illness of lung cancer, and this will be coordinated with your Part E benefits, leaving your net entitlement to compensation under Part E as $123,826.40.

STATEMENT OF THE CASE

On October 15, 2001, you filed a claim for benefits under Part E (formerly Part D) of EEOICPA and identified lung cancer as the illness that allegedly resulted from your employment at a Department of Energy (DOE) facility. On February 20, 2004, the FAB issued a final decision concluding that you were entitled to lump-sum monetary and medical benefits for your lung cancer under Part B of EEOICPA. Based on that conclusion, you were awarded $150,000.00 and medical benefits for your lung cancer under Part B. On August 9, 2006, the FAB issued a final decision that also awarded you medical benefits under Part E of EEOICPA for your lung cancer.

On January 8, 2007, the district office received your request for impairment and wage-loss benefits under Part E based on your lung cancer. You elected to have a physician selected by the Department of Labor perform the impairment rating. You also you stated that you first experienced wage-loss beginning in 1997, when you were "officially medically retired from work at Westinghouse Savannah River Plant" and that this wage-loss has continued since then.

The DOE confirmed your employment at the Savannah River Site (SRS) in Aiken, South Carolina from April 23, 1984 to November 1, 1997. You worked for E.I. DuPont and Westinghouse, two DOE contractors, during your employment at the SRS. The medical evidence includes a January 3, 1995 pathology report, signed by Dr. Sharon Daspit, which confirms a diagnosis of squamous cell carcinoma of the left lung. On April 25, 2007, the district office also received your request that your coronary artery disease be accepted as a consequential illness of your lung cancer, as it is related to your radiation treatment for your lung cancer.

To determine your "minimum impairment rating" (the percentage rating representing the extent of whole person impairment, based on the organ and body functions affected by your covered illnesses and the extent of the impairment attributable to your covered illnesses), the district office referred your file material to a District Medical Consultant (DMC).

On April 18, 2007, the DMC reviewed the medical evidence of record and determined that pursuant to Table 8-2 of the Fifth Edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, your covered illness of lung cancer resulted in a Class 4 respiratory disorder that translated to a 73% whole person impairment. The DMC also determined that pursuant to Table 3.6a of the *Guides*, your coronary artery disease resulted in an 18% whole person impairment. Using the combined values chart contained in the *Guides*, the DMC concluded that you had a 78% whole person impairment due to your covered illnesses of lung cancer and coronary artery disease. The DMC explicitly stated that your cardiac condition is "due to the radiation of the lung cancer, and such is a known complication of chest radiation."

You submitted your Social Security Administration earnings statement, which shows that you last had recorded wages in 1997. An April 8, 1997 letter from Dr. James R. Mobley states that your pulmonary and cardiovascular systems "are so marginal that any stress will possibly cause an exacerbation" of your problems, and that in his opinion you should be considered totally disabled from gainful employment.

You submitted a copy of your "Compromise Settlement Agreement and Petition for Approval" confirming that you received a settlement of your state workers' compensation claim totaling $126,713.60 for your lung cancer.

On June 8, 2007, the Jacksonville district office issued a recommended decision finding that your coronary artery disease was a consequential illness related to your lung cancer treatment, that your accepted illnesses of lung cancer and coronary artery disease resulted in a 78% whole body impairment, that you were entitled to $195,000.00 in impairment benefits, and calculating your wage-loss benefits as $55,000, which was capped when the total amount of Part E monetary benefits reached $250,000.00. From this combined maximum amount of $250,000.00, the district office subtracted your $126,173.60 in state workers' compensation benefits and recommended that you be awarded a net payment of $123,826.40 in monetary benefits under Part E of EEOICPA.

In its recommended decision, the district office stated that you had no earnings reported to Social Security for the years 1998 through 2006; however, it stated that since total Part E compensation was statutorily capped at $250,000.00 and it was recommending that you receive $195,000.00 in impairment benefits, your wage-loss benefits were only calculated for the years 1998 through 2001 (you are entitled to $15,000 in wage-loss benefits for the qualifying calendar years 1998 through 2000, and $10,000.00 for the qualifying calendar year 2001). This totals $55,000.00 in wage-loss benefits.

On June 15, 2007, the FAB received your waiver of your right to object to the findings of fact and conclusions of law contained in the recommended decision.

On July 13, 2007, the FAB remanded your claim, and stated that the recommended decision did not take into account the full amount of wage-loss benefits to which you are entitled. The FAB stated that, "It is true that total compensation, excluding medical benefits, under Part E may not exceed $250,000; however, it is the final number after coordination of state workers' compensation benefits that cannot exceed $250,000, not the benefit amount before state workers' compensation benefits are subtracted."

On November 21, 2007, the Director of DEEOIC issued a Director's Order vacating the July 13, 2007 remand order issued by the FAB. The Director's Order stated that the only way to interpret the regulations at 20 C.F.R. § 30.626(a), which state "the OWCP will reduce the compensation payable under Part E by the amount of benefits the claimant receives from a state workers' compensation program by reason of the same covered illness," is to stop calculating the benefits an employee is entitled to under Part E at $250,000.00, and then coordinate the state workers' compensation benefits.

Following an independent review of the evidence of record, the undersigned hereby makes the following:

FINDINGS OF FACT

1. On October 15, 2001, you filed a claim for benefits under Part E (formerly Part D) of EEOICPA. You identified lung cancer as the illness you alleged resulted from your employment at a DOE facility.

2. On February 20, 2004, the FAB issued a final decision determining that you were entitled to lump-sum and medical benefits for your lung cancer under Part B, and awarding you $150,000.00 and medical benefits for your lung cancer under Part B.

3. On August 9, 2006, the FAB issued a final decision awarding you medical benefits under Part E of EEOICPA for your covered illness of lung cancer.

4. Your coronary artery disease is a consequential illness of your lung cancer.

5. On April 18, 2007, the DMC reviewed the medical evidence of record and determined that your covered illness of lung cancer and covered consequential illness of coronary artery disease resulted in a 78% whole person impairment.

6. You last had recorded wages in 1997. Your doctor states that your pulmonary and cardiovascular systems "are so marginal that any stress will possibly cause an exacerbation" of your problems, and that in his opinion you should be considered totally disabled from gainful employment.

7. You were born on October 5, 1942 and turned 55 years old in 1997. Your normal Social Security retirement age is 65 years.

8. You received $126,173.60 in state workers' compensation benefits for your lung cancer, based on exposure to ionizing radiation.

Based on these facts, the undersigned hereby makes the following:

CONCLUSIONS OF LAW

If the claimant waives any objections to all or part of the recommended decision, the FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part. 20 C.F.R. § 30.316(a). You have waived your right to file objections to the findings of fact and conclusions of law issued in the May 9, 2007 recommended decision.

Under Part E of EEOICPA, a "covered DOE contractor employee" with a "covered illness" shall be entitled to impairment benefits based upon the extent of whole person impairment of all organs and body functions that are compromised or otherwise affected by the employee's "covered illness." *See* 42 U.S.C § 7385s-2(a); 20 C.F.R. § 30.901(a). This "minimum impairment rating" shall be determined in accordance with the Fifth Edition of the *Guides*. *See* 42 U.S.C. § 7385s-2(b). The statute provides that for each percentage point of the "minimum impairment rating" that is a result of a "covered illness," the "covered DOE contractor employee" shall receive $2,500.00. *See* 42 U.S.C. § 7385s-2(a)(1).

The evidence of record indicates that you are a covered DOE contractor employee with a covered illness of lung cancer and a covered consequential illness of coronary artery disease. You have a "minimum impairment rating" of 78% of your whole body as a result of your covered illnesses of lung cancer and coronary artery disease, based on the *Guides*. You are therefore entitled to $195,000.00 in impairment benefits (78 x $2,500 = $195,000.00) under Part E of EEOICPA.

In order to be entitled to wage-loss benefits under Part E, you must submit factual evidence of your wage-loss and medical evidence that is of sufficient probative value to establish that the period of wage-loss at issue is causally related to your covered illness. *See* Federal (EEOICPA) Procedure Manual, Chapter E-800.6b (September 2005). You were born on October 5, 1942 and turned 55 years old in 1997. Your normal Social Security retirement age is 65 years. You last had recorded wages in 1997 and have not had any wages since then. Your doctor states that your pulmonary and cardiovascular systems "are so marginal that any stress will possibly cause an exacerbation" of your

problems, and that in his opinion you should be considered totally disabled from gainful employment. This is sufficient to show that you had wage-loss related to your covered illnesses of lung cancer and coronary artery disease beginning in 1998.

Accordingly, your claim for wage-loss benefits under Part E of EEOICPA is accepted in the amount of $55,000.00. You are entitled to $15,000.00 in wage-loss benefits for the qualifying calendar years 1998 through 2000, and $10,000.00 for the qualifying calendar year 2001. This totals $55,000.00 in wage-loss benefits, which together with your $195,000.00 in impairment benefits, totals the statutory maximum of $250,000.00. Therefore, your wage-loss eligibility ends there.

All benefits payable under Part E of EEOICPA must be coordinated with the amount of any state workers' compensation benefits that were paid to the claimant for the same covered illness or illnesses. *See* 42 U.S.C. § 7385s-11. Based on the evidence in the file, this results in a reduction of the maximum amount payable to you in impairment and wage-loss benefits, $250,000.00, by $126,173.60, resulting in a net entitlement of $123,826.40.

Therefore, your claim for the consequential illness of coronary artery disease is accepted under Part E. Your claim for impairment and wage-loss benefits under Part E for your lung cancer and coronary artery disease is also accepted, and you are awarded a net amount of $123,826.40.

Washington, DC

Carrie A. Rhoads

Hearing Representative

Final Adjudication Branch

Covered employment

EEOICPA Fin. Dec. No. 1400-2002 (Dep't of Labor, January 22, 2002)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA).

On December 12, 2001, the Seattle District Office issued a recommended decision concluding that the deceased covered employee was a member of the Special Exposure Cohort, as that term is defined in § 7384l(14) of the EEOICPA, and that you are entitled to compensation in the amount of $150,000 pursuant to § 7384s of the EEOICPA as his survivor. On December 17, 2001, the Final Adjudication Branch received written notification from you waiving any and all objections to the recommended decision.

The undersigned has reviewed the evidence of record and the recommended decision issued by the Seattle district office on December 12, 2001, and finds that:

In a report dated August 20, 1996, Dr. John Mues diagnosed the deceased covered employee with

mixed squamous/adenocarcinoma of the lung. The report states the diagnosis was based on the results of a thoracoscopy and nodule removal. Lung cancer is a specified disease as that term is defined in § 7384l(17)(A) of the EEOICPA and 20 CFR § 30.5(dd)(2) of the EEOICPA regulations.

You stated in the employment history that the deceased covered employee worked for S.S. Mullins on Amchitka Island, Alaska from April 21, 1967 to June 17, 1969. Nancy Shaw, General Counsel for the Teamsters Local 959 confirmed the employment by affidavit dated November 1, 2001. The affidavit is acceptable evidence in accordance with § 30.111 (c) of the EEOICPA regulations.

Jeffrey L. Kotch[1], a certified health physicist, has advised it is his professional opinion that radioactivity from the Long Shot underground nuclear test was released to the atmosphere a month after the detonation on October 29, 1965. He further states that as a result of those airborne radioactive releases, SEC members who worked on Amchitka Island, as defined in EEOICPA § 7384l(14)(B), could have been exposed to ionizing radiation from the Long Shot underground nuclear test beginning a month after the detonation, i.e., the exposure period could be from approximately December 1, 1965 through January 1, 1974 (the end date specified in EEOICPA, § 7384l(14)(B)). He supports his opinion with the Department of Energy study, *Linking Legacies*, DOE/EM-0319, dated January 1997, which reported that radioactive contamination on Amchitka Island occurred as a result of activities related to the preparation for underground nuclear tests and releases from Long Shot and Cannikin. Tables 4-4 and C-1, on pages 79 and 207, respectively, list Amchitka Island as a DOE Environmental Management site with thousands of cubic meters of contaminated soil resulting from nuclear testing.

The covered employee was a member of the Special Exposure Cohort as defined in § 7384l(14)(B) of the EEOICPA and §§ 30.210(a)(2) and 30.213(a)(2) of the EEOICPA regulations. This is supported by evidence that shows he was working on Amchitka Island for S.S. Mullins during the potential exposure period, December 1, 1965 to January 1, 1974.

The covered employee died February 17, 1999. Metastatic lung cancer was included as a immediate cause of death on the death certificate.

You were married to the covered employee August 18, 1961 and were his wife at the time of his death. You are the eligible surviving spouse of the covered employee as defined in § 7384s of the EEOICPA, as amended by the National Defense Authorization Act (NDAA) for Fiscal Year 2002 (Public Law 107-107, 115 Stat. 1012, 1371, December 28, 2001.[2]

The undersigned hereby affirms the award of $150,000.00 to you as recommended by the Seattle District Office.

Washington, DC

Thomasyne L. Hill

Hearing Representative

[1] Jeffrey L. Kotch is a certified health physicist employed with the Department of Labor, EEOICP, Branch of Policies, Regulations and Procedures. He provided his professional opinion in a December 6, 2001 memorandum to Peter Turcic, Director of EEOICP.

[2] Title XXXI of the National Defense Authorization Act for Fiscal Year 2002 amended the Energy Employees

EEOICPA Fin. Dec. No. 1704-2003 (Dep't of Labor, February 10, 2003)

NOTICE OF FINAL DECISION - REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA). On January 22, 2003, Attorney Mike G. Nassios, your authorized representative, wrote to the FAB and filed objections to the November 27, 2002 recommended decision of the Jacksonville district office. Your objections have been considered by means of a review of the written record.

STATEMENT OF THE CASE

On August 9, 2001, you filed a claim (Form EE-1) for benefits under the EEOICPA. You identified lung cancer as the diagnosed condition being claimed. You stated that Paul Rankin employed you as a pipe layer and laborer at the K-25 and Y-12 Plants at Oak Ridge from 1958 to 1964. Based upon the evidence of record, the Jacksonville district office issued a recommended decision on November 27, 2002, in which it concluded that you were not employed as a contracted or subcontracted employee at an atomic weapons employer or facility, nor at a Department of Energy facility, as those terms are defined in § 7384l of the EEOICPA and § 30.5 of the EEOICPA regulations. 42 U.S.C. § 7384l. 20 C.F.R. § 30.5. The district office also concluded that you are not a covered employee as that term is defined in § 7384l(1) of the EEOICPA. 42 U.S.C. § 7384l(1).

OBJECTIONS

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, pursuant to § 30.310 of the EEOICPA regulations. 20 C.F.R. § 30.310. On January 22, 2003, your attorney filed objection to the recommended decision of the district office. Your attorney stated it was your position that you have proven by a preponderance of the evidence that you were employed as a contracted or subcontracted employee at an atomic weapons employer or facility or a Department of Energy (DOE) facility as those terms are defined in §§ 7384l of the EEOICPA and 30.5 of the EEOICPA regulations. 42 U.S.C. § 7384l. 20 C.F.R. § 30.5. He also stated it was your position that you had presented more evidence than a self-serving affidavit of yourself, in that you presented the affidavit of other individuals and the DOE cannot legitimately rebut this proof in that the DOE records are not always all inclusive. On January 30, 2003, your attorney submitted an affidavit from Fay Webb in which she stated that you were employed by Paul Rankin from February 1958 until December 1958 at the Y-12 Plant and from October 1964 to December 1964 at the K-25 plant. Mrs. Webb identified herself as the wife of your co-worker.

You stated in your employment history (Form EE-3) that Paul Rankin employed you as a pipe layer and laborer from 1958 to 1964 at the K-25 and Y-12 Plants in Oak Ridge, TN. You submitted a copy of the Social Security Administration (SSA) statement of earnings which show Paul Rankin employed you in the third quarter of 1958 and the fourth quarter of 1964. Mr. Franklin Whetsell, who identified himself as a work associate, and your wife signed affidavits (Form EE-4) stating that you were employed by Paul Rankin from 1958 to 1964. On June 7, 2002, you advised the district office in writing that you worked for Paul Rankin at Oak Ridge for two different jobs. You stated that the first job began around February 1958 and ended December 1958 at Y-12 and the second job at K-25 began

and ended in 1964. On September 5, 2002, Frank Whetsell wrote to the district office in regards to the affidavit he submitted and advised that "his father" worked for Paul Rankin during the years 1958 through 1964. Mr. Whetsell explained that he was a "kid" at the time so he doesn't remember specific dates but he does recall his father "talking about working out there."

ANALYSIS

The DOE has advised that it has no employment information regarding you. There has been no evidence submitted that establishes that Paul Rankin, the employer for whom you claim you worked, was a contractor at the Y-12 or K-25 plant. The employment history (Form EE-3) you submitted conflicts with the SSA earnings statement and the information in your letter of June 7, 2002. You stated in your employment history that you worked for Paul Rankin at the Y-12 and K-25 plants from 1958 to 1964 but you stated in your June 7, 2002 letter to the district office that you worked at Oak Ridge on two different jobs. You stated that the first job was at the Y-12 plant and began around February 1958 and ended December 1958. The second job was at the K-25 plant and it began and ended in 1964. You also stated in your June 7, 2002 letter that you have no exact recollection of the dates. The SSA earnings statement only shows earnings for the third quarter in 1958 and the fourth quarter in 1964 which would not total the 250 days required to establish that you are a member of the Special Exposure Cohort. You submitted an affidavit from Franklin Whetsell in which he identified himself as a "work associate" and in response to the question to describe his knowledge of your employment history, he stated you were employed by Paul Rankin from 1958 to 1964 at the DOE facilities in Oak Ridge, TN (K-25 and Y-12). However, on September 5, 2002, Mr. Whetsell advised the district office, by letter, that his father worked with you during the years 1958 through 1964. He also stated that he was a kid at the time and he did not remember specific dates. Mr. Whetsell's letter conflicts with the information provided on his affidavit. Your wife submitted an affidavit in which she stated that you worked for Paul Rankin at the Oak Ridge Facilities from 1958 to 1964 which conflicts with the information that you provided as clarification in your June 7, 2002 letter. The information provided by Mrs. Webb in her affidavit is in conflict with the SSA earnings statement.

The EEOICPA regulations at § 30.111(c) allows for the acceptance of written affidavits or declarations as evidence of employment history for the purpose of establishing eligibility. Pursuant to the EEOICPA regulations at § 30.111(a), the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. 20 C.F.R. §§ 30.111(a), 30.111(c). A claimant will not be entitled to any presumption otherwise provided for in the EEOICPA regulations if substantial evidence exists that rebuts the existence of the fact that is the subject of the presumption. *See* 20 C.F.R. § 30.111(d). The evidence of record is not sufficient to establish you are a covered employee as defined in the EEOICPA. *See* 42 U.S.C. §§ 7384l(1), 7384l(4), 7384l(7), 7384l(9), 7384l(11), 7384l(14). The evidence of record is not sufficient to establish that Paul Rankin was a contractor for the DOE.

CONCLUSION:

Based on my review of your case record and pursuant to the authority granted by § 30.316(b) of the EEOICPA regulations, I find that the district office's November 27, 2002 recommended decision is correct and I accept those findings and the recommendation of the district office.

Therefore, I find that you are not entitled to benefits under the Act, and that your claim for

compensation must be denied.

Washington, DC

Thomasyne L. Hill

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 10432-2004 (Dep't of Labor, September 13, 2004)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On September 24, 2001, you filed a claim, Form EE-1, for benefits under the EEOICPA based on prostate cancer, stomach cancer, other lung condition specified as a spot, goiter and an unspecified throat condition.

Medical evidence submitted in support of your claim included a surgical pathology report dated January 9, 1995 that showed a diagnosis of adenocarcinoma of the stomach and a hospital discharge summary dated January 11, 1995 that showed a diagnosis of gastric carcinoma. The medical evidence also showed diagnoses of benign prostatic hyperplasia in January 1995; multinodular goiter, status post; right thyroid lobectomy in March 1997; and stable pulmonary nodules in February 2000.

You provided an employment history on Form EE-3 indicating that you were employed at INCO, Reduction Pilot Plant (RPP) in Huntington, West Virginia from October 11, 1952 to 1986. The Huntington Pilot Plant in Huntington, West Virginia is recognized as a DOE facility from 1951 to 1963, and from 1978 to 1979. *See* Department of Energy Worker Advocacy Facilities List.

On October 5, 2001, the Cleveland district office notified you that your claims for a goiter, lung and throat conditions were not covered under the Act.

On January 14, 2002, the Department of Energy (DOE) reported that they had no employment information on you. On January 29, 2002, the Cleveland district office notified you that DOE does not have any employment record to show that you worked for INCO at the RPP during the period of your employment. You were advised to furnish any document or documents (copy of security clearance, ID card, SSA records, etc.) that would establish your employment at INCO from 1952 to 1986. You were also advised that you could ask others to affirm your employment by INCO by completing and returning an Employment History Affidavit (Form EE-4). You were asked to provide the requested evidence within 30 days of the letter.

In response on April 8, 2002, you submitted a copy of your Itemized Statement of Earnings from the Social Security Administration (SSA) that showed you received earnings from INCO Alloys International Inc. from 1952 to 1986.

On December 8, 2003, the Cleveland district office requested the DOE's corporate verifier for INCO to determine whether you worked in the RPP. On December 15, 2003, the DOE's corporate verifier reported that no record was found to establish that you were assigned and/or worked in the RPP while employed by INCO from 1952 to 1986.

On January 27, 2004, the Cleveland district office explained that while the evidence shows that you worked at INCO in Huntington, West Virginia from 1952 to 1986, there is no evidence showing that you were assigned and/or worked in the RPP, the covered nuclear portion of the facility, while employed by INCO from 1952 to 1986. The SSA records you submitted merely show that you received earnings from INCO from 1952 to 1986; however they do not place you within the RPP. They requested that you provide any documents that would show that you were assigned by INCO to work at the RPP, the covered nuclear portion of the facility. No response to this request was received.

On July 1, 2004, the district office issued a recommended decision which concluded that you are not entitled to compensation under 42 U.S.C. § 7384s because the evidence failed to establish that the you are a covered employee, as defined by 42 U.S.C. § 7384l(1); and that you did not provide sufficient evidence to show that you were employed at an "atomic weapons employer facility" as defined in 42 U.S.C. § 7384l(5) nor that you were employed at a "Department of Energy facility" as defined by 42 U.S.C. § 7384l(12).

FINDINGS OF FACT

1. You filed a claim for benefits under the EEOICPA on September 24, 2001.

2. You were employed by INCO Alloys International Inc. in Huntington, West Virginia from 1956 to 1986.

3. The DOE's corporate verifier for INCO confirmed that they have no record that you worked at the RPP, the covered nuclear portion of that facility. The Huntington Pilot Plant was a Department of Energy (DOE) facility from 1951 to 1963 and from 1978 to 1979. INCO was the DOE contractor at that facility from 1951 to 1963.

4. You did not provide sufficient employment evidence to establish that you were assigned by INCO to work in the RPP.

5. You were advised of the deficiencies in your claim and provided with the opportunity to correct them.

CONCLUSIONS OF LAW

I have reviewed the recommended decision issued by the Cleveland district office on July 1, 2004. I find that you have not filed any objections to the recommended decision, and that the sixty-day period for filing such objections has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

In order to be afforded coverage under the Energy Employees Occupational Illness Compensation Program Act, you must establish that you have been diagnosed with a designated occupational illness incurred as a result of exposure to silica, beryllium, and/or radiation: *cancer, beryllium sensitivity, chronic beryllium disease*, and *silicosis*. *See* 42 U.S.C. § 7384l(15); 20 C.F.R. § 30.110(a). Further, the illness must have been incurred while in the performance of duty for the Department of Energy and certain of its vendors, contractors, and subcontractors, or for an atomic weapons employer or facility. *See* 42 U.S.C. §§ 7384l(4)-(7), (9), (11).

Additionally, in order to be afforded coverage as a "covered employee with cancer," you must show that you were a DOE employee, a DOE contractor employee, or an atomic weapons employee, who contracted cancer after beginning employment at a DOE facility or an atomic weapons employer facility. *See* 42 U.S.C. § 7384l(9); 20 C.F.R. § 30.210(b). While you did provide evidence of a diagnosis of stomach cancer, the record in its current posture lacks proof that you worked in covered employment under the Act.

The record shows that by letters dated January 29, 2002 and January 25, 2004, you were requested to provide the required information to prove you had covered employment under the Act.

It is the claimant's responsibility to establish entitlement to benefits under the Act. The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of every criterion under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means it is more likely than not that a given proposition is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing to the Office of Workers' Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

The record in this case shows that you did not submit proof that you had covered employment under the Act. Therefore, your claim must be denied for lack of evidence showing that you had covered employment under the EEOICPA.

For the above reasons the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

Cleveland, Ohio

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Debra A. Benedict

Acting District Manager

Final Adjudication Branch

EEOICPA Fin. Dec. No. 17556-2003 (Dep't of Labor, September 27, 2004)

NOTICE OF FINAL DECISION

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

STATEMENT OF THE CASE

On December 13, 2001, you filed a claim, Form EE-2 (Claim for Survivor Benefits under the EEOICPA), based on the employment of your late husband, **[Employee]** (the employee). You identified an unspecified cancer as the condition being claimed.

Medical evidence submitted with the claim included a December 19, 1989 medical report from St. Mary's Hospital, showing a diagnosis of poorly differentiated large cell carcinoma of the upper lobe of the right lung. You also submitted a copy of a pathology report which diagnosed lung cancer on December 15, 1989.

You provided a Form EE-3 (Employment History), indicating that your husband was employed with James Bolt, a subcontractor, while at the Portsmouth Gaseous Diffusion Plant (GDP) in Piketon, Ohio from approximately 1976 to 1985. The Department of Energy (DOE) was unable to verify your husband's employment. Following appropriate development, on December 11, 2002, the Cleveland district office issued a recommended decision to deny the claim based on the lack of established employment at a facility covered under the Act. On February 20, 2003, the Final Adjudication Branch affirmed the findings of the district office's recommended decision.

On January 13, 2004, you requested that your case be reopened. Along with your request, you submitted additional employment evidence. On April 23, 2004, as a result of the additional employment evidence you submitted, a Director's Order was issued vacating the February 20, 2003 final decision of the Final Adjudication Branch denying your claim for compensation under the EEOICPA. Your case was then returned to the Cleveland district office for consideration of the new evidence and issuance of a new recommended decision.

The Cleveland district office was able to verify that your husband was employed by James Bolt from about 1978 to 1985 based on an itemized statement of earnings provided by the Social Security Administration (SSA). You also provided several letters and Forms EE-4 (Employment History Affidavit) from Pat Spriggs (your husband's co-worker), Cassandra Bolt-Meredith (the wife of James Bolt, your husband's employer), and **[Name of Employee's son-in-law]** (your husband's son-in-law) placing your husband on site at the Portsmouth GDP as a part-time subcontractor employee from 1978 to 1985. In addition, a letter from Bruce E. Peterson, General Manager of Ledoux & Company stating that "Mr. James Bolt was an independent subcontractor for Ledoux & Company performing witnessing services for various clients at the Portsmouth Gaseous Diffusion Nuclear Facility in Portsmouth, Ohio" supports that a contract existed between James Bolt, Ledoux & Company, and the Portsmouth GDP during the 1970's and 1980's.

You provided a copy of your marriage certificate, showing you and your husband were married on October 7, 1947. You provided a copy of your husband's death certificate showing he was married to you at his time of death on February 14, 1990.

On August 23, 2004, the Cleveland district office issued a recommended decision that concluded your

husband is a member of the Special Exposure Cohort, as defined by § 7384l(14)(A). The district office further concluded that your husband was diagnosed with lung cancer, which is a specified cancer as defined by § 7384l(17)(A). In addition, the district office concluded that you are the surviving spouse of the employee, as defined by § 7384s, and, as such, you are entitled to compensation in the amount of $150,000.00 pursuant to § 7384s.

On August 30, 2004, the Final Adjudication Branch received written notification that you waive any and all rights to file objections to the recommended decision.

FINDINGS OF FACT

1. You filed a claim and presented medical evidence on December 13, 2001, based on your husband's lung cancer.

2. For the purposes of SEC membership, your husband was employed with James Bolt, a DOE subcontractor, at the Portsmouth GDP in Piketon, Ohio, from at least 1978 to 1985

3. Your husband was employed for a number of work days aggregating at least 250 work days from September 1, 1954, to February 1, 1992, and during such employment worked in a job that had exposures comparable to a job that is or was monitored through the use of dosimetry badges.

4. On December 15, 1989, your husband was diagnosed with lung cancer.

5. You are the surviving spouse of the employee and were married to him at least one year prior to his death.

CONCLUSIONS OF LAW

In order to be considered a "member of the Special Exposure Cohort," your husband must have been a Department of Energy (DOE) employee, DOE contractor employee, or an atomic weapons employee who was so employed for a number of work days aggregating at least 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, and, during such employment worked in a job that was monitored through the use of dosimetry badges for exposure at the plant of the external parts of the employee's body; or had exposures comparable to a job that is, or, was monitored through the use of dosimetry badges, as outlined in 42 U.S.C. § 7384l(14)(A).

The evidence of record establishes that your husband worked in covered employment at the Portsmouth GDP from at least 1978 to 1985. Consequently, he met the requirement of working more than an aggregate 250 days at a covered facility. Also, the statute requires proof that the covered employee was monitored through the use of dosimetry badges for exposure at the plant of the external parts of employee's body. You indicated that you were not sure whether your husband wore a dosimetry badge. Under provisions of the Division of Energy Employees Occupational Illness Compensation (DEEOIC), employees who worked at the Portsmouth GDP between September 1, 1954 and February 1, 1992 performed work that was comparable to a job that was monitored through the use of dosimetry badges. *See* Federal (EEOICPA) Procedure Manual, Chapter 2-500.3 (June 2002). Thus, your husband met the dosimetry requirements of the Act.

The EEOICPA provides coverage for a specified cancer as defined in § 4(b)(2) of the Radiation Exposure Compensation Act (RECA) including cancer of the lung. The medical evidence of record indicates that your husband was diagnosed with lung cancer. Therefore, he is a member of the Special Exposure Cohort, who was diagnosed with a specified cancer under the Act. *See* 42 U.S.C. § 7384l(17)(A).

The employee is deceased and you have provided documentation that you are the surviving spouse of the employee, who was married to the employee at least one year immediately before his death. *See* 42 U.S.C. § 7384s(e)(3)(A).

For the foregoing reasons, the undersigned hereby accepts and approves your claim based on cancer of the lung. You are entitled to compensation in the amount of $150,000, pursuant to § 7384s of the EEOICPA. *See* 42 U.S.C. § 7384s(a)(1) and (e)(1)(A).

Cleveland, Ohio

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Debra A. Benedict

Acting District Manager

Final Adjudication Branch

EEOICPA Fin. Dec. No. 59055-2004 (Dep't of Labor, September 17, 2004)

NOTICE OF FINAL DECISION

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

STATEMENT OF THE CASE

You filed a claim, Form EE-1 (Claim for Employee Benefits under the EEOICPA), on July 7, 2004, based on rectal cancer/colon cancer. You provided a copy of a histopathology report which diagnosed invasive adenocarcinoma, based on analysis of a rectal polyp obtained during a colonoscopy on February 24, 1997. An operative report shows that you underwent a low anterior resection due to rectal cancer on March 13, 1997. The post-surgical pathology report diagnoses moderately differentiated adenocarcinoma of the colon.

You also provided a Form EE-3 (Employment History) in which you state that you worked for Dynamic Industrial (Dycon) at the Portsmouth Gaseous Diffusion Plant (GDP), in Piketon, OH, as a pipefitter from January 1983 to November 1984 and from January 1985 to June 1985. You also report that you worked for the Marley Cooling Tower Co. at the Portsmouth GDP during March 1985. You also state that you wore a dosimetry badge while so employed.

The Department of Energy (DOE) was unable to confirm your reported employment. You provided copies of Forms W-2 which show that you were paid wages by Dynamic Industrial Cons. Inc. during 1983, 1984, and 1985; and by the Marley Cooling Tower Co. in 1985. A letter from the Financial Secretary Treasurer of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 577, reports that you worked at the Portsmouth GDP for Dynamic Industrial from January 1983 to November 1984 and from January 1985 to June 1985; and for Marley Cooling Tower Co. during March 1985. A representative of the DOE provided information which establishes that Dycon was a subcontractor at the Portsmouth GDP from 1980 through 1986. The Portsmouth GDP is recognized as a Department of Energy (DOE) facility from 1954 to 1998. *See* Department of Energy, Office of Worker Advocacy Facilities List.

On August 6, 2004, the Cleveland district office issued a recommended decision concluding that you are a member of the Special Exposure Cohort (SEC), as defined by 42 U.S.C. § 7384l(14), who was diagnosed with rectal cancer, which is a specified cancer under 42 U.S.C. § 7384l(17). In addition the district office concluded that, as a covered employee, you are entitled to compensation in the amount of $150,000, pursuant to 42 U.S.C. § 7384s. The district office also concluded that, pursuant to 42 U.S.C. § 7384s(b), you are entitled to medical benefits, as described in 42 U.S.C. § 7384t, beginning July 7, 2004, for rectal cancer.

On August 19, 2004, the Final Adjudication Branch (FAB) received written notification that you waive any and all objections to the recommended decision.

The FAB received additional evidence subsequent to receipt of your waiver. The DOE provided a copy of a Personnel Clearance Master Card which shows that you were granted a security clearance with SWEC (Dynamic Indust.) on January 18, 1984. No termination date is shown. You submitted additional medical reports regarding your treatment for cancer. Some of these were duplicates of reports already of record. The remaining records discuss your treatment following surgery in March 1997.

FINDINGS OF FACT

1. You filed a claim for benefits on July 7, 2004.

2. For purposes of SEC membership, you worked at Portsmouth GDP for Dycon during the periods of January 1983 to November 1984 and January 1985 to June 1985.

3. The evidence of record establishes that Dycon was a subcontractor for the Portsmouth Gaseous Diffusion Plant from 1980 to 1986.

4. You were employed for a number of work days aggregating at least 250 work days during the period of September 1, 1954, to February 1, 1992, and during such employment performed work that was comparable to a job that is or was monitored through the use of dosimetry badges.

5. You were diagnosed with rectal cancer on February 24, 1997.

CONCLUSIONS OF LAW

In order to be considered a “member of the Special Exposure Cohort,” you must have been a

Department of Energy (DOE) employee, DOE contractor employee, or an atomic weapons employee who was so employed for a number of work days aggregating at least 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, and, during such employment worked in a job that was monitored through the use of dosimetry badges for exposure at the plant of the external parts of employee's body; or had exposures comparable to a job that is or was monitored through the use of dosimetry badges, as outlined in 42 U.S.C. § 7384l(14)(A).

The evidence of record establishes that you worked in covered employment at the Portsmouth GDP from January 1983 to November 1984 and January 1985 to June 1985. This meets the requirement of working more than an aggregate 250 days at a covered facility. *See* 42 U.S.C. § 7384l(14)(A). The Division of Energy Employees Occupational Illness Compensation (DEEOIC) has determined that employees who worked at the Portsmouth GDP between September 1954 and February 1, 1992, performed work that was comparable to a job that was monitored through the use of dosimetry badges. *See* Federal (EEOICPA) Procedure Manual, Chapter 2-500.3a (June 2002). On that basis, you meet the dosimetry badge requirement.

The Final Adjudication Branch notes that you claimed benefits based on rectal cancer/colon cancer. The medical evidence of record interchangeably refers to adenocarcinoma of the rectum and the colon. Regardless of the term used, the evidence reveals only a single tumor located in the rectum. For that reason, your claim is considered to be based on a single occurrence of cancer in your rectum.

Rectal cancer is considered to be colon cancer, which is a specified cancer under the Act, and the medical evidence of record establishes a diagnosis of rectal cancer. Therefore, you are a member of the Special Exposure Cohort, who was diagnosed with a specified cancer. *See* 42 U.S.C. §§ 7384l(14)(A) and (17).

For the reasons stated above, I accept your claim for benefits based on rectal cancer. You are entitled to compensation in the amount of $150,000, pursuant to 42 U.S.C. § 7384s. Additionally, I conclude that, pursuant to 42 U.S.C. § 7384s(b), you are entitled to medical benefits, as described in 42 U.S.C. § 7384t, beginning July 7, 2004, for rectal cancer.

Cleveland, Ohio

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Debra A. Benedict

Acting District Manager

Final Adjudication Branch

EEOICPA Fin. Dec. No. 19750-2004 (Dep't of Labor, November 12, 2004)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This decision of the Final Adjudication Branch (FAB) concerns 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). For the reasons stated below, your claims for benefits are denied.

STATEMENT OF THE CASE

On January 22, 2002, **[Claimant 1]** filed a claim (Form EE-2) for survivor benefits under the EEOICPA and identified carcinomatosis and bronchogenic carcinoma as the diagnosed conditions on which his claim was based. On May 20, 2002, **[Claimant 2]** and **[Claimant 3]** filed claims for survivor benefits under the EEOICPA and identified carcinomatosis and bronchogenic carcinoma as the diagnosed conditions on which their claims were based. **[Claimant 1]** submitted an employment history form (EE-3) on which he stated that **[Employee]** was employed at the International Nickel Company (INCO) from 1951 until the early 1960s. He also stated that **[Employee]** wore a dosimetry badge while employed. As evidence of employment, the claimants submitted the following:

1. Certificate of Membership in the INCO retirement system dated March 1952 acknowledging that **[Employee]** had been employed for one year.

2. Personnel Dept.-Absentee Record which shows **[Employee]** was employed by INCO from May 1953 to January 1967 in the refinery department.

3. Daily Treatment Cards which show **[Employee]** was hired On March 6, 1952.

4. INCO personnel interoffice memo which states **[Employee]** last worked on January 7, 1967.

5. INCO Personal Record which shows **[Employee]** was hired in the refinery department on March 6, 1952, worked in the blacksmith and extrusion departments, and was pensioned effective May 8, 1968.

6. Affidavit from **[Co-worker 1]** in which he attested that he worked with **[Employee]** in the refinery and that **[Employee]** was assigned to pick up contaminated material from the pilot plant, and melt it in the furnace. **[Co-worker 1]** also attested that **[Employee]** volunteered to work in the pilot plant during shut downs sweeping and cleaning.

7. Affidavit from **[Co-worker 2]** in which he attested that he worked with **[Employee]** in the 1960s. **[Co-worker 2]** also attested that he and **[Employee]** went to the pilot plant to load contaminated material and transport it back to the refinery department for melt down.

On March 11, 2002, Department of Energy representative Roger M. Anders advised the district office, via Form EE-5, that the employment history provided contained information that was not accurate. In an attachment, Mr. Anders advised that **[Employee]** was not employed in the covered portion of the plant. On April 15, 2002, a representative of the Huntington Pilot Plant advised the district office, by telephone, that a refinery employee worked ½ mile from the reduction plant (old plant) which is the covered part of the plant. On August 6, 2002, an INCO representative wrote to the district office and advised that **[Employee]** did not work in the Reduction Pilot Plant. The district office determined that the preponderance of evidence establishes the employee was employed at the Huntington Pilot Plant for various periods from March 6, 1952 to May 10, 1971.

As medical evidence, the claimants submitted Dr. Donald P. Stacks April 22, 1971 medical report in which he states **[Employee]** was diagnosed with “bronchogenic carcinoma of the left with mediastinal metastases.” The claimant submitted correspondence from the Cabell Wayne County Medical Examiner in which he states he had received a request for toxicology, pathology or autopsy reports but he could locate no records concerning **[Employee]**. The claimants also submitted a letter from St. Mary’s Medical Center which states, “No path report found for 1971.”

The claimants submitted a copy of the employee's marriage certificate which shows he was married to **[Spouse's Maiden Name]** on October 8, 1937. The claimants submitted copies of their birth certificates which show their parents as **[Employee]** and **[Spouse]**. The claimants submitted a copy of the employee's death certificate which shows he died on May 10, 1971 due to carcinomatosis and bronchogenic carcinoma and a copy of **[Spouse]**'s death certificate which shows she died on October 5, 1995.

On February 12, 2003, the Cleveland district office referred the evidence of record to the National Institute for Occupational Safety and Health (NIOSH) to assist in determining if the employee's lung cancer was at least as likely as not related to his employment at the Huntington Pilot Plant. On November 29, 2003, December 2, 2003 and December 3, 2003, **[Claimant 2]**, **[Claimant 3]** and **[Claimant 1]**, respectively, signed a Form OCAS-1 indicating they had reviewed the NIOSH Draft Report of Dose Reconstruction and agreed that it identified all of the relevant information they provided to NIOSH. On January 15, 2004, the district office received the Final Report of Dose Reconstruction from NIOSH. The district office used the information provided in that report to determine that there was a 13.85% probability that the employee's lung cancer was caused by radiation exposures at the Huntington Pilot Plant.

Based upon the evidence of record, the Cleveland district office issued a recommended decision on January 26, 2004, in which it concluded that **[Employee]** did not qualify as a covered employee with cancer under 42 U.S.C. § 7384l(9)(B) because he did not meet the requirements shown in 42 U.S.C. § 7384n(b); that NIOSH performed dose reconstruction estimates in accordance with 42 U.S.C. § 7384n(d) and 42 C.F.R. § 82.10; and that the Department of Labor (DOL) completed the probability of causation calculation in accordance with 42 U.S.C. § 7384n(c)(3) and 20 C.F.R. § 30.213, which references Subpart E of 42 C.F.R. part 81. The district office recommended denial of the claims based on its conclusions.

On March 16, 2004, **[Claimant 3]** wrote to the FAB and objected to the recommended decision. **[Claimant 3]** stated that she did not believe any computer program could measure the amount of radiation to which her father was exposed. **[Claimant 3]** also stated that the recommended decision indicated her father's degree of contamination was evaluated on the premise that he only worked at the RPP (Reduction Pilot Plant) at shut down, which was not the case as he also worked at various times during the regular work year as well as during shut down. **[Claimant 3]** requested a hearing and such was held before the undersigned on June 30, 2004 in Charleston, WV. **[Claimant 3]**'s representative, **[Claimant 2]** and **[Claimant 3]** provided testimony at the hearing as to where the employee was employed while at the Huntington Pilot Plant. They explained the period the employee worked during the shut down, how the employee was directly assigned to the Pilot Plant and the other type of employment assignments the employee was given. **[Claimant 2]** testified that he felt the "13% damage" determined by NIOSH was "way out of hand" and that his father's death was caused by his employment at the plant. **[Claimant 2]** also testified that it was his position that his father's early death at age 51 was due to his employment. **[Claimant 3's Representative]** also raised an issue that it was the claimants' belief that the dose reconstruction was based on the fact that the employee only worked at the Pilot Plant intermittently during shutdown. He wanted to clarify that the term shut down meant the period of years the employee was working in and out of the Pilot Plant. The claimants also objected to the fact that the employee's work at the refinery was not considered as covered employment. The claimants submitted audio taped affidavits from **[Co-worker 1]** and **[Co-worker 2]** as evidence. Subsequent to the hearing, the undersigned advised the claimants that in order to accept the testimony contained in the taped affidavits, the tapes would have to be transcribed and signed by the persons providing the testimony. On August 9, 2004, **[Claimant 3]** wrote to the FAB and advised

of several errors in the transcript. She also stated that the claimants objected to the use of the term "causally related to his employment" on page 6, paragraph 6 of the transcript because the employee worked directly in the Pilot Plant throughout his career with INCO. **[Claimant 3]** reiterated the claimant's objection that work in the refinery was not included as covered employment and their concern that the term "shut down" was not being applied properly in considering the merits of the claim. On September 28, 2004, **[Claimant 3]** submitted a signed affidavit from **[Co-worker 2]**. In his affidavit, **[Co-worker 2]** attested that the employee volunteered to work shut down (one month in each year when the plant would shut down) at the Pilot Plant but also worked there various other times during the year. **[Claimant 3]** also submitted a statement from **[Claimant 1]** in which he advised that **[Co-worker 1]** died on January 26, 2004, but **[Co-worker 1's Spouse]** had advised him verbally that **[Co-worker 1]** would have signed the affidavit. **[Co-worker 1]**'s affidavit reiterates the information he previously provided by affidavit prior to his death.

After considering the written record of the claim, the claimants' objections and testimony presented at the hearing, the FAB hereby makes the following:

FINDINGS OF FACT

1. **[Claimant 1]** filed a claim for survivor benefits under the EEOICPA on January 22, 2002.

2. **[Claimant 2]** and **[Claimant 3]** filed claims for survivor benefits under the EEOICPA on May 20, 2002.

3. The employee was diagnosed with bronchogenic cancer on April 22, 1971.

4. The employee was employed at the Huntington Pilot Plant, a Department of Energy facility,[1] for various periods between March 6, 1952 and 1967.

5. The employee died on May 10, 1971.

6. The employee's **[Spouse]** died on October 5, 1995.

7. **[Claimant 1]**, **[Claimant 2]** and **[Claimant 3]** are the surviving children of the employee.

8. On January 14, 2004, NIOSH provided the district office a Final Report of Dose Reconstruction under the EEOICPA based on the evidence of record. On January 29, 2004, the Final Adjudication Branch independently analyzed the information in that report and confirmed the 13.85% probability determined by NIOSH.

Based on the above-noted findings of fact in this claim, the FAB hereby makes the following:

CONCLUSIONS OF LAW

To establish eligibility for compensation as a result of cancer, it must first be established that the employee was a DOE employee, a DOE contractor employee, or an atomic weapons employee who contracted cancer (that has been determined pursuant to guidelines promulgated by the Department of Health and Human Services, "to be at least as likely as not related to such employment"), after beginning such employment. 42 U.S.C. § 7384l(9) and 20 C.F.R. § 30.210. The DOE advised that

[Employee] was not employed at the covered site at the Huntington Pilot Plant, however, two of **[Employee]**'s co-workers submitted affidavits stating that he volunteered to work at the pilot plant each year during "shut down" and was assigned to work at the pilot plant at various other times during his employment. **[Claimant 3]** advised in a letter, dated March 16, 2004, that the reason the employment records did not show the employee's assignments to the pilot plant was because of a Union agreement which allowed employees to be detailed or loaned to different departments as long as the employee's pay and job status remained the same. **[Claimant 3]** did not submit a copy of the Union agreement with her letter. The EEOICPA regulations, at § 30.111, provide for the acceptance of written affidavits or declarations as evidence of employment history for the purpose of establishing eligibility. The sworn statements from the employee's coworkers attesting that he worked at the Pilot Plant during annual shut downs and various periods between 1952 and 1967 are used to establish his employment at the Pilot Plant. On January 29, 2004, using the dose estimates provided by NIOSH, the FAB calculated the probability of causation for the employee's cancer with the software program known as NIOSH-IREP. These calculations showed that there was a 13.85% probability that the employee's bronchial cancer was caused by his exposure to radiation during the period of his covered employment at the Huntington Pilot Plant.

The claimants' objections have been reviewed. In regards to the claimants' objection concerning the exposure received by the employee at the pilot plant, because no radiation monitoring records were found, the employee was assigned the highest reasonably possible radiation dose using worst-case assumptions related to radiation exposure and intake, based on current science, documented experience and relevant data. The dose reconstruction evaluated the employee's radiation exposure to the bronchi from the potential exposure starting in 1952 until he was diagnosed with cancer in 1971. The primary data source utilized for the dose reconstruction was the document, "Basis for Development of an Exposure Matrix for Huntington Pilot Plant" which presents the evaluation of information regarding the nickel scrap reprocessing work performed by the Huntington Pilot Plant for the Atomic Energy Commission. It was assumed that the employee was exposed chronically to the source, the contaminated nickel during nickel scrap reprocessing. This assumption overestimated the employee's dose. Even under these assumptions, NIOSH has determined that further research and analysis will not produce a level of radiation dose resulting in a probability of causation of 50% or greater.[2] This approach is based on worst-case assumptions, which is a methodology used by NIOSH per the provisions of 42 C.F.R. § 82.10(k)(2). This is a challenge of the dose reconstruction methodology.

In regards to the claimants' objection regarding the use of computers to determine the amount of radiation and the percentage of probability determined, scientists evaluate the likelihood that radiation causes cancer in a worker by using medical and scientific knowledge about the relationship between specific types and levels of radiation dose and the frequency of cancers in exposed populations. Simply explained, if research determines that a specific type of cancer occurs more frequently among a population exposed to a higher level of radiation than a comparable population (a population with less radiation exposure but similar in age, gender, and other factors that have a role in health), and if the radiation exposure levels are known in the two populations, then it is possible to estimate the proportion of cancers in the exposed population that may have been caused by a given level of radiation. The computer program for calculating probability of causation, named the Interactive RadioEpidemiological Program (IREP), allows the Department of Labor (DOL) to apply the National Cancer Institute's risk models directly to data about exposure for an individual employee. IREP estimates the probability that an employee's cancer was caused by his individual radiation dose. The model takes into account the employee's cancer type, year of birth, year of cancer diagnosis, and exposure information such as years of exposure, as well as the dose received from gamma radiation, X-rays, alpha radiation, beta radiation, and neutrons during each year. None of the risk models explicitly accounts for exposure to other occupational, environmental, or dietary carcinogens. In

particular, IREP allows the user to take into account uncertainty concerning the information being used to estimate individualized exposure and to calculate the probability of causation (PoC). Accounting for uncertainty is important because it can have a large effect on the PoC estimates for a specific individual. As required by EEOICPA, DOL uses the upper 99% credibility limit to determine whether the cancers of employees were caused by their radiation doses. This helps minimize the possibility of denying compensation to claimants under EEOICPA for those employees with cancers likely to have been caused by occupational radiation exposures.[3] This is a challenge of the probability of causation methodology, which was developed by NIOSH.

Objections challenging the dose reconstruction methodology cannot be addressed by the FAB pursuant to § 30.318(b) of the EEOICPA regulations. 20 C.F.R. § 30.318(b). Pursuant to that section, the methodology used by Health and Human Services (HHS) in arriving at reasonable estimates of the radiation doses received by an employee, established by regulations issued by HHS at 42 C.F.R. part 82, is binding on the FAB.
In regards to the claimants' objection regarding the exclusion of the refinery as a covered work site, the DOE has advised that the refinery was not a covered portion of the Huntington Pilot Plant; therefore employment at that site is not considered.
The evidence of record does not establish that the employee's bronchial cancer was "at least as likely as not" (50% or greater) caused by his employment at the Huntington Pilot Plant, within the meaning of § 7384n of the Act. 42 U.S.C. § 7384n. The evidence of record is not sufficient to establish that the employee was a covered cancer employee as defined by § 7384l(9) of the EEOICPA; therefore the claims for benefits under the EEOICPA are denied. 42 U.S.C. § 7384l(9).
Washington, DC

Thomasyne L. Hill

Hearing Representative

Final Adjudication Branch

[1] U.S. Department of Energy. *Huntington Pilot Plant*. Time Period: 1951-1963; 1978-1979. Worker Advocacy Facility List. Available: http://tis.eh.doe.gov/advocacy/faclist/showfacility.cfm [retrieved June 28, 2004].

[2] NIOSH report of Dose Reconstruction under the EEOICPA (November 24, 2003).

[3] EEOICP Decision 43095-2004—2004-05-19.

EEOICPA Fin. Dec. No. 22675-2002 (Dep't of Labor, April 21, 2004)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq.* Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On February 19, 2002, you filed a Form EE-1 (Claim for Benefits under the EEOICPA), based on prostate cancer. You also filed a Form EE-3 (Employment History) that indicated, from 1944 to 1945, you were "assigned to grade work sites when [the] Hanford project was started," that you were "a conscientious objector," and treated as a prisoner at a camp near Hanford. You indicated that you are unsure if you wore a dosimetry badge.

You also signed and submitted a Form EE-4 (Employment History Affidavit) that provided additional employment information. You wrote that you worked, from May 15, 1944 to May 15, 1945, for the "United States Dept. of Corrections, Columbia Road Camp, Hanford Area, WA." You continued that you were a "Grader operator in and around all of the atomic energy facilitys and surrounding area." A representative of the Department of Energy (DOE) reported that it had searched various employment records, including the records of General Electric (GE), Hanford Environmental Health Foundation (HEHF) and DuPont, and the Hanford Site contractor records contained no employment information regarding you.

By letters dated March 6, June 18, and August 27, 2002, the Seattle district office advised you that they had completed the initial review of your claim, and that additional employment and medical evidence was needed. Subsequently, you provided a pathology report dated November 9, 1993, signed by L. K. Hatch, M.D., that indicated a diagnosis of moderately differentiated prostatic adenocarcinoma; and copies of your medical records relating to possible cancer from Spokane Urology were received.

On September 30, 2002, the district office recommended denial of your claim for benefits. The district office concluded that the DOE did not confirm you worked for a covered facility, subcontractor or vendor and you did not submit employment evidence to support that you are a covered employee. The district office also concluded that you are not entitled to compensation as outlined in 42 U.S.C. § 7384s. *See* 42 U.S.C. § 7384s.

On October 7, 2002, you submitted additional employment information related to your work. You indicated that Walter J. Hardy worked with you "in irrigation," for the U.S. Department of Corrections as an irrigation and grader operator, from 1944 to 1945. An affidavit, signed by Walter J. Hardy, indicated he worked, with you, from late 1944 to late 1945, with the U.S. Department of Corrections at Hanford, Washington, and that your work consisted of irrigation repair and operation of a road grader. He further affirmed that your work covered most areas of the restricted Hanford project. Also, an affidavit, by Don Hughart, affirmed that he was acquainted with you at the Hanford camp, called "Columbia Camp," from sometime in 1944 to late 1945. He further affirmed that he worked in the orchards with you and that you operated a grader "in and around the Hanford Atomic Bomb Projects."

On December 20, 2002, the Final Adjudication Branch remanded your claim for further development of the employment evidence, to determine whether you were an employee of the U.S. Department of Corrections in your status as a "prisoner" and if so, whether a contractual agreement existed between the U.S. Department of Corrections and the DOE.

By letter dated December 31, 2002, the district office posed certain questions to you regarding your claimed employment on the Hanford Site. The questions inquired whether you received earnings from your work, whether you had individual liberty, if you were in a "prisoner status" under the U.S. Department of Corrections, if the Columbia Camp was on the Hanford Site, and if you were on the Hanford Site all the time. You responded to the questions that you earned nine cents per hour for your labor, that you were followed to the Hanford gate and at night were free to go anywhere in the camp

area, that you were in a "prisoner status," that the Columbia Camp was just outside the Hanford gate, that you were not always on the Hanford Site but were there during the day in order to work, and that you returned to the camp at night.

On February 17, 2004, the district office again recommended denial of your claim for benefits. The district office concluded that the evidence of record is insufficient to establish that you were present at a covered facility as defined under § 7384l(12) while working for the Department of Energy or any of its covered contractors, subcontractors or vendors as defined under section 7384l(11) during a covered time period. *See* 42 U.S.C. § 7384l(11) and (12) The district office further concluded that you are not entitled to compensation pursuant to 42 U.S.C. § 7384s.

FINDINGS OF FACT

1. You filed a claim for employee benefits on February 19, 2002.

2. You submitted medical documentation adequate to establish a diagnosis of prostate cancer.

3. You did not provide sufficient evidence to establish that you engaged in covered employment under the EEOICPA.

CONCLUSIONS OF LAW

The undersigned has reviewed the recommended decision issued by the Seattle district office on February 17, 2004. I find that you have not filed any objections to the recommended decision as provided by § 30.316(a) of the regulations, and that the 60-day period for filing such objections, as provided for in § 30.310(a) has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

In order to be afforded coverage under the Energy Employees Occupational Illness Compensation Program Act, you must establish that you were diagnosed as having a designated occupational illness incurred as a result of exposure to silica, beryllium, and radiation: *cancer, beryllium sensitivity, chronic beryllium disease*, and *silicosis*. *See* 42 U.S.C. § 7384l(15); 20 C.F.R. § 30.110(a). Further, the illness must have been incurred while in the performance of duty for the Department of Energy and certain of its vendors, contractors, and subcontractors, or for an atomic weapons employer or facility. *See* 42 U.S.C. § 7384l(4)-(7), (9), (11).

In order to be afforded coverage under § 7384l(9) of the EEOICPA as a "covered employee with cancer," the claimant must show the employee met any of the following:

(I) A Department of Energy employee who contracted that cancer after beginning employment at a Department of Energy facility;

(II) A Department of Energy contractor employee who contracted that cancer after beginning employment at a Department of Energy facility;

(III) An Atomic weapons employee who contracted that cancer after beginning employment at an atomic weapons facility.

42 U.S.C. § 7384l(9); 20 C.F.R. § 30.210(b). The record lacks proof that you worked in covered

employment under the Act. Federal prison inmates who worked at a DOE facility for Federal Prison Industries, Incorporated (FPI), are not "employees" within the meaning of the EEOICPA and, therefore, not eligible for benefits under the Act. The question of prisoners' employment status for purposes of EEOICPA is properly resolved by focusing on the nature of the relationship between the prisoner and FPI. The relationship between an inmate worker and FPI is a compulsory assignment to work rather than a traditional contractual employer-employee relationship in which an employee bargains to provide his labor in return for agreed upon compensation and is free to quit at will. Not even FPI's payments to prison laborers are a matter of a contractual right. Instead, they are remitted to the prisoner solely by congressional grace and governed by the rules and regulations promulgated by the Attorney General. Prisoners working for prison-run industries are not considered employees.

The record shows that, by letters dated March 16, June 18, and August 27, 2002, you were requested to provide the required information to prove covered employment under the Act. You did not provide sufficient evidence to prove covered employment.

It is the claimant's responsibility to establish entitlement to benefits under the Act. The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of every criterion under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means it is more likely than not that a given proposition is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing to the Office of Workers' Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

The record in this case shows that although you submitted medical documentation showing a diagnosis of prostate cancer, you did not submit proof of covered employment under the Act. Federal prison inmates who worked at a DOE facility for Federal Prison Industries, Incorporated are not "employees" within the meaning of the EEOICPA and, therefore, not eligible for benefits under the Act. Therefore, your claim must be denied for lack of evidence of proof of covered employment under the EEOICPA.

For the above reasons the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

Seattle, WA

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Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA Fin. Dec. No. 27798-2003 (Dep't of Labor, June 20, 2003)

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 (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. Upon a careful review of the facts and an independent review of the record, the

Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claims for benefits are denied.

STATEMENT OF THE CASE

On April 11, 2002, **[Claimant 1]** filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA), stating that he was the son of **[Employee]**, who was diagnosed with pharyngeal cancer. An additional claim followed thereafter from **[Claimant 2]** on October 20, 2002. **[Claimant 1]** also completed a Form EE-3, Employment History, indicating that **[Employee]** worked for Standard Oil Company, from 1950 to 1961; the State of Alaska as Deputy Director of Veterans Affairs, from 1961 to 1964; the State of Alaska Department of Military Affairs, Alaska Disaster Office, from 1965 to 1979 (where it was believed he wore a dosimetry badge); and, for the American Legion from 1979 to 1985.

In correspondence dated June 24, 2002, a representative of the Department of Energy (DOE) indicated that they had no employment information regarding **[Employee]**, but that he had been issued film badges at the Amchitka Test Site on the following dates: October 28, 1965; September 30, 1969; and, September 21, 1970. You also submitted a completed Form EE-4 (Employment Affidavit) signed by Don Lowell, your father's supervisor at the State of Alaska, Department of Public Safety, Division of Civil Defense. According to Mr. Lowell, your father was a radiological officer for the State of Alaska and accompanied him to Amchitka Island for Project Longshot on November 29, 1965, and the Milrow Test on October 2, 1969, as a representative of the State of Alaska.

Additional documentation submitted in support of your claim included copies of your birth certificates, a marriage certificate documenting **[Name of Claimant 2 at Birth]**'s marriage to **[Husband]**, and the death certificate for **[Employee]**, indicating that he was widowed at the time of his death on May 10, 1993. In addition, you provided medical documentation reflecting a diagnosis of squamous cell carcinoma of the pharyngeal wall in November 1991.

On November 8, 2002, the Seattle district office issued a recommended decision that concluded that **[Employee]** was a covered employee as defined in § 7384l(9)(A) of the Act and an eligible member of the Special Exposure Cohort as defined in § 7384l(14)(B) of the EEOICPA, who was diagnosed as having a specified cancer, specifically cancer of the hypopharynx, as defined in § 7384l(17) of the Act. *See* 42 U.S.C. 7384l(9)(A), (14)(B), (17). The district office further concluded that you were eligible survivors of **[Employee]** as outlined in § 7384s(e)(3) of the Act, and that you were each entitled to compensation in the amount of $75,000 pursuant to § 7384s(a)(1) and (e)(1) of the EEOICPA. *See* 42 U.S.C. §§ 7384s(a)(1) and (e)(1).

On December 20, 2002, the Final Adjudication Branch issued a Remand Order in this case on the basis that the evidence of record did not establish that **[Employee]** was a member of the "Special Exposure Cohort," as required by the Act. The Seattle district office was specifically directed to determine whether the Department of Energy and the State of Alaska, Department of Public Safety, Division of Civil Defense, had a contractual relationship.

In correspondence dated January 17, 2003, Don Lowell elaborated further on your father's employment and his reasons for attending the nuclear testing on Amchitka Island. According to Mr. Lowell, the Atomic Energy Commission (AEC) invited the governors of Alaska to send representatives to witness all three tests on Amchitka Island (Longshot, Milrow, and Cannikin). As such, **[Employee]** attended both the Longshot and Milrow tests as a guest of the Atomic Energy Commission, which provided

transportation, housing and food, and assured the safety and security of those representatives.

On February 4, 2003, the district office received an electronic mail transmission from Karen Hatch, Records Management Program Officer at the National Nuclear Security Agency. Ms. Hatch indicated that she had been informed by the former senior DOE Operations Manager on Amchitka Island that escorts were not on the site to perform work for the AEC, but were most likely there to provide a service to the officials from the State of Alaska.

In correspondence dated February 11, 2003, a representative of the State of Alaska, Department of Public Safety, Division of Administrative Services, indicated that there was no mention of Amchitka or any sort of agreement with the Department of Energy in **[Employee]**'s personnel records, but that the absence of such reference did not mean that he did not go to Amchitka or that a contract did not exist. He further explained that temporary assignments were not always reflected in these records and suggested that the district office contact the Department of Military and Veterans Affairs to see if they had any record of an agreement between the State of Alaska and the DOE. By letter dated March 13, 2003, the district office contacted the Department of Military and Veterans Affairs and requested clarification as to **[Employee]**'s employment with the State of Alaska and assignment(s) to Amchitka Island. No response to this request was received.

On April 16, 2003, the S eattle district office recommended denial of your claims. The district office concluded that you did not submit employment evidence as proof that **[Employee]** was a member of the "Special Exposure Cohort" as defined by § 7384l(14)(B) of the Act, as the evidence did not establish that he had been present at a covered facility as defined under § 7384l(12) of the Act, while working for the Department of Energy or any of its covered contractors, subcontractors or vendors as defined under § 7384l(11) of the Act, during a covered time period. *See* 42 U.S.C. § 7384l(11), (12). The district office further concluded that you were not entitled to compensation as outlined under § 7384s(e)(1) of the Act. *See* 42 U.S.C. § 7384s(e)(1).

FINDINGS OF FACT

1. On April 11 and October 20, 2002, **[Claimant 1]** and **[Claimant 2]**, respectively, filed claims for survivor benefits under the EEOICPA as the children of **[Employee]**.

2. **[Employee]** was diagnosed as having squamous cell carcinoma of the hypopharynx.

3. **[Employee]** was employed by the State of Alaska, Civil Defense Division, and was present on Amchitka Island for Project Longshot on November 29, 1965, and the Milrow Test on October 2, 1969.

4. **[Employee]**'s employment with the State of Alaska, Civil Defense Division, on assignment to Amchitka Island, Alaska, was as a representative of the governor of Alaska.

CONCLUSIONS OF LAW

The undersigned has reviewed the recommended decision issued by the Seattle district office on April 16, 2003. I find that you have not filed any objections to the recommended decision as provided by § 30.316(a) of the regulations, and that the 60-day period for filing such objections, as provided for in § 30.310(a) has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

In order to be awarded benefits under the Energy Employees Occupational Illness Compensation Program Act, the covered employee (or his/her eligible survivors), must first establish that the employee has been diagnosed with beryllium illness, cancer, or chronic silicosis. *See* 42 U.S.C. § 7384l(15), 20 C.F.R. § 30.110(a). The evidence to show proof of an occupational illness is not in dispute in this case. The medical evidence establishes that **[Employee]** was diagnosed as having squamous cell carcinoma of the hypopharynx. Consequently, **[Employee]** was diagnosed with an illness covered under the Act.

Employees of a DOE contractor (or their eligible survivors) are entitled under the EEOICPA to seek compensation for a cancer as a member of the Special Exposure Cohort (SEC) or through a determination that they incurred cancer that was at least as likely as not related to employment at a DOE facility. 42 U.S.C. §§ 7384l(14), 7384l(9)(B)(ii)(II). To be included in the SEC, a DOE employee, DOE contractor employee, or atomic weapons employee must have been employed for an aggregate of 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, or employed before January 1, 1974, by the DOE or a DOE contractor or subcontractor on Amchitka Island, Alaska, and exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests. 42 U.S.C. § 7384l(14). To qualify as a covered employee with cancer, members of the SEC need only establish that they contracted a "specified cancer," designated in § 7384l(17) of the EEOICPA, after beginning employment at a DOE facility or atomic weapons employer facility.

While the EEOICPA does not contain a specific definition of a DOE contractor, it does contain a definition of a DOE contractor employee that, in effect, defines what a DOE contractor is. Section 7384l(11) of the EEOICPA defines a DOE contractor employee as:

(A) An individual who is or was in residence at a Department of Energy facility as a researcher for one or more periods aggregating at least 24 months.
(B) An individual who is or was employed at a Department of Energy facility by-
    (i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or
    (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

The question presented in this case is whether **[Employee]**, an employee of the State of Alaska, was, during the time he spent on Amchitka Island, providing management and operation, management and integration or environmental remediation services under a contract between the DOE and the State of Alaska.

The undersigned notes that the Atomic Energy Commission's Managers Completion Report refers to the State of Alaska as a prime contractor for work on Milrow and Cannikin. The work to be performed under that contract consisted of police protection.

According to Don Lowell, **[Employee]**'s supervisor at the time of his assignment to Amchitka Island, your father was not an employee of any contractor or the AEC at the time of his visit to Amchitka Island. Rather, he was an invited guest of the AEC requested to witness the atomic testing as a representative of the governor of Alaska.

The preponderance of the evidence in this case supports the conclusion that **[Employee]** was on

Amchitka Island for the sole purpose of witnessing the atomic testing as a representative of the governor of Alaska. While the DOE indicated that **[Employee]** was issued a dosimetry badge on three occasions, such evidence may be used to establish that he was present on Amchitka Island, not to establish that he was a covered DOE employee. Therefore, **[Employee]**'s presence on Amchitka Island was to perform work for the State of Alaska, as a representative of the governor, and not pursuant to a contract between the DOE and the State of Alaska.

It is the claimant's responsibility to establish entitlement to benefits under the EEOICPA. The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of each and every criterion under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing the Office of Workers' Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

Although you submitted medical evidence to show a covered illness manifested by squamous cell carcinoma of the hypopharynx, the evidence of record is insufficient to establish that **[Employee]** engaged in covered employment. Therefore, your claims must be denied for lack of proof of covered employment under the EEOICPA.

Seattle, Washington

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Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA Fin. Dec. No. 30971-2002 (Dep't of Labor, March 15, 2004)

NOTICE OF FINAL DECISION - REVIEW OF THE WRITTEN RECORD

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 stated below, your claim for benefits is denied.

STATEMENT OF THE CASE

On June 10, 2002, you filed a Claim for Survivor Benefits under the EEOICPA, form EE-2, with the Denver district office, as the spouse of the employee, for multiple myeloma. You indicated on the EE-3 form that your husband was employed by the U.S. Coast and Geodetic Survey at various locations, including the Nevada Test Site, from early 1951 to December 1953.

You also submitted marriage certificate and death certificates establishing that you were married to the

employee from March 7, 1953 until his death on November 5, 1999, tax forms confirming his employment with the U.S. Coast and Geodetic Survey in 1951 and 1952 and a document from the Nevada Field Office of the Department of Energy (DOE) indicating that they had records of your husband having been exposed to radiation in 1951 and 1952. Additionally, you submitted a document stating that your claim under the Radiation Exposure Compensation Act had been approved in the amount of $75,000; you stated that you had declined to accept the award and that was confirmed by a representative of the Department of Justice on August 12, 2002.

On July 1, 2002, you were informed of the medical evidence needed to support that your husband had cancer. You submitted records of medical treatment, including a pathology report of April 19, 1993, confirming that he was diagnosed with multiple myeloma.

On July 22, 2002, a DOE official stated that, to her knowledge, your husband's employers were not Department of Energy contractors or subcontractors. On July 29, 2002, you were advised of the type of evidence you could submit to support that your husband had employment which would give rise to coverage under the Act, and given 30 days to submit such evidence. You submitted statements from co-workers confirming that he did work at the Nevada Test Site for a period from October to December 1951 and again for a few weeks in the spring of 1952.

On August 29, 2002, the district office issued a recommended decision that concluded that you were not entitled to compensation benefits because the evidence did not establish that your husband was a covered employee.

By letter dated September 20, 2002, your representative objected to the recommended decision, stating that your husband was a covered employee in that he worked at the Test Site while employed by the U.S. Coast and Geodetic Survey, which was a contractor of the Atomic Energy Commission (AEC), a predecessor agency of the DOE. The representative also submitted documents which indicated that the U.S. Coast and Geodetic Survey performed work, including offering technical advice and conducting surveys, for other government agencies, including the AEC and the military, and that it was covered by a cooperative agreement between the Secretary of Commerce and the Secretary of the Army. On April 1, 2003, the case was remanded to the district office for the purpose of determining whether your husband's work at the Nevada Test Site was performed under a "contract" between the DOE and the U.S. Coast and Geodetic Survey.

The documents submitted by your representative were forwarded to the DOE, which responded on May 28, 2003 that dosimetry records existed for your husband "showing that he was with the USC&GS but after further research it was established that the USC&GS was in fact not a contractor or subcontractor of the AEC during those years." The documents were also reviewed by the Branch of Policy, Regulations and Procedures in our National Office. On November 7, 2003, the district office issued a recommended decision to deny your claim. The decision stated that the evidence submitted did not support that the U.S. Coast and Geodetic Survey was a contractor of the DOE at the Nevada Test Site, and, concluded that you were not entitled to benefits under § 7384s of the EEOICPA as your husband was not a covered employee under § 7384l. 42 U.S.C. §§ 7384l and 7384s.

In a letter dated January 7, 2004, your representative objected to the recommended decision. He did not submit additional evidence but did explain why he believes the evidence already submitted was sufficient to support that your husband was a covered employee under the Act. Specifically, he stated that the evidence supported that your husband worked at the Nevada Test Site in 1951 and 1952 in the

course of his employment with the U.S. Coast and Geodetic Survey, an agency which was performing a survey at the request of the AEC, and that the latter agency issued him a badge which established that he was exposed to radiation while working there. He argued that one must reasonably conclude from these facts that his work at the Nevada Test Site did constitute covered employment under the EEOICPA.

FINDINGS OF FACT

You filed a claim for survivor benefits under the EEOICPA on June 10, 2002.

You were married to the employee from March 7, 1953 until his death on November 5, 1999.

Medical records, including a pathology report, confirmed he was diagnosed with multiple myeloma in April 1993.

In the course of his employment by the U.S. Coast and Geodetic Survey, your husband worked, and was exposed to radiation, at the Nevada Test Site, a DOE facility.

The evidence does not support, and the Department of Energy has denied, that the U.S. Coast and Geodetic Survey was a contractor of the DOE at the time your husband worked at the Nevada Test Site.

CONCLUSIONS OF LAW

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, pursuant to 20 C.F.R. § 30.310. The same section of the regulations provides that in filing objections, the claimant must identify his objections as specifically as possible. In reviewing any objections submitted, under 20 C.F.R. § 30.313, the Final Adjudication Branch will review the written record, any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. I have reviewed the record in this case and your representative's letter of January 2, 2004 and must conclude that no further investigation is warranted.

The purpose of the EEOICPA, as stated in its § 7384d(b), is to provide for "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." 42 U.S.C. § 7384d(b).

A "covered employee with cancer" includes, pursuant to § 7384l(9)(B) of the Act, an individual who is a "Department of Energy contractor employee who contracted…cancer after beginning employment at a Department of Energy facility." Under § 7384l(11), a "Department of Energy contractor employee" may be an individual who "was employed at a Department of energy facility by…an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or…a contractor or subcontractor that provided services, including construction and maintenance, at the facility." 42 U.S.C. § 7384l(9)(B), (11).

EEOICPA Bulletin NO. 03-26 states that "a civilian employee of a state or federal government agency can be considered a 'DOE contractor employee' if the government agency employing that individual is (1) found to have entered into a contract with DOE for the accomplishment of…services it was not

statutorily obligated to perform, and (2) DOE compensated the agency for that activity." The same Bulletin goes on to define a "contract" as "an agreement that something specific is to be done in return for some payment or consideration."

Section 30.111(a) states that "Except where otherwise provided in the Act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category set forth in § 30.110." 20 C.F.R. § 30.111(a).

As noted above, the evidence supports that your husband was exposed to radiation while working for the U.S. Coast and Geodetic Survey at the Nevada Test Site in late 1951 and early 1952, that he was diagnosed with multiple myeloma in April 1993, and that you were married to him from March 7, 1953 until his death on November 5, 1999.

It does not reasonably follow from the evidence in the file that his work at the Nevada Test Site must have been performed under a "contract" between the U.S. Coast and Geodetic Survey and the AEC. Government agencies are not private companies and often cooperate with and provide services for other agencies without reimbursement. The DOE issued radiation badges to military personnel, civilian employees of other government agencies, and visitors, who were authorized to be on a site but were not DOE employees or DOE contractor employees. No evidence has been submitted that your husband's work at the Nevada Test Site was pursuant to a "contract" between the U.S. Coast and Geodetic Survey and the AEC and the DOE has specifically denied that his employing agency was a contractor or subcontractor at that time. Therefore, there is no basis under the Act to pay compensation benefits for his cancer.

For the foregoing reasons, the undersigned must find that you have not established your claim for compensation under the EEOICPA and hereby denies that claim.

Washington, DC

Richard Koretz

Hearing Representative

EEOICPA Fin. Dec. No. 34771-2003 (Dep't of Labor, July 21, 2003)

REVIEW OF THE WRITTEN RECORD AND NOTICE OF FINAL DECISION

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 for benefits is denied.

STATEMENT OF THE CASE

On August 14, 2002, you filed a Form EE-2 (Survivor's Claim for Benefits under EEOICPA) seeking compensation as the eligible surviving beneficiary of your husband, **[Employee]**. On the EE-2 form, you indicated that he had been diagnosed with colon cancer. In support of your claim, you submitted

medical evidence that confirmed the diagnosis of the claimed condition. You also indicated that **[Employee]** was a member of the Special Exposure Cohort having been employed at the West Kentucky Wildlife Management area near the Paducah Gaseous Diffusion Plant.

On September 10, 2002, the district office advised you that the corporate verifier, Oak Ridge Institute for Science and Education, had sent notice to the district office that it had no employment records for **[Employee]**, and that the Social Security Earnings statement and affidavits submitted detail employment for the Department of Fish and Wildlife for the State of Kentucky. The district office requested that you provide proof of employment with a contractor or subcontractor for the Department of Energy (DOE) within thirty days. You did not respond to this request.

The district office reviewed the record and found that you submitted a claim for compensation under the EEOICPA. It was further found that no evidence was submitted that supported the claim that **[Employee]** had been employed at a facility covered under the Act. Therefore, on October 30, 2002, the district office recommended the denial of your claim.

Section 30.316(b) of the EEOICPA implementing regulations states that if the claimant files objections to all or part of the recommended decision, the FAB reviewer will issue a decision on the claim after either the hearing or the review of the written record, and after completing such further development of the case as he or she may deem necessary. 20 C.F.R. § 30.316(b). On November 19, 2002, the Final Adjudication Branch received your letter of appeal. In your statement of appeal, you objected to the conclusion that you did not submit evidence establishing employment at a covered facility for **[Employee]**. On May 21, 2003, you submitted additional evidence regarding employment for **[Employee]**. This additional evidence consisted of a licensing agreement between the Commonwealth of Kentucky and the U.S. Atomic Energy Commission dated October 22, 1959, and a 1989 wildlife compliance inspection of the area conducted by the General Services Administration.

FINDINGS OF FACT

1. You filed a claim for compensation as an eligible surviving beneficiary of **[Employee]**.

2. **[Employee]** was employed by the Kentucky Department of Fish and Wildlife Resources.

3. The Department of Energy indicated that there was no record of **[Employee]**'s employment at the Paducah Gaseous Diffusion Plant.

4. You did not establish that there was a contractual relationship between the State of Kentucky, Department of Fish and Wildlife Resources and the Department of Energy.

CONCLUSIONS OF LAW

In determining whether **[Employee]** was employed by a Department of Energy contractor due to services being rendered pursuant to a contract, the Final Adjudication Branch must examine two critical issues. Firstly, we must establish how a DOE contactor is defined under the Act. Secondly, we must determine the nature of the agreement between the parties, and if that agreement contains the essential elements of a contract, i.e., mutual intent to contract and the exchange of consideration or payment.

I conclude that the employee was not a DOE contractor employee. The EEOICPA program has

established how a DOE contractor and subcontractor are to be defined. Program bulletin 03-27 sets forth the following definitions:

Contractor – An entity engaged in a contractual business arrangement with the Department of Energy to provide services, produce materials or manage operations at a beryllium vendor or Department of Energy facility.

Subcontractor – An entity engaged in a contracted business arrangement with a beryllium vendor contractor or a contractor of the Department of Energy to provide a service at a beryllium vendor or Department of Energy facility. EEOICPA Bulletin No. 03-27, 2003.

Therefore, an entity must be engaged in a contractual business arrangement to provide services to the DOE in order to be a contractor or subcontractor.

The evidence submitted does not support the claim that **[Employee]**'s employer, the Kentucky Department of Fish and Wildlife Resources, had contracted with the Atomic Energy Commission or DOE to provide management and operating, management and integration, or environmental remediation at the facility. Consequently, **[Employee]**'s employer does not meet the definition of a DOE contractor. Furthermore, the mere existence of a formal written document authorizing a state or federal entity to perform work for DOE does not automatically make the entity a DOE contractor if the document and arrangement lack the elements necessary to constitute a contract. The license in this case permitted the state of Kentucky, Department of Fish and Wildlife Resources to utilize DOE land as a field trial area.

The Act is clear that its provisions extend compensation only to certain employees. These "covered employees" are defined as covered employees with cancer, covered beryllium employees, and covered employees with silicosis. The definition of a covered employee with cancer (who is a member of the Special Exposure Cohort[1]) is found in § 7384l(9)(A) of the Act. That section states that in order to be considered a covered employee with cancer one must have been a Department of Energy employee or contractor employee who contracted the cancer after beginning employment at a Department of Energy facility, or an atomic weapons employee who contracted cancer after beginning employment at an atomic weapons facility. 42 U.S.C. § 7384l(9)(A).

Based on the review of the record, the undersigned hereby concludes that the record supports the finding that **[Employee]** did not have covered employment as defined under the Act. Because you have not established, with the required evidence, employment covered under the EEOICPA, your claim for compensation must be denied.

Washington, DC

David E. Benedict

Hearing Representative

[1] The Special Exposure Cohort differs from other Department of Energy and atomic weapon employees in that is comprised of individuals who were so employed for a number of work days aggregating at least 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, and, during such employment were monitored through the use of dosimetry badges; or worked in a job that had exposures

comparable to a job that is or was monitored through the use of dosimetry badges. The Cohort also includes employees that were employed before January 1, 1974, by the Department of Energy or a Department of Energy contractor or subcontractor on Amchitka Island, Alaska, and was exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests. Individuals designated as a member of the Special Exposure Cohort by the President for purposes of the compensation program under section 7384q of this title are also included. 42 U.S.C. § 7384l(9)(A); 42 U.S.C. § 7384l(14).

EEOICPA Fin. Dec. No. 75271-2007 (Dep't of Labor, August 29, 2007)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning the claimants' claims for survivor benefits under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, FAB accepts and approves the claims for compensation under Part B of EEOICPA.

STATEMENT OF THE CASE

On January 26, 2006, the claimants each filed a Form EE-2 claiming for survivor benefits under EEOICPA as surviving children of **[Employee]**, based on the condition of chondrosarcoma (bone cancer). They submitted a copy of **[Employee]**'s death certificate, which indicates his marital status was "divorced" at the time of his death on January 29, 2002 due to chondrosarcoma with lung metastases. They also provided copies of their birth certificates showing that they are children of **[Employee]**. **[Claimant #1]** also provided copies of her marriage certificates documenting her changes of name.

[Claimant #1 and Claimant #2] submitted medical evidence including a pathology report showing **[Employee]** had a diagnosis of metastatic high grade chondrosarcoma on December 19, 2001.

A representative of the Department of Energy (DOE) verified that **[Employee]** was employed by the U.S. Geological Survey (USGS) at the Grand Junction Field Office from August 8, 1951 to March 8, 1978, and stated that he was issued dosimetry badges associated with USGS at the Nevada Test Site on 66 separate occasions between November 5, 1958 and July 11, 1966. Additionally, other official government records including security clearances, applications for federal employment, and personnel actions were submitted, indicating that **[Employee]** was employed by USGS and resided in Mercury, Nevada from September 25, 1958 to June 11, 1962. Mercury, Nevada was a town that was within the perimeter of the Nevada Test Site and housed those who worked at the site.

On May 18, 2007, the Seattle district office issued a recommended decision to accept **[Claimant #1 and Claimant #2]**'s claims based on the employee's condition of chondrosarcoma. The district office concluded that the employee was a member of the Special Exposure Cohort (SEC), and was diagnosed with chondrosarcoma (bone cancer), which is a "specified" cancer under EEOICPA. The district office therefore concluded that **[Claimant #1 and Claimant #2]** were entitled to compensation in equal shares in the total amount of $150,000.00 under Part B.

The evidence of record includes letters received by FAB on May 23 and June 1, 2007, signed by **[Claimant #2 and Claimant #1**, respectively, whereby they both indicated that they have never filed for or received any payments, awards, or benefits from a lawsuit, tort suit, third party claim, or state workers' compensation program, based on the employee's condition. Further, they confirmed that they

have never pled guilty to or been convicted of fraud in connection with an application for, or receipt of, federal or state workers' compensation.

On May 26 and June 6, 2007, FAB received written notification from **[Claimant #2 and Claimant #1]**, respectively, indicating that they waive all rights to file objections to the findings of fact and conclusions of law in the recommended decision.

After considering the evidence of record, FAB hereby makes the following:

FINDINGS OF FACT

1. On January 26, 2006, **[Claimant #1 and Claimant #2]** filed claims for survivor benefits under EEOICPA.
2. **[Claimant #1 and Claimant #2]** provided sufficient documentation establishing that they are the eligible surviving children of **[Employee]**.
3. A representative of DOE verified that **[Employee]** was issued dosimetry badges for his employment at the Nevada Test Site, a covered DOE facility, in association with USGS, a DOE contractor, from November 5, 1958 to July 11, 1966.
4. **[Employee]** was diagnosed with chondrosarcoma (bone cancer), which is a "specified" cancer under EEOICPA, on December 19, 2001, after beginning employment at a DOE facility.
5. The evidence of record supports a causal connection between the employee's cancer and his exposure to radiation and/or a toxic substance at a DOE facility while employed in covered employment under EEOICPA.

Based on the above-noted findings of fact, FAB hereby also makes the following:

CONCLUSIONS OF LAW

Section 30.316(a) of the regulations provides that, if the claimant waives any objections to all or part of the recommended decision, FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part. *See* 20 C.F.R. § 30.316(a). **[Claimant #1 and Claimant #2]** waived their right to file objections to the findings of fact and conclusions of law contained in the recommended decision issued on their claims for survivor benefits under EEOICPA.

On June 26, 2006, the Secretary of HHS designated a class of certain employees as an addition to the SEC: DOE employees or DOE contractor or subcontractor employees who worked at the Nevada Test Site between January 27, 1951 and December 31, 1962, for a number of work days aggregating at least 250 work days, either solely under this employment or in combination with work days within the parameters (excluding aggregate work day requirements) established for other classes of employees included in the SEC, and who were monitored or should have been monitored. This addition to the SEC became effective July 26, 2006.

The employment evidence in this case is sufficient to establish that the employee was present at the Nevada Test Site for an aggregate of at least 250 work days, from September 1958 through at least November 2, 1962, and qualifies him as a member of the SEC. However, for this employment to be considered covered employment, it must also be determined that the employee was employed at a DOE facility by DOE, a DOE contractor, subcontractor or vendor. In this regard, the case was referred to the Branch of Policies, Regulations and Procedures (BPRP) for review and determination.

In its written determination dated August 6, 2007, BPRP indicated that a civilian employee of a state or federal government agency can be considered a "DOE contractor employee" if the government agency employing that individual is: (1) found to have entered into a contract with DOE for the accomplishment of services it was not statutorily obligated to perform; and (2) DOE compensated that agency for that activity. *See* EEOICPA Bulletin No. 03-26 (issued June 3, 2003). BPRP evaluated the evidence of record including the following pertinent documents:

- An October 5, 1956 letter from the Acting Director for USGS to the Director of Finance of the AEC's Albuquerque Operations Office, which states:

  > In accordance with an agreement between our respective agencies, an advance of funds $56,400 is requested to finance the 1957 fiscal year program to be performed by the Geological Survey for the Division of Military Application (DMA).[1]

- AEC Staff Paper 944/33. This September 1957 document shows clearly that it was the AEC's DMA that had oversight over the USGS geological work at the NTS.

- A document dated March 23, 1959, from the United States Department of the Interior Geological Survey summarizing a letter to the AEC Albuquerque Operations Office. The summary states in part:

  > Advised that your draft rewrite of Memorandum of Understanding No. AT(29-2)-474, has been reviewed and is acceptable to the GS except for following changes in Article IV, Budgeting & Finance. Also request that the amount available for NTS work in fiscal year 1959 be increased from $750,000 to 837,000 and that available for the GNOME program be increased from $85,000 to $91,000.

- A June 26, 1959 letter from the Director of USGS to **[Employee]**, complimenting him on his efforts at the NTS and forwarding to him a letter from the AEC's Albuquerque Operations Office in which the AEC provides general compliments to USGS for their work at NTS during 1958.

- A technical report entitled, "A Summary Interpretation of Geologic, Hydrologic, and Geophysical Data for Yucca Valley, Nevada Test Site, Nye County, NV," detailing the work and outcome of the work performed by USGS at the Nevada Test Site. The report states that the work was undertaken at the behest of the AEC and also states, "Compilation of data, preparation of illustration, and writing of the report were completed during the period of December 26, 1958 to January 10, 1959. Some of the general conclusions must be considered as tentative until more data are available."

- Correspondence from 1957 between USGS and the AEC Raw Materials Division (not the Division of Military Application). These letters show that USGS provided assistance to the AEC in prospecting for uranium on the Colorado Plateau and other locations.

These documents clearly show that there was an agreement for payment, by which USGS performed work for the AEC at the Nevada Test Site.

BPRP then turned to the final issue to be addressed, which was whether the work performed by USGS

at the Nevada Test Site was work that USGS was not statutorily obligated to perform. A review of the USGS website[2] showed that since being founded in 1879, its statutory obligations have changed. Primarily, its function has been topographical mapping and gathering information pertaining to soil and water resources. Also, with advances in science, USGS has similarly evolved to meet these changes. The USGS website makes it clear that in the post-war era, USGS was grappling to keep up its scientific pace and that it did so, in part, with money from the Defense Department, the AEC, and from the states. Further, BPRP noted that since the formation of USGS, legislation has changed its statutory obligations over the years, whereby seven legal changes to the USGS statutory obligations pertain in some way to DOE or its predecessor agencies. These changes include: geothermal energy; gathering information on energy and mineral potential; geological mapping of potential nuclear reactor sites and geothermal mapping; working with the Energy Research and Development Administration, a DOE predecessor, on coal hydrology; consulting with DOE on locating a suitable geological repository for the storage of high-level radioactive waste and a retrievable storage option; monitoring the domestic uranium industry; and to cooperate with DOE and other federal agencies on "continental scientific drilling".

Today, USGS describes itself in the following manner:

As the Nation's largest water, earth, and biological science and civilian mapping agency, the U.S. Geological Survey (USGS) collects, monitors, analyzes, and provides scientific understanding about natural resource conditions, issues, and problems. The diversity of our scientific expertise enables us to carry out large-scale, multi-disciplinary investigations and provide impartial scientific information to resource managers, planners, and other customers.

As described, while providing geological support to DOE may be part of what USGS is statutorily obligated to perform in 2007, the totality of the evidence suggests this was not always true. Therefore, BPRP concluded that the Memorandum of Understanding between USGS and the AEC constituted a contract by which USGS provided services to the AEC that USGS was not statutorily obligated to perform through at least 1961, the last year of which their analysis pertained.

In considering the above analysis and determination, FAB concludes that **[Employee]** is a member of the SEC and was diagnosed with chondrosarcoma, which is a "specified" cancer (bone), and is, therefore, a "covered employee with cancer." *See* 42 U.S.C. §§ 7384l(14)(C), 7384l(17), 7384l(9)(A). **[Claimant #1 and Claimant #2]** are the eligible survivors of **[Employee]** as defined under EEOICPA, and are entitled to equal shares of the total compensation amount of $150,000.00. *See* 42 U.S.C. §§ 7384s(e) and 7384s(a)(1).

Accordingly, **[Claimant #1 and Claimant #2]** are each entitled to compensation in the amount of $75,000.00.

Seattle, Washington

Kelly Lindlief

Hearing Representative

Final Adjudication Branch

[1] The AEC's Division of Military Application (DMA) was the division responsible for nuclear weapons testing.

[2] Http://www.usgs.gov/aboutusgs/.

EEOICPA Fin. Dec. No. 10043931-2006 (Dep't of Labor, March 10, 2008)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) on the employee's claim for benefits under Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the employee's claim is denied.

STATEMENT OF THE CASE

On May 31, 2002, the employee filed a claim for benefits under Part B of EEOICPA and alleged that he had contracted beryllium sensitivity, chronic beryllium disease (CBD) and pulmonary insufficiency due to occupational exposure to beryllium as a mechanical engineer at the Massachusetts Institute of Technology campus in Cambridge, Massachusetts (MIT). In support of his claim, he filed a Form EE-3 on which he alleged that he had been employed by "U.S. Army, (T-4) Special Engineering Detachment, Manhattan District, Corps of Engineers, assigned to Metallurgical Project, U of Chicago, Mass. Inst. of Tech Location," at Oak Ridge, Tennessee, and as a radiation monitor at Bikini Atoll from May through August 1946. On that form, the employee alleged that he was assigned to the "Beryllium Group" at MIT from November 1945 to May 1946.

By letter dated June 10, 2002, the Denver district office of the Division of Energy Employees Occupational Illness Compensation (DEEOIC) confirmed receipt of the employee's claim and informed him that coverage under EEOICPA is limited to civilian employees of the Department of Energy (DOE), its predecessor agencies and certain of its contractors and subcontractors, and that military personnel are not similarly covered. The employee then submitted several documents regarding his employment, including a June 17, 2002 letter in which he clarified that: (1) he joined the Army in 1942; (2) he was called to active duty in May 1943; and (3) he was assigned to the K-25 Gaseous Diffusion Plant in Oak Ridge in September 1944. He stated that shortly afterward, he was transferred to the "Metallurgical Project" at MIT, still as an enlisted member of the Army, and worked there until May 1946 when he was transferred back to Oak Ridge and trained for his subsequent job at Operation Crossroads in the Pacific.

Employment records provided by MIT on April 24, 2003 indicate: (1) that the employee was initially assigned to work at MIT as an enlisted member of the U.S. Army on December 1, 1944; (2) that on January 26, 1945, a change in his Army status allowed MIT to hire him directly as a civilian employee on the same project; and (3) that he was recalled to active military duty in the Army on October 22, 1945, but continued to work on the project at MIT until May 2, 1946. In a letter dated May 10, 2003, the employee provided a detailed work history, with supporting documents, that was consistent with the information provided by MIT and confirmed that he was a civilian employee of MIT at MIT's Cambridge campus from January 26, 1945 to October 22, 1945. Neither DOE nor its Oak Ridge Operations Office was able to verify the employee's alleged employment at Oak Ridge or at Bikini Atoll, but the enlistment records in his case file are consistent with his claim of military employment at these two locations.

On May 15, 2003, the Denver district office issued a recommended decision to accept the employee's claim for beryllium sensitivity, and on May 30, 2003 the FAB issued a final decision consistent with the district office's recommendation. In that decision, the FAB awarded the employee medical benefits and monitoring for his beryllium sensitivity, retroactive to his filing date of May 31, 2002. Thereafter, on September 11, 2003, the Denver district office issued a recommended decision to accept the employee's Part B claim for CBD, based on the recommended findings that he had covered civilian employment at MIT from January 26, 1945 to October 22, 1945, and that he had been diagnosed with CBD on July 2, 2003. On September 22, 2003, the FAB issued a final decision accepting the employee's Part B claim for CBD and awarding him a lump-sum of $150,000.00 plus medical benefits for his CBD, retroactive to May 31, 2002. In this final decision, the FAB concluded that the employee was a "covered beryllium employee" and that he had been diagnosed with CBD consistent with the criteria set out in EEOICPA.

Following the 2004 amendments to EEOICPA that included the enactment of new Part E[1], the employee filed a claim based on his CBD under Part E of EEOICPA on November 25 , 2005. Shortly thereafter, the employee's new Part E claim was transferred to the Cleveland district office of DEEOIC for adjudication. By letter dated March 9, 2006, the Cleveland district office informed the employee that he did not meet the eligibility requirements under Part E of EEOICPA. The district office explained that Part E differs from Part B in that Part E only provides benefits for civilian employees of DOE contractors and subcontractors (or their eligible survivors), but does not provide benefits for employees of the other types of employers that are covered under Part B, *i.e.*, atomic weapons employers or beryllium vendors. The letter provided the employee with an opportunity to submit additional evidence "[i]f you intend to claim additional employment or intend to provide evidence that MIT should be designated as a DOE facility. . . ." Included with the letter was a print-out of the Department of Energy (DOE) Facility List entry for MIT, which indicated that at that time, MIT's Cambridge campus was designated only as an atomic weapons employer (AWE) facility and a beryllium vendor facility, but not a DOE facility.[2]

On April 17, 2006, the Cleveland district office issued a recommended decision to deny the employee's Part E claim for his CBD, based on their recommended finding that the evidence in the file was insufficient to establish that he was a "covered DOE contractor employee," as that term is defined in § 7384l(11) of EEOICPA, because it failed to establish that his civilian employment at MIT was at a "Department of Energy facility," as that second term is defined in § 7384l(12) of EEOICPA. The employee filed objections to the recommended decision in letters to the FAB dated May 4, 2006, June 26, 2006, September 17, 2006 and October 26, 2006, and submitted several affidavits, exhibits and other factual evidence in support of his objections. All of the employee's objections were made in support of his position on one point—that DEEOIC should determine that MIT's Cambridge campus, or a portion thereof, is a "DOE facility" for the purposes of his Part E claim.

On June 6, 2006, the FAB referred the employee's Part E claim to DEEOIC's Branch of Policy, Regulations and Procedures (BPRP) for guidance on the issue of whether the evidence submitted by the employee warranted the requested determination regarding MIT's Cambridge campus. On December 21, 2006, BPRP referred the issue to the Office of the Solicitor of Labor (SOL). On March 14, 2007, SOL issued an opinion in which it concluded that the evidence in the case file was insufficient to establish that MIT's campus meets the statutory definition of a "Department of Energy facility." Based on that conclusion, SOL advised BPRP that DEEOIC could reasonably determine that the employee was ineligible for benefits under Part E as he was not a "covered Department of Energy contractor employee."

On May 4, 2007, the FAB issued a final decision denying the employee's Part E claim. In its final decision, the FAB restated both the employee's objections and the opinion of SOL. The FAB found that while MIT's Cambridge campus was recognized as both an AWE facility and a beryllium vendor facility during the period of the employee's civilian employment there, the evidence was insufficient to establish that it also satisfied the statutory definition of a "DOE facility" during that time period. Thus, the FAB concluded that the employee was not a "covered DOE contractor employee," as that term is defined in EEOICPA.

By letter dated May 24, 2007, the employee filed a request for reconsideration of the FAB's final decision and on July 17, 2007, the FAB issued a denial of the employee's request. In its denial, the FAB restated the employee's objections and based its denial on the conclusion that he had not submitted any new evidence or arguments that would justify reconsidering the May 4, 2007 final decision. On January 25, 2008, the Director of DEEOIC issued an Order vacating both the FAB's May 4, 2007 final decision on the employee's Part E claim and its July 17, 2007 denial of the employee's request for reconsideration. In his Order, the Director indicated that while the FAB had restated the employee's objections in its final decision, it had not explicitly analyzed each of those objections. Because of this, the Director vacated the FAB's decisions and returned the employee's Part E claim to the FAB "for issuance of a new final decision that gives appropriate consideration to the employee's objections to the Cleveland district office of DEEOIC's recommended denial of his Part E claim."

OBJECTIONS

As noted above, the employee objected to the recommended denial of his Part E claim in a letter dated May 4, 2006 and urged that MIT's Cambridge campus was misclassified and should be determined to be a DOE facility. The employee's first argument urged that the work of the Metallurgical Project at MIT was "nuclear weapons related." The evidence supports this argument. The DOE Facility List entry for MIT describes the uranium metallurgical work and beryllium work performed at MIT in support of the U.S. Army Corps of Engineers Manhattan Engineer District (MED) during the period 1942 through 1946.[3] This work—a portion of which was performed by the employee—supports the determination that MIT's Cambridge campus is both an AWE facility from 1942 through 1946, and a beryllium vendor facility from 1943 through 1946.

The employee's second argument was that DEEOIC previously determined that MIT's Cambridge campus was a DOE facility. In support of this position, the employee correctly pointed out that in its May 15, 2003 recommended decision on his Part B claim, the Denver district office stated that "Massachusetts Institute of Technology initially became a DOE facility in 1942." The FAB acknowledges that the Denver district office made that erroneous historical statement in its recommended decision on the employee's Part B claim; however, that error was not carried forward in any of the subsequent recommended decisions on the employee's several claims, nor was it repeated in any finding of fact or conclusion of law in any of the FAB's final decisions issued on the employee's several claims. In issuing a final agency decision on a claim under EEOICPA, the FAB is not bound by a historical inaccuracy contained in a recommended decision issued by a DEEOIC district office. *See* EEOICPA Fin. Dec. No. 10028664-2006 (Dep't of Labor, August 24, 2006).

The employee also argued that the MED was a predecessor agency of DOE. The FAB agrees with this historical point. 42 U.S.C. § 7384l(10).

The employee argued that "beryllium work was done at MIT and that acute beryllium disease resulted." The FAB agrees. The DOE Facility List description of the work that was performed at MIT describes beryllium work performed at the MIT Cambridge campus, and that work supports the designation of MIT as a beryllium vendor during the period 1943 through 1946. That description also refers to "a number of cases of beryllium disease at MIT" prior to the fall of 1946.[4]

The employee submitted evidence that the Metallurgical Laboratory (Met Lab) in Chicago, Illinois, is

classified as an AWE facility, a beryllium vendor facility and a DOE facility, and argued that the work performed at MIT's Cambridge campus "was just an extension of" the work performed under Dr. Arthur Compton at the Met Lab. The FAB agrees that the Met Lab was designated as an AWE facility (1942-1952), a beryllium vendor facility (1942-1946) and a DOE facility (1982-1983, 1987).[5] The FAB notes, however, that like MIT's Cambridge campus, the Met Lab is classified only as an AWE facility and a beryllium vendor facility during the time of their early uranium and metallurgical work in the 1940s. The Met Lab is classified as a DOE facility only during the periods of remediation work that was performed there in the 1980s. These classifications are consistent with those for MIT's Cambridge campus. The FAB concludes that the evidence in the file is insufficient to establish that the work performed at MIT's Cambridge campus "was just an extension of" the work performed at the Met Lab. The work performed at MIT's Cambridge campus was performed pursuant to a contract between the MED and MIT, and there is no evidence in the file to corroborate the employee's claim that the Met Lab directed or controlled the MIT Metallurgical Project.

The employee also submitted evidence showing that the Ames Laboratory in Ames, Iowa, is classified as a DOE facility, but made no argument in his May 4, 2006 letter as to the relevance of this information. In a letter dated February 7, 2008, the employee clarified his argument regarding the Ames Laboratory by asserting that the Met Lab and the Ames Laboratory "were both classified as DOE Employers while MIT was not, even though the work was analogous and facilities in all cases were owned by the universities. . . . The precedents established by these classifications seems not to have been considered." The FAB acknowledges that the Ames Laboratory is designated as a DOE facility (1942-present),[6] but points out that there is no probative evidence in the case file that corroborates the employee's argument that the work performed at the Ames Laboratory was analogous to the work that was performed at MIT's Cambridge campus, or that the contracts for such work were similar in type to the pertinent MED contract with MIT, or that the buildings used at the Ames Laboratory were owned by the associated university.[7] The regulations governing EEOICPA place upon the claimant the burden to produce evidence necessary to establish all criteria for benefits and to prove the existence of all elements necessary to establish eligibility for benefits. 20 C.F.R. § 30.111(a). The employee's bare assertions regarding the Met Lab and the Ames Laboratory are not, without supporting factual evidence, sufficient to establish his precedent argument and, thus, do not provide probative support for his claim.

The employee also argued that his work was recognized by the Secretary of War as "essential to the production of the Atomic Bomb." The FAB does not dispute this point.

In his letter dated June 26, 2006, the employee modified his objection to the recommended decision by stating that the MIT Metallurgical Project (MMP), not the entire MIT Cambridge campus, should be classified as a DOE facility. In support of that objection, he argued that "if the MMP was reclassified to meet the requirements of 'Department of Energy' Facility,'" then he would satisfy the statutory requirements of a "Department of Energy contractor employee." Based on the totality of the evidence in the case file, the FAB concludes that the evidence does not provide sufficient support for this argument. Even if the MMP were to be classified as a DOE facility during the employee's period of civilian employment there, he would still have to submit factual evidence sufficient to establish that he was employed by "(i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility." 42 U.S.C. § 7384l(11)(B). The evidence does not support a conclusion that he was so employed, because it does not establish that his employer, MIT, contracted with DOE (or any of its predecessor agencies) "to provide management and operating, management and integration, [] environmental remediation, [or] services, including construction and maintenance, at the facility."

The employee also argued that the MMP meets the first part of the two-part statutory definition of a "DOE facility." In support of this argument, he asserted that the evidence in the file proves that the

MMP is a building, structure or premise "in which operations are, or have been, conducted by, or on behalf of, the Department of Energy," pursuant to 42 U.S.C. § 7384l(12)(A). The FAB agrees that the evidence supports this conclusion. During the development of the employee's Part E claim, his file was referred to the SOL, and on March 14, 2007, that office issued a memorandum in which it found that the evidence supports a conclusion that the employee's "work on the Metallurgical Project was performed pursuant to Contract No. W-7405-eng-175 between MIT and the MED, thus meeting the test of § 7384l(12)(A)." The FAB agrees with that conclusion.

The employee then argued that the MMP also meets the second part of the two-part statutory definition of a "DOE facility," in that the MED had "a proprietary interest" in the MMP, as required by subsection (i) of 42 U.S.C. § 7384l(12)(B). In support of this position, the employee alleged that "The MED paid all bills, provided all priorities, met all needs for civilian or military personnel, which would indicate a clear proprietary interest in the MMP." As set forth more fully in the Conclusions of Law section of this final decision, the evidence in the file does not provide sufficient support for the employee's argument that the MED had "a proprietary interest" in the MMP. In their March 14, 2007 memorandum, SOL concluded that there is no evidence in the employee's case file that the MED had "a proprietary interest" in any of the buildings, structures or premises in which he worked as a civilian employee at MIT's Cambridge campus. That conclusion is part of the totality of the evidence that FAB has considered in this case, and FAB agrees with that conclusion.

That conclusion is also supported by the employee's own statements regarding ownership of the buildings in which he worked at MIT's Cambridge campus. His first identification of the buildings in which he worked during his civilian employment at MIT's Cambridge campus was more than two years after he filed his Part E claim. In a letter dated February 7, 2008, submitted after his claim was reopened by order of the Director of DEEOIC, the employee stated that all of his work for the MMP was performed in Buildings 4, 8 and 16 on MIT's Cambridge campus. He also asserted that those buildings were analogous to the buildings used at the Met Lab and the Ames Laboratory for MED work during that same time period and argued that the classification of all three facilities should be the same because "facilities in all cases were owned by the universities." Consistent with the employee's assertion that MIT owned the buildings and laboratories in which MMP research was performed, there is no probative evidence in the file establishing that the MED had a proprietary interest in any of these three buildings.

Alternatively, the employee argued that the MMP meets the second part of the two-part statutory definition of a "DOE facility" because the MED "entered into a contract with [MIT] to provide management and operation," as required by subsection (ii) of 42 U.S.C. § 7384l(12)(B). In support of this position, he argued that:

> The MED clearly entered into a contract with MIT to provide management and scientific operations. I have never seen this contract. . . . However, the Division of Industrial Cooperation at MIT did not do *pro bono* work. A contract is certainly implied by analogy to other universities such as Chicago's MetLab and Iowa State's Ames Lab, both of which, by the way, have DOE classifications.

However, the employee did not submit a contract or any other evidence that establishes that a "management and operation" contract was entered into between the MED and MIT for the work performed by the MMP. As noted above, SOL concluded in their March 14, 2007 memorandum that the work of the MIT Metallurgical Project was performed pursuant to a contract between MIT and the MED—Contract No. W-7405-eng-175. The employee's case file does not include a copy of the actual contract and FAB has not been able to locate a copy of that contract.[8] However, the SOL memorandum cites a page from Book VII, Volume I, Appendix K of the Manhattan District History, which describes the contract as follows: "Contract W-7405 eng-175 with Massachusetts Institute of Technology is a research and development contract involving work with Be as well as other metals and compounds."[9] Thus, based on available evidence, SOL concluded that the contract was not a

contract "to provide management and operation," but was, rather, a "research and development contract." This conclusion is consistent with DOE's description of the facility at MIT's Cambridge campus in the DOE Facility List. That description references contract W-7405-eng-175 and the beryllium-related research that was conducted at MIT's Cambridge campus pursuant to the contract.
[10] There is no probative evidence in the file that the MIT-MED contract under which the employee worked was a "management or operation" contract, as asserted by the employee. Thus, based on the totality of the evidence, the FAB concludes that the evidence is insufficient to establish that MIT's Cambridge campus satisfies the statutory requirements of § 7384l(12)(B)(ii).
By letter dated September 17, 2006, the employee supplemented his objection concerning the "proprietary interest" test of 42 U.S.C. § 7384l(11)(B)(i). In that letter, the employee argued that Roget's Thesaurus lists several synonyms for the term "proprietary interest," including "vested interest" and "beneficiary interest," and that by these broader definitions, the MED had a "proprietary interest" in the MMP. The employee argued that since "all work of the MIT project was paid for by and directly benefited the MED," the MED had a "proprietary interest" in the buildings in which the MMP work was performed.
The FAB finds that the evidence supports the employee's statement that the work on the MMP project was paid for by and directly benefited the MED. Both the SOL memorandum and the DOE Facilities List support a finding that the MMP work was performed pursuant to Contract No. W-7405-eng-175 between MIT and the MED, and FAB will assume that the MED met its payment obligations to MIT under the contract. However, payment for work performed under the contract and receipt of benefits from the performance of the contract do not establish that the MED had a proprietary interest in the *buildings* in which the contract's work was performed. The structure of the statutory definition of a "Department of Energy facility" supports this conclusion. The Act defines the term "Department of Energy facility" as:

> [A]ny building, structure, or premise, including the grounds upon which such building, structure, or premise is located—
> (A) in which operations are, or have been, conducted by, or on behalf of, the Department of Energy. . .; and
> (B) with regard to which the Department of Energy has or had—
>
> (i) a proprietary interest, or
> (ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services.

42 U.S.C. § 7384l(12). Thus, in order to satisfy the requirements of subsection (B) of the statutory definition, it must be established that DOE (or its predecessors, including the MED) either (i) had a proprietary interest in the buildings in which **[Employee]** worked, or (ii) had a contract with MIT to provide at least one of the specific types of services listed in the definition. Thus, the "proprietary interest" test of subsection (B)(i) is an alternative to the "contract" test of subsection (B)(ii). If evidence of payment and receipt of benefits under a type (B)(ii) contract was sufficient to meet the "proprietary interest" test of (B)(i), as the employee urged, there would be no need to have the alternative subsection (B)(i) test. Thus, the meaning of "proprietary interest" proffered by the employee would render subsection (B)(i) superfluous.
Additionally, as set forth more fully in the Conclusions of Law section of this decision, the employee's alternative definitions of the phrase "proprietary interest" are not consistent with its ordinary meaning, that is, an interest characterized by ownership, use and control. The employee has made no allegation, nor proffered any evidence, that the buildings in which he worked on MIT's Cambridge campus during his civilian employment from January 26, 1945 to October 22, 1945, *i.e.*, Buildings 4, 8 and 16, were owned, rented, or controlled by the MED for use by the MMP. In fact, he repeatedly refers to those buildings as labs of the MIT Metallurgical Department owned by MIT, not labs owned by the MED.

[11]
Finally, under cover letter dated October 26, 2006, the employee supplied additional factual evidence in support of his argument that there was a contract between the MED and MIT for the MMP, and therefore the "contract" test of 42 U.S.C. § 7384l(11)(B)(ii) is satisfied and the MMP should be classified as a DOE facility. As described above, FAB acknowledges that the employee's civilian work at MIT was performed pursuant to a contract between MIT and the MED, but concludes that there is insufficient evidence to establish that the contract in question meets the requirements of 42 U.S.C. § 7384l(12)(B)(ii), and therefore the buildings used for the MMP do not satisfy the statutory definition of a "DOE facility."
After reviewing the written record of the case file and the employee's objections described above, the FAB hereby makes the following:

FINDINGS OF FACT

1. On May 31, 2002, the employee filed a claim for benefits under Part B of EEOICPA based on the allegation that he had contracted beryllium sensitivity, CBD and pulmonary insufficiency due to his occupational exposure to beryllium as a mechanical engineer at MIT's campus in Cambridge, Massachusetts.

2. The employee was a civilian employee of MIT from January 26, 1945 to October 22, 1945, and worked on the MMP during that time period.

3. During his period of civilian employment by MIT, the employee worked in Buildings 4, 8 and 16 on MIT's Cambridge campus. The MED did not have a "proprietary interest" in any of those three buildings, which were instead owned by MIT.

4. The employee's work on the MMP was performed pursuant to Contract No. W-7405-eng-175 between MIT and the MED (a predecessor agency of DOE).

5. During the period of the employee's civilian employment by MIT, Contract No. W-7405-eng-175 was a research and development contract and was not a contract to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services at MIT's Cambridge campus.

6. Prior to January 26, 1945 and after October 22, 1945, the employee was an active enlisted member of the U.S. Army.

7. On May 30, 2003, the FAB issued a final decision accepting the employee's Part B claim for beryllium sensitivity and awarding him medical benefits and sensitivity monitoring retroactive to his filing date of May 31, 2002.

8. The employee was diagnosed with CBD on July 2, 2003.

9. On August 5, 2003, the employee filed a second claim under Part B of EEOICPA for his CBD.

10. On September 22, 2003, the FAB issued a final decision accepting the employee's Part B claim for CBD and awarding him a lump sum of $150,000.00, plus medical benefits for his CBD retroactive to May 31, 2002.

11. On November 25, 2005, the employee filed a claim under Part E of EEOICPA based on his CBD.

12. For purposes of EEOICPA, MIT's Cambridge campus is classified as an AWE facility for the time period 1942 through 1946, and as a beryllium vendor facility for the time period 1943 through 1946. While MIT's Cambridge campus is not classified as a DOE facility, the Hood Building, which was located adjacent to MIT's Cambridge campus prior to its demolition, is classified as a DOE facility for the time period 1946 through 1963.

Based on the above findings of fact, the undersigned makes the following:

CONCLUSIONS OF LAW

Regulations governing the implementation of EEOICPA allow claimants 60 days from the date of the district office's recommended decision to submit to the FAB any written objections to the recommended decision, or a written request for a hearing. *See* 20 C.F.R. §§ 30.310 and 30.311. On May 4, 2006, June 26, 2006, September 17, 2006 and October 26, 2006, the employee filed written objections to the recommended decision, but did not request a hearing. Pursuant to 20 C.F.R. §§ 30.312 and 30.313, the FAB has considered the objections by means of a review of the written record of this case. After a thorough review of the record in this case, the FAB concludes that no further investigation of the employee's objections is warranted, and the FAB now issues a final decision on the employee's Part E claim.

In order to be afforded coverage under Part E of EEOICPA, a claimant must establish that, among other things, he is a "covered DOE contractor employee." 42 U.S.C. §§ 7385s(1), 7385s-1, 7385s-8. To prove that he is a "covered DOE contractor employee" for purposes of Part E eligibility, the employee must establish: (1) that he was a "DOE contractor employee" and (2) that he "contracted a covered illness through exposure at a Department of Energy facility." 42 U.S.C. § 7385s(1). As a result of this statutory scheme, only DOE contractor employees are eligible for benefits under Part E, whereas employees of an AWE or a beryllium vendor are excluded from such coverage.[12]

The Act defines the term "Department of Energy contractor employee," in pertinent part, as follows: "An individual who is or was **employed at a Department of Energy facility** by—(i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or (ii) a contractor or subcontractor that provided services, including construction and maintenance at the facility." 42 U.S.C. § 7384l(11)(B) (emphasis added). Thus, in order to be considered a "Department of Energy contractor employee," a claimant must have been employed at a DOE facility. The statutory definition of a "Department of Energy facility" is:

"[A]ny building, structure, or premise, including the grounds upon which such building, structure, or premise is located—

> (A) in which operations are, or have been, conducted by, or on behalf of, the Department of Energy. . .; and
> (B) with regard to which the Department of Energy has or had—
>> (i) a proprietary interest, or
>> (ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation

services, construction, or maintenance services.
42 U.S.C. § 7384l(12). Therefore, in order to be eligible for benefits under Part E, a claimant must prove that he is or was employed as a civilian employee of a DOE contractor or subcontractor at a facility that meets the requirements of both subsection (A) and subsection (B) of § 7384l(12).

The FAB concludes that the employee has established that he was a civilian employee of MIT from January 26, 1945 to October 22, 1945, and that he worked in various laboratories in Buildings 4, 8 and 16 on the MIT campus in Cambridge, Massachusetts, during that time period. The evidence further establishes that the employee's work for the MMP during that period was performed pursuant to a contract that MIT entered into with the MED to perform research and development on beryllium and other metals and compounds in support of the Manhattan Project. Based on the totality of the evidence, FAB concludes that MIT's Cambridge campus satisfies subsection (A) of the statutory definition of a "Department of Energy facility." 42 U.S.C. § 7384l(12)(A).

The evidence in support of subsection (B) of § 7384l(12), however, is lacking. Subsection (B) requires that in order for a building, structure or premise to be deemed a "Department of Energy facility," the evidence must establish that it is a building, structure, or premise "with regard to which the Department of Energy has or had—(i) a proprietary interest, or (ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services." Neither the "proprietary interest" test nor the alternative "contract" test has been satisfied by a preponderance of the evidence in this claim.

The statute and the governing regulations do not define the term "proprietary interest," as that term is used in subsection (B)(i) of § 7384l(12). Black's Law Dictionary defines the term as: "The interest of an owner of property together with all rights appurtenant thereto such as the right to vote shares of stock and right to participate in managing if the person has a proprietary interest in the shares." *Black's Law Dictionary*, p.1098 (5th ed. 1979). *See also Evans v. U. S.*, 349 F.2d 653, 658 (5th Cir. 1965) (holding that the phrase "proprietary interest" is "not so technical, or ambiguous, as to require a specific definition" and assuming that the jury in that case gave the phrase "its common ordinary meaning, such as 'one who has an interest in, control of, or present use of certain property.'") Employing the common accepted definition of the term, in order to meet the "proprietary interest" test, the evidence must establish that the MED had rights of ownership, use, or control in the buildings in which the employee worked at MIT's Cambridge campus from January 26, 1945 to October 22, 1945. The employee has proffered no such evidence. To the contrary, in a letter dated February 7, 2008, he asserted that those buildings were owned by MIT, and in a May 30, 2006 email he referred to the laboratories in those buildings as "Metallurgical Dept labs." He has likewise offered no probative evidence that the MED controlled the buildings in question or rented space in them.

With regard to the "contract" test of subsection (B)(ii) of § 7384l(12), there is evidence of the existence of a contract between MIT and the MED for the work that was performed by the employee's group on the MMP; specifically, Contract No. W-7405-eng-175. However, based on the totality of the evidence, the FAB concludes that that contract was not entered into "to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services"; rather, it was a much narrower "research and development contract involving work with Be [beryllium] as well as other metals and compounds." Since the contract was not one of the limited types enumerated by Congress in its statutory definition of "Department of Energy facility," the FAB concludes that Congress did not intend buildings such as those in which the employee worked to be designated as DOE facilities for purposes of EEOICPA.

The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving "by a preponderance of the evidence" the existence of every criterion under any compensable claim category set forth in § 30.110. "Proof by a preponderance of the evidence means it is more likely than not that a given proposition is true." 20 C.F.R. § 30.111(a). The FAB concludes that the totality of the evidence in the case file is insufficient to establish by a preponderance of the evidence that the employee meets the statutory definition of a "Department of Energy contractor employee" because the evidence is insufficient to establish that he was employed at a "Department of Energy facility" during his civilian employment at MIT's Cambridge campus. *Accord* EEOICPA Fin. Dec. No. 10033981-2006 (Dep't of Labor, November 27, 2006). Therefore, the employee has not established that he is a "covered DOE contractor employee" and he is not entitled to benefits under Part E of EEOICPA. As a result, the FAB hereby denies the employee's claim under Part E.

Washington, DC

Thomas R. Daugherty

Hearing Representative

Final Adjudication Branch

[1] Pub. Law 108-375, § 3161 (October 28, 2004).

[2] As of the date of the March 9, 2006 letter, MIT's campus was designated as an AWE facility and a beryllium vendor facility for the time period 1942 through 1963. On October 10, 2007, the designation of MIT's campus was modified in two ways; first, the dates of the AWE facility and beryllium vendor facility designations were changed such that MIT's Cambridge campus is now designated as an AWE facility from 1942 through 1946 and as a beryllium vendor facility from 1943 through 1946; second, the Hood Building, which was adjacent to MIT's campus, was determined to be a DOE facility for the period 1946 through 1963. *See* EEOICPA Circular No. 08-01 (issued October 10, 2007) and the entry for MIT on the DOE Facility List at http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/showfacility.cfm.

[3] *See* the entry for MIT on the DOE Facility List at http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/showfacility.cfm.

[4] *Id.*

[5] *See* the entry for the Metallurgical Laboratory on the DOE Facility List at http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/showfacility.cfm.

[6] *See* the entry for the Ames Laboratory on the DOE Facility List at http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/showfacility.cfm.

[7] The Ames Laboratory was established at Iowa State College in Ames, Iowa, on May 17, 1947. The college was subsequently renamed Iowa State University. Work done for the MED at Iowa State College between 1942 and May 16, 1947 is covered under the DOE facility designation, as is all work done in the Ames Laboratory facilities since that date. *See* http://www.external.ameslab.gov/final/About/Aboutindex.htm.

[8]The FAB notes that it is the claimant's responsibility to establish entitlement to benefits under the Act. Subject to certain limited exceptions expressly provided in the Act and regulations, the claimant bears the burden of providing "all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in these regulations." 20 C.F.R. § 30.111(a). *See also* EEOICPA Fin Dec. No. 10432-2004 (Dep't of Labor, September 13, 2004).

[9] A copy of this page has been placed in the case file and a copy has been forwarded to the employee with this decision.

[10] *See* the entry for MIT on the DOE Facility List at http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/showfacility.cfm.

[11] *See* the employee's email to the EEOICPA Ombudsman dated May 30, 2006, and his letter to FAB dated February 7, 2008.

[12] Although they are not covered under Part E of EEOICPA, atomic weapons employees and beryllium vendor employees are covered under Part B of EEOICPA. Additionally, Congress has stated that EEOICPA was established to compensate "civilian" men and women who performed duties uniquely related to nuclear weapons production and testing. *See* 42 U.S.C. § 7384(a)(8). Consequently, members of the military are not covered by EEOICPA. *See* EEOICPA Fin. Dec. No. 57276-2004 (Dep't of Labor, October 26, 2004).

EEOICPA Fin. Dec. No. 20121219-81137-1 (Dep't of Labor, March 13, 2013)

EMPLOYEE:	**[Name Deleted]**
CLAIMANTS:	**[Name Deleted]**
	[Name Deleted]
FILE NUMBER:	**[Number Deleted]**
DOCKET NUMBER:	**20121219-81137-1**
DECISION DATE:	**March 13, 2013**

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning the above-noted claims for survivor benefits under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claims under Parts B and E of EEOICPA are denied.

STATEMENT OF THE CASE

On October 7, 2009, **[Employee's son]** filed a Form EE-2 claiming survivor benefits under Parts B and E of EEOICPA as a surviving child of **[Employee]** for his alleged stomach cancer and for his death on September 7, 1978, respectively. On October 14, 2009, **[Employee's spouse]** also filed a Form EE-2 claiming benefits as the surviving spouse of the employee.

The evidence of record includes a copy of the employee's death certificate, which indicated that he died on September 7, 1978 due to carcinomatosis resulting from adenocarcinoma of the stomach. **[Employee's spouse]** submitted a copy of a marriage certificate indicating the she married the employee on June 10, 1972. The employee's death certificate identified **[Employee's spouse]** as the

employee's surviving spouse. **[Employee's spouse]** documented her changes in surname. **[Employee's son]** submitted a copy of his birth certificate, which indicated that he was born on August 10, 1937 and that the employee was his father. He also submitted a statement that he was capable of self-support at the time of the employee's death.

[Employee's son] submitted a Form EE-3 in which he alleged that the employee worked in Area IV of the Santa Susana Field Laboratory (SSFL) as an electrician for North American Aviation and Rockwell/Rocketdyne from 1973 to 1988.[1] The current operator of the SSFL, the Boeing Company, submitted employment information indicating that the employee worked for Rocketdyne in Area II of the SSFL intermittently between November 7, 1955 and September 30, 1969. However, Area II of the SSFL is not a Department of Energy (DOE) facility and employment in Area II is not covered DOE facility employment. DOE was asked and was unable to confirm that the employee worked in Area IV of the SSFL.

On February 16, 2010, the Seattle district office of the Division of Energy Employees Occupational Illness Compensation (DEEOIC) received a signed and notarized letter dated February 7, 2010 from **[Affiant]**, who indicated:

- That he had worked at the SSFL and often visited Area IV to service pump systems;
- That the employee had worked as a maintenance electrician on the third shift;
- That he knew "for a fact" that the employee was often in Area IV in pursuit of his duties; and
- That the employee worked at the SSFL for twenty years or more.

[Affiant] later submitted a signed and notarized Form EE-4 dated April 5, 2010, in which he indicated that he had worked with the employee and knew that the employee worked as a maintenance electrician in all areas of the SSFL, including Area IV, and specified that the employee had worked in Area IV from February 16, 1956 through July 29, 1957.

On April 15, 2010, the district office issued a recommended decision to accept **[Employee's spouse]**'s Part B and Part E claim, based on the recommended findings that the employee qualified as a member of a Special Exposure Cohort (SEC) class at Area IV of the SSFL (based on **[Affiant]**'s statements), and that he was diagnosed with a "specified" cancer. In that same decision, the district office recommended denial of **[Employee's son]**'s Part B and Part E claim on the ground that he was not an eligible survivor. On May 26, 2010, FAB issued a final decision consistent with the district office's recommendation and awarded **[Employee's spouse]** $150,000.00 under Part B and $125,000.00 under Part E, for a total award of $275,000.00.

[Employee's spouse] received payment of $275,000.00 on or about June 17, 2010.

On March 28, 2011, the Seattle district office received a signed and notarized letter dated March 21, 2011 from **[Affiant]**, in which he stated:

- That his EE-4 was false as he had never worked with the employee;
- That the employee, on his deathbed, asked him to take care of **[Employee's spouse]**;
- That he was called several times by **[Employee's spouse]** who requested that he verify that the employee had worked in Area IV in support of her EEOICPA claim;

- That in an effort to help **[Employee's spouse]** with her EEOICPA claim he had executed a false affidavit;
- That he had advised **[Employee's spouse]** that they were committing fraud; and
- That he wanted $50,000.00 from her EEOICPA award to spread among the employee's grandchildren.

[Affiant] died in June 2011. Thereafter, this matter was referred to the Las Vegas field office of the Office of Labor Racketeering and Fraud Investigations (OLRFI) within the Department of Labor's Office of Inspector General. In the course of OLRFI's investigation, **[Employee's son]** provided OLRFI with copies of three letters from **[Affiant]**, as follows:

- A January 3, 2010 letter addressed to **[Employee's son]**, in which **[Affiant]** admitted that he was "stretching things" when he had previously emailed him about where the employee worked at the SSFL.
- A January 7, 2011 letter addressed to **[Employee's spouse]**, in which **[Affiant]** stated that he had: (1) taped their previous discussions when he told her that they were committing fraud against the government and that the penalties were severe; and (2) agreed to lie about the employee's employment record so that she would be eligible to receive $150,000.00 under EEOICPA (of which he would receive $50,000.00).
- A January 20, 2011 letter addressed to **[Employee's spouse]**, in which **[Affiant]** stated that he "came up with the idea that I would ask for $50k for misrepresenting the truth" to "spread it among the children and at the same time I would be helping **[Employee's spouse]**," and advised her that there was "quite a penalty for defrauding the Federal Government. . . ."

On September 24, 2012, the Director of DEEOIC issued an order vacating the May 26, 2010 final decision and returned the case file to the district office for further development and issuance of a new recommended decision regarding the eligibility of the claimants to receive survivor benefits under Part B and Part E.

On October 11, 2012, the district office sent letters to the claimants to notify them that it was unable to verify the employee's employment in Area IV of the SSFL and requested that they submit evidence that the employee had worked for a DOE contractor or subcontractor at a DOE facility during a covered time period. On October 23, 2012, the district office received a response from **[Employee's spouse]**, in which she indicated that she was not married to the employee at the time that he worked at the SSFL, that she could not send any information to the district office because she does not have the employee's work records, and she was "introduced to" **[Affiant]** and was told that he and her husband had worked together. **[Employee's son]** did not respond to the October 11, 2012 letter.

On December 19, 2012, the district office issued a recommended decision to deny the claimants' survivor claims under Part B and Part E on the ground that neither claimant had met their burden of proof to establish that the employee worked in Area IV of the SSFL, as alleged. On January 14, 2013, **[Employee's son]** submitted a signed waiver of his right to object to the findings of fact and conclusions of law of the recommended decision.

After considering the evidence of record, FAB makes the following:

FINDINGS OF FACT

1. **[Employee's son]** and **[Employee's spouse]** filed claims for survivor benefits on October 7 and 14, 2009, respectively.

2. The evidence of record is insufficient to establish that the employee worked in Area IV of the SSFL during the time period of February 16, 1956 through July 29, 1957, as alleged.

3. The employee died on September 7, 1978.

4. **[Employee's son]** is a child of the employee.

5. **[Employee's spouse]** is the surviving spouse of the employee, and was paid $275,000.00 pursuant to a prior final decision dated May 26, 2010.

Based on the above-noted findings of fact, FAB also hereby makes the following:

CONCLUSIONS OF LAW

If a claimant waives any objections to all or part of a recommended decision, FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part. *See* 20 C.F.R. § 30.316(a) (2012). **[Employee's son]** waived his right to object to the findings of fact and conclusions of law in the recommended decision. **[Employee's spouse]** did not object to the recommended decision within the 60-day period for filing an objection.

The regulations provide that the claimant bears the burden of providing the evidence necessary to establish eligibility for benefits and of proving "by a preponderance of the evidence the existence of each and every criterion" required for eligibility. The regulations also provide that "[p]roof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true." 20 C.F.R. § 30.111(a).

To qualify for benefits as a survivor of a "covered employee with cancer" under Part B of EEOICPA, a claimant must show that they are a qualified survivor of an employee who was either a DOE employee, or a DOE contractor employee, or an employee of an atomic weapons employer who contracted cancer in the performance of duty after beginning employment at a DOE facility or an AWE facility. To qualify for survivor benefits under Part E, a claimant must establish that they are a survivor of a "covered DOE contractor employee" who was engaged in covered employment at a DOE facility and that the employee was determined to have contracted a covered illness through exposure at that facility.

However, as found above, the evidence of record does not establish that the employee worked at a DOE facility—Area IV of the SSFL—as alleged. Thus, the claimants have not established the necessary criteria for eligibility under EEOICPA and their claims for survivor benefits under Parts B and E are denied.

Compensation received by **[Employee's spouse]** under the vacated May 26, 2010 final decision now appears to have resulted in an overpayment. The national office of DEEOIC will provide **[Employee's spouse]** with written notification regarding the overpayment and its overpayment procedures at a later date.

Seattle, WA

Keiran Gorny

Hearing Representative

Final Adjudication Branch

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[1] Area IV of the SSFL is a covered DOE facility from 1955 to 1988 and from 1988 to the present for remediation. *See* http://www.hss.energy.gov/healthsafety/FWSP/advocacy/faclist/showfacility.cfm (retrieved on February 27, 2013).

EEOICPA Fin. Dec. No. 20130111-12000242-2 (Dep't of Labor, June 13, 2013)

EMPLOYEE: **[Name Deleted]**

CLAIMANT: **[Name Deleted]**

FILE NUMBER: **[Number Deleted]**

DOCKET NUMBER: **20130111-12000242-2**

DECISION DATE: **June 13, 2013**

NOTICE OF FINAL DECISION

FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch (FAB) concerning the above-noted claim for benefits under Parts B and E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq.* For the reasons set forth below, the claim for chronic beryllium disease (CBD) under Parts B and E, and for hearing loss, hypertension and chronic obstructive pulmonary disease (COPD)/emphysema under Part E, are hereby denied.

STATEMENT OF THE CASE

On January 30, 2012, the employee's authorized representative filed a claim on behalf of her client under both Parts B and E of EEOICPA for the illnesses noted above. In support of that claim, the representative argued that the Department of Energy (DOE) and its predecessors had leased the Kansas City Plant[1] from the General Services Administration (GSA), and that as part of such lease, GSA maintenance workers (such as the employee) performed maintenance work on utilities located within

the boundaries of the Kansas City Plant. Although the representative did not submit a copy of the alleged "lease agreement" to the district office, she did submit a copy of a Memorandum of Agreement (MOA) signed in July of 1993 by representatives of GSA, DOE and the Department of Defense for "environmental investigatory work at the Bannister Federal Complex." The representative also provided the following: a GSA form completed on July 12, 1988 regarding the employee's medical examination on that date; respirator use forms dated 1990-1994; and a June 14, 1993 health unit history form completed by the employee in which he stated that he began working for GSA on July 3, 1961 as an A/C Operator and Plumber/Pipefitter.

On February 2, 2012 and March 2, 2012, a claims examiner sent the employee letters requesting that he submit a Form EE-3 and a copy of the "lease agreement" that his representative referred to in her argument. These letters also asked the employee to submit medical evidence in support of his alleged illnesses. In response, the employee submitted a completed Form EE-3 in which he indicated that he worked at the "Kansas City Plant/Bendix" for "GSA-PBS-R6" as a "pipe fitter/plumbing/ maintenance" from July 3, 1961 to December 30, 1994, and that he had "[f]requent assignments with security Personnel to Bendix steam pits." The employee did not provide the requested copy of the "lease agreement" to the district office, but his representative submitted a March 16, 2012 statement signed by a GSA buildings manager supervisor who alleged that GSA maintenance employees were required to enter DOE space at the Bannister Federal Complex to perform work on mechanical systems and operations that were intertwined or shared between DOE and GSA.

The employee also submitted medical evidence consisting of health unit and employment screening evaluations conducted intermittently between June 13, 1988 and June 21, 1994. Most of these evaluations took the form of x-rays read by B-readers who found evidence of pleural changes consistent with asbestos exposure, but Dr. David F. Hazuka opined that the employee's July 25, 1991 chest x-ray showed a few benign calcifications appearing in the employee's lower right lung field, and Dr. Kenneth M. Jacob noted a few bilateral calcified granulomas after review of the employee's June 21, 1994 chest x-ray. The employee also submitted an August 12, 1994 report indicated that the employee's pulmonary function tests showed some abnormalities that were below the normal range but were mild and did not require follow-up medical attention.

On March 14, 2012 and on April 17, 2012, the claims examiner sent a request to Honeywell, the DOE contractor at the Kansas City Plant, for verification of the employee's alleged work at that location as a GSA employee, and a document acquisition request. On May 17, 2012, Honeywell responded that it did not have any evidence regarding the employee's alleged work.

At the same time that the representative filed the employee's claim with the district office, she also faxed a copy of the 1993 MOA noted above, her argument in support of the claim and other documents to the Director of the Division of Energy Employees Occupational Illness Compensation (DEEOIC) in Washington, D.C. After considering her argument, the Director wrote to the Denver district office on August 7, 2012 and noted that there was no evidence that GSA was a subcontractor of the DOE contractor at the Kansas City Plant. The district office then issued a recommended decision on August 23, 2012 to deny both aspects of the employee's claim on the ground that there was insufficient evidence to establish that he had any covered employment at a DOE facility.

On August 30, 2012, FAB received an August 27, 2012 statement from the representative in which she objected to the recommended decision and requested an oral hearing. In light of this request, the national office of DEEOIC forwarded several documents regarding the Bannister Federal Complex to

FAB, as follows:

- A May 7, 1963 "Space Permit and Service Agreement," identified as Contract No. AT(23-3)-14, between the Atomic Energy Commission (AEC) and GSA that was made retroactive to July 1, 1962.

- A September 26, 1974 memorandum to the AEC setting out the chronology of the Kansas City Plant from 1943 through 1963.

- A February 17, 1977 letter in which GSA notified the Energy Research and Development Administration (ERDA) that it had transferred ownership of 122.05 acres at the Bannister Federal Complex to ERDA, effective September 30, 1976, and included a provision that the property would be transferred back to GSA whenever ERDA no longer had use for it.

- Modification No. M085 to Management and Operations (M&O) Contract No. EY-76-C-04-0613 between ERDA and Bendix, effective January 1, 1977.

- Modification No. M107 to M&O Contract No. DE-AC04-76DP00613 between DOE and Bendix, effective January 1, 1982.

- A Memorandum of Understanding (MOU) between DOE and GSA, No. DE-GM33-89AL53604, effective March 1, 1989.

After it received the above-noted evidence, FAB issued a September 21, 2012 order remanding the employee's claim under Parts B and E to the district office. With respect to the employee's Part B claim, FAB noted that the district office did not make any findings in the recommended decision on the employee's allegation that he worked for GSA at the Bannister Federal Complex, and, if this was true, whether he was eligible for Part B benefits for his alleged CBD pursuant to 42 U.S.C. § 7384l(7)(A). As for the employee's Part E claim, FAB also noted that the same recommended decision did not address whether he met the definition of a "Department of Energy contractor employee" under Part E. Accordingly, FAB returned the file to the district office for further development.

Upon return of the case file, the district office wrote to the employee on September 25, 2012 and asked him to submit a copy of the alleged lease his representative had referred to earlier. The employee did not respond to this request within the period of time allotted; however, the Denver district office obtained copies of additional documents that the employee's representative had faxed to DEEOIC's Director about the Kansas City Plant before she filed the employee's claim. In a cover letter that she had faxed to the Director on January 12, 2012, the representative argued that the following documents proved that the War Assets Administration (WAA) and then GSA "owned the Kansas City property and leased it to various AEC contractors. . .(Westinghouse, Bendix, Allied Signal, Honeywell)":

- A January 31, 1947 memorandum from the WAA to the Real Property Review Board regarding a "[p]roposal to lease for multiple tenancy plan together with proposed rental rates" for Plancor 1213 [*i.e.*, the Bannister Federal Complex] in Kansas City, Missouri.

- A July 3, 1947 WAA internal memorandum concerning revision of rental rates at Plancor 1213.

- A July 2, 1952 letter wherein the Navy informed GSA that it could not release 32 acres of property included in the lease agreement between the Navy and Westinghouse to GSA, and indicated that part of the main plant was "turned over to Bendix" for use on an AEC project.

The district office also wrote to the employee on December 5, 2012 and requested that he submit additional medical evidence in support of his claim for CBD under Part B of EEOICPA. The district office did not receive any response to that letter from the employee. Thus, on January 11, 2013, the district office issued a recommended decision to deny the employee's claim for CBD under Part B on the ground that the evidence of record did not establish that he developed that condition, and to deny his claim for CBD, hypertension, hearing loss and COPD/emphysema under Part E on the ground that he was not a "covered DOE contractor employee."

On January 16, 2013, the employee's representative objected to the recommended decision and requested an oral hearing. She also asked FAB to issue a subpoena for "correspondence" she believed had occurred in connection with the employee's claim. In a letter dated January 28, 2013, FAB denied the representative's subpoena request in connection with the employee's Part E claim, and informed her of the criteria she would have to meet before it could consider issuing a subpoena in connection with her client's Part B claim. Since the representative did not address either of those requirements in her January 16, 2013 request, FAB provided her 30 days from the date of the letter to submit a response, but no response was received. The undersigned hearing representative held the requested hearing in Kansas City, Missouri on March 28, 2013.

OBJECTIONS

At the hearing, the employee and other witnesses provided oral testimony in support of the claim under both Parts B and E. The representative also provided a number of arguments, as described below.

First, the representative argued that the employee had met his burden to establish a diagnosis of CBD under Part B, using the pre-1993 statutory criteria. However, the medical evidence in the file does not satisfy at least three out of those five criteria, because while it is arguable that the employee may have submitted evidence of characteristic chest radiographic abnormalities and either a restrictive or obstructive lung physiology testing (or diffusing lung capacity) defect, the employee did *not* submit any evidence of lung pathology consistent with CBD, a clinical course consistent with a chronic respiratory disorder, or any immunologic tests showing beryllium sensitivity. Therefore, he had not met his burden to proof to establish that he has CBD under Part B of EEOICPA.

Second, the representative argued that the 1993 MOA discussed above is a contract for services by which GSA agreed to clean up hazardous substances at the Kansas City Plant in exchange for compensation from DOE, and therefore GSA is a subcontractor at the Kansas City Plant and her client is a subcontractor employee eligible for Part E benefits. However, this is not a correct interpretation of this document. While the 1993 MOA *was* an agreement between GSA, DOE and the Department of Defense, it only concerned the environmental investigatory work these three agencies undertook at the Bannister Federal Complex pursuant to their respective statutory obligations under either the Resource Conservation and Recovery Act or the Comprehensive Environmental Response, Compensation and Liability Act. Also, while the MOA provided that each party could seek reimbursement from the others for investigatory and cleanup costs, the 1993 MOA is *not* a contract in which GSA agreed to perform services it was not statutorily obligated to perform in exchange for compensation from DOE. Therefore, this document does not establish the employee's entitlement to any Part E benefits.

Thirdly, the representative argued that her timely request for the issuance of a subpoena related to the employee's Part E claim was wrongly denied on January 28, 2013. However, DEEOIC's authority to issue subpoenas in connection with claims filed under EEOICPA is limited by the express terms of 42 U.S.C. § 7384w, which strictly limits that authority to Part B claims. Since this objection concerns a request for a subpoena in connection with a Part E claim, there is no basis for this objection.

Fourth, the representative suggested that the Policy Branch within the national office of DEEOIC somehow lacked the authority to provide guidance regarding the employee's alleged entitlement to benefits under Part E of EEOICPA to the Denver district office of DEEOIC. However, there is no apparent legal or factual basis for this suggestion, and more importantly, the Policy Branch was providing guidance to the district office on a question of entitlement, not deciding to either accept or deny the employee's Part E claim. Consistent with 20 C.F.R. § 30.300 (2012), all final agency decisions issued on claims of entitlement under EEOICPA are issued by FAB, not the Policy Branch of DEEOIC.

And finally, the representative's main argument in support of the employee's Part E claim was that there was a lease agreement showing that the WAA was the "landlord" for the Kansas City Plant (this location was part of the larger location called "Plancor 1213" in WAA documents) beginning in the 1940s, and that as the landlord, the WAA (and then GSA) had a duty to perform certain services for the DOE contractors at the Kansas City Plant for which the WAA/GSA was paid under the terms of this alleged lease agreement.

In order to address these final contentions, it is first necessary to set out some of the pertinent history of the Bannister Federal Complex, of which the Kansas City Plant is a part, as established by the documents in the case file. Those documents indicate that in 1942, a large manufacturing building was built at the site of the present-day Bannister Federal Complex for the Department of the Navy, and that Pratt & Whitney assembled engines for Navy fighter planes in that building from 1943 to 1945. They also indicate that the Defense Plant Corporation (a wartime subsidiary of the Reconstruction Finance Corporation, which was then an independent agency of the U.S. government) owned the property from at least 1943 through 1947. On December 31, 1947, the Navy acquired the land by a Quitclaim Deed from the Reconstruction Finance Corporation, acting through the War Assets Administrator, and immediately leased the "old Pratt & Whitney plant," *i.e.*, the large manufacturing building in question, to the Westinghouse Electric Company, who continued to build Navy jet engines at the plant from 1948 through 1961.

The evidence in the file establishes that during the period of its lease, Westinghouse subleased portions of the "old Pratt & Whitney plant" to various government agencies and private entities. One of those subleases was executed in 1948, when Westinghouse sublet the warehouse portion of the "old Pratt & Whitney plant" to the Bendix Corporation, with the AEC's approval, after the AEC had entered into Contract No. AT(29-1)-613 with Bendix on November 5, 1948 "for the performance by the Contractor of certain work involving management and operation of Government-owned facilities." This event marks the historical beginning of the worksite known as the Kansas City Plant. Bendix actually began its work for the AEC at this subleased location in 1949 and continued working there even after the Navy terminated its lease with Westinghouse on June 30, 1961; shortly thereafter, the Navy transferred ownership of all 300 acres comprising the Bannister Federal Complex to GSA. The Westinghouse-to-Bendix sublease also presumably ended in 1961, although there is no documentation available on this point.

Based on the above, the representative's assertion that the AEC began leasing space for the Kansas City

Plant at the Bannister Federal Complex from the WAA in the 1940s is factually incorrect. The January 31, 1947 and July 3, 1947 memoranda discussed earlier are not evidence of a lease agreement between the WAA and either the AEC or Bendix, because they were both dated more than one year before Bendix contracted with the AEC to perform work for it at the Kansas City Plant in November of 1948. Instead, the evidence shows that Bendix subleased a portion of the complex from Westinghouse (*not* GSA) from 1948 through 1961.

After that sublease ended, both GSA and the AEC entered into a "Space Permit and Service Agreement," effective July 1, 1962, through which GSA granted the AEC and its contractors a permit for "possession and use" of the Kansas City Plant. In return, the AEC agreed to pay GSA an "unfunded users charge." Under this Space Permit and Service Agreement, the AEC was responsible for its own day-to-day and long-term maintenance of the interior of the buildings in its area, its adjacent areas and border fences, and all installed utilities and/or mechanical systems within its area. GSA was denied general access to the Kansas City Plant, and was granted access only upon approval by the AEC for the purpose of making periodic inspections and for any other reasonable and legitimate purposes, and subject to clearance in accordance with the AEC's security procedures. The terms of the Space Permit and Service Agreement obligated the AEC to supply certain utility services to the entire Bannister Federal Complex for GSA, and to operate and maintain (excluding long-term maintenance) utility systems within the Service Area.[2] In return, GSA agreed to pay the AEC for the cost of utility services that the contractor provided to the Service Area. GSA was to provide long-term maintenance for its own area and the Service Area, and was specifically excluded from providing such services in the designated AEC areas.

On its face, the Space Permit and Service Agreement obviously has many characteristics of a real estate lease. It is contractual in nature, since it granted the AEC long-term authority to use the Kansas City Plant in return for a "users charge," and it also gave the AEC exclusive control and possession of the Kansas City Plant against all others, including the owner, GSA. However, even assuming that this is the "lease agreement" referred to by the employee's representative, a close reading of the document does not support the representative's allegations regarding the *terms* of the "lease agreement." Specifically, there is nothing within the four corners of the Space Permit and Service Agreement that obligated the GSA to provide any services to the AEC at the Kansas City Plant in return for any payment or compensation, as the representative alleges.

Returning to the history of the Kansas City Plant, the file contains a February 17, 1977 letter in which GSA indicated it had transferred ownership of "122.05 acres of land. . .with improvements thereon" at the Bannister Federal Complex to ERDA, effective September 30, 1976. Clearly, from this point in time forward, any question of a "lease agreement" regarding the Kansas City Plant between GSA and another entity is foreclosed. Under the 1989 MOU in the case file, the GSA agreed to pay DOE for the utilities it provided at an agreed upon rate, and the two parties agreed to share responsibility and reimburse each other for the cost of maintaining the shared utility service distribution systems, flood control functions and joint use areas at the Bannister Federal Complex. The requirement that DOE share the cost in maintaining areas that it shared with GSA, however, is not evidence of a contract under 42 U.S.C. § 7384l(11)(B)(ii), since it did not *obligate the GSA to provide any specific services for DOE or its contractors in exchange for compensation*.

After carefully considering the entirety of the evidence now in the case file, FAB hereby makes the following:

FINDINGS OF FACT

1. The employee filed a Form EE-1 on January 30, 2012, claiming benefits for CBD under Parts B and E, and for hypertension, hearing loss and COPD/emphysema under Part E of EEOICPA.

2. The employee is a federal worker employed by GSA at the Bannister Federal Complex as an A/C Operator and Plumber/Pipefitter.

3. The employee's representative did not respond to FAB's January 28, 2013 request that she submit a response satisfying the criteria for issuing a subpoena in connection with her client's Part B claim.

4. The medical evidence is not sufficient to establish a statutory diagnosis of CBD under Part B using either the pre-1993 or post-1993 statutory criteria.

5. There is no evidence to show that either GSA or its predecessors entered into a contract with Honeywell or its predecessors in which it agreed to perform any specific services for the DOE contractor at the Kansas City Plant in exchange for compensation.

Based on the above-noted findings of fact, FAB also hereby makes the following:

CONCLUSIONS OF LAW

The benefits available under Parts B and E of EEOICPA are only payable to claimants who satisfy the eligibility requirements set out in the statute. Pursuant to 20 C.F.R. § 30.111(a), the claimant has the burden of providing all documentation necessary to establish eligibility for benefits and of proving "by a preponderance of the evidence the existence of each and every criterion," except as provided in the regulations or the statute, required for eligibility. That same section also notes that "Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved it true."

With respect to the employee's claim under Part B, a "covered beryllium employee" is defined in § 7384l(7)(A) of EEOICPA as a federal employee "who may have been exposed to beryllium at a Department of Energy facility." Because the employee here is presumed to have been exposed to beryllium at the Kansas City Plant, a DOE facility, he meets the test of a covered beryllium employee. Despite this, the medical evidence of record fails to meet three of the five criteria for diagnosing CBD prior to January 1, 1993 as set out at § 7384l(13)(B), because the employee did not submit any evidence of lung pathology consistent with CBD, a clinical course consistent with a chronic respiratory disorder, or any immunologic tests showing beryllium sensitivity. Also, the employee did not submit any evidence of an abnormal beryllium lymphocyte proliferation test performed on either blood or lung lavage cells, as is required to establish a diagnosis of CBD on or after January 1, 1993 pursuant to § 7384l(13)(A). Therefore, he has not met his burden to proof to establish that he has the alleged illness of CBD under Part B of EEOICPA.

As for the representative's timely request for the issuance of a subpoena in connection with the March 28, 2013 hearing in this matter, the record establishes that the representative was properly informed of the criteria in 20 C.F.R. § 30.301(b) for issuing a subpoena relating to her client's Part B claim, and that she failed to respond within the period of time allotted. In addition, and as noted above, DEEOIC's authority to issue subpoenas is strictly limited by the terms of 42 U.S.C. § 7384w to claims under Part B. Therefore, the January 28, 2013 letter that preliminarily denied the representative's request for a subpoena under Part E was correct, and the record also shows that she did not respond to the January

28, 2013 request that she fulfill the regulatory criteria for issuing a subpoena under Part B.

And with regard to his Part E claim, the employee's representative alleged that the employee qualifies as a DOE contractor employee because he performed maintenance work on the grounds of the Kansas City Plant pursuant to contracts between GSA and DOE (and their predecessors), for which GSA and its predecessors were paid. However, FAB concludes otherwise. As set out at length above, there is no evidence of a contract between GSA and DOE (or their predecessors) for GSA to provide services for DOE or its contractor at the Kansas City Plant in return for compensation, as alleged. Neither the 1962 Space Permit and Service Agreement nor the 1989 MOU obligated GSA to provide any specific services at the Kansas City Plant in exchange for compensation. The mere requirement that DOE share the cost of maintaining areas that it shared with GSA at the Bannister Federal Complex, however, is not evidence of a contract under 42 U.S.C. § 7384l(11)(B)(ii), because it did not *obligate* the GSA to provide any specific services to DOE or its contractors in exchange for compensation. Moreover, the agencies' environmental investigation work described in the 1993 MOA was due to their respective statutory obligations under either the Resource Conservation and Recovery Act or the Comprehensive Environmental Response, Compensation and Liability Act and not pursuant to a contract between the agencies. *See* Chapter 2-500.16 (January 2010), Federal (EEOICPA) Procedure Manual. Thus, because the evidence in the case file does not prove the existence of the alleged contract, the employee has failed to meet his burden of proof to establish that he is a DOE contractor employee under Part E of EEOICPA. Under these circumstances, he is not entitled to any Part E benefits.

Accordingly, FAB hereby denies the employee's claim under both Parts B and E of EEOICPA, and confirms the January 28, 2013 preliminary denial of his representative's subpoena request.

Denver, CO

William Elsenbrock

Final Adjudication Branch

Hearing Representative

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[1] The Kansas City Plant is a government-owned, contractor-operated installation listed as a DOE facility from November 5, 1948 to the present in the latest *Federal Register* notice. 78 Fed. Reg. 20950 at 20952 (April 8, 2013). The facility comprises approximately two-thirds of the 300-acre Bannister Federal Complex, and currently consists of a large manufacturing building and 36 other buildings. The remaining one-third of the Bannister Federal Complex is owned by GSA.

[2] For example, at the March 28, 2013 oral hearing, a former GSA General Foreman at the Bannister Federal Complex testified that "Bendix provided the Federal Building at 2306 Bannister Road, steam from their power plants" and that "DOE, Bendix, operated the powerhouses with their people."

Exposure

EEOICPA Fin. Dec. No. 20858-2006 (Dep't of Labor, June 30, 2006)

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 in part and denied in part.

STATEMENT OF THE CASE

You each filed a Form EE-2, Claim for Survivor Benefits. A claim was also filed by **[Claimant #8]**, but he died on April 21, 2005 before adjudication was complete. You stated on the Forms EE-2 that you were filing for the lung and throat cancer of your late father, **[Employee]**, hereinafter referred to as "the employee." The death certificate and affidavits establish that the employee was diagnosed with lung cancer in approximately June 1959. The employee's death certificate shows lung cancer as the cause of death on June 13, 1961. There is no medical evidence supporting a diagnosis of throat cancer. On the Form EE-3, Employment History, you stated the employee was employed sometime in the 1940s as a machinist with the Manhattan Project in Oak Ridge, Tennessee. The district office verified that the employee worked for Tennessee Eastman Corporation (TEC) at the Y-12 plant[1] for the period of December 27, 1943 to August 29, 1946.

On July 16, 2002, the district office referred your application package to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction. On September 26, 2005, NIOSH returned your case to the district office. Effective September 24, 2005, the Department of Health and Human Services designated certain employees of the Y-12 plant who were employed for a number of work days aggregating at least 250 work days, either solely under this employment or in combination with work days of employment occurring within the parameters established for classes of employees included in the SEC, as members of the Special Exposure Cohort (SEC) based on work performed in uranium enrichment or other radiological activities at the Y-12 plant, for the period from March 1943 through December 1947.

In support of your claims for survivorship, you submitted the death certificate of the employee, and a copy of the death certificate of the employee's spouse. In addition, you submitted evidence that you are the children of the employee, along with documentation of legal name changes.

On March 20, 2006, the Seattle district office issued a recommended decision, concluding that you are entitled to lump-sum compensation as eligible survivors under Part B of the Act, that **[Claimant #1]**, **[Claimant #4]**, **[Claimant #5]**, and **[Claimant #6]** are eligible survivors under Part E, and **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #7]** are not eligible survivors under Part E of the Act. The district office also recommended that the claim for throat cancer be denied. On May 27, 2006, the Final Adjudication Branch issued a final decision, denying compensation to **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #7]** under Part E of the Act.

You each verified that neither you nor the employee filed a lawsuit or a state workers' compensation claim or received a settlement, award, or benefit for the claimed condition.

The Final Adjudication Branch received written notification that you each waived any and all objections to the recommended decision.

FINDINGS OF FACT

1. You each filed a Form EE-2, Claim for Survivor Benefits.

2. The employee was diagnosed with lung cancer in approximately June 1959.

3. The employee was employed at the Y-12 plant in Oak Ridge, Tennessee, from December 27, 1943 to Au gust 29, 1946.

4. You are each the employee's child. **[Claimant #1]**'s birth date is **[Date of Birth]**; **[Claimant #4]**'s birth date is **[Date of Birth]**; **[Claimant #5]**'s birth date is **[Date of Birth]**; and **[Claimant #6]**'s birth date is **[Date of Birth]**. The employee's spouse is no longer living. **[Claimant #4]** and **[Claimant #6]** were enrolled in college full-time and continuously from the age of 18 through the date of the employee's death on June 13, 1961.

5. The employee's lung cancer caused his death.

6. The employee was 50 years old at the time of his death and died 15 years before his normal retirement age of 65 years.

CONCLUSIONS OF LAW

I have reviewed of the evidence of record and the recommended decision.

On June 5, 2006, the Director of the Division of Energy Employees Occupational Illness Compensation (DEEOIC) issued a bulletin establishing supplemental guidance for processing claims for the SEC class at the Y-12 Plant from March 1943 to December 1947.[2] This directive supplements the guidance provided for making a determination that the employee performed work in uranium enrichment operations or other radiological activities for more than 250 days at the Y-12 plant.[3] Attachment 1 of the bulletin lists occupational titles for Y-12 employees involved in Uranium Enrichment Processes. The employment evidence of record, specifically the report from the Oak Ridge Institute for Science and Education (ORISE) database and Department of Energy (DOE) records, indicates that the employee was classified as a "maintenance mechanic" from December 27, 1943 to April 1, 1944; as a "millwright" from April 2, 1944 to December 8, 1945; as a "vacuum service mechanic" from December 9, 1945 to January 12, 1946; and as a "millwright" from January 13, 1946 to August 29, 1946. However, the employee's job titles are not on the list.[4]

The DEEOIC notes that the Y-12 facility had building locations where uranium enrichment operations or other processes relating to radiological material were conducted. Employees performing non-uranium enrichment duties that were routinely present within the buildings or areas where uranium enrichment operations occurred are also considered part of the SEC class. Department of Energy (DOE) records include a clinical record for the employee listing each time he went to the employee health unit for treatment while employed by the Tennessee Eastman Corporation. Several treatments list a building number (9204-4). Building 9204-4 is acknowledged to be a Beta building where the calutron was located and uranium enrichment occurred. The Final Adjudication Branch performed a search of the U. S. Department of Labor Site Exposure Matrices (SEM). Source documents used to compile the SEM establish that the labor category of "millwright" at Y-12 could potentially be exposed to the toxic substance of uranium tetrafluoride. The SEM contains a list of processes performed by this

labor category, which includes uranium recovery, purification, and recycle operations.

The evidence shows that the employee worked at the Y-12 plant in Oak Ridge, Tennessee from December 27, 1943 to August 29, 1946, and as a millwright from April 2, 1944 to December 8, 1945 and from January 13, 1946 to August 29, 1946, which equals more than 250 days during the SEC class period, and that he was involved in uranium enrichment operations and other radiological activities. Therefore, the employee qualifies as a member of the SEC.

The employee was diagnosed with lung cancer which is a "specified cancer" pursuant to 42 U.S.C. § 7384l(17)(A) and 20 C.F.R. § 30.5(ff)(2). You meet the definition of survivors under Part B of the Act. 42 U.S.C. § 7384s(e)(B). Therefore, you are entitled to compensation of $150,000 for the employee's lung cancer, to be divided equally. 42 U.S.C. § 7384s(a). The exact payment amounts may vary by one penny, as the total compensation may not exceed $150,000.

The employee was an employee of a DOE contractor at a DOE facility. 42 U.S.C. §§ 7384l(11), 7384l(12). A determination under Part B of the Act that a DOE contractor employee is entitled to compensation under that part for an occupational illness is treated as a determination that the employee contracted that illness through exposure at a DOE facility. 42 U.S.C. § 7385s-4(a). Therefore, the employee is a covered DOE contractor employee with a covered illness. 42 U.S.C. §§ 7385s(1), 7385s(2).

[Claimant #1] was 14 at the time of the employee's death. **[Claimant #4]** was 19 at the time of the employee's death and enrolled full-time in school. **[Claimant #5]** was 11 at the time of the employee's death. **[Claimant #6]** was 21 at the time of the employee's death and enrolled full-time in school. Therefore, **[Claimant #1]**, **[Claimant #4]**, **[Claimant #5]**, and **[Claimant #6]** each meet the definition of a covered child under Part E of the Act. 42 U.S.C. § 7385s-3(d)(2). Therefore, **[Claimant #1]**, **[Claimant #4]**, **[Claimant #5]**, and **[Claimant #6]** are also entitled to benefits in the amount of $125,000 for the employee's death related to lung cancer, to be divided equally. 42 U.S.C. § 7385s-3(a)(1).

The employee experienced presumed wage-loss for each calendar year subsequent to the calendar year of his death through and including the calendar year in which he would have reached normal retirement age. 20 C.F.R. § 30.815 (2005). This equals 14 years of wage-loss. Therefore, **[Claimant #1]**, **[Claimant #4]**, **[Claimant #5]**, and **[Claimant #6]** are also entitled to share an additional $25,000 for the employee's wage-loss, for a total award of $150,000. 42 U.S.C. § 7385s-3(a)(2).

I also conclude that there was no medical evidence submitted to establish that the employee was diagnosed with the claimed condition of throat cancer, and the claims for that condition must be denied. 20 C.F.R. §§ 30.211, 30.215.

Jacksonville, Florida

Sidne M. Valdivieso

Hearing Representative

[1] According to the Department of Energy's (DOE) Office of Worker Advocacy on the DOE website at: http://www.eh.doe.gov/advocacy/faclist/showfacility.cfm., the Y-12 plant is a covered DOE facility from 1942 to the present. Tennessee Eastman Corporation (TEC) was a DOE contractor at this facility from 1943 to 1947. (Retrieved June

30, 2006).

[2] EEOICPA Bulletin No. 06-11 (issued June 5, 2006).

[3] EEOICPA Bulletin No. 06-04 (issued November 21, 2005).

[4] EEOICPA Bulletin No. 06-11 (issued June 5, 2006).

EEOICPA Fin. Dec. No. 60165-2005 (Dep't of Labor, May 10, 2005)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under Part B of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq.* For the reasons set forth below, the Final Adjudication Branch accepts and approves your claims for the condition of chronic beryllium disease, and denies your claims for the condition of chronic silicosis, under Part B of the Act.

STATEMENT OF THE CASE

On August 4, 2004 (**[Claimant #1]**), August 31, 2004 (**[Claimant #2]**), and September 13, 2004 (**[Claimant #3]**), you each filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA), claiming compensation based on chronic beryllium disease and chronic silicosis. **[Claimant #1]** also filed a Form EE-3 (Employment History) indicating that your father was employed various times at the Nevada Test Site from 1961 through 1969. A Department of Energy (DOE) representative verified that your father worked at the Nevada Test Site with the Reynolds Electrical and Engineering Company, Inc., from November 8, 1961 to January 17, 1963; January 30, 1963 to June 16, 1966; and February 15, 1967 to August 24, 1967. The Nevada Test Site is recognized as a covered DOE facility from 1951 to the present. *See* DOE, Office of Worker Advocacy, Facility List.

You provided medical records including chest x-rays from 1992, 1993 and 1994; a pulmonary function test (PFT) dated June 21, 1994; and a narrative report dated February 5, 1993. The medical records did not provide a diagnosis of chronic beryllium disease (CBD) or chronic silicosis, but the evidence of record was indicative of a possible diagnosis of chronic beryllium disease, in reference to the medical evidence required for a diagnosis of CBD prior to January 1, 1993, as defined under the Act.

On December 17, 2004, the Seattle district office sent a copy of your case file to Milton D. Rossman, M.D., a District Medical Consultant (DMC). By report dated February 17, 2005, Dr. Rossman indicated that the chest x-rays of February 6, 1993 and April 20, 1992, showed hilar calcifications and a left lower lobe granuloma sufficient to be consistent with CBD. Secondly, Dr. Rossman stated that the PFT on June 21, 1994, indicated a reduced FVC at 36%, a reduced FEV1.0 at 15%, for a combined FEV1.0/FVC of 31.25, showing evidence of severe obstruction, which could be consistent with CBD. Lastly, Dr. Rossman indicated that the history and physical dated February 5, 1993, showed that the employee was already on four drugs for his chronic respiratory disease, and there is no question that the employee had a clinical course consistent with a chronic respiratory disorder prior to January 1993.

You submitted a copy of your father's death certificate, which indicates he was married to your mother, **[Employee's Spouse]**, at the time he passed away on September 15, 1994. You also provided a copy of your mother's death certificate, which shows she passed away on July 7, 1997, and copies of your birth

certificates showing that you are the surviving children of the employee. In addition, you each provided copies of your marriage certificates and other evidence to document your changes of name.

On April 11, 2005, the Seattle district office recommended acceptance of your claims for survivor benefits for the condition of chronic beryllium disease, concluding that you are survivors of a covered beryllium employee as defined by § 42 U.S.C. § 7384l(7). The district office also concluded that chronic beryllium disease is a compensable occupational illness pursuant to § 42 U.S.C. § 7384l(8)(B) and that the evidence you submitted met the criteria necessary to establish a diagnosis of chronic beryllium disease as defined by § 42 U.S.C. § 7384l(13). The district office further concluded that you are each entitled to compensation in the amount of $50,000.00, pursuant to § 42 U.S.C. § 7384s(a)(1) and (e)(1). In addition, the district office concluded that the medical evidence of record was insufficient for a diagnosis of chronic silicosis, as defined under section 42 U.S.C. § 7384l(15), and recommended denial of your claims for chronic silicosis.

On April 15, 2005 (**[Claimant #3]**), April 18, 2005 (**[Claimant #2]**), and April 19, 2005 (**[Claimant #1]**), the Final Adjudication Branch received your written notification that you waive any and all rights to file objections to the recommended decision.

FINDINGS OF FACT

1. On August 4, 2004 (**[Claimant #1]**), August 31, 2004 (**[Claimant #2]**), and September 13, 2004 (**[Claimant #3]**), you each filed a claim for survivor benefits under Part B of the EEOICPA for chronic beryllium disease (CBD) and chronic silicosis.
2. Your father was employed at the Nevada Test Site, a covered DOE facility, from November 8, 1961 to January 17, 1963; January 30, 1963 to June 16, 1966; and February 15, 1967 to August 24, 1967.
3. Your father is a covered beryllium employee who worked at the Nevada Test Site during a period when beryllium dust, particles or vapor may have been present.
4. Your father's chest x-rays, pulmonary function test, and the physician's history and physical report describing the clinical course of his chronic respiratory disease, are consistent with a diagnosis of chronic beryllium disease on April 20, 1992.
5. The onset of chronic beryllium disease occurred after your father's exposure to beryllium in the performance of duty.
6. The medical evidence of record is insufficient for a diagnosis of chronic silicosis.
7. You submitted birth certificates establishing that you are the surviving children of the employee.

CONCLUSIONS OF LAW

In the absence of substantial evidence to the contrary, a covered beryllium employee shall be presumed to have been exposed to beryllium in the performance of duty if, and only if, the employee was employed at a Department of Energy facility, or present at a Department of Energy facility, or a facility owned and operated by a beryllium vendor, because of employment by the United States, a beryllium vendor, or a contractor or subcontractor of the Department of Energy during a period when beryllium dust, particles, or vapor may have been present at such a facility. *See* 42 U.S.C. § 7384n(a)(1) and (2); 20 C.F.R. § 30.205(1), (2), (3).

In addition, in order to establish entitlement to benefits based on chronic beryllium disease, you must provide medical documentation in accordance with the following:

(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 axial 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).

See 42 U.S.C. § 7384l(13)(B).
Based on the employee's covered employment at the Nevada Test Site, a DOE facility, during a period when beryllium dust, particles, or vapor may have been present, the employee was exposed to beryllium in the performance of duty.

The record contains medical documentation satisfying the criteria set forth under the EEOICPA for a diagnosis of chronic beryllium disease prior to January 1, 1993. Dr. Rossman's report of February 17, 2005, provides a well-reasoned opinion regarding the chest x-rays, pulmonary function test, and narrative report describing the clinical course of your father's chronic respiratory disease, concluding that the medical evidence is consistent with chronic beryllium disease.

Your father is a "covered beryllium employee" and he was exposed to beryllium in the performance of duty. *See* 42 U.S.C. § 7384l(7). In light of these findings, the Final Adjudication Branch has determined that sufficient evidence of record exists to accept your claims for the condition of chronic beryllium disease based on the statutory criteria for a diagnosis of chronic beryllium disease prior to January 1, 1993. *See* 42 U.S.C. § 7384l(13)(B).

You also filed a claim based on chronic silicosis. The medical evidence of record is insufficient for a diagnosis of chronic silicosis, as defined under 42 U.S.C. § 7384r(c)(d) and (e). Therefore, your claim based on the condition of chronic silicosis is denied.

For the foregoing reasons, the undersigned hereby accepts your claims under Part B of the Act for survivor benefits for the condition of chronic beryllium disease, and denies your claims for benefits for the condition of chronic silicosis. You are each entitled to compensation in the amount of $50,000.00. *See* 42 U.S.C. § 7384s(a)(1).

Seattle, WA

Kelly Lindlief, Hearing Representative

Final Adjudication Branch

Medical evidence of covered illness under Part E

EEOICPA Fin. Dec. No. 81625-2008 (Dep't of Labor, July 30, 2008).

NOTICE OF FINAL DECISION

This decision of the Final Adjudication Branch (FAB) concerns your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. Your claim for survivor benefits under Part E is accepted and you are awarded compensation in the amount of $125,000.00 for the death due to non-Hodgkin's lymphoma with metastases to the spine, brain, and lung. Your claim for survivor benefits under Part B of EEOICPA is denied.

STATEMENT OF THE CASE

On October 30, 2006, you filed a Form EE-2 claiming survivor benefits under EEOICPA as a surviving child of **[Employee]**, hereinafter referred to as "the employee," due to the employee's non-Hodgkin's lymphoma, lung lesions, and brain and back tumors. You indicated your belief on the Form EE-2 that the employee was a member of the Special Exposure Cohort (SEC). You submitted a child support order establishing that your date of birth was May 2, 1991, and that the employee was your father.

A November 14, 2003 pathology report diagnosed the employee with non-Hodgkin's lymphoma. The employee's death certificate established the date of death as June 11, 2006, that the cause of death was cardiopulmonary arrest with another significant condition of lymphoma, and that there is no surviving spouse. Also submitted was medical evidence supporting the diagnoses of metastatic lung, brain and spine cancer.

On Form EE-3, you alleged that the employee worked as a laboratory technician at the Savannah River Site (SRS) in Aiken, South Carolina, in 1990 or 1991, and that he wore a dosimetry badge. The Department of Energy (DOE) confirmed that the employee worked at the SRS from January 24, 1991 to March 18, 1992.

The Division of Energy Employees Occupational Illness Compensation (DEEOIC) has undertaken extensive data collection efforts with regard to the various types of toxic substances present at particular DOE facilities and the health effects these substances have on workers. These data have been organized into a Site Exposure Matrix (SEM), which allows claims staff to identify illnesses linked to particular toxic substances, site locations where toxic materials were used, exposures based on different job processes or job titles, and other pertinent facility data. Data retrieved from SEM was examined to determine if there was any identified toxic substance that had a health effect relating to the claimed illnesses. The district office examined data from SEM but was unable to identify any toxic substance for the employee's labor category that had a health effect relating to the claimed illnesses.

In a letter dated April 12, 2007, the Jacksonville district office advised you of the requirement under Part E to establish that it is at least as likely as not that exposure to toxic substances at a DOE facility was a significant factor in causing, aggravating, or contributing to the claimed illness and the employee's death from the claimed illness. You were also asked to submit additional employment information regarding the employee's job title. You were given time to respond. No other medical evidence was received.

To determine the probability of whether the employee sustained his cancer in the performance of duty, as required to establish entitlement under Part B of EEOICPA, the district office referred your application package to the National Institute for Occupational Safety and Health (NIOSH) for a radiation dose reconstruction. NIOSH reported annual dose estimates from the date of initial radiation

exposure during covered employment, to the date the cancer was first diagnosed. A summary and explanation of information and methods applied to produce these dose estimates, including your involvement through an interview and review of the dose report, are documented in the "NIOSH Report of Dose Reconstruction under EEOICPA."

You signed Form OCAS-1 on March 19, 2008, indicating that you had reviewed the NIOSH Draft Report of Dose Reconstruction and agreed that it identified all of the relevant information provided to NIOSH. The district office received the final NIOSH Report of Dose Reconstruction on April 10, 2008. Pursuant to the implementing NIOSH regulations, the district office used the information provided in this report to determine that there was a 13.22% probability that the employee's cancer was caused by his radiation exposure at the SRS.

On April 25, 2008, the district office issued a decision recommending denial of your claim for survivor benefits under both Part B and Part E of EEOICPA because the probability of causation was less than 50% and because it was not at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in causing, aggravating, or contributing to the employee's non-Hodgkin's lymphoma and death. An addendum advised you of your right to file objections and/or request a hearing within sixty days of issuance. That period ended on June 24, 2008. To date, no objection or request for hearing has been received.

The FAB conducted an independent SEM search and found several toxic substances to which the employee may have been exposed in the course of his employment at the SRS. The case was then referred to a District Medical Consultant (DMC) for review and an opinion on the possible relationship between the employee's illnesses and his occupational exposure to toxic substances. In a report dated May 1, 2008, the DMC opined that exposure to toxic substances at the SRS (including solvents, pesticides and benzene) was at least as likely as not a significant factor in causing, aggravating, or contributing to the employee's non-Hodgkin's lymphoma with lung, brain, and spinal metastases and that "the metastases to the spine, brain, and elsewhere significantly contributed to the employee's death."

The FAB performed an independent analysis of the NIOSH radiation dose reconstruction, confirmed the 13.22% probability of causation calculation, and hereby makes the following:

FINDINGS OF FACT

1. On October 30, 2006, you filed a claim for survivor benefits under EEOICPA based on the employee's non-Hodgkin's lymphoma, lung lesions, and brain and back tumors.

2. The employee was diagnosed with non-Hodgkin's lymphoma on November 13 , 2003.

3. The employee worked for Westinghouse Savannah River Company at the SRS from January 24, 1991 to March 18, 1992.

4. The employee died on June 11, 2006 from cardiopulmonary arrest and lymphoma and was never married.

5. You are the biological child of the employee and you were 15 years old at the time of the employee's death.

6. The probability that the employee's non-Hodgkin's lymphoma was caused by radiation

exposure at the SRS was less than 50%.

7. There is sufficient evidence in the file to establish that exposure to toxic substances at the SRS was a significant factor in causing, aggravating, or contributing to the employee's non-Hodgkin's lymphoma with metastases and that the metastases to the brain and spine significantly contributed to the employee's death.

Based on the above findings of fact, the undersigned hereby makes the following:

CONCLUSIONS OF LAW

The implementing regulations provide that within 60 days from the date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision and whether a hearing is desired. 20 C.F.R. § 30.310(a) (2008). If the claimant does not file a written statement that objects to the recommended decision and/or requests a hearing within the period of time allotted or if the claimant waives any objections to the recommended decision, the FAB may issue a decision accepting the recommendation of the district office. 20 C.F.R. § 30.316(a).

The "claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category" and providing "all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in these regulations." 20 C.F.R. § 30.111. Any claim that "does not meet all the criteria for at least one of the categories, set forth in the regulations, must be denied." 20 C.F.R. § 30.110(b), (c).

Under Part B of EEOICPA, you meet the definition of a "child" and a "covered employee with cancer" is an individual with a "specified" cancer who is a member of the SEC, if and only if that individual contracted that "specified" cancer after beginning employment at a DOE facility (in the case of a DOE employee or DOE contractor employee) or at an atomic weapons employer facility (in the case of an atomic weapons employee). 42 U.S.C. § 7384l(9)(A). The employee was not a member of the SEC.

Part B of the Act established a compensation program to provide a lump-sum payment and medical benefits as compensation to eligible covered employees who have been diagnosed with a specific occupational illness incurred as a result of their exposure to radiation, beryllium or silica while in the performance of duty for the DOE and certain of its vendors, contractors and subcontractors. A cancer is considered to have been sustained in the performance of duty if it was at least as likely as not (a 50% or greater probability) related to radiation doses incurred while working at a DOE facility. 42 U.S.C. § 7384n(b).

Based on my review of the evidence of record and the recommended decision, I conclude that you are not entitled to compensation under Part B because the calculation of "probability of causation" does not show that there is a 50% or greater likelihood that the employee's non-Hodgkin's lymphoma was caused by radiation exposure received at a DOE worksite in the performance of duty. Therefore, your claim for benefits under Part B is denied.

You also meet the definition of a "covered" child under Part E of EEOICPA, 42 U.S.C. § 7385s-3(d)(2). Under Part E, specific criteria must be met to establish that the employee contracted an illness

through exposure at a DOE facility. Under Part E, a "covered illness" means an illness or death that resulted from exposure to a toxic substance at a DOE facility. *See* 42 U.S.C. § 7385s(2).

The evidence of record establishes that it is "at least as likely as not" that exposure to toxic substances at a DOE facility during a covered time period was a significant factor in causing the employee's claimed illnesses of non-Hodgkin's lymphoma with metastases to the brain and spine. I conclude that there is sufficient evidence to prove that toxic exposure at a DOE facility was at least as likely as not a significant factor in causing, aggravating, or contributing to the claimed condition(s) and to the employee's death. Therefore, you are entitled to survivor benefits in the amount of $125,000.00 under Part E of EEOICPA.

Jacksonville, FL

Sidne M. Valdivieso

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 10006745-2006 (Dep't of Labor, July 27, 2006)

NOTICE OF FINAL DECISION

This decision of the Final Adjudication Branch concerns 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

You filed a Form EE-2, Claim for Survivor Benefits under the EEOICPA, and a Request for Review by Physicians Panel, for the lung cancer and heart problems of your late spouse, **[Employee]**, hereinafter referred to as "the employee."

In support of your claim for survivorship, you submitted your marriage certificate, showing you married the employee on March 20, 1953, and the employee's death certificate, showing you were the employee's spouse on the date of his death, June 22, 2001. The death certificate stated the cause of death was cardiogenic shock and coronary artery disease (CAD).

A previous Final Decision was issued by the Department of Labor under Part B of the Act on June 5, 2002, concluding that you were entitled to compensation due to the employee's lung cancer, based on employment by Union Carbide at the gaseous diffusion plant in Oak Ridge, Tennessee, from November 1, 1973 to March 31, 1982.

On February 22, 2006, the district office received your written confirmation that neither you nor the employee had received any settlement or award from a lawsuit or workers' compensation claim in connection with the accepted condition, and that the employee, at the time of death, had no minor children or children incapable of self-support, who were not your natural or adopted children.

On May 18, 2006, the Jacksonville district office issued a recommended decision, concluding you were entitled to compensation in the amount of $125,000.

On May 30, 2006, the Final Adjudication Branch received written notification that you waived any and all objections to the recommended decision.

FINDINGS OF FACT

1. You filed a Claim for Survivor Benefits under EEOICPA.

2. The employee was diagnosed with lung cancer.

3. A previous Final Decision was issued by the Department of Labor under Part B on June 5, 2002, concluding that you were entitled to compensation on the basis of the employee's lung cancer.

4. You were the employee's spouse at the time of his death and at least a year prior.

5. The employee's lung cancer contributed to his death.

CONCLUSIONS OF LAW

I have reviewed the evidence of record and the recommended decision.

The district office submitted the evidence of record to the district medical consultant (DMC) for review. In her report of October 26, 2005, Dr. Sylvie I. Cohen stated that the employee's lung cancer did not contribute to the causes of the employee's death as listed on the death certificate. The employee's attending physician, Dr. Charles W. Bruton, stated in a report dated November 15, 2005 that the irradiation treatment prescribed for the employee's lung cancer contributed to the employee's heart disease and caused heart damage. The district office made a second referral to a DMC, to consider the November 15, 2005 report from the attending physician. In his report of March 8, 2006, Dr. John Ellis also opined that the radiation effects did not contribute in any significant way to the employee's death. Dr. Frederick J. Barry then submitted a report, dated April 13, 2006, in which he asserted that the radiation therapy received by the employee in 1987 contributed to his heart disease and death with chronic congestive heart failure, since radiation therapy is "well known to cause coronary atherosclerosis as well as cardiac muscle damage leading to cardiomyopathy." The weight of the medical evidence rests with the opinions of the treating physician, who actually examined the employee, and Dr. Frederick J. Berry, a Fellow in the American College of Chest Physicians, who provided well-rationalized, probative opinions concerning the causal relationship between the employee's lung cancer treatment and his subsequent death from cardiogenic shock and coronary artery disease. Therefore, the employee's lung cancer contributed to his death.

The employee was an employee of a DOE contractor at a DOE facility. 42 U.S.C. §§ 7384l(11), 7384l(12). A determination under Part B of the Act that a DOE contractor employee is entitled to compensation under that part for an occupational illness is treated as a determination that the employee contracted that illness through exposure at a DOE facility. 42 U.S.C. § 7385s-4(a). Therefore, the employee is a covered DOE contractor employee with a covered illness. 42 U.S.C. §§ 7385s(1), 7385s(2).

You meet the definition of a survivor under Part E. 42 U.S.C. § 7385s-3(d)(1). Therefore, you are entitled to benefits in the amount of $125,000 for the employee's death as a consequence of the treatment of lung cancer. 42 U.S.C. § 7385s-3.

Jacksonville, FL

Sidne M. Valdivieso

Hearing Representative

EEOICPA Fin. Dec. No. 10016501-2007 (Dep't of Labor, May 7, 2007)

NOTICE OF FINAL DECISION

This is the final decision of the Final Adjudication Branch (FAB) concerning the above claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the FAB reverses the recommended decision of the district office and accepts the claim under Part E of EEOICPA for medical benefits based on the covered illness of brain tumor (meningioma).

STATEMENT OF CASE

On December 18, 2002, **[Employee]** filed a claim for benefits under Part B and the former Part D of EEOICPA claiming he developed a brain tumor, diagnosed in February of 1993, as the result of his work at a Department of Energy (DOE) facility. On October 28, 2004, Part E of EEOICPA was enacted when Congress repealed Part D. **[Employee]** alleged on his Form EE-3 that he was employed as a Hazard Reduction Technician (HRT) from April 14, 1984 to the date of his signature (December 18, 2002) at the Rocky Flats Plant.[1] DOE confirmed his employment at the Rocky Flats Plant from April 16, 1984 to January 15, 2003.

[Employee] submitted medical records in support of his claim. Included in these medical records were several surgical pathology reports, MRI reports and medical narratives, which document he was diagnosed with meningioma (a non-cancerous brain tumor) in February 1993 at the age of 31. Then, he developed several recurrences of the initial meningioma as well as new lesions in other parts of his brain. Notably, his tumors were always referred to in these records as being "atypical, aggressive, and skull-based" and have resulted in his loss of hearing and other neurological deficits.

On May 14, 2003, FAB issued a final decision denying **[Employee]**'s claim under Part B of EEOICPA, because non-cancerous tumors of the brain are not compensable "occupational" illnesses under that Part.

In September 2006, the district office initiated development of **[Employee]**'s claim under Part E. Under that Part, once the medical evidence substantiates a diagnosis of a claimed condition, the district office proceeds with a causation analysis to make a determination as to whether there is a causal connection between that condition and exposure to a toxic substance or substances at a DOE facility. The standard by which causation between an illness and employment is established is explained in Federal (EEOICPA) Procedure Manual Chapter E-500.3b:

Causation Test for Toxic Exposure. Evidence must establish that there is a relationship between exposure to a toxic substance and an employee's illness or death. The evidence must show that it is "at least as likely as not" that such exposure at a covered DOE facility during a covered time period was a **significant factor** in aggravating, contributing to, or causing the employee's illness or death, **and** that it is "at least as likely as not" that exposure to a toxic substance(s) was related to employment at a DOE facility.

To assist employees in meeting this standard, the Division of Energy Employees Occupational Illness Compensation (DEEOIC) undertakes a variety of steps to collect necessary information to show that a claimed illness is linked to a toxic exposure. Principally, DEEOIC has undertaken extensive data collection efforts with regard to the various types of toxic substances present at particular DOE facilities and the health effects these substances have on workers. This data has been organized into the Site Exposure Matrices (SEM). SEM allows DEEOIC claims staff to identify illnesses linked to particular toxic substances, site locations where toxic materials were used, exposures based on different job processes or job titles, and other pertinent facility data.

In addition to the SEM data, DEEOIC works directly with DOE to collect individual employee exposure and medical records. Contact is also made in certain situations to obtain information from Former Worker Screening Programs or trade groups that may have relevant exposure or medical information. Relevant specialists in the areas of industrial hygiene and toxicology are also utilized in certain situations to evaluate and render opinions on claims made by employees. DEEOIC also works directly with treating physicians or other medical specialists in an effort to obtain the necessary medical evidence to satisfy the causation standard delineated under EEOICPA.

On September 20, 2006, the district office notified **[Employee]** that after conducting extensive research, they had been unable to establish a causal connection between the development of his meningioma and exposure to a toxic substance or substances at the Rocky Flats Plant. He was afforded a period of 30 days to provide factual or medical evidence that established such a link.

On October 17, 2006, the district office received a letter from **[Employee]**'s authorized representative, in which he indicated that he believed that **[Employee]**'s exposure to plutonium and his work in the glove boxes where he was exposed to radiation contributed to the development of his brain tumor. He requested a copy of the file, which was provided by the district office on November 14, 2006.

On December 4, 2006, a letter was received from **[Employee]**'s representative, in which he detailed several instances, based on his review of **[Employee]**'s exposure records, when he had experienced plutonium contamination.

Subsequently, on January 31, 2007, the district office issued a recommended decision to deny the claim under Part E of EEOICPA, finding that the evidence of record was not sufficient to establish a causal relationship between the development of **[Employee]**'s meningioma and his exposure to toxic substances at the Rocky Flats Plant. The recommended decision was then forwarded to FAB for review.

[Employee]'s representative requested an oral hearing on February 12, 2007, and reiterated his contention that **[Employee]**'s exposure to radiation had contributed to the development of his meningioma. By letter dated February 27, 2007, the representative provided results of his research into the relationship between the development of meningioma and exposure to radiation. He referenced

fourteen medical articles that suggested such a relationship existed.

Upon review of the record, FAB determined that based on the contamination records in the file; **[Employee]**'s age at the time of diagnosis; his length of exposure to radiation at the time of diagnosis; the location of his meningiomas, the description of his meningiomas as being atypical, aggressive and skull-based; and the fact that the medical literature appears to support a relationship between exposure to radiation and the development of these types of tumor, that **[Employee]**'s record should be referred to a DEEOIC toxicologist.

On April 11, 2007, a statement of accepted facts detailing **[Employee]**'s employment dates, labor categories, the work processes he had been engaged in, the buildings that he worked in, his exposure history, the number of positive contamination events he had experienced with resulting acute intakes of plutonium, as well as his medical and case history was referred to a toxicologist. The toxicologist was asked to provide an opinion as to whether there was current scientific and/or medical evidence supporting a causal link between exposure to radiation and the development of meningioma and, if so, whether based on the specifics of **[Employee]**'s case, it is as likely as not that his exposure to radiation at the Rocky Flats Plant was a significant factor in causing, contributing to, or aggravating his meningioma.

On April 26, 2007, the toxicologist stated that the scientific and medical literature does support a "causal" relationship between ionizing radiation and meningiomas at levels below 1 siever (SV). Further, she opined with a reasonable degree of scientific certainty "[t]hat it is as likely as not that exposure to a toxic substance at a DOE facility during a covered time period was a significant factor in aggravating, contributing to, or causing the employee's illness, and that it is 'at least as likely as not' that exposure to a toxic substance was related to employment at a DOE facility."

On May 7, 2007, **[Employee]** affirmed he had never filed for or received any benefits for meningioma associated with a tort suit or state workers' compensation claim. Additionally, he stated that he had never pled guilty to or been convicted of any charges of fraud in connection with a state or federal workers' compensation claim.

After a careful review of the case file, FAB hereby makes the following:

FINDINGS OF FACT

1. On December 18, 2002, **[Employee]** filed a claim under Part E of EEOICPA for a brain tumor.

2. **[Employee]** was employed by DOE contractors from April 16, 1984 to January 15, 2003 at the Rocky Flats Plant, a covered DOE facility.

3. During **[Employee]**'s employment he was exposed to ionizing radiation.

4. **[Employee]** was diagnosed with meningioma, a non-cancerous tumor of the brain, after he began his employment at the Rocky Flats Plant.

5. The evidence of record supports a causal relationship between the development of **[Employee]**'s meningioma and exposure to ionizing radiation at the Rocky Flat Plant.

6. Ionizing radiation is as least as likely as not a significant factor in causing, contributing to, or aggravating **[Employee]**'s meningioma.

Based on the above-noted findings of fact in this claim, FAB hereby also makes the following:

CONCLUSIONS OF LAW

Pursuant to the regulations implementing EEOICPA, a claimant has 60 days from the date of issuance of the recommended decision to raise objections to that decision to FAB. 20 C.F.R § 30.310(a). If an objection is not raised during the 60-day period, FAB will consider any and all objections to the recommended decision waived and issue a final decision affirming the district office's recommended decision. 20 C.F.R. § 30.316(a).

FAB received the letter of objection and request for an oral hearing. A hearing was scheduled, but upon review of the evidence in the case file, FAB determined the claim was not in posture for a final decision and required a review by a toxicologist. Based on this review, the recommended decision is hereby reversed and **[Employee]'s** claim for meningioma is accepted. On May 7, 2007, he submitted a written statement affirming that he agreed with the final decision to reverse the recommended decision and to accept his claim for meningioma.

FAB concludes that **[Employee]** is a covered DOE contractor employee with a covered illness who contracted that illness through exposure to a toxic substance at a DOE facility pursuant to 42 U.S.C. § 7385s-4(c). Therefore, **[Employee]**'s claim under Part E is accepted and he is awarded medical benefits for the treatment of meningioma pursuant to 42 U.S.C. § 7385s-8.

Denver, CO

Paula Breitling

Hearing Representative

Final Adjudication Branch

[1] According to DOE's website at: http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/showfacility.cfm, the Rocky Flats Plant in Golden, Colorado is a covered DOE facility from 1951 to the present.

EEOICPA Fin. Dec. No. 10027260-2006 (Dep't of Labor, December 6, 2006)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This decision of the Final Adjudication Branch (FAB) concerns your claims for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA or the Act), 42 U.S.C. § 7384 *et seq*. For the reasons stated below, your claims for benefits are denied.

STATEMENT OF THE CASE

In December 2003, you each filed a Form EE-2, Claim for Survivor Benefits under the Act. **[Claimant #1]** also submitted a Request for Review by Physicians Panel form, which is considered to be on behalf of all survivors. On the forms, you listed possible chronic beryllium disease (CBD) and breathing problems as the claimed conditions related to the employment of your late father, **[Employee]** (hereinafter called the employee).

In support of your claims for survivorship, you submitted birth certificates listing the employee as your father, and the death certificates of the employee and his spouse. The death certificate lists the causes of death on April 25, 1980 as ischemic heart disease with acute [illegible] myocardial infarction. Marriage certificates showing legal changes in name were also submitted.

On the Form EE-3, Employment History, you stated that the employee was employed by F.H. McGraw as a laborer at the Gaseous Diffusion Plant (GDP) in Paducah, Kentucky, from 1950 to 1954. The evidence of record, including DOE security clearance records and co-worker affidavits, shows that the employee worked at the Paducah GDP from April 23, 1951 to December 30, 1954.

On May 19, 2004, the FAB issued a final decision to deny survivor compensation under Part B of the Act, because an "occupational illness" could not be established.
The district office provided you the opportunity to substantiate your claim by sending a development letter dated February 4, 2006, concerning whether any of you met the criteria to be considered a "covered child." The district office sent letters on February 6, 2006 and March 24, 2006, requesting medical evidence of a diagnosis and factual evidence to support covered employment. In response, **[Claimant #6]** submitted medical records. These records include psychiatric records noting a history of alcohol abuse/addiction in 1956 (the report states that the employee had no regular employment since December 1954 when he was released from the atomic plant); repeat positive tests for tuberculosis; an upper G.I. series report dated June 25, 1970 showing rugal folds in the stomach "seen in patients with gastritis, Menetrier's disease and lymphoma"; and a chest x-ray from January 11, 1972 showing "old chronic changes in the chest with no evidence of active disease."
On May 1, 2006, the Jacksonville district office issued a recommended decision, concluding that the medical evidence was insufficient to establish that the employee was diagnosed with CBD or breathing problems. Attached to the recommended decision was a notice of claimant rights, which stated that you had 60 days in which to file an objection to the recommended decision and/or request a hearing. That 60-day period expired on June 30, 2006.
On June 26, 2006, the FAB received a letter from **[Claimant #6]**, dated June 22, 2006, objecting to the recommended decision and requesting a hearing. The hearing was held by the undersigned in Paducah, Kentucky, on September 14, 2006. **[Claimant #6]** was duly affirmed to provide truthful testimony.

The letter of objections stated that you have been unable to obtain medical records because many of them have been destroyed or the facilities no longer exist; that the public should have been informed earlier about this program so records could have been obtained; that the odds of the employee having an occupational illness must be high due to the number of reported cases; that you are a hospice nurse and many of your patients are terminally ill because they worked at the plant or were exposed to loves ones who did; you remember the employee having multiple respiratory problems, including chronic cough with thick secretions and being unable to lie down or play with his children because of shortness of breath; that you believe your mother died of colon cancer from being exposed to the employee's clothing while washing it and cleaning up his body fluids when he was too ill to do it himself.

During the hearing, the objections were discussed in greater detail, and it was explained that survivor compensation under Part E of the Act is payable only when the employee's death is considered to be related to conditions resulting from toxic exposures at a covered Department of Energy facility. While several of the employee's survivors may meet the criteria to be considered a "covered child," the need for definitive medical evidence or opinion concerning a diagnosis related to the employee's death was discussed, along with the requirement that a claim be based on employment exposures, and not secondary exposures, such as you claim for your mother.

In accordance with § 30.314(e) and (f) of the implementing regulations, a claimant is allowed thirty days after the hearing is held to submit additional evidence or argument, and twenty days after a copy of the transcript is sent to them to submit any changes or corrections to that record. 20 C.F.R. §§ 30.314(e) and (f). By letter dated September 28, 2006, the transcript was forwarded to you. No further evidence, changes or corrections were received.

Part E of the Act requires that a survivor claim be based on the death of the employee due to a condition relating to toxic exposures encountered during employment at a Department of Energy facility. The conditions listed on the death certificate are ischemic heart disease and myocardial infarction. The implementing regulations require that a claim be based on medical evidence and it is the survivor's responsibility to submit or arrange for the submission of evidence that establishes entitlement for benefits. 20 C.F.R. § 30.111. There is no diagnosis of CBD or other breathing problems, and it has been previously determined that the employee did not meet the statutory criteria for a diagnosis of CBD under Part B.

After considering the recommended decision and all the evidence in the case file, the FAB hereby makes the following:

FINDINGS OF FACT

1. **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** filed claims for benefits under the Act.

2. The employee worked for F.H. McGraw at the Paducah GDP from April 23, 1951 to December 30, 1954.

3. You are children of the employee and the employee's spouse is no longer living.

4. The medical evidence is insufficient to establish a diagnosis of CBD or breathing problems.

Based on the above-noted findings of fact in this claim, the FAB hereby makes the following:

CONCLUSIONS OF LAW

The Federal (EEOICPA) Procedure Manual describes the differences between the requirements for CBD under the two parts of the Act. Part B requires that the medical evidence meet the statutory criteria; Part E requires a physician's diagnosis and a review of the medical evidence as a whole. The statutory requirements that define CBD under Part B do not apply to the evaluation of CBD claims under Part E.[1] A physician's report that evaluates the employee's medical condition and finds that it is "at least as likely as not" that exposure to beryllium was a significant factor in aggravating,

contributing to, or causing CBD, given the weight of all the medical evidence of file, may establish causation for CBD under Part E. A diagnosis provided by a qualified physician is required to establish CBD under Part E. Breathing problems is a description or symptom, and requires a diagnosis of a specific condition causing the breathing problems in order to be reviewed for compensability. The required medical evidence is described in § 30.114 of the implementing regulations (physician's reports, lab reports, hospital records, etc.), and does not refer to mere recitations by the survivor of symptoms the employee experienced that the survivor believes indicate that the employee sustained an occupational illness or a covered illness. 20 C.F.R. § 30.114

The medical evidence is insufficient to establish that the employee was diagnosed with the claimed conditions of CBD or breathing problems. 20 C.F.R. § 30.114. Therefore, you are not entitled to compensation under Part E of the Act. 42 U.S.C. §§ 7385s-2, 7385s-8.

Jacksonville, FL

Sidne M. Valdivieso, Hearing Representative

Final Adjudication Branch

[1] Federal (EEOICPA) Procedure Manual, Chapter E-500.15 (June 2006).

EEOICPA Fin. Dec. No. 10076658-2009 (Dep't of Labor, October 29, 2008)

NOTICE OF FINAL DECISION

This decision of the Final Adjudication Branch (FAB) concerns the above-noted claim under Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq.* For the reasons set forth below, the claim for skin lesions, skin cancer, an abdominal aortic aneurism, congestive heart failure, chronic obstructive pulmonary disease and interstitial basilar pleural parenchymal disease is accepted for medical benefits. However, the claim for blindness and atherosclerotic peripheral vascular disease under Part E is denied.

STATEMENT OF THE CASE

On July 15, 2008, **[Employee]** filed a Form EE-1 claiming benefits under EEOICPA for blindness, emphysema, skin lesions, chronic obstructive pulmonary disease (COPD), congestive heart failure and an abdominal aortic aneurism. On August 21, 2008, **[Employee]** filed a second Form EE-1 for the additional conditions of interstitial and right basilar pleural parenchymal disease and atherosclerotic peripheral vascular disease. On the claim forms, **[Employee]** indicated that he had not received any settlement or award from a tort suit or state workers' compensation claim in connection with the claimed conditions and that he had neither pled guilty to nor been convicted of workers' compensation fraud.

On a Form EE-3, **[Employee]** stated that he was employed as an electrician, video technician and assistant estimator by E.I. Dupont at the Savannah River Site (SRS) for the period of January 1, 1952 to December 30, 1987. The Oak Ridge Institute for Science and Education (ORISE) database was checked and verified his SRS employment from June 18, 1952 to December 31, 1986, and Department of Energy (DOE) records identify **[Employee]**'s labor categories as instrument mechanic and project assistant.

The district office performed a search of the U.S. Department of Labor Site Exposure Matrices (SEM). Source documents used to compile the SEM establish that the labor category of "instrument mechanic" at the SRS could potentially be exposed to the toxic substances arsenic, asbestos, cadmium, coal ash, nitrogen dioxide, phosgene and silicon dioxide. The SEM lists skin cancer as a possible specific health effect of exposure to arsenic, and COPD as a possible specific health effect of asbestos, cadmium, coal ash, nitrogen dioxide, phosgene and silicon dioxide.

The district office sent **[Employee]**'s medical records to a District Medical Consultant (DMC) for review. In his October 10, 2008 report, the DMC stated that **[Employee]** was diagnosed with squamous cell carcinoma of the right thumb, continued actinic keratosis of the right index finger, and seven actinic keratoses. The DMC noted that the final pathology diagnosis of the keratosis of the index finger was consistent with an arsenical keratosis. The DMC therefore concluded that **[Employee]**'s exposure to arsenic was a significant factor in causing or contributing to his skin cancer and skin lesions of keratoses of his hands.

The DMC also noted that interstitial basilar pleural parenchymal disease is a type of lung disease found in cases of asbestos exposure. The DMC determined that it is at least as likely as not that **[Employee]**'s exposure to toxic substances while working at the SRS was a significant factor in contributing to or aggravating his COPD, emphysema, and interstitial basilar pleural parenchymal disease.

As for the claimed abdominal aortic aneurism, the DMC noted that these aneurisms are not considered to be an occupational illness and are not known to be caused, contributed to, or aggravated by any toxic substances. However, the DMC noted that the medical notes stated that **[Employee]**'s aneurism was unable to be surgically corrected as a result of other significant medical problems, one of which was his moderately severe COPD. As a result, the DMC concluded that it was at least as likely as not that **[Employee]**'s COPD and emphysema were a significant factor in aggravating his aneurism.

With respect to pulmonary hypertension, the DMC noted that it can be caused by chronic lung disease and certainly contributes to congestive heart failure (CHF). Therefore, the DMC concluded that it was at least as likely as not that **[Employee]**'s COPD and emphysema were significant contributing factors in the development of his CHF.

The DMC noted, however, that ophthalmic notes diagnosed **[Employee]** with Fuch's dystrophy, an inherited genetic eye disorder, as well as relatively common eye conditions, particularly common in people his age. As such, the DMC concluded that it is not at least as likely as not that **[Employee]**'s exposure to toxic substances at the SRS was a significant factor in causing, contributing to, or aggravating his blindness.

And finally, the DMC noted that atherosclerotic peripheral vascular disease is generally not considered to be an occupational illness and that there are no accepted toxic substances that are known to cause, contribute to, or aggravate the condition. Accordingly, the DMC concluded that it was not at least as likely as not that **[Employee]**'s exposure to toxic substances at the SRS was a significant factor in causing, contributing to, or aggravating his atherosclerotic peripheral vascular disease.

On October 16, 2008, the Jacksonville district office issued a recommended decision to accept **[Employee]**'s claim under Part E of EEOICPA for the conditions of skin lesions, skin cancer, an abdominal aortic aneurism, CHF and interstitial basilar pleural parenchymal disease, and to deny his

claim for blindness and atherosclerotic peripheral vascular disease.

On October 24, 2008, FAB received written notification that **[Employee]** waived any and all objections to the recommended decision. FAB has performed a search of the SEM, which confirmed the findings of the district office. After reviewing the evidence in the case file, FAB hereby makes the following:

FINDINGS OF FACT

1. **[Employee]** was employed at the SRS from June 18, 1952 to December 31, 1986.

2. **[Employee]** was diagnosed with interstitial and right basilar pleural parenchymal disease, atherosclerotic peripheral vascular disease, blindness, emphysema, skin lesions, COPD, CHF and an abdominal aortic aneurism following exposure to toxic substances during covered employment at a DOE facility.

3. The medical evidence establishes that it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing **[Employee]**'s COPD, emphysema, interstitial basilar pleural parenchymal disease, skin cancer, and skin lesions.

4. **[Employee]**'s COPD and emphysema were significant factors in aggravating his aneurism and contributing to his CHF.

5. There is no link between **[Employee]**'s blindness or atherosclerotic peripheral vascular disease and exposure to toxic substances at the SRS.

Based on the above-noted findings of fact, FAB hereby makes the following:

CONCLUSIONS OF LAW

Section 30.316(a) of the EEOICPA regulations provides that if the claimant waives any objections to all or part of the recommended decision, FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part. 20 C.F.R. § 30.316(a) (2009).

Under Part E of EEOICPA, a "covered illness" is an illness or death resulting from exposure to a toxic substance. 42 U.S.C. § 7385s(2). As found above, the medical evidence establishes that it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing **[Employee]**'s skin cancers, skin lesions, CHF, abdominal aortic aneurism, interstitial basilar pleural parenchymal disease and COPD. That same evidence does not establish that it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing **[Employee]**'s blindness or atherosclerotic peripheral vascular disease.

Since the evidence does not establish that **[Employee]** has contracted blindness or atherosclerotic peripheral vascular disease through exposure to a toxic substance at a DOE facility, they cannot be considered covered illnesses under Part E. I hereby deny payment of medical benefits under Part E for the claimed blindness and atherosclerotic peripheral vascular disease. However, **[Employee]** is entitled to medical benefits for skin lesions, skin cancer, an abdominal aortic aneurism, CHR, COPD and

interstitial basilar pleural parenchymal disease, effective July 15, 2008, under Part E of EEOICPA. *See* 42 U.S.C. § 7385s-8.

Armando J. Pinelo

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 10076658-2009 (Dep't of Labor, October 29, 2008)

NOTICE OF FINAL DECISION

This decision of the Final Adjudication Branch (FAB) concerns the above-noted claim under Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq.* For the reasons set forth below, the claim for skin lesions, skin cancer, an abdominal aortic aneurism, congestive heart failure, chronic obstructive pulmonary disease and interstitial basilar pleural parenchymal disease is accepted for medical benefits. However, the claim for blindness and atherosclerotic peripheral vascular disease under Part E is denied.

STATEMENT OF THE CASE

On July 15, 2008, **[Employee]** filed a Form EE-1 claiming benefits under EEOICPA for blindness, emphysema, skin lesions, chronic obstructive pulmonary disease (COPD), congestive heart failure and an abdominal aortic aneurism. On August 21, 2008, **[Employee]** filed a second Form EE-1 for the additional conditions of interstitial and right basilar pleural parenchymal disease and atherosclerotic peripheral vascular disease. On the claim forms, **[Employee]** indicated that he had not received any settlement or award from a tort suit or state workers' compensation claim in connection with the claimed conditions and that he had neither pled guilty to nor been convicted of workers' compensation fraud.

On a Form EE-3, **[Employee]** stated that he was employed as an electrician, video technician and assistant estimator by E.I. Dupont at the Savannah River Site (SRS) for the period of January 1, 1952 to December 30, 1987. The Oak Ridge Institute for Science and Education (ORISE) database was checked and verified his SRS employment from June 18, 1952 to December 31, 1986, and Department of Energy (DOE) records identify **[Employee]**'s labor categories as instrument mechanic and project assistant.
The district office performed a search of the U.S. Department of Labor Site Exposure Matrices (SEM). Source documents used to compile the SEM establish that the labor category of "instrument mechanic" at the SRS could potentially be exposed to the toxic substances arsenic, asbestos, cadmium, coal ash, nitrogen dioxide, phosgene and silicon dioxide. The SEM lists skin cancer as a possible specific health effect of exposure to arsenic, and COPD as a possible specific health effect of asbestos, cadmium, coal ash, nitrogen dioxide, phosgene and silicon dioxide.

The district office sent **[Employee]**'s medical records to a District Medical Consultant (DMC) for review. In his October 10, 2008 report, the DMC stated that **[Employee]** was diagnosed with squamous cell carcinoma of the right thumb, continued actinic keratosis of the right index finger, and seven actinic keratoses. The DMC noted that the final pathology diagnosis of the keratosis of the index

finger was consistent with an arsenical keratosis. The DMC therefore concluded that **[Employee]**'s exposure to arsenic was a significant factor in causing or contributing to his skin cancer and skin lesions of keratoses of his hands.

The DMC also noted that interstitial basilar pleural parenchymal disease is a type of lung disease found in cases of asbestos exposure. The DMC determined that it is at least as likely as not that **[Employee]**'s exposure to toxic substances while working at the SRS was a significant factor in contributing to or aggravating his COPD, emphysema, and interstitial basilar pleural parenchymal disease.

As for the claimed abdominal aortic aneurism, the DMC noted that these aneurisms are not considered to be an occupational illness and are not known to be caused, contributed to, or aggravated by any toxic substances. However, the DMC noted that the medical notes stated that **[Employee]**'s aneurism was unable to be surgically corrected as a result of other significant medical problems, one of which was his moderately severe COPD. As a result, the DMC concluded that it was at least as likely as not that **[Employee]**'s COPD and emphysema were a significant factor in aggravating his aneurism.

With respect to pulmonary hypertension, the DMC noted that it can be caused by chronic lung disease and certainly contributes to congestive heart failure (CHF). Therefore, the DMC concluded that it was at least as likely as not that **[Employee]**'s COPD and emphysema were significant contributing factors in the development of his CHF.

The DMC noted, however, that ophthalmic notes diagnosed **[Employee]** with Fuch's dystrophy, an inherited genetic eye disorder, as well as relatively common eye conditions, particularly common in people his age. As such, the DMC concluded that it is not at least as likely as not that **[Employee]**'s exposure to toxic substances at the SRS was a significant factor in causing, contributing to, or aggravating his blindness.

And finally, the DMC noted that atherosclerotic peripheral vascular disease is generally not considered to be an occupational illness and that there are no accepted toxic substances that are known to cause, contribute to, or aggravate the condition. Accordingly, the DMC concluded that it was not at least as likely as not that **[Employee]**'s exposure to toxic substances at the SRS was a significant factor in causing, contributing to, or aggravating his atherosclerotic peripheral vascular disease.

On October 16, 2008, the Jacksonville district office issued a recommended decision to accept **[Employee]**'s claim under Part E of EEOICPA for the conditions of skin lesions, skin cancer, an abdominal aortic aneurism, CHF and interstitial basilar pleural parenchymal disease, and to deny his claim for blindness and atherosclerotic peripheral vascular disease.

On October 24, 2008, FAB received written notification that **[Employee]** waived any and all objections to the recommended decision. FAB has performed a search of the SEM, which confirmed the findings of the district office. After reviewing the evidence in the case file, FAB hereby makes the following:

FINDINGS OF FACT

1. **[Employee]** was employed at the SRS from June 18, 1952 to December 31, 1986.

2. **[Employee]** was diagnosed with interstitial and right basilar pleural parenchymal disease,

atherosclerotic peripheral vascular disease, blindness, emphysema, skin lesions, COPD, CHF and an abdominal aortic aneurism following exposure to toxic substances during covered employment at a DOE facility.

3. The medical evidence establishes that it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing **[Employee]**'s COPD, emphysema, interstitial basilar pleural parenchymal disease, skin cancer, and skin lesions.

4. **[Employee]**'s COPD and emphysema were significant factors in aggravating his aneurism and contributing to his CHF.

5. There is no link between **[Employee]**'s blindness or atherosclerotic peripheral vascular disease and exposure to toxic substances at the SRS.

Based on the above-noted findings of fact, FAB hereby makes the following:

CONCLUSIONS OF LAW

Section 30.316(a) of the EEOICPA regulations provides that if the claimant waives any objections to all or part of the recommended decision, FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part. 20 C.F.R. § 30.316(a) (2009).

Under Part E of EEOICPA, a "covered illness" is an illness or death resulting from exposure to a toxic substance. 42 U.S.C. § 7385s(2). As found above, the medical evidence establishes that it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing **[Employee]**'s skin cancers, skin lesions, CHF, abdominal aortic aneurism, interstitial basilar pleural parenchymal disease and COPD. That same evidence does not establish that it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing **[Employee]**'s blindness or atherosclerotic peripheral vascular disease.

Since the evidence does not establish that **[Employee]** has contracted blindness or atherosclerotic peripheral vascular disease through exposure to a toxic substance at a DOE facility, they cannot be considered covered illnesses under Part E. I hereby deny payment of medical benefits under Part E for the claimed blindness and atherosclerotic peripheral vascular disease. However, **[Employee]** is entitled to medical benefits for skin lesions, skin cancer, an abdominal aortic aneurism, CHR, COPD and interstitial basilar pleural parenchymal disease, effective July 15, 2008, under Part E of EEOICPA. *See* 42 U.S.C. § 7385s-8.

Armando J. Pinelo

Hearing Representative

Final Adjudication Branch

Medical evidence of occupational illness under Part B

EEOICPA Fin. Dec. No. 14718-2003 (Dep't of Labor, September 30, 2004)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) 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 stated below, your claims for survivor benefits are accepted.

No decision has yet been made on your claims for benefits under Subpart E of the Act. The adjudication of your Subpart E claims are deferred until issuance of the Interim Final Regulations. Once a decision has been made on your claims for benefits under Subpart E, you will receive a separate decision notice.

STATEMENT OF THE CASE

On November 13, 2001, **[Spouse]** and **[Claimant 1]** each filed a Form EE-2 as the surviving spouse and surviving child of the **[Employee]** for benefits under Part B of the EEOICPA for COPD. It was subsequently claimed that the employee developed chronic beryllium disease due as a result of his employment exposure at the Los Alamos National Laboratory.

In support of the claim, the employee's death certificate was submitted, which establishes the date of death as December 28, 1990 and **[Spouse]** as his surviving spouse and a birth certificate for **[Claimant 1]**, which establishes her as a surviving child. The employee's medical records were also submitted, which included several chest radiograph reports, clinical medical notes demonstrating a history of a chronic respiratory disorder and an arterial blood gas report.

However, **[Spouse]** died prior to the completion of processing of the claim. **[Claimant 1]** provided the district office with information regarding two other surviving children of the employee.

On November 5, 2002 and November 12, 2002, respectively, **[Claimant 2]** and **[Claimant 3]** each filed a Form EE-2, seeking compensation under the Act as surviving children of the **[Employee]**. You claimed that the employee developed chronic beryllium disease from COPD as a result of his employment exposure at the Los Alamos National Laboratory. You also submitted your birth certificates to establish that you are surviving children of the employee.

The Department of Energy and the Oak Ridge Institute for Science and Education (ORISE) was unable to verify the employee's employment history. However, based upon employment evidence submitted, the Denver district office determined that the employee was employed by E.F. Olds Plumbing & Heating Company, a subcontractor for the War Department Corps of Engineers, Manhattan District. Under the EEOICPA, the Manhattan Engineering district is considered a predecessor agency of the Department of Energy. The district office obtained the employee's social security earnings record, which indicated he was employed by M.M. Sundt Corporation in 1942 and E.F. Olds Plumbing & Heating Company from 1944-1945. They also confirmed that M.M. Sundt Corporation was a subcontractor at Los Alamos National Laboratory and therefore determined that the employee did work at Los Alamos National Laboratory in 1942.

To establish a diagnosis of chronic beryllium disease prior to 1993, the record must establish an

occupational or environmental history or epidemiologic evidence of beryllium in conjunction with medical evidence that contains at least three out of the five following test results:

- Characteristic chest radiograph or computed tomography denoting abnormalities
- A restrictive or obstructive lung physiology test or diffusion lung capacity defect
- Lung pathology consistent with chronic beryllium disease
- Clinical course consistent with chronic beryllium disease
- Immunological tests showing beryllium sensitivity (skin patch or beryllium test)

The Denver district office issued a recommended decision on September 22, 2003 to deny the three surviving children claims because the medical evidence failed to support at least three out of five criteria required to establish a diagnosis of chronic beryllium disease prior to 1993. They concluded that you had established the required clinical course consistent with chronic beryllium disease and chest radiograph denoting abnormalities consistent with CDB. The Final Adjudication Branch received a letter of objection from two of the claimants, requesting hearing. On November 12, 2003, the Final Adjudication Branch issued a remand order, for consideration of the arterial blood gas report as medical evidence to establish a diagnosis of CBD.

The district office referred the case to the District Medical Consultant, who opined on January 9, 2004 that the arterial blood gas report alone was not sufficient to determine a clinical course consistent with CDB prior to 1993. The district medical consultant also stated that the chest x-ray reports may be supportive of CBD but the findings are nonspecific. Based upon the consultative report, the district office issued a second recommended decision to deny the claims on January 12, 2004.

You each submitted a letter of objection to the second recommended decision and requested hearing. The hearing was held by the Final Adjudication Branch on March 24, 2004. During the hearing, you submitted additional medical evidence from Louis M. Benevento, M.D., who stated by affidavit that he treated the employee for many years for advance COPD and emphysema, which was confirmed by pulmonary function testing. The Final Adjudication Branch remanded the case to the district office for additional development of new medical evidence.

The district office contacted Dr. Benevento by letter on October 20, 2004 and November 29, 2004 to request the pulmonary function reports he mentioned in his affidavit, but the doctor did not respond. The district office determined that the affidavit by Dr. Benevento was sufficient to establish a third requirement required to establish CBD prior to 1993, a restrictive or obstructive lung physiology test or diffusion lung capacity defect. On January 4, 2005, the Denver district office issued a recommended decision concluding that the employee was a beryllium employee, as that term is defined in 42 U.S.C. § 7384l(7), that he contracted chronic beryllium disease as a result of employment exposure. As the eligible survivors, you are each entitled to compensation in the amount of $50,000 pursuant to 42 U.S.C. § 7384s(a).

On the dates listed below, the Final Adjudication Branch received written notification that the claimants waive any and all objections to the recommended decision:

[Claimant 1] January 20, 2005

[Claimant 2] January 20, 2005

[Claimant 3] January 20, 2005

After a thorough review of the case file forwarded by the Denver district office, the FAB hereby makes the following:

FINDINGS OF FACT

1. On November 13, 2001, **[Spouse]** and **[Claimant 1]** each filed a claim as the surviving spouse and surviving child, respectively, of the employee who had COPD and CBD as a result of his employment at Los Alamos National Laboratory.

2. The surviving spouse of the employee passed away on May 28, 2002, before her claim completed processing.

3. On November 5, 2002 and November 12, 2002, respectively, **[Claimant 2]** and **[Claimant 3]** each filed a Form EE-2, seeking compensation under the Act as surviving children of the employee.

4. You have established that you are the three surviving children of the employee.

5. You were issued recommended decisions to deny your claim on September 22, 2003 and January 12, 2004, which you subsequently filed objections and requested hearing.

6. The Final Adjudication Branch issued remand orders on November 12, 2003 and September 30, 2004.

7. You have established that the employee worked at Los Alamos National Laboratory in 1942.

8. The potential for beryllium exposure existed at Los Alamos National Laboratory due to historical beryllium use, residual contamination and decontamination activities.

9. The employee's medical evidence was sufficient to establish that he suffered from a respiratory disorder consistent with chronic beryllium disease prior to 1993. The employee medical records included chest radiograph reports with abnormalities consistent with chronic beryllium disease, medical reports demonstrating a clinical course consistent with CDB and a restrictive or obstructive lung physiology test consistent with CDB.

Based on the above-noted findings of fact in this claim, the FAB hereby also makes the following:

CONCLUSIONS OF LAW

1. The employee was a covered beryllium employee pursuant to 42 U.S.C. § 7384l(7).

2. Prior to his death, the employee contracted chronic beryllium disease in accordance with the criteria set forth in 42 U.S.C. §7384l(13)(B) under Part B of the EEOICPA.

3. You have established that you are the three eligible survivors of the employee pursuant to the criteria of 42 U.S.C. §7384s(3) under Part B of the EEOICPA.

4. You are entitled to compensation in the amount of $150,000 which is to be divided among the eligible survivors pursuant to 42 U.S.C. § 7384s(a). Therefore, you are each entitled to compensation in the amount of $50,000.

The undersigned has thoroughly reviewed the case record and the recommended decision issued by the district office on May 13, 2004 and finds that the employee was a covered beryllium employee, as that term is defined in 42 U.S.C. § 7384l(7), that he was diagnosed with chronic beryllium disease, a specified disease under 42 U.S.C. § 7384l(8), and that the diagnosis was pursuant to 42 U.S.C. § 7384l(13). It is the decision of the Final Adjudication Branch that the three survivor claims under Part B of the Act are accepted.

Denver, CO

Joyce L. Terry

District Manager

EEOICPA Fin. Dec. No. 47856-2005 (Dep't of Labor, July 21, 2005)

NOTICE OF FINAL DECISION

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

STATEMENT OF THE CASE

On August 30, 2001, the employee's surviving spouse filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA), based on lymphoma and peripheral bronchogenic carcinoma, and on July 24, 2003, she passed away, and her claim was administratively closed. On August 7 (**[Claimant #1]**) and September 9 (**[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**), 2003, you filed Forms EE-2 under the EEOICPA, based on bronchogenic carcinoma and lymphoma.

The record includes a Form EE-3 (Employment History Affidavit) that indicates the worker was employed by Reynolds Electrical and Engineering Company (REECo) at the Nevada Test Site (NTS) intermittently from 1957 to 1978, and that he wore a dosimetry badge. A representative of the Department of Energy confirmed the employee was employed at NTS by REECo intermittently from August 23, 1958 to February 4, 1978.

Medical documentation received included a copy of a Nevada Central Cancer Registry report that indicated an aspiration biopsy was performed on February 1, 1978, and it showed the employee was diagnosed with primary lung cancer. A Valley Hospital discharge summary, dated February 4, 1978, indicated the employee had a tumor in the right upper lobe of the lung. The record does not contain documentation demonstrating the employee was diagnosed with lymphoma.

To determine the probability of whether the employee sustained the cancer in the performance of duty, the Seattle district office referred your case to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction in accordance with 20 C.F.R. § 30.115. The district office received the final NIOSH Report of Dose Reconstruction dated April 20, 2005. *See* 42 U.S.C. § 7384n(d). NIOSH noted the employee had worked at NTS intermittently from August 23, 1958 to February 4, 1978. However, in order to expedite the claim, only the employment from 1966 through 1970 was assessed. NIOSH determined that the employee's dose as reconstructed under the EEOICPA was 71.371 rem to the lung, and the dose was calculated only for this organ because of the specific type of cancer associated with the claim. NIOSH also determined that in accordance with the provisions of 42 C.F.R. § 82.10(k)(1), calculation of internal dose alone was of sufficient magnitude to consider the dose reconstruction complete. Further, NIOSH indicated, the calculated internal dose reported is an "*underestimate*" of the employee's total occupational radiation dose. *See* NIOSH Report of Dose Reconstruction, pp. 4, 5, 6, and 7.

Using the information provided in the Report of Dose Reconstruction, the Seattle district office utilized the Interactive RadioEpidemiological Program (IREP) to determine the probability of causation of the employee's cancer, and reported in its recommended decision that the probability the employee's lung cancer was caused by his exposure to radiation while employed at NTS was at least 50%.

You provided copies of the death certificates of the employee and his spouse, copies of your birth certificates showing you are the natural children of the employee, and documentation verifying your changes of names, as appropriate.

The record shows that you (**[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**) and **[Claimant #5]** filed claims with the Department of Justice (DOJ) for compensation under the Radiation Exposure Compensation Act (RECA). By letter dated May 20, 2005, a representative of the DOJ reported that an award under § 4 of the RECA was approved for you; however, the award was rejected by **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**.

On June 14, 2005, the Seattle district office recommended acceptance of your claims for survivor compensation for the condition of lung cancer, and denial of your claims based on lymphoma.

On June 12 (**[Claimant #1]** and June 20 (**[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**), 2005, the Final Adjudication Branch received written notification from you indicating that you waive any and all rights to file objections to the recommended decision.

FINDINGS OF FACT

1. On August 7 (**[Claimant #1]**) and September 9 (**[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**), 2003, you filed claims for survivor benefits.

2. Documentation of record shows that the employee and his surviving spouse have passed away, you (**[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**) are the children of the employee, and you are his survivors.

3. You (**[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**) have rejected an award of compensation under the Radiation Exposure Compensation Act.

4. The worker was employed at NTS by REECo, intermittently, from August 23, 1958 to February 4, 1978.

5. The employee was diagnosed with lung cancer on February 1, 1978.

6. The NIOSH Interactive RadioEpidemiological Program indicated at least a 50% probability that the employee's cancer was caused by radiation exposure at NTS.

7. The employee's cancer was at least as likely as not related to his employment at a Department of Energy facility.

CONCLUSIONS OF LAW

The evidence of record indicates that the worker was employed at NTS by REECo, intermittently, from August 23, 1958 to February 6, 1978. Medical documentation provided indicated the employee was diagnosed with lung cancer on February 1, 1978; however, there is no evidence showing the employee was diagnosed with lymphoma, and your claims based on lymphoma must be denied.

After establishing that a partial dose reconstruction provided sufficient information to produce a probability of causation of 50% or greater, NIOSH determined that sufficient research and analysis had been conducted to end the dose reconstruction, and the dose reconstruction was considered complete. *See* 42 C.F.R. § 82.10(k)(1).

The Final Adjudication Branch analyzed the information in the NIOSH Report of Dose Reconstruction and utilized the NIOSH-IREP to confirm the 63.34% probability that the employee's cancer was caused by his employment at NTS. *See* 42 C.F.R. § 81.20. (Use of NIOSH-IREP). Thus, the evidence shows that the employee's cancer was at least as likely as not related to his employment at NTS.

The Final Adjudication Branch notes that, in its Conclusions of Law, the recommended decision erroneously indicates the employee, **[Employee]**, is entitled to compensation in the amount of $150,000.00; therefore, that Conclusion of Law must be vacated as the employee is deceased. *See* 42 U.S.C. § 7384s(a)(1).

The Final Adjudication Branch notes that the record shows the employee passed away on February 4, 1978. However, his employment history indicates he worked at NTS until February 6, 1978. Consequently, for purposes of administration of the Act, his employment is considered to have ended on February 4, 1978.

Based on the employee's covered employment at NTS, the medical documentation showing his diagnosis of lung cancer, and the determination that the employee's lung cancer was "at least as likely as not" related to his occupational exposure at NTS, and thus sustained in the performance of duty, the employee is a "covered employee with cancer," under 42 U.S.C. § 7384l. *See* 42 U.S.C. § 7384l(9)(B); 20 C.F.R. § 30.213(b); 42 C.F.R. § 81.2. Further, as the record indicates there is one other potential beneficiary under the EEOICPA, you are each (**[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**) entitled to survivor compensation under 42 U.S.C. § 7384 in the amount of $30,000.00. As there is evidence that another survivor is a child of the employee, and potentially an eligible survivor under the Act, the potential share ($30,000.00) of the compensation must remain in the EEOICPA Fund. *See* Federal (EEOICPA) Procedure Manual, Chapter 2-200.7c(2) (June 2004).

Seattle, WA

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA Fin. Dec. No. 55793-2004 (Dep't of Labor, September 22, 2004)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq.* Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On March 22, 2004, you filed a Form EE-1 (Claim for Benefits under the EEOICPA), based on the conditions of prostate cancer, emphysema and possible lung cancer. You also provided a Form EE-3 (Employment History), on which you indicated that you worked at the Weldon Spring Plant from 1956 to 1967, and that you wore a dosimetry badge.

Information obtained from a Department of Energy (DOE) representative and the Oak Ridge Institute for Science and Education database indicated that you worked as a contractor employee at the Weldon Spring Plant from July 17, 1956 to June 30, 1966. The Weldon Spring Plant is recognized as a covered DOE facility from 1957 to 1967 and 1985 to the present (for remediation). *See* Department of Energy, Office of Worker Advocacy, Facility List.

By letters dated March 31, May 5, and June 14, 2004, the Seattle district office notified you that they had completed the initial review of your claim for benefits under the EEOICPA, but additional medical evidence was needed in order to establish a claim. You were requested to provide documentation of a covered occupational illness, specifically, cancer.

You provided medical documentation which indicated that you received treatment for conditions including hypertension, diabetes mellitus, bronchitis and emphysema. In addition, a hospital discharge summary report from a hospital stay from April 15 to April 16, 1993, indicated that you were admitted to the hospital for a medical procedure following a radical prostatectomy, which was performed "in order to allow the patient to be treated for his cancer of the prostate." The date of diagnosis of prostate cancer was not noted.

The record also includes several telephone messages, which indicate that you, with the assistance of your authorized representative, have been trying to obtain the medical records pertaining to your diagnosis of prostate cancer and the date of diagnosis, but that you have not yet received the medical records.

On July 16, 2004, the Seattle district office recommended denial of your claim for benefits. The district office concluded that you did not provide sufficient evidence as proof that you were diagnosed

with a covered occupational illness as defined by § 7384l(15) of the Act. *See* 42 U.S.C. § 7384l(15). The district office further concluded that you were not entitled to compensation as outlined under § 7384s of the Act. *See* 42 U.S.C. § 7384s.

FINDINGS OF FACT

1. You filed a claim for employee benefits on March 22, 2004.
2. You worked at the Weldon Spring Plant, a covered Department of Energy facility, from July 17, 1956 to June 30, 1966.
3. You did not submit sufficient medical evidence establishing a date of diagnosis of a covered occupational illness under the EEOICPA.

CONCLUSIONS OF LAW

The undersigned has reviewed the recommended decision issued by the Seattle district office on July 16, 2004. I find that you have not filed any objections to the recommended decision as provided by § 30.316(a) of the regulations and that the sixty-day period for filing such objections, as provided for in section 30.310(a) has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

In order to be afforded coverage under Part B of the EEOICPA, you must establish that you were diagnosed with a designated occupational illness incurred as a result of exposure to silica, beryllium, and/or radiation: *cancer, beryllium sensitivity, chronic beryllium disease, and silicosis.* *See* 42 U.S.C. § 7384l(15), 20 C.F.R. § 30.110(a).

You filed a claim based on the condition of emphysema, which is not a compensable illness under Part B of the Act. You also filed a claim based on prostate cancer and possible lung cancer. Under the EEOICPA, a claim for cancer must be demonstrated by medical evidence that sets forth the diagnosis of cancer and the date on which the diagnosis was made. *See* 20 C. F. R. § 30.211.

The record in this case shows that by letters dated March 31, May 5, and June 14, 2004, you were requested to provide the required information to prove a medical condition. While a hospital discharge report dated April 16, 1993, contains a reference to your treatment for prostate cancer, the evidence of record does not contain a date of diagnosis of this cancer. Without the date of prostate cancer diagnosis, it is not possible to determine if this cancer was related to your employment at the Weldon Spring Plant. In regard to you claim for possible lung cancer, the medical documentation of record does not indicate a diagnosis of lung cancer.

It is the claimant's responsibility to establish entitlement to benefits under the Act. The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by the preponderance of the evidence, the existence of each and every criterion under any compensable claim category set forth in section 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing to the Office of Workers' Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

The record in this case shows that you did not provide sufficient medical documentation of a covered occupational illness under the Act. Therefore, your claim must be denied.

For the above reasons, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

Seattle, WA

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA Fin. Dec. No. 55834-2004 (Dep't of Labor, September 21, 2004)

FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq.* Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On March 25, 2004, you filed a Form EE-1 (Claim for Benefits under EEOICPA), seeking compensation based on beryllium sensitivity and chronic silicosis. You indicated on Form EE-3 (Employment History) that you worked at the Beryllium Co., in Hazleton, PA, from 1970 to 1971, and at the Avco Corp. (Trexton) in Stratford, CT, from 1960 to 1970. The Beryllium Corporation of America (Hazleton) is recognized as a beryllium vendor from 1957 to 1979. *See* Department of Energy, Office of Worker Advocacy Facilities List.

By letters dated March 30, and April 30, 2004, the Cleveland district office notified you of the medical evidence you must submit to establish that you had been diagnosed with beryllium sensitivity and chronic silicosis. You were also advised that, to be considered for entitlement to compensation based on chronic silicosis, you would have to provide evidence that you had worked during the mining of tunnels at Department of Energy facilities in Nevada or Alaska for tests or experiments related to an atomic weapon. By letter dated May 28, 2004, you were again advised of the medical evidence you must submit to establish that you had been diagnosed with beryllium sensitivity. No medical or employment evidence was received.

On July 8, 2004, the district office recommended denial of your claim for benefits, concluding that you are not a covered employee with chronic silicosis because you were not exposed to silica in the performance of duty as required by 42 U.S.C. § 7384r(c). The district office also recommended denial of your claim because you did not submit sufficient medical evidence that you had been diagnosed with a covered occupational illness as defined 42 U.S.C. § 7384l(15). The district office further concluded that you were not entitled to compensation as set forth in 42 U.S.C. § 7384s.

FINDINGS OF FACT

1. On March 25, 2004, you filed a claim for benefits.

2. You did not provide the medical evidence required to establish a diagnosis of a covered occupational illness under the EEOICPA.

CONCLUSIONS OF LAW

I have reviewed the evidence of record and the recommended decision issued by the district office on July 8, 2004. I find that you have not filed any objections to the recommended decision and that the sixty-day period for filing such objections has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

In order to be afforded coverage under Part B of the Energy Employees Occupational Illness Compensation Program Act, the employees (or their eligible survivors), must establish that they have been diagnosed with a designated occupational illness incurred as a result of exposure to silica, beryllium, and radiation: *cancer, beryllium sensitivity, chronic beryllium disease*, and/or *silicosis*. *See* 42 U.S.C. § 7384l(15). Further, the illness must have been incurred while in the performance of duty for the Department of Energy and certain of its vendors, contractors, and subcontractors, or for an atomic weapons employer or facility. *See* 42 U.S.C. § 7384l(4)-(7), (9) and (11).

You filed a claim based on beryllium sensitivity and chronic silicosis. The regulations provide that a claim based on beryllium sensitivity must include an abnormal Lymphocyte Proliferation Test performed on either blood or lung lavage cells. *See* 20 C.F.R. § 30.207(b). Similarly, a claim based on chronic silicosis must include a written diagnosis of that condition, signed by a medical doctor, and must be accompanied by either a chest x-ray interpreted by a B reader, or the result of a CAT or other imaging technique, or a lung biopsy, consistent with silicosis. Although you were advised to provide the medical documentation required to establish that you had been diagnosed with beryllium sensitivity and chronic silicosis, no such evidence was received.

It is the claimant's responsibility to establish entitlement to benefits under the Act. The regulations state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of each and every criterion under any compensable claim category. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing to the Office of Workers' Compensation Program all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

Therefore, your claim must be denied because you did not submit evidence sufficient to establish that you had been diagnosed with a covered occupational illness as defined by 42 U.S.C. § 7384l(15).

For the above reasons, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

Cleveland, Ohio

Debra A. Benedict

Acting District Manager

Final Adjudication Branch

EEOICPA Fin. Dec. No. 57599-2005 (Dep't of Labor, January 4, 2005)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claims for compensation under Part B of 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.

STATEMENT OF THE CASE

On May 17, 2004, **[Claimant 1]** and **[Claimant 2]** each filed a Form EE-2, Claim for Survivor Benefits under the EEOICPA. Your claims were based, in part, on the assertion that your 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 acute myelomonocytic leukemia (AML). The evidence shows that all medical records have been destroyed; therefore, per office procedure, the employee's death certificate is sufficient to establish that he was diagnosed with AML.

On the Form EE-3, Employment History, you stated the employee was employed by A. S. Shulman Electric, a subcontractor of C. P. Schwartz, at the gaseous diffusion plant (GDP) in Paducah, Kentucky, for the period of June 1951 to 1955. Department of Energy records, Social Security records, and employment affidavits confirm employment by C. P. Schwartz and F. H. McGraw from at least October 1, 1952 to December 31, 1953.

On November 17, 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 $75,000 each, for the employee's AML. You each submitted written notification that you waive any and all objections to the recommended decision.

In order for the employee to qualify as a member of the Special Exposure Cohort (SEC) under § 7384l(14)(A) of the Act, the following requirements must be satisfied:

> (A) The employee was so employed for a number of work days aggregating at least 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, and, during such employment - -
>
> (i) was monitored through the use of dosimetry badges for

exposure at the plant of the external parts of employee's body to radiation; or

(ii) worked on a job that had exposures comparable to a job that is or was monitored through the use of dosimetry badges. 42 U.S.C. § 7384l(14)(A).

Department of Energy records, Social Security records, and employment affidavits confirm employment for at least 250 days from at least October 1, 1952 to December 31, 1953 at the Paducah GDP. You indicated on the Form EE-3 (Employment History) that you did not know whether your father wore a dosimetry badge. According to the Department of Energy sponsored report entitled *Exposure Assessment Project at Paducah Gaseous Diffusion Plant*, released in December 2000, Section 4.2.1.1 External Dosimeters states: "Prior to 1961, select groups of employees considered to have the potential for radiation exposures were issued film badges. After [July 1] 1960, all employees were issued two combination security/film badges." Because the period of your father's employment fell within the time that some or all employees at the Paducah GDP were issued dosimetry badges, I find that the employee's employment at the Paducah GDP satisfies the requirements under § 7384l(14)(A) of the Act. 42 U.S.C. §7384l(14)(A).

FINDINGS OF FACT

1. On May 17, 2004, **[Claimant 1]** and **[Claimant 2]** each filed a Form EE-2, Claim for Survivor Benefits under the EEOICPA.

2. The evidence is sufficient to establish that the employee was diagnosed with acute myelomonocytic leukemia (AML).

3. Acute myelomonocytic leukemia (AML) is a specified cancer under Part B of the Act and the implementing regulations. 42 U.S.C. § 7384l(17)(A), 20 C.F.R. § 30.5(dd)(1).

4. The employee was employed at the gaseous diffusion plant in Paducah, Kentucky for the period of at least October 1, 1952 to December 31, 1953. The employee is a covered employee as defined in the Act. 42 U.S.C. § 7384l(1).

5. The employee is a member of the Special Exposure Cohort, as defined in the Act. 42 U.S.C. § 7384l(14)(A).

6. In proof of survivorship, you submitted birth certificates, documentation of name changes, and the death certificates of the employee and his spouse. Therefore, you have established that you are survivors as defined by the implementing regulations. 20 C.F.R. § 30.5(ee).

7. The district office issued the recommended decision on November 17, 2004.

8. 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 November 17, 2004. I find that the employee is a member of the Special Exposure Cohort, as that term is defined in the Act, and that the employee's acute myelomonocytic leukemia (AML) is a specified cancer under Part B of the Act and the implementing regulations. 42 U.S.C. §§ 7384l(14)(A), 7384l(17)(A); 20 C.F.R. § 30.5(dd)(1).

I find that the recommended decision is in accordance with the facts and the law in this case, and that you are each entitled to one-half of the maximum $150,000 award, in the amount of $75,000 each, pursuant to Part B of the EEOICPA. 42 U.S.C. §§ 7384s(a), 7384s(e)(1)(B).

Jacksonville, FL

Mark Stewart

Hearing Representative

Cancer, Radiogenic

Changes in dose reconstruction methodology

EEOICPA Fin. Dec. No. 61433-2006 (Dep't of Labor, April 25, 2008)

NOTICE OF FINAL DECISION

This decision of the Final Adjudication Branch (FAB) concerns the claimants' claims for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claims for benefits for the employee's lung cancer are denied under Part B of EEOICPA.

STATEMENT OF THE CASE

On August 9, 2004, **[Claimant #1]** filed a Form EE-2 claiming for survivor benefits under EEOICPA, and on September 7, 2004, **[Claimant #2]** and **[Claimant #3]** filed a Form EE-2. **[Claimant #2]** also filed a Request for Review by Medical Panels form with the Department of Energy (DOE) on that date. On the claim forms, they each identified themselves as the surviving children of **[Employee]** (hereinafter referred to as "the employee") and lung cancer as the employee's condition for which they were claiming benefits. On the EE-2 forms, they each indicated that the employee worked at a Special Exposure Cohort (SEC) location.

In support of their claims for survivorship, they provided a copy of the employee's death certificate, which shows that the employee died on June 29, 2003, and that he was widowed on his date of death. They each provided a copy of their birth certificate identifying the employee as their father. Where appropriate, they provided the documentation that reflects their surname changes.

On the Form EE-3, they alleged that the employee worked for F.H. McGraw during construction of the gaseous diffusion plant (GDP) in Paducah, Kentucky from 1951 to May 1955. They also indicated that the employee did not wear a dosimetry badge. DOE was unable to verify the alleged employment.

Numerous documents, including Social Security Administration (SSA) Itemized Statements of Earnings, an Employment History Affidavit (Form EE-4), and a security clearance issued by DOE to the employee through F.H. McGraw were reviewed in an effort to reconstruct and verify the employee's work history and employment by DOE contractors and/or subcontractors at the Paducah GDP. A review of this documentation shows that the employee was employed by F.H. McGraw, a recognized DOE subcontractor, at the Paducah GDP from May 12, 1952 until July 7, 1952.

On April 24, 2006, FAB issued a final decision under Parts B and E of EEOICPA on their claims. The FAB denied their claims under Part E as there was insufficient evidence that any of them were a surviving child of the employee, who, at the time of the employee's death, was under the age of 18, under the age of 23 and continuously enrolled as a full-time student, or any age and incapable of self-support on the employee's date of death, which are the criteria that govern whether an employee's surviving child qualifies as a "covered" child under Part E, and is thereby eligible for benefits under Part E.

With respect to Part B of EEOICPA, FAB found that the medical evidence established that the employee was diagnosed with small cell lung cancer on December 17, 2002. The district office had submitted the case to the National Institute for Occupational Safety and Health (NIOSH) for dose reconstruction. Based on the dose reconstruction report prepared by NIOSH and the calculated probability of causation ("PoC")[1], FAB determined that the employee's lung cancer was not "at least as likely as not" caused by his exposure to radiation at the DOE facility. Accordingly, FAB denied their claims based on the employee's lung cancer under Part B.

On March 21, 2007, NIOSH released OCAS-PEP-013, entitled "Evaluation of the Impact of Changes to the Isotopic Ratios for the Paducah Gaseous Diffusion Plant." This release outlined NIOSH's plan for evaluating the effect on dose reconstructions of changes to multiple Paducah GDP Technical Basis Documents (TBDs) that were made to ensure that the published isotopic ratios for transuranic radionuclides meet the criteria of providing either an accurate or maximum dose estimate. NIOSH determined that the current ratios in the prior TBDs did not meet that goal. As such, the Occupational Internal Dose and Occupational Environmental Dose TBDs were updated to account for the transuranic uranium isotopic ratios (relative to uranium) for estimating dose from these radionuclides. In response to OCAS–PEP-013, the Division of Energy Employees Occupational Illness Compensation (DEEOIC) issued a letter to NIOSH on July 2, 2007 in which it informed NIOSH that all cases potentially affected by the release of OCAS-PEP-013 would be reopened and returned to NIOSH for a new radiation dose reconstruction.[2]

In light of NIOSH's OCAS-PEP-013, a Director's Order was issued on October 25, 2007 vacating the FAB's Final Decision of April 24, 2006 under Part B and reopening these claims under Part B of EEOICPA. The Director ordered that the case be resubmitted to NIOSH so that NIOSH could perform a new dose reconstruction. Thereafter, the district office resubmitted the case to NIOSH.

The purpose of dose reconstruction is to determine the probability of whether an employee sustained his or her cancer in the performance of duty, in order to establish entitlement as required under the relevant portions of Part B. In performing the radiation dose reconstruction, NIOSH reported annual dose estimates from the date of initial radiation exposure during covered employment, to the date the cancer was first diagnosed. A summary and explanation of information and methods applied to produce these dose estimates, including the involvement of **[Claimant #1, Claimant #2 and Claimant #3]** through an interview and review of the dose report, are documented in the "NIOSH Report of Dose Reconstruction under EEOICPA." On December 24, 2007, **[Claimant #1]** and **[Claimant #3]** signed Form OCAS-1, and on January 28, 2008, **[Claimant #2]** signed Form OCAS-1, indicating that they had reviewed the NIOSH Draft Report of Dose Reconstruction and agreed that it identified all of the

relevant information they had provided to NIOSH. The district office received the new, final NIOSH Report of Dose Reconstruction on February 1, 2008. Pursuant to the NIOSH regulations, the district office used the information provided in this report to determine that there was a 1.16% probability that the employee's lung cancer was caused by his radiation exposure at the Paducah GDP.[3]

On February 11, 2008, the Jacksonville district office issued a recommended decision to deny these claims under Part B. Attached to the recommended decision was a notice of claimant rights, which stated that **[Claimant #1, Claimant #2 and Claimant #3]** had 60 days in which to file an objection to the recommended decision. These 60 days expired on April 11, 2008. They did not submit any objections to the recommended decision.

After considering all of the evidence in the file, the undersigned hereby makes the following:

FINDINGS OF FACT

1. **[Claimant #1, Claimant #2 and Claimant #3]** each filed a claim for survivor benefits under EEOICPA based on the employee's cancer.

2. The employee was employed at the GDP in Paducah, Kentucky, from May 12, 1952 until July 7, 1952.

3. The employee was diagnosed with lung cancer on December 17, 2002.

4. The employee, a widower, died on June 29, 2003.

5. **[Claimant #1, Claimant #2 and Claimant #3]** are the employee's surviving children.

6. The probability that the employee's lung cancer was caused by radiation at the Paducah GDP is 1.16%.

Based on the above-noted findings of fact, the undersigned also makes the following:

CONCLUSIONS OF LAW

The implementing regulations provide that within 60 days from the date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision and whether a hearing is desired. 20 C.F.R. § 30.310(a) (2006). If the claimant does not file a written statement that objects to the recommended decision and/or requests a hearing within the period of time allotted or if the claimant waives any objections to the recommended decision, FAB may issue a decision accepting the recommendation of the district office. 20 C.F.R. § 30.316(a).

I conclude that the medical evidence establishes that the employee was diagnosed with lung cancer. Part B of EEOICPA established a compensation program to provide a lump-sum payment of $150,000.00 and medical benefits as compensation to eligible covered employees who have been diagnosed with a specific occupational illness incurred as a result of their exposure to radiation, beryllium or silica while in the performance of duty for DOE and certain of its vendors, contractors and subcontractors. Additionally, Part B provides for compensation to be paid to the covered employee's

eligible survivors in the event that the covered employee is deceased at the time that compensation is paid under Part B. *See* 42 U.S.C. § 7284s(e).

In order for an employee to be entitled to compensation for cancer under Part B, he or she must meet the definition of a "covered employee with cancer," which means an employee who is a "member of the Special Exposure Cohort" with a "specified cancer" or an employee whose cancer is at least as likely as not related to employment at a DOE facility. *See* 42 U.S.C. § 7384l(9), (14) and (17); 42 U.S.C. § 7384n(b).

As noted above, **[Claimant #1, Claimant #2 and Claimant #3]** indicated that the employee worked at a SEC location. In pertinent part, EEOICPA defines a SEC member as follows:

> The term "member of the Special Exposure Cohort" means a Department of Energy employee, Department of Energy contractor employee, or atomic weapons employee who meets any of the following requirements:
>
> (A) The employee was so employed for a number of work days aggregating at least 250 work days before February 1, 1992, at [the] gaseous diffusion plant located in Paducah, Kentucky. . .and, during such employment—
>
> (i) was monitored through the use of dosimetry badges for exposure at the plant of the external parts of employee's body to radiation.

42 U.S.C. § 7384l(14)(a)(i). As stated above, DOE was unable to verify that the employee worked at the Paducah GDP. The documents used to establish the employee's work history at the Paducah GDP show that the employee's employment there ended on July 7, 1952. **[Claimant #1, Claimant #2 and Claimant #3]** indicated on their claim forms that the employee did not wear a dosimetry badge. Radioactive materials were not present at the Paducah GDP until July 1952. Since the employee was not exposed to radiation at the Paducah GDP for an aggregate of 250 workdays after July 1952, the employee cannot be considered to be a member of the SEC.[4]

An employee who is not a member of the SEC with a specified cancer will be considered to have sustained his or her cancer in the performance of duty if the cancer was at least as likely as not (a 50% or greater probability) related to radiation doses incurred while working at a DOE facility. *See* 42 U.S.C. § 7384n(b). In this case, the calculation of "probability of causation" does not show that there is a 50% or greater likelihood that the employee's lung cancer was caused by radiation received at the Paducah GDP in the performance of duty.

Based on my review of the evidence of record and the recommended decision, I conclude that **[Claimant #1, Claimant #2 and Claimant #3]** are not entitled to compensation under Part B of EEOICPA because the employee is not a "covered employee with cancer."

Jacksonville, FL

Wendell Perez

Hearing Representative

Final Adjudication Branch

[1] The PoC was calculated at that time to be 2.55%.

[2] *See* EEOICPA Bulletin No. 07-28 (issued September 6, 2007).

[3] Subsequently, FAB performed an independent analysis of the evidence received from NIOSH and confirmed the 1.16% proability of causation.

[4] Pursuant to the Federal (EEOICPA) Procedure Manual, Chapter 2-500.3a(2), if the employee qualifies for inclusion in the SEC on the basis of working at a GDP but has not indicated having worn a dosimeter on the EE-3 form, the claims examiner will be required to determine whether the employee had exposure within a time period during which his or her exposure was comparable to a job that is or was monitored through the use of dosimetry badges. For the Paducah GPD, the comparison dates of employment are July 1952 through February 1, 1992. This date has been established as the first date radioactive material was introduced into the plant. Therefore, for SEC purposes, the accepted beginning date of the employee's exposure to radiation at the Paducah GDP is July 1, 1952.

Compensable occupational illness

EEOICPA Fin. Dec. No. 1002-2005 (Dep't of Labor, January 17, 2006)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under Part B of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA or the Act), 42 U.S.C. § 7384 *et seq.* For the reasons set forth below, the Final Adjudication Branch accepts and approves your claim for compensation and medical benefits for the condition of thyroid cancer, and denies your claim based on the condition of brain tumor, under Part B of the Act.

STATEMENT OF THE CASE

On August 6, 2001, you filed a Form EE-1 (Claim for Benefits under the EEOICPA), based on the conditions of thyroid cancer and brain tumor.

You submitted a Form EE-3 (Employment History) indicating that you worked for Pan American Airlines (September 3, 1963 to April 21, 1970) and Reynolds Electrical & Engineering Company (REECo) (April 21, 1970 to February 2, 1994), at the Nevada Test Site. A representative of the Department of Energy (DOE) verified that you were employed with REECo for four periods: November 16 to December 30, 1970; April 21 to October 11, 1971; March 30, 1972 to July 27, 1973; and March 11, 1974 to September 30, 1993. Based on dosimetry records, which indicated you were present at the Nevada Test Site from September 3, 1963 to April 21, 1970, that employment was verified for Pan American World Airways. The Nevada Test Site is recognized as a covered Department of Energy facility site from 1951 to the present. REECo is indicated as a contractor of the DOE from 1952 to 1995. *See* DOE, Office of Worker Advocacy Facility List, http://www.eh.doe.gov/advocacy/faclist/showfacility.cfm (retrieved January 16, 2006).

The medical documentation you submitted included pathology reports and medical reports for your treatment of a brain tumor and thyroid cancer. On May 22, 1993 you were diagnosed with a large meningioma of the brain and underwent resection, which reoccurred necessitating resection again on October 16, 2000. The district office requested an opinion from your physician, Jay Tassin, M.D, whether your brain tumor was benign or cancerous. On November 27, 2001, he responded reluctantly that "It's a difficult question, as [] meningioma is 'benign' by histologic criteria, and unlikely to spread through the body via hematogenous or lymphatic seeding." Dr. Tassin noted the tumor has affected

your condition of health and quality of life. Other evidence of record indicates that on April 22, 1998 you underwent total throidectomy and Stephen D. McBride, M.D., diagnosed "follicular carcinoma."

To determine the probability of whether you sustained cancer in the performance of duty, the Seattle district office referred your claims to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction. *See* 20 C.F.R. § 30.115. The district office received the final NIOSH Report of Dose Reconstruction dated May 27, 2005.

The radiation dose reconstruction report indicates that an efficiency model was used for the dose reconstruction. For purposes of your radiation dose reconstruction, NIOSH used only your external dose and calculated missed dose during your work as a janitor and painter, at the Nevada Test Site. The dose reconstruction was 8.428 rem to the thyroid. NIOSH Report of Dose Reconstruction, p. 4. Thus the dose is reported is an "underestimate" of your total occupational radiation dose. NIOSH Report of Dose Reconstruction, p. 6. The Final Adjudication Branch notes that the employment period used by NIOSH, based on dosimetry records provided by the DOE, was January 1963 to September 30, 1993 (more than the period noted above).

Using the information provided in the Report of Dose Reconstruction, the Seattle district office utilized the Interactive RadioEpidemiological Program (IREP) to determine the probability of causation of thyroid cancer and reported in its recommended decision that there was a 51.43% probability that your thyroid cancer was caused by radiation exposure at the Nevada Test Site.

On September 2, 2005, the Seattle district office recommended acceptance of your claim for compensation based on the condition of thyroid cancer, with medical benefits retroactive to the date of filing, August 6, 2001.

FINDINGS OF FACT

1. On August 6, 2001, you filed a claim for benefits.

2. You were diagnosed with thyroid cancer on April 22, 1998.

3. You worked in covered employment for REECo and Pan American World Airways, at the Nevada Test Site from September 3, 1963 to April 21, 1970, and for REECo, at the Nevada Test Site from November 16 to December 30, 1970; April 21 to October 11, 1971; March 30, 1972 to July 27, 1973; and March 11, 1974 to September 30, 1993.

4. The diagnosis of cancer was made after you started work at a Department of Energy facility.

5. The NIOSH Interactive RadioEpidemiological Program indicated a 51.43% probability that your thyroid cancer was caused by radiation exposure at the Nevada Test Site.

CONCLUSIONS OF LAW

The undersigned has reviewed the recommended decision issued by the Seattle district office on September 2, 2005. I find that you have not filed any objections to the recommended decision as provided by § 30.316(a) of the regulations, and that the 60-day period for filing such objections, as provided for in § 30.310(a) has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

The Final Adjudication Branch calculated the probability of causation for your thyroid cancer using the

NIOSH-IREP software program. These calculation confirmed the 51.43% probability of causation that your thyroid cancer was "at least as likely as not" (a 50% or greater probability) caused by radiation exposure you incurred while employed at the Nevada Test Site.

While you provided proof you were diagnosed with a brain tumor, it is not a covered occupational illness. Under Part B of EEOICPA, "only malignant tumors are covered." Federal (EEOICPA) Procedure Manual, Chapter 2-600.3a(1)(a) (Sept. 2004). The available medical information does not support that meningioma is a malignant cancer, to fit within the coverage of Part B of EEOICPA. Your claim based on brain tumor under Part B is denied, although you may wish to file a claim under Part E.

Based on your covered employment at a covered DOE facility site and the medical documentation showing your diagnosis of thyroid cancer, and the determination that your cancer was at least as likely as not related to your occupational exposure at the Nevada Test Site, and thus sustained in the performance of duty, you are a "covered employee with cancer" under EEOICPA. *See* 42 U.S.C. § 7384l(1)(B), (9)(B); 20 C.F.R. § 30.213(b); 42 C.F.R. § 81.2.

You are entitled to $150,000.00 compensation and reimbursement of medical expenses related to the condition of thyroid cancer, retroactive to August 6, 2001, the date you filed your claim. *See* 42 U.S.C. §§ 7384s and 7384t; 20 C.F.R. § 30.400(a).

Washington, DC

Rosanne M. Dummer

Hearing Representative

EEOICPA Fin. Dec. No. 13679-2002 (Dep't of Labor, January 13, 2005)

NOTICE OF FINAL DECISION AND REMAND ORDER FOLLOWING A HEARING

This is the final decision and remand order of the Final Adjudication Branch concerning your claim for compensation under Part B of 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 for benefits based on your cancer and nesidioblastosis is denied. However, the case is remanded to the Jacksonville district office for the reason provided below. Adjudication of your Part E claim is deferred until issuance of the Interim Final Regulations.

STATEMENT OF THE CASE

On October 25, 2001, 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 distal pancreas and spleen nesidioblastosis.

On the Form EE-3, Employment History, you stated you were employed as an electrical worker by Westinghouse at the Savannah River Site (SRS) in Aiken, South Carolina, for the period of May 8, 1989 to April 1, 2001. The DOE verified these employment dates. You submitted medical evidence establishing that you were diagnosed with nesidioblastosis on September 21, 2000, and malignant epithelioid hemangioendothelioma on October 25, 2002.

A modification order of January 21, 2003, vacated the October 24, 2002 decision of the Final

Adjudication Branch, which affirmed the recommended denial of benefits dated August 19, 2002.
In order to be eligible for benefits under Part B of the Act, the evidence must establish that your cancer (hemangioendothelioma) was at least as likely as not related to your employment at a covered facility, within the meaning of the Act. 42 U.S.C. § 7384n.
To determine the probability of whether you sustained cancer in the performance of duty, the Jacksonville district office referred the application package to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction in accordance with the EEOICPA implementing regulations. 20 C.F.R. § 30.115. NIOSH reported annual dose estimates from the date of initial radiation exposure during covered employment, to the date the cancer was first diagnosed. A summary and explanation of information and methods applied to produce these dose estimates, including your involvement through an interview and review of the dose report, are documented in the "NIOSH Report of Dose Reconstruction under EEOICPA." On April 8, 2004, you signed Form OCAS-1, indicating the NIOSH Draft Report of Dose Reconstruction had been reviewed and agreeing that it identified all of the relevant information provided to NIOSH. The district office received the final NIOSH Report of Dose Reconstruction on April 26, 2004.

Pursuant to the implementing NIOSH regulations, the district office used the information provided in this report to determine that there was a 9.37% probability that your cancer was caused by radiation exposure at the SRS. 42 C.F.R. § 81.20. The Final Adjudication Branch independently analyzed the information in the NIOSH report, confirming the 9.37% probability.
On May 3, 2004, the Denver district office issued a recommended decision concluding that you are not entitled to compensation since your cancer is not covered under Part B of the Act.

The recommended decision informed you that you had sixty days to file any objections, and that period ended on July 2, 2004. On May 13, 2004, the Final Adjudication Branch received your letter of objection and request for a hearing dated May 12, 2004. In this letter, you discussed the progression of your health problems and their effect on your life. You made the following objections:

1) Although you were in perfect health when you began working at the SRS, your health started to deteriorate after working there.

2) The probability of causation was 9.37%; therefore, no one can say conclusively that your present condition was not caused by employment at the SRS.

The hearing was held on August 18, 2004, in North Augusta, South Carolina. During the hearing, you presented the following objections:

3) Before you were trained differently, you used to carry sources very close to your feet. HT page 8, line 17, through page 9, line 3. In addition, you would push contaminated material around with your feet to clear "the huts." HT page 9, lines 3 through 9, and page 10, line 7, through page 10, line 25. You wore the dosimetry badge on your chest, but your cancer developed in your feet, where you think more radiation was received. In other words, since the dosimetry badge was positioned on your chest, it did not accurately measure the radiation you received to your feet. HT page 9, line 8, through page 10, line 6, and page 10, line 25, through page 11, line 5. Sometimes you wore safety shoes or rubber booties, but when you were sourcing the vamps, often you would just have on tennis shoes. HT page 11, lines 12 through 16. Around 1995, new procedures were instituted, including the placement of the source in a lead box after using it. This causes you to think that the source was contaminated with radiation back when you were carrying it exposed right near your feet. HT page 11, line 17, through

page 12, line 17.

4) Besides your hemangioendothelioma, you were also diagnosed with nesidioblastosis, a rare pancreatic condition, after working at the SRS. The fact that you have two rare conditions makes you think you were exposed to a lot of toxic material. HT page 12, line 25, through page 14, line 17.

5) You provided additional information about the tank farms. You are discovering that you were exposed to more chemicals and types and intensity of radiation than you were told originally. HT page 19, line 22, through page 20, line 24.

6) You were often exposed to radon and RADCON would make you sit in a hut for hours until they told you that you were clear and could leave. Most of the time, the monitors would pick up the activity from your shoes. You read some research on a website from N. B. Anderson in Houston that said radon is a possible cause of your cancer. HT 23, line 12, through page 25, line 21.

In accordance with the implementing regulations, a claimant is allowed thirty days after the hearing is held to submit additional evidence or argument, and twenty days after a copy of the transcript is sent to them to submit any changes or corrections to that record. 20 C.F.R. §§ 30.314(e), 30.314(f). By letter dated September 15, 2004, the transcript was forwarded to you. No response was received. However, new medical evidence was submitted following the issuance of the recommended decision. Although this new evidence appears to mostly concern previously diagnosed conditions and their sequelae, some conditions mentioned do not appear to have been addressed.

Pursuant to the implementing regulations, if the claimant objects to NIOSH's dose reconstruction the Final Adjudication Branch (FAB) will evaluate the factual findings upon which NIOSH based the dose reconstruction. However, the methodology used by NIOSH in arriving at estimates of radiation doses received by an employee is binding on the FAB. 20 C.F.R. § 30.318.

In reference to your first objection, although your cancer occurred after your employment at the SRS, according to Part B of the Act, the connection between your cancer and your employment must be causal, not temporal. In other words, the evidence must show that your cancer was caused in the performance of duty, not that it occurred during or after your employment. 42 U.S.C. § 7384n(b). This is a challenge of fact, specifically a challenge to regulations.

Concerning your second objection, Part B of the Act states that a cancer is shown to have occurred in the performance of duty if the evidence shows that it was "at least as likely than not" caused by radiation exposure at work. 42 U.S.C. § 7384n(b). "At least as likely as not" is defined by a 50% or more probability of causation. 42 C.F.R. § 81.2. "Probability of causation" means the likelihood that a cancer was caused by radiation exposure incurred by a covered employee in the performance of duty. In statistical terms, it is the cancer risk attributable to radiation exposure divided by the sum of the baseline cancer risk (the risk to the general population) plus the cancer risk attributable to the radiation exposure. 42 C.F.R. § 81.4(n). This is a challenge of fact, specifically a challenge to statutory regulations.

The third objection concerns the correction for the location of the cancer in the foot to the dosimeter worn on the chest. As is noted in the "External Dose" section under the "Radiation Type, Energy, and Exposure Geometry" sub-section of the dose reconstruction report, the distribution of your exposure geometry and radiation energies was selected to maximize dose. Also, to ensure that the estimated dose

was maximized, an organ dose conversion factor of 1.0 was used to calculate the dose to the foot for photons per NIOSH's "Technical Basis Document for the Savannah River Site To Be Used for EEOICPA Dose Reconstructions," Rev. 1, August 2003. While a specific correction for the badge location on the body is not made, an organ dose correction factor of 1.0, which is claimant-favorable, is used to encompass this issue. During a discussion with a NIOSH health physicist, it was determined that you had 17 mrem recorded deep dose from two positive readings in your dose record. NIOSH assigned 2,574 mrem in this dose reconstruction. This overestimate of the dose to the foot appears to be sufficient to address any uncertainty about inferring dose from the dosimeter on the chest to the foot.

The "Dose from Radiological Incidents" section of your dose reconstruction report addresses the issues you discuss concerning the radioactive cesium source that would hang a few inches from your feet as you carried it. The discussion in this section of the report notes that any external dose received would have been measured or detected by the routine monitoring systems in place. This is a challenge of the dose reconstruction methodology, which is binding on the FAB per 20 C.F.R. § 30.318(b).

In reference to your fourth objection, although you were diagnosed with two rare conditions, NIOSH only considers primary cancers when performing the dose reconstruction and nesidioblastosis is not considered a covered occupational illness under Part B of the Act. While Part B of the Act extends benefits based on cancers which are caused by exposure to radiation, Part B does not consider cancer caused by other toxic materials. This is a challenge of fact, specifically a challenge to the statute.

In your fifth objection, you discuss your concerns that you were exposed to more chemicals and radiation at the tank farms than were considered in the dose reconstruction. Your discussion in the hearing transcript is not specific to any additional radiation or radionuclides that were present at the tank farm. The SRS site profile contains the assumptions used for exposures to workers at the tank farm and these assumptions are considered by NIOSH to result in overestimates of dose based on the energy of the radiation and the radionuclides assumed. In addition, the SRS site profile is a living document and as such will be revised if significant information is found that changes the assumptions and parameters used in dose reconstructions. If these changes require a denied case to be reevaluated, NIOSH will review all affected dose reconstructions to determine if the doses would be significantly increased. As stated above, Part B of the Act only considers exposure to radiation, not chemicals. This is a challenge of the dose reconstruction methodology, which is binding on the FAB per 20 C.F.R. § 30.318(b).

The sixth objection concerns the presence of radon. As stated above, the SRS site profile contains the assumptions used for exposures to workers at the tank farm and these assumptions are considered by NIOSH to result in overestimates of dose based on the energy of the radiation and the radionuclides assumed. Due to the energy of radiation from radon, the leather of the work boot or shoes would significantly attenuate the dose to the foot. This is a challenge of the dose reconstruction methodology, which is binding on the FAB per 20 C.F.R. § 30.318(b).

In reference to your discussion of the research publication by N. B. Anderson, NIOSH is constantly reviewing new scientific evidence that would significantly affect the cancer models used in the dose reconstructions and in NIOSH-IREP. In fact, NIOSH has recently begun a study of occupational exposures at DOE facilities and will apply any significant findings to the cancer models used in the dose reconstructions and in NIOSH-IREP. This is a factual objection and as stated above NIOSH is constantly reviewing new scientific evidence that would significantly affect the cancer models used in the dose reconstructions and in NIOSH-IREP.

In summary, your objections are challenges to NIOSH methodology and challenges of fact with insufficient evidence to warrant a rework by NIOSH.

FINDINGS OF FACT

1) On October 25, 2001, you filed a Form EE-1, Claim for Benefits under the EEOICPA, based on your distal pancreas and spleen nesidioblastosis.
2) You were employed at the SRS in Aiken, South Carolina, for the period of May 8, 1989 to April 1, 2001.
3) You were diagnosed with nesidioblastosis on September 21, 2000, and malignant epithelioid hemangioendothelioma on October 25, 2002. Nesidioblastosis is not a covered occupational illness under Part B of the Act and implementing regulations. 42 U.S.C. § 7384l(15); 20 C.F.R. § 30.5(z).
4) Based on the dose reconstruction performed by NIOSH, the district office calculated the probability of causation (the likelihood that the cancer was caused by radiation exposure incurred while working at a covered facility) for malignant epithelioid hemangioendothelioma. The district office calculated a probability of causation of 9.37% and determined that this condition was not "at least as likely as not" (a 50% or greater probability) related to employment at the covered facility. The Final Adjudication Branch independently analyzed the information in the NIOSH report, confirming the 9.37% probability.
5) On May 3, 2004, the Denver district office issued a recommended decision concluding that the dose reconstruction estimates were performed in accordance with the Act; that the probability of causation calculation was completed in accordance with the Act and implementing NIOSH regulations; that you did not sustain your hemangioendothelioma in the performance of duty as required by Part B of the Act; and that you are not entitled to compensation in the amount of $150,000 as outlined under Part B of the Act. 42 U.S.C. §§ 7384n(d), 7384n(c)(3), 7384n(b), 7384s(a); 42 C.F.R. §§ 81.0 *et seq.*, 81.21.

6) On May 13, 2004, the Final Adjudication Branch received your letter of objection and request for a hearing dated May 12, 2004.

7) The hearing was held on August 18, 2004, in North Augusta, South Carolina. The objections raised are challenges to NIOSH methodology and challenges of fact with insufficient evidence to warrant a rework by NIOSH.

CONCLUSIONS OF LAW

The undersigned has reviewed the facts and the recommended decision issued by the Denver district office on May 3, 2004, and finds that the evidence submitted before, during, or after the hearing does not establish that your malignant epithelioid hemangioendothelioma was at least as likely as not related to your employment at a covered facility as specified by the Act. 42 U.S.C. § 7384n. The evidence in the record does not establish that you are entitled to compensation under the Act because the calculation of "probability of causation" does not show that there is a 50% or greater likelihood that your cancer was caused by radiation exposure received at the SRS in the performance of duty. Therefore, I find that the decision of the Denver district office is supported by the evidence and the law, and cannot be changed based on the objections you submitted.

Your claim for benefits on the basis of your nesidioblastosis is denied since this is not a beryllium illness, cancer, or chronic silicosis, and cannot be considered a covered occupational illness under Part B of the Act and implementing regulations. 42 U.S.C. § 7384l(15);

20 C.F.R. § 30.5(z).

As explained in § 30.110(b) of the implementing regulations, "Any claim that does not meet all of the criteria for at least one of these categories as set forth in these regulations must be denied." 20 C.F.R. §

30.110(b). The undersigned hereby denies payment of lump-sum compensation and medical benefits under Part B of the Act.

However, the case is remanded to the Jacksonville district office for review of the medical evidence submitted following the issuance of the recommended decision. After reviewing the medical reports in accordance with EEOICPA and the implementing regulations, the district office should issue a new recommended decision.

Jacksonville, FL

Mark Stewart

Hearing Representative

EEOICPA Fin. Dec. No. 60418-2005 (Dep't of Labor, June 21, 2005)

NOTICE OF FINAL DECISION FOLLOWING A REVIEW OF THE WRITTEN RECORD

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). Since **[Claimant #2]** requested a hearing, but then did not attend the scheduled hearing, a review of the written record was performed, in accordance with the implementing regulations. 20 C.F.R. § 30.312.

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, in accordance with the implementing regulations. 20 C.F.R. § 30.310. In reviewing any objections submitted, the Final Adjudication Branch will review the written record, any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. 20 C.F.R. § 30.313.

For the reasons set forth below, your claims for benefits are denied.

STATEMENT OF THE CASE

On August 3, 2004, **[Claimant #2]** filed a Form EE-2, Claim for Survivor Benefits under the EEOICPA, and on August 11, 2004, **[Claimant #1]** filed a Form EE-2. The claims were based, in part, on the assertion that your late mother 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 lung cancer, hypoxia, obstructive jaundice, beryllium sensitivity, and chronic beryllium disease.

On the Form EE-3, Employment History, you stated that the employee was employed at the American Beryllium Company in Tallevast, Florida, from September 1982 to June 1992. The district office verified this employment as September 1, 1982 to June 1, 1992 through Social Security earnings records and other employment records.

To support your claim that the employee had a condition that was covered by § 7384 of the EEOICPA, you initially submitted medical evidence consisting of records of the employee's diagnosis and

treatment for lung cancer in 2000. All of the medical evidence of the employee's treatment for a chronic lung condition was dated after January 1, 1993. There is no provision for coverage of cancer as a result of employment with a designated beryllium vendor.[1]

Because the medical evidence submitted did not diagnose a compensable occupational illness, the district office provided you the opportunity to substantiate your claims by sending development letters dated August 30, 2004; November 17, 2004; and January 7, 2005. Those letters explained the needed information, requested additional medical evidence, and allowed time for response. No additional medical evidence was received.

Because the necessary elements to establish a diagnosis of a compensable occupational illness under the Act were not met, the Jacksonville district office issued a recommended denial on February 11, 2005. The recommended decision found that the evidence does not establish that the employee was diagnosed with chronic beryllium disease or beryllium sensitivity. 42 U.S.C. § 7384l(8). The recommended decision also found that hypoxia, obstructive jaundice, and lung cancer are not compensable occupational illnesses as described in the Act. 42 U.S.C. § 7384.

Section 7384 of the Energy Employees Occupational Illness Compensation Program Act established a compensation program to provide a lump sum payment of $150,000 and medical benefits as compensation to eligible covered employees who have been diagnosed with a specific occupational illness incurred as a result of their exposure to radiation, beryllium, or silica while in the performance of duty for the DOE and certain of its vendors, contractors, and subcontractors. 42 U.S.C. § 7384. Eligible survivors may receive lump sum compensation, if applicable. Those "occupational illnesses" covered by the EEOICPA are specifically described in § 7384 of the Act as "covered beryllium illness, cancer referred to in § 7384l(9)(B)[2] of this title, specified cancer, or chronic silicosis, as the case may be." 42 U.S.C. § 7384l(15). There are no provisions under § 7384 of the EEOICPA to cover any other illnesses, even if that illness may be related to employment at a covered facility.

A person exposed to beryllium during the course of employment in specified facilities qualifies as a "covered beryllium employee," as defined in the Act. 42 U.S.C. § 7384l(7). Due to confirmation of the employee's employment in a facility where beryllium was present, the employee is considered to be a "covered beryllium employee." However, in order to receive medical benefits and/or compensation, the employee must have been diagnosed with a covered beryllium illness, in accordance with the Act and implementing regulations. 42 U.S.C. § 7384l(8), 20 C.F.R. § 30.205. "Covered beryllium illness" is defined in the Act as beryllium sensitivity as established by an abnormal beryllium lymphocyte proliferation test (LPT) performed on either blood or lung lavage cells *or* established chronic beryllium disease. 42 U.S.C. § 7384l(8).

You claimed that the employee was diagnosed with beryllium sensitivity and chronic beryllium disease. According to the Act, chronic beryllium disease is 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

(iii) 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). 42 U.S.C. § 7384l(13).

Given that all of the medical documentation that was submitted for the employee's treatment for a chronic lung disease was dated post-1993, the criteria for a diagnosis of chronic beryllium disease diagnosed after January 1, 1993 was applied to the submitted medical evidence. Without an abnormal beryllium lymphocyte proliferation test performed on either blood or lung lavage cells or a pathology report from a lung tissue biopsy that confirms the presence of granulomas, the criteria for a diagnosis of chronic beryllium disease post-1993 can not be established. There is no evidence of record that the employee was tested for beryllium sensitivity or that the employee had a lung tissue biopsy that confirmed the presence of granulomas.

The EEOICPA implementing regulations are clear as to the burden of proof placed on every claimant under the Act. Submitting medical evidence in support of a claim is ultimately the claimant's responsibility, as explained in the implementing regulations. 20 C.F.R. § 30.111. This section states that "the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category. . .the claimant also bears the burden of providing to the OWCP all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in these regulations."

OBJECTIONS

The recommended decision informed you that you had 60 days to file any objections, and that period ended on April 12, 2005. On February 22, 2005, the Final Adjudication Branch received **[Claimant #2's]** letter of objection dated February 16, 2005. In the letter, you stated that you disagreed with the

recommended decision; that your mother was employed at American Beryllium for 10 years and her job was to deburr the beryllium, which released beryllium dust into the air; that the records of company annual physicals have disappeared; that she died before tests for beryllium sensitivity were available; that you could not obtain medical records because of the time that has passed; that she took many over-the-counter drugs for sinusitis and bronchitis and allergies; that she died of the same symptoms as the disease of CBD; and that negligence was the reason for her death. You requested an oral hearing, which was scheduled for

April 20, 2005 in St. Petersburg, Florida.

When you did not appear for the hearing at the scheduled time, you were contacted by telephone. You stated that you were in the process of moving and would not be able to attend. Therefore, the request for a hearing was converted to a review of the written record.

The district office verified that your mother worked at American Beryllium for at least 10 years. However, neither the district office nor the FAB is granted flexibility in relaxing the statutory requirements for a diagnosis of beryllium sensitivity or chronic beryllium disease. Without an abnormal beryllium lymphocyte proliferation test performed on either blood or lung lavage cells or a pathology report from a lung tissue biopsy that confirms the presence of granulomas, the criteria for a diagnosis of chronic beryllium disease post-1993 can not be established.

FINDINGS OF FACT

1. You each filed a Form EE-2, Claim for Survivor Benefits under the EEOICPA.

2. You claimed the employee's conditions of chronic beryllium disease, beryllium sensitivity, hypoxia, lung cancer, and obstructive jaundice.

3. The employee was employed at the American Beryllium Company. Since beryllium was present at the American Beryllium Company during the time of the employee's employment, the employee is considered a "covered beryllium employee," as defined in the Act.

4. The medical evidence does not establish that the employee was diagnosed with a "covered beryllium illness" as defined in the Act.

5. You also claimed the employee's other lung conditions of hypoxia and lung cancer. Hypoxia is a symptom, and is not a beryllium illness, cancer or silicosis, and, therefore, cannot be considered a compensable occupational illness as defined by the Act and implementing regulations. Lung cancer, while a compensable occupational illness in certain situations, is not considered as such for employees of beryllium vendors.

6. The Jacksonville district office issued the recommended decision on February 11, 2005.

7. On March 21, 2005, the Final Adjudication Branch received **[Claimant #2's]** letter of objection dated March 10, 2005, and a review of the written record was conducted.

CONCLUSIONS OF LAW

The undersigned has reviewed the facts and the recommended decision issued by the Jacksonville district office on February 11, 2005, and finds that the evidence submitted does not establish that the employee was diagnosed with chronic beryllium disease, as defined in the Act, or any other compensable occupational illness, as defined in the Act and implementing regulations. 42 U.S.C. §§ 7384l(13), 7384l(15); 20 C.F.R. § 30.5(z). I find that the decision of the district office is supported by the evidence and the law, and cannot be changed based on the objections you submitted. As explained in the implementing regulations, "Any claim that does not meet all of the criteria for at least one of these categories as set forth in these regulations must be denied." 20 C.F.R. § 30.110(b). The undersigned hereby denies payment of lump sum compensation and medical benefits under § 7384 of the Act.

42 U.S.C. § 7384.

Jacksonville, FL

Sidne M. Valdivieso

Hearing Representative

[1] EEOICPA Bulletin No. 03-08 (issued December 16, 2002).

[2] 42 U.S.C. § 7384l(9)(B) describes a "covered employee with cancer" as "An individual with cancer specified in subclause (I), (II), or (III) of clause (ii), if and only if that individual is deemed to have sustained that cancer in the performance of duty in accordance with § 7384n(b)" of the EEOICPA. Clause (ii) states that to be covered for cancer, the employee must have been a DOE employee, DOE contractor employee or an atomic weapons employee who contracted the cancer after beginning such employment.

EEOICPA Fin. Dec. No. 10086042-2010 (Dep't of Labor, June 22, 2010)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) on the above-noted claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claim for medical benefits due to choroid melanoma of the left eye, based on exposure to non-ionizing radiation, is accepted under Part E of EEOICPA. The claim for choroid melanoma of the left eye under Part B is deferred pending completion of a radiation dose reconstruction.

STATEMENT OF THE CASE

On September 9, 2009, the employee filed a Form EE-1 claiming benefits under EEOICPA for choroid melanoma. On a Form EE-3, Employment History, he indicated he was employed as a welder by Union Carbide at the Oak Ridge Gaseous Diffusion Plant (K-25) from September 1967 to July 1974. The Oak Ridge Institute for Science and Education (ORISE) database verified his contractor employment as a welder at K-25 from September 18, 1967 to July 5, 1974. K-25 is a covered Department of Energy (DOE) facility.[1]

DOE provided the employee's available personnel and medical records. A November 3, 1969 medical report noted conjunctivitis (flash burns) to his eyes after performing his regular welding duties and noted he had suffered previous flash burns. An incident report, dated December 18, 1969, diagnosed

flash burns to his eyes after welding at K-25 and again noted he had previous burns to his eyes. A September 1, 2009 letter, signed by the employee's physician, listed a diagnosis of choroidal melanoma of the left eye.
On October 5, 2009, the employee completed an Occupational History Questionnaire in which he identified areas in which he worked (K-1401, K-1410, K-1420), his job title (welder), and some of the toxic substances to which he may have been exposed in the course of his employment (including beryllium, cadmium, chromium, lead, manganese, etc.).
To determine his exposure to ionizing radiation, the district office referred the employee's application package to the National Institute for Occupational Safety and Health (NIOSH) for a radiation dose reconstruction. The reconstruction is still being completed.
The district office reviewed source documents used to compile the U. S. Department of Labor's Site Exposure Matrices (SEM) to determine whether or not it is possible that, given the employee's labor category and the work processes engaged in, he was exposed to a toxic substance in the course of employment that corresponds to the claimed medical condition. The SEM search failed to establish a known causal link between melanoma and exposure to any toxic substance.

The district office sent the employee's records to a district medical consultant (DMC) for review. In an April 26, 2010 report, the DMC concluded that it was "at least as likely as not" that exposure to toxic substances at the covered facility was a significant factor in causing, contributing to, or aggravating the employee's choroidal melanoma of the left eye. The DMC noted that a recognized risk factor for ocular melanoma is ultraviolet light exposure and there is growing scientific literature which includes case-control epidemiologic studies and meta-analysis that supports that work as a welder increases risk for ocular melanoma, particularly if multiple burns of the eyes occur. The DMC noted that high energy welding processes can generate intense ultraviolet light and the welding-related burns, which can occur in the eyes or skin, are sometimes called flash burns. The DMC noted that the time between his documented flash burns to the eyes to diagnosis of the eye melanoma is a sufficient latency period for the cancer to occur from worksite exposures.

On May 20, 2010, the Jacksonville district office issued a recommended decision recommending acceptance of the claim for medical benefits under Part E for choroid melanoma of the left eye. The recommended decision informed the employee that he had 60 days to file any objections. On May 27, 2010, FAB received written notification that the employee waived any and all objections to the recommended decision. On June 18, 2010, FAB received the employee's signed statement verifying that he had not received any settlement or award from a lawsuit related to toxic exposure at the covered facility or workers' compensation claim in connection with choroid melanoma of the left eye, and that he had neither pled guilty to nor been convicted of workers' compensation fraud.

In light of the above, the undersigned hereby makes the following:

FINDINGS OF FACT

1. On September 9, 2009, the employee filed a claim for benefits under EEOICPA based on choroid melanoma.

2. The employee was initially diagnosed with choroid melanoma of the left eye on September 1, 2009.

3. The employee was a DOE contractor employee at K-25 from September 18, 1967 to July 5,

1974.

4. There is a causal relationship between toxic exposure at K-25 and the employee's choroid melanoma of the left eye.

Based on the above findings of fact, the undersigned hereby makes the following:

CONCLUSIONS OF LAW

Section 30.316(a) of the EEOICPA regulations provides that, if the claimant waives any objections to all or part of the recommended decision, FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part. 20 C.F.R. § 30.316(a) (2010).

Under Part E, a "covered illness" means an illness or death resulting from exposure to a toxic substance. A "toxic substance" means any material that has the potential to cause illness or death because of its radioactive, chemical, or biological nature. 20 C.F.R. § 30.5(ii). Non-ionizing radiation in the form of radio-frequency radiation, microwaves, visible light, and infrared or ultraviolet light radiation is a toxic substance under Part E.[2]

Under Part B, radiation is defined only as ionizing radiation in the form of alpha particles, beta particles, neutrons, gamma rays, X-rays, or accelerated ions or subatomic particles from accelerator machines. 42 U.S.C. § 7384l(16). A NIOSH radiation dose reconstruction is required to determine the probability that ionizing radiation exposure during the performance of duty caused an employee's cancer. However, EEOICPA does not require a dose reconstruction to determine if *non*-ionizing radiation exposure caused an employee's cancer under Part E. 20 C.F.R. § 30.213(c).

The evidence establishes that it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing the employee's choroid melanoma of the left eye. The employee was a DOE contractor employee with choroid melanoma of the left eye due to exposure to a toxic substance at a DOE facility. Therefore, I hereby conclude that the employee is entitled to medical benefits for choroid melanoma of the left eye, effective September 9, 2009, under Part E of EEOICPA.

Jacksonville, FL

Jeana F. LaRock

Hearing Representative

Final Adjudication Branch

[1] See DOE's facility list on the agency website at: http://www.hss.energy.gov/healthsafety/FWSP/advocacy/faclist/showfacility.cfm (Retrieved June 21, 2010).

[2] Federal (EEOICPA) Procedure Manual, Chapter 0-0500.2(ss) (November 2008).

Dose reconstruction

EEOICPA Fin. Dec. No. 884-2002 (Dep't of Labor, May 31, 2006)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) 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 under Part B of the Act is denied. Adjudication of the claim filed under Part E of the Act is deferred pending further development.

STATEMENT OF THE CASE

On August 7, 2001, you submitted a claim (Form EE-1) for benefits under Part B of EEOICPA, and identified colon cancer as the diagnosed condition on which your claim was based. You submitted an Employment History (Form EE-3) on which you stated that you were employed: by Quadrex , Inc. at the Oak Ridge Gaseous Diffusion Plant (K-25)[1] from January 1981 to January 1987; by Chemical Waste Management, at K-25, from April 1, 1991 to October 30, 1993; by Ferguson Harbour, Inc. at the Portsmouth Gaseous Diffusion Plant (PGDP)[2] from November 1, 1993 to May 30, 1994; by DKM Construction, Inc. from May 1, 1994 to May 17, 1994, and by R & D Development, Inc. from January 1, 1994 to October 30, 1994, both at the Portsmouth GDP; by the Foley Company, at the Oak Ridge National Laboratory (X-10)[3] from November 1, 1994 to December 1, 1996; by FedEx Custom Critical, as a team driver making deliveries across Canada and the United States, including Department of Energy (DOE) facilities, from January 19, 1997 to April 18, 2000; and by Safety and Ecology, Inc., at the Brookhaven National Laboratory(BNL)[4] from May 18, 2000 to March 23, 2001.

As medical evidence, you submitted numerous records, including a pathology report, dated May 15, 2001, from Joseph Eatherly, M.D., which provides a diagnosis of well-differentiated adenocarcinoma of the colon; and an operative report from Francis Cross, M.D., dated May 21, 2001, which provides a diagnosis of carcinoma of the cecum.

You submitted six affidavits (Form EE-4) concerning your employment at K-25, the Portsmouth GDP, and at the BNL. There was an affidavit from Kenneth Burch, who identified himself as a friend. He indicated that you worked for Quadrex at K-25 from January 1, 1981 to January 1, 1987, and that he "lived at the same address for a short period of time."

Your wife, **[Employee's wife]**, completed four of the six affidavits, indicating that you worked: for Chemical Waste Management at K-25 from April 1, 1991 to October 30, 1993; at the Portsmouth GDP from November 1, 1993 to October 30, 1994; for the Foley Company at X-10 from November 1, 1994 to December 1, 1996; at the BNL from May 18, 2000 to March 23, 2001. You also submitted copies of an assortment of employment records, which included various certificates regarding training courses, internship records, training attendance reports and sign in sheets, which you contend provides evidence of employment with, or for, the Portsmouth GDP, FedEx, X-10, Quadrex, and the BNL.

In October 2001, you provided the district office with a copy of a letter to you dated June 20, 1992, from the Quadrex Corporation/ Quadrex Recycle Center. The first paragraph of the letter states, "This is to inform you **[Employee]**, Social Security Number **[Number]**, that you were monitored for ionizing radiation for the period indicated and incurred the below listed exposure while performing activities at Quadrex Recycle Center, Oak Ridge, Tennessee." The letter indicates that the exposure site was the Recycle Center, and it documents exposure dates between October 25, 1982 and June 24, 1984. There

are no dates listed for the period between November 24, 1982 and October 21, 1983.

You indicated in an affidavit dated January 19, 2002, that your employment dates with Quadrex, at K-25, were from November 24, 1982 to October 21, 1983. In correspondence dated November 11, 2001, the DOE verified your employment at K-25 for the period of July 7, 1992 to February 4, 1993.

On February 26, 2002, the Jacksonville district office issued a decision on your claim, recommending approval of the claim, after concluding that you were employed for an aggregate of at least 250 work days, at K-25, prior to February 1, 1992.

The Oak Ridge Natural Laboratory, via correspondence dated September 3, 2002, advised that they were unable to locate any records regarding your claimed employment.

A representative of US ECOLOGY, successor company to Quadrex, and operating at the same address as did Quadrex in Oak Ridge, Tennessee, sent a memo to the FAB, dated May 6, 2002, which provided copies of your Quadrex dosimetry records, and indicated that US ECOLOGY was not able to verify your claim that any field assignments were made to K-25 from Quadrex.

On July 15, 2002, the FAB issued a remand order, sending the claim back to the district office to determine if, in fact, you had 250 days of aggregate employment prior to February 1, 1992 at a gaseous diffusion plant.

On December 19, 2002, the district office received a copy of your Social Security records for the time period of January 1987 thru December 2001. In September 2002, the BNL provided information reflecting employment dates of June 5, 2000 to March 9, 2001. On September 16, 2002, the DOE provided confirmation of your work history at the Portsmouth GDP. The DOE was only able to provide your termination date of November 30, 1994.

The district office was unable to establish that Quadrex was a DOE contractor. The district office was also unable to establish that you worked an aggregate of 250 work days at a gaseous diffusion plant prior to February 1, 1992. Therefore, to determine the probability of whether you sustained your colon (cecum) cancer in the performance of duty, the district office referred your application package to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction in January 2003, in accordance with the EEOICPA implementing regulations. On April 4, 2004, you signed a Form OCAS-1, indicating that you had reviewed the NIOSH Draft Report of Dose Reconstruction and agreed that it identified all of the relevant information you provided to NIOSH. On April 22, 2004, NIOSH submitted the Final Report of Dose Reconstruction to the district office.

The dose reconstruction performed by NIOSH was to have been performed using verified dates of covered employment as determined by the district office. NIOSH utilized your verified dates of employment, however, they also added in dates of employment which had not been verified by the district office. NIOSH added unverified employment at K-25 from December 1, 1991 to July 6, 1992; and unverified employment at the Portsmouth GDP from March 3, 1995 to December 31, 1996. The district office used the information provided in the final NIOSH report, including data obtained utilizing the unverified employment dates, to determine that there was a 20.14% probability that your colon (cecum) cancer was caused by radiation exposure at a covered DOE facility.

On March 7, 2005, you filed a Request for Review by Physician Panel, under the EEOICPA, with the

Department of Energy, seeking assistance with a claim for state workers' compensation benefits under Part D (since replaced by Part E) of EEOICPA. You claimed colon cancer and lung scarring as the conditions that you felt were caused by employment at DOE facilities.

On March 7, 2006, the DOE advised the Jacksonville district office that Quadrex was not involved with remediation of sludge ponds at K-25 during the 1980's.

On March 15, 2006, the Jacksonville district office issued a recommended decision which concluded: that you do not qualify as a member of the Special Exposure Cohort, as you were not employed at a gaseous diffusion plant prior to February 1, 1992; that NIOSH performed dose reconstruction estimates in accordance with applicable statutes and regulations; and that the Department of Labor completed the Probability of Causation calculation in accordance with applicable statutes and regulations. The district office recommended denial of your claim based on its conclusions.

After considering the written record of the claim forwarded by the district office, and after conducting any further development of the claim as was deemed necessary, the Final Adjudication Branch hereby makes the following:

FINDINGS OF FACT

1. You filed a claim for benefits under Part B of the EEOICPA on August 7, 2001, based on your colon cancer.

2. You were employed at K-25, a DOE facility, from July 7, 1992 through February 4, 1993; at the Portsmouth GDP, a DOE facility, from June 2, 1994 to November 30, 1994; and at the Brookhaven National Laboratory, a DOE facility, from June 5, 2000 to March 9, 2001.

3. You were not employed for an aggregate of 250 work days at a gaseous diffusion plant prior to February 1, 1992.

4. You were diagnosed with cancer of the colon (cecum) on May 15, 2001.

5. NIOSH reported dose estimates for your cancer for each year of your employment at a DOE facility, through the date that your colon cancer was diagnosed. A summary and explanation of information and methods applied to produce these dose estimates are documented in the "NIOSH Report of Dose Reconstruction under the EEOICPA," provided to the district office on April 22, 2004.

6. NIOSH included several periods of unverified DOE employment to produce the dose reconstruction; at K-25, from December 1, 1991 to July 6, 1992; and at the Portsmouth GDP from March 3, 1995 to December 31, 1996. There is no substantive evidence that you were employed at K-25 between December 1, 1991 and July 6, 1992.

7. On May 26, 2006, the Final Adjudication Branch independently analyzed the information in the NIOSH report and confirmed the 20.14% probability of causation.

8. You have not filed any objections to the recommended decision.

Based on the above-noted findings of fact in this claim and pursuant to the authority granted by the EEOICPA regulations, the Final Adjudication Branch hereby also makes the following:

CONCLUSIONS OF LAW

Section 30.310(a) of the EEOICPA implementing regulations provides that, "Within 60 days from the date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision, including HHS's reconstruction of the radiation dose to which the employee was exposed (if any), and whether a hearing is desired." 20 C.F.R. § 30.310(a). Section 30.316(a) of those regulations further states that, "If the claimant does not file a written statement that objects to the recommended decision and/or requests a hearing within the period of time allotted in § 30.310, or if the claimant waives any objections to all or part of the recommended decision, the FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part." 20 C.F.R. §§ 30.310 and 30.316(a). The allowed time to file an objection has passed, and you have not filed an objection to the recommended decision.

Eligibility for EEOICPA compensation based on cancer may be established by demonstrating that the employee is a member of the "Special Exposure Cohort" (SEC) who contracted a specified cancer after beginning employment at a DOE facility (in the case of a DOE employee or DOE contractor employee). 42 U.S.C. §§ 7384l(9)(A), 7384l(14)(A).

In order for the employee to qualify as a member of the SEC under 42 U.S.C. § 7384l (14) (A) of the Act, the following requirements must be satisfied:

> (A) The employee was so employed for a number of work days aggregating at least 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, and, during such employment - -
>
> > (i) was monitored through the use of dosimetry badges for exposure at the plant of the external parts of employee's body to radiation; or
> >
> > (ii) worked in a job that had exposures comparable to a job that is or was monitored through the use of dosimetry badges.

The evidence of record does not establish that you were employed at a gaseous diffusion plant prior to February 1, 1992. The weight of the evidence supports that Quadrex did not have a contractual relationship with K-25 during your claimed employment at K-25 from November 24, 1982 to October 21, 1983. You have asserted that during this period of time you were working onsite at K-25, assisting with the pumping of ponds into underground tanks, and loading mud into drums. The DOE has advised that Quadrex was not involved with the remediation of sludge ponds at K-25 in the 1980's.

Assuming, for the purposes of argument, that you were employed as a DOE contractor at K-25 for the period of November 24, 1982 to October 21, 1983, this period of time does not satisfy the requirement of being employed at a gaseous diffusion plant for an aggregate of 250 *work days* before February 1, 1992. Your other alleged employment at a gaseous diffusion plant, prior to February 1, 1992, is with Chemical Waste Management at K-25, for the period of December 1, 1991 to July 6, 1992. Records received from the Social Security Administration do not indicate you were employed in 1991 for Waste Management. The DOE has confirmed your employment at K-25 from July 7, 1992 through February

4, 1993. This period of time is supported by the Social Security Administration records. Therefore, even assuming, for purposes of argument only, that you were employed at K-25 for the period of November 24, 1982 to October 21, 1983, given a lack of affirmative evidence that you were employed at a gaseous diffusion plant at any other time prior to February 1, 1992, your aggregate work days would not amount to 250 prior to February 1, 1992. Accordingly, you do not qualify as a member of the SEC. 42 U.S.C. § 7384l (14)
(A).

Inasmuch as you do not qualify as a member of the SEC, to establish eligibility for compensation as a result of cancer, it must first be established that you were a DOE employee, a DOE contractor employee or an atomic weapons employee who contracted cancer (that has been determined pursuant to guidelines promulgated by Health and Human Services, "to be at least as likely as not related to such employment"), after beginning such employment. 42 U.S.C. § 7384l (9) and 20 C.F.R. § 30.210.

While EEOICPA does not contain a specific definition of a DOE contractor, it does contain a definition of a DOE contractor employee that, in effect, defines what a DOE contractor is. Section 7384l(11) of EEOICPA defines a DOE contractor employee as:

A. An individual who is or was in residence at a Department of Energy facility as a researcher for one or more periods aggregating at least 24 months.

B. an individual who is or was employed at a Department of Energy facility by—

(i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or

(ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

The DEEOIC has further addressed the issues of how a "contractor or subcontractor" may be defined in EEOICPA Bulletin No. 03-27 (issued May 28, 2003). The following definitions have been adopted by the DEEOIC:

Contractor – An entity engaged in a contractual business arrangement with the Department of Energy to provide services, produce materials or manage operations at a beryllium vendor or Department of Energy facility.

Subcontractor – An entity engaged in a contracted business arrangement with a beryllium vendor contractor or a contractor of the Department of Energy to provide a service at a beryllium vendor or Department of Energy facility.

Service – In order for an individual working for a subcontractor to be determined to have performed a "service" at a covered facility, the individual must have performed work or labor for the benefit of another within the boundaries of a DOE or beryllium vendor facility. Example of workers providing such services would be janitors, construction and maintenance works.

Contract - An agreement to perform a service in exchange for compensation, usually memorialized by a memorandum of understanding, a cooperative agreement, an actual written contract, or any form

of written or implied agreement, is considered a contract for the purpose of determining whether an entity is a "DOE contractor."

Delivery of Goods – The delivery and loading or unloading of goods alone is **not** a service and is not covered for any occupation, including construction and maintenance workers.

You have alleged covered employment as a team driver with FedEx Custom Critical. You have also indicated that you actually worked for Tires on Fire Express, which had a contract with FedEx. There is no evidence of record indicating that there was a contract between the DOE and FedEx. The evidence indicates that, irregardless of whether a contract existed between Tires on Fire Express and the DOE, that your job with Tires on Fire did not involve you providing services, producing materials, or managing operations at a DOE facility. Accordingly, your employment at FedEx Custom Critical does not qualify as covered employment under the Act. EEOICPA Bulletin No. 03-27 (issued May 28, 2003).

The balance of the evidence of record does establish that you are a DOE contractor-employee, who contracted colon cancer, after beginning your employment at several DOE facilities. On May 26, 2006, using the dose estimates provided by NIOSH, the FAB calculated the probability of causation for your colon cancer with the software program known as NIOSH-IREP. These calculations show that there is a 20.14% probability that your colon cancer was caused by your exposure to radiation during the period of your covered employment.

Because the evidence of record does not establish that your colon cancer was "at least as likely as not" (a 50% or greater probability) caused by your employment at a DOE facility within the meaning of 42 U.S.C. § 7384n of the Act, I find that you are not entitled to benefits under Part B of the Act, and that your claim for compensation must be denied.

Washington, DC

Steven A. Levin

Hearing Representative

Final Adjudication Branch

[1] Oak Ridge Gaseous Diffusion Plant (K-25) was a Department of Energy facility from 1943 to 1987 and from 1988 to the present in remediation, where radioactive materials were present, according to the Department of Energy Office of Worker Advocacy Facility List. (http://www.eh.doe.gov/advocacy/faclist/findfacility.cfm).

[2] The Portsmouth Gaseous Diffusion Plant (PGDP), in Piketon, Ohio, is a covered Department of Energy facility from 1952 to July 28, 1998, where radioactive materials were present, as well as from July 29, 1998 to the present, when the facility has been in remediation, according to the Department of Energy Office of Worker Advocacy Facility List. (http://www.eh.doe.gov/advocacy/faclist/showfacility.cfm).

[3] The Oak Ridge National Laboratory, also known as X-10, was a DOE facility from 1943 to present, where radioactive materials were present, according to the Department of Energy Office of Worker Advocacy Facility List. (http://www.eh.doe.gov/advocacy/faclist/findfacility.cfm).

[4] The Brookhaven National Laboratory was a Department of Energy facility from 1947 to present, where radioactive material was present, according to the Department of Energy Office of Worker Advocacy Facility List. (http://www.eh.doe.gov/advocacy/faclist/findfacility.cfm).

EEOICPA Fin. Dec. No. 2597-2002 (Dep't of Labor, July 8, 2003)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA).

On June 6, 2003, the Jacksonville district office issued a decision recommending that you are entitled to medical benefits effective April 28, 2003 for colon cancer.

The district office referred the claims for skin cancer and cancer of the pyriform sinus to the National Institute for Occupational Safety and Health (NIOSH). However, the pyriform sinus is part of the hypo pharynx. EEOICPA Bulletin No. 02-28, Effective September 5, 2002, further defines that the hypo pharynx is one of three parts of the pharynx. The pharynx is a Special Exposure Cohort (SEC) cancer as defined in § 7384l(17)(A) of the Act, and § 30.5(dd)(5)(iii)(E) of the implementing regulations. 42 U.S.C. § 7384l(17)(A), 20 C.F.R. § 30.5(dd)(5)(iii)(E). Therefore, I find that **[Employee]** has cancer of the pharynx, and is entitled to medical benefits for the treatment of pharynx cancer. As the pyriform sinus (pharynx cancer) is an SEC cancer, there is no need for dose reconstruction by NIOSH. The condition of skin cancer remains for dose reconstruction at NIOSH.

On June 16, 2003, the Final Adjudication Branch received your written notification that you waive any and all objections to the recommended decision. I have reviewed the record on this claim and the recommended decision issued by the district office on June 6, 2003. I find that you are a member of the Special Exposure Cohort, as that term is defined in § 7384l(14)(A) of the Act; and that your colon cancer and pharynx (pyriform sinus) cancer are specified cancers under § 7384l(17)(A) of the Act and §§ 30.5(dd)(5)(iii)(M) and (E) of the implementing regulations. 42 U.S.C. §§ 7384l(14)(A), 7384l(17)(A), 20 C.F.R. §§ 30.5(dd)(5)(iii)(M), 30.5(dd)(5)(iii)(E).

A claimant is entitled to compensation one time in the amount of $150,000 for a disability from a covered occupational illness. Since you were previously awarded $150,000 for lung cancer, this decision is for medical benefits only. I find that the recommended decision is in accordance with the facts and the law in this case, and that you are entitled to medical benefits effective April 28, 2003 for colon cancer, and effective August 9, 2001 for pharynx cancer (pyriform sinus), pursuant to § 7384t of the Act. 42 U.S.C. § 7384t.

Jacksonville, FL

July 8, 2003

Jeana F. LaRock

District Manager

Final Adjudication Branch

EEOICPA Fin. Dec. No. 3201-2004 (Dep't of Labor, September 24, 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 stated below, three claims for survivor benefits are accepted.

STATEMENT OF THE CASE

Three claims were filed by the surviving children of **[Employee]** (the employee) under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA). **[Claimant 1]** filed on August 16, 2001. **[Claimant 2]** filed on November 1, 2002. **[Claimant 3]** filed on November 15, 2002. On Form EE-3 (Employment History for Claim under EEOICPA) it was stated that the employee had worked as a machinist for Union Carbide & Carbon Corporation at the Y-12 Plant located in Oak Ridge, Tennessee during the 1970's. The Department of Energy (DOE) has identified the Y-12 Plant as a DOE facility from 1942 through the present time. On December 5, 2001, the DOE verified the following employment dates for the employee at the Y-12 Plant from August 24, 1953 until January 13, 1961, May 29, 1961 until January 28, 1965 and March 1, 1971 until January 28, 1972. You each stated that as a result of his employment exposure to radiation at the Y-12 Plant, the employee developed lung cancer on February 17, 2000. You submitted a death certificate for the employee that indicated he was divorced at the time of his death. You also provided birth records, and where appropriate, marriage records for the children of the employee.

You submitted medical evidence in support of the claims. This evidence included the employee's death certificate that indicated the immediate cause of death on April 23, 2000 was non-small cell carcinoma of the lung (lung cancer). The evidence also included a pathology report describing a biopsy specimen of a right lung mass that was obtained on April, 10, 2000 and provided a diagnoses for the employee of well-differentiated adenocarcinoma (lung cancer).

The district office evaluated the medical evidence and determined that the claim required referral to the National Institute for Occupational Safety and Health (NIOSH) to perform a dose reconstruction for the primary cancer. A copy of the case file and the NIOSH Referral Summary Document were forwarded to NIOSH for dose reconstruction on March 16, 2002. An amended referral to include a smoking history questionnaire, indicating that at the time of diagnosis the employee was a current smoker consuming 10-19 cigarettes per day, was sent to NIOSH on July 11, 2003.

To expedite this claim, NIOSH used only the internal radiation dose to the lungs. The cumulative dose to the lungs, including the external dose, was not evaluated for the lung cancer. Per the provisions in 42 C.F.R. § 82.10(k)(1), it was determined that the reconstructed internal dose was of sufficient magnitude to consider the dose reconstruction complete. Therefore, NIOSH reported that the dose information is a reasonable underestimate of the total occupational radiation exposure to the employee while he was employed at the Y-12 Plant. On June 1, 2004, each of the claimants signed Form OCAS-1, indicating that they had reviewed the NIOSH Draft Report of Dose Reconstruction and agreed that it identified all of the relevant information they provided to NIOSH and that NIOSH should forward the final dose reconstruction report to the Department of Labor (DOL) to complete adjudication of their claims.

The completed NIOSH Report of Dose Reconstruction under EEOICPA was forwarded to the district office on June 18, 2004. The report provided radiation dose estimates of 71.440 rem to the employee's lung. Based on the dose estimate, the probability of causation calculation was completed by the district

office claims examiner using NIOSH-IREP, which is an interactive software program. Pursuant to §§ 81.21 and 81.22 of the implementing NIOSH regulations, the district office used the information provided in this report to determine that there was a 56.66% probability that the employee's cancer was caused by radiation exposure related to his employment at the Y-12 Plant.

On August 19, 2004, the Denver district office issued a recommended decision indicating the dose reconstruction estimates were performed in accordance with 42 U.S.C. § 7384n(d) of EEOICPA and 42 C.F.R § 82.10. The probability of causation was completed in accordance with 42 U.S.C. § 7384n(c)(3) of EEOICPA and 20 C.F.R. § 30.213, which references Subpart E of 42 C.F.R. Part 81. The recommended decision concluded that each claimant was entitled to compensation in the amount of $50,000 pursuant to 42 U.S.C. § 7384s(a).

On August 30, 2004, the Final Adjudication Branch received written notification from each of the three claimants stating that they waived any and all objections to the recommended decision.

After reviewing the evidence in the claims, the Final Adjudication Branch makes the following:

FINDINGS OF FACT

1. The following individuals filed claims for compensation as the surviving children of the employee on the dates indicated. **[Claimant 1]** filed on August 16, 2001. **[Claimant 2]** filed on November 1, 2002. **[Claimant 3]** filed on November 15, 2002.

2. The Department of Energy (DOE) verified the employment dates of the employee at the Y-12 Plant from August 24, 1953 until

January 13, 1961, May 29, 1961 until January 28, 1965 and March 1, 1971 until January 28, 1972.

3. The employee was diagnosed with lung cancer on April 10, 2000, after he began employment at the Y-12 Plant.

4. NIOSH reported only a partial dose reconstruction to the lung, since it was shown that the employee's lung cancer met the "at least as likely as not" (a 50% or greater probability) threshold required under the EEOICPA that his cancer was caused by radiation doses incurred while employed at the Y-12 Plant. A summary and explanation of information and methods applied to produce this dose estimate, including the claimants' involvement through interviews and reviews of the dose report, are documented in the NIOSH Report of Dose Reconstruction dated as approved on May 24, 2004.

5. Based on the dose reconstruction performed by NIOSH, the probability of causation (the likelihood that a cancer was caused by radiation exposure incurred by the employee while working at the Y-12 Plant) was calculated for the employee's primary cancer. The calculation was completed by a district office claims examiner and was independently verified by a Final Adjudication Branch claims examiner. The probability of causation values were determined using the upper 99% credibility limit, which helps minimize the possibility of denying claims to employees with cancers likely to have been caused by occupational radiation exposures. It was shown that the employee's lung cancer was 56.66% and met the "at least as likely as not" (a 50% or greater probability) threshold required under the EEOICPA that his cancer was caused by radiation doses incurred while employed at the Y-12 Plant.

Based on the above noted findings of fact in the claims, the Final Adjudication Branch also makes the following:

CONCLUSIONS OF LAW

1. The dose reconstruction estimate was performed in accordance with 42 U.S.C. § 7384n(d) of EEOICPA and 42 C.F.R. § 82.10.

2. The probability of causation calculation was completed in accordance with 42 U.S.C. § 7384n(c)(3) of EEOICPA and 20 C.F.R. § 30.213, which references Subpart E of 42 C.F.R. Part 81.

3. Based on the 56.66% probability of causation it is "at least as likely as not" that the employee's lung cancer was caused by his employment at a covered facility, the Y-12 Plant, within the meaning of 42 U.S.C. § 7384n(b) of the Act.

4. The evidence establishes that the employee was a covered employee pursuant to 42 U.S.C. § 7384l(1).

5. The employee meets the criteria of a covered employee with cancer, specifically, that his cancer was at least as likely as not related to the employment. 42 U.S.C. §§ 7384l(1)(B) and 7384l(9)(B)(ii)(II).

6. You each have established that you are current eligible survivors of the employee pursuant to 42 U.S.C. § 7384s(e).

7. You are each entitled to compensation in the amount of $50,000.

The undersigned has thoroughly reviewed the case record and finds that three claims are accepted.

Denver, Colorado

September 24, 2004

Janet R. Kapsin

Hearing Representative

EEOICPA Fin. Dec. No. 5537-2004 (Dep't of Labor, September 13, 2004)

REVIEW OF THE WRITTEN RECORD AND NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq.* Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On August 16, 2001, you filed a Form EE-1 (Claim for Benefits under the EEOICPA). You identified the diagnosed condition being claimed as prostate cancer.

The medical documentation of record shows that you were diagnosed with adenocarcinoma of the prostate on April 30, 1998. A pathology report dated May 2, 1998, signed by Edward C. Poole, M.D., was submitted showing adenocarcinoma, moderately differentiated based on prostate needle core biopsy performed on April 30, 1998. A narrative medical report from Philip Lepanto M.D., dated June 24, 1998, also gives a diagnosis of carcinoma of the prostate.

You also filed a Form EE-3 (Employment History) indicating that you worked at the International Nickel Plant (Huntington Pilot Plant) in Huntington, West Virginia. You provided no dates of employment. On September 24, 2001, the Department of Energy verified that you were employed at the Huntington facility from February 21, 1950 to May 1, 1996. On December 15, 2003, the corporate verifier verified that you were employed in the Reduction Pilot Plant, from September 22, 1958 to March 23, 1959. The Huntington Pilot Plant in Huntington,West Virginia is recognized as a Department of Energy facility from 1951 to 1963 and from 1978 to 1979. *See* DOE Worker Advocacy Facility List.

To determine the probability of whether you sustained cancer in the performance of duty, the Cleveland district office referred the claim to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction in accordance with 20 C.F.R. § 30.115. On February 23 , 2004, you signed Form OCAS-1, indicating the NIOSH Draft Report of Dose Reconstruction had been reviewed and agreeing that it identified all of the relevant information provided to NIOSH. The district office received the final NIOSH Report of Dose Reconstruction dated March 22, 2004. Using the information provided in the Report of Dose Reconstruction, the district office utilized the Interactive RadioEpidemiological Program (IREP) to determine the probability of causation (PoC) of your cancer and reported in its recommended decision that there was a 1.14% probability that your prostate cancer was caused by radiation exposure at the Huntington Pilot Plant.

On March 25, 2004, the Cleveland district office recommended denial of your claim for compensation finding that your cancer was not “at least as likely as not” (a 50% or greater probability) caused by radiation doses incurred while employed at the Huntington Pilot Plant. The district office concluded that the dose reconstruction estimates were performed in accordance with 42 U.S.C. § 7384n(d). Further, the district office concluded that the PoC was completed in accordance with 42 U.S.C. § 7384n(c)(3). The district office also concluded that you do not qualify as a covered employee with cancer as defined in 42 U.S.C. § 7384l(9)(B). Lastly, the district office concluded that you are not entitled to compensation, as outlined under 42 U.S.C. § 7384s.

The Final Adjudication Branch received your letter on May 6, 2004, in which you object to the recommended decision. You state that you directly handled radioactive materials but were never tested. You also question the quality of the dose reconstruction estimates.

FINDINGS OF FACT

1. You filed a claim for benefits on August 16, 2001.

2. You worked at the Huntington Pilot Plant in Huntington, West Virginia, a covered DOE facility, from February 21, 1950 to May 1, 1996. You worked in the Reduction Pilot Plant, the covered nuclear

portion of the Huntington facility from September 22, 1958 to March 23, 1959.

3. You were diagnosed with prostate cancer on April 30, 1998.

4. The NIOSH Interactive RadioEpidemiological Program indicated a 1.14% probability that your prostate cancer was caused by radiation exposure at the Huntington Pilot Plant.

5. Your cancer was not "at least as likely as not" related to your employment at a DOE facility.

CONCLUSIONS OF LAW

The regulations provide that a claimant may object to any or all of the findings of fact or conclusions of law in the recommended decision. *See* 20 C.F.R. § 30.310. Further, the regulations provide that the Final Adjudication Branch will consider objections by means of a review of the written record, in the absence of a request for a hearing. *See* 20 C.F.R. § 30.312.

The Final Adjudication Branch reviewer will review the record forwarded by the district office and any additional evidence and/or argument submitted by the claimant. *See* 20 C.F.R. § 30.313. Consequently, the Final Adjudication Branch will consider all of the evidence of record in reviewing the claim, including evidence and argument included with the objection(s).

You filed a claim based on prostate cancer. Under the EEOICPA, a claim for cancer must be demonstrated by medical evidence that sets forth the diagnosis of cancer and the date on which the diagnosis was made. *See* 20 C.F.R. § 30.211. Additionally, in order to be afforded coverage as a "covered employee with cancer," you must show that you were a DOE employee, a DOE contractor employee, or an atomic weapons employee, who contracted cancer after beginning employment at a DOE facility or an atomic weapons employer facility. *See* 42 U.S.C. § 7384l(9). The cancer must also be determined to have been sustained in the performance of duty, *i.e.*, at least as likely as not related to employment at a DOE facility or atomic weapons employer facility. *See* 42 U.S.C. § 7384n(b).

The Department of Energy verified that you worked at the Huntington facility from February 21, 1950 to May 1, 1996 and the corporate verifier for the Huntington facility verified that you worked in the Reduction Pilot Plant, from September 22, 1958 to March 23, 1959. In addition, the medical documentation shows that you were diagnosed as having prostate cancer on April 30, 1998.

To determine the probability of whether you sustained cancer in the performance of duty, the district office referred your claim to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction, in accordance with 20 C.F.R. § 30.115. The information and methods utilized to produce the dose reconstruction are summarized and explained in the NIOSH Report of Dose Reconstruction under the EEOICPA, dated March 22, 2004. NIOSH assigned the highest reasonably possible radiation dose using worst-case

assumptions related to radiation exposure and intake, based on current science, documented experience, and relevant data, as well as information recorded during the computer-assisted telephone interview.

Using the information provided in the Report of Dose Reconstruction for prostate cancer, the district office utilized the Interactive RadioEpidemiological Program (NIOSH-IREP) to determine a 1.14%

probability that your cancer was caused by radiation exposure while employed at the Huntington Pilot Plant. *See* 42 C.F.R. §§ 81.20, 81.21, and 81.22. The Final Adjudication Branch also analyzed the information in the NIOSH report, confirming the 1.14% probability.

The Final Adjudication Branch notes that your main technical objection is that you directly handled radioactive materials, but were never tested and that you also question the quality of the dose reconstruction estimates.

No dosimetry or bioassay records were found for you. For the purposes of this dose reconstruction, NIOSH assigned you the highest reasonably possible radiation dose using maximizing assumptions related to radiation exposure and intake, based on current science, documented experience, and relevant data.

Doses were calculated to the prostate, using the testes as the surrogate organ, for external exposure from storage containers of process residues, contaminated surfaces, and semi-annual medical X-rays. Internal doses were calculated to the prostate, using the testes as the surrogate organ, for exposure to enriched uranium. These assumptions are expected to encompass periodic direct contact with radioactive material. This approach of using maximizing assumptions is a NIOSH methodology per the provisions of 42 C.F.R. § 82.10 (k)(2). This is a challenge of the dose reconstruction methodology and cannot be addressed by the FAB per 20 C.F.R. § 30.318(b).

The Final Adjudication Branch also notes that the term "covered employee with cancer" is defined by 42 U.S.C. § 7384l(9)(B) as a Department of Energy employee who contracted cancer after beginning employment at a Department of Energy facility if, and only if, that individual is determined to have sustained that cancer in the performance of duty in accordance with 42 U.S.C. § 7384n(b). That section of the Act provides that such cancer shall be determined to have been sustained in the performance of duty if, and only if, the cancer was at least as likely as not related to employment covered under the EEOICPA, as determined by the guidelines established in 42 U.S.C. § 7384n(c). The statutory requirements for those guidelines specify that they shall:

(A) be based on the radiation dose received by the employee (or a group of employees performing similar work) at such facility and the upper 99 percent confidence interval of the probability of causation in the radioepidemiological tables published under section 7(b) of the Orphan Drug Act (42 U.S.C. 241 note), as such tables may be updated under section 7(b)(3) of such Act from time to time;

(B) incorporate the methods established under subsection (d); and

(C) take into consideration the type of cancer, past health-related activities (such as smoking), information on the risk of developing a radiation-related cancer from workplace exposure, and other relevant factors.

The Act requires that methods for arriving at reasonable estimates of the radiation dose received by an individual at a covered facility be established by regulation to include each of the following employees:

(A) An employee who was not monitored for exposure to radiation at such facility.

(B) An employee who was monitored inadequately for exposure to radiation at such facility.

(C) An employee whose records of exposure to radiation at such facility are missing or incomplete.

The regulations required to establish the guidelines and dose reconstruction methods are published in 42 C.F.R. Parts 81 and 82, by the Department of Health and Human Services.

Objections challenging the dose reconstruction methodology cannot be addressed by the Final Adjudication Branch pursuant to 20 C.F.R. § 30.318(b). Pursuant to that section, the methodology used by the Department of Health and Human Services (HHS) in arriving at reasonable estimates of the radiation doses received by an employee, as established by regulations issued by HHS at 42 C.F.R. Part 82, is binding on the Final Adjudication Branch. The Final Adjudication Branch has no authority to depart from the guidelines.
Therefore, your claim must be denied because the evidence does not establish that you are a "covered employee with cancer," because your prostate cancer was not determined to be "at least as likely as not" (a 50% or greater probability) related to radiation doses incurred in the performance of duty at the Huntington Pilot Plant. *See* 42 U.S.C. §§ 7384l(1)(B) and 7384l (9)(B).

For the above reasons, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

Cleveland, Ohio

Debra A. Benedict

Acting District Manager

Final Adjudication Branch

EEOICPA Fin. Dec. No. 38748-2004 (Dep't of Labor, September 13, 2004)

NOTICE OF FINAL DECISION FOLLOWING REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch (FAB) 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). A claimant who receives a recommended denial from the district office is entitled to file objections to the decision. 20 C.F.R. § 30.310. Since you submitted a written objection to recommended decision but did not specifically request a hearing, a review of the written record was performed. 20 C.F.R. § 30.312.

In reviewing any objections submitted, the FAB will review the written record, any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. 20 C.F.R. § 30.313.

For the reasons set forth below, your claim for benefits is denied.

STATEMENT OF THE CASE

On November 12, 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 lung cancer. You

submitted medical evidence establishing that you were diagnosed with lung cancer on December 7, 2000.[1]
On the Form EE-3, Employment History, you stated you were employed at the Savannah River Site in Aiken, South Carolina from August 1988 through April 1993. The DOE verified your employment at the Savannah River Site as August 23, 1988 through April 29, 1993. In order to be eligible for benefits, the evidence must establish that your cancer was at least as likely as not related to your employment at a Department of Energy (DOE) facility.
To determine the probability of whether you sustained cancer in the performance of duty, the Jacksonville district office referred the application package to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction. 20 C.F.R. § 30.115. The NIOSH reported annual dose estimates from the date of initial radiation exposure during covered employment, to the date the cancer was first diagnosed. A summary and explanation of information and methods applied to produce these dose estimates, including your involvement through an interview and review of the dose report, are documented in the "NIOSH Report of Dose Reconstruction under EEOICPA."
On June 21, 2004, you signed Form OCAS-1, indicating the NIOSH Draft Report of Dose Reconstruction had been reviewed and agreeing that it identified all of the relevant information provided to the NIOSH. The district office received the final NIOSH Report of Dose Reconstruction on June 28, 2004.

The district office used the information provided in this report to determine that there was a 27.04% probability that your cancer was caused by radiation exposure at the Savannah River Site. 42 C.F.R. § 81.20. The FAB independently analyzed the information in the NIOSH report, confirming the 27.04% probability.
On July 2, 2004, the Denver district office issued a recommended decision denying your claim for compensation, concluding that you are not entitled to compensation since your lung cancer is not "at least as likely as not" related to employment at the covered facility.

Attached to the recommended decision was a notice of claimant rights, which stated that you had 60 days in which to file an objection to the recommended decision and/or request a hearing. You were also advised that, if there was no timely objection filed, the recommended decision would be affirmed and you would be deemed to have waived the right to challenge the decision. This 60-day period expired on August 31, 2004.
The implementing regulations provide that within 60 days from the date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision, including the NIOSH's reconstruction of the radiation dose to which the employee was exposed (if any), and whether a hearing is desired. 20 C.F.R. § 30.310(a). The regulations further provide that if the claimant does not file a written statement that objects to the recommended decision and/or requests a hearing within the 60 days, or if the claimant waives any objections to all or part of the recommended decision, the FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part. 20 C.F.R. § 30.316(a). If the claimant objects to the NIOSH dose reconstruction, the FAB will evaluate the factual findings upon which NIOSH based the dose reconstruction. However, the methodology used by NIOSH in arriving at estimates of radiation doses received by an employee is binding on the FAB.

On July 15, 2004, the Final Adjudication Branch received your letter of objection. In your letter, you stated that you believed too many people had worked on your dose reconstruction, and that you did not believe that computers could be used to reconstruct someone's illness. Your objections have been reviewed.
Congress directed NIOSH to create a method of calculating the probability that a compensable cancer

occurred “in the performance of duty.” The risk models used by NIOSH take into account the employee’s cancer type, year of birth, year of cancer diagnosis, and exposure information such as years of exposure, as well as the dose received from the various types of radiation during each year, along with epidemiological studies of cancer rates. Some of the data that may be included in the dose reconstruction include, but are not limited to: internal dosimetry (such as results from urinalysis); external dosimetry data (such as film badge readings); workplace monitoring data (such as air sample results); workplace characterization data (such as type and amount of radioactive material processed); and descriptions of the type of work performed at the work location. When dose information is not available, is very limited, or the dose of record is low, NIOSH may use the highest reasonably possible radiation dose, based on reliable science, documented experience, and relevant data, to complete a claimant’s dose reconstruction. The guiding principle in conducting these dose reconstructions is to ensure that the assumptions are fair, consistent, and well-grounded in the best available science, while ensuring uncertainties in the science and data are handled to the advantage, rather than to the detriment, of the claim when feasible. The use of a computer to calculate the probability of causation is required, due to the vast amounts of data involved. Furthermore, the reconstruction is of the probable radiation dose received during employment, and not the diagnosed illness. The issues that you raised concern methodology, and are binding on the FAB.

FINDINGS OF FACT

1) On November 12, 2002, you filed a Form EE-1, Claim for Benefits under the EEOICPA, based on your lung cancer.
2) You were employed at the Savannah River Site from August 23, 1988 through April 29, 1993.
3) You were diagnosed with lung cancer on December 7, 2000.
4) Based on the dose reconstruction performed by the NIOSH, the district office calculated the probability of causation (the likelihood that the cancer was caused by radiation exposure incurred while working at a covered facility) for lung cancer. The district office calculated a probability of causation of 27.04% and determined that this condition was not “at least as likely as not” (a 50% or greater probability) related to employment at the covered facility. The FAB independently analyzed the information in the NIOSH report, confirming the 27.04% probability.
5) On July 2, 2004, the Denver district office issued a recommended decision denying your claim for compensation, concluding that you are not entitled to compensation since your lung cancer is not “at least as likely as not” related to employment at the covered facility.

6) You submitted a written objection to the recommended decision, and a review of the written record was conducted.

CONCLUSIONS OF LAW

Based on my review of the evidence of record and the recommended decision, I find that the evidence does not establish that your lung cancer was at least as likely as not related to your employment at a covered facility. 42 U.S.C. § 7384n. I also find that the decision of the district office cannot be changed based on the objections submitted. As provided in the implementing regulations, any claim that does not meet all of the criteria for at least one of these categories as set forth in these regulations must be denied. 20 C.F.R. § 30.110(b).

Under the Act, you are not entitled to benefits and your claim for compensation is denied. 42 U.S.C. § 7384s.
Jacksonville, FL

Sidne M. Valdivieso

Hearing Representative

[1]The district office reported a diagnosis date of December 8, 2000 to NIOSH. Despite this discrepancy, the percentage of probability of causation would not be materially affected as both dates are within the same year.

EEOICPA Fin. Dec. No. 10522-2004 (Dep't of Labor, November 14, 2003)

NOTICE OF FINAL DECISION

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

STATEMENT OF THE CASE

On September 24, 2001, you filed a Form EE-1 (Claim for Employee Benefits under the EEOICPA), based on skin cancer. A representative of the Department of Energy (DOE) verified that you engaged in covered employment at the Hanford site for General Electric from December 5, 1955 to November 8, 1957 and for J.A. Jones/Kaiser Engineers Hanford from September 13, 1960 to February 4, 1975, February 6, 1975 to October 11, 1976, and November 30, 1976 to September 30, 1987. The Hanford site is recognized as a covered DOE facility from 1942 to the present. *See* Department of Energy Worker Advocacy Facility List.

You provided a medical record summary from David L. Adams, M.D., of Tri-City Derm Management, Inc., that indicates you had surgical excisions diagnosed as basal cell carcinoma on the following twelve dates: December 14, 1977 (right sideburn area); March 17, 1982 (right anterior sideburn area); March 18, 1982 (right anterior sideburn area); March 23, 1982 (right anterior sideburn area); March 25, 1982 (right anterior sideburn area); March 29, 1982 (right anterior sideburn area); March 25, 1986 (right lateral face); September 16, 1986 (mid posterior chest); December 23, 1986 (right sideburn area); June 7, 1989 (right cheek of face); February 22, 1995 (right face) and March 8, 1995 (right side of face).

You submitted four operative reports related to your cancers as follows: March 17, 1982 (basal cell carcinoma); March 18, 1982 (Mohs microscopic controlled surgery – subsequent treatment. "The second layer shows cancer still present."); March 23, 1982 ("The third layer shows cancer still present."); and March 25, 1982 ("The 4^{th} layer shows cancer still present."). Also, you submitted five pathology reports related to your cancer as follows: December 14, 1977 (basal cell epithelioma); February 22, 1995 ("Basosquamous carcinoma"); March 8, 1995 (ulcerated multifocal superficial basal cell carcimoma); December 21, 1995 (right pre-auricular basal cell carcinoma); and February 28, 1996 (basal cell carcinoma right lateral cheek skin). Further, you submitted a pathology report dated January 5, 1996 that diagnosed seborrheic keratosis, a non-covered condition. You also submitted chart notes dated February 28, 1996 that indicate "a large recurrent basal cell carcinoma on the right preauricular lateral cheek area," and "Right lateral cheek, preauricular skin." Consequently, the medical evidence includes a medical record summary, operative reports and pathology reports showing your diagnoses of skin cancer.

To determine the probability of whether you sustained these cancers in the performance of duty, the Seattle district office referred your claim to the National Institute for Occupational Safety and Health

(NIOSH) for radiation dose reconstruction in accordance with § 30.115 of the EEOICPA regulations. *See* 20 C.F.R. § 30.115. The district office received the final NIOSH Report of Dose Reconstruction on October 22, 2003. *See* 42 U.S.C. § 7384n(d); 42 C.F.R. Part 82, § 82.26 (NIOSH report of dose reconstruction results). In its report, NIOSH indicated, in its "Dose Reconstruction Overview," that it performed radiation dose reconstructions on only four of your basal cell carcinomas that were diagnosed as follows: February 28, 1996 (left cheek); March 9, 1995 (auricular skin); March 9, 1995 (right side of the face); and March 17, 1982 (right sideburn area of the face).

Using the information provided in the Report of Dose Reconstruction, the Seattle district office utilized the Interactive RadioEpidemiological Program (IREP) to determine the probability of causation of your cancer and reported in its Recommended Decision that there was a 52.35% probability that your basal cell carcinoma of the skin was caused by radiation exposure at the INEEL site. The district office continued, in its recommended decision, that "Based on the dose reconstruction performed by NIOSH, the probability of causation (the likelihood that a cancer was caused by radiation exposure incurred by the employee while working at a DOE covered facility) was calculated for the four primary cancers."

On November 3, 2003, the Seattle district office recommended acceptance of your claim for compensation, and on November 7, 2003, the Seattle Final Adjudication Branch received written notification from you indicating that you waive any and all rights to file objections to the recommended decision.

FINDINGS OF FACT

1. You filed a claim for employee benefits on September 24, 2001.
2. You were employed at the Hanford site by General Electric from December 5, 1955 to November 8, 1957; and by J.A. Jones/Kaiser Engineers Hanford from September 13, 1960 to February 4, 1975, February 6, 1975 to October 11, 1976, and November 30, 1976 to September 30, 1987.
3. You are a covered employee as defined by § 7384l(9)(B) of the EEOICPA. *See* 42 U.S.C. § 7384l(9)(B).
4. You were diagnosed with multiple skin cancers.
5. Your cancer diagnoses were made after you began employment with the Department of Energy.
6. The NIOSH Interactive RadioEpidemiological Program indicated a 52.35% probability that your basal cell carcinoma was caused by radiation exposure at the Hanford site.
7. The dose reconstruction estimate was performed in accordance with § 7384n(d) of the EEOICPA and 42 C.F.R. Part 82. *See* 42 U.S.C. § 7384n(d); 42 C.F.R. Part 82 § 82.26.
8. The Probability of Causation was completed in accordance with § 7384n(c)(3) of the EEOICPA and 42 C.F.R. Part 81. The calculation of the probability of causation was based on four basal cell carcinoma primary cancer sites and was completed in accordance with 42 C.F.R. Part 81. *See* 42 U.S.C. § 7384n(c)(3); 42 C.F.R. Part 81, Subpart E.
9. After determining that the probability of causation for your basal cell carcinoma was 50% or greater, NIOSH determined that sufficient research and analysis had been conducted to end the dose reconstruction as it was evident the estimated cumulative dose is sufficient to qualify you for compensation. Additional calculations of probability of causation were not required to be determined. *See* 42 C.F.R. § 82.10(k).

CONCLUSIONS OF LAW

The DOE verified your employment at the Hanford site by General Electric from December 5, 1955 to November 8, 1957; and by J.A. Jones/Kaiser Engineers Hanford from September 13, 1960 to February

4, 1975, February 6, 1975 to October 11, 1976, and November 30, 1976 to September 30, 1987.

The medical documentation submitted in support of your claim shows that you were diagnosed with skin cancer on December 14, 1977 (right sideburn area); March 17, 1982 (right anterior sideburn area); March 18, 1982 (right anterior sideburn area); March 23, 1982 (right anterior sideburn area); March 25, 1982 (right anterior sideburn area); March 29, 1982 (right anterior sideburn area); March 25, 1986 (right lateral face); September 16, 1986 (mid posterior chest); December 23, 1986 (right sideburn area); June 7, 1989 (right cheek of face); February 22, 1995 (right face) and March 8, 1995 (right side of face). Operative reports you submitted indicated cancer-related excisions on the following dates: March 17, 1982 (basal cell carcinoma); March 18, 1982 (Mohs microscopic controlled surgery – subsequent treatment. "The second layer shows cancer still present."); March 23, 1982 ("The third layer shows cancer still present."); and March 25, 1982 ("The 4th layer shows cancer still present."). You submitted pathology reports providing cancer diagnoses as follows: December 14, 1977 (basal cell epithelioma); February 22, 1995 ("Basosquamous carcinoma"); March 8, 1995 (ulcerated multifocal superficial basal cell carcimoma); December 21, 1995 (right pre-auricular basal cell carcinoma); and February 28, 1996 (basal cell carcinoma right lateral cheek skin).

Based on your covered employment at the Hanford site and the medical documentation showing diagnoses of multiple skin cancers, you are a "covered employee with cancer" under the EEOICPA. *See* 42 U.S.C. § 7384l(9)(B)(i).

The undersigned notes that there is no indication in the case file of diagnosis of an auricular skin cancer, on March 9, 1995, as indicated in the NIOSH Report of Dose Reconstruction. But, there is a diagnosis of a right pre-auricular basal cell carcinoma on December 21, 1995 as well as a reference to a basal cell carcinoma on the "right preauricular lateral cheek area" in the chart notes dated February 28, 1996**.** It is also noted that the IREP probability of causation results show that the auricular primary cancer was diagnosed in 1995, and that no month or day was used in the computer calculation of the results. Consequently, any discrepancy in the date of diagnosis of pre-auricular basal cell carcinoma in 1995 would not affect the outcome of this case.

To determine the probability of whether you sustained cancer in the performance of duty, the district office referred your claim to NIOSH for radiation dose reconstruction on January 10, 2002, in accordance with § 30.115 of the EEOICPA regulations. *See* 20 C.F.R. § 30.115. On October 22, 2003, the Seattle district office received the final NIOSH Report of Dose Reconstruction.

Using the information provided in the Report of Dose Reconstruction for basal cell carcinoma, the district office utilized the Interactive RadioEpidemiological Program (NIOSH-IREP), pursuant to §§ 81.20, 81.21, 81.22, and 81.25 of the implementing NIOSH regulations, to determine a 52.35% probability that your cancer was caused by radiation exposure while employed at the Hanford site. *See* 42 C.F.R. §§ 81.20 (Required use of NIOSH-IREP), 81.21 (Cancers requiring the use of NIOSH-IREP), 81.22 (General guidelines for use of NIOSH-IREP), 81.25 (Guidelines for claims involving two or more primary cancers). The Final Adjudication Branch also analyzed the information in the NIOSH report, confirming the 52.35% probability. Thus, the evidence shows that your cancer was at least as likely as not related to your employment at the Hanford site and no further determinations of probability of causation were required.

You are a "covered employee with cancer," which is defined in § 7384l(9)(B)(i) and (ii) of the EEOICPA. *See* 42 U.S.C. § 7384l(9)(B)(i) and (ii). Pursuant to §§ 81.20, 81.21, 81.22, and 81.25 of

the NIOSH implementing regulations, your cancer was at least as likely as not related to your employment at the Hanford site. *See* 42 C.F.R. §§ 81.20, 81.21, 81.22, and 81.25.

The record indicates that you filed Form EE-1, Claim for Employee Benefits under the EEOICPA, on September 24, 2001. The date you filed your claim is the date you became eligible for medical benefits for cancer. *See* 42 U.S.C. § 7384t(d).

Pursuant to Bulletin 03-24, if all primary cancers claimed have not gone through dose reconstruction when the 50% threshold has been reached, NIOSH will not complete dose reconstruction for the rest of the cancers. The calculation of additional POCs for the remaining primary cancers, which were not calculated, would only make the final numerical value of the POC larger, and all of the cancers, including those for which NIOSH did not perform a dose calculation, are covered for medical benefits. Consequently, you are entitled to compensation and medical benefits for skin cancer retroactive to September 24, 2001. *See* EEOICPA Bulletin No. 03-24 (issued May 2, 2003).

For the foregoing reasons, the undersigned hereby accepts your claim for skin cancer. You are entitled to compensation in the amount of $150,000 pursuant to § 7384s(a) of the Act. You are also entitled to medical benefits related to skin cancer, since September 24, 2001. *See* 42 U.S.C. § § 7384s, 7384t.

Seattle, WA

Rosanne M. Dummer, District Manager

Final Adjudication Branch Seattle

EEOICPA Fin. Dec. No. 12659-2004 (Dep't of Labor, November 6, 2003)

FINAL DECISION

This is the decision of the Final Adjudication Branch concerning the claim of **[Claimant]** 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 discussed below, compensation based on lung cancer is granted.

STATEMENT OF THE CASE

On October 2, 2003, the Cleveland district office issued a recommended decision finding that **[Employee]**'s lung cancer was at least as likely as not related to his employment at a Department of Energy (DOE) facility, within the meaning of 42 U.S.C. § 7384n; that the employee is a "covered employee with cancer", as that term is defined in 42 U.S.C. § 7384l(9)(B); and concluding that the claimant, as the survivor of the employee, is entitled to compensation in the amount of $150,000 pursuant to 42 U.S.C. § 7384s.

The evidence shows that the employee worked in decontamination/housekeeping maintenance at Monsanto Chemical Company (Mound Plant) for the period of November 21, 1951, to October 2, 1978. Additional evidence shows that he was on active military service from September 4, 1952, to August 20, 1954. In order to be eligible for benefits based on the employee's cancer, the evidence must

establish that the cancer was at least as likely as not related to his employment at a DOE facility.

To determine the probability of whether the employee sustained lung cancer in the performance of duty, the district office referred the claimant's application package to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction, in accordance with 20 C.F.R. § 30.115 of the Department of Labor's implementing regulations. NIOSH performed the dose reconstruction by calculating the annual radiation dosage during recorded radiation intake periods. Because the potential intake on December 27, 1960, occurred near the end of that year, all dose for that intake was assigned to 1961. On August 18, 2003, the claimant signed Form OCAS-1, indicating that she had reviewed the NIOSH Draft Report of Dose Reconstruction and agreed that it identified all of the relevant information she had provided to NIOSH.

Pursuant to 42 C.F.R. § 81.20 of the Department of Health and Human Services' regulations, the district office used the information provided in this report to determine that there was an 83.73% probability that the employee's lung cancer was caused by radiation exposure at Monsanto Chemical Company (Mound Plant).

In making this determination, the district office used the parameter for smoking history of "10-19 cigarettes per day". This parameter was used because the smoking history questionnaire that the claimant submitted was marked in the blocks corresponding to "Current Cigarette Smoker" and "10-19 cigarettes per day." A consultation report from Miami Valley Hospital, dated June 24, 1978, notes that the employee provided a history that he is a "heavy smoker - 2 ppd x 30 years."

Based on that report, the Final Adjudication Branch independently analyzed the information in the NIOSH report, and re-determined the probability of causation using a smoking history parameter of ">40 cig/day (currently)". That history was considered to be the most reliable estimate of the employee's smoking history. The re-analysis resulted in an 82.44% probability that the employee's lung cancer was sustained in the performance of duty.

On October 8, 2003, the Final Adjudication Branch received written notification that the claimant waives any and all objections to the recommended decision.

FINDINGS OF FACT

1. The claimant filed an application for benefits on October 15, 2001, under the EEOICPA based on the employee's lung cancer.

2. The employee worked at Monsanto Chemical Company (Mound Plant) for the period of November 21, 1951, to October 2, 1978. Monsanto Chemical Company (Mound Plant) is identified as a DOE facility from 1947 to the present.

3. The employee was diagnosed with lung cancer in June 1978.

4. NIOSH reported annual dose estimates for lung cancer during recorded radiation intake periods. A summary and explanation of information and methods applied to produce these dose estimates, including the claimant's involvement through an interview and review of the dose report, are documented in the "NIOSH Report of Dose Reconstruction under EEOICPA."

5. Based on the dose reconstruction performed by NIOSH, the district office calculated the probability of causation (the likelihood that the cancer was caused by radiation exposure incurred while working at a covered facility) for lung cancer. The district office determined that lung cancer was estimated to have a greater than 50% probability that it is related to employment at the covered facility.

6. The claimant is the surviving spouse of the employee and was married to him for at least one year immediately before his death.

CONCLUSIONS OF LAW

I have reviewed the facts and the recommended decision issued by the district office, and find that the employee's lung cancer was at least as likely as not sustained in the performance of duty at a DOE facility as specified by 42 U.S.C. § 7384n. The employee is a "covered employee with cancer", as that term is defined by 42 U.S.C. § 7384l(9)(B). The claimant is the surviving spouse of the employee as defined by 42 U.S.C. § 7384s(e)(1). I find that the recommended decision is in accordance with the facts and the law in this case, and that the claimant is entitled to $150,000 based on the employee's lung cancer, as provided by 42 U.S.C. § 7384s.

Cleveland, OH

Daria Rusyn

Final Adjudication

Branch Manager

EEOICPA Fin. Dec. No. 12659-2004 (Dep't of Labor, November 6, 2003)

FINAL DECISION

This is the decision of the Final Adjudication Branch concerning the claim of **[Claimant]** 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 discussed below, compensation based on lung cancer is granted.

STATEMENT OF THE CASE

On October 2, 2003, the Cleveland district office issued a recommended decision finding that **[Employee]**'s lung cancer was at least as likely as not related to his employment at a Department of Energy (DOE) facility, within the meaning of 42 U.S.C. § 7384n; that the employee is a "covered employee with cancer", as that term is defined in 42 U.S.C. § 7384l(9)(B); and concluding that the claimant, as the survivor of the employee, is entitled to compensation in the amount of $150,000 pursuant to 42 U.S.C. § 7384s.

The evidence shows that the employee worked in decontamination/housekeeping maintenance at Monsanto Chemical Company (Mound Plant) for the period of November 21, 1951, to October 2,

1978. Additional evidence shows that he was on active military service from September 4, 1952, to August 20, 1954. In order to be eligible for benefits based on the employee's cancer, the evidence must establish that the cancer was at least as likely as not related to his employment at a DOE facility.

To determine the probability of whether the employee sustained lung cancer in the performance of duty, the district office referred the claimant's application package to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction, in accordance with 20 C.F.R. § 30.115 of the Department of Labor's implementing regulations. NIOSH performed the dose reconstruction by calculating the annual radiation dosage during recorded radiation intake periods. Because the potential intake on December 27, 1960, occurred near the end of that year, all dose for that intake was assigned to 1961. On August 18, 2003, the claimant signed Form OCAS-1, indicating that she had reviewed the NIOSH Draft Report of Dose Reconstruction and agreed that it identified all of the relevant information she had provided to NIOSH.

Pursuant to 42 C.F.R. § 81.20 of the Department of Health and Human Services' regulations, the district office used the information provided in this report to determine that there was an 83.73% probability that the employee's lung cancer was caused by radiation exposure at Monsanto Chemical Company (Mound Plant).

In making this determination, the district office used the parameter for smoking history of "10-19 cigarettes per day". This parameter was used because the smoking history questionnaire that the claimant submitted was marked in the blocks corresponding to "Current Cigarette Smoker" and "10-19 cigarettes per day." A consultation report from Miami Valley Hospital, dated June 24, 1978, notes that the employee provided a history that he is a "heavy smoker - 2 ppd x 30 years."

Based on that report, the Final Adjudication Branch independently analyzed the information in the NIOSH report, and re-determined the probability of causation using a smoking history parameter of ">40 cig/day (currently)". That history was considered to be the most reliable estimate of the employee's smoking history. The re-analysis resulted in an 82.44% probability that the employee's lung cancer was sustained in the performance of duty.

On October 8, 2003, the Final Adjudication Branch received written notification that the claimant waives any and all objections to the recommended decision.

FINDINGS OF FACT

1. The claimant filed an application for benefits on October 15, 2001, under the EEOICPA based on the employee's lung cancer.

2. The employee worked at Monsanto Chemical Company (Mound Plant) for the period of November 21, 1951, to October 2, 1978. Monsanto Chemical Company (Mound Plant) is identified as a DOE facility from 1947 to the present.

3. The employee was diagnosed with lung cancer in June 1978.

4. NIOSH reported annual dose estimates for lung cancer during recorded radiation intake periods. A summary and explanation of information and methods applied to produce these dose estimates, including the claimant's involvement through an interview and review of the dose

report, are documented in the "NIOSH Report of Dose Reconstruction under EEOICPA."

5. Based on the dose reconstruction performed by NIOSH, the district office calculated the probability of causation (the likelihood that the cancer was caused by radiation exposure incurred while working at a covered facility) for lung cancer. The district office determined that lung cancer was estimated to have a greater than 50% probability that it is related to employment at the covered facility.

6. The claimant is the surviving spouse of the employee and was married to him for at least one year immediately before his death.

CONCLUSIONS OF LAW

I have reviewed the facts and the recommended decision issued by the district office, and find that the employee's lung cancer was at least as likely as not sustained in the performance of duty at a DOE facility as specified by 42 U.S.C. § 7384n. The employee is a "covered employee with cancer", as that term is defined by 42 U.S.C. § 7384l(9)(B). The claimant is the surviving spouse of the employee as defined by 42 U.S.C. § 7384s(e)(1). I find that the recommended decision is in accordance with the facts and the law in this case, and that the claimant is entitled to $150,000 based on the employee's lung cancer, as provided by 42 U.S.C. § 7384s.

Cleveland, OH

Daria Rusyn

Final Adjudication

Branch Manager

EEOICPA Fin. Dec. No. 16967-2004 (Dep't of Labor, September 3, 2004)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq.* Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On May 3, 2002, you filed a Form EE-1 (Claim for Employee Benefits under the EEOICPA), based on prostate cancer. Medical documentation submitted in support of your claim shows that you were diagnosed as having prostate cancer on February 15, 1999.

You also provided a Form EE-3 (Employment History) in which you stated that you worked for the GAT, Martin Marrieta at the Portsmouth Plant, in Piketon, OH, from November 15, 1954, to June 15,

1992, and that you wore a dosimetry badge. The Department of Energy (DOE) verified that you worked at the Portsmouth Gaseous Diffusion Plant (GDP) in Piketon, OH, from November 15 , 1954, to August 31, 1961, and January 26, 1970, to June 14, 1992. The Portsmouth GDP is recognized as a covered DOE facility from 1954 to 1998. *See* Department of Energy, Office of Worker Advocacy, Facility List.

To determine the probability of whether you sustained cancer in the performance of duty, the district office referred your claim to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction in accordance with § 30.115 of the EEOICPA regulations. The district office advised NIOSH that you had been employed at the Portsmouth GDP from November 15, 1954, to June 15, 1992. NIOSH used that continuous period of employment in reconstructing your radiation dose. The district office received the final NIOSH Report of Dose Reconstruction which is dated May 17, 2004. On May 24, 2004 you signed Form OCAS-1 indicating that you had reviewed the NIOSH Draft Report of Dose Reconstruction and agreeing that it identified all of the relevant information provided to NIOSH. Using the information provided in this report, the Cleveland district office utilized the Interactive RadioEpidemiological Program (NIOSH-IREP) to determine the probability of causation of your cancer and reported in its recommended decision that there was a 35.65% probability that your cancer was caused by radiation exposure at the Portsmouth GDP.

On June 22, 2004, the Cleveland district office recommended denial of your claim for compensation finding that your cancer was not "at least as likely as not" (a 50% or greater probability) caused by radiation doses incurred while employed at the Portsmouth GDP. The district office concluded that the dose reconstruction estimates were performed in accordance with 42 U.S.C. § 7384n(d). Further, the district office concluded that the probability of causation was completed in accordance with 42 U.S.C. § 7384n(c)(3). The district office also concluded that you do not qualify as a covered employee as defined in 42 U.S.C. § 7384l(9)(B). Lastly, the district office concluded that you are not entitled to compensation, as outlined in 42 U.S.C. § 7384s.

FINDINGS OF FACT

1. You filed a claim for benefits on December 10, 2001.

2. You were employed at the Portsmouth GDP, a covered DOE facility, from November 15 , 1954, to August 31, 1961, and from January 26, 1970, to June 14, 1992.

3. You were diagnosed as having prostate cancer on February 15, 1999.

4. The NIOSH Interactive RadioEpidemiological Program indicated a 35.65% probability that your cancer was caused by radiation exposure at the Portsmouth GDP.

5. Your cancer was not "at least as likely as not" related to your employment at a DOE facility.

CONCLUSIONS OF LAW

I have reviewed the recommended decision issued by the Cleveland district office on June 22, 2004. I find that you have not filed any objections to the recommended decision, and that the sixty-day period for filing such objections has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

The Final Adjudication Branch analyzed the information in the NIOSH report, confirming the 35.65% probability that your cancer was related to your employment at the Portsmouth GDP. That probability

is based on your having continuously received radiation dose for the period November 15 , 1954 to June 14, 1992. Because NIOSH assigned occupational radiation dose for the period September 1, 1961, to January 25, 1970, a period during which you did not work at the Portsmouth GDP, the total dose assigned is a significant overestimate of your actual occupational radiation dose at that facility.

The Final Adjudication Branch notes that regardless of whether the occupational radiation dose provided in the NIOSH Report of Dose Reconstruction is based on exposure for the period November 15, 1954 to June 15, 1992, or the correct dates of November 15, 1954, to August 31, 1961, and January 26, 1970, to June 14, 1992, the resulting decision would be unchanged. The probability that prostate cancer resulted from radiation received at the Portsmouth GDP, based on the period of November 15, 1954 to June 15, 1992, is 35.65%. Because your occupational radiation dose from November 15, 1954, to August 31, 1961, and January 26, 1970, to June 14, 1992, the correct (shorter) time period, would result in a decrease in the dose and, consequently, a decrease in the probability of causation, no rework of the dose reconstruction and probability of causation is warranted. *See* EEOICPA Bulletin No. 04-01 (issued October 31, 2003).

Therefore, your claim must be denied because the evidence does not establish that you are a "covered employee with cancer" under the EEOICPA, because your cancer was not determined to be "at least as likely as not" (a 50% or greater probability) related to radiation doses incurred in the performance of duty at the Portsmouth GDP. *See* 42 U.S.C. §§ 7384l(1)(B), 7384l(9)(B).

For the above reasons, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

Cleveland, OH

Debra A. Benedict

Acting District Manager

Final Adjudication Branch

EEOICPA Fin. Dec. No. 16967-2004 (Dep't of Labor, September 3, 2004)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On May 3, 2002, you filed a Form EE-1 (Claim for Employee Benefits under the EEOICPA), based on prostate cancer. Medical documentation submitted in support of your claim shows that you were diagnosed as having prostate cancer on February 15, 1999.

You also provided a Form EE-3 (Employment History) in which you stated that you worked for the GAT, Martin Marrieta at the Portsmouth Plant, in Piketon, OH, from November 15, 1954, to June 15, 1992, and that you wore a dosimetry badge. The Department of Energy (DOE) verified that you worked at the Portsmouth Gaseous Diffusion Plant (GDP) in Piketon, OH, from November 15 , 1954, to August 31, 1961, and January 26, 1970, to June 14, 1992. The Portsmouth GDP is recognized as a covered DOE facility from 1954 to 1998. *See* Department of Energy, Office of Worker Advocacy, Facility List.

To determine the probability of whether you sustained cancer in the performance of duty, the district office referred your claim to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction in accordance with § 30.115 of the EEOICPA regulations. The district office advised NIOSH that you had been employed at the Portsmouth GDP from November 15, 1954, to June 15, 1992. NIOSH used that continuous period of employment in reconstructing your radiation dose. The district office received the final NIOSH Report of Dose Reconstruction which is dated May 17, 2004. On May 24, 2004 you signed Form OCAS-1 indicating that you had reviewed the NIOSH Draft Report of Dose Reconstruction and agreeing that it identified all of the relevant information provided to NIOSH. Using the information provided in this report, the Cleveland district office utilized the Interactive RadioEpidemiological Program (NIOSH-IREP) to determine the probability of causation of your cancer and reported in its recommended decision that there was a 35.65% probability that your cancer was caused by radiation exposure at the Portsmouth GDP.

On June 22, 2004, the Cleveland district office recommended denial of your claim for compensation finding that your cancer was not "at least as likely as not" (a 50% or greater probability) caused by radiation doses incurred while employed at the Portsmouth GDP. The district office concluded that the dose reconstruction estimates were performed in accordance with 42 U.S.C. § 7384n(d). Further, the district office concluded that the probability of causation was completed in accordance with 42 U.S.C. § 7384n(c)(3). The district office also concluded that you do not qualify as a covered employee as defined in 42 U.S.C. § 7384l(9)(B). Lastly, the district office concluded that you are not entitled to compensation, as outlined in 42 U.S.C. § 7384s.

FINDINGS OF FACT

1. You filed a claim for benefits on December 10, 2001.

2. You were employed at the Portsmouth GDP, a covered DOE facility, from November 15 , 1954, to August 31, 1961, and from January 26, 1970, to June 14, 1992.

3. You were diagnosed as having prostate cancer on February 15, 1999.

4. The NIOSH Interactive RadioEpidemiological Program indicated a 35.65% probability that your cancer was caused by radiation exposure at the Portsmouth GDP.

5. Your cancer was not "at least as likely as not" related to your employment at a DOE facility.

CONCLUSIONS OF LAW

I have reviewed the recommended decision issued by the Cleveland district office on June 22, 2004. I find that you have not filed any objections to the recommended decision, and that the sixty-day period for filing such objections has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

The Final Adjudication Branch analyzed the information in the NIOSH report, confirming the 35.65% probability that your cancer was related to your employment at the Portsmouth GDP. That probability is based on your having continuously received radiation dose for the period November 15 , 1954 to June 14, 1992. Because NIOSH assigned occupational radiation dose for the period September 1, 1961, to January 25, 1970, a period during which you did not work at the Portsmouth GDP, the total dose assigned is a significant overestimate of your actual occupational radiation dose at that facility.

The Final Adjudication Branch notes that regardless of whether the occupational radiation dose provided in the NIOSH Report of Dose Reconstruction is based on exposure for the period November 15, 1954 to June 15, 1992, or the correct dates of November 15, 1954, to August 31, 1961, and January 26, 1970, to June 14, 1992, the resulting decision would be unchanged. The probability that prostate cancer resulted from radiation received at the Portsmouth GDP, based on the period of November 15, 1954 to June 15, 1992, is 35.65%. Because your occupational radiation dose from November 15, 1954, to August 31, 1961, and January 26, 1970, to June 14, 1992, the correct (shorter) time period, would result in a decrease in the dose and, consequently, a decrease in the probability of causation, no rework of the dose reconstruction and probability of causation is warranted. *See* EEOICPA Bulletin No. 04-01 (issued October 31, 2003).

Therefore, your claim must be denied because the evidence does not establish that you are a "covered employee with cancer" under the EEOICPA, because your cancer was not determined to be "at least as likely as not" (a 50% or greater probability) related to radiation doses incurred in the performance of duty at the Portsmouth GDP. *See* 42 U.S.C. §§ 7384l(1)(B), 7384l(9)(B).

For the above reasons, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

Cleveland, OH

Debra A. Benedict

Acting District Manager

Final Adjudication Branch

EEOICPA Fin. Dec. No. 23398-2004 (Dep't of Labor, September 10, 2004)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq.* Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On February 21, 2002, you filed a Form EE-1 (Claim for Employee Benefits under the EEOICPA), based on uterine carcinoma. Medical documentation submitted in support of your claim shows that

you were diagnosed as having endometrial adenocarcinoma on November 27, 2001.

You also provided a Form EE-3 (Employment History) in which you state that you worked for the Carbide and Carbon Chemical Corporation at the Oak Ridge Gaseous Diffusion Plant (GDP) from July 1948 to October 19, 1953, and for the Goodyear Atomic Corporation at the Portsmouth GDP from September 1, 1954 to August 1, 1955. You also report that you did not wear a dosimetry badge at either facility. A representative of the Department of Energy (DOE) verified that you worked at the Oak Ridge GDP from April 12, 1948, to October 19, 1953, and at the Portsmouth GDP from September 7, 1954, to September 15, 1955. The Oak Ridge GDP is recognized as a covered DOE facility from 1943 to the present and the Portsmouth GDP is recognized as a covered DOE facility from 1954 to 1998. *See* Department of Energy, Office of Worker Advocacy, Facility List.

Based on covered employment of more than 250 workdays at the Oak Ridge and Portsmouth GDPs, in a job that had exposures comparable to a job that is or was monitored through the use of dosimetry badges, you meet the requirements for Special Exposure Cohort membership. *See* 42 U.S.C. § 7384l(14). However, because the cancer with which you had been diagnosed, endometrial carcinoma, is not a specified cancer under 42 U.S.C. § 7384l(17), your case was referred to NIOSH in order to further consider your entitlement to compensation under the Act.

To determine the probability of whether you sustained cancer in the performance of duty, the district office referred your claim to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction in accordance with § 20 C.F.R. § 30.115. On June 16, 2004, you signed Form OCAS-1, indicating that you had reviewed the NIOSH Draft Report of Dose Reconstruction and agreeing that it identified all of the relevant information provided to NIOSH. On June 23, 2004, the district office received the final NIOSH Report of Dose Reconstruction. Using the information provided in this report, the Cleveland district office utilized the Interactive RadioEpidemiological Program (NIOSH-IREP) to determine the probability of causation of your cancer and reported in its recommended decision that there was a 7.57% probability that your cancer was caused by radiation exposure at the Oak Ridge and Portsmouth GDPs.

On June 29, 2004, the Cleveland district office recommended denial of your claim for compensation finding that your cancer was not "at least as likely as not" (a 50% or greater probability) caused by radiation doses incurred while employed at the Oak Ridge and Portsmouth GDPs. The district office concluded that the dose reconstruction estimates were performed in accordance with 42 U.S.C. § 7384n(d). Further, the district office concluded that the probability of causation was completed in accordance with 42 U.S.C. § 7384n(c)(3). The district office also concluded that you do not qualify as a covered employee with cancer as defined in 42 U.S.C. § 7384l(9)(B). Lastly, the district office concluded that you are not entitled to compensation, as outlined under 42 U.S.C. § 7384s.

FINDINGS OF FACT

1. You filed a claim for benefits on February 21, 2002.

2. You were employed at the Oak Ridge GDP and at the Portsmouth GDP, covered DOE facilities, from April 12, 1948, to October 19, 1953, and September 7, 1954, to September 15, 1955, respectively.

3. You were diagnosed as having endometrial adenocarcinoma on November 27, 2001.

4. The NIOSH Interactive RadioEpidemiological Program indicated a 7.57% probability that your cancer was caused by radiation exposure at the Oak Ridge GDP and at the Portsmouth GDP.

5. Your cancer was not "at least as likely as not" related to your employment at a DOE facility.

CONCLUSIONS OF LAW

I have reviewed the recommended decision issued by the Cleveland district office on June 29, 2004. I find that you have not filed any objections to the recommended decision and that the sixty-day period for filing such objections has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

To determine the probability of whether you sustained cancer in the performance of duty, the district office referred your claim to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction, in accordance with 20 C.F.R. § 30.115. The information and methods utilized to produce the dose reconstruction are summarized and explained in the NIOSH Report of Dose Reconstruction dated June 8, 2004. NIOSH assigned an overestimate of radiation dose using maximizing assumptions related to radiation exposure and intake, based on current science, documented experience, and relevant data, as well as information recorded during the computer-assisted telephone interview. *See* 42 C.F.R. §§ 82.25 and 82.26.

Using the information provided in the Report of Dose Reconstruction for prostate cancer, the district

office utilized the NIOSH Interactive RadioEpidemiological Program to determine a 7.57% probability that your cancer was caused by radiation exposure while employed at the Oak Ridge and Portsmouth GDPs. The Final Adjudication Branch also analyzed the information in the NIOSH report, confirming the 7.57% probability.

Therefore, your claim must be denied because the evidence does not establish that you are a "covered employee with cancer", because your cancer was not determined to be "at least as likely as not" (a 50% or greater probability) related to radiation doses incurred in the performance of duty at the Oak Ridge and Portsmouth GDPs. *See* 42 U.S.C. §§ 7384l(1)(B), 7384l(9)(B).

For the above reasons, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

Cleveland, OH

Debra A. Benedict

Acting District Manager

Final Adjudication Branch

EEOICPA Fin. Dec. No. 28416-2004 (Dep't of Labor, March 14, 2005)

NOTICE OF FINAL DECISION

FOLLOWING A HEARING

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

STATEMENT OF THE CASE

On April 29, 2002, you filed a claim for benefits under Part B of the Act. You listed bladder cancer as the medical condition on which your claim is based. You provided medical evidence to support the claimed medical condition. The first date of diagnosis of the cancer is November 19, 2001, as shown on the pathology report.

Your employment history Form, EE-3, states that you were employed at the Y-12 plant in Oak Ridge, TN, from July 1970 to March 2000. The Department of Energy (DOE) confirmed your employment dates as July 13, 1970 to March 27, 2000.

To determine the probability that you sustained cancer in the performance of duty, the district office forwarded a complete copy of your case record to the National Institute for Occupational Safety and Health (NIOSH) for reconstruction of the radiation dose you had received in the course of your employment at the Y-12 plant. On May 3, 2004, you signed Form OCAS-1, indicating that you had reviewed the NIOSH Draft Report of Dose Reconstruction and agreed that it identified all of the

relevant information provided to NIOSH.

On May 10, 2004, NIOSH provided the district office with a copy of the dose reconstruction. The report states that NIOSH assigned an overestimate of radiation dose using maximizing assumptions related to radiation exposure and intake, based on current science, documented experience and relevant data.

Pursuant to Subpart E of the Department of Health and Human Services' regulations, 42 C.F.R part 81, the district office used the information provided in this report to determine that there was a 22.18% probability that your bladder cancer was caused by radiation exposure at the Y-12 plant.

On May 18, 2004, the Denver district office issued a recommended decision to deny your claim for compensation benefits. Based on the evidence contained in the case record, the district office concluded that the dose reconstruction estimates were performed in accordance with 42 U.S.C. § 7384n(d) and 42 C.F.R. § 82.26; the probability of causation calculation was completed in accordance with 42 U.S.C. § 7384n(c)(3) and 42 C.F.R. part 81; and you are not entitled to compensation as outlined under 42 U.S.C. § 7384n(b).

OBJECTIONS

On July 19, 2004, the Final Adjudication Branch received your letter of objection which was postmarked on July 17, 2004. You objected to the recommended decision and requested an oral hearing to present your objections. You stated your objection as: "I worked over all of Y-12. Contact with different substances, materials, etc. I ate my lunch, took breaks, smoked cigarettes in areas in the 1970 – 80s, which now you have to have training and pass a test, plus wear specific EGP to enter the areas." An oral hearing was held on October 13, 2004, in Oak Ridge, TN.

At the hearing, you reiterated the original stated objection (See Hearing Transcript (HT) pages 13-15); you testified that you have had recurrences of the bladder cancer (See HT pages 9 and 10); you testified that there is no history in your family of cancer (See HT page 11.); you described areas in which you worked, specifically with the roof crews and in the biology department at the "mouse house." (See HT pages 12 and 13). The objections to be addressed are:

1. "I worked over all of Y-12. Contact with different substances, materials, etc. I ate my lunch, took breaks, smoked cigarettes in areas in the 1970 – 80s, which now you have to have training and pass a test, plus wear specific EGP to enter the areas."

2. You have had recurrences of bladder cancer.

3. There is no family history of bladder cancer.

4. You discussed working on roof crews at Oak Ridge. Also, mentioned working in the biology department at the "mouse house."

Additionally, you testified that you had been diagnosed with skin cancer in the past and you were attempting to obtain the documentation which reflects that you had skin cancer (See HT pages 10-11).

Your first and fourth objections concern the accuracy of the dose reconstruction and its consideration of

the workplace environment. A review of the dose reconstruction report shows that DOE dosimetry records were used as a starting point in determining your external and internal doses. In addition, the dosimetry records provide information relating to where the claimant worked. These records provide an indication of your dose since the dosimeter and bioassay measurements detect radiation in the work environment, *i.e.*, your dose is recorded regardless of where you worked at the Y-12 plant. NIOSH assigned you maximized missed doses. For dose reconstruction purposes, the term "missed dose" represents the dose that could have been received, but may not have been recorded due to the dosimeter detection limits or site reporting practices. In addition, the dose received from diagnostic medical X-ray procedures that were required as a condition of employment was included in the overall estimate of the dose to the prostate and the colon. Maximizing dose conversion factors were used to convert potential whole body exposure dose to dose to the bladder. (See dose reconstruction report (DR) pages 5 through 7.)

The dose reconstruction report shows that NIOSH reviewed internal dose monitoring records. NIOSH states that there were no bioassay results greater than the minimum detectable activity for the bioassay methods used were recorded in the DOE record. To ensure that your internal dose was overestimated, internal dose from an assumed hypothetical intake was assigned by NIOSH based on the Technical Information Bulletin: Maximum Internal Dose Estimates for Certain DOE Complex Claims. The hypothetical intake is composed of 28 radionuclides and exceeds any possible actual intake, as the level of activity necessary to generate such an intake is likely to have been detectable by workplace indicators. Additionally, these nuclides would not all be found in a single location on site. (See DR page 6)

A review of the dose reconstruction report shows that for the purposes of the dose reconstruction, NIOSH assigned you the highest reasonably possible radiation dose to the bladder related to radiation exposure and intake using available dosimetry data, when available, and maximizing assumptions in the absence of documented exposures. As noted above, dosimeter and bioassay measurements detect his radiological exposure in the work environment, *i.e.*, measurements are made and recorded regardless of where he worked at the Y-12 plant, and this addresses the issues in these two objections. The NIOSH approach is based on current science, documented experience and relevant data. Objections 1 and 3 relate to the methodology used by NIOSH to complete the dose reconstruction.

The second objection relates to three recurrences of the bladder cancer. The file indicates that the district office initially reported to NIOSH that you had been diagnosed with two primary bladder cancers: one in November 2001 and the other in September 2002. The pathology report dated September 18, 2002, states that you were diagnosed with "recurrent" bladder cancer. At the hearing you provided a letter from Dr. Jeff E. Flickinger dated August 26, 2004 which states that you have been diagnosed with "superficial bladder cancer, originally in 2001. The last recurrence he had was on May 2002." On November 17, 2004, the undersigned received the packet of medical reports you sent on November 12, 2004. The packet includes the previously submitted and considered pathology reports dated November 19, 2001 and September 18, 2002. You also provided copies of pathology reports which were not previously in the file, as follows:

Pathology report as a result of a colon screen dated December 6, 2002, provides a diagnosis of hyperplastic polyp.

Pathology report dated May 7, 2003, shows a diagnosis of recurrent bladder tumor.

Pathology report resulting from a urine sample dated December 4, 2003, states that there were no malignant cells identified.

Your fourth objection concerns your statement that there is no family history of bladder cancer. It is a scientific fact that ionizing radiation may cause some cancers, but no one can be certain in any specific case. The software program, named the NIOSH-Interactive RadioEpidemiological Program (NIOSH-IREP), is based on NIOSH regulations found at 42 C.F.R. part 81 and uses the updated version of radioepidemiological tables developed by the National Institutes of Health as a basis for determining probability of causation for employees covered under EEOICPA. NIOSH-IREP allows claims examiners to apply the National Cancer Institute risk models directly to data for an individual claimant.

Scientists evaluate the likelihood that radiation causes cancer in a worker by using medical and scientific knowledge about the relationship between specific types and levels of radiation dose and the frequency of cancers in exposed populations. If research determines that a specific type of cancer occurs more frequently among a population exposed to a higher level of radiation than a comparable population (a population with less radiation exposure but similar in age, gender, and other factors that have a role in health), and if the radiation exposure levels are known in the two populations, then it is possible to estimate the proportion of cancers in the exposed population that may have been caused by a given level of radiation.

The probability of causation (PoC) means the probability or likelihood that a cancer was caused by radiation exposure incurred by a covered employee in the performance of duty. The PoC is calculated as the risk of cancer attributable to radiation exposure (RadRisk) divided by the sum of the baseline risk of cancer to the general population 42 C.F.R. § 81.4(n). The Department of Labor (DOL) uses NIOSH-IREP to estimate the probability that an employee's cancer was caused by his/her individual radiation dose. The model takes into account the employee's cancer type, year of birth, year of cancer diagnosis, and exposure information such as years of exposure, as well as the dose received from gamma radiation, X-rays, alpha radiation, beta radiation, and neutrons during each year. None of the risk models explicitly accounts for exposure to other occupational, environmental, or dietary carcinogens.

NIOSH-IREP allows DOL to take into account uncertainty concerning the information being used to estimate individualized exposure and to calculate the PoC. Accounting for uncertainty is important because it can have a large effect on the PoC estimates for a specific individual. As required by the EEOICPA, DOL uses the upper 99% credibility limit to determine whether the cancers of employees were caused by their radiation doses. This helps minimize the possibility of denying compensation to claimants under EEOICPA for those employees with cancers likely to have been caused by occupational radiation exposures.

Factors which may or may not potentially predispose an employee to the carcinogenic effects of radiation to the affected site, such as family history of cancer, exposure to other toxic substances, or the effect that radiation dose to other organs/tissues may have on the dose directly to the primary cancer site, are not part of the NIOSH-IREP model. Objection three relates to the probability of causation portion of the dose reconstruction methodology.

FINDINGS OF FACT

1. You filed a claim for benefits under Part B of the EEOICPA on April 29, 2002.

2. You were employed at the Y-12 plant from July 13, 1970 to March 27, 2000.

3. The first diagnosis of bladder cancer was made on November 19, 2001, after you began employment at a covered facility.

4. The medical evidence in the file establishes that you have been diagnosed with one primary cancer, bladder cancer.

5. NIOSH reported annual dose estimates for your bladder cancer from the date of initial radiation exposure during covered employment, to the date of the cancer's first diagnosis. A summary and explanation of information and methods applied to produce these dose estimates, including your involvement through interview and review of the dose report, are documented in the "NIOSH Report of Dose Reconstruction under EEOICPA," dated January 30, 2004.

6. The undersigned has verified that there is a 22.18% probability that the bladder cancer was caused by your occupational radiation exposure during your covered employment at the Y-12 plant.

7. The probability of causation value is less than 50%, and shows that your cancer is not "at least as likely as not" related to employment at the covered facility.

8. You submitted additional evidence after the hearing.

9. You have not submitted any comments to the hearing transcript, a copy of which was sent to you on November 1, 2004.

10. You have not submitted any evidence relating to skin cancer.

CONCLUSIONS OF LAW

The record contains sufficient evidence to support that you have been diagnosed with bladder cancer. Therefore, to determine the probability of whether you sustained cancer in the performance of duty, the district office forwarded a complete copy of the case record to the National Institute for Occupational Safety and Health (NIOSH) for reconstruction of the radiation dose you had received in the course of your employment at the Y-12 plant, in Oak Ridge, TN. The dose reconstruction is used by the Department of Labor to determine the probability that the claimed cancer is related to employment at a covered facility.

The National Institute for Occupational Safety and Health (NIOSH) has full authority under the regulations to complete the dose reconstruction as prescribed in its rules. If a claimant objects to the dose reconstruction, the Final Adjudication Branch will evaluate the factual findings upon which NIOSH based the dose reconstruction. *See* 20 C.F.R. § 30.318(a).

Objection two relates to district office's use of the first date of the diagnosis of bladder cancer to

calculate the probability that your bladder cancer was caused by radiation exposure during your employment at the Y-12 plant. I find that the district office's calculation of the probability of causation for the primary bladder cancer diagnosed on November 19, 2001 is in accordance with current policy and procedures.

Objections one, three and four relate to the choice by NIOSH of the dose reconstruction methodology. The regulations promulgated by the Department of Health and Human Services (DHHS) leave the determination of methodology to NIOSH. In accordance with 20 C.F.R. § 30.318(b), these objections can not be addressed by the Final Adjudication Branch.

I find that the decision of the district office is supported by the evidence and the law, and cannot be changed based on your objections. As explained in § 30.110(b) of the implementing regulations, "Any claim that does not meet all of the criteria for at least one of these categories as set forth in these regulations must be denied." 20 C.F.R. § 30.110(b).

Therefore, I find that you are not entitled to benefits under the Act, and that your claim for compensation must be denied.

Washington, DC

Linda M. Parker

Hearing Representative

EEOICPA Fin. Dec. No. 36328-2004 (Dep't of Labor, September 27, 2004)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) 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 denied.

STATEMENT OF THE CASE

On September 16, 2002, you filed a claim (Form EE-2) for benefits as the surviving spouse of **[Employee]**. You identified breast cancer and liver cancer as the diagnosed conditions on which your claim was based. You submitted an employment history form (EE-3) on which you stated that **[Employee]** was employed at the INEEL site (Idaho National Engineering and Environmental Laboratory) from January 15, 1977 to March 6, 2001 and that she wore a dosimetry badge while employed. As medical evidence, you submitted the following:

1. A copy of a November 7, 2001 hospital summary report which includes the results of the June 12 1998 pathology report in which **[Employee]** was diagnosed with right breast cancer.

2. A copy of Dr. John H. Ward's October 28, 1999 medical report in which he stated **[Employee]** was diagnosed with metastatic breast cancer to the liver.

3. A copy of Dr. William Brant's February 17, 2000 ultrasound report in which he states

[Employee] had multiple masses of metastatic breast carcinoma within the liver.

You submitted a copy of **[Employee's]** death certificate that shows she died on March 6, 2001 due to metastatic breast cancer and that you were her spouse at the time of death. You did not submit a copy of your marriage certificate to establish you were married to **[Employee]** as requested by the district office on September 25, 2002. On October 9, 2002, INEEL representatives Katherine A. Vivian and Lynn E. Rockhold advised the district office by letter that **[Employee]** was employed at INEEL from March 27, 1978 to February 28, 2001.

To determine the probability of whether **[Employee]** sustained cancer in the performance of duty, the district office referred your application package to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction on November 4, 2002, in accordance with § 30.115 of the implementing regulations. 20 C.F.R. § 30.115. On June 29, 2004, you signed Form OCAS-1, indicating that you had reviewed the NIOSH Draft Report of Dose Reconstruction and agreed that it identified all of the relevant information you provided to NIOSH. On July 7, 2004, NIOSH submitted the Final Report of Dose Reconstruction to the district office. Pursuant to § 81.20 of the implementing NIOSH regulations, the district office used the information provided in that report to determine that there was a 30.89% probability that **[Employee's]** breast cancer was caused by radiation exposure at the INEEL site. 42 C.F.R. § 81.20.

On July 14, 2004, the district office issued a recommended decision in which it concluded that **[Employee]** does not qualify as a covered employee with cancer under 42 U.S.C. § 7384l(9)(B) as she does not meet the requirements shown in 42 U.S.C. § 7384n(b); that NIOSH performed dose reconstruction estimates in accordance with 42 U.S.C. § 7384n(d) of the EEOICPA and 42 C.F.R. § 82.10; and that the Department of Labor completed the Probability of Causation calculation in accordance with 42 U.S.C. § 7384n(c)(3) and 20 C.F.R. § 30.213, which references Subpart E of 42 C.F.R. § 81. The district office recommended denial of your claim based on its conclusions.

Section 30.310(a) of the EEOICPA implementing regulations provides that, "Within 60 days from the date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision, including HHS's reconstruction of the radiation dose to which the employee was exposed (if any), and whether a hearing is desired." 20 C.F.R. § 30.310(a). Section 30.316(a) of those regulations further states that, "If the claimant does not file a written statement that objects to the recommended decision and/or requests a hearing within the period of time allotted in § 30.310, or if the claimant waives any objections to all or part of the recommended decision, the FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part."

20 C.F.R. § 30.316(a).

After considering the written record of the claim forwarded by the district office, and after conducting the further development of the claim as was deemed necessary, the FAB hereby makes the following:

FINDINGS OF FACT

1. You filed a claim for survivor benefits on September 16, 2002.

2. **[Employee]** was employed at the Idaho National Engineering and Environmental Laboratory, a

Department of Energy facility,[1] from August 2, 1976 to December 1, 1981.

3. **[Employee]** was diagnosed with breast cancer on June 12, 1998.

4. **[Employee]** died on March 6, 2001 due to metastatic breast cancer.

5. On July 7, 2004, NIOSH provided the district office a Final Report of Dose Reconstruction under the EEOICPA based on the evidence of record. On September 14, 2004, the Final Adjudication Branch independently analyzed the information in that report and confirmed the 30.89% probability determined by the district office.

6. You did not submit evidence that establishes you are the surviving spouse of **[Employee]**.

7. You have not filed any objections to the recommended decision within the 60 days allowed by § 30.310(b) of the EEOICPA regulations.

Based on the above-noted findings of fact in this claim and pursuant to the authority granted by § 30.316(a) of the EEOICPA regulations, the FAB hereby also makes the following:

CONCLUSIONS OF LAW

To establish eligibility for compensation as a result of cancer, it must first be established that **[Employee]** was a DOE employee, a DOE contractor employee or an atomic weapons employee who contracted cancer (that has been determined pursuant to guidelines promulgated by Health and Human Services, "to be at least as likely as not related to such employment"), after beginning such employment. 42 U.S.C. § 7384l(9) and 20 C.F.R. § 30.210. The evidence of record establishes that **[Employee]** was a DOE employee who contracted breast cancer after beginning her employment at the INEEL. On September 14, 2004, using the dose estimates provided by NIOSH, the FAB calculated the probability of causation for **[Employee's]** breast cancer with the software program known as NIOSH-IREP. These calculations show that there was a 30.89% probability that **[Employee's]** breast cancer was caused by her exposure to radiation during the period of her covered employment at the INEEL site. Pursuant to 42 C.F.R. § 82.26, NIOSH will only complete dose estimates for the organ or tissue relevant to the primary cancer site(s). It has been established by the medical evidence of record that **[Employee]** was diagnosed with multiple masses of metastatic breast carcinoma within the liver. Evidence was not submitted that establishes she was diagnosed with liver cancer; therefore dose estimates were not completed for that organ.

Because the evidence of record does not establish that **[Employee's]** cancer was "at least as likely as not" (a 50% or greater probability) caused by her employment at the INEEL site within the meaning of § 7384n of the Act, I find that you are not entitled to benefits under the Act, and that your claim for compensation must be denied.

Additionally, you did not submit evidence that establishes you are an eligible survivor as defined under the EEOICPA. Pursuant to § 7384s(e)(2) of the EEOICPA, if a covered employee eligible for payment dies before filing a claim under this title, a survivor of that employee may file a claim for such payment. 42 U.S.C. § 7384s(e)(2). Payment may be made to a surviving spouse if it is established that the spouse was married to the employee for at least one year immediately prior to the employee's death. See 42 U.S.C. § 7384s(e)(3)(A).

Washington, DC

Thomasyne L. Hill

Hearing Representative

Final Adjudication Branch

[1] U.S. Department of Energy. *Idaho National Engineering and Environmental Laboratory*. Time Period: 1949 to Present. Worker Advocacy Facility List. Available: http://tis.eh.doe.gov/advocacy/faclist/showfacility.cfm [retrieved September 14, 2004].

EEOICPA Fin. Dec. No. 37539-2005 (Dep't of Labor, November 2, 2005)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

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 for benefits under § 7384 of the Act is denied.

STATEMENT OF THE CASE

On October 23, 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 esophageal cancer. You submitted medical evidence establishing that you were diagnosed with esophageal cancer on April 12, 2002.

On the Form EE-3, Employment History, you stated you were employed as a sheet metal worker at the Y-12 plant in Oak Ridge, Tennessee, for the period of April 1, 1974 to February 12, 2002. You stated that during this employment, you visited the Oak Ridge, Portsmouth, and Paducah gaseous diffusion plants several times a year, as well as X-10 (the Oak Ridge National Laboratory, or ORNL). In addition you visited the Idaho National Engineering and Environmental Laboratory (INEEL) in Scoville, Idaho. The district office verified this employment as April 1, 1974 to February 11, 2002, including a period of temporary duty at INEEL from April 10, 1992 to May 18, 1992.

To determine the probability of whether you sustained cancer in the performance of duty, as required to determine eligibility for benefits under § 7384 of the Act, the Jacksonville district office referred the application package to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction. 20 C.F.R. § 30.115. NIOSH reported annual dose estimates from the date of initial radiation exposure during covered employment, to the date the cancer was first diagnosed. A summary and explanation of information and methods applied to produce these dose estimates, including your involvement through an interview and review of the dose report, are documented in the "NIOSH Report of Dose Reconstruction under EEOICPA." On March 27, 2004, you signed Form OCAS-1, indicating the NIOSH Draft Report of Dose Reconstruction had been reviewed and agreeing that it identified all of the relevant information provided to NIOSH. The district office received the final NIOSH Report of Dose Reconstruction on June 1, 2004.

Pursuant to the implementing NIOSH regulations, the district office used the information provided in this report to determine that there was a 28.1% probability that your cancer was caused by radiation exposure at the DOE facilities in which you worked. 42 C.F.R. § 81.20. The Final Adjudication Branch independently confirmed the 28.1% probability.

On March 4, 2005, the Denver district office issued a recommended decision concluding that you are not entitled to compensation since your cancer is not covered under § 7384 of the Act.

The recommended decision informed you that you had sixty days to file any objections, and that period ended on May 3, 2005. On May 6, 2005, the Final Adjudication Branch received your letter of objection and request for a hearing dated May 6, 2005. The hearing was held on July 20, 2005, in Oak Ridge, Tennessee.

In accordance with the implementing regulations, a claimant is allowed thirty days after the hearing is held to submit additional evidence or argument, and twenty days after a copy of the transcript is sent to them to submit any changes or corrections to that record. 20 C.F.R. §§ 30.314(e), 30.314(f). By letter dated August 8, 2005, the transcript was forwarded to you. No response was received.

OBJECTIONS

Pursuant to the implementing regulations, if the claimant objects to NIOSH's dose reconstruction the Final Adjudication Branch (FAB) will evaluate the factual findings upon which NIOSH based the dose reconstruction. However, the methodology used by NIOSH in arriving at estimates of radiation doses received by an employee is binding on the FAB. 20 C.F.R. § 30.318(b).

1. The dose reconstruction did not take into account the multitude of x-rays you had to take on account of your work-related injuries (mostly back injuries). You estimate you had several hundred of these x-rays. You would not have been hurt if it had not been for your work, and these x-rays were required under workers' compensation in order to receive benefits. (Hearing Transcript (HT) pages 7 through 8.)

NIOSH procedures do not consider doses from medical x-ray procedures as applicable to include in an employee's dose reconstruction other than those required as a condition of employment. This is both a factual objection and an objection to NIOSH methodology, since medical x-ray doses due to work-related injuries are not covered under NIOSH procedures. NIOSH methodology is binding on the FAB.

2. You stated that at Y-12 the main radiation was alpha radiation and there is no way to reconstruct an alpha dose. DOE painted over the alpha radiation on the walls, but over time the paint flecked off. (HT pages 8 through 11.)

3. You were exposed to quite bit of the alpha radiation through ingestion and breathing. Their shop did a lot of grinding and modification of equipment from other parts of the plant, including process areas. They also worked on amphibious landing craft that was armored with a mixture of depleted uranium and other metals. Therefore, you think the majority of your radiation exposure was internal rather than external. However, you were not involved in any bioassay monitoring. (HT pages 8 through 11, and pages 15 through 17)

The second and third objections concern the accuracy of the dose reconstruction. The main issue concerns your exposure to alpha radiation through ingestion and breathing and the fact that you did not participate in a bioassay monitoring program. The basic principle of dose reconstruction is to characterize the occupational radiation environment to which a worker was exposed using available worker and/or workplace monitoring information. In cases where radiation exposures in the workplace

environment cannot be fully characterized based on available data, default values based on reasonable scientific assumptions are used as substitutes. The approaches for determining your external and internal dose are discussed in detail in NIOSH's dose reconstruction report. Since your concerns focus on internal dose, the discussion below will also focus on this area of the dose reconstruction.

NIOSH reviewed your employment records and no records of bioassay monitoring results were found. NIOSH notes that internal monitoring programs are applied to individuals who are likely to be exposed to radiation from internally-deposited radioactive material. Personnel who are not selected for internal dose monitoring programs are less likely to be exposed. However, to account for any incidental dose that may have been received but not documented, NIOSH assigned internal dose based on a hypothetical intake assuming an intake of 28 radionuclides. NIOSH considered that this resulted in an intake that greatly exceeds any possible actual intake by you because this level of activity would be expected to be detectable by workplace indicators. Additionally, these nuclides would not all be found in a single location on site.

In the "Dose from Radiological Incidents" section of the dose reconstruction report NIOSH indicated that you worked with contaminated parts and equipment. In the course of this work you may have received external radiation exposures from the contamination or internal radiation exposures during grinding, cutting, or welding activities if protective measures such as enclosures or ventilation were not adequate. However, NIOSH considered that these potential exposures were accounted for in this dose reconstruction by the claimant-favorable assumptions applied in the calculation of both external and internal doses.

For the purposes of the dose reconstruction, NIOSH believes they assigned you the highest reasonably possible radiation dose related to radiation exposure and intake using available dosimetry data, when available, and maximizing assumptions in the absence of documented exposures. The NIOSH approach is based on current science, documented experience and relevant data. These objections are challenges of the dose reconstruction methodology, which is binding on the FAB.

4. Your physician linked your cancer to radiation. You have no family history of cancer and no unhealthy habits (smoking or drinking). (HT pages 9 through 10)

5. Out of a group of 60-70 co-workers, you believe a much higher amount died of cancer than would have died in a similar size group involved in non-radiation work. (HT pages 17 through 19)

The fourth and fifth objections concern statements that your cancer was caused by occupational radiation exposure and that there is no family history of cancer and no unhealthy habits. You also noted that a much higher number of co-workers died of cancer than would have died in a similar size group involved in non-radiation work. It is a scientific fact that ionizing radiation may cause some cancers, but no one can be certain in any specific case. The software program, named the NIOSH-Interactive RadioEpidemiological Program (NIOSH-IREP), is based on NIOSH regulations found at 42 C.F.R. part 81 and uses the updated version of radioepidemiological tables developed by the National Institutes of Health as a basis for determining probability of causation for employees covered under EEOICPA. NIOSH-IREP allows claims examiners to apply the National Cancer Institute risk models directly to data for an individual claimant.

Scientists evaluate the likelihood that radiation causes cancer in a worker by using medical and scientific knowledge about the relationship between specific types and levels of radiation dose and the

frequency of cancers in exposed populations. If research determines that a specific type of cancer occurs more frequently among a population exposed to a higher level of radiation than a comparable population (a population with less radiation exposure but similar in age, gender, and other factors that have a role in health), and if the radiation exposure levels are known in the two populations, then it is possible to estimate the proportion of cancers in the exposed population that may have been caused by a given level of radiation.

The probability of causation (PoC) means the probability or likelihood that a cancer was caused by radiation exposure incurred by a covered employee in the performance of duty. The PoC is calculated as the risk of cancer attributable to radiation exposure (RadRisk) divided by the sum of the baseline risk of cancer to the general population. 42 C.F.R. § 81.4(n). DOL uses NIOSH-IREP to estimate the probability that an employee's cancer was caused by his/her individual radiation dose. The model takes into account the employee's cancer type, year of birth, year of cancer diagnosis, and exposure information such as years of exposure, as well as the dose received from gamma radiation, X-rays, alpha radiation, beta radiation, and neutrons during each year. None of the risk models explicitly accounts for exposure to other occupational, environmental, or dietary carcinogens.

NIOSH-IREP allows DOL to take into account uncertainty concerning the information being used to estimate individualized exposure and to calculate the PoC. Accounting for uncertainty is important because it can have a large effect on the PoC estimates for a specific individual. As required by EEOICPA, DOL uses the upper 99% credibility limit to determine whether the cancers of employees were caused by their radiation doses. This helps minimize the possibility of denying compensation to claimants under EEOICPA for those employees with cancers likely to have been caused by occupational radiation exposures.

Factors which may or may not potentially predispose an employee to the carcinogenic effects of radiation to the affected site, such as family history of cancer, exposure to other toxic substances, or the effect that radiation dose to other organs/tissues may have on the dose directly to the primary cancer site, are not part of the NIOSH-IREP model.

These objections are challenges of the methodology that OWCP uses to determine if a claimed cancer was at least as likely as not related to covered employment (*i.e.*, the probability of causation methodology). This methodology is binding on the FAB.

In summary, your objections are challenges of fact which do not require a rework by NIOSH, challenges of NIOSH methodology, which is binding on the FAB, and challenges of the OWCP's probability of causation methodology, which is binding on the FAB.

FINDINGS OF FACT

1) You filed a Form EE-1 on October 23, 2002, based on your esophageal cancer.
2) You were diagnosed with esophageal cancer on April 12, 2002.
3) You were employed at the Y-12 plant in Oak Ridge, Tennessee, for the period of April 1, 1974 to February 11, 2002.
4) The probability that your cancer was due to radiation exposure at the DOE facilities in which you worked is 28.1%.
5) On March 4, 2005, the Denver district office issued a recommended decision concluding that you are not entitled to compensation in the amount of $150,000 since your cancer is not covered under § 7384 of the Act.

6) You requested a hearing, which was held on July 20, 2005, in Oak Ridge, Tennessee. The objections raised are challenges of fact which do not require a change in the dose reconstruction or challenges of NIOSH methodology, which is binding on the FAB. 20 C.F.R. § 30.318(b).

CONCLUSIONS OF LAW

The undersigned has reviewed the facts and the recommended decision issued by the Jacksonville district office on March 4, 2005, and finds that the evidence submitted before and during the hearing does not establish that your esophageal cancer was at least as likely as not related to your employment at the covered facilities in which you worked as specified by § 7384 of the Act. 42 U.S.C. § 7384n. The evidence in the record does not establish that you are entitled to compensation under § 7384 of the Act because the calculation of "probability of causation" does not show that there is a 50% or greater likelihood that your cancer was caused by radiation exposure received at DOE facilities in the performance of duty. Therefore, I find that the decision of the Denver district office is supported by the evidence and the law and cannot be changed based on the objections you submitted.

As explained in § 30.110(c) of the implementing regulations, "Any claim that does not meet all of the criteria for at least one of these categories as set forth in these regulations must be denied." 20 C.F.R. § 30.110(c). The undersigned hereby denies payment of lump sum compensation and medical benefits under § 7384 of the Act.

Jacksonville, FL

Mark Stewart

Hearing Representative

EEOICPA Fin. Dec. No. 38748-2004 (Dep't of Labor, September 13, 2004)

NOTICE OF FINAL DECISION FOLLOWING REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch (FAB) 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). A claimant who receives a recommended denial from the district office is entitled to file objections to the decision. 20 C.F.R. § 30.310. Since you submitted a written objection to recommended decision but did not specifically request a hearing, a review of the written record was performed. 20 C.F.R. § 30.312.

In reviewing any objections submitted, the FAB will review the written record, any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. 20 C.F.R. § 30.313.

For the reasons set forth below, your claim for benefits is denied.

STATEMENT OF THE CASE

On November 12, 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 lung cancer. You submitted medical evidence establishing that you were diagnosed with lung cancer on December 7,

2000.[1]
On the Form EE-3, Employment History, you stated you were employed at the Savannah River Site in Aiken, South Carolina from August 1988 through April 1993. The DOE verified your employment at the Savannah River Site as August 23, 1988 through April 29, 1993. In order to be eligible for benefits, the evidence must establish that your cancer was at least as likely as not related to your employment at a Department of Energy (DOE) facility.
To determine the probability of whether you sustained cancer in the performance of duty, the Jacksonville district office referred the application package to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction. 20 C.F.R. § 30.115. The NIOSH reported annual dose estimates from the date of initial radiation exposure during covered employment, to the date the cancer was first diagnosed. A summary and explanation of information and methods applied to produce these dose estimates, including your involvement through an interview and review of the dose report, are documented in the "NIOSH Report of Dose Reconstruction under EEOICPA."
On June 21, 2004, you signed Form OCAS-1, indicating the NIOSH Draft Report of Dose Reconstruction had been reviewed and agreeing that it identified all of the relevant information provided to the NIOSH. The district office received the final NIOSH Report of Dose Reconstruction on June 28, 2004.

The district office used the information provided in this report to determine that there was a 27.04% probability that your cancer was caused by radiation exposure at the Savannah River Site. 42 C.F.R. § 81.20. The FAB independently analyzed the information in the NIOSH report, confirming the 27.04% probability.
On July 2, 2004, the Denver district office issued a recommended decision denying your claim for compensation, concluding that you are not entitled to compensation since your lung cancer is not "at least as likely as not" related to employment at the covered facility.

Attached to the recommended decision was a notice of claimant rights, which stated that you had 60 days in which to file an objection to the recommended decision and/or request a hearing. You were also advised that, if there was no timely objection filed, the recommended decision would be affirmed and you would be deemed to have waived the right to challenge the decision. This 60-day period expired on August 31, 2004.
The implementing regulations provide that within 60 days from the date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision, including the NIOSH's reconstruction of the radiation dose to which the employee was exposed (if any), and whether a hearing is desired. 20 C.F.R. § 30.310(a). The regulations further provide that if the claimant does not file a written statement that objects to the recommended decision and/or requests a hearing within the 60 days, or if the claimant waives any objections to all or part of the recommended decision, the FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part. 20 C.F.R. § 30.316(a). If the claimant objects to the NIOSH dose reconstruction, the FAB will evaluate the factual findings upon which NIOSH based the dose reconstruction. However, the methodology used by NIOSH in arriving at estimates of radiation doses received by an employee is binding on the FAB.

On July 15, 2004, the Final Adjudication Branch received your letter of objection. In your letter, you stated that you believed too many people had worked on your dose reconstruction, and that you did not believe that computers could be used to reconstruct someone's illness. Your objections have been reviewed.
Congress directed NIOSH to create a method of calculating the probability that a compensable cancer occurred "in the performance of duty." The risk models used by NIOSH take into account the

employee's cancer type, year of birth, year of cancer diagnosis, and exposure information such as years of exposure, as well as the dose received from the various types of radiation during each year, along with epidemiological studies of cancer rates. Some of the data that may be included in the dose reconstruction include, but are not limited to: internal dosimetry (such as results from urinalysis); external dosimetry data (such as film badge readings); workplace monitoring data (such as air sample results); workplace characterization data (such as type and amount of radioactive material processed); and descriptions of the type of work performed at the work location. When dose information is not available, is very limited, or the dose of record is low, NIOSH may use the highest reasonably possible radiation dose, based on reliable science, documented experience, and relevant data, to complete a claimant's dose reconstruction. The guiding principle in conducting these dose reconstructions is to ensure that the assumptions are fair, consistent, and well-grounded in the best available science, while ensuring uncertainties in the science and data are handled to the advantage, rather than to the detriment, of the claim when feasible. The use of a computer to calculate the probability of causation is required, due to the vast amounts of data involved. Furthermore, the reconstruction is of the probable radiation dose received during employment, and not the diagnosed illness. The issues that you raised concern methodology, and are binding on the FAB.

FINDINGS OF FACT

1) On November 12, 2002, you filed a Form EE-1, Claim for Benefits under the EEOICPA, based on your lung cancer.
2) You were employed at the Savannah River Site from August 23, 1988 through April 29, 1993.
3) You were diagnosed with lung cancer on December 7, 2000.
4) Based on the dose reconstruction performed by the NIOSH, the district office calculated the probability of causation (the likelihood that the cancer was caused by radiation exposure incurred while working at a covered facility) for lung cancer. The district office calculated a probability of causation of 27.04% and determined that this condition was not "at least as likely as not" (a 50% or greater probability) related to employment at the covered facility. The FAB independently analyzed the information in the NIOSH report, confirming the 27.04% probability.
5) On July 2, 2004, the Denver district office issued a recommended decision denying your claim for compensation, concluding that you are not entitled to compensation since your lung cancer is not "at least as likely as not" related to employment at the covered facility.

6) You submitted a written objection to the recommended decision, and a review of the written record was conducted.

CONCLUSIONS OF LAW

Based on my review of the evidence of record and the recommended decision, I find that the evidence does not establish that your lung cancer was at least as likely as not related to your employment at a covered facility. 42 U.S.C. § 7384n. I also find that the decision of the district office cannot be changed based on the objections submitted. As provided in the implementing regulations, any claim that does not meet all of the criteria for at least one of these categories as set forth in these regulations must be denied. 20 C.F.R. § 30.110(b).

Under the Act, you are not entitled to benefits and your claim for compensation is denied. 42 U.S.C. § 7384s.
Jacksonville, FL

Sidne M. Valdivieso

Hearing Representative

[1]The district office reported a diagnosis date of December 8, 2000 to NIOSH. Despite this discrepancy, the percentage of probability of causation would not be materially affected as both dates are within the same year.

EEOICPA Fin. Dec. No. 38748-2004 (Dep't of Labor, September 13, 2004)

NOTICE OF FINAL DECISION FOLLOWING REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch (FAB) 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). A claimant who receives a recommended denial from the district office is entitled to file objections to the decision. 20 C.F.R. § 30.310. Since you submitted a written objection to recommended decision but did not specifically request a hearing, a review of the written record was performed. 20 C.F.R. § 30.312.

In reviewing any objections submitted, the FAB will review the written record, any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. 20 C.F.R. § 30.313.

For the reasons set forth below, your claim for benefits is denied.

STATEMENT OF THE CASE

On November 12, 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 lung cancer. You submitted medical evidence establishing that you were diagnosed with lung cancer on December 7, 2000.[1]

On the Form EE-3, Employment History, you stated you were employed at the Savannah River Site in Aiken, South Carolina from August 1988 through April 1993. The DOE verified your employment at the Savannah River Site as August 23, 1988 through April 29, 1993. In order to be eligible for benefits, the evidence must establish that your cancer was at least as likely as not related to your employment at a Department of Energy (DOE) facility.

To determine the probability of whether you sustained cancer in the performance of duty, the Jacksonville district office referred the application package to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction. 20 C.F.R. § 30.115. The NIOSH reported annual dose estimates from the date of initial radiation exposure during covered employment, to the date the cancer was first diagnosed. A summary and explanation of information and methods applied to produce these dose estimates, including your involvement through an interview and review of the dose report, are documented in the "NIOSH Report of Dose Reconstruction under EEOICPA."

On June 21, 2004, you signed Form OCAS-1, indicating the NIOSH Draft Report of Dose Reconstruction had been reviewed and agreeing that it identified all of the relevant information provided to the NIOSH. The district office received the final NIOSH Report of Dose Reconstruction on June 28, 2004.

The district office used the information provided in this report to determine that there was a 27.04% probability that your cancer was caused by radiation exposure at the Savannah River Site. 42 C.F.R. § 81.20. The FAB independently analyzed the information in the NIOSH report, confirming the 27.04% probability.

On July 2, 2004, the Denver district office issued a recommended decision denying your claim for compensation, concluding that you are not entitled to compensation since your lung cancer is not "at

least as likely as not" related to employment at the covered facility.

Attached to the recommended decision was a notice of claimant rights, which stated that you had 60 days in which to file an objection to the recommended decision and/or request a hearing. You were also advised that, if there was no timely objection filed, the recommended decision would be affirmed and you would be deemed to have waived the right to challenge the decision. This 60-day period expired on August 31, 2004.

The implementing regulations provide that within 60 days from the date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision, including the NIOSH's reconstruction of the radiation dose to which the employee was exposed (if any), and whether a hearing is desired. 20 C.F.R. § 30.310(a). The regulations further provide that if the claimant does not file a written statement that objects to the recommended decision and/or requests a hearing within the 60 days, or if the claimant waives any objections to all or part of the recommended decision, the FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part. 20 C.F.R. § 30.316(a). If the claimant objects to the NIOSH dose reconstruction, the FAB will evaluate the factual findings upon which NIOSH based the dose reconstruction. However, the methodology used by NIOSH in arriving at estimates of radiation doses received by an employee is binding on the FAB.

On July 15, 2004, the Final Adjudication Branch received your letter of objection. In your letter, you stated that you believed too many people had worked on your dose reconstruction, and that you did not believe that computers could be used to reconstruct someone's illness. Your objections have been reviewed.

Congress directed NIOSH to create a method of calculating the probability that a compensable cancer occurred "in the performance of duty." The risk models used by NIOSH take into account the employee's cancer type, year of birth, year of cancer diagnosis, and exposure information such as years of exposure, as well as the dose received from the various types of radiation during each year, along with epidemiological studies of cancer rates. Some of the data that may be included in the dose reconstruction include, but are not limited to: internal dosimetry (such as results from urinalysis); external dosimetry data (such as film badge readings); workplace monitoring data (such as air sample results); workplace characterization data (such as type and amount of radioactive material processed); and descriptions of the type of work performed at the work location. When dose information is not available, is very limited, or the dose of record is low, NIOSH may use the highest reasonably possible radiation dose, based on reliable science, documented experience, and relevant data, to complete a claimant's dose reconstruction. The guiding principle in conducting these dose reconstructions is to ensure that the assumptions are fair, consistent, and well-grounded in the best available science, while ensuring uncertainties in the science and data are handled to the advantage, rather than to the detriment, of the claim when feasible. The use of a computer to calculate the probability of causation is required, due to the vast amounts of data involved. Furthermore, the reconstruction is of the probable radiation dose received during employment, and not the diagnosed illness. The issues that you raised concern methodology, and are binding on the FAB.

FINDINGS OF FACT

1) On November 12, 2002, you filed a Form EE-1, Claim for Benefits under the EEOICPA, based on your lung cancer.
2) You were employed at the Savannah River Site from August 23, 1988 through April 29, 1993.
3) You were diagnosed with lung cancer on December 7, 2000.
4) Based on the dose reconstruction performed by the NIOSH, the district office calculated the probability of causation (the likelihood that the cancer was caused by radiation exposure incurred while working at a covered facility) for lung cancer. The district office calculated a probability of causation

of 27.04% and determined that this condition was not "at least as likely as not" (a 50% or greater probability) related to employment at the covered facility. The FAB independently analyzed the information in the NIOSH report, confirming the 27.04% probability.
5) On July 2, 2004, the Denver district office issued a recommended decision denying your claim for compensation, concluding that you are not entitled to compensation since your lung cancer is not "at least as likely as not" related to employment at the covered facility.

6) You submitted a written objection to the recommended decision, and a review of the written record was conducted.

CONCLUSIONS OF LAW

Based on my review of the evidence of record and the recommended decision, I find that the evidence does not establish that your lung cancer was at least as likely as not related to your employment at a covered facility. 42 U.S.C. § 7384n. I also find that the decision of the district office cannot be changed based on the objections submitted. As provided in the implementing regulations, any claim that does not meet all of the criteria for at least one of these categories as set forth in these regulations must be denied. 20 C.F.R. § 30.110(b).

Under the Act, you are not entitled to benefits and your claim for compensation is denied. 42 U.S.C. § 7384s.
Jacksonville, FL

Sidne M. Valdivieso

Hearing Representative

[1]The district office reported a diagnosis date of December 8, 2000 to NIOSH. Despite this discrepancy, the percentage of probability of causation would not be materially affected as both dates are within the same year.

EEOICPA Fin. Dec. No. 47583-2004 (Dep't of Labor, February 2, 2005)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch (FAB) concerning your claim for compensation under Part B of 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 stated below, your claim is denied.

STATEMENT OF THE CASE

On July 25, 2003, you filed a claim (Form EE-1) for benefits under Part B of the EEOICPA. On the Form EE-1, you identified brain cancer, oligodendroglioma, as the diagnosed condition for which you sought compensation. In support of your claim, you submitted medical records that discuss an April 3, 2003 biopsy of the brain tumor which revealed an anaplastic oligodendroglioma. The Department of Energy (DOE) verified that you were employed by various contractors at the Hanford[1] site intermittently from 1964 thorugh 1998.[2] The medical and employment evidence submitted show that you were diagnosed with brain cancer after beginning employment at a DOE facility.

To determine the probability that you sustained cancer in the performance of duty while employed at

the Hanford site, on September 10, 2003 the district office forwarded a complete copy of your case record to the National Institute for Occupational Safety and Health (NIOSH) for dose reconstruction. On April 29, 2004, you signed Form OCAS-1, indicating that you had reviewed the NIOSH Draft Report of Dose Reconstruction and agreed that it identified all of the relevant information you provided to NIOSH. On May 5, 2004, NIOSH provided the district office with a copy of the dose reconstruction report in which you were given an overestimate of radiation dose using claimant-favorable assumptions related to radiation exposure and intake. NIOSH considered the internal and external radiation doses based on dosimetry records from the DOE, dosimetry parameters applicable to the Hanford site, current science, and information obtained in the computer assisted telephone interview (CATI). Using the dose estimates provided by NIOSH and the software program NIOSH-IREP, the district office calculated the probability of causation for the brain cancer. These calculations show that the probability that your cancer was caused by exposure to radiation during your employment at the Hanford site is 25.05%.

In review of your case file, the district office noticed that NIOSH performed the dose reconstruction based on ICD-9 code 191 instead of the correct ICD-9 code 191.8. However, NIOSH procedure indicates that the models used in the external and internal dose reconstruction and the IREP model are the same for all ICD-9 codes under 191. The dose reconstruction as performed is appropriate and is not affected by the fourth digit (in this case). Accordingly, on June 1, 2004, the district office issued a recommended decision to deny your claim for benefits. The district office found that you filed a claim under Part B of the EEOICPA on July 25, 2003 but that your brain cancer is not "at least as likely as not" caused by your employment at a covered facility, within the meaning of 42 U.S.C. § 7384n(b). As such, the district office concluded that you are not a "covered employee with cancer" as defined by 42 U.S.C. § 7384l(9)(B)(i) and that you are not entitled to compensation under Part B of the EEOICPA.

On July 23, 2004, the FAB received your written objections to the recommended decision. In your letter of objection you specifically objected to the fact that the NIOSH dose reconstruction failed to show that your cancer was "at least as likely as not related" to your employment at the Hanford site. On September 8, 2004, a hearing was held via telephone attended by your authorized representative, **[Name of Representative]**. Throughout the hearing testimony and in your letter of objection, it was stated that the use of the wrong ICD-9 code and the incorrect location of the tumor (left versus right) in the dose reconstruction needs further investigation. You did not submit any additional evidence to support your objections.

After considering the evidence of record, the NIOSH report, your objections to the recommended decision, and after conducting a hearing, the FAB hereby makes the following:

FINDINGS OF FACT

1. You were employed at a covered DOE facility, the Hanford site, during a covered period.

2. You were diagnosed with a covered occupational illness, brain cancer, after beginning employment at a DOE facility.

3. There is a 25.05% probability that the brain cancer was caused by exposure to radiation during your employment at the Hanford site.

Based on the above-noted findings of fact in this claim, the FAB hereby also makes the following:

CONCLUSIONS OF LAW

The purpose of the EEOICPA is to provide "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." 42 U.S.C. § 7384d(b). In order to be afforded coverage, the claimant must first establish that the employee had been diagnosed with an "occupational illness," defined by the Act as "a covered beryllium illness, cancer referred to in § 7384l(9)(B). . .or chronic silicosis, as the case may be." 42 U.S.C. § 7384l(15). You identified and submitted medical documentation consistent with the diagnosis of brain cancer, which is a cancer covered under the EEOICPA.

The Act explains that a "covered employee with cancer" is, among other things, a DOE or AWE employee who contracted that cancer after beginning employment at a DOE or AWE facility, if and only if that individual is determined to have sustained that cancer in the performance of duty. 42 U.S.C. § 7384l(9)(B). In order to establish that the employee "sustained that cancer in the performance of duty," § 30.115 of the implementing regulations instructs the district office to forward a complete copy of your case record to NIOSH for dose reconstruction. 20 C.F.R. § 30.115. NIOSH attempts to determine how high the exposures could possibly be for someone who worked at the Hanford site during the covered period, given what is known about the exposures of the workers. This approach forms the basis for the NIOSH dose reconstruction using a series of the highest exposures for various exposure modes (internal vs. external) at different times during the duration of the entire project.

NIOSH's approach to conclude the dose reconstruction process based on claimant-favorable assumptions, which includes using the same model for ICD-9 code 191 and ICD-9 code 191.8, is consistent with its methodology. Section 30.318 of the regulations states that "The methodology used by HHS in arriving at reasonable estimates of the radiation doses received. . .is binding on the FAB." 20 C.F.R. § 30.318. Therefore, your request for a re-work to consider the location of the brain tumor and the correct ICD-9 code is a challenge to the methodology utilized by NIOSH and will not be addressed by the FAB.

Based on NIOSH's findings, the district office determined that the probability that your brain cancer was caused by exposure to radiation during your employment at the Hanford site is 25.05%. The FAB independently analyzed the information in the NIOSH report, confirming that the factual evidence reviewed by NIOSH was properly addressed, and that there is a 25.05% probability that your cancer is related to your employment at the Hanford site. Since your probability of causation is less than 50%, it is determined that you did not incur cancer in the performance of duty for an AWE or DOE facility. Accordingly, you do not meet the statutory definition of a "covered employee with cancer" and your claim for compensation must be denied.

I find that the district office's June 1, 2004 recommended decision is correct and I accept those findings and the recommendations of the district office. Accordingly, your claim for compensation under Part B of the EEOICPA is hereby denied.

Washington, DC

Vawndalyn B. Feagins

Hearing Representative

Final Adjudication Branch

[1] The Hanford site is identified on the DOE's Covered Facility List as a DOE facility from 1942 through the present.

[2] For the purpose of the dose reconstruction, NIOSH considered the employment from 1964 through 1998 to be continuous.

EEOICPA Order No. 50245-2004 (Dep't of Labor, April 14, 2011)

ORDER DENYING REQUEST FOR RECONSIDERATION

This is the response to the claimant's December 28, 2010 request for reconsideration of the November 30, 2010 decision of the Final Adjudication Branch (FAB) on his survivor claim under both Part B and Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. In that decision, FAB concluded that with respect to Part B, the employee's pancreatic cancer was not sustained "in the performance of duty," as that term is defined in § 7384n(b), because it is not "at least as likely as not" (a 50% or greater probability) that such cancer was related to the radiation doses she received during her covered employment at a Department of Energy (DOE) facility—Hangar 481, Kirtland Air Force Base (AFB)—from March 1, 1989 through June 30, 1994. FAB also concluded that with respect to Part E of EEOICPA, the employee was not a "covered DOE contractor employee," as that term is defined in § 7385s(1), because it is also not at least as likely as not that her exposure to toxic substances at Hangar 481 was a significant factor in aggravating, contributing to, or causing her pancreatic cancer. It was because of these two conclusions that the claim for survivor benefits due to the employee's pancreatic cancer under Part B, and for her death due to pancreatic cancer under E, was denied. A decision on the Part E claim for the employee's death due to acoustic neuroma, however, was deferred pending further development.

In support of his December 28, 2010 reconsideration request, the claimant raised a number of interwoven and somewhat confusing arguments. To the extent that I can discern what they are, his arguments in support of his request are as follows.

1. FAB should have found that the period of the employee's covered employment began when she started work for Ross Aviation at Hangar 481, Kirtland AFB, on December 9, 1985, rather than when Hangar 481 became a covered DOE facility on March 1, 1989, because Ross Aviation had contracts with DOE and its predecessor agencies starting in 1970, and because those contracts show that Ross Aviation began working at Hangar 481 in 1984. In conjunction with this argument, which the claimant raised earlier in the adjudication of his claim, he asserts that copies of the contracts in question that he submitted have either never been considered, or were not considered by the appropriate agency of the Department of Labor.

2. FAB wrongly found that the employee's diagnosed acoustic neuroma was not an "occupational illness" that is compensable under Part B that should have been taken into account during the dose reconstruction process and the determination of the probability of causation for the Part B claim.

3. FAB wrongly concluded that the effect of the employee's alleged exposure to radiation prior to beginning her employment with Ross Aviation on December 9, 1985, as well as her alleged "non-employment" exposure during her accepted covered employment, could not be taken into account when it determined the probability of causation for her pancreatic cancer. The claimant contends that

these alleged exposures to radiation can be inferred from evidence in the file and must be taken into account, because 42 U.S.C. § 7384n(c)(3)(C) provides that the regulatory guidelines for determining the probability of causation for cancer under Part B "shall take into consideration. . .other relevant factors." As was the case with the claimant's first argument noted above, he made this particular argument previously in the adjudication of his claim.

4. FAB wrongly concluded that the alleged radiation exposure of the employee "in other employments" was not covered under EEOICPA. The claimant contends that this alleged radiation exposure should have been taken into account and "added to the worker's total exposure. . . ." While he acknowledges that the dose reconstruction methodology that the National Institute for Occupational Safety and Health (NIOSH) used to estimate the radiation dose of the employee is binding on FAB, he believes that FAB should have determined that his objections concerning the application of that methodology, as it related to the alleged exposures in question, needed to be considered by NIOSH and therefore should have returned the Part B claim to the district office for referral to NIOSH for such consideration. To support this argument regarding the employee's radiation dose, he asserts that:

[G]eneral principles of workers [*sic*] compensation law contemplate that a worker who was exposed to radiation in multiple employments, like the worker in this case, is not limited to an analysis of exposure during the last term of injurious employment. Rather, in such cases the sum total of the worker's exposure during successive employments should be taken into account in assessing the effect of the worker's last injurious exposure to radiation, and in so doing the exposure with the last employer. . .is given its due weight in contributing to the onset of a subsequently occurring cancer.

Similar to the first and third arguments listed above, the claimant raised this argument previously in the adjudication of his EEOICPA claim.

5. The claimant was not afforded the opportunity to present his objections regarding the dose reconstruction for the employee to NIOSH, which he acknowledges is "the agency which most logically has the expertise to evaluate the merits" of his position. Therefore, the claimant believes that FAB should have returned his Part B claim to the district office for referral to NIOSH so it could consider his contention that the dose reconstruction for the employee should have included her non-employment and "other employments" exposures.

After careful consideration of these arguments, and for the reasons set forth below, the request for reconsideration is hereby denied.

With regard to the first argument noted above, and as set out in FAB's November 30, 2010 decision, there is no dispute that Ross Aviation performed work under contracts it had with DOE and its predecessor agencies as early as February of 1970, and that the evidence establishes that the employee started working for Ross Aviation on December 9, 1985. The pertinent question for the purposes of the claimant's survivor claim, however, concerns where Ross Aviation did its work under its contracts with DOE that covered the period of the employee's employment from December 9, 1985 through June 30, 1994. Contrary to the claimant's allegations noted above, the contracts at issue have, in fact, been previously reviewed by the Director of the Division of Energy Employees Occupational Illness Compensation (DEEOIC), which is the division of the Office of Workers' Compensation Programs that administers EEOICPA[1], when NIOSH provided her with copies of them and asked, in a September 30, 2009 letter regarding the petition to add a class of employees at Hangar 481 to the Special Exposure Cohort the claimant filed with NIOSH, whether those contracts were sufficient to expand the "covered"

period of Hangar 481 as a DOE facility. In her February 2, 2010 response, the Director noted that after carefully reviewing those contracts, it was her conclusion that they did not support changing the determination that Ross Aviation was a DOE contractor at Hangar 481, Kirtland AFB, for the period March 1, 1989 through February 29, 1996. Those same contracts were also carefully considered yet again when the claimant submitted copies of them to the case file in support of his claim, and are briefly described below:

- Contract No. AT(29-2)-2859 (covering February 1, 1970 through January 31, 1973) states that Ross Aviation would be performing air transport services for the Atomic Energy Commission (AEC) "at the Albuquerque Sunport, , ." There is no mention in this contract that any of the work being done by Ross Aviation will be done at Kirtland AFB.

- Contract No. AT(29-2)-3276 (covering February 1, 1973 through January 31, 1974, with multiple modifications that extended the coverage to February 28, 1979 and changed the contract number to E(29-2)-3276 when the AEC was replaced by the Energy Research and Development Administration (ERDA)) states that the "main operations base shall be maintained at the Contractor's facility at the Albuquerque International Airport. . . ." Again, there is no mention in this contract or its modifications that any of the work being done by Ross Aviation will be done at Kirtland AFB.

- Modification number A011 to Contract No. EY-76-C-04-3276 (extending the coverage of that contract from March 1, 1979 through February 29, 1984 and changing the contract number to DE-AC04-76DP03276 when ERDA was replaced by DOE) states that the "main operations base shall be maintained at the Government's existing facility at the Albuquerque International Airport. . . ." This modification also fails to state that any of the work being done by Ross Aviation will be done at Kirtland AFB.

- Modification number M016 to Contract No. DE-AC04-76DP03276 (covering the period of March 1, 1980 to February 28, 1981) states that the location at which Ross Aviation is maintaining and flying Government-furnished aircraft is "the Main Base - ."[2] Once again, there is no mention in this modification that any of the work being done by Ross Aviation will be done at Kirtland AFB.

- Contract No. DE-AC04-89AL52318 (covering March 1, 1989 through February 28, 1990, with extensions through February 29, 1996) is the earliest contract that describes the location at which Ross Aviation is working as "Government-owned facilities located on Kirtland Air Force Base, New Mexico." Because Contract No. DE-AC04-89AL52318 is a "Management and Operations" contract, this also means that Ross Aviation became a DOE contractor at that time within the meaning of 42 U.S.C. § 7384l(12)(B)(ii), because it was an "entity" that entered into a "management and operations" contract with DOE at a DOE facility, *i.e.*, Hangar 481, Kirtland AFB.

As noted above, and as previously stated in FAB's November 30, 2010 decision, there is no probative and persuasive evidence specifying that Ross Aviation performed its work under a contract with DOE at Hangar 481, Kirtland AFB, prior to March 1, 1989. In this regard, and again as pointed out by FAB in the November 30, 2010 decision, the non-contractual evidence the claimant submitted in support of this argument is of diminished probative value when compared to the actual contracts described above. Accordingly, there is no basis for extending the covered period for that facility to include the earlier

period that the employee worked there beginning on December 9, 1985, and this argument does not warrant reconsideration of FAB's November 30, 2010 decision.

As for the second argument described above, FAB's November 30, 2010 decision specifically informed the claimant that acoustic neuroma is not an "occupational illness," as that term is defined in § 7384l(15), and therefore is not compensable under Part B. While he contends that acoustic neuroma is a cancer and therefore it should have been taken into account by NIOSH when it reconstructed the employee's radiation dose and by DEEOIC when it determined the probability of causation based on that dose reconstruction, acoustic neuroma is actually a benign tumor of the eighth cranial nerve. The only reference to that illness in the medical evidence is in an August 11, 2000 report by Dr. Jorge Sedas, in which Dr. Sedas related the employee's history of a "right-sided acoustic tumor – stable"; there is no medical evidence in the file showing that the reported tumor was malignant (cancer). The provisions of 42 U.S.C. § 7384n(b), (c), and (d) regarding the dose reconstruction process and the determination of probability of causation are applicable only for the purpose of determining whether *cancer* was sustained in the performance of duty. For those reasons, this second argument also does not warrant reconsideration of the November 30, 2010 decision of FAB.

In the third argument described above, the claimant contends that FAB should have taken the employee's alleged exposure to radiation prior to beginning her employment with Ross Aviation and her alleged non-employment exposure during her accepted covered employment, which he asserts can be inferred from the evidence in the file, into account as "other relevant factors" when it determined the probability of causation for the employee's pancreatic cancer under Part B. While he is correct that § 7384n(c)(3)(C) of EEOICPA directs that the regulatory guidelines for determining the probability of causation for cancer claimed under Part B "shall take into consideration. . .other relevant factors," the task of *devising* these guidelines (and taking those "other relevant factors" into account) pursuant to that statutory directive was assigned to the Secretary of Health and Human Services (HHS), not the Secretary of Labor, by the President in Sec. 2(b)(i)(A) of Executive Order 13179 of December 7, 2000. 65 Fed. Reg. 77487 (December 11, 2000).[3] While DEEOIC is required by 42 C.F.R. § 81.20(b) to *apply* the HHS regulatory guidelines, which have been incorporated into the NIOSH Interactive RadioEpidemiological Program (NIOSH-IREP), DEEOIC does not have the authority to *alter* the guidelines to take into account the particular non-covered employment exposures the claimant alleges that the employee experienced both prior to and away from her covered employment at Hangar 481 as "other relevant factors" when determining the probability of causation for her pancreatic cancer under Part B. On the contrary, as Paragraph 2.0 of the *User's Guide the for the Interactive RadioEpidemiological Program (NIOSH-IREP)* states:

The NIOSH-IREP computer code is a web-based program that estimates the probability that an employee's cancer was caused by his or her individual radiation dose. Personal information (*e.g.*, birth year, year of cancer diagnosis, gender) and exposure information (*e.g.*, exposure year, dose) may be entered manually or through the use of an input file. For application by the U.S. Department of Labor (DOL), *the input file option is used to preset all personal information, exposure information, and system variables. These input files are created by NIOSH for each individual claim and transmitted to the appropriate DOL district office for processing*.[4] (emphasis added)

Accordingly, the claimant's third argument also does not warrant granting his request to reconsider FAB's November 30, 2010 decision.

In the fourth argument in support of the claimant's request, he contends that the employee's alleged radiation exposures "in other employments" should have been taken into account and "added to the

worker's total exposure" as "other relevant factors." As FAB's November 30, 2010 decision noted, the issue of what radiation dose to include is exclusively under the control of NIOSH, pursuant to the President's assignment of the task of performing dose reconstructions to the Secretary of HHS (which then re-delegated it to NIOSH) in Sec. 2(b)(iii) of Executive Order 13179. Also, the statute itself, at § 7384n(d)(1), restricts the dose to be used to determine probability of causation to radiation exposure that occurred solely "at a facility," which in the employee's case, means the dose she received when Hangar 481 was a DOE facility—March 1, 1989 through June 30, 1994. HHS has issued regulations governing the dose reconstruction process at 42 C.F.R. part 82, and those regulations do not provide for any consideration of pre-employment and non-employment radiation exposures in estimating radiation dose incurred at a DOE facility, regardless of the claimant's belief that principles of workers' compensation require such consideration. Because consideration of the "other relevant factors" referred to in 42 U.S.C. § 7384n(c)(3)(C), which as noted above, refers solely to the determination of probability of causation, this fourth argument also does not warrant reconsideration of the November 30, 2010 FAB decision on the claim.

Finally, in the fifth argument, the claimant asserts that FAB should have returned his Part B claim to the district office for referral to NIOSH, so NIOSH could consider his contention that the dose reconstruction for the employee should have included non-employment and "other employments" exposures. While there is no dispute that NIOSH is "the agency which most logically has the expertise to evaluate the merits" of his position, the fact remains that the claimant was provided with the opportunity, at multiple points during the dose reconstruction process at NIOSH, to submit whatever evidence he had regarding the employee's radiation exposures for consideration by NIOSH. Further, as discussed above, the types of exposures at issue here are simply not covered under EEOICPA. Therefore, there was no reason for FAB to return the Part B claim to the district office for referral to NIOSH, and this final argument, like the preceding four, does not provide a sufficient basis for reconsidering FAB's November 30, 2010 decision.

I must deny the request for reconsideration because the claimant has not submitted any argument or evidence which justifies reconsideration of the November 30, 2010 final decision. That decision of FAB is therefore final on the date of issuance of this denial of the request for reconsideration. *See* 20 C.F.R. § 30.319(c)(2).

Cleveland,

Tracy Smart

Hearing Representative

Final Adjudication Branch

[1] The sources of authority for administering EEOICPA are set out at 20 C.F.R. § 30.1,which states that the Director of the Office of Workers' Compensation Programs (and his designee the Director of DEEOIC) has the primary responsibility to administer EEOICPA, except for those activities assigned to other agencies. This responsibility includes the "exclusive authority to. . . interpret the provisions of EEOICPA," among them the statutory definition of "Department of Energy facility" at § 7384l(12).

[2] The case file also contains numerous other modifications of Contract No. DE-AC04-76DP03276, but those other modifications also do not include a "Statement of Work" provision identifying the location where Ross Aviation was to perform its work; thus, they are not described above. For example, modification number M062 extended the provisions of that contract to cover the period from March 1, 1984 through February 28, 1989 (during which the employee began working

for Ross Aviation), but contained no language whatsoever that described where Ross Aviation performed its work for DOE.

[3] *See also* 20 C.F.R. § 30.2(b) (". . .HHS has promulgated regulations at 42 CFR part 81 that set out guidelines that OWCP follows when it assesses the compensability of an employee's radiogenic cancer") and 20 C.F.R. § 30.213(b) ("HHS's regulations satisfy the legal requirements in section 7384n(c) of the Act, which also sets out OWCP's obligation to use them in its adjudication of claims for radiogenic cancer filed under Part B of the Act, and provide the factual basis for OWCP to determine if the 'probability of causation' (PoC) that an employee's cancer was sustained in the performance of duty is 50% or greater (*i.e.*, it is 'at least as likely as not' causally related to employment), as required under section 7384n(b)").

[4] *See:* http://www.cdc.gov/niosh/ocas/pdfs/irep/irepug56.pdf(last visited April 13, 2011).

EEOICPA Fin. Dec. No. 55286-2006 (Dep't of Labor, August 22, 2008)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning your claims for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the FAB accepts the claims of **[Claimant #1]**, **[Claimant #2]**, and **[Claimant #3]** for compensation under Part B of EEOICPA in the amount of $150,000.00 ($50,000.00 payable to each) for the employee's occupational illness of prostate cancer metastasized to the bone.

STATEMENT OF THE CASE

On September 20, 2002, **[Employee's spouse]** filed a Form EE-2 with the Division of Energy Employees Occupational Illness Compensation (DEEOIC) and a Form DOE F 350.3 with the Department of Energy (DOE), seeking benefits as the surviving spouse of **[Employee]**. **[Employee's spouse]** identified the claimed conditions of prostate cancer and bone cancer. On May 8, 2003, **[Employee's spouse]** died and her claim was administratively closed under Part B on March 31, 2004, and under Part E on October 6, 2005.

[Claimant #1] (on March 10, 2004), **[Claimant #2]** (on April 5, 2004), and **[Claimant #3]** (on April 5, 2004) each submitted a Form EE-2 with DEEOIC as the surviving children of **[Employee]**. They claimed **[Employee]** developed prostate cancer and bone cancer as a result of his employment at the Hanford site.

[Employee's spouse] had submitted a Form EE-3 in which she alleged that **[Employee]** was employed at the Hanford site as a truck driver with E.I. DuPont Nemours & Company (Du Pont) from December 1943 to December 1944, with General Electric Company (GE) as a millwright from July 6, 1954 to January 3, 1965, and as a millwright with Battelle-Northwest (Battelle) at the Pacific Northwest National Laboratory (PNNL) from January 4, 1965 to July 8, 1983. A representative of DOE verified that **[Employee]** was employed at the Hanford site, a DOE facility, by DuPont, a DOE contractor, from December 14, 1943 to December, 1944, and by GE, another DOE contractor, as a millwright from July 6, 1954 to December 31, 1964, and with Battelle at PNNL, a second DOE facility, from January 4, 1965 to July 29, 1983. The Oak Ridge Institute for Science and Education (ORISE) database contained information verifying that **[Employee]** was employed at the Hanford site starting on July 6, 1954. DOE records establish that **[Employee]** had worked in Area 200 West during his employment at the Hanford site.

The medical evidence of record includes a pathology report, dated October 3, 1988, in which Dr. Thomas D. Mahony diagnosed prostate cancer. The medical evidence of record also includes a whole body bone scan conducted on September 27, 1988, which noted the metastases of the prostate cancer to the bone of the skull, ribs, thoracic vertebra, pelvis and right femur.

The evidence of record includes a copy of the employee's death certificate, which indicates that **[Employee]** was married at the time of his death on October 4, 1991 to **[Employee's spouse]**. You also submitted a copy of **[Employee's spouse]**'s death certificate. **[Employee]**'s death certificate lists the cause of his death on October 4, 1991 as arrhythmia due to myocardial infarction, coronary heart disease, and cancer of the prostate metastases. In support of your claims, you each submitted a copy of your birth certificate showing that you are the biological children of **[Employee]** and that **[Claimant #1]** was born on May 26, 1957, **[Claimant #2]** was born on October 4, 1941, and that **[Claimant #3]** was born on March 3, 1950. At the time of the employee's death on October 4, 1991, **[Claimant #1]** was 34 years old, **[Claimant #2]** was 50 years old, and **[Claimant #3]** was 41years old. **[Claimant #1]** produced sufficient evidence to show the change in her surname.

To determine the probability that **[Employee]**'s prostate cancer was sustained in the performance of duty, the Seattle district office referred the case to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction. In a prior final decision dated May 8, 2006, the FAB denied the Part B claims of **[Claimant #1], [Claimant #2]**, and **[Claimant #3]** because there was only a 24.78% probability that the employee's prostate cancer was caused by radiation exposure at the Hanford site. The FAB concluded that **[Employee]** did not qualify as a covered employee with cancer under Part B, that the dose reconstruction estimates and the probability of causation calculations were performed according to EEOICPA and its regulations, and that **[Claimant #1]**, **[Claimant #2],** and **[Claimant #3]** were not entitled to survivor benefits under Part B of EEOICPA.

On March 29, 2007, NIOSH issued OCAS-PEP-012 Rev-00, entitled "Program Evaluation Plan: Evaluation of Highly Insoluble Plutonium Compounds." It was NIOSH's determination that the existence of the highly insoluble plutonium compound at the Hanford site should be considered Type Super S plutonium in dose reconstructions for employees at that site. The PEP provided NIOSH's plan for evaluating dose reconstructions for certain claims to determine the impact of highly insoluble plutonium compounds at particular sites. The change went into effect on February 6, 2007. *See* EEOICPA Bulletin No. 07-19 (issued May 16, 2007).

On April 2, 2008, a Director's Order was issued vacating the FAB's May 8, 2006 final decision and reopening the Part B claims of **[Claimant #1]**, **[Claimant #2]**, and **[Claimant #3]** for further development. The Director's Order instructed the Seattle district office to forward the case to NIOSH for rework of the employee's dose reconstruction pursuant to EEOICPA Bulletin No. 07-27 (issued August 8, 2007).

On April 7, 2008, your claims were returned to NIOSH for rework of the employee's radiation dose reconstruction; however the dose reconstruction was not completed following the addition of a particular class of Hanford employees to the Special Exposure Cohort (SEC).

On May 30, 2008, the Secretary of Health and Human Services (HHS) designated a class of employees at the Hanford site for inclusion in the SEC. This designation went into effect on June 29, 2008. The class consists of all employees of DOE, its predecessor agencies, and DOE contractors or subcontractors who worked from: (1) September 1, 1946 though December 31, 1961 in the 300 area;

or (2) January 1, 1949 through December 31, 1968 in the 200 areas (East and West) at the Hanford Nuclear Reservation in Richland, Washington for a number of work days aggregating at least 250 work days occurring either solely under this employment or in combination with work days within the parameters established for one or more other classes of employees in the SEC.

On July 18, 2008, the Seattle district office recommended acceptance of your claims for survivor benefits under Part B, concluding that the employee is a member of the above-noted addition to the SEC, since he was employed at Hanford for an aggregate of 250 days or more during the SEC period and was diagnosed with prostate cancer that metastasized to the bone. Secondary (metastatic) bone cancer is a "specified" cancer under EEOICPA. The district office concluded that **[Claimant #1]**, **[Claimant #2]**, and **[Claimant #3]** are the surviving children of the employee and entitled to survivor benefits under Part B of the Act, in the amount of $150,000.00, to be divided equally among them in the amount of $50,000.00 each.

On July 21, 2008, the FAB received written notification from **[Claimant #2]** indicating that neither he, nor anyone in his family, had ever filed for or received any payments, awards, or benefits from a lawsuit, tort suit, third-party claim or state workers' compensation claim in relation to **[Employee]**'s cancer. **[Claimant #2]** stated that he has never pled guilty to or been convicted of fraud in connection with an application for or receipt of federal or state workers' compensation. Further, he averred that other than **[Claimant #1]** and **[Claimant #3]**, there were no other individuals who might qualify as a survivor of **[Employee]**. On July 21, 2008, the FAB also received **[Claimant #2]**'s written notification indicating that he waived all rights to file objections to the findings of fact and conclusions of law in the July 18, 2008 recommended decision.

On July 22, 2008, the FAB received written notification from **[Claimant #1]** indicating that neither she, nor anyone in her family, had ever filed for or received any payments, awards, or benefits from a lawsuit, tort suit, third party claim or state workers' compensation claim in relation to **[Employee]**'s cancer. **[Claimant #1]** further stated that she has never pled guilty to or been convicted of fraud in connection with an application for or receipt of federal or state workers' compensation. Further, she averred that other than **[Claimant #2]** and **[Claimant #3]**, there were no other individuals who might qualify as a survivor of **[Employee]**. On July 22, 2008, the FAB also received **[Claimant #1]**'s written notification indicating that she waived all rights to file objections to the findings of fact and conclusions of law in the July 18, 2008 recommended decision.

On July 24, 2008, the FAB received written notification from **[Claimant #3]** indicating that neither he, nor anyone in his family, had ever filed for or received any payments, awards, or benefits from a lawsuit, tort suit, third party claim or state workers' compensation claim in relation to **[Employee]**'s cancer. **[Claimant #3]** further stated that he has never pled guilty to or been convicted of fraud in connection with an application for or receipt of federal or state workers' compensation. Further, he indicated that other than **[Claimant #2]** and **[Claimant #1]**, there were no other individuals who might qualify as a survivor of **[Employee]**. On July 24, 2008, the FAB also received **[Claimant #3]**'s written notification indicating that he waived all rights to file objections to the findings of fact and conclusions of law in the July 18, 2008 recommended decision.

After considering the evidence of record, the FAB hereby makes the following:

FINDINGS OF FACT

1. On September 20, 2002, **[Employee's spouse]** filed a claim for benefits under EEOICPA as the surviving spouse of **[Employee]**. **[Employee's spouse]** died on May 8, 2003, and her claim was administratively closed under Part B on March 31, 2004, and under Part E on October 6, 2005.
2. **[Claimant #1], [Claimant #2]** and **[Claimant #3]** each submitted claims for survivor benefits under EEOICPA, as the surviving children of **[Employee]**.
3. **[Claimant #1], [Claimant #2]** and **[Claimant #3]** are the biological children of **[Employee]**. **[Claimant #1]**, **[Claimant #2]** and **[Claimant #3]** are the only children and eligible survivors of the employee.
4. The employee worked at the Hanford site, with DuPont from December 14, 1943 to December 31, 1944, with GE from July 6, 1954 to December 31, 1964, and at PNNL with Battelle from January 4, 1965 to July 29, 1983. The employee was monitored for radiation exposures and worked in Area 200 West during his employment at the Hanford site. This employment met or exceeded 250 aggregate work days, and qualifies **[Employee]** as a member of the SEC.
5. The employee was diagnosed with metastatic bone cancer of the skull, ribs, thoracic vertebra, pelvis, and right femur, which is a "specified" cancer, on September 27, 1988, after starting work at a DOE facility.
6. **[Claimant #1]**, **[Claimant #2]** and **[Claimant #3]** each stated that they, or anyone in their family, had never filed for or received any settlement or award from a lawsuit, tort suit, or third-party claim in relation to the illnesses claimed. **[Claimant #1]**, **[Claimant #2]** and **[Claimant #3]** have never pled guilty to or been convicted of any charges connected with an application for or receipt of federal or state workers' compensation, nor have they or anyone in their family ever filed for or received any payments, awards, or benefits for a state workers' compensation claim in relation to **[Employee]**'s cancer.

Based on the above noted findings of fact, the FAB hereby also makes the following:

CONCLUSIONS OF LAW

Section 30.316(a) of the EEOICPA regulations provides that, if the claimant waives any objections to all or part of the recommended decision, the FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part. *See* 20 C.F.R. § 30.316(a). **[Claimant #1]**, **[Claimant #2]** and **[Claimant #3]** waived their right to file objections to the findings of fact and conclusions of law contained in the July 18, 2008 recommended decision issued on their claims for benefits under EEOICPA.

In order to be afforded coverage under Part B of EEOICPA, you must establish that **[Employee]** has been diagnosed with an occupational illness incurred as a result of his exposure to silica, beryllium, and/or radiation. Further, the illness must have been incurred while he was in the performance of duty for DOE or certain of its contractors. The evidence of record indicates that the employee worked in covered employment at Hanford from December 14, 1943 to December 31, 1944, and from July 6, 1954 to December 31, 1964, and at PNNL from January 4, 1965 to July 29, 1983 in Area 200 West. The period of employment from July 6, 1954 to December 31, 1961 exceeds the 250-day requirement as set forth in the SEC designation. The medical evidence submitted in support of the claim shows that **[Employee]** was diagnosed with metastatic bone cancer of the skull, ribs, thoracic vertebra, pelvis and right femur, which is a "specified" cancer, on September 27, 1988, which was more than 5 years after his initial exposure to radiation.

Accordingly, the employee is a member of the SEC and is a "covered employee with cancer" under § 7384l(9)(A) of EEOICPA. *See* EEOICPA Bulletin No. 08-33 (issued June 30, 2008). Further, **[Claimant #1]**, **[Claimant #2]** and **[Claimant #3]** are the surviving children of the employee as

defined by § 7384s(e)(1)(B) and are entitled to compensation in the amount of $150,000.00, to be divided equally.

Seattle, Washington

Keiran Gorny

Hearing Representative

Final Adjudication Branch

EEOICPA Order No. 62728-2008 (Dep't of Labor, July 1, 2009)

REMAND ORDER

This order of the Final Adjudication Branch (FAB) concerns the above-noted claim for survivor benefits under Part B of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claim is remanded to the Cleveland district office for additional development to determine if the employee qualifies as a "covered employee with cancer" under Part B of EEOICPA.

On October 20, 2004, **[Claimant]** filed a claim for survivor benefits under Part B and a request for assistance under former Part D of EEOICPA, as the spouse of **[Employee]**. **[Claimant]** identified lung cancer and mouth cancer as the medical conditions of **[Employee]** resulting from his employment for an atomic weapons employer. Subsequent to **[Claimant]**'s filing a request for assistance under Part D, Congress amended EEOICPA by repealing Part D and enacting Part E. As part of these amendments, Congress directed that the filing of a request for assistance under former Part D would be treated as a claim for benefits under the new Part E. On August 2, 2005, **[Claimant]** filed another Part E claim based on the alleged condition of lung disease.

On November 9, 2006, FAB issued a final decision denying **[Claimant]**'s claim for survivor benefits under Part E because the evidence did not establish that **[Employee]** was employed by a DOE contractor performing remediation activities at a covered Department of Energy (DOE) facility. On July 31, 2008, FAB also issued a final decision to deny **[Claimant]**'s claim for survivor benefits under Part B because the evidence did not establish that **[Employee]** worked for a subsequent owner or operator of an atomic weapons employer facility at that atomic weapons employer facility. On October 16, 2008, **[Claimant]** submitted an affidavit in which Ronald G. Proffitt indicated that he had worked with **[Employee]** at the General Steel Industries facility in Granite City , Illinois from 1963 to 1973. Based on this new evidence, the Director issued a January 13, 2009 Order vacating the FAB's July 31, 2008 final decision and reopening **[Claimant]**'s claim for survivor benefits under Part B.

On Form EE-3 (employment history), **[Claimant]** indicated that **[Employee]** worked for Granite City Steel (General Steel Castings) from April 1963 to December 2000. On November 8, 2004, a representative from DOE verified that **[Employee]** worked for Granite City Steel from January 14, 1974 to December 19, 2000. Records from St. Elizabeth Medical Center dated March 17, 1980 and December 21, 2000 indicate that **[Employee]** worked for Granite City Steel located at 20th and Madison and 1520 20th Street, respectively, in Granite City, Illinois. Earnings records from the Social Security Administration (SSA) indicate that **[Employee]** had earnings from National Roll **[EIN**

deleted] from the second quarter of 1963 to the third quarter of 1973 and in 1978, and from National Steel Corporation **[EIN deleted]** from the first quarter of 1974 to 2001. The General Steel Industries facility in Granite City, Illinois (also known as Old Betatron Building, General Steel Castings, General Steel Industries, Granite City Steel, and National Steel Company) is covered as an atomic weapons employer facility from 1953 to 1966. This same facility is also covered for employees of subsequent owners and operators of this facility for residual radiation from 1967 to 1992, and also as a DOE facility for remediation activities in 1993.

[Claimant] submitted medical records from **[Employee]**'s healthcare providers, including a July 12, 2001 pathology report in which Dr. Samir K. El-Mofty diagnosed poorly differentiated squamous cell carcinoma of the floor of the employee's mouth. These medical records did not establish that **[Employee]** was diagnosed with lung cancer.

[Claimant] submitted a copy of **[Employee]**'s death certificate, signed by Dr. M. Bavesik, which listed the employee's age as 60 as of the date of his death on November 28, 2001. The death certificate indicated that the immediate cause of **[Employee]**'s death was cancer of the floor of the mouth, and that **[Claimant]** was **[Employee]**'s surviving spouse. **[Claimant]** also submitted a copy of a July 8, 1966 marriage certificate confirming her marriage to **[Employee]** on that date.

To determine the probability of whether **[Employee]** contracted cancer in the performance of duty, the district office referred **[Claimant]**'s application package to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction. The district office subsequently received the NIOSH Report of Dose Reconstruction for the employee, dated August 7, 2007. The dose reconstruction was based on **[Employee]**'s employment at the General Steel Industries facility from January 14, 1974 to December 19, 2000, and calculated the dose to his oral cavity from 1974 to the date his oral cavity cancer was diagnosed in 2001. The district office used the information provided in this NIOSH report to determine that there was a 4.36% probability that **[Employee]**'s cancer was caused by ionizing radiation exposure at the General Steel Industries facility in Granite City, Illinois.

On April 23, 2009, the district office issued a recommended decision to deny **[Claimant]**'s claim for survivor benefits under Part B of EEOICPA based on the employee's lung cancer, lung disease and mouth cancer. In recommending denial of **[Claimant]**'s claim, the district office found that **[Employee]** had covered employment at Granite City Steel from January 14, 1974 to December 19, 2000, but did not indicate what weight, if any, that it gave to the affidavit that **[Claimant]** submitted from Ronald G. Proffitt, or the SSA records indicating that **[Employee]** had reported earnings from National Roll from the second quarter of 1963 to the third quarter of 1973. I note that evidence in the case file indicates that in 1994, SSA changed the company associated with **[EIN deleted]** from General Steel Industries to National Roll; this change was shown in all SSA reports printed after 1994. In the absence of evidence to the contrary, SSA records showing wages paid by General Steel Castings Corporation **[EIN deleted]** or by National Roll **[EIN deleted]** are considered sufficient proof of employment by General Steel at their covered Granite City location. The November 8, 2004 verification of employment by DOE is limited to employment at this facility by Granite City Steel (a subsequent owner and operator of this facility).

The Federal (EEOICPA) Procedure Manual, Chapter 2-0600.10 (September 2004) requires the claims examiner to compare the dose reconstruction report to the evidence in the file. If there are significant discrepancies between the information in the file and the dose reconstruction report, a new dose reconstruction report may be necessary. The Procedure Manual specifies that changed employment facilities or dates, or a change in the date of diagnosis outside of the month previously used, constitutes

a significant discrepancy. NIOSH did not consider **[Employee]**'s dose prior to January 1974 and thus did not include his dose at the facility from April 1963 to that date in the dose reconstruction. This constitutes a significant discrepancy. A rework of the dose reconstruction is needed to determine if **[Employee]** qualifies as a covered employee with cancer under Part B based on his exposure to ionizing radiation during the performance of duty at a covered facility during a covered period. This case should be returned to NIOSH for a rework of the dose reconstruction that includes **[Employee]**'s dose from April 1963.

Because a rework is necessary,**[Claimant]**'s claim for survivor benefits under Part B is not in posture for a final decision. Pursuant to the authority granted to FAB by 20 C.F.R. § 30.317, **[Claimant]**'s claim is remanded to the Cleveland district office. On remand, the district office should perform such further development it may deem necessary to determine if **[Employee]** qualifies as a covered employee with cancer. This should include referring the case to NIOSH for a rework of the dose reconstruction using the correct covered employment dates. After this development, the district office should issue a new recommended decision on **[Claimant]**'s claim for survivor benefits under Part B of EEOICPA.

Washington, DC

William J. Elsenbrock

Hearing Representative

Final Adjudication Branch

Medical evidence

EEOICPA Fin. Dec. No. 13677-2004 (Dep't of Labor, September 28, 2004)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) 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 for benefits is accepted.

STATEMENT OF THE CASE

On October 26, 2001, you filed a claim for survivor benefits under the EEOICPA, Form EE-2, wherein you indicated that your late husband, **[Employee]** (hereinafter referred to as the employee), was diagnosed with "chronic lung disease," throat cancer and left and right kidney cancer. On Form EE-3 (Employment History), you indicated that the employee was employed by E.I. Dupont at the Savannah River Site (SRS)[1] from 1952 until December 31, 1980. In November, 2001, the Department of Energy (DOE) verified that the employee worked at the SRS from June 23, 1952 until December 31, 1980. You also submitted the employee's death certificate and your marriage certificate in support of your claim as his only eligible surviving beneficiary.

You submitted medical evidence dated between October, 1984 and December, 1997. As part of the

medical evidence that you submitted was an October 31, 1984 pathology report by Dr. James V. Kasin, in which he diagnosed adenocarcinoma of the right kidney, and a May 20, 1986 pathology report by Dr. Denyse N. Parnell, in which she diagnosed adenocarcinoma of the left kidney.

In regard to the claimed condition of throat cancer, a December 3, 1997 discharge summary by Dr. Jack L. Ratliff indicated that the employee had a "HX [history] of ENT [ear, nose and throat] cancer" and "bilateral neck resections for cancer of the base of his 'nostril'." However, the medical evidence of record is devoid of a pathology report to confirm the diagnosis of cancer to the ear, nose or throat. In regard to the claimed condition of "chronic lung disease," this is a non-covered condition under the Act.

In order for you to be eligible for benefits relating to the employee's right and left kidney cancers, the evidence must establish that these two primary cancers were "at least as likely as not" related to the employee's employment at a covered facility, pursuant to § 7384n(b) of the Act and § 30.210(b) of the implementing regulations. 42 U.S.C. § 7384n(b), 20 C.F.R. § 30.210(b). To determine the probability of whether the employee sustained his cancers in the performance of duty, the district office referred your application package to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction on August 22, 2002 in accordance with § 30.115 of the implementing regulations. 20 C.F.R. § 30.115. The district office submitted an amended application to NIOSH for dose reconstruction on May 17, 2004.

On June 26, 2004, you signed Form OCAS-1, indicating that you had reviewed the NIOSH Draft Report of Dose Reconstruction and agreed that it identified all of the relevant information you provided to NIOSH. The district office received the final NIOSH Report of Dose Reconstruction on July 1, 2004.[2] Pursuant to §§ 81.20 and 81.25 of the implementing NIOSH regulations, the district office used the information provided in this report to determine that there was a 63.16% probability that the employee's right and left kidney cancers were caused by radiation exposure at the SRS. 42 C.F.R. §§ 81.20, 81.25.

On August 20, 2004, the district office issued a recommended decision that concluded that you are the surviving spouse of the employee and that the employee's right and left kidney cancers were "at least as likely as not" caused by his employment at the SRS. It was therefore recommended that you receive compensation in the amount of $150,000. The district office also concluded that you did not submit sufficient medical evidence to establish the claimed conditions of throat cancer and "chronic lung disease" under the Act.

Therefore, based on a review of the case file evidence, I make the following,

FINDINGS OF FACT

1. You filed a claim for survivor benefits on October 26, 2001.

2. You submitted evidence which established that the employee worked at the SRS from June 23, 1952 until December 31, 1980.

3. You submitted evidence which established that the employee was diagnosed with right kidney cancer on October 31, 1984 and left kidney cancer on May 20, 1986.

4. You submitted evidence which established that you are the employee's surviving spouse.

5. You did not submit sufficient medical evidence to establish that the employee was diagnosed with throat cancer.

6. The claimed condition of "chronic lung disease" is not a covered occupational illness under the Act.

7. NIOSH reported annual dose estimates for the employee's two primary kidney cancers from the date of initial radiation exposure during covered employment to the date of the cancers' first diagnosis. A summary and explanation of information and methods applied to produce these dose estimates, including your involvement through an interview and review of the dose report, are documented in the "NIOSH Report of Dose Reconstruction under EEOICPA," dated June 18, 2004.

8. Based on the dose reconstruction performed by NIOSH, the probability of causation (the likelihood that the cancer was caused by radiation exposure incurred while working at a covered facility) for the employee's right and left kidney cancers were "at least as likely as not" (a 50% or greater probability) related to his employment at a covered facility, as required by the EEOICPA.

Therefore, based on a review of the case file evidence, I make the following:

CONCLUSIONS OF LAW

Pursuant to § 7384l(15) of the Act, a covered occupational illness "means a covered beryllium illness, cancer referred to in section 7384l(9)(B) of this title, specified cancer, or chronic silicosis, as the case may be." 42 U.S.C. § 7384l(15). The claimed condition of "chronic lung disease" is not a covered occupational illness under Part B of the EEOICPA.

Pursuant to § 30.211 of the implementing regulations, "a claimant establishes that the employee has or had contracted cancer with medical evidence that sets forth the diagnosis of cancer and the date on which that diagnosis was made." 20 C.F.R. § 30.211. Additionally, according to Chapter 2-600.3 (September 2004) of the Federal (EEOICPA) Procedure Manual, sufficient medical evidence must be presented by the claimant in order to substantiate a diagnosis of cancer. The case record must include medical evidence that lists a cancer diagnosis made by a qualified physician with tissue examinations described in a pathology report being the most conclusive method of diagnosis. You did not submit sufficient medical evidence to establish that the employee was diagnosed with throat cancer under the EEOICPA.

The FAB independently analyzed the information in the NIOSH report, confirming the 63.16% probability of causation for the employee's left and right kidney cancers. I find that the evidence establishes that the employee's left and right kidney cancers were "at least as likely as not" related to his employment at a covered facility, pursuant to § 7384n(b) of the Act and § 30.210(b) of the EEOICPA regulations. 42 U.S.C. § 7384n(b), 20 C.F.R. § 30.210(b).

On August 30, 2004, the FAB received written notification that you waived any and all objections to the recommended decision. The undersigned has reviewed the facts and the recommended decision

issued by the district office on August 20, 2004 and finds that the employee's right and left kidney cancers were "at least as likely as not" caused by his employment at a covered facility pursuant to § 7384n(b) of the Act, that he was a covered employee with cancer pursuant to § 7384l(9)(B)(i) of the Act, that you are the only eligible survivor of the covered employee pursuant to § 7384s(e)(2)(3)(A) of Act and that you are entitled to the sum of $150,000 pursuant to §§ 7384s(a), 7384s(e)(A) of the Act. 42 U.S.C. §§ 7384n(b), 7384l(9)(B)(i), 7384s(a), 7384s(e)(A)(2)(3)(A).

Washington, DC

Richard Koretz

Hearing Representative

[1] According to the Department of Energy's (DOE) Office of Worker Advocacy on the DOE website at http://tis.eh.doe.gov/advocacy/faclist/showfacility.cfm, the Savannah River Site (SRS) in Aiken, SC is a covered DOE facility from 1950 to the present.

[2] NIOSH originally submitted a "NIOSH Report of Dose Reconstruction" to the district office on March 31, 2004. However, after further review of the evidence and consultation with the EEOICPA senior health physicist, the district office determined that a re-work of the dose reconstruction was necessary in that the employee's claimed throat cancer was erroneously included in the NIOSH dose reconstruction and that one of the employee's two primary kidney cancers was erroneously omitted from the NIOSH dose reconstruction. Therefore, on May 17, 2004 the district office submitted an amended application to NIOSH for dose reconstruction.

EEOICPA Fin. Dec. No. 47856-2005 (Dep't of Labor, July 21, 2005)

NOTICE OF FINAL DECISION

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

STATEMENT OF THE CASE

On August 30, 2001, the employee's surviving spouse filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA), based on lymphoma and peripheral bronchogenic carcinoma, and on July 24, 2003, she passed away, and her claim was administratively closed. On August 7 (**[Claimant #1]**) and September 9 (**[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**), 2003, you filed Forms EE-2 under the EEOICPA, based on bronchogenic carcinoma and lymphoma.

The record includes a Form EE-3 (Employment History Affidavit) that indicates the worker was employed by Reynolds Electrical and Engineering Company (REECo) at the Nevada Test Site (NTS) intermittently from 1957 to 1978, and that he wore a dosimetry badge. A representative of the Department of Energy confirmed the employee was employed at NTS by REECo intermittently from August 23, 1958 to February 4, 1978.

Medical documentation received included a copy of a Nevada Central Cancer Registry report that indicated an aspiration biopsy was performed on February 1, 1978, and it showed the employee was diagnosed with primary lung cancer. A Valley Hospital discharge summary, dated February 4, 1978,

indicated the employee had a tumor in the right upper lobe of the lung. The record does not contain documentation demonstrating the employee was diagnosed with lymphoma.

To determine the probability of whether the employee sustained the cancer in the performance of duty, the Seattle district office referred your case to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction in accordance with 20 C.F.R. § 30.115. The district office received the final NIOSH Report of Dose Reconstruction dated April 20, 2005. *See* 42 U.S.C. § 7384n(d). NIOSH noted the employee had worked at NTS intermittently from August 23, 1958 to February 4, 1978. However, in order to expedite the claim, only the employment from 1966 through 1970 was assessed. NIOSH determined that the employee's dose as reconstructed under the EEOICPA was 71.371 rem to the lung, and the dose was calculated only for this organ because of the specific type of cancer associated with the claim. NIOSH also determined that in accordance with the provisions of 42 C.F.R. § 82.10(k)(1), calculation of internal dose alone was of sufficient magnitude to consider the dose reconstruction complete. Further, NIOSH indicated, the calculated internal dose reported is an "*underestimate*" of the employee's total occupational radiation dose. *See* NIOSH Report of Dose Reconstruction, pp. 4, 5, 6, and 7.

Using the information provided in the Report of Dose Reconstruction, the Seattle district office utilized the Interactive RadioEpidemiological Program (IREP) to determine the probability of causation of the employee's cancer, and reported in its recommended decision that the probability the employee's lung cancer was caused by his exposure to radiation while employed at NTS was at least 50%.

You provided copies of the death certificates of the employee and his spouse, copies of your birth certificates showing you are the natural children of the employee, and documentation verifying your changes of names, as appropriate.

The record shows that you (**[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**) and **[Claimant #5]** filed claims with the Department of Justice (DOJ) for compensation under the Radiation Exposure Compensation Act (RECA). By letter dated May 20, 2005, a representative of the DOJ reported that an award under § 4 of the RECA was approved for you; however, the award was rejected by **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**.

On June 14, 2005, the Seattle district office recommended acceptance of your claims for survivor compensation for the condition of lung cancer, and denial of your claims based on lymphoma.

On June 12 (**[Claimant #1]** and June 20 (**[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**), 2005, the Final Adjudication Branch received written notification from you indicating that you waive any and all rights to file objections to the recommended decision.

FINDINGS OF FACT

1. On August 7 (**[Claimant #1]**) and September 9 (**[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**), 2003, you filed claims for survivor benefits.

2. Documentation of record shows that the employee and his surviving spouse have passed away, you (**[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**) are the children of the employee, and you are his survivors.

3. You (**[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**) have rejected an award of compensation under the Radiation Exposure Compensation Act.

4. The worker was employed at NTS by REECo, intermittently, from August 23, 1958 to February 4, 1978.

5. The employee was diagnosed with lung cancer on February 1, 1978.

6. The NIOSH Interactive RadioEpidemiological Program indicated at least a 50% probability that the employee's cancer was caused by radiation exposure at NTS.

7. The employee's cancer was at least as likely as not related to his employment at a Department of Energy facility.

CONCLUSIONS OF LAW

The evidence of record indicates that the worker was employed at NTS by REECo, intermittently, from August 23, 1958 to February 6, 1978. Medical documentation provided indicated the employee was diagnosed with lung cancer on February 1, 1978; however, there is no evidence showing the employee was diagnosed with lymphoma, and your claims based on lymphoma must be denied.

After establishing that a partial dose reconstruction provided sufficient information to produce a probability of causation of 50% or greater, NIOSH determined that sufficient research and analysis had been conducted to end the dose reconstruction, and the dose reconstruction was considered complete. *See* 42 C.F.R. § 82.10(k)(1).

The Final Adjudication Branch analyzed the information in the NIOSH Report of Dose Reconstruction and utilized the NIOSH-IREP to confirm the 63.34% probability that the employee's cancer was caused by his employment at NTS. *See* 42 C.F.R. § 81.20. (Use of NIOSH-IREP). Thus, the evidence shows that the employee's cancer was at least as likely as not related to his employment at NTS.

The Final Adjudication Branch notes that, in its Conclusions of Law, the recommended decision erroneously indicates the employee, **[Employee]**, is entitled to compensation in the amount of $150,000.00; therefore, that Conclusion of Law must be vacated as the employee is deceased. *See* 42 U.S.C. § 7384s(a)(1).

The Final Adjudication Branch notes that the record shows the employee passed away on February 4, 1978. However, his employment history indicates he worked at NTS until February 6, 1978. Consequently, for purposes of administration of the Act, his employment is considered to have ended on February 4, 1978.

Based on the employee's covered employment at NTS, the medical documentation showing his diagnosis of lung cancer, and the determination that the employee's lung cancer was "at least as likely as not" related to his occupational exposure at NTS, and thus sustained in the performance of duty, the employee is a "covered employee with cancer," under 42 U.S.C. § 7384l. *See* 42 U.S.C. § 7384l(9)(B); 20 C.F.R. § 30.213(b); 42 C.F.R. § 81.2. Further, as the record indicates there is one other potential beneficiary under the EEOICPA, you are each (**[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**) entitled to survivor compensation under 42 U.S.C. § 7384 in the amount of

$30,000.00. As there is evidence that another survivor is a child of the employee, and potentially an eligible survivor under the Act, the potential share ($30,000.00) of the compensation must remain in the EEOICPA Fund. *See* Federal (EEOICPA) Procedure Manual, Chapter 2-200.7c(2) (June 2004).

Seattle, WA

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Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA Fin. Dec. No. 51475-2004 (Dep't of Labor, August 20, 2004)

REVIEW OF THE WRITTEN RECORD AND NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq.* Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On November 19, 2003, you filed a Form EE-2 (Claim for Survivor Benefits under EEOICPA) and indicated that the employee was diagnosed with brain, rib cage, heart, and lung cancer. Medical documentation submitted in support of the claim showed that the employee was diagnosed as having cancer with an unknown primary cancer site on April 30, 1981. In addition, the employee's death certificate indicated that he was diagnosed as having metastatic adenocarcinoma of the lung eight years before the date of death, May 23, 1989.

You also filed a Form EE-3 (Employment History) and indicated that the employee worked, from 1983 to 1987, at the Lawrence Berkeley National Laboratory (LBNL). In correspondence dated April 5, 2004, a representative of the Department of Energy (DOE) reported that the employee was employed at LBNL from February 1, 1983 to March 31, 1988. The LBNL is recognized as a covered DOE facility from 1939 to the present. *See* DOE, Office of Worker Advocacy, Facility List.

By letter dated April 22, 2004, the Seattle district office notified you that the medical documentation provided indicated that the onset of the employee's cancer occurred twenty-two months prior to the time he began employment at LBNL. Further, the district office requested that you submit any additional evidence of either the employee's cancer or his employment history, within fourteen days of the date of the letter, in order for the district office to determine if the employee was diagnosed as having a covered condition with a diagnosis date subsequent to the first date he began his employment at LBNL. You submitted no additional evidence to show that the employee was diagnosed as having cancer on a date subsequent to his first date of employment at LBNL.

On June 10, 2004, the Seattle district office recommended denial of your claim for benefits. The district office found that the date of diagnosis of the employee's illness preceded the initial date of his

employment at LBNL, and concluded that the employee therefore did not qualify as a covered employee with cancer as defined in § 7384l(9). *See* 42 U.S.C. § 7384l (9). The district office also concluded that you are not entitled to compensation under § 7384s(e)(1). *See* 42 U.S.C. § 7384s(e)(1).

The Final Adjudication Branch received your letter of objection to the recommended decision and additional medical documentation on June 16, 2004. You wrote that you had recently found the enclosed "medical letters from the doctors caring for **[Employee]** at the time of retirement." You stated that the employee worked at UC Berkeley, in the "Groonosh Building," from about 1960 to 1973, and that there were "unvented pipes on some of the labs he worked at." The additional medical documentation you provided included a copy of a letter from Robert J. Stallone, M.D., dated September 25, 1987, and indicated that the employee was under the doctor's care "since April, 1981 and underwent surgery for carcinoma of the lung in May, 1981." The letter continued, "The patient now has developed metastatic adenocarcinoma of the pericardium and is totally incapacitated from any type of employment." Another letter you submitted is from Mervyn A. Sahud, M.D., and dated September 28, 1987. Doctor Sahud wrote that the employee "is a 50-year-old electrician who has been treated for adenocarcinoma, lung primary, since April 1981, when he first underwent a left upper lobe resection followed by radiation therapy and chemotherapy. He had a relapse in May 1985 with pericardial tamponade and underwent a partial pericardiectomy followed by chemotherapy." You also submitted various insurance disability forms. The documentation submitted on June 16, 2004 showed that the employee was diagnosed with cancer in 1981, prior to the initial date of his employment at LBNL, and that he had a "relapse," or recurrence, of the same cancer in 1985 and metastatic adenocarcinoma of the pericardium in 1987.

FINDINGS OF FACT

1. You filed a claim for survivor benefits under the EEOICPA on November 19, 2003.

2. The employee worked at LBNL, a covered DOE facility, from February 1, 1983 to March 31, 1988.

3. The employee was diagnosed with cancer on April 30, 1981, a date prior to his initial date of employment at LBNL.

CONCLUSIONS OF LAW

The regulations provide that a claimant may object to any or all of the findings of fact or conclusions of law in the recommended decision. 20 C.F.R. § 30.312. Further, the regulations provide that the Final Adjudication Branch will consider objections by means of a review of the written record, in the absence of a request for a hearing. 20 C.F.R. § 30.312. The Final Adjudication Branch reviewer will review the record forwarded by the district office and any additional evidence and/or argument submitted by the claimant. 20 C.F.R. § 30.313. The Final Adjudication Branch will consider all of the evidence of record in reviewing the claim, including evidence and argument included with the objection(s).

The undersigned has reviewed the Recommended Decision issued by the Seattle district office on June 10, 2004 as well as your written objections and the additional medical documentation submitted on June 16, 2004. In order to be afforded coverage under the Energy Employees Occupational Illness Compensation Program Act, the covered employees (or their eligible survivors), must establish that

they have been diagnosed with a designated occupational illness incurred as a result of exposure to silica, beryllium, and/or radiation: *cancer, beryllium sensitivity, chronic beryllium disease*, and/or *chronic silicosis*. *See* 42 U.S.C. § 7384l (15), 20 C.F.R. § 30.110(a). Further, the illness must have been incurred while in the performance of duty for the Department of Energy and certain of its vendors, contractors, and subcontractors, or for an atomic weapons employer or facility. *See* 42 U.S.C. § 7384l (4)-(7), (9), (11).

You filed a claim based on cancer. Under the EEOICPA, a claim for cancer must be demonstrated by medical evidence that sets forth the diagnosis of cancer and the date on which the diagnosis was made. *See* 20 C.F.R. § 30.211. The evidence shows that the employee was diagnosed as having cancer with an unknown primary on April 30, 1981, a recurrence of cancer in 1985, and metastatic cancer in 1987. In order to be afforded coverage under § 7384l (9) of the EEOICPA based on a "covered employee with cancer," the claimant must show the employee contracted that cancer after beginning employment at a Department of Energy or atomic weapons facility. *See* 42 U.S.C. § 7384l(9)(B).

The evidence indicates that the employee was diagnosed with adenocarcinoma of the lung on April 30, 1981, prior to covered employment. In May 1985, the employee had a "relapse" of the cancer, which is a reoccurrence of a previously diagnosed cancer. The relapse of cancer, within a covered period of employment, would not qualify as a primary cancer under the EEOICPA, since the initial diagnosis of the primary cancer was prior to the start of verified employment. *See* 42 U.S.C. § 7384l(9); 20 C.F.R. § 30.210(b).

The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of each and every criterion under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing to the Office of Workers' Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

The evidence of record is insufficient to establish that the worker contracted cancer after beginning employment at a covered DOE facility. Thus, although you submitted medical documentation showing a diagnosis of cancer, the employee did not contract that cancer after beginning employment at a Department of Energy facility. *See* 42 U.S.C. § 7384l(9). Therefore, your claim must be denied for lack of proof that the employee was a "covered employee with cancer" under the EEOICPA.

For the above reasons, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

Seattle, WA

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James T. Carender

Hearing Representative, Final Adjudication Branch

EEOICPA Fin. Dec. No. 55793-2004 (Dep't of Labor, September 22, 2004)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq.* Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On March 22, 2004, you filed a Form EE-1 (Claim for Benefits under the EEOICPA), based on the conditions of prostate cancer, emphysema and possible lung cancer. You also provided a Form EE-3 (Employment History), on which you indicated that you worked at the Weldon Spring Plant from 1956 to 1967, and that you wore a dosimetry badge.

Information obtained from a Department of Energy (DOE) representative and the Oak Ridge Institute for Science and Education database indicated that you worked as a contractor employee at the Weldon Spring Plant from July 17, 1956 to June 30, 1966. The Weldon Spring Plant is recognized as a covered DOE facility from 1957 to 1967 and 1985 to the present (for remediation). *See* Department of Energy, Office of Worker Advocacy, Facility List.

By letters dated March 31, May 5, and June 14, 2004, the Seattle district office notified you that they had completed the initial review of your claim for benefits under the EEOICPA, but additional medical evidence was needed in order to establish a claim. You were requested to provide documentation of a covered occupational illness, specifically, cancer.

You provided medical documentation which indicated that you received treatment for conditions including hypertension, diabetes mellitus, bronchitis and emphysema. In addition, a hospital discharge summary report from a hospital stay from April 15 to April 16, 1993, indicated that you were admitted to the hospital for a medical procedure following a radical prostatectomy, which was performed "in order to allow the patient to be treated for his cancer of the prostate." The date of diagnosis of prostate cancer was not noted.

The record also includes several telephone messages, which indicate that you, with the assistance of your authorized representative, have been trying to obtain the medical records pertaining to your diagnosis of prostate cancer and the date of diagnosis, but that you have not yet received the medical records.

On July 16, 2004, the Seattle district office recommended denial of your claim for benefits. The district office concluded that you did not provide sufficient evidence as proof that you were diagnosed with a covered occupational illness as defined by § 7384l(15) of the Act. *See* 42 U.S.C. § 7384l(15). The district office further concluded that you were not entitled to compensation as outlined under § 7384s of the Act. *See* 42 U.S.C. § 7384s.

FINDINGS OF FACT

1. You filed a claim for employee benefits on March 22, 2004.
2. You worked at the Weldon Spring Plant, a covered Department of Energy facility, from July 17, 1956 to June 30, 1966.
3. You did not submit sufficient medical evidence establishing a date of diagnosis of a covered occupational illness under the EEOICPA.

CONCLUSIONS OF LAW

The undersigned has reviewed the recommended decision issued by the Seattle district office on July 16, 2004. I find that you have not filed any objections to the recommended decision as provided by § 30.316(a) of the regulations and that the sixty-day period for filing such objections, as provided for in section 30.310(a) has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

In order to be afforded coverage under Part B of the EEOICPA, you must establish that you were diagnosed with a designated occupational illness incurred as a result of exposure to silica, beryllium, and/or radiation: *cancer, beryllium sensitivity, chronic beryllium disease, and silicosis.* *See* 42 U.S.C. § 7384l(15), 20 C.F.R. § 30.110(a).

You filed a claim based on the condition of emphysema, which is not a compensable illness under Part B of the Act. You also filed a claim based on prostate cancer and possible lung cancer. Under the EEOICPA, a claim for cancer must be demonstrated by medical evidence that sets forth the diagnosis of cancer and the date on which the diagnosis was made. *See* 20 C. F. R. § 30.211.

The record in this case shows that by letters dated March 31, May 5, and June 14, 2004, you were requested to provide the required information to prove a medical condition. While a hospital discharge report dated April 16, 1993, contains a reference to your treatment for prostate cancer, the evidence of record does not contain a date of diagnosis of this cancer. Without the date of prostate cancer diagnosis, it is not possible to determine if this cancer was related to your employment at the Weldon Spring Plant. In regard to you claim for possible lung cancer, the medical documentation of record does not indicate a diagnosis of lung cancer.

It is the claimant's responsibility to establish entitlement to benefits under the Act. The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by the preponderance of the evidence, the existence of each and every criterion under any compensable claim category set forth in section 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing to the Office of Workers' Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

The record in this case shows that you did not provide sufficient medical documentation of a covered occupational illness under the Act. Therefore, your claim must be denied.

For the above reasons, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

Seattle, WA

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA Fin. Dec. No. 57599-2005 (Dep't of Labor, January 4, 2005)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claims for compensation under Part B of 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.

STATEMENT OF THE CASE

On May 17, 2004, **[Claimant 1]** and **[Claimant 2]** each filed a Form EE-2, Claim for Survivor Benefits under the EEOICPA. Your claims were based, in part, on the assertion that your 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 acute myelomonocytic leukemia (AML). The evidence shows that all medical records have been destroyed; therefore, per office procedure, the employee's death certificate is sufficient to establish that he was diagnosed with AML.

On the Form EE-3, Employment History, you stated the employee was employed by A. S. Shulman Electric, a subcontractor of C. P. Schwartz, at the gaseous diffusion plant (GDP) in Paducah, Kentucky, for the period of June 1951 to 1955. Department of Energy records, Social Security records, and employment affidavits confirm employment by C. P. Schwartz and F. H. McGraw from at least October 1, 1952 to December 31, 1953.

On November 17, 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 $75,000 each, for the employee's AML. You each submitted written notification that you waive any and all objections to the recommended decision.

In order for the employee to qualify as a member of the Special Exposure Cohort (SEC) under § 7384l(14)(A) of the Act, the following requirements must be satisfied:

> (A) The employee was so employed for a number of work days aggregating at least 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, and, during such employment - -
>
> > (i) was monitored through the use of dosimetry badges for exposure at the plant of the external parts of employee's body to radiation; or
> >
> > (ii) worked on a job that had exposures comparable to a job that is or was monitored through the use of dosimetry badges. 42 U.S.C. § 7384l(14)(A).

Department of Energy records, Social Security records, and employment affidavits confirm employment for at least 250 days from at least October 1, 1952 to December 31, 1953 at the Paducah GDP. You indicated on the Form EE-3 (Employment History) that you did not know whether your father wore a dosimetry badge. According to the Department of Energy sponsored report entitled *Exposure Assessment Project at Paducah Gaseous Diffusion Plant*, released in December 2000, Section 4.2.1.1 External Dosimeters states: "Prior to 1961, select groups of employees considered to have the potential for radiation exposures were issued film badges. After [July 1] 1960, all employees were issued two combination security/film badges." Because the period of your father's employment fell within the time that some or all employees at the Paducah GDP were issued dosimetry badges, I find that the employee's employment at the Paducah GDP satisfies the requirements under § 7384l(14)(A) of the Act. 42 U.S.C. §7384l(14)(A).

FINDINGS OF FACT

1. On May 17, 2004, **[Claimant 1]** and **[Claimant 2]** each filed a Form EE-2, Claim for Survivor Benefits under the EEOICPA.

2. The evidence is sufficient to establish that the employee was diagnosed with acute myelomonocytic leukemia (AML).

3. Acute myelomonocytic leukemia (AML) is a specified cancer under Part B of the Act and the implementing regulations. 42 U.S.C. § 7384l(17)(A), 20 C.F.R. § 30.5(dd)(1).

4. The employee was employed at the gaseous diffusion plant in Paducah, Kentucky for the period of at least October 1, 1952 to December 31, 1953. The employee is a covered employee as defined in the Act. 42 U.S.C. § 7384l(1).

5. The employee is a member of the Special Exposure Cohort, as defined in the Act. 42 U.S.C. § 7384l(14)(A).

6. In proof of survivorship, you submitted birth certificates, documentation of name changes, and the death certificates of the employee and his spouse. Therefore, you have established that you are survivors as defined by the implementing regulations. 20 C.F.R. § 30.5(ee).

7. The district office issued the recommended decision on November 17, 2004.

8. 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 November 17, 2004. I find that the employee is a member of the Special Exposure Cohort, as that term is defined in the Act, and that the employee's acute myelomonocytic leukemia (AML) is a specified cancer under Part B of the Act and the implementing regulations. 42 U.S.C. §§ 7384l(14)(A), 7384l(17)(A); 20 C.F.R. § 30.5(dd)(1).

I find that the recommended decision is in accordance with the facts and the law in this case, and that

you are each entitled to one-half of the maximum $150,000 award, in the amount of $75,000 each, pursuant to Part B of the EEOICPA. 42 U.S.C. §§ 7384s(a), 7384s(e)(1)(B).

Jacksonville, FL

Mark Stewart

Hearing Representative

EEOICPA Fin. Dec. No. 63258-2005 (Dep't of Labor, March 11, 2005)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning your claim for compensation under Part B of 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 for benefits is accepted.

STATEMENT OF THE CASE

On November 9, 2004, you filed a claim for survivor benefits under Part B of the EEOICPA, Form EE-2, wherein you indicated that your late husband, **[Employee]** (hereinafter referred to as the employee), suffered from a "Brain tumor-Oligodendroglioma" (brain cancer) and worked prior to January 1, 1974 on Amchitka Island.[1] On the EE-3 form (Employment History), you indicated that the employee was employed by the U.S. Geological Survey (USGS) from October 10, 1960 until February 13, 1980 and that the employee was involved in geological studies and the mapping of Amchitka Island. You submitted the employee's death certificate and your marriage certificate in support of your claim as the employee's eligible surviving beneficiary.

You submitted an October 11, 2004 letter from AMC Cancer Research Center, and an October 12, 2004 letter from Exempla Lutheran Medical Center, which indicated that the employee's medical records had been destroyed. You also submitted the employee's physician-signed death certificate, which indicated that the employee died on April 30, 1982 from "Brain tumor- Oligodendroglioma" at the AMC Cancer Research Center and that 6 years and 2 months was the interval between the onset of the disease and the employee's death. The district office concluded that the employee's death certificate was sufficient to establish that the employee was diagnosed with brain cancer on March 2, 1976.

The district office searched the Oak Ridge Institute for Science and Education (ORISE) website database in an effort to verify the employment claimed, but no records were found. The Department of Energy (DOE) was also not able to verify the employment claimed. In response to the district office's request for employment evidence, you submitted various employment documents. As part of the documentation that you submitted were the following:

1) A technical letter prepared by the USGS for the U.S. Atomic Energy Commission (AEC) entitled, "Amchitka-3 Geologic Reconnaissance of Amchitka Island, December 1966," which indicated that the employee and W. J. Carr were part of a reconnaissance team that was on Amchitka Island between November 30 and December 16, 1966 for the purpose of selecting drilling sites.

2) A USGS professional paper prepared on behalf of the AEC entitled, "Interpretation of Aeromagnetic Survey of Amchitka Island Area, Alaska," which indicated that the employee and W. J. Carr were involved in reconnaissance mapping on Amchitka in 1966 and 1967.

3) A January 10, 1967 letter of appreciation from the AEC to the USGS, which indicated that the employee was part of a reconnaissance team on Amchitka Island.

4) An employment history affidavit, Form EE-4, from **[Co-Worker #1]** and **[Co-Worker #2]**, in which they attested that they were the employee's co-workers at the USGS during 1960's and 1970's.

5) Entries from the employee's field notebook, dated between November 29 and December 17, 1966 and April 28 to May 3, 1967, relative to his work on Amchitka Island.

According to Appendix A-7 of the Atomic Energy's Manager's Completion Report, dated January, 1973, the USGS was designated an Amchitka prime contractor. Therefore, the district office concluded that the USGS was a DOE contractor, in accordance with EEOICPA Bulletin No. 03-26 (issued June 3, 2003). Altogether, the district office concluded that the aforementioned employment evidence was sufficient to establish that the employee was a DOE contractor employee on Amchitka Island from November 29, 1966 until December 17, 1966 and from April 28, 1967 until May 3, 1967.

On February 8, 2005, the district office issued a recommended decision, which concluded that the employee was a member of the special exposure cohort (SEC), that he suffered from brain cancer and that you are entitled to $150,000 dollars in survivor's compensation under Part B of the Act.

On February 15, 2005, the FAB received your written notification that you waived any and all objections to the recommended decision. Therefore, based upon a review of the case file evidence, the undersigned makes the following:

FINDINGS OF FACT

1) You filed a claim for survivor benefits under Part B of the EEOICPA on November 9, 2004.
2) You established that the employee was employed by a DOE contractor on Amchitka Island from November 29, 1966 until December 17, 1966 and from April 28, 1967 until May 3, 1967.
3) You established that the employee was diagnosed with brain cancer on March 2, 1976.
4) The district office issued a recommended decision on February 8, 2005, which concluded that you are entitled to $150,000 dollars in survivor's compensation.
Therefore, based upon a review of the case file evidence, the undersigned makes the following:

CONCLUSIONS OF LAW

Pursuant to § 7384l(14)(B) of the Act, a member of the SEC is defined as an employee that was "employed before January 1, 1974, by the Department of Energy or a Department of Energy contractor or subcontractor on Amchitka Island, Alaska, and was exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests." 42 U.S.C. § 7384l(14)(B). The evidence of record established that the employee was employed by a DOE contractor on Amchitka Island during a covered time period: November 29, 1966 until December 17, 1966 and from April 28, 1967 until May 3, 1967. Therefore, the undersigned finds that the employee was a member of the SEC pursuant to § 7384l(14)(B) of the Act.

Pursuant to § 30.5(dd) of the implementing regulations, brain cancer is considered a specified cancer provided that its onset occurred at least five years after the employee's first exposure to radiation. 20 C.F.R. § 30.5(dd). Additionally, pursuant to § 7384l(9)(A) of the Act, a covered employee with cancer is "an individual with a specified cancer who is a member of the Special Exposure Cohort, if and only if that individual contracted that specified cancer after beginning employment at a Department of Energy facility (in the case of a Department of Energy employee or Department of Energy contractor employee) or at an atomic weapons employer facility (in the case of an atomic weapons employee)." 42 U.S.C. § 7384l(9)(A). The evidence of record established that as a member of the SEC the employee was diagnosed with brain cancer more than five years after he began his covered employment on Amchitka Island. Therefore, the undersigned finds that the employee was a covered employee with cancer, pursuant to § 7384l(9)(A) of the Act.

The undersigned has reviewed the facts and the district office's February 8, 2005 recommended decision and finds that you are entitled to $150,000 dollars in compensation for the employee's brain cancer, pursuant to § 7384s(a),(e)(1)(A) of the Act.

Washington, DC

Mark D. Langowski

Hearing Representative

[1] According to the Department of Energy's (DOE) Office of Worker Advocacy on the DOE website at http://tis.eh.doe.gov/advocacy/faclist/showfacility.cfm, the Amchitka Island Test Site on Amchitka Island, AK is a covered DOE facility from 1965 to 1972 and from 1995 to the present.

Part E cancer claims

EEOICPA Fin. Dec. No. 10009704-2007 (Dep't of Labor, February 22, 2010)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning the above-captioned claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claim for benefits based on lymphoma is denied under Part E of EEOICPA.

STATEMENT OF THE CASE

On March 19, 2002, the employee filed a claim for benefits under Part B of EEOICPA and alleged that he had contracted pulmonary fibrosis and lymphoma due to his employment as a uranium miner. On May 11, 2004, he also filed a Request for Review by Physicians Panel with the Department of Energy (DOE) under former Part D of EEOICPA for pulmonary fibrosis and lymphoma. With the repeal of Part D and the enactment of Part E, the employee's Part D claim was treated as a claim for benefits under Part E.

On August 16, 2002, FAB issued a final decision accepting the claim under Part B for pulmonary fibrosis and awarded the employee $50,000.00 in lump-sum compensation. In that decision, FAB

noted that the Department of Justice (DOJ) confirmed that the employee was an award recipient under section 5 of the Radiation Exposure Compensation Act (RECA), 42 U.S.C. 2210 note, for the condition of pulmonary fibrosis. On May 21, 2007, FAB issued another final decision that accepted the claim for pulmonary fibrosis, this time under Part E, and awarded the employee medical benefits under Part E for that covered illness. On November 3, 2008, FAB also issued a final decision that awarded the employee impairment benefits under Part E based on his accepted pulmonary fibrosis; the award of $142,500.00 was for his 57% whole body impairment.

In support of his Part E claim for lymphoma, the employee submitted an employment history on Form EE-3, showing that he had worked as a miner for Kerr-McGee at the KerMac 24 Mine in Grants, New Mexico, from approximately September 1, 1959 to March 1, 1960, and for Phillips Petroleum/Sandstone at the Ambrosia Lake Mine, from approximately March 1, 1960 to November 30, 1960. DOJ submitted employment evidence it had collected in connection with his RECA claim, including an Itemized Statement of Earnings from the Social Security Administration and a Uranium Miner's study, both of which verified that the employee worked as a uranium miner for Kerr-McGee in Section 24 from January 1, 1959 to September 30, 1960, and for Phillips Petroleum at Sandstone from October 1, 1960 to December 31, 1960. The employee also submitted a pathology report, dated November 10, 1998, in which Dr. Glenn H. Segal diagnosed B-cell non-Hodgkin's lymphoma involving bone marrow. He also submitted a November 18, 1998 report in which Dr. Jo-Ann Andriko confirmed the diagnosis of malignant lymphoma.

The district office reviewed source documents used to compile the U. S. Department of Labor's Site Exposure Matrices (SEM)[1]to determine whether it was possible that, given the employee's labor category and the work processes in which he was engaged, he was exposed to a toxic substance in the course of his employment that has a causal link with his claimed lymphoma. The district office determined that SEM did not have such a link and by letters dated August 14, 2009, and September 14, 2009, it advised the employee that there was insufficient evidence to establish that exposure to a toxic substance at a DOE facility or section 5 mine was a significant factor in aggravating, contributing to or causing his lymphoma. The district office requested that he provide further evidence of the link necessary to support his claim and afforded him 30 days to provide the requested evidence. In response, on October 13, 2009, he submitted a letter in which he stated that his lymphoma was the result of his employment as a uranium miner. The letter was accompanied by the following documents:

1. An article entitled "Radon Exposure and Mortality Among White and American Indian Uranium Miners: An Update of the Colorado Plateau Cohort."

2. An article entitled "Radiation Exposure Tied to Lymphoma Risk in Men."

3. An article entitled "Occupational Exposures and Non-Hodgkin's Lymphoma: Canadian Case-Control Study."

4. An article on non-Hodgkin's lymphoma.

5. An abstract from the update of mortality from all causes among white uranium miners from the Colorado plateau study group.

6. A section from the Federal Register Notice regarding changes to the dose

reconstruction target organ selection for lymphoma under EEOICPA.

7. A letter dated August 17, 2001 in which Dr. Thomas P. Hyde opined that it was highly likely that the employee's lymphoma was caused by his exposure to radiation during his employment as a uranium miner.

To determine the probability of whether the employee contracted cancer in the performance of duty under Part E due to radiation, the district office referred his claim to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction. On November 10, 2009, the district office received the final NIOSH Report of Dose Reconstruction and used the information provided in that report to determine the probability of causation (PoC). The district office calculated that there was a 17.10% probability that the employee's lymphoma was caused by radiation exposure at the uranium mines in which he worked.

On December 10, 2009, the district office issued a recommended decision to deny the employee's Part E claim for lymphoma on the ground that it was not "at least as likely as not" (a 50% or greater probability) that his lymphoma was caused by his employment at the uranium mines where he worked. The district office further concluded that there was no evidence meeting the "at least as likely as not" causation standard that exposure to a toxic substance other than radiation at either a DOE facility or a section 5 mine was a significant factor in aggravating, contributing to or causing the claimed illness of lymphoma.

Following issuance of the recommended decision, FAB independently analyzed the information in the NIOSH report and confirmed the district office's PoC calculation of 17.10%. Based on a thorough review of the case file, FAB hereby makes the following:

FINDINGS OF FACT

1. The employee worked as a uranium miner for Kerr-McGee in Section 24 from January 1, 1959 to September 30, 1960, and for Phillips Petroleum at Sandstone from October 1, 1960 to December 31, 1960.

2. He was diagnosed with lymphoma on November 10, 1998.

3. Based on the dose reconstruction performed by NIOSH, the PoC (the likelihood that the cancer was caused by radiation exposure incurred while working at a covered facility) for the employee's lymphoma was 17.10%, which is less than 50%.

4. There is insufficient evidence in the file to establish that it is "at least as likely as not" that exposure to toxic substances other than radiation at a covered DOE facility or section 5 mine was a significant factor in aggravating, contributing to or causing the employee's lymphoma.

Based on a review of the aforementioned facts, FAB also hereby makes the following:

CONCLUSIONS OF LAW

Part E of EEOICPA provides compensation to covered DOE contractor employees who have contracted a "covered illness" through exposure at a DOE facility in accordance with § 7385s-2. Section 7385s(2)

defines a “covered DOE contractor employee” as any DOE contractor employee determined under § 7385s-4 to have contracted a covered illness through exposure at a DOE facility, and § 7385s(2) defines a “covered illness” as an illness or death resulting from exposure to a toxic substance. Pursuant to 42 U.S.C. § 7385s-5(2), a section 5 uranium worker determined under § 7385s-4(c) to have contracted a covered illness through exposure to a toxic substance at a section 5 mine or mill will be eligible for Part E benefits to the same extent as a DOE contractor employee determined under § 7385s-4 to have contracted a covered illness through exposure to a toxic substance at a DOE facility.

To establish eligibility for benefits for radiogenic cancer under Part E of EEOICPA, an employee must show that he or she has been diagnosed with cancer; was a civilian DOE contractor employee or a civilian RECA section 5 uranium worker who contracted that cancer after beginning employment at a DOE facility or a RECA section 5 facility; and that the cancer was at least as likely as not related to exposure to radiation at a DOE facility or a RECA section 5 facility. Section 30.213 of the implementing regulations (20 C.F.R. § 30.213(c) (2009)) states that:

The Office of Workers’ Compensation Programs (OWCP) also uses the Department of Health and Human Services (HHS) regulations when it makes the determination required by § 7385s-4(c)(1)(A) of the Act, since those regulations provide the factual basis for OWCP to determine if "it is at least as likely as not" that exposure to radiation at a DOE facility or RECA section 5 facility, as appropriate, was a significant factor in aggravating, contributing to or causing the employee’s radiogenic cancer claimed under Part E of the Act. For cancer claims under Part E of the Act, if the PoC is less than 50% and the employee alleges that he was exposed to additional toxic substances, OWCP will determine if the claim is otherwise compensable pursuant to § 30.230(d) of this part.

FAB notes that the PoC calculations in this case were performed in accordance with 20 C.F.R. § 30.213. FAB independently analyzed the information in the NIOSH report, confirming the district office’s PoC calculation of 17.10%.

Section 30.111(a) of the regulations states that “Except where otherwise provided in the Act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true.” 20 C.F.R. § 30.111(a). As found above, the case file does not contain sufficient evidence to enable the employee to meet his burden of proof to establish that it is “at least as likely as not” that exposure to toxic substances other than radiation at a covered DOE facility or section 5 mine was a significant factor in aggravating, contributing to or causing his lymphoma.

In the absence of evidence to support that it is at least as likely as not that exposure to a toxic or radiological substance at a DOE facility or a RECA section 5 facility was a significant factor in aggravating, contributing to, or causing his lymphoma, FAB concludes that the employee has failed to establish that he contracted the “covered illness” of lymphoma, and his claim under Part E of EEOICPA is denied.

Kathleen M. Graber

Hearing Representative

Final Adjudication Branch

[1] SEM is a database of occupational categories, the locations where those occupational categories would have been performed, a list of process activities at the facility and the locations where those processes occurred, a list of toxic substances and the locations where those toxic substances were located, and a list of medical conditions and the toxic substances associated with those conditions.

Probability of causation

EEOICPA Fin. Dec. No. 10522-2004 (Dep't of Labor, November 14, 2003)

NOTICE OF FINAL DECISION

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

STATEMENT OF THE CASE

On September 24, 2001, you filed a Form EE-1 (Claim for Employee Benefits under the EEOICPA), based on skin cancer. A representative of the Department of Energy (DOE) verified that you engaged in covered employment at the Hanford site for General Electric from December 5, 1955 to November 8, 1957 and for J.A. Jones/Kaiser Engineers Hanford from September 13, 1960 to February 4, 1975, February 6, 1975 to October 11, 1976, and November 30, 1976 to September 30, 1987. The Hanford site is recognized as a covered DOE facility from 1942 to the present. *See* Department of Energy Worker Advocacy Facility List.

You provided a medical record summary from David L. Adams, M.D., of Tri-City Derm Management, Inc., that indicates you had surgical excisions diagnosed as basal cell carcinoma on the following twelve dates: December 14, 1977 (right sideburn area); March 17, 1982 (right anterior sideburn area); March 18, 1982 (right anterior sideburn area); March 23, 1982 (right anterior sideburn area); March 25, 1982 (right anterior sideburn area); March 29, 1982 (right anterior sideburn area); March 25, 1986 (right lateral face); September 16, 1986 (mid posterior chest); December 23, 1986 (right sideburn area); June 7, 1989 (right cheek of face); February 22, 1995 (right face) and March 8, 1995 (right side of face).

You submitted four operative reports related to your cancers as follows: March 17, 1982 (basal cell carcinoma); March 18, 1982 (Mohs microscopic controlled surgery – subsequent treatment. "The second layer shows cancer still present."); March 23, 1982 ("The third layer shows cancer still present."); and March 25, 1982 ("The 4^{th} layer shows cancer still present."). Also, you submitted five pathology reports related to your cancer as follows: December 14, 1977 (basal cell epithelioma); February 22, 1995 ("Basosquamous carcinoma"); March 8, 1995 (ulcerated multifocal superficial basal cell carcimoma); December 21, 1995 (right pre-auricular basal cell carcinoma); and February 28, 1996 (basal cell carcinoma right lateral cheek skin). Further, you submitted a pathology report dated January 5, 1996 that diagnosed seborrheic keratosis, a non-covered condition. You also submitted chart notes dated February 28, 1996 that indicate "a large recurrent basal cell carcinoma on the right preauricular lateral cheek area," and "Right lateral cheek, preauricular skin." Consequently, the medical evidence includes a medical record summary, operative reports and pathology reports showing your diagnoses of skin cancer.

To determine the probability of whether you sustained these cancers in the performance of duty, the Seattle district office referred your claim to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction in accordance with § 30.115 of the EEOICPA regulations. *See* 20 C.F.R. § 30.115. The district office received the final NIOSH Report of Dose Reconstruction on October 22, 2003. *See* 42 U.S.C. § 7384n(d); 42 C.F.R. Part 82, § 82.26 (NIOSH report of dose reconstruction results). In its report, NIOSH indicated, in its "Dose Reconstruction Overview," that it performed radiation dose reconstructions on only four of your basal cell carcinomas that were diagnosed as follows: February 28, 1996 (left cheek); March 9, 1995 (auricular skin); March 9, 1995 (right side of the face); and March 17, 1982 (right sideburn area of the face).

Using the information provided in the Report of Dose Reconstruction, the Seattle district office utilized the Interactive RadioEpidemiological Program (IREP) to determine the probability of causation of your cancer and reported in its Recommended Decision that there was a 52.35% probability that your basal cell carcinoma of the skin was caused by radiation exposure at the INEEL site. The district office continued, in its recommended decision, that "Based on the dose reconstruction performed by NIOSH, the probability of causation (the likelihood that a cancer was caused by radiation exposure incurred by the employee while working at a DOE covered facility) was calculated for the four primary cancers."

On November 3, 2003, the Seattle district office recommended acceptance of your claim for compensation, and on November 7, 2003, the Seattle Final Adjudication Branch received written notification from you indicating that you waive any and all rights to file objections to the recommended decision.

FINDINGS OF FACT

1. You filed a claim for employee benefits on September 24, 2001.
2. You were employed at the Hanford site by General Electric from December 5, 1955 to November 8, 1957; and by J.A. Jones/Kaiser Engineers Hanford from September 13, 1960 to February 4, 1975, February 6, 1975 to October 11, 1976, and November 30, 1976 to September 30, 1987.
3. You are a covered employee as defined by § 7384l(9)(B) of the EEOICPA. *See* 42 U.S.C. § 7384l(9)(B).
4. You were diagnosed with multiple skin cancers.
5. Your cancer diagnoses were made after you began employment with the Department of Energy.
6. The NIOSH Interactive RadioEpidemiological Program indicated a 52.35% probability that your basal cell carcinoma was caused by radiation exposure at the Hanford site.
7. The dose reconstruction estimate was performed in accordance with § 7384n(d) of the EEOICPA and 42 C.F.R. Part 82. *See* 42 U.S.C. § 7384n(d); 42 C.F.R. Part 82 § 82.26.
8. The Probability of Causation was completed in accordance with § 7384n(c)(3) of the EEOICPA and 42 C.F.R. Part 81. The calculation of the probability of causation was based on four basal cell carcinoma primary cancer sites and was completed in accordance with 42 C.F.R. Part 81. *See* 42 U.S.C. § 7384n(c)(3); 42 C.F.R. Part 81, Subpart E.
9. After determining that the probability of causation for your basal cell carcinoma was 50% or greater, NIOSH determined that sufficient research and analysis had been conducted to end the dose reconstruction as it was evident the estimated cumulative dose is sufficient to qualify you for compensation. Additional calculations of probability of causation were not required to be determined. *See* 42 C.F.R. § 82.10(k).

CONCLUSIONS OF LAW

The DOE verified your employment at the Hanford site by General Electric from December 5, 1955 to November 8, 1957; and by J.A. Jones/Kaiser Engineers Hanford from September 13, 1960 to February 4, 1975, February 6, 1975 to October 11, 1976, and November 30, 1976 to September 30, 1987.

The medical documentation submitted in support of your claim shows that you were diagnosed with skin cancer on December 14, 1977 (right sideburn area); March 17, 1982 (right anterior sideburn area); March 18, 1982 (right anterior sideburn area); March 23, 1982 (right anterior sideburn area); March 25, 1982 (right anterior sideburn area); March 29, 1982 (right anterior sideburn area); March 25, 1986 (right lateral face); September 16, 1986 (mid posterior chest); December 23, 1986 (right sideburn area); June 7, 1989 (right cheek of face); February 22, 1995 (right face) and March 8, 1995 (right side of face). Operative reports you submitted indicated cancer-related excisions on the following dates: March 17, 1982 (basal cell carcinoma); March 18, 1982 (Mohs microscopic controlled surgery – subsequent treatment. "The second layer shows cancer still present."); March 23, 1982 ("The third layer shows cancer still present."); and March 25, 1982 ("The 4th layer shows cancer still present."). You submitted pathology reports providing cancer diagnoses as follows: December 14, 1977 (basal cell epithelioma); February 22, 1995 ("Basosquamous carcinoma"); March 8, 1995 (ulcerated multifocal superficial basal cell carcimoma); December 21, 1995 (right pre-auricular basal cell carcinoma); and February 28, 1996 (basal cell carcinoma right lateral cheek skin).

Based on your covered employment at the Hanford site and the medical documentation showing diagnoses of multiple skin cancers, you are a "covered employee with cancer" under the EEOICPA. *See* 42 U.S.C. § 7384l(9)(B)(i).

The undersigned notes that there is no indication in the case file of diagnosis of an auricular skin cancer, on March 9, 1995, as indicated in the NIOSH Report of Dose Reconstruction. But, there is a diagnosis of a right pre-auricular basal cell carcinoma on December 21, 1995 as well as a reference to a basal cell carcinoma on the "right preauricular lateral cheek area" in the chart notes dated February 28, 1996**.** It is also noted that the IREP probability of causation results show that the auricular primary cancer was diagnosed in 1995, and that no month or day was used in the computer calculation of the results. Consequently, any discrepancy in the date of diagnosis of pre-auricular basal cell carcinoma in 1995 would not affect the outcome of this case.

To determine the probability of whether you sustained cancer in the performance of duty, the district office referred your claim to NIOSH for radiation dose reconstruction on January 10, 2002, in accordance with § 30.115 of the EEOICPA regulations. *See* 20 C.F.R. § 30.115. On October 22, 2003, the Seattle district office received the final NIOSH Report of Dose Reconstruction.

Using the information provided in the Report of Dose Reconstruction for basal cell carcinoma, the district office utilized the Interactive RadioEpidemiological Program (NIOSH-IREP), pursuant to §§ 81.20, 81.21, 81.22, and 81.25 of the implementing NIOSH regulations, to determine a 52.35% probability that your cancer was caused by radiation exposure while employed at the Hanford site. *See* 42 C.F.R. §§ 81.20 (Required use of NIOSH-IREP), 81.21 (Cancers requiring the use of NIOSH-IREP), 81.22 (General guidelines for use of NIOSH-IREP), 81.25 (Guidelines for claims involving two or more primary cancers). The Final Adjudication Branch also analyzed the information in the NIOSH report, confirming the 52.35% probability. Thus, the evidence shows that your cancer was at least as likely as not related to your employment at the Hanford site and no further determinations of probability of causation were required.

You are a "covered employee with cancer," which is defined in § 7384l(9)(B)(i) and (ii) of the EEOICPA. *See* 42 U.S.C. § 7384l(9)(B)(i) and (ii). Pursuant to §§ 81.20, 81.21, 81.22, and 81.25 of the NIOSH implementing regulations, your cancer was at least as likely as not related to your employment at the Hanford site. *See* 42 C.F.R. §§ 81.20, 81.21, 81.22, and 81.25.

The record indicates that you filed Form EE-1, Claim for Employee Benefits under the EEOICPA, on September 24, 2001. The date you filed your claim is the date you became eligible for medical benefits for cancer. *See* 42 U.S.C. § 7384t(d).

Pursuant to Bulletin 03-24, if all primary cancers claimed have not gone through dose reconstruction when the 50% threshold has been reached, NIOSH will not complete dose reconstruction for the rest of the cancers. The calculation of additional POCs for the remaining primary cancers, which were not calculated, would only make the final numerical value of the POC larger, and all of the cancers, including those for which NIOSH did not perform a dose calculation, are covered for medical benefits. Consequently, you are entitled to compensation and medical benefits for skin cancer retroactive to September 24, 2001. *See* EEOICPA Bulletin No. 03-24 (issued May 2, 2003).

For the foregoing reasons, the undersigned hereby accepts your claim for skin cancer. You are entitled to compensation in the amount of $150,000 pursuant to § 7384s(a) of the Act. You are also entitled to medical benefits related to skin cancer, since September 24, 2001. *See* 42 U.S.C. § § 7384s, 7384t.

Seattle, WA

Rosanne M. Dummer, District Manager

Final Adjudication Branch Seattle

EEOICPA Fin. Dec. No. 12659-2004 (Dep't of Labor, November 6, 2003)

FINAL DECISION

This is the decision of the Final Adjudication Branch concerning the claim of **[Claimant]** 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 discussed below, compensation based on lung cancer is granted.

STATEMENT OF THE CASE

On October 2, 2003, the Cleveland district office issued a recommended decision finding that **[Employee]**'s lung cancer was at least as likely as not related to his employment at a Department of Energy (DOE) facility, within the meaning of 42 U.S.C. § 7384n; that the employee is a "covered employee with cancer", as that term is defined in 42 U.S.C. § 7384l(9)(B); and concluding that the claimant, as the survivor of the employee, is entitled to compensation in the amount of $150,000 pursuant to 42 U.S.C. § 7384s.

The evidence shows that the employee worked in decontamination/housekeeping maintenance at Monsanto Chemical Company (Mound Plant) for the period of November 21, 1951, to October 2,

1978. Additional evidence shows that he was on active military service from September 4, 1952, to August 20, 1954. In order to be eligible for benefits based on the employee's cancer, the evidence must establish that the cancer was at least as likely as not related to his employment at a DOE facility.

To determine the probability of whether the employee sustained lung cancer in the performance of duty, the district office referred the claimant's application package to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction, in accordance with 20 C.F.R. § 30.115 of the Department of Labor's implementing regulations. NIOSH performed the dose reconstruction by calculating the annual radiation dosage during recorded radiation intake periods. Because the potential intake on December 27, 1960, occurred near the end of that year, all dose for that intake was assigned to 1961. On August 18, 2003, the claimant signed Form OCAS-1, indicating that she had reviewed the NIOSH Draft Report of Dose Reconstruction and agreed that it identified all of the relevant information she had provided to NIOSH.

Pursuant to 42 C.F.R. § 81.20 of the Department of Health and Human Services' regulations, the district office used the information provided in this report to determine that there was an 83.73% probability that the employee's lung cancer was caused by radiation exposure at Monsanto Chemical Company (Mound Plant).

In making this determination, the district office used the parameter for smoking history of "10-19 cigarettes per day". This parameter was used because the smoking history questionnaire that the claimant submitted was marked in the blocks corresponding to "Current Cigarette Smoker" and "10-19 cigarettes per day." A consultation report from Miami Valley Hospital, dated June 24, 1978, notes that the employee provided a history that he is a "heavy smoker - 2 ppd x 30 years."

Based on that report, the Final Adjudication Branch independently analyzed the information in the NIOSH report, and re-determined the probability of causation using a smoking history parameter of ">40 cig/day (currently)". That history was considered to be the most reliable estimate of the employee's smoking history. The re-analysis resulted in an 82.44% probability that the employee's lung cancer was sustained in the performance of duty.

On October 8, 2003, the Final Adjudication Branch received written notification that the claimant waives any and all objections to the recommended decision.

FINDINGS OF FACT

1. The claimant filed an application for benefits on October 15, 2001, under the EEOICPA based on the employee's lung cancer.

2. The employee worked at Monsanto Chemical Company (Mound Plant) for the period of November 21, 1951, to October 2, 1978. Monsanto Chemical Company (Mound Plant) is identified as a DOE facility from 1947 to the present.

3. The employee was diagnosed with lung cancer in June 1978.

4. NIOSH reported annual dose estimates for lung cancer during recorded radiation intake periods. A summary and explanation of information and methods applied to produce these dose estimates, including the claimant's involvement through an interview and review of the dose

report, are documented in the "NIOSH Report of Dose Reconstruction under EEOICPA."

5. Based on the dose reconstruction performed by NIOSH, the district office calculated the probability of causation (the likelihood that the cancer was caused by radiation exposure incurred while working at a covered facility) for lung cancer. The district office determined that lung cancer was estimated to have a greater than 50% probability that it is related to employment at the covered facility.

6. The claimant is the surviving spouse of the employee and was married to him for at least one year immediately before his death.

CONCLUSIONS OF LAW

I have reviewed the facts and the recommended decision issued by the district office, and find that the employee's lung cancer was at least as likely as not sustained in the performance of duty at a DOE facility as specified by 42 U.S.C. § 7384n. The employee is a "covered employee with cancer", as that term is defined by 42 U.S.C. § 7384l(9)(B). The claimant is the surviving spouse of the employee as defined by 42 U.S.C. § 7384s(e)(1). I find that the recommended decision is in accordance with the facts and the law in this case, and that the claimant is entitled to $150,000 based on the employee's lung cancer, as provided by 42 U.S.C. § 7384s.

Cleveland, OH

Daria Rusyn

Final Adjudication

Branch Manager

EEOICPA Fin. Dec. No. 21570-2005 (Dep't of Labor, May 26, 2005)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch concerning your claim for compensation under Part B of 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 stated below, your claim for benefits is denied. A copy of this decision will be provided to your authorized representative. Adjudication of your Part E claim is deferred until after issuance of the Interim Final Regulations.

STATEMENT OF THE CASE

On January 8, 2002, you filed Form EE-2, Claim for Survivor Benefits under EEOICPA, with the Jacksonville district office. The claim was based, in part, on the assertion that your late spouse was an employee of a Department of Energy (DOE) contractor at a DOE facility. You stated on the Form EE-2 that you were filing for the breast cancer of **[Employee]** (hereinafter called the employee).

On the Form EE-3, Employment History, you stated that the employee was employed at the Savannah River Site (SRS) in Aiken, South Carolina, from 1951 to December 31, 1984. The Department of Energy verified employment as August 20, 1951 to December 31, 1984.

You submitted medical evidence establishing that the employee was diagnosed with left breast cancer on September 10, 1985. In order for you to be eligible for benefits, the evidence must establish that the cancer was at least as likely as not related to employment at a covered facility, within the meaning of Part B of the Act. 42 U.S.C. § 7384n.
To determine the probability of whether the employee sustained cancer in the performance of duty, the Jacksonville district office referred the application package to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction in accordance with § 30.115 of the Department of Labor's implementing regulations. 20 C.F.R. § 30.115. NIOSH reported annual dose estimates from the date of initial radiation exposure during covered employment, to the date the cancer was first diagnosed. A summary and explanation of information and methods applied to produce these dose estimates, including your involvement through an interview and review of the dose report, are documented in the "NIOSH Report of Dose Reconstruction under EEOICPA." On October 9, 2004, you signed Form OCAS-1, indicating the NIOSH Draft Report of Dose Reconstruction had been reviewed and agreeing that it identified all of the relevant information provided to NIOSH. The district office received the final NIOSH Report of Dose Reconstruction on October 15, 2004.

Pursuant to the implementing NIOSH regulations, the district office used the information provided in this report to determine that there was a 36% probability that the employee's cancer was caused by radiation exposure at the Savannah River Site. 42 C.F.R. § 81.20. The Final Adjudication Branch (FAB) independently analyzed the information in the NIOSH report, confirming the 36% probability. On December 17, 2004, the Denver district office issued a recommended decision concluding that the employee's breast cancer is not covered under Part B of the Act and that you are not entitled to compensation. Attached to the recommended decision was a notice of claimant rights, which stated that you had 60 days in which to file an objection to the recommended decision and/or request a hearing. That 60-day period expired on February 15, 2005.

OBJECTIONS

On January 31, 2005, the Final Adjudication Branch received a letter from your authorized representative, dated January 19, 2005, objecting to the recommended decision and requesting a hearing. By letter dated February 8, 2005, your authorized representative requested a telephone hearing. The hearing was held by the undersigned by telephone on March 31, 2005. You and your authorized representative (your daughter) were duly affirmed to provide truthful testimony.

In the letter of objection, your authorized representative stated that the actual primary site of the cancer was probably unknown, since the cancer had already metastasized by the time the employee went to the doctor; that breast cancer is rare in men and there is no family history, so the likelihood that radiation exposure caused it is more likely; you could not obtain additional records from the oncologist since he is no longer in the area; that the employee worked at SRS for 33 years and was exposed to large amounts of radiation and other harmful elements; and that he began work at SRS before exposure records were kept.

At the hearing, you discussed the employee's medical and employment histories. The authorized representative stated that the employee had bumped his chest and noticed a lump and finally went to

the doctor when it wouldn't go away, and that he had had knots throughout his body for some time but never told anyone. She noted that this could indicate the primary site was not the breast since he didn't live long enough for the physicians to actually determine the primary site with testing and diagnostics. She stated that she believed the primary site was the lung, since that was the area the doctors chose to treat.

In accordance with §§ 30.314(e) and (f) of the implementing regulations, a claimant is allowed thirty days after the hearing is held to submit additional evidence or argument, and twenty days after a copy of the transcript is sent to them to submit any changes or corrections to that record. 20 C.F.R. §§ 30.314(e), 30.314(f). By letter dated April 8, 2005, the transcript was forwarded to you. No response, additional evidence, argument, changes or comments were received.

The objections raised before and during the hearing have been reviewed. Part B of the Act defines that the probability of causation shall be based on the radiation dose received by the employee, and states that cancer must be "at least as likely as not related to employment at the facility specified…." 42 U.S.C. §§ 7384n(b), 7384n(c). The implementing regulations state that the FAB may evaluate factual findings or arguments concerning the application of dose reconstruction methodology. 20 C.F.R. § 30.318. However, § 30.318(b) of the implementing regulations states that the methodology used by NIOSH in arriving at reasonable estimates of the radiation doses received by an employee is binding on the FAB.

In your first objection, you stated that the actual primary site of the employee's cancer is unknown. However, as discussed at length during the hearing, the medical records all indicate a breast primary with metastasis to the lymph system and lungs. The implementing regulations state that the establishment of a cancer diagnosis is based on medical evidence that sets forth the diagnosis of cancer and the date on which that diagnosis was made. 20 C.F.R. § 30.211. Your belief that the medical evidence of record is incorrect is a challenge of a fact, and is insufficient to override the evidence of record.

Your second objection relates to the rarity of breast cancer in men and the lack of a family history of breast cancer in either sex. Scientists evaluate the likelihood that radiation causes cancer in a worker by using medical and scientific knowledge about the relationship between specific types and levels of radiation dose and the frequency of cancers in exposed populations. If research determines that a specific type of cancer occurs more frequently among a population exposed to a higher level of radiation than a comparable population (a population with less radiation exposure but similar in age, gender, and other factors that have a role in health), and if the radiation exposure levels are known in the two populations, then it is possible to estimate the proportion of cancers in the exposed population that may have been caused by a given level of radiation.

The probability of causation (PoC) means the probability or likelihood that a cancer was caused by radiation exposure incurred by a covered employee in the performance of duty. The PoC is calculated as the risk of cancer attributable to radiation exposure (RadRisk) divided by the sum of the baseline risk of cancer to the general population. 42 C.F.R. § 81.4(n). The Department of Labor (DOL) uses NIOSH-IREP to estimate the probability that an employee's cancer was caused by his individual radiation dose. The model takes into account the employee's cancer type, year of birth, year of cancer diagnosis, and exposure information such as years of exposure, as well as the dose received from gamma radiation, X-rays, alpha radiation, beta radiation, and neutrons during each year.

Complex factors associated with cancer incidence are taken into account in NIOSH-IREP in calculating probability of causation (PoC) at the 99th percentile credibility limit for any given cancer, including breast cancer. These factors include gender-specific rate differences as well as the gender-specific ratios between U.S. and Japanese incidence rates. However, PoC depends more on excess risk due to radiation exposure than to gender differences. In fact, PoC under EEOICPA is calculated as the risk of cancer attributable to radiation exposure (RadRisk) divided by the sum of the baseline risk of cancer (BasRisk) plus RadRisk, converted to a percentage.

By definition, a PoC of 50% is obtained whenever radiation exposure doubles the natural baseline incidence of cancer, regardless if the baseline is low or high. Consequently, similar doses are required for males and females to qualify for compensation for breast cancer because the risk coefficient is similar for males and females.

Male breast cancer rates are indeed quite low compared to females. Further, this is true in both the U.S. and in Japan. Thus, as would be expected, the net effect in IREP of these differing gender incidence rates for breast cancer is that the same dose, holding all other IREP inputs constant, produces a higher PoC for males compared to females. However, gender differences in baseline rates are already taken into account in IREP calculations. This is a challenge of the PoC portion of the dose reconstruction methodology and cannot be addressed by the FAB per

20 C.F.R. § 30.318(b).

The last objection concerns the accuracy of the dose reconstruction, since the employee began work before exposure records were kept. The basic principle of dose reconstruction is to characterize the occupational radiation environment to which a worker was exposed using available worker and/or workplace monitoring information. In cases where radiation exposures in the workplace environment cannot be fully characterized based on available data, default values based on reasonable scientific assumptions are used as substitutes. The approaches for determining the employee's external and internal dose are discussed in detail in his dose reconstruction report and are summarized below.

Dosimetry records from the Savannah River Site were used as a starting point in determining the employee's external dose, including the addition of missed dose (when zeros were reported in his dosimetry records). Maximizing dose conversion factors were used to convert potential whole body exposure dose to the brain.

The employee participated in the bioassay program, but all of his measurements showed activities less than the level of detection used in the program. Based on certain bioassay results, internal doses were calculated for tritium.

On-site ambient doses and doses received from diagnostic medical X-ray procedures that were required as a condition of employment were also included in the overall estimate of the dose to the breast.

For the purposes of the dose reconstruction, NIOSH assigned the employee the highest reasonably possible radiation dose related to radiation exposure and intake using available dosimetry data, when available, and worst-case assumptions in the absence of documented exposures. The NIOSH approach is based on current science, documented experience and relevant data. A part of the approach does include checks of dosimetry results against work place exposure indicators. This is a challenge of the dose reconstruction methodology and cannot be addressed by the FAB per 20 C.F.R. § 30.318(b).

Your concerns about other "harmful elements" the employee may have been exposed to is a challenge of a fact, in this case the EEOICPA Part B requirement of exposure to beryllium or ionizing radiation related to nuclear weapons production.

FINDINGS OF FACT

1. You filed a Form EE-2, Claim for Survivor Benefits under the EEOICPA, on January 8, 2002.

2. The Department of Energy verified the employment at the SRS as August 20, 1951 to December 31, 1984.

3. The employee was diagnosed with breast cancer on September 10, 1985.

4. In proof of survivorship, you submitted copies of your marriage certificate to the employee and the employee's death certificate. Therefore, you have established that you are a survivor as defined by the implementing regulations. 20 C.F.R. § 30.5(ee).

5. Based on the dose reconstruction performed by NIOSH, the district office calculated the probability of causation (the likelihood that the cancer was caused by radiation exposure incurred while working at a covered facility) for breast cancer. The district office calculated a probability of causation of 36% and determined that this condition was not "at least as likely as not" (a 50% or greater probability) related to employment at the covered facility. The Final Adjudication Branch confirmed this probability of causation calculation.

6. On December 17, 2004, the Denver district office issued a recommended decision concluding that the employee's breast cancer is not covered under Part B of the Act, and that you are not entitled to compensation.

7. A hearing was held on March 31, 2005. Your objections were reviewed and determined to be challenges to the dose reconstruction methodology or a challenge of fact concerning the coverage of the law.

CONCLUSIONS OF LAW

The undersigned has reviewed the facts, the recommended decision issued by the Denver district office on December 17, 2004, and the information received before and during the hearing. The evidence in the record does not establish that you are entitled to compensation under Part B of the Act because the calculation of "probability of causation" does not show that there is a 50% or greater likelihood that the employee's cancer was caused by radiation exposure received at the

Savannah River Site in the performance of duty. Therefore, I find that the decision of the district office is supported by the evidence and the law, and cannot be changed based on the objections you submitted.

Since the evidence does not establish that the employee's breast cancer was at least as likely as not related to employment at a covered facility, you are not entitled to benefits under Part B of the Act, and the claim for compensation is denied. 42 U.S.C. § 7384s(e).

Jacksonville, FL

Sidne M. Valdivieso

Hearing Representative

EEOICPA Fin. Dec. No. 21570-2005 (Dep't of Labor, May 26, 2005)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch concerning your claim for compensation under Part B of 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 stated below, your claim for benefits is denied. A copy of this decision will be provided to your authorized representative. Adjudication of your Part E claim is deferred until after issuance of the Interim Final Regulations.

STATEMENT OF THE CASE

On January 8, 2002, you filed Form EE-2, Claim for Survivor Benefits under EEOICPA, with the Jacksonville district office. The claim was based, in part, on the assertion that your late spouse was an employee of a Department of Energy (DOE) contractor at a DOE facility. You stated on the Form EE-2 that you were filing for the breast cancer of **[Employee]** (hereinafter called the employee).

On the Form EE-3, Employment History, you stated that the employee was employed at the Savannah River Site (SRS) in Aiken, South Carolina, from 1951 to December 31, 1984. The Department of Energy verified employment as August 20, 1951 to December 31, 1984.

You submitted medical evidence establishing that the employee was diagnosed with left breast cancer on September 10, 1985. In order for you to be eligible for benefits, the evidence must establish that the cancer was at least as likely as not related to employment at a covered facility, within the meaning of Part B of the Act. 42 U.S.C. § 7384n.

To determine the probability of whether the employee sustained cancer in the performance of duty, the Jacksonville district office referred the application package to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction in accordance with § 30.115 of the Department of Labor's implementing regulations. 20 C.F.R. § 30.115. NIOSH reported annual dose estimates from the date of initial radiation exposure during covered employment, to the date the cancer was first diagnosed. A summary and explanation of information and methods applied to produce these dose estimates, including your involvement through an interview and review of the dose report, are documented in the "NIOSH Report of Dose Reconstruction under EEOICPA." On October 9, 2004, you signed Form OCAS-1, indicating the NIOSH Draft Report of Dose Reconstruction had been reviewed and agreeing that it identified all of the relevant information provided to NIOSH. The district office received the final NIOSH Report of Dose Reconstruction on October 15, 2004.

Pursuant to the implementing NIOSH regulations, the district office used the information provided in this report to determine that there was a 36% probability that the employee's cancer was caused by radiation exposure at the Savannah River Site. 42 C.F.R. § 81.20. The Final Adjudication Branch (FAB) independently analyzed the information in the NIOSH report, confirming the 36% probability.

On December 17, 2004, the Denver district office issued a recommended decision concluding that the employee's breast cancer is not covered under Part B of the Act and that you are not entitled to compensation. Attached to the recommended decision was a notice of claimant rights, which stated that you had 60 days in which to file an objection to the recommended decision and/or request a hearing. That 60-day period expired on February 15, 2005.

OBJECTIONS

On January 31, 2005, the Final Adjudication Branch received a letter from your authorized representative, dated January 19, 2005, objecting to the recommended decision and requesting a hearing. By letter dated February 8, 2005, your authorized representative requested a telephone hearing. The hearing was held by the undersigned by telephone on March 31, 2005. You and your authorized representative (your daughter) were duly affirmed to provide truthful testimony.

In the letter of objection, your authorized representative stated that the actual primary site of the cancer was probably unknown, since the cancer had already metastasized by the time the employee went to the doctor; that breast cancer is rare in men and there is no family history, so the likelihood that radiation exposure caused it is more likely; you could not obtain additional records from the oncologist since he is no longer in the area; that the employee worked at SRS for 33 years and was exposed to large amounts of radiation and other harmful elements; and that he began work at SRS before exposure records were kept.

At the hearing, you discussed the employee's medical and employment histories. The authorized representative stated that the employee had bumped his chest and noticed a lump and finally went to the doctor when it wouldn't go away, and that he had had knots throughout his body for some time but never told anyone. She noted that this could indicate the primary site was not the breast since he didn't live long enough for the physicians to actually determine the primary site with testing and diagnostics. She stated that she believed the primary site was the lung, since that was the area the doctors chose to treat.

In accordance with §§ 30.314(e) and (f) of the implementing regulations, a claimant is allowed thirty days after the hearing is held to submit additional evidence or argument, and twenty days after a copy of the transcript is sent to them to submit any changes or corrections to that record. 20 C.F.R. §§ 30.314(e), 30.314(f). By letter dated April 8, 2005, the transcript was forwarded to you. No response, additional evidence, argument, changes or comments were received.

The objections raised before and during the hearing have been reviewed. Part B of the Act defines that the probability of causation shall be based on the radiation dose received by the employee, and states that cancer must be "at least as likely as not related to employment at the facility specified…." 42 U.S.C. §§ 7384n(b), 7384n(c). The implementing regulations state that the FAB may evaluate factual findings or arguments concerning the application of dose reconstruction methodology. 20 C.F.R. § 30.318. However, § 30.318(b) of the implementing regulations states that the methodology used by NIOSH in arriving at reasonable estimates of the radiation doses received by an employee is binding on the FAB.

In your first objection, you stated that the actual primary site of the employee's cancer is unknown. However, as discussed at length during the hearing, the medical records all indicate a breast primary with metastasis to the lymph system and lungs. The implementing regulations state that the

establishment of a cancer diagnosis is based on medical evidence that sets forth the diagnosis of cancer and the date on which that diagnosis was made. 20 C.F.R. § 30.211. Your belief that the medical evidence of record is incorrect is a challenge of a fact, and is insufficient to override the evidence of record.

Your second objection relates to the rarity of breast cancer in men and the lack of a family history of breast cancer in either sex. Scientists evaluate the likelihood that radiation causes cancer in a worker by using medical and scientific knowledge about the relationship between specific types and levels of radiation dose and the frequency of cancers in exposed populations. If research determines that a specific type of cancer occurs more frequently among a population exposed to a higher level of radiation than a comparable population (a population with less radiation exposure but similar in age, gender, and other factors that have a role in health), and if the radiation exposure levels are known in the two populations, then it is possible to estimate the proportion of cancers in the exposed population that may have been caused by a given level of radiation.

The probability of causation (PoC) means the probability or likelihood that a cancer was caused by radiation exposure incurred by a covered employee in the performance of duty. The PoC is calculated as the risk of cancer attributable to radiation exposure (RadRisk) divided by the sum of the baseline risk of cancer to the general population. 42 C.F.R. § 81.4(n). The Department of Labor (DOL) uses NIOSH-IREP to estimate the probability that an employee's cancer was caused by his individual radiation dose. The model takes into account the employee's cancer type, year of birth, year of cancer diagnosis, and exposure information such as years of exposure, as well as the dose received from gamma radiation, X-rays, alpha radiation, beta radiation, and neutrons during each year.

Complex factors associated with cancer incidence are taken into account in NIOSH-IREP in calculating probability of causation (PoC) at the 99^{th} percentile credibility limit for any given cancer, including breast cancer. These factors include gender-specific rate differences as well as the gender-specific ratios between U.S. and Japanese incidence rates. However, PoC depends more on excess risk due to radiation exposure than to gender differences. In fact, PoC under EEOICPA is calculated as the risk of cancer attributable to radiation exposure (RadRisk) divided by the sum of the baseline risk of cancer (BasRisk) plus RadRisk, converted to a percentage.

By definition, a PoC of 50% is obtained whenever radiation exposure doubles the natural baseline incidence of cancer, regardless if the baseline is low or high. Consequently, similar doses are required for males and females to qualify for compensation for breast cancer because the risk coefficient is similar for males and females.

Male breast cancer rates are indeed quite low compared to females. Further, this is true in both the U.S. and in Japan. Thus, as would be expected, the net effect in IREP of these differing gender incidence rates for breast cancer is that the same dose, holding all other IREP inputs constant, produces a higher PoC for males compared to females. However, gender differences in baseline rates are already taken into account in IREP calculations. This is a challenge of the PoC portion of the dose reconstruction methodology and cannot be addressed by the FAB per

20 C.F.R. § 30.318(b).

The last objection concerns the accuracy of the dose reconstruction, since the employee began work before exposure records were kept. The basic principle of dose reconstruction is to characterize the

occupational radiation environment to which a worker was exposed using available worker and/or workplace monitoring information. In cases where radiation exposures in the workplace environment cannot be fully characterized based on available data, default values based on reasonable scientific assumptions are used as substitutes. The approaches for determining the employee's external and internal dose are discussed in detail in his dose reconstruction report and are summarized below.

Dosimetry records from the Savannah River Site were used as a starting point in determining the employee's external dose, including the addition of missed dose (when zeros were reported in his dosimetry records). Maximizing dose conversion factors were used to convert potential whole body exposure dose to the brain.

The employee participated in the bioassay program, but all of his measurements showed activities less than the level of detection used in the program. Based on certain bioassay results, internal doses were calculated for tritium.

On-site ambient doses and doses received from diagnostic medical X-ray procedures that were required as a condition of employment were also included in the overall estimate of the dose to the breast.

For the purposes of the dose reconstruction, NIOSH assigned the employee the highest reasonably possible radiation dose related to radiation exposure and intake using available dosimetry data, when available, and worst-case assumptions in the absence of documented exposures. The NIOSH approach is based on current science, documented experience and relevant data. A part of the approach does include checks of dosimetry results against work place exposure indicators. This is a challenge of the dose reconstruction methodology and cannot be addressed by the FAB per 20 C.F.R. § 30.318(b).

Your concerns about other "harmful elements" the employee may have been exposed to is a challenge of a fact, in this case the EEOICPA Part B requirement of exposure to beryllium or ionizing radiation related to nuclear weapons production.

FINDINGS OF FACT

1. You filed a Form EE-2, Claim for Survivor Benefits under the EEOICPA, on January 8, 2002.

2. The Department of Energy verified the employment at the SRS as August 20, 1951 to December 31, 1984.

3. The employee was diagnosed with breast cancer on September 10, 1985.

4. In proof of survivorship, you submitted copies of your marriage certificate to the employee and the employee's death certificate. Therefore, you have established that you are a survivor as defined by the implementing regulations. 20 C.F.R. § 30.5(ee).

5. Based on the dose reconstruction performed by NIOSH, the district office calculated the probability of causation (the likelihood that the cancer was caused by radiation exposure incurred while working at a covered facility) for breast cancer. The district office calculated a probability of causation of 36% and determined that this condition was not "at least as likely as not" (a 50% or greater probability) related to employment at the covered facility. The Final Adjudication Branch confirmed this probability of causation calculation.

6. On December 17, 2004, the Denver district office issued a recommended decision concluding that the employee's breast cancer is not covered under Part B of the Act, and that you are not entitled to compensation.

7. A hearing was held on March 31, 2005. Your objections were reviewed and determined to be challenges to the dose reconstruction methodology or a challenge of fact concerning the coverage of the law.

CONCLUSIONS OF LAW

The undersigned has reviewed the facts, the recommended decision issued by the Denver district office on December 17, 2004, and the information received before and during the hearing. The evidence in the record does not establish that you are entitled to compensation under Part B of the Act because the calculation of "probability of causation" does not show that there is a 50% or greater likelihood that the employee's cancer was caused by radiation exposure received at the

Savannah River Site in the performance of duty. Therefore, I find that the decision of the district office is supported by the evidence and the law, and cannot be changed based on the objections you submitted.

Since the evidence does not establish that the employee's breast cancer was at least as likely as not related to employment at a covered facility, you are not entitled to benefits under Part B of the Act, and the claim for compensation is denied. 42 U.S.C. § 7384s(e).
Jacksonville, FL

Sidne M. Valdivieso

Hearing Representative

EEOICPA Fin. Dec. No. 29552-2006 (Dep't of Labor, April 5, 2006)

NOTICE OF FINAL DECISION AND REMAND ORDER

This is the decision of the Final Adjudication Branch (FAB) 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 for compensation and medical benefits under Part B of the Act is accepted for the condition of lung cancer. Your claim for benefits for the conditions of skin lesions, and loss of sensation in fingertips are denied under Part B of the Act. Your claim for additional benefits under Part E of the Act is remanded to the district office for further development.

STATEMENT OF THE CASE

On May 10, 2002, you filed a claim for compensation (Form EE-1) under Part B and a request for

review by medical panels (OWA1-7/6/01) under Part D of the EEOICPA. Your claims identified lung cancer, skin lesions, and loss of sensation in fingertips as the claimed conditions resulting from your employment at a Department of Energy (DOE) facility. You filed an Employment History (Form EE-3) claiming employment as a laborer for roads and grounds at the Paducah Gaseous Diffusion Plant (GDP) from June 1962 to August 1962 and again from June 1963 to August 1963.

The Department of Energy (DOE) verified your employment from June 11, 1962, to August 31, 1962, and again from June 10, 1963, to August 30, 1963. The Paducah GDP is a covered DOE facility from 1951 to July 28, 1998, and in remediation from July 29, 1998 to the present (*See* the Department of Energy's worker's advocacy facility listings at: http://www.eh.doe.gov/advocacy/faclist/findfacility.cfm; verified by the FAB on April 4, 2006).

On June 3, 2002, the district office sent you a letter acknowledging your claim and advising you that skin lesions and loss of sensation in fingertips were not occupational illnesses under Part B of the Act. That letter requested medical records to substantiate a covered condition under the Act.

In support of your claim you submitted medical records including a copy of an October 30, 1997 pathology report signed by Moacyr Da Silva, M.D., providing a diagnosis of "small cell neuroendocrine carcinoma of lung intermediate cell type."

To determine if your cancer was "at least as likely as not" sustained in the performance of your duty at a covered facility, (known as determining the probability of causation or "PoC"), on January 14, 2003, the district office referred your application package to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction.

On September 20, 2005, NIOSH completed the dose reconstruction and sent a draft copy of the report to you to review. On September 30, 2005, NIOSH received your signed Form OCAS-1, indicating that you had received the NIOSH Draft Report of Dose Reconstruction and agreed that it identified all of the relevant information you had provided. On that same date, NIOSH forwarded a copy of the completed dose reconstruction report to the district office.

Based on the dose estimate, the probability of causation for your cancer was calculated by the district office claims examiner using NIOSH-IREP (Interactive RadioEpidemiological Program). NIOSH-IREP is a computer software application developed by NIOSH in collaboration with the National Cancer Institute. This computer software is a science-based tool that allows the DOL to determine the probability that a cancer was caused by a person's radiation dose. The district office determined that the probability that your cancer was related to your employment was 53.72%.

On October 28, 2004, the President signed into law an amendment abolishing Part D of EEOICPA and replacing it with a new program called Part E. The law gave the Department of Labor the responsibility for administering the new program. As a result, Part D of your claim was developed under the new Part E provisions by the Jacksonville district office.

On February 22, 2006, the Jacksonville district office issued a recommended decision finding in pertinent part that you were a covered DOE employee at the Paducah GDP from June 11, 1962, to August 31, 1962, and again from June 10, 1963 to August 30, 1963; that you were diagnosed with neuroendocrine carcinoma of lung after you began covered employment; that based on the NIOSH dose reconstruction, the probability of causation (PoC) revealed that your cancer was at least as likely

as not caused by your employment at a DOE facility. The decision concluded that you were entitled to $150,000 compensation under Part B as well as medical benefits under Parts B and E of the EEOICPA for your lung cancer effective May 10, 2002.

On March 6, 2006, the FAB received your signed waiver of your right to object to any of the findings of fact or conclusions of law contained in the recommended decision.

On April 4, 2006, you stated that you have not filed a tort suit in connection with either an occupational illness or a consequential injury for which you would be eligible to receive compensation under the EEOICPA and that you have not received any settlement or award from a claim or suit against a third party in connection with either an occupational illness or a consequential injury for which you would be eligible to receive compensation under the EEOICPA.

Following an independent review of the evidence of record, the undersigned hereby makes the following:

FINDINGS OF FACT

1. You filed a claim for benefits under EEOICPA on May 10, 2002.

2. You are a covered Department of Energy employee who worked at the Paducah Gaseous Diffusion Plant from June 11, 1962, to August 31, 1962, and again from June 10, 1963 to August 30, 1963.

3. On October 30, 1997, you were diagnosed with small cell neuroendocrine carcinoma of lung intermediate cell type. This is after you began covered employment.

4. The district office calculated the probability of causation of your cancer and determined that the probability of causation was 53.72%, and that your cancer was “at least as likely as not” related to your employment at a covered DOE facility.

5. Skin lesions and loss of sensation in fingertips are not occupational illnesses under Part B of EEOICPA.

6. You have not filed a tort suit in connection with either an occupational illness or a consequential injury for which you would be eligible to receive compensation under EEOICPA.

Based on these facts, the undersigned makes the following:

CONCLUSIONS OF LAW

Section 30.316(a) of EEOICPA regulations provides that, if the claimant waives any objections to all or part of the recommended decision, the Final Adjudication Branch may issue a final decision accepting the recommendation of the district office, either in whole or in part. 20 C.F.R. § 30.316(a). You have waived your rights to file objections to the findings of fact and conclusions of law pertaining to the award of benefits in the recommended decision.

The EEOICPA was established to provide compensation benefits to covered employees that have been

diagnosed with designated occupational illnesses incurred as a result of their exposure to radiation, beryllium, or silica, while in the performance of duty for the Department of Energy and certain of its vendors, contractors, and subcontractors. Part B of EEOICPA, defines an occupational illness as a covered beryllium illness, cancer referred to in § 7384l(9)(B) of this title, specified cancer, or chronic silicosis, as the case may be. 42 U.S.C. §§ 7384l(15), 7384l(9)(B). As you worked for the Department of Energy at a covered DOE facility when radiation may have been present, you are a covered DOE employee pursuant to 42 U.S.C. §§ 7384l(9)(B) and 7384n(b).

Compensation may be paid to a covered employee which, under 42 U.S.C. § 7384l(1), includes a "covered employee with cancer." Since your employment was less than 250 days and you did not qualify for Special Exposure Cohort (SEC) status, a "covered employee with cancer" employed at a DOE facility is eligible for compensation "if and only if, that individual is determined to have sustained that cancer in the performance of duty," which means "if, and only if," the cancer was "at least as likely as not" related to employment. 42 U.S.C. §§ 7384l(9)(B) and 7384n.

On April 4, 2006 the FAB calculated the PoC of your lung cancer and determined the PoC was 59.77%. [1]

I have independently reviewed the facts of your case and the recommended decision issued by the Jacksonville district office, and conclude that your lung cancer was "at least as likely as not" sustained in the performance of your duty at a DOE facility as specified by 42 U.S.C. § 7384n (b) of the Act and § 30.210(b) of the EEOICP implementing regulations. 42 U.S.C. § 7384n(b); 20 C.F.R § 30.210(a)(2). You are therefore a "covered employee with cancer" as that term is defined by Part B, 42 U.S.C. § 7384l(9)(B). A covered employee shall receive compensation for the disability in the amount of $150,000. *See* 42 U.S.C. § 7384s(a).

A covered employee shall receive medical benefits under the EEOICPA for that employee's occupational illness. 42 U.S.C. § 7384s(b). An individual receiving medical benefits for a covered illness is entitled to the services, appliances, and supplies prescribed or recommended by a qualified physician for that illness, which are likely to cure, give relief, or reduce the degree or the period of that illness. 42 U.S.C. § 7384t(a); 20 C.F.R. § 30.400(a). An individual receiving benefits shall be furnished those benefits as of the date on which that individual submitted the claim for those benefits. 42 U.S.C. § 7384t(d).

Accordingly, you are entitled to compensation in the amount of $150,000 as provided in § 7384s(a) and medical benefits for lung cancer retroactive to the date of your initial filing on May 10, 2002, pursuant to Part B.

Skin lesions and loss of sensation in fingertips are not covered occupational illnesses under Part B of the Act. Therefore, your claim based skin lesions and loss of sensation in fingertips under Part B of EEOICPA is denied.

Part E of EEOICPA provides additional compensation to Department of Energy contractor employees determined to have contracted a covered illness through exposure at a Department of Energy facility. *See* 42 U.S.C. §§ 7385s, 7385s(1) and 20 C.F.R. § 30.5(p). The evidence of record does not establish that you are a DOE contractor employee of the AEC/DOE, a requirement for eligibility under Part E to qualify for compensation. 42 U.S.C. § 7385s(1). Additional development of the employment evidence may be required to determine if you worked for a contractor of the DOE.

Pursuant to 20 C.F.R. § 30.317, the portion of the recommended decision pertaining to your claim for benefits under Part E of EEOICPA is vacated and remanded to the Jacksonville district office for further development consistent with this order, to be followed by a new recommended decision on your eligibility under Part E of the Act.

Washington, DC

Edward W. Feeny

Hearing Representative,

Final Adjudication Branch

[1] On September 20, 2005, the district office calculated the probability of causation using NIOSH-IREP, version 5.4. Effective February 28, 2006, NIOSH implemented NIOSP-IREP version 5.5. The increased PoC does not change the outcome of your claim, since the result from each version is more than 50%.

EEOICPA Order No. 50245-2004 (Dep't of Labor, April 14, 2011)

ORDER DENYING REQUEST FOR RECONSIDERATION

This is the response to the claimant's December 28, 2010 request for reconsideration of the November 30, 2010 decision of the Final Adjudication Branch (FAB) on his survivor claim under both Part B and Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. In that decision, FAB concluded that with respect to Part B, the employee's pancreatic cancer was not sustained "in the performance of duty," as that term is defined in § 7384n(b), because it is not "at least as likely as not" (a 50% or greater probability) that such cancer was related to the radiation doses she received during her covered employment at a Department of Energy (DOE) facility—Hangar 481, Kirtland Air Force Base (AFB)—from March 1, 1989 through June 30, 1994. FAB also concluded that with respect to Part E of EEOICPA, the employee was not a "covered DOE contractor employee," as that term is defined in § 7385s(1), because it is also not at least as likely as not that her exposure to toxic substances at Hangar 481 was a significant factor in aggravating, contributing to, or causing her pancreatic cancer. It was because of these two conclusions that the claim for survivor benefits due to the employee's pancreatic cancer under Part B, and for her death due to pancreatic cancer under E, was denied. A decision on the Part E claim for the employee's death due to acoustic neuroma, however, was deferred pending further development.

In support of his December 28, 2010 reconsideration request, the claimant raised a number of interwoven and somewhat confusing arguments. To the extent that I can discern what they are, his arguments in support of his request are as follows.

1. FAB should have found that the period of the employee's covered employment began when she started work for Ross Aviation at Hangar 481, Kirtland AFB, on December 9, 1985, rather than when Hangar 481 became a covered DOE facility on March 1, 1989, because Ross Aviation had contracts with DOE and its predecessor agencies starting in 1970, and because those contracts show that Ross Aviation began working at Hangar 481 in 1984. In conjunction with this argument, which the claimant raised earlier in the adjudication of his claim, he asserts that copies of the contracts in question that he submitted have either never been considered, or were not considered by the appropriate agency of the

Department of Labor.

2. FAB wrongly found that the employee's diagnosed acoustic neuroma was not an "occupational illness" that is compensable under Part B that should have been taken into account during the dose reconstruction process and the determination of the probability of causation for the Part B claim.

3. FAB wrongly concluded that the effect of the employee's alleged exposure to radiation prior to beginning her employment with Ross Aviation on December 9, 1985, as well as her alleged "non-employment" exposure during her accepted covered employment, could not be taken into account when it determined the probability of causation for her pancreatic cancer. The claimant contends that these alleged exposures to radiation can be inferred from evidence in the file and must be taken into account, because 42 U.S.C. § 7384n(c)(3)(C) provides that the regulatory guidelines for determining the probability of causation for cancer under Part B "shall take into consideration. . .other relevant factors." As was the case with the claimant's first argument noted above, he made this particular argument previously in the adjudication of his claim.

4. FAB wrongly concluded that the alleged radiation exposure of the employee "in other employments" was not covered under EEOICPA. The claimant contends that this alleged radiation exposure should have been taken into account and "added to the worker's total exposure. . . ." While he acknowledges that the dose reconstruction methodology that the National Institute for Occupational Safety and Health (NIOSH) used to estimate the radiation dose of the employee is binding on FAB, he believes that FAB should have determined that his objections concerning the application of that methodology, as it related to the alleged exposures in question, needed to be considered by NIOSH and therefore should have returned the Part B claim to the district office for referral to NIOSH for such consideration. To support this argument regarding the employee's radiation dose, he asserts that:

[G]eneral principles of workers [*sic*] compensation law contemplate that a worker who was exposed to radiation in multiple employments, like the worker in this case, is not limited to an analysis of exposure during the last term of injurious employment. Rather, in such cases the sum total of the worker's exposure during successive employments should be taken into account in assessing the effect of the worker's last injurious exposure to radiation, and in so doing the exposure with the last employer. . .is given its due weight in contributing to the onset of a subsequently occurring cancer.

Similar to the first and third arguments listed above, the claimant raised this argument previously in the adjudication of his EEOICPA claim.

5. The claimant was not afforded the opportunity to present his objections regarding the dose reconstruction for the employee to NIOSH, which he acknowledges is "the agency which most logically has the expertise to evaluate the merits" of his position. Therefore, the claimant believes that FAB should have returned his Part B claim to the district office for referral to NIOSH so it could consider his contention that the dose reconstruction for the employee should have included her non-employment and "other employments" exposures.

After careful consideration of these arguments, and for the reasons set forth below, the request for reconsideration is hereby denied.

With regard to the first argument noted above, and as set out in FAB's November 30, 2010 decision, there is no dispute that Ross Aviation performed work under contracts it had with DOE and its

predecessor agencies as early as February of 1970, and that the evidence establishes that the employee started working for Ross Aviation on December 9, 1985. The pertinent question for the purposes of the claimant's survivor claim, however, concerns where Ross Aviation did its work under its contracts with DOE that covered the period of the employee's employment from December 9, 1985 through June 30, 1994. Contrary to the claimant's allegations noted above, the contracts at issue have, in fact, been previously reviewed by the Director of the Division of Energy Employees Occupational Illness Compensation (DEEOIC), which is the division of the Office of Workers' Compensation Programs that administers EEOICPA[1], when NIOSH provided her with copies of them and asked, in a September 30, 2009 letter regarding the petition to add a class of employees at Hangar 481 to the Special Exposure Cohort the claimant filed with NIOSH, whether those contracts were sufficient to expand the "covered" period of Hangar 481 as a DOE facility. In her February 2, 2010 response, the Director noted that after carefully reviewing those contracts, it was her conclusion that they did not support changing the determination that Ross Aviation was a DOE contractor at Hangar 481, Kirtland AFB, for the period March 1, 1989 through February 29, 1996. Those same contracts were also carefully considered yet again when the claimant submitted copies of them to the case file in support of his claim, and are briefly described below:

- Contract No. AT(29-2)-2859 (covering February 1, 1970 through January 31, 1973) states that Ross Aviation would be performing air transport services for the Atomic Energy Commission (AEC) "at the Albuquerque Sunport, , ." There is no mention in this contract that any of the work being done by Ross Aviation will be done at Kirtland AFB.

- Contract No. AT(29-2)-3276 (covering February 1, 1973 through January 31, 1974, with multiple modifications that extended the coverage to February 28, 1979 and changed the contract number to E(29-2)-3276 when the AEC was replaced by the Energy Research and Development Administration (ERDA)) states that the "main operations base shall be maintained at the Contractor's facility at the Albuquerque International Airport. . . ." Again, there is no mention in this contract or its modifications that any of the work being done by Ross Aviation will be done at Kirtland AFB.

- Modification number A011 to Contract No. EY-76-C-04-3276 (extending the coverage of that contract from March 1, 1979 through February 29, 1984 and changing the contract number to DE-AC04-76DP03276 when ERDA was replaced by DOE) states that the "main operations base shall be maintained at the Government's existing facility at the Albuquerque International Airport. . . ." This modification also fails to state that any of the work being done by Ross Aviation will be done at Kirtland AFB.

- Modification number M016 to Contract No. DE-AC04-76DP03276 (covering the period of March 1, 1980 to February 28, 1981) states that the location at which Ross Aviation is maintaining and flying Government-furnished aircraft is "the Main Base - ."[2] Once again, there is no mention in this modification that any of the work being done by Ross Aviation will be done at Kirtland AFB.

- Contract No. DE-AC04-89AL52318 (covering March 1, 1989 through February 28, 1990, with extensions through February 29, 1996) is the earliest contract that describes the location at which Ross Aviation is working as "Government-owned facilities located on Kirtland Air Force Base, New Mexico." Because Contract No. DE-AC04-89AL52318 is a "Management and Operations" contract, this also means that Ross Aviation became a DOE contractor at that time

within the meaning of 42 U.S.C. § 7384l(12)(B)(ii), because it was an "entity" that entered into a "management and operations" contract with DOE at a DOE facility, *i.e.*, Hangar 481, Kirtland AFB.

As noted above, and as previously stated in FAB's November 30, 2010 decision, there is no probative and persuasive evidence specifying that Ross Aviation performed its work under a contract with DOE at Hangar 481, Kirtland AFB, prior to March 1, 1989. In this regard, and again as pointed out by FAB in the November 30, 2010 decision, the non-contractual evidence the claimant submitted in support of this argument is of diminished probative value when compared to the actual contracts described above. Accordingly, there is no basis for extending the covered period for that facility to include the earlier period that the employee worked there beginning on December 9, 1985, and this argument does not warrant reconsideration of FAB's November 30, 2010 decision.

As for the second argument described above, FAB's November 30, 2010 decision specifically informed the claimant that acoustic neuroma is not an "occupational illness," as that term is defined in § 7384l(15), and therefore is not compensable under Part B. While he contends that acoustic neuroma is a cancer and therefore it should have been taken into account by NIOSH when it reconstructed the employee's radiation dose and by DEEOIC when it determined the probability of causation based on that dose reconstruction, acoustic neuroma is actually a benign tumor of the eighth cranial nerve. The only reference to that illness in the medical evidence is in an August 11, 2000 report by Dr. Jorge Sedas, in which Dr. Sedas related the employee's history of a "right-sided acoustic tumor – stable"; there is no medical evidence in the file showing that the reported tumor was malignant (cancer). The provisions of 42 U.S.C. § 7384n(b), (c), and (d) regarding the dose reconstruction process and the determination of probability of causation are applicable only for the purpose of determining whether *cancer* was sustained in the performance of duty. For those reasons, this second argument also does not warrant reconsideration of the November 30, 2010 decision of FAB.

In the third argument described above, the claimant contends that FAB should have taken the employee's alleged exposure to radiation prior to beginning her employment with Ross Aviation and her alleged non-employment exposure during her accepted covered employment, which he asserts can be inferred from the evidence in the file, into account as "other relevant factors" when it determined the probability of causation for the employee's pancreatic cancer under Part B. While he is correct that § 7384n(c)(3)(C) of EEOICPA directs that the regulatory guidelines for determining the probability of causation for cancer claimed under Part B "shall take into consideration. . .other relevant factors," the task of *devising* these guidelines (and taking those "other relevant factors" into account) pursuant to that statutory directive was assigned to the Secretary of Health and Human Services (HHS), not the Secretary of Labor, by the President in Sec. 2(b)(i)(A) of Executive Order 13179 of December 7, 2000. 65 Fed. Reg. 77487 (December 11, 2000).[3] While DEEOIC is required by 42 C.F.R. § 81.20(b) to *apply* the HHS regulatory guidelines, which have been incorporated into the NIOSH Interactive RadioEpidemiological Program (NIOSH-IREP), DEEOIC does not have the authority to *alter* the guidelines to take into account the particular non-covered employment exposures the claimant alleges that the employee experienced both prior to and away from her covered employment at Hangar 481 as "other relevant factors" when determining the probability of causation for her pancreatic cancer under Part B. On the contrary, as Paragraph 2.0 of the *User's Guide the for the Interactive RadioEpidemiological Program (NIOSH-IREP)* states:

The NIOSH-IREP computer code is a web-based program that estimates the probability that an employee's cancer was caused by his or her individual radiation dose. Personal information (*e.g.*, birth year, year of cancer diagnosis, gender) and exposure information (*e.g.*, exposure year, dose) may be

entered manually or through the use of an input file. For application by the U.S. Department of Labor (DOL), *the input file option is used to preset all personal information, exposure information, and system variables. These input files are created by NIOSH for each individual claim and transmitted to the appropriate DOL district office for processing*.[4] (emphasis added)

Accordingly, the claimant's third argument also does not warrant granting his request to reconsider FAB's November 30, 2010 decision.

In the fourth argument in support of the claimant's request, he contends that the employee's alleged radiation exposures "in other employments" should have been taken into account and "added to the worker's total exposure" as "other relevant factors." As FAB's November 30, 2010 decision noted, the issue of what radiation dose to include is exclusively under the control of NIOSH, pursuant to the President's assignment of the task of performing dose reconstructions to the Secretary of HHS (which then re-delegated it to NIOSH) in Sec. 2(b)(iii) of Executive Order 13179. Also, the statute itself, at § 7384n(d)(1), restricts the dose to be used to determine probability of causation to radiation exposure that occurred solely "at a facility," which in the employee's case, means the dose she received when Hangar 481 was a DOE facility—March 1, 1989 through June 30, 1994. HHS has issued regulations governing the dose reconstruction process at 42 C.F.R. part 82, and those regulations do not provide for any consideration of pre-employment and non-employment radiation exposures in estimating radiation dose incurred at a DOE facility, regardless of the claimant's belief that principles of workers' compensation require such consideration. Because consideration of the "other relevant factors" referred to in 42 U.S.C. § 7384n(c)(3)(C), which as noted above, refers solely to the determination of probability of causation, this fourth argument also does not warrant reconsideration of the November 30, 2010 FAB decision on the claim.

Finally, in the fifth argument, the claimant asserts that FAB should have returned his Part B claim to the district office for referral to NIOSH, so NIOSH could consider his contention that the dose reconstruction for the employee should have included non-employment and "other employments" exposures. While there is no dispute that NIOSH is "the agency which most logically has the expertise to evaluate the merits" of his position, the fact remains that the claimant was provided with the opportunity, at multiple points during the dose reconstruction process at NIOSH, to submit whatever evidence he had regarding the employee's radiation exposures for consideration by NIOSH. Further, as discussed above, the types of exposures at issue here are simply not covered under EEOICPA. Therefore, there was no reason for FAB to return the Part B claim to the district office for referral to NIOSH, and this final argument, like the preceding four, does not provide a sufficient basis for reconsidering FAB's November 30, 2010 decision.

I must deny the request for reconsideration because the claimant has not submitted any argument or evidence which justifies reconsideration of the November 30, 2010 final decision. That decision of FAB is therefore final on the date of issuance of this denial of the request for reconsideration. *See* 20 C.F.R. § 30.319(c)(2).

Cleveland,

Tracy Smart

Hearing Representative

Final Adjudication Branch

[1] The sources of authority for administering EEOICPA are set out at 20 C.F.R. § 30.1,which states that the Director of the Office of Workers' Compensation Programs (and his designee the Director of DEEOIC) has the primary responsibility to administer EEOICPA, except for those activities assigned to other agencies. This responsibility includes the "exclusive authority to. . . interpret the provisions of EEOICPA," among them the statutory definition of "Department of Energy facility" at § 7384l(12).

[2] The case file also contains numerous other modifications of Contract No. DE-AC04-76DP03276, but those other modifications also do not include a "Statement of Work" provision identifying the location where Ross Aviation was to perform its work; thus, they are not described above. For example, modification number M062 extended the provisions of that contract to cover the period from March 1, 1984 through February 28, 1989 (during which the employee began working for Ross Aviation), but contained no language whatsoever that described where Ross Aviation performed its work for DOE.

[3] *See also* 20 C.F.R. § 30.2(b) (". . .HHS has promulgated regulations at 42 CFR part 81 that set out guidelines that OWCP follows when it assesses the compensability of an employee's radiogenic cancer") and 20 C.F.R. § 30.213(b) ("HHS's regulations satisfy the legal requirements in section 7384n(c) of the Act, which also sets out OWCP's obligation to use them in its adjudication of claims for radiogenic cancer filed under Part B of the Act, and provide the factual basis for OWCP to determine if the 'probability of causation' (PoC) that an employee's cancer was sustained in the performance of duty is 50% or greater (*i.e.*, it is 'at least as likely as not' causally related to employment), as required under section 7384n(b)").

[4] *See:* http://www.cdc.gov/niosh/ocas/pdfs/irep/irepug56.pdf(last visited April 13, 2011).

Specified cancers

EEOICPA Fin. Dec. No. 1400-2002 (Dep't of Labor, January 22, 2002)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA).

On December 12, 2001, the Seattle District Office issued a recommended decision concluding that the deceased covered employee was a member of the Special Exposure Cohort, as that term is defined in § 7384l(14) of the EEOICPA, and that you are entitled to compensation in the amount of $150,000 pursuant to § 7384s of the EEOICPA as his survivor. On December 17, 2001, the Final Adjudication Branch received written notification from you waiving any and all objections to the recommended decision.

The undersigned has reviewed the evidence of record and the recommended decision issued by the Seattle district office on December 12, 2001, and finds that:

In a report dated August 20, 1996, Dr. John Mues diagnosed the deceased covered employee with mixed squamous/adenocarcinoma of the lung. The report states the diagnosis was based on the results of a thoracoscopy and nodule removal. Lung cancer is a specified disease as that term is defined in § 7384l(17)(A) of the EEOICPA and 20 CFR § 30.5(dd)(2) of the EEOICPA regulations.

You stated in the employment history that the deceased covered employee worked for S.S. Mullins on Amchitka Island, Alaska from April 21, 1967 to June 17, 1969. Nancy Shaw, General Counsel for the Teamsters Local 959 confirmed the employment by affidavit dated November 1, 2001. The affidavit is

acceptable evidence in accordance with § 30.111 (c) of the EEOICPA regulations.

Jeffrey L. Kotch[1], a certified health physicist, has advised it is his professional opinion that radioactivity from the Long Shot underground nuclear test was released to the atmosphere a month after the detonation on October 29, 1965. He further states that as a result of those airborne radioactive releases, SEC members who worked on Amchitka Island, as defined in EEOICPA § 7384l(14)(B), could have been exposed to ionizing radiation from the Long Shot underground nuclear test beginning a month after the detonation, i.e., the exposure period could be from approximately December 1, 1965 through January 1, 1974 (the end date specified in EEOICPA, § 7384l(14)(B)). He supports his opinion with the Department of Energy study, *Linking Legacies*, DOE/EM-0319, dated January 1997, which reported that radioactive contamination on Amchitka Island occurred as a result of activities related to the preparation for underground nuclear tests and releases from Long Shot and Cannikin. Tables 4-4 and C-1, on pages 79 and 207, respectively, list Amchitka Island as a DOE Environmental Management site with thousands of cubic meters of contaminated soil resulting from nuclear testing.

The covered employee was a member of the Special Exposure Cohort as defined in § 7384l(14)(B) of the EEOICPA and §§ 30.210(a)(2) and 30.213(a)(2) of the EEOICPA regulations. This is supported by evidence that shows he was working on Amchitka Island for S.S. Mullins during the potential exposure period, December 1, 1965 to January 1, 1974.

The covered employee died February 17, 1999. Metastatic lung cancer was included as a immediate cause of death on the death certificate.

You were married to the covered employee August 18, 1961 and were his wife at the time of his death. You are the eligible surviving spouse of the covered employee as defined in § 7384s of the EEOICPA, as amended by the National Defense Authorization Act (NDAA) for Fiscal Year 2002 (Public Law 107-107, 115 Stat. 1012, 1371, December 28, 2001.[2]

The undersigned hereby affirms the award of $150,000.00 to you as recommended by the Seattle District Office.

Washington, DC

Thomasyne L. Hill

Hearing Representative

[1] Jeffrey L. Kotch is a certified health physicist employed with the Department of Labor, EEOICP, Branch of Policies, Regulations and Procedures. He provided his professional opinion in a December 6, 2001 memorandum to Peter Turcic, Director of EEOICP.

[2] Title XXXI of the National Defense Authorization Act for Fiscal Year 2002 amended the Energy Employees Occupational Illness Compensation Program Act.

EEOICPA Fin. Dec. No. 50214-2005 (Dep't of Labor, March 2, 2005)

FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under

Part B of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On October 16, 2003, you filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA) claiming benefits as the spouse of **[Employee]**. You identified the diagnosed condition being claimed as liver cancer (hepatocellular carcinoma). The medical documentation of record shows that your husband was diagnosed with liver cancer on September 15, 2003. Those records also show findings of cirrhosis of the liver. You also indicated that your husband was a member of the Special Exposure Cohort (SEC) based on his employment at the gaseous diffusion plant in Portsmouth, OH.

You submitted a copy of your marriage certificate which shows that you and your husband were wed on February 16, 2000. You also submitted a copy of your husband's death certificate showing that he died on September 20, 2003, and identifying you as his surviving spouse. The death certificate shows the cause of death as respiratory failure due to cirrhosis of the liver and cancer of the liver.

You also provided a Form EE-3 (Employment History) in which you stated that your husband worked for GAT, Lockheed Martin Marietta, and USEC from April 19, 1976, to September 20, 2003. You did not indicate the location of your husband's employment. The Department of Energy (DOE) verified that he worked at the Portsmouth Gaseous Diffusion Plant (GDP) from April 19, 1976, to September 20, 2003. The Portsmouth GDP is recognized as a covered DOE facility from 1954 to July 28, 1998; from July 29, 1998 to the present for remediation; and from May 2001 to the present in cold standby status. *See* DOE, Office of Worker Advocacy, Facility List.

To determine the probability of whether your husband sustained cancer in the performance of duty, the Cleveland district office referred your claim to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction in accordance with 20 C.F.R. § 30.115. On November 29, 2004, you signed Form OCAS-1, indicating that you had reviewed the NIOSH Draft Report of Dose Reconstruction and agreeing that it identified all of the relevant information provided to NIOSH. On December 9, 2004, the district office received the final NIOSH Report of Dose Reconstruction. Using the information provided in this report, the district office utilized the Interactive RadioEpidemiological Program (IREP) to determine the probability of causation of your husband's cancer and reported in its recommended decision that there was a 42.16% probability that liver cancer was caused by radiation exposure at the Portsmouth GDP.

On December 20, 2004, the Cleveland district office recommended denial of your claim for compensation finding that the employee's cancer was not "at least as likely as not" (a 50% or greater probability) caused by radiation doses incurred while employed at the Portsmouth GDP. The district office concluded that the dose reconstruction estimates were performed in accordance with 42 U.S.C. § 7384n(d). Further, the district office concluded that the probability of causation was completed in accordance with 42 U.S.C. § 7384n(c)(3). The district office also concluded that your husband does not qualify as a covered employee with cancer as defined in 42 U.S.C. § 7384l(9)(B). The district office noted that your husband's liver cancer cannot be a "specified cancer" because cirrhosis is also indicated by the evidence of record. Lastly, the district office concluded that you are not entitled to compensation, as outlined under 42 U.S.C. § 7384s.

FINDINGS OF FACT

1. You filed a claim for benefits on October 16, 2003.

2. Your husband worked at Portsmouth GDP, a covered DOE facility, from April 19, 1976, to September 20, 2003.

3. Your husband was diagnosed with liver cancer on September 15, 2003. The medical evidence also indicated findings of cirrhosis.

4. The NIOSH Interactive RadioEpidemiological Program indicated a 42.16% probability that your husband's liver cancer was caused by radiation exposure at the Portsmouth GDP.

5. Your husband's cancer was not at least as likely as not related to his employment at a DOE facility

6. You are the surviving spouse of **[Employee]** and were married to him for at least one year immediately prior to his death.

CONCLUSIONS OF LAW

I have reviewed the recommended decision issued by the Cleveland district office on December 20, 2004. I find that you have not filed any objections to the recommended decision and that the sixty-day period for filing such objections has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

You filed a claim based on liver cancer. Under the EEOICPA, a claim for cancer must be demonstrated by medical evidence that sets forth the diagnosis of cancer and the date on which the diagnosis was made. *See* 20 C.F.R. § 30.211. Additionally, in order to be afforded coverage as a "covered employee with cancer," you must show that your husband was a DOE employee, a DOE contractor employee, or an atomic weapons employee, who contracted cancer after beginning employment at a DOE facility or an atomic weapons employer facility. *See* 42 U.S.C. § 7384l(9). The cancer must also be determined to have been sustained in the performance of duty, *i.e*., at least as likely as not related to employment at a DOE facility or atomic weapons employer facility. *See* 42 U.S.C. § 7384n(b).

Using the information provided in the Report of Dose Reconstruction for liver cancer, the district office utilized the NIOSH Interactive RadioEpidemiological Program to determine a 42.16% probability that your husband's cancer was caused by radiation exposure while employed at the Portsmouth GDP. The Final Adjudication Branch (FAB) also analyzed the information in the NIOSH report, confirming the 42.16% probability.

You also claimed entitlement to compensation due to your husband's status as a member of the SEC. The FAB finds that the medical evidence of record indicates the presence of cirrhosis of the liver. Based on that finding, your husband's liver cancer cannot be considered a "specified cancer" as defined by 42 U.S.C. § 7384l(17)(A). For that reason, although your husband's employment is sufficient to establish that he is a member of the SEC, he cannot be considered to be a covered employee with cancer as defined by 42 U.S.C. § 7384l(9)(A).

Therefore, your claim must be denied because the evidence does not establish that your husband is a "covered employee with cancer," because his cancer was not determined to be "at least as likely as not" (a 50% or greater probability) related to radiation doses incurred in the performance of duty at the Portsmouth GDP. Additionally, the evidence does not establish that your husband is a "covered employee with cancer," based on SEC membership and liver cancer, because cirrhosis is indicated by the medical evidence of record. *See* 42 U.S.C. § 7384l(1)(B), (9)(A) and (B), and (17)(A).

For the above reasons, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under Part B of the Act. Accordingly, your claim for benefits is denied.

Cleveland, OH

Tracy Smart

Acting FAB Manager

Final Adjudication Branch

EEOICPA Fin. Dec. No. 59055-2004 (Dep't of Labor, September 17, 2004)

NOTICE OF FINAL DECISION

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

STATEMENT OF THE CASE

You filed a claim, Form EE-1 (Claim for Employee Benefits under the EEOICPA), on July 7, 2004, based on rectal cancer/colon cancer. You provided a copy of a histopathology report which diagnosed invasive adenocarcinoma, based on analysis of a rectal polyp obtained during a colonoscopy on February 24, 1997. An operative report shows that you underwent a low anterior resection due to rectal cancer on March 13, 1997. The post-surgical pathology report diagnoses moderately differentiated adenocarcinoma of the colon.

You also provided a Form EE-3 (Employment History) in which you state that you worked for Dynamic Industrial (Dycon) at the Portsmouth Gaseous Diffusion Plant (GDP), in Piketon, OH, as a pipefitter from January 1983 to November 1984 and from January 1985 to June 1985. You also report that you worked for the Marley Cooling Tower Co. at the Portsmouth GDP during March 1985. You also state that you wore a dosimetry badge while so employed.

The Department of Energy (DOE) was unable to confirm your reported employment. You provided copies of Forms W-2 which show that you were paid wages by Dynamic Industrial Cons. Inc. during 1983, 1984, and 1985; and by the Marley Cooling Tower Co. in 1985. A letter from the Financial Secretary Treasurer of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 577, reports that you worked at the Portsmouth GDP for Dynamic Industrial from January 1983 to November 1984 and from January 1985 to June 1985; and for Marley Cooling Tower Co. during March 1985. A representative of the DOE provided information which establishes that Dycon was a subcontractor at the Portsmouth GDP from 1980 through 1986. The Portsmouth GDP is recognized as a Department of Energy (DOE) facility from 1954 to 1998. *See* Department of Energy, Office of Worker Advocacy Facilities List.

On August 6, 2004, the Cleveland district office issued a recommended decision concluding that you are a member of the Special Exposure Cohort (SEC), as defined by 42 U.S.C. § 7384l(14), who was diagnosed with rectal cancer, which is a specified cancer under 42 U.S.C. § 7384l(17). In addition the district office concluded that, as a covered employee, you are entitled to compensation in the amount of $150,000, pursuant to 42 U.S.C. § 7384s. The district office also concluded that, pursuant to 42 U.S.C. § 7384s(b), you are entitled to medical benefits, as described in 42 U.S.C. § 7384t, beginning July 7, 2004, for rectal cancer.

On August 19, 2004, the Final Adjudication Branch (FAB) received written notification that you waive any and all objections to the recommended decision.

The FAB received additional evidence subsequent to receipt of your waiver. The DOE provided a copy of a Personnel Clearance Master Card which shows that you were granted a security clearance with SWEC (Dynamic Indust.) on January 18, 1984. No termination date is shown. You submitted additional medical reports regarding your treatment for cancer. Some of these were duplicates of

reports already of record. The remaining records discuss your treatment following surgery in March 1997.

FINDINGS OF FACT

1. You filed a claim for benefits on July 7, 2004.

2. For purposes of SEC membership, you worked at Portsmouth GDP for Dycon during the periods of January 1983 to November 1984 and January 1985 to June 1985.

3. The evidence of record establishes that Dycon was a subcontractor for the Portsmouth Gaseous Diffusion Plant from 1980 to 1986.

4. You were employed for a number of work days aggregating at least 250 work days during the period of September 1, 1954, to February 1, 1992, and during such employment performed work that was comparable to a job that is or was monitored through the use of dosimetry badges.

5. You were diagnosed with rectal cancer on February 24, 1997.

CONCLUSIONS OF LAW

In order to be considered a "member of the Special Exposure Cohort," you must have been a Department of Energy (DOE) employee, DOE contractor employee, or an atomic weapons employee who was so employed for a number of work days aggregating at least 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, and, during such employment worked in a job that was monitored through the use of dosimetry badges for exposure at the plant of the external parts of employee's body; or had exposures comparable to a job that is or was monitored through the use of dosimetry badges, as outlined in 42 U.S.C. § 7384l(14)(A).

The evidence of record establishes that you worked in covered employment at the Portsmouth GDP from January 1983 to November 1984 and January 1985 to June 1985. This meets the requirement of working more than an aggregate 250 days at a covered facility. *See* 42 U.S.C. § 7384l(14)(A). The Division of Energy Employees Occupational Illness Compensation (DEEOIC) has determined that employees who worked at the Portsmouth GDP between September 1954 and February 1, 1992, performed work that was comparable to a job that was monitored through the use of dosimetry badges. *See* Federal (EEOICPA) Procedure Manual, Chapter 2-500.3a (June 2002). On that basis, you meet the dosimetry badge requirement.

The Final Adjudication Branch notes that you claimed benefits based on rectal cancer/colon cancer. The medical evidence of record interchangeably refers to adenocarcinoma of the rectum and the colon. Regardless of the term used, the evidence reveals only a single tumor located in the rectum. For that reason, your claim is considered to be based on a single occurrence of cancer in your rectum.

Rectal cancer is considered to be colon cancer, which is a specified cancer under the Act, and the medical evidence of record establishes a diagnosis of rectal cancer. Therefore, you are a member of the

Special Exposure Cohort, who was diagnosed with a specified cancer. *See* 42 U.S.C. §§ 7384l(14)(A) and (17).
For the reasons stated above, I accept your claim for benefits based on rectal cancer. You are entitled to compensation in the amount of $150,000, pursuant to 42 U.S.C. § 7384s. Additionally, I conclude that, pursuant to 42 U.S.C. § 7384s(b), you are entitled to medical benefits, as described in 42 U.S.C. § 7384t, beginning July 7, 2004, for rectal cancer.
Cleveland, Ohio

Debra A. Benedict

Acting District Manager

Final Adjudication Branch

Chronic Silicosis

Definition of employee with chronic silicosis

EEOICPA Fin. Dec. No. 366-2002 (Dep't of Labor, June 3, 2003)

NOTICE OF FINAL DECISION REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq.* The recommended decision was to deny your claim. You submitted objections to that recommended decision. The Final Adjudication Branch carefully considered the objections and completed a review of the written record. *See* 20 C.F.R. § 30.312. The Final Adjudication Branch concludes that the evidence is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On July 31, 2001, you filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA), stating that you were the daughter of **[Employee]**, who was diagnosed with cancer, chronic silicosis, and emphysema. You completed a Form EE-3, Employment History for Claim under the EEOICPA, indicating that from December 2, 1944 to May 30, 1975, **[Employee]** was employed as a heavy mobile and equipment mechanic, for Alaska District, Corps of Engineers, Anchorage, Alaska.

On August 20, 2001, a representative of the Department of Energy (or DOE) indicated that "none of the employment history listed on the EE-3 form was for an employer/facility which appears on the Department of Energy Covered Facilities List." Also, on August 29, 2001, a representative of the DOE stated in Form EE-5 that the employment history contains information that is not accurate. The information from the DOE lacked indication of covered employment under the EEOICPA.

The record in this case contains other employment evidence for **[Employee]**. With the claim for benefits, you submitted a "Request and Authorization for TDY Travel of DOD Personnel" Form DD-1610, initiated on November 10, 1971 and approved on November 11, 1971. **[Employee]** was approved for TDY travel for three days to perform work on Amchitka Island, Alaska, for the Department of Defense, Alaska District Corps of Engineers beginning on November 15, 1971. He was employed as a Mobile Equipment Mechanic WG-12, and the purpose of the TDY was noted "to examine equipment for potential use on Blair Lake Project." The security clearance was noted as "Secret." You also submitted numerous personnel documents from **[Employee]**'s employment with the Alaska District Corp of Engineers. Those documents include a "Notification of Personnel Action" Form SF-50 stating that **[Employee]**'s service compensation date was December 2, 1944, for his work as a Heavy Mobile Equipment Mechanic; and at a WG-12, Step 5, and that he voluntarily retired on May 30, 1975.

The medical documentation of record shows that **[Employee]** was diagnosed with emphysema, small cell carcinoma of the lung, and chronic silicosis. A copy of **[Employee]**'s Death Certificate shows that he died on October 9, 1990, and the cause of death was due to or as a consequence of bronchogenic cancer of the lung, small cell type.

On September 6 and November 5, 2001, the district office wrote to you stating that additional evidence was needed to show that **[Employee]** engaged in covered employment. You were requested to submit a Form EE-4, Employment History Affidavit, or other contemporaneous records to show proof of **[Employee]**'s employment at the Amchitka Island, Alaska site covered under the EEOICPA. You did not submit any additional evidence and by recommended decision dated December 12, 2001, the Seattle district office recommended denial of your claim. The district office concluded that you did not submit employment evidence as proof that **[Employee]** worked during a period of covered employment as required by § 30.110 of the EEOICPA regulations. *See* 20 C.F.R. § 30.110.

On January 15 and February 6, 2002, you submitted written objections to the recommended denial decision. The DOE also forwarded additional employment information. On March 20, 2002, a representative of the DOE provided a Form EE-5 stating that the employment history is accurate and complete. However, on March 25, 2002, a representative of the DOE submitted a "corrected copy" Form EE-5 that indicated that the employment history provided in support of the claim for benefits "contains information that is not accurate." An attachment to Form EE-5 indicated that **[Employee]** was employed by the Army Corps of Engineers for the period July 25, 1944 to August 11, 1952, at Fort Richardson, Alaska; and from August 11, 1952 to May 30, 1975 at Elmendorf Air Force Base, Alaska. Further, the attachment included clarifying information:

Our records show that the Corps of Engineers' was a prime AEC contractor at Amchitka. **[Employee]**'s Official Personnel Folder (OPF) indicates that he was at Forth Richardson and Elmendorf AFB, both in Alaska. The OPF provided no indication that **[Employee]** worked at Amchitka, Alaska. To the best of our knowledge, Blair Lake Project was not a DOE project.

Also, on April 3, 2002, a representative of the DOE submitted a Form EE-5 indicating that Bechtel Nevada had no information regarding **[Employee]**, but he had a film badge issued at the Amchitka Test Site, on November 15, 1971. The record includes a copy of Appendix A-7 of a "Manager's Completion Report" which indicates that the U. S. Army Corps of Engineers was a prime AEC (Atomic Energy Commission) Construction, Operations and Support Contractor, on Amchitka Island, Alaska.

On December 10, 2002, a hearing representative of the Final Adjudication Branch issued a Remand Order. Noting the above evidence, the hearing representative determined that the "only evidence in the record with regard to the Army Corps of Engineers status as a contractor on Amchitka Island is the DOE verification of its listing as a prime AEC contractor . . . and DOE's unexplained and unsupported verification [of **[Employee]**'s employment, which] are not sufficient to establish that a contractual relationship existed between the AEC, as predecessor to the DOE, and the Army Corps of Engineers." The Remand Order requested the district office to further develop the record to determine whether the Army Corps of Engineers had a contract with the Department of Energy for work on Amchitka Island, Alaska, and if the work **[Employee]** performed was in conjunction with that contract. Further the Remand Order directed the district office to obtain additional evidence to determine if **[Employee]** was survived by a spouse, and since it did not appear that you were a natural child of **[Employee]**, if you could establish that you were a stepchild who lived with **[Employee]** in a regular parent-child relationship. Thus, the Remand Order requested additional employment evidence and proof of eligibility under the Act.

On January 9, 2003, the district office wrote to you requesting that you provide proof that the U.S. Army Corps of Engineers had a contract with the AEC for work **[Employee]** performed on his TDY assignment to Amchitka Island, Alaska for the three days in November 1971. Further, the district office requested that you provide proof of your mother's death, as well as evidence to establish your relationship to **[Employee]** as a survivor.

You submitted a copy of your birth certificate that indicated that you were born **[Name of Claimant at Birth]** on October 4, 1929, to your natural mother and natural father **[Natural Mother]** and **[Natural Father]**. You also submitted a Divorce Decree filed in Boulder County Court, Colorado, Docket No. 10948, which showed that your biological parents were divorced on October 10, 1931, and your mother, **[Natural Mother]** was awarded sole custody of the minor child, **[Name of Claimant at Birth]**. In addition, you submitted a marriage certificate that indicated that **[Natural Mother]** married **[Employee]** in the State of Colorado on November 10, 1934. Further, you took the name **[Name of Claimant Assuming Employee's Last Name]** at the time of your mother's marriage in 1934, as indicated by the sworn statement of your mother on March 15, 1943. You provided a copy of a Marriage Certificate to show that on August 19, 1949, you married **[Husband]**. In addition, you submitted a copy of the Death Certificate for **[Name of Natural Mother Assuming Employee's Last Name]** stating that she died on May 2, 1990. The record includes a copy of **[Employee]**'s Death Certificate showing he died on October 9, 1990.

You also submitted the following additional documentation on January 20, 2003: (1) A copy of **[Employee's]** Last Will and Testament indicated that you, **[Claimant]**, were the adult daughter and named her as Personal Representative of the Estate; (2) Statements by Jeanne Findler McKinney and Jean M. Peterson acknowledged on January 17, 2003, indicated that you lived in a parent-child relationship with **[Employee]** since 1945; (3) A copy of an affidavit signed by **[Name of Natural Mother Assuming Employee's Last Name]** (duplicate) indicated that at the time of your mother's marriage to **[Employee]**, you took the name **[Name of Claimant Assuming Employee's Last Name]**.

You submitted additional employment documentation on January 27, 2003: (1) A copy of **[Employee]**'s TDY travel orders (duplicate); (2) A Memorandum of Appreciation dated February 11, 1972 from the Department of the Air Force commending **[Employee]** and other employees, for their support of the Blair Lake Project; (3) A letter of appreciation dated February 18, 1972 from the Department of the Army for **[Employee]**'s contribution to the Blair Lake Project; and (4) Magazine and newspaper articles containing photographs of **[Employee]**, which mention the work performed by the

U.S. Army Corps of Engineers in Anchorage, Alaska.

The record also includes correspondence, dated March 27, 2003, from a DOE representative. Based on a review of the documents you provided purporting that **[Employee]** was a Department of Energy contractor employee working for the U.S. Army Corps of Engineers on TDY in November, 1971, the DOE stated that the Blair Lake Project was not a DOE venture, observing that "[i]f Blair Lake Project had been our work, we would have found some reference to it."

On April 4, 2003, the Seattle district office recommended denial of your claim for benefits. The district office concluded that the evidence of record was insufficient to establish that **[Employee]** was a covered employee as defined under § 7384l(9)(A). *See* 42 U.S.C. § 7384l(9)(A). Further, **[Employee]** was not a member of the Special Exposure Cohort, as defined by § 7384l(14)(B). *See* 42 U.S. C. § 7384l(14)(B). Also, **[Employee]** was not a "covered employee with silicosis" as defined under §§ 7384r(b) and 7384r(c). *See* 42 U.S.C. §§ 7384r(b) and (c). Lastly, the recommended decision found that you are not entitled to compensation under § 7384s. *See* 42 U.S.C. § 7384s.

On April 21, 2003, the Final Adjudication Branch received your letter of objection to the recommended decision and attachments. First, you contended that the elements of the December 10, 2002 Remand Order were fulfilled because you submitted a copy of your mother's death certificate and further proof that **[Employee]** was your stepfather; and that the letter from the district office on April 4, 2003 "cleared that question on page three – quote 'Our records show that the Corps of Engineers was a prime AEC contractor at Amchitka.'"

Second, you stated that further clarification was needed as to the condition you were claiming. You submitted a death certificate for **[Employee]** showing that he died due to bronchogenic cancer of the lung, small cell type, and noted that that was the condition you alleged as the basis of your claim on your first Form, associated with your claim under the EEOICPA.

Third, you alleged that, in **[Employee]**'s capacity as a "Mobile Industrial Equipment Mechanic" for the Army Corps of Engineers, "he was required to work not only for the DOD (Blair Lake project) but also for DOE on the Amchitka program. For example: on March 5, 1968 he was sent to Seward, Alaska to 'Inspect equipment going to Amchitka.' He was sent from the Blair Lake project (DOD) to Seward for the specified purpose of inspecting equipment bound for Amchitka (DOE). Thus, the DOE benefited from my father's [Corp of Engineers] expertise/service while on 'loan' from the DOD. Since the closure of the Amchitka project (DOE), the island has been restored to its original condition. . . . Therefore, my dad's trip to Amchitka to inspect equipment which might have been used at the Blair Lake project benefited not only DOD but also DOE. In the common law, this is known as the 'shared Employee' doctrine, and it subjects both employers to liability for various employment related issues."

On May 21, 2003, the Final Adjudication Branch received your letter dated May 21, 2003, along with various attachments. You indicated that the U.S. Army Corps of Engineers was a contractor to the DOE for the Amchitka Project, based upon page 319 of an unclassified document you had previously submitted in March 2002. Further, you indicated that **[Employee]** had traveled to Seward, Alaska to inspect equipment used at on-site operations for use on Amchitka Island by the Corps of Engineers for the DOE project, and referred to the copy of the Corps of Engineers TDY for Seward travel you submitted to the Final Adjudication Branch with your letter of April 18, 2003. Also, you indicated that **[Employee]** traveled to Amchitka, Island in November 1972 to inspect the equipment referenced above, which had been shipped from Seward, Alaska. You indicated that **[Employee]** was a mobile industrial equipment mechanic, and that his job required him to travel. You attached the following documents in support of your contention that the equipment **[Employee]** inspected could have included equipment belonging to the Corps of Engineers: Job Description, Alaska District, Corps of Engineers (previously submitted), and an Employee Performance Appraisal.

In addition, you indicated **[Employee]** was required to travel to remote sites throughout Alaska in order to perform his job with the Corps of Engineers, and in support of this you referred to your electronic mail sent to the Seattle District Office on January 7, 2003. You indicated that, since **[Employee]** was required to travel to Amchitka as a part of his regular duties as a mobile industrial equipment mechanic, it was possible that the equipment he inspected on the November 15, 1971 trip to Amchitka included equipment owned by the Corps as well as inspection of equipment owned by private contractors. You attached a copy of a document entitled, "Affidavit," dated May 21, 2003, signed by Erwin L. Long. Mr. Long stated that he was head of the Foundations Material Branch for the Corps of Engineers at the time of his retirement, and that in 1971 he had been Head of the Rock Design Section. Mr. Long indicated that he did not spend any time on Amchitka Island, that he had known **[Employee]** since 1948, and that he "believe[d]" **[Employee]**'s travel to Amchitka for his job would have required him to track equipment belonging to the Corps of Engineers, and that **[Employee]** would also have "performed required maintenance on the equipment before preparing [it] for shipping off Amchitka Island." Mr. Long also stated that **[Employee]** would not talk about his work on Amchitka since it was classified. Finally, you attached a TDY dated March 4, 1968, as well as a travel voucher/subvoucher dated March 15, 1968, to support that **[Employee]**'s mission to Amchitka had been completed.

FINDINGS OF FACT

1. On July 31, 2001, **[Claimant]** filed a claim for survivor benefits under the EEOICPA as the daughter of **[Employee]**.

2. **[Employee]** was diagnosed with small cell bronchogenic carcinoma of the lung and chronic silicosis.

3. **[Employee]** was employed by the U.S. Army Corps of Engineers for the period from July 25, 1944 to August 11, 1952, at Fort Richardson, Alaska; and from August 11, 1952 to May 30, 1975 at Elmendorf Air Force Base, Alaska.

4. **[Employee]**'s employment for the U.S. Army Corps of Engineers on TDY assignment at the Amchitka Island, Alaska site in November 1971 was in conjunction with a Department of Defense venture, the Blair Lakes Project.

CONCLUSIONS OF LAW

The EEOCIPA implementing regulations provide that a claimant may object to any or all of the findings of fact or conclusions of law, in the recommended decision. 20 C.F.R. § 30.310. Further, the regulations provide that the Final Adjudication Branch will consider objections by means of a review of the written record. 20 C.F.R. § 30.312. The Final Adjudication Branch reviewer will review the record forwarded by the district office and any additional evidence and/or argument submitted by the claimant. 20 C.F.R. § 30.313. Consequently, the Final Adjudication Branch will consider the overall evidence of record in reviewing the written record.

In order to be awarded benefits under the Energy Employees Occupational Illness Compensation Program Act, the covered employee (or his/her eligible survivors), must first establish that the employee has been diagnosed with beryllium illness, cancer, or chronic silicosis. *See* 42 U.S.C. § 7384l(15), 20 C.F.R. § 30.110(a). The evidence to show proof of an occupational illness is not in dispute in this case. The medical evidence establishes that **[Employee]** was diagnosed with cancer (bronchogenic cancer of the lung, small cell type) and chronic silicosis. Consequently, **[Employee]** was diagnosed with two illnesses potentially covered under the Act.

Employees of a DOE contractor (or their eligible survivors) are entitled under the EEOICPA to seek compensation for a cancer as a member of the Special Exposure Cohort (SEC) or through a determination that they incurred cancer that was at least as likely as not related to employment at a DOE facility. 42 U.S.C. §§ 7384l(14), 7384l(9)(B)(ii)(II). To be included in the SEC, a DOE employee, DOE contractor employee, or atomic weapons employee must have been employed for an aggregate of 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee or employed before January 1, 1974, by the DOE or a DOE contractor or subcontractor on Amchitka Island, Alaska, and have been exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests. 42 U.S.C. § 7384l(14). To qualify as a covered employee with cancer, members of the SEC need only establish that they contracted a "specified cancer", designated in section 7384l(17) of the EEOICPA, after beginning employment at a DOE facility or atomic weapons employer facility.

While the EEOICPA does not contain a specific definition of a DOE contractor, it does contain a definition of a DOE contractor employee that, in effect, defines what a DOE contractor is. Section 7384l(11) of the EEOICPA defines a DOE contractor employee as:

(A) An individual who is or was in residence at a Department of Energy facility as a researcher for one or more periods aggregating at least 24 months.

(B) An individual who is or was employed at a Department of Energy facility by-

(i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or
(ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

The question presented in this case is whether **[Employee]**, an employee of the U.S. Army Corps of Engineers was, during the time he spent on Amchitka Island, providing management and operation, management and integration or environmental remediation services under a contract between the DOE and the Army Corps of Engineers.

The undersigned notes that the Atomic Energy Commission's Managers Completion Report refers to the U.S. Army Corp of Engineers, as a prime contractor for work on Milrow and Cannikin. The work to be performed under that contract consisted of "engineering, procurement, construction administration and inspection."

[Employee]'s "Request and Authorization for TDY Travel of DOD Personnel," initiated on November 10 and approved on November 11, 1971, was for the purpose of three days work on Amchitka Island, Alaska, for the Department of Defense, Alaska District Corps of Engineers. The purpose of the TDY was to "examine equipment for potential use on Blair Lake Project."

You submitted the following new documents along with your letter to the Final Adjudication Branch dated May 21, 2003: Employee Performance Appraisal for the period February 1, 1966 to January 31, 1967; Affidavit of Erwin L. Long dated May 21, 2003; Request and Authorization for Military Personnel TDY Travel and Civilian Personnel TDY and PCS Travel, dated March 4, 1968; and Travel Voucher or Subvoucher, dated March 15, 1968. None of the documents submitted establish that **[Employee]** was on Amchitka Island providing services pursuant to a contract with the DOE.

The preponderance of the evidence in this case supports the conclusion that **[Employee]** was on Amchitka Island in November 1971 for the sole purpose of inspecting equipment to be used by the Department of Defense on its Blair Lake Project. The documentation of record refers to the Blair Lake Project as a Department of Defense project, and the DOE noted in correspondence dated March 27, 2003, that research was not able to verify that Blair Lake was a DOE project.

While the DOE indicated that **[Employee]** was issued a dosimetry badge, such evidence may be used to establish that he was present on Amchitka Island, not to establish that he was a covered DOE employee. Therefore, **[Employee]**'s presence on Amchitka Island was to perform work for the Department of Defense, and not pursuant to a contract between the DOE and the U.S. Army Corps of Engineers.

The evidence is also insufficient to show covered employment under § 7384r(c) and (d) of the EEOICPA for chronic silicosis. To be a "covered employee with chronic silicosis" it must be established that the employee was:

A DOE employee or a DOE contractor employee, who was present for a number of workdays aggregating at least 250 work days during the mining of tunnels at a DOE facility located in Nevada or Alaska for test or experiments related to an atomic weapon.

See 42 U.S.C. § 7384r(c) and (d); 20 C.F.R. § 30.220(a). Consequently, even if the evidence showed

DOE employment (which it does not since **[Employee]** worked for the DOD), he was present only three days on Amchitka, which is not sufficient for the 250 days required under the Act as a covered employee with silicosis.

The undersigned notes that in your objection to the recommended decision, you referred to a "shared employee" doctrine which you believe should be applied to this claim. You contend that on March 5, 1968, **[Employee]** was sent to Seward, Alaska to "Inspect equipment going to Amchitka, which might have been used at the Blair Lake project [to benefit] not only DOD but also DOE." No provision in the Act refers to a "shared employee" doctrine. Given the facts of this case, coverage could only be established if **[Employee]** was on Amchitka Island providing services pursuant to a contract with the DOE, evidence of which is lacking in this case.

It is the claimant's responsibility to establish entitlement to benefits under the EEOICPA. The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of each and every criterion under any compensable claim category set forth in section 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing the Office of Workers' Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

Although you submitted medical evidence to show covered illnesses due to cancer and chronic silicosis, the evidence of record is insufficient to establish that **[Employee]** engaged in covered employment. Therefore, your claim must be denied for lack of proof of covered employment under the EEOICPA.

Seattle, Washington

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

Medical evidence

EEOICPA Fin. Dec. No. 55834-2004 (Dep't of Labor, September 21, 2004)

FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq.* Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On March 25, 2004, you filed a Form EE-1 (Claim for Benefits under EEOICPA), seeking

compensation based on beryllium sensitivity and chronic silicosis. You indicated on Form EE-3 (Employment History) that you worked at the Beryllium Co., in Hazleton, PA, from 1970 to 1971, and at the Avco Corp. (Trexton) in Stratford, CT, from 1960 to 1970. The Beryllium Corporation of America (Hazleton) is recognized as a beryllium vendor from 1957 to 1979. *See* Department of Energy, Office of Worker Advocacy Facilities List.

By letters dated March 30, and April 30, 2004, the Cleveland district office notified you of the medical evidence you must submit to establish that you had been diagnosed with beryllium sensitivity and chronic silicosis. You were also advised that, to be considered for entitlement to compensation based on chronic silicosis, you would have to provide evidence that you had worked during the mining of tunnels at Department of Energy facilities in Nevada or Alaska for tests or experiments related to an atomic weapon. By letter dated May 28, 2004, you were again advised of the medical evidence you must submit to establish that you had been diagnosed with beryllium sensitivity. No medical or employment evidence was received.

On July 8, 2004, the district office recommended denial of your claim for benefits, concluding that you are not a covered employee with chronic silicosis because you were not exposed to silica in the performance of duty as required by 42 U.S.C. § 7384r(c). The district office also recommended denial of your claim because you did not submit sufficient medical evidence that you had been diagnosed with a covered occupational illness as defined 42 U.S.C. § 7384l(15). The district office further concluded that you were not entitled to compensation as set forth in 42 U.S.C. § 7384s.

FINDINGS OF FACT

1. On March 25, 2004, you filed a claim for benefits.

2. You did not provide the medical evidence required to establish a diagnosis of a covered occupational illness under the EEOICPA.

CONCLUSIONS OF LAW

I have reviewed the evidence of record and the recommended decision issued by the district office on July 8, 2004. I find that you have not filed any objections to the recommended decision and that the sixty-day period for filing such objections has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

In order to be afforded coverage under Part B of the Energy Employees Occupational Illness Compensation Program Act, the employees (or their eligible survivors), must establish that they have been diagnosed with a designated occupational illness incurred as a result of exposure to silica, beryllium, and radiation: *cancer, beryllium sensitivity, chronic beryllium disease*, and/or *silicosis*. *See* 42 U.S.C. § 7384l(15). Further, the illness must have been incurred while in the performance of duty for the Department of Energy and certain of its vendors, contractors, and subcontractors, or for an atomic weapons employer or facility. *See* 42 U.S.C. § 7384l(4)-(7), (9) and (11).

You filed a claim based on beryllium sensitivity and chronic silicosis. The regulations provide that a claim based on beryllium sensitivity must include an abnormal Lymphocyte Proliferation Test performed on either blood or lung lavage cells. *See* 20 C.F.R. § 30.207(b). Similarly, a claim based on chronic silicosis must include a written diagnosis of that condition, signed by a medical doctor, and must be accompanied by either a chest x-ray interpreted by a B reader, or the result of a CAT or other imaging technique, or a lung biopsy, consistent with silicosis. Although you were advised to provide the medical documentation required to establish that you had been diagnosed with beryllium sensitivity and chronic silicosis, no such evidence was received.

It is the claimant's responsibility to establish entitlement to benefits under the Act. The regulations state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of each and every criterion under any compensable claim category. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing to the Office of Workers' Compensation Program all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

Therefore, your claim must be denied because you did not submit evidence sufficient to establish that you had been diagnosed with a covered occupational illness as defined by 42 U.S.C. § 7384l(15).

For the above reasons, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

Cleveland, Ohio

Debra A. Benedict

Acting District Manager

Final Adjudication Branch

Claims for Compensation

Development of

EEOICPA Fin. Dec. No. 30568-2005 (Dep't of Labor, September 16, 2005)

FINAL DECISION FOLLOWING A REVIEW OF THE WRITTEN RECORD

This is a decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000. 42 U.S.C. § 7384 *et seq.* Since your attorney-in-fact submitted a letter of objection, but did not specifically request a hearing, a review of the written record was performed, in accordance with the implementing regulations. 20 C.F.R. § 30.312.

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, in accordance with the implementing regulations. 20 C.F.R. § 30.310. In reviewing any objections submitted, the Final Adjudication Branch will review the written record, any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. 20 C.F.R. § 30.313.

For the reasons set forth below, your claim is denied.

STATEMENT OF THE CASE

On May 30, 2002, you filed a Form EE-1, Claim for Benefits under the EEOICPA, for emphysema, and on February 23, 2004, you filed a Form EE-1 for chronic beryllium disease (CBD) and removal of lung in 1958. On the Form EE-3, Employment History, you stated you were employed in Oak Ridge, Tennessee, at the K-25 gaseous diffusion plant with Maxon Construction as an ironworker from 1950/51 to 1954; at the Y-12 plant as a machinist from December 1954 to mid-1955; and at the Oak Ridge National Laboratory (X-10) as a chemical operator from mid 1955 to June 1982.

The district office verified employment at Y-12 as December 20, 1954 to October 9, 1955 and at X-10 from October 10, 1955 to July 31, 1982.

On December 2, 2004, the Jacksonville district office recommended acceptance of the claim for CBD based on the statutory criteria for a pre-1993 diagnosis and recommended denial of the claimed emphysema. On January 3, 2005, the Final Adjudication Branch (FAB) issued a remand order, which

returned the case to the district office for further development.

In accordance with the remand order, the district office obtained a copy of a lymphocyte proliferation test (LPT) verbally reported to have been normal, and forwarded the evidence of record to a district medical consultant for an opinion whether a finding of pulmonary fibrosis was a characteristic abnormality of CBD on a chest x-ray.

A person exposed to beryllium during the course of employment in specified facilities qualifies as a "covered beryllium employee," as defined in the Act. 42 U.S.C. § 7384l(7). Due to confirmation of your employment in a facility where beryllium was present, you are considered to be a "covered beryllium employee." However, in order for you to receive compensation, you must be diagnosed with a covered beryllium illness, in accordance with § 7384 of the Act and implementing regulations. 42 U.S.C. § 7384l(8), 20 C.F.R. § 30.205. "Covered beryllium illness" is defined in the Act as beryllium sensitivity as established by an abnormal beryllium lymphocyte proliferation test (LPT) performed on either blood or lung lavage cells *or* established chronic beryllium disease. 42 U.S.C. § 7384l(8).

According to § 7384 of the Act, chronic beryllium disease is 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
>
> (iii) 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).

42 U.S.C. § 7384l(13).

On April 29, 2005, the district office received a copy of the lymphocyte proliferation test conducted on January 23, 2003, which contained a finding of a normal response to beryllium sulfate. In light of the report from your physician stating that your steroid use could affect the outcome of the testing, the district office noted that the only situation where a normal LPT could be overridden for acceptance of a post-1993 CBD diagnosis was when a lung tissue biopsy revealed the presence of granulomas consistent with CBD. The lung biopsy on file, from 1958, did not include a finding of granulomas.

Therefore, the claim was also considered under the pre-1993 criteria. The evidence consisted of x-rays denoting abnormalities, obstructive lung physiology testing, and a medical history showing a clinical course consistent with a chronic respiratory condition. However, the chest x-rays which revealed abnormalities were referred to a district medical consultant (DMC), in accordance with policy, to determine if they were characteristic of CBD. In his report of

March 26, 2005, Dr. Robert Sandblom opined that the x-ray reports on file did not show any abnormalities consistent with CBD.

On May 9, 2005, the Jacksonville district office issued a recommended decision to deny the claim for CBD, emphysema, and a lung abscess, since there was insufficient medical evidence to establish a diagnosis of a covered occupational illness under § 7384 of the Act.

42 U.S.C. § 7384l(15).

Attached to the recommended decision was a notice of claimant rights, which stated that you had 60 days in which to file an objection to the recommended decision and/or request a hearing. These 60 days expired on July 8, 2005. On July 5, 2005, the Final Adjudication Branch received a letter of objection, dated June 30, 2005, from your attorney-in-fact.

OBJECTIONS

In the objection letter, the attorney-in-fact stated that she disagreed with the office procedures which allowed pulmonary fibrosis to be considered characteristic and then not characteristic. She stated that changes such as this should not be implemented in a retroactive manner, since the clarifications of policy appeared to be more restrictive in order to deny claims. She questioned whether the LPT on record would be investigated further since your physician said that your steroid use could alter the results. She said a phone call to the FAB had not been returned; however, there are no records of any telephone calls after the recommended decision was issued.

The district office and Final Adjudication Branch are bound by the policies and procedures in place at the time a claim is adjudicated and are required to review such a claim in light of those current policies. The issue for determination is whether the chest x-rays meet the pre-1993 criteria for a statutory diagnosis of CBD. Since Dr. Sandblom did not specifically mention the chest x-ray report of February 13, 1967 (which the district office used as support for their recommended acceptance in the original decision) in his earlier response, the Final Adjudication Branch requested clarification. In an addendum dated September 15, 2005, Dr. Sandblom explained that the pulmonary fibrosis noted in

February 1967 was due to localized scarring “consistent with the prior lobectomy for lung abscess” and stated that “these changes are definitely not consistent with CBD.”

Furthermore, the procedures address the use of a normal LPT in a living claimant: a lung biopsy that confirms the presence of granulomas may override a normal LPT. The district office thoroughly addressed this requirement in the recommended decision, as discussed above. Telephone records in the case file indicate a test kit was to be forwarded to you in May by ORISE. The results of that testing have not been received.

FINDINGS OF FACT

1. On May 30, 2002, you filed a Form EE-1, Claim for Benefits under the EEOICPA, for emphysema, and on February 23, 2004, you filed a Form EE-1 for chronic beryllium disease (CBD) and removal of lung in 1958

2. The district office verified employment at Y-12 as December 20, 1954 to October 9, 1955 and at X-10 from October 10, 1955 to July 31, 1982.

3. The medical evidence does not establish that the employee was diagnosed with a “covered beryllium illness” as defined in the Act.

4. On May 9, 2005, the Jacksonville district office issued a recommended decision to deny compensation and medical benefits for chronic beryllium disease, emphysema, and a lung abscess.

5. On July 5, 2005, the Final Adjudication Branch received a letter of objection from your attorney-in-fact, dated June 30, 2005, and conducted a review of the written record. The objections are insufficient to warrant a change to the recommended decision.

CONCLUSIONS OF LAW

The undersigned has reviewed the facts and the recommended decision issued by the Jacksonville district office on May 9, 2005, and finds that the evidence submitted does not establish that you meet the statutory criteria for a diagnosis of chronic beryllium disease, as defined in the Act, or any other covered occupational illness, as defined in the Act and implementing regulations. 42 U.S.C. §§ 7384l(13), 7384l(15), 20 C.F.R. § 30.5(z). I find that the decision of the district office is supported by the evidence and the law, and cannot be changed based on the objections submitted. As explained in the implementing regulations, “Any claim that does not meet all of the criteria for at least one of these categories as set forth in these regulations must be denied.” 20 C.F.R. § 30.110(b). Therefore, I find that you are not entitled to compensation or medical benefits under the Act, and that your claim for compensation must be denied.

Jacksonville, FL

Sidne M. Valdivieso

Hearing Representative

Filing

EEOICPA Fin. Dec. No. 62339-2005 (Dep't of Labor, November 18, 2005)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) 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 October 4, 2004, you filed a Form EE-1, Claim for Benefits under the EEOICPA, for beryllium sensitivity. A review of the medical evidence revealed that along with beryllium sensitivity you were diagnosed with multiple skin cancers: basal cell carcinoma (BCC) of the right temple, diagnosed July 25, 1995; BCC of the left face, diagnosed April 11, 2000; BCC of the right face, diagnosed March 12, 2001[1], and BCCs of the upper and lower face, diagnosed August 2, 2004.[2]

On the Form EE-3, Employment History, you stated you were employed as a laborer by F. H. McGraw at the Paducah gaseous diffusion plant (GDP) in Paducah, Kentucky, for the period of January 1, 1951 to December 25, 1954. The evidence of record establishes you worked for F. H. McGraw at Paducah GDP for the claimed period of employment.

On February 1, 2005, a final decision and remand order was issued by the FAB accepting your claim for beryllium sensitivity and remanding your case for further development of chronic beryllium disease (CBD). The district office referred your claim to a district medical consultant (DMC) for review on September 14, 2005.

On the Form EE-1, you indicated that you were a member of the Special Exposure Cohort (SEC). You established that you were diagnosed with multiple skin cancers. To determine the probability of whether you sustained your cancer in the performance of duty, as required to establish entitlement under Part B of the Act, the district office referred your application package to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction. NIOSH reported annual dose estimates from the date of initial radiation exposure during covered employment, to the date the cancer was first diagnosed. A summary and explanation of information and methods applied to produce these dose estimates, including your involvement through an interview and review of the dose report, are documented in the "NIOSH Report of Dose Reconstruction under EEOICPA." On August 24, 2005, you signed Form OCAS-1, indicating that you had reviewed the NIOSH Draft Report of Dose Reconstruction and agreed that it identified all of the relevant information you provided to NIOSH. The district office received the final NIOSH Report of Dose Reconstruction on August 29, 2005.

Pursuant to the implementing NIOSH regulations, the district office used the information provided in this report to determine that there was a 55.97% combined probability that your cancers[3] were caused by radiation exposure at the Paducah GDP. 42 C.F.R. § 81.20. The Final Adjudication Branch confirmed the 55.97% combined probability.

On September 14, 2005, the Jacksonville district office issued a recommended decision finding that your skin cancer(s) were at least as likely as not caused by your employment at a Department of

Energy (DOE) facility and concluding that that you are entitled to compensation in the amount of $150,000. The district office's recommended decision also concluded that you are entitled to medical benefits beginning October 4, 2004 for skin cancer.

On September 19, 2005, the Final Adjudication Branch received written notification that you waived any and all objections to the recommended decision.

The district office had deferred adjudication of your claim for CBD until receipt of the DMC's report. On October 6, 2005, the FAB received the October 2, 2005 report from Dr. Robert E. Sandblom. Dr. Sandblom verified that the pulmonary function tests on record were consistent with chronic beryllium disease.

FINDINGS OF FACT

1. You filed a Form EE-1, for beryllium sensitivity and review of the medical records revealed evidence of skin cancer and possible chronic beryllium disease.

2. You were diagnosed with skin cancer (BCC) on July 25, 1995, April 11, 2000, and August 2, 2004 (x2).

3. You were employed at the Paducah GDP from January 1, 1951 to December 25, 1954.

4. The probability that your cancer was caused by radiation at the Paducah GDP is 55.97%.

5. On September 14, 2005, the Jacksonville district office issued a recommended decision.

6. On September 19, 2005, the Final Adjudication Branch received written notification that you waived any and all objections to the recommended decision.

7. On October 6, 2005, the FAB received a report from the DMC, confirming a statutory diagnosis of CBD.

CONCLUSIONS OF LAW

I have reviewed the evidence of record and the recommended decision.

To qualify as a member of the SEC under the Act, the following requirements must be satisfied:

The employee was so employed for a number of work days aggregating at least 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee. . . . 42 U.S.C. § 7384l(14)(A).

The evidence shows that you worked at the Paducah GDP from January 1, 1951 to December 25, 1954, which equals more than 250 days prior to February 1, 1992. Therefore, you qualify as a member of the SEC.

However, in order to be entitled to benefits as a member of the SEC, you must have been diagnosed with a specified cancer as defined by the Act and implementing regulations. 42 U.S.C. § 7384l(17); 20

C.F.R. § 30.5(ff) (2005). Skin cancers are not a specified cancer.

A cancer is considered to have been sustained in the performance of duty if it was at least as likely as not (a 50% or greater probability) related to radiation doses incurred while working at a DOE facility. 42 U.S.C. § 7384n(b); 42 C.F.R. Part 81. I conclude that your skin cancers were at least as likely as not caused by your employment at a Department of Energy (DOE) facility. 42 U.S.C. § 7384n(b). Therefore, you are a covered employee with cancer. 42 U.S.C. § 7384l(9)(B).

The medical evidence is sufficient to establish that you have CBD. Under Part B of the Act, CBD may be 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.
>
> 42 U.S.C. § 7384l(13).

The beryllium lymphocyte proliferation test (BeLPT) of July 28, 2004 was positive. Therefore, you have beryllium sensitivity, as previously established by final decision dated February 1, 2005. 42 U.S.C. § 7384l(8).

The DMC verified in his report of October 2, 2005 that pulmonary function tests on record were consistent with chronic beryllium disease, meeting criterion iii. Office policy allows the FAB to accept a claimed medical condition based on new evidence, if the case was in posture for acceptance of benefits for another condition.[4] Therefore, I conclude that you are a covered beryllium employee and that your chronic beryllium disease is a covered occupational illness. 42 U.S.C. §§ 7384l(7), 7384l(13); 20 C.F.R. § 30.207.

In accordance with Part B of the Act, you are entitled to $150,000 and medical benefits beginning October 4, 2004 for skin cancer and chronic beryllium disease. 42 U.S.C. §§ 7384s(a), 7384t.

Jacksonville, FL

Sidne Valdivieso
Hearing Representative

[1] Review of the pathology report shows this was not a BCC but rather a pilomatricoma, which may be either benign or malignant. The pathology report did not specify which. Therefore, this should not have been utilized in the dose reconstruction. However, you had an additional cancer that was not utilized by NIOSH in the dose reconstruction, the BCC of the right lower face, diagnosed August 2, 2004, that the DOL health physicist has determined could be substituted for the pilomatricoma without negatively impacting the combined probability of causation.

[2] You did not file a Form EE-1 for skin cancer or chronic beryllium disease, but any written communication that requests benefits under the Act will be considered a claim, including the submission of new medical evidence for review.

[3] NIOSH computed the percentage of causation for four BCCs to arrive at 55.97%. When the percentage of causation is over 50% establishing that those cancers were at least as likely as not related to employment at a covered facility, calculation of the percentage of causation for the remaining cancers is not necessary.

[4] EEOICPA Bulletin No. 03-29 (issued June 30, 2003).

Non-claiming individuals

EEOICPA Fin. Dec. No. 47856-2005 (Dep't of Labor, July 21, 2005)

NOTICE OF FINAL DECISION

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

STATEMENT OF THE CASE

On August 30, 2001, the employee's surviving spouse filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA), based on lymphoma and peripheral bronchogenic carcinoma, and on July 24, 2003, she passed away, and her claim was administratively closed. On August 7 (**[Claimant #1]**) and September 9 (**[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**), 2003, you filed Forms EE-2 under the EEOICPA, based on bronchogenic carcinoma and lymphoma.

The record includes a Form EE-3 (Employment History Affidavit) that indicates the worker was employed by Reynolds Electrical and Engineering Company (REECo) at the Nevada Test Site (NTS) intermittently from 1957 to 1978, and that he wore a dosimetry badge. A representative of the Department of Energy confirmed the employee was employed at NTS by REECo intermittently from August 23, 1958 to February 4, 1978.

Medical documentation received included a copy of a Nevada Central Cancer Registry report that indicated an aspiration biopsy was performed on February 1, 1978, and it showed the employee was diagnosed with primary lung cancer. A Valley Hospital discharge summary, dated February 4, 1978, indicated the employee had a tumor in the right upper lobe of the lung. The record does not contain documentation demonstrating the employee was diagnosed with lymphoma.

To determine the probability of whether the employee sustained the cancer in the performance of duty, the Seattle district office referred your case to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction in accordance with 20 C.F.R. § 30.115. The district office received the final NIOSH Report of Dose Reconstruction dated April 20, 2005. *See* 42 U.S.C. § 7384n(d). NIOSH noted the employee had worked at NTS intermittently from August 23, 1958 to February 4, 1978. However, in order to expedite the claim, only the employment from 1966 through 1970 was assessed. NIOSH determined that the employee's dose as reconstructed under the EEOICPA was 71.371 rem to the lung, and the dose was calculated only for this organ because of the specific type of cancer associated with the claim. NIOSH also determined that in accordance with the

provisions of 42 C.F.R. § 82.10(k)(1), calculation of internal dose alone was of sufficient magnitude to consider the dose reconstruction complete. Further, NIOSH indicated, the calculated internal dose reported is an "*underestimate*" of the employee's total occupational radiation dose. *See* NIOSH Report of Dose Reconstruction, pp. 4, 5, 6, and 7.

Using the information provided in the Report of Dose Reconstruction, the Seattle district office utilized the Interactive RadioEpidemiological Program (IREP) to determine the probability of causation of the employee's cancer, and reported in its recommended decision that the probability the employee's lung cancer was caused by his exposure to radiation while employed at NTS was at least 50%.

You provided copies of the death certificates of the employee and his spouse, copies of your birth certificates showing you are the natural children of the employee, and documentation verifying your changes of names, as appropriate.

The record shows that you (**[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**) and **[Claimant #5]** filed claims with the Department of Justice (DOJ) for compensation under the Radiation Exposure Compensation Act (RECA). By letter dated May 20, 2005, a representative of the DOJ reported that an award under § 4 of the RECA was approved for you; however, the award was rejected by **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**.

On June 14, 2005, the Seattle district office recommended acceptance of your claims for survivor compensation for the condition of lung cancer, and denial of your claims based on lymphoma.

On June 12 (**[Claimant #1]** and June 20 (**[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**), 2005, the Final Adjudication Branch received written notification from you indicating that you waive any and all rights to file objections to the recommended decision.

FINDINGS OF FACT

1. On August 7 (**[Claimant #1]**) and September 9 (**[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**), 2003, you filed claims for survivor benefits.

2. Documentation of record shows that the employee and his surviving spouse have passed away, you (**[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**) are the children of the employee, and you are his survivors.

3. You (**[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**) have rejected an award of compensation under the Radiation Exposure Compensation Act.

4. The worker was employed at NTS by REECo, intermittently, from August 23, 1958 to February 4, 1978.

5. The employee was diagnosed with lung cancer on February 1, 1978.

6. The NIOSH Interactive RadioEpidemiological Program indicated at least a 50% probability that the employee's cancer was caused by radiation exposure at NTS.

7. The employee's cancer was at least as likely as not related to his employment at a Department

of Energy facility.

CONCLUSIONS OF LAW

The evidence of record indicates that the worker was employed at NTS by REECo, intermittently, from August 23, 1958 to February 6, 1978. Medical documentation provided indicated the employee was diagnosed with lung cancer on February 1, 1978; however, there is no evidence showing the employee was diagnosed with lymphoma, and your claims based on lymphoma must be denied.

After establishing that a partial dose reconstruction provided sufficient information to produce a probability of causation of 50% or greater, NIOSH determined that sufficient research and analysis had been conducted to end the dose reconstruction, and the dose reconstruction was considered complete. *See* 42 C.F.R. § 82.10(k)(1).

The Final Adjudication Branch analyzed the information in the NIOSH Report of Dose Reconstruction and utilized the NIOSH-IREP to confirm the 63.34% probability that the employee's cancer was caused by his employment at NTS. *See* 42 C.F.R. § 81.20. (Use of NIOSH-IREP). Thus, the evidence shows that the employee's cancer was at least as likely as not related to his employment at NTS.

The Final Adjudication Branch notes that, in its Conclusions of Law, the recommended decision erroneously indicates the employee, **[Employee]**, is entitled to compensation in the amount of $150,000.00; therefore, that Conclusion of Law must be vacated as the employee is deceased. *See* 42 U.S.C. § 7384s(a)(1).

The Final Adjudication Branch notes that the record shows the employee passed away on February 4, 1978. However, his employment history indicates he worked at NTS until February 6, 1978. Consequently, for purposes of administration of the Act, his employment is considered to have ended on February 4, 1978.

Based on the employee's covered employment at NTS, the medical documentation showing his diagnosis of lung cancer, and the determination that the employee's lung cancer was "at least as likely as not" related to his occupational exposure at NTS, and thus sustained in the performance of duty, the employee is a "covered employee with cancer," under 42 U.S.C. § 7384l. *See* 42 U.S.C. § 7384l(9)(B); 20 C.F.R. § 30.213(b); 42 C.F.R. § 81.2. Further, as the record indicates there is one other potential beneficiary under the EEOICPA, you are each (**[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**) entitled to survivor compensation under 42 U.S.C. § 7384 in the amount of $30,000.00. As there is evidence that another survivor is a child of the employee, and potentially an eligible survivor under the Act, the potential share ($30,000.00) of the compensation must remain in the EEOICPA Fund. *See* Federal (EEOICPA) Procedure Manual, Chapter 2-200.7c(2) (June 2004).

Seattle, WA

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

Waiver

EEOICPA Fin. Dec. No. 44377-2004 (Dep't of Labor, October 6, 2005)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is a 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.*

STATEMENT OF THE CASE

You each filed a Form EE-2, Claim for Survivor Benefits, for the bladder cancer of your late husband and father, **[Employee]**, hereinafter referred to as "the employee."

On the Form EE-3, Employment History, you stated the employee was employed as a pipefitter with several sub-contractors in Oak Ridge, Tennessee, at the K-25 gaseous diffusion plant, Y-12 plant, and Oak Ridge National Laboratory (X-10) with no listed dates other than at least 3 years at K-25 and several years at Y-12; and in Paducah, Kentucky, at the gaseous diffusion plant for 3-4 months in the 1950s. The evidence of record establishes that the employee worked at the K-25 gaseous diffusion plant (GDP) for Rust Engineering from 1975 to 1978, along with other periods of employment for various contractors at each of the Oak Ridge plants.

On the Forms EE-2, you indicated the employee was a member of the Special Exposure Cohort (SEC). To qualify as a member of the SEC, the following requirements must be satisfied:

> (A) The employee was so employed for a number of work days aggregating at least 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, and, during such employment - -
>
> > (i) was monitored through the use of dosimetry badges for exposure at the plant of the external parts of employee's body to radiation; or
> >
> > (ii) worked on a job that had exposures comparable to a job that is or was monitored through the use of dosimetry badges. 42 U.S.C. § 7384l(14)(A).

The employee worked at the K-25 gaseous diffusion plant (GDP) for intermittent periods from at least 1975 to 1978. For SEC purposes, the employee is shown to have worked more than 250 work days prior to February 1, 1992, and was monitored through the use of dosimetry badge number **[Number Deleted]**. Therefore, the employment meets the criteria for inclusion in the SEC. 42 U.S.C. § 7384l(14).

The medical evidence establishes the employee was diagnosed with bladder cancer on January 21, 1992. Bladder cancer is a specified cancer as defined by the Act and implementing regulations, if onset is at least five years after first radiation exposure. 42 U.S.C § 7384l(17), 20 C.F.R. § 30.5(ff).

In support of your claim for survivorship, you (**[Employee's Spouse/Claimant #1]**) submitted your marriage certificate which states that you married the employee on September 10, 1994, and the

employee's death certificate, which states that you were married to the employee on the date of his death, October 31, 1996.

In support of your claims for survivorship, the living children of the employee submitted birth certificates and marriage certificates.

On April 26, 2005, the Jacksonville district office issued a recommended decision[1], concluding that the living spouse is the only entitled survivor and is entitled to survivor benefits in the amount of $150,000 for the employee's bladder cancer. The district office recommended denial of the claims of the living children.

Attached to the recommended decision was a notice of claimant rights, which stated that claimants had 60 days in which to file an objection to the recommended decision and/or request a hearing. These 60 days expired on June 25, 2005. On May 5, 2005, the Final Adjudication Branch received written notification that **[Employee's Spouse]** waived any and all objections to the recommended decision. On May 27, 2005, the Final Adjudication Branch received an objection to the recommended decision and request for an oral hearing signed by all the living children. The hearing was held by the undersigned in Oak Ridge, Tennessee, on August 2, 2005. **[Claimant #2]**, **[Claimant #4]**, **[Claimant #3]**, and **[Claimant #7]** were duly affirmed to provide truthful testimony.

OBJECTIONS

In the letter of objection, you stated that you believe the rules and regulations governing the Act are contradictory. You also stated you believe your privacy rights have been violated under the Privacy Act of 1974. During the hearing, you stated that the pre-marital agreement, which you believe is valid under the rules of the State of Tennessee, should be recognized by the Federal government; that the employee's will should take precedence over the way the Act breaks down survivor entitlement; that the documentation you gathered was used to benefit **[Employee's Spouse]** without her having to do anything and that the documentation you gathered should have been maintained for your benefit only; and that new information concerning the survivorship amendment to the Act in December 2002 should have been forwarded to all claimants, since you were basing your actions on a pamphlet released in August of 2002. You were provided with a copy of the Privacy Act of 1974 which includes instructions on filing a claim under that Act.

In accordance with §§ 30.314(e) and (f) of the implementing regulations, a claimant is allowed thirty days after the hearing is held to submit additional evidence or argument, and twenty days after a copy of the transcript is sent to them to submit any changes or corrections to that record. 20 C.F.R. §§ 30.314(e), 30.314(f). By letters dated August 23, 2005, the transcript was forwarded to you. On September 15, 2005, the Final Adjudication Branch received a letter from **[Claimant #2]**, clarifying statements made during the hearing.

The law, as written and amended by Congress, establishes the precedence of survivors in each section of the Act and the apportionment of any lump-sum compensation. Section 7384s(e) of the Act (also known as Part B) explains who is entitled to compensation if the covered employee is deceased:

(e) PAYMENTS IN THE CASE OF DECEASED PERSONS—(1) In the case of a covered employee who is deceased at the time of payment of compensation under this section, whether or not the death is the result of the covered employee's occupational illness, such payment may be made only as follows:

(A) If the covered employee is survived by a spouse who is living at the time of payment, such payment shall be made to such surviving spouse.

(B) If there is no surviving spouse described in subparagraph (A), such payment shall be made in equal shares to all children of the covered employee who are living at the time of payment.

(C) If there is no surviving spouse described in subparagraph (A) and if there are no children described in subparagraph (B), such payment shall be made in equal shares to the parents of the covered employee who are living at the time of payment.

(D) If there is no surviving spouse described in subparagraph (A), and if there are no children described in subparagraph (B) or parents described in subparagraph (C), such payment shall be made in equal shares to all grandchildren of the covered employee who are living at the time of payment.

(E) If there is no surviving spouse described in subparagraph (A), and if there are no children described in subparagraph (B), parents described in subparagraph (C), or grandchildren described in subparagraph (D), then such payment shall be made in equal shares to the grandparents of the covered employee who are living at the time of payment.

(F) Notwithstanding the other provisions of this paragraph, if there is—

(i) a surviving spouse described in subparagraph (A); and

(ii) at least one child of the covered employee who is living and a minor at the time of payment and who is not a recognized natural child or adopted child of such surviving spouse, then half of such payment shall be made to such surviving spouse, and the other half of such payment shall be made in equal shares to each child of the covered employee who is living and a minor at the time of payment. 42 U.S.C. § 7384s(e).

Section 7384s(e)(3)(B) of the Act explains that a "child" includes a recognized child, a stepchild who lived with an individual in a regular parent-child relationship, and an adopted child. 42 U.S.C. §§ 7384s(e)(3)(B).

The Office of the Solicitor provided an opinion, dated December 1, 2004, concerning the pre-nuptial agreement signed on September 9, 1994, by the employee and **[Employee's Spouse]**. In that opinion, the Solicitor determined that a widow with a valid claim under the Act is not bound by an otherwise legally valid agreement, such as a pre-nuptial agreement or a will, in which she promised to forego that award. The opinion did not contain a ruling on the validity of the pre-nuptial agreement itself; only that the Energy Employees Occupational Illness Compensation Program Act specifically maintains that a beneficiary cannot be deprived of an award that he or she is entitled to under the statute.

FINDINGS OF FACT

1. You each filed a Form EE-2, Claim for Survivor Benefits.

2. The employee was diagnosed with bladder cancer on January 21, 1992.

3. The employee was employed at the K-25 gaseous diffusion plant (GDP) for intermittent periods from at least 1975 to 1978 and was monitored through the use of dosimetry badge number **[Number Deleted]**.

4. The employee is a member of the Special Exposure Cohort.

5. The employee's bladder cancer is a specified cancer.

6. **[Employee's Spouse]** was the employee's spouse at the time of his death and at least one year prior.

7. On April 26, 2005, the Jacksonville district office issued a recommended decision.

8. On May 5, 2005, the Final Adjudication Branch received written notification that **[Employee's Spouse]** waived any and all objections to the recommended decision.

9. The Final Adjudication Branch received a letter of objection from **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant #6]**, and **[Claimant #7]**, and a hearing was held on August 2, 2005.

CONCLUSIONS OF LAW

The undersigned has reviewed the record and the recommended decision dated April 26, 2005 and concludes that the employee is a member of the Special Exposure Cohort, as defined by the Act, and that the employee's bladder cancer is a specified cancer, as defined by the Act and implementing regulations. 42 U.S.C. §§ 7384l(14)(A), 7384l(17), 20 C.F.R. § 30.5(ff).

I find that the recommended decision is in accordance with the facts and the law in this case, and that **[Employee's Spouse]**, the eligible living spouse, is entitled to survivor benefits in the amount of $150,000 for the employee's bladder cancer, pursuant to the Act. 42 U.S.C. §§ 7384s(a). I also find that **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant #6]**, and **[Claimant #7]** are not eligible survivors under the Act, and your claims for compensation are denied.

Jacksonville, FL

Sidne M. Valdivieso

Hearing Representative

[1] A previous recommended decision, dated March 4, 2004, was remanded on October 6, 2004 by the Final Adjudication Branch for a legal opinion concerning a pre-nuptial agreement signed by the employee and spouse.

EEOICPA Fin. Dec. No. 55875-2004 (Dep't of Labor, November 15, 2005)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

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, the Final Adjudication Branch accepts **[Claimant #1/Employee's Spouse's]** claim for compensation under 42 U.S.C. § 7384 and denies **[Claimant #2's]**, **[Claimant #3's]** and **[Claimant #4's]** claims for compensation under 42 U.S.C. § 7384.

STATEMENT OF THE CASE

On March 22, 2004, **[Claimant #2]** filed a Form EE-2 (Claim for Survivor Benefits under EEOICPA) claiming benefits as a surviving child of **[Employee]**. On March 29, 2004, **[Employee's Spouse]** filed a Form EE-2 claiming benefits as the surviving spouse of **[Employee]**.

[Claimant #2] claimed that her father had been diagnosed with leukemia, melanoma (skin cancer) and prostate cancer. **[Employee's Spouse]** claimed that her husband had been diagnosed with lymphoma, hairy cell leukemia, basal and squamous cell cancer, and b-cell lymphoma. The medical evidence of record includes several pathology reports which diagnose various squamous cell cancers of the skin. A pathology report dated January 29, 1997, presents a diagnosis of malignant lymphoma, diffuse, large cell type, and subsequent records support that diagnosis. A reference is noted regarding a history of hairy cell leukemia in September 1994.

A copy of a marriage certificate shows that **[Employee's Spouse's previous name]** and **[Employee]** were wed on June 16, 1986. This document indicates that both parties were widowed at the time of marriage and that **[Employee's Spouse's previous name]** parents' last name was **[Employee's Spouse's maiden name]**. A copy of the employee's death certificate shows that he died on September 15, 1997, and identifies **[Employee's Spouse's maiden name]** as his surviving spouse. A copy of a death certificate for **[Employee's Spouse's first husband]** shows that he died on October 7, 1984, and identifies **[Employee's Spouse's previous name]** as his surviving spouse. A copy of a birth certificate identifies **[Claimant #2's maiden name]** as the child of **[Employee]** and a copy of a marriage certificate establishes the change of her last name to **[Claimant #2's married name]**. **[Claimant #3]** and **[Claimant #4]** also provided their birth certificates showing **[Employee]** as their father. **[Claimant #4]** provided a marriage certificate showing her change in surname from **[Claimant #4's maiden name]** to **[Claimant #4's married name]**.

[Employee's Spouse] provided a Form EE-3 (Employment History) in which she states that her husband worked as a pipefitter for Grinnell at the Portsmouth Gaseous Diffusion Plant (GDP) in Portsmouth, OH, from 1953 to 1955. **[Claimant #2]** provided an employment history in which she states that her father worked as a pipefitter for Grinnell and Myer Brothers at the Portsmouth GDP in Piketon, OH. She indicates that she does not know the dates of employment. Neither claimant indicates that the employee wore a dosimetry badge. The Portsmouth GDP in Piketon, OH, is recognized as a covered DOE facility from 1954 to July 28, 1998; from July 29, 1998 to the present for remediation; and from May 2001 to the present in cold standby status. *See* DOE Worker Advocacy Facility List.

An affidavit was provided by Allen D. Volney, a work associate, who reports that **[Employee]** was employed by the Grinnell Corp at the Portsmouth GDP as a pipefitter from 1953 to 1955 and that he worked with the employee at that location during that time period.

An itemized statement of earnings from the Social Security Administration (SSA) shows that the employee was paid wages by the Blaw-Knox Company and by the ITT Grinnell Corp. during the fourth

quarter (October to December) of 1953, and by the ITT Grinnell Corp. beginning in the first quarter (January to March) of 1954 and ending in the third quarter (July to September) of 1955. This is because the maximum taxable earnings were met for the year during that quarter.

The DOE was unable to confirm the reported employment. However, they provided a personnel clearance master card documenting that **[Employee]** was granted a security clearance with Blaw-Knox (Eichleay Corp.) and (Peter Kiewit Sons Co.) on January 8, 1954. No termination date is shown.

On April 8, 2004, the district office received a copy of an ante-nuptial agreement, signed by **[Employee]** and **[Employee's Spouse's previous name]** on June 9, 1968, which was recorded in the office of the County Clerk for Pike County, Kentucky, on June 10, 1986. In pertinent part, that document states that "each party hereby releases and discharges completely and forever, the other from. . .benefits or privileges accruing to either party by virtue of said marriage relationship, or otherwise, and whether the same are conferred by statutory law or the commonlaw of Kentucky, or any other state or of the United States. It is the understanding between the parties that this agreement, except as otherwise provided herein, forever and completely adjusts, settles, disposes of and completely terminates any and all rights, claims, privileges and benefits that each now has, or may have reason to believe each has against the other, arising out of said marriage relationship or otherwise, and whether the same are conferred by the laws of the Commonwealth of Kentucky, of any other state, or of the United States, and which are now, or which may hereafter be, in force or effect."

In a letter dated April 12, 2004, the district office advised **[Claimant #2]** that a review of the rules and regulations of this program found them to be silent with regard to a "pre-nuptial agreement." The letter further stated that adult children may be eligible for compensation as survivors if there is no surviving spouse of the employee.

On May 6, 2004, the Cleveland district office issued a recommended decision concluding that **[Employee]** is a DOE contractor employee as defined by 42 U.S.C. § 7384l(11)(B)(ii) and a member of the Special Exposure Cohort (SEC), as defined by 42 U.S.C. § 7384l(14), who was diagnosed with malignant lymphoma, which is a specified cancer under 42 U.S.C. § 7384l(17). For those reasons the district office concluded that **[Employee's Spouse]**, as his surviving spouse, is entitled to compensation in the amount of $150,000, pursuant to 42 U.S.C. § 7384s. The district office also concluded that **[Claimant #2]** is not entitled to compensation as a surviving child, because the employee is survived by a spouse. *See* 42 U.S.C. § 7384s(e)(1)(A). The district office also stated that Grinnell Corp. is a known subcontractor to Peter Kiewit Son's Co. at the Portsmouth facility in the 1950s.

On June 18, 2004, the Final Adjudication Branch (FAB) received a letter of objection from **[Claimant #2]**. **[Claimant #2]** stated that she believes that **[Employee's Spouse]** gave up any rights to any benefits based on the ante-nuptial agreement and that the benefits granted to **[Employee's Spouse]** by the May 6, 2004, recommended decision should be awarded to the surviving children.

On June 21, 2004, the FAB received a letter from the authorized representative of the three children/claimants objecting to the recommended decision of May 6, 2004, on behalf of each of them. On June 22, 2004, the FAB advised the representative that **[Claimant #4]** and **[Claimant #3]** had not filed claims for benefits and that only claimants who had been issued a recommended decision may object to such a decision. On July 2, 2004, the FAB received a letter from the authorized representative of **[Claimant #3]** and **[Claimant #4]** to the effect that they were claiming entitlement to benefits under

the EEOICPA as surviving children of **[Employee]**. On July 6, 2004, the FAB received a copy of a death certificate which shows that **[Employee's first wife]** died on March 13, 1985, and identifies **[Employee]** as her surviving spouse. On July 23, 2004, the FAB issued a remand order which vacated the recommended decision and returned the case to the district office to adjudicate the new claims, to include any additional development which might be warranted, and to issue a new recommended decision to all claimants.

On August 16, 2004, **[Claimant #3]** and **[Claimant #4]** filed Forms EE-2 (Claim for Survivor Benefits under EEOICPA) claiming benefits as surviving children of **[Employee]**. Both claimants state that the employee had been diagnosed with leukemia, myeloma, and lymphoma.

On August 20, 2004, the Cleveland district office issued a recommended decision concluding that **[Employee]** is a DOE contractor employee as defined by 42 U.S.C. § 7384l(11)(B)(ii) and a member of the Special Exposure Cohort (SEC), as defined by 42 U.S.C. § 7384l(14), who was diagnosed with malignant lymphoma, which is a specified cancer under 42 U.S.C. § 7384l(17). For those reasons the district office concluded that **[Employee's Spouse]**, as his surviving spouse, is entitled to compensation in the amount of $150,000, pursuant to 42 U.S.C. § 7384s. The district office also concluded that **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]** are not entitled to compensation as surviving children, because the employee is survived by a spouse. *See* 42 U.S.C. § 7384s(e)(1)(A). The district office also finds that **[Employee]** was employed by Grinnell Corp. as a DOE subcontractor employee from September 1, 1954, to December 31, 1955.

On August 27, 2004, the FAB received written notification that **[Employee's Spouse]** waives any and all rights to file objections to the recommended decision. On September 17, 2004, the FAB received a letter from **[Claimant #4]** objecting to the award of benefits to **[Employee's Spouse]**. On October 19, 2004, the FAB received a letter from the authorized representative of the three children/claimants based on a "valid ante-nuptial agreement" between **[Employee's Spouse]** and **[Employee]** in which she expressly waived all rights to benefits which might arise from their marital relationship. It is argued that, although **[Employee's Spouse]** is a "surviving spouse" pursuant to 42 U.S.C. § 7384s(e)(3)(A), she waived any and all rights as the surviving spouse of **[Employee]** to receive benefits under the Act by entering into an ante-nuptial agreement by which she clearly waived the right to any federal benefits arising after the date of the agreement. It is argued that, in the absence of a clear mandate from the statute to ignore a valid ante-nuptial agreement, there is no reason that the Department should not follow the current state of the law and honor the ante-nuptial agreement. Finally, it is argued that, because **[Employee's Spouse]** has waived any and all rights to the benefits provided under the Act, the children/claimants are entitled to benefits pursuant to 42 U.S.C. § 7384s(e)(1)(B).

Pursuant to the authority granted by 20 C.F.R. § 30.317, the recommended decision was vacated and the case was remanded to the district office on November 19, 2004, so that a determination could be made regarding the effect of the ante-nuptial agreement on the claimants' entitlement to compensation under the Act.

On March 18, 2005, the Cleveland district office issued a recommended decision in which they note that the issue of the effect of the ante-nuptial agreement was referred to the Branch of Policies, Regulations, & Procedures for review, and was subsequently forwarded to the Solicitor of Labor (SOL) for expert guidance. On January 4, 2005, the SOL opined that Congress intended, through 42 U.S.C. § 7385f(a), that persons with valid claims under the statute are not permitted to transfer or assign those claims. SOL determined that **[Employee's Spouse]** is entitled to any award payable under the EEOICPA even if she knowingly entered into an otherwise legally valid agreement in which she

promised to forego that award. Since it has been determined that the deceased employee is a covered employee with cancer, by operation of 42 U.S.C. §§ 7384s(e)(1)(A) and 7385f(a), **[Employee's Spouse]** is entitled to receive the award payable in this claim. In conclusion, SOL opined, "an agreement to waive benefits to which one is entitled to under the EEOICPA, or to otherwise assign, or transfer the right to such payments, is legally prohibited, and has no effect on the party to whom an award is paid under the statute. The order of precedence established must be followed in this case and as a result, **[Employee's Spouse]** is entitled to payment."

Based on that opinion, the Cleveland district office found that **[Employee's Spouse's]** ante-nuptial agreement did not affect her entitlement to payment. The district office concluded that **[Employee]** is a covered employee under 42 U.S.C. § 7384l(1)(B), as he is a covered employee with cancer as that term is defined by 42 U.S.C. § 7384l(9)(A). **[Employee]** is a member of the Special Exposure Cohort, as defined by 42 U.S.C. § 7384l(14)(A)(ii), and was diagnosed with malignant lymphoma cancer, which is a specified cancer per 42 U.S.C. § 7384l(17)(A). The district office also concluded that as **[Employee]** is a covered employee and is now deceased, his eligible survivor is entitled to compensation of $150,000.00, per 42 U.S.C. § 7384s(a)(1). Lastly, the district office concluded that **[Employee's Spouse]** is the surviving spouse of **[Employee]**, per 42 U.S.C. § 7384s(e)(3)(A); and, as there is no evidence of a living minor child of **[Employee]**, the exception provided by 42 U.S.C. § 7384s(e)(1)(F) does not apply and, pursuant to 42 U.S.C. § 7384s(e)(1)(A), **[Employee's Spouse]** is thus entitled to the above mentioned compensation of $150,000.00, and that **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]** are not entitled to compensation pursuant to 42 U.S.C. § 7384s(e)(1)(A).

On March 28, 2005, the Final Adjudication Branch received written notification that **[Employee's Spouse]** waives any and all rights to file objections to the recommended decision. On April 15 and May 17, 2005, the Final Adjudication Branch received **[Claimant #2's]**, **[Claimant #3's]**, and **[Claimant #4's]** objections to the district office's March 18, 2005, recommended decision denying their claims, and a request for an oral hearing to present their objections. The hearing was held on August 23, 2005, in Bowling Green, KY.

In accordance with the implementing regulations, a claimant is allowed thirty days after the hearing is held to submit additional evidence or argument, and twenty days after a copy of the transcript is sent to them to submit any changes or corrections to that record. 20 C.F.R. § 30.314(e), and (f). By letter dated September 9, 2005, the transcript was forwarded to **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]**. By letter dated September 30, 2005, the transcript was forwarded to **[Employee's Spouse]**. **[Claimant #4]** provided her comments on the transcript. No other responses were received.

OBJECTIONS

The following objections were presented:

1. The claimants disagreed with the SOL January 4, 2005, opinion, and argued that the SOL improperly relied upon judicial interpretations of statutory provisions in other federal programs when it was concluded that an ante-nuptial agreement cannot override EEOICPA's statutory provision of survivor benefits to the spouse of a deceased covered employee.

2. It was requested that the FAB issue a finding regarding the legality of the prenuptial agreement that **[Employee]** and **[Employee's Spouse]** signed on June 9, 1986. Copies of the decisions in *Callahan v. Hutsell, Callahan & Buchino, P.S.C., Revised Profit Sharing Plan, et al.,* 813 F. Supp. 541

(W.D. Ky. 1992), *vacated and remanded*, 14 F.2d 600 (Table), 1993 WL 533557 (6th Cir. 1993), were submitted in support of the proposition that contractual rights in ante-nuptial agreements in Kentucky have been recognized by the Court of Appeals for the Sixth Circuit, and also as support for their contention that EEOICPA's prohibition against transfers or assignments is for the protection of covered employees only and not their survivors.

3. It was requested that the FAB change the "finding of fact" in the March 18, 2005, recommended decision that the Cleveland district office received the SOL legal opinion that **[Employee's Spouse's]** antenuptial agreement did not affect her entitlement to an award to a "conclusion of law."

The first objection is in regard to whether a prenuptial agreement can effect a waiver of a claim for survivor benefits under EEOICPA. A spouse's right to survivor benefits under EEOICPA is an entitlement or interest that is personal to the spouse and independent of any belonging to a covered employee. Section 7384s(e)(1)(A) of EEOICPA provides that if a covered Part B employee is deceased at the time of payment of compensation, "payment may be made only as follows: (A) If the covered employee is survived by a spouse who is living at the time of payment, such payment shall be made to the surviving spouse." The term "spouse" is defined in Part B as a "wife or husband of [the deceased covered Part B employee] who was married to that individual for at least one year immediately before the death of that individual. . . ." 42 U.S.C. § 7384s(e)(3)(A). As a result, it is clear that at the time **[Employee's Spouse]** signed the prenuptial agreement on June 9, 1986, she was not yet a "spouse" because she did not satisfy the above-noted definition for Part B of EEOICPA. Therefore, she had no entitlement to or interest in survivor benefits at that time that she could have attempted to waive.

Whether or not **[Employee's Spouse]** waived any rights under EEOICPA when she signed the prenuptial agreement, she is currently a "surviving spouse" as that term is defined in EEOICPA. Section 7384s(e) provides that payment shall be made to children of a covered employee *only* "[i]f there is no surviving spouse." Accordingly, even if **[Employee's Spouse]** has waived her right to survivor benefits, the covered Part B employee's children are precluded from receiving those benefits as long as **[Employee's Spouse]** is alive.

In *Duxbury v. Office of Personnel Management*, 232 F.3d 913 (Table), 2000 WL 380085 (Fed. Cir. 2000), the court denied a claim of a deceased employee's children from a prior marriage that they were entitled, as opposed to the deceased employee's widow, to any benefits attributable to their father's civil service retirement contributions based upon a prenuptial agreement signed by their father and his widow. In upholding the administrative denial of their claim, the court noted that it is the "widow" or "widower" of a federal employee covered by the Civil Service Retirement System who is entitled to a survivor annuity under 5 U.S.C. § 8341(d), and that "widow" is statutorily defined as "the surviving wife of an employee" who was married to him for at least nine months immediately before his death. Noting that the prenuptial agreement governed property distribution and did not speak to the validity of the marriage, the court concluded that "because the petitioners cannot establish that [the widow] is ineligible for a survivor annuity under federal law, the Board did not err in affirming OPM's decision denying the [children's] claims." *Duxbury*, 2000 WL 38005 at **3.

Even if a claimant could waive his or her entitlement to survivor benefits by signing a prenuptial agreement, such a waiver would be barred by 42 U.S.C. § 7385f(a), which states that "[n]o claim cognizable under [EEOICPA] shall be assignable or transferable." Interpreting the anti-alienation provision within § 7385f(a) to prohibit the waiver of any interest in survivor benefits is consistent with the interpretation of other anti-alienation provisions by both the government and federal courts.

With regard to the second issue, under Part B of EEIOCPA, survivor benefits are paid to a "surviving spouse," defined as an individual who was married to the deceased covered Part B employee for at least 12 months prior to the employee's death. As in *Duxbury*, the prenuptial agreement signed by **[Employee's Spouse]** would be relevant to Division of the Energy Employees Occupational Illness Compensation's (DEEOIC) determination of her claim for survivor benefits only to the extent that it addresses the validity of **[Employee's Spouse's]** marriage to **[Employee]**. Since it does not, there is no reason for DEEOIC to consider the terms of the agreement, let alone make a finding on the legality of the agreement under Kentucky law, as requested by the claimants' authorized representative.

With regard to the third issue, the FAB finds that the referenced sentence is most properly a conclusion of law rather than a finding of fact, and it is so stated below.

FINDINGS OF FACT

1. **[Claimant #2]** filed a claim for survivor benefits on March 22, 2004. **[Employee's Spouse]** filed a claim for survivor benefits on March 22, 2004. **[Claimant #3]** and **[Claimant #4]** filed claims for survivor benefits on August 16, 2004.

2. **[Employee]** worked at the Portsmouth GDP, a covered DOE facility, from December 3, 1953 to December 21, 1955.

3. **[Employee]** worked for a number of work days aggregating at least 250 work days during the period of September 1954 to February 1, 1992.

4. **[Employee]** was diagnosed with malignant lymphoma cancer, a specified cancer, on January 29, 1997.

5. **[Employee's Spouse]** is the surviving spouse of **[Employee]** and was married to him for at least one year immediately prior to his death.

6. **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]** are the surviving children of **[Employee]**.

CONCLUSIONS OF LAW

A claimant who receives a recommended decision from the district office is entitled to file objections to the decision, pursuant to 20 C.F.R. § 30.310. In reviewing any objections submitted, the FAB will review the written record, in the manner specified in 20 C.F.R. § 30.314, to include any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. I have reviewed the record in this case, as well as the objections raised and the evidence submitted before, during, or after the hearing, and must conclude that no further investigation is warranted.

Under the EEOICPA, for **[Employee]** to be considered a "member of the Special Exposure Cohort," he must have been a Department of Energy (DOE) employee, DOE contractor employee, or an atomic weapons employee who was so employed for a number of work days aggregating at least 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, and, during such employment worked in a job that was monitored

through the use of dosimetry badges for exposure at the plant of the external parts of employee's body; or had exposures comparable to a job that is or was monitored through the use of dosimetry badges, as outlined in 42 U.S.C. § 7384l(14)(A).
The evidence of record establishes that **[Employee]** worked in covered employment at the Portsmouth GDP, in Piketon, Ohio from December 3, 1953 to December 21, 1955. For SEC purposes, only employment from September 1954 to before February 1992 may be considered. His employment at the Portsmouth GDP from September 1, 1954 to December 21, 1955 meets the requirement of working more than an aggregate 250 days at a covered facility. *See* 42 U.S.C. § 7384l(14)(A). The record does not show whether **[Employee]** wore a dosimetry badge. However, the Division of Energy Employees Occupational Illness Compensation (DEEOIC) has determined that employees who worked at the Portsmouth GDP between September 1954 and February 1, 1992, performed work that was comparable to a job that was monitored through the use of dosimetry badges. *See* Federal (EEOICPA) Procedure Manual, Chapter 2-500 (June 2002). On that basis, **[Employee]** meets the dosimetry badge requirement. The Portsmouth GDP is recognized as a covered DOE facility from 1952 to July 28, 1998; from July 29, 1998 to the present for remediation; and from May 2001 to the present in cold standby status. *See* DOE, Office of Worker Advocacy, Facility List. The evidence of record also establishes that **[Employee]** was diagnosed with malignant lymphoma, a specified cancer under 42 U.S.C. § 7384l(17)(A).
Based on the discussion above, **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]** have not presented objections or evidence showing that **[Employee's Spouse]** waived her eligibility to survivor benefits by signing the June 9, 1986 pre-nuptial agreement.

I have reviewed the record on this claim and the recommended decision issued by the district office. I find that the recommended decision is in accordance with the facts and the law in this case, and that **[Employee's Spouse]**, as the surviving spouse of the **[Employee]**, is entitled to compensation in the amount of $150,000.00, pursuant to 42 U.S.C. § 7384s. I also find that **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]** are not entitled to compensation pursuant to 42 U.S.C. § 7384s(e)(1)(A).

Cleveland, Ohio

Tracy Smart

Hearing Representative

Final Adjudication Branch

Withdrawal of claim

EEOICPA Fin. Dec. No. 64180-2005 (Dep't of Labor, February 17, 2005)

NOTICE OF FINAL DECISION AND REMAND ORDER

This is the decision of the Final Adjudication Branch concerning your claim for compensation under Part B of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended, 42 U.S.C. § 7384 *et seq.* (EEOICPA). For the reasons set forth below, the Final Adjudication Branch accepts your claim for compensation based on lung cancer. Additionally, for the reasons set forth below, this case is remanded to the district office regarding the issue of entitlement to medical benefits based on skin cancer.

On August 16, 2004, **[Employee]** filed a claim for compensation under Part B of the EEOICPA listing skin cancer of the ear, forehead, nose, arm, and neck as the medical conditions on which his claim was based. The employee provided medical documentation showing that he had been diagnosed with basal cell carcinoma of the right temple and the nasal tip on May 23, 1995; with basal cell carcinoma of the left ear on September 11, 1997; and with basal cell carcinoma of the forehead on January 20, 2003. Additional medical documentation was also provided to show that he had been diagnosed with cancer of the left lung on October 26, 2004.

The employee had also submitted evidence showing that he was employed by several subcontractors at the Portsmouth Gaseous Diffusion Plant (GDP) in Piketon, OH. That evidence, when considered in its totality, demonstrated that, during the period of January 1952 to June 1985, he worked at the Portsmouth GDP for the contractors listed below:

	FROM	TO	Months Worked
Grinnell (ITT)	September 1954*	August 1955	12.0
Julian Speer	September 1979	July 1980	10.5
Mechanical Construction	July 1980	January 1981	6.5
Dynamic Industrial Construction	October 1981	June 1985	45.0
TOTAL			74

*September 1954 is the earliest date from which employment qualifies for purposes of Special Exposure Cohort Membership.

On November 30, 2004, the district office issued a recommended decision to accept the employee's claim for compensation as a member of the Special Exposure Cohort, based on lung cancer, and deferred a decision regarding entitlement to medical benefits for skin cancer pending dose reconstruction. Unfortunately, **[Employee]** had died on November 26, 2004, and the Final Adjudication Branch (FAB) remanded his case to the district office for administrative closure and consideration of the claim you had filed. The remand order stated that the issue of entitlement to medical benefits under 42 U.S.C. § 7384s(b) was to be addressed in any future recommended decision.

On December 17, 2004, you filed a claim for benefits under the EEOICPA listing lung cancer as the medical condition on which your claim is based. The medical documentation of record shows that your husband was diagnosed with cancer of the left lung on October 26, 2004.

The evidence of record establishes that your husband was employed at the Portsmouth GDP as specified above. The Portsmouth GDP is recognized as a covered DOE facility from 1954 to July 28, 1998; from July 29, 1998 to the present for remediation; and from May 2001 to the present in cold standby status. *See* DOE, Office of Worker Advocacy, Facility List.

On January 11, 2005, the Cleveland district office issued a decision concluding that your husband is a covered employee with cancer because he is a member of the Special Exposure Cohort who has been diagnosed with lung cancer, a specified cancer under 42 U.S.C. § 7384l(17). The district office

recommends that you, as his surviving spouse, are entitled to compensation in the amount of $150,000 pursuant to 42 U.S.C. § 7384s for lung cancer. The recommended decision also concluded that, pursuant to 42 U.S.C. § 7384s(b), your husband is entitled to medical benefits, as described in 42 U.S.C. § 7384t, from August 16, 2004, to November 26, 2004, for lung cancer. That decision noted, as a Finding of Fact, that a decision regarding entitlement based on skin cancer would not be issued because you had withdrawn your husband's claim based on skin cancer.

On January 19, 2005, the FAB received written notification that you waive any and all objections to the recommended decision. I have reviewed the record on this claim and the recommended decision issued by the district office. I find that the recommended decision is in accordance with the facts and the law in this case with regard to your entitlement to compensation based on your husband's lung cancer and that payment will be made for treatment of that condition. For that reason, I find that you, as the surviving spouse, are entitled to $150,000 pursuant to 42 U.S.C. § 7384s. As provided by 20 C.F.R. § 30.400(a), payment will be made for treatment of your husband's lung cancer, as described in 42 U.S.C. § 7384t, for the period of August 16, 2004, to November 26, 2004.

In reviewing your case the FAB notes that the district office accepted your letter of December 21, 2004, as a withdrawal of your husband's claim for benefits based on skin cancer. However, 20 C.F.R. § 30.101(b) provides that a survivor may withdraw his or her claim by so requesting in writing to the Office of Workers' Compensation Programs (OWCP) at any time before OWCP determines eligibility for benefits. The regulations contain no provision allowing a survivor to withdraw a claim previously filed by an employee.

The basic rules for obtaining medical care, 20 C.F.R. § 30.400(a), provide that a covered employee who fits into at least one of the compensable claim categories is entitled to receive all medical services, appliances or supplies that a qualified physician prescribes or recommends and that OWCP considers necessary to treat his or her occupational illness, retroactive to the date the employee filed a claim for benefits under the EEOICPA. When a survivor receives payment, OWCP will pay for such treatment if the covered employee died before the claim was paid.

Because your husband has been found to fit into the compensable claim category of "covered employee with cancer," and because you have been determined to be entitled to payment of compensation on that basis, entitlement to payment for treatment for the claimed skin cancers is an obligation of the OWCP if they are found to be occupational illnesses. In order to determine if payment for treatment of the skin cancers claimed by the employee is in order, a decision must be made as to whether or not those cancers are occupational illnesses.

For the reasons discussed above, your case is remanded to the district office for any necessary development, to include dose reconstruction as described in 42 U.S.C. § 7384n(c), and issuance of a new recommended decision as to whether or not any or all of the claimed skin cancers are occupational illnesses, and, if so, whether or not OWCP will pay for such treatment.

Cleveland, OH

Tracy Smart

Acting FAB Manager

Final Adjudication Branch

Covered Employment

Atomic weapons employers

EEOICPA Fin. Dec. No. 2158-2003 (Dep't of Labor, July 11, 2008)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch (FAB) concerning your claim for survivor benefits under Part B of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, your claim for survivor benefits based on acute myelocytic leukemia (acute myelomonocytic leukemia) is denied.

STATEMENT OF THE CASE

On August 7, 2001, you filed a claim for survivor benefits under Part B of EEOICPA, Form EE-2, as the spouse of **[Employee]**, hereinafter referred to as the employee. On July 31, 2002, you also filed a claim for assistance under Part D of EEOICPA with the Department of Energy (DOE). You identified acute myelocytic leukemia (acute myelomonocytic leukemia) as the medical condition of the employee resulting from his employment at an atomic weapons facility.

On Form EE-3 you indicated that the employee worked as a laboratory technician for Lucius Pitkin at the Allied Chemical facility in Metropolis, Illinois from July 1978 to July 1985. The Allied Chemical Corporation Plant in Metropolis, Illinois is a covered atomic weapons employer (AWE) facility from 1959 to 1976 and covered for residual radiation contamination from 1977 to July 2006.[1]

On February 28, 2003, DOE denied your claim for assistance under Part D, because the employee's work at the Allied Chemical Corporation Plant was at an AWE rather than a DOE facility. On April 14, 2003, the FAB issued a final decision denying your claim for survivor benefits under Part B because the employee did not have covered employment under the EEOICPA. The FAB found that the employee's period of employment at the Allied Chemical Corporation Plant was outside the covered years for that facility.

Thereafter, on October 28, 2004, Congress repealed Part D of EEOICPA and enacted new Part E. Because of this, DEEOIC proceeded to adjudicate your Part D claim under Part E and on May 17, 2006, the FAB issued a final decision denying your claim for survivor benefits under Part E because the employee was not employed by a DOE contractor at a DOE facility. As part of the 2004 amendments to EEOICPA, Congress amended the definition of an "atomic weapons employee" to include employees of subsequent owners or operators of an AWE facility beyond the time period during which weapons-related work occurred, provided that the National Institute for Occupational Safety and Health (NIOSH) had found that there was the potential for residual radiation contamination at the facility. NIOSH subsequently determined that the Allied Chemical Corporation facility had the potential for residual radiation contamination from 1977 to July 2006. This period of residual contamination resulted in the covered period at this particular facility being expanded.

On June 5, 2007, the Director of the Division of Energy Employees Occupational Illness Compensation

(DEEOIC) issued a Director's Order vacating the FAB's April 14, 2003 final decision and reopening your claim for benefits under Part B. This order instructed the district office to determine if the employee's employment by Lucius Pitkin at the Allied Chemical Corporation facility qualified as employment by a "subsequent owner or operator" at that AWE facility under Part B of EEOICPA. As part of this further development, the district office received a June 20, 2007 letter from I. Boyarsky, the controller of Lucius Pitkin, Inc., in which he indicated that Lucius Pitkin, Inc. was hired as an independent observer at the facility to weigh and sample ore and was never a co-owner nor operator of the Allied Chemical Corporation facility.

On July 17, 2007, the district office issued a recommended decision to deny your claim for benefits under Part B because the employee was not employed by Allied Chemical or by a subsequent owner or operator of the Allied Chemical Corporation facility, and thus his employment was not covered under EEOICPA. On August 6, 2007, you objected to the recommended decision and attached a copy of the Director's Order. On August 20, 2007, the FAB issued a remand order returning your claim to the district office with instructions to refer the case file to the Branch of Policies, Regulations and Procedures (BPRP) within DEEOIC for a determination on whether the employee's work with Lucius Pitkin, Inc. at the Allied Chemical Corporation facility qualified him as an atomic weapons employee under Part B of EEOICPA. Pursuant to that remand order, the district office referred your case file to the BPRP. On November 26, 2007, the BPRP determined that the employee's employment with Lucius Pitkin, Inc. at the Allied Chemical Corporation facility did not qualify him as an atomic weapons employee because Lucius Pitkin, Inc. was not a subsequent owner or operator of that AWE facility.

On December 13, 2007, the district office issued another recommended decision to deny your claim for survivor benefits under Part B of EEOICPA, on the ground that the employee's employment by Lucius Pitkin, Inc. at the Allied Chemical Corporation facility did not qualify him as an "atomic weapons employee," as that term is defined in EEOICPA. Accompanying the recommended decision was a letter explaining your rights and responsibilities in regard to the recommended decision.

OBJECTIONS

On January 14, 2008, the FAB received your January 8, 2008 letter objecting to the recommended decision and requesting a hearing to air your objections, which was held on March 19, 2008 in Mount Vernon , Illinois. You and Virginia Griffey were present at this hearing and presented testimony. Your objections to the recommended decision are summarized below:

Objection No. 1: You indicated that the employee worked for Lucius Pitkin, Inc. but worked at the Allied Chemical Corporation facility, and because he was checking the moisture content of the dry uranium, which was an activity that was vital to the operation of the plant, then his employment should be covered because he should be considered an operator of the facility.

Objection No. 2: You indicated that Allied Chemical supplied the employees of Lucius Pitkin, Inc. with clothing, gloves, hard-hats and shoes, laundered their clothing and provided and maintained the respirators used by both Allied Chemical and Lucius Pitkin, Inc. employees.

Objection No. 3: You indicated that the employee's doctors advised that the employee's cancer was caused by him handling raw uranium.

Objection No. 4: You indicated that it is unfair to compensate employees of the United States

Enrichment Corporation (USEC) who worked at the Paducah Gaseous Diffusion Plant or Allied Chemical Company employees who worked in the same building as the employee, had the same exposures as the employee and who also contracted cancer, but not to compensate the employee merely because he was not working for a covered employer.

Your first objection concerns whether the employee's work duties qualified him as an operator of this facility. The EEOICPA provides that an "atomic weapons employee" includes an individual who was employed by an AWE during a period when the employer was processing, or producing, for the use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining and milling. It also includes an individual employed by an AWE or subsequent owners or operators of an AWE facility during a period of significant residual radiation contamination outside of the period in which weapons-related production occurred. *See* 42 U.S.C. § 7384l(3).

The period of the employee's employment at this AWE facility is not during the period when weapons-related production occurred; however, it was during the residual radiation period when employees of the AWE, or subsequent owners or operators of the facility, are covered. There is no evidence that the employee was employed by the Allied Chemical Corporation or a subsequent owner or operation of this AWE facility. The employee was working for Lucius Pitkin, Inc. and his duties at the Allied Chemical Corporation facility were performed pursuant to a contract between the Allied Chemical Corporation and Lucius Pitkin, Inc. The controller of Lucius Pitkin, Inc. has confirmed that Lucius Pitkin, Inc. was not an operator or subsequent owner of the Allied Chemical Corporation facility. The determination of whether a contractor of an AWE is an owner or operator of an AWE facility is not based on the duties performed by an individual employee, but rather by the nature of the contract. The evidence of record does not establish that the employee worked for an AWE, a subsequent owner of the AWE facility or for a company that was contracted to operate this facility.

Your second objection concerns whether the employee should be considered an employee of Allied Chemical Corporation for purposes of EEOICPA. When it enacted EEOICPA, Congress provided specific criteria that must be met to establish that an individual qualifies as an "atomic weapons employee" in § 7384l(3). Those criteria do not include employees of contractors or subcontractors of an AWE, employees of wholly-owned subsidiaries of an AWE, or employees who are considered "shared," "on loan," "borrowed servants," or "statutory employees." *See* EEOICPA Fin. Dec. No. 4894-2004 (Dep't of Labor, March 8, 2005); EEOICPA Fin. Dec. No. 366-2002 (Dep't of Labor, June 3, 2003); EEOICPA Fin. Dec. No. 13183-2003 (Dep't of Labor, October 14, 2003). The evidence of record simply does not establish that the employee worked for an AWE. The Department of Labor must administer EEOICPA as enacted by Congress and cannot alter the necessary criteria to qualify as an atomic weapons employee under EEOICPA.

Your third objection concerns the cause of the employee's cancer. EEOICPA provides benefits for specific occupational illnesses like cancer for an employee (or his survivors) who is considered to be a "covered employee with cancer." *See* 42 U.S.C. §§ 7384l(9), 7384n. The cause of an employee's cancer does not determine if that employee has covered employment. The evidence of record does not establish that the employee had any employment that was covered under EEOICPA.

Your fourth objection concerns the distinguishing criteria set out by Congress that are prerequisites to qualify for benefits based on cancer for atomic weapons employees, DOE employees working at covered DOE facilities, or DOE contractor or subcontractor employees working at covered facilities under EEOICPA. The Department of Labor has no authority to alter those statutory criteria. EEOICPA

regulations place the burden of establishing covered employment upon the claimant. You have not submitted evidence that establishes that the employee has covered employment under EEOICPA.

After reviewing the evidence of record in your claim file forwarded by the district office, I hereby make the following:

FINDINGS OF FACT

1. You filed a claim for survivor benefits under Part B of EEOICPA on August 7, 2001 as the spouse of the employee.

2. You alleged that the employee worked for Lucius Pitkin, Inc. at the Allied Chemical Corporation facility from July 1978 to July 1985.

3. The Allied Chemical Corporation facility is an AWE facility from 1959 to 1976, and also covered for residual radiation contamination from 1977 to July 2006.

4. Lucius Pitkin, Inc. is not an AWE, a subsequent owner of the Allied Chemical Corporation facility, or a subsequent operator of that AWE facility.

5. You have not submitted evidence that the employee was employed by an AWE at an AWE facility, or that the employee worked for DOE or for a DOE contractor or subcontractor at a DOE facility.

Based upon these facts, the undersigned makes the following:

CONCLUSIONS OF LAW

Part B of EEOICPA provides benefits to covered employees working at covered facilities who sustain an "occupational illness" as a result of exposure during the performance of duty at those facilities. *See* 42 U.S.C. §§ 7384l(1), 7384n and 7384s. In order to claim benefits under Part B of EEOICPA for cancer, the evidence must establish that the employee was either a DOE employee or a DOE contractor employee working at a DOE facility, or an atomic weapons employee working at an AWE facility who contracted cancer due to exposure to radiation in the performance of duty. *See* 42 U.S.C. §§ 7384l(9), 7384n and 7384s.

You claimed that the employee contracted cancer as a result of his employment at the Allied Chemical Corporation facility. However, EEOICPA sets out specific criteria for an employee to qualify as an "atomic weapons employee." An "atomic weapons employee" is defined an individual who was employed by an AWE during a period when the employer was processing or producing, for the use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining and milling. It is also defined as an individual employed by an AWE or a subsequent owner or operator of an AWE facility during a period of significant residual radiation contamination outside of the period in which weapons-related production occurred. 42 U.S.C. § 7384l(3). Further, EEOICPA defines an "an atomic weapons employer" as an entity (other than the United States) that processed or produced for use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining and milling, and is designated by the Secretary of Energy as an AWE for the purposes of EEOICPA. 42 U.S.C. §

7384l(4). The term “atomic weapons employer facility” means a facility owned by an AWE that is or was used to process or produce, for use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining or milling. 42 U.S.C. § 7384l(5).

A determination regarding your entitlement to benefits must be based on the totality of the evidence. You indicated that the employee worked at the Allied Chemical Corporation facility. That facility is a covered “atomic weapons employer facility” as defined by 42 U.S.C. § 7384l(5). You claimed that the employee worked for Lucius Pitkin, Inc. However, Lucius Pitkin, Inc is not an AWE because it has not been designated as such by the Secretary of Energy, nor is it a subsequent owner or operator of the Allied Chemical Corporation facility. Therefore, the employee does not qualify as an “atomic weapons employee” because he was not employed by an AWE during a period when that employer was processing or producing, for the use by the U.S., material that emitted radiation and was used in the production of an atomic weapon, nor was he employed by a subsequent owner or operator of the AWE facility during a period of residual radiation contamination. I have reviewed the evidence of record and it does not establish that the employee has employment covered under EEOICPA.

Section 30.110(c) of the EEOICPA regulations provides that any claim that does not meet all of the criteria for at least one of the categories including a “covered Part B employee” (as defined in § 30.5(p)) set forth in the regulations must be denied. *See* 20 C.F.R. §§ 30.5(p), 30.110(b), and 30.110(c). As you have not established that the employee is a covered Part B employee (because the evidence does not establish that the employee worked for an AWE), your claim for survivor benefits based on the employee’s acute myelocytic leukemia (acute myelomonocytic leukemia) under Part B of EEOICPA must be denied.

Washington D.C.

William J. Elsenbrock

Hearing Representative

Final Adjudication Branch

[1] See DOE’s Office of Health, Safety & Security facility list on the agency website at: http://www.hss.energy.gov/healthsafety/FWSP/advocacy/faclist/showfacility.cfm. (retrieved July 11, 2008).

EEOICPA Fin. Dec. No. 4898-2004 (Dep’t of Labor, March 8, 2005)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This decision of the Final Adjudication Branch (FAB) concerns your claim for compensation under Part B of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended, 42 U.S.C. §7384 *et seq.* (EEOICPA). For the reasons stated below, your claim for benefits is denied.

STATEMENT OF THE CASE

On August 9, 2001, you filed a claim for benefits under Part B of the EEOICPA as the surviving spouse of **[Employee]** and identified malignant melanoma as the diagnosed condition being claimed. You

submitted an Employment History Form (EE-3) on which you stated that your husband was employed by Allegheny Ludlow Steel from March 27, 1966 to June 1, 1985, by Nuclear Materials and Equipment Corp. in February 1966, by Wilson Rearich Hauling from 1963 to 1964 and by MESLA Machine Co. (you did not provide dates or the name of a covered facility in regards to this employment). You stated that you did not know if your husband wore a dosimetry badge while employed by Nuclear Materials and Equipment Corp. and you stated that your husband did not wear a dosimetry badge while employed by the other employers. As medical evidence you submitted the following:

A copy of Dr. Harry Gerstbrein's final autopsy report in which he diagnosed your husband with "malignant melanoma arising in right middle lobe of lung, metastatic melanoma to upper lobes of both lungs, and metastatic melanoma to terminal ileum and perirectal area (history)."

A copy of Dr. Allen T. Lefor's July 4, 1985 hospital admission report in which he states your husband was diagnosed with malignant melanoma by biopsy on May 24, 1985.

You submitted a copy of your marriage certificate which shows that you were married to **[Employee]** on October 27, 1964 and a copy of your husband's death certificate which shows that he died on January 16, 1986. As evidence of employment, you submitted a copy of your husband's 1966 W2 from Nuclear Decontamination Corp. On February 19, 2002, Department of Energy (DOE) representative Roger Anders advised the district office, via Form EE-5, that the DOE did not have employment information regarding your husband. On August 30, 2003, the district office obtained a copy of your husband's Social Security Administration statement of earnings which indicate that he received earnings from Nuclear Decontamination Corp. in the first quarter of 1966 and earnings from Allegheny Ludlum Corporation from 1979 to 1985.

Based upon the evidence of record, the district office issued a recommended decision on June 30, 2004, in which it concluded that you did not establish that **[Employee]** was a covered employee under 42 U.S.C. § 7384l(1), as he was not a DOE employee or contractor employee at a DOE facility, nor an atomic weapons employee at an atomic weapons employer facility, as those facilities are defined in 42 U.S.C. §§ 7384l(4), 7384l(11) and 7384l(12), respectively. It was the district office's recommendation that your claim be denied based on its conclusions.

OBJECTIONS

On August 13, 2004, you wrote to the FAB, advised that you disagreed with the recommended decision and requested a hearing. You stated in your letter that it was your position that Nuclear Decontamination Corp. was a covered facility because it merged with Nuclear Materials and Equipment Corp. on May 13, 1974. You stated that the merger was more than sufficient to show that "the two companies were initially operating out of the same Apollo facility and eventually became one and the same." You also stated that at the time your husband began work at Nuclear Decontamination Corp. the same person was doing the hiring for both companies.

A hearing was held on November 10, 2004 in Pittsburgh, PA. You testified at the hearing that Nuclear Decontamination Corp. and Nuclear Material Equipment Corp. (NUMEC) had the same address in Apollo, PA, worked on the same parcel of land, and used the same employment office. Hearing Transcript (HT)-8. You also testified that the merger documents between Decontamination Corp. and NUMEC show that the same person owned both companies because the same person signed as president of both companies in the merger documents. HT-10. You submitted the following exhibits as

evidence to support your claim:

Exhibit 1 Commonwealth of Pennsylvania Department of State Corporation Bureau Articles of Merger which document the April 26, 1974 merger between NUMEC and Nuclear Decontamination Corp., June 23, 1959 Nuclear Decontamination Corp. Articles of Incorporation and Certificate of Incorporation.

Exhibit 2 Commonwealth of Pennsylvania Department of State Corporation Bureau Articles of Merger which document the January 9, 1975 merger between NUMEC and the Babcock & Wilcox Company, January 9, 1975 NUMEC Certificate of Withdrawal from doing business in PA, April 12, 1967 NUMEC application for Certificate of Authority, and April 12, 1967 Certificate of Authority issued to NUMEC to transact business in PA.

Exhibit 3 Copy of Pennsylvania Department of State microfilm document showing that Nuclear Decontamination Corp. merged with NUMEC.

The merger documents you submitted indicate that Nuclear Decontamination Corp. (NDC) was a wholly-owned subsidiary of NUMEC. (The merger documents show that at the time of the merger, NUMEC owned all of NDC's outstanding shares of Common Stock.) Wholly-owned subsidiaries are companies in their own right that share an affiliation with a parent company, but operate as a separate functional entity and provide for employees in accordance with their own distinct corporate administrative policies and regulations. Due to the separate and distinct nature of a wholly-owned subsidiary and the strict regulatory and statutory definition of an Atomic Weapons Employer (AWE) facility, a wholly owned subsidiary of a DOE-designated AWE that is not itself designated as an AWE by the DOE can not be considered an AWE.[1]

After considering the written record of the claim, your letter of objection and the testimony presented at the hearing, the FAB hereby makes the following:

FINDINGS OF FACT

1. You filed a claim for survivor benefits under Part B of the EEOICPA on August 9, 2001.

2. Your husband was employed at Nuclear Decontamination Corp. in the first quarter of 1966 and at Allegheny Ludlum Corporation from 1979 to 1985.

3. Your husband was employed at Allegheny Ludlum Steel subsequent to the period it was a designated covered atomic weapons employer. In its June 2004 *Report on Residual Radioactive and Beryllium Contamination at Atomic Weapons Employer Facilities and Beryllium Vendor Facilities*, the National Institute for Occupational Safety and Health (NIOSH) determined that there was little potential for significant residual contamination outside of the period in which weapons-related production occurred.

4. Nuclear Decontamination Corp. is not a covered facility under the EEOICPA. While NDC may have been a wholly-owned subsidiary of NUMEC, it was a separate, distinct corporation at the time of your husband's employment.

5. Your husband was diagnosed with malignant melanoma on May 24, 1985.

6. Your husband died on January 16, 1986 due to malignant melanoma.

7. You are the surviving spouse of **[Employee]**.

Based on the above-noted findings of fact in this claim, the FAB hereby makes the following:

CONCLUSIONS OF LAW

Section 30.310(a) of the EEOICPA implementing regulations provide that, "Within 60 days from the date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision, including the Health and Human Service's reconstruction of the radiation dose to which the employee was exposed (if any), and whether a hearing is desired." 20 C.F.R. § 30.310(a). At your request a hearing was held on November 10, 2004.

Part B of the Energy Employees Occupational Illness Compensation Program Act was established to provide compensation benefits to covered employees (or their eligible survivors) who have been diagnosed with designated occupational illnesses incurred as a result of their exposure to radiation, beryllium, or silica, while in the performance of duty for Department of Energy and certain of its vendors, contractors and subcontractors. "Occupational illness" is defined in § 7384l(15) of the EEOICPA, as a covered beryllium illness, cancer referred to in section 7384l(9)(B)[2] of this title, specified cancer, or chronic silicosis, as the case may. 42 U.S.C. §§ 7384l(15), 7384l(9)(B). To be eligible for compensation for cancer under Part B of the EEOICPA, an employee either must be: a DOE employee, a DOE contractor employee or an atomic weapons employee who contracted cancer (that has been determined pursuant to guidelines promulgated by Health and Human Services, "to be at least as like as not related to such employment"), after beginning such employment. *See* 42 U.S.C. § 7384l(9)(2); 20 C.F.R. § 30.210.

The evidence of record establishes that your husband was employed by Allegheny-Ludlum Steel from 1979 to 1985. Allegheny-Ludlum Steel was a covered Atomic Weapons Employer from 1950 to 1952. [3] Pursuant to 42 U.S.C. § 7384l(3), an "atomic weapons employee" is defined as:

> (A) An individual employed by an atomic weapons employer during a period when the employer was processing or producing, for the use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining and milling.
> (B) An individual employed—
> (i) at a facility with respect to which the National Institute for Occupational Safety and Health, in its report dated October 2003 and titled "Report on Residual Radioactive and Beryllium Contamination at Atomic Weapons Employer Facilities and Beryllium Vendor Facilities", or any update to that report, found that there is a potential for significant residual contamination outside of the period in which weapons-related production occurred;
> (ii) by an atomic weapons employer or subsequent owner or operators of a facility described in clause (i); and
> (iii) during a period, as specified in such report or any update to such report, of potential for significant residual radioactive

contamination at such facility.

The June 2004 NIOSH *Report on Residual Radioactive and Beryllium Contamination at Atomic Weapons Employer Facilities and Beryllium Vendor Facilities*, does not support a period for potential significant residual contamination at Allegheny Ludlum Steel subsequent to the covered period; therefore your husband's employment at that facility is not covered employment under the EEOICPA. Any work performed by NDC for NUMEC during the period your husband was employed, by NDC, would be viewed as work performed by a contractor of a designated AWE.[4] AWE contractor employees are not covered under the EEOICPA. *See* 42 U.S.C. §§ 7384l(1), 7384l(3), 7384l(4) and 7384l(5).

Because you did not submit evidence that establishes your husband was a "covered employee with cancer" as defined at § 7384l(9) of the EEOICPA, your claim for benefits is denied. 42 U.S.C. § 7384l(9).

Washington, DC

Thomasyne L. Hill

Hearing Representative

Final Adjudication Branch

[1] EEOICPA Bulletin No. 04-12 (issued September 16, 2004).

[2] §7384l(9)(B). An individual with cancer specified in subclause (I), (II), or (III) of clause (ii), if and only if that individual is determined to have sustained that cancer in the performance of duty in accordance with section 7384n(b). Clause (ii) references DOE employees, DOE contractor employees and atomic weapons employees who contract cancer after beginning employee at the required facility.

[3] U.S. Department of Energy. *Allegheny-Ludlum Steel*. Time period: 1950-1952. Worker Advocacy Facility List. Available: http://tis.eh.doe.gov/advocacy/faclist/showfacility.cfm. [retrieved November 9, 2004].

[4] EEOICPA Bulletin No. 04-12 (issued September 16, 2004).

EEOICPA Fin. Dec. No. 10033981-2006 (Dep't of Labor, November 27, 2006)

NOTICE OF FINAL DECISION

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

STATEMENT OF THE CASE

On August 1, 2003, you filed a Form EE-2, Claim for Survivor Benefits, and a Request for Review by a Physicians Panel for the brain cancer of your late father, **[Employee]**, hereinafter referred to as "the employee." The death certificate lists the cause of death on July 25, 2001 as malignant brain tumor with metastases. In support of your claim for survivorship, you did not submit a birth certificate. The death certificate indicates that the employee was divorced at the time of death.

On the form EE-3, Employment History, you stated the employee was employed by Gardinier, Inc. and Cargill Fertilizer, Inc. in Bartow, Florida, from 1970 to March 2000. The district office verified employment with Gardinier and Cargill from December 1969 to March 2000. The U.S. Phosphoric Plant Uranium Recovery Unit[1] in Tampa, Florida, was a covered atomic weapons employer from 1951 to 1954 and from 1956 to 1961, prior to the employee's employment there.

On February 9, 2004, the FAB issued a final decision to deny compensation to you under Part B of the Act, because you did not establish covered employment. A request for reopening was denied on June 13, 2005. March 23, 2006, the Jacksonville district office issued a recommended decision concluding that your claim for benefits under Part E of the Act should be denied. The recommended decision was returned by the U.S. Postal Service as undeliverable. The recommended decision was reissued to the correct address on April 13, 2006. The recommended decision informed you that you had sixty days to file any objections, and that period ended on June 12, 2006. You have not filed an objection to the recommended decision. After considering the recommended decision and all the evidence in the case file, the FAB hereby makes the following:

FINDINGS OF FACT

1. You filed a claim for survivor benefits under the Act based on the brain cancer of the employee.

2. You have not submitted evidence to establish you are a child of the employee.

3. Employment at a covered DOE facility has not been verified.

Based on the above-noted findings of fact in this claim, the FAB hereby makes the following:

CONCLUSIONS OF LAW

The implementing regulations provide that within 60 days from the date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision and whether a hearing is desired. 20 C.F.R. § 30.310(a) (2005). If the claimant does not file a written statement that objects to the recommended decision within the period of time allotted or if the claimant waives any objections to the recommended decision, the FAB may issue a decision accepting the recommendation of the district office. 20 C.F.R. § 30.316(a).

The eligibility criteria for claims under Part E of EEOICPA are discussed in § 30.230 of the regulations, which state that "the employee is a Department of Energy contractor employee as defined in § 30.5(w). . . ." 20 C.F.R. § 30.230(a). Section 30.5(w) of the regulations and § 7384l of the Act define a Department of Energy contractor employee to be (1) an individual who is or was in residence at a DOE facility as a researcher for one or more periods aggregating at least 24 months; or (2) an individual who is or was employed at a DOE facility by: (i) an entity that contracted with the DOE to provide management and operating, management and integration, or environmental remediation at the facility; or (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility. 20 C.F.R. § 30.5(w); 42 U.S.C. § 7384l(11).

I have reviewed the evidence of file and the recommended decision of the Jacksonville district office. Based upon a review of the case file materials, there is insufficient evidence to establish employment at

a covered facility during a covered period. Furthermore, employees of atomic weapons employers are not DOE contractor employees.

Since the evidence does not establish that the employee was a Department of Energy contractor employee, you are not entitled to benefits under the Act, and the claim for compensation is denied. 42 U.S.C. §§ 7385s-4(c) and 7385s-3(a).

Jacksonville, FL

Sidne M. Valdivieso, Hearing Representative

Final Adjudication Branch

[1] Other names for the plant were Gardinier, Inc.; Cargill Fertilizer, Inc.; and U.S. Phosphoric Products Division of The Tennessee Corp.

EEOICPA Order No. 20120912-81095-1 (Dep't of Labor, May 30, 2013)

EMPLOYEE: **[Name Deleted]**

CLAIMANT: **[Name Deleted]**

FILE NUMBER: **[Number Deleted]**

DOCKET NUMBER: **20120912-81095-1**

DECISION DATE: **May 30, 2013**

NOTICE OF DENIAL OF

REQUEST FOR RECONSIDERATION

This is the response to the May 9, 2013 request for reconsideration of the April 10, 2013 decision of the Final Adjudication Branch (FAB) on this claim for chronic beryllium disease (CBD) under Part B of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. In that decision, FAB concluded that while the employee worked for the Allied Chemical Corporation from January 15, 1959 to June 29, 1964 at its facility in Metropolis, Illinois, he was nevertheless not entitled to benefits under Part B for CBD because the Allied Chemical Corporation is an Atomic Weapons Employer (AWE), and employees of AWEs are only potentially eligible to receive Part B benefits for radiogenic cancer.

In support of the May 9, 2013 reconsideration request, the employee's representative raised a number of interwoven and somewhat confusing arguments, all of which he raised previously in the adjudication of this claim for CBD. To the extent I can discern what they are, those arguments are as follows:

1. Because the Division of Energy Employees Occupational Illness Compensation (DEEOIC) does not dispute that "operations" on behalf of the Atomic Energy Commission (AEC) and the Energy Research and Development Administration (ERDA) took place at the Metropolis plant, FAB should have concluded that there was a contractual relationship between the AEC, and also ERDA, and the Allied Chemical Corporation such that the Metropolis plant meets the definition of a "DOE facility" set out in § 7384l(12) of EEOICPA.[1]

2. DEEOIC has wrongly refused to acknowledge that there are suggestions that beryllium was present at the Allied Chemical Corporation's Metropolis plant.

3. DEEOIC has wrongly refused to recognize the presence of uranium "daughter" products that were associated with the processing work that occurred at the Allied Chemical Corporation's Metropolis worksite.

4. The Metropolis worksite will be designated for remediation under the Formerly Utilized Sites Remedial Action Program (FUSRAP), and therefore workers employed there doing clean-up will be covered under Part E.

5. DEEOIC failed to follow prior FAB decisions regarding atomic weapons employees, as well as EEOICPA Circular No. 08-05 (issued May 2, 2008) on the status of the Office of Scientific and Technical Information (OSTI) worksite in Oak Ridge, Tennessee as a DOE facility and EEOICPA Bulletin No. 07-15 (issued May 9, 2007) on the class of Allied Chemical Corporation employees added to the Special Exposure Cohort (SEC), in its adjudication of the employee's Part B claim for CBD.

6. Employees of a contractor that had allegedly concealed transuranics at the Metropolis worksite from the NRC were hired by DEEOIC to compile both Site Exposure Matrices (SEM) information for the Metropolis worksite, as well as for the site profile used by NIOSH to perform dose reconstructions for workers at that same worksite, and this created an impermissible conflict of interest.

In support of the above arguments on reconsideration, the representative submitted additional copies of the following evidence that was already in the employee's file: (1) copies of 5 U.S.C. §§ 702 and 706; (2) a report of a June 22, 2006 public meeting that NIOSH held on the site profile used for performing dose reconstructions for workers at the Metropolis worksite; (3) a partial copy (provenance unknown) of an agreement by which the Allied Chemical Corporation undertook to covert natural uranium concentrates owned by an unidentified entity into uranium hexafluoride[2]; (4) a partial manifest (provenance also unknown) purporting to list chemicals that the Allied Chemical Corporation stored at an unspecified location for DOE; (5) extracts from EEOICPA Circular No. 08-05; (6) extracts from EEOICPA Bulletin No. 07-15; (7) extracts of general information from the FUSRAP website; (8) extracts from November 5, 2012 DOE memoranda on allegations of conflicts of interest among contractors performing remediation work for DOE at the Portsmouth Gaseous Diffusion Plant and at the Oak Ridge Reservation; (9) a copy of a September 1, 2010 medical report already in the case file; (10) a copy of the employee's August 13, 2012 statement already in the case file; and (11) extracts from EEOICPA Fin. Dec. No. 10043931-2006 (Dep't of Labor, March 10, 2008). In addition, the employee's representative also submitted new evidence consisting of extracts from EEOICPA Fin Dec. No. 2158-2003 (Dep't of Labor, July 11, 2008), EEOICPA Fin. Dec. No. 25833-2004 (Dep't of Labor, October 20, 2004), and EEOICPA Fin. Dec. No. 55211-2004 (Dep't of Labor, September 16, 2004).

After careful consideration of the above arguments and evidence, and for the reasons set forth below,

the employee's request for reconsideration is hereby denied.

With regard to the first argument, the benefits available under Part B of EEOICPA are only payable to claimants who meet their burden of proof to satisfy the eligibility requirements set out in the statute. In this Part B claim for CBD, the employee alleges that he qualifies as a DOE contractor employee because he worked at the Allied Chemical Corporation's Metropolis plant, which he asserts fits within the statutory definition of a DOE facility set out in § 7384l(12). However, even though DEEOIC does not dispute that "operations" occurred at the Metropolis plant, since there is ample evidence showing that the Allied Chemical Corporation processed natural uranium concentrates into uranium hexafluoride for the AEC at that location, first under a processing contract with the AEC that ran from 1959 through June 30, 1964[3], and thereafter for both the AEC and ERDA on an "as needed" basis through 1976[4], it is not enough to merely establish that "operations" occurred at a worksite. The representative contends that the Allied Chemical Corporation's Metropolis plant meets the statutory definition of a DOE facility because DOE or one of its predecessor agencies "entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services" as required by § 7384l(12)(B)(ii). However, FAB concludes that none of the submissions from the representative contained any persuasive arguments or factual evidence in support of the assertion that the contractual relationship between the Allied Chemical Corporation and the AEC/ERDA satisfies the statutory requirements of § 7384l(12)(B)(ii) of EEOICPA. Therefore, the employee has not met his burden of proof to establish this crucial point.

In response to the second argument listed above, the question of whether or not beryllium was present at the Metropolis plant is irrelevant to the employee's claim for CBD under Part B, because atomic weapons employees are not eligible for benefits due to that particular "occupational illness." Under § 7384l(7) of EEOICPA, the term "covered beryllium employee" only refers to employees who worked at either DOE facilities or beryllium vendor facilities, while the employee here worked at an AWE facility.

As for the third argument, this concerns the amount of radiation to which the employee was exposed while working at the Allied Chemical Corporation's Metropolis plant, and that question is within the exclusive jurisdiction of the National Institute for Occupational Safety and Health (NIOSH), not DEEOIC, as noted in 20 C.F.R. § 30.2(b) (2013). In addition, the radiation to which he was exposed is irrelevant to his Part B claim for CBD, which was the only claim of the employee that was addressed by FAB on April 10, 2013.

With respect to the fourth argument, the assertion that the Allied Chemical Corporation's Metropolis plant will be designated for remediation is based on a belief that such designation will be made *in the future*. However, as of the present time, the Metropolis plant has *not* been so designated under FUSRAP.[5] Furthermore, even if the Metropolis plant *had* been designated for remediation under FUSRAP, such designation would be irrelevant to the employee's Part B claim for CBD.

As for the fifth argument set out above, the FAB decisions in question are irrelevant to this CBD claim because they provide no support for the argument that the Metropolis plant is a DOE facility. Also, the reason why DEEOIC determined in EEOICPA Circular No. 08-05 that OSTI was a DOE facility was based, in part, on the fact that DOE and its predecessor agencies had a "proprietary interest" in that worksite under 42 U.S.C. § 7384l(12)(B)(i), and neither DOE nor any of its predecessor agencies has ever had such an interest in the Metropolis plant, which has always been owned by the Allied Chemical Corporation and its corporate successors. In addition, EEOICPA Bulletin No. 07-15 only concerns the

class of Allied Chemical Corporation employees, all of whom are atomic weapons employees, that was added to the SEC and does not support the employee's belief that the Metropolis plant is a DOE facility.

And finally, with respect to the sixth argument, DEEOIC did *not* hire the contractors that prepared the site profile used by NIOSH to perform dose reconstructions for workers at the Allied Chemical Corporation's Metropolis plant, NIOSH did. Also, there is no toxic substance exposure profile for the Metropolis plant in SEM because it is an AWE facility, and SEM only contains profiles of worksites that are either DOE facilities or uranium mines and mills covered under Part E. And more importantly, this argument is irrelevant to both the employee's Part B claim and his representative's assertion that the Metropolis plant satisfies the statutory definition of a DOE facility.

Therefore, I must deny the employee's request for reconsideration because he has not submitted any arguments or evidence that would justify reconsideration of the April 10, 2013 final decision on his Part B claim for CBD. That decision of FAB is therefore final on the date of issuance of this denial of the request for reconsideration. *See* 20 C.F.R. § 30.319(c)(2).

Washington, DC

David F. Howell

Hearing Representative

Final Adjudication Branch

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[1] The representative apparently believes that the Nuclear Regulatory Commission (NRC) is a predecessor agency of DOE. This is incorrect, since the NRC and DOE were created simultaneously when ERDA was split into two agencies on October 1, 1977 by the "Department of Energy Organization Act," Pub. L. 95-91, 91 Stat. 565.

[2] While the representative may believe that this agreement is a contract between DOE (or one of its predecessor agencies) and the Allied Chemical Corporation, the language used in the part of the agreement in the file suggests that it was actually an example of the type of agreement that the Allied Chemical Corporation entered into to process uranium concentrates owned by private nuclear power plants. These agreements became possible following passage of the Private Ownership of Special Nuclear Materials Act, Pub. L. No. 88-489, 73 Stat. 602 (August 26, 1964). *See* 42 U.S.C. § 2011 note. *See also* Opinion No. B-207463 (Comp. Gen. December 27, 1984), 1984 WL 47145.

[3] *See* http://www.converdyn.com/metropolis/mtwhistory.html and http://www.Honeywell-metropolisworks.com/about-metropolis.php (both sites last visited on March 26, 2013). *See also* "Annual Report to Congress of the Atomic Energy Commission for 1964" (January 1965), p. 48.

[4] *E.g.*, "Annual Report to Congress of the Atomic Energy Commission for 1959" (January 1960), p. 63; "Annual Report to Congress of the Atomic Energy Commission for 1964" (January 1965), p. 48; "Annual Report to Congress of the Atomic Energy Commission for 1965" (January 1966), p. 37; "Annual Report to Congress of the Atomic Energy Commission for

1966" (January 1967), p. 362; "Annual Report to Congress of the Atomic Energy Commission for 1967" (January 1968), p. 274.

[5] A comprehensive listing of all covered worksites designated for remediation under FUSRAP can be found at the following DOE website: http://energy.gov/lm/sites/lm-sites/considered-sites (last visited May 21, 2013). A review of the website reveals that the Allied Chemical Corporation's Metropolis plant is not listed as a covered worksite under FUSRAP.

EEOICPA Fin. Dec. No. 20121127-84623-1 (Dep't of Labor, April 30, 2013)

EMPLOYEE: **[Name Deleted]**

CLAIMANT: **[Name Deleted]**

FILE NUMBER: **[Number Deleted]**

DOCKET NUMBER: **20121127-84623-1**

DECISION DATE: **April 30, 2013**

NOTICE OF FINAL DECISION

FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch (FAB) concerning the above-noted claim for benefits under Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq.* For the reasons set forth below, the claim for liver cancer, a liver transplant, liver disease, diabetes and hypertension under Part E is hereby denied.

STATEMENT OF THE CASE

On April 30, 2010, the claimant filed a Form EE-1, claiming benefits under Part B of EEOICPA for liver cancer. In support of that claim, the claimant submitted an employment history stating that he worked at the Allied Chemical Corporation's worksite in Metropolis, Illinois, beginning on February 16, 2004. The Metropolis worksite has been designated as an Atomic Weapons Employer (AWE) facility by the Department of Energy (DOE), for the covered period of 1959 through 1976, with a period of residual radioactive contamination of 1977 to March 1, 2011.[1] This claimed employment was accepted by the Division of Energy Employees Occupational Illness Compensation (DEEOIC) as factual through at least May 22, 2010, which is the date that the claimant's employer verified he was still employed.

During the adjudication of the claimant's Part B claim, which included a referral to the National Institute for Occupational Safety and Health (NIOSH) for a radiation dose reconstruction, his

authorized representative submitted a facsimile on March 26, 2011 in which he contended that DEEOIC should either designate the Metropolis worksite as a DOE facility, or in the alternative, that it should find that the corporate successor to the Allied Chemical Corporation—Honeywell International—was a subcontractor to the DOE contractor at the Paducah Gaseous Diffusion Plant, and also award the claimant benefits under Part E of EEOICPA. The representative's arguments were considered and rejected in an April 12, 2011 memorandum from DEEOIC's Policy Branch, which concluded that there was no evidence in support of either contention, after which FAB issued an April 14, 2011 final decision denying the claimant's Part B claim. FAB's denial of the claimant's Part B claim was based on NIOSH's dose reconstruction, and the finding that it was not "at least as likely as not" (a 50% or greater threshold for compensability) that his liver cancer was due to the radiation doses he had received while working at the Allied Chemical Corporation's Metropolis worksite. FAB did not, however, make any determination on the claimant's eligibility under Part E of EEOICPA it its April 14, 2011 final decision.

By facsimile dated May 14, 2011, the representative requested reconsideration of FAB's April 14, 2011 final decision and repeated his earlier arguments in support of his contention that the Metropolis worksite should be determined to meet the statutory definition of a DOE facility set out in § 7384l(12) of EEOICPA. However, FAB denied this request on June 21, 2011, on the ground that the April 14, 2011 final decision only addressed the claimant's Part B claim, and therefore his authorized representative's contentions regarding his eligibility under Part E were irrelevant to that determination.

By letter dated October 2, 2012, the Cleveland district office of DEEOIC acknowledged that the claimant's authorized representative had made a claim for benefits under Part E of EEOICPA on his behalf during the adjudication of his Part B claim, and asked the claimant to submit another Form EE-1 so it could properly develop his Part E claim. As part of this letter, the district office reminded him of the following:

As you are also aware, the evidence submitted by your authorized representative in regard to changing the designation of the Allied Chemical facility to a DOE facility was submitted to [DEEOIC's Policy Branch]. The policy branch evaluated the evidence presented and determined that the Allied Chemical Plant in Metropolis, IL does not meet the definition of a DOE facility and cannot be considered as such for administration of the EEOICPA.

The district office enclosed a copy of the Policy Branch's April 12, 2011 determination with its October 2, 2012 letter, and informed the claimant that it was his burden of proof to establish that he had covered employment at a DOE facility in support of his claim for benefits under Part E of EEOICPA.

On October 19, 2012, the claimant filed the requested Form EE-1, in which he claimed benefits under Part E for liver cancer, a liver transplant, liver disease, diabetes and hypertension due to his verified employment at the Metropolis worksite. In a development letter dated October 24, 2012, the district office repeated the substance of its October 2, 2012 letter, and asked again that he submit evidence that could support designating the Metropolis worksite as a DOE facility.

No new evidence was received in response to the October 24, 2012 letters. Thus, on November 27, 2012, the Cleveland district office issued a recommended decision to deny the claimant's Part E claim, on the ground that the evidence of record failed to establish that he had worked at a DOE facility. The claimant's representative thereafter submitted a timely facsimile in which he objected to the November 27, 2012 recommended decision and requested an oral hearing, which was held in Paducah, Kentucky, on January 16, 2013.

OBJECTIONS

In his December 4, 2012 facsimile objecting to the recommendation to deny the claimant's Part E claim, the representative made the following five arguments (which are each followed by a response):

1. DEEOIC has wrongly refused to recognize the presence of uranium "daughter" products associated with the processing work that occurred at the Allied Chemical Corporation's Metropolis worksite. **RESPONSE:** This argument involves the amount of radiation to which the claimant was exposed, and this issue is within the exclusive jurisdiction of NIOSH, not DEEOIC, as noted in 20 C.F.R. § 30.2(b) (2013).
2. The Metropolis worksite is a DOE facility because "operations" on behalf of DOE and its predecessor agencies took place there. **RESPONSE:** While DEEOIC does not dispute that "operations" took place at the worksite, this fact alone is insufficient to support the requested determination that the Metropolis plant is a DOE facility, as that statutory term is defined in § 7384l(12) of EEOICPA.
3. DEEOIC determined that the Office of Scientific and Technical Information (OSTI) worksite in Oak Ridge, Tennessee, was a DOE facility when a Part E claim was filed by a worker at that location, and it should do the same in connection with the Allied Chemical Corporation's Metropolis worksite. **RESPONSE:** The determination by DEEOIC that OSTI was a DOE facility was based, in part, on the fact that DOE and its predecessor agencies had a "proprietary interest" in that worksite under 42 U.S.C. § 7384l(12)(B)(i), and neither DOE nor any of its predecessor agencies has ever had such an interest in the Metropolis worksite, which has always been owned by the Allied Chemical Corporation and its corporate successors.
4. The Metropolis worksite was designated for remediation under the Formerly Utilized Sites Remedial Action Program (FUSRAP), and therefore workers employed there doing clean-up are covered under Part E. **RESPONSE:** This assertion is not correct, because the Metropolis worksite has *not* been designated for remediation under FUSRAP.[2]
5. Employees of a contractor that had allegedly concealed transuranics at the Metropolis worksite from the Nuclear Regulatory Commission were hired by DEEOIC to compile both Site Exposure Matrices (SEM) information for the Metropolis worksite, as well as for the site profile used by NIOSH to perform dose reconstructions for workers at that same worksite, and this created an impermissible conflict of interest. **RESPONSE:** DEEOIC did *not* hire the contractors that prepared the site profile used by NIOSH to perform dose reconstructions, NIOSH did. Also, there is no toxic substance exposure profile for the Metropolis worksite in SEM because it is an AWE facility (SEM only contains profiles of worksites that are either DOE facilities or uranium mines and mills covered under Part E). And more importantly, this argument is irrelevant to both the claimant's Part E claim and his belief that the Allied Chemical Corporation's Metropolis worksite satisfies the statutory definition of a DOE facility.

At the January 16, 2013 oral hearing, the claimant, his wife and a former worker at the Paducah Gaseous Diffusion Plant provided testimony in support of the claim. However, this testimony (most of which involved the United States Enrichment Corporation, which has both owned and operated the Paducah Gaseous Diffusion Plant[3] since July 28, 1998, rather than either DOE or the Allied Chemical Corporation) was entirely irrelevant to, and provided no support for, the argument that the Allied Chemical Corporation's Metropolis worksite meets the definition of a DOE facility, because it failed to establish that DOE (or its predecessor agencies) either had a "proprietary interest" in the worksite, or had entered into one of the specific types of contracts that are listed in § 7384l(12)(B)(ii) with an entity at the worksite.

The representative also submitted a "hearing brief" on that date that repeated his prior arguments and included copies of: (1) Executive Order 13179; (2) 5 U.S.C. §§ 702 and 706; (3) a report of a June 22, 2006 public meeting that NIOSH held concerning the site profile for performing dose reconstructions for workers at the Metropolis worksite; (4) a partial copy (provenance unknown) of an agreement by

which the Allied Chemical Corporation undertook to covert natural uranium concentrates owned by an unidentified entity into uranium hexafluoride[4]; (5) a partial manifest (provenance also unknown) purporting to list chemicals that the Allied Chemical Corporation stored at an unspecified location for DOE; (6) extracts from EEOICPA Fin. Dec. No. 10043931-2006 (Dep't of Labor, March 10, 2008); (7) extracts from EEOICPA Circular No. 08-05 (issued May 2, 2008); (8) extracts from EEOICPA Bulletin No. 07-15 (issued May 9, 2007); (9) extracts of general information from the FUSRAP website; (10) extracts from a November 5, 2012 DOE memorandum on allegations of conflicts of interest among contractors performing remediation work for DOE at the Portsmouth Gaseous Diffusion Plant and at the Oak Ridge Reservation; and (11) extracts from multiple documents and databases posted on both DOE and DEEOIC websites relating to SEM, notices published in the *Federal Register*, § 7384 of EEOICPA and the regulations implementing EEOICPA. However, as was the case with his arguments discussed above, the copies submitted as part of the representative's "hearing brief" are entirely irrelevant to the claimant's Part E claim and fail to establish, or even suggest, that the Allied Chemical Corporation's Metropolis worksite meets the statutory definition of a DOE facility.

Following the hearing, the claimant's representative submitted a February 12, 2013 facsimile containing: (1) copies of items already in the case file; (2) a complaint alleging employment discrimination from the former Paducah employee who had testified at the January 13, 2013 oral hearing; (3) emails from that same former Paducah employee; (4) a January 30, 2013 interim response from DEEOIC to a Freedom of Information Act request filed by the representative; (5) additional extracts from the FUSRAP and DEEOIC websites; and (6) factual allegations made by another purported Part E claimant (not the claimant involved in this decision) regarding the work performed at the Allied Chemical Corporation's Metropolis worksite. Once again, however, this evidence has been reviewed and fails to provide any support for the claimant's assertion that the Metropolis worksite is a DOE facility.

And finally on March 4, 2013, the representative sent yet another facsimile; this one forwarded copies of three FAB decisions the representative believed supported the claimant's Part E claim: (1) EEOICPA Fin Dec. No. 2158-2003 (Dep't of Labor, July 11, 2008); (2) EEOICPA Fin. Dec. No. 25833-2004 (Dep't of Labor, October 20, 2004); and (3) EEOICPA Fin. Dec. No. 55211-2004 (Dep't of Labor, September 16, 2004). However, all of these FAB decisions are factually distinguishable from the Part E claim at issue in this final decision and fail to establish that the Allied Chemical Corporation's Metropolis worksite is a DOE facility.

After carefully considering the entirety of the evidence now in the case file, FAB hereby makes the following:

FINDINGS OF FACT

1. The claimant filed a Form EE-1, claiming benefits for multiple alleged conditions under Part E of EEOICPA, on October 19, 2012.

2. The claimant has verified employment at the Allied Chemical Corporation's Metropolis, Illinois, worksite from February 16, 2004 through at least May 22, 2010.

3. The Allied Chemical Corporation's Metropolis worksite has been designated as an AWE facility for the covered period from 1959 through 1976 by DOE. In addition, NIOSH has also identified a period of residual radioactive contamination at the worksite from 1977 through March 1, 2011.

4. While the case file contains evidence establishing that "operations" by or on behalf of two of DOE's predecessor agencies were conducted at the Allied Chemical Corporation's Metropolis worksite, which processed uranium concentrates into uranium hexafluoride for the Atomic Energy Commission (AEC), and the Energy Research and Development Administration (ERDA) after the AEC was abolished, from 1959 through 1976, there is no evidence that these two predecessor agencies either had a "proprietary interest" in the Metropolis worksite, or had entered into one of the enumerated types of contracts listed in 42 U.S.C. § 7384l(12)(B)(ii) with an entity at the worksite.

Based on the above-noted findings of fact, FAB also hereby makes the following:

CONCLUSIONS OF LAW

The benefits available under Part E of EEOICPA are only payable to claimants who satisfy the eligibility requirements set out in the statute. In this Part E claim, the claimant alleges that he qualifies as a DOE contractor employee because he worked at the Allied Chemical Corporation's Metropolis worksite, which he believes fits within the statutory definition of a DOE facility set out in § 7384l(12). However, FAB concludes otherwise, and accordingly the claimant is not entitled to Part E benefits, as alleged.

As noted above, DEEOIC does not dispute that "operations" occurred at the Metropolis worksite, because there is ample evidence showing that the Allied Chemical Corporation processed natural uranium concentrates into uranium hexafluoride for the AEC at that location, first pursuant to a processing contract with the AEC that ran from 1959 through June 30, 1964[5], and thereafter for both the AEC and ERDA on an "as needed" basis through 1976.[6] Therefore, this final decision need not address the bulk of the arguments put forward by the claimant's representative, because they were made to prove this already accepted requirement of § 7384l(12)(A) of EEOICPA.[7]

However, it is not enough to merely establish that "operations" occurred at a worksite. Before DEEOIC can determine that the Allied Chemical Corporation's Metropolis worksite meets the statutory definition of a DOE facility, the claimant must also prove *either* that DOE or one of its predecessor agencies had a "proprietary interest" in the Metropolis worksite as required by § 7384l(12)(B)(i), *or* that DOE or one of its predecessor agencies "entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services" as required by § 7384l(12)(B)(ii). Pursuant to 20 C.F.R. § 30.111(a), the claimant has the burden of proving at least one of these two statutory requirements "by a preponderance of the evidence." That same section also notes that "Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved it true." However, and as discussed above, FAB concludes none of the submissions from the claimant's representative contained any persuasive arguments or factual evidence in support of *either* of these statutory requirements.

Thus, FAB concludes that the claimant has failed to prove that the Allied Chemical Corporation worksite in Metropolis, Illinois meets the statutory definition of a DOE facility, and that he has also failed to prove that he is a DOE contractor employee who worked at a DOE facility under Part E of EEOICPA. Accordingly, FAB hereby denies his Part E claim.

Jacksonville, FL

Wendell Perez

Hearing Representative

Final Adjudication Branch

[1] *See* http://www.hss.energy.gov/HealthSafety/fwsp/advocacy/faclist/showfacility.cfm (last visited April 17, 2013).

[2] A comprehensive listing of all covered worksites designated for remediation under FUSRAP can be found at the following DOE website: http://energy.gov/lm/sites/lm-sites/considered-sites (last visited April 16, 2013). A review of the website reveals that the Allied Chemical Corporation's Metropolis worksite is not listed as a covered worksite under FUSRAP.

[3] *See* http://www.usec.com/gaseous-diffusion/paducah-gdp/paducah-history (last visited on March 26, 2013).

[4] While the representative may believe that this agreement is a contract between DOE (or one of its predecessor agencies) and the Allied Chemical Corporation, the language used in the part of the agreement in the file suggests that it was actually an example of the type of agreement that the Allied Chemical Corporation entered into to process uranium concentrates owned by private nuclear power plants. These agreements became possible following passage of the Private Ownership of Special Nuclear Materials Act, Pub. L. No. 88-489, 73 Stat. 602 (August 26, 1964). *See* 42 U.S.C. § 2011 note. *See also* Opinion No. B-207463 (Comp. Gen. December 27, 1984), 1984 WL 47145.

[5] *See* http://www.converdyn.com/metropolis/mtwhistory.html and http://www.Honeywell-metropolisworks.com/about-metropolis.php (both sites last visited on March 26, 2013). *See also* "Annual Report to Congress of the Atomic Energy Commission for 1964" (January 1965), p. 48.

[6] *E.g.*, "Annual Report to Congress of the Atomic Energy Commission for 1959" (January 1960), p. 63; "Annual Report to Congress of the Atomic Energy Commission for 1964" (January 1965), p. 48; "Annual Report to Congress of the Atomic Energy Commission for 1965" (January 1966), p. 37; "Annual Report to Congress of the Atomic Energy Commission for 1966" (January 1967), p. 362; "Annual Report to Congress of the Atomic Energy Commission for 1967" (January 1968), p. 274.

[7] During the development of this Part E claim, the representative seemed to be confusing the term "operations" in subsection (A) of § 7384l(12) with the "management and operations" type of contract in subsection (B)(ii). They are clearly not the same thing. A history of DOE's use of "management and operations" contracts, and a description of their features, is in Chapter 17.6 (October 2007) of DOE's *Acquisition Guide* at http://energy.gov/sites/prod/files/17.6_Origin%2C_Characteristics%2C_and_Significance_of_the_DOE%27s_Management_and_Operating_0.pdf.

Beryllium vendors

EEOICPA Fin. Dec. No. 23005-2002 (Dep't of Labor, July 31, 2007)

NOTICE OF FINAL DECISION FOLLOWING

REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch (FAB) concerning the above claim for compensation under Part B of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons stated below, the claim for benefits under Part B for chronic beryllium disease (CBD) is accepted. A copy of this decision is being

sent to the authorized representative.

STATEMENT OF THE CASE

On February 19, 2002, the employee filed a Form EE-1 claiming benefits for CBD under Part B of EEOICPA with the Denver district office of the Division of Energy Employees Occupational Illness Compensation (DEEOIC). In an accompanying employment history, the employee indicated that he had worked for the Coors Porcelain Company (a beryllium vendor that is now known as CoorsTek, Inc.) in Golden, Colorado from June of 1983 through 1995, and alleged that he had been exposed to residual beryllium oxide contamination during the period that he worked in Building 16. The employee also submitted a number of medical reports in which he was diagnosed with CBD, including a February 6, 1990 report that related the employee's history of working as a punch press operator in Building 16 for the first six months of his employment (June through December of 1983), and that his regular daily duties included sweeping up throughout all of Building 16.

By letter dated March 1, 2002, the Denver district office informed the employee that the entire period of his alleged employment with the Coors Porcelain Company took place after that beryllium vendor had ceased processing or producing beryllium for the Atomic Energy Commission (AEC) in 1975, and asked him to submit any evidence he had that might enable it to conclude that the beryllium vendor had continued to process or produce beryllium for the AEC (or any of its successor agencies) after 1975. In a March 21, 2002 response, the employee's representative disagreed with the suggestion in the district office's letter that the scope of coverage for beryllium vendor employees was limited to the period during which the vendor was producing or processing beryllium for sale to, or use by, the Department of Energy (DOE) or its predecessor agencies, and argued that the employee should be considered a "covered beryllium employee" under § 7384l(7)(C) of EEOICPA because he was apparently exposed to beryllium in Building 16 while he was cleaning up residual beryllium contamination from its AEC work. In support of this argument, the representative submitted additional medical evidence and a number of documents from the employee's prior litigation in the District Court for Jefferson County, Colorado, Civil Action No. 96-CV-2532 (Division 5), against both the Coors Porcelain Company and Brush Wellman, Inc.: (1) a deposition exhibit identifying the time periods between 1960 and 1985 during which different work projects and/or departments of the Coors Porcelain Company had been located in Building 16; (2) excerpts from a deposition transcript in which another employee of the Coors Porcelain Company described working in Building 16; (3) Coors Porcelain Company documents concerning beryllium work that was done in Building 16 and the potential for exposure to residual beryllium, as well as both internal and external communications regarding the remediation and demolition of Building 16 by Morrison-Knudson Engineers, Inc. during 1985; and (4) a May 28, 1985 report of a sampling study of beryllium residues in Building 16 performed by Morrison-Knudson Engineers, Inc.

On May 3, 2002, the Denver district office acknowledged receipt of the representative's March 21, 2002 response and repeated its earlier request that he submit any evidence in his possession demonstrating that the beryllium vendor in question had continued to process or produce beryllium for the AEC (or DOE) beyond 1975. In a June 17, 2002 reply, an associate of the employee's representative noted that the scope of coverage under EEOICPA extended to "a period when the vendor was *engaged in activities related to the production or processing* of beryllium for sale to, or use by, the Department of Energy." (emphasis in original) On June 28, 2002, the Denver district office received additional factual evidence from the employee's representative, including a number of complaints that had been filed in the employee's state court litigation[1], an undated order that dismissed the Coors Porcelain Company from that suit, and a June 20, 2002 order that subsequently dismissed the suit against the remaining defendant, Brush Wellman, Inc.

On September 12, 2002, the Denver district office issued a recommended decision to deny the employee's claim on the ground that he was not a "covered beryllium employee" because he was employed at the Coors Porcelain Company after 1975, and therefore he was not employed during "a period when the vendor was engaged in activities related to the production or processing of beryllium for sale to, or use by, the Department of Energy" or any of its predecessor agencies.

Neither the employee nor his representative filed any objections to the September 12, 2002 recommended decision, and on February 20, 2003 the FAB issued a final decision denying the claim. In that decision, the FAB noted that the employee had not filed any objections to the recommended decision as permitted under 20 C.F.R. § 30.310 and affirmed the Denver district office's finding that the employee was not a "covered beryllium employee" pursuant to 42 U.S.C. § 7384l(7)(C) because he was not employed by a beryllium vendor at a beryllium vendor facility during "a period when the vendor was engaged in activities related to the production or processing of beryllium for sale to, or use by, the Department of Energy."

On March 27, 2003, the employee's representative filed a request for reconsideration of the FAB's February 20, 2003 final decision. In support of his request, the representative argued that while the employee did not work at a beryllium vendor facility "during a period of time in which ongoing production and processing of beryllium occurred," he did "work at such a facility (Coors Porcelain) while there was ongoing remediation of residual beryllium contamination resulting from processing of beryllium for the DOE." Therefore, argued the representative, the employee should "be considered a 'covered beryllium employee' pursuant to 42 U.S.C. § 7384l(7)(C)." On May 20, 2003, the FAB issued an order denying the request for reconsideration of its February 20, 2003 final decision on the ground that "no evidence of a contractual relationship during the claimed period of employment was submitted."

On February 15, 2005, the employee filed a petition in the United States District Court for the District of Columbia, seeking review of the FAB's final decision on his Part B claim (Civil Action No. 1:05-CV-325). Shortly thereafter, on April 8, 2005, the Director of DEEOIC issued an order that vacated the FAB's February 20, 2003 final decision and reopened the employee's claim for both further development and the issuance of new recommended and final decisions. That order specifically directed the Denver district office to consider whether the employee was a "covered beryllium employee," as that term is defined in EEOICPA, because he had worked at the Coors Porcelain Company during a period of environmental remediation. Shortly after the Director issued his order, the employee voluntarily dismissed his petition.

In an August 5, 2005 response to a request for information from the Denver district office, CoorsTek, Inc. submitted a number of documents that it had obtained from DOE through a Freedom of Information Act request. These documents related to the environmental remediation of Building 16, as well as the beryllium work that the Coors Porcelain Company performed for the AEC. They established that the former site of Building 16 was now the location of a parking lot, and generally described the history of nuclear and beryllium work that was carried out in Building 16 from its construction in 1960 through its remediation and demolition by Morrison-Knudson Engineers, Inc. in 1985.

On September 28, 2005, the Denver district office issued a new recommended decision denying the employee's Part B claim on the ground that he was not a "covered beryllium employee" under EEOICPA. The recommended decision found that the employee was not employed by a beryllium vendor at a beryllium vendor facility during a time when the facility was engaged in activities related to

production or processing of beryllium for sale to, or use by, DOE, "including [under the Secretary's regulations] periods during which environmental remediation of a vendor's facility was undertaken pursuant to a contract between the vendor and DOE."

On November 21, 2005, the employee's representative filed objections to the September 28, 2005 recommended decision with the FAB and argued that the employee's work at the beryllium vendor's facility during a period of environmental remediation was related to the production or processing of beryllium for sale to, or use by, DOE. On April 18, 2006, the FAB issued another final decision in which it denied the employee's claim on the ground that, pursuant to 20 C.F.R. § 30.205(a)(2)(iii) (2005)[2], only environmental remediation of a beryllium vendor's facility that is undertaken pursuant to a contract between that vendor and DOE is considered to be an activity "related to the production or processing of beryllium" for the purpose of meeting the definition of "covered beryllium employee."

On May 23, 2006, the employee filed a second petition in the United States District Court for the District of Columbia seeking review of the FAB's latest final decision on his Part B claim (Civil Action No. 1:06-CV-958). In a "Memorandum Order" dated March 14, 2007[3], District Judge Robertson ruled that 20 C.F.R. § 30.205(a)(2)(iii) did not describe the *only* beryllium vendor activities that were related to production or processing and found that the administrative record in the employee's EEOICPA claim would require further development before he could determine whether the employee was a "covered beryllium employee." Thereafter, on April 20, 2007 the parties filed a "Joint Motion for Remand Order" that proposed a method for undertaking the further development of the claim that was described in the March 14, 2007 Memorandum Order, and on April 26, 2007, the judge signed the "Order for Remand" that had been prepared by the parties. Pursuant to that Order, the judge retained jurisdiction over the employee's claim while it was undergoing further development.

On remand, the Director of DEEOIC served a May 18, 2007 administrative subpoena on CoorsTek, Inc. by certified mail, which was received by CoorsTek, Inc. on May 22, 2007. The subpoena directed CoorsTek, Inc. to provide DEEOIC with copies of records in its possession relating to the processing or producing of beryllium at its Golden, Colorado facility from 1960 through 1995, whether for the AEC/DOE or other entities, and to the contract or agreement entered into between the Coors Porcelain Company and Morrison-Knudson Engineers, Inc. for the remediation and demolition of Building 16. In a submission that was received by DEEOIC on June 22, 2007, CoorsTek, Inc. submitted a CD containing 315 electronic files of scanned documents totaling 1,807 pages, consisting of the following, in pertinent part:

- A memorandum of a May 3, 1960 meeting between officials of the Lawrence Radiation Laboratory (now known as the Lawrence Livermore National Laboratory) and the Coors Porcelain Company held during negotiations that led to the execution of Subcontract No. 165, during which officials of the Coors Porcelain Company stated they would construct, at their expense, the separate building that would be needed to perform the contemplated production work.

- Subcontract No. 165 to Contract W-7405-eng-48, between the Regents of the University of California (the DOE contractor for the Lawrence Radiation Laboratory) and the Coors Porcelain Company, which was executed on September 9, 1960. This subcontract called for the Coors Porcelain Company to fabricate the fuel elements needed by the Lawrence Radiation Laboratory for its "Pluto Project," an effort to develop a nuclear ramjet engine. Appendix A noted that the Coors Porcelain Company would build a facility to perform the work under the

contract, and that the University would furnish government-owned BeO to produce the fuel elements; Appendix B stated that title in the land and building remained in the Coors Porcelain Company.

- A letter from the Lawrence Radiation Laboratory to the Coors Porcelain Company, dated September 27, 1960, memorializing the understandings of the parties to Subcontract No. 165, which included the understanding that the Coors Porcelain Company would need about 20,000 kilograms of BeO.

- Subcontract No. 256 to Contract W-7405-eng-48, between the Regents of the University of California and the Coors Porcelain Company, which was executed on September 25, 1963. This subcontract was an extension of Subcontract No. 165 and provided for the shut-down of the Fuel Element Project at the Coors Porcelain Company on or before June 30, 1964. Appendix B noted that one purpose of Subcontract No.256 was to maintain the capability of the Coors Porcelain Company to perform research and development work on beryllium tubes using government-owned BeO.

- The Coors Porcelain Company's "Final Progress Report for Research and Development Program" under the Pluto Project covering the period October 1, 1963 through June 30, 1964. Among other things, this report described the arrival of government-owned BeO at the Coors Porcelain Company from Brush Wellman, Inc. in powder form.

- An August 7, 1986 Rocky Flats Plant Report entitled "Pluto Program Overview, Fuel Element Fabrication for Tory II-C Reactor," tracing the history of the Coors Porcelain Company entering into Subcontract No. 165 on September 9, 1960 to fabricate 756,000 fuel elements (4.5-inch long hexagonal tubes) for this AEC program, and an extension known as Subcontract No. 256. The report included Table III (Materials Balances) on page 5 showing how 18,681.5 kilograms of beryllium were used in this project to actually fabricate approximately 500,000 beryllium and beryllium-uranium fuel elements.

- An April 5, 1965 letter from the Argonne National Laboratory to the Coors Porcelain Company that requested a quote for the fabrication of six nuclear fuel specimens.

- Portions of a February 21, 2000 deposition of **[Employee's co-worker]** from the employee's state court litigation, which established that the "Fuel Element Building" was later known as "Building 16."

- A "Further Study of Beryllium Controls, Coors Porcelain Company," dated November 6, 1969, in which an industrial hygienist noted the imminent move of the Coors Porcelain Company's BeO Department into Building 16 from another location within the facility.

- An internal Coors Porcelain Company research project report entitled "BeO Tape Status," dated January 1970, which memorialized recent research efforts into solving production problems involving this product during the period February 2, 1969 through January 30, 1970, recommended that future raw material (BeO) be obtained from Kawecki-Berylco, Inc. rather than Brush Wellman, Inc., and noted that "four small orders have been shipped to date" to non-AEC entities as part of a pilot project designed to develop a profitable industrial process.

- An internal Coors Porcelain Company research project report entitled "BeO Extrusion Status," also dated January 1970, which memorialized recent research efforts into solving production problems involving this product during the period February 2, 1969 through January 30, 1970, and noted that "[t]he extrusion is done in the Erie Press in Building 16."

- An internal Coors Porcelain Company research project report entitled "KBI BeO Conversion," dated February 1970, which listed many reasons why the Coors Porcelain Company should obtain raw material (BeO) from Kawecki-Berylco, Inc., instead of from Brush Wellman, Inc.

- Minutes of the Toxic Material Board Meeting at the Coors Porcelain Company, dated July 28, 1970, which noted that the BeO Department had moved into Building 16.

- An internal Coors Porcelain Company memorandum, dated May 29, 1985, which noted that BeO was used in Building 16 from 1970 to 1975 in non-AEC ceramics work, and stated that employees would be evacuated from the building before clean-up work began.

- An August 19, 1985 letter from Morrison-Knudson Engineers, Inc. to the Coors Porcelain Company, which referred to "deactivation" of Building 16 pursuant to Contract No. 5083 between the two parties.

- A report entitled "Production of Beryllia Ceramics and the 1989-90 Beryllium Disease Surveillance Project at Coors Ceramics Company," dated July 5, 1991, which contained a detailed history of BeO use in production activities from 1958 through 1975 by the BeO Department and for the Fuel Cell Project, and beryllium substrates after 1975. It confirmed that Building 16 was built for the AEC work on the Fuel Element Project, and then used by the Beryllium Ceramics Department from 1970 through the end of 1975.

On July 12, 2007, the national office of DEEOIC issued a recommended decision to accept the employee's Part B claim for benefits, finding that the evidence of record established that he was a "covered beryllium employee" since he was employed at a beryllium vendor during a period when that vendor was engaged in "activities related to" the production or processing of beryllium for sale to, or use by, DOE or its predecessor agencies, *i.e.*, remediation during calendar year 1985. The case was transferred to the FAB and on July 30, 2007, it received the employee's signed, written waiver of all objections to the July 12, 2007 recommended decision. The employee also submitted a signed statement indicating that he had not received any money from a tort action for his beryllium exposure, and that he had not been convicted of fraud in connection with any application for or receipt of EEOICPA benefits or any other state or federal workers' compensation benefits.

After considering the recommended decision and all the evidence in the case file, the FAB hereby makes the following:

FINDINGS OF FACT

1. The employee filed a claim for benefits under Part B of EEOICPA on February 19, 2002.

2. The employee was employed as a punch press operator by a beryllium vendor, the Coors Porcelain Company (or its corporate successors), from June of 1983 through 1995. The employee worked in Building 16 for approximately six months between June and December of 1983, after which time he worked in other buildings at the beryllium vendor's facility through 1995.

3. The beryllium vendor had processed or produced beryllium for DOE and its predecessor agencies in Building 16 from 1947 through 1975.

4. The National Institute for Occupational Safety and Health has determined that there is "potential for significant residual contamination outside of the period in which weapons-related production occurred" at the beryllium vendor's facility in its revised June 2004 *Report on Residual Radioactive and Beryllium Contamination at Atomic Weapons Employer Facilities and Beryllium Vendor Facilities*, at Appendix B-2, page 4.

5. Management of the beryllium vendor made a conscious determination to address this residual beryllium contamination by hiring Morrison-Knudson Engineers, Inc., pursuant to Contract No. 5083, to remediate and demolish Building 16 in early 1985.

6. The remediation work at the facility required removal or other remediation of residual beryllium contamination that consisted of more than a *de minimus* amount of beryllium dust, particles or vapors attributable to work that the beryllium vendor had done for the AEC/DOE.

7. The employee worked for the beryllium vendor during a period when it was engaged in activity pursuant to a conscious determination to remediate more than a *de minimus* amount of residual beryllium contamination that was attributable to work the vendor had done for the AEC/DOE.

8. Building 16 was remediated and demolished by the end of 1985 by Morrison-Knudson Engineers, Inc.

9. The employee was diagnosed with CBD on May 8, 1990.

10. The employee filed a tort action in 1996 against the beryllium vendor and a second defendant that contained an allegation that he had experienced work-related exposure to beryllium. This tort action was dismissed with respect to all defendants no later than June 20, 2002.

Based on the above-noted findings of fact in this claim, the FAB hereby makes the following:

CONCLUSIONS OF LAW

The first issue in this claim is whether the employee is a "covered beryllium employee" for the purpose of EEOICPA. For the purpose of this claim, a "covered beryllium employee" is defined as:

A current of former employee of a beryllium vendor, or of a contractor or subcontractor of a beryllium vendor, during a period when the vendor was engaged in activities related to the production or processing of beryllium for sale to, or use by, the Department of Energy.

42 U.S.C. § 7384l(7)(C). There is no dispute that the beryllium vendor in question ceased all "production or processing of beryllium for sale to, or use by, the" AEC no later than 1975, eight years before the employee began working for the vendor at its Golden, Colorado facility in June of 1983. Accordingly, the compensability of the employee's claim turns on whether the beryllium vendor was "engaged in *activities related to*" that production or processing at any time during the period of his employment from June of 1983 through 1995.

The scope of what Congress intended by the phrase "activities related to" is broad and not otherwise

defined in either EEOICPA or its legislative history. Therefore, the definition of the phrase is properly left to DEEOIC as the agency charged with the administration of the compensation program established as Part B of EEOICPA. *See* 20 C.F.R. § 30.2(a). As an exercise of that authority, § 30.205(a)(2)(iii) of the regulations implementing EEOICPA provides some guidance regarding the scope of the phrase "activities related to" by indicating that it includes "periods during which environmental remediation of a vendor's facility was undertaken pursuant to a contract between the vendor and DOE. . . ." However, as noted by District Judge Robertson in his March 14, 2007 Memorandum Order, § 30.205(a)(2)(iii) only describes one type of activity "related to" a beryllium vendor's production or processing of beryllium for sale to, or use by, DOE for the purpose of defining what a "covered beryllium employee" is under EEOICPA.

Accordingly, DEEOIC will consider whether additional activities of beryllium vendors are "activities related to" production or processing beryllium as claims present additional factual scenarios for its evaluation. In light of the findings of fact for the employee's claim set out above, DEEOIC concludes that the Coors Porcelain Company "was engaged in activities related to the production or processing of beryllium for sale to, or use by, the Department of Energy" or its predecessor agencies in 1985 when its management took conscious action to remediate the more than *de minimus* residual beryllium contamination in Building 16 that was attributable to work it had done for the AEC. This is another type of activity "related to" the production or processing of beryllium for sale to, or use by, DOE in addition to the activity described in § 30.205(a)(2)(iii); there will likely be others presented in future claims yet to be adjudicated.

In light of the above conclusion of law, and because the employee was exposed to beryllium in the "performance of duty" under 42 U.S.C. § 7384n(a)(2) since he was present at the beryllium vendor's facility due to his employment by that beryllium vendor during a period when beryllium dust, particles, or vapor may have been present at such facility, DEEOIC also concludes that the employee qualifies as a "covered beryllium employee" under Part B, as that term is defined by 42 U.S.C. § 7384l(7)(C), because he was employed by a beryllium vendor "during a period when the vendor was engaged in activities related to the production or processing of beryllium for sale to, or use by, the Department of Energy" or its predecessor agencies.

Because the employee qualifies as a "covered beryllium employee" under Part B, he is therefore also a "covered employee," as that term is defined by 42 U.S.C. § 7384l(1)(A), and has been diagnosed with a "covered beryllium illness," as that term is defined by 42 U.S.C. § 7384l(8)(B).

The second issue in this claim is whether the employee has complied with the dismissal requirements of 20 C.F.R. § 30.616(b) in connection with his tort suit against the beryllium vendor. As set out in the above findings of fact, the employee was one of a group of plaintiffs that filed a tort action against the beryllium vendor and another defendant in 1996, alleging (among other things) that he was exposed to beryllium while working for the beryllium vendor. Thus, this tort action fell squarely within the definition contained in 20 C.F.R. § 30.615(a), and was subject to the dismissal requirements set out in § 30.616(b) since it was filed before October 30, 2000 and was still pending on December 28, 2001. However, the evidence in the case file establishes that the employee timely elected to receive benefits due to his exposure to beryllium under EEOICPA by dismissing his suit against the beryllium vendor within the time period set out in 20 C.F.R. § 30.616(b), which mandates that all such tort actions must be dismissed prior to December 31, 2003.

Accordingly, the employee is entitled to compensation for CBD under Part B, as outlined in 42 U.S.C. §§ 7384s(a)(1) and 7384s(b), and the FAB hereby awards him lump-sum benefits of $150,000 and

medical benefits for that occupational illness under Part B, retroactive to the date he filed his claim on February 19, 2002.

Washington, DC

Alan Kelly

Hearing Representative

Final Adjudication Branch

[1] This litigation, which was filed in 1996, included allegations that some of the plaintiffs had been exposed to beryllium at work, and contained a specific allegation that the employee in this matter had been exposed while working for the Coors Porcelain Company.

[2] This provision of the interim final regulations did not change when the final regulations were issued. *See* 71 Fed. Reg. 78520, 78543-44 (Dec. 29, 2006).

[3] *[Employee] v. Office of Workers' Compensation Programs*, 477 F.Supp.2d 160 (D.D.C. 2007).

EEOICPA Fin. Dec. No. 10015106-2006 (Dep't of Labor, July 25, 2006)

NOTICE OF FINAL DECISION FOLLOWING A REVIEW OF THE WRITTEN RECORD

This decision of the Final Adjudication Branch concerns 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 denied.

Since you submitted a letter of objection, but did not specifically request a hearing, a review of the written record was performed, in accordance with the implementing regulations. 20 C.F.R. § 30.312.

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, in accordance with the implementing regulations. 20 C.F.R. § 30.310. In reviewing any objections submitted, the Final Adjudication Branch will review the written record, any additional evidence or arguments submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. 20 C.F.R. § 30.313.

STATEMENT OF THE CASE

On December 9, 2002, you filed a Form EE-2, Claim for Survivor Benefits, and a Request for Review by Physicians Panel for the esophageal cancer of your late spouse, **[Employee]**, hereinafter referred to as "the employee." The death certificate states the employee died of interstitial lung disease (illegible word), acute ARDS due to infection, congestive heart failure, and myocardial infarction.

On the Form EE-3, Employment History, you stated the employee was employed as lead maintenance man for Lithium Corporation of American/FMC from October 3, 1955 to January 31, 1992. The district office verified the employee worked for Lithium Corporation, a joint venture with Beryllium Metal and Chemical Corporation (BERMET), in Bessemer City, North Carolina, from October 3, 1955 to January 31, 1992.

In support of your claim for survivorship, you submitted your marriage certificate, showing you married the employee on May 22, 1948, and the employee's death certificate, showing you were the employee's spouse on the date of his death, December 3, 1992.

On March 22, 2006, the Jacksonville district office issued a recommended decision, concluding that you are not entitled to lump-sum survivor compensation under Part E of the Act, because the employee was not a Department of Energy (DOE) contractor employee.

Attached to the recommended decision was a notice of claimant rights, which stated that you had 60 days in which to file an objection to the recommended decision and/or request a hearing. On May 15, 2006, the Final Adjudication Branch (FAB) received your letter of objection dated May 12, 2006.

OBJECTIONS

In the letter of objection, you stated that the employee qualified as a covered beryllium employee under the law, and therefore, should be covered under Part E. You quoted the Federal Regulations in § 30.205, which establishes the criteria for an employee to be considered a covered beryllium employee. 20 C.F.R. § 30.205 (2005). However, the heading for that section of the regulations states that the eligibility criteria are for "Claims Relating to Covered Beryllium Illness under *Part B* of EEOICPA" [emphasis added], not Part E of the EEOICPA.

On October 28, 2004, Congress abolished Part D of the Act, which had been administered by the Department of Energy, and created Part E of the Act to be administered by the Department of Labor. Congress established the criteria for a "covered DOE contractor employee" under Part E. The Department of Labor must apply those criteria as written.

FINDINGS OF FACT

1. On December 9, 2002, you filed a Form EE-2, Claim for Survivor Benefits.

2. The employee was diagnosed with interstitial lung disease, acute ARDS due to infection, congestive heart failure, and myocardial infarction.

3. The employee was employed at Lithium Corporation, a joint venture with Beryllium Metal and Chemical Corporation (BERMET), an acknowledged beryllium vendor, from October 3, 1955 to January 31, 1992.

4. You were the employee's spouse at the time of his death and at least a year prior.

CONCLUSIONS OF LAW

The undersigned has reviewed the record, the recommended decision issued by the Jacksonville district office on March 22, 2006 and the subsequently submitted objections. I find that the decision of the Jacksonville district office is supported by the evidence and the law, and cannot be changed.

The eligibility criteria for your claim under Part E of EEOICPA are discussed in § 30.230 of the regulations, which state that "the employee is a Department of Energy contractor employee as defined in § 30.5(w). . . ." 20 C.F.R. § 30.230(a). Section 30.5(w) of the regulations and § 7384l of the Act

define a Department of Energy contractor employee to be (1) an individual who is or was in residence at a DOE facility as a researcher for one or more periods aggregating at least 24 months; or (2) an individual who is or was employed at a DOE facility by: (i) an entity that contracted with the DOE to provide management and operation, management and integration, or environmental remediation at the facility; or (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility. 20 C.F.R. § 30.5(w), 42 U.S.C. § 7384l(11). The employee was a covered beryllium employee, employed by a beryllium vendor, with no indication of employment at any DOE facility.

You meet the definition of a survivor. 42 U.S.C. § 7385s-3(d)(1). However, since the evidence does not establish that the employee was a Department of Energy contractor employee, you are not entitled to benefits under Part E of the Act, and the claim for compensation is denied. 42 U.S.C. §§ 7385s-4(c)(1)(A), 7385s-3(a)(1)(B).

Jacksonville, FL

Sidne M. Valdivieso

Hearing Representative

Contractors of other agencies

EEOICPA Fin. Dec. No. 10038639-2007 (Dep't of Labor, Nov. 12, 2008)

NOTICE OF FINAL DECISION FOLLOWINGREVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch (FAB) concerning the above claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons stated below, the claim for chronic obstructive pulmonary disease (COPD) under Part E of EEOICPA is denied.

STATEMENT OF THE CASE

On August 9, 2005, the employee filed a claim for benefits under Part E of EEOICPA and alleged that he had contracted COPD. In support of his claim, he submitted an employment history stating that he was employed as a security officer by EG&G Special Projects at the Nevada Test Site (NTS) from January 1981 to October 1990, and that he wore a dosimetry badge while employed. The Oak Ridge Institute for Science and Education (ORISE) database did not contain information to verify this employment. The Department of Energy (DOE) verified the employee's employment with Edgerton, Germeshausen, and Grier Special Projects and stated, "This was not a DOE-funded project and was not associated with the DOE Nevada Test Site work."

On June 15, 2007, the district office issued a recommended decision to deny the claim on the ground that the medical evidence of record was insufficient to establish the diagnosis of COPD. However, on December 20, 2007, FAB issued an order remanding the case for further development after the employee submitted medical evidence that supported the diagnosis of COPD. As a result, the claim was returned to the district office for further development and the issuance of a new recommended decision.

By letter dated January 25, 2008, the Seattle district office informed the employee that under Part E of EEOICPA, an employee must have worked for a DOE contractor or subcontractor at a DOE facility during a covered time period, and that to date, DOE had verified his employment by EG&G Special Projects at the Nevada Test Site from January 1, 1981 to October 31, 1990. He was informed that DOE had indicated that EG&G Special Projects was not a DOE funded project and that any employment for these projects took place outside the borders of the NTS, and therefore was not covered employment under EEOICPA. The district office asked him to submit evidence to establish that EG&G Special Projects was involved in operations for DOE or on behalf of DOE at the NTS.

In a response received by the district office on February 14, 2008, the employee submitted an affidavit on Form EE-4 from a work associate, who asserted that the employee was employed as a security officer by EG&G Special Projects at NTS from January 5, 1981 to October 15, 1990. The employee also submitted an affidavit from his wife, who asserted that he was employed as a security officer by EG&G Special Projects at NTS from January 5, 1981 to October 15, 1990.

On February 29, 2008, the district office issued a new recommended decision to deny the employee's claim for COPD under Part E, on the ground that the evidence was insufficient to establish that he was present at a covered facility while working for DOE or any of its covered contractors, subcontractors, or vendors during a covered time period.

OBJECTIONS

On March 12, 2008, FAB received the employee's written objections to the recommended decision. In his objection letter, he stated the following:

I am submitting a copyrighted article from the Las Vegas Review Journal dated Thursday, December 16, 1999. In this article there is a discussion of President Clinton signing into law, under the military lands withdrawal act of 1999. The document in question was signed on , and the Department of Energy released the article to the press approximately two months later. In the document President Clinton signed over to the Air Force control over Department of Energy property in the rectangle around Groom Lake which is the northeastern corner of the test site this land was previously used by the Air Force under an agreement with the Atomic Energy Commission that dates back to 1958, the location is commonly known as Area 51. This article makes perfectly clear, prior to the property was under the control of the Department of Energy. As to the funding of EG&G Special Projects, their funding came directly from the Department of Energy in the form of laundered money that was approved for projects approved by Congress for the Nevada Test Site. The cost overruns were then used to fund the black projects at Area 51. By using approved monies in this manner, further protected the activities that occurred at Area 51 (projects that cannot be investigated by Congress). Also the general manager for all projects at Area 51, that person's name is was **[General Manager]**, who was in charge of all subcontractors at Area 51. **[General Manager]** was an employee of Reynolds Electrical & Engineering the prime contractor at the NTS, a company owned by EG&G.

On August 5, 2008, the Division of Energy Employees Occupational Illness Compensation (DEEOIC) issued EEOICPA Circular No. 08-06 which states the following:

The Nevada Test Site is a covered DOE facility for the period 1951-present. The DEEOIC considers Area 51 part of NTS for the period 1958-1999. The DOE categorizes Reynolds Electrical and Engineering Company (REECo) and Bechtel , Inc. as "captive contractors," for the DOE and its

predecessors, including both the Atomic Energy Commission (AEC) and the Energy Research and Development Agency (ERDA). This means that employees of REECo and Bechtel who worked at the NTS, including Area 51, are DOE contractor employees, regardless of what information may previously have been received from DOE.

By letter dated October 17, 2008, DOE confirmed for FAB that EG&G Special Projects was not a DOE contractor at the Nevada Test Site.

After considering the evidence of record, FAB hereby makes the following:

FINDINGS OF FACT

1. The employee was employed by EG&G Special Projects from January 5, 1981 to October 15, 1990.

2. The case file does not contain sufficient evidence to establish that the employee worked for a DOE contractor or subcontractor at the NTS.

Based on the above-noted findings of fact, FAB also hereby makes the following:

CONCLUSIONS OF LAW

The term "covered DOE contractor employee" used in Part E is defined as a DOE contractor employee determined to have contracted a covered illness through exposure at a DOE facility. *See* 42 U.S.C. § 7385s(1). The term "covered illness" means an illness or death resulting from exposure to a toxic substance. 42 U.S.C. § 7385s(2).

DEEOIC has researched the issue of claimed employment at Area 51 of NTS, and considers Area 51 to be part of NTS for the period 1958-1999. As noted above, DOE categorizes REECo and Bechtel Nevada, Inc. as "captive contractors" for DOE and its predecessors; this means that employees of REECo and Bechtel who worked at NTS (including Area 51 during the period 1958-1999) are DOE contractor employees. Also as noted above, DOE has confirmed that EG&G Special Projects was not a DOE contractor at NTS.

It is the claimant's responsibility to establish entitlement to benefits under EEOICPA. The regulations at 20 C.F.R. § 30.111(a) state that the claimant bears the burden of proving, by a preponderance of the evidence, the existence of each and every criterion under any compensable claim category. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. *See* 20 C.F.R. § 30.111(a) (2008).

As found above, the evidence of record establishes that the employee worked for EG&G Special Projects, but does not establish that he is a "covered DOE contractor employee" as defined by 42 U.S.C. § 7385s(1), because he did not work for a DOE contractor or subcontractor. Therefore, the claim must be denied for lack of covered employment under Part E of EEOICPA.

Washington,

Amanda M. Fallon

Hearing Representative

Final Adjudication Branch

Federal employees

EEOICPA Fin. Dec. No. 87969-2008 (Dep't of Labor, November 19, 2008)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch (FAB) concerning the above claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claim for survivor benefits under Part B and Part E of EEOICPA is denied.

STATEMENT OF THE CASE

On June 22, 2007, **[Claimant]** filed a claim for benefits under EEOICPA as the surviving spouse of **[Employee]**. **[Claimant]** identified kidney cancer and a "lung condition" as the conditions resulting from the employee's work at a Department of Energy (DOE) facility. On the claim form, **[Claimant]** indicated that the employee had worked at a location with a class of employees in the Special Exposure Cohort (SEC).

[Claimant] submitted an Employment History (Form EE-3) stating that the employee was employed by the Department of the Army and/or the Atomic Energy Commission (AEC) at the Iowa Ordnance Plant (IOP) in Burlington, Iowa (also known as the Iowa Army Ammunition Plant (IAAP)) from 1936 to 1976. **[Claimant]** indicated that the employee worked on Line 1 and on other lines and facilities on site as a Laborer in 1936, a Security Guard from 1936-1939, a Quality Control Supervisor from 1944-1952, and a Quality Control Supervisor from 1952-1976. The portion of the IAAP considered a DOE facility includes the buildings and property/grounds of the IAAP identified as "Line 1." Line 1 of the IAAP encompasses a cluster of several buildings that were utilized for AEC activities. On July 26, 2007, DOE indicated that the employee worked for the Department of Defense (DOD) at the IAAP from September 9, 1960 to September 20, 1960 and from June 8, 1961 to September 22, 1961. DOE indicated that it could find no evidence that the employee worked for the AEC at the AEC part of the plant.

[Claimant] submitted a marriage certificate confirming that she married the employee on January 25, 1935. **[Claimant]** also submitted the employee's death certificate, signed by Dr. Sherman Williams, which indicated that the employee died on May 21, 1996 at the age of 84. The death certificate listed the cause of death as congestive heart failure due to pneumonia, and listed **[Claimant]** as the employee's surviving spouse. **[Claimant]** also submitted medical information in support of her claim. A July 2, 1992 pathology report by Dr. J.G. Lyday noted that the employee was diagnosed with renal cell adenocarcinoma on June 29, 1992.

The evidence of record includes information from the U. S. Department of Labor's Site Exposure Matrices (SEM) database. The SEM database provides information regarding occupational categories, process operations, building and area locations, toxic substances, incidents, and the locations at the

facility where the occupational categories performed their job duties, the locations of the toxic substances, and the locations of various incidents of exposure. The SEM database includes the occupational category of security guard. The SEM database identifies Buildings AX-1, and AX-2, both on Line 1, as locations where a security guard would work. SEM identifies Line 1, Building 1-62 as a location where a fireman would work, and identifies Line 1 Building 1-70 and Building 1-99 as locations where a Foreman for Explosives Storage would work. This was independently verified by the undersigned on October 20, 2008. A needs assessment from the Burlington AEC Plant Former Worker Program also confirms that these labor categories were associated with Line 1.

The evidence of record also includes a Department of the Army document dated October 1, 1963, entitled "Permit to other Federal Government Department or Agency to Use Property on Iowa Army Ammunition Plant, Iowa." The permit indicates that the Army granted the AEC a revocable permit to use certain buildings and land within the IOP for a ten-year period, subject to conditions, including that the AEC pay the Army's cost for "producing and supplying any utilities and other services furnished" for the AEC's use.

On November 30, 2007, the Cleveland district office issued a decision recommending denial of **[Claimant]**'s claim under both Parts B and E of EEOICPA because the evidence did not show that the employee was a "DOE contractor employee" as defined at 42 U.S.C. § 7384l(11).

OBJECTIONS

On January 7, 2008, FAB received **[Claimant]**'s objections to the November 30, 2007 recommended decision. Along with her letter, **[Claimant]** submitted new factual evidence. **[Claimant]**'s letter also explained that since her authorized representative had not been copied on the district office's correspondence, the evidence had not been submitted earlier. On June 14, 2008, **[Claimant]** submitted the following relevant evidence to FAB with her objection letter in support of her claim: an April 19, 1974 letter from Lieutenant Colonel C. Frederick Kleis of the Department of the Army to the employee expressing appreciation for his service at the IAAP; an April 19, 1974 certificate of retirement, signed by Lieutenant Colonel Kleis, recognizing the employee's retirement from the federal service; a June 1, 1942 certificate from the IOP that recognized the employee's completion of training as a Plant Guard; a December 19, 1967 certificate issued to the employee (as an employee at the IAAP) by the AMC Ammunition School, Savanna Army Depot upon his completion of a Quality Assurance Course; a Department of the Army Certificate of Service presented to the employee on May 29, 1963 for 20 years of federal service; a copy of Day & Zimmerman, Inc., IOP, Retired Employees Reunion badge dated May 17, 1986; and a Form DA-2496, dated April 1, 1974, that provided the employee's AMC career record maintained at the Tobyhanna Army Depot. The form indicated that the employee was employed by the Department of Army at the IAAP in Burlington, Iowa beginning June 29, 1943.

In summary, **[Claimant]** stated the following objection

Objection 1: [Claimant] objected that the Findings of Fact numbered 4, 5, 6 and 7 in the November 30, 2007 recommended decision were incorrect. Finding of Fact No. 4 stated that "DOE verified **[Employee]** worked at the DOD part of the IOP from September 9, 1960 to September 20, 1960 and from June 8, 1961 to September 22, 1961." Finding of Fact No. 5 stated that "[t]he district office did not receive sufficient employment evidence to establish that the employee worked on Line 1 at the IOP during the SEC period." Finding of Fact No. 6 stated that "[t]he district office has not received evidence establishing entitlement to compensation on the basis of qualifying employment and a

specified cancer for purposes of the SEC." Finding of Fact No. 7 stated that the district office advised **[Claimant]** of the deficiencies in her claim and provided her the opportunity to correct them.

[Claimant] requested an oral hearing to express her objections to the recommended decision and to review the records of the employee's work history. A hearing on her objections to the recommended decision was held before a FAB Hearing Representative on March 11, 2008 in Burlington, Iowa, with **[Claimant]**, **[Claimant]**'s son and authorized representative, another of **[Claimant]**'s sons, and her daughter-in-law in attendance. At the hearing, **[Claimant]**'s son and authorized representative testified that the employee's computation date for his employment at the IOP was 1943 but that he actually started working at the IOP in 1942 as a guard, and that the employee retired from the IOP in 1974. **[Claimant]**'s son also testified that **[Claimant]** was employed at the hospital as head nurse, that **[Claimant]** rode to work with the employee, and that **[Claimant]** knew that there was a time that the employee worked on Line 1. He stated that the documents indicate that the employee worked at the plant for 10,800 days and noted that the SEC requirement is 250 days. He stated that the employee's pay increase records, which he submitted after the hearing, prove the employee's length of employment. He explained that the DOE evidence indicating that the employee worked at the IOP from September 9, 1960 to September 20, 1960 and from June 8, 1961 to September 22, 1961 was erroneous and reflected his own employment at the plant. He explained that the mix-up by DOE occurred due to the fact that he and the employee have the same name. **[Claimant]**'s son testified that he obtained and reviewed the employee's employment records at the plant from 1942 through 1974. He submitted an email dated February 25, 2008, marked as Exhibit 1, from Marek Mikulski of the Burlington AEC Plant Former Workers Program, which confirms that DOE incorrectly verified the employee's employment at the Plant, by providing the employment dates of the employee's son, who also worked at the plant.

[Claimant]'s son testified that the employee worked at the fire department at the plant, and thus had access to Line 1. He testified that he lunched with the employee at Line 1. He stated that **[Claimant]** drove the employee to work every day and dropped him off at the guard gate at Line 1. He stated that the records submitted, including the employee's job descriptions, have numerous references to the employee having access to all lines at the IOP. **[Claimant]**'s son also read information from several affidavits into the record, noting that the actual affidavits would be submitted immediately after the hearing. He identified a photograph, submitted with the objection letter, of the employee wearing a badge that stated "all areas."

At the hearing, **[Claimant]** presented the following documents as evidence: a Department of the Army job description for an "Ammunition Loading Inspector, Leader," dated April 20, 1960; a Department of the Army job description for an "Ammunition Loading Inspector, Lead Foreman," dated February 15, 1965; a Department of the Army job description for an "Ammunition Loading Inspector, Lead Foreman," dated July 19, 1955; a Department of the Army Certificate of Training for "One Year Firefighter-Guard Training" given at the IOP dated May 29, 1950; a Department of Army Form 873, Certificate of Clearance dated May 29, 1957 from IOP; a Department of the Army Notification of Personnel Action dated October 30, 1950, which reflects the promotion of **[Employee]** from Guard (Crew Chief) to Guard (Captain); an affidavit by a friend of the employee who attested that the employee worked all over the IOP as a guard-quality control; an affidavit by a work associate of the employee who attested that he worked at the IOP on Line 1 as a guard and quality control from 1960 to April 1974, and that she and the employee had lunch and worked together on Line 1; an affidavit of a work associate of the employee who attested that she worked for the employee in the Quality Assurance Department on all lines; an affidavit by **[Claimant]**'s son and authorized representative, who identified himself as a work associate and son of the employee. In this affidavit, **[Claimant]**'s son

and authorized representative attested that the employee worked in Quality Assurance and as a Guard at the IAAP as a federal employee. He stated that he knew this because he was employed to cut grass on Line 1 and that he had lunch with the employee there. He stated that the employee had clearance to be on Line 1 because he was not required to be accompanied by a guard. **[Claimant]** also submitted an affidavit by **[Claimant]**'s other son, who attested that his father worked at the AEC at IOP from December 1942 to April 1974 as a Guard and Quality Control supervisor; and her own affidavit, in which she attested that the employee worked at the IOP on Line 1. **[Claimant]** also attested that the employee was a Guard and Quality Control Supervisor working throughout the plant with access to all Lines. **[Claimant]** further stated that she rode to work with the employee and often let him off at Line 1 while she continued on to her job at the hospital.

A copy of the hearing transcript was sent to **[Claimant]** on March 24, 2008, who provided additional comments on the hearing transcript. On April 11, 2008, FAB received **[Claimant]**'s son and authorized representative's letter expressing his disappointment in the hearing because **[Claimant]** was not provided an opportunity to discover evidence from the Department of Labor indicating that the employee did not work on Line 1 for at least 250 days. **[Claimant]**'s son also provided a copy of Congressman Dave Loebsack's March 19, 2008 inquiry to the Department of Labor regarding the status of **[Claimant]**'s claim. The letter also referred to the FAB Hearing Representative's March 25, 2008 call confirming that kidney cancer is a "specified cancer." He stated his concern that the exhibits submitted at the hearing were not reproduced in the hearing transcript, and emphasized that the exhibits were more probative than the hearing testimony. He provided a summary of the content of the six affidavits and personnel records submitted at the hearing and expressed concern whether the documentation would be reviewed and considered.

Response: The additional documents **[Claimant]** submitted with her objections and at the hearing establish that the employment dates provided for the employee by DOE were incorrect and, in fact, reflected the employment dates of the employee's son, who also worked at the plant. Based on the new evidence **[Claimant]** submitted, a new finding has been made below that the employee was employed by the Department of the Army at the IAAP in Burlington, Iowa from June 29, 1943 to April 1, 1974.

The documents **[Claimant]** submitted with her objections include a copy of a June 1, 1942 certificate from the Iowa Ordnance Plant recognizing the employee's completion of training as a Plant Guard. At the hearing, **[Claimant]** submitted a June 20, 1959 Federal Government/Civil Service Experience and Qualification Statement (SG-55) for the employee, which indicated that he was employed at the IAAP from February 11, 1952 to at least June 20, 1959 as an ammunition loading inspector in the Inspection Division; from August 6, 1950 to February 10, 1952 as a Captain in the Guard Department; and from June 29, 1947 to May 27, 1949 as an Ammunition & Equipment Storage Foreman in the Transportation & Storage Division. **[Claimant]** submitted, with her objection, a June 20, 1959 Government employment application with a handwritten resume, signed by the employee. The application states he was employed at the IOP from June 29, 1947 to May 27, 1949 as an Ammo & Equipment Storage Foreman in the Transportation and Storage Division. A May 27, 1948 Application for Federal Employment, signed by the employee, states he was employed at the IOP as a Munitions Handler Foreman beginning June 1947; a Material Receiver and Checker from January 1947 to June 1947; a Guard from May 1946 to January 1947; and a Guard from December 1942 to May 1944 (shell and bomb loading). An October 30, 1950 Department of the Army Notification of Personnel Action reflects the promotion of the employee from Guard (Crew Chief) to Guard (Captain).

[Claimant] provided additional documentation, including EE-4 affidavits, work records for the employee, and testimony at the hearing indicating that the employee was employed by the Department

of the Army at the IAAP from June 29, 1943 to April 1, 1974 and that the employee worked on Line 1 for at least 250 days during March 1949 through 1974. The evidence reflects that the employee was diagnosed with renal cell adenocarcinoma on June 29, 1992. All of the evidence **[Claimant]** submitted with her objections and at the hearing has been reviewed and considered by FAB.

Objection 2: [Claimant] stated that the claim adjudication process was frustrating and difficult. She expressed her dissatisfaction with the way some of the claims examiners handled her claim.

Response: It is regrettable that **[Claimant]** experienced some difficulty during the processing of her claim. The Division of Energy Employees Occupational Illness Compensation (DEEOIC) customer service policy affirms DEEOIC's commitment to serving its customers with excellence. It is DEEOIC's responsibility to work with its customers to improve the practical value of the information, services, products, and distribution mechanisms it provides and the importance of interacting proactively with customers, identifying their needs, and integrating these needs into DEEOIC program planning and implementation. The highest level of customer service is expected in all dealings with individuals conducting business with DEEOIC. As representatives of DEEOIC, all staff members are expected to be courteous, professional, flexible, honest and helpful.

After considering the written record of the claim, **[Claimant]**'s letters of objection, along with the testimony and objections presented at the hearing, FAB hereby makes the following:

FINDINGS OF FACT

1. **[Claimant]** filed a claim for survivor benefits under EEOICPA on June 12, 2007.

2. The employee was employed by the Department of the Army at the IOP from June 29, 1943 to April 1, 1974. The employee worked for at least 250 work days on Line 1 during the period March 1949 through 1974.

3. The employee was diagnosed with renal cell adenocarcinoma on June 29, 1992.

4. The employee died on May 21, 1996 as a consequence of congestive heart failure due to pneumonia. **[Claimant]** is the surviving spouse of the employee.

5. An October 1, 1963 permit indicates that the Army granted the AEC a revocable permit to use certain buildings and land within the IOP for a ten year period, subject to conditions, including that the AEC pay the Army's cost in "producing and supplying any utilities and other services furnished" for the AEC's use. The permit did not obligate the Army to provide any specific services to the AEC, and does not in itself constitute a contract for the provision of services between the Army and the AEC by which the AEC paid the U.S. Army to provide services on Line 1.

Based on the above-noted findings of fact in this claim, FAB hereby makes the following:

CONCLUSIONS OF LAW

The undersigned has carefully reviewed the testimony, the evidence of record, and the November 30, 2007 recommended decision issued by the Cleveland district office. Based on **[Claimant]**'s objections,

testimony at the hearing, and the evidence of record, **[Claimant]**'s survivor claim for benefits under Parts B and E for the employee's kidney cancer and "lung condition" is denied.

Part B of EEOICPA provides benefits to eligible current or former employees of DOE, and certain of its vendors, contractors and subcontractors, and to survivors of such individuals. To be eligible, an employee must have sustained cancer, chronic silicosis, beryllium sensitivity or chronic beryllium disease while in the performance of duty at a covered DOE facility, atomic weapons employer facility, or a beryllium vendor facility during a specified period of time.

With respect to claims for cancer arising out of work-related exposure to radiation under Part B, the SEC was established by Congress to allow the adjudication of certain claims without the completion of a radiation dose reconstruction. *See* 42 C.F.R. § 83.5 (2007). The Department of Labor (DOL) can move directly to a decision on cases involving a "specified cancer" contracted by a member of the SEC because the statute provides a presumption that specified cancers contracted by a member were caused by the worker's exposure to radiation at a covered facility. A "specified cancer" is any cancer described in the list appearing at 20 C.F.R. § 30.5(ff) (2007).

On June 19, 2005, employees of DOE or DOE contractors or subcontractors employed at the IOP/IAAP (Line 1) during the period March 1949 through 1974 who were employed for a number of work days aggregating at least 250 work days either solely under this employment or in combination with work days within the parameters (excluding aggregate work day requirements) established for other classes of employees in the SEC were added to the SEC. 70 Fed. Reg. 37409 (June 29, 2005).

In order for an employee to be afforded coverage under EEOICPA, the employee must be a "covered employee." 42 U.S.C. § 7384l(11)(B). The evidence of record demonstrates that the employee was employed by the Department of the Army at the IAAP from June 29, 1943 to April 1, 1974, and that he worked for at least 250 work days on Line 1 during the period March 1949 through 1974. He was diagnosed with kidney cancer on June 29, 1992, and kidney cancer is a specified cancer. However, the evidence is insufficient to show that the Department of the Army was a DOE contractor or subcontractor. Consequently, the employee does not qualify as a "covered employee with cancer," under EEOICPA. *See* 42 U.S.C. § 7384l(9)(A).

Part E of EEOICPA provides compensation and medical benefits to DOE contractor employees determined to have contracted a covered illness through exposure to a toxic substance at a DOE facility. *See* 42 U.S.C. § 7385s(2); 20 C.F.R. § 30.5(p).

The term "Department of Energy contractor employee" means any of the following:

(A) An individual who is or was in residence at a Department of Energy facility as a researcher for one or more periods aggregating at least 24 months.

(B) An individual who is or was employed at a Department of Energy facility by—

(i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or

(ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

42 U.S.C. § 7384l(11).

On June 3, 2003, DEEOIC issued EEOICPA Bulletin No. 03-26, which provides guidance to its staff with respect to the adjudication of EEOICPA claims filed by current or former employees of state or federal government agencies seeking coverage as a "DOE contractor employee." The policy and procedures outlined in this Bulletin only apply to state and federal agencies that have/had a contract or an agreement with DOE. The Bulletin states that a civilian employee of a state or federal government agency can be considered a "DOE contractor employee" if the government agency employing that individual is: (1) found to have entered into a contract with DOE for the accomplishment of one or more services it was not statutorily obligated to perform, and (2) DOE compensated the agency for that activity. Thus, a civilian employee of DOD who meets the criteria required to be considered a DOE contractor employee is not excluded from EEOICPA coverage solely because they were employed by DOD.

The evidence of record includes an October 1, 1963 Department of the Army document entitled "Permit to other Federal Government Department or Agency to Use Property on Iowa Army Ammunition Plant, Iowa." The permit indicates that the Army granted the AEC a revocable permit to use certain buildings and land within the IAAP for a ten-year period, subject to conditions, including that the AEC pay the Army's cost in "producing and supplying any utilities and other services furnished" for the AEC's use. Because the condition did not obligate the Army to provide any specific services to the AEC, it is insufficient to establish that a contract for the provision of services between the Army and the AEC existed by which the AEC paid the U.S. Army to provide services on Line 1 that the Army was not otherwise statutorily obligated to perform.

Section 30.110(c) of the regulations provides that any claim that does not meet all of the criteria for at least one of the categories including a "covered employee" (as defined in § 30.5(p)) as set forth in the regulations must be denied. *See* 20 C.F.R. §§ 30.5(p), 30.110(b) and (c).

The evidence of record does not show that the employee was employed by a DOE contractor or subcontractor as required by 42 U.S.C. § 7384l(11). Accordingly, **[Claimant]**'s claim under EEOICPA is denied.

Washington, D.C.

Susan von Struensee

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 10024820-2006 (Dep't of Labor, April 17, 2006)

NOTICE OF FINAL DECISION

This is the final decision of the Office of Workers' Compensation Programs (OWCP) on 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 stated below, your claim for benefits under Part E is denied.

STATEMENT OF THE CASE

On October 1, 2001, you filed Form EE-1, Claim for Benefits under the Energy Employees Occupational Illness Compensation Program Act indicating that you were diagnosed with beryllium sensitivity and that you worked at a Department of Energy (DOE) facility.

On Form EE-3, Employment History, you stated that you were employed at the U.S. Department of Energy, Albuquerque Operations Office, assigned to the Rocky Flats Area Office in Golden, CO from 1958 to May 5, 1978. Kaiser-Hill, the Rocky Flats Plant operator, stated that there were no records to support you were employed directly by the plant operator, however; you were issued a radiation monitoring badge from September 29, 1958 to May 5, 1978.

A beryllium lymphocyte transformation test from blood drawn on March 24, 1997, revealed an abnormal response to beryllium sulfate.

On March 10, 2003, the Final Adjudication Branch accepted your claim for the medical monitoring of beryllium sensitivity.

On October 25, 2001, you filed Form KK-1, Request for Review by Medical Panels, with the Department of Energy (DOE) under Part D of the Act. On October 28, 2004, Part E of EEOICPA was created when Congress repealed Part D of EEOICPA, and your claim is now being processed under Part E.

The Denver district office confirmed that you were a federal employee employed by the Atomic Energy Commission at Rocky Flats from September 29, 1958 to May 5, 1978.

On March 21, 2006, the Denver district office issued a recommended decision denying your claim for benefits under Part E of the Act, as you were not a "covered DOE contractor employee." After reviewing the evidence in your claim, the Final Adjudication Branch makes the following:

FINDINGS OF FACT

1. You filed a claim for compensation under the former Part D of the Act on October 25, 2001.

2. You were a federal employee directly employed by the Atomic Energy Commission at the Rocky Flats Plant, from September 29, 1958 to May 5, 1978; therefore, you cannot be considered a DOE contractor employee.

3. You were diagnosed with beryllium sensitivity on March 24, 1997.

Based on the above noted findings of fact in this claim, the Final Adjudication Branch makes the following:

CONCLUSIONS OF LAW

Pursuant to the regulations implementing of EEOICPA, a claimant has 60 days from the date of issuance of the recommended decision to raise objections to that decision to the Final Adjudication Branch pursuant to 20 C.F.R. § 30.310(a). If an objection is not raised during the 60-day period, the Final Adjudication Branch will consider any and all evidence in the record and issue a final decision

affirming the district office's recommended decision pursuant to 20 C.F.R. § 30.316(a). On March 31, 2006, the Final Adjudication Branch received your written notification waiving any and all objections to the recommended decision.

A "covered Part E employee" means, under Part E of the Act, a Department of Energy contractor employee or RECA section 5 uranium worker who has been determined by OWCP to have contracted a covered illness through exposure at Department of Energy facility or a RECA section 5 facility, as appropriate. *See* 20 C.F.R. § 30.5(p).

You have not established that you were a DOE contractor employee pursuant to 42 U.S.C. § 7385s(1) of the EEOICPA.

You are not entitled to compensation pursuant to Part E.

The undersigned has thoroughly reviewed the case record and finds that it is in accordance with the facts and the law in this case. It is the decision of the Final Adjudication Branch that your claim under Part E is denied.

Denver, Colorado

Anna Navarro

Hearing Representative

EEOICPA Fin. Dec. No. 10028664-2006 (Dep't of Labor, August 24, 2006)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This decision of the Final Adjudication Branch concerns the above 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 stated below, your claim for benefits is denied. A copy of this decision will be provided to your authorized representative.

STATEMENT OF THE CASE

On August 27, 2001, you filed Form EE-2, Claim for Survivor's Benefits and a Request for Review by Medical Panels under EEOICPA. You stated on the Form EE-2 that you were filing for the aplastic anemia of your late spouse, **[Employee]**, hereinafter referred to as "the employee." The death certificate shows the employee died on March 5, 1997 from intracerebral hemorrhage, severe thrombocytopenia, and myelodysplastic syndrome.

On the Form EE-3, Employment History, you stated that the employee was employed in Oak Ridge, Tennessee as a quality assurance inspector by Union Carbide Corporation, Nuclear Division, at the K-25 gaseous diffusion plant from 1952 to June 30, 1974. In a letter dated June 1, 2001, you stated that the employee worked at the Y-12 plant from June 30, 1952 to June 28, 1974. The district office verified the employee was actually an employee of the Atomic Energy Commission (AEC) (which became the Department of Energy (DOE)) who worked at K-25 for at least 250 days from 1963 to June

30, 1974, as a quality assurance specialist.

In support of your claim for survivorship, you submitted your marriage certificate, showing you married the employee on February 3, 1945, and the employee's death certificate, showing you were the employee's spouse on the date of his death.

Because there are no requirements under Part B of the Act that an employee who qualifies for membership in the Special Exposure Cohort (SEC) with a specified cancer be a "contractor employee," your claim under that portion of the Act was approved by final decision dated March 12, 2002.

However, because the necessary elements to establish covered employment were not met under Part E of the Act, the Jacksonville district office issued a recommended denial on April 4, 2006. The decision found that the employee did not qualify as a "DOE contractor employee" as described under the Act. The recommended decision informed you that you had sixty days to file any objections, in accordance with § 30.310(b) of the implementing regulations, and that period ended on June 3, 2006. 20 C.F.R. § 30.310(b).

OBJECTIONS

On April 14, 2006, the Final Adjudication Branch (FAB) received a letter from Congressman John J. Duncan, Jr. The letter from Congressman Duncan included a letter from you, dated April 7, 2006, objecting to the recommended decision and requesting an oral hearing. The hearing was held by the undersigned in Oak Ridge, Tennessee, on July 12, 2006. You and your attorney were both duly affirmed to provide truthful testimony.

In the letter of objection, you stated that written evidence was included, but there were no enclosures. At the hearing, your attorney submitted copies of the employee's job description and specific objections to the recommended decision. He stated that the recommended decision issued in 2002 found that the employee was an employee of Union Carbide and this should be binding on any future decisions. He noted that a Physicians Panel review under former Part D of the Act was completed and the Secretary of Energy accepted the Panel's affirmative determination that the employee's myelodysplastic syndrome was due to exposure to a toxic substance at a DOE facility. He stated that the physicians on the panel ruled that the employee was a DOE contractor employee and that should be binding on the Department of Labor (DOL). He stated that the Part E procedures required acceptance of these types of claims. He also argued that the employee should be considered a "researcher" under the Act, since Congress did not provide a definition of a researcher, and the job duties of the employee "would constitute nuclear materials research done on behalf of the AEC in the area of quality assurance."

One of the documents submitted shows that the employee also performed his job duties for the AEC at other facilities, such as the Kerr McGee facility in Guthrie, Oklahoma[1], and the Union Carbide facility in Wood River Junction, Rhode Island.[2] The employee's resume states he worked for the AEC in Oak Ridge from 1952 to June 30, 1974, verifying that contractors followed building codes and specifications to meet the contracts issued by the AEC and inspected the manufacturing of equipment made of various types of metal. He also stated that he worked for the AEC from 1946 to 1952 as a security inspector at various AEC installations throughout the United States. The periods from 1940 to 1946 and from 1950 to 1952 were military service.

In accordance with §§ 30.314(e) and (f) of the implementing regulations, a claimant is allowed thirty days after the hearing is held to submit additional evidence or argument, and twenty days after a copy of the transcript is sent to them to submit any changes or corrections to that record. 20 C.F.R. §§ 30.314(e), 30.314(f). On July 21, 2006, the transcript was forwarded to you and your attorney. You did not provide any corrections or changes to the transcript.

On July 26, 2006, the Final Adjudication Branch received a submission from your attorney, reiterating the objections and arguments set forth during the hearing.

FINDINGS OF FACT

1. You filed a claim for survivor's benefits under the Act.

2. The employee was diagnosed with myelodysplastic syndrome on April 19, 1996 and his death on March 5, 1997 resulted from that condition.

3. The employee worked for the Department of Energy at the Y-12 plant and the K-25 gaseous diffusion plant from at least 1963 to June 30, 1974, with intermittent periods at other facilities.

4. You were the employee's spouse at the time of his death and at least a year prior.

CONCLUSIONS OF LAW

The undersigned has reviewed the facts, the recommended decision issued by the Jacksonville district office on April 4, 2006, and the information received before, during, and after the hearing.

The eligibility criteria for claims under Part E of EEOICPA are discussed in the regulations, which require that the employee be a Department of Energy contractor employee as defined in § 30.5(w). Section 30.5(w) of the regulations and § 7384l of the Act define a Department of Energy contractor employee to be (1) an individual who is or was in residence at a DOE facility as a researcher for one or more periods aggregating at least 24 months; or (2) an individual who is or was employed at a DOE facility by: (i) an entity that contracted with the DOE to provide management and operation, management and integration, or environmental remediation at the facility; or (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility. 20 C.F.R. § 30.5(w); 42 U.S.C. § 7384l(11).

The finding in a recommended decision that the employee was employed by Union Carbide is not legally binding, since only final decisions can be considered the legal determination of the Department of Labor. The Physicians Panel review finding of covered employment is also not binding on the Department of Labor. Under Part D, the DOE was to serve as a liaison with the various state workers' compensation authorities, and as the letter from the DOE states, a filing under the appropriate state system would have been necessary. A finding that the employee was a federal government employee would likely have resulted in a negative decision from the state workers' compensation authority.

The evidence submitted does not establish that the employee meets the definition of a DOE contractor employee or a researcher. An employee of the federal government cannot be considered an employee of a government contractor or subcontractor, unless the government agency by which they were/are

employed had/has a contract with the DOE to provide services that meet the criteria established by the Act. 42 U.S.C. § 7384l(11). EEOICPA Bulletin No. 03-26 states that "a civilian employee of a state or federal government agency can be considered a 'DOE contractor employee' if the government agency employing that individual is (1) found to have entered into a contract with DOE for the accomplishment of. . .services it was not statutorily obligated to perform, and (2) DOE compensated the agency for that activity."[3] The qualification of a researcher in the Act requires "residence" at a DOE facility, which leads to the interpretation that the researcher is likely affiliated with a university or scientific body, and would logically have the word "researcher" or "research" in their job title or job description. A review of the employee's job descriptions does not show the use of the word "research" or "researcher."

The Act does state that a determination under Part B that a Department of Energy *contractor* [emphasis added] employee is entitled to compensation under that part for an occupational illness shall be treated for purposes of this part [Part E] as a determination that the employee contracted that illness through exposure at a Department of Energy facility. 42 U.S.C. § 7385s-4. If an employee does not fall into the category of a contractor employee, then this section of the law does not apply.

You meet the definition of a survivor under Part E of the Act. 42 U.S.C. § 7385s-3(d)(1). However, since the evidence does not establish that the employee was a Department of Energy contractor employee, you are not entitled to benefits under Part E of the Act, and the claim for compensation is denied. 42 U.S.C. §§ 7385s-4(c)(1)(A), 7385s-3(a)(1)(B).

Jacksonville, FL

Sidne M. Valdivieso

Hearing Representative

[1] There is no facility in Guthrie, Oklahoma listed on the DOE's Office of Worker Advocacy (OWA) website as a covered facility. The only facility in Oklahoma on the website associated with Kerr-McGee is listed as being in Crescent, Oklahoma, and is described as an atomic weapons employer (AWE).

[2] There is no facility in Wood River Junction, Rhode Island listed on the DOE OWA website as a covered facility. The only facility in Rhode Island listed on the website is listed as being in Cranston, Rhode Island, and is described as an AWE.

[3] EEOICPA Bulletin No. 03-26 (issued June 3, 2003).

Federal prisoners

EEOICPA Fin. Dec. No. 22675-2002 (Dep't of Labor, April 21, 2004)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq.* Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On February 19, 2002, you filed a Form EE-1 (Claim for Benefits under the EEOICPA), based on prostate cancer. You also filed a Form EE-3 (Employment History) that indicated, from 1944 to 1945, you were "assigned to grade work sites when [the] Hanford project was started," that you were "a conscientious objector," and treated as a prisoner at a camp near Hanford. You indicated that you are unsure if you wore a dosimetry badge.

You also signed and submitted a Form EE-4 (Employment History Affidavit) that provided additional employment information. You wrote that you worked, from May 15, 1944 to May 15, 1945, for the "United States Dept. of Corrections, Columbia Road Camp, Hanford Area, WA." You continued that you were a "Grader operator in and around all of the atomic energy facilitys and surrounding area." A representative of the Department of Energy (DOE) reported that it had searched various employment records, including the records of General Electric (GE), Hanford Environmental Health Foundation (HEHF) and DuPont, and the Hanford Site contractor records contained no employment information regarding you.

By letters dated March 6, June 18, and August 27, 2002, the Seattle district office advised you that they had completed the initial review of your claim, and that additional employment and medical evidence was needed. Subsequently, you provided a pathology report dated November 9, 1993, signed by L. K. Hatch, M.D., that indicated a diagnosis of moderately differentiated prostatic adenocarcinoma; and copies of your medical records relating to possible cancer from Spokane Urology were received.

On September 30, 2002, the district office recommended denial of your claim for benefits. The district office concluded that the DOE did not confirm you worked for a covered facility, subcontractor or vendor and you did not submit employment evidence to support that you are a covered employee. The district office also concluded that you are not entitled to compensation as outlined in 42 U.S.C. § 7384s. *See* 42 U.S.C. § 7384s.

On October 7, 2002, you submitted additional employment information related to your work. You indicated that Walter J. Hardy worked with you "in irrigation," for the U.S. Department of Corrections as an irrigation and grader operator, from 1944 to 1945. An affidavit, signed by Walter J. Hardy, indicated he worked, with you, from late 1944 to late 1945, with the U.S. Department of Corrections at Hanford, Washington, and that your work consisted of irrigation repair and operation of a road grader. He further affirmed that your work covered most areas of the restricted Hanford project. Also, an affidavit, by Don Hughart, affirmed that he was acquainted with you at the Hanford camp, called "Columbia Camp," from sometime in 1944 to late 1945. He further affirmed that he worked in the orchards with you and that you operated a grader "in and around the Hanford Atomic Bomb Projects."

On December 20, 2002, the Final Adjudication Branch remanded your claim for further development of the employment evidence, to determine whether you were an employee of the U.S. Department of Corrections in your status as a "prisoner" and if so, whether a contractual agreement existed between the U.S. Department of Corrections and the DOE.

By letter dated December 31, 2002, the district office posed certain questions to you regarding your claimed employment on the Hanford Site. The questions inquired whether you received earnings from your work, whether you had individual liberty, if you were in a "prisoner status" under the U.S. Department of Corrections, if the Columbia Camp was on the Hanford Site, and if you were on the

Hanford Site all the time. You responded to the questions that you earned nine cents per hour for your labor, that you were followed to the Hanford gate and at night were free to go anywhere in the camp area, that you were in a "prisoner status," that the Columbia Camp was just outside the Hanford gate, that you were not always on the Hanford Site but were there during the day in order to work, and that you returned to the camp at night.

On February 17, 2004, the district office again recommended denial of your claim for benefits. The district office concluded that the evidence of record is insufficient to establish that you were present at a covered facility as defined under § 7384l(12) while working for the Department of Energy or any of its covered contractors, subcontractors or vendors as defined under section 7384l(11) during a covered time period. *See* 42 U.S.C. § 7384l(11) and (12) The district office further concluded that you are not entitled to compensation pursuant to 42 U.S.C. § 7384s.

FINDINGS OF FACT

1. You filed a claim for employee benefits on February 19, 2002.

2. You submitted medical documentation adequate to establish a diagnosis of prostate cancer.

3. You did not provide sufficient evidence to establish that you engaged in covered employment under the EEOICPA.

CONCLUSIONS OF LAW

The undersigned has reviewed the recommended decision issued by the Seattle district office on February 17, 2004. I find that you have not filed any objections to the recommended decision as provided by § 30.316(a) of the regulations, and that the 60-day period for filing such objections, as provided for in § 30.310(a) has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

In order to be afforded coverage under the Energy Employees Occupational Illness Compensation Program Act, you must establish that you were diagnosed as having a designated occupational illness incurred as a result of exposure to silica, beryllium, and radiation: *cancer, beryllium sensitivity, chronic beryllium disease*, and *silicosis*. *See* 42 U.S.C. § 7384l(15); 20 C.F.R. § 30.110(a). Further, the illness must have been incurred while in the performance of duty for the Department of Energy and certain of its vendors, contractors, and subcontractors, or for an atomic weapons employer or facility. *See* 42 U.S.C. § 7384l(4)-(7), (9), (11).

In order to be afforded coverage under § 7384l(9) of the EEOICPA as a "covered employee with cancer," the claimant must show the employee met any of the following:

(I) A Department of Energy employee who contracted that cancer after beginning employment at a Department of Energy facility;

(II) A Department of Energy contractor employee who contracted that cancer after beginning employment at a Department of Energy facility;

(III) An Atomic weapons employee who contracted that cancer after beginning employment at an atomic weapons facility.

42 U.S.C. § 7384l(9); 20 C.F.R. § 30.210(b). The record lacks proof that you worked in covered employment under the Act. Federal prison inmates who worked at a DOE facility for Federal Prison Industries, Incorporated (FPI), are not "employees" within the meaning of the EEOICPA and, therefore, not eligible for benefits under the Act. The question of prisoners' employment status for purposes of EEOICPA is properly resolved by focusing on the nature of the relationship between the prisoner and FPI. The relationship between an inmate worker and FPI is a compulsory assignment to work rather than a traditional contractual employer-employee relationship in which an employee bargains to provide his labor in return for agreed upon compensation and is free to quit at will. Not even FPI's payments to prison laborers are a matter of a contractual right. Instead, they are remitted to the prisoner solely by congressional grace and governed by the rules and regulations promulgated by the Attorney General. Prisoners working for prison-run industries are not considered employees.

The record shows that, by letters dated March 16, June 18, and August 27, 2002, you were requested to provide the required information to prove covered employment under the Act. You did not provide sufficient evidence to prove covered employment.

It is the claimant's responsibility to establish entitlement to benefits under the Act. The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of every criterion under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means it is more likely than not that a given proposition is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing to the Office of Workers' Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

The record in this case shows that although you submitted medical documentation showing a diagnosis of prostate cancer, you did not submit proof of covered employment under the Act. Federal prison inmates who worked at a DOE facility for Federal Prison Industries, Incorporated are not "employees" within the meaning of the EEOICPA and, therefore, not eligible for benefits under the Act. Therefore, your claim must be denied for lack of evidence of proof of covered employment under the EEOICPA.

For the above reasons the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

Seattle, WA

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA Fin. Dec. No. 22675-2002 (Dep't of Labor, April 21, 2004)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation

under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On February 19, 2002, you filed a Form EE-1 (Claim for Benefits under the EEOICPA), based on prostate cancer. You also filed a Form EE-3 (Employment History) that indicated, from 1944 to 1945, you were "assigned to grade work sites when [the] Hanford project was started," that you were "a conscientious objector," and treated as a prisoner at a camp near Hanford. You indicated that you are unsure if you wore a dosimetry badge.

You also signed and submitted a Form EE-4 (Employment History Affidavit) that provided additional employment information. You wrote that you worked, from May 15, 1944 to May 15, 1945, for the "United States Dept. of Corrections, Columbia Road Camp, Hanford Area, WA." You continued that you were a "Grader operator in and around all of the atomic energy facilitys and surrounding area." A representative of the Department of Energy (DOE) reported that it had searched various employment records, including the records of General Electric (GE), Hanford Environmental Health Foundation (HEHF) and DuPont, and the Hanford Site contractor records contained no employment information regarding you.

By letters dated March 6, June 18, and August 27, 2002, the Seattle district office advised you that they had completed the initial review of your claim, and that additional employment and medical evidence was needed. Subsequently, you provided a pathology report dated November 9, 1993, signed by L. K. Hatch, M.D., that indicated a diagnosis of moderately differentiated prostatic adenocarcinoma; and copies of your medical records relating to possible cancer from Spokane Urology were received.

On September 30, 2002, the district office recommended denial of your claim for benefits. The district office concluded that the DOE did not confirm you worked for a covered facility, subcontractor or vendor and you did not submit employment evidence to support that you are a covered employee. The district office also concluded that you are not entitled to compensation as outlined in 42 U.S.C. § 7384s. *See* 42 U.S.C. § 7384s.

On October 7, 2002, you submitted additional employment information related to your work. You indicated that Walter J. Hardy worked with you "in irrigation," for the U.S. Department of Corrections as an irrigation and grader operator, from 1944 to 1945. An affidavit, signed by Walter J. Hardy, indicated he worked, with you, from late 1944 to late 1945, with the U.S. Department of Corrections at Hanford, Washington, and that your work consisted of irrigation repair and operation of a road grader. He further affirmed that your work covered most areas of the restricted Hanford project. Also, an affidavit, by Don Hughart, affirmed that he was acquainted with you at the Hanford camp, called "Columbia Camp," from sometime in 1944 to late 1945. He further affirmed that he worked in the orchards with you and that you operated a grader "in and around the Hanford Atomic Bomb Projects."

On December 20, 2002, the Final Adjudication Branch remanded your claim for further development of the employment evidence, to determine whether you were an employee of the U.S. Department of Corrections in your status as a "prisoner" and if so, whether a contractual agreement existed between the U.S. Department of Corrections and the DOE.

By letter dated December 31, 2002, the district office posed certain questions to you regarding your claimed employment on the Hanford Site. The questions inquired whether you received earnings from

your work, whether you had individual liberty, if you were in a "prisoner status" under the U.S. Department of Corrections, if the Columbia Camp was on the Hanford Site, and if you were on the Hanford Site all the time. You responded to the questions that you earned nine cents per hour for your labor, that you were followed to the Hanford gate and at night were free to go anywhere in the camp area, that you were in a "prisoner status," that the Columbia Camp was just outside the Hanford gate, that you were not always on the Hanford Site but were there during the day in order to work, and that you returned to the camp at night.

On February 17, 2004, the district office again recommended denial of your claim for benefits. The district office concluded that the evidence of record is insufficient to establish that you were present at a covered facility as defined under § 7384l(12) while working for the Department of Energy or any of its covered contractors, subcontractors or vendors as defined under section 7384l(11) during a covered time period. *See* 42 U.S.C. § 7384l(11) and (12) The district office further concluded that you are not entitled to compensation pursuant to 42 U.S.C. § 7384s.

FINDINGS OF FACT

1. You filed a claim for employee benefits on February 19, 2002.

2. You submitted medical documentation adequate to establish a diagnosis of prostate cancer.

3. You did not provide sufficient evidence to establish that you engaged in covered employment under the EEOICPA.

CONCLUSIONS OF LAW

The undersigned has reviewed the recommended decision issued by the Seattle district office on February 17, 2004. I find that you have not filed any objections to the recommended decision as provided by § 30.316(a) of the regulations, and that the 60-day period for filing such objections, as provided for in § 30.310(a) has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

In order to be afforded coverage under the Energy Employees Occupational Illness Compensation Program Act, you must establish that you were diagnosed as having a designated occupational illness incurred as a result of exposure to silica, beryllium, and radiation: *cancer, beryllium sensitivity, chronic beryllium disease*, and *silicosis*. *See* 42 U.S.C. § 7384l(15); 20 C.F.R. § 30.110(a). Further, the illness must have been incurred while in the performance of duty for the Department of Energy and certain of its vendors, contractors, and subcontractors, or for an atomic weapons employer or facility. *See* 42 U.S.C. § 7384l(4)-(7), (9), (11).

In order to be afforded coverage under § 7384l(9) of the EEOICPA as a "covered employee with cancer," the claimant must show the employee met any of the following:

(I) A Department of Energy employee who contracted that cancer after beginning employment at a Department of Energy facility;

(II) A Department of Energy contractor employee who contracted that cancer after beginning employment at a Department of Energy facility;

(III) An Atomic weapons employee who contracted that cancer after beginning employment at an atomic weapons facility.

42 U.S.C. § 7384l(9); 20 C.F.R. § 30.210(b). The record lacks proof that you worked in covered employment under the Act. Federal prison inmates who worked at a DOE facility for Federal Prison Industries, Incorporated (FPI), are not "employees" within the meaning of the EEOICPA and, therefore, not eligible for benefits under the Act. The question of prisoners' employment status for purposes of EEOICPA is properly resolved by focusing on the nature of the relationship between the prisoner and FPI. The relationship between an inmate worker and FPI is a compulsory assignment to work rather than a traditional contractual employer-employee relationship in which an employee bargains to provide his labor in return for agreed upon compensation and is free to quit at will. Not even FPI's payments to prison laborers are a matter of a contractual right. Instead, they are remitted to the prisoner solely by congressional grace and governed by the rules and regulations promulgated by the Attorney General. Prisoners working for prison-run industries are not considered employees.

The record shows that, by letters dated March 16, June 18, and August 27, 2002, you were requested to provide the required information to prove covered employment under the Act. You did not provide sufficient evidence to prove covered employment.

It is the claimant's responsibility to establish entitlement to benefits under the Act. The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of every criterion under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means it is more likely than not that a given proposition is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing to the Office of Workers' Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

The record in this case shows that although you submitted medical documentation showing a diagnosis of prostate cancer, you did not submit proof of covered employment under the Act. Federal prison inmates who worked at a DOE facility for Federal Prison Industries, Incorporated are not "employees" within the meaning of the EEOICPA and, therefore, not eligible for benefits under the Act. Therefore, your claim must be denied for lack of evidence of proof of covered employment under the EEOICPA.

For the above reasons the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

Seattle, WA

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

In general

EEOICPA Fin. Dec. No. 51813-2004 (Dep't of Labor, December 27, 2004)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch concerning the claims for compensation under Part B of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended, 42 U.S.C. § 7384 *et seq.* (EEOICPA). For the reasons stated below, the claims for survivor benefits are denied.

STATEMENT OF THE CASE

On December 2, 2003, **[Claimant 1]** filed a claim for survivor benefits under Part B of the EEOICPA. On February 4, 2004, **[Claimant 2]** filed for survivor benefits under Part B of the EEOICPA. On March 16, 2004, **[Claimant 3]** and **[Claimant 4]** filed claims for survivor benefits under Part B of the EEOICPA. Each claimant filed as a surviving grandchild of **Employee]**. **[Employee]** passed away on December 7, 1955. The claimants listed multiple myeloma and uremia amyloidosis as the medical conditions on which their claims are based. The evidence of record is sufficient to establish that **[Employee]** was diagnosed with multiple myeloma, a condition covered under Part B of the Act, in March 1955, as evidenced by information on his December 7, 1955 death certificate.

Social Security Earnings statements as well as the work history provided by the claimants, indicate that **[Employee]** was employed by various employers in Weldon Spring, MO, in approximately 1945. The record contains social security earnings records for the claimed period of time

The district office informed each claimant that the Weldon Spring Plant was not a covered facility until 1957. The district office afforded each claimant the opportunity to provide evidence to support that **[Employee]** had employment covered under the Act. The record fails to establish that the claimants provided additional employment evidence to the district office for review.

By recommended decision dated April 28, 2004, the Seattle district office recommended denial of each of the claims based on its findings that **[Employee]** is not a covered employee as defined under 42 U.S.C. § 7384l; and the evidence of record is insufficient to establish that **[Employee]** was present at a covered facility as defined under 42 U.S.C. § 7384l (12) while working for the Department of Energy or any of its covered contractors, subcontractors or vendors as defined under 42 U.S.C. § 7384l(11) during a covered time period.

On May 17, 2004, the Final Adjudication Branch received **[Claimant 2]**'s letter of objection and request for an oral hearing. **[Claimant 2]** objected to the Seattle district office's recommended decision on the basis of the covered time period which began in 1957. On June 16, 2004, a hearing was held in St. Louis, MO at the request of **[Claimant 2]**. It is noted that **[Claimant 1]** filed an objection to the recommended decision but did not request a hearing. **[Claimant 1]** participated in the June 16, 2004 hearing. On June 22, 2004, the Final Adjudication Branch received the June 15, 2004 letter from **[Claimant 3]** and **[Claimant 4]** objecting to the April 28, 2004, recommended decision. **[Claimant 3]** and **[Claimant 4]** object to the Seattle district office's recommended decision on the basis of the covered time period which began in 1957.

On June 28, 2004, the undersigned contacted **[Claimant 3]** and explained that the letter of objection was received after the hearing had been held, but within the 60 day period in which objections could be filed. **[Claimant 3]** was informed that an oral hearing could be scheduled or they could be added to an existing hearing docket. After conferring with **[Claimant 4]**, **[Claimant 3]** notified this office that they would like to be added to the July 27, 2004 docket of hearings. By letter dated July 6, 2004, each of the claimants were notified that a hearing at the request of **[Claimant 3]** and **[Claimant 4]** was to be

conducted July 27, 2004 via telephone. By letters dated June 28, 2004, and September 1, 2004, each of the claimants were provided a copy of the transcripts from the June 16, 2004 and July 27, 2004 hearings respectively.

At the June 16, 2004 hearing, **[Claimant 2]** testified that when she was young, the family talked about the chemicals her grandfather, **[Employee]**, worked with; he worked unprotected; that **[Employee]** became very ill and the family felt that it was a result of his work. **[Claimant 2]** provided testimony regarding information found on the internet (Exhibit A) which she felt showed that Weldon Springs was opened in 1940 and that the time frame established as the covered periods should be expanded. See hearing transcript pages 8 and 10. **[Claimant 2]** further testified that her mother talked about experiments conducted on **[Employee]** for "multiple myeloma, for the Japanese, for radiation poisoning, investigating on how – what caused it, how the body acts, what to do about it." **[Claimant 2]** stated that she is researching this issue further. *See* hearing transcript page 15. The records provided by the Social Security Administration (Exhibit B) indicate that **[Employee]** worked in Kansas City in 1942 and 1943. **[Claimant 2]** testified that this may indicate that **[Employee]** worked at the Kansas City Plant and is attempting to confirm this. *See* hearing transcript page 10. **[Claimant 2]** also stated that one of her grandfather's employers, T.A. Rick (Exhibit C), was a subcontractor to Mallinckrodt.

[Claimant 1] testified that his grandfather, **[Employee]**, worked at Weldon Springs and at Kansas City and that during this timeframe, **[Employee]** was exposed to "things that he just did not know about." **[Claimant 1]** testified that exposure to chemicals resulted in his grandfather's death. *See* hearing transcript page 16. On July 9, 2004, **[Claimant 2]** requested a 30 day extension in which to provide additional evidence.

The hearing conducted on July 27, 2004, was attended by **[Claimant 3]**. **[Claimant 3]** testified that she recalled her grandmother stating that her grandfather, **[Employee]** "wouldn't have gotten sick if it had not been for the plant." During the hearing, **[Claimant 3]** questioned the provisions of the Act. On September 1, 2004, the undersigned provided **[Claimant 3]** with a copy of the Act along with the hearing transcript for her review.

The claimants have not provided any additional evidence or comments to the hearing transcripts.

FINDINGS OF FACT

1. Each claimant filed a claim for survivor benefits as a grandchild of the employee.

2. The claimants listed multiple myeloma and uremia amyloidosis as the medical conditions on which their claims are based. **[Employee]** was diagnosed with multiple myeloma in March 1955. Uremia amyloidosis is not a condition covered under Part B of the Act.

3. The Atomic Energy Commission (AEC) constructed the Weldon Spring Uranium Feed Materials Plant and contracted with the Mallinckrodt Chemical Company to operate the plant starting in June 1957. The claimants stated that the employee worked for various employers at the Weldon Spring Plant in approximately 1945.

4. On April 28, 2004, the Seattle district office issued a recommended decision to deny the claims for survivor benefits because the evidence of record is insufficient to establish that **[Employee]** was present at a covered facility while working for the Department of Energy or any of its covered

contractors, subcontractors or vendors.

5. The claimants objected to the recommended decision. **[Claimant 2]**, **[Claimant 3]**, and **[Claimant 4]** each requested a hearing. **[Claimant 1]** objected to the recommended decision, but did not request a hearing.

6. The hearings were held on June 16, 2004 and July 27, 2004. The claimants have not submitted any additional evidence or comments on the hearing transcripts, copies of which were sent to the claimants on June 28, 2004 and September 1, 2004.

CONCLUSIONS OF LAW

The issue to be decided is whether **[Employee]** is a covered employee as defined under the Act based on the claimed employment in Weldon Spring, MO, in 1945. According to the updated Department of Energy's facility list, reviewed by the undersigned on December 15, 2004, the Weldon Springs Plant is designated as a Department of Energy facility for the period of 1957 to 1967 and again from 1975 through the present for remediation.[1] The DOE facility list states in part: "In 1955 the Army transferred 205 acres of what had been the Weldon Springs Ordnance Works to the AEC for construction of a uranium feed materials plant. The AEC constructed the Weldon Spring Uranium Feed Materials Plant at this location and contracted with the Mallinckrodt Chemical Company to operate the plant starting in June 1957. The plant was used for uranium refining activities in support of the national defense program. The AEC closed down the plant in December 1966 after deciding it was obsolete."

At the June 16, 2004 hearing, **[Claimant 2]** provided as Exhibit A, information from the internet[2] which states in part: "The Weldon Springs Uranium Feed Materials Plant is on 220 acres of land between the Missouri and Mississippi Rivers near St. Louis, Missouri. Weldon Springs Site is located at 7295 Highway 94 South in St. Charles, Missouri, on a portion of the former Weldon Springs Ordinance Works, a 17,000 acre Army facility operated from 1941-45 which produced explosives. A quarry located on the site was used by the Army for limestone to construct the Ordinance Works and then as a dump for TNT and DNT contaminated waste and rubble which they burned. In 1955 the Army transferred some of the property to the AEC who built the Uranium Feed Materials Plant. . . ." According to both the DOE facility list and Exhibit A, the Army transferred land to the AEC in 1955. The claim is based on employment in 1945. The established covered time period for the Weldon Spring Plant is 1957 to 1967 and from 1975 to the present. **[Employee]** passed away in 1955, prior to the covered time period.

To date, the claimants have not provided any evidence in support of their belief that **[Employee]** may have worked at the Kansas City Plant during the covered time period.

For the foregoing reasons, the undersigned must find that the claimants have not established their claims for compensation under Part B of the EEOICPA and that the Recommended Decision of the district office is correct. Therefore, the undersigned hereby affirms the denial of the claims for compensation under Part B of the EEOICPA.

Washington, DC

Linda M. Parker

Hearing Representative

[1] http://www.eh.doe.gov/advocacy/faclist/findfacility.cfm.

[2] http://nuclearhistory.tripod.com/doe.html.

Non-occupational exposure

EEOICPA Fin. Dec. No. 366-2002 (Dep't of Labor, June 3, 2003)

NOTICE OF FINAL DECISION REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. The recommended decision was to deny your claim. You submitted objections to that recommended decision. The Final Adjudication Branch carefully considered the objections and completed a review of the written record. *See* 20 C.F.R. § 30.312. The Final Adjudication Branch concludes that the evidence is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On July 31, 2001, you filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA), stating that you were the daughter of **[Employee]**, who was diagnosed with cancer, chronic silicosis, and emphysema. You completed a Form EE-3, Employment History for Claim under the EEOICPA, indicating that from December 2, 1944 to May 30, 1975, **[Employee]** was employed as a heavy mobile and equipment mechanic, for Alaska District, Corps of Engineers, Anchorage, Alaska.

On August 20, 2001, a representative of the Department of Energy (or DOE) indicated that "none of the employment history listed on the EE-3 form was for an employer/facility which appears on the Department of Energy Covered Facilities List." Also, on August 29, 2001, a representative of the DOE stated in Form EE-5 that the employment history contains information that is not accurate. The information from the DOE lacked indication of covered employment under the EEOICPA.

The record in this case contains other employment evidence for **[Employee]**. With the claim for benefits, you submitted a "Request and Authorization for TDY Travel of DOD Personnel" Form DD-1610, initiated on November 10, 1971 and approved on November 11, 1971. **[Employee]** was approved for TDY travel for three days to perform work on Amchitka Island, Alaska, for the Department of Defense, Alaska District Corps of Engineers beginning on November 15, 1971. He was employed as a Mobile Equipment Mechanic WG-12, and the purpose of the TDY was noted "to examine equipment for potential use on Blair Lake Project." The security clearance was noted as "Secret." You also submitted numerous personnel documents from **[Employee]**'s employment with the Alaska District Corp of Engineers. Those documents include a "Notification of Personnel Action" Form SF-50 stating that **[Employee]**'s service compensation date was December 2, 1944, for his work as a Heavy Mobile Equipment Mechanic; and at a WG-12, Step 5, and that he voluntarily retired on May 30, 1975.

The medical documentation of record shows that **[Employee]** was diagnosed with emphysema, small cell carcinoma of the lung, and chronic silicosis. A copy of **[Employee]**'s Death Certificate shows that he died on October 9, 1990, and the cause of death was due to or as a consequence of bronchogenic cancer of the lung, small cell type.

On September 6 and November 5, 2001, the district office wrote to you stating that additional evidence was needed to show that **[Employee]** engaged in covered employment. You were requested to submit a Form EE-4, Employment History Affidavit, or other contemporaneous records to show proof of **[Employee]**'s employment at the Amchitka Island, Alaska site covered under the EEOICPA. You did not submit any additional evidence and by recommended decision dated December 12, 2001, the Seattle district office recommended denial of your claim. The district office concluded that you did not submit employment evidence as proof that **[Employee]** worked during a period of covered employment as required by § 30.110 of the EEOICPA regulations. *See* 20 C.F.R. § 30.110.

On January 15 and February 6, 2002, you submitted written objections to the recommended denial decision. The DOE also forwarded additional employment information. On March 20, 2002, a representative of the DOE provided a Form EE-5 stating that the employment history is accurate and complete. However, on March 25, 2002, a representative of the DOE submitted a "corrected copy" Form EE-5 that indicated that the employment history provided in support of the claim for benefits "contains information that is not accurate." An attachment to Form EE-5 indicated that **[Employee]** was employed by the Army Corps of Engineers for the period July 25, 1944 to August 11, 1952, at Fort Richardson, Alaska; and from August 11, 1952 to May 30, 1975 at Elmendorf Air Force Base, Alaska. Further, the attachment included clarifying information:

Our records show that the Corps of Engineers' was a prime AEC contractor at Amchitka. **[Employee]**'s Official Personnel Folder (OPF) indicates that he was at Forth Richardson and Elmendorf AFB, both in Alaska. The OPF provided no indication that **[Employee]** worked at Amchitka, Alaska. To the best of our knowledge, Blair Lake Project was not a DOE project.

Also, on April 3, 2002, a representative of the DOE submitted a Form EE-5 indicating that Bechtel Nevada had no information regarding **[Employee]**, but he had a film badge issued at the Amchitka Test Site, on November 15, 1971. The record includes a copy of Appendix A-7 of a "Manager's Completion Report" which indicates that the U. S. Army Corps of Engineers was a prime AEC (Atomic Energy Commission) Construction, Operations and Support Contractor, on Amchitka Island, Alaska.

On December 10, 2002, a hearing representative of the Final Adjudication Branch issued a Remand Order. Noting the above evidence, the hearing representative determined that the "only evidence in the record with regard to the Army Corps of Engineers status as a contractor on Amchitka Island is the DOE verification of its listing as a prime AEC contractor . . . and DOE's unexplained and unsupported verification [of **[Employee]**'s employment, which] are not sufficient to establish that a contractual relationship existed between the AEC, as predecessor to the DOE, and the Army Corps of Engineers." The Remand Order requested the district office to further develop the record to determine whether the Army Corps of Engineers had a contract with the Department of Energy for work on Amchitka Island, Alaska, and if the work **[Employee]** performed was in conjunction with that contract. Further the Remand Order directed the district office to obtain additional evidence to determine if **[Employee]** was survived by a spouse, and since it did not appear that you were a natural child of **[Employee]**, if you could establish that you were a stepchild who lived with **[Employee]** in a regular parent-child relationship. Thus, the Remand Order requested additional employment evidence and proof of eligibility under the Act.

On January 9, 2003, the district office wrote to you requesting that you provide proof that the U.S. Army Corps of Engineers had a contract with the AEC for work **[Employee]** performed on his TDY assignment to Amchitka Island, Alaska for the three days in November 1971. Further, the district office requested that you provide proof of your mother's death, as well as evidence to establish your relationship to **[Employee]** as a survivor.

You submitted a copy of your birth certificate that indicated that you were born **[Name of Claimant at Birth]** on October 4, 1929, to your natural mother and natural father **[Natural Mother]** and **[Natural Father]**. You also submitted a Divorce Decree filed in Boulder County Court, Colorado, Docket No. 10948, which showed that your biological parents were divorced on October 10, 1931, and your mother, **[Natural Mother]** was awarded sole custody of the minor child, **[Name of Claimant at Birth]**. In addition, you submitted a marriage certificate that indicated that **[Natural Mother]** married **[Employee]** in the State of Colorado on November 10, 1934. Further, you took the name **[Name of Claimant Assuming Employee's Last Name]** at the time of your mother's marriage in 1934, as indicated by the sworn statement of your mother on March 15, 1943. You provided a copy of a Marriage Certificate to show that on August 19, 1949, you married **[Husband]**. In addition, you submitted a copy of the Death Certificate for **[Name of Natural Mother Assuming Employee's Last Name]** stating that she died on May 2, 1990. The record includes a copy of **[Employee]**'s Death Certificate showing he died on October 9, 1990.

You also submitted the following additional documentation on January 20, 2003: (1) A copy of **[Employee's]** Last Will and Testament indicated that you, **[Claimant]**, were the adult daughter and named her as Personal Representative of the Estate; (2) Statements by Jeanne Findler McKinney and Jean M. Peterson acknowledged on January 17, 2003, indicated that you lived in a parent-child relationship with **[Employee]** since 1945; (3) A copy of an affidavit signed by **[Name of Natural Mother Assuming Employee's Last Name]** (duplicate) indicated that at the time of your mother's marriage to **[Employee]**, you took the name **[Name of Claimant Assuming Employee's Last Name]**.

You submitted additional employment documentation on January 27, 2003: (1) A copy of **[Employee]**'s TDY travel orders (duplicate); (2) A Memorandum of Appreciation dated February 11, 1972 from the Department of the Air Force commending **[Employee]** and other employees, for their support of the Blair Lake Project; (3) A letter of appreciation dated February 18, 1972 from the Department of the Army for **[Employee]**'s contribution to the Blair Lake Project; and (4) Magazine and newspaper articles containing photographs of **[Employee]**, which mention the work performed by the

U.S. Army Corps of Engineers in Anchorage, Alaska.

The record also includes correspondence, dated March 27, 2003, from a DOE representative. Based on a review of the documents you provided purporting that **[Employee]** was a Department of Energy contractor employee working for the U.S. Army Corps of Engineers on TDY in November, 1971, the DOE stated that the Blair Lake Project was not a DOE venture, observing that "[i]f Blair Lake Project had been our work, we would have found some reference to it."

On April 4, 2003, the Seattle district office recommended denial of your claim for benefits. The district office concluded that the evidence of record was insufficient to establish that **[Employee]** was a covered employee as defined under § 7384l(9)(A). *See* 42 U.S.C. § 7384l(9)(A). Further, **[Employee]** was not a member of the Special Exposure Cohort, as defined by § 7384l(14)(B). *See* 42 U.S. C. § 7384l(14)(B). Also, **[Employee]** was not a "covered employee with silicosis" as defined under §§ 7384r(b) and 7384r(c). *See* 42 U.S.C. §§ 7384r(b) and (c). Lastly, the recommended decision found that you are not entitled to compensation under § 7384s. *See* 42 U.S.C. § 7384s.

On April 21, 2003, the Final Adjudication Branch received your letter of objection to the recommended decision and attachments. First, you contended that the elements of the December 10, 2002 Remand Order were fulfilled because you submitted a copy of your mother's death certificate and further proof that **[Employee]** was your stepfather; and that the letter from the district office on April 4, 2003 "cleared that question on page three – quote 'Our records show that the Corps of Engineers was a prime AEC contractor at Amchitka.'"

Second, you stated that further clarification was needed as to the condition you were claiming. You submitted a death certificate for **[Employee]** showing that he died due to bronchogenic cancer of the lung, small cell type, and noted that that was the condition you alleged as the basis of your claim on your first Form, associated with your claim under the EEOICPA.

Third, you alleged that, in **[Employee]**'s capacity as a "Mobile Industrial Equipment Mechanic" for the Army Corps of Engineers, "he was required to work not only for the DOD (Blair Lake project) but also for DOE on the Amchitka program. For example: on March 5, 1968 he was sent to Seward, Alaska to 'Inspect equipment going to Amchitka.' He was sent from the Blair Lake project (DOD) to Seward for the specified purpose of inspecting equipment bound for Amchitka (DOE). Thus, the DOE benefited from my father's [Corp of Engineers] expertise/service while on 'loan' from the DOD. Since the closure of the Amchitka project (DOE), the island has been restored to its original condition. . . . Therefore, my dad's trip to Amchitka to inspect equipment which might have been used at the Blair Lake project benefited not only DOD but also DOE. In the common law, this is known as the 'shared Employee' doctrine, and it subjects both employers to liability for various employment related issues."

On May 21, 2003, the Final Adjudication Branch received your letter dated May 21, 2003, along with various attachments. You indicated that the U.S. Army Corps of Engineers was a contractor to the DOE for the Amchitka Project, based upon page 319 of an unclassified document you had previously submitted in March 2002. Further, you indicated that **[Employee]** had traveled to Seward, Alaska to inspect equipment used at on-site operations for use on Amchitka Island by the Corps of Engineers for the DOE project, and referred to the copy of the Corps of Engineers TDY for Seward travel you submitted to the Final Adjudication Branch with your letter of April 18, 2003. Also, you indicated that **[Employee]** traveled to Amchitka, Island in November 1972 to inspect the equipment referenced above, which had been shipped from Seward, Alaska. You indicated that **[Employee]** was a mobile industrial equipment mechanic, and that his job required him to travel. You attached the following documents in support of your contention that the equipment **[Employee]** inspected could have included equipment belonging to the Corps of Engineers: Job Description, Alaska District, Corps of Engineers (previously submitted), and an Employee Performance Appraisal.

In addition, you indicated **[Employee]** was required to travel to remote sites throughout Alaska in order to perform his job with the Corps of Engineers, and in support of this you referred to your electronic mail sent to the Seattle District Office on January 7, 2003. You indicated that, since **[Employee]** was required to travel to Amchitka as a part of his regular duties as a mobile industrial equipment mechanic, it was possible that the equipment he inspected on the November 15, 1971 trip to Amchitka included equipment owned by the Corps as well as inspection of equipment owned by private contractors. You attached a copy of a document entitled, "Affidavit," dated May 21, 2003, signed by Erwin L. Long. Mr. Long stated that he was head of the Foundations Material Branch for the Corps of Engineers at the time of his retirement, and that in 1971 he had been Head of the Rock Design Section. Mr. Long indicated that he did not spend any time on Amchitka Island, that he had known **[Employee]** since 1948, and that he "believe[d]" **[Employee]**'s travel to Amchitka for his job would have required him to track equipment belonging to the Corps of Engineers, and that **[Employee]** would also have "performed required maintenance on the equipment before preparing [it] for shipping off Amchitka Island." Mr. Long also stated that **[Employee]** would not talk about his work on Amchitka since it was classified. Finally, you attached a TDY dated March 4, 1968, as well as a travel voucher/subvoucher dated March 15, 1968, to support that **[Employee]**'s mission to Amchitka had been completed.

FINDINGS OF FACT

1. On July 31, 2001, **[Claimant]** filed a claim for survivor benefits under the EEOICPA as the daughter of **[Employee]**.

2. **[Employee]** was diagnosed with small cell bronchogenic carcinoma of the lung and chronic silicosis.

3. **[Employee]** was employed by the U.S. Army Corps of Engineers for the period from July 25, 1944 to August 11, 1952, at Fort Richardson, Alaska; and from August 11, 1952 to May 30, 1975 at Elmendorf Air Force Base, Alaska.

4. **[Employee]**'s employment for the U.S. Army Corps of Engineers on TDY assignment at the Amchitka Island, Alaska site in November 1971 was in conjunction with a Department of Defense venture, the Blair Lakes Project.

CONCLUSIONS OF LAW

The EEOCIPA implementing regulations provide that a claimant may object to any or all of the findings of fact or conclusions of law, in the recommended decision. 20 C.F.R. § 30.310. Further, the regulations provide that the Final Adjudication Branch will consider objections by means of a review of the written record. 20 C.F.R. § 30.312. The Final Adjudication Branch reviewer will review the record forwarded by the district office and any additional evidence and/or argument submitted by the claimant. 20 C.F.R. § 30.313. Consequently, the Final Adjudication Branch will consider the overall evidence of record in reviewing the written record.

In order to be awarded benefits under the Energy Employees Occupational Illness Compensation Program Act, the covered employee (or his/her eligible survivors), must first establish that the employee has been diagnosed with beryllium illness, cancer, or chronic silicosis. *See* 42 U.S.C. § 7384l(15), 20 C.F.R. § 30.110(a). The evidence to show proof of an occupational illness is not in dispute in this case. The medical evidence establishes that **[Employee]** was diagnosed with cancer (bronchogenic cancer of the lung, small cell type) and chronic silicosis. Consequently, **[Employee]** was diagnosed with two illnesses potentially covered under the Act.

Employees of a DOE contractor (or their eligible survivors) are entitled under the EEOICPA to seek compensation for a cancer as a member of the Special Exposure Cohort (SEC) or through a determination that they incurred cancer that was at least as likely as not related to employment at a DOE facility. 42 U.S.C. §§ 7384l(14), 7384l(9)(B)(ii)(II). To be included in the SEC, a DOE employee, DOE contractor employee, or atomic weapons employee must have been employed for an aggregate of 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee or employed before January 1, 1974, by the DOE or a DOE contractor or subcontractor on Amchitka Island, Alaska, and have been exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests. 42 U.S.C. § 7384l(14). To qualify as a covered employee with cancer, members of the SEC need only establish that they contracted a "specified cancer", designated in section 7384l(17) of the EEOICPA, after beginning employment at a DOE facility or atomic weapons employer facility.

While the EEOICPA does not contain a specific definition of a DOE contractor, it does contain a definition of a DOE contractor employee that, in effect, defines what a DOE contractor is. Section 7384l(11) of the EEOICPA defines a DOE contractor employee as:

(A) An individual who is or was in residence at a Department of Energy facility as a researcher for one or more periods aggregating at least 24 months.
(B) An individual who is or was employed at a Department of Energy facility by-
    (i) an entity that contracted with the Department of Energy to provide

management and operating, management and integration, or environmental remediation at the facility; or
(ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

The question presented in this case is whether **[Employee]**, an employee of the U.S. Army Corps of Engineers was, during the time he spent on Amchitka Island, providing management and operation, management and integration or environmental remediation services under a contract between the DOE and the Army Corps of Engineers.

The undersigned notes that the Atomic Energy Commission's Managers Completion Report refers to the U.S. Army Corp of Engineers, as a prime contractor for work on Milrow and Cannikin. The work to be performed under that contract consisted of "engineering, procurement, construction administration and inspection."

[Employee]'s "Request and Authorization for TDY Travel of DOD Personnel," initiated on November 10 and approved on November 11, 1971, was for the purpose of three days work on Amchitka Island, Alaska, for the Department of Defense, Alaska District Corps of Engineers. The purpose of the TDY was to "examine equipment for potential use on Blair Lake Project."

You submitted the following new documents along with your letter to the Final Adjudication Branch dated May 21, 2003: Employee Performance Appraisal for the period February 1, 1966 to January 31, 1967; Affidavit of Erwin L. Long dated May 21, 2003; Request and Authorization for Military Personnel TDY Travel and Civilian Personnel TDY and PCS Travel, dated March 4, 1968; and Travel Voucher or Subvoucher, dated March 15, 1968. None of the documents submitted establish that **[Employee]** was on Amchitka Island providing services pursuant to a contract with the DOE.

The preponderance of the evidence in this case supports the conclusion that **[Employee]** was on Amchitka Island in November 1971 for the sole purpose of inspecting equipment to be used by the Department of Defense on its Blair Lake Project. The documentation of record refers to the Blair Lake Project as a Department of Defense project, and the DOE noted in correspondence dated March 27, 2003, that research was not able to verify that Blair Lake was a DOE project.

While the DOE indicated that **[Employee]** was issued a dosimetry badge, such evidence may be used to establish that he was present on Amchitka Island, not to establish that he was a covered DOE employee. Therefore, **[Employee]**'s presence on Amchitka Island was to perform work for the Department of Defense, and not pursuant to a contract between the DOE and the U.S. Army Corps of Engineers.

The evidence is also insufficient to show covered employment under § 7384r(c) and (d) of the EEOICPA for chronic silicosis. To be a "covered employee with chronic silicosis" it must be established that the employee was:

A DOE employee or a DOE contractor employee, who was present for a number of workdays aggregating at least 250 work days during the mining of tunnels at a DOE facility located in Nevada or Alaska for test or experiments related to an atomic weapon.

See 42 U.S.C. § 7384r(c) and (d); 20 C.F.R. § 30.220(a). Consequently, even if the evidence showed DOE employment (which it does not since **[Employee]** worked for the DOD), he was present only

three days on Amchitka, which is not sufficient for the 250 days required under the Act as a covered employee with silicosis.

The undersigned notes that in your objection to the recommended decision, you referred to a "shared employee" doctrine which you believe should be applied to this claim. You contend that on March 5, 1968, **[Employee]** was sent to Seward, Alaska to "Inspect equipment going to Amchitka, which might have been used at the Blair Lake project [to benefit] not only DOD but also DOE." No provision in the Act refers to a "shared employee" doctrine. Given the facts of this case, coverage could only be established if **[Employee]** was on Amchitka Island providing services pursuant to a contract with the DOE, evidence of which is lacking in this case.

It is the claimant's responsibility to establish entitlement to benefits under the EEOICPA. The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of each and every criterion under any compensable claim category set forth in section 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing the Office of Workers' Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

Although you submitted medical evidence to show covered illnesses due to cancer and chronic silicosis, the evidence of record is insufficient to establish that **[Employee]** engaged in covered employment. Therefore, your claim must be denied for lack of proof of covered employment under the EEOICPA.

Seattle, Washington

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA Fin. Dec. No. 27798-2003 (Dep't of Labor, June 20, 2003)

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 (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claims for benefits are denied.

STATEMENT OF THE CASE

On April 11, 2002, **[Claimant 1]** filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA), stating that he was the son of **[Employee]**, who was diagnosed with pharyngeal cancer. An additional claim followed thereafter from **[Claimant 2]** on October 20, 2002. **[Claimant 1]** also completed a Form EE-3, Employment History, indicating that **[Employee]** worked for Standard Oil Company, from

1950 to 1961; the State of Alaska as Deputy Director of Veterans Affairs, from 1961 to 1964; the State of Alaska Department of Military Affairs, Alaska Disaster Office, from 1965 to 1979 (where it was believed he wore a dosimetry badge); and, for the American Legion from 1979 to 1985.

In correspondence dated June 24, 2002, a representative of the Department of Energy (DOE) indicated that they had no employment information regarding **[Employee]**, but that he had been issued film badges at the Amchitka Test Site on the following dates: October 28, 1965; September 30, 1969; and, September 21, 1970. You also submitted a completed Form EE-4 (Employment Affidavit) signed by Don Lowell, your father's supervisor at the State of Alaska, Department of Public Safety, Division of Civil Defense. According to Mr. Lowell, your father was a radiological officer for the State of Alaska and accompanied him to Amchitka Island for Project Longshot on November 29, 1965, and the Milrow Test on October 2, 1969, as a representative of the State of Alaska.

Additional documentation submitted in support of your claim included copies of your birth certificates, a marriage certificate documenting **[Name of Claimant 2 at Birth]**'s marriage to **[Husband]**, and the death certificate for **[Employee]**, indicating that he was widowed at the time of his death on May 10, 1993. In addition, you provided medical documentation reflecting a diagnosis of squamous cell carcinoma of the pharyngeal wall in November 1991.

On November 8, 2002, the Seattle district office issued a recommended decision that concluded that **[Employee]** was a covered employee as defined in § 7384l(9)(A) of the Act and an eligible member of the Special Exposure Cohort as defined in § 7384l(14)(B) of the EEOICPA, who was diagnosed as having a specified cancer, specifically cancer of the hypopharynx, as defined in § 7384l(17) of the Act. *See* 42 U.S.C. 7384l(9)(A), (14)(B), (17). The district office further concluded that you were eligible survivors of **[Employee]** as outlined in § 7384s(e)(3) of the Act, and that you were each entitled to compensation in the amount of $75,000 pursuant to § 7384s(a)(1) and (e)(1) of the EEOICPA. *See* 42 U.S.C. §§ 7384s(a)(1) and (e)(1).

On December 20, 2002, the Final Adjudication Branch issued a Remand Order in this case on the basis that the evidence of record did not establish that **[Employee]** was a member of the "Special Exposure Cohort," as required by the Act. The Seattle district office was specifically directed to determine whether the Department of Energy and the State of Alaska, Department of Public Safety, Division of Civil Defense, had a contractual relationship.

In correspondence dated January 17, 2003, Don Lowell elaborated further on your father's employment and his reasons for attending the nuclear testing on Amchitka Island. According to Mr. Lowell, the Atomic Energy Commission (AEC) invited the governors of Alaska to send representatives to witness all three tests on Amchitka Island (Longshot, Milrow, and Cannikin). As such, **[Employee]** attended both the Longshot and Milrow tests as a guest of the Atomic Energy Commission, which provided transportation, housing and food, and assured the safety and security of those representatives.

On February 4, 2003, the district office received an electronic mail transmission from Karen Hatch, Records Management Program Officer at the National Nuclear Security Agency. Ms. Hatch indicated that she had been informed by the former senior DOE Operations Manager on Amchitka Island that escorts were not on the site to perform work for the AEC, but were most likely there to provide a service to the officials from the State of Alaska.

In correspondence dated February 11, 2003, a representative of the State of Alaska, Department of

Public Safety, Division of Administrative Services, indicated that there was no mention of Amchitka or any sort of agreement with the Department of Energy in **[Employee]**'s personnel records, but that the absence of such reference did not mean that he did not go to Amchitka or that a contract did not exist. He further explained that temporary assignments were not always reflected in these records and suggested that the district office contact the Department of Military and Veterans Affairs to see if they had any record of an agreement between the State of Alaska and the DOE. By letter dated March 13, 2003, the district office contacted the Department of Military and Veterans Affairs and requested clarification as to **[Employee]**'s employment with the State of Alaska and assignment(s) to Amchitka Island. No response to this request was received.

On April 16, 2003, the S eattle district office recommended denial of your claims. The district office concluded that you did not submit employment evidence as proof that **[Employee]** was a member of the "Special Exposure Cohort" as defined by § 7384l(14)(B) of the Act, as the evidence did not establish that he had been present at a covered facility as defined under § 7384l(12) of the Act, while working for the Department of Energy or any of its covered contractors, subcontractors or vendors as defined under § 7384l(11) of the Act, during a covered time period. *See* 42 U.S.C. § 7384l(11), (12). The district office further concluded that you were not entitled to compensation as outlined under § 7384s(e)(1) of the Act. *See* 42 U.S.C. § 7384s(e)(1).

FINDINGS OF FACT

1. On April 11 and October 20, 2002, **[Claimant 1]** and **[Claimant 2]**, respectively, filed claims for survivor benefits under the EEOICPA as the children of **[Employee]**

2. **[Employee]** was diagnosed as having squamous cell carcinoma of the hypopharynx.

3. **[Employee]** was employed by the State of Alaska, Civil Defense Division, and was present on Amchitka Island for Project Longshot on November 29, 1965, and the Milrow Test on October 2, 1969.

4. **[Employee]**'s employment with the State of Alaska, Civil Defense Division, on assignment to Amchitka Island, Alaska, was as a representative of the governor of Alaska.

CONCLUSIONS OF LAW

The undersigned has reviewed the recommended decision issued by the Seattle district office on April 16, 2003. I find that you have not filed any objections to the recommended decision as provided by § 30.316(a) of the regulations, and that the 60-day period for filing such objections, as provided for in § 30.310(a) has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

In order to be awarded benefits under the Energy Employees Occupational Illness Compensation Program Act, the covered employee (or his/her eligible survivors), must first establish that the employee has been diagnosed with beryllium illness, cancer, or chronic silicosis. *See* 42 U.S.C. § 7384l(15), 20 C.F.R. § 30.110(a). The evidence to show proof of an occupational illness is not in dispute in this case. The medical evidence establishes that **[Employee]** was diagnosed as having squamous cell carcinoma of the hypopharynx. Consequently, **[Employee]** was diagnosed with an illness covered under the Act.

Employees of a DOE contractor (or their eligible survivors) are entitled under the EEOICPA to seek compensation for a cancer as a member of the Special Exposure Cohort (SEC) or through a determination that they incurred cancer that was at least as likely as not related to employment at a DOE facility. 42 U.S.C. §§ 7384l(14), 7384l(9)(B)(ii)(II). To be included in the SEC, a DOE employee, DOE contractor employee, or atomic weapons employee must have been employed for an aggregate of 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, or employed before January 1, 1974, by the DOE or a DOE contractor or subcontractor on Amchitka Island, Alaska, and exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests. 42 U.S.C. § 7384l(14). To qualify as a covered employee with cancer, members of the SEC need only establish that they contracted a "specified cancer," designated in § 7384l(17) of the EEOICPA, after beginning employment at a DOE facility or atomic weapons employer facility.

While the EEOICPA does not contain a specific definition of a DOE contractor, it does contain a definition of a DOE contractor employee that, in effect, defines what a DOE contractor is. Section 7384l(11) of the EEOICPA defines a DOE contractor employee as:

(A) An individual who is or was in residence at a Department of Energy facility as a researcher for one or more periods aggregating at least 24 months.
(B) An individual who is or was employed at a Department of Energy facility by-
    (i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or
    (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

The question presented in this case is whether **[Employee]**, an employee of the State of Alaska, was, during the time he spent on Amchitka Island, providing management and operation, management and integration or environmental remediation services under a contract between the DOE and the State of Alaska.

The undersigned notes that the Atomic Energy Commission's Managers Completion Report refers to the State of Alaska as a prime contractor for work on Milrow and Cannikin. The work to be performed under that contract consisted of police protection.

According to Don Lowell, **[Employee]**'s supervisor at the time of his assignment to Amchitka Island, your father was not an employee of any contractor or the AEC at the time of his visit to Amchitka Island. Rather, he was an invited guest of the AEC requested to witness the atomic testing as a representative of the governor of Alaska.

The preponderance of the evidence in this case supports the conclusion that **[Employee]** was on Amchitka Island for the sole purpose of witnessing the atomic testing as a representative of the governor of Alaska. While the DOE indicated that **[Employee]** was issued a dosimetry badge on three occasions, such evidence may be used to establish that he was present on Amchitka Island, not to establish that he was a covered DOE employee. Therefore, **[Employee]**'s presence on Amchitka Island was to perform work for the State of Alaska, as a representative of the governor, and not pursuant to a contract between the DOE and the State of Alaska.

It is the claimant's responsibility to establish entitlement to benefits under the EEOICPA. The

EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of each and every criterion under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing the Office of Workers' Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

Although you submitted medical evidence to show a covered illness manifested by squamous cell carcinoma of the hypopharynx, the evidence of record is insufficient to establish that **[Employee]** engaged in covered employment. Therefore, your claims must be denied for lack of proof of covered employment under the EEOICPA.

Seattle, Washington

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA Fin. Dec. No. 34291-2003 (Dep't of Labor, August 1, 2003)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

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 stated below, your claim for benefits is denied.

STATEMENT OF THE CASE

On August 2, 2002, you filed a Claim for Benefits under the EEOICPA, form EE-1, through the Paducah Resource Center. On the EE-1 form, you indicated that the condition for which you filed your claim was kidney cancer. You submitted medical records from 1993 to 2001 that showed you had a nephrectomy in April of 1996. Medical records from Western Baptist Hospital from April of 1996 included an operative report for a right radical nephrectomy and a pathology report that confirmed the diagnosis of large renal cell carcinoma.

You also submitted a Form EE-3 indicating that you were employed as a conservation office for the Kentucky Department of Fish and Wildlife at the Paducah Gaseous Diffusion Plant (GDP) from 1969 to 1973. You submitted a Department of Energy (DOE) License for Non-Federal Use of Property for the purpose of wildlife development beginning September 4, 1953 and continuing indefinitely. You also submitted a DOE License for Non-Federal Use of Property for the period January 1, 1990 to December 31, 1995, and you submitted a DOE License for Non-Federal Use of Property for bow deer hunts for the period January 1, 1996 to December 31, 2000.

In addition, you submitted a copy of the five year plan and budget for the West Kentucky Wildlife

Management Area for the period July 1, 1985 to June 30, 1990. You submitted an April 4, 1958 letter from the "Assistant General Counsel" noting that a corrected Quitclaim Deed from the United States of America to the State of Kentucky had been prepared and an August 21, 1989 report from the General Services Administration concluding that the State of Kentucky, Fish and Wildlife Division, was in compliance with the terms of the conveyance of these lands. You submitted an October 6, 1959 letter from Atomic Energy Commission (AEC) referencing a grant to the Commonwealth of Kentucky and the Department of Fish and Wildlife Resources of a license and permission to enter a portion of the AEC's lands for the purpose of developing the wildlife on the property and conducting bird dog field trials. This letter extended the license and permission to additional lands. In an October 14, 1959 letter, the Director of the Division of Game recommended to the Governor of Kentucky that the license and permission to use the AEC lands be accepted. He noted that the Division would have no pecuniary obligation for use of the land, apart from patrolling, posting and protecting the land licensed for use by the Division of Fish and Wildlife Resources.

You submitted forms EE-4 from Shirley Beauchamp and Phillip Scott Beauchamp stating you worked for the Department of Fish and Wildlife at the Paducah GDP from 1968 to 1973. Social Security Earnings records were submitted showing employment with the state of Kentucky from 1971 to 1973. The Department of Energy advised the district office, however, that DOE had no information regarding your employment.

On November 15, 2002, the district office issued a recommended decision concluding that you were not employed by an entity that contracted with the DOE to provide "management and operating, management and integration, or environmental remediation" as set forth in 42 U.S.C. § 7384l(11)(B)(i) and (ii) and that, accordingly, you were not a covered DOE contractor. The district office therefore recommended that benefits be denied.

On December 23, 2002, you filed an objection to the recommended decision and requested a hearing. An oral hearing was held on February 26, 2003. At the hearing, you testified that you worked for the Kentucky Department of Fish and Wildlife from 1971 to 1973 and that you worked at the Paducah GDP and its surrounding grounds. You testified that your duties included patrolling the perimeter of the fenced portion of the plant and building two bridges and that you entered the plant through the main gate on a regular basis to remove animals that got into the GDP. You testified that you did not enter any of the buildings inside the fenced area of the GDP. You described other duties you performed during this period of employment, and you testified that you checked hunting and fishing licenses and controlled hunting at the reserve. You testified also that you participated in game sampling in conjunction with the DOE prior to the hunting season and that DOE would collect specific body parts provided by the Department of Fish and Wildlife and ship them for sampling.

FINDINGS OF FACT

You filed a claim for benefits under the EEOICPA on August 2, 2002. You were employed by the State of Kentucky, Department of Fish and Wildlife from 1971 to 1973. You were diagnosed with kidney cancer on or about April 13, 1996. You have not established that you worked in employment covered under the EEOICPA.

CONCLUSIONS OF LAW

A covered employee is eligible for compensation under the EEOICPA for an "occupational illness,"

which is defined in § 7384l(15) of the EEOICPA as "a covered beryllium illness, cancer referred to in § 7384l(9)(B) of this title, specified cancer, or chronic silicosis, as the case may be." 42 U.S.C. § 7384l(15). A "covered employee" is eligible for compensation under EEOICPA for a specified "occupational illness." A "covered employee," as defined in §§ 7384l(1),7384l(3),7384l(7),7384l(9), 7384l(11) and § 7384r of the EEOICPA, includes employees of private companies (an entity "other than the United States", per § 7384l(4)) which provided radioactive materials to the United States for the production of atomic weapons, employees at Department of Energy facilities or test sites (§ 7384l(12)), and employees of Department of Energy contractors, subcontractors, or beryllium vendors. 42 U.S.C. §§ 7384l(1),(3),(7),(9), (11); 7384r. Section 7384(l)(11)(B)(I and ii) defines a "Department of Energy contractor employee" to include

"An individual who is or was employed at a Department of Energy facility by—

(i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or

(ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility."

The DEEOIC has further addressed the issues of how a "contractor or subcontractor" may be defined, as well as whether employees of state or federal governments may be considered DOE contractor employees, in EEOICPA Bulletins No. 03-27 (issued May 28, 2003) and No. 03-26 (issued June 3, 2003). The following definitions have been adopted by the DEEOIC:

Contractor – An entity engaged in a contractual business arrangement with the Department of Energy to provide services, produce materials or manage operations at a beryllium vendor or Department of Energy facility.

Subcontractor – An entity engaged in a contracted business arrangement with a beryllium vendor contractor or a contractor of the Department of Energy to provide a service at a beryllium vendor or Department of Energy facility.

Contract - An agreement to perform a service in exchange for compensation, usually memorialized by a memorandum of understanding, a cooperative agreement, an actual written contract, or any form of written or implied agreement, is considered a contract for the purpose of determining whether an entity is a "DOE contractor."

For a civilian employee of a state or federal government agency to be considered a DOE contractor employee, it must be shown that the government agency employing that individual entered into a contract with the DOE for the accomplishment of one or more services it was not statutorily obligated to perform and that the DOE compensated the agency for that activity.

There is no evidence that the DOE compensated the State of Kentucky, Department of Fish and Wildlife Resources, for any services on behalf of the Department of Energy. The State of Kentucky was simply given permission to use federal land. The fact that the State of Kentucky was not required to provide any fees for use of federal property does not, conversely, show that the Department of Energy compensated the State of Kentucky for services provided by the State. The evidence of record

shows simply that the Department of Energy or AEC gave permission for the State of Kentucky to use certain of its lands in order to conduct bird dog trials or hunting or fishing or similar activities. The Fish and Wildlife division was responsible for the activities that it would otherwise be responsible for under state law. The quitclaim deed to certain lands was not compensation to the State of Kentucky for any services performed for the Department of Energy, but was conveyed to the State of Kentucky for the purpose of management for wildlife purposes. The mere presence of an individual on DOE-owned property does not confer covered employment status.

For the foregoing reasons, the undersigned must find that you have not established your claim for compensation under the EEOICPA and hereby denies your claim for compensation.

Cleveland, Ohio

Anthony Zona

Hearing Representative

EEOICPA Fin. Dec. No. 559-2004 (Dep't of Labor, October 25, 2004)

NOTICE OF FINAL DECISION

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). For the reasons set forth below, your claim for benefits is denied.

STATEMENT OF THE CASE

On July 31, 2001, you filed a claim for benefits under the EEOICPA listing endometrial adenocarcinoma, colon carcinoma and another lung condition identified as lung collapsed as the medical conditions on which your claim is based. An operative report dated May 27, 1994 provides a diagnosis of endometrial adenocarcinoma. An operative report dated June 16, 1997 provides a diagnosis of colon carcinoma. The district office informed you that the claimed lung condition is not covered under the Act.

The employment history form, EE-3, states that you were employed at the Idaho National Engineering and Environmental Laboratory (INEEL) from March 1979 to March 1995. DOE verified your employment at the Idaho National Engineering and Environmental Laboratory (INEEL) from March 26, 1979 through January 31, 1995.

You further stated on the EE-3 that you worked for KID Broadcasting, Company from 1954 to 1975 and that while covering news stories, you frequently worked at sites where radiation and contamination were present. You did not however claim that this employment was with the Department of Energy (DOE), one of its contractors or subcontractors or a beryllium vendor. As noted by the district office in the recommended decision, visiting a covered facility is not considered covered employment for the purposes of this benefit program.

To determine the probability that you sustained cancer in the performance of duty, the district office forwarded a complete copy of your case record to the National Institute for Occupational Safety and

Health (NIOSH) for reconstruction of the radiation dose you had received in the course of your employment at the Idaho National Engineering and Environmental Laboratory. On June 9, 2004, you signed Form OCAS-1, indicating that you had reviewed the NIOSH Draft Report of Dose Reconstruction and agreed that it identified all of the relevant information provided to NIOSH.

On July 1, 2004, NIOSH provided the district office with a copy of the dose reconstruction. The report states that NIOSH assigned an overestimate of radiation dose using maximizing assumptions related to radiation exposure and intake, based on current science, documented experience and relevant data**.** Based on the dose reconstruction, NIOSH estimated that the dose to the uterus was 19.276 rem (roentgen equivalent man) and the dose to the colon was 20.613 rem. According to the dose reconstruction report, the NIOSH reported dose is a significant overestimate of your occupational radiation dose.

Pursuant to 42 C.F.R. § 81.20 of the Department of Health and Human Services' regulations, the district office used the information provided in this report to determine that there was a combined total probability of 26.18% that your endometrial adenocarcinoma and your colon carcinoma were caused by radiation exposure at the Idaho National Engineering and Environmental Laboratory.

On August 12, 2004, the Cleveland district office issued a recommended decision to deny your claim for compensation benefits. Based on the evidence contained in the case record, the district office concluded that the claim for another lung condition, identified as "lung collapsed" does not qualify you as a covered employee under 42 U.S.C. § 7384l(1), as this condition is not an occupational illness, per 42 U.S.C. § 7384l(15); you are not a covered employee as defined by 42 U.S.C. § 7384l(9)(B), as you do not meet the requirements shown, 42 U.S.C. § 7384n(b); the dose reconstruction estimates were performed in accordance with 42 U.S.C. § 7384n(d) and 42 C.F.R. § 82.10 and the Probability of Causation was completed in accordance with 42 U.S.C. § 7384n(c)(3) and 20 C.F.R. § 30.213, which references Subpart E of 42 C.F.R. Part 81. The calculation was based on multiple primary cancer sites and was completed in accordance with 42 C.F.R. §81.25.

FINDINGS OF FACT

1. You filed a claim for benefits under the EEOICPA on July 31, 2001.

2. You were employed at the Idaho National Engineering and Environmental Laboratory (INEEL) from March 26, 1979 through January 31, 1995.

3. The first diagnosis of endometrial adenocarcinoma was made on May 27, 1994, after you began employment at a covered facility.

4. The first diagnosis of colon carcinoma was made on June 16, 1997, after you began employment at a covered facility.

5. NIOSH reported annual dose estimates for your cancers from the date of initial radiation exposure during covered employment, to the date of the cancers' first diagnosis. A summary and explanation of information and methods applied to produce these dose estimates, including your involvement through interview and review of the dose report, are documented in the "NIOSH Report of Dose Reconstruction under EEOICPA," dated May 25, 2004.

6. The undersigned has verified that there is a combined total of 26.18% probability that the cancers were caused by your occupational radiation exposure during your covered employment at the Idaho National Engineering and Environmental Laboratory (INEEL).

7. The probability of causation value is less than 50%, and shows that your endometrial adenocarcinoma and your colon carcinoma are not "at least as likely as not" related to employment at the covered facility.

8. You have not filed any objections to the recommended decision within the 60 days allowed by § 30.310(a) of the EEOICPA regulations.

CONCLUSIONS OF LAW

Section 30.310(a) of the EEOICPA implementing regulations provides that: "Within 60 days from the date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision, including HHS's reconstruction of the radiation dose to which the employee was exposed (if any), and whether a hearing is desired." 20 C.F.R. § 30.310(a).

Section 30.316(a) of the EEOICPA regulations specifies, if the 60-day period expires and no objections are filed, the Final Adjudication Branch may issue a final decision accepting the recommendation of the district office, either in whole or in part. 20 C.F.R. § 30.316(a).

Based on my review of you case record, I find that the evidence in the record does not establish that you are entitled to compensation under the Act because the calculation of "probability of causation" does not show that there is a 50% or greater chance that your cancers were caused by radiation exposure received at the Idaho National Engineering and Environmental Laboratory (INEEL) in the performance of duty. Pursuant to the authority granted by § 30.316(a) of the EEOICPA regulations, I find that the district office's August 12, 2004 recommended decision is correct and I accept those findings and the recommendation of the district office. 20 C.F.R. § 30.316(a)

Therefore, I find that you are not entitled to benefits under the Act, and that your claim for compensation must be denied.

Washington, DC

Linda M. Parker

Hearing Representative

EEOICPA Fin. Dec. No. 2442-2004 (Dep't of Labor, December 1, 2004)

REVIEW OF THE WRITTEN RECORD AND NOTICE OF FINAL DECISION

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 (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record

is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On July 25, 2001, you filed a Form EE-1 (Claim for Employee Benefits under the EEOICPA). You identified beryllium sensitivity and tuberculosis as the conditions being claimed. As the claim was submitted prior to the start of the program, the date of filing is considered to be July 31, 2001, the effective date of the Act.

You also provided a Form EE-3 (Employment History) in which you stated that you were employed at a Beryllium Plant in Reading, Pennsylvania sometime between 1943 and 1945. On April 29, 2003, the corporate verifier for NGK Metals Corporation/Beryllium Corporation (Berylco) verified that you were employed at Berylco from February 6, 1945 to October 23, 1945. Berylco is recognized by the Department of Energy (DOE) as a covered beryllium vendor from 1943 to 1979. *See* DOE, Office of Worker Advocacy Facility List.

You submitted medical records in support of your claim including three reports of abnormal beryllium lymphocyte proliferation tests (BeLPT's) performed on January 23, March 1, and May 11, 2001; as well as, a report of pulmonary testing performed on May 10, 2001. Also submitted was a letter from Milton D. Rossman, M.D., dated May 29, 2001, stating that you were referred for beryllium evaluation as a result of abnormal BeLPTs and slightly reduced pulmonary function test (PFT) results. The letter further stated that the PFTs exhibited reduced lung capacity and that a fiber-optic bronchoscopy yielded 19.8 percent lymphocytes. Dr. Rossman also identified abnormal findings in you chest x-rays. However, Dr. Rossman could not definitively state whether or not your symptoms were due to interstitial lung disease or congestive heart failure.

Based on the information submitted, the Cleveland district office determined that sufficient medical evidence existed to award medical benefits for beryllium sensitivity monitoring. Prior to issuing a decision awarding benefits, the district office on March 4, 2002, sent you Form EE/EN-15, and requested that you sign, complete, and return the documents, as they were required to determine whether or not you were a party to any litigation against a covered "beryllium vendor" or had received a settlement or court judgment arising out of litigation against a "beryllium vendor."

On April 2, 2002, you via legal counsel, requested withdrawal of your claim. Subsequently, on April 3, 2003, you via legal counsel, later verified as your authorized representative, requested a reopening of your claim. On May 8, 2003, the district office again sent you Form EE/EN-15, and requested that you sign, complete, and return the documents. On June 9, 2003, the district office received a completed Form EN-15 signed by your authorized representative. In addition, your authorized representative indicated that you had not filed a tort suit against a beryllium vendor or atomic weapons employer in connection with either an occupational illness or a consequential injury for which you would be eligible to receive compensation under the EEOICPA. He listed the tort suit ***[Employee]****, et al. v. Cabot Corporation, et al.* and attached a copy of the complaint. The complaint seeks relief for damages allegedly sustained as a result of your alleged exposure to beryllium as "down-winders" living within six miles of the defendants' facility in Reading, Pennsylvania. Also, the complaint includes allegations that were based on your employment at the defendant's Reading, Pennsylvania facility. On June 10, 2003, the district office again sent you Form EE/EN-15, and requested that you sign, complete, and return the documents, as your authorized representative does not have the authority to sign on your behalf. *See* Federal (EEOICPA) Procedure Manual, Chapter 2-1200 (January 2002).

On June 30, 2003, the district office received a completed Form EN-15 signed by you, indicating the same effects initially indicated by your authorized representative. You also provided additional medical evidence in support of chronic beryllium disease (CBD) including a narrative report and pulmonary function studies from Milton D. Rossman, M.D., dated March 14, 2002, indicating a condition consistent with CBD. You submitted a computerized axial tomography (CT) scan of the chest dated April 11, 2002, showing scattered bilateral calcified and non-calcified lung nodules indicative of granulomas. Further, you provided a narrative report and pulmonary function studies from Dr. Rossman, dated August 5, 2002, indicating a condition consistent with CBD.

On July 7, 2003, the district office advised you that the medical information submitted was sufficient to establish a potential claim for CBD; however, it appeared that your lawsuit's cause of action was in part based on your covered employment, as well as, your beryllium illness, and thus could have an adverse affect on your claim for compensation. You were also notified that your complaint would be forwarded to our National Office, as well as, the Department of Labor's Solicitor's Office, to determine if the district office's interpretation of your lawsuit's cause of action was accurate. In addition, you were notified that according to the district office's present interpretation of your lawsuit's cause of action, as well as, the governing statute and regulations, you would not be eligible for compensation benefits. Further, the district office informed you that based on the medical evidence submitted you would have to dismiss your lawsuit by September 1, 2003, to not be disqualified for compensation.

On July 30, 2003, the district office received a statement from your authorized representative that "any reasonable interpretation of the Complaint, particularly viewing Paragraphs 16 through 20 inclusive of the Complaint, makes clear that **[Employee]**'s lawsuit is based upon his exposure as a resident near the Reading plant and nothing more." It is further indicated that the facts the district office is considering are "incidental to the main cause of action which is one for environmental harm."

In order to resolve the issue of whether or not your complaint against Cabot Corporation constituted a tort claim your case was forwarded to the Office of the Solicitor (SOL) for review and opinion. On January 15, 2004, the SOL concluded that, "since the date that **[Employee]** was required by § 7385d(c) to dismiss the portion of his tort suit that involved his employment-related exposure to beryllium passed before he did so, he is no longer potentially entitled to any EEOICPA benefits." Thus, you were required to and did not dismiss any parts of the complaint falling within that description on or before April 30, 2003, also because more than 30 months elapsed before your tort suit was dismissed your potential entitlement to EEOICPA benefits were barred by operation of law. *See* 42 U.S.C. § 7385d(c)(2).

On July 30, 2004, the Branch Chief of Policies, Regulations & Procedures, DEEOIC, sent a letter to the district office noting that, "§ 7385d of the Act states that the tort suit must be dismissed before April 30, 2003 or the date that is 30 months after the date the individual first became aware that an illness covered by subtitle B of a covered employee may be connected to the exposure of the covered employee in the performance of duty under section 3623. In this instance, a review of the medical evidence of file (and of the Form EE-1) reveals that the date you first became aware that your beryllium illness was related to employment was no later than May 29, 2001 (the date of Dr. Rossman's report indicated that you exhibited an abnormal proliferative response to beryllium, showed reduced lung capacity, and underwent a bronchoscopy yielding 19.8 percent lymphocytes, which serves as evidence that you had been diagnosed with a beryllium illness). While there are indications that you were made "aware" of your beryllium illness as early as January 23, 2001, the date of the first abnormal BeLPT, a full review of the medical evidence indicates that you became fully "aware" of your condition on May 29, 2001.

On July 28, 2004, the district office issued a recommended decision which concluded that you are a covered beryllium employee as defined by 42 U.S.C. § 7384l(7) and were exposed to beryllium in the performance of duty under 42 U.S.C. § 7384n. You were diagnosed with a beryllium illness, which is a covered occupational illness as defined by 42 U.S.C. § 7384l(8). The recommended decision further concluded that 42 U.S.C. § 7385d establishes different deadlines, varying according to the date of the filing of a lawsuit, by which an EEOICPA claimant must make the election of remedy. Because your lawsuit was filed on April 17, 2002, subsection 7385d(c) governs this date. That provision states, in subsection (c)(2), that "an otherwise eligible individual" must "dismiss" the "covered tort suit" on or before April 30, 2003 or the date that is 30 months after the date the individual first became aware that an illness covered by Part B may be connected to the exposure of the covered employee in the performance of duty under § 3623. In this instance, the 30 month date was November 29, 2003. Therefore, the recommended decision also concluded that, since the lawsuit was not dismissed until December 17, 2003, you are not eligible for compensation under the Act. Further, the district office concluded that tuberculosis is not an occupational illness as defined by § 7384l(15) of the EEOICPA.

On September 17, 2004, an objection to the recommended decision was received via fax from your authorized representative. The objections were based on issues related to your lawsuit, as well as, evidence in support of CBD.

FINDINGS OF FACT

1. You filed a claim for benefits effective July 31, 2001 based on beryllium sensitivity and tuberculosis.

2. You were employed with Berylco, from February 6, 1945 to October 23, 1945.

3. Berylco is a beryllium vendor.

4. You are a covered beryllium employee, working at Berylco during a covered time period when beryllium was present.

5. You were diagnosed with beryllium sensitivity and submitted medical evidence in support of the post-January 1, 1993 requirements for CBD, both considered occupational illnesses under the EEOICPA.

6. Tuberculosis is not an occupational illness covered under the EEOICPA.

7. Your lawsuit against Cabot Corporation alleges a claim against a beryllium vendor arising out of a covered beryllium employee's employment-related exposure to beryllium.

8. You did not dismiss your lawsuit by November 29 , 2003.

CONCLUSIONS OF LAW

The regulations provide that a claimant may object to any or all of the findings of fact or conclusions of law in the recommended decision. *See* 20 C.F.R. § 30.310. Further, the regulations provide that the Final Adjudication Branch will consider objections by means of a review of the written record, in the absence of a request for a hearing. *See* 20 C.F.R. § 30.312.

The Final Adjudication Branch reviewer will review the record forwarded by the district office and any additional evidence and/or argument submitted by the claimant. *See* 20 C.F.R. § 30.313. Consequently, the Final Adjudication Branch will consider all of the evidence of record in reviewing the claim, including evidence and argument included with the objection(s).

In order to be afforded coverage under the EEOICPA, you must establish that you had been diagnosed with a designated occupational illness resulting from the exposure to silica, beryllium, and/or radiation: *cancer, beryllium sensitivity, chronic beryllium disease*, and *silicosis*. *See* 42 U.S.C. § 7384l(15); 20 C.F.R. § 30.110(a). Further, the illness must have been incurred while in the performance of duty for the Department of Energy and certain of its vendors, contractors, and subcontractors, or for an atomic weapons employer. *See* 42 U.S.C. § 7384l(4)-(7), (9), (11).

The Final Adjudication Branch considered your objections to the recommended decision. First, you indicate that your claim is not merely for beryllium sensitivity under the Act, but for CBD, which was diagnosed in your favor as of August 2002. In addition, you submitted several duplicate copies of Dr. Rossman's diagnostic report dated August 5, 2002. On June 30, 2003, the district office received medical evidence in support of CBD. You submitted a narrative report and pulmonary function studies from Dr. Rossman, dated March 14, 2002, indicating a condition consistent with CBD. You submitted a CT scan of the chest dated April 11, 2002, showing scattered bilateral calcified and non-calcified lung nodules indicative of granulomas. Further, you provided narrative report and pulmonary function studies from Dr. Rossman, dated August 5, 2002, indicating a condition consistent with CBD.

The Final Adjudication Branch notes that all medical evidence submitted to date is post-1993, and thus the statutory criteria on or after January 1, 1993, would apply. For diagnoses on or after January 1, 1993, beryllium sensitivity [based on an abnormal BeLPT], together with lung pathology consistent with CBD, including one of the following: 1) a lung biopsy showing granulomas or a lymphocytic process consistent with CBD; 2) a CT scan showing changes consistent with CBD; or 3) pulmonary function or exercise testing showing pulmonary deficits consistent with CBD. *See* 42 U.S.C. § 7384l(13)(A). One of the three reports of abnormal BeLPT's performed on January 23, March 1, and May 11, 2001, respectively, in combination with the results of Dr. Rossman's pulmonary function study, dated March 14, 2002, are consistent with a diagnosis of CBD after January 1, 1993. However, the condition of CBD is not in dispute, as the July 7, 2003 letter from the district office advised you that the medical information submitted was sufficient to establish a potential claim for CBD.

Second, you indicate that, although you did bring a tort claim against a beryllium vendor, it proceeded solely on the basis of long-standing, non-occupational exposure based upon nearby residency and employment outside of the beryllium vendor's plant, not occupational exposure while employed by a beryllium vendor. The SOL opined that six counts set forth in your April 17, 2002 complaint, rely, at least in part, upon your exposure to beryllium while working for the defendant beryllium vendor, including one count brought by your spouse for loss of consortium. Specifically, paragraphs 6 and 21 of the complaint alleged that you had also been exposed to beryllium in the course of your employment at the defendants' Reading plant in the early 1940's. In addition, paragraph 24 of the complaint alleged that you had sustained CBD due to the above exposures, and paragraph 48 alleged that your spouse "has and will in the future be deprived of her husband's services, companionship and society and hereby claims loss of consortium to her great detriment and loss." The SOL concluded that paragraph 6 and 21 of the complaint alleged that you had been exposed to beryllium while working at the defendants' Reading plant, and these paragraphs were incorporated into all six of the claims raised in the complaint.

Third, you indicate that based on an expert medical report prepared in connection with your legal claim concludes that your exposures from residing and working within the community was the medical cause of your CBD. In addition, you submitted several duplicate copies of the expert medical report from Lisa Maier, M.D., M.S.P.H. You specifically refer to page 17 of the report for conclusion on causation. On page 17 of the report, Dr. Maier states that "it is my medical opinion that his exposures primarily from residing and working with the community surrounding the beryllium facility caused or contributed substantially to his development of chronic beryllium disease." In addition, on page 16 of the report, Dr. Maier states that "he may have also had some exposure while working for a very limited time in the Reading beryllium facility." This report is in further support of your beryllium illness, which, as previously discussed, is not in dispute. Further, issues related to environmental exposure are not issues covered under the EEOICPA, as there is no provision under the EEOICPA for conditions that are not occupationally related.

The Final Adjudication Branch notes that issues related to environmental exposure will not be considered as it has no bearing on the outcome of the decision.

In the fourth, fifth, sixth, and seventh parts of your objection, you indicate the following: 1) "The Department of Labor, through its solicitor's office, has clearly ruled in previous claims that a claimant may bring an action for his environment or non-occupational exposure to beryllium and simultaneously maintain a claim under the Act;" 2) As you are not a plaintiff in any lawsuit which requires dismissal under the Act, there is therefore, no obligation to dismiss such a lawsuit as contemplated under 42 U.S.C. § 7385d(c); 3) Notwithstanding that you did not have an obligation to dismiss a lawsuit, your lawsuit, "was marked dismissed upon the dockets, as noted by the recommended decision of July 28, 2004, on December 17, 2003;" and 4) "As the claim herein one for CBD, of which the claimant was made "aware" as defined under 20 C.F.R § 30.618(c)(2), a dismissal of a lawsuit occurred within 30 months after the date of the claimant's diagnosis for CBD on August 5, 2002." Based on these objections you demanded that your claim for benefits be approved.

As noted by the SOL, each of the six counts were based at least in part, upon your exposure to beryllium while working for the defendant beryllium vendor and you were required to dismiss any parts of your complaint arising out of your employment-related exposure to beryllium at the Reading facility. While as you indicated that the SOL has previously opined that an eligible claimant can maintain a lawsuit without the need for dismissal of an environmental claim and simultaneous present a claim under the EEOICPA, your complaint is not solely an environmental claim, as your environmental claim is not an issue in dispute. As discussed in the SOL's opinion you were required to dismiss any parts of your complaint arising out of your employment-related exposure to beryllium at the Reading facility and did not do so by the date required under the Act.

In order to be eligible for benefits you must also satisfy the requirements under 42 U.S.C. § 7385d. SOL determined that in order to have preserved your eligibility for compensation under the EEOICPA, you were required to dismiss any parts of your complaint arising out of your employment related exposure to beryllium at the Reading facility by April 30, 2003. The Branch of Policies, Regulations and Procedures noted that in addition to the April 30, 2003 date, the Act provides that if the date that is 30 months after the date the individual first became aware that an illness covered by subtitle B of a covered employee may be connected to the exposure of the covered employee in the performance of duty under section 3623 is later, that later date is the date by which the complaint must be dismissed.

Section 30.111(a) of the regulations states that, "Except where otherwise provided in the Act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence

of each and every criterion necessary to establish eligibility under any compensable claim category set forth in 20 C.F.R. § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing to the Office of Workers Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in these regulations." *See* 20 C.F.R. § 30.111(a).

In addition to meeting the EEOICPA requirements for a covered occupational illness and for covered employment, in cases where tort claims have been filed, 42 U.S.C. § 7385d establishes different deadlines, varying according to the date of the filing of a lawsuit, by which an EEOICPA claimant must make the election of remedy. If an otherwise eligible individual filed a tort case after the date of the enactment of the National Defense Authorization Act for Fiscal Year 2002, subsection 7385d(c) governs this date. That provision states, in subsection (c)(2), that "an otherwise eligible individual" must "dismiss" the "covered tort suit" on or before April 30, 2003 or the date that is 30 months after the date the individual first became aware that an illness covered by Part B may be connected to the exposure of the covered employee in the performance of duty under section 7384n.

On July 7, 2003, the district office advised you that the medical information submitted was sufficient to establish a potential claim for CBD; however, it appeared that your lawsuit's cause of action was in part based on your covered employment, as well as, your beryllium illness, and thus could have an adverse affect on your claim for compensation. Further, the district office informed you that based on the medical evidence submitted you would have to dismiss your lawsuit by September 1, 2003, to not be disqualified for compensation. While there are indications that you were made "aware" of your beryllium illness as early as January 23, 2001, the date of the first abnormal BeLPT, a full review of the medical evidence indicates that you became fully "aware" of your condition on May 29, 2001. Based on the medical evidence of record, you had until November 29, 2003, in order to dismiss the portions of your lawsuit based on occupational exposure to beryllium. However, you did not do so until December 17, 2003.

I have reviewed the evidence in the record and the recommended decision issued by the district office. A review of the evidence shows that you are a covered beryllium employee as defined by 42 U.S.C. § 7384l(7) and were exposed to beryllium in the performance of duty under 42 U.S.C. § 7384n. You also were diagnosed with CBD, which is a covered occupational illness as defined by 42 U.S.C. § 7384(8)(B) and met the criteria established for this diagnosis under 42 U.S.C. § 7384l(13)(A). However, you did not dismiss the covered tort case as required by 42 U.S.C. § 7385d(c)(2).

Since no evidence was submitted establishing that the lawsuit was timely dismissed your claim for compensation is denied pursuant to the provisions of 42 U.S.C. § 7385d(c)(2). In addition your claim based on tuberculosis is denied, as tuberculosis is not a covered occupational illness defined by § 7384l(15) of the EEOICPA.

Cleveland, Ohio

Debra A. Benedict

Acting District Manager

Final Adjudication Branch

EEOICPA Fin. Dec. No. 27798-2003 (Dep't of Labor, June 20, 2003)

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 (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claims for benefits are denied.

STATEMENT OF THE CASE

On April 11, 2002, **[Claimant 1]** filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA), stating that he was the son of **[Employee]**, who was diagnosed with pharyngeal cancer. An additional claim followed thereafter from **[Claimant 2]** on October 20, 2002. **[Claimant 1]** also completed a Form EE-3, Employment History, indicating that **[Employee]** worked for Standard Oil Company, from 1950 to 1961; the State of Alaska as Deputy Director of Veterans Affairs, from 1961 to 1964; the State of Alaska Department of Military Affairs, Alaska Disaster Office, from 1965 to 1979 (where it was believed he wore a dosimetry badge); and, for the American Legion from 1979 to 1985.

In correspondence dated June 24, 2002, a representative of the Department of Energy (DOE) indicated that they had no employment information regarding **[Employee]**, but that he had been issued film badges at the Amchitka Test Site on the following dates: October 28, 1965; September 30, 1969; and, September 21, 1970. You also submitted a completed Form EE-4 (Employment Affidavit) signed by Don Lowell, your father's supervisor at the State of Alaska, Department of Public Safety, Division of Civil Defense. According to Mr. Lowell, your father was a radiological officer for the State of Alaska and accompanied him to Amchitka Island for Project Longshot on November 29, 1965, and the Milrow Test on October 2, 1969, as a representative of the State of Alaska.

Additional documentation submitted in support of your claim included copies of your birth certificates, a marriage certificate documenting **[Name of Claimant 2 at Birth]**'s marriage to **[Husband]**, and the death certificate for **[Employee]**, indicating that he was widowed at the time of his death on May 10, 1993. In addition, you provided medical documentation reflecting a diagnosis of squamous cell carcinoma of the pharyngeal wall in November 1991.

On November 8, 2002, the Seattle district office issued a recommended decision that concluded that **[Employee]** was a covered employee as defined in § 7384l(9)(A) of the Act and an eligible member of the Special Exposure Cohort as defined in § 7384l(14)(B) of the EEOICPA, who was diagnosed as having a specified cancer, specifically cancer of the hypopharynx, as defined in § 7384l(17) of the Act. *See* 42 U.S.C. 7384l(9)(A), (14)(B), (17). The district office further concluded that you were eligible survivors of **[Employee]** as outlined in § 7384s(e)(3) of the Act, and that you were each entitled to compensation in the amount of $75,000 pursuant to § 7384s(a)(1) and (e)(1) of the EEOICPA. *See* 42 U.S.C. §§ 7384s(a)(1) and (e)(1).

On December 20, 2002, the Final Adjudication Branch issued a Remand Order in this case on the basis that the evidence of record did not establish that **[Employee]** was a member of the "Special Exposure

Cohort," as required by the Act. The Seattle district office was specifically directed to determine whether the Department of Energy and the State of Alaska, Department of Public Safety, Division of Civil Defense, had a contractual relationship.

In correspondence dated January 17, 2003, Don Lowell elaborated further on your father's employment and his reasons for attending the nuclear testing on Amchitka Island. According to Mr. Lowell, the Atomic Energy Commission (AEC) invited the governors of Alaska to send representatives to witness all three tests on Amchitka Island (Longshot, Milrow, and Cannikin). As such, **[Employee]** attended both the Longshot and Milrow tests as a guest of the Atomic Energy Commission, which provided transportation, housing and food, and assured the safety and security of those representatives.

On February 4, 2003, the district office received an electronic mail transmission from Karen Hatch, Records Management Program Officer at the National Nuclear Security Agency. Ms. Hatch indicated that she had been informed by the former senior DOE Operations Manager on Amchitka Island that escorts were not on the site to perform work for the AEC, but were most likely there to provide a service to the officials from the State of Alaska.

In correspondence dated February 11, 2003, a representative of the State of Alaska, Department of Public Safety, Division of Administrative Services, indicated that there was no mention of Amchitka or any sort of agreement with the Department of Energy in **[Employee]**'s personnel records, but that the absence of such reference did not mean that he did not go to Amchitka or that a contract did not exist. He further explained that temporary assignments were not always reflected in these records and suggested that the district office contact the Department of Military and Veterans Affairs to see if they had any record of an agreement between the State of Alaska and the DOE. By letter dated March 13, 2003, the district office contacted the Department of Military and Veterans Affairs and requested clarification as to **[Employee]**'s employment with the State of Alaska and assignment(s) to Amchitka Island. No response to this request was received.

On April 16, 2003, the S eattle district office recommended denial of your claims. The district office concluded that you did not submit employment evidence as proof that **[Employee]** was a member of the "Special Exposure Cohort" as defined by § 7384l(14)(B) of the Act, as the evidence did not establish that he had been present at a covered facility as defined under § 7384l(12) of the Act, while working for the Department of Energy or any of its covered contractors, subcontractors or vendors as defined under § 7384l(11) of the Act, during a covered time period. *See* 42 U.S.C. § 7384l(11), (12). The district office further concluded that you were not entitled to compensation as outlined under § 7384s(e)(1) of the Act. *See* 42 U.S.C. § 7384s(e)(1).

FINDINGS OF FACT

1. On April 11 and October 20, 2002, **[Claimant 1]** and **[Claimant 2]**, respectively, filed claims for survivor benefits under the EEOICPA as the children of **[Employee]**.

2. **[Employee]** was diagnosed as having squamous cell carcinoma of the hypopharynx.

3. **[Employee]** was employed by the State of Alaska, Civil Defense Division, and was present on Amchitka Island for Project Longshot on November 29, 1965, and the Milrow Test on October 2, 1969.

4. **[Employee]**'s employment with the State of Alaska, Civil Defense Division, on assignment to Amchitka Island, Alaska, was as a representative of the governor of Alaska.

CONCLUSIONS OF LAW

The undersigned has reviewed the recommended decision issued by the Seattle district office on April 16, 2003. I find that you have not filed any objections to the recommended decision as provided by § 30.316(a) of the regulations, and that the 60-day period for filing such objections, as provided for in § 30.310(a) has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

In order to be awarded benefits under the Energy Employees Occupational Illness Compensation Program Act, the covered employee (or his/her eligible survivors), must first establish that the employee has been diagnosed with beryllium illness, cancer, or chronic silicosis. *See* 42 U.S.C. § 7384l(15), 20 C.F.R. § 30.110(a). The evidence to show proof of an occupational illness is not in dispute in this case. The medical evidence establishes that **[Employee]** was diagnosed as having squamous cell carcinoma of the hypopharynx. Consequently, **[Employee]** was diagnosed with an illness covered under the Act.

Employees of a DOE contractor (or their eligible survivors) are entitled under the EEOICPA to seek compensation for a cancer as a member of the Special Exposure Cohort (SEC) or through a determination that they incurred cancer that was at least as likely as not related to employment at a DOE facility. 42 U.S.C. §§ 7384l(14), 7384l(9)(B)(ii)(II). To be included in the SEC, a DOE employee, DOE contractor employee, or atomic weapons employee must have been employed for an aggregate of 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, or employed before January 1, 1974, by the DOE or a DOE contractor or subcontractor on Amchitka Island, Alaska, and exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests. 42 U.S.C. § 7384l(14). To qualify as a covered employee with cancer, members of the SEC need only establish that they contracted a "specified cancer," designated in § 7384l(17) of the EEOICPA, after beginning employment at a DOE facility or atomic weapons employer facility.

While the EEOICPA does not contain a specific definition of a DOE contractor, it does contain a definition of a DOE contractor employee that, in effect, defines what a DOE contractor is. Section 7384l(11) of the EEOICPA defines a DOE contractor employee as:

(A) An individual who is or was in residence at a Department of Energy facility as a researcher for one or more periods aggregating at least 24 months.
(B) An individual who is or was employed at a Department of Energy facility by-
  (i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or
  (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

The question presented in this case is whether **[Employee]**, an employee of the State of Alaska, was, during the time he spent on Amchitka Island, providing management and operation, management and integration or environmental remediation services under a contract between the DOE and the State of Alaska.

The undersigned notes that the Atomic Energy Commission's Managers Completion Report refers to the State of Alaska as a prime contractor for work on Milrow and Cannikin. The work to be performed under that contract consisted of police protection.

According to Don Lowell, **[Employee]**'s supervisor at the time of his assignment to Amchitka Island, your father was not an employee of any contractor or the AEC at the time of his visit to Amchitka Island. Rather, he was an invited guest of the AEC requested to witness the atomic testing as a representative of the governor of Alaska.

The preponderance of the evidence in this case supports the conclusion that **[Employee]** was on Amchitka Island for the sole purpose of witnessing the atomic testing as a representative of the governor of Alaska. While the DOE indicated that **[Employee]** was issued a dosimetry badge on three occasions, such evidence may be used to establish that he was present on Amchitka Island, not to establish that he was a covered DOE employee. Therefore, **[Employee]**'s presence on Amchitka Island was to perform work for the State of Alaska, as a representative of the governor, and not pursuant to a contract between the DOE and the State of Alaska.

It is the claimant's responsibility to establish entitlement to benefits under the EEOICPA. The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of each and every criterion under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing the Office of Workers' Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

Although you submitted medical evidence to show a covered illness manifested by squamous cell carcinoma of the hypopharynx, the evidence of record is insufficient to establish that **[Employee]** engaged in covered employment. Therefore, your claims must be denied for lack of proof of covered employment under the EEOICPA.

Seattle, Washington

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA Fin. Dec. No. 56806-2004 (Dep't of Labor, November 1, 2004)

NOTICE OF FINAL DECISION ANDREVIEW OF THE WRITTEN RECORD

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 stated below, your claim for benefits is denied.

STATEMENT OF THE CASE

On April 19, 2004, you filed a Claim for Benefits under the EEOICPA, Form EE-1, with the Seattle district office, for prostate cancer, lung cancer, non-Hodgkin's lymphoma and basal cell skin cancer. You stated on the EE-3 form that you were employed by the Missouri Pacific Railroad, and worked periodically at the Destrehan Street Site of the Mallinckrodt Chemical Company, between October 31, 1957 and June 30, 1963. The Destrehan Street Plant was a Department of Energy (DOE) facility, where radioactive material was present, from 1942 to 1962 and again (for remediation) in 1995, according to the Department of Energy Office of Worker Advocacy Facility List website at http://www.hss.energy.gov/HealthSafety/FWSP/Advocacy/faclist/findfacility.cfm.

On April 28, 2004, you were informed of the medical evidence you had to submit to support that you had been diagnosed with cancer. No medical evidence was submitted.

On June 2, 2004, you were informed of the categories of employment for which compensation benefits may be paid for cancer, under 42 U.S.C. § 7384s of the Act. You were also advised of the kinds of evidence which you could submit to support that you had such employment.

You responded with a letter, received in the district office on June 25, 2004, explaining how your employment as a sales representative for the Missouri Pacific Railroad led to your calling on many firms, including Mallinckrodt's Destrehan Street Plant, from October 1957 to June 1963. You stated that your employer "did not directly serve. . .Mallinckrodt but instead received freight cars by way of another railroad. . .which railroad switched the cars from the plant to the Missouri Pacific R.R. that then hauled the freight cars beyond. As such the Missouri Pacific R.R. became a party to the Bill of Lading contract, which was used by all transportors of freight."

On July 21, 2004, the district office issued a recommended decision concluding you were not entitled to compensation, since the evidence did not support that you had employment which would render you a covered employee, as defined in 42 U.S.C. § 7384l of the EEOICPA. The decision also found that you had not submitted evidence establishing that you had cancer.

On August 19, 2004, you submitted an objection to the recommended decision, in which you reiterated that you were employed by the Missouri Pacific Railroad and that this employment took you to the Mallinckrodt Plant where you were exposed to contamination which, you believe, may have caused your cancers. With your objection, you submitted an employment document, as well as records of medical treatment you received. The employment document supported that you worked as a traffic representative and a track rail sales representative for the Missouri Pacific Railroad from May 22, 1957 to June 30, 1963. The medical records, including pathology reports, confirmed that you were diagnosed with prostate cancer, non-Hodgkin's lymphoma, multiple basal cell carcinomas and lung cancer. Upon review of the case record, the undersigned makes the following:

FINDINGS OF FACT

1. You filed a claim for benefits under the EEOICPA on April 19, 2004.

2. You have been diagnosed with prostate cancer, non-Hodgkin's lymphoma, multiple basal cell carcinomas and lung cancer.

3. You were employed by the Missouri Pacific Railroad, as a traffic representative and a track rail sales representative, from May 22, 1957 to June 30, 1963.

Based on these facts, the undersigned makes the following:

CONCLUSIONS OF LAW

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, pursuant to 20 C.F.R. § 30.310. The same section of the regulations provides that in filing objections, the claimant must identify his objections as specifically as possible. In reviewing any objections submitted, under 20 C.F.R. § 30.313, the FAB will review the written record, any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. I have reviewed the record in this case, as well as the written objections you submitted and must conclude that no further investigation is warranted.

A "covered employee," as defined in 42 U.S.C. § 7384l(1) of the EEOICPA, includes a "covered employee with cancer," which, pursuant to 42 U.S.C. § 7384l(9)(B), may include a "Department of Energy employee" or a "Department of Energy contractor employee who contracted. . .cancer after beginning employment at a Department of Energy facility."

A "Department of Energy contractor employee" is defined, in 42 U.S.C. § 7384l(11) of the Act, as an "individual who. . .was in residence at a Department of Energy facility as a researcher for one or more periods aggregating at least 24 months," or, an "individual who. . .was employed at a Department of Energy facility by (i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility."

The regulations state, in 20 C.F.R. § 30.111(a), that "Except where otherwise provided in the Act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category set forth in § 30.110."

You have not alleged, or submitted any evidence to support, that you were a Department of Energy employee or that you were in residence for at least 24 months, as a researcher at a Department of Energy facility. You also have not submitted any evidence or statements supporting that your employer, the Missouri Pacific Railroad, had a contractual relationship with the Department of Energy to provide management, remediation or any other services, at the Destrehan Street Plant facility of the Mallinckrodt Chemical Company. By your own statement, your employer merely hauled freight cars which had already been removed from the facility by another company. Therefore, the evidence fails to support that your employment with the Missouri Pacific Railroad was such as to qualify you as a "covered employee."

For the foregoing reasons, the undersigned must find that you have not established your claim under the EEOICPA and hereby denies payment of compensation.

Washington, DC

Richard Koretz

Hearing Representative

Shared employee doctrine

EEOICPA Fin. Dec. No. 366-2002 (Dep't of Labor, June 3, 2003)

NOTICE OF FINAL DECISION REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. The recommended decision was to deny your claim. You submitted objections to that recommended decision. The Final Adjudication Branch carefully considered the objections and completed a review of the written record. *See* 20 C.F.R. § 30.312. The Final Adjudication Branch concludes that the evidence is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On July 31, 2001, you filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA), stating that you were the daughter of **[Employee]**, who was diagnosed with cancer, chronic silicosis, and emphysema. You completed a Form EE-3, Employment History for Claim under the EEOICPA, indicating that from December 2, 1944 to May 30, 1975, **[Employee]** was employed as a heavy mobile and equipment mechanic, for Alaska District, Corps of Engineers, Anchorage, Alaska.

On August 20, 2001, a representative of the Department of Energy (or DOE) indicated that "none of the employment history listed on the EE-3 form was for an employer/facility which appears on the Department of Energy Covered Facilities List." Also, on August 29, 2001, a representative of the DOE stated in Form EE-5 that the employment history contains information that is not accurate. The information from the DOE lacked indication of covered employment under the EEOICPA.

The record in this case contains other employment evidence for **[Employee]**. With the claim for benefits, you submitted a "Request and Authorization for TDY Travel of DOD Personnel" Form DD-1610, initiated on November 10, 1971 and approved on November 11, 1971. **[Employee]** was approved for TDY travel for three days to perform work on Amchitka Island, Alaska, for the Department of Defense, Alaska District Corps of Engineers beginning on November 15, 1971. He was employed as a Mobile Equipment Mechanic WG-12, and the purpose of the TDY was noted "to examine equipment for potential use on Blair Lake Project." The security clearance was noted as "Secret." You also submitted numerous personnel documents from **[Employee]**'s employment with the Alaska District Corp of Engineers. Those documents include a "Notification of Personnel Action" Form SF-50 stating that **[Employee]**'s service compensation date was December 2, 1944, for his work as a Heavy Mobile Equipment Mechanic; and at a WG-12, Step 5, and that he voluntarily retired on May 30, 1975.

The medical documentation of record shows that **[Employee]** was diagnosed with emphysema, small cell carcinoma of the lung, and chronic silicosis. A copy of **[Employee]**'s Death Certificate shows that he died on October 9, 1990, and the cause of death was due to or as a consequence of bronchogenic cancer of the lung, small cell type.

On September 6 and November 5, 2001, the district office wrote to you stating that additional evidence was needed to show that **[Employee]** engaged in covered employment. You were requested to submit a Form EE-4, Employment History Affidavit, or other contemporaneous records to show proof of **[Employee]**'s employment at the Amchitka Island, Alaska site covered under the EEOICPA. You did not submit any additional evidence and by recommended decision dated December 12, 2001, the Seattle district office recommended denial of your claim. The district office concluded that you did not submit employment evidence as proof that **[Employee]** worked during a period of covered employment as required by § 30.110 of the EEOICPA regulations. *See* 20 C.F.R. § 30.110.

On January 15 and February 6, 2002, you submitted written objections to the recommended denial decision. The DOE also forwarded additional employment information. On March 20, 2002, a representative of the DOE provided a Form EE-5 stating that the employment history is accurate and complete. However, on March 25, 2002, a representative of the DOE submitted a "corrected copy" Form EE-5 that indicated that the employment history provided in support of the claim for benefits "contains information that is not accurate." An attachment to Form EE-5 indicated that **[Employee]** was employed by the Army Corps of Engineers for the period July 25, 1944 to August 11, 1952, at Fort Richardson, Alaska; and from August 11, 1952 to May 30, 1975 at Elmendorf Air Force Base, Alaska. Further, the attachment included clarifying information:

Our records show that the Corps of Engineers' was a prime AEC contractor at Amchitka. **[Employee]**'s Official Personnel Folder (OPF) indicates that he was at Forth Richardson and Elmendorf AFB, both in Alaska. The OPF provided no indication that **[Employee]** worked at Amchitka, Alaska. To the best of our knowledge, Blair Lake Project was not a DOE project.

Also, on April 3, 2002, a representative of the DOE submitted a Form EE-5 indicating that Bechtel Nevada had no information regarding **[Employee]**, but he had a film badge issued at the Amchitka Test Site, on November 15, 1971. The record includes a copy of Appendix A-7 of a "Manager's Completion Report" which indicates that the U. S. Army Corps of Engineers was a prime AEC (Atomic Energy Commission) Construction, Operations and Support Contractor, on Amchitka Island, Alaska.

On December 10, 2002, a hearing representative of the Final Adjudication Branch issued a Remand Order. Noting the above evidence, the hearing representative determined that the "only evidence in the record with regard to the Army Corps of Engineers status as a contractor on Amchitka Island is the DOE verification of its listing as a prime AEC contractor . . . and DOE's unexplained and unsupported verification [of **[Employee]**'s employment, which] are not sufficient to establish that a contractual relationship existed between the AEC, as predecessor to the DOE, and the Army Corps of Engineers." The Remand Order requested the district office to further develop the record to determine whether the Army Corps of Engineers had a contract with the Department of Energy for work on Amchitka Island, Alaska, and if the work **[Employee]** performed was in conjunction with that contract. Further the Remand Order directed the district office to obtain additional evidence to determine if **[Employee]** was survived by a spouse, and since it did not appear that you were a natural child of **[Employee]**, if you could establish that you were a stepchild who lived with **[Employee]** in a regular parent-child relationship. Thus, the Remand Order requested additional employment evidence and proof of eligibility under the Act.

On January 9, 2003, the district office wrote to you requesting that you provide proof that the U.S. Army Corps of Engineers had a contract with the AEC for work **[Employee]** performed on his TDY assignment to Amchitka Island, Alaska for the three days in November 1971. Further, the district office requested that you provide proof of your mother's death, as well as evidence to establish your relationship to **[Employee]** as a survivor.

You submitted a copy of your birth certificate that indicated that you were born **[Name of Claimant at Birth]** on October 4, 1929, to your natural mother and natural father **[Natural Mother]** and **[Natural Father]**. You also submitted a Divorce Decree filed in Boulder County Court, Colorado, Docket No. 10948, which showed that your biological parents were divorced on October 10, 1931, and your mother, **[Natural Mother]** was awarded sole custody of the minor child, **[Name of Claimant at Birth]**. In addition, you submitted a marriage certificate that indicated that **[Natural Mother]** married **[Employee]** in the State of Colorado on November 10, 1934. Further, you took the name **[Name of Claimant Assuming Employee's Last Name]** at the time of your mother's marriage in 1934, as indicated by the sworn statement of your mother on March 15, 1943. You provided a copy of a Marriage Certificate to show that on August 19, 1949, you married **[Husband]**. In addition, you submitted a copy of the Death Certificate for **[Name of Natural Mother Assuming Employee's Last Name]** stating that she died on May 2, 1990. The record includes a copy of **[Employee]**'s Death Certificate showing he died on October 9, 1990.

You also submitted the following additional documentation on January 20, 2003: (1) A copy of **[Employee's]** Last Will and Testament indicated that you, **[Claimant]**, were the adult daughter and named her as Personal Representative of the Estate; (2) Statements by Jeanne Findler McKinney and Jean M. Peterson acknowledged on January 17, 2003, indicated that you lived in a parent-child relationship with **[Employee]** since 1945; (3) A copy of an affidavit signed by **[Name of Natural Mother Assuming Employee's Last Name]** (duplicate) indicated that at the time of your mother's marriage to **[Employee]**, you took the name **[Name of Claimant Assuming Employee's Last Name]**.

You submitted additional employment documentation on January 27, 2003: (1) A copy of **[Employee]**'s TDY travel orders (duplicate); (2) A Memorandum of Appreciation dated February 11, 1972 from the Department of the Air Force commending **[Employee]** and other employees, for their support of the Blair Lake Project; (3) A letter of appreciation dated February 18, 1972 from the Department of the Army for **[Employee]**'s contribution to the Blair Lake Project; and (4) Magazine and newspaper articles containing photographs of **[Employee]**, which mention the work performed by the

U.S. Army Corps of Engineers in Anchorage, Alaska.

The record also includes correspondence, dated March 27, 2003, from a DOE representative. Based on a review of the documents you provided purporting that **[Employee]** was a Department of Energy contractor employee working for the U.S. Army Corps of Engineers on TDY in November, 1971, the DOE stated that the Blair Lake Project was not a DOE venture, observing that "[i]f Blair Lake Project had been our work, we would have found some reference to it."

On April 4, 2003, the Seattle district office recommended denial of your claim for benefits. The district office concluded that the evidence of record was insufficient to establish that **[Employee]** was a covered employee as defined under § 7384l(9)(A). *See* 42 U.S.C. § 7384l(9)(A). Further, **[Employee]** was not a member of the Special Exposure Cohort, as defined by § 7384l(14)(B). *See* 42 U.S. C. § 7384l(14)(B). Also, **[Employee]** was not a "covered employee with silicosis" as defined under §§ 7384r(b) and 7384r(c). *See* 42 U.S.C. §§ 7384r(b) and (c). Lastly, the recommended decision found that you are not entitled to compensation under § 7384s. *See* 42 U.S.C. § 7384s.

On April 21, 2003, the Final Adjudication Branch received your letter of objection to the recommended decision and attachments. First, you contended that the elements of the December 10, 2002 Remand Order were fulfilled because you submitted a copy of your mother's death certificate and further proof that **[Employee]** was your stepfather; and that the letter from the district office on April 4, 2003 "cleared that question on page three – quote 'Our records show that the Corps of Engineers was a prime AEC contractor at Amchitka.'"

Second, you stated that further clarification was needed as to the condition you were claiming. You submitted a death certificate for **[Employee]** showing that he died due to bronchogenic cancer of the lung, small cell type, and noted that that was the condition you alleged as the basis of your claim on your first Form, associated with your claim under the EEOICPA.

Third, you alleged that, in **[Employee]**'s capacity as a "Mobile Industrial Equipment Mechanic" for the Army Corps of Engineers, "he was required to work not only for the DOD (Blair Lake project) but also for DOE on the Amchitka program. For example: on March 5, 1968 he was sent to Seward, Alaska to 'Inspect equipment going to Amchitka.' He was sent from the Blair Lake project (DOD) to Seward for the specified purpose of inspecting equipment bound for Amchitka (DOE). Thus, the DOE benefited from my father's [Corp of Engineers] expertise/service while on 'loan' from the DOD. Since the closure of the Amchitka project (DOE), the island has been restored to its original condition. . . . Therefore, my dad's trip to Amchitka to inspect equipment which might have been used at the Blair Lake project benefited not only DOD but also DOE. In the common law, this is known as the 'shared Employee' doctrine, and it subjects both employers to liability for various employment related issues."

On May 21, 2003, the Final Adjudication Branch received your letter dated May 21, 2003, along with various attachments. You indicated that the U.S. Army Corps of Engineers was a contractor to the DOE for the Amchitka Project, based upon page 319 of an unclassified document you had previously submitted in March 2002. Further, you indicated that **[Employee]** had traveled to Seward, Alaska to inspect equipment used at on-site operations for use on Amchitka Island by the Corps of Engineers for the DOE project, and referred to the copy of the Corps of Engineers TDY for Seward travel you submitted to the Final Adjudication Branch with your letter of April 18, 2003. Also, you indicated that **[Employee]** traveled to Amchitka, Island in November 1972 to inspect the equipment referenced above, which had been shipped from Seward, Alaska. You indicated that **[Employee]** was a mobile industrial equipment mechanic, and that his job required him to travel. You attached the following documents in support of your contention that the equipment **[Employee]** inspected could have included equipment belonging to the Corps of Engineers: Job Description, Alaska District, Corps of Engineers (previously submitted), and an Employee Performance Appraisal.

In addition, you indicated **[Employee]** was required to travel to remote sites throughout Alaska in order to perform his job with the Corps of Engineers, and in support of this you referred to your electronic mail sent to the Seattle District Office on January 7, 2003. You indicated that, since **[Employee]** was required to travel to Amchitka as a part of his regular duties as a mobile industrial equipment mechanic, it was possible that the equipment he inspected on the November 15, 1971 trip to Amchitka included equipment owned by the Corps as well as inspection of equipment owned by private contractors. You attached a copy of a document entitled, "Affidavit," dated May 21, 2003, signed by Erwin L. Long. Mr. Long stated that he was head of the Foundations Material Branch for the Corps of Engineers at the time of his retirement, and that in 1971 he had been Head of the Rock Design Section. Mr. Long indicated that he did not spend any time on Amchitka Island, that he had known **[Employee]** since 1948, and that he "believe[d]" **[Employee]**'s travel to Amchitka for his job would have required him to track equipment belonging to the Corps of Engineers, and that **[Employee]** would also have "performed required maintenance on the equipment before preparing [it] for shipping off Amchitka Island." Mr. Long also stated that **[Employee]** would not talk about his work on Amchitka since it was classified. Finally, you attached a TDY dated March 4, 1968, as well as a travel voucher/subvoucher dated March 15, 1968, to support that **[Employee]**'s mission to Amchitka had been completed.

FINDINGS OF FACT

1. On July 31, 2001, **[Claimant]** filed a claim for survivor benefits under the EEOICPA as the daughter of **[Employee]**.

2. **[Employee]** was diagnosed with small cell bronchogenic carcinoma of the lung and chronic silicosis.

3. **[Employee]** was employed by the U.S. Army Corps of Engineers for the period from July 25, 1944 to August 11, 1952, at Fort Richardson, Alaska; and from August 11, 1952 to May 30, 1975 at Elmendorf Air Force Base, Alaska.

4. **[Employee]**'s employment for the U.S. Army Corps of Engineers on TDY assignment at the Amchitka Island, Alaska site in November 1971 was in conjunction with a Department of Defense venture, the Blair Lakes Project.

CONCLUSIONS OF LAW

The EEOCIPA implementing regulations provide that a claimant may object to any or all of the findings of fact or conclusions of law, in the recommended decision. 20 C.F.R. § 30.310. Further, the regulations provide that the Final Adjudication Branch will consider objections by means of a review of the written record. 20 C.F.R. § 30.312. The Final Adjudication Branch reviewer will review the record forwarded by the district office and any additional evidence and/or argument submitted by the claimant. 20 C.F.R. § 30.313. Consequently, the Final Adjudication Branch will consider the overall evidence of record in reviewing the written record.

In order to be awarded benefits under the Energy Employees Occupational Illness Compensation Program Act, the covered employee (or his/her eligible survivors), must first establish that the employee has been diagnosed with beryllium illness, cancer, or chronic silicosis. *See* 42 U.S.C. § 7384l(15), 20 C.F.R. § 30.110(a). The evidence to show proof of an occupational illness is not in dispute in this case. The medical evidence establishes that **[Employee]** was diagnosed with cancer (bronchogenic cancer of the lung, small cell type) and chronic silicosis. Consequently, **[Employee]** was diagnosed with two illnesses potentially covered under the Act.

Employees of a DOE contractor (or their eligible survivors) are entitled under the EEOICPA to seek compensation for a cancer as a member of the Special Exposure Cohort (SEC) or through a determination that they incurred cancer that was at least as likely as not related to employment at a DOE facility. 42 U.S.C. §§ 7384l(14), 7384l(9)(B)(ii)(II). To be included in the SEC, a DOE employee, DOE contractor employee, or atomic weapons employee must have been employed for an aggregate of 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee or employed before January 1, 1974, by the DOE or a DOE contractor or subcontractor on Amchitka Island, Alaska, and have been exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests. 42 U.S.C. § 7384l(14). To qualify as a covered employee with cancer, members of the SEC need only establish that they contracted a "specified cancer", designated in section 7384l(17) of the EEOICPA, after beginning employment at a DOE facility or atomic weapons employer facility.

While the EEOICPA does not contain a specific definition of a DOE contractor, it does contain a definition of a DOE contractor employee that, in effect, defines what a DOE contractor is. Section 7384l(11) of the EEOICPA defines a DOE contractor employee as:

(A) An individual who is or was in residence at a Department of Energy facility as a researcher for one or more periods aggregating at least 24 months.
(B) An individual who is or was employed at a Department of Energy facility by-
    (i) an entity that contracted with the Department of Energy to provide

management and operating, management and integration, or environmental remediation at the facility; or
(ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

The question presented in this case is whether **[Employee]**, an employee of the U.S. Army Corps of Engineers was, during the time he spent on Amchitka Island, providing management and operation, management and integration or environmental remediation services under a contract between the DOE and the Army Corps of Engineers.

The undersigned notes that the Atomic Energy Commission's Managers Completion Report refers to the U.S. Army Corp of Engineers, as a prime contractor for work on Milrow and Cannikin. The work to be performed under that contract consisted of "engineering, procurement, construction administration and inspection."

[Employee]'s "Request and Authorization for TDY Travel of DOD Personnel," initiated on November 10 and approved on November 11, 1971, was for the purpose of three days work on Amchitka Island, Alaska, for the Department of Defense, Alaska District Corps of Engineers. The purpose of the TDY was to "examine equipment for potential use on Blair Lake Project."

You submitted the following new documents along with your letter to the Final Adjudication Branch dated May 21, 2003: Employee Performance Appraisal for the period February 1, 1966 to January 31, 1967; Affidavit of Erwin L. Long dated May 21, 2003; Request and Authorization for Military Personnel TDY Travel and Civilian Personnel TDY and PCS Travel, dated March 4, 1968; and Travel Voucher or Subvoucher, dated March 15, 1968. None of the documents submitted establish that **[Employee]** was on Amchitka Island providing services pursuant to a contract with the DOE.

The preponderance of the evidence in this case supports the conclusion that **[Employee]** was on Amchitka Island in November 1971 for the sole purpose of inspecting equipment to be used by the Department of Defense on its Blair Lake Project. The documentation of record refers to the Blair Lake Project as a Department of Defense project, and the DOE noted in correspondence dated March 27, 2003, that research was not able to verify that Blair Lake was a DOE project.

While the DOE indicated that **[Employee]** was issued a dosimetry badge, such evidence may be used to establish that he was present on Amchitka Island, not to establish that he was a covered DOE employee. Therefore, **[Employee]**'s presence on Amchitka Island was to perform work for the Department of Defense, and not pursuant to a contract between the DOE and the U.S. Army Corps of Engineers.

The evidence is also insufficient to show covered employment under § 7384r(c) and (d) of the EEOICPA for chronic silicosis. To be a "covered employee with chronic silicosis" it must be established that the employee was:

A DOE employee or a DOE contractor employee, who was present for a number of workdays aggregating at least 250 work days during the mining of tunnels at a DOE facility located in Nevada or Alaska for test or experiments related to an atomic weapon.

See 42 U.S.C. § 7384r(c) and (d); 20 C.F.R. § 30.220(a). Consequently, even if the evidence showed DOE employment (which it does not since **[Employee]** worked for the DOD), he was present only

three days on Amchitka, which is not sufficient for the 250 days required under the Act as a covered employee with silicosis.

The undersigned notes that in your objection to the recommended decision, you referred to a "shared employee" doctrine which you believe should be applied to this claim. You contend that on March 5, 1968, **[Employee]** was sent to Seward, Alaska to "Inspect equipment going to Amchitka, which might have been used at the Blair Lake project [to benefit] not only DOD but also DOE." No provision in the Act refers to a "shared employee" doctrine. Given the facts of this case, coverage could only be established if **[Employee]** was on Amchitka Island providing services pursuant to a contract with the DOE, evidence of which is lacking in this case.

It is the claimant's responsibility to establish entitlement to benefits under the EEOICPA. The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of each and every criterion under any compensable claim category set forth in section 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing the Office of Workers' Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

Although you submitted medical evidence to show covered illnesses due to cancer and chronic silicosis, the evidence of record is insufficient to establish that **[Employee]** engaged in covered employment. Therefore, your claim must be denied for lack of proof of covered employment under the EEOICPA.

Seattle, Washington

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA Fin. Dec. No. 13183-2003 (Dep't of Labor, October 15, 2003)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch (FAB) 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 discussed below, your claim for compensation is denied.

STATEMENT OF THE CASE

You filed a claim, Form EE-2, on October 23, 2001, seeking benefits pursuant to the Energy Employees Occupational Illness Compensation Program Act. You indicated on the claim form that you were filing for your spouse's cancer, specifically, acute myelogenous leukemia, diagnosed approximately on January 1, 1995. You also submitted Form EE-3, employment history, indicating that

your spouse was employed by Fercleve Corporation, Manhattan Project, Oakridge, Tennessee, as a project technician from 1944 through 1946. Along with the claim forms, you submitted:

- your spouse's death certificate, noting the immediate cause of death as Mucormycosis Brain Abcess(s) due to or as a consequence of acute myelogenous leukemia;
- your marriage certificate;
- several listings of prescriptions/medications;
- several listings of medical expenses;
- a copy of your spouse's honorable discharge certificate dated March 14, 1946;
- a copy of your spouse's enlisted record and report of separation;
- a copy of a letter to Senator Bunning from **[Authorized Representative]** dated February 2, 2001;
- a copy of a letter to The Christ Hospital from Philip D. Leming, M.D. dated December 5, 1997;
- a copy of a hematology consultation and admission note signed by Philip D. Leming dated October 2, 1997, noting a diagnosis of acute myelocytic lueukemia with pancytopenia;
- a copy of a Ohio State University James Cancer Hospital and Research Institute medical document signed by Michael A. Caligiuri dated September 10, 1998;
- a copy of a letter signed by Philip D. Leming, M.D dated September 24, 2001, noting that it was at least as likely as not that the patient's acute leukemia was related to the radiation exposure in the past from his work on the atomic bomb project (Manhattan Project) in Oakridge, TN as any additional exposures;
- a copy of United States of America, War Department Army Service Forces Corps of Engineers Manhattan District certificate that states, "This is to certify that **[Employee]** Fercleve Corporation has participated in work essential to the production of the Atomic Bomb, thereby contributing to the successful conclusion of World War II. This certificate is awarded in appreciation of effective service." Signed by the Secretary of War, dated August 6, 1945;

On November 15, 2001, the Cleveland, Ohio, district office received a letter from Droder & Miller CO., L.P.A. indicating that on your original application for benefits under the EEOICPA it indicated that your spouse's diagnosis of cancer was in January of 1995, but Mr. Miller believes the records indicate that the diagnosis was sometime in mid to late 1997.

On February 12, 2002, the Cleveland District Office requested that additional medical evidence be provided within 30 days from the date of the letter. On February 27, 2002, the District Office received a letter from you dated February 25, 2002, stating that your spouse's diagnosis was 10/97, not 1/95, and that you received only the February 12, 2002, letter from the District Office. You also submitted:

- a duplicate copy of a letter dated September 24, 2001, signed by Philip D. Leming, M.D.;
- a duplicate copy of the Ohio State University James Cancer Hospital and Research Institute medical document signed by Michael A. Caligiuri dated September 10, 1998;
- an unsigned December 6, 1999, Christ Hospital progress note indicating that acute myeloid leukemia was initially diagnosed September 30, 1997;
- an unsigned December 3, 1999, Christ Hospital progress note, a November 29, 1999, follow up note from Cincinnati Hematology – Oncology, INC.;
- an October 3, 1997, surgical pathology report indicating a diagnosis of Bone marrow, clot section and aspirate smears involved by acute myeloid leukemia, seen microscopic description, signed by Cindy Westermann, M.D. and;
- a September 30, 1997, bone marrow clinical summary indicating a diagnosis of acute undifferentiated leukemia.

On November 30, 2001, the District Office received information from the Department of Energy regarding your spouse's claimed employment. The EE-5 form signed by Roger Holt stated "See Attached." The attached information indicated that **[Employee]**'s address was **[Employee's address],** birthplace Ft. Thomas, Kentucky, date of birth **[Date of Birth]**; under the clearance status section, the section titled "report rec'd" indicated file Chk. Neg.; the section "restriction removed" on December 14, 1944 and notes at the bottom stated, "Loyalty Ck. Reg. November 24, 1944" and "Ref. Ltrs. November 27, 1944."

On March 12, 2002, the Cleveland District Office advised you that your case file was transferred to the Jacksonville District Office.

On June 20, 2002, the Jacksonville District Office advised you that they reviewed all the evidence presented with your claim and that the evidence was not sufficient to make a decision. They indicated that the discharge papers you submitted indicated that your spouse was on active duty service with the U.S. Army from May 3, 1943 to March 14, 1946 and that the EEOICPA does not list the U.S. Army as one of the covered facilities under the Act. The District Office advised you of the criteria for employment at a covered facility and requested that you provide the name and location of the company and employment dates and any information that shows that your spouse worked at a Department of Energy facility or a Department of Energy contractor/subcontractor and/or atomic weapons facility. You were requested to provide the employment evidence within 30 days from the date of the letter.

On June 24, 2002, the District Office received a letter from you authorizing your brother in law **[Authorized Representative]** to act as your authorized representative concerning your claim under the EEOICPA. On July 18, 2002, the District Office received an employment history affidavit signed by **[Authorized Representative]**, your spouse's brother. **[Authorized Representative]** indicated employment at Fercleve Corp, Manhattan Project, Oak Ridge, TN from November 1944 to February 1946.

On August 5, 2002, the District Office received another EE-5 form from the Department of Energy stating that the employment history contains information that is not accurate. An attachment to the

form indicated that at the request of the Department of Energy, Bechtel Jacobs Company, LLC performed a search for certain records regarding dates and locations of employment relating to special exposure claimant **[Employee]**. The document included a statement, "we have searched payroll/radcon records in the possession of BJC to verify whether the claimant was employed at the K-25, Portsmouth or Paducah GDP, as appropriate, for more than 250 days prior to February 1, 1992. We were unable to locate any records for the claimant."

On August 26, 2002, the District Office requested you complete the SSA-581 and return it. On September 11, 2002, your completed SSA form was sent to the Department of Labor. On November 1, 2002, the District Office received Social Security Administration records regarding your spouse's employment from January 1942 thru December 1947. The records indicate that your spouse was employed at Cincinnati Gas and Electric Co. in 1942 and 1943; at PJ Erdal General Merchandise in 1942; at AT&T Corporation, in 1946 and 1947.

On December 27, 2002, the Jacksonville District Office issued a Recommended Decision regarding your claim for compensation under the EEOICPA. The decision concluded that there is no evidence to support that **[Employee]** was a covered employee pursuant to 42 U.S.C. § 7384l(1) and 20 C.F.R. § 30.5(u) of the implementing regulations.

Attached to the recommended decision was an explanation of your appeal rights, which stated that you had 60 days in which to file an objection to the recommended decision and/or request a hearing. You were also advised that, if there was no timely objection filed, the recommended decision would be affirmed and you would be deemed to have waived your right to challenge the decision.

On February 7, 2003, the Final Adjudication Branch received a letter from **[Authorized Representative]** advising that you object to the recommended decision and your request for an oral hearing. The letter stated that the reason you disagree with the decision is because the summary of events, most of which are documented in the file, clearly show that **[Employee]** was a covered employee under the EEOICPA. **[Authorized Representative]** stated, "**[Employee]** and I are brothers. In 1944 we were attending Ohio State University in Columbus, OH and were involved in an Army Specialized Training Program. We were both majoring in Electrical Engineering. While at Ohio State University he was recruited by representatives of Fercleve Corporation regarding work in Oak Ridge, TN. He accepted the offer to go to work for them to be on loan from the Army. In the Fall of 1944 he went to Oak Ridge, TN to work for Fercleve Corporation. **[Employee]**'s work with Fercleve Corporation turned out to involve nuclear activity on the first atomic bomb program, referred to as the Manhattan Project. He worked for Fercleve Corporation from 1944 until 1946. During this time he reported for work everyday for Fercleve. He worked under Fercleve supervision. He worked with equipment and tools provided by Fercleve. He worked in the Gaseous Diffusion Process where they pumped nuclear gases through a series of diaphragms over and over until the proper isotope was isolated. He also worked in the thermal diffusion process where they cooked the nuclear solutions, similar to a distilling process, over and over again until the just right isotope was isolated. He told me that in the gaseous diffusion process there were leaks where the nuclear gases would contaminate the immediate atmosphere. They were provided with little or no protection against the effect of these gases. In the thermal diffusion process they encountered numerous spills of extremely corrosive liquids. They would immediately flush these spills with water to minimize the corrosive damage that would otherwise occur on human flesh and equipment. After the war ended and we were all home, he told me a lot about his activity at Oak Ridge. In summary, all the time he worked for Fercleve he told me that he worked as a civilian on loan from the Army. There is no disputing the following facts: 1).Everyday in Oak Ridge, TN he went to work for Fercleve. 2).He worked with and under Fercleve

supervision. 3).He worked with tools furnished for Fercleve. 4).He worked with equipment and processing machinery provided by Fercleve. 5).And most importantly, he received a formal certificate of merit awarded in appreciation of effective service with Fercleve Corporation, signed by Henry L. Stinson, Secretary of War, who was the overall chief of the Manhattan Project."

On March 4, 2002, the Final Adjudication Branch advised you that your hearing would be held on April 22, 2003, at 2:00pm. Also, on March 4, 2002, you signed an Authorization for Representation authorizing **[Authorized Representative]** to serve as your representative in all matters pertaining to the adjudication of your claim under the EEOICPA.

On April 22, 2003, your hearing was held. Present were yourself, and **[Authorized Representative]**. You discussed the fact that your spouse went for a physical in September 1997. You indicated that his blood was taken and they got the test results back and that your spouse was told to see an oncologist immediately. You indicated that after he saw the oncologist, he told you that he had leukemia. **[Authorized Representative]** discussed the history of his brother's employment and the specifics of the letter filed on February 7, 2003, during the hearing.

On May 1, 2003, the Final Adjudication Branch sent the hearing transcripts to you for comment. On May 20, 2003, the Final Adjudication Branch received your comments on the transcript and your comments are included as a part of the record in this case and have been considered.

FINDINGS OF FACT

- You filed a claim for survivor benefits on October 23, 2001.

· You claimed a diagnosis of your spouse's acute myelogenous leukemia as a result of occupational exposure during his employment.

· You claimed that your spouse worked at Fercleve Corporation, in Oak Ridge, TN from 1944 to 1946.

· Your spouse served on active duty in the United States Army from May 3, 1943 to March 1946.

· The Department of Energy was unable to verify the claimed employment history.

· Cancer is a covered occupational illness under the EEOICPA. The medical evidence of record substantiates that your spouse had leukemia.

· Your spouse was diagnosed with leukemia in 1997.

· You were advised that you needed to provide employment evidence establishing proof that your spouse was employed at a covered facility during a covered time period.

· You did not provide employment evidence to substantiate that your spouse was a Department of Energy employee or contractor employee at a Department of Energy facility, nor an atomic weapons employee at an atomic weapons employer facility.

· Social Security Administration Records from 1942 to 1947 list Cincinnati Gas and Electric

Company, PJ Erdal General Merchandise and AT&T Corporation as **[Employee]**'s employers.

· The Jacksonville, District Office recommended denial of your claim for benefits as you did not provide evidence that your spouse was a covered employee under the EEOICPA.

· You objected to the recommended denial of your claim.

· You did not submit additional employment evidence that would substantiate that your spouse was a covered employee under the EEOICPA.

CONCLUSIONS OF LAW

The EEOICPA established a compensation program to provide compensation to covered employees suffering from specifically designated occupational illnesses incurred as a result of their exposure to radiation, beryllium, or silica while in the performance of duty for the Department of Energy and certain of its vendors, contractors and subcontractors. The term "occupational illness" is defined by 42 U.S.C. §7384l(15) and 20 CFR § 30.5(z) as a covered beryllium illness, cancer, or chronic silicosis. You claimed leukemia as your spouse's diagnosed illness on your claim form. You presented medical evidence that establishes that your spouse has been diagnosed with leukemia. Although leukemia is a covered condition under the EEOICPA, in order to establish entitlement to compensation under the EEOICPA, the evidence must demonstrate the existence of an occupational illness related to a period of employment specified by the Act. While you have provided medical evidence to establish a diagnosis of leukemia, you have not provided sufficient employment evidence to show that your spouse was a covered employee under the EEOICPA. To be a "covered employee with cancer," the employee must meet the requirements of 42 U.S.C. § 7384l(9) and 20 C.F.R. § 30.210. Those provisions of the Act and implementing regulations require that the employee must have been an employee of the Department of Energy (DOE) at a DOE facility, of a DOE contractor at a DOE facility, or of an atomic weapons employer.

The term "covered employee" is defined by 42 U.S.C. § 7384l(1) and means any of the following: (A) A covered beryllium employee; (B) A covered employee with cancer; (C) To the extent provided in section 7384r of this title, a covered employee with chronic silicosis (as defined in that section).

The term "atomic weapons employee" is defined by 42 U.S.C. § 7384l(3) as an individual employed by an atomic weapons employer during a period when the employer was processing or producing, for the use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining and milling.

The term "atomic weapons employer" is defined by 42 U.S.C. § 7384l(4) as any entity, other than the United States that (A) processed or produced, for use by the United States, material that emitted radiation and was used in production of an atomic weapon, excluding uranium mining and milling: and (B) is designated by the Secretary of Energy as an atomic weapons employer for purposes of the compensation program.

The term "atomic weapons employer facility" is defined by 42 U.S.C. § 7384l(5) as a facility owned by an atomic weapons employer, that is or was used to process or produce, for use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining or milling.

The term “Department of Energy facility” under 42 U.S.C. § 7384l(12) means any building, structure, or premise, including the grounds upon which such building, structure, or premise is located-

(A) in which operations are, or have been, conducted by, or on behalf of, the Department of Energy (except for buildings, structures, premises, grounds, or operations covered by Executive Order No. 12344, dated February 1, 1982 (42 U.S.C. 7158 note), pertaining to the Naval Nuclear Propulsion Program); and

(B) with regard to which the Department of Energy has or had-

(i) a proprietary interest; or

(ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction , or maintenance services.

Section 30.111(a) of the regulations states that, "Except where otherwise provided in the Act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and these regulations, the claimant also bears the burden of providing to OWCP all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in these regulations." 20 C.F.R. § 30.111(a).

The record in this case demonstrates that you did not provide the requested employment evidence to show that your spouse was a Department of Energy employee or contractor employee at a Department of Energy facility, nor an atomic weapons employee at an atomic weapons employer facility, as those facilities are defined in 42 U.S.C. § 7384l(4) and (12).

You were advised of the deficiencies in your claim. Based on my review of the evidence in your case record, your objections and pursuant to the authority granted by § 30.316(b) of the EEOCIPA regulations, I find that the district office’s December 27, 2002, recommended decision is correct in the denial of your claim. The recommended decision denied your claim, because although you had submitted medical evidence showing that your spouse was diagnosed with leukemia, you did not submit the requested employment evidence showing that your spouse was a Department of Energy employee or contractor employee at a Department of Energy facility, nor an atomic weapons employee at an atomic weapons employer facility, as those facilities are defined in 42 U.S.C. § 7384l(4) and (12). Thus the undersigned finds that you were given the opportunity but have not established that your spouse was employed at a covered facility. You reported on the employment history form that your spouse was employed by the Fercleve Corporation, Manhattan Project in Oak Ridge, TN from 1944 to 1946. The evidence of record to date does not show that your spouse was a Department of Energy employee or contractor employee at a Department of Energy facility, nor an atomic weapons employee at an atomic weapons employer facility, as those facilities are defined in 42 U.S.C. § 7384l(4) and (12). Therefore you have not established that your spouse is a covered employee with cancer as defined under the EEOICPA. You objected and indicated that your spouse worked for Fercleve Corporation on loan from the United States Army. The employment evidence of record does not substantiate that your spouse is a covered employee as defined under the EEOICPA. In order to be

potentially eligible under the EEOICPA, an employee must have had covered employment. The evidence of record does not show that your spouse had covered employment.

Upon review of the entire case file, I find that you have not submitted evidence to substantiate that your spouse is a covered employee as defined by 42 U.S.C. § 7384l(1) nor a covered employee with cancer as defined under 42 U.S.C. § 7384l(9), as the evidence of record does not substantiate that your spouse was a Department of Energy employee, Department of Energy contractor employee or an atomic weapons employee who contracted the cancer after beginning such employment. I also find that the district office's recommended decision is supported by the evidence and the law, and cannot be overturned based on the additional information you submitted. For the reasons stated above, your claim for benefits for the claimed condition of leukemia is therefore denied.

Cleveland, Ohio

Tracy Smart, Hearing Representative

U.S. military

EEOICPA Fin. Dec. No. 57276-2004 (Dep't of Labor, October 26, 2004)

NOTICE OF FINAL DECISION

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 (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On May 3, 2004, you filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA), based on the condition of pancreatic cancer. Medical documentation submitted in support of the claim shows that **[Employee]** (the employee) was diagnosed as having pancreatic cancer in October 2001.

You also provided a Form EE-3 (Employment History), on which you indicated that the employee worked for the U.S. Navy in the Marshall Islands from April to October 1956, during Operation Redwing, and that he wore a dosimetry badge. A Department of Energy representative and a corporate representative of Bechtel Nevada indicated that the employee was issued film badges at the Pacific Proving Ground (Marshall Islands), during Operation Redwing, associated with the U.S. Navy, as a military participant, between the dates of April 19 and July 27, 1956.

By letters dated May 17 and July 7, 2004, the Seattle district office notified you that they had completed the initial review of your claim for benefits under the EEOICPA, but that additional employment evidence was needed in order to establish a claim. You were specifically informed that the claimed military employment with the U.S. Navy was not covered employment under the EEOICPA. You were requested to provide supporting documentation of covered employment within thirty days of the date of the district office letters.

You provided a Form EE-4 (Employment History Affidavit), on which you indicated that the employee

worked for the U.S. Navy in the Marshall Islands from November 4, 1952 to October 31, 1956, and McDonnell Douglas in St. Louis, Missouri, from January 1956 to January 1991. You also provided a signed Form SSA-581 (Authorization to Obtain Earnings Data from the Social Security Administration).

On August 23, 2004, the Seattle district office recommended denial of your claim for benefits. The district office concluded that the employee was not a covered employee as defined under § 7384l of the Act, as the evidence did not establish that he had been present at a covered facility as defined under § 7384l(12) of the Act, while working for the Department of Energy or any of its covered contractors, subcontractors or vendors as defined under § 7384l(11), of the Act, during a covered time period. *See* 42 U.S.C. § 7384l(11) and (12). The district office further noted that it had been determined that Congress did not expressly direct that military personnel be included as covered employees under the Act and that military personnel suffering from injuries resulting from government service were already covered under a separate program for veterans. Finally, the district office concluded that you were not entitled to compensation as outlined under § 7384s(e)(1) of the Act. *See* 42 U.S.C. § 7384s(e)(1).

FINDINGS OF FACT

1. You filed a claim for survivor benefits on May 3, 2004.

2. The employee was diagnosed as having pancreatic cancer in October 2001.

3. The employee's military employment with the U.S. Navy is not covered employment under the Act.

4. You did not provide evidence to establish that the employee worked in covered employment under the EEOICPA.

CONCLUSIONS OF LAW

The undersigned has reviewed the recommended decision issued by the Seattle district office on August 23, 2003. I find that you have not filed any objections to the recommended decision as provided by § 30.316(a) of the regulations, and that the sixty-day period for filing such objections, as provided for in § 30.310(a) has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

In order to be afforded coverage under the Energy Employees Occupational Illness Compensation Program Act, you must establish that the employee was diagnosed with a designated occupational illness incurred as a result of exposure to silica, beryllium, and radiation: *cancer, beryllium sensitivity, chronic beryllium disease*, and *silicosis*. *See* 42 U.S.C. § 7384l(15); 20 C.F.R. § 30.110(a). Further, the illness must have been incurred while in the performance of duty for the Department of Energy and certain of its vendors, contractors, and subcontractors, or for an atomic weapons employer. *See* 42 U.S.C. § 7384l(4)-(7), (9), (11).

In order to be afforded coverage under § 7384l(9) of the EEOICPA as a "covered employee with cancer," the claimant must show that the employee was a Department of Energy (DOE) employee, a DOE contractor employee, or an atomic weapons employee, who contracted cancer after beginning employment at a DOE facility or an atomic weapons employer facility. *See* 42 U.S.C. § 7384l(9); 20 C.F.R. § 30.210(b).

Although you provided a diagnosis of cancer, the evidence of record does not show that the employee was a DOE employee, contractor, subcontractor or atomic weapons employee. The evidence demonstrates that the employee was on active duty in the U.S. military. The EEOICPA was established to compensate civilian men and women who performed duties uniquely related to nuclear weapons production and testing. *See* 42 U.S.C. § 7384l(a)(7). Consequently, the employee's military employment is excluded from coverage under the EEOICPA.

The record shows that by letters dated May 17 and July 7, 2004, you were requested to provide the required information to prove covered employment. It is the claimant's responsibility to establish entitlement to benefits under the Act. The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of each and every criterion under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing to the Office of Workers' Compensation Program all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

The record in this case shows that you did not provide employment evidence to establish that the employee worked for a DOE employer, contractor, or atomic weapons employer. *See* 42 U.S.C. § 7384l(1). Therefore, your claim must be denied for lack of evidence of covered employment under the EEOICPA.

For the above reasons, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

Seattle, Washington

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA Fin. Dec. No. 59598-2004 (Dep't of Labor, November 10, 2004)

NOTICE OF FINAL DECISION

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 (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On July 20, 2004, you filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA), based on the condition of a brain tumor. You also provided a Form EE-3 (Employment History), on which you indicated that **[Employee]** worked for the U.S. Army from October 2, 1951 to July 1, 1953 and viewed an atom bomb blast while he was stationed at Camp Desert Rock, Nevada; was self-employed as a farmer from 1954 to 1972; worked for Swift's Independent Packing from 1972 to 1985; and with John

Deere from 1985 to 1989.

The record includes a letter in which you indicated that your spouse "viewed the atom bomb blast while he was at Camp Desert Rock, Nevada." The record also includes copies of your marriage certificate, the employee's Report of Separation from the Armed Forces, the employee's certificate of honorable military discharge, and the employee's death certificate. The employee's military discharge document indicates that he entered military service with the U.S. Army in Omaha, Nebraska on October 2, 1951, and separated from service in the state of California on July 1, 1953. The employee's death certificate indicates that he passed away on August 23, 1990, due to respiratory failure and a brain astrocytoma.

A review of the Oak Ridge Institute for Science and Education (ORISE) database was negative for employment information pertaining to the employee.

By letter dated July 27, 2004, the Seattle district office notified you that they had completed the initial review of your claim for benefits under the EEOICPA, but that additional employment evidence was needed in order to establish a claim. You were specifically informed that the military and civilian employment you claimed on Form EE-3 was not covered employment under the EEOICPA. You were requested to provide supporting documentation of covered employment within thirty days of the date of the district office letter. No additional documentation was received.

On September 7, 2004, the Seattle district office recommended denial of your claim for benefits. The district office concluded that the employee was not a covered employee as defined under § 7384l of the Act, as the evidence did not establish that he had been present at a covered facility as defined under § 7384l(12) of the Act, while working for the Department of Energy or any of its covered contractors, subcontractors or vendors as defined under § 7384l(10), of the Act, during a covered time period. *See* 42 U.S.C. § 7384l(10) and (12). The district office further noted that it had been determined that Congress did not expressly direct that military personnel be included as covered employees under the Act and that military personnel suffering from injuries resulting from government service were already covered under a separate program for veterans. Finally, the district office concluded that you were not entitled to compensation as outlined under § 7384s of the Act. *See* 42 U.S.C. § 7384s.

FINDINGS OF FACT

1. You filed a claim for survivor benefits on July 20, 2004.

2. The employee's employment with the U.S. Army, Swift's Independent Packing, John Deere, and his self-employment is not covered employment under the Act.

3. You did not provide evidence to establish that the employee worked in covered employment under the EEOICPA.

CONCLUSIONS OF LAW

The undersigned has reviewed the recommended decision issued by the Seattle district office on September 7, 2003. I find that you have not filed any objections to the recommended decision as provided by § 30.316(a) of the regulations, and that the sixty-day period for filing such objections, as provided for in § 30.310(a) has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

In order to be afforded coverage under the Energy Employees Occupational Illness Compensation Program Act, you must establish that the employee was diagnosed with a designated occupational illness incurred as a result of exposure to silica, beryllium, and radiation: *cancer, beryllium sensitivity, chronic beryllium disease*, and *silicosis*. *See* 42 U.S.C. § 7384l(15); 20 C.F.R. § 30.110(a). Further, the illness must have been incurred while in the performance of duty for the Department of Energy and certain of its vendors, contractors, and subcontractors, or for an atomic weapons employer. *See* 42 U.S.C. § 7384l(4)-(7), (9), (11).

In order to be afforded coverage under § 7384l(9) of the EEOICPA as a "covered employee with cancer," the claimant must show that the employee was a Department of Energy (DOE) employee, a DOE contractor employee, or an atomic weapons employee, who contracted cancer after beginning employment at a DOE facility or an atomic weapons employer facility. *See* 42 U.S.C. § 7384l(9); 20 C.F.R. § 30.210(b).

You indicated on Form EE-3 that the employee viewed an atomic blast while he was stationed with the Army at Camp Desert Rock, Nevada. The evidence of record does not show that the employee was a DOE employee, contractor, subcontractor or atomic weapons employee. The evidence demonstrates that the employee was on active duty in the U.S. military (Army). The EEOICPA was established to compensate civilian men and women who performed duties uniquely related to nuclear weapons production and testing. *See* 42 U.S.C. § 7384l(a)(7). Consequently, the employee's military employment is excluded from coverage under the EEOICPA.

The record shows that by letter dated July 27, 2004, you were requested to provide the required information to prove covered employment.

It is the claimant's responsibility to establish entitlement to benefits under the Act. The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of each and every criterion under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing to the Office of Workers' Compensation Program all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

The record in this case shows that you did not provide employment evidence to establish that the employee worked for a DOE employer, contractor, or atomic weapons employer. *See* 42 U.S.C. § 7384l(1). Therefore, your claim must be denied for lack of evidence of covered employment under the EEOICPA.

For the above reasons, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

Seattle, Washington

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

Verification of

EEOICPA Fin. Dec. No. 1400-2002 (Dep't of Labor, January 22, 2002)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA).

On December 12, 2001, the Seattle District Office issued a recommended decision concluding that the deceased covered employee was a member of the Special Exposure Cohort, as that term is defined in § 7384l(14) of the EEOICPA, and that you are entitled to compensation in the amount of $150,000 pursuant to § 7384s of the EEOICPA as his survivor. On December 17, 2001, the Final Adjudication Branch received written notification from you waiving any and all objections to the recommended decision.

The undersigned has reviewed the evidence of record and the recommended decision issued by the Seattle district office on December 12, 2001, and finds that:

In a report dated August 20, 1996, Dr. John Mues diagnosed the deceased covered employee with mixed squamous/adenocarcinoma of the lung. The report states the diagnosis was based on the results of a thoracoscopy and nodule removal. Lung cancer is a specified disease as that term is defined in § 7384l(17)(A) of the EEOICPA and 20 CFR § 30.5(dd)(2) of the EEOICPA regulations.

You stated in the employment history that the deceased covered employee worked for S.S. Mullins on Amchitka Island, Alaska from April 21, 1967 to June 17, 1969. Nancy Shaw, General Counsel for the Teamsters Local 959 confirmed the employment by affidavit dated November 1, 2001. The affidavit is acceptable evidence in accordance with § 30.111 (c) of the EEOICPA regulations.

Jeffrey L. Kotch[1], a certified health physicist, has advised it is his professional opinion that radioactivity from the Long Shot underground nuclear test was released to the atmosphere a month after the detonation on October 29, 1965. He further states that as a result of those airborne radioactive releases, SEC members who worked on Amchitka Island, as defined in EEOICPA § 7384l(14)(B), could have been exposed to ionizing radiation from the Long Shot underground nuclear test beginning a month after the detonation, i.e., the exposure period could be from approximately December 1, 1965 through January 1, 1974 (the end date specified in EEOICPA, § 7384l(14)(B)). He supports his opinion with the Department of Energy study, *Linking Legacies*, DOE/EM-0319, dated January 1997, which reported that radioactive contamination on Amchitka Island occurred as a result of activities related to the preparation for underground nuclear tests and releases from Long Shot and Cannikin. Tables 4-4 and C-1, on pages 79 and 207, respectively, list Amchitka Island as a DOE Environmental Management site with thousands of cubic meters of contaminated soil resulting from nuclear testing.

The covered employee was a member of the Special Exposure Cohort as defined in § 7384l(14)(B) of the EEOICPA and §§ 30.210(a)(2) and 30.213(a)(2) of the EEOICPA regulations. This is supported by evidence that shows he was working on Amchitka Island for S.S. Mullins during the potential exposure period, December 1, 1965 to January 1, 1974.

The covered employee died February 17, 1999. Metastatic lung cancer was included as a immediate

cause of death on the death certificate.

You were married to the covered employee August 18, 1961 and were his wife at the time of his death. You are the eligible surviving spouse of the covered employee as defined in § 7384s of the EEOICPA, as amended by the National Defense Authorization Act (NDAA) for Fiscal Year 2002 (Public Law 107-107, 115 Stat. 1012, 1371, December 28, 2001.[2]

The undersigned hereby affirms the award of $150,000.00 to you as recommended by the Seattle District Office.

Washington, DC

Thomasyne L. Hill

Hearing Representative

[1] Jeffrey L. Kotch is a certified health physicist employed with the Department of Labor, EEOICP, Branch of Policies, Regulations and Procedures. He provided his professional opinion in a December 6, 2001 memorandum to Peter Turcic, Director of EEOICP.

[2] Title XXXI of the National Defense Authorization Act for Fiscal Year 2002 amended the Energy Employees Occupational Illness Compensation Program Act.

EEOICPA Fin. Dec. No. 41341-2005 (Dep't of Labor, May 11, 2005)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under Part B of the Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq.* For the reasons set forth below, the Final Adjudication Branch accepts and approves your claim for compensation and benefits, based on multiple myeloma, under Part B of the Act. Your claim under Part E of the Act, and your claim under Part B of the Act for skin and throat cancer, is deferred.

STATEMENT OF THE CASE

On February 6, 2003, you filed a Form EE-1 (Claim for Benefits under the EEOICPA), based on cancer, specified as multiple myeloma, skin, and throat cancer. You also filed a Form EE-3 (Employment History), in which you indicated that you were employed at Oak Ridge, by "Keagan & Hughes," from January 1, 1950 to February 10, 1951, at Paducah, Kentucky, from February 15, 1951 to March 23, 1953, and at the Hanford site from April 15, 1954 to January 21, 1955, and that you did not wear a dosimetry badge.

The employment evidence of record consists of affidavits, personnel information from the Atomic Energy Commission, earnings information from the Social Security Administration, and information from the Center to Protect Workers Rights. You provided an employment history affidavit from the business manager of L.U. # 237, Texarkana, TX/AR, who indicated he had been vice-president of local # 237, and therefore knew that you were employed by the following employers: (1) "Keagen & Hughes," Oak Ridge, Tennessee, "AEC," from January 1, 1950 to February 10, 1951; (2) M.W.

Kellogg, Paducah, Kentucky, from February 15, 1951 to March 23, 1952; and (3) Kaiser Engineers, Hanford site, North Richland, Washington, from April 15, 1954 to January 21, 1955.

An Atomic Energy Commission (AEC), Oak Ridge, Tennessee, Personnel Clearance Master Card shows that you were granted an emergency clearance, on June 26, 1951, as an employee of Kaighin & Hughes, a subcontractor with Maxon Construction Company, and you were terminated on October 9, 1951. A second AEC, Oak Ridge, Personnel Clearance Master Card shows that your security clearance was "reinstated" on October 17, 1951, the name of your employer was "F.H. McGraw & Company M.W. Kellogg," and that you were terminated on October 29, 1952. The card further shows a transfer to Hanford on April 13, 1954.

A co-worker at the Oak Ridge Gaseous Diffusion Plant (GDP), also known as K-25, provided an employment history affidavit in which he indicated that he worked with you for "Kaighan & Hughes" at the Oak Ridge K-25 Plant from January 1, 1950 to February 10, 1951. A dispatch record from Local No. 237, shows that you were employed by Kaiser from March 31 to May 30, 1954. An Itemized Statement of Earnings obtained from the Social Security Administration (SSA) shows that you had earnings paid by M.W. Kellogg from October through December 1949, October through December 1951, January through June 30 1952, and January through March 1953. In addition, the SSA Itemized Statement of Earnings showed that you were paid earnings by Atlantic Industries, Incorporated, during the period from January through March 1950, and Kaiser Engineers during the period from April through September 1954. A letter provided, by the Business Manager of the Plumbers & Steamfitters Local 184, Paducah, Kentucky shows that the M.W. Kellogg Company was a subcontractor at the Paducah GDP, Paducah, Kentucky from 1951 to 1955. The record also contains a copy of a "Certificate of Amendment to the Articles of Incorporation of Kaighin & Hughes, Inc." that indicates the shareholders authorized the name of the company to be changed to "Atlantic Industries, Inc." by resolution dated May 17, 1968.

The Division of Energy Employees Occupational Illness Compensation (DEEOIC) has contracted with the Center to Protect Workers' Rights (CPWR) for assistance in obtaining records pertinent to construction and trade employees at DOE, atomic weapons employer (AWE) or beryllium vendor facilities. The CPWR is a research, development, and training arm of the Building and Construction Trades Department (BCTD) of the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO). The CPWR concluded that (1) Kaighin & Hughes was a subcontractor to Maxon and, as shown in a report to the President by the Atomic Energy Labor Relations Panel, Kaighin & Hughes was a primary contractor of K29 – K31 of the K25 GDP, and a contractual relationship between Kaighin & Hughes and AEC/DOE was also confirmed by a DOE representative who reported that Kaighin & Hughes, Inc. was a subcontractor to Maxon for construction of the K29, K31, and K33 buildings of the K25 GDP from 1947 to 1956. *See* Section 2 - CPWR Research Results. The Oak Ridge GDP is recognized as a covered DOE facility from 1943 to 1987 and 1988 to the present (remediation); the Paducah GDP is recognized as a covered DOE facility from 1951 to July 28, 1998 and July 29, 1998 to the present (remediation); and the Hanford site is recognized as a covered DOE facility from 1942 to the present. *See* DOE, Office of Worker Advocacy, Facility List.

You indicated on your Form EE-3 that you were not monitored, through the use of dosimetry badges, for exposure at either the Oak Ridge GDP or Paducah GDP, and the information above shows that you were employed at the Oak Ridge GDP and Paducah GDP, respectively, from January 1 through October 9, 1951 and January 1 through October 29, 1952. However, the evidence shows that you worked in a job that had exposures comparable to a job that is or was monitored through the use of dosimetry badges for your entire period of employment at Oak Ridge and for the period from July

1952 to October 29, 1952 at the Paducah GDP.

In addition to medical documentation showing diagnosis of skin cancer, you provided a narrative medical report by Joyce Feagin, M.D., dated January 11, 2001, that indicated you were diagnosed as having multiple myeloma.

On March 30, 2005, the Seattle district office issued a recommended decision that concluded you are a member of the special exposure cohort under Part B, as defined by 42 U.S.C. § 7384l(14)(A), you were diagnosed with multiple myeloma, a specified cancer under Part B as defined by 42 U.S.C. § 7384l(17), and that you are entitled to compensation under Part B in the amount of $150,000.00, pursuant to 42 U.S.C. § 7384s(a)(1). The district office also concluded that you are entitled to medical benefits under Part B, retroactive to the date you filed you claim for benefits, February 6, 2003, as outlined under 42 U.S.C. § 7384t. The district office deferred adjudication of your claim for skin cancers pending completion of the report of radiation dose reconstruction by the National Institute for Occupational Safety and Health (NIOSH).

On April 11, 2005, the Final Adjudication Branch received written notification from you indicating that you waive any and all rights to file objections to the recommended decision.

FINDINGS OF FACT

1. You filed a claim for benefits under the EEOICPA on February 6, 2003.

2. You were employed at the Oak Ridge GDP from January 1, 1951 to October 9, 1951, and the Paducah GDP from January 1, 1952 to October 29, 1952.

3. A DOE contractor or subcontractor employed you for a number of work days aggregating at least 250 work days before February 1, 1992, at gaseous diffusion plants located in Oak Ridge, Tennessee and Paducah, Kentucky.

4. You were diagnosed as having multiple myeloma, a specified cancer, on January 11, 2001.

5. You contracted multiple myeloma after having begun covered employment with a DOE contractor or subcontractor at the Oak Ridge GDP and Paducah GDP, and the onset of the illness was more than five years after your first exposure at a GDP.

CONCLUSIONS OF LAW

In order for an employee to be afforded coverage under the "special exposure cohort," the employee must be a DOE employee who was employed for a number of work days aggregating at least 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, and, during such employment – (i) was monitored through the use of dosimetry badges for exposure at the plant of the external parts of
[the] employee's body to radiation; or (ii) worked in a job that had exposures comparable to a job that is or was monitored through the use of dosimetry badges. *See* 42 U.S.C. § 7384l(14).
Further, a specified cancer is "A specified disease, as that term is defined in § 4(b)(2) of the Radiation Exposure Compensation Act (42 U.S.C. 2210 note)," including multiple myeloma, provided the onset was at least five years after first exposure to radiation. *See* 42 U.S.C. § 7384l(17)(A); 20 C.F.R. §

30.5(dd)(5)(i) (multiple myeloma). The medical evidence of record indicates that you were diagnosed with multiple myeloma on January 11, 2001, which was more than five years after you were first exposed to radiation at Oak Ridge.

Your employment history (including employment history affidavits, Social Security records, union dispatch records, security clearance records, and confirmation by the CPWR) shows that you were employed at the Oak Ridge GDP from January 1, 1951 to October 9, 1951, and the Paducah GDP from January 1, 1952 to October 29, 1952, a period exceeding 250 work days. However, employees who indicate on their Form EE-3 that they were not monitored by dosimetry while employed at the Paducah GDP are determined to have been engaged in covered employment beginning in July 1952. *See* Federal (EEOICPA) Procedure Manual, Chapter 2-500.3a(2)(a) (June 2004). Therefore, your period of employment at the Paducah GDP, for purposes of coverage as a member of the special exposure cohort, must be calculated using a beginning date of July 1, 1952, and an ending date of October 29, 1952. Thus, the evidence shows that you were employed by a DOE contractor or subcontractor for a number of work days aggregating at least 250 work days before February 1, 1992 at gaseous diffusion plants located in Oak Ridge, Tennessee and Paducah, Kentucky, "in a job that had exposures comparable to a job that is or was monitored through the use of dosimetry badges," and you are a "member of the Special Exposure Cohort." *See* 42 U.S.C. § 7384l(14)(A).

You filed a claim based on multiple myeloma, skin, and throat cancer. The Final Adjudication Branch has reviewed the medical reports of record and found that you were diagnosed as having multiple myeloma on January 11, 2001. Consequently, you are a "covered employee with cancer," and a member of the special exposure cohort who was diagnosed as having a "specified cancer" under the EEOICPA. *See* 42 U.S.C. §§ 7384l(9)(A), (14)(A), and (17)(A).

For the forgoing reasons, the Final Adjudication Branch hereby accepts and approves your claim for multiple myeloma. You are entitled to compensation under Part B of the Act in the amount of $150,000.00. *See* 42 U.S.C. § 7384s(a)(1). In addition, you are entitled to medical benefits for multiple myeloma under Part B of the Act, retroactive to February 6, 2003, pursuant to 42 U.S.C. § 7384t. Adjudication of your claim for skin cancers and throat cancer is deferred pending completion of the radiation dose reconstruction by NIOSH, and adjudication of your Part E claim is deferred until issuance of the Interim Final Regulations.

Seattle, WA

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA Order No. 62728-2008 (Dep't of Labor, July 1, 2009)

REMAND ORDER

This order of the Final Adjudication Branch (FAB) concerns the above-noted claim for survivor benefits under Part B of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claim is remanded to the Cleveland district office for additional development to determine if the employee qualifies as a "covered employee with cancer" under Part B of EEOICPA.

On October 20, 2004, **[Claimant]** filed a claim for survivor benefits under Part B and a request for assistance under former Part D of EEOICPA, as the spouse of **[Employee]**. **[Claimant]** identified lung

cancer and mouth cancer as the medical conditions of **[Employee]** resulting from his employment for an atomic weapons employer. Subsequent to **[Claimant]**'s filing a request for assistance under Part D, Congress amended EEOICPA by repealing Part D and enacting Part E. As part of these amendments, Congress directed that the filing of a request for assistance under former Part D would be treated as a claim for benefits under the new Part E. On August 2, 2005, **[Claimant]** filed another Part E claim based on the alleged condition of lung disease.

On November 9, 2006, FAB issued a final decision denying **[Claimant]**'s claim for survivor benefits under Part E because the evidence did not establish that **[Employee]** was employed by a DOE contractor performing remediation activities at a covered Department of Energy (DOE) facility. On July 31, 2008, FAB also issued a final decision to deny **[Claimant]**'s claim for survivor benefits under Part B because the evidence did not establish that **[Employee]** worked for a subsequent owner or operator of an atomic weapons employer facility at that atomic weapons employer facility. On October 16, 2008, **[Claimant]** submitted an affidavit in which Ronald G. Proffitt indicated that he had worked with **[Employee]** at the General Steel Industries facility in Granite City , Illinois from 1963 to 1973. Based on this new evidence, the Director issued a January 13, 2009 Order vacating the FAB's July 31, 2008 final decision and reopening **[Claimant]**'s claim for survivor benefits under Part B.

On Form EE-3 (employment history), **[Claimant]** indicated that **[Employee]** worked for Granite City Steel (General Steel Castings) from April 1963 to December 2000. On November 8, 2004, a representative from DOE verified that **[Employee]** worked for Granite City Steel from January 14, 1974 to December 19, 2000. Records from St. Elizabeth Medical Center dated March 17, 1980 and December 21, 2000 indicate that **[Employee]** worked for Granite City Steel located at 20th and Madison and 1520 20th Street, respectively, in Granite City, Illinois. Earnings records from the Social Security Administration (SSA) indicate that **[Employee]** had earnings from National Roll **[EIN deleted]** from the second quarter of 1963 to the third quarter of 1973 and in 1978, and from National Steel Corporation **[EIN deleted]** from the first quarter of 1974 to 2001. The General Steel Industries facility in Granite City, Illinois (also known as Old Betatron Building, General Steel Castings, General Steel Industries, Granite City Steel, and National Steel Company) is covered as an atomic weapons employer facility from 1953 to 1966. This same facility is also covered for employees of subsequent owners and operators of this facility for residual radiation from 1967 to 1992, and also as a DOE facility for remediation activities in 1993.

[Claimant] submitted medical records from **[Employee]**'s healthcare providers, including a July 12, 2001 pathology report in which Dr. Samir K. El-Mofty diagnosed poorly differentiated squamous cell carcinoma of the floor of the employee's mouth. These medical records did not establish that **[Employee]** was diagnosed with lung cancer.

[Claimant] submitted a copy of **[Employee]**'s death certificate, signed by Dr. M. Bavesik, which listed the employee's age as 60 as of the date of his death on November 28, 2001. The death certificate indicated that the immediate cause of **[Employee]**'s death was cancer of the floor of the mouth, and that **[Claimant]** was **[Employee]**'s surviving spouse. **[Claimant]** also submitted a copy of a July 8, 1966 marriage certificate confirming her marriage to **[Employee]** on that date.

To determine the probability of whether **[Employee]** contracted cancer in the performance of duty, the district office referred **[Claimant]**'s application package to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction. The district office subsequently received the NIOSH Report of Dose Reconstruction for the employee, dated August 7, 2007. The dose reconstruction was based on **[Employee]**'s employment at the General Steel Industries facility from

January 14, 1974 to December 19, 2000, and calculated the dose to his oral cavity from 1974 to the date his oral cavity cancer was diagnosed in 2001. The district office used the information provided in this NIOSH report to determine that there was a 4.36% probability that **[Employee]**'s cancer was caused by ionizing radiation exposure at the General Steel Industries facility in Granite City, Illinois.

On April 23, 2009, the district office issued a recommended decision to deny **[Claimant]**'s claim for survivor benefits under Part B of EEOICPA based on the employee's lung cancer, lung disease and mouth cancer. In recommending denial of **[Claimant]**'s claim, the district office found that **[Employee]** had covered employment at Granite City Steel from January 14, 1974 to December 19, 2000, but did not indicate what weight, if any, that it gave to the affidavit that **[Claimant]** submitted from Ronald G. Proffitt, or the SSA records indicating that **[Employee]** had reported earnings from National Roll from the second quarter of 1963 to the third quarter of 1973. I note that evidence in the case file indicates that in 1994, SSA changed the company associated with **[EIN deleted]** from General Steel Industries to National Roll; this change was shown in all SSA reports printed after 1994. In the absence of evidence to the contrary, SSA records showing wages paid by General Steel Castings Corporation **[EIN deleted]** or by National Roll **[EIN deleted]** are considered sufficient proof of employment by General Steel at their covered Granite City location. The November 8, 2004 verification of employment by DOE is limited to employment at this facility by Granite City Steel (a subsequent owner and operator of this facility).

The Federal (EEOICPA) Procedure Manual, Chapter 2-0600.10 (September 2004) requires the claims examiner to compare the dose reconstruction report to the evidence in the file. If there are significant discrepancies between the information in the file and the dose reconstruction report, a new dose reconstruction report may be necessary. The Procedure Manual specifies that changed employment facilities or dates, or a change in the date of diagnosis outside of the month previously used, constitutes a significant discrepancy. NIOSH did not consider **[Employee]**'s dose prior to January 1974 and thus did not include his dose at the facility from April 1963 to that date in the dose reconstruction. This constitutes a significant discrepancy. A rework of the dose reconstruction is needed to determine if **[Employee]** qualifies as a covered employee with cancer under Part B based on his exposure to ionizing radiation during the performance of duty at a covered facility during a covered period. This case should be returned to NIOSH for a rework of the dose reconstruction that includes **[Employee]**'s dose from April 1963.

Because a rework is necessary,**[Claimant]**'s claim for survivor benefits under Part B is not in posture for a final decision. Pursuant to the authority granted to FAB by 20 C.F.R. § 30.317, **[Claimant]**'s claim is remanded to the Cleveland district office. On remand, the district office should perform such further development it may deem necessary to determine if **[Employee]** qualifies as a covered employee with cancer. This should include referring the case to NIOSH for a rework of the dose reconstruction using the correct covered employment dates. After this development, the district office should issue a new recommended decision on **[Claimant]**'s claim for survivor benefits under Part B of EEOICPA.

Washington, DC

William J. Elsenbrock

Hearing Representative

Final Adjudication Branch

DOE Contractor Employees

Definition of

EEOICPA Fin. Dec. No. 366-2002 (Dep't of Labor, June 3, 2003)

NOTICE OF FINAL DECISION REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq.* The recommended decision was to deny your claim. You submitted objections to that recommended decision. The Final Adjudication Branch carefully considered the objections and completed a review of the written record. *See* 20 C.F.R. § 30.312. The Final Adjudication Branch concludes that the evidence is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On July 31, 2001, you filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA), stating that you were the daughter of **[Employee]**, who was diagnosed with cancer, chronic silicosis, and emphysema. You completed a Form EE-3, Employment History for Claim under the EEOICPA, indicating that from December 2, 1944 to May 30, 1975, **[Employee]** was employed as a heavy mobile and equipment mechanic, for Alaska District, Corps of Engineers, Anchorage, Alaska.

On August 20, 2001, a representative of the Department of Energy (or DOE) indicated that "none of the employment history listed on the EE-3 form was for an employer/facility which appears on the Department of Energy Covered Facilities List." Also, on August 29, 2001, a representative of the DOE stated in Form EE-5 that the employment history contains information that is not accurate. The information from the DOE lacked indication of covered employment under the EEOICPA.

The record in this case contains other employment evidence for **[Employee]**. With the claim for benefits, you submitted a "Request and Authorization for TDY Travel of DOD Personnel" Form DD-1610, initiated on November 10, 1971 and approved on November 11, 1971. **[Employee]** was approved for TDY travel for three days to perform work on Amchitka Island, Alaska, for the Department of Defense, Alaska District Corps of Engineers beginning on November 15, 1971. He was employed as a Mobile Equipment Mechanic WG-12, and the purpose of the TDY was noted "to examine equipment for potential use on Blair Lake Project." The security clearance was noted as "Secret." You also submitted numerous personnel documents from **[Employee]**'s employment with the Alaska District Corp of Engineers. Those documents include a "Notification of Personnel Action" Form SF-50 stating that **[Employee]**'s service compensation date was December 2, 1944, for his work as a Heavy Mobile Equipment Mechanic; and at a WG-12, Step 5, and that he voluntarily retired on May 30, 1975.

The medical documentation of record shows that **[Employee]** was diagnosed with emphysema, small cell carcinoma of the lung, and chronic silicosis. A copy of **[Employee]**'s Death Certificate shows that he died on October 9, 1990, and the cause of death was due to or as a consequence of bronchogenic cancer of the lung, small cell type.

On September 6 and November 5, 2001, the district office wrote to you stating that additional evidence was needed to show that **[Employee]** engaged in covered employment. You were requested to submit a Form EE-4, Employment History Affidavit, or other contemporaneous records to show proof of **[Employee]**'s employment at the Amchitka Island, Alaska site covered under the EEOICPA. You did not submit any additional evidence and by recommended decision dated December 12, 2001, the Seattle district office recommended denial of your claim. The district office concluded that you did not submit employment evidence as proof that **[Employee]** worked during a period of covered employment as required by § 30.110 of the EEOICPA regulations. *See* 20 C.F.R. § 30.110.

On January 15 and February 6, 2002, you submitted written objections to the recommended denial decision. The DOE also forwarded additional employment information. On March 20, 2002, a representative of the DOE provided a Form EE-5 stating that the employment history is accurate and complete. However, on March 25, 2002, a representative of the DOE submitted a "corrected copy" Form EE-5 that indicated that the employment history provided in support of the claim for benefits "contains information that is not accurate." An attachment to Form EE-5 indicated that **[Employee]** was employed by the Army Corps of Engineers for the period July 25, 1944 to August 11, 1952, at Fort Richardson, Alaska; and from August 11, 1952 to May 30, 1975 at Elmendorf Air Force Base, Alaska. Further, the attachment included clarifying information:

Our records show that the Corps of Engineers' was a prime AEC contractor at Amchitka. **[Employee]**'s Official Personnel Folder (OPF) indicates that he was at Forth Richardson and Elmendorf AFB, both in Alaska. The OPF provided no indication that **[Employee]** worked at Amchitka, Alaska. To the best of our knowledge, Blair Lake Project was not a DOE project.

Also, on April 3, 2002, a representative of the DOE submitted a Form EE-5 indicating that Bechtel Nevada had no information regarding **[Employee]**, but he had a film badge issued at the Amchitka Test Site, on November 15, 1971. The record includes a copy of Appendix A-7 of a "Manager's Completion Report" which indicates that the U. S. Army Corps of Engineers was a prime AEC (Atomic Energy Commission) Construction, Operations and Support Contractor, on Amchitka Island, Alaska.

On December 10, 2002, a hearing representative of the Final Adjudication Branch issued a Remand Order. Noting the above evidence, the hearing representative determined that the "only evidence in the record with regard to the Army Corps of Engineers status as a contractor on Amchitka Island is the DOE verification of its listing as a prime AEC contractor . . . and DOE's unexplained and unsupported verification [of **[Employee]**'s employment, which] are not sufficient to establish that a contractual relationship existed between the AEC, as predecessor to the DOE, and the Army Corps of Engineers." The Remand Order requested the district office to further develop the record to determine whether the Army Corps of Engineers had a contract with the Department of Energy for work on Amchitka Island, Alaska, and if the work **[Employee]** performed was in conjunction with that contract. Further the Remand Order directed the district office to obtain additional evidence to determine if **[Employee]** was survived by a spouse, and since it did not appear that you were a natural child of **[Employee]**, if you could establish that you were a stepchild who lived with **[Employee]** in a regular parent-child relationship. Thus, the Remand Order requested additional employment evidence and proof of eligibility under the Act.

On January 9, 2003, the district office wrote to you requesting that you provide proof that the U.S. Army Corps of Engineers had a contract with the AEC for work **[Employee]** performed on his TDY assignment to Amchitka Island, Alaska for the three days in November 1971. Further, the district office requested that you provide proof of your mother's death, as well as evidence to establish your relationship to **[Employee]** as a survivor.

You submitted a copy of your birth certificate that indicated that you were born **[Name of Claimant at Birth]** on October 4, 1929, to your natural mother and natural father **[Natural Mother]** and **[Natural Father]**. You also submitted a Divorce Decree filed in Boulder County Court, Colorado, Docket No. 10948, which showed that your biological parents were divorced on October 10, 1931, and your mother, **[Natural Mother]** was awarded sole custody of the minor child, **[Name of Claimant at Birth]**. In addition, you submitted a marriage certificate that indicated that **[Natural Mother]** married **[Employee]** in the State of Colorado on November 10, 1934. Further, you took the name **[Name of Claimant Assuming Employee's Last Name]** at the time of your mother's marriage in 1934, as indicated by the sworn statement of your mother on March 15, 1943. You provided a copy of a Marriage Certificate to show that on August 19, 1949, you married **[Husband]**. In addition, you submitted a copy of the Death Certificate for **[Name of Natural Mother Assuming Employee's Last Name]** stating that she died on May 2, 1990. The record includes a copy of **[Employee]**'s Death Certificate showing he died on October 9, 1990.

You also submitted the following additional documentation on January 20, 2003: (1) A copy of **[Employee's]** Last Will and Testament indicated that you, **[Claimant]**, were the adult daughter and named her as Personal Representative of the Estate; (2) Statements by Jeanne Findler McKinney and Jean M. Peterson acknowledged on January 17, 2003, indicated that you lived in a parent-child relationship with **[Employee]** since 1945; (3) A copy of an affidavit signed by **[Name of Natural Mother Assuming Employee's Last Name]** (duplicate) indicated that at the time of your mother's marriage to **[Employee]**, you took the name **[Name of Claimant Assuming Employee's Last Name]**.

You submitted additional employment documentation on January 27, 2003: (1) A copy of **[Employee]**'s TDY travel orders (duplicate); (2) A Memorandum of Appreciation dated February 11, 1972 from the Department of the Air Force commending **[Employee]** and other employees, for their support of the Blair Lake Project; (3) A letter of appreciation dated February 18, 1972 from the Department of the Army for **[Employee]**'s contribution to the Blair Lake Project; and (4) Magazine and newspaper articles containing photographs of **[Employee]**, which mention the work performed by the

U.S. Army Corps of Engineers in Anchorage, Alaska.

The record also includes correspondence, dated March 27, 2003, from a DOE representative. Based on a review of the documents you provided purporting that **[Employee]** was a Department of Energy contractor employee working for the U.S. Army Corps of Engineers on TDY in November, 1971, the DOE stated that the Blair Lake Project was not a DOE venture, observing that "[i]f Blair Lake Project had been our work, we would have found some reference to it."

On April 4, 2003, the Seattle district office recommended denial of your claim for benefits. The district office concluded that the evidence of record was insufficient to establish that **[Employee]** was a covered employee as defined under § 7384l(9)(A). *See* 42 U.S.C. § 7384l(9)(A). Further, **[Employee]** was not a member of the Special Exposure Cohort, as defined by § 7384l(14)(B). *See* 42 U.S. C. § 7384l(14)(B). Also, **[Employee]** was not a "covered employee with silicosis" as defined under §§ 7384r(b) and 7384r(c). *See* 42 U.S.C. §§ 7384r(b) and (c). Lastly, the recommended decision found that you are not entitled to compensation under § 7384s. *See* 42 U.S.C. § 7384s.

On April 21, 2003, the Final Adjudication Branch received your letter of objection to the recommended decision and attachments. First, you contended that the elements of the December 10, 2002 Remand Order were fulfilled because you submitted a copy of your mother's death certificate and further proof that **[Employee]** was your stepfather; and that the letter from the district office on April 4, 2003 "cleared that question on page three – quote 'Our records show that the Corps of Engineers was a prime AEC contractor at Amchitka.'"

Second, you stated that further clarification was needed as to the condition you were claiming. You submitted a death certificate for **[Employee]** showing that he died due to bronchogenic cancer of the lung, small cell type, and noted that that was the condition you alleged as the basis of your claim on your first Form, associated with your claim under the EEOICPA.

Third, you alleged that, in **[Employee]**'s capacity as a "Mobile Industrial Equipment Mechanic" for the Army Corps of Engineers, "he was required to work not only for the DOD (Blair Lake project) but also for DOE on the Amchitka program. For example: on March 5, 1968 he was sent to Seward, Alaska to 'Inspect equipment going to Amchitka.' He was sent from the Blair Lake project (DOD) to Seward for the specified purpose of inspecting equipment bound for Amchitka (DOE). Thus, the DOE benefited from my father's [Corp of Engineers] expertise/service while on 'loan' from the DOD. Since the closure of the Amchitka project (DOE), the island has been restored to its original condition. . . . Therefore, my dad's trip to Amchitka to inspect equipment which might have been used at the Blair Lake project benefited not only DOD but also DOE. In the common law, this is known as the 'shared Employee' doctrine, and it subjects both employers to liability for various employment related issues."

On May 21, 2003, the Final Adjudication Branch received your letter dated May 21, 2003, along with various attachments. You indicated that the U.S. Army Corps of Engineers was a contractor to the DOE for the Amchitka Project, based upon page 319 of an unclassified document you had previously submitted in March 2002. Further, you indicated that **[Employee]** had traveled to Seward, Alaska to inspect equipment used at on-site operations for use on Amchitka Island by the Corps of Engineers for the DOE project, and referred to the copy of the Corps of Engineers TDY for Seward travel you submitted to the Final Adjudication Branch with your letter of April 18, 2003. Also, you indicated that **[Employee]** traveled to Amchitka, Island in November 1972 to inspect the equipment referenced above, which had been shipped from Seward, Alaska. You indicated that **[Employee]** was a mobile industrial equipment mechanic, and that his job required him to travel. You attached the following documents in support of your contention that the equipment **[Employee]** inspected could have included equipment belonging to the Corps of Engineers: Job Description, Alaska District, Corps of Engineers (previously submitted), and an Employee Performance Appraisal.

In addition, you indicated **[Employee]** was required to travel to remote sites throughout Alaska in order to perform his job with the Corps of Engineers, and in support of this you referred to your electronic mail sent to the Seattle District Office on January 7, 2003. You indicated that, since **[Employee]** was required to travel to Amchitka as a part of his regular duties as a mobile industrial equipment mechanic, it was possible that the equipment he inspected on the November 15, 1971 trip to Amchitka included equipment owned by the Corps as well as inspection of equipment owned by private contractors. You attached a copy of a document entitled, "Affidavit," dated May 21, 2003, signed by Erwin L. Long. Mr. Long stated that he was head of the Foundations Material Branch for the Corps of Engineers at the time of his retirement, and that in 1971 he had been Head of the Rock Design Section. Mr. Long indicated that he did not spend any time on Amchitka Island, that he had known **[Employee]** since 1948, and that he "believe[d]" **[Employee]**'s travel to Amchitka for his job would have required him to track equipment belonging to the Corps of Engineers, and that **[Employee]** would also have "performed required maintenance on the equipment before preparing [it] for shipping off Amchitka Island." Mr. Long also stated that **[Employee]** would not talk about his work on Amchitka since it was classified. Finally, you attached a TDY dated March 4, 1968, as well as a travel voucher/subvoucher dated March 15, 1968, to support that **[Employee]**'s mission to Amchitka had been completed.

FINDINGS OF FACT

1. On July 31, 2001, **[Claimant]** filed a claim for survivor benefits under the EEOICPA as the daughter of **[Employee]**.

2. **[Employee]** was diagnosed with small cell bronchogenic carcinoma of the lung and chronic silicosis.

3. **[Employee]** was employed by the U.S. Army Corps of Engineers for the period from July 25, 1944 to August 11, 1952, at Fort Richardson, Alaska; and from August 11, 1952 to May 30, 1975 at Elmendorf Air Force Base, Alaska.

4. **[Employee]**'s employment for the U.S. Army Corps of Engineers on TDY assignment at the Amchitka Island, Alaska site in November 1971 was in conjunction with a Department of Defense venture, the Blair Lakes Project.

CONCLUSIONS OF LAW

The EEOCIPA implementing regulations provide that a claimant may object to any or all of the findings of fact or conclusions of law, in the recommended decision. 20 C.F.R. § 30.310. Further, the regulations provide that the Final Adjudication Branch will consider objections by means of a review of the written record. 20 C.F.R. § 30.312. The Final Adjudication Branch reviewer will review the record forwarded by the district office and any additional evidence and/or argument submitted by the claimant. 20 C.F.R. § 30.313. Consequently, the Final Adjudication Branch will consider the overall evidence of record in reviewing the written record.

In order to be awarded benefits under the Energy Employees Occupational Illness Compensation Program Act, the covered employee (or his/her eligible survivors), must first establish that the employee has been diagnosed with beryllium illness, cancer, or chronic silicosis. *See* 42 U.S.C. § 7384l(15), 20 C.F.R. § 30.110(a). The evidence to show proof of an occupational illness is not in dispute in this case. The medical evidence establishes that **[Employee]** was diagnosed with cancer (bronchogenic cancer of the lung, small cell type) and chronic silicosis. Consequently, **[Employee]** was diagnosed with two illnesses potentially covered under the Act.

Employees of a DOE contractor (or their eligible survivors) are entitled under the EEOICPA to seek compensation for a cancer as a member of the Special Exposure Cohort (SEC) or through a determination that they incurred cancer that was at least as likely as not related to employment at a DOE facility. 42 U.S.C. §§ 7384l(14), 7384l(9)(B)(ii)(II). To be included in the SEC, a DOE employee, DOE contractor employee, or atomic weapons employee must have been employed for an aggregate of 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee or employed before January 1, 1974, by the DOE or a DOE contractor or subcontractor on Amchitka Island, Alaska, and have been exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests. 42 U.S.C. § 7384l(14). To qualify as a covered employee with cancer, members of the SEC need only establish that they contracted a "specified cancer", designated in section 7384l(17) of the EEOICPA, after beginning employment at a DOE facility or atomic weapons employer facility.

While the EEOICPA does not contain a specific definition of a DOE contractor, it does contain a definition of a DOE contractor employee that, in effect, defines what a DOE contractor is. Section 7384l(11) of the EEOICPA defines a DOE contractor employee as:

(A) An individual who is or was in residence at a Department of Energy facility as a researcher for one or more periods aggregating at least 24 months.
(B) An individual who is or was employed at a Department of Energy facility by-
    (i) an entity that contracted with the Department of Energy to provide

management and operating, management and integration, or environmental remediation at the facility; or
(ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

The question presented in this case is whether **[Employee]**, an employee of the U.S. Army Corps of Engineers was, during the time he spent on Amchitka Island, providing management and operation, management and integration or environmental remediation services under a contract between the DOE and the Army Corps of Engineers.

The undersigned notes that the Atomic Energy Commission's Managers Completion Report refers to the U.S. Army Corp of Engineers, as a prime contractor for work on Milrow and Cannikin. The work to be performed under that contract consisted of "engineering, procurement, construction administration and inspection."

[Employee]'s "Request and Authorization for TDY Travel of DOD Personnel," initiated on November 10 and approved on November 11, 1971, was for the purpose of three days work on Amchitka Island, Alaska, for the Department of Defense, Alaska District Corps of Engineers. The purpose of the TDY was to "examine equipment for potential use on Blair Lake Project."

You submitted the following new documents along with your letter to the Final Adjudication Branch dated May 21, 2003: Employee Performance Appraisal for the period February 1, 1966 to January 31, 1967; Affidavit of Erwin L. Long dated May 21, 2003; Request and Authorization for Military Personnel TDY Travel and Civilian Personnel TDY and PCS Travel, dated March 4, 1968; and Travel Voucher or Subvoucher, dated March 15, 1968. None of the documents submitted establish that **[Employee]** was on Amchitka Island providing services pursuant to a contract with the DOE.

The preponderance of the evidence in this case supports the conclusion that **[Employee]** was on Amchitka Island in November 1971 for the sole purpose of inspecting equipment to be used by the Department of Defense on its Blair Lake Project. The documentation of record refers to the Blair Lake Project as a Department of Defense project, and the DOE noted in correspondence dated March 27, 2003, that research was not able to verify that Blair Lake was a DOE project.

While the DOE indicated that **[Employee]** was issued a dosimetry badge, such evidence may be used to establish that he was present on Amchitka Island, not to establish that he was a covered DOE employee. Therefore, **[Employee]**'s presence on Amchitka Island was to perform work for the Department of Defense, and not pursuant to a contract between the DOE and the U.S. Army Corps of Engineers.

The evidence is also insufficient to show covered employment under § 7384r(c) and (d) of the EEOICPA for chronic silicosis. To be a "covered employee with chronic silicosis" it must be established that the employee was:

A DOE employee or a DOE contractor employee, who was present for a number of workdays aggregating at least 250 work days during the mining of tunnels at a DOE facility located in Nevada or Alaska for test or experiments related to an atomic weapon.

See 42 U.S.C. § 7384r(c) and (d); 20 C.F.R. § 30.220(a). Consequently, even if the evidence showed DOE employment (which it does not since **[Employee]** worked for the DOD), he was present only

three days on Amchitka, which is not sufficient for the 250 days required under the Act as a covered employee with silicosis.

The undersigned notes that in your objection to the recommended decision, you referred to a "shared employee" doctrine which you believe should be applied to this claim. You contend that on March 5, 1968, **[Employee]** was sent to Seward, Alaska to "Inspect equipment going to Amchitka, which might have been used at the Blair Lake project [to benefit] not only DOD but also DOE." No provision in the Act refers to a "shared employee" doctrine. Given the facts of this case, coverage could only be established if **[Employee]** was on Amchitka Island providing services pursuant to a contract with the DOE, evidence of which is lacking in this case.

It is the claimant's responsibility to establish entitlement to benefits under the EEOICPA. The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of each and every criterion under any compensable claim category set forth in section 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing the Office of Workers' Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

Although you submitted medical evidence to show covered illnesses due to cancer and chronic silicosis, the evidence of record is insufficient to establish that **[Employee]** engaged in covered employment. Therefore, your claim must be denied for lack of proof of covered employment under the EEOICPA.

Seattle, Washington

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA Fin. Dec. No. 27798-2003 (Dep't of Labor, June 20, 2003)

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 (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claims for benefits are denied.

STATEMENT OF THE CASE

On April 11, 2002, **[Claimant 1]** filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA), stating that he was the son of **[Employee]**, who was diagnosed with pharyngeal cancer. An additional claim followed thereafter from **[Claimant 2]** on October 20, 2002. **[Claimant 1]** also completed a Form EE-3, Employment History, indicating that **[Employee]** worked for Standard Oil Company, from

1950 to 1961; the State of Alaska as Deputy Director of Veterans Affairs, from 1961 to 1964; the State of Alaska Department of Military Affairs, Alaska Disaster Office, from 1965 to 1979 (where it was believed he wore a dosimetry badge); and, for the American Legion from 1979 to 1985.

In correspondence dated June 24, 2002, a representative of the Department of Energy (DOE) indicated that they had no employment information regarding **[Employee]**, but that he had been issued film badges at the Amchitka Test Site on the following dates: October 28, 1965; September 30, 1969; and, September 21, 1970. You also submitted a completed Form EE-4 (Employment Affidavit) signed by Don Lowell, your father's supervisor at the State of Alaska, Department of Public Safety, Division of Civil Defense. According to Mr. Lowell, your father was a radiological officer for the State of Alaska and accompanied him to Amchitka Island for Project Longshot on November 29, 1965, and the Milrow Test on October 2, 1969, as a representative of the State of Alaska.

Additional documentation submitted in support of your claim included copies of your birth certificates, a marriage certificate documenting **[Name of Claimant 2 at Birth]**'s marriage to **[Husband]**, and the death certificate for **[Employee]**, indicating that he was widowed at the time of his death on May 10, 1993. In addition, you provided medical documentation reflecting a diagnosis of squamous cell carcinoma of the pharyngeal wall in November 1991.

On November 8, 2002, the Seattle district office issued a recommended decision that concluded that **[Employee]** was a covered employee as defined in § 7384l(9)(A) of the Act and an eligible member of the Special Exposure Cohort as defined in § 7384l(14)(B) of the EEOICPA, who was diagnosed as having a specified cancer, specifically cancer of the hypopharynx, as defined in § 7384l(17) of the Act. *See* 42 U.S.C. 7384l(9)(A), (14)(B), (17). The district office further concluded that you were eligible survivors of **[Employee]** as outlined in § 7384s(e)(3) of the Act, and that you were each entitled to compensation in the amount of $75,000 pursuant to § 7384s(a)(1) and (e)(1) of the EEOICPA. *See* 42 U.S.C. §§ 7384s(a)(1) and (e)(1).

On December 20, 2002, the Final Adjudication Branch issued a Remand Order in this case on the basis that the evidence of record did not establish that **[Employee]** was a member of the "Special Exposure Cohort," as required by the Act. The Seattle district office was specifically directed to determine whether the Department of Energy and the State of Alaska, Department of Public Safety, Division of Civil Defense, had a contractual relationship.

In correspondence dated January 17, 2003, Don Lowell elaborated further on your father's employment and his reasons for attending the nuclear testing on Amchitka Island. According to Mr. Lowell, the Atomic Energy Commission (AEC) invited the governors of Alaska to send representatives to witness all three tests on Amchitka Island (Longshot, Milrow, and Cannikin). As such, **[Employee]** attended both the Longshot and Milrow tests as a guest of the Atomic Energy Commission, which provided transportation, housing and food, and assured the safety and security of those representatives.

On February 4, 2003, the district office received an electronic mail transmission from Karen Hatch, Records Management Program Officer at the National Nuclear Security Agency. Ms. Hatch indicated that she had been informed by the former senior DOE Operations Manager on Amchitka Island that escorts were not on the site to perform work for the AEC, but were most likely there to provide a service to the officials from the State of Alaska.

In correspondence dated February 11, 2003, a representative of the State of Alaska, Department of

Public Safety, Division of Administrative Services, indicated that there was no mention of Amchitka or any sort of agreement with the Department of Energy in **[Employee]**'s personnel records, but that the absence of such reference did not mean that he did not go to Amchitka or that a contract did not exist. He further explained that temporary assignments were not always reflected in these records and suggested that the district office contact the Department of Military and Veterans Affairs to see if they had any record of an agreement between the State of Alaska and the DOE. By letter dated March 13, 2003, the district office contacted the Department of Military and Veterans Affairs and requested clarification as to **[Employee]**'s employment with the State of Alaska and assignment(s) to Amchitka Island. No response to this request was received.

On April 16, 2003, the S eattle district office recommended denial of your claims. The district office concluded that you did not submit employment evidence as proof that **[Employee]** was a member of the "Special Exposure Cohort" as defined by § 7384l(14)(B) of the Act, as the evidence did not establish that he had been present at a covered facility as defined under § 7384l(12) of the Act, while working for the Department of Energy or any of its covered contractors, subcontractors or vendors as defined under § 7384l(11) of the Act, during a covered time period. *See* 42 U.S.C. § 7384l(11), (12). The district office further concluded that you were not entitled to compensation as outlined under § 7384s(e)(1) of the Act. *See* 42 U.S.C. § 7384s(e)(1).

FINDINGS OF FACT

1. On April 11 and October 20, 2002, **[Claimant 1]** and **[Claimant 2]**, respectively, filed claims for survivor benefits under the EEOICPA as the children of **[Employee]**.

2. **[Employee]** was diagnosed as having squamous cell carcinoma of the hypopharynx.

3. **[Employee]** was employed by the State of Alaska, Civil Defense Division, and was present on Amchitka Island for Project Longshot on November 29, 1965, and the Milrow Test on October 2, 1969.

4. **[Employee]**'s employment with the State of Alaska, Civil Defense Division, on assignment to Amchitka Island, Alaska, was as a representative of the governor of Alaska.

CONCLUSIONS OF LAW

The undersigned has reviewed the recommended decision issued by the Seattle district office on April 16, 2003. I find that you have not filed any objections to the recommended decision as provided by § 30.316(a) of the regulations, and that the 60-day period for filing such objections, as provided for in § 30.310(a) has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

In order to be awarded benefits under the Energy Employees Occupational Illness Compensation Program Act, the covered employee (or his/her eligible survivors), must first establish that the employee has been diagnosed with beryllium illness, cancer, or chronic silicosis. *See* 42 U.S.C. § 7384l(15), 20 C.F.R. § 30.110(a). The evidence to show proof of an occupational illness is not in dispute in this case. The medical evidence establishes that **[Employee]** was diagnosed as having squamous cell carcinoma of the hypopharynx. Consequently, **[Employee]** was diagnosed with an illness covered under the Act.

Employees of a DOE contractor (or their eligible survivors) are entitled under the EEOICPA to seek compensation for a cancer as a member of the Special Exposure Cohort (SEC) or through a determination that they incurred cancer that was at least as likely as not related to employment at a DOE facility. 42 U.S.C. §§ 7384l(14), 7384l(9)(B)(ii)(II). To be included in the SEC, a DOE employee, DOE contractor employee, or atomic weapons employee must have been employed for an aggregate of 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, or employed before January 1, 1974, by the DOE or a DOE contractor or subcontractor on Amchitka Island, Alaska, and exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests. 42 U.S.C. § 7384l(14). To qualify as a covered employee with cancer, members of the SEC need only establish that they contracted a "specified cancer," designated in § 7384l(17) of the EEOICPA, after beginning employment at a DOE facility or atomic weapons employer facility.

While the EEOICPA does not contain a specific definition of a DOE contractor, it does contain a definition of a DOE contractor employee that, in effect, defines what a DOE contractor is. Section 7384l(11) of the EEOICPA defines a DOE contractor employee as:

(A) An individual who is or was in residence at a Department of Energy facility as a researcher for one or more periods aggregating at least 24 months.
(B) An individual who is or was employed at a Department of Energy facility by-

> (i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or
>
> (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

The question presented in this case is whether **[Employee]**, an employee of the State of Alaska, was, during the time he spent on Amchitka Island, providing management and operation, management and integration or environmental remediation services under a contract between the DOE and the State of Alaska.

The undersigned notes that the Atomic Energy Commission's Managers Completion Report refers to the State of Alaska as a prime contractor for work on Milrow and Cannikin. The work to be performed under that contract consisted of police protection.

According to Don Lowell, **[Employee]**'s supervisor at the time of his assignment to Amchitka Island, your father was not an employee of any contractor or the AEC at the time of his visit to Amchitka Island. Rather, he was an invited guest of the AEC requested to witness the atomic testing as a representative of the governor of Alaska.

The preponderance of the evidence in this case supports the conclusion that **[Employee]** was on Amchitka Island for the sole purpose of witnessing the atomic testing as a representative of the governor of Alaska. While the DOE indicated that **[Employee]** was issued a dosimetry badge on three occasions, such evidence may be used to establish that he was present on Amchitka Island, not to establish that he was a covered DOE employee. Therefore, **[Employee]**'s presence on Amchitka Island was to perform work for the State of Alaska, as a representative of the governor, and not pursuant to a contract between the DOE and the State of Alaska.

It is the claimant's responsibility to establish entitlement to benefits under the EEOICPA. The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of each and every criterion under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing the Office of Workers' Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

Although you submitted medical evidence to show a covered illness manifested by squamous cell carcinoma of the hypopharynx, the evidence of record is insufficient to establish that **[Employee]** engaged in covered employment. Therefore, your claims must be denied for lack of proof of covered employment under the EEOICPA.

Seattle, Washington

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA Fin. Dec. No. 30971-2002 (Dep't of Labor, March 15, 2004)

NOTICE OF FINAL DECISION REVIEW OF THE WRITTEN RECORD

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 stated below, your claim for benefits is denied.

STATEMENT OF THE CASE

On June 10, 2002, you filed a Claim for Survivor Benefits under the EEOICPA, form EE-2, with the Denver district office, as the spouse of the employee, for multiple myeloma. You indicated on the EE-3 form that your husband was employed by the U.S. Coast and Geodetic Survey at various locations, including the Nevada Test Site, from early 1951 to December 1953.

You also submitted marriage certificate and death certificates establishing that you were married to the employee from March 7, 1953 until his death on November 5, 1999, tax forms confirming his employment with the U.S. Coast and Geodetic Survey in 1951 and 1952 and a document from the Nevada Field Office of the Department of Energy (DOE) indicating that they had records of your husband having been exposed to radiation in 1951 and 1952. Additionally, you submitted a document stating that your claim under the Radiation Exposure Compensation Act had been approved in the amount of $75,000; you stated that you had declined to accept the award and that was confirmed by a representative of the Department of Justice on August 12, 2002.

On July 1, 2002, you were informed of the medical evidence needed to support that your husband had

cancer. You submitted records of medical treatment, including a pathology report of April 19, 1993, confirming that he was diagnosed with multiple myeloma.

On July 22, 2002, a DOE official stated that, to her knowledge, your husband's employers were not Department of Energy contractors or subcontractors. On July 29, 2002, you were advised of the type of evidence you could submit to support that your husband had employment which would give rise to coverage under the Act, and given 30 days to submit such evidence. You submitted statements from co-workers confirming that he did work at the Nevada Test Site for a period from October to December 1951 and again for a few weeks in the spring of 1952.

On August 29, 2002, the district office issued a recommended decision that concluded that you were not entitled to compensation benefits because the evidence did not establish that your husband was a covered employee.

By letter dated September 20, 2002, your representative objected to the recommended decision, stating that your husband was a covered employee in that he worked at the Test Site while employed by the U.S. Coast and Geodetic Survey, which was a contractor of the Atomic Energy Commission (AEC), a predecessor agency of the DOE. The representative also submitted documents which indicated that the U.S. Coast and Geodetic Survey performed work, including offering technical advice and conducting surveys, for other government agencies, including the AEC and the military, and that it was covered by a cooperative agreement between the Secretary of Commerce and the Secretary of the Army. On April 1, 2003, the case was remanded to the district office for the purpose of determining whether your husband's work at the Nevada Test Site was performed under a "contract" between the DOE and the U.S. Coast and Geodetic Survey.

The documents submitted by your representative were forwarded to the DOE, which responded on May 28, 2003 that dosimetry records existed for your husband "showing that he was with the USC&GS but after further research it was established that the USC&GS was in fact not a contractor or subcontractor of the AEC during those years." The documents were also reviewed by the Branch of Policy, Regulations and Procedures in our National Office. On November 7, 2003, the district office issued a recommended decision to deny your claim. The decision stated that the evidence submitted did not support that the U.S. Coast and Geodetic Survey was a contractor of the DOE at the Nevada Test Site, and, concluded that you were not entitled to benefits under § 7384s of the EEOICPA as your husband was not a covered employee under § 7384l. 42 U.S.C. §§ 7384l and 7384s.

In a letter dated January 7, 2004, your representative objected to the recommended decision. He did not submit additional evidence but did explain why he believes the evidence already submitted was sufficient to support that your husband was a covered employee under the Act. Specifically, he stated that the evidence supported that your husband worked at the Nevada Test Site in 1951 and 1952 in the course of his employment with the U.S. Coast and Geodetic Survey, an agency which was performing a survey at the request of the AEC, and that the latter agency issued him a badge which established that he was exposed to radiation while working there. He argued that one must reasonably conclude from these facts that his work at the Nevada Test Site did constitute covered employment under the EEOICPA.

FINDINGS OF FACT

You filed a claim for survivor benefits under the EEOICPA on June 10, 2002.

You were married to the employee from March 7, 1953 until his death on November 5, 1999.

Medical records, including a pathology report, confirmed he was diagnosed with multiple myeloma in April 1993.

In the course of his employment by the U.S. Coast and Geodetic Survey, your husband worked, and was exposed to radiation, at the Nevada Test Site, a DOE facility.

The evidence does not support, and the Department of Energy has denied, that the U.S. Coast and Geodetic Survey was a contractor of the DOE at the time your husband worked at the Nevada Test Site.

CONCLUSIONS OF LAW

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, pursuant to 20 C.F.R. § 30.310. The same section of the regulations provides that in filing objections, the claimant must identify his objections as specifically as possible. In reviewing any objections submitted, under 20 C.F.R. § 30.313, the Final Adjudication Branch will review the written record, any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. I have reviewed the record in this case and your representative's letter of January 2, 2004 and must conclude that no further investigation is warranted.

The purpose of the EEOICPA, as stated in its § 7384d(b), is to provide for "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." 42 U.S.C. § 7384d(b).

A "covered employee with cancer" includes, pursuant to § 7384l(9)(B) of the Act, an individual who is a "Department of Energy contractor employee who contracted…cancer after beginning employment at a Department of Energy facility." Under § 7384l(11), a "Department of Energy contractor employee" may be an individual who "was employed at a Department of energy facility by…an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or…a contractor or subcontractor that provided services, including construction and maintenance, at the facility." 42 U.S.C. § 7384l(9)(B), (11).

EEOICPA Bulletin NO. 03-26 states that "a civilian employee of a state or federal government agency can be considered a 'DOE contractor employee' if the government agency employing that individual is (1) found to have entered into a contract with DOE for the accomplishment of…services it was not statutorily obligated to perform, and (2) DOE compensated the agency for that activity." The same Bulletin goes on to define a "contract" as "an agreement that something specific is to be done in return for some payment or consideration."

Section 30.111(a) states that "Except where otherwise provided in the Act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category set forth in § 30.110." 20 C.F.R. § 30.111(a).

As noted above, the evidence supports that your husband was exposed to radiation while working for

the U.S. Coast and Geodetic Survey at the Nevada Test Site in late 1951 and early 1952, that he was diagnosed with multiple myeloma in April 1993, and that you were married to him from March 7, 1953 until his death on November 5, 1999.

It does not reasonably follow from the evidence in the file that his work at the Nevada Test Site must have been performed under a "contract" between the U.S. Coast and Geodetic Survey and the AEC. Government agencies are not private companies and often cooperate with and provide services for other agencies without reimbursement. The DOE issued radiation badges to military personnel, civilian employees of other government agencies, and visitors, who were authorized to be on a site but were not DOE employees or DOE contractor employees. No evidence has been submitted that your husband's work at the Nevada Test Site was pursuant to a "contract" between the U.S. Coast and Geodetic Survey and the AEC and the DOE has specifically denied that his employing agency was a contractor or subcontractor at that time. Therefore, there is no basis under the Act to pay compensation benefits for his cancer.

For the foregoing reasons, the undersigned must find that you have not established your claim for compensation under the EEOICPA and hereby denies that claim.

Washington, DC

Richard Koretz

Hearing Representative

EEOICPA Fin. Dec. No. 34291-2003 (Dep't of Labor, August 1, 2003)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

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 stated below, your claim for benefits is denied.

STATEMENT OF THE CASE

On August 2, 2002, you filed a Claim for Benefits under the EEOICPA, form EE-1, through the Paducah Resource Center. On the EE-1 form, you indicated that the condition for which you filed your claim was kidney cancer. You submitted medical records from 1993 to 2001 that showed you had a nephrectomy in April of 1996. Medical records from Western Baptist Hospital from April of 1996 included an operative report for a right radical nephrectomy and a pathology report that confirmed the diagnosis of large renal cell carcinoma.

You also submitted a Form EE-3 indicating that you were employed as a conservation office for the Kentucky Department of Fish and Wildlife at the Paducah Gaseous Diffusion Plant (GDP) from 1969 to 1973. You submitted a Department of Energy (DOE) License for Non-Federal Use of Property for the purpose of wildlife development beginning September 4, 1953 and continuing indefinitely. You also submitted a DOE License for Non-Federal Use of Property for the period January 1, 1990 to

December 31, 1995, and you submitted a DOE License for Non-Federal Use of Property for bow deer hunts for the period January 1, 1996 to December 31, 2000.

In addition, you submitted a copy of the five year plan and budget for the West Kentucky Wildlife Management Area for the period July 1, 1985 to June 30, 1990. You submitted an April 4, 1958 letter from the "Assistant General Counsel" noting that a corrected Quitclaim Deed from the United States of America to the State of Kentucky had been prepared and an August 21, 1989 report from the General Services Administration concluding that the State of Kentucky, Fish and Wildlife Division, was in compliance with the terms of the conveyance of these lands. You submitted an October 6, 1959 letter from Atomic Energy Commission (AEC) referencing a grant to the Commonwealth of Kentucky and the Department of Fish and Wildlife Resources of a license and permission to enter a portion of the AEC's lands for the purpose of developing the wildlife on the property and conducting bird dog field trials. This letter extended the license and permission to additional lands. In an October 14, 1959 letter, the Director of the Division of Game recommended to the Governor of Kentucky that the license and permission to use the AEC lands be accepted. He noted that the Division would have no pecuniary obligation for use of the land, apart from patrolling, posting and protecting the land licensed for use by the Division of Fish and Wildlife Resources.

You submitted forms EE-4 from Shirley Beauchamp and Phillip Scott Beauchamp stating you worked for the Department of Fish and Wildlife at the Paducah GDP from 1968 to 1973. Social Security Earnings records were submitted showing employment with the state of Kentucky from 1971 to 1973. The Department of Energy advised the district office, however, that DOE had no information regarding your employment.

On November 15, 2002, the district office issued a recommended decision concluding that you were not employed by an entity that contracted with the DOE to provide "management and operating, management and integration, or environmental remediation" as set forth in 42 U.S.C. § 7384l(11)(B)(i) and (ii) and that, accordingly, you were not a covered DOE contractor. The district office therefore recommended that benefits be denied.

On December 23, 2002, you filed an objection to the recommended decision and requested a hearing. An oral hearing was held on February 26, 2003. At the hearing, you testified that you worked for the Kentucky Department of Fish and Wildlife from 1971 to 1973 and that you worked at the Paducah GDP and its surrounding grounds. You testified that your duties included patrolling the perimeter of the fenced portion of the plant and building two bridges and that you entered the plant through the main gate on a regular basis to remove animals that got into the GDP. You testified that you did not enter any of the buildings inside the fenced area of the GDP. You described other duties you performed during this period of employment, and you testified that you checked hunting and fishing licenses and controlled hunting at the reserve. You testified also that you participated in game sampling in conjunction with the DOE prior to the hunting season and that DOE would collect specific body parts provided by the Department of Fish and Wildlife and ship them for sampling.

FINDINGS OF FACT

You filed a claim for benefits under the EEOICPA on August 2, 2002. You were employed by the State of Kentucky, Department of Fish and Wildlife from 1971 to 1973. You were diagnosed with kidney cancer on or about April 13, 1996. You have not established that you worked in employment covered under the EEOICPA.

CONCLUSIONS OF LAW

A covered employee is eligible for compensation under the EEOICPA for an "occupational illness," which is defined in § 7384l(15) of the EEOICPA as "a covered beryllium illness, cancer referred to in § 7384l(9)(B) of this title, specified cancer, or chronic silicosis, as the case may be." 42 U.S.C. § 7384l(15). A "covered employee" is eligible for compensation under EEOICPA for a specified "occupational illness." A "covered employee," as defined in §§ 7384l(1),7384l(3),7384l(7),7384l(9), 7384l(11) and § 7384r of the EEOICPA, includes employees of private companies (an entity "other than the United States", per § 7384l(4)) which provided radioactive materials to the United States for the production of atomic weapons, employees at Department of Energy facilities or test sites (§ 7384l(12)), and employees of Department of Energy contractors, subcontractors, or beryllium vendors. 42 U.S.C. §§ 7384l(1),(3),(7),(9), (11); 7384r. Section 7384(l)(11)(B)(I and ii) defines a "Department of Energy contractor employee" to include

"An individual who is or was employed at a Department of Energy facility by—

(i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or

(ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility."

The DEEOIC has further addressed the issues of how a "contractor or subcontractor" may be defined, as well as whether employees of state or federal governments may be considered DOE contractor employees, in EEOICPA Bulletins No. 03-27 (issued May 28, 2003) and No. 03-26 (issued June 3, 2003). The following definitions have been adopted by the DEEOIC:

Contractor – An entity engaged in a contractual business arrangement with the Department of Energy to provide services, produce materials or manage operations at a beryllium vendor or Department of Energy facility.

Subcontractor – An entity engaged in a contracted business arrangement with a beryllium vendor contractor or a contractor of the Department of Energy to provide a service at a beryllium vendor or Department of Energy facility.

Contract - An agreement to perform a service in exchange for compensation, usually memorialized by a memorandum of understanding, a cooperative agreement, an actual written contract, or any form of written or implied agreement, is considered a contract for the purpose of determining whether an entity is a "DOE contractor."

For a civilian employee of a state or federal government agency to be considered a DOE contractor employee, it must be shown that the government agency employing that individual entered into a contract with the DOE for the accomplishment of one or more services it was not statutorily obligated to perform and that the DOE compensated the agency for that activity.

There is no evidence that the DOE compensated the State of Kentucky, Department of Fish and Wildlife Resources, for any services on behalf of the Department of Energy. The State of Kentucky

was simply given permission to use federal land. The fact that the State of Kentucky was not required to provide any fees for use of federal property does not, conversely, show that the Department of Energy compensated the State of Kentucky for services provided by the State. The evidence of record shows simply that the Department of Energy or AEC gave permission for the State of Kentucky to use certain of its lands in order to conduct bird dog trials or hunting or fishing or similar activities. The Fish and Wildlife division was responsible for the activities that it would otherwise be responsible for under state law. The quitclaim deed to certain lands was not compensation to the State of Kentucky for any services performed for the Department of Energy, but was conveyed to the State of Kentucky for the purpose of management for wildlife purposes. The mere presence of an individual on DOE-owned property does not confer covered employment status.

For the foregoing reasons, the undersigned must find that you have not established your claim for compensation under the EEOICPA and hereby denies your claim for compensation.

Cleveland, Ohio

Anthony Zona

Hearing Representative

EEOICPA Fin. Dec. No. 75271-2007 (Dep't of Labor, August 29, 2007)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning the claimants' claims for survivor benefits under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, FAB accepts and approves the claims for compensation under Part B of EEOICPA.

STATEMENT OF THE CASE

On January 26, 2006, the claimants each filed a Form EE-2 claiming for survivor benefits under EEOICPA as surviving children of **[Employee]**, based on the condition of chondrosarcoma (bone cancer). They submitted a copy of **[Employee]**'s death certificate, which indicates his marital status was "divorced" at the time of his death on January 29, 2002 due to chondrosarcoma with lung metastases. They also provided copies of their birth certificates showing that they are children of **[Employee]**. **[Claimant #1]** also provided copies of her marriage certificates documenting her changes of name.

[Claimant #1 and Claimant #2] submitted medical evidence including a pathology report showing **[Employee]** had a diagnosis of metastatic high grade chondrosarcoma on December 19, 2001.

A representative of the Department of Energy (DOE) verified that **[Employee]** was employed by the U.S. Geological Survey (USGS) at the Grand Junction Field Office from August 8, 1951 to March 8, 1978, and stated that he was issued dosimetry badges associated with USGS at the Nevada Test Site on 66 separate occasions between November 5, 1958 and July 11, 1966. Additionally, other official government records including security clearances, applications for federal employment, and personnel actions were submitted, indicating that **[Employee]** was employed by USGS and resided in Mercury,

Nevada from September 25, 1958 to June 11, 1962. Mercury, Nevada was a town that was within the perimeter of the Nevada Test Site and housed those who worked at the site.

On May 18, 2007, the Seattle district office issued a recommended decision to accept **[Claimant #1 and Claimant #2]**'s claims based on the employee's condition of chondrosarcoma. The district office concluded that the employee was a member of the Special Exposure Cohort (SEC), and was diagnosed with chondrosarcoma (bone cancer), which is a "specified" cancer under EEOICPA. The district office therefore concluded that **[Claimant #1 and Claimant #2]** were entitled to compensation in equal shares in the total amount of $150,000.00 under Part B.

The evidence of record includes letters received by FAB on May 23 and June 1, 2007, signed by **[Claimant #2 and Claimant #1**, respectively, whereby they both indicated that they have never filed for or received any payments, awards, or benefits from a lawsuit, tort suit, third party claim, or state workers' compensation program, based on the employee's condition. Further, they confirmed that they have never pled guilty to or been convicted of fraud in connection with an application for, or receipt of, federal or state workers' compensation.

On May 26 and June 6, 2007, FAB received written notification from **[Claimant #2 and Claimant #1]**, respectively, indicating that they waive all rights to file objections to the findings of fact and conclusions of law in the recommended decision.

After considering the evidence of record, FAB hereby makes the following:

FINDINGS OF FACT

1. On January 26, 2006, **[Claimant #1 and Claimant #2]** filed claims for survivor benefits under EEOICPA.
2. **[Claimant #1 and Claimant #2]** provided sufficient documentation establishing that they are the eligible surviving children of **[Employee]**.
3. A representative of DOE verified that **[Employee]** was issued dosimetry badges for his employment at the Nevada Test Site, a covered DOE facility, in association with USGS, a DOE contractor, from November 5, 1958 to July 11, 1966.
4. **[Employee]** was diagnosed with chondrosarcoma (bone cancer), which is a "specified" cancer under EEOICPA, on December 19, 2001, after beginning employment at a DOE facility.
5. The evidence of record supports a causal connection between the employee's cancer and his exposure to radiation and/or a toxic substance at a DOE facility while employed in covered employment under EEOICPA.

Based on the above-noted findings of fact, FAB hereby also makes the following:

CONCLUSIONS OF LAW

Section 30.316(a) of the regulations provides that, if the claimant waives any objections to all or part of the recommended decision, FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part. *See* 20 C.F.R. § 30.316(a). **[Claimant #1 and Claimant #2]** waived their right to file objections to the findings of fact and conclusions of law contained in the recommended decision issued on their claims for survivor benefits under EEOICPA.

On June 26, 2006, the Secretary of HHS designated a class of certain employees as an addition to the

SEC: DOE employees or DOE contractor or subcontractor employees who worked at the Nevada Test Site between January 27, 1951 and December 31, 1962, for a number of work days aggregating at least 250 work days, either solely under this employment or in combination with work days within the parameters (excluding aggregate work day requirements) established for other classes of employees included in the SEC, and who were monitored or should have been monitored. This addition to the SEC became effective July 26, 2006.

The employment evidence in this case is sufficient to establish that the employee was present at the Nevada Test Site for an aggregate of at least 250 work days, from September 1958 through at least November 2, 1962, and qualifies him as a member of the SEC. However, for this employment to be considered covered employment, it must also be determined that the employee was employed at a DOE facility by DOE, a DOE contractor, subcontractor or vendor. In this regard, the case was referred to the Branch of Policies, Regulations and Procedures (BPRP) for review and determination.

In its written determination dated August 6, 2007, BPRP indicated that a civilian employee of a state or federal government agency can be considered a "DOE contractor employee" if the government agency employing that individual is: (1) found to have entered into a contract with DOE for the accomplishment of services it was not statutorily obligated to perform; and (2) DOE compensated that agency for that activity. *See* EEOICPA Bulletin No. 03-26 (issued June 3, 2003). BPRP evaluated the evidence of record including the following pertinent documents:

- An October 5, 1956 letter from the Acting Director for USGS to the Director of Finance of the AEC's Albuquerque Operations Office, which states:

  > In accordance with an agreement between our respective agencies, an advance of funds $56,400 is requested to finance the 1957 fiscal year program to be performed by the Geological Survey for the Division of Military Application (DMA).[1]

- AEC Staff Paper 944/33. This September 1957 document shows clearly that it was the AEC's DMA that had oversight over the USGS geological work at the NTS.

- A document dated March 23, 1959, from the United States Department of the Interior Geological Survey summarizing a letter to the AEC Albuquerque Operations Office. The summary states in part:

  > Advised that your draft rewrite of Memorandum of Understanding No. AT(29-2)-474, has been reviewed and is acceptable to the GS except for following changes in Article IV, Budgeting & Finance. Also request that the amount available for NTS work in fiscal year 1959 be increased from $750,000 to 837,000 and that available for the GNOME program be increased from $85,000 to $91,000.

- A June 26, 1959 letter from the Director of USGS to **[Employee]**, complimenting him on his efforts at the NTS and forwarding to him a letter from the AEC's Albuquerque Operations Office in which the AEC provides general compliments to USGS for their work at NTS during 1958.

- A technical report entitled, "A Summary Interpretation of Geologic, Hydrologic, and Geophysical Data for Yucca Valley, Nevada Test Site, Nye County, NV," detailing the work and

outcome of the work performed by USGS at the Nevada Test Site. The report states that the work was undertaken at the behest of the AEC and also states, "Compilation of data, preparation of illustration, and writing of the report were completed during the period of December 26, 1958 to January 10, 1959. Some of the general conclusions must be considered as tentative until more data are available."

- Correspondence from 1957 between USGS and the AEC Raw Materials Division (not the Division of Military Application). These letters show that USGS provided assistance to the AEC in prospecting for uranium on the Colorado Plateau and other locations.

These documents clearly show that there was an agreement for payment, by which USGS performed work for the AEC at the Nevada Test Site.

BPRP then turned to the final issue to be addressed, which was whether the work performed by USGS at the Nevada Test Site was work that USGS was not statutorily obligated to perform. A review of the USGS website[2] showed that since being founded in 1879, its statutory obligations have changed. Primarily, its function has been topographical mapping and gathering information pertaining to soil and water resources. Also, with advances in science, USGS has similarly evolved to meet these changes. The USGS website makes it clear that in the post-war era, USGS was grappling to keep up its scientific pace and that it did so, in part, with money from the Defense Department, the AEC, and from the states. Further, BPRP noted that since the formation of USGS, legislation has changed its statutory obligations over the years, whereby seven legal changes to the USGS statutory obligations pertain in some way to DOE or its predecessor agencies. These changes include: geothermal energy; gathering information on energy and mineral potential; geological mapping of potential nuclear reactor sites and geothermal mapping; working with the Energy Research and Development Administration, a DOE predecessor, on coal hydrology; consulting with DOE on locating a suitable geological repository for the storage of high-level radioactive waste and a retrievable storage option; monitoring the domestic uranium industry; and to cooperate with DOE and other federal agencies on "continental scientific drilling".

Today, USGS describes itself in the following manner:

As the Nation's largest water, earth, and biological science and civilian mapping agency, the U.S. Geological Survey (USGS) collects, monitors, analyzes, and provides scientific understanding about natural resource conditions, issues, and problems. The diversity of our scientific expertise enables us to carry out large-scale, multi-disciplinary investigations and provide impartial scientific information to resource managers, planners, and other customers.

As described, while providing geological support to DOE may be part of what USGS is statutorily obligated to perform in 2007, the totality of the evidence suggests this was not always true. Therefore, BPRP concluded that the Memorandum of Understanding between USGS and the AEC constituted a contract by which USGS provided services to the AEC that USGS was not statutorily obligated to perform through at least 1961, the last year of which their analysis pertained.

In considering the above analysis and determination, FAB concludes that **[Employee]** is a member of the SEC and was diagnosed with chondrosarcoma, which is a "specified" cancer (bone), and is, therefore, a "covered employee with cancer." *See* 42 U.S.C. §§ 7384l(14)(C), 7384l(17), 7384l(9)(A). **[Claimant #1 and Claimant #2]** are the eligible survivors of **[Employee]** as defined under EEOICPA,

and are entitled to equal shares of the total compensation amount of $150,000.00. *See* 42 U.S.C. §§ 7384s(e) and 7384s(a)(1).

Accordingly, **[Claimant #1 and Claimant #2]** are each entitled to compensation in the amount of $75,000.00.

Seattle, Washington

Kelly Lindlief

Hearing Representative

Final Adjudication Branch

[1] The AEC's Division of Military Application (DMA) was the division responsible for nuclear weapons testing.

[2] Http://www.usgs.gov/aboutusgs/.

EEOICPA Fin. Dec. No. 34291-2003 (Dep't of Labor, August 1, 2003)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

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 stated below, your claim for benefits is denied.

STATEMENT OF THE CASE

On August 2, 2002, you filed a Claim for Benefits under the EEOICPA, form EE-1, through the Paducah Resource Center. On the EE-1 form, you indicated that the condition for which you filed your claim was kidney cancer. You submitted medical records from 1993 to 2001 that showed you had a nephrectomy in April of 1996. Medical records from Western Baptist Hospital from April of 1996 included an operative report for a right radical nephrectomy and a pathology report that confirmed the diagnosis of large renal cell carcinoma.

You also submitted a Form EE-3 indicating that you were employed as a conservation office for the Kentucky Department of Fish and Wildlife at the Paducah Gaseous Diffusion Plant (GDP) from 1969 to 1973. You submitted a Department of Energy (DOE) License for Non-Federal Use of Property for the purpose of wildlife development beginning September 4, 1953 and continuing indefinitely. You also submitted a DOE License for Non-Federal Use of Property for the period January 1, 1990 to December 31, 1995, and you submitted a DOE License for Non-Federal Use of Property for bow deer hunts for the period January 1, 1996 to December 31, 2000.

In addition, you submitted a copy of the five year plan and budget for the West Kentucky Wildlife Management Area for the period July 1, 1985 to June 30, 1990. You submitted an April 4, 1958 letter from the "Assistant General Counsel" noting that a corrected Quitclaim Deed from the United States of

America to the State of Kentucky had been prepared and an August 21, 1989 report from the General Services Administration concluding that the State of Kentucky, Fish and Wildlife Division, was in compliance with the terms of the conveyance of these lands. You submitted an October 6, 1959 letter from Atomic Energy Commission (AEC) referencing a grant to the Commonwealth of Kentucky and the Department of Fish and Wildlife Resources of a license and permission to enter a portion of the AEC's lands for the purpose of developing the wildlife on the property and conducting bird dog field trials. This letter extended the license and permission to additional lands. In an October 14, 1959 letter, the Director of the Division of Game recommended to the Governor of Kentucky that the license and permission to use the AEC lands be accepted. He noted that the Division would have no pecuniary obligation for use of the land, apart from patrolling, posting and protecting the land licensed for use by the Division of Fish and Wildlife Resources.

You submitted forms EE-4 from Shirley Beauchamp and Phillip Scott Beauchamp stating you worked for the Department of Fish and Wildlife at the Paducah GDP from 1968 to 1973. Social Security Earnings records were submitted showing employment with the state of Kentucky from 1971 to 1973. The Department of Energy advised the district office, however, that DOE had no information regarding your employment.

On November 15, 2002, the district office issued a recommended decision concluding that you were not employed by an entity that contracted with the DOE to provide "management and operating, management and integration, or environmental remediation" as set forth in 42 U.S.C. § 7384l(11)(B)(i) and (ii) and that, accordingly, you were not a covered DOE contractor. The district office therefore recommended that benefits be denied.

On December 23, 2002, you filed an objection to the recommended decision and requested a hearing. An oral hearing was held on February 26, 2003. At the hearing, you testified that you worked for the Kentucky Department of Fish and Wildlife from 1971 to 1973 and that you worked at the Paducah GDP and its surrounding grounds. You testified that your duties included patrolling the perimeter of the fenced portion of the plant and building two bridges and that you entered the plant through the main gate on a regular basis to remove animals that got into the GDP. You testified that you did not enter any of the buildings inside the fenced area of the GDP. You described other duties you performed during this period of employment, and you testified that you checked hunting and fishing licenses and controlled hunting at the reserve. You testified also that you participated in game sampling in conjunction with the DOE prior to the hunting season and that DOE would collect specific body parts provided by the Department of Fish and Wildlife and ship them for sampling.

FINDINGS OF FACT

You filed a claim for benefits under the EEOICPA on August 2, 2002. You were employed by the State of Kentucky, Department of Fish and Wildlife from 1971 to 1973. You were diagnosed with kidney cancer on or about April 13, 1996. You have not established that you worked in employment covered under the EEOICPA.

CONCLUSIONS OF LAW

A covered employee is eligible for compensation under the EEOICPA for an "occupational illness," which is defined in § 7384l(15) of the EEOICPA as "a covered beryllium illness, cancer referred to in § 7384l(9)(B) of this title, specified cancer, or chronic silicosis, as the case may be." 42 U.S.C. §

7384l(15). A "covered employee" is eligible for compensation under EEOICPA for a specified "occupational illness." A "covered employee," as defined in §§ 7384l(1),7384l(3),7384l(7),7384l(9), 7384l(11) and § 7384r of the EEOICPA, includes employees of private companies (an entity "other than the United States", per § 7384l(4)) which provided radioactive materials to the United States for the production of atomic weapons, employees at Department of Energy facilities or test sites (§ 7384l(12)), and employees of Department of Energy contractors, subcontractors, or beryllium vendors. 42 U.S.C. §§ 7384l(1),(3),(7),(9), (11); 7384r. Section 7384(l)(11)(B)(I and ii) defines a "Department of Energy contractor employee" to include

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There is no evidence that the DOE compensated the State of Kentucky, Department of Fish and Wildlife Resources, for any services on behalf of the Department of Energy. The State of Kentucky was simply given permission to use federal land. The fact that the State of Kentucky was not required to provide any fees for use of federal property does not, conversely, show that the Department of Energy compensated the State of Kentucky for services provided by the State. The evidence of record shows simply that the Department of Energy or AEC gave permission for the State of Kentucky to use certain of its lands in order to conduct bird dog trials or hunting or fishing or similar activities. The

Fish and Wildlife division was responsible for the activities that it would otherwise be responsible for under state law. The quitclaim deed to certain lands was not compensation to the State of Kentucky for any services performed for the Department of Energy, but was conveyed to the State of Kentucky for the purpose of management for wildlife purposes. The mere presence of an individual on DOE-owned property does not confer covered employment status.

For the foregoing reasons, the undersigned must find that you have not established your claim for compensation under the EEOICPA and hereby denies your claim for compensation.

Cleveland, Ohio

Anthony Zona

Hearing Representative

EEOICPA Fin. Dec. No. 34291-2003 (Dep't of Labor, August 1, 2003)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

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FINDINGS OF FACT

You filed a claim for benefits under the EEOICPA on August 2, 2002. You were employed by the State of Kentucky, Department of Fish and Wildlife from 1971 to 1973. You were diagnosed with kidney cancer on or about April 13, 1996. You have not established that you worked in employment covered under the EEOICPA.

CONCLUSIONS OF LAW

A covered employee is eligible for compensation under the EEOICPA for an "occupational illness," which is defined in § 7384l(15) of the EEOICPA as "a covered beryllium illness, cancer referred to in § 7384l(9)(B) of this title, specified cancer, or chronic silicosis, as the case may be." 42 U.S.C. § 7384l(15). A "covered employee" is eligible for compensation under EEOICPA for a specified "occupational illness." A "covered employee," as defined in §§ 7384l(1),7384l(3),7384l(7),7384l(9), 7384l(11) and § 7384r of the EEOICPA, includes employees of private companies (an entity "other

than the United States", per § 7384l(4)) which provided radioactive materials to the United States for the production of atomic weapons, employees at Department of Energy facilities or test sites (§ 7384l(12)), and employees of Department of Energy contractors, subcontractors, or beryllium vendors. 42 U.S.C. §§ 7384l(1),(3),(7),(9), (11); 7384r. Section 7384(l)(11)(B)(I and ii) defines a "Department of Energy contractor employee" to include

"An individual who is or was employed at a Department of Energy facility by—

(i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or

(ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility."

The DEEOIC has further addressed the issues of how a "contractor or subcontractor" may be defined, as well as whether employees of state or federal governments may be considered DOE contractor employees, in EEOICPA Bulletins No. 03-27 (issued May 28, 2003) and No. 03-26 (issued June 3, 2003). The following definitions have been adopted by the DEEOIC:

Contractor – An entity engaged in a contractual business arrangement with the Department of Energy to provide services, produce materials or manage operations at a beryllium vendor or Department of Energy facility.

Subcontractor – An entity engaged in a contracted business arrangement with a beryllium vendor contractor or a contractor of the Department of Energy to provide a service at a beryllium vendor or Department of Energy facility.

Contract - An agreement to perform a service in exchange for compensation, usually memorialized by a memorandum of understanding, a cooperative agreement, an actual written contract, or any form of written or implied agreement, is considered a contract for the purpose of determining whether an entity is a "DOE contractor."

For a civilian employee of a state or federal government agency to be considered a DOE contractor employee, it must be shown that the government agency employing that individual entered into a contract with the DOE for the accomplishment of one or more services it was not statutorily obligated to perform and that the DOE compensated the agency for that activity.

There is no evidence that the DOE compensated the State of Kentucky, Department of Fish and Wildlife Resources, for any services on behalf of the Department of Energy. The State of Kentucky was simply given permission to use federal land. The fact that the State of Kentucky was not required to provide any fees for use of federal property does not, conversely, show that the Department of Energy compensated the State of Kentucky for services provided by the State. The evidence of record shows simply that the Department of Energy or AEC gave permission for the State of Kentucky to use certain of its lands in order to conduct bird dog trials or hunting or fishing or similar activities. The Fish and Wildlife division was responsible for the activities that it would otherwise be responsible for under state law. The quitclaim deed to certain lands was not compensation to the State of Kentucky for any services performed for the Department of Energy, but was conveyed to the State of Kentucky for

the purpose of management for wildlife purposes. The mere presence of an individual on DOE-owned property does not confer covered employment status.

For the foregoing reasons, the undersigned must find that you have not established your claim for compensation under the EEOICPA and hereby denies your claim for compensation.

Cleveland, Ohio

Anthony Zona

Hearing Representative

EEOICPA Fin. Dec. No. 34771-2003 (Dep't of Labor, July 21, 2003)

REVIEW OF THE WRITTEN RECORD AND NOTICE OF FINAL DECISION

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 for benefits is denied.

STATEMENT OF THE CASE

On August 14, 2002, you filed a Form EE-2 (Survivor's Claim for Benefits under EEOICPA) seeking compensation as the eligible surviving beneficiary of your husband, **[Employee]**. On the EE-2 form, you indicated that he had been diagnosed with colon cancer. In support of your claim, you submitted medical evidence that confirmed the diagnosis of the claimed condition. You also indicated that **[Employee]** was a member of the Special Exposure Cohort having been employed at the West Kentucky Wildlife Management area near the Paducah Gaseous Diffusion Plant.

On September 10, 2002, the district office advised you that the corporate verifier, Oak Ridge Institute for Science and Education, had sent notice to the district office that it had no employment records for **[Employee]**, and that the Social Security Earnings statement and affidavits submitted detail employment for the Department of Fish and Wildlife for the State of Kentucky. The district office requested that you provide proof of employment with a contractor or subcontractor for the Department of Energy (DOE) within thirty days. You did not respond to this request.

The district office reviewed the record and found that you submitted a claim for compensation under the EEOICPA. It was further found that no evidence was submitted that supported the claim that **[Employee]** had been employed at a facility covered under the Act. Therefore, on October 30, 2002, the district office recommended the denial of your claim.

Section 30.316(b) of the EEOICPA implementing regulations states that if the claimant files objections to all or part of the recommended decision, the FAB reviewer will issue a decision on the claim after either the hearing or the review of the written record, and after completing such further development of the case as he or she may deem necessary. 20 C.F.R. § 30.316(b). On November 19, 2002, the Final Adjudication Branch received your letter of appeal. In your statement of appeal, you objected to the conclusion that you did not submit evidence establishing employment at a covered facility for

[Employee]. On May 21, 2003, you submitted additional evidence regarding employment for **[Employee]**. This additional evidence consisted of a licensing agreement between the Commonwealth of Kentucky and the U.S. Atomic Energy Commission dated October 22, 1959, and a 1989 wildlife compliance inspection of the area conducted by the General Services Administration.

FINDINGS OF FACT

1. You filed a claim for compensation as an eligible surviving beneficiary of **[Employee]**.

2. **[Employee]** was employed by the Kentucky Department of Fish and Wildlife Resources.

3. The Department of Energy indicated that there was no record of **[Employee]**'s employment at the Paducah Gaseous Diffusion Plant.

4. You did not establish that there was a contractual relationship between the State of Kentucky, Department of Fish and Wildlife Resources and the Department of Energy.

CONCLUSIONS OF LAW

In determining whether **[Employee]** was employed by a Department of Energy contractor due to services being rendered pursuant to a contract, the Final Adjudication Branch must examine two critical issues. Firstly, we must establish how a DOE contactor is defined under the Act. Secondly, we must determine the nature of the agreement between the parties, and if that agreement contains the essential elements of a contract, i.e., mutual intent to contract and the exchange of consideration or payment.

I conclude that the employee was not a DOE contractor employee. The EEOICPA program has established how a DOE contractor and subcontractor are to be defined. Program bulletin 03-27 sets forth the following definitions:

Contractor – An entity engaged in a contractual business arrangement with the Department of Energy to provide services, produce materials or manage operations at a beryllium vendor or Department of Energy facility.

Subcontractor – An entity engaged in a contracted business arrangement with a beryllium vendor contractor or a contractor of the Department of Energy to provide a service at a beryllium vendor or Department of Energy facility. EEOICPA Bulletin No. 03-27, 2003.

Therefore, an entity must be engaged in a contractual business arrangement to provide services to the DOE in order to be a contractor or subcontractor.

The evidence submitted does not support the claim that **[Employee]**'s employer, the Kentucky Department of Fish and Wildlife Resources, had contracted with the Atomic Energy Commission or DOE to provide management and operating, management and integration, or environmental remediation at the facility. Consequently, **[Employee]**'s employer does not meet the definition of a DOE contractor. Furthermore, the mere existence of a formal written document authorizing a state or federal entity to perform work for DOE does not automatically make the entity a DOE contractor if the document and arrangement lack the elements necessary to constitute a contract. The license in this case permitted the state of Kentucky, Department of Fish and Wildlife Resources to utilize DOE land as

a field trial area.

The Act is clear that its provisions extend compensation only to certain employees. These "covered employees" are defined as covered employees with cancer, covered beryllium employees, and covered employees with silicosis. The definition of a covered employee with cancer (who is a member of the Special Exposure Cohort[1]) is found in § 7384l(9)(A) of the Act. That section states that in order to be considered a covered employee with cancer one must have been a Department of Energy employee or contractor employee who contracted the cancer after beginning employment at a Department of Energy facility, or an atomic weapons employee who contracted cancer after beginning employment at an atomic weapons facility. 42 U.S.C. § 7384l(9)(A).

Based on the review of the record, the undersigned hereby concludes that the record supports the finding that **[Employee]** did not have covered employment as defined under the Act. Because you have not established, with the required evidence, employment covered under the EEOICPA, your claim for compensation must be denied.

Washington, DC

David E. Benedict

Hearing Representative

[1] The Special Exposure Cohort differs from other Department of Energy and atomic weapon employees in that is comprised of individuals who were so employed for a number of work days aggregating at least 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, and, during such employment were monitored through the use of dosimetry badges; or worked in a job that had exposures comparable to a job that is or was monitored through the use of dosimetry badges. The Cohort also includes employees that were employed before January 1, 1974, by the Department of Energy or a Department of Energy contractor or subcontractor on Amchitka Island, Alaska, and was exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests. Individuals designated as a member of the Special Exposure Cohort by the President for purposes of the compensation program under section 7384q of this title are also included. 42 U.S.C. § 7384l(9)(A); 42 U.S.C. § 7384l(14).

EEOICPA Fin. Dec. No. 50247-2004 (Dep't of Labor, September 16, 2004)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This decision of the Final Adjudication Branch (FAB) concerns 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). For the reasons stated below, your claim for benefits is denied.

STATEMENT OF THE CASE

On October 15, 2003, you filed a claim for benefits under the EEOICPA as the surviving spouse of **[Employee]** and identified bladder cancer as the diagnosed condition being claimed. You submitted an Employment History Form (EE-3) on which you stated that Commercial Motor Freight employed your husband at the Portsmouth Gaseous Diffusion Plant (GDP) from December 11, 1954 to December 11, 1981. You did not state if your husband wore a dosimetry badge while employed. You submitted an

affidavit from Connie Bighouse and J. Frank Bighouse in which they attested that they were employed by Commercial Motor Freight from 1958 to 1985 at the Chillicothe Terminal. Ms. Bighouse and Mr. Bighouse also attested that your husband worked for Commercial Motor Freight as a driver, delivering and picking up freight at the Goodyear Atomic Corporation. They did not provide dates of your husband's employment. You submitted a copy of your marriage certificate which shows you were married to **[Employee]** on December 9, 1947. You submitted a copy of your husband's death certificate which shows he died on April 30, 2000 due to myocardial rupture, myocardial infarction and arteriosclerotic cardiovascular disease. As medical evidence, you submitted a copy of Dr. W. G. Rice's February 9, 1978 pathology report in which your husband was diagnosed with transitional cell carcinoma of the bladder.

On October 22, 2003, the district office attempted to verify your husband's employment through the Oak Ridge Institute for Science and Education (ORISE) database but there were no records of your husband's employment. On November 18, 2003, Department of Energy (DOE) representative Roger Holt advised, via Form EE-5, that the DOE was unable to verify your husband's employment but other pertinent evidence existed. Mr. Holt submitted a copy of your husband's Personnel Clearance Master Card which shows your husband was granted a "Q" clearance at the request of Goodyear Atomic Corp. and Commercial Motor Freight, Inc. as a truck driver on April 27, 1970 and the clearance terminated on June 23, 1982. On December 4, 2003, the district office received a copy of your husband's Social Security Administration itemized statement of earnings which shows he had earnings from Lee Way Holding Company, which is now bankrupt, from 1954 to 1982. The district office verified, through the bankruptcy trustee, that the earnings from Lee Way Holding represented earnings from Commercial Motor Freight, Inc. On December 9, 2003, DOE and Bechtel Jacobs Company representative Wendy L. Wilcox advised, via Form EE-5, that no evidence existed in regards to the employment you claimed. On January 5, 2004, at the request of the district office, Frank Bighouse and Connie Bighouse submitted a supplement to their affidavit regarding your husband's employment. Ms. Bighouse attested that she worked with your husband from 1967 until he left the company (no date provided). Ms. Bighouse and Mr. Bighouse also attested that your husband made deliveries to the GDP in the morning and pickups in the evenings five days a week. They also attested that he would spend approximately one to two hours on site for each pick up and each delivery.

Based upon the evidence of record, the district office issued a recommended decision on January 14, 2004, in which it concluded that **[Employee]** was a member of the Special Exposure Cohort as defined by 42 U.S.C. § 7384l(14)(A); that **[Employee]** was diagnosed with bladder cancer which is a specified cancer as defined by 42 U.S.C. § 7384l(17); and that you are the surviving spouse of **[Employee]** as defined in 42 U.S.C. § 7384s(e)(3)(A). The district office recommended payment of your claim for benefits based on its conclusions. On February 13, 2004, after reviewing the written record, the Cleveland FAB office found that the evidence did not establish that your husband was a contract employee as defined under the Act. The FAB vacated the recommended decision and remanded your claim to the district office for additional development and the issuance of a new recommended decision. On March 22, 2004, the district office issued a new recommended decision in which it concluded that the evidence of record did not establish that **[Employee]** was a "covered employee with cancer" as that term is defined under 42 U.S.C. § 7384l(9)(B). The district office recommended denial of your claim based on its conclusion.

Section 30.310(a) of the EEOICPA implementing regulations provide that, "Within 60 days from the date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision, including the HHS's reconstruction of the radiation dose to which the employee was exposed (if any), and whether a hearing

is desired." 20 C.F.R. § 30.310(a). On April 13, 2004, you wrote to the FAB and advised that you disagreed with the recommended decision. You stated that you objected to the decision that your husband's sub-contracted employment did not constitute a service, but a mere delivery of goods and that he is not considered to be a covered employee with cancer. You submitted the following evidence in support of your position:

1. Copy of Dr. William Lutmer's September 1, 1997 medical report on which was circled the statement, "He does not smoke or drink."

2. March 19, 2004 statement from Malcolm Blosser who stated that he worked for Goodyear Atomic and Martin Marietta Corp. in Piketon. Mr. Blosser stated that your husband was a driver for Commercial Motor Freight, that your husband delivered freight to the GDP everyday, and that he helped your husband to unload the freight.

3. March 28, 2004 statement from Dale Reed, Maintenance Division of the United States Energy Corporation, in which he stated that the purpose of his letter was "a testimonial to the reasonable possibility of **[Employee]** being exposed to high levels of contamination, radiation and chemicals of both known and unknown measures." Mr. Reed attested to the high levels of exposure in the buildings that your husband entered on a regular basis. He included a copy of the Risk Mapping performed for union and company purposes as a guide to the exposures of each building.

You requested a hearing and such was held by the undersigned on June 8, 2004 in Piketon, OH. You appeared at the hearing with your son, **[Employee's son]**. **[Employee's son]** testified at the hearing that you disagree with the classification of your husband's employment as "a mere delivery of goods" because he had a security clearance which required him to come in and out of the plant for 11 years. **[Employee's son]** also testified that your husband spent two or three hours a day loading and unloading "classified" freight. Hearing Transcript (HT) 8-9. You submitted, as evidence, a statement from Mr. Malcolm Blosser dated June 7, 2004, in which he reiterated the information in his previous statement of March 19, 2004.

After considering the written record of the claim, your letter of objection, the testimony and objections presented at the hearing, the FAB hereby makes the following:

FINDINGS OF FACT

1. You filed a claim for survivor benefits under the EEOICPA on October 15, 2003.

2. Commercial Motor Freight Inc. employed your husband, as a truck driver, from 1954 to 1982.

3. **[Employee]** was diagnosed with bladder cancer on February 9, 1978.

4. **[Employee]** died on April 30, 2000 due to myocardial rupture, myocardial infarction and arteriosclerotic cardiovascular disease.

5. You are the surviving spouse of **[Employee]**.

Based on the above-noted findings of fact in this claim, the FAB hereby makes the following:

CONCLUSIONS OF LAW

The Energy Employees Occupational Illness Compensation Program Act was established to provide compensation benefits to covered employees (or their eligible survivors) who have been diagnosed with designated occupational illnesses incurred as a result of their exposure to radiation, beryllium, or silica, while in the performance of duty for Department of Energy and certain of its vendors, contractors and subcontractors. Occupational illness is defined in § 7384l(15) of the EEOICPA, as a covered beryllium illness, cancer referred to in § 7384l(9)(B)[1], specified cancer, or chronic silicosis, as the case may. 42 U.S.C. §§ 7384l(15), 7384l(9)(B).

To be eligible for compensation for cancer, an employee either must be: (1) a member of the Special Exposure Cohort (SEC) who was a DOE employee, a DOE contractor employee, or an atomic weapons employee who contracted a specified cancer after beginning such employment; or (2) a DOE employee, a DOE contractor employee or an atomic weapons employee who contracted cancer (that has been determined pursuant to guidelines promulgated by HHS, "to be at least as like as not related to such employment"), after beginning such employment. *See* 42 U.S.C. § 7384l(9) and 20 C.F.R. § 30.210.

While the EEOICPA does not contain a specific definition of a DOE contractor, it does contain a definition of a DOE contractor employee that, in effect, defines what a DOE contractor is. Section 7384l(11) of the EEOICPA defines a DOE contractor employee as:

A. An individual who is or was in residence at a Department of Energy facility as a researcher for one or more periods aggregating at least 24 months.

B. an individual who is or was employed at a Department of Energy facility by—

(i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or

(ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

The DEEOIC has further addressed the issues of how a "contractor or subcontractor" may be defined in EEOICPA Bulletin No. 03-27 (issued May 28, 2003). The following definitions have been adopted by the DEEOIC:

Contractor – An entity engaged in a contractual business arrangement with the Department of Energy to provide services, produce materials or manage operations at a beryllium vendor or Department of Energy facility.

Subcontractor – An entity engaged in a contracted business arrangement with a beryllium vendor contractor or a contractor of the Department of Energy to provide a service at a beryllium vendor or Department of Energy facility.

Service – In order for an individual working for a subcontractor to be determined to have performed a "service" at a covered facility, the individual must have performed work or labor for the benefit of another within the boundaries of a DOE or beryllium vendor facility. Example of workers providing such services would be janitors, construction and maintenance works.

Contract - An agreement to perform a service in exchange for compensation, usually memorialized by a memorandum of understanding, a cooperative agreement, an actual written contract, or any form of written or implied agreement, is considered a contract for the purpose of determining whether an entity is a "DOE contractor."

Delivery of Goods – The delivery and loading or unloading of goods alone is **not** a service and is not covered for any occupation, including construction and maintenance workers.

You submitted employment evidence that establishes your husband was employed as a truck driver, by Commercial Motor Freight, to deliver goods to the Portsmouth GDP, a Department of Energy facility. [2] In order for a contractor or subcontractor employee to be determined to have performed work or labor for DOE, the individual must have performed a "service" for the benefit of the DOE within the boundaries of a DOE facility. The mere delivery of goods alone is insufficient to establish that a service was performed for the benefit of DOE.[3] Because you did not submit evidence that establishes your husband is a "covered employee with cancer" as defined at § 7384l(9) of the EEOICPA, your claim for benefits is denied. 42 U.S.C. § 7384l(9).
Washington, DC

Thomasyne L. Hill

Hearing Representative

Final Adjudication Branch

[1] Section 7384l(9)(B) refers to an individual with cancer specified in subclause (I), (II), or (III) of clause (ii), if and only if that individual is determined to have sustained that cancer in the performance of duty in accordance with § 7384n(b). Clause (ii) references DOE employees, DOE contractor employees and atomic weapons employees who contract cancer after beginning employee at the required facility.

[2] U.S. Department of Energy. *Portsmouth Gaseous Diffusion Plant*. Time Period: 1954-1998. Worker Advocacy Facility List. Available: http://tis.eh.doe.gov/advocacy/faclist/showfacility.cfm [retrieved October 21, 2003].

[3] EEOICPA Bulletin 03-27.

EEOICPA Fin. Dec. No. 56806-2004 (Dep't of Labor, November 1, 2004)

NOTICE OF FINAL DECISION AND REVIEW OF THE WRITTEN RECORD

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 stated below, your claim for benefits is denied.

STATEMENT OF THE CASE

On April 19, 2004, you filed a Claim for Benefits under the EEOICPA, Form EE-1, with the Seattle district office, for prostate cancer, lung cancer, non-Hodgkin's lymphoma and basal cell skin cancer. You stated on the EE-3 form that you were employed by the Missouri Pacific Railroad, and worked

periodically at the Destrehan Street Site of the Mallinckrodt Chemical Company, between October 31, 1957 and June 30, 1963. The Destrehan Street Plant was a Department of Energy (DOE) facility, where radioactive material was present, from 1942 to 1962 and again (for remediation) in 1995, according to the Department of Energy Office of Worker Advocacy Facility List website at http://www.hss.energy.gov/HealthSafety/FWSP/Advocacy/faclist/findfacility.cfm.

On April 28, 2004, you were informed of the medical evidence you had to submit to support that you had been diagnosed with cancer. No medical evidence was submitted.

On June 2, 2004, you were informed of the categories of employment for which compensation benefits may be paid for cancer, under 42 U.S.C. § 7384s of the Act. You were also advised of the kinds of evidence which you could submit to support that you had such employment.

You responded with a letter, received in the district office on June 25, 2004, explaining how your employment as a sales representative for the Missouri Pacific Railroad led to your calling on many firms, including Mallinckrodt's Destrehan Street Plant, from October 1957 to June 1963. You stated that your employer "did not directly serve. . .Mallinckrodt but instead received freight cars by way of another railroad. . .which railroad switched the cars from the plant to the Missouri Pacific R.R. that then hauled the freight cars beyond. As such the Missouri Pacific R.R. became a party to the Bill of Lading contract, which was used by all transportors of freight."

On July 21, 2004, the district office issued a recommended decision concluding you were not entitled to compensation, since the evidence did not support that you had employment which would render you a covered employee, as defined in 42 U.S.C. § 7384l of the EEOICPA. The decision also found that you had not submitted evidence establishing that you had cancer.

On August 19, 2004, you submitted an objection to the recommended decision, in which you reiterated that you were employed by the Missouri Pacific Railroad and that this employment took you to the Mallinckrodt Plant where you were exposed to contamination which, you believe, may have caused your cancers. With your objection, you submitted an employment document, as well as records of medical treatment you received. The employment document supported that you worked as a traffic representative and a track rail sales representative for the Missouri Pacific Railroad from May 22, 1957 to June 30, 1963. The medical records, including pathology reports, confirmed that you were diagnosed with prostate cancer, non-Hodgkin's lymphoma, multiple basal cell carcinomas and lung cancer. Upon review of the case record, the undersigned makes the following:

FINDINGS OF FACT

1. You filed a claim for benefits under the EEOICPA on April 19, 2004.

2. You have been diagnosed with prostate cancer, non-Hodgkin's lymphoma, multiple basal cell carcinomas and lung cancer.

3. You were employed by the Missouri Pacific Railroad, as a traffic representative and a track rail sales representative, from May 22, 1957 to June 30, 1963.

Based on these facts, the undersigned makes the following:

CONCLUSIONS OF LAW

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, pursuant to 20 C.F.R. § 30.310. The same section of the regulations provides that in filing objections, the claimant must identify his objections as specifically as possible. In reviewing any objections submitted, under 20 C.F.R. § 30.313, the FAB will review the written record, any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. I have reviewed the record in this case, as well as the written objections you submitted and must conclude that no further investigation is warranted.

A "covered employee," as defined in 42 U.S.C. § 7384l(1) of the EEOICPA, includes a "covered employee with cancer," which, pursuant to 42 U.S.C. § 7384l(9)(B), may include a "Department of Energy employee" or a "Department of Energy contractor employee who contracted. . .cancer after beginning employment at a Department of Energy facility."

A "Department of Energy contractor employee" is defined, in 42 U.S.C. § 7384l(11) of the Act, as an "individual who. . .was in residence at a Department of Energy facility as a researcher for one or more periods aggregating at least 24 months," or, an "individual who. . .was employed at a Department of Energy facility by (i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility."

The regulations state, in 20 C.F.R. § 30.111(a), that "Except where otherwise provided in the Act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category set forth in § 30.110."

You have not alleged, or submitted any evidence to support, that you were a Department of Energy employee or that you were in residence for at least 24 months, as a researcher at a Department of Energy facility. You also have not submitted any evidence or statements supporting that your employer, the Missouri Pacific Railroad, had a contractual relationship with the Department of Energy to provide management, remediation or any other services, at the Destrehan Street Plant facility of the Mallinckrodt Chemical Company. By your own statement, your employer merely hauled freight cars which had already been removed from the facility by another company. Therefore, the evidence fails to support that your employment with the Missouri Pacific Railroad was such as to qualify you as a "covered employee."

For the foregoing reasons, the undersigned must find that you have not established your claim under the EEOICPA and hereby denies payment of compensation.

Washington, DC

Richard Koretz

Hearing Representative

EEOICPA Fin. Dec. No. 61192-2005 (Dep't of Labor, April 5, 2005)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under Part B of 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 denied.

STATEMENT OF THE CASE

On August 31, 2004, you filed a claim for survivor benefits under Part B of the EEOICPA, Form EE-2, as the widow of **[Employee]**. You identified lung cancer as the claimed condition. You stated on the Employment History Form EE-3 that your husband was employed by the Illinois Central Railroad at the Paducah Gaseous Diffusion Plant in Paducah, Kentucky for an "unknown" period. The Department of Energy (DOE) was unable to verify **[Employee's]** employment at Paducah Gaseous Diffusion Plant. [1]

On September 17, 2004 and October 27, 2004, you were advised by the district office of the evidence that was required to support the claim that your husband was employed by a covered DOE contractor or subcontractor. To establish covered employment you need to submit evidence that your husband was employed at a DOE facility during a covered time frame and that there was a contract between the claimed contractor or subcontractor and the DOE to provide a service on the premises of the facility. The mere delivery and loading or unloading of goods alone is insufficient to establish that a service was performed for the benefit of the DOE.[2]

You submitted a statement in which you indicated your husband was employed by the Illinois Central Railroad from 1950 to January 31, 1982 and that he worked as a flagman and conductor. You also indicated that "he went to coal mines in Central City, KY, factories in Calvert City, KY and Bluford, IL, and atomic plant in Future City, KY." You submitted a notice from the United States of America Railroad Retirement Board indicating that you are eligible for monthly spousal benefits.

You have submitted a death certificate for **[Employee]** that indicated a date of death of March 3, 2001 and that the immediate cause of death was cardiopulmonary arrest. This death certificate also indicated the decedent was survived by his wife, **[Employee's Spouse]**. You submitted a marriage certificate showing that **[Employee]** and **[Employee's Spouse]** were married on July 23, 1949.

You submitted a December 29, 1982 operative report, from Ted Myre, M.D., which indicated a postoperative diagnosis of cancer of the left lung with invasion of the mediastinum. A December 30, 1982 pathology report, from James R. Naugh, M.D., indicated a diagnosis of moderately well differentiated squamous cell carcinoma of the left lung.

On January 22, 2005, the district office issued a recommended decision finding that you have not provided evidence proving that your husband's claimed employment meets the criteria of a covered employee in accordance with 42 U.S.C. §§ 7384l(1) and (11) and 20 C.F.R. §§ 30.5(p) and (u) Therefore, the district office concluded that you were not entitled to compensation under the Act.

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, pursuant to 20 C.F.R. § 30.310. You did not file an objection. I have reviewed the record in this case and must conclude that no further investigation is warranted. Based upon a review of the case file evidence, I make the following::

FINDINGS OF FACT

You filed a claim for survivor benefits on August 31, 2004, under Part B of the EEOICPA.

You were married to the employee from July 23, 1949, until his death on March 3, 2001.

You husband was first diagnosed with lung cancer on December 29, 1982.

Based on these facts, the undersigned makes the following:

CONCLUSIONS OF LAW

The evidence submitted does not establish that your husband meets the definition of covered employee, during a covered time period, as defined by §§ 42 U.S.C. §§ 7384l (1), (7) and (11). For that reason, you are not entitled to compensation under § 7384s of the Act.

You have not provided records or affidavits from co-workers or other sources in support of the employment that you are claiming. Section 30.111(a) states that "Except where otherwise provided in the Act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category set forth in § 30.110". *See* 20 C.F.R. § 30.111(a).

For the foregoing reasons, the undersigned hereby denies your claim for compensation for survivor benefits under Part B of the EEOICPA.

Washington, DC

Tom Daugherty

Hearing Representative

[1] The Paducah Gaseous Diffusion Plant was a DOE facility from 1952 to 1998, where radioactive material was present, according to the Department of Energy Office of Worker Advocacy Facility List (http://www.hss.energy.gov/HealthSafety/FWSP/Advocacy/faclist/findfacility.cfm).

[2] Per EEOICPA Bulletin No. 03-27 (issued March 28, 2003).

EEOICPA Fin. Dec. No. 10028664-2006 (Dep't of Labor, August 24, 2006)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This decision of the Final Adjudication Branch concerns the above 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 stated below, your claim for benefits is denied. A copy of this decision will be provided to your authorized representative.

STATEMENT OF THE CASE

On August 27, 2001, you filed Form EE-2, Claim for Survivor's Benefits and a Request for Review by Medical Panels under EEOICPA. You stated on the Form EE-2 that you were filing for the aplastic anemia of your late spouse, **[Employee]**, hereinafter referred to as "the employee." The death certificate shows the employee died on March 5, 1997 from intracerebral hemorrhage, severe thrombocytopenia, and myelodysplastic syndrome.

On the Form EE-3, Employment History, you stated that the employee was employed in Oak Ridge, Tennessee as a quality assurance inspector by Union Carbide Corporation, Nuclear Division, at the K-25 gaseous diffusion plant from 1952 to June 30, 1974. In a letter dated June 1, 2001, you stated that the employee worked at the Y-12 plant from June 30, 1952 to June 28, 1974. The district office verified the employee was actually an employee of the Atomic Energy Commission (AEC) (which became the Department of Energy (DOE)) who worked at K-25 for at least 250 days from 1963 to June 30, 1974, as a quality assurance specialist.

In support of your claim for survivorship, you submitted your marriage certificate, showing you married the employee on February 3, 1945, and the employee's death certificate, showing you were the employee's spouse on the date of his death.

Because there are no requirements under Part B of the Act that an employee who qualifies for membership in the Special Exposure Cohort (SEC) with a specified cancer be a "contractor employee," your claim under that portion of the Act was approved by final decision dated March 12, 2002.

However, because the necessary elements to establish covered employment were not met under Part E of the Act, the Jacksonville district office issued a recommended denial on April 4, 2006. The decision found that the employee did not qualify as a "DOE contractor employee" as described under the Act. The recommended decision informed you that you had sixty days to file any objections, in accordance with § 30.310(b) of the implementing regulations, and that period ended on June 3, 2006. 20 C.F.R. § 30.310(b).

OBJECTIONS

On April 14, 2006, the Final Adjudication Branch (FAB) received a letter from Congressman John J. Duncan, Jr. The letter from Congressman Duncan included a letter from you, dated April 7, 2006, objecting to the recommended decision and requesting an oral hearing. The hearing was held by the undersigned in Oak Ridge, Tennessee, on July 12, 2006. You and your attorney were both duly affirmed to provide truthful testimony.

In the letter of objection, you stated that written evidence was included, but there were no enclosures. At the hearing, your attorney submitted copies of the employee's job description and specific objections to the recommended decision. He stated that the recommended decision issued in 2002 found that the employee was an employee of Union Carbide and this should be binding on any future decisions. He noted that a Physicians Panel review under former Part D of the Act was completed and the Secretary of Energy accepted the Panel's affirmative determination that the employee's myelodysplastic syndrome was due to exposure to a toxic substance at a DOE facility. He stated that the physicians on the panel ruled that the employee was a DOE contractor employee and that should be binding on the Department of Labor (DOL). He stated that the Part E procedures required acceptance

of these types of claims. He also argued that the employee should be considered a "researcher" under the Act, since Congress did not provide a definition of a researcher, and the job duties of the employee "would constitute nuclear materials research done on behalf of the AEC in the area of quality assurance."

One of the documents submitted shows that the employee also performed his job duties for the AEC at other facilities, such as the Kerr McGee facility in Guthrie, Oklahoma[1], and the Union Carbide facility in Wood River Junction, Rhode Island.[2] The employee's resume states he worked for the AEC in Oak Ridge from 1952 to June 30, 1974, verifying that contractors followed building codes and specifications to meet the contracts issued by the AEC and inspected the manufacturing of equipment made of various types of metal. He also stated that he worked for the AEC from 1946 to 1952 as a security inspector at various AEC installations throughout the United States. The periods from 1940 to 1946 and from 1950 to 1952 were military service.

In accordance with §§ 30.314(e) and (f) of the implementing regulations, a claimant is allowed thirty days after the hearing is held to submit additional evidence or argument, and twenty days after a copy of the transcript is sent to them to submit any changes or corrections to that record. 20 C.F.R. §§ 30.314(e), 30.314(f). On July 21, 2006, the transcript was forwarded to you and your attorney. You did not provide any corrections or changes to the transcript.

On July 26, 2006, the Final Adjudication Branch received a submission from your attorney, reiterating the objections and arguments set forth during the hearing.

FINDINGS OF FACT

1. You filed a claim for survivor's benefits under the Act.

2. The employee was diagnosed with myelodysplastic syndrome on April 19, 1996 and his death on March 5, 1997 resulted from that condition.

3. The employee worked for the Department of Energy at the Y-12 plant and the K-25 gaseous diffusion plant from at least 1963 to June 30, 1974, with intermittent periods at other facilities.

4. You were the employee's spouse at the time of his death and at least a year prior.

CONCLUSIONS OF LAW

The undersigned has reviewed the facts, the recommended decision issued by the Jacksonville district office on April 4, 2006, and the information received before, during, and after the hearing.

The eligibility criteria for claims under Part E of EEOICPA are discussed in the regulations, which require that the employee be a Department of Energy contractor employee as defined in § 30.5(w). Section 30.5(w) of the regulations and § 7384l of the Act define a Department of Energy contractor employee to be (1) an individual who is or was in residence at a DOE facility as a researcher for one or more periods aggregating at least 24 months; or (2) an individual who is or was employed at a DOE facility by: (i) an entity that contracted with the DOE to provide management and operation, management and integration, or environmental remediation at the facility; or (ii) a contractor or

subcontractor that provided services, including construction and maintenance, at the facility. 20 C.F.R. § 30.5(w); 42 U.S.C. § 7384l(11).

The finding in a recommended decision that the employee was employed by Union Carbide is not legally binding, since only final decisions can be considered the legal determination of the Department of Labor. The Physicians Panel review finding of covered employment is also not binding on the Department of Labor. Under Part D, the DOE was to serve as a liaison with the various state workers' compensation authorities, and as the letter from the DOE states, a filing under the appropriate state system would have been necessary. A finding that the employee was a federal government employee would likely have resulted in a negative decision from the state workers' compensation authority.

The evidence submitted does not establish that the employee meets the definition of a DOE contractor employee or a researcher. An employee of the federal government cannot be considered an employee of a government contractor or subcontractor, unless the government agency by which they were/are employed had/has a contract with the DOE to provide services that meet the criteria established by the Act. 42 U.S.C. § 7384l(11). EEOICPA Bulletin No. 03-26 states that "a civilian employee of a state or federal government agency can be considered a 'DOE contractor employee' if the government agency employing that individual is (1) found to have entered into a contract with DOE for the accomplishment of. . .services it was not statutorily obligated to perform, and (2) DOE compensated the agency for that activity."[3] The qualification of a researcher in the Act requires "residence" at a DOE facility, which leads to the interpretation that the researcher is likely affiliated with a university or scientific body, and would logically have the word "researcher" or "research" in their job title or job description. A review of the employee's job descriptions does not show the use of the word "research" or "researcher."

The Act does state that a determination under Part B that a Department of Energy *contractor* [emphasis added] employee is entitled to compensation under that part for an occupational illness shall be treated for purposes of this part [Part E] as a determination that the employee contracted that illness through exposure at a Department of Energy facility. 42 U.S.C. § 7385s-4. If an employee does not fall into the category of a contractor employee, then this section of the law does not apply.

You meet the definition of a survivor under Part E of the Act. 42 U.S.C. § 7385s-3(d)(1). However, since the evidence does not establish that the employee was a Department of Energy contractor employee, you are not entitled to benefits under Part E of the Act, and the claim for compensation is denied. 42 U.S.C. §§ 7385s-4(c)(1)(A), 7385s-3(a)(1)(B).

Jacksonville, FL

Sidne M. Valdivieso

Hearing Representative

[1] There is no facility in Guthrie, Oklahoma listed on the DOE's Office of Worker Advocacy (OWA) website as a covered facility. The only facility in Oklahoma on the website associated with Kerr-McGee is listed as being in Crescent, Oklahoma, and is described as an atomic weapons employer (AWE).

[2] There is no facility in Wood River Junction, Rhode Island listed on the DOE OWA website as a covered facility. The only facility in Rhode Island listed on the website is listed as being in Cranston, Rhode Island, and is described as an AWE.

[3] EEOICPA Bulletin No. 03-26 (issued June 3, 2003).

Employees of other federal agencies

EEOICPA Fin. Dec. No. 366-2002 (Dep't of Labor, June 3, 2003)

NOTICE OF FINAL DECISION REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. The recommended decision was to deny your claim. You submitted objections to that recommended decision. The Final Adjudication Branch carefully considered the objections and completed a review of the written record. *See* 20 C.F.R. § 30.312. The Final Adjudication Branch concludes that the evidence is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On July 31, 2001, you filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA), stating that you were the daughter of **[Employee]**, who was diagnosed with cancer, chronic silicosis, and emphysema. You completed a Form EE-3, Employment History for Claim under the EEOICPA, indicating that from December 2, 1944 to May 30, 1975, **[Employee]** was employed as a heavy mobile and equipment mechanic, for Alaska District, Corps of Engineers, Anchorage, Alaska.

On August 20, 2001, a representative of the Department of Energy (or DOE) indicated that "none of the employment history listed on the EE-3 form was for an employer/facility which appears on the Department of Energy Covered Facilities List." Also, on August 29, 2001, a representative of the DOE stated in Form EE-5 that the employment history contains information that is not accurate. The information from the DOE lacked indication of covered employment under the EEOICPA.

The record in this case contains other employment evidence for **[Employee]**. With the claim for benefits, you submitted a "Request and Authorization for TDY Travel of DOD Personnel" Form DD-1610, initiated on November 10, 1971 and approved on November 11, 1971. **[Employee]** was approved for TDY travel for three days to perform work on Amchitka Island, Alaska, for the Department of Defense, Alaska District Corps of Engineers beginning on November 15, 1971. He was employed as a Mobile Equipment Mechanic WG-12, and the purpose of the TDY was noted "to examine equipment for potential use on Blair Lake Project." The security clearance was noted as "Secret." You also submitted numerous personnel documents from **[Employee]**'s employment with the Alaska District Corp of Engineers. Those documents include a "Notification of Personnel Action" Form SF-50 stating that **[Employee]**'s service compensation date was December 2, 1944, for his work as a Heavy Mobile Equipment Mechanic; and at a WG-12, Step 5, and that he voluntarily retired on May 30, 1975.

The medical documentation of record shows that **[Employee]** was diagnosed with emphysema, small cell carcinoma of the lung, and chronic silicosis. A copy of **[Employee]**'s Death Certificate shows that he died on October 9, 1990, and the cause of death was due to or as a consequence of bronchogenic cancer of the lung, small cell type.

On September 6 and November 5, 2001, the district office wrote to you stating that additional evidence was needed to show that **[Employee]** engaged in covered employment. You were requested to submit a Form EE-4, Employment History Affidavit, or other contemporaneous records to show proof of **[Employee]**'s employment at the Amchitka Island, Alaska site covered under the EEOICPA. You did not submit any additional evidence and by recommended decision dated December 12, 2001, the Seattle district office recommended denial of your claim. The district office concluded that you did not submit employment evidence as proof that **[Employee]** worked during a period of covered employment as required by § 30.110 of the EEOICPA regulations. *See* 20 C.F.R. § 30.110.

On January 15 and February 6, 2002, you submitted written objections to the recommended denial decision. The DOE also forwarded additional employment information. On March 20, 2002, a representative of the DOE provided a Form EE-5 stating that the employment history is accurate and complete. However, on March 25, 2002, a representative of the DOE submitted a "corrected copy" Form EE-5 that indicated that the employment history provided in support of the claim for benefits "contains information that is not accurate." An attachment to Form EE-5 indicated that **[Employee]** was employed by the Army Corps of Engineers for the period July 25, 1944 to August 11, 1952, at Fort Richardson, Alaska; and from August 11, 1952 to May 30, 1975 at Elmendorf Air Force Base, Alaska. Further, the attachment included clarifying information:

Our records show that the Corps of Engineers' was a prime AEC contractor at Amchitka. **[Employee]**'s Official Personnel Folder (OPF) indicates that he was at Forth Richardson and Elmendorf AFB, both in Alaska. The OPF provided no indication that **[Employee]** worked at Amchitka, Alaska. To the best of our knowledge, Blair Lake Project was not a DOE project.

Also, on April 3, 2002, a representative of the DOE submitted a Form EE-5 indicating that Bechtel Nevada had no information regarding **[Employee]**, but he had a film badge issued at the Amchitka Test Site, on November 15, 1971. The record includes a copy of Appendix A-7 of a "Manager's Completion Report" which indicates that the U. S. Army Corps of Engineers was a prime AEC (Atomic Energy Commission) Construction, Operations and Support Contractor, on Amchitka Island, Alaska.

On December 10, 2002, a hearing representative of the Final Adjudication Branch issued a Remand Order. Noting the above evidence, the hearing representative determined that the "only evidence in the record with regard to the Army Corps of Engineers status as a contractor on Amchitka Island is the DOE verification of its listing as a prime AEC contractor . . . and DOE's unexplained and unsupported verification [of **[Employee]**'s employment, which] are not sufficient to establish that a contractual relationship existed between the AEC, as predecessor to the DOE, and the Army Corps of Engineers." The Remand Order requested the district office to further develop the record to determine whether the Army Corps of Engineers had a contract with the Department of Energy for work on Amchitka Island, Alaska, and if the work **[Employee]** performed was in conjunction with that contract. Further the Remand Order directed the district office to obtain additional evidence to determine if **[Employee]** was survived by a spouse, and since it did not appear that you were a natural child of **[Employee]**, if you could establish that you were a stepchild who lived with **[Employee]** in a regular parent-child relationship. Thus, the Remand Order requested additional employment evidence and proof of eligibility under the Act.

On January 9, 2003, the district office wrote to you requesting that you provide proof that the U.S. Army Corps of Engineers had a contract with the AEC for work **[Employee]** performed on his TDY assignment to Amchitka Island, Alaska for the three days in November 1971. Further, the district office requested that you provide proof of your mother's death, as well as evidence to establish your relationship to **[Employee]** as a survivor.

You submitted a copy of your birth certificate that indicated that you were born **[Name of Claimant at Birth]** on October 4, 1929, to your natural mother and natural father **[Natural Mother]** and **[Natural Father]**. You also submitted a Divorce Decree filed in Boulder County Court, Colorado, Docket No. 10948, which showed that your biological parents were divorced on October 10, 1931, and your mother, **[Natural Mother]** was awarded sole custody of the minor child, **[Name of Claimant at Birth]**. In addition, you submitted a marriage certificate that indicated that **[Natural Mother]** married **[Employee]** in the State of Colorado on November 10, 1934. Further, you took the name **[Name of Claimant Assuming Employee's Last Name]** at the time of your mother's marriage in 1934, as indicated by the sworn statement of your mother on March 15, 1943. You provided a copy of a Marriage Certificate to show that on August 19, 1949, you married **[Husband]**. In addition, you submitted a copy of the Death Certificate for **[Name of Natural Mother Assuming Employee's Last Name]** stating that she died on May 2, 1990. The record includes a copy of **[Employee]**'s Death Certificate showing he died on October 9, 1990.

You also submitted the following additional documentation on January 20, 2003: (1) A copy of **[Employee's]** Last Will and Testament indicated that you, **[Claimant]**, were the adult daughter and named her as Personal Representative of the Estate; (2) Statements by Jeanne Findler McKinney and Jean M. Peterson acknowledged on January 17, 2003, indicated that you lived in a parent-child relationship with **[Employee]** since 1945; (3) A copy of an affidavit signed by **[Name of Natural Mother Assuming Employee's Last Name]** (duplicate) indicated that at the time of your mother's marriage to **[Employee]**, you took the name **[Name of Claimant Assuming Employee's Last Name]**.

You submitted additional employment documentation on January 27, 2003: (1) A copy of **[Employee]**'s TDY travel orders (duplicate); (2) A Memorandum of Appreciation dated February 11, 1972 from the Department of the Air Force commending **[Employee]** and other employees, for their support of the Blair Lake Project; (3) A letter of appreciation dated February 18, 1972 from the Department of the Army for **[Employee]**'s contribution to the Blair Lake Project; and (4) Magazine and newspaper articles containing photographs of **[Employee]**, which mention the work performed by the

U.S. Army Corps of Engineers in Anchorage, Alaska.

The record also includes correspondence, dated March 27, 2003, from a DOE representative. Based on a review of the documents you provided purporting that **[Employee]** was a Department of Energy contractor employee working for the U.S. Army Corps of Engineers on TDY in November, 1971, the DOE stated that the Blair Lake Project was not a DOE venture, observing that "[i]f Blair Lake Project had been our work, we would have found some reference to it."

On April 4, 2003, the Seattle district office recommended denial of your claim for benefits. The district office concluded that the evidence of record was insufficient to establish that **[Employee]** was a covered employee as defined under § 7384l(9)(A). *See* 42 U.S.C. § 7384l(9)(A). Further, **[Employee]** was not a member of the Special Exposure Cohort, as defined by § 7384l(14)(B). *See* 42 U.S. C. § 7384l(14)(B). Also, **[Employee]** was not a "covered employee with silicosis" as defined under §§ 7384r(b) and 7384r(c). *See* 42 U.S.C. §§ 7384r(b) and (c). Lastly, the recommended decision found that you are not entitled to compensation under § 7384s. *See* 42 U.S.C. § 7384s.

On April 21, 2003, the Final Adjudication Branch received your letter of objection to the recommended decision and attachments. First, you contended that the elements of the December 10, 2002 Remand Order were fulfilled because you submitted a copy of your mother's death certificate and further proof that **[Employee]** was your stepfather; and that the letter from the district office on April 4, 2003 "cleared that question on page three – quote 'Our records show that the Corps of Engineers was a prime AEC contractor at Amchitka.'"

Second, you stated that further clarification was needed as to the condition you were claiming. You submitted a death certificate for **[Employee]** showing that he died due to bronchogenic cancer of the lung, small cell type, and noted that that was the condition you alleged as the basis of your claim on your first Form, associated with your claim under the EEOICPA.

Third, you alleged that, in **[Employee]**'s capacity as a "Mobile Industrial Equipment Mechanic" for the Army Corps of Engineers, "he was required to work not only for the DOD (Blair Lake project) but also for DOE on the Amchitka program. For example: on March 5, 1968 he was sent to Seward, Alaska to 'Inspect equipment going to Amchitka.' He was sent from the Blair Lake project (DOD) to Seward for the specified purpose of inspecting equipment bound for Amchitka (DOE). Thus, the DOE benefited from my father's [Corp of Engineers] expertise/service while on 'loan' from the DOD. Since the closure of the Amchitka project (DOE), the island has been restored to its original condition. . . . Therefore, my dad's trip to Amchitka to inspect equipment which might have been used at the Blair Lake project benefited not only DOD but also DOE. In the common law, this is known as the 'shared Employee' doctrine, and it subjects both employers to liability for various employment related issues."

On May 21, 2003, the Final Adjudication Branch received your letter dated May 21, 2003, along with various attachments. You indicated that the U.S. Army Corps of Engineers was a contractor to the DOE for the Amchitka Project, based upon page 319 of an unclassified document you had previously submitted in March 2002. Further, you indicated that **[Employee]** had traveled to Seward, Alaska to inspect equipment used at on-site operations for use on Amchitka Island by the Corps of Engineers for the DOE project, and referred to the copy of the Corps of Engineers TDY for Seward travel you submitted to the Final Adjudication Branch with your letter of April 18, 2003. Also, you indicated that **[Employee]** traveled to Amchitka, Island in November 1972 to inspect the equipment referenced above, which had been shipped from Seward, Alaska. You indicated that **[Employee]** was a mobile industrial equipment mechanic, and that his job required him to travel. You attached the following documents in support of your contention that the equipment **[Employee]** inspected could have included equipment belonging to the Corps of Engineers: Job Description, Alaska District, Corps of Engineers (previously submitted), and an Employee Performance Appraisal.

In addition, you indicated **[Employee]** was required to travel to remote sites throughout Alaska in order to perform his job with the Corps of Engineers, and in support of this you referred to your electronic mail sent to the Seattle District Office on January 7, 2003. You indicated that, since **[Employee]** was required to travel to Amchitka as a part of his regular duties as a mobile industrial equipment mechanic, it was possible that the equipment he inspected on the November 15, 1971 trip to Amchitka included equipment owned by the Corps as well as inspection of equipment owned by private contractors. You attached a copy of a document entitled, "Affidavit," dated May 21, 2003, signed by Erwin L. Long. Mr. Long stated that he was head of the Foundations Material Branch for the Corps of Engineers at the time of his retirement, and that in 1971 he had been Head of the Rock Design Section. Mr. Long indicated that he did not spend any time on Amchitka Island, that he had known **[Employee]** since 1948, and that he "believe[d]" **[Employee]**'s travel to Amchitka for his job would have required him to track equipment belonging to the Corps of Engineers, and that **[Employee]** would also have "performed required maintenance on the equipment before preparing [it] for shipping off Amchitka Island." Mr. Long also stated that **[Employee]** would not talk about his work on Amchitka since it was classified. Finally, you attached a TDY dated March 4, 1968, as well as a travel voucher/subvoucher dated March 15, 1968, to support that **[Employee]**'s mission to Amchitka had been completed.

FINDINGS OF FACT

1. On July 31, 2001, **[Claimant]** filed a claim for survivor benefits under the EEOICPA as the daughter of **[Employee]**.

2. **[Employee]** was diagnosed with small cell bronchogenic carcinoma of the lung and chronic silicosis.

3. **[Employee]** was employed by the U.S. Army Corps of Engineers for the period from July 25, 1944 to August 11, 1952, at Fort Richardson, Alaska; and from August 11, 1952 to May 30, 1975 at Elmendorf Air Force Base, Alaska.

4. **[Employee]**'s employment for the U.S. Army Corps of Engineers on TDY assignment at the Amchitka Island, Alaska site in November 1971 was in conjunction with a Department of Defense venture, the Blair Lakes Project.

CONCLUSIONS OF LAW

The EEOCIPA implementing regulations provide that a claimant may object to any or all of the findings of fact or conclusions of law, in the recommended decision. 20 C.F.R. § 30.310. Further, the regulations provide that the Final Adjudication Branch will consider objections by means of a review of the written record. 20 C.F.R. § 30.312. The Final Adjudication Branch reviewer will review the record forwarded by the district office and any additional evidence and/or argument submitted by the claimant. 20 C.F.R. § 30.313. Consequently, the Final Adjudication Branch will consider the overall evidence of record in reviewing the written record.

In order to be awarded benefits under the Energy Employees Occupational Illness Compensation Program Act, the covered employee (or his/her eligible survivors), must first establish that the employee has been diagnosed with beryllium illness, cancer, or chronic silicosis. *See* 42 U.S.C. § 7384l(15), 20 C.F.R. § 30.110(a). The evidence to show proof of an occupational illness is not in dispute in this case. The medical evidence establishes that **[Employee]** was diagnosed with cancer (bronchogenic cancer of the lung, small cell type) and chronic silicosis. Consequently, **[Employee]** was diagnosed with two illnesses potentially covered under the Act.

Employees of a DOE contractor (or their eligible survivors) are entitled under the EEOICPA to seek compensation for a cancer as a member of the Special Exposure Cohort (SEC) or through a determination that they incurred cancer that was at least as likely as not related to employment at a DOE facility. 42 U.S.C. §§ 7384l(14), 7384l(9)(B)(ii)(II). To be included in the SEC, a DOE employee, DOE contractor employee, or atomic weapons employee must have been employed for an aggregate of 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee or employed before January 1, 1974, by the DOE or a DOE contractor or subcontractor on Amchitka Island, Alaska, and have been exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests. 42 U.S.C. § 7384l(14). To qualify as a covered employee with cancer, members of the SEC need only establish that they contracted a "specified cancer", designated in section 7384l(17) of the EEOICPA, after beginning employment at a DOE facility or atomic weapons employer facility.

While the EEOICPA does not contain a specific definition of a DOE contractor, it does contain a definition of a DOE contractor employee that, in effect, defines what a DOE contractor is. Section 7384l(11) of the EEOICPA defines a DOE contractor employee as:

(A) An individual who is or was in residence at a Department of Energy facility as a researcher for one or more periods aggregating at least 24 months.
(B) An individual who is or was employed at a Department of Energy facility by-
    (i) an entity that contracted with the Department of Energy to provide

management and operating, management and integration, or environmental remediation at the facility; or
(ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

The question presented in this case is whether **[Employee]**, an employee of the U.S. Army Corps of Engineers was, during the time he spent on Amchitka Island, providing management and operation, management and integration or environmental remediation services under a contract between the DOE and the Army Corps of Engineers.

The undersigned notes that the Atomic Energy Commission's Managers Completion Report refers to the U.S. Army Corp of Engineers, as a prime contractor for work on Milrow and Cannikin. The work to be performed under that contract consisted of "engineering, procurement, construction administration and inspection."

[Employee]'s "Request and Authorization for TDY Travel of DOD Personnel," initiated on November 10 and approved on November 11, 1971, was for the purpose of three days work on Amchitka Island, Alaska, for the Department of Defense, Alaska District Corps of Engineers. The purpose of the TDY was to "examine equipment for potential use on Blair Lake Project."

You submitted the following new documents along with your letter to the Final Adjudication Branch dated May 21, 2003: Employee Performance Appraisal for the period February 1, 1966 to January 31, 1967; Affidavit of Erwin L. Long dated May 21, 2003; Request and Authorization for Military Personnel TDY Travel and Civilian Personnel TDY and PCS Travel, dated March 4, 1968; and Travel Voucher or Subvoucher, dated March 15, 1968. None of the documents submitted establish that **[Employee]** was on Amchitka Island providing services pursuant to a contract with the DOE.

The preponderance of the evidence in this case supports the conclusion that **[Employee]** was on Amchitka Island in November 1971 for the sole purpose of inspecting equipment to be used by the Department of Defense on its Blair Lake Project. The documentation of record refers to the Blair Lake Project as a Department of Defense project, and the DOE noted in correspondence dated March 27, 2003, that research was not able to verify that Blair Lake was a DOE project.

While the DOE indicated that **[Employee]** was issued a dosimetry badge, such evidence may be used to establish that he was present on Amchitka Island, not to establish that he was a covered DOE employee. Therefore, **[Employee]**'s presence on Amchitka Island was to perform work for the Department of Defense, and not pursuant to a contract between the DOE and the U.S. Army Corps of Engineers.

The evidence is also insufficient to show covered employment under § 7384r(c) and (d) of the EEOICPA for chronic silicosis. To be a "covered employee with chronic silicosis" it must be established that the employee was:

A DOE employee or a DOE contractor employee, who was present for a number of workdays aggregating at least 250 work days during the mining of tunnels at a DOE facility located in Nevada or Alaska for test or experiments related to an atomic weapon.

See 42 U.S.C. § 7384r(c) and (d); 20 C.F.R. § 30.220(a). Consequently, even if the evidence showed DOE employment (which it does not since **[Employee]** worked for the DOD), he was present only

three days on Amchitka, which is not sufficient for the 250 days required under the Act as a covered employee with silicosis.

The undersigned notes that in your objection to the recommended decision, you referred to a "shared employee" doctrine which you believe should be applied to this claim. You contend that on March 5, 1968, **[Employee]** was sent to Seward, Alaska to "Inspect equipment going to Amchitka, which might have been used at the Blair Lake project [to benefit] not only DOD but also DOE." No provision in the Act refers to a "shared employee" doctrine. Given the facts of this case, coverage could only be established if **[Employee]** was on Amchitka Island providing services pursuant to a contract with the DOE, evidence of which is lacking in this case.

It is the claimant's responsibility to establish entitlement to benefits under the EEOICPA. The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of each and every criterion under any compensable claim category set forth in section 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing the Office of Workers' Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

Although you submitted medical evidence to show covered illnesses due to cancer and chronic silicosis, the evidence of record is insufficient to establish that **[Employee]** engaged in covered employment. Therefore, your claim must be denied for lack of proof of covered employment under the EEOICPA.

Seattle, Washington

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA Fin. Dec. No. 27798-2003 (Dep't of Labor, June 20, 2003)

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 (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claims for benefits are denied.

STATEMENT OF THE CASE

On April 11, 2002, **[Claimant 1]** filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA), stating that he was the son of **[Employee]**, who was diagnosed with pharyngeal cancer. An additional claim followed thereafter from **[Claimant 2]** on October 20, 2002. **[Claimant 1]** also completed a Form EE-3, Employment History, indicating that **[Employee]** worked for Standard Oil Company, from

1950 to 1961; the State of Alaska as Deputy Director of Veterans Affairs, from 1961 to 1964; the State of Alaska Department of Military Affairs, Alaska Disaster Office, from 1965 to 1979 (where it was believed he wore a dosimetry badge); and, for the American Legion from 1979 to 1985.

In correspondence dated June 24, 2002, a representative of the Department of Energy (DOE) indicated that they had no employment information regarding **[Employee]**, but that he had been issued film badges at the Amchitka Test Site on the following dates: October 28, 1965; September 30, 1969; and, September 21, 1970. You also submitted a completed Form EE-4 (Employment Affidavit) signed by Don Lowell, your father's supervisor at the State of Alaska, Department of Public Safety, Division of Civil Defense. According to Mr. Lowell, your father was a radiological officer for the State of Alaska and accompanied him to Amchitka Island for Project Longshot on November 29, 1965, and the Milrow Test on October 2, 1969, as a representative of the State of Alaska.

Additional documentation submitted in support of your claim included copies of your birth certificates, a marriage certificate documenting **[Name of Claimant 2 at Birth]**'s marriage to **[Husband]**, and the death certificate for **[Employee]**, indicating that he was widowed at the time of his death on May 10, 1993. In addition, you provided medical documentation reflecting a diagnosis of squamous cell carcinoma of the pharyngeal wall in November 1991.

On November 8, 2002, the Seattle district office issued a recommended decision that concluded that **[Employee]** was a covered employee as defined in § 7384l(9)(A) of the Act and an eligible member of the Special Exposure Cohort as defined in § 7384l(14)(B) of the EEOICPA, who was diagnosed as having a specified cancer, specifically cancer of the hypopharynx, as defined in § 7384l(17) of the Act. *See* 42 U.S.C. 7384l(9)(A), (14)(B), (17). The district office further concluded that you were eligible survivors of **[Employee]** as outlined in § 7384s(e)(3) of the Act, and that you were each entitled to compensation in the amount of $75,000 pursuant to § 7384s(a)(1) and (e)(1) of the EEOICPA. *See* 42 U.S.C. §§ 7384s(a)(1) and (e)(1).

On December 20, 2002, the Final Adjudication Branch issued a Remand Order in this case on the basis that the evidence of record did not establish that **[Employee]** was a member of the "Special Exposure Cohort," as required by the Act. The Seattle district office was specifically directed to determine whether the Department of Energy and the State of Alaska, Department of Public Safety, Division of Civil Defense, had a contractual relationship.

In correspondence dated January 17, 2003, Don Lowell elaborated further on your father's employment and his reasons for attending the nuclear testing on Amchitka Island. According to Mr. Lowell, the Atomic Energy Commission (AEC) invited the governors of Alaska to send representatives to witness all three tests on Amchitka Island (Longshot, Milrow, and Cannikin). As such, **[Employee]** attended both the Longshot and Milrow tests as a guest of the Atomic Energy Commission, which provided transportation, housing and food, and assured the safety and security of those representatives.

On February 4, 2003, the district office received an electronic mail transmission from Karen Hatch, Records Management Program Officer at the National Nuclear Security Agency. Ms. Hatch indicated that she had been informed by the former senior DOE Operations Manager on Amchitka Island that escorts were not on the site to perform work for the AEC, but were most likely there to provide a service to the officials from the State of Alaska.

In correspondence dated February 11, 2003, a representative of the State of Alaska, Department of

Public Safety, Division of Administrative Services, indicated that there was no mention of Amchitka or any sort of agreement with the Department of Energy in **[Employee]**'s personnel records, but that the absence of such reference did not mean that he did not go to Amchitka or that a contract did not exist. He further explained that temporary assignments were not always reflected in these records and suggested that the district office contact the Department of Military and Veterans Affairs to see if they had any record of an agreement between the State of Alaska and the DOE. By letter dated March 13, 2003, the district office contacted the Department of Military and Veterans Affairs and requested clarification as to **[Employee]**'s employment with the State of Alaska and assignment(s) to Amchitka Island. No response to this request was received.

On April 16, 2003, the S eattle district office recommended denial of your claims. The district office concluded that you did not submit employment evidence as proof that **[Employee]** was a member of the "Special Exposure Cohort" as defined by § 7384l(14)(B) of the Act, as the evidence did not establish that he had been present at a covered facility as defined under § 7384l(12) of the Act, while working for the Department of Energy or any of its covered contractors, subcontractors or vendors as defined under § 7384l(11) of the Act, during a covered time period. *See* 42 U.S.C. § 7384l(11), (12). The district office further concluded that you were not entitled to compensation as outlined under § 7384s(e)(1) of the Act. *See* 42 U.S.C. § 7384s(e)(1).

FINDINGS OF FACT

1. On April 11 and October 20, 2002, **[Claimant 1]** and **[Claimant 2]**, respectively, filed claims for survivor benefits under the EEOICPA as the children of **[Employee]**.

2. **[Employee]** was diagnosed as having squamous cell carcinoma of the hypopharynx.

3. **[Employee]** was employed by the State of Alaska, Civil Defense Division, and was present on Amchitka Island for Project Longshot on November 29, 1965, and the Milrow Test on October 2, 1969.

4. **[Employee]**'s employment with the State of Alaska, Civil Defense Division, on assignment to Amchitka Island, Alaska, was as a representative of the governor of Alaska.

CONCLUSIONS OF LAW

The undersigned has reviewed the recommended decision issued by the Seattle district office on April 16, 2003. I find that you have not filed any objections to the recommended decision as provided by § 30.316(a) of the regulations, and that the 60-day period for filing such objections, as provided for in § 30.310(a) has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

In order to be awarded benefits under the Energy Employees Occupational Illness Compensation Program Act, the covered employee (or his/her eligible survivors), must first establish that the employee has been diagnosed with beryllium illness, cancer, or chronic silicosis. *See* 42 U.S.C. § 7384l(15), 20 C.F.R. § 30.110(a). The evidence to show proof of an occupational illness is not in dispute in this case. The medical evidence establishes that **[Employee]** was diagnosed as having squamous cell carcinoma of the hypopharynx. Consequently, **[Employee]** was diagnosed with an illness covered under the Act.

Employees of a DOE contractor (or their eligible survivors) are entitled under the EEOICPA to seek compensation for a cancer as a member of the Special Exposure Cohort (SEC) or through a determination that they incurred cancer that was at least as likely as not related to employment at a DOE facility. 42 U.S.C. §§ 7384l(14), 7384l(9)(B)(ii)(II). To be included in the SEC, a DOE employee, DOE contractor employee, or atomic weapons employee must have been employed for an aggregate of 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, or employed before January 1, 1974, by the DOE or a DOE contractor or subcontractor on Amchitka Island, Alaska, and exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests. 42 U.S.C. § 7384l(14). To qualify as a covered employee with cancer, members of the SEC need only establish that they contracted a "specified cancer," designated in § 7384l(17) of the EEOICPA, after beginning employment at a DOE facility or atomic weapons employer facility.

While the EEOICPA does not contain a specific definition of a DOE contractor, it does contain a definition of a DOE contractor employee that, in effect, defines what a DOE contractor is. Section 7384l(11) of the EEOICPA defines a DOE contractor employee as:

(A) An individual who is or was in residence at a Department of Energy facility as a researcher for one or more periods aggregating at least 24 months.
(B) An individual who is or was employed at a Department of Energy facility by-
    (i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or
    (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

The question presented in this case is whether **[Employee]**, an employee of the State of Alaska, was, during the time he spent on Amchitka Island, providing management and operation, management and integration or environmental remediation services under a contract between the DOE and the State of Alaska.

The undersigned notes that the Atomic Energy Commission's Managers Completion Report refers to the State of Alaska as a prime contractor for work on Milrow and Cannikin. The work to be performed under that contract consisted of police protection.

According to Don Lowell, **[Employee]**'s supervisor at the time of his assignment to Amchitka Island, your father was not an employee of any contractor or the AEC at the time of his visit to Amchitka Island. Rather, he was an invited guest of the AEC requested to witness the atomic testing as a representative of the governor of Alaska.

The preponderance of the evidence in this case supports the conclusion that **[Employee]** was on Amchitka Island for the sole purpose of witnessing the atomic testing as a representative of the governor of Alaska. While the DOE indicated that **[Employee]** was issued a dosimetry badge on three occasions, such evidence may be used to establish that he was present on Amchitka Island, not to establish that he was a covered DOE employee. Therefore, **[Employee]**'s presence on Amchitka Island was to perform work for the State of Alaska, as a representative of the governor, and not pursuant to a contract between the DOE and the State of Alaska.

It is the claimant's responsibility to establish entitlement to benefits under the EEOICPA. The

EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of each and every criterion under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing the Office of Workers' Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

Although you submitted medical evidence to show a covered illness manifested by squamous cell carcinoma of the hypopharynx, the evidence of record is insufficient to establish that **[Employee]** engaged in covered employment. Therefore, your claims must be denied for lack of proof of covered employment under the EEOICPA.

Seattle, Washington

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA Fin. Dec. No. 34291-2003 (Dep't of Labor, August 1, 2003)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

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 stated below, your claim for benefits is denied.

STATEMENT OF THE CASE

On August 2, 2002, you filed a Claim for Benefits under the EEOICPA, form EE-1, through the Paducah Resource Center. On the EE-1 form, you indicated that the condition for which you filed your claim was kidney cancer. You submitted medical records from 1993 to 2001 that showed you had a nephrectomy in April of 1996. Medical records from Western Baptist Hospital from April of 1996 included an operative report for a right radical nephrectomy and a pathology report that confirmed the diagnosis of large renal cell carcinoma.

You also submitted a Form EE-3 indicating that you were employed as a conservation office for the Kentucky Department of Fish and Wildlife at the Paducah Gaseous Diffusion Plant (GDP) from 1969 to 1973. You submitted a Department of Energy (DOE) License for Non-Federal Use of Property for the purpose of wildlife development beginning September 4, 1953 and continuing indefinitely. You also submitted a DOE License for Non-Federal Use of Property for the period January 1, 1990 to December 31, 1995, and you submitted a DOE License for Non-Federal Use of Property for bow deer hunts for the period January 1, 1996 to December 31, 2000.

In addition, you submitted a copy of the five year plan and budget for the West Kentucky Wildlife

Management Area for the period July 1, 1985 to June 30, 1990. You submitted an April 4, 1958 letter from the "Assistant General Counsel" noting that a corrected Quitclaim Deed from the United States of America to the State of Kentucky had been prepared and an August 21, 1989 report from the General Services Administration concluding that the State of Kentucky, Fish and Wildlife Division, was in compliance with the terms of the conveyance of these lands. You submitted an October 6, 1959 letter from Atomic Energy Commission (AEC) referencing a grant to the Commonwealth of Kentucky and the Department of Fish and Wildlife Resources of a license and permission to enter a portion of the AEC's lands for the purpose of developing the wildlife on the property and conducting bird dog field trials. This letter extended the license and permission to additional lands. In an October 14, 1959 letter, the Director of the Division of Game recommended to the Governor of Kentucky that the license and permission to use the AEC lands be accepted. He noted that the Division would have no pecuniary obligation for use of the land, apart from patrolling, posting and protecting the land licensed for use by the Division of Fish and Wildlife Resources.

You submitted forms EE-4 from Shirley Beauchamp and Phillip Scott Beauchamp stating you worked for the Department of Fish and Wildlife at the Paducah GDP from 1968 to 1973. Social Security Earnings records were submitted showing employment with the state of Kentucky from 1971 to 1973. The Department of Energy advised the district office, however, that DOE had no information regarding your employment.

On November 15, 2002, the district office issued a recommended decision concluding that you were not employed by an entity that contracted with the DOE to provide "management and operating, management and integration, or environmental remediation" as set forth in 42 U.S.C. § 7384l(11)(B)(i) and (ii) and that, accordingly, you were not a covered DOE contractor. The district office therefore recommended that benefits be denied.

On December 23, 2002, you filed an objection to the recommended decision and requested a hearing. An oral hearing was held on February 26, 2003. At the hearing, you testified that you worked for the Kentucky Department of Fish and Wildlife from 1971 to 1973 and that you worked at the Paducah GDP and its surrounding grounds. You testified that your duties included patrolling the perimeter of the fenced portion of the plant and building two bridges and that you entered the plant through the main gate on a regular basis to remove animals that got into the GDP. You testified that you did not enter any of the buildings inside the fenced area of the GDP. You described other duties you performed during this period of employment, and you testified that you checked hunting and fishing licenses and controlled hunting at the reserve. You testified also that you participated in game sampling in conjunction with the DOE prior to the hunting season and that DOE would collect specific body parts provided by the Department of Fish and Wildlife and ship them for sampling.

FINDINGS OF FACT

You filed a claim for benefits under the EEOICPA on August 2, 2002. You were employed by the State of Kentucky, Department of Fish and Wildlife from 1971 to 1973. You were diagnosed with kidney cancer on or about April 13, 1996. You have not established that you worked in employment covered under the EEOICPA.

CONCLUSIONS OF LAW

A covered employee is eligible for compensation under the EEOICPA for an "occupational illness,"

which is defined in § 7384l(15) of the EEOICPA as "a covered beryllium illness, cancer referred to in § 7384l(9)(B) of this title, specified cancer, or chronic silicosis, as the case may be." 42 U.S.C. § 7384l(15). A "covered employee" is eligible for compensation under EEOICPA for a specified "occupational illness." A "covered employee," as defined in §§ 7384l(1),7384l(3),7384l(7),7384l(9), 7384l(11) and § 7384r of the EEOICPA, includes employees of private companies (an entity "other than the United States", per § 7384l(4)) which provided radioactive materials to the United States for the production of atomic weapons, employees at Department of Energy facilities or test sites (§ 7384l(12)), and employees of Department of Energy contractors, subcontractors, or beryllium vendors. 42 U.S.C. §§ 7384l(1),(3),(7),(9), (11); 7384r. Section 7384(l)(11)(B)(I and ii) defines a "Department of Energy contractor employee" to include

"An individual who is or was employed at a Department of Energy facility by—

(i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or

(ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility."

The DEEOIC has further addressed the issues of how a "contractor or subcontractor" may be defined, as well as whether employees of state or federal governments may be considered DOE contractor employees, in EEOICPA Bulletins No. 03-27 (issued May 28, 2003) and No. 03-26 (issued June 3, 2003). The following definitions have been adopted by the DEEOIC:

Contractor – An entity engaged in a contractual business arrangement with the Department of Energy to provide services, produce materials or manage operations at a beryllium vendor or Department of Energy facility.

Subcontractor – An entity engaged in a contracted business arrangement with a beryllium vendor contractor or a contractor of the Department of Energy to provide a service at a beryllium vendor or Department of Energy facility.

Contract - An agreement to perform a service in exchange for compensation, usually memorialized by a memorandum of understanding, a cooperative agreement, an actual written contract, or any form of written or implied agreement, is considered a contract for the purpose of determining whether an entity is a "DOE contractor."

For a civilian employee of a state or federal government agency to be considered a DOE contractor employee, it must be shown that the government agency employing that individual entered into a contract with the DOE for the accomplishment of one or more services it was not statutorily obligated to perform and that the DOE compensated the agency for that activity.

There is no evidence that the DOE compensated the State of Kentucky, Department of Fish and Wildlife Resources, for any services on behalf of the Department of Energy. The State of Kentucky was simply given permission to use federal land. The fact that the State of Kentucky was not required to provide any fees for use of federal property does not, conversely, show that the Department of Energy compensated the State of Kentucky for services provided by the State. The evidence of record

shows simply that the Department of Energy or AEC gave permission for the State of Kentucky to use certain of its lands in order to conduct bird dog trials or hunting or fishing or similar activities. The Fish and Wildlife division was responsible for the activities that it would otherwise be responsible for under state law. The quitclaim deed to certain lands was not compensation to the State of Kentucky for any services performed for the Department of Energy, but was conveyed to the State of Kentucky for the purpose of management for wildlife purposes. The mere presence of an individual on DOE-owned property does not confer covered employment status.

For the foregoing reasons, the undersigned must find that you have not established your claim for compensation under the EEOICPA and hereby denies your claim for compensation.

Cleveland, Ohio

Anthony Zona

Hearing Representative

EEOICPA Fin. Dec. No. 30971-2002 (Dep't of Labor, March 15, 2004)

NOTICE OF FINAL DECISION

REVIEW OF THE WRITTEN RECORD

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 stated below, your claim for benefits is denied.

STATEMENT OF THE CASE

On June 10, 2002, you filed a Claim for Survivor Benefits under the EEOICPA, form EE-2, with the Denver district office, as the spouse of the employee, for multiple myeloma. You indicated on the EE-3 form that your husband was employed by the U.S. Coast and Geodetic Survey at various locations, including the Nevada Test Site, from early 1951 to December 1953.

You also submitted marriage certificate and death certificates establishing that you were married to the employee from March 7, 1953 until his death on November 5, 1999, tax forms confirming his employment with the U.S. Coast and Geodetic Survey in 1951 and 1952 and a document from the Nevada Field Office of the Department of Energy (DOE) indicating that they had records of your husband having been exposed to radiation in 1951 and 1952. Additionally, you submitted a document stating that your claim under the Radiation Exposure Compensation Act had been approved in the amount of $75,000; you stated that you had declined to accept the award and that was confirmed by a representative of the Department of Justice on August 12, 2002.

On July 1, 2002, you were informed of the medical evidence needed to support that your husband had cancer. You submitted records of medical treatment, including a pathology report of April 19, 1993, confirming that he was diagnosed with multiple myeloma.

On July 22, 2002, a DOE official stated that, to her knowledge, your husband's employers were not Department of Energy contractors or subcontractors. On July 29, 2002, you were advised of the type of evidence you could submit to support that your husband had employment which would give rise to coverage under the Act, and given 30 days to submit such evidence. You submitted statements from co-workers confirming that he did work at the Nevada Test Site for a period from October to December 1951 and again for a few weeks in the spring of 1952.

On August 29, 2002, the district office issued a recommended decision that concluded that you were not entitled to compensation benefits because the evidence did not establish that your husband was a covered employee.

By letter dated September 20, 2002, your representative objected to the recommended decision, stating that your husband was a covered employee in that he worked at the Test Site while employed by the U.S. Coast and Geodetic Survey, which was a contractor of the Atomic Energy Commission (AEC), a predecessor agency of the DOE. The representative also submitted documents which indicated that the U.S. Coast and Geodetic Survey performed work, including offering technical advice and conducting surveys, for other government agencies, including the AEC and the military, and that it was covered by a cooperative agreement between the Secretary of Commerce and the Secretary of the Army. On April 1, 2003, the case was remanded to the district office for the purpose of determining whether your husband's work at the Nevada Test Site was performed under a "contract" between the DOE and the U.S. Coast and Geodetic Survey.

The documents submitted by your representative were forwarded to the DOE, which responded on May 28, 2003 that dosimetry records existed for your husband "showing that he was with the USC&GS but after further research it was established that the USC&GS was in fact not a contractor or subcontractor of the AEC during those years." The documents were also reviewed by the Branch of Policy, Regulations and Procedures in our National Office. On November 7, 2003, the district office issued a recommended decision to deny your claim. The decision stated that the evidence submitted did not support that the U.S. Coast and Geodetic Survey was a contractor of the DOE at the Nevada Test Site, and, concluded that you were not entitled to benefits under § 7384s of the EEOICPA as your husband was not a covered employee under § 7384l. 42 U.S.C. §§ 7384l and 7384s.

In a letter dated January 7, 2004, your representative objected to the recommended decision. He did not submit additional evidence but did explain why he believes the evidence already submitted was sufficient to support that your husband was a covered employee under the Act. Specifically, he stated that the evidence supported that your husband worked at the Nevada Test Site in 1951 and 1952 in the course of his employment with the U.S. Coast and Geodetic Survey, an agency which was performing a survey at the request of the AEC, and that the latter agency issued him a badge which established that he was exposed to radiation while working there. He argued that one must reasonably conclude from these facts that his work at the Nevada Test Site did constitute covered employment under the EEOICPA.

FINDINGS OF FACT

You filed a claim for survivor benefits under the EEOICPA on June 10, 2002.

You were married to the employee from March 7, 1953 until his death on November 5, 1999.

Medical records, including a pathology report, confirmed he was diagnosed with multiple myeloma in April 1993.

In the course of his employment by the U.S. Coast and Geodetic Survey, your husband worked, and was exposed to radiation, at the Nevada Test Site, a DOE facility.

The evidence does not support, and the Department of Energy has denied, that the U.S. Coast and Geodetic Survey was a contractor of the DOE at the time your husband worked at the Nevada Test Site.

CONCLUSIONS OF LAW

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, pursuant to 20 C.F.R. § 30.310. The same section of the regulations provides that in filing objections, the claimant must identify his objections as specifically as possible. In reviewing any objections submitted, under 20 C.F.R. § 30.313, the Final Adjudication Branch will review the written record, any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. I have reviewed the record in this case and your representative's letter of January 2, 2004 and must conclude that no further investigation is warranted.

The purpose of the EEOICPA, as stated in its § 7384d(b), is to provide for "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." 42 U.S.C. § 7384d(b).

A "covered employee with cancer" includes, pursuant to § 7384l(9)(B) of the Act, an individual who is a "Department of Energy contractor employee who contracted…cancer after beginning employment at a Department of Energy facility." Under § 7384l(11), a "Department of Energy contractor employee" may be an individual who "was employed at a Department of energy facility by…an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or…a contractor or subcontractor that provided services, including construction and maintenance, at the facility." 42 U.S.C. § 7384l(9)(B), (11).

EEOICPA Bulletin NO. 03-26 states that "a civilian employee of a state or federal government agency can be considered a 'DOE contractor employee' if the government agency employing that individual is (1) found to have entered into a contract with DOE for the accomplishment of…services it was not statutorily obligated to perform, and (2) DOE compensated the agency for that activity." The same Bulletin goes on to define a "contract" as "an agreement that something specific is to be done in return for some payment or consideration."

Section 30.111(a) states that "Except where otherwise provided in the Act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category set forth in § 30.110." 20 C.F.R. § 30.111(a).

As noted above, the evidence supports that your husband was exposed to radiation while working for the U.S. Coast and Geodetic Survey at the Nevada Test Site in late 1951 and early 1952, that he was diagnosed with multiple myeloma in April 1993, and that you were married to him from March 7, 1953

until his death on November 5, 1999.

It does not reasonably follow from the evidence in the file that his work at the Nevada Test Site must have been performed under a "contract" between the U.S. Coast and Geodetic Survey and the AEC. Government agencies are not private companies and often cooperate with and provide services for other agencies without reimbursement. The DOE issued radiation badges to military personnel, civilian employees of other government agencies, and visitors, who were authorized to be on a site but were not DOE employees or DOE contractor employees. No evidence has been submitted that your husband's work at the Nevada Test Site was pursuant to a "contract" between the U.S. Coast and Geodetic Survey and the AEC and the DOE has specifically denied that his employing agency was a contractor or subcontractor at that time. Therefore, there is no basis under the Act to pay compensation benefits for his cancer.

For the foregoing reasons, the undersigned must find that you have not established your claim for compensation under the EEOICPA and hereby denies that claim.

Washington, DC

Richard Koretz

Hearing Representative

EEOICPA Fin. Dec. No. 34291-2003 (Dep't of Labor, August 1, 2003)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

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 stated below, your claim for benefits is denied.

STATEMENT OF THE CASE

On August 2, 2002, you filed a Claim for Benefits under the EEOICPA, form EE-1, through the Paducah Resource Center. On the EE-1 form, you indicated that the condition for which you filed your claim was kidney cancer. You submitted medical records from 1993 to 2001 that showed you had a nephrectomy in April of 1996. Medical records from Western Baptist Hospital from April of 1996 included an operative report for a right radical nephrectomy and a pathology report that confirmed the diagnosis of large renal cell carcinoma.

You also submitted a Form EE-3 indicating that you were employed as a conservation office for the Kentucky Department of Fish and Wildlife at the Paducah Gaseous Diffusion Plant (GDP) from 1969 to 1973. You submitted a Department of Energy (DOE) License for Non-Federal Use of Property for the purpose of wildlife development beginning September 4, 1953 and continuing indefinitely. You also submitted a DOE License for Non-Federal Use of Property for the period January 1, 1990 to December 31, 1995, and you submitted a DOE License for Non-Federal Use of Property for bow deer hunts for the period January 1, 1996 to December 31, 2000.

In addition, you submitted a copy of the five year plan and budget for the West Kentucky Wildlife Management Area for the period July 1, 1985 to June 30, 1990. You submitted an April 4, 1958 letter from the "Assistant General Counsel" noting that a corrected Quitclaim Deed from the United States of America to the State of Kentucky had been prepared and an August 21, 1989 report from the General Services Administration concluding that the State of Kentucky, Fish and Wildlife Division, was in compliance with the terms of the conveyance of these lands. You submitted an October 6, 1959 letter from Atomic Energy Commission (AEC) referencing a grant to the Commonwealth of Kentucky and the Department of Fish and Wildlife Resources of a license and permission to enter a portion of the AEC's lands for the purpose of developing the wildlife on the property and conducting bird dog field trials. This letter extended the license and permission to additional lands. In an October 14, 1959 letter, the Director of the Division of Game recommended to the Governor of Kentucky that the license and permission to use the AEC lands be accepted. He noted that the Division would have no pecuniary obligation for use of the land, apart from patrolling, posting and protecting the land licensed for use by the Division of Fish and Wildlife Resources.

You submitted forms EE-4 from Shirley Beauchamp and Phillip Scott Beauchamp stating you worked for the Department of Fish and Wildlife at the Paducah GDP from 1968 to 1973. Social Security Earnings records were submitted showing employment with the state of Kentucky from 1971 to 1973. The Department of Energy advised the district office, however, that DOE had no information regarding your employment.

On November 15, 2002, the district office issued a recommended decision concluding that you were not employed by an entity that contracted with the DOE to provide "management and operating, management and integration, or environmental remediation" as set forth in 42 U.S.C. § 7384l(11)(B)(i) and (ii) and that, accordingly, you were not a covered DOE contractor. The district office therefore recommended that benefits be denied.

On December 23, 2002, you filed an objection to the recommended decision and requested a hearing. An oral hearing was held on February 26, 2003. At the hearing, you testified that you worked for the Kentucky Department of Fish and Wildlife from 1971 to 1973 and that you worked at the Paducah GDP and its surrounding grounds. You testified that your duties included patrolling the perimeter of the fenced portion of the plant and building two bridges and that you entered the plant through the main gate on a regular basis to remove animals that got into the GDP. You testified that you did not enter any of the buildings inside the fenced area of the GDP. You described other duties you performed during this period of employment, and you testified that you checked hunting and fishing licenses and controlled hunting at the reserve. You testified also that you participated in game sampling in conjunction with the DOE prior to the hunting season and that DOE would collect specific body parts provided by the Department of Fish and Wildlife and ship them for sampling.

FINDINGS OF FACT

You filed a claim for benefits under the EEOICPA on August 2, 2002. You were employed by the State of Kentucky, Department of Fish and Wildlife from 1971 to 1973. You were diagnosed with kidney cancer on or about April 13, 1996. You have not established that you worked in employment covered under the EEOICPA.

CONCLUSIONS OF LAW

A covered employee is eligible for compensation under the EEOICPA for an "occupational illness," which is defined in § 7384l(15) of the EEOICPA as "a covered beryllium illness, cancer referred to in § 7384l(9)(B) of this title, specified cancer, or chronic silicosis, as the case may be." 42 U.S.C. § 7384l(15). A "covered employee" is eligible for compensation under EEOICPA for a specified "occupational illness." A "covered employee," as defined in §§ 7384l(1),7384l(3),7384l(7),7384l(9), 7384l(11) and § 7384r of the EEOICPA, includes employees of private companies (an entity "other than the United States", per § 7384l(4)) which provided radioactive materials to the United States for the production of atomic weapons, employees at Department of Energy facilities or test sites (§ 7384l(12)), and employees of Department of Energy contractors, subcontractors, or beryllium vendors. 42 U.S.C. §§ 7384l(1),(3),(7),(9), (11); 7384r. Section 7384(l)(11)(B)(I and ii) defines a "Department of Energy contractor employee" to include

"An individual who is or was employed at a Department of Energy facility by—

(i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or

(ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility."

The DEEOIC has further addressed the issues of how a "contractor or subcontractor" may be defined, as well as whether employees of state or federal governments may be considered DOE contractor employees, in EEOICPA Bulletins No. 03-27 (issued May 28, 2003) and No. 03-26 (issued June 3, 2003). The following definitions have been adopted by the DEEOIC:

Contractor – An entity engaged in a contractual business arrangement with the Department of Energy to provide services, produce materials or manage operations at a beryllium vendor or Department of Energy facility.

Subcontractor – An entity engaged in a contracted business arrangement with a beryllium vendor contractor or a contractor of the Department of Energy to provide a service at a beryllium vendor or Department of Energy facility.

Contract - An agreement to perform a service in exchange for compensation, usually memorialized by a memorandum of understanding, a cooperative agreement, an actual written contract, or any form of written or implied agreement, is considered a contract for the purpose of determining whether an entity is a "DOE contractor."

For a civilian employee of a state or federal government agency to be considered a DOE contractor employee, it must be shown that the government agency employing that individual entered into a contract with the DOE for the accomplishment of one or more services it was not statutorily obligated to perform and that the DOE compensated the agency for that activity.

There is no evidence that the DOE compensated the State of Kentucky, Department of Fish and Wildlife Resources, for any services on behalf of the Department of Energy. The State of Kentucky was simply given permission to use federal land. The fact that the State of Kentucky was not required to provide any fees for use of federal property does not, conversely, show that the Department of

Energy compensated the State of Kentucky for services provided by the State. The evidence of record shows simply that the Department of Energy or AEC gave permission for the State of Kentucky to use certain of its lands in order to conduct bird dog trials or hunting or fishing or similar activities. The Fish and Wildlife division was responsible for the activities that it would otherwise be responsible for under state law. The quitclaim deed to certain lands was not compensation to the State of Kentucky for any services performed for the Department of Energy, but was conveyed to the State of Kentucky for the purpose of management for wildlife purposes. The mere presence of an individual on DOE-owned property does not confer covered employment status.

For the foregoing reasons, the undersigned must find that you have not established your claim for compensation under the EEOICPA and hereby denies your claim for compensation.

Cleveland, Ohio

Anthony Zona

Hearing Representative

EEOICPA Fin. Dec. No. 75271-2007 (Dep't of Labor, August 29, 2007)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning the claimants' claims for survivor benefits under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, FAB accepts and approves the claims for compensation under Part B of EEOICPA.

STATEMENT OF THE CASE

On January 26, 2006, the claimants each filed a Form EE-2 claiming for survivor benefits under EEOICPA as surviving children of **[Employee]**, based on the condition of chondrosarcoma (bone cancer). They submitted a copy of **[Employee]**'s death certificate, which indicates his marital status was "divorced" at the time of his death on January 29, 2002 due to chondrosarcoma with lung metastases. They also provided copies of their birth certificates showing that they are children of **[Employee]**. **[Claimant #1]** also provided copies of her marriage certificates documenting her changes of name.

[Claimant #1 and Claimant #2] submitted medical evidence including a pathology report showing **[Employee]** had a diagnosis of metastatic high grade chondrosarcoma on December 19, 2001.

A representative of the Department of Energy (DOE) verified that **[Employee]** was employed by the U.S. Geological Survey (USGS) at the Grand Junction Field Office from August 8, 1951 to March 8, 1978, and stated that he was issued dosimetry badges associated with USGS at the Nevada Test Site on 66 separate occasions between November 5, 1958 and July 11, 1966. Additionally, other official government records including security clearances, applications for federal employment, and personnel actions were submitted, indicating that **[Employee]** was employed by USGS and resided in Mercury, Nevada from September 25, 1958 to June 11, 1962. Mercury, Nevada was a town that was within the perimeter of the Nevada Test Site and housed those who worked at the site.

On May 18, 2007, the Seattle district office issued a recommended decision to accept **[Claimant #1 and Claimant #2]**'s claims based on the employee's condition of chondrosarcoma. The district office concluded that the employee was a member of the Special Exposure Cohort (SEC), and was diagnosed with chondrosarcoma (bone cancer), which is a "specified" cancer under EEOICPA. The district office therefore concluded that **[Claimant #1 and Claimant #2]** were entitled to compensation in equal shares in the total amount of $150,000.00 under Part B.

The evidence of record includes letters received by FAB on May 23 and June 1, 2007, signed by **[Claimant #2 and Claimant #1**, respectively, whereby they both indicated that they have never filed for or received any payments, awards, or benefits from a lawsuit, tort suit, third party claim, or state workers' compensation program, based on the employee's condition. Further, they confirmed that they have never pled guilty to or been convicted of fraud in connection with an application for, or receipt of, federal or state workers' compensation.

On May 26 and June 6, 2007, FAB received written notification from **[Claimant #2 and Claimant #1]**, respectively, indicating that they waive all rights to file objections to the findings of fact and conclusions of law in the recommended decision.

After considering the evidence of record, FAB hereby makes the following:

FINDINGS OF FACT

1. On January 26, 2006, **[Claimant #1 and Claimant #2]** filed claims for survivor benefits under EEOICPA.
2. **[Claimant #1 and Claimant #2]** provided sufficient documentation establishing that they are the eligible surviving children of **[Employee]**.
3. A representative of DOE verified that **[Employee]** was issued dosimetry badges for his employment at the Nevada Test Site, a covered DOE facility, in association with USGS, a DOE contractor, from November 5, 1958 to July 11, 1966.
4. **[Employee]** was diagnosed with chondrosarcoma (bone cancer), which is a "specified" cancer under EEOICPA, on December 19, 2001, after beginning employment at a DOE facility.
5. The evidence of record supports a causal connection between the employee's cancer and his exposure to radiation and/or a toxic substance at a DOE facility while employed in covered employment under EEOICPA.

Based on the above-noted findings of fact, FAB hereby also makes the following:

CONCLUSIONS OF LAW

Section 30.316(a) of the regulations provides that, if the claimant waives any objections to all or part of the recommended decision, FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part. *See* 20 C.F.R. § 30.316(a). **[Claimant #1 and Claimant #2]** waived their right to file objections to the findings of fact and conclusions of law contained in the recommended decision issued on their claims for survivor benefits under EEOICPA.

On June 26, 2006, the Secretary of HHS designated a class of certain employees as an addition to the SEC: DOE employees or DOE contractor or subcontractor employees who worked at the Nevada Test Site between January 27, 1951 and December 31, 1962, for a number of work days aggregating at least 250 work days, either solely under this employment or in combination with work days within the

parameters (excluding aggregate work day requirements) established for other classes of employees included in the SEC, and who were monitored or should have been monitored. This addition to the SEC became effective July 26, 2006.

The employment evidence in this case is sufficient to establish that the employee was present at the Nevada Test Site for an aggregate of at least 250 work days, from September 1958 through at least November 2, 1962, and qualifies him as a member of the SEC. However, for this employment to be considered covered employment, it must also be determined that the employee was employed at a DOE facility by DOE, a DOE contractor, subcontractor or vendor. In this regard, the case was referred to the Branch of Policies, Regulations and Procedures (BPRP) for review and determination.

In its written determination dated August 6, 2007, BPRP indicated that a civilian employee of a state or federal government agency can be considered a "DOE contractor employee" if the government agency employing that individual is: (1) found to have entered into a contract with DOE for the accomplishment of services it was not statutorily obligated to perform; and (2) DOE compensated that agency for that activity. *See* EEOICPA Bulletin No. 03-26 (issued June 3, 2003). BPRP evaluated the evidence of record including the following pertinent documents:

- An October 5, 1956 letter from the Acting Director for USGS to the Director of Finance of the AEC's Albuquerque Operations Office, which states:

  > In accordance with an agreement between our respective agencies, an advance of funds $56,400 is requested to finance the 1957 fiscal year program to be performed by the Geological Survey for the Division of Military Application (DMA).[1]

- AEC Staff Paper 944/33. This September 1957 document shows clearly that it was the AEC's DMA that had oversight over the USGS geological work at the NTS.

- A document dated March 23, 1959, from the United States Department of the Interior Geological Survey summarizing a letter to the AEC Albuquerque Operations Office. The summary states in part:

  > Advised that your draft rewrite of Memorandum of Understanding No. AT(29-2)-474, has been reviewed and is acceptable to the GS except for following changes in Article IV, Budgeting & Finance. Also request that the amount available for NTS work in fiscal year 1959 be increased from $750,000 to 837,000 and that available for the GNOME program be increased from $85,000 to $91,000.

- A June 26, 1959 letter from the Director of USGS to **[Employee]**, complimenting him on his efforts at the NTS and forwarding to him a letter from the AEC's Albuquerque Operations Office in which the AEC provides general compliments to USGS for their work at NTS during 1958.

- A technical report entitled, "A Summary Interpretation of Geologic, Hydrologic, and Geophysical Data for Yucca Valley, Nevada Test Site, Nye County, NV," detailing the work and outcome of the work performed by USGS at the Nevada Test Site. The report states that the work was undertaken at the behest of the AEC and also states, "Compilation of data, preparation of illustration, and writing of the report were completed during the period of December 26,

1958 to January 10, 1959. Some of the general conclusions must be considered as tentative until more data are available."

- Correspondence from 1957 between USGS and the AEC Raw Materials Division (not the Division of Military Application). These letters show that USGS provided assistance to the AEC in prospecting for uranium on the Colorado Plateau and other locations.

These documents clearly show that there was an agreement for payment, by which USGS performed work for the AEC at the Nevada Test Site.

BPRP then turned to the final issue to be addressed, which was whether the work performed by USGS at the Nevada Test Site was work that USGS was not statutorily obligated to perform. A review of the USGS website[2] showed that since being founded in 1879, its statutory obligations have changed. Primarily, its function has been topographical mapping and gathering information pertaining to soil and water resources. Also, with advances in science, USGS has similarly evolved to meet these changes. The USGS website makes it clear that in the post-war era, USGS was grappling to keep up its scientific pace and that it did so, in part, with money from the Defense Department, the AEC, and from the states. Further, BPRP noted that since the formation of USGS, legislation has changed its statutory obligations over the years, whereby seven legal changes to the USGS statutory obligations pertain in some way to DOE or its predecessor agencies. These changes include: geothermal energy; gathering information on energy and mineral potential; geological mapping of potential nuclear reactor sites and geothermal mapping; working with the Energy Research and Development Administration, a DOE predecessor, on coal hydrology; consulting with DOE on locating a suitable geological repository for the storage of high-level radioactive waste and a retrievable storage option; monitoring the domestic uranium industry; and to cooperate with DOE and other federal agencies on "continental scientific drilling".

Today, USGS describes itself in the following manner:

As the Nation's largest water, earth, and biological science and civilian mapping agency, the U.S. Geological Survey (USGS) collects, monitors, analyzes, and provides scientific understanding about natural resource conditions, issues, and problems. The diversity of our scientific expertise enables us to carry out large-scale, multi-disciplinary investigations and provide impartial scientific information to resource managers, planners, and other customers.

As described, while providing geological support to DOE may be part of what USGS is statutorily obligated to perform in 2007, the totality of the evidence suggests this was not always true. Therefore, BPRP concluded that the Memorandum of Understanding between USGS and the AEC constituted a contract by which USGS provided services to the AEC that USGS was not statutorily obligated to perform through at least 1961, the last year of which their analysis pertained.

In considering the above analysis and determination, FAB concludes that **[Employee]** is a member of the SEC and was diagnosed with chondrosarcoma, which is a "specified" cancer (bone), and is, therefore, a "covered employee with cancer." *See* 42 U.S.C. §§ 7384l(14)(C), 7384l(17), 7384l(9)(A). **[Claimant #1 and Claimant #2]** are the eligible survivors of **[Employee]** as defined under EEOICPA, and are entitled to equal shares of the total compensation amount of $150,000.00. *See* 42 U.S.C. §§ 7384s(e) and 7384s(a)(1).

Accordingly, **[Claimant #1 and Claimant #2]** are each entitled to compensation in the amount of $75,000.00.

Seattle, Washington

Kelly Lindlief

Hearing Representative

Final Adjudication Branch

[1] The AEC's Division of Military Application (DMA) was the division responsible for nuclear weapons testing.

[2] Http://www.usgs.gov/aboutusgs/.

EEOICPA Fin. Dec. No. 30971-2002 (Dep't of Labor, March 15, 2004)

NOTICE OF FINAL DECISIONREVIEW OF THE WRITTEN RECORD

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 stated below, your claim for benefits is denied.

STATEMENT OF THE CASE

On June 10, 2002, you filed a Claim for Survivor Benefits under the EEOICPA, form EE-2, with the Denver district office, as the spouse of the employee, for multiple myeloma. You indicated on the EE-3 form that your husband was employed by the U.S. Coast and Geodetic Survey at various locations, including the Nevada Test Site, from early 1951 to December 1953.

You also submitted marriage certificate and death certificates establishing that you were married to the employee from March 7, 1953 until his death on November 5, 1999, tax forms confirming his employment with the U.S. Coast and Geodetic Survey in 1951 and 1952 and a document from the Nevada Field Office of the Department of Energy (DOE) indicating that they had records of your husband having been exposed to radiation in 1951 and 1952. Additionally, you submitted a document stating that your claim under the Radiation Exposure Compensation Act had been approved in the amount of $75,000; you stated that you had declined to accept the award and that was confirmed by a representative of the Department of Justice on August 12, 2002.

On July 1, 2002, you were informed of the medical evidence needed to support that your husband had cancer. You submitted records of medical treatment, including a pathology report of April 19, 1993, confirming that he was diagnosed with multiple myeloma.

On July 22, 2002, a DOE official stated that, to her knowledge, your husband's employers were not Department of Energy contractors or subcontractors. On July 29, 2002, you were advised of the type of evidence you could submit to support that your husband had employment which would give rise to coverage under the Act, and given 30 days to submit such evidence. You submitted statements from

co-workers confirming that he did work at the Nevada Test Site for a period from October to December 1951 and again for a few weeks in the spring of 1952.

On August 29, 2002, the district office issued a recommended decision that concluded that you were not entitled to compensation benefits because the evidence did not establish that your husband was a covered employee.

By letter dated September 20, 2002, your representative objected to the recommended decision, stating that your husband was a covered employee in that he worked at the Test Site while employed by the U.S. Coast and Geodetic Survey, which was a contractor of the Atomic Energy Commission (AEC), a predecessor agency of the DOE. The representative also submitted documents which indicated that the U.S. Coast and Geodetic Survey performed work, including offering technical advice and conducting surveys, for other government agencies, including the AEC and the military, and that it was covered by a cooperative agreement between the Secretary of Commerce and the Secretary of the Army. On April 1, 2003, the case was remanded to the district office for the purpose of determining whether your husband's work at the Nevada Test Site was performed under a "contract" between the DOE and the U.S. Coast and Geodetic Survey.

The documents submitted by your representative were forwarded to the DOE, which responded on May 28, 2003 that dosimetry records existed for your husband "showing that he was with the USC&GS but after further research it was established that the USC&GS was in fact not a contractor or subcontractor of the AEC during those years." The documents were also reviewed by the Branch of Policy, Regulations and Procedures in our National Office. On November 7, 2003, the district office issued a recommended decision to deny your claim. The decision stated that the evidence submitted did not support that the U.S. Coast and Geodetic Survey was a contractor of the DOE at the Nevada Test Site, and, concluded that you were not entitled to benefits under § 7384s of the EEOICPA as your husband was not a covered employee under § 7384l. 42 U.S.C. §§ 7384l and 7384s.

In a letter dated January 7, 2004, your representative objected to the recommended decision. He did not submit additional evidence but did explain why he believes the evidence already submitted was sufficient to support that your husband was a covered employee under the Act. Specifically, he stated that the evidence supported that your husband worked at the Nevada Test Site in 1951 and 1952 in the course of his employment with the U.S. Coast and Geodetic Survey, an agency which was performing a survey at the request of the AEC, and that the latter agency issued him a badge which established that he was exposed to radiation while working there. He argued that one must reasonably conclude from these facts that his work at the Nevada Test Site did constitute covered employment under the EEOICPA.

FINDINGS OF FACT

You filed a claim for survivor benefits under the EEOICPA on June 10, 2002.

You were married to the employee from March 7, 1953 until his death on November 5, 1999.

Medical records, including a pathology report, confirmed he was diagnosed with multiple myeloma in April 1993.

In the course of his employment by the U.S. Coast and Geodetic Survey, your husband worked, and

was exposed to radiation, at the Nevada Test Site, a DOE facility.

The evidence does not support, and the Department of Energy has denied, that the U.S. Coast and Geodetic Survey was a contractor of the DOE at the time your husband worked at the Nevada Test Site.

CONCLUSIONS OF LAW

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, pursuant to 20 C.F.R. § 30.310. The same section of the regulations provides that in filing objections, the claimant must identify his objections as specifically as possible. In reviewing any objections submitted, under 20 C.F.R. § 30.313, the Final Adjudication Branch will review the written record, any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. I have reviewed the record in this case and your representative's letter of January 2, 2004 and must conclude that no further investigation is warranted.

The purpose of the EEOICPA, as stated in its § 7384d(b), is to provide for "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." 42 U.S.C. § 7384d(b).

A "covered employee with cancer" includes, pursuant to § 7384l(9)(B) of the Act, an individual who is a "Department of Energy contractor employee who contracted…cancer after beginning employment at a Department of Energy facility." Under § 7384l(11), a "Department of Energy contractor employee" may be an individual who "was employed at a Department of energy facility by…an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or…a contractor or subcontractor that provided services, including construction and maintenance, at the facility." 42 U.S.C. § 7384l(9)(B), (11).

EEOICPA Bulletin NO. 03-26 states that "a civilian employee of a state or federal government agency can be considered a 'DOE contractor employee' if the government agency employing that individual is (1) found to have entered into a contract with DOE for the accomplishment of…services it was not statutorily obligated to perform, and (2) DOE compensated the agency for that activity." The same Bulletin goes on to define a "contract" as "an agreement that something specific is to be done in return for some payment or consideration."

Section 30.111(a) states that "Except where otherwise provided in the Act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category set forth in § 30.110." 20 C.F.R. § 30.111(a).

As noted above, the evidence supports that your husband was exposed to radiation while working for the U.S. Coast and Geodetic Survey at the Nevada Test Site in late 1951 and early 1952, that he was diagnosed with multiple myeloma in April 1993, and that you were married to him from March 7, 1953 until his death on November 5, 1999.

It does not reasonably follow from the evidence in the file that his work at the Nevada Test Site must have been performed under a "contract" between the U.S. Coast and Geodetic Survey and the AEC.

Government agencies are not private companies and often cooperate with and provide services for other agencies without reimbursement. The DOE issued radiation badges to military personnel, civilian employees of other government agencies, and visitors, who were authorized to be on a site but were not DOE employees or DOE contractor employees. No evidence has been submitted that your husband's work at the Nevada Test Site was pursuant to a "contract" between the U.S. Coast and Geodetic Survey and the AEC and the DOE has specifically denied that his employing agency was a contractor or subcontractor at that time. Therefore, there is no basis under the Act to pay compensation benefits for his cancer.

For the foregoing reasons, the undersigned must find that you have not established your claim for compensation under the EEOICPA and hereby denies that claim.

Washington, DC

Richard Koretz

Hearing Representative

EEOICPA Fin. Dec. No. 63258-2005 (Dep't of Labor, March 11, 2005)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning your claim for compensation under Part B of 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 for benefits is accepted.

STATEMENT OF THE CASE

On November 9, 2004, you filed a claim for survivor benefits under Part B of the EEOICPA, Form EE-2, wherein you indicated that your late husband, **[Employee]** (hereinafter referred to as the employee), suffered from a "Brain tumor-Oligodendroglioma" (brain cancer) and worked prior to January 1, 1974 on Amchitka Island.[1] On the EE-3 form (Employment History), you indicated that the employee was employed by the U.S. Geological Survey (USGS) from October 10, 1960 until February 13, 1980 and that the employee was involved in geological studies and the mapping of Amchitka Island. You submitted the employee's death certificate and your marriage certificate in support of your claim as the employee's eligible surviving beneficiary.

You submitted an October 11, 2004 letter from AMC Cancer Research Center, and an October 12, 2004 letter from Exempla Lutheran Medical Center, which indicated that the employee's medical records had been destroyed. You also submitted the employee's physician-signed death certificate, which indicated that the employee died on April 30, 1982 from "Brain tumor- Oligodendroglioma" at the AMC Cancer Research Center and that 6 years and 2 months was the interval between the onset of the disease and the employee's death. The district office concluded that the employee's death certificate was sufficient to establish that the employee was diagnosed with brain cancer on March 2, 1976.

The district office searched the Oak Ridge Institute for Science and Education (ORISE) website database in an effort to verify the employment claimed, but no records were found. The Department of

Energy (DOE) was also not able to verify the employment claimed. In response to the district office's request for employment evidence, you submitted various employment documents. As part of the documentation that you submitted were the following:

1) A technical letter prepared by the USGS for the U.S. Atomic Energy Commission (AEC) entitled, "Amchitka-3 Geologic Reconnaissance of Amchitka Island, December 1966," which indicated that the employee and W. J. Carr were part of a reconnaissance team that was on Amchitka Island between November 30 and December 16, 1966 for the purpose of selecting drilling sites.

2) A USGS professional paper prepared on behalf of the AEC entitled, "Interpretation of Aeromagnetic Survey of Amchitka Island Area, Alaska," which indicated that the employee and W. J. Carr were involved in reconnaissance mapping on Amchitka in 1966 and 1967.

3) A January 10, 1967 letter of appreciation from the AEC to the USGS, which indicated that the employee was part of a reconnaissance team on Amchitka Island.

4) An employment history affidavit, Form EE-4, from **[Co-Worker #1]** and **[Co-Worker #2]**, in which they attested that they were the employee's co-workers at the USGS during 1960's and 1970's.

5) Entries from the employee's field notebook, dated between November 29 and December 17, 1966 and April 28 to May 3, 1967, relative to his work on Amchitka Island.

According to Appendix A-7 of the Atomic Energy's Manager's Completion Report, dated January, 1973, the USGS was designated an Amchitka prime contractor. Therefore, the district office concluded that the USGS was a DOE contractor, in accordance with EEOICPA Bulletin No. 03-26 (issued June 3, 2003). Altogether, the district office concluded that the aforementioned employment evidence was sufficient to establish that the employee was a DOE contractor employee on Amchitka Island from November 29, 1966 until December 17, 1966 and from April 28, 1967 until May 3, 1967.

On February 8, 2005, the district office issued a recommended decision, which concluded that the employee was a member of the special exposure cohort (SEC), that he suffered from brain cancer and that you are entitled to $150,000 dollars in survivor's compensation under Part B of the Act.

On February 15, 2005, the FAB received your written notification that you waived any and all objections to the recommended decision. Therefore, based upon a review of the case file evidence, the undersigned makes the following:

FINDINGS OF FACT

1) You filed a claim for survivor benefits under Part B of the EEOICPA on November 9, 2004.
2) You established that the employee was employed by a DOE contractor on Amchitka Island from November 29, 1966 until December 17, 1966 and from April 28, 1967 until May 3, 1967.
3) You established that the employee was diagnosed with brain cancer on March 2, 1976.
4) The district office issued a recommended decision on February 8, 2005, which concluded that you are entitled to $150,000 dollars in survivor's compensation.

Therefore, based upon a review of the case file evidence, the undersigned makes the following:

CONCLUSIONS OF LAW

Pursuant to § 7384l(14)(B) of the Act, a member of the SEC is defined as an employee that was "employed before January 1, 1974, by the Department of Energy or a Department of Energy contractor or subcontractor on Amchitka Island, Alaska, and was exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests." 42 U.S.C. § 7384l(14)(B). The evidence of record established that the employee was employed by a DOE contractor on Amchitka Island during a covered time period: November 29, 1966 until December 17, 1966 and from April 28, 1967 until May 3, 1967. Therefore, the undersigned finds that the employee was a member of the SEC pursuant to § 7384l(14)(B) of the Act.

Pursuant to § 30.5(dd) of the implementing regulations, brain cancer is considered a specified cancer provided that its onset occurred at least five years after the employee's first exposure to radiation. 20 C.F.R. § 30.5(dd). Additionally, pursuant to § 7384l(9)(A) of the Act, a covered employee with cancer is "an individual with a specified cancer who is a member of the Special Exposure Cohort, if and only if that individual contracted that specified cancer after beginning employment at a Department of Energy facility (in the case of a Department of Energy employee or Department of Energy contractor employee) or at an atomic weapons employer facility (in the case of an atomic weapons employee)." 42 U.S.C. § 7384l(9)(A). The evidence of record established that as a member of the SEC the employee was diagnosed with brain cancer more than five years after he began his covered employment on Amchitka Island. Therefore, the undersigned finds that the employee was a covered employee with cancer, pursuant to § 7384l(9)(A) of the Act.

The undersigned has reviewed the facts and the district office's February 8, 2005 recommended decision and finds that you are entitled to $150,000 dollars in compensation for the employee's brain cancer, pursuant to § 7384s(a),(e)(1)(A) of the Act.

Washington, DC

Mark D. Langowski

Hearing Representative

[1] According to the Department of Energy's (DOE) Office of Worker Advocacy on the DOE website at http://tis.eh.doe.gov/advocacy/faclist/showfacility.cfm, the Amchitka Island Test Site on Amchitka Island, AK is a covered DOE facility from 1965 to 1972 and from 1995 to the present.

EEOICPA Fin. Dec. No. 75271-2007 (Dep't of Labor, August 29, 2007)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning the claimants' claims for survivor benefits under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, FAB accepts and approves the claims for compensation under Part B of EEOICPA.

STATEMENT OF THE CASE

On January 26, 2006, the claimants each filed a Form EE-2 claiming for survivor benefits under

EEOICPA as surviving children of **[Employee]**, based on the condition of chondrosarcoma (bone cancer). They submitted a copy of **[Employee]**'s death certificate, which indicates his marital status was "divorced" at the time of his death on January 29, 2002 due to chondrosarcoma with lung metastases. They also provided copies of their birth certificates showing that they are children of **[Employee]**. **[Claimant #1]** also provided copies of her marriage certificates documenting her changes of name.

[Claimant #1 and Claimant #2] submitted medical evidence including a pathology report showing **[Employee]** had a diagnosis of metastatic high grade chondrosarcoma on December 19, 2001.

A representative of the Department of Energy (DOE) verified that **[Employee]** was employed by the U.S. Geological Survey (USGS) at the Grand Junction Field Office from August 8, 1951 to March 8, 1978, and stated that he was issued dosimetry badges associated with USGS at the Nevada Test Site on 66 separate occasions between November 5, 1958 and July 11, 1966. Additionally, other official government records including security clearances, applications for federal employment, and personnel actions were submitted, indicating that **[Employee]** was employed by USGS and resided in Mercury, Nevada from September 25, 1958 to June 11, 1962. Mercury, Nevada was a town that was within the perimeter of the Nevada Test Site and housed those who worked at the site.

On May 18, 2007, the Seattle district office issued a recommended decision to accept **[Claimant #1 and Claimant #2]**'s claims based on the employee's condition of chondrosarcoma. The district office concluded that the employee was a member of the Special Exposure Cohort (SEC), and was diagnosed with chondrosarcoma (bone cancer), which is a "specified" cancer under EEOICPA. The district office therefore concluded that **[Claimant #1 and Claimant #2]** were entitled to compensation in equal shares in the total amount of $150,000.00 under Part B.

The evidence of record includes letters received by FAB on May 23 and June 1, 2007, signed by **[Claimant #2 and Claimant #1**, respectively, whereby they both indicated that they have never filed for or received any payments, awards, or benefits from a lawsuit, tort suit, third party claim, or state workers' compensation program, based on the employee's condition. Further, they confirmed that they have never pled guilty to or been convicted of fraud in connection with an application for, or receipt of, federal or state workers' compensation.

On May 26 and June 6, 2007, FAB received written notification from **[Claimant #2 and Claimant #1]**, respectively, indicating that they waive all rights to file objections to the findings of fact and conclusions of law in the recommended decision.

After considering the evidence of record, FAB hereby makes the following:

FINDINGS OF FACT

1. On January 26, 2006, **[Claimant #1 and Claimant #2]** filed claims for survivor benefits under EEOICPA.
2. **[Claimant #1 and Claimant #2]** provided sufficient documentation establishing that they are the eligible surviving children of **[Employee]**.
3. A representative of DOE verified that **[Employee]** was issued dosimetry badges for his employment at the Nevada Test Site, a covered DOE facility, in association with USGS, a DOE contractor, from November 5, 1958 to July 11, 1966.

4. **[Employee]** was diagnosed with chondrosarcoma (bone cancer), which is a "specified" cancer under EEOICPA, on December 19, 2001, after beginning employment at a DOE facility.
5. The evidence of record supports a causal connection between the employee's cancer and his exposure to radiation and/or a toxic substance at a DOE facility while employed in covered employment under EEOICPA.
Based on the above-noted findings of fact, FAB hereby also makes the following:

CONCLUSIONS OF LAW

Section 30.316(a) of the regulations provides that, if the claimant waives any objections to all or part of the recommended decision, FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part. *See* 20 C.F.R. § 30.316(a). **[Claimant #1 and Claimant #2]** waived their right to file objections to the findings of fact and conclusions of law contained in the recommended decision issued on their claims for survivor benefits under EEOICPA.

On June 26, 2006, the Secretary of HHS designated a class of certain employees as an addition to the SEC: DOE employees or DOE contractor or subcontractor employees who worked at the Nevada Test Site between January 27, 1951 and December 31, 1962, for a number of work days aggregating at least 250 work days, either solely under this employment or in combination with work days within the parameters (excluding aggregate work day requirements) established for other classes of employees included in the SEC, and who were monitored or should have been monitored. This addition to the SEC became effective July 26, 2006.

The employment evidence in this case is sufficient to establish that the employee was present at the Nevada Test Site for an aggregate of at least 250 work days, from September 1958 through at least November 2, 1962, and qualifies him as a member of the SEC. However, for this employment to be considered covered employment, it must also be determined that the employee was employed at a DOE facility by DOE, a DOE contractor, subcontractor or vendor. In this regard, the case was referred to the Branch of Policies, Regulations and Procedures (BPRP) for review and determination.

In its written determination dated August 6, 2007, BPRP indicated that a civilian employee of a state or federal government agency can be considered a "DOE contractor employee" if the government agency employing that individual is: (1) found to have entered into a contract with DOE for the accomplishment of services it was not statutorily obligated to perform; and (2) DOE compensated that agency for that activity. *See* EEOICPA Bulletin No. 03-26 (issued June 3, 2003). BPRP evaluated the evidence of record including the following pertinent documents:

- An October 5, 1956 letter from the Acting Director for USGS to the Director of Finance of the AEC's Albuquerque Operations Office, which states:

  > In accordance with an agreement between our respective agencies, an advance of funds $56,400 is requested to finance the 1957 fiscal year program to be performed by the Geological Survey for the Division of Military Application (DMA).[1]

- AEC Staff Paper 944/33. This September 1957 document shows clearly that it was the AEC's DMA that had oversight over the USGS geological work at the NTS.

- A document dated March 23, 1959, from the United States Department of the Interior

Geological Survey summarizing a letter to the AEC Albuquerque Operations Office. The summary states in part:

> Advised that your draft rewrite of Memorandum of Understanding No. AT(29-2)-474, has been reviewed and is acceptable to the GS except for following changes in Article IV, Budgeting & Finance. Also request that the amount available for NTS work in fiscal year 1959 be increased from $750,000 to 837,000 and that available for the GNOME program be increased from $85,000 to $91,000.

- A June 26, 1959 letter from the Director of USGS to **[Employee]**, complimenting him on his efforts at the NTS and forwarding to him a letter from the AEC's Albuquerque Operations Office in which the AEC provides general compliments to USGS for their work at NTS during 1958.

- A technical report entitled, "A Summary Interpretation of Geologic, Hydrologic, and Geophysical Data for Yucca Valley, Nevada Test Site, Nye County, NV," detailing the work and outcome of the work performed by USGS at the Nevada Test Site. The report states that the work was undertaken at the behest of the AEC and also states, "Compilation of data, preparation of illustration, and writing of the report were completed during the period of December 26, 1958 to January 10, 1959. Some of the general conclusions must be considered as tentative until more data are available."

- Correspondence from 1957 between USGS and the AEC Raw Materials Division (not the Division of Military Application). These letters show that USGS provided assistance to the AEC in prospecting for uranium on the Colorado Plateau and other locations.

These documents clearly show that there was an agreement for payment, by which USGS performed work for the AEC at the Nevada Test Site.

BPRP then turned to the final issue to be addressed, which was whether the work performed by USGS at the Nevada Test Site was work that USGS was not statutorily obligated to perform. A review of the USGS website[2] showed that since being founded in 1879, its statutory obligations have changed. Primarily, its function has been topographical mapping and gathering information pertaining to soil and water resources. Also, with advances in science, USGS has similarly evolved to meet these changes. The USGS website makes it clear that in the post-war era, USGS was grappling to keep up its scientific pace and that it did so, in part, with money from the Defense Department, the AEC, and from the states. Further, BPRP noted that since the formation of USGS, legislation has changed its statutory obligations over the years, whereby seven legal changes to the USGS statutory obligations pertain in some way to DOE or its predecessor agencies. These changes include: geothermal energy; gathering information on energy and mineral potential; geological mapping of potential nuclear reactor sites and geothermal mapping; working with the Energy Research and Development Administration, a DOE predecessor, on coal hydrology; consulting with DOE on locating a suitable geological repository for the storage of high-level radioactive waste and a retrievable storage option; monitoring the domestic uranium industry; and to cooperate with DOE and other federal agencies on "continental scientific drilling".

Today, USGS describes itself in the following manner:

As the Nation's largest water, earth, and biological science and civilian mapping agency, the U.S. Geological Survey (USGS) collects, monitors, analyzes, and provides scientific understanding about natural resource conditions, issues, and problems. The diversity of our scientific expertise enables us to carry out large-scale, multi-disciplinary investigations and provide impartial scientific information to resource managers, planners, and other customers.

As described, while providing geological support to DOE may be part of what USGS is statutorily obligated to perform in 2007, the totality of the evidence suggests this was not always true. Therefore, BPRP concluded that the Memorandum of Understanding between USGS and the AEC constituted a contract by which USGS provided services to the AEC that USGS was not statutorily obligated to perform through at least 1961, the last year of which their analysis pertained.

In considering the above analysis and determination, FAB concludes that **[Employee]** is a member of the SEC and was diagnosed with chondrosarcoma, which is a "specified" cancer (bone), and is, therefore, a "covered employee with cancer." *See* 42 U.S.C. §§ 7384l(14)(C), 7384l(17), 7384l(9)(A). **[Claimant #1 and Claimant #2]** are the eligible survivors of **[Employee]** as defined under EEOICPA, and are entitled to equal shares of the total compensation amount of $150,000.00. *See* 42 U.S.C. §§ 7384s(e) and 7384s(a)(1).

Accordingly, **[Claimant #1 and Claimant #2]** are each entitled to compensation in the amount of $75,000.00.

Seattle, Washington

Kelly Lindlief

Hearing Representative

Final Adjudication Branch

[1] The AEC's Division of Military Application (DMA) was the division responsible for nuclear weapons testing.

[2] Http://www.usgs.gov/aboutusgs/.

EEOICPA Fin. Dec. No. 87969-2008 (Dep't of Labor, November 19, 2008)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch (FAB) concerning the above claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claim for survivor benefits under Part B and Part E of EEOICPA is denied.

STATEMENT OF THE CASE

On June 22, 2007, **[Claimant]** filed a claim for benefits under EEOICPA as the surviving spouse of **[Employee]**. **[Claimant]** identified kidney cancer and a "lung condition" as the conditions resulting from the employee's work at a Department of Energy (DOE) facility. On the claim form, **[Claimant]**

indicated that the employee had worked at a location with a class of employees in the Special Exposure Cohort (SEC).

[Claimant] submitted an Employment History (Form EE-3) stating that the employee was employed by the Department of the Army and/or the Atomic Energy Commission (AEC) at the Iowa Ordnance Plant (IOP) in Burlington, Iowa (also known as the Iowa Army Ammunition Plant (IAAP)) from 1936 to 1976. **[Claimant]** indicated that the employee worked on Line 1 and on other lines and facilities on site as a Laborer in 1936, a Security Guard from 1936-1939, a Quality Control Supervisor from 1944-1952, and a Quality Control Supervisor from 1952-1976. The portion of the IAAP considered a DOE facility includes the buildings and property/grounds of the IAAP identified as "Line 1." Line 1 of the IAAP encompasses a cluster of several buildings that were utilized for AEC activities. On July 26, 2007, DOE indicated that the employee worked for the Department of Defense (DOD) at the IAAP from September 9, 1960 to September 20, 1960 and from June 8, 1961 to September 22, 1961. DOE indicated that it could find no evidence that the employee worked for the AEC at the AEC part of the plant.

[Claimant] submitted a marriage certificate confirming that she married the employee on January 25, 1935. **[Claimant]** also submitted the employee's death certificate, signed by Dr. Sherman Williams, which indicated that the employee died on May 21, 1996 at the age of 84. The death certificate listed the cause of death as congestive heart failure due to pneumonia, and listed **[Claimant]** as the employee's surviving spouse. **[Claimant]** also submitted medical information in support of her claim. A July 2, 1992 pathology report by Dr. J.G. Lyday noted that the employee was diagnosed with renal cell adenocarcinoma on June 29, 1992.

The evidence of record includes information from the U. S. Department of Labor's Site Exposure Matrices (SEM) database. The SEM database provides information regarding occupational categories, process operations, building and area locations, toxic substances, incidents, and the locations at the facility where the occupational categories performed their job duties, the locations of the toxic substances, and the locations of various incidents of exposure. The SEM database includes the occupational category of security guard. The SEM database identifies Buildings AX-1, and AX-2, both on Line 1, as locations where a security guard would work. SEM identifies Line 1, Building 1-62 as a location where a fireman would work, and identifies Line 1 Building 1-70 and Building 1-99 as locations where a Foreman for Explosives Storage would work. This was independently verified by the undersigned on October 20, 2008. A needs assessment from the Burlington AEC Plant Former Worker Program also confirms that these labor categories were associated with Line 1.

The evidence of record also includes a Department of the Army document dated October 1, 1963, entitled "Permit to other Federal Government Department or Agency to Use Property on Iowa Army Ammunition Plant, Iowa." The permit indicates that the Army granted the AEC a revocable permit to use certain buildings and land within the IOP for a ten-year period, subject to conditions, including that the AEC pay the Army's cost for "producing and supplying any utilities and other services furnished" for the AEC's use.

On November 30, 2007, the Cleveland district office issued a decision recommending denial of **[Claimant]**'s claim under both Parts B and E of EEOICPA because the evidence did not show that the employee was a "DOE contractor employee" as defined at 42 U.S.C. § 7384l(11).

OBJECTIONS

On January 7, 2008, FAB received **[Claimant]**'s objections to the November 30, 2007 recommended decision. Along with her letter, **[Claimant]** submitted new factual evidence. **[Claimant]**'s letter also explained that since her authorized representative had not been copied on the district office's correspondence, the evidence had not been submitted earlier. On June 14, 2008, **[Claimant]** submitted the following relevant evidence to FAB with her objection letter in support of her claim: an April 19, 1974 letter from Lieutenant Colonel C. Frederick Kleis of the Department of the Army to the employee expressing appreciation for his service at the IAAP; an April 19, 1974 certificate of retirement, signed by Lieutenant Colonel Kleis, recognizing the employee's retirement from the federal service; a June 1, 1942 certificate from the IOP that recognized the employee's completion of training as a Plant Guard; a December 19, 1967 certificate issued to the employee (as an employee at the IAAP) by the AMC Ammunition School, Savanna Army Depot upon his completion of a Quality Assurance Course; a Department of the Army Certificate of Service presented to the employee on May 29, 1963 for 20 years of federal service; a copy of Day & Zimmerman, Inc., IOP, Retired Employees Reunion badge dated May 17, 1986; and a Form DA-2496, dated April 1, 1974, that provided the employee's AMC career record maintained at the Tobyhanna Army Depot. The form indicated that the employee was employed by the Department of Army at the IAAP in Burlington, Iowa beginning June 29, 1943.

In summary, **[Claimant]** stated the following objections:

Objection 1: [Claimant] objected that the Findings of Fact numbered 4, 5, 6 and 7 in the November 30, 2007 recommended decision were incorrect. Finding of Fact No. 4 stated that "DOE verified **[Employee]** worked at the DOD part of the IOP from September 9, 1960 to September 20, 1960 and from June 8, 1961 to September 22, 1961." Finding of Fact No. 5 stated that "[t]he district office did not receive sufficient employment evidence to establish that the employee worked on Line 1 at the IOP during the SEC period." Finding of Fact No. 6 stated that "[t]he district office has not received evidence establishing entitlement to compensation on the basis of qualifying employment and a specified cancer for purposes of the SEC." Finding of Fact No. 7 stated that the district office advised **[Claimant]** of the deficiencies in her claim and provided her the opportunity to correct them."

[Claimant] requested an oral hearing to express her objections to the recommended decision and to review the records of the employee's work history. A hearing on her objections to the recommended decision was held before a FAB Hearing Representative on March 11, 2008 in Burlington, Iowa, with **[Claimant]**, **[Claimant]**'s son and authorized representative, another of **[Claimant]**'s sons, and her daughter-in-law in attendance. At the hearing, **[Claimant]**'s son and authorized representative testified that the employee's computation date for his employment at the IOP was 1943 but that he actually started working at the IOP in 1942 as a guard, and that the employee retired from the IOP in 1974. **[Claimant]**'s son also testified that **[Claimant]** was employed at the hospital as head nurse, that **[Claimant]** rode to work with the employee, and that **[Claimant]** knew that there was a time that the employee worked on Line 1. He stated that the documents indicate that the employee worked at the plant for 10,800 days and noted that the SEC requirement is 250 days. He stated that the employee's pay increase records, which he submitted after the hearing, prove the employee's length of employment. He explained that the DOE evidence indicating that the employee worked at the IOP from September 9, 1960 to September 20, 1960 and from June 8, 1961 to September 22, 1961 was erroneous and reflected his own employment at the plant. He explained that the mix-up by DOE occurred due to the fact that he and the employee have the same name. **[Claimant]**'s son testified that he obtained and reviewed the employee's employment records at the plant from 1942 through 1974. He submitted an email dated February 25, 2008, marked as Exhibit 1, from Marek Mikulski of the Burlington AEC Plant Former Workers Program, which confirms that DOE incorrectly verified the employee's employment at the Plant, by providing the employment dates of the employee's son, who

also worked at the plant.

[Claimant]'s son testified that the employee worked at the fire department at the plant, and thus had access to Line 1. He testified that he lunched with the employee at Line 1. He stated that **[Claimant]** drove the employee to work every day and dropped him off at the guard gate at Line 1. He stated that the records submitted, including the employee's job descriptions, have numerous references to the employee having access to all lines at the IOP. **[Claimant]**'s son also read information from several affidavits into the record, noting that the actual affidavits would be submitted immediately after the hearing. He identified a photograph, submitted with the objection letter, of the employee wearing a badge that stated "all areas."

At the hearing, **[Claimant]** presented the following documents as evidence: a Department of the Army job description for an "Ammunition Loading Inspector, Leader," dated April 20, 1960; a Department of the Army job description for an "Ammunition Loading Inspector, Lead Foreman," dated February 15, 1965; a Department of the Army job description for an "Ammunition Loading Inspector, Lead Foreman," dated July 19, 1955; a Department of the Army Certificate of Training for "One Year Firefighter-Guard Training" given at the IOP dated May 29, 1950; a Department of Army Form 873, Certificate of Clearance dated May 29, 1957 from IOP; a Department of the Army Notification of Personnel Action dated October 30, 1950, which reflects the promotion of **[Employee]** from Guard (Crew Chief) to Guard (Captain); an affidavit by a friend of the employee who attested that the employee worked all over the IOP as a guard-quality control; an affidavit by a work associate of the employee who attested that he worked at the IOP on Line 1 as a guard and quality control from 1960 to April 1974, and that she and the employee had lunch and worked together on Line 1; an affidavit of a work associate of the employee who attested that she worked for the employee in the Quality Assurance Department on all lines; an affidavit by **[Claimant]**'s son and authorized representative, who identified himself as a work associate and son of the employee. In this affidavit, **[Claimant]**'s son and authorized representative attested that the employee worked in Quality Assurance and as a Guard at the IAAP as a federal employee. He stated that he knew this because he was employed to cut grass on Line 1 and that he had lunch with the employee there. He stated that the employee had clearance to be on Line 1 because he was not required to be accompanied by a guard. **[Claimant]** also submitted an affidavit by **[Claimant]**'s other son, who attested that his father worked at the AEC at IOP from December 1942 to April 1974 as a Guard and Quality Control supervisor; and her own affidavit, in which she attested that the employee worked at the IOP on Line 1. **[Claimant]** also attested that the employee was a Guard and Quality Control Supervisor working throughout the plant with access to all Lines. **[Claimant]** further stated that she rode to work with the employee and often let him off at Line 1 while she continued on to her job at the hospital.

A copy of the hearing transcript was sent to **[Claimant]** on March 24, 2008, who provided additional comments on the hearing transcript. On April 11, 2008, FAB received **[Claimant]**'s son and authorized representative's letter expressing his disappointment in the hearing because **[Claimant]** was not provided an opportunity to discover evidence from the Department of Labor indicating that the employee did not work on Line 1 for at least 250 days. **[Claimant]**'s son also provided a copy of Congressman Dave Loebsack's March 19, 2008 inquiry to the Department of Labor regarding the status of **[Claimant]**'s claim. The letter also referred to the FAB Hearing Representative's March 25, 2008 call confirming that kidney cancer is a "specified cancer." He stated his concern that the exhibits submitted at the hearing were not reproduced in the hearing transcript, and emphasized that the exhibits were more probative than the hearing testimony. He provided a summary of the content of the six affidavits and personnel records submitted at the hearing and expressed concern whether the documentation would be reviewed and considered.

Response: The additional documents **[Claimant]** submitted with her objections and at the hearing establish that the employment dates provided for the employee by DOE were incorrect and, in fact, reflected the employment dates of the employee's son, who also worked at the plant. Based on the new evidence **[Claimant]** submitted, a new finding has been made below that the employee was employed by the Department of the Army at the IAAP in Burlington, Iowa from June 29, 1943 to April 1, 1974.

The documents **[Claimant]** submitted with her objections include a copy of a June 1, 1942 certificate from the Iowa Ordnance Plant recognizing the employee's completion of training as a Plant Guard. At the hearing, **[Claimant]** submitted a June 20, 1959 Federal Government/Civil Service Experience and Qualification Statement (SG-55) for the employee, which indicated that he was employed at the IAAP from February 11, 1952 to at least June 20, 1959 as an ammunition loading inspector in the Inspection Division; from August 6, 1950 to February 10, 1952 as a Captain in the Guard Department; and from June 29, 1947 to May 27, 1949 as an Ammunition & Equipment Storage Foreman in the Transportation & Storage Division. **[Claimant]** submitted, with her objection, a June 20, 1959 Government employment application with a handwritten resume, signed by the employee. The application states he was employed at the IOP from June 29, 1947 to May 27, 1949 as an Ammo & Equipment Storage Foreman in the Transportation and Storage Division. A May 27, 1948 Application for Federal Employment, signed by the employee, states he was employed at the IOP as a Munitions Handler Foreman beginning June 1947; a Material Receiver and Checker from January 1947 to June 1947; a Guard from May 1946 to January 1947; and a Guard from December 1942 to May 1944 (shell and bomb loading). An October 30, 1950 Department of the Army Notification of Personnel Action reflects the promotion of the employee from Guard (Crew Chief) to Guard (Captain).

[Claimant] provided additional documentation, including EE-4 affidavits, work records for the employee, and testimony at the hearing indicating that the employee was employed by the Department of the Army at the IAAP from June 29, 1943 to April 1, 1974 and that the employee worked on Line 1 for at least 250 days during March 1949 through 1974. The evidence reflects that the employee was diagnosed with renal cell adenocarcinoma on June 29, 1992. All of the evidence **[Claimant]** submitted with her objections and at the hearing has been reviewed and considered by FAB.

Objection 2: [Claimant] stated that the claim adjudication process was frustrating and difficult. She expressed her dissatisfaction with the way some of the claims examiners handled her claim.

Response: It is regrettable that **[Claimant]** experienced some difficulty during the processing of her claim. The Division of Energy Employees Occupational Illness Compensation (DEEOIC) customer service policy affirms DEEOIC's commitment to serving its customers with excellence. It is DEEOIC's responsibility to work with its customers to improve the practical value of the information, services, products, and distribution mechanisms it provides and the importance of interacting proactively with customers, identifying their needs, and integrating these needs into DEEOIC program planning and implementation. The highest level of customer service is expected in all dealings with individuals conducting business with DEEOIC. As representatives of DEEOIC, all staff members are expected to be courteous, professional, flexible, honest and helpful.

After considering the written record of the claim, **[Claimant]**'s letters of objection, along with the testimony and objections presented at the hearing, FAB hereby makes the following:

FINDINGS OF FACT

1. **[Claimant]** filed a claim for survivor benefits under EEOICPA on June 12, 2007.

2. The employee was employed by the Department of the Army at the IOP from June 29, 1943 to April 1, 1974. The employee worked for at least 250 work days on Line 1 during the period March 1949 through 1974.

3. The employee was diagnosed with renal cell adenocarcinoma on June 29, 1992.

4. The employee died on May 21, 1996 as a consequence of congestive heart failure due to pneumonia. **[Claimant]** is the surviving spouse of the employee.

5. An October 1, 1963 permit indicates that the Army granted the AEC a revocable permit to use certain buildings and land within the IOP for a ten year period, subject to conditions, including that the AEC pay the Army's cost in "producing and supplying any utilities and other services furnished" for the AEC's use. The permit did not obligate the Army to provide any specific services to the AEC, and does not in itself constitute a contract for the provision of services between the Army and the AEC by which the AEC paid the U.S. Army to provide services on Line 1.

Based on the above-noted findings of fact in this claim, FAB hereby makes the following:

CONCLUSIONS OF LAW

The undersigned has carefully reviewed the testimony, the evidence of record, and the November 30, 2007 recommended decision issued by the Cleveland district office. Based on **[Claimant]**'s objections, testimony at the hearing, and the evidence of record, **[Claimant]**'s survivor claim for benefits under Parts B and E for the employee's kidney cancer and "lung condition" is denied.

Part B of EEOICPA provides benefits to eligible current or former employees of DOE, and certain of its vendors, contractors and subcontractors, and to survivors of such individuals. To be eligible, an employee must have sustained cancer, chronic silicosis, beryllium sensitivity or chronic beryllium disease while in the performance of duty at a covered DOE facility, atomic weapons employer facility, or a beryllium vendor facility during a specified period of time.

With respect to claims for cancer arising out of work-related exposure to radiation under Part B, the SEC was established by Congress to allow the adjudication of certain claims without the completion of a radiation dose reconstruction. *See* 42 C.F.R. § 83.5 (2007). The Department of Labor (DOL) can move directly to a decision on cases involving a "specified cancer" contracted by a member of the SEC because the statute provides a presumption that specified cancers contracted by a member were caused by the worker's exposure to radiation at a covered facility. A "specified cancer" is any cancer described in the list appearing at 20 C.F.R. § 30.5(ff) (2007).

On June 19, 2005, employees of DOE or DOE contractors or subcontractors employed at the IOP/IAAP (Line 1) during the period March 1949 through 1974 who were employed for a number of work days aggregating at least 250 work days either solely under this employment or in combination with work days within the parameters (excluding aggregate work day requirements) established for other classes of employees in the SEC were added to the SEC. 70 Fed. Reg. 37409 (June 29, 2005).

In order for an employee to be afforded coverage under EEOICPA, the employee must be a "covered employee." 42 U.S.C. § 7384l(11)(B). The evidence of record demonstrates that the employee was employed by the Department of the Army at the IAAP from June 29, 1943 to April 1, 1974, and that he worked for at least 250 work days on Line 1 during the period March 1949 through 1974. He was diagnosed with kidney cancer on June 29, 1992, and kidney cancer is a specified cancer. However, the evidence is insufficient to show that the Department of the Army was a DOE contractor or subcontractor. Consequently, the employee does not qualify as a "covered employee with cancer," under EEOICPA. *See* 42 U.S.C. § 7384l(9)(A).

Part E of EEOICPA provides compensation and medical benefits to DOE contractor employees determined to have contracted a covered illness through exposure to a toxic substance at a DOE facility. *See* 42 U.S.C. § 7385s(2); 20 C.F.R. § 30.5(p).

The term "Department of Energy contractor employee" means any of the following:

(A) An individual who is or was in residence at a Department of Energy facility as a researcher for one or more periods aggregating at least 24 months.

(B) An individual who is or was employed at a Department of Energy facility by—

(i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or

(ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

42 U.S.C. § 7384l(11).

On June 3, 2003, DEEOIC issued EEOICPA Bulletin No. 03-26, which provides guidance to its staff with respect to the adjudication of EEOICPA claims filed by current or former employees of state or federal government agencies seeking coverage as a "DOE contractor employee." The policy and procedures outlined in this Bulletin only apply to state and federal agencies that have/had a contract or an agreement with DOE. The Bulletin states that a civilian employee of a state or federal government agency can be considered a "DOE contractor employee" if the government agency employing that individual is: (1) found to have entered into a contract with DOE for the accomplishment of one or more services it was not statutorily obligated to perform, and (2) DOE compensated the agency for that activity. Thus, a civilian employee of DOD who meets the criteria required to be considered a DOE contractor employee is not excluded from EEOICPA coverage solely because they were employed by DOD.

The evidence of record includes an October 1, 1963 Department of the Army document entitled "Permit to other Federal Government Department or Agency to Use Property on Iowa Army Ammunition Plant, Iowa." The permit indicates that the Army granted the AEC a revocable permit to use certain buildings and land within the IAAP for a ten-year period, subject to conditions, including that the AEC pay the Army's cost in "producing and supplying any utilities and other services furnished" for the AEC's use. Because the condition did not obligate the Army to provide any specific services to the AEC, it is insufficient to establish that a contract for the provision of services between the Army and the AEC existed by which the AEC paid the U.S. Army to provide services on Line 1 that

the Army was not otherwise statutorily obligated to perform.

Section 30.110(c) of the regulations provides that any claim that does not meet all of the criteria for at least one of the categories including a "covered employee" (as defined in § 30.5(p)) as set forth in the regulations must be denied. *See* 20 C.F.R. §§ 30.5(p), 30.110(b) and (c).

The evidence of record does not show that the employee was employed by a DOE contractor or subcontractor as required by 42 U.S.C. § 7384l(11). Accordingly, **[Claimant]**'s claim under EEOICPA is denied.

Washington, D.C.

Susan von Struensee

Hearing Representative

Final Adjudication Branch

Employees of state agencies

EEOICPA Fin. Dec. No. 366-2002 (Dep't of Labor, June 3, 2003)

NOTICE OF FINAL DECISION REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. The recommended decision was to deny your claim. You submitted objections to that recommended decision. The Final Adjudication Branch carefully considered the objections and completed a review of the written record. *See* 20 C.F.R. § 30.312. The Final Adjudication Branch concludes that the evidence is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On July 31, 2001, you filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA), stating that you were the daughter of **[Employee]**, who was diagnosed with cancer, chronic silicosis, and emphysema. You completed a Form EE-3, Employment History for Claim under the EEOICPA, indicating that from December 2, 1944 to May 30, 1975, **[Employee]** was employed as a heavy mobile and equipment mechanic, for Alaska District, Corps of Engineers, Anchorage, Alaska.

On August 20, 2001, a representative of the Department of Energy (or DOE) indicated that "none of the employment history listed on the EE-3 form was for an employer/facility which appears on the Department of Energy Covered Facilities List." Also, on August 29, 2001, a representative of the DOE stated in Form EE-5 that the employment history contains information that is not accurate. The information from the DOE lacked indication of covered employment under the EEOICPA.

The record in this case contains other employment evidence for **[Employee]**. With the claim for benefits, you submitted a "Request and Authorization for TDY Travel of DOD Personnel" Form DD-1610, initiated on November 10, 1971 and approved on November 11, 1971. **[Employee]** was approved for TDY travel for three days to perform work on Amchitka Island, Alaska, for the Department of Defense, Alaska District Corps of Engineers beginning on November 15, 1971. He was employed as a Mobile Equipment Mechanic WG-12, and the purpose of the TDY was noted "to examine equipment for potential use on Blair Lake Project." The security clearance was noted as "Secret." You also submitted numerous personnel documents from **[Employee]**'s employment with the Alaska District Corp of Engineers. Those documents include a "Notification of Personnel Action" Form SF-50 stating that **[Employee]**'s service compensation date was December 2, 1944, for his work as a Heavy Mobile Equipment Mechanic; and at a WG-12, Step 5, and that he voluntarily retired on May 30, 1975.

The medical documentation of record shows that **[Employee]** was diagnosed with emphysema, small cell carcinoma of the lung, and chronic silicosis. A copy of **[Employee]**'s Death Certificate shows that he died on October 9, 1990, and the cause of death was due to or as a consequence of bronchogenic cancer of the lung, small cell type.

On September 6 and November 5, 2001, the district office wrote to you stating that additional evidence was needed to show that **[Employee]** engaged in covered employment. You were requested to submit a Form EE-4, Employment History Affidavit, or other contemporaneous records to show proof of **[Employee]**'s employment at the Amchitka Island, Alaska site covered under the EEOICPA. You did not submit any additional evidence and by recommended decision dated December 12, 2001, the Seattle district office recommended denial of your claim. The district office concluded that you did not submit employment evidence as proof that **[Employee]** worked during a period of covered employment as required by § 30.110 of the EEOICPA regulations. *See* 20 C.F.R. § 30.110.

On January 15 and February 6, 2002, you submitted written objections to the recommended denial decision. The DOE also forwarded additional employment information. On March 20, 2002, a representative of the DOE provided a Form EE-5 stating that the employment history is accurate and complete. However, on March 25, 2002, a representative of the DOE submitted a "corrected copy" Form EE-5 that indicated that the employment history provided in support of the claim for benefits "contains information that is not accurate." An attachment to Form EE-5 indicated that **[Employee]** was employed by the Army Corps of Engineers for the period July 25, 1944 to August 11, 1952, at Fort Richardson, Alaska; and from August 11, 1952 to May 30, 1975 at Elmendorf Air Force Base, Alaska. Further, the attachment included clarifying information:

Our records show that the Corps of Engineers' was a prime AEC contractor at Amchitka. **[Employee]**'s Official Personnel Folder (OPF) indicates that he was at Forth Richardson and Elmendorf AFB, both in Alaska. The OPF provided no indication that **[Employee]** worked at Amchitka, Alaska. To the best of our knowledge, Blair Lake Project was not a DOE project.

Also, on April 3, 2002, a representative of the DOE submitted a Form EE-5 indicating that Bechtel Nevada had no information regarding **[Employee]**, but he had a film badge issued at the Amchitka Test Site, on November 15, 1971. The record includes a copy of Appendix A-7 of a "Manager's Completion Report" which indicates that the U. S. Army Corps of Engineers was a prime AEC (Atomic Energy Commission) Construction, Operations and Support Contractor, on Amchitka Island, Alaska.

On December 10, 2002, a hearing representative of the Final Adjudication Branch issued a Remand Order. Noting the above evidence, the hearing representative determined that the "only evidence in the record with regard to the Army Corps of Engineers status as a contractor on Amchitka Island is the DOE verification of its listing as a prime AEC contractor . . . and DOE's unexplained and unsupported verification [of **[Employee]**'s employment, which] are not sufficient to establish that a contractual relationship existed between the AEC, as predecessor to the DOE, and the Army Corps of Engineers." The Remand Order requested the district office to further develop the record to determine whether the Army Corps of Engineers had a contract with the Department of Energy for work on Amchitka Island, Alaska, and if the work **[Employee]** performed was in conjunction with that contract. Further the Remand Order directed the district office to obtain additional evidence to determine if **[Employee]** was survived by a spouse, and since it did not appear that you were a natural child of **[Employee]**, if you could establish that you were a stepchild who lived with **[Employee]** in a regular parent-child relationship. Thus, the Remand Order requested additional employment evidence and proof of eligibility under the Act.

On January 9, 2003, the district office wrote to you requesting that you provide proof that the U.S. Army Corps of Engineers had a contract with the AEC for work **[Employee]** performed on his TDY assignment to Amchitka Island, Alaska for the three days in November 1971. Further, the district office requested that you provide proof of your mother's death, as well as evidence to establish your relationship to **[Employee]** as a survivor.

You submitted a copy of your birth certificate that indicated that you were born **[Name of Claimant at Birth]** on October 4, 1929, to your natural mother and natural father **[Natural Mother]** and **[Natural Father]**. You also submitted a Divorce Decree filed in Boulder County Court, Colorado, Docket No. 10948, which showed that your biological parents were divorced on October 10, 1931, and your mother, **[Natural Mother]** was awarded sole custody of the minor child, **[Name of Claimant at Birth]**. In addition, you submitted a marriage certificate that indicated that **[Natural Mother]** married **[Employee]** in the State of Colorado on November 10, 1934. Further, you took the name **[Name of Claimant Assuming Employee's Last Name]** at the time of your mother's marriage in 1934, as indicated by the sworn statement of your mother on March 15, 1943. You provided a copy of a Marriage Certificate to show that on August 19, 1949, you married **[Husband]**. In addition, you submitted a copy of the Death Certificate for **[Name of Natural Mother Assuming Employee's Last Name]** stating that she died on May 2, 1990. The record includes a copy of **[Employee]**'s Death Certificate showing he died on October 9, 1990.

You also submitted the following additional documentation on January 20, 2003: (1) A copy of **[Employee's]** Last Will and Testament indicated that you, **[Claimant]**, were the adult daughter and named her as Personal Representative of the Estate; (2) Statements by Jeanne Findler McKinney and Jean M. Peterson acknowledged on January 17, 2003, indicated that you lived in a parent-child relationship with **[Employee]** since 1945; (3) A copy of an affidavit signed by **[Name of Natural Mother Assuming Employee's Last Name]** (duplicate) indicated that at the time of your mother's marriage to **[Employee]**, you took the name **[Name of Claimant Assuming Employee's Last Name]**.

You submitted additional employment documentation on January 27, 2003: (1) A copy of **[Employee]**'s TDY travel orders (duplicate); (2) A Memorandum of Appreciation dated February 11, 1972 from the Department of the Air Force commending **[Employee]** and other employees, for their support of the Blair Lake Project; (3) A letter of appreciation dated February 18, 1972 from the Department of the Army for **[Employee]**'s contribution to the Blair Lake Project; and (4) Magazine and newspaper articles containing photographs of **[Employee]**, which mention the work performed by the

U.S. Army Corps of Engineers in Anchorage, Alaska.

The record also includes correspondence, dated March 27, 2003, from a DOE representative. Based on a review of the documents you provided purporting that **[Employee]** was a Department of Energy contractor employee working for the U.S. Army Corps of Engineers on TDY in November, 1971, the DOE stated that the Blair Lake Project was not a DOE venture, observing that "[i]f Blair Lake Project had been our work, we would have found some reference to it."

On April 4, 2003, the Seattle district office recommended denial of your claim for benefits. The district office concluded that the evidence of record was insufficient to establish that **[Employee]** was a covered employee as defined under § 7384l(9)(A). *See* 42 U.S.C. § 7384l(9)(A). Further, **[Employee]** was not a member of the Special Exposure Cohort, as defined by § 7384l(14)(B). *See* 42 U.S. C. § 7384l(14)(B). Also, **[Employee]** was not a "covered employee with silicosis" as defined under §§ 7384r(b) and 7384r(c). *See* 42 U.S.C. §§ 7384r(b) and (c). Lastly, the recommended decision found that you are not entitled to compensation under § 7384s. *See* 42 U.S.C. § 7384s.

On April 21, 2003, the Final Adjudication Branch received your letter of objection to the recommended decision and attachments. First, you contended that the elements of the December 10, 2002 Remand Order were fulfilled because you submitted a copy of your mother's death certificate and further proof that **[Employee]** was your stepfather; and that the letter from the district office on April 4, 2003 "cleared that question on page three – quote 'Our records show that the Corps of Engineers was a prime AEC contractor at Amchitka.'"

Second, you stated that further clarification was needed as to the condition you were claiming. You submitted a death certificate for **[Employee]** showing that he died due to bronchogenic cancer of the lung, small cell type, and noted that that was the condition you alleged as the basis of your claim on your first Form, associated with your claim under the EEOICPA.

Third, you alleged that, in **[Employee]**'s capacity as a "Mobile Industrial Equipment Mechanic" for the Army Corps of Engineers, "he was required to work not only for the DOD (Blair Lake project) but also for DOE on the Amchitka program. For example: on March 5, 1968 he was sent to Seward, Alaska to 'Inspect equipment going to Amchitka.' He was sent from the Blair Lake project (DOD) to Seward for the specified purpose of inspecting equipment bound for Amchitka (DOE). Thus, the DOE benefited from my father's [Corp of Engineers] expertise/service while on 'loan' from the DOD. Since the closure of the Amchitka project (DOE), the island has been restored to its original condition. . . . Therefore, my dad's trip to Amchitka to inspect equipment which might have been used at the Blair Lake project benefited not only DOD but also DOE. In the common law, this is known as the 'shared Employee' doctrine, and it subjects both employers to liability for various employment related issues."

On May 21, 2003, the Final Adjudication Branch received your letter dated May 21, 2003, along with various attachments. You indicated that the U.S. Army Corps of Engineers was a contractor to the DOE for the Amchitka Project, based upon page 319 of an unclassified document you had previously submitted in March 2002. Further, you indicated that **[Employee]** had traveled to Seward, Alaska to inspect equipment used at on-site operations for use on Amchitka Island by the Corps of Engineers for the DOE project, and referred to the copy of the Corps of Engineers TDY for Seward travel you submitted to the Final Adjudication Branch with your letter of April 18, 2003. Also, you indicated that **[Employee]** traveled to Amchitka, Island in November 1972 to inspect the equipment referenced above, which had been shipped from Seward, Alaska. You indicated that **[Employee]** was a mobile industrial equipment mechanic, and that his job required him to travel. You attached the following documents in support of your contention that the equipment **[Employee]** inspected could have included equipment belonging to the Corps of Engineers: Job Description, Alaska District, Corps of Engineers (previously submitted), and an Employee Performance Appraisal.

In addition, you indicated **[Employee]** was required to travel to remote sites throughout Alaska in order to perform his job with the Corps of Engineers, and in support of this you referred to your electronic mail sent to the Seattle District Office on January 7, 2003. You indicated that, since **[Employee]** was required to travel to Amchitka as a part of his regular duties as a mobile industrial equipment mechanic, it was possible that the equipment he inspected on the November 15, 1971 trip to Amchitka included equipment owned by the Corps as well as inspection of equipment owned by private contractors. You attached a copy of a document entitled, "Affidavit," dated May 21, 2003, signed by Erwin L. Long. Mr. Long stated that he was head of the Foundations Material Branch for the Corps of Engineers at the time of his retirement, and that in 1971 he had been Head of the Rock Design Section. Mr. Long indicated that he did not spend any time on Amchitka Island, that he had known **[Employee]** since 1948, and that he "believe[d]" **[Employee]**'s travel to Amchitka for his job would have required him to track equipment belonging to the Corps of Engineers, and that **[Employee]** would also have "performed required maintenance on the equipment before preparing [it] for shipping off Amchitka Island." Mr. Long also stated that **[Employee]** would not talk about his work on Amchitka since it was classified. Finally, you attached a TDY dated March 4, 1968, as well as a travel voucher/subvoucher dated March 15, 1968, to support that **[Employee]**'s mission to Amchitka had been completed.

FINDINGS OF FACT

1. On July 31, 2001, **[Claimant]** filed a claim for survivor benefits under the EEOICPA as the daughter of **[Employee]**.

2. **[Employee]** was diagnosed with small cell bronchogenic carcinoma of the lung and chronic silicosis.

3. **[Employee]** was employed by the U.S. Army Corps of Engineers for the period from July 25, 1944 to August 11, 1952, at Fort Richardson, Alaska; and from August 11, 1952 to May 30, 1975 at Elmendorf Air Force Base, Alaska.

4. **[Employee]**'s employment for the U.S. Army Corps of Engineers on TDY assignment at the Amchitka Island, Alaska site in November 1971 was in conjunction with a Department of Defense venture, the Blair Lakes Project.

CONCLUSIONS OF LAW

The EEOCIPA implementing regulations provide that a claimant may object to any or all of the findings of fact or conclusions of law, in the recommended decision. 20 C.F.R. § 30.310. Further, the regulations provide that the Final Adjudication Branch will consider objections by means of a review of the written record. 20 C.F.R. § 30.312. The Final Adjudication Branch reviewer will review the record forwarded by the district office and any additional evidence and/or argument submitted by the claimant. 20 C.F.R. § 30.313. Consequently, the Final Adjudication Branch will consider the overall evidence of record in reviewing the written record.

In order to be awarded benefits under the Energy Employees Occupational Illness Compensation Program Act, the covered employee (or his/her eligible survivors), must first establish that the employee has been diagnosed with beryllium illness, cancer, or chronic silicosis. *See* 42 U.S.C. § 7384l(15), 20 C.F.R. § 30.110(a). The evidence to show proof of an occupational illness is not in dispute in this case. The medical evidence establishes that **[Employee]** was diagnosed with cancer (bronchogenic cancer of the lung, small cell type) and chronic silicosis. Consequently, **[Employee]** was diagnosed with two illnesses potentially covered under the Act.

Employees of a DOE contractor (or their eligible survivors) are entitled under the EEOICPA to seek compensation for a cancer as a member of the Special Exposure Cohort (SEC) or through a determination that they incurred cancer that was at least as likely as not related to employment at a DOE facility. 42 U.S.C. §§ 7384l(14), 7384l(9)(B)(ii)(II). To be included in the SEC, a DOE employee, DOE contractor employee, or atomic weapons employee must have been employed for an aggregate of 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee or employed before January 1, 1974, by the DOE or a DOE contractor or subcontractor on Amchitka Island, Alaska, and have been exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests. 42 U.S.C. § 7384l(14). To qualify as a covered employee with cancer, members of the SEC need only establish that they contracted a "specified cancer", designated in section 7384l(17) of the EEOICPA, after beginning employment at a DOE facility or atomic weapons employer facility.

While the EEOICPA does not contain a specific definition of a DOE contractor, it does contain a definition of a DOE contractor employee that, in effect, defines what a DOE contractor is. Section 7384l(11) of the EEOICPA defines a DOE contractor employee as:

(A) An individual who is or was in residence at a Department of Energy facility as a researcher for one or more periods aggregating at least 24 months.
(B) An individual who is or was employed at a Department of Energy facility by-
    (i) an entity that contracted with the Department of Energy to provide

management and operating, management and integration, or environmental remediation at the facility; or
(ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

The question presented in this case is whether **[Employee]**, an employee of the U.S. Army Corps of Engineers was, during the time he spent on Amchitka Island, providing management and operation, management and integration or environmental remediation services under a contract between the DOE and the Army Corps of Engineers.

The undersigned notes that the Atomic Energy Commission's Managers Completion Report refers to the U.S. Army Corp of Engineers, as a prime contractor for work on Milrow and Cannikin. The work to be performed under that contract consisted of "engineering, procurement, construction administration and inspection."

[Employee]'s "Request and Authorization for TDY Travel of DOD Personnel," initiated on November 10 and approved on November 11, 1971, was for the purpose of three days work on Amchitka Island, Alaska, for the Department of Defense, Alaska District Corps of Engineers. The purpose of the TDY was to "examine equipment for potential use on Blair Lake Project."

You submitted the following new documents along with your letter to the Final Adjudication Branch dated May 21, 2003: Employee Performance Appraisal for the period February 1, 1966 to January 31, 1967; Affidavit of Erwin L. Long dated May 21, 2003; Request and Authorization for Military Personnel TDY Travel and Civilian Personnel TDY and PCS Travel, dated March 4, 1968; and Travel Voucher or Subvoucher, dated March 15, 1968. None of the documents submitted establish that **[Employee]** was on Amchitka Island providing services pursuant to a contract with the DOE.

The preponderance of the evidence in this case supports the conclusion that **[Employee]** was on Amchitka Island in November 1971 for the sole purpose of inspecting equipment to be used by the Department of Defense on its Blair Lake Project. The documentation of record refers to the Blair Lake Project as a Department of Defense project, and the DOE noted in correspondence dated March 27, 2003, that research was not able to verify that Blair Lake was a DOE project

While the DOE indicated that **[Employee]** was issued a dosimetry badge, such evidence may be used to establish that he was present on Amchitka Island, not to establish that he was a covered DOE employee. Therefore, **[Employee]**'s presence on Amchitka Island was to perform work for the Department of Defense, and not pursuant to a contract between the DOE and the U.S. Army Corps of Engineers.

The evidence is also insufficient to show covered employment under § 7384r(c) and (d) of the EEOICPA for chronic silicosis. To be a "covered employee with chronic silicosis" it must be established that the employee was:

A DOE employee or a DOE contractor employee, who was present for a number of workdays aggregating at least 250 work days during the mining of tunnels at a DOE facility located in Nevada or Alaska for test or experiments related to an atomic weapon.

See 42 U.S.C. § 7384r(c) and (d); 20 C.F.R. § 30.220(a). Consequently, even if the evidence showed DOE employment (which it does not since **[Employee]** worked for the DOD), he was present only

three days on Amchitka, which is not sufficient for the 250 days required under the Act as a covered employee with silicosis.

The undersigned notes that in your objection to the recommended decision, you referred to a "shared employee" doctrine which you believe should be applied to this claim. You contend that on March 5, 1968, **[Employee]** was sent to Seward, Alaska to "Inspect equipment going to Amchitka, which might have been used at the Blair Lake project [to benefit] not only DOD but also DOE." No provision in the Act refers to a "shared employee" doctrine. Given the facts of this case, coverage could only be established if **[Employee]** was on Amchitka Island providing services pursuant to a contract with the DOE, evidence of which is lacking in this case.

It is the claimant's responsibility to establish entitlement to benefits under the EEOICPA. The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of each and every criterion under any compensable claim category set forth in section 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing the Office of Workers' Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

Although you submitted medical evidence to show covered illnesses due to cancer and chronic silicosis, the evidence of record is insufficient to establish that **[Employee]** engaged in covered employment. Therefore, your claim must be denied for lack of proof of covered employment under the EEOICPA.

Seattle, Washington

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA Fin. Dec. No. 27798-2003 (Dep't of Labor, June 20, 2003)

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 (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claims for benefits are denied.

STATEMENT OF THE CASE

On April 11, 2002, **[Claimant 1]** filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA), stating that he was the son of **[Employee]**, who was diagnosed with pharyngeal cancer. An additional claim followed thereafter from **[Claimant 2]** on October 20, 2002. **[Claimant 1]** also completed a Form EE-3, Employment History, indicating that **[Employee]** worked for Standard Oil Company, from

1950 to 1961; the State of Alaska as Deputy Director of Veterans Affairs, from 1961 to 1964; the State of Alaska Department of Military Affairs, Alaska Disaster Office, from 1965 to 1979 (where it was believed he wore a dosimetry badge); and, for the American Legion from 1979 to 1985.

In correspondence dated June 24, 2002, a representative of the Department of Energy (DOE) indicated that they had no employment information regarding **[Employee]**, but that he had been issued film badges at the Amchitka Test Site on the following dates: October 28, 1965; September 30, 1969; and, September 21, 1970. You also submitted a completed Form EE-4 (Employment Affidavit) signed by Don Lowell, your father's supervisor at the State of Alaska, Department of Public Safety, Division of Civil Defense. According to Mr. Lowell, your father was a radiological officer for the State of Alaska and accompanied him to Amchitka Island for Project Longshot on November 29, 1965, and the Milrow Test on October 2, 1969, as a representative of the State of Alaska.

Additional documentation submitted in support of your claim included copies of your birth certificates, a marriage certificate documenting **[Name of Claimant 2 at Birth]**'s marriage to **[Husband]**, and the death certificate for **[Employee]**, indicating that he was widowed at the time of his death on May 10, 1993. In addition, you provided medical documentation reflecting a diagnosis of squamous cell carcinoma of the pharyngeal wall in November 1991.

On November 8, 2002, the Seattle district office issued a recommended decision that concluded that **[Employee]** was a covered employee as defined in § 7384l(9)(A) of the Act and an eligible member of the Special Exposure Cohort as defined in § 7384l(14)(B) of the EEOICPA, who was diagnosed as having a specified cancer, specifically cancer of the hypopharynx, as defined in § 7384l(17) of the Act. *See* 42 U.S.C. 7384l(9)(A), (14)(B), (17). The district office further concluded that you were eligible survivors of **[Employee]** as outlined in § 7384s(e)(3) of the Act, and that you were each entitled to compensation in the amount of $75,000 pursuant to § 7384s(a)(1) and (e)(1) of the EEOICPA. *See* 42 U.S.C. §§ 7384s(a)(1) and (e)(1).

On December 20, 2002, the Final Adjudication Branch issued a Remand Order in this case on the basis that the evidence of record did not establish that **[Employee]** was a member of the "Special Exposure Cohort," as required by the Act. The Seattle district office was specifically directed to determine whether the Department of Energy and the State of Alaska, Department of Public Safety, Division of Civil Defense, had a contractual relationship.

In correspondence dated January 17, 2003, Don Lowell elaborated further on your father's employment and his reasons for attending the nuclear testing on Amchitka Island. According to Mr. Lowell, the Atomic Energy Commission (AEC) invited the governors of Alaska to send representatives to witness all three tests on Amchitka Island (Longshot, Milrow, and Cannikin). As such, **[Employee]** attended both the Longshot and Milrow tests as a guest of the Atomic Energy Commission, which provided transportation, housing and food, and assured the safety and security of those representatives.

On February 4, 2003, the district office received an electronic mail transmission from Karen Hatch, Records Management Program Officer at the National Nuclear Security Agency. Ms. Hatch indicated that she had been informed by the former senior DOE Operations Manager on Amchitka Island that escorts were not on the site to perform work for the AEC, but were most likely there to provide a service to the officials from the State of Alaska.

In correspondence dated February 11, 2003, a representative of the State of Alaska, Department of

Public Safety, Division of Administrative Services, indicated that there was no mention of Amchitka or any sort of agreement with the Department of Energy in **[Employee]**'s personnel records, but that the absence of such reference did not mean that he did not go to Amchitka or that a contract did not exist. He further explained that temporary assignments were not always reflected in these records and suggested that the district office contact the Department of Military and Veterans Affairs to see if they had any record of an agreement between the State of Alaska and the DOE. By letter dated March 13, 2003, the district office contacted the Department of Military and Veterans Affairs and requested clarification as to **[Employee]**'s employment with the State of Alaska and assignment(s) to Amchitka Island. No response to this request was received.

On April 16, 2003, the S eattle district office recommended denial of your claims. The district office concluded that you did not submit employment evidence as proof that **[Employee]** was a member of the "Special Exposure Cohort" as defined by § 7384l(14)(B) of the Act, as the evidence did not establish that he had been present at a covered facility as defined under § 7384l(12) of the Act, while working for the Department of Energy or any of its covered contractors, subcontractors or vendors as defined under § 7384l(11) of the Act, during a covered time period. *See* 42 U.S.C. § 7384l(11), (12). The district office further concluded that you were not entitled to compensation as outlined under § 7384s(e)(1) of the Act. *See* 42 U.S.C. § 7384s(e)(1).

FINDINGS OF FACT

1. On April 11 and October 20, 2002, **[Claimant 1]** and **[Claimant 2]**, respectively, filed claims for survivor benefits under the EEOICPA as the children of **[Employee]**.

2. **[Employee]** was diagnosed as having squamous cell carcinoma of the hypopharynx.

3. **[Employee]** was employed by the State of Alaska, Civil Defense Division, and was present on Amchitka Island for Project Longshot on November 29, 1965, and the Milrow Test on October 2, 1969.

4. **[Employee]**'s employment with the State of Alaska, Civil Defense Division, on assignment to Amchitka Island, Alaska, was as a representative of the governor of Alaska.

CONCLUSIONS OF LAW

The undersigned has reviewed the recommended decision issued by the Seattle district office on April 16, 2003. I find that you have not filed any objections to the recommended decision as provided by § 30.316(a) of the regulations, and that the 60-day period for filing such objections, as provided for in § 30.310(a) has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

In order to be awarded benefits under the Energy Employees Occupational Illness Compensation Program Act, the covered employee (or his/her eligible survivors), must first establish that the employee has been diagnosed with beryllium illness, cancer, or chronic silicosis. *See* 42 U.S.C. § 7384l(15), 20 C.F.R. § 30.110(a). The evidence to show proof of an occupational illness is not in dispute in this case. The medical evidence establishes that **[Employee]** was diagnosed as having squamous cell carcinoma of the hypopharynx. Consequently, **[Employee]** was diagnosed with an illness covered under the Act.

Employees of a DOE contractor (or their eligible survivors) are entitled under the EEOICPA to seek compensation for a cancer as a member of the Special Exposure Cohort (SEC) or through a determination that they incurred cancer that was at least as likely as not related to employment at a DOE facility. 42 U.S.C. §§ 7384l(14), 7384l(9)(B)(ii)(II). To be included in the SEC, a DOE employee, DOE contractor employee, or atomic weapons employee must have been employed for an aggregate of 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, or employed before January 1, 1974, by the DOE or a DOE contractor or subcontractor on Amchitka Island, Alaska, and exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests. 42 U.S.C. § 7384l(14). To qualify as a covered employee with cancer, members of the SEC need only establish that they contracted a "specified cancer," designated in § 7384l(17) of the EEOICPA, after beginning employment at a DOE facility or atomic weapons employer facility.

While the EEOICPA does not contain a specific definition of a DOE contractor, it does contain a definition of a DOE contractor employee that, in effect, defines what a DOE contractor is. Section 7384l(11) of the EEOICPA defines a DOE contractor employee as:

(A) An individual who is or was in residence at a Department of Energy facility as a researcher for one or more periods aggregating at least 24 months.
(B) An individual who is or was employed at a Department of Energy facility by-

> (i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or
>
> (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

The question presented in this case is whether **[Employee]**, an employee of the State of Alaska, was, during the time he spent on Amchitka Island, providing management and operation, management and integration or environmental remediation services under a contract between the DOE and the State of Alaska.

The undersigned notes that the Atomic Energy Commission's Managers Completion Report refers to the State of Alaska as a prime contractor for work on Milrow and Cannikin. The work to be performed under that contract consisted of police protection.

According to Don Lowell, **[Employee]**'s supervisor at the time of his assignment to Amchitka Island, your father was not an employee of any contractor or the AEC at the time of his visit to Amchitka Island. Rather, he was an invited guest of the AEC requested to witness the atomic testing as a representative of the governor of Alaska.

The preponderance of the evidence in this case supports the conclusion that **[Employee]** was on Amchitka Island for the sole purpose of witnessing the atomic testing as a representative of the governor of Alaska. While the DOE indicated that **[Employee]** was issued a dosimetry badge on three occasions, such evidence may be used to establish that he was present on Amchitka Island, not to establish that he was a covered DOE employee. Therefore, **[Employee]**'s presence on Amchitka Island was to perform work for the State of Alaska, as a representative of the governor, and not pursuant to a contract between the DOE and the State of Alaska.

It is the claimant's responsibility to establish entitlement to benefits under the EEOICPA. The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of each and every criterion under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing the Office of Workers' Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

Although you submitted medical evidence to show a covered illness manifested by squamous cell carcinoma of the hypopharynx, the evidence of record is insufficient to establish that **[Employee]** engaged in covered employment. Therefore, your claims must be denied for lack of proof of covered employment under the EEOICPA.

Seattle, Washington

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA Fin. Dec. No. 34291-2003 (Dep't of Labor, August 1, 2003)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

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 stated below, your claim for benefits is denied.

STATEMENT OF THE CASE

On August 2, 2002, you filed a Claim for Benefits under the EEOICPA, form EE-1, through the Paducah Resource Center. On the EE-1 form, you indicated that the condition for which you filed your claim was kidney cancer. You submitted medical records from 1993 to 2001 that showed you had a nephrectomy in April of 1996. Medical records from Western Baptist Hospital from April of 1996 included an operative report for a right radical nephrectomy and a pathology report that confirmed the diagnosis of large renal cell carcinoma.

You also submitted a Form EE-3 indicating that you were employed as a conservation office for the Kentucky Department of Fish and Wildlife at the Paducah Gaseous Diffusion Plant (GDP) from 1969 to 1973. You submitted a Department of Energy (DOE) License for Non-Federal Use of Property for the purpose of wildlife development beginning September 4, 1953 and continuing indefinitely. You also submitted a DOE License for Non-Federal Use of Property for the period January 1, 1990 to December 31, 1995, and you submitted a DOE License for Non-Federal Use of Property for bow deer hunts for the period January 1, 1996 to December 31, 2000.

In addition, you submitted a copy of the five year plan and budget for the West Kentucky Wildlife Management Area for the period July 1, 1985 to June 30, 1990. You submitted an April 4, 1958 letter from the "Assistant General Counsel" noting that a corrected Quitclaim Deed from the United States of America to the State of Kentucky had been prepared and an August 21, 1989 report from the General Services Administration concluding that the State of Kentucky, Fish and Wildlife Division, was in compliance with the terms of the conveyance of these lands. You submitted an October 6, 1959 letter from Atomic Energy Commission (AEC) referencing a grant to the Commonwealth of Kentucky and the Department of Fish and Wildlife Resources of a license and permission to enter a portion of the AEC's lands for the purpose of developing the wildlife on the property and conducting bird dog field trials. This letter extended the license and permission to additional lands. In an October 14, 1959 letter, the Director of the Division of Game recommended to the Governor of Kentucky that the license and permission to use the AEC lands be accepted. He noted that the Division would have no pecuniary obligation for use of the land, apart from patrolling, posting and protecting the land licensed for use by the Division of Fish and Wildlife Resources.

You submitted forms EE-4 from Shirley Beauchamp and Phillip Scott Beauchamp stating you worked for the Department of Fish and Wildlife at the Paducah GDP from 1968 to 1973. Social Security Earnings records were submitted showing employment with the state of Kentucky from 1971 to 1973. The Department of Energy advised the district office, however, that DOE had no information regarding your employment.

On November 15, 2002, the district office issued a recommended decision concluding that you were not employed by an entity that contracted with the DOE to provide "management and operating, management and integration, or environmental remediation" as set forth in 42 U.S.C. § 7384l(11)(B)(i) and (ii) and that, accordingly, you were not a covered DOE contractor. The district office therefore recommended that benefits be denied

On December 23, 2002, you filed an objection to the recommended decision and requested a hearing. An oral hearing was held on February 26, 2003. At the hearing, you testified that you worked for the Kentucky Department of Fish and Wildlife from 1971 to 1973 and that you worked at the Paducah GDP and its surrounding grounds. You testified that your duties included patrolling the perimeter of the fenced portion of the plant and building two bridges and that you entered the plant through the main gate on a regular basis to remove animals that got into the GDP. You testified that you did not enter any of the buildings inside the fenced area of the GDP. You described other duties you performed during this period of employment, and you testified that you checked hunting and fishing licenses and controlled hunting at the reserve. You testified also that you participated in game sampling in conjunction with the DOE prior to the hunting season and that DOE would collect specific body parts provided by the Department of Fish and Wildlife and ship them for sampling.

FINDINGS OF FACT

You filed a claim for benefits under the EEOICPA on August 2, 2002. You were employed by the State of Kentucky, Department of Fish and Wildlife from 1971 to 1973. You were diagnosed with kidney cancer on or about April 13, 1996. You have not established that you worked in employment covered under the EEOICPA.

CONCLUSIONS OF LAW

A covered employee is eligible for compensation under the EEOICPA for an "occupational illness," which is defined in § 7384l(15) of the EEOICPA as "a covered beryllium illness, cancer referred to in § 7384l(9)(B) of this title, specified cancer, or chronic silicosis, as the case may be." 42 U.S.C. § 7384l(15). A "covered employee" is eligible for compensation under EEOICPA for a specified "occupational illness." A "covered employee," as defined in §§ 7384l(1),7384l(3),7384l(7),7384l(9), 7384l(11) and § 7384r of the EEOICPA, includes employees of private companies (an entity "other than the United States", per § 7384l(4)) which provided radioactive materials to the United States for the production of atomic weapons, employees at Department of Energy facilities or test sites (§ 7384l(12)), and employees of Department of Energy contractors, subcontractors, or beryllium vendors. 42 U.S.C. §§ 7384l(1),(3),(7),(9), (11); 7384r. Section 7384(l)(11)(B)(I and ii) defines a "Department of Energy contractor employee" to include

"An individual who is or was employed at a Department of Energy facility by—

(i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or

(ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility."

The DEEOIC has further addressed the issues of how a "contractor or subcontractor" may be defined, as well as whether employees of state or federal governments may be considered DOE contractor employees, in EEOICPA Bulletins No. 03-27 (issued May 28, 2003) and No. 03-26 (issued June 3, 2003). The following definitions have been adopted by the DEEOIC:

Contractor – An entity engaged in a contractual business arrangement with the Department of Energy to provide services, produce materials or manage operations at a beryllium vendor or Department of Energy facility.

Subcontractor – An entity engaged in a contracted business arrangement with a beryllium vendor contractor or a contractor of the Department of Energy to provide a service at a beryllium vendor or Department of Energy facility.

Contract - An agreement to perform a service in exchange for compensation, usually memorialized by a memorandum of understanding, a cooperative agreement, an actual written contract, or any form of written or implied agreement, is considered a contract for the purpose of determining whether an entity is a "DOE contractor."

For a civilian employee of a state or federal government agency to be considered a DOE contractor employee, it must be shown that the government agency employing that individual entered into a contract with the DOE for the accomplishment of one or more services it was not statutorily obligated to perform and that the DOE compensated the agency for that activity.

There is no evidence that the DOE compensated the State of Kentucky, Department of Fish and Wildlife Resources, for any services on behalf of the Department of Energy. The State of Kentucky was simply given permission to use federal land. The fact that the State of Kentucky was not required to provide any fees for use of federal property does not, conversely, show that the Department of

Energy compensated the State of Kentucky for services provided by the State. The evidence of record shows simply that the Department of Energy or AEC gave permission for the State of Kentucky to use certain of its lands in order to conduct bird dog trials or hunting or fishing or similar activities. The Fish and Wildlife division was responsible for the activities that it would otherwise be responsible for under state law. The quitclaim deed to certain lands was not compensation to the State of Kentucky for any services performed for the Department of Energy, but was conveyed to the State of Kentucky for the purpose of management for wildlife purposes. The mere presence of an individual on DOE-owned property does not confer covered employment status.

For the foregoing reasons, the undersigned must find that you have not established your claim for compensation under the EEOICPA and hereby denies your claim for compensation.

Cleveland, Ohio

Anthony Zona

Hearing Representative

EEOICPA Fin. Dec. No. 27798-2003 (Dep't of Labor, June 20, 2003)

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 (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claims for benefits are denied.

STATEMENT OF THE CASE

On April 11, 2002, **[Claimant 1]** filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA), stating that he was the son of **[Employee]**, who was diagnosed with pharyngeal cancer. An additional claim followed thereafter from **[Claimant 2]** on October 20, 2002. **[Claimant 1]** also completed a Form EE-3, Employment History, indicating that **[Employee]** worked for Standard Oil Company, from 1950 to 1961; the State of Alaska as Deputy Director of Veterans Affairs, from 1961 to 1964; the State of Alaska Department of Military Affairs, Alaska Disaster Office, from 1965 to 1979 (where it was believed he wore a dosimetry badge); and, for the American Legion from 1979 to 1985.

In correspondence dated June 24, 2002, a representative of the Department of Energy (DOE) indicated that they had no employment information regarding **[Employee]**, but that he had been issued film badges at the Amchitka Test Site on the following dates: October 28, 1965; September 30, 1969; and, September 21, 1970. You also submitted a completed Form EE-4 (Employment Affidavit) signed by Don Lowell, your father's supervisor at the State of Alaska, Department of Public Safety, Division of Civil Defense. According to Mr. Lowell, your father was a radiological officer for the State of Alaska and accompanied him to Amchitka Island for Project Longshot on November 29, 1965, and the Milrow Test on October 2, 1969, as a representative of the State of Alaska.

Additional documentation submitted in support of your claim included copies of your birth certificates,

a marriage certificate documenting **[Name of Claimant 2 at Birth]**'s marriage to **[Husband]**, and the death certificate for **[Employee]**, indicating that he was widowed at the time of his death on May 10, 1993. In addition, you provided medical documentation reflecting a diagnosis of squamous cell carcinoma of the pharyngeal wall in November 1991.

On November 8, 2002, the Seattle district office issued a recommended decision that concluded that **[Employee]** was a covered employee as defined in § 7384l(9)(A) of the Act and an eligible member of the Special Exposure Cohort as defined in § 7384l(14)(B) of the EEOICPA, who was diagnosed as having a specified cancer, specifically cancer of the hypopharynx, as defined in § 7384l(17) of the Act. *See* 42 U.S.C. 7384l(9)(A), (14)(B), (17). The district office further concluded that you were eligible survivors of **[Employee]** as outlined in § 7384s(e)(3) of the Act, and that you were each entitled to compensation in the amount of $75,000 pursuant to § 7384s(a)(1) and (e)(1) of the EEOICPA. *See* 42 U.S.C. §§ 7384s(a)(1) and (e)(1).

On December 20, 2002, the Final Adjudication Branch issued a Remand Order in this case on the basis that the evidence of record did not establish that **[Employee]** was a member of the "Special Exposure Cohort," as required by the Act. The Seattle district office was specifically directed to determine whether the Department of Energy and the State of Alaska, Department of Public Safety, Division of Civil Defense, had a contractual relationship.

In correspondence dated January 17, 2003, Don Lowell elaborated further on your father's employment and his reasons for attending the nuclear testing on Amchitka Island. According to Mr. Lowell, the Atomic Energy Commission (AEC) invited the governors of Alaska to send representatives to witness all three tests on Amchitka Island (Longshot, Milrow, and Cannikin). As such, **[Employee]** attended both the Longshot and Milrow tests as a guest of the Atomic Energy Commission, which provided transportation, housing and food, and assured the safety and security of those representatives.

On February 4, 2003, the district office received an electronic mail transmission from Karen Hatch, Records Management Program Officer at the National Nuclear Security Agency. Ms. Hatch indicated that she had been informed by the former senior DOE Operations Manager on Amchitka Island that escorts were not on the site to perform work for the AEC, but were most likely there to provide a service to the officials from the State of Alaska.

In correspondence dated February 11, 2003, a representative of the State of Alaska, Department of Public Safety, Division of Administrative Services, indicated that there was no mention of Amchitka or any sort of agreement with the Department of Energy in **[Employee]**'s personnel records, but that the absence of such reference did not mean that he did not go to Amchitka or that a contract did not exist. He further explained that temporary assignments were not always reflected in these records and suggested that the district office contact the Department of Military and Veterans Affairs to see if they had any record of an agreement between the State of Alaska and the DOE. By letter dated March 13, 2003, the district office contacted the Department of Military and Veterans Affairs and requested clarification as to **[Employee]**'s employment with the State of Alaska and assignment(s) to Amchitka Island. No response to this request was received.

On April 16, 2003, the S eattle district office recommended denial of your claims. The district office concluded that you did not submit employment evidence as proof that **[Employee]** was a member of the "Special Exposure Cohort" as defined by § 7384l(14)(B) of the Act, as the evidence did not establish that he had been present at a covered facility as defined under § 7384l(12) of the Act, while

working for the Department of Energy or any of its covered contractors, subcontractors or vendors as defined under § 7384l(11) of the Act, during a covered time period. *See* 42 U.S.C. § 7384l(11), (12). The district office further concluded that you were not entitled to compensation as outlined under § 7384s(e)(1) of the Act. *See* 42 U.S.C. § 7384s(e)(1).

FINDINGS OF FACT

1. On April 11 and October 20, 2002, **[Claimant 1]** and **[Claimant 2]**, respectively, filed claims for survivor benefits under the EEOICPA as the children of **[Employee]**.

2. **[Employee]** was diagnosed as having squamous cell carcinoma of the hypopharynx.

3. **[Employee]** was employed by the State of Alaska, Civil Defense Division, and was present on Amchitka Island for Project Longshot on November 29, 1965, and the Milrow Test on October 2, 1969.

4. **[Employee]**'s employment with the State of Alaska, Civil Defense Division, on assignment to Amchitka Island, Alaska, was as a representative of the governor of Alaska.

CONCLUSIONS OF LAW

The undersigned has reviewed the recommended decision issued by the Seattle district office on April 16, 2003. I find that you have not filed any objections to the recommended decision as provided by § 30.316(a) of the regulations, and that the 60-day period for filing such objections, as provided for in § 30.310(a) has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

In order to be awarded benefits under the Energy Employees Occupational Illness Compensation Program Act, the covered employee (or his/her eligible survivors), must first establish that the employee has been diagnosed with beryllium illness, cancer, or chronic silicosis. *See* 42 U.S.C. § 7384l(15), 20 C.F.R. § 30.110(a). The evidence to show proof of an occupational illness is not in dispute in this case. The medical evidence establishes that **[Employee]** was diagnosed as having squamous cell carcinoma of the hypopharynx. Consequently, **[Employee]** was diagnosed with an illness covered under the Act.

Employees of a DOE contractor (or their eligible survivors) are entitled under the EEOICPA to seek compensation for a cancer as a member of the Special Exposure Cohort (SEC) or through a determination that they incurred cancer that was at least as likely as not related to employment at a DOE facility. 42 U.S.C. §§ 7384l(14), 7384l(9)(B)(ii)(II). To be included in the SEC, a DOE employee, DOE contractor employee, or atomic weapons employee must have been employed for an aggregate of 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, or employed before January 1, 1974, by the DOE or a DOE contractor or subcontractor on Amchitka Island, Alaska, and exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests. 42 U.S.C. § 7384l(14). To qualify as a covered employee with cancer, members of the SEC need only establish that they contracted a "specified cancer," designated in § 7384l(17) of the EEOICPA, after beginning employment at a DOE facility or atomic weapons employer facility.

While the EEOICPA does not contain a specific definition of a DOE contractor, it does contain a

definition of a DOE contractor employee that, in effect, defines what a DOE contractor is. Section 7384l(11) of the EEOICPA defines a DOE contractor employee as:

(A) An individual who is or was in residence at a Department of Energy facility as a researcher for one or more periods aggregating at least 24 months.
(B) An individual who is or was employed at a Department of Energy facility by-
(i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or
(ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

The question presented in this case is whether **[Employee]**, an employee of the State of Alaska, was, during the time he spent on Amchitka Island, providing management and operation, management and integration or environmental remediation services under a contract between the DOE and the State of Alaska.

The undersigned notes that the Atomic Energy Commission's Managers Completion Report refers to the State of Alaska as a prime contractor for work on Milrow and Cannikin. The work to be performed under that contract consisted of police protection.

According to Don Lowell, **[Employee]**'s supervisor at the time of his assignment to Amchitka Island, your father was not an employee of any contractor or the AEC at the time of his visit to Amchitka Island. Rather, he was an invited guest of the AEC requested to witness the atomic testing as a representative of the governor of Alaska.

The preponderance of the evidence in this case supports the conclusion that **[Employee]** was on Amchitka Island for the sole purpose of witnessing the atomic testing as a representative of the governor of Alaska. While the DOE indicated that **[Employee]** was issued a dosimetry badge on three occasions, such evidence may be used to establish that he was present on Amchitka Island, not to establish that he was a covered DOE employee. Therefore, **[Employee]**'s presence on Amchitka Island was to perform work for the State of Alaska, as a representative of the governor, and not pursuant to a contract between the DOE and the State of Alaska.

It is the claimant's responsibility to establish entitlement to benefits under the EEOICPA. The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of each and every criterion under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing the Office of Workers' Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

Although you submitted medical evidence to show a covered illness manifested by squamous cell carcinoma of the hypopharynx, the evidence of record is insufficient to establish that **[Employee]** engaged in covered employment. Therefore, your claims must be denied for lack of proof of covered employment under the EEOICPA.

Seattle, Washington

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA Fin. Dec. No. 30971-2002 (Dep't of Labor, March 15, 2004)

NOTICE OF FINAL DECISION REVIEW OF THE WRITTEN RECORD

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 stated below, your claim for benefits is denied.

STATEMENT OF THE CASE

On June 10, 2002, you filed a Claim for Survivor Benefits under the EEOICPA, form EE-2, with the Denver district office, as the spouse of the employee, for multiple myeloma. You indicated on the EE-3 form that your husband was employed by the U.S. Coast and Geodetic Survey at various locations, including the Nevada Test Site, from early 1951 to December 1953.

You also submitted marriage certificate and death certificates establishing that you were married to the employee from March 7, 1953 until his death on November 5, 1999, tax forms confirming his employment with the U.S. Coast and Geodetic Survey in 1951 and 1952 and a document from the Nevada Field Office of the Department of Energy (DOE) indicating that they had records of your husband having been exposed to radiation in 1951 and 1952. Additionally, you submitted a document stating that your claim under the Radiation Exposure Compensation Act had been approved in the amount of $75,000; you stated that you had declined to accept the award and that was confirmed by a representative of the Department of Justice on August 12, 2002.

On July 1, 2002, you were informed of the medical evidence needed to support that your husband had cancer. You submitted records of medical treatment, including a pathology report of April 19, 1993, confirming that he was diagnosed with multiple myeloma.

On July 22, 2002, a DOE official stated that, to her knowledge, your husband's employers were not Department of Energy contractors or subcontractors. On July 29, 2002, you were advised of the type of evidence you could submit to support that your husband had employment which would give rise to coverage under the Act, and given 30 days to submit such evidence. You submitted statements from co-workers confirming that he did work at the Nevada Test Site for a period from October to December 1951 and again for a few weeks in the spring of 1952.

On August 29, 2002, the district office issued a recommended decision that concluded that you were not entitled to compensation benefits because the evidence did not establish that your husband was a covered employee.

By letter dated September 20, 2002, your representative objected to the recommended decision, stating

that your husband was a covered employee in that he worked at the Test Site while employed by the U.S. Coast and Geodetic Survey, which was a contractor of the Atomic Energy Commission (AEC), a predecessor agency of the DOE. The representative also submitted documents which indicated that the U.S. Coast and Geodetic Survey performed work, including offering technical advice and conducting surveys, for other government agencies, including the AEC and the military, and that it was covered by a cooperative agreement between the Secretary of Commerce and the Secretary of the Army. On April 1, 2003, the case was remanded to the district office for the purpose of determining whether your husband's work at the Nevada Test Site was performed under a "contract" between the DOE and the U.S. Coast and Geodetic Survey.

The documents submitted by your representative were forwarded to the DOE, which responded on May 28, 2003 that dosimetry records existed for your husband "showing that he was with the USC&GS but after further research it was established that the USC&GS was in fact not a contractor or subcontractor of the AEC during those years." The documents were also reviewed by the Branch of Policy, Regulations and Procedures in our National Office. On November 7, 2003, the district office issued a recommended decision to deny your claim. The decision stated that the evidence submitted did not support that the U.S. Coast and Geodetic Survey was a contractor of the DOE at the Nevada Test Site, and, concluded that you were not entitled to benefits under § 7384s of the EEOICPA as your husband was not a covered employee under § 7384l. 42 U.S.C. §§ 7384l and 7384s.

In a letter dated January 7, 2004, your representative objected to the recommended decision. He did not submit additional evidence but did explain why he believes the evidence already submitted was sufficient to support that your husband was a covered employee under the Act. Specifically, he stated that the evidence supported that your husband worked at the Nevada Test Site in 1951 and 1952 in the course of his employment with the U.S. Coast and Geodetic Survey, an agency which was performing a survey at the request of the AEC, and that the latter agency issued him a badge which established that he was exposed to radiation while working there. He argued that one must reasonably conclude from these facts that his work at the Nevada Test Site did constitute covered employment under the EEOICPA.

FINDINGS OF FACT

You filed a claim for survivor benefits under the EEOICPA on June 10, 2002.

You were married to the employee from March 7, 1953 until his death on November 5, 1999.

Medical records, including a pathology report, confirmed he was diagnosed with multiple myeloma in April 1993.

In the course of his employment by the U.S. Coast and Geodetic Survey, your husband worked, and was exposed to radiation, at the Nevada Test Site, a DOE facility.

The evidence does not support, and the Department of Energy has denied, that the U.S. Coast and Geodetic Survey was a contractor of the DOE at the time your husband worked at the Nevada Test Site.

CONCLUSIONS OF LAW

A claimant who receives a recommended denial from the district office is entitled to file objections to

the decision, pursuant to 20 C.F.R. § 30.310. The same section of the regulations provides that in filing objections, the claimant must identify his objections as specifically as possible. In reviewing any objections submitted, under 20 C.F.R. § 30.313, the Final Adjudication Branch will review the written record, any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. I have reviewed the record in this case and your representative's letter of January 2, 2004 and must conclude that no further investigation is warranted.

The purpose of the EEOICPA, as stated in its § 7384d(b), is to provide for "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." 42 U.S.C. § 7384d(b).

A "covered employee with cancer" includes, pursuant to § 7384l(9)(B) of the Act, an individual who is a "Department of Energy contractor employee who contracted…cancer after beginning employment at a Department of Energy facility." Under § 7384l(11), a "Department of Energy contractor employee" may be an individual who "was employed at a Department of energy facility by…an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or…a contractor or subcontractor that provided services, including construction and maintenance, at the facility." 42 U.S.C. § 7384l(9)(B), (11).

EEOICPA Bulletin NO. 03-26 states that "a civilian employee of a state or federal government agency can be considered a 'DOE contractor employee' if the government agency employing that individual is (1) found to have entered into a contract with DOE for the accomplishment of…services it was not statutorily obligated to perform, and (2) DOE compensated the agency for that activity." The same Bulletin goes on to define a "contract" as "an agreement that something specific is to be done in return for some payment or consideration."

Section 30.111(a) states that "Except where otherwise provided in the Act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category set forth in § 30.110." 20 C.F.R. § 30.111(a).

As noted above, the evidence supports that your husband was exposed to radiation while working for the U.S. Coast and Geodetic Survey at the Nevada Test Site in late 1951 and early 1952, that he was diagnosed with multiple myeloma in April 1993, and that you were married to him from March 7, 1953 until his death on November 5, 1999.

It does not reasonably follow from the evidence in the file that his work at the Nevada Test Site must have been performed under a "contract" between the U.S. Coast and Geodetic Survey and the AEC. Government agencies are not private companies and often cooperate with and provide services for other agencies without reimbursement. The DOE issued radiation badges to military personnel, civilian employees of other government agencies, and visitors, who were authorized to be on a site but were not DOE employees or DOE contractor employees. No evidence has been submitted that your husband's work at the Nevada Test Site was pursuant to a "contract" between the U.S. Coast and Geodetic Survey and the AEC and the DOE has specifically denied that his employing agency was a contractor or subcontractor at that time. Therefore, there is no basis under the Act to pay compensation benefits for his cancer.

For the foregoing reasons, the undersigned must find that you have not established your claim for compensation under the EEOICPA and hereby denies that claim.

Washington, DC

Richard Koretz

Hearing Representative

EEOICPA Fin. Dec. No. 34771-2003 (Dep't of Labor, July 21, 2003)

REVIEW OF THE WRITTEN RECORD AND NOTICE OF FINAL DECISION

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 for benefits is denied.

STATEMENT OF THE CASE

On August 14, 2002, you filed a Form EE-2 (Survivor's Claim for Benefits under EEOICPA) seeking compensation as the eligible surviving beneficiary of your husband, **[Employee]**. On the EE-2 form, you indicated that he had been diagnosed with colon cancer. In support of your claim, you submitted medical evidence that confirmed the diagnosis of the claimed condition. You also indicated that **[Employee]** was a member of the Special Exposure Cohort having been employed at the West Kentucky Wildlife Management area near the Paducah Gaseous Diffusion Plant.

On September 10, 2002, the district office advised you that the corporate verifier, Oak Ridge Institute for Science and Education, had sent notice to the district office that it had no employment records for **[Employee]**, and that the Social Security Earnings statement and affidavits submitted detail employment for the Department of Fish and Wildlife for the State of Kentucky. The district office requested that you provide proof of employment with a contractor or subcontractor for the Department of Energy (DOE) within thirty days. You did not respond to this request.

The district office reviewed the record and found that you submitted a claim for compensation under the EEOICPA. It was further found that no evidence was submitted that supported the claim that **[Employee]** had been employed at a facility covered under the Act. Therefore, on October 30, 2002, the district office recommended the denial of your claim.

Section 30.316(b) of the EEOICPA implementing regulations states that if the claimant files objections to all or part of the recommended decision, the FAB reviewer will issue a decision on the claim after either the hearing or the review of the written record, and after completing such further development of the case as he or she may deem necessary. 20 C.F.R. § 30.316(b). On November 19, 2002, the Final Adjudication Branch received your letter of appeal. In your statement of appeal, you objected to the conclusion that you did not submit evidence establishing employment at a covered facility for **[Employee]**. On May 21, 2003, you submitted additional evidence regarding employment for **[Employee]**. This additional evidence consisted of a licensing agreement between the Commonwealth of Kentucky and the U.S. Atomic Energy Commission dated October 22, 1959, and a 1989 wildlife

compliance inspection of the area conducted by the General Services Administration.

FINDINGS OF FACT

1. You filed a claim for compensation as an eligible surviving beneficiary of **[Employee]**.

2. **[Employee]** was employed by the Kentucky Department of Fish and Wildlife Resources.

3. The Department of Energy indicated that there was no record of **[Employee]**'s employment at the Paducah Gaseous Diffusion Plant.

4. You did not establish that there was a contractual relationship between the State of Kentucky, Department of Fish and Wildlife Resources and the Department of Energy.

CONCLUSIONS OF LAW

In determining whether **[Employee]** was employed by a Department of Energy contractor due to services being rendered pursuant to a contract, the Final Adjudication Branch must examine two critical issues. Firstly, we must establish how a DOE contactor is defined under the Act. Secondly, we must determine the nature of the agreement between the parties, and if that agreement contains the essential elements of a contract, i.e., mutual intent to contract and the exchange of consideration or payment.

I conclude that the employee was not a DOE contractor employee. The EEOICPA program has established how a DOE contractor and subcontractor are to be defined. Program bulletin 03-27 sets forth the following definitions:

Contractor – An entity engaged in a contractual business arrangement with the Department of Energy to provide services, produce materials or manage operations at a beryllium vendor or Department of Energy facility.

Subcontractor – An entity engaged in a contracted business arrangement with a beryllium vendor contractor or a contractor of the Department of Energy to provide a service at a beryllium vendor or Department of Energy facility. EEOICPA Bulletin No. 03-27, 2003.

Therefore, an entity must be engaged in a contractual business arrangement to provide services to the DOE in order to be a contractor or subcontractor.

The evidence submitted does not support the claim that **[Employee]**'s employer, the Kentucky Department of Fish and Wildlife Resources, had contracted with the Atomic Energy Commission or DOE to provide management and operating, management and integration, or environmental remediation at the facility. Consequently, **[Employee]**'s employer does not meet the definition of a DOE contractor. Furthermore, the mere existence of a formal written document authorizing a state or federal entity to perform work for DOE does not automatically make the entity a DOE contractor if the document and arrangement lack the elements necessary to constitute a contract. The license in this case permitted the state of Kentucky, Department of Fish and Wildlife Resources to utilize DOE land as a field trial area.

The Act is clear that its provisions extend compensation only to certain employees. These "covered

employees" are defined as covered employees with cancer, covered beryllium employees, and covered employees with silicosis. The definition of a covered employee with cancer (who is a member of the Special Exposure Cohort[1]) is found in § 7384l(9)(A) of the Act. That section states that in order to be considered a covered employee with cancer one must have been a Department of Energy employee or contractor employee who contracted the cancer after beginning employment at a Department of Energy facility, or an atomic weapons employee who contracted cancer after beginning employment at an atomic weapons facility. 42 U.S.C. § 7384l(9)(A).

Based on the review of the record, the undersigned hereby concludes that the record supports the finding that **[Employee]** did not have covered employment as defined under the Act. Because you have not established, with the required evidence, employment covered under the EEOICPA, your claim for compensation must be denied.

Washington, DC

David E. Benedict

Hearing Representative

[1] The Special Exposure Cohort differs from other Department of Energy and atomic weapon employees in that is comprised of individuals who were so employed for a number of work days aggregating at least 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, and, during such employment were monitored through the use of dosimetry badges; or worked in a job that had exposures comparable to a job that is or was monitored through the use of dosimetry badges. The Cohort also includes employees that were employed before January 1, 1974, by the Department of Energy or a Department of Energy contractor or subcontractor on Amchitka Island, Alaska, and was exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests. Individuals designated as a member of the Special Exposure Cohort by the President for purposes of the compensation program under section 7384q of this title are also included. 42 U.S.C. § 7384l(9)(A); 42 U.S.C. § 7384l(14).

DOE Facilities

Definition of

EEOICPA Fin. Dec. No. 10043931-2006 (Dep't of Labor, March 10, 2008)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) on the employee's claim for benefits under Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the employee's claim is denied.

STATEMENT OF THE CASE

On May 31, 2002, the employee filed a claim for benefits under Part B of EEOICPA and alleged that he had contracted beryllium sensitivity, chronic beryllium disease (CBD) and pulmonary insufficiency due to occupational exposure to beryllium as a mechanical engineer at the Massachusetts Institute of Technology campus in Cambridge, Massachusetts (MIT). In support of his claim, he filed a Form EE-3 on which he alleged that he had been employed by "U.S. Army, (T-4) Special Engineering Detachment, Manhattan District, Corps of Engineers, assigned to Metallurgical Project, U of Chicago, Mass. Inst. of Tech Location," at Oak Ridge, Tennessee, and as a radiation monitor at Bikini Atoll from May through

August 1946. On that form, the employee alleged that he was assigned to the "Beryllium Group" at MIT from November 1945 to May 1946.

By letter dated June 10, 2002, the Denver district office of the Division of Energy Employees Occupational Illness Compensation (DEEOIC) confirmed receipt of the employee's claim and informed him that coverage under EEOICPA is limited to civilian employees of the Department of Energy (DOE), its predecessor agencies and certain of its contractors and subcontractors, and that military personnel are not similarly covered. The employee then submitted several documents regarding his employment, including a June 17, 2002 letter in which he clarified that: (1) he joined the Army in 1942; (2) he was called to active duty in May 1943; and (3) he was assigned to the K-25 Gaseous Diffusion Plant in Oak Ridge in September 1944. He stated that shortly afterward, he was transferred to the "Metallurgical Project" at MIT, still as an enlisted member of the Army, and worked there until May 1946 when he was transferred back to Oak Ridge and trained for his subsequent job at Operation Crossroads in the Pacific.

Employment records provided by MIT on April 24, 2003 indicate: (1) that the employee was initially assigned to work at MIT as an enlisted member of the U.S. Army on December 1, 1944; (2) that on January 26, 1945, a change in his Army status allowed MIT to hire him directly as a civilian employee on the same project; and (3) that he was recalled to active military duty in the Army on October 22, 1945, but continued to work on the project at MIT until May 2, 1946. In a letter dated May 10, 2003, the employee provided a detailed work history, with supporting documents, that was consistent with the information provided by MIT and confirmed that he was a civilian employee of MIT at MIT's Cambridge campus from January 26, 1945 to October 22, 1945. Neither DOE nor its Oak Ridge Operations Office was able to verify the employee's alleged employment at Oak Ridge or at Bikini Atoll, but the enlistment records in his case file are consistent with his claim of military employment at these two locations.

On May 15, 2003, the Denver district office issued a recommended decision to accept the employee's claim for beryllium sensitivity, and on May 30, 2003 the FAB issued a final decision consistent with the district office's recommendation. In that decision, the FAB awarded the employee medical benefits and monitoring for his beryllium sensitivity, retroactive to his filing date of May 31, 2002. Thereafter, on September 11, 2003, the Denver district office issued a recommended decision to accept the employee's Part B claim for CBD, based on the recommended findings that he had covered civilian employment at MIT from January 26, 1945 to October 22, 1945, and that he had been diagnosed with CBD on July 2, 2003. On September 22, 2003, the FAB issued a final decision accepting the employee's Part B claim for CBD and awarding him a lump-sum of $150,000.00 plus medical benefits for his CBD, retroactive to May 31, 2002. In this final decision, the FAB concluded that the employee was a "covered beryllium employee" and that he had been diagnosed with CBD consistent with the criteria set out in EEOICPA.

Following the 2004 amendments to EEOICPA that included the enactment of new Part E[1], the employee filed a claim based on his CBD under Part E of EEOICPA on November 25 , 2005. Shortly thereafter, the employee's new Part E claim was transferred to the Cleveland district office of DEEOIC for adjudication. By letter dated March 9, 2006, the Cleveland district office informed the employee that he did not meet the eligibility requirements under Part E of EEOICPA. The district office explained that Part E differs from Part B in that Part E only provides benefits for civilian employees of DOE contractors and subcontractors (or their eligible survivors), but does not provide benefits for employees of the other types of employers that are covered under Part B, *i.e.*, atomic weapons employers or beryllium vendors. The letter provided the employee with an opportunity to submit

additional evidence "[i]f you intend to claim additional employment or intend to provide evidence that MIT should be designated as a DOE facility. . . ." Included with the letter was a print-out of the Department of Energy (DOE) Facility List entry for MIT, which indicated that at that time, MIT's Cambridge campus was designated only as an atomic weapons employer (AWE) facility and a beryllium vendor facility, but not a DOE facility.[2]

On April 17, 2006, the Cleveland district office issued a recommended decision to deny the employee's Part E claim for his CBD, based on their recommended finding that the evidence in the file was insufficient to establish that he was a "covered DOE contractor employee," as that term is defined in § 7384l(11) of EEOICPA, because it failed to establish that his civilian employment at MIT was at a "Department of Energy facility," as that second term is defined in § 7384l(12) of EEOICPA. The employee filed objections to the recommended decision in letters to the FAB dated May 4, 2006, June 26, 2006, September 17, 2006 and October 26, 2006, and submitted several affidavits, exhibits and other factual evidence in support of his objections. All of the employee's objections were made in support of his position on one point—that DEEOIC should determine that MIT's Cambridge campus, or a portion thereof, is a "DOE facility" for the purposes of his Part E claim.

On June 6, 2006, the FAB referred the employee's Part E claim to DEEOIC's Branch of Policy, Regulations and Procedures (BPRP) for guidance on the issue of whether the evidence submitted by the employee warranted the requested determination regarding MIT's Cambridge campus. On December 21, 2006, BPRP referred the issue to the Office of the Solicitor of Labor (SOL). On March 14, 2007, SOL issued an opinion in which it concluded that the evidence in the case file was insufficient to establish that MIT's campus meets the statutory definition of a "Department of Energy facility." Based on that conclusion, SOL advised BPRP that DEEOIC could reasonably determine that the employee was ineligible for benefits under Part E as he was not a "covered Department of Energy contractor employee."

On May 4, 2007, the FAB issued a final decision denying the employee's Part E claim. In its final decision, the FAB restated both the employee's objections and the opinion of SOL. The FAB found that while MIT's Cambridge campus was recognized as both an AWE facility and a beryllium vendor facility during the period of the employee's civilian employment there, the evidence was insufficient to establish that it also satisfied the statutory definition of a "DOE facility" during that time period. Thus, the FAB concluded that the employee was not a "covered DOE contractor employee," as that term is defined in EEOICPA.

By letter dated May 24, 2007, the employee filed a request for reconsideration of the FAB's final decision and on July 17, 2007, the FAB issued a denial of the employee's request. In its denial, the FAB restated the employee's objections and based its denial on the conclusion that he had not submitted any new evidence or arguments that would justify reconsidering the May 4, 2007 final decision. On January 25, 2008, the Director of DEEOIC issued an Order vacating both the FAB's May 4, 2007 final decision on the employee's Part E claim and its July 17, 2007 denial of the employee's request for reconsideration. In his Order, the Director indicated that while the FAB had restated the employee's objections in its final decision, it had not explicitly analyzed each of those objections. Because of this, the Director vacated the FAB's decisions and returned the employee's Part E claim to the FAB "for issuance of a new final decision that gives appropriate consideration to the employee's objections to the Cleveland district office of DEEOIC's recommended denial of his Part E claim."

OBJECTIONS

As noted above, the employee objected to the recommended denial of his Part E claim in a letter dated

May 4, 2006 and urged that MIT's Cambridge campus was misclassified and should be determined to be a DOE facility. The employee's first argument urged that the work of the Metallurgical Project at MIT was "nuclear weapons related." The evidence supports this argument. The DOE Facility List entry for MIT describes the uranium metallurgical work and beryllium work performed at MIT in support of the U.S. Army Corps of Engineers Manhattan Engineer District (MED) during the period 1942 through 1946.[3] This work—a portion of which was performed by the employee—supports the determination that MIT's Cambridge campus is both an AWE facility from 1942 through 1946, and a beryllium vendor facility from 1943 through 1946.

The employee's second argument was that DEEOIC previously determined that MIT's Cambridge campus was a DOE facility. In support of this position, the employee correctly pointed out that in its May 15, 2003 recommended decision on his Part B claim, the Denver district office stated that "Massachusetts Institute of Technology initially became a DOE facility in 1942." The FAB acknowledges that the Denver district office made that erroneous historical statement in its recommended decision on the employee's Part B claim; however, that error was not carried forward in any of the subsequent recommended decisions on the employee's several claims, nor was it repeated in any finding of fact or conclusion of law in any of the FAB's final decisions issued on the employee's several claims. In issuing a final agency decision on a claim under EEOICPA, the FAB is not bound by a historical inaccuracy contained in a recommended decision issued by a DEEOIC district office. *See* EEOICPA Fin. Dec. No. 10028664-2006 (Dep't of Labor, August 24, 2006).

The employee also argued that the MED was a predecessor agency of DOE. The FAB agrees with this historical point. 42 U.S.C. § 7384l(10).

The employee argued that "beryllium work was done at MIT and that acute beryllium disease resulted." The FAB agrees. The DOE Facility List description of the work that was performed at MIT describes beryllium work performed at the MIT Cambridge campus, and that work supports the designation of MIT as a beryllium vendor during the period 1943 through 1946. That description also refers to "a number of cases of beryllium disease at MIT" prior to the fall of 1946.[4]

The employee submitted evidence that the Metallurgical Laboratory (Met Lab) in Chicago, Illinois, is classified as an AWE facility, a beryllium vendor facility and a DOE facility, and argued that the work performed at MIT's Cambridge campus "was just an extension of" the work performed under Dr. Arthur Compton at the Met Lab. The FAB agrees that the Met Lab was designated as an AWE facility (1942-1952), a beryllium vendor facility (1942-1946) and a DOE facility (1982-1983, 1987).[5] The FAB notes, however, that like MIT's Cambridge campus, the Met Lab is classified only as an AWE facility and a beryllium vendor facility during the time of their early uranium and metallurgical work in the 1940s. The Met Lab is classified as a DOE facility only during the periods of remediation work that was performed there in the 1980s. These classifications are consistent with those for MIT's Cambridge campus. The FAB concludes that the evidence in the file is insufficient to establish that the work performed at MIT's Cambridge campus "was just an extension of" the work performed at the Met Lab. The work performed at MIT's Cambridge campus was performed pursuant to a contract between the MED and MIT, and there is no evidence in the file to corroborate the employee's claim that the Met Lab directed or controlled the MIT Metallurgical Project.

The employee also submitted evidence showing that the Ames Laboratory in Ames, Iowa, is classified as a DOE facility, but made no argument in his May 4, 2006 letter as to the relevance of this information. In a letter dated February 7, 2008, the employee clarified his argument regarding the Ames Laboratory by asserting that the Met Lab and the Ames Laboratory "were both classified as DOE Employers while MIT was not, even though the work was analogous and facilities in all cases were owned by the universities. . . . The precedents established by these classifications seems not to have been considered." The FAB acknowledges that the Ames Laboratory is designated as a DOE facility (1942-present),[6] but points out that there is no probative evidence in the case file that corroborates the employee's argument that the work performed at the Ames Laboratory was analogous to the work

that was performed at MIT's Cambridge campus, or that the contracts for such work were similar in type to the pertinent MED contract with MIT, or that the buildings used at the Ames Laboratory were owned by the associated university.[7] The regulations governing EEOICPA place upon the claimant the burden to produce evidence necessary to establish all criteria for benefits and to prove the existence of all elements necessary to establish eligibility for benefits. 20 C.F.R. § 30.111(a). The employee's bare assertions regarding the Met Lab and the Ames Laboratory are not, without supporting factual evidence, sufficient to establish his precedent argument and, thus, do not provide probative support for his claim.

The employee also argued that his work was recognized by the Secretary of War as "essential to the production of the Atomic Bomb." The FAB does not dispute this point.

In his letter dated June 26, 2006, the employee modified his objection to the recommended decision by stating that the MIT Metallurgical Project (MMP), not the entire MIT Cambridge campus, should be classified as a DOE facility. In support of that objection, he argued that "if the MMP was reclassified to meet the requirements of 'Department of Energy' Facility,'" then he would satisfy the statutory requirements of a "Department of Energy contractor employee." Based on the totality of the evidence in the case file, the FAB concludes that the evidence does not provide sufficient support for this argument. Even if the MMP were to be classified as a DOE facility during the employee's period of civilian employment there, he would still have to submit factual evidence sufficient to establish that he was employed by "(i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility." 42 U.S.C. § 7384l(11)(B). The evidence does not support a conclusion that he was so employed, because it does not establish that his employer, MIT, contracted with DOE (or any of its predecessor agencies) "to provide management and operating, management and integration, [] environmental remediation, [or] services, including construction and maintenance, at the facility."

The employee also argued that the MMP meets the first part of the two-part statutory definition of a "DOE facility." In support of this argument, he asserted that the evidence in the file proves that the MMP is a building, structure or premise "in which operations are, or have been, conducted by, or on behalf of, the Department of Energy," pursuant to 42 U.S.C. § 7384l(12)(A). The FAB agrees that the evidence supports this conclusion. During the development of the employee's Part E claim, his file was referred to the SOL, and on March 14, 2007, that office issued a memorandum in which it found that the evidence supports a conclusion that the employee's "work on the Metallurgical Project was performed pursuant to Contract No. W-7405-eng-175 between MIT and the MED, thus meeting the test of § 7384l(12)(A)." The FAB agrees with that conclusion.

The employee then argued that the MMP also meets the second part of the two-part statutory definition of a "DOE facility," in that the MED had "a proprietary interest" in the MMP, as required by subsection (i) of 42 U.S.C. § 7384l(12)(B). In support of this position, the employee alleged that "The MED paid all bills, provided all priorities, met all needs for civilian or military personnel, which would indicate a clear proprietary interest in the MMP." As set forth more fully in the Conclusions of Law section of this final decision, the evidence in the file does not provide sufficient support for the employee's argument that the MED had "a proprietary interest" in the MMP. In their March 14, 2007 memorandum, SOL concluded that there is no evidence in the employee's case file that the MED had "a proprietary interest" in any of the buildings, structures or premises in which he worked as a civilian employee at MIT's Cambridge campus. That conclusion is part of the totality of the evidence that FAB has considered in this case, and FAB agrees with that conclusion.

That conclusion is also supported by the employee's own statements regarding ownership of the buildings in which he worked at MIT's Cambridge campus. His first identification of the buildings in which he worked during his civilian employment at MIT's Cambridge campus was more than two years after he filed his Part E claim. In a letter dated February 7, 2008, submitted after his claim was

reopened by order of the Director of DEEOIC, the employee stated that all of his work for the MMP was performed in Buildings 4, 8 and 16 on MIT's Cambridge campus. He also asserted that those buildings were analogous to the buildings used at the Met Lab and the Ames Laboratory for MED work during that same time period and argued that the classification of all three facilities should be the same because "facilities in all cases were owned by the universities." Consistent with the employee's assertion that MIT owned the buildings and laboratories in which MMP research was performed, there is no probative evidence in the file establishing that the MED had a proprietary interest in any of these three buildings.

Alternatively, the employee argued that the MMP meets the second part of the two-part statutory definition of a "DOE facility" because the MED "entered into a contract with [MIT] to provide management and operation," as required by subsection (ii) of 42 U.S.C. § 7384l(12)(B). In support of this position, he argued that:

> The MED clearly entered into a contract with MIT to provide management and scientific operations. I have never seen this contract. . . . However, the Division of Industrial Cooperation at MIT did not do *pro bono* work. A contract is certainly implied by analogy to other universities such as Chicago's MetLab and Iowa State's Ames Lab, both of which, by the way, have DOE classifications.

However, the employee did not submit a contract or any other evidence that establishes that a "management and operation" contract was entered into between the MED and MIT for the work performed by the MMP. As noted above, SOL concluded in their March 14, 2007 memorandum that the work of the MIT Metallurgical Project was performed pursuant to a contract between MIT and the MED—Contract No. W-7405-eng-175. The employee's case file does not include a copy of the actual contract and FAB has not been able to locate a copy of that contract.[8] However, the SOL memorandum cites a page from Book VII, Volume I, Appendix K of the Manhattan District History, which describes the contract as follows: "Contract W-7405 eng-175 with Massachusetts Institute of Technology is a research and development contract involving work with Be as well as other metals and compounds."[9] Thus, based on available evidence, SOL concluded that the contract was not a contract "to provide management and operation," but was, rather, a "research and development contract." This conclusion is consistent with DOE's description of the facility at MIT's Cambridge campus in the DOE Facility List. That description references contract W-7405-eng-175 and the beryllium-related research that was conducted at MIT's Cambridge campus pursuant to the contract.[10] There is no probative evidence in the file that the MIT-MED contract under which the employee worked was a "management or operation" contract, as asserted by the employee. Thus, based on the totality of the evidence, the FAB concludes that the evidence is insufficient to establish that MIT's Cambridge campus satisfies the statutory requirements of § 7384l(12)(B)(ii).

By letter dated September 17, 2006, the employee supplemented his objection concerning the "proprietary interest" test of 42 U.S.C. § 7384l(11)(B)(i). In that letter, the employee argued that Roget's Thesaurus lists several synonyms for the term "proprietary interest," including "vested interest" and "beneficiary interest," and that by these broader definitions, the MED had a "proprietary interest" in the MMP. The employee argued that since "all work of the MIT project was paid for by and directly benefited the MED," the MED had a "proprietary interest" in the buildings in which the MMP work was performed.

The FAB finds that the evidence supports the employee's statement that the work on the MMP project was paid for by and directly benefited the MED. Both the SOL memorandum and the DOE Facilities List support a finding that the MMP work was performed pursuant to Contract No. W-7405-eng-175 between MIT and the MED, and FAB will assume that the MED met its payment obligations to MIT under the contract. However, payment for work performed under the contract and receipt of benefits from the performance of the contract do not establish that the MED had a proprietary interest in the *buildings* in which the contract's work was performed. The structure of the statutory definition of a

"Department of Energy facility" supports this conclusion. The Act defines the term "Department of Energy facility" as:

[A]ny building, structure, or premise, including the grounds upon which such building, structure, or premise is located—

(A) in which operations are, or have been, conducted by, or on behalf of, the Department of Energy. . .; and

(B) with regard to which the Department of Energy has or had—

(i) a proprietary interest, or

(ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services.

42 U.S.C. § 7384l(12). Thus, in order to satisfy the requirements of subsection (B) of the statutory definition, it must be established that DOE (or its predecessors, including the MED) either (i) had a proprietary interest in the buildings in which **[Employee]** worked, or (ii) had a contract with MIT to provide at least one of the specific types of services listed in the definition. Thus, the "proprietary interest" test of subsection (B)(i) is an alternative to the "contract" test of subsection (B)(ii). If evidence of payment and receipt of benefits under a type (B)(ii) contract was sufficient to meet the "proprietary interest" test of (B)(i), as the employee urged, there would be no need to have the alternative subsection (B)(i) test. Thus, the meaning of "proprietary interest" proffered by the employee would render subsection (B)(i) superfluous.

Additionally, as set forth more fully in the Conclusions of Law section of this decision, the employee's alternative definitions of the phrase "proprietary interest" are not consistent with its ordinary meaning, that is, an interest characterized by ownership, use and control. The employee has made no allegation, nor proffered any evidence, that the buildings in which he worked on MIT's Cambridge campus during his civilian employment from January 26, 1945 to October 22, 1945, *i.e.*, Buildings 4, 8 and 16, were owned, rented, or controlled by the MED for use by the MMP. In fact, he repeatedly refers to those buildings as labs of the MIT Metallurgical Department owned by MIT, not labs owned by the MED. [11]

Finally, under cover letter dated October 26, 2006, the employee supplied additional factual evidence in support of his argument that there was a contract between the MED and MIT for the MMP, and therefore the "contract" test of 42 U.S.C. § 7384l(11)(B)(ii) is satisfied and the MMP should be classified as a DOE facility. As described above, FAB acknowledges that the employee's civilian work at MIT was performed pursuant to a contract between MIT and the MED, but concludes that there is insufficient evidence to establish that the contract in question meets the requirements of 42 U.S.C. § 7384l(12)(B)(ii), and therefore the buildings used for the MMP do not satisfy the statutory definition of a "DOE facility."

After reviewing the written record of the case file and the employee's objections described above, the FAB hereby makes the following:

FINDINGS OF FACT

1. On May 31, 2002, the employee filed a claim for benefits under Part B of EEOICPA based on the allegation that he had contracted beryllium sensitivity, CBD and pulmonary insufficiency due to his occupational exposure to beryllium as a mechanical engineer at MIT's campus in Cambridge, Massachusetts.

2. The employee was a civilian employee of MIT from January 26, 1945 to October 22, 1945, and worked on the MMP during that time period.

3. During his period of civilian employment by MIT, the employee worked in Buildings 4, 8 and 16 on MIT's Cambridge campus. The MED did not have a "proprietary interest" in any of those three buildings, which were instead owned by MIT.

4. The employee's work on the MMP was performed pursuant to Contract No. W-7405-eng-175 between MIT and the MED (a predecessor agency of DOE).

5. During the period of the employee's civilian employment by MIT, Contract No. W-7405-eng-175 was a research and development contract and was not a contract to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services at MIT's Cambridge campus.

6. Prior to January 26, 1945 and after October 22, 1945, the employee was an active enlisted member of the U.S. Army.

7. On May 30, 2003, the FAB issued a final decision accepting the employee's Part B claim for beryllium sensitivity and awarding him medical benefits and sensitivity monitoring retroactive to his filing date of May 31, 2002.

8. The employee was diagnosed with CBD on July 2, 2003.

9. On August 5, 2003, the employee filed a second claim under Part B of EEOICPA for his CBD.

10. On September 22, 2003, the FAB issued a final decision accepting the employee's Part B claim for CBD and awarding him a lump sum of $150,000.00, plus medical benefits for his CBD retroactive to May 31, 2002.

11. On November 25, 2005, the employee filed a claim under Part E of EEOICPA based on his CBD.

12. For purposes of EEOICPA, MIT's Cambridge campus is classified as an AWE facility for the time period 1942 through 1946, and as a beryllium vendor facility for the time period 1943 through 1946. While MIT's Cambridge campus is not classified as a DOE facility, the Hood Building, which was located adjacent to MIT's Cambridge campus prior to its demolition, is classified as a DOE facility for the time period 1946 through 1963.

Based on the above findings of fact, the undersigned makes the following:

CONCLUSIONS OF LAW

Regulations governing the implementation of EEOICPA allow claimants 60 days from the date of the district office's recommended decision to submit to the FAB any written objections to the recommended decision, or a written request for a hearing. *See* 20 C.F.R. §§ 30.310 and 30.311. On May 4, 2006, June 26, 2006, September 17, 2006 and October 26, 2006, the employee filed written objections to the recommended decision, but did not request a hearing. Pursuant to 20 C.F.R. §§ 30.312 and 30.313, the FAB has considered the objections by means of a review of the written record of this case. After a thorough review of the record in this case, the FAB concludes that no further investigation of the employee's objections is warranted, and the FAB now issues a final decision on the

employee's Part E claim.

In order to be afforded coverage under Part E of EEOICPA, a claimant must establish that, among other things, he is a "covered DOE contractor employee." 42 U.S.C. §§ 7385s(1), 7385s-1, 7385s-8. To prove that he is a "covered DOE contractor employee" for purposes of Part E eligibility, the employee must establish: (1) that he was a "DOE contractor employee" and (2) that he "contracted a covered illness through exposure at a Department of Energy facility." 42 U.S.C. § 7385s(1). As a result of this statutory scheme, only DOE contractor employees are eligible for benefits under Part E, whereas employees of an AWE or a beryllium vendor are excluded from such coverage.[12]

The Act defines the term "Department of Energy contractor employee," in pertinent part, as follows: "An individual who is or was **employed at a Department of Energy facility** by—(i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or (ii) a contractor or subcontractor that provided services, including construction and maintenance at the facility." 42 U.S.C. § 7384l(11)(B) (emphasis added). Thus, in order to be considered a "Department of Energy contractor employee," a claimant must have been employed at a DOE facility. The statutory definition of a "Department of Energy facility" is:

"[A]ny building, structure, or premise, including the grounds upon which such building, structure, or premise is located—

> (A) in which operations are, or have been, conducted by, or on behalf of, the Department of Energy. . .; and
> (B) with regard to which the Department of Energy has or had—
>> (i) a proprietary interest, or
>> (ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services.

42 U.S.C. § 7384l(12). Therefore, in order to be eligible for benefits under Part E, a claimant must prove that he is or was employed as a civilian employee of a DOE contractor or subcontractor at a facility that meets the requirements of both subsection (A) and subsection (B) of § 7384l(12).

The FAB concludes that the employee has established that he was a civilian employee of MIT from January 26, 1945 to October 22, 1945, and that he worked in various laboratories in Buildings 4, 8 and 16 on the MIT campus in Cambridge, Massachusetts, during that time period. The evidence further establishes that the employee's work for the MMP during that period was performed pursuant to a contract that MIT entered into with the MED to perform research and development on beryllium and other metals and compounds in support of the Manhattan Project. Based on the totality of the evidence, FAB concludes that MIT's Cambridge campus satisfies subsection (A) of the statutory definition of a "Department of Energy facility." 42 U.S.C. § 7384l(12)(A).

The evidence in support of subsection (B) of § 7384l(12), however, is lacking. Subsection (B) requires that in order for a building, structure or premise to be deemed a "Department of Energy facility," the evidence must establish that it is a building, structure, or premise "with regard to which the Department of Energy has or had—(i) a proprietary interest, or (ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services." Neither the "proprietary interest" test nor the alternative "contract" test has been satisfied by a preponderance of the evidence in this claim.

The statute and the governing regulations do not define the term "proprietary interest," as that term is used in subsection (B)(i) of § 7384l(12). Black's Law Dictionary defines the term as: "The interest of an owner of property together with all rights appurtenant thereto such as the right to vote shares of stock and right to participate in managing if the person has a proprietary interest in the shares." *Black's Law Dictionary*, p.1098 (5th ed. 1979). *See also Evans v. U. S.*, 349 F.2d 653, 658 (5th Cir. 1965) (holding that the phrase "proprietary interest" is "not so technical, or ambiguous, as to require a specific definition" and assuming that the jury in that case gave the phrase "its common ordinary meaning, such as 'one who has an interest in, control of, or present use of certain property.'") Employing the common accepted definition of the term, in order to meet the "proprietary interest" test, the evidence must establish that the MED had rights of ownership, use, or control in the buildings in which the employee worked at MIT's Cambridge campus from January 26, 1945 to October 22, 1945. The employee has proffered no such evidence. To the contrary, in a letter dated February 7, 2008, he asserted that those buildings were owned by MIT, and in a May 30, 2006 email he referred to the laboratories in those buildings as "Metallurgical Dept labs." He has likewise offered no probative evidence that the MED controlled the buildings in question or rented space in them.

With regard to the "contract" test of subsection (B)(ii) of § 7384l(12), there is evidence of the existence of a contract between MIT and the MED for the work that was performed by the employee's group on the MMP; specifically, Contract No. W-7405-eng-175. However, based on the totality of the evidence, the FAB concludes that that contract was not entered into "to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services"; rather, it was a much narrower "research and development contract involving work with Be [beryllium] as well as other metals and compounds." Since the contract was not one of the limited types enumerated by Congress in its statutory definition of "Department of Energy facility," the FAB concludes that Congress did not intend buildings such as those in which the employee worked to be designated as DOE facilities for purposes of EEOICPA.

The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving "by a preponderance of the evidence" the existence of every criterion under any compensable claim category set forth in § 30.110. "Proof by a preponderance of the evidence means it is more likely than not that a given proposition is true." 20 C.F.R. § 30.111(a). The FAB concludes that the totality of the evidence in the case file is insufficient to establish by a preponderance of the evidence that the employee meets the statutory definition of a "Department of Energy contractor employee" because the evidence is insufficient to establish that he was employed at a "Department of Energy facility" during his civilian employment at MIT's Cambridge campus. *Accord* EEOICPA Fin. Dec. No. 10033981-2006 (Dep't of Labor, November 27, 2006). Therefore, the employee has not established that he is a "covered DOE contractor employee" and he is not entitled to benefits under Part E of EEOICPA. As a result, the FAB hereby denies the employee's claim under Part E.

Washington, DC

Thomas R. Daugherty

Hearing Representative

Final Adjudication Branch

[1] Pub. Law 108-375, § 3161 (October 28, 2004).

[2] As of the date of the March 9, 2006 letter, MIT's campus was designated as an AWE facility and a beryllium vendor facility for the time period 1942 through 1963. On October 10, 2007, the designation of MIT's campus was modified in two ways; first, the dates of the AWE facility and beryllium vendor facility designations were changed such that MIT's Cambridge campus is now designated as an AWE facility from 1942 through 1946 and as a beryllium vendor facility from 1943 through 1946; second, the Hood Building, which was adjacent to MIT's campus, was determined to be a DOE facility for the period 1946 through 1963. *See* EEOICPA Circular No. 08-01 (issued October 10, 2007) and the entry for MIT on the DOE Facility List at http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/showfacility.cfm.

[3] *See* the entry for MIT on the DOE Facility List at http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/showfacility.cfm.

[4] *Id.*

[5] *See* the entry for the Metallurgical Laboratory on the DOE Facility List at http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/showfacility.cfm.

[6] *See* the entry for the Ames Laboratory on the DOE Facility List at http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/showfacility.cfm.

[7] The Ames Laboratory was established at Iowa State College in Ames, Iowa, on May 17, 1947. The college was subsequently renamed Iowa State University. Work done for the MED at Iowa State College between 1942 and May 16, 1947 is covered under the DOE facility designation, as is all work done in the Ames Laboratory facilities since that date. *See* http://www.external.ameslab.gov/final/About/Aboutindex.htm.

[8]The FAB notes that it is the claimant's responsibility to establish entitlement to benefits under the Act. Subject to certain limited exceptions expressly provided in the Act and regulations, the claimant bears the burden of providing "all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in these regulations." 20 C.F.R. § 30.111(a). *See also* EEOICPA Fin Dec. No. 10432-2004 (Dep't of Labor, September 13, 2004).

[9] A copy of this page has been placed in the case file and a copy has been forwarded to the employee with this decision.

[10] *See* the entry for MIT on the DOE Facility List at http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/showfacility.cfm.

[11] *See* the employee's email to the EEOICPA Ombudsman dated May 30, 2006, and his letter to FAB dated February 7, 2008.

[12] Although they are not covered under Part E of EEOICPA, atomic weapons employees and beryllium vendor employees are covered under Part B of EEOICPA. Additionally, Congress has stated that EEOICPA was established to compensate "civilian" men and women who performed duties uniquely related to nuclear weapons production and testing. *See* 42 U.S.C. § 7384(a)(8). Consequently, members of the military are not covered by EEOICPA. *See* EEOICPA Fin. Dec. No. 57276-2004 (Dep't of Labor, October 26, 2004).

EEOICPA Order No. 20120912-81095-1 (Dep't of Labor, May 30, 2013)

EMPLOYEE: **[Name Deleted]**

CLAIMANT: **[Name Deleted]**

FILE NUMBER: **[Number Deleted]**

DOCKET NUMBER: **20120912-81095-1**

DECISION DATE: **May 30, 2013**

NOTICE OF DENIAL OF

REQUEST FOR RECONSIDERATION

This is the response to the May 9, 2013 request for reconsideration of the April 10, 2013 decision of the Final Adjudication Branch (FAB) on this claim for chronic beryllium disease (CBD) under Part B of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. In that decision, FAB concluded that while the employee worked for the Allied Chemical Corporation from January 15, 1959 to June 29, 1964 at its facility in Metropolis, Illinois, he was nevertheless not entitled to benefits under Part B for CBD because the Allied Chemical Corporation is an Atomic Weapons Employer (AWE), and employees of AWEs are only potentially eligible to receive Part B benefits for radiogenic cancer.

In support of the May 9, 2013 reconsideration request, the employee's representative raised a number of interwoven and somewhat confusing arguments, all of which he raised previously in the adjudication of this claim for CBD. To the extent I can discern what they are, those arguments are as follows:

1. Because the Division of Energy Employees Occupational Illness Compensation (DEEOIC) does not dispute that "operations" on behalf of the Atomic Energy Commission (AEC) and the Energy Research and Development Administration (ERDA) took place at the Metropolis plant, FAB should have concluded that there was a contractual relationship between the AEC, and also ERDA, and the Allied Chemical Corporation such that the Metropolis plant meets the definition of a "DOE facility" set out in § 7384l(12) of EEOICPA.[1]

2. DEEOIC has wrongly refused to acknowledge that there are suggestions that beryllium was present at the Allied Chemical Corporation's Metropolis plant.

3. DEEOIC has wrongly refused to recognize the presence of uranium "daughter" products that were associated with the processing work that occurred at the Allied Chemical Corporation's Metropolis worksite.

4. The Metropolis worksite will be designated for remediation under the Formerly Utilized Sites Remedial Action Program (FUSRAP), and therefore workers employed there doing clean-up will be covered under Part E.

5. DEEOIC failed to follow prior FAB decisions regarding atomic weapons employees, as well as EEOICPA Circular No. 08-05 (issued May 2, 2008) on the status of the Office of Scientific and Technical Information (OSTI) worksite in Oak Ridge, Tennessee as a DOE facility and EEOICPA Bulletin No. 07-15 (issued May 9, 2007) on the class of Allied Chemical Corporation employees added to the Special Exposure Cohort (SEC), in its adjudication of the employee's Part B claim for CBD.

6. Employees of a contractor that had allegedly concealed transuranics at the Metropolis worksite from

the NRC were hired by DEEOIC to compile both Site Exposure Matrices (SEM) information for the Metropolis worksite, as well as for the site profile used by NIOSH to perform dose reconstructions for workers at that same worksite, and this created an impermissible conflict of interest.

In support of the above arguments on reconsideration, the representative submitted additional copies of the following evidence that was already in the employee's file: (1) copies of 5 U.S.C. §§ 702 and 706; (2) a report of a June 22, 2006 public meeting that NIOSH held on the site profile used for performing dose reconstructions for workers at the Metropolis worksite; (3) a partial copy (provenance unknown) of an agreement by which the Allied Chemical Corporation undertook to covert natural uranium concentrates owned by an unidentified entity into uranium hexafluoride[2]; (4) a partial manifest (provenance also unknown) purporting to list chemicals that the Allied Chemical Corporation stored at an unspecified location for DOE; (5) extracts from EEOICPA Circular No. 08-05; (6) extracts from EEOICPA Bulletin No. 07-15; (7) extracts of general information from the FUSRAP website; (8) extracts from November 5, 2012 DOE memoranda on allegations of conflicts of interest among contractors performing remediation work for DOE at the Portsmouth Gaseous Diffusion Plant and at the Oak Ridge Reservation; (9) a copy of a September 1, 2010 medical report already in the case file; (10) a copy of the employee's August 13, 2012 statement already in the case file; and (11) extracts from EEOICPA Fin. Dec. No. 10043931-2006 (Dep't of Labor, March 10, 2008). In addition, the employee's representative also submitted new evidence consisting of extracts from EEOICPA Fin Dec. No. 2158-2003 (Dep't of Labor, July 11, 2008), EEOICPA Fin. Dec. No. 25833-2004 (Dep't of Labor, October 20, 2004), and EEOICPA Fin. Dec. No. 55211-2004 (Dep't of Labor, September 16, 2004).

After careful consideration of the above arguments and evidence, and for the reasons set forth below, the employee's request for reconsideration is hereby denied.

With regard to the first argument, the benefits available under Part B of EEOICPA are only payable to claimants who meet their burden of proof to satisfy the eligibility requirements set out in the statute. In this Part B claim for CBD, the employee alleges that he qualifies as a DOE contractor employee because he worked at the Allied Chemical Corporation's Metropolis plant, which he asserts fits within the statutory definition of a DOE facility set out in § 7384l(12). However, even though DEEOIC does not dispute that "operations" occurred at the Metropolis plant, since there is ample evidence showing that the Allied Chemical Corporation processed natural uranium concentrates into uranium hexafluoride for the AEC at that location, first under a processing contract with the AEC that ran from 1959 through June 30, 1964[3], and thereafter for both the AEC and ERDA on an "as needed" basis through 1976[4], it is not enough to merely establish that "operations" occurred at a worksite. The representative contends that the Allied Chemical Corporation's Metropolis plant meets the statutory definition of a DOE facility because DOE or one of its predecessor agencies "entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services" as required by § 7384l(12)(B)(ii). However, FAB concludes that none of the submissions from the representative contained any persuasive arguments or factual evidence in support of the assertion that the contractual relationship between the Allied Chemical Corporation and the AEC/ERDA satisfies the statutory requirements of § 7384l(12)(B)(ii) of EEOICPA. Therefore, the employee has not met his burden of proof to establish this crucial point.

In response to the second argument listed above, the question of whether or not beryllium was present at the Metropolis plant is irrelevant to the employee's claim for CBD under Part B, because atomic weapons employees are not eligible for benefits due to that particular "occupational illness." Under § 7384l(7) of EEOICPA, the term "covered beryllium employee" only refers to employees who worked

at either DOE facilities or beryllium vendor facilities, while the employee here worked at an AWE facility.

As for the third argument, this concerns the amount of radiation to which the employee was exposed while working at the Allied Chemical Corporation's Metropolis plant, and that question is within the exclusive jurisdiction of the National Institute for Occupational Safety and Health (NIOSH), not DEEOIC, as noted in 20 C.F.R. § 30.2(b) (2013). In addition, the radiation to which he was exposed is irrelevant to his Part B claim for CBD, which was the only claim of the employee that was addressed by FAB on April 10, 2013.

With respect to the fourth argument, the assertion that the Allied Chemical Corporation's Metropolis plant will be designated for remediation is based on a belief that such designation will be made *in the future*. However, as of the present time, the Metropolis plant has *not* been so designated under FUSRAP.[5] Furthermore, even if the Metropolis plant *had* been designated for remediation under FUSRAP, such designation would be irrelevant to the employee's Part B claim for CBD.

As for the fifth argument set out above, the FAB decisions in question are irrelevant to this CBD claim because they provide no support for the argument that the Metropolis plant is a DOE facility. Also, the reason why DEEOIC determined in EEOICPA Circular No. 08-05 that OSTI was a DOE facility was based, in part, on the fact that DOE and its predecessor agencies had a "proprietary interest" in that worksite under 42 U.S.C. § 7384l(12)(B)(i), and neither DOE nor any of its predecessor agencies has ever had such an interest in the Metropolis plant, which has always been owned by the Allied Chemical Corporation and its corporate successors. In addition, EEOICPA Bulletin No. 07-15 only concerns the class of Allied Chemical Corporation employees, all of whom are atomic weapons employees, that was added to the SEC and does not support the employee's belief that the Metropolis plant is a DOE facility.

And finally, with respect to the sixth argument, DEEOIC did *not* hire the contractors that prepared the site profile used by NIOSH to perform dose reconstructions for workers at the Allied Chemical Corporation's Metropolis plant, NIOSH did. Also, there is no toxic substance exposure profile for the Metropolis plant in SEM because it is an AWE facility, and SEM only contains profiles of worksites that are either DOE facilities or uranium mines and mills covered under Part E. And more importantly, this argument is irrelevant to both the employee's Part B claim and his representative's assertion that the Metropolis plant satisfies the statutory definition of a DOE facility.

Therefore, I must deny the employee's request for reconsideration because he has not submitted any arguments or evidence that would justify reconsideration of the April 10, 2013 final decision on his Part B claim for CBD. That decision of FAB is therefore final on the date of issuance of this denial of the request for reconsideration. *See* 20 C.F.R. § 30.319(c)(2).

Washington, DC

David F. Howell

Hearing Representative

Final Adjudication Branch

[1] The representative apparently believes that the Nuclear Regulatory Commission (NRC) is a predecessor agency of DOE. This is incorrect, since the NRC and DOE were created simultaneously when ERDA was split into two agencies on October 1, 1977 by the "Department of Energy Organization Act," Pub. L. 95-91, 91 Stat. 565.

[2] While the representative may believe that this agreement is a contract between DOE (or one of its predecessor agencies) and the Allied Chemical Corporation, the language used in the part of the agreement in the file suggests that it was actually an example of the type of agreement that the Allied Chemical Corporation entered into to process uranium concentrates owned by private nuclear power plants. These agreements became possible following passage of the Private Ownership of Special Nuclear Materials Act, Pub. L. No. 88-489, 73 Stat. 602 (August 26, 1964). *See* 42 U.S.C. § 2011 note. *See also* Opinion No. B-207463 (Comp. Gen. December 27, 1984), 1984 WL 47145.

[3] *See* http://www.converdyn.com/metropolis/mtwhistory.html and http://www.Honeywell-metropolisworks.com/about-metropolis.php (both sites last visited on March 26, 2013). *See also* "Annual Report to Congress of the Atomic Energy Commission for 1964" (January 1965), p. 48.

[4] *E.g.*, "Annual Report to Congress of the Atomic Energy Commission for 1959" (January 1960), p. 63; "Annual Report to Congress of the Atomic Energy Commission for 1964" (January 1965), p. 48; "Annual Report to Congress of the Atomic Energy Commission for 1965" (January 1966), p. 37; "Annual Report to Congress of the Atomic Energy Commission for 1966" (January 1967), p. 362; "Annual Report to Congress of the Atomic Energy Commission for 1967" (January 1968), p. 274.

[5] A comprehensive listing of all covered worksites designated for remediation under FUSRAP can be found at the following DOE website: http://energy.gov/lm/sites/lm-sites/considered-sites (last visited May 21, 2013). A review of the website reveals that the Allied Chemical Corporation's Metropolis plant is not listed as a covered worksite under FUSRAP.

EEOICPA Fin. Dec. No. 20121127-84623-1 (Dep't of Labor, April 30, 2013)

EMPLOYEE: **[Name Deleted]**

CLAIMANT: **[Name Deleted]**

FILE NUMBER: **[Number Deleted]**

DOCKET NUMBER: **20121127-84623-1**

DECISION DATE: **April 30, 2013**

NOTICE OF FINAL DECISION

FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch (FAB) concerning the above-noted claim for benefits under Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq.* For the reasons set forth below, the claim for liver cancer, a liver transplant, liver disease, diabetes and hypertension under Part E is hereby denied.

STATEMENT OF THE CASE

On April 30, 2010, the claimant filed a Form EE-1, claiming benefits under Part B of EEOICPA for liver cancer. In support of that claim, the claimant submitted an employment history stating that he worked at the Allied Chemical Corporation's worksite in Metropolis, Illinois, beginning on February 16, 2004. The Metropolis worksite has been designated as an Atomic Weapons Employer (AWE) facility by the Department of Energy (DOE), for the covered period of 1959 through 1976, with a period of residual radioactive contamination of 1977 to March 1, 2011.[1] This claimed employment was accepted by the Division of Energy Employees Occupational Illness Compensation (DEEOIC) as factual through at least May 22, 2010, which is the date that the claimant's employer verified he was still employed.

During the adjudication of the claimant's Part B claim, which included a referral to the National Institute for Occupational Safety and Health (NIOSH) for a radiation dose reconstruction, his authorized representative submitted a facsimile on March 26, 2011 in which he contended that DEEOIC should either designate the Metropolis worksite as a DOE facility, or in the alternative, that it should find that the corporate successor to the Allied Chemical Corporation—Honeywell International—was a subcontractor to the DOE contractor at the Paducah Gaseous Diffusion Plant, and also award the claimant benefits under Part E of EEOICPA. The representative's arguments were considered and rejected in an April 12, 2011 memorandum from DEEOIC's Policy Branch, which concluded that there was no evidence in support of either contention, after which FAB issued an April 14, 2011 final decision denying the claimant's Part B claim. FAB's denial of the claimant's Part B claim was based on NIOSH's dose reconstruction, and the finding that it was not "at least as likely as not" (a 50% or greater threshold for compensability) that his liver cancer was due to the radiation doses he had received while working at the Allied Chemical Corporation's Metropolis worksite. FAB did not, however, make any determination on the claimant's eligibility under Part E of EEOICPA it its April 14, 2011 final decision.

By facsimile dated May 14, 2011, the representative requested reconsideration of FAB's April 14, 2011 final decision and repeated his earlier arguments in support of his contention that the Metropolis worksite should be determined to meet the statutory definition of a DOE facility set out in § 7384l(12) of EEOICPA. However, FAB denied this request on June 21, 2011, on the ground that the April 14, 2011 final decision only addressed the claimant's Part B claim, and therefore his authorized representative's contentions regarding his eligibility under Part E were irrelevant to that determination.

By letter dated October 2, 2012, the Cleveland district office of DEEOIC acknowledged that the claimant's authorized representative had made a claim for benefits under Part E of EEOICPA on his behalf during the adjudication of his Part B claim, and asked the claimant to submit another Form EE-1 so it could properly develop his Part E claim. As part of this letter, the district office reminded him of the following:

As you are also aware, the evidence submitted by your authorized representative in regard to changing the designation of the Allied Chemical facility to a DOE facility was submitted to [DEEOIC's Policy Branch]. The policy branch evaluated the evidence presented and determined that the Allied Chemical

Plant in Metropolis, IL does not meet the definition of a DOE facility and cannot be considered as such for administration of the EEOICPA.

The district office enclosed a copy of the Policy Branch's April 12, 2011 determination with its October 2, 2012 letter, and informed the claimant that it was his burden of proof to establish that he had covered employment at a DOE facility in support of his claim for benefits under Part E of EEOICPA.
On October 19, 2012, the claimant filed the requested Form EE-1, in which he claimed benefits under Part E for liver cancer, a liver transplant, liver disease, diabetes and hypertension due to his verified employment at the Metropolis worksite. In a development letter dated October 24, 2012, the district office repeated the substance of its October 2, 2012 letter, and asked again that he submit evidence that could support designating the Metropolis worksite as a DOE facility.
No new evidence was received in response to the October 24, 2012 letters. Thus, on November 27, 2012, the Cleveland district office issued a recommended decision to deny the claimant's Part E claim, on the ground that the evidence of record failed to establish that he had worked at a DOE facility. The claimant's representative thereafter submitted a timely facsimile in which he objected to the November 27, 2012 recommended decision and requested an oral hearing, which was held in Paducah, Kentucky, on January 16, 2013.

OBJECTIONS

In his December 4, 2012 facsimile objecting to the recommendation to deny the claimant's Part E claim, the representative made the following five arguments (which are each followed by a response):

6. DEEOIC has wrongly refused to recognize the presence of uranium "daughter" products associated with the processing work that occurred at the Allied Chemical Corporation's Metropolis worksite. **RESPONSE:** This argument involves the amount of radiation to which the claimant was exposed, and this issue is within the exclusive jurisdiction of NIOSH, not DEEOIC, as noted in 20 C.F.R. § 30.2(b) (2013).
7. The Metropolis worksite is a DOE facility because "operations" on behalf of DOE and its predecessor agencies took place there. **RESPONSE:** While DEEOIC does not dispute that "operations" took place at the worksite, this fact alone is insufficient to support the requested determination that the Metropolis plant is a DOE facility, as that statutory term is defined in § 7384l(12) of EEOICPA.
8. DEEOIC determined that the Office of Scientific and Technical Information (OSTI) worksite in Oak Ridge, Tennessee, was a DOE facility when a Part E claim was filed by a worker at that location, and it should do the same in connection with the Allied Chemical Corporation's Metropolis worksite. **RESPONSE:** The determination by DEEOIC that OSTI was a DOE facility was based, in part, on the fact that DOE and its predecessor agencies had a "proprietary interest" in that worksite under 42 U.S.C. § 7384l(12)(B)(i), and neither DOE nor any of its predecessor agencies has ever had such an interest in the Metropolis worksite, which has always been owned by the Allied Chemical Corporation and its corporate successors.
9. The Metropolis worksite was designated for remediation under the Formerly Utilized Sites Remedial Action Program (FUSRAP), and therefore workers employed there doing clean-up are covered under Part E. **RESPONSE:** This assertion is not correct, because the Metropolis worksite has *not* been designated for remediation under FUSRAP.[2]
10. Employees of a contractor that had allegedly concealed transuranics at the Metropolis worksite from the Nuclear Regulatory Commission were hired by DEEOIC to compile both Site

Exposure Matrices (SEM) information for the Metropolis worksite, as well as for the site profile used by NIOSH to perform dose reconstructions for workers at that same worksite, and this created an impermissible conflict of interest. **RESPONSE:** DEEOIC did *not* hire the contractors that prepared the site profile used by NIOSH to perform dose reconstructions, NIOSH did. Also, there is no toxic substance exposure profile for the Metropolis worksite in SEM because it is an AWE facility (SEM only contains profiles of worksites that are either DOE facilities or uranium mines and mills covered under Part E). And more importantly, this argument is irrelevant to both the claimant's Part E claim and his belief that the Allied Chemical Corporation's Metropolis worksite satisfies the statutory definition of a DOE facility.

At the January 16, 2013 oral hearing, the claimant, his wife and a former worker at the Paducah Gaseous Diffusion Plant provided testimony in support of the claim. However, this testimony (most of which involved the United States Enrichment Corporation, which has both owned and operated the Paducah Gaseous Diffusion Plant[3] since July 28, 1998, rather than either DOE or the Allied Chemical Corporation) was entirely irrelevant to, and provided no support for, the argument that the Allied Chemical Corporation's Metropolis worksite meets the definition of a DOE facility, because it failed to establish that DOE (or its predecessor agencies) either had a "proprietary interest" in the worksite, or had entered into one of the specific types of contracts that are listed in § 7384l(12)(B)(ii) with an entity at the worksite.

The representative also submitted a "hearing brief" on that date that repeated his prior arguments and included copies of: (1) Executive Order 13179; (2) 5 U.S.C. §§ 702 and 706; (3) a report of a June 22, 2006 public meeting that NIOSH held concerning the site profile for performing dose reconstructions for workers at the Metropolis worksite; (4) a partial copy (provenance unknown) of an agreement by which the Allied Chemical Corporation undertook to covert natural uranium concentrates owned by an unidentified entity into uranium hexafluoride[4]; (5) a partial manifest (provenance also unknown) purporting to list chemicals that the Allied Chemical Corporation stored at an unspecified location for DOE; (6) extracts from EEOICPA Fin. Dec. No. 10043931-2006 (Dep't of Labor, March 10, 2008); (7) extracts from EEOICPA Circular No. 08-05 (issued May 2, 2008); (8) extracts from EEOICPA Bulletin No. 07-15 (issued May 9, 2007); (9) extracts of general information from the FUSRAP website; (10) extracts from a November 5, 2012 DOE memorandum on allegations of conflicts of interest among contractors performing remediation work for DOE at the Portsmouth Gaseous Diffusion Plant and at the Oak Ridge Reservation; and (11) extracts from multiple documents and databases posted on both DOE and DEEOIC websites relating to SEM, notices published in the *Federal Register*, § 7384 of EEOICPA and the regulations implementing EEOICPA. However, as was the case with his arguments discussed above, the copies submitted as part of the representative's "hearing brief" are entirely irrelevant to the claimant's Part E claim and fail to establish, or even suggest, that the Allied Chemical Corporation's Metropolis worksite meets the statutory definition of a DOE facility.

Following the hearing, the claimant's representative submitted a February 12, 2013 facsimile containing: (1) copies of items already in the case file; (2) a complaint alleging employment discrimination from the former Paducah employee who had testified at the January 13, 2013 oral hearing; (3) emails from that same former Paducah employee; (4) a January 30, 2013 interim response from DEEOIC to a Freedom of Information Act request filed by the representative; (5) additional extracts from the FUSRAP and DEEOIC websites; and (6) factual allegations made by another purported Part E claimant (not the claimant involved in this decision) regarding the work performed at the Allied Chemical Corporation's Metropolis worksite. Once again, however, this evidence has been reviewed and fails to provide any support for the claimant's assertion that the Metropolis worksite is a DOE facility.

And finally on March 4, 2013, the representative sent yet another facsimile; this one forwarded copies of three FAB decisions the representative believed supported the claimant's Part E claim: (1) EEOICPA Fin Dec. No. 2158-2003 (Dep't of Labor, July 11, 2008); (2) EEOICPA Fin. Dec. No. 25833-2004 (Dep't of Labor, October 20, 2004); and (3) EEOICPA Fin. Dec. No. 55211-2004 (Dep't of Labor, September 16, 2004). However, all of these FAB decisions are factually distinguishable from the Part E claim at issue in this final decision and fail to establish that the Allied Chemical Corporation's Metropolis worksite is a DOE facility.

After carefully considering the entirety of the evidence now in the case file, FAB hereby makes the following:

FINDINGS OF FACT

1. The claimant filed a Form EE-1, claiming benefits for multiple alleged conditions under Part E of EEOICPA, on October 19, 2012.

2. The claimant has verified employment at the Allied Chemical Corporation's Metropolis, Illinois, worksite from February 16, 2004 through at least May 22, 2010.

3. The Allied Chemical Corporation's Metropolis worksite has been designated as an AWE facility for the covered period from 1959 through 1976 by DOE. In addition, NIOSH has also identified a period of residual radioactive contamination at the worksite from 1977 through March 1, 2011.

4. While the case file contains evidence establishing that "operations" by or on behalf of two of DOE's predecessor agencies were conducted at the Allied Chemical Corporation's Metropolis worksite, which processed uranium concentrates into uranium hexafluoride for the Atomic Energy Commission (AEC), and the Energy Research and Development Administration (ERDA) after the AEC was abolished, from 1959 through 1976, there is no evidence that these two predecessor agencies either had a "proprietary interest" in the Metropolis worksite, or had entered into one of the enumerated types of contracts listed in 42 U.S.C. § 7384l(12)(B)(ii) with an entity at the worksite.

Based on the above-noted findings of fact, FAB also hereby makes the following:

CONCLUSIONS OF LAW

The benefits available under Part E of EEOICPA are only payable to claimants who satisfy the eligibility requirements set out in the statute. In this Part E claim, the claimant alleges that he qualifies as a DOE contractor employee because he worked at the Allied Chemical Corporation's Metropolis worksite, which he believes fits within the statutory definition of a DOE facility set out in § 7384l(12). However, FAB concludes otherwise, and accordingly the claimant is not entitled to Part E benefits, as alleged.

As noted above, DEEOIC does not dispute that "operations" occurred at the Metropolis worksite, because there is ample evidence showing that the Allied Chemical Corporation processed natural uranium concentrates into uranium hexafluoride for the AEC at that location, first pursuant to a processing contract with the AEC that ran from 1959 through June 30, 1964[5], and thereafter for both the AEC and ERDA on an "as needed" basis through 1976.[6] Therefore, this final decision need not address the bulk of the arguments put forward by the claimant's representative, because they were

made to prove this already accepted requirement of § 7384l(12)(A) of EEOICPA.[7]

However, it is not enough to merely establish that "operations" occurred at a worksite. Before DEEOIC can determine that the Allied Chemical Corporation's Metropolis worksite meets the statutory definition of a DOE facility, the claimant must also prove *either* that DOE or one of its predecessor agencies had a "proprietary interest" in the Metropolis worksite as required by § 7384l(12)(B)(i), *or* that DOE or one of its predecessor agencies "entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services" as required by § 7384l(12)(B)(ii). Pursuant to 20 C.F.R. § 30.111(a), the claimant has the burden of proving at least one of these two statutory requirements "by a preponderance of the evidence." That same section also notes that "Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved it true." However, and as discussed above, FAB concludes none of the submissions from the claimant's representative contained any persuasive arguments or factual evidence in support of *either* of these statutory requirements.

Thus, FAB concludes that the claimant has failed to prove that the Allied Chemical Corporation worksite in Metropolis, Illinois meets the statutory definition of a DOE facility, and that he has also failed to prove that he is a DOE contractor employee who worked at a DOE facility under Part E of EEOICPA. Accordingly, FAB hereby denies his Part E claim.

Jacksonville, FL

Wendell Perez

Hearing Representative

Final Adjudication Branch

[1] *See* http://www.hss.energy.gov/HealthSafety/fwsp/advocacy/faclist/showfacility.cfm (last visited April 17, 2013).

[2] A comprehensive listing of all covered worksites designated for remediation under FUSRAP can be found at the following DOE website: http://energy.gov/lm/sites/lm-sites/considered-sites (last visited April 16, 2013). A review of the website reveals that the Allied Chemical Corporation's Metropolis worksite is not listed as a covered worksite under FUSRAP.

[3] *See* http://www.usec.com/gaseous-diffusion/paducah-gdp/paducah-history (last visited on March 26, 2013).

[4] While the representative may believe that this agreement is a contract between DOE (or one of its predecessor agencies) and the Allied Chemical Corporation, the language used in the part of the agreement in the file suggests that it was actually an example of the type of agreement that the Allied Chemical Corporation entered into to process uranium concentrates owned by private nuclear power plants. These agreements became possible following passage of the Private Ownership of Special Nuclear Materials Act, Pub. L. No. 88-489, 73 Stat. 602 (August 26, 1964). *See* 42 U.S.C. § 2011 note. *See also* Opinion No. B-207463 (Comp. Gen. December 27, 1984), 1984 WL 47145.

[5] *See* http://www.converdyn.com/metropolis/mtwhistory.html and http://www.Honeywell-metropolisworks.com/about-metropolis.php (both sites last visited on March 26, 2013). *See also* "Annual Report to Congress of the Atomic Energy Commission for 1964" (January 1965), p. 48.

[6] *E.g.*, "Annual Report to Congress of the Atomic Energy Commission for 1959" (January 1960), p. 63; "Annual Report to Congress of the Atomic Energy Commission for 1964" (January 1965), p. 48; "Annual Report to Congress of the Atomic

Energy Commission for 1965" (January 1966), p. 37; "Annual Report to Congress of the Atomic Energy Commission for 1966" (January 1967), p. 362; "Annual Report to Congress of the Atomic Energy Commission for 1967" (January 1968), p. 274.

[7] During the development of this Part E claim, the representative seemed to be confusing the term "operations" in subsection (A) of § 7384l(12) with the "management and operations" type of contract in subsection (B)(ii). They are clearly not the same thing. A history of DOE's use of "management and operations" contracts, and a description of their features, is in Chapter 17.6 (October 2007) of DOE's *Acquisition Guide* at http://energy.gov/sites/prod/files/17.6_Origin%2C_Characteristics%2C_and_Significance_of_the_DOE%27s_Management_and_Operating_0.pdf.

Determination by DOL

EEOICPA Fin. Dec. No. 10083-2007 (Dep't of Labor, June 6, 2007)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch (FAB) concerning the above claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. Upon a careful review of the facts, FAB concludes that the evidence of record is insufficient to allow compensation. Accordingly, the claim for survivor benefits under Part B is denied.

STATEMENT OF THE CASE

On July 31, 2001, **[Claimant]** filed a Form EE-2 claiming for survivor benefits under EEOICPA as the spouse of **[Employee]**, based on the condition of myelofibrosis. She submitted a certificate showing that she and **[Employee]** were married, and a copy of his death certificate identifying her as his spouse at the time he died on March 26, 1987 due to pneumonia, agnogenic myeloid metaplasia and chronic obstructive pulmonary disease.

[Claimant] submitted medical documentation including narrative reports, stating that her spouse had a diagnosis of myelofibrosis as early as the autumn of 1983. She also filed a Form EE-3 alleging that her spouse was employed at the National Bureau of Standards (NBS) Radioactivity Lab in Washington, D.C. from May 18, 1931 through May 1948. Her spouse's employment as a federal employee with the NBS was verified from May 26, 1931 to May 14, 1948. The NBS facility on Van Ness Street was initially designated as a covered Atomic Weapons Employer (AWE) under EEOICPA by the Department of Energy (DOE) from 1943 through 1952.

On November 30, 2005, the NBS was removed as a covered AWE by DOE per notice in the *Federal Register*.[1] DOE took this action when it determined that Congress established the NBS in 1901, and that Congress changed its name to the National Institute of Standards and Technology in 1988 as part of the Omnibus Trade and Competitiveness Act, and that it is a non-regulatory federal agency currently located within the Commerce Department's Technology Administration. DOE also determined that NBS never came under the organizational hierarchy of the Manhattan Engineer District (MED), the Atomic Energy Commission (AEC), or DOE itself. Hence, DOE concluded that the NBS facility on Van Ness Street was erroneously designated as an AWE facility because it is a facility of an agency of the United States, and the definition of an AWE specifically excludes agencies of the United States.

On March 1, 2006, the Cleveland district office advised **[Claimant]** that the NBS facility on Van Ness Street is not considered to be a covered AWE facility under EEOICPA, and requested that she submit any additional information she possessed that would lend itself to classifying this facility as an AWE facility within 30 days. **[Claimant]** responded to this request and submitted thirteen documents she believed would support a determination that this facility should be reclassified as a "DOE facility" under EEOICPA.

On September 25, 2006, after reviewing the evidence of record, the additional thirteen documents submitted, and historical research conducted on the NBS facility on Van Ness Street, the Chief of the Branch of Policies, Regulations and Procedures concluded that the NBS facility on Van Ness Street does not meet the definition of a DOE facility for the purposes of EEOICPA. While it was noted that this facility did perform valuable work for both the MED and the AEC, there was no evidence supporting that there was either a proprietary interest or the existence of a management and operation, management and integration, environmental remediation services, construction, or maintenance services contract between either the MED or the AEC and NBS. Based on this, it could not be considered a DOE facility.

On October 12, 2006, the Cleveland district office recommended denial of **[Claimant]**'s claim for survivor benefits, finding that the evidence of record did not establish that **[Employee]** was a covered employee with cancer under EEOICPA, as there was insufficient evidence that he was employed by either an AWE or a DOE contractor at an AWE facility or a DOE facility, as those terms are defined in the statute. Accordingly, the district office recommended denial of **[Claimant]**'s claim for survivor benefits.

OBJECTIONS

On December 11, 2006, FAB received **[Claimant]**'s letter of objection to the recommended decision with her request for an oral hearing, which was held on March 13, 2007 in Seattle, Washington, attended by her daughter and authorized representative, **[Claimant's daughter]**, and her husband. In summary, **[Claimant]**'s letter of objection and her testimony at the hearing indicated that she disagreed with the recommended decision and that she has requested copies of the necessary contractual documents through a Freedom of Information Act (FOIA) to the U.S. Department of Labor (DOL), which has since been turned over to DOE for response, as DOL does not have the documents she requested. **[Claimant]** indicated that she is still waiting for a response from DOE with the documents she needs to support her objection to the delisting of this facility from the covered facilities list. **[Claimant]** believes the work done by NBS was more than just research and development, the employees were in charge of quality control, analyzed samples from production plants, devised more effective methods of analysis, furnished personnel and facilities, helped in start-up operations of major production plants and provided guidance for the control program. **[Claimant]** argued these responsibilities clearly fall into the areas of management and operations, which were the responsibilities of contractors.

In reviewing all of the evidence of record, including all of the documents submitted at the hearing, there remains insufficient evidence to establish that there was either a proprietary interest or the existence of a management and operation, management and integration, environmental remediation services, construction, or maintenance services contract between either the MED or the AEC and the NBS. While **[Claimant]** argued that the work done by employees of the NBS at its facility on Van Ness Street constitutes work related to "management and operations which were the responsibilities of contractors," she did not provide supporting documentation showing that a proprietary interest or

contractual relationship existed between the NBS and the MED, or the AEC/DOE. Therefore, the NBS facility on Van Ness Street cannot be considered a "DOE facility" for the purposes of EEOICPA.

After considering the evidence of record, FAB hereby makes the following:

FINDINGS OF FACT

1. On July 31, 2001, **[Claimant]** filed a claim for survivor benefits under EEOICPA.

2. **[Claimant]** is the surviving spouse of the employee.

3. In 1983, the employee was diagnosed as having myelofibrosis, which is also known as agnogenic myeloid metaplasia.

4. **[Claimant]** did not submit sufficient evidence that **[Employee]**'s employment at the NBS facility on Van Ness Street meets the criteria to be considered "covered employment" under EEOICPA.

Based on the above-noted findings of fact, FAB hereby also makes the following:

CONCLUSIONS OF LAW

Although the NBS facility on Van Ness Street was once designated as an AWE facility by DOE, DOE later determined that this facility does not qualify as an AWE facility for the purposes of EEOICPA, and consequently removed its designation as an AWE facility in a notice published in the *Federal Register* on November 30, 2005.

[Claimant]'s objection to the removal of this facility as an AWE facility by DOE relates to her belief that the NBS facility on Van Ness Street should be reclassified as a "DOE facility," and that the work completed by the employees of the NBS at this facility, namely **[Employee]**, was consistent with the work completed by other employees of DOE contractors. While this may be accurate, the type of work completed alone is not the determinative criteria required for a facility to be considered a "DOE facility" under EEOICPA. It must also be shown that the AEC/DOE has or had a proprietary interest, or entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services; the evidence of record is currently insufficient to meet this requirement.

It is the claimant's responsibility to establish entitlement to benefits under EEOICPA. The regulations at § 30.111(a) provide that the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in EDEOICPA and the regulations, the claimant also bears the burden of providing all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a). If **[Claimant]** obtains evidence in the future that she believes satisfies this criteria, she should submit this to the district office for consideration with a request for reopening of the claim.

FAB is bound by the criteria and provisions of EEOICPA and has no authority to depart from it or

EEOICPA's implementing regulations. Therefore, **[Claimant]**'s claim must be denied for lack of evidence that **[Employee]** was a covered employee as defined by the statute.

Seattle, Washington

Kelly Lindlief

Hearing Representative

Final Adjudication Branch

[1] 70 Fed. Reg. 71815 (November 30, 2005).

EEOICPA Fin. Dec. No. 10432-2004 (Dep't of Labor, September 13, 2004)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq.* Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On September 24, 2001, you filed a claim, Form EE-1, for benefits under the EEOICPA based on prostate cancer, stomach cancer, other lung condition specified as a spot, goiter and an unspecified throat condition.

Medical evidence submitted in support of your claim included a surgical pathology report dated January 9, 1995 that showed a diagnosis of adenocarcinoma of the stomach and a hospital discharge summary dated January 11, 1995 that showed a diagnosis of gastric carcinoma. The medical evidence also showed diagnoses of benign prostatic hyperplasia in January 1995; multinodular goiter, status post; right thyroid lobectomy in March 1997; and stable pulmonary nodules in February 2000.

You provided an employment history on Form EE-3 indicating that you were employed at INCO, Reduction Pilot Plant (RPP) in Huntington, West Virginia from October 11, 1952 to 1986. The Huntington Pilot Plant in Huntington, West Virginia is recognized as a DOE facility from 1951 to 1963, and from 1978 to 1979. *See* Department of Energy Worker Advocacy Facilities List.

On October 5, 2001, the Cleveland district office notified you that your claims for a goiter, lung and throat conditions were not covered under the Act.

On January 14, 2002, the Department of Energy (DOE) reported that they had no employment information on you. On January 29, 2002, the Cleveland district office notified you that DOE does not have any employment record to show that you worked for INCO at the RPP during the period of your employment. You were advised to furnish any document or documents (copy of security clearance, ID card, SSA records, etc.) that would establish your employment at INCO from 1952 to 1986. You were

also advised that you could ask others to affirm your employment by INCO by completing and returning an Employment History Affidavit (Form EE-4). You were asked to provide the requested evidence within 30 days of the letter.

In response on April 8, 2002, you submitted a copy of your Itemized Statement of Earnings from the Social Security Administration (SSA) that showed you received earnings from INCO Alloys International Inc. from 1952 to 1986.

On December 8, 2003, the Cleveland district office requested the DOE's corporate verifier for INCO to determine whether you worked in the RPP. On December 15, 2003, the DOE's corporate verifier reported that no record was found to establish that you were assigned and/or worked in the RPP while employed by INCO from 1952 to 1986.

On January 27, 2004, the Cleveland district office explained that while the evidence shows that you worked at INCO in Huntington, West Virginia from 1952 to 1986, there is no evidence showing that you were assigned and/or worked in the RPP, the covered nuclear portion of the facility, while employed by INCO from 1952 to 1986. The SSA records you submitted merely show that you received earnings from INCO from 1952 to 1986; however they do not place you within the RPP. They requested that you provide any documents that would show that you were assigned by INCO to work at the RPP, the covered nuclear portion of the facility. No response to this request was received.

On July 1, 2004, the district office issued a recommended decision which concluded that you are not entitled to compensation under 42 U.S.C. § 7384s because the evidence failed to establish that the you are a covered employee, as defined by 42 U.S.C. § 7384l(1); and that you did not provide sufficient evidence to show that you were employed at an "atomic weapons employer facility" as defined in 42 U.S.C. § 7384l(5) nor that you were employed at a "Department of Energy facility" as defined by 42 U.S.C. § 7384l(12).

FINDINGS OF FACT

1. You filed a claim for benefits under the EEOICPA on September 24, 2001.

2. You were employed by INCO Alloys International Inc. in Huntington, West Virginia from 1956 to 1986.

3. The DOE's corporate verifier for INCO confirmed that they have no record that you worked at the RPP, the covered nuclear portion of that facility. The Huntington Pilot Plant was a Department of Energy (DOE) facility from 1951 to 1963 and from 1978 to 1979. INCO was the DOE contractor at that facility from 1951 to 1963.

4. You did not provide sufficient employment evidence to establish that you were assigned by INCO to work in the RPP.

5. You were advised of the deficiencies in your claim and provided with the opportunity to correct them.

CONCLUSIONS OF LAW

I have reviewed the recommended decision issued by the Cleveland district office on July 1, 2004. I find that you have not filed any objections to the recommended decision, and that the sixty-day period for filing such objections has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

In order to be afforded coverage under the Energy Employees Occupational Illness Compensation Program Act, you must establish that you have been diagnosed with a designated occupational illness incurred as a result of exposure to silica, beryllium, and/or radiation: *cancer, beryllium sensitivity, chronic beryllium disease*, and *silicosis*. *See* 42 U.S.C. § 7384l(15); 20 C.F.R. § 30.110(a). Further, the illness must have been incurred while in the performance of duty for the Department of Energy and certain of its vendors, contractors, and subcontractors, or for an atomic weapons employer or facility. *See* 42 U.S.C. §§ 7384l(4)-(7), (9), (11).

Additionally, in order to be afforded coverage as a "covered employee with cancer," you must show that you were a DOE employee, a DOE contractor employee, or an atomic weapons employee, who contracted cancer after beginning employment at a DOE facility or an atomic weapons employer facility. *See* 42 U.S.C. § 7384l(9); 20 C.F.R. § 30.210(b). While you did provide evidence of a diagnosis of stomach cancer, the record in its current posture lacks proof that you worked in covered employment under the Act.

The record shows that by letters dated January 29, 2002 and January 25, 2004, you were requested to provide the required information to prove you had covered employment under the Act.

It is the claimant's responsibility to establish entitlement to benefits under the Act. The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of every criterion under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means it is more likely than not that a given proposition is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing to the Office of Workers' Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

The record in this case shows that you did not submit proof that you had covered employment under the Act. Therefore, your claim must be denied for lack of evidence showing that you had covered employment under the EEOICPA.

For the above reasons the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

Cleveland, Ohio

Debra A. Benedict

Acting District Manager

Final Adjudication Branch

EEOICPA Order No. 50245-2004 (Dep't of Labor, April 14, 2011)

ORDER DENYING REQUEST FOR RECONSIDERATION

This is the response to the claimant's December 28, 2010 request for reconsideration of the November 30, 2010 decision of the Final Adjudication Branch (FAB) on his survivor claim under both Part B and Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. In that decision, FAB concluded that with respect to Part B, the employee's pancreatic cancer was not sustained "in the performance of duty," as that term is defined in § 7384n(b), because it is not "at least as likely as not" (a 50% or greater probability) that such cancer was related to the radiation doses she received during her covered employment at a Department of Energy (DOE) facility—Hangar 481, Kirtland Air Force Base (AFB)—from March 1, 1989 through June 30, 1994. FAB also concluded that with respect to Part E of EEOICPA, the employee was not a "covered DOE contractor employee," as that term is defined in § 7385s(1), because it is also not at least as likely as not that her exposure to toxic substances at Hangar 481 was a significant factor in aggravating, contributing to, or causing her pancreatic cancer. It was because of these two conclusions that the claim for survivor benefits due to the employee's pancreatic cancer under Part B, and for her death due to pancreatic cancer under E, was denied. A decision on the Part E claim for the employee's death due to acoustic neuroma, however, was deferred pending further development.

In support of his December 28, 2010 reconsideration request, the claimant raised a number of interwoven and somewhat confusing arguments. To the extent that I can discern what they are, his arguments in support of his request are as follows.

1. FAB should have found that the period of the employee's covered employment began when she started work for Ross Aviation at Hangar 481, Kirtland AFB, on December 9, 1985, rather than when Hangar 481 became a covered DOE facility on March 1, 1989, because Ross Aviation had contracts with DOE and its predecessor agencies starting in 1970, and because those contracts show that Ross Aviation began working at Hangar 481 in 1984. In conjunction with this argument, which the claimant raised earlier in the adjudication of his claim, he asserts that copies of the contracts in question that he submitted have either never been considered, or were not considered by the appropriate agency of the Department of Labor.

2. FAB wrongly found that the employee's diagnosed acoustic neuroma was not an "occupational illness" that is compensable under Part B that should have been taken into account during the dose reconstruction process and the determination of the probability of causation for the Part B claim.

3. FAB wrongly concluded that the effect of the employee's alleged exposure to radiation prior to beginning her employment with Ross Aviation on December 9, 1985, as well as her alleged "non-employment" exposure during her accepted covered employment, could not be taken into account when it determined the probability of causation for her pancreatic cancer. The claimant contends that these alleged exposures to radiation can be inferred from evidence in the file and must be taken into account, because 42 U.S.C. § 7384n(c)(3)(C) provides that the regulatory guidelines for determining the probability of causation for cancer under Part B "shall take into consideration. . .other relevant factors." As was the case with the claimant's first argument noted above, he made this particular argument previously in the adjudication of his claim.

4. FAB wrongly concluded that the alleged radiation exposure of the employee "in other employments" was not covered under EEOICPA. The claimant contends that this alleged radiation exposure should have been taken into account and "added to the worker's total exposure. . . ." While

he acknowledges that the dose reconstruction methodology that the National Institute for Occupational Safety and Health (NIOSH) used to estimate the radiation dose of the employee is binding on FAB, he believes that FAB should have determined that his objections concerning the application of that methodology, as it related to the alleged exposures in question, needed to be considered by NIOSH and therefore should have returned the Part B claim to the district office for referral to NIOSH for such consideration. To support this argument regarding the employee's radiation dose, he asserts that:

[G]eneral principles of workers [*sic*] compensation law contemplate that a worker who was exposed to radiation in multiple employments, like the worker in this case, is not limited to an analysis of exposure during the last term of injurious employment. Rather, in such cases the sum total of the worker's exposure during successive employments should be taken into account in assessing the effect of the worker's last injurious exposure to radiation, and in so doing the exposure with the last employer. . .is given its due weight in contributing to the onset of a subsequently occurring cancer.

Similar to the first and third arguments listed above, the claimant raised this argument previously in the adjudication of his EEOICPA claim.

5. The claimant was not afforded the opportunity to present his objections regarding the dose reconstruction for the employee to NIOSH, which he acknowledges is "the agency which most logically has the expertise to evaluate the merits" of his position. Therefore, the claimant believes that FAB should have returned his Part B claim to the district office for referral to NIOSH so it could consider his contention that the dose reconstruction for the employee should have included her non-employment and "other employments" exposures.

After careful consideration of these arguments, and for the reasons set forth below, the request for reconsideration is hereby denied.

With regard to the first argument noted above, and as set out in FAB's November 30, 2010 decision, there is no dispute that Ross Aviation performed work under contracts it had with DOE and its predecessor agencies as early as February of 1970, and that the evidence establishes that the employee started working for Ross Aviation on December 9, 1985. The pertinent question for the purposes of the claimant's survivor claim, however, concerns where Ross Aviation did its work under its contracts with DOE that covered the period of the employee's employment from December 9, 1985 through June 30, 1994. Contrary to the claimant's allegations noted above, the contracts at issue have, in fact, been previously reviewed by the Director of the Division of Energy Employees Occupational Illness Compensation (DEEOIC), which is the division of the Office of Workers' Compensation Programs that administers EEOICPA[1], when NIOSH provided her with copies of them and asked, in a September 30, 2009 letter regarding the petition to add a class of employees at Hangar 481 to the Special Exposure Cohort the claimant filed with NIOSH, whether those contracts were sufficient to expand the "covered" period of Hangar 481 as a DOE facility. In her February 2, 2010 response, the Director noted that after carefully reviewing those contracts, it was her conclusion that they did not support changing the determination that Ross Aviation was a DOE contractor at Hangar 481, Kirtland AFB, for the period March 1, 1989 through February 29, 1996. Those same contracts were also carefully considered yet again when the claimant submitted copies of them to the case file in support of his claim, and are briefly described below:

- Contract No. AT(29-2)-2859 (covering February 1, 1970 through January 31, 1973) states that Ross Aviation would be performing air transport services for the Atomic Energy Commission

(AEC) “at the Albuquerque Sunport, , .” There is no mention in this contract that any of the work being done by Ross Aviation will be done at Kirtland AFB.

- Contract No. AT(29-2)-3276 (covering February 1, 1973 through January 31, 1974, with multiple modifications that extended the coverage to February 28, 1979 and changed the contract number to E(29-2)-3276 when the AEC was replaced by the Energy Research and Development Administration (ERDA)) states that the “main operations base shall be maintained at the Contractor’s facility at the Albuquerque International Airport. . . .” Again, there is no mention in this contract or its modifications that any of the work being done by Ross Aviation will be done at Kirtland AFB.

- Modification number A011 to Contract No. EY-76-C-04-3276 (extending the coverage of that contract from March 1, 1979 through February 29, 1984 and changing the contract number to DE-AC04-76DP03276 when ERDA was replaced by DOE) states that the “main operations base shall be maintained at the Government’s existing facility at the Albuquerque International Airport. . . .” This modification also fails to state that any of the work being done by Ross Aviation will be done at Kirtland AFB.

- Modification number M016 to Contract No. DE-AC04-76DP03276 (covering the period of March 1, 1980 to February 28, 1981) states that the location at which Ross Aviation is maintaining and flying Government-furnished aircraft is “the Main Base - .”[2] Once again, there is no mention in this modification that any of the work being done by Ross Aviation will be done at Kirtland AFB.

- Contract No. DE-AC04-89AL52318 (covering March 1, 1989 through February 28, 1990, with extensions through February 29, 1996) is the earliest contract that describes the location at which Ross Aviation is working as “Government-owned facilities located on Kirtland Air Force Base, New Mexico.” Because Contract No. DE-AC04-89AL52318 is a “Management and Operations” contract, this also means that Ross Aviation became a DOE contractor at that time within the meaning of 42 U.S.C. § 7384l(12)(B)(ii), because it was an “entity” that entered into a “management and operations” contract with DOE at a DOE facility, *i.e.*, Hangar 481, Kirtland AFB.

As noted above, and as previously stated in FAB’s November 30, 2010 decision, there is no probative and persuasive evidence specifying that Ross Aviation performed its work under a contract with DOE at Hangar 481, Kirtland AFB, prior to March 1, 1989. In this regard, and again as pointed out by FAB in the November 30, 2010 decision, the non-contractual evidence the claimant submitted in support of this argument is of diminished probative value when compared to the actual contracts described above. Accordingly, there is no basis for extending the covered period for that facility to include the earlier period that the employee worked there beginning on December 9, 1985, and this argument does not warrant reconsideration of FAB’s November 30, 2010 decision.

As for the second argument described above, FAB’s November 30, 2010 decision specifically informed the claimant that acoustic neuroma is not an “occupational illness,” as that term is defined in § 7384l(15), and therefore is not compensable under Part B. While he contends that acoustic neuroma is a cancer and therefore it should have been taken into account by NIOSH when it reconstructed the employee’s radiation dose and by DEEOIC when it determined the probability of causation based on that dose reconstruction, acoustic neuroma is actually a benign tumor of the eighth cranial nerve. The

only reference to that illness in the medical evidence is in an August 11, 2000 report by Dr. Jorge Sedas, in which Dr. Sedas related the employee's history of a "right-sided acoustic tumor – stable"; there is no medical evidence in the file showing that the reported tumor was malignant (cancer). The provisions of 42 U.S.C. § 7384n(b), (c), and (d) regarding the dose reconstruction process and the determination of probability of causation are applicable only for the purpose of determining whether *cancer* was sustained in the performance of duty. For those reasons, this second argument also does not warrant reconsideration of the November 30, 2010 decision of FAB.

In the third argument described above, the claimant contends that FAB should have taken the employee's alleged exposure to radiation prior to beginning her employment with Ross Aviation and her alleged non-employment exposure during her accepted covered employment, which he asserts can be inferred from the evidence in the file, into account as "other relevant factors" when it determined the probability of causation for the employee's pancreatic cancer under Part B. While he is correct that § 7384n(c)(3)(C) of EEOICPA directs that the regulatory guidelines for determining the probability of causation for cancer claimed under Part B "shall take into consideration. . .other relevant factors," the task of *devising* these guidelines (and taking those "other relevant factors" into account) pursuant to that statutory directive was assigned to the Secretary of Health and Human Services (HHS), not the Secretary of Labor, by the President in Sec. 2(b)(i)(A) of Executive Order 13179 of December 7, 2000. 65 Fed. Reg. 77487 (December 11, 2000).[3] While DEEOIC is required by 42 C.F.R. § 81.20(b) to *apply* the HHS regulatory guidelines, which have been incorporated into the NIOSH Interactive RadioEpidemiological Program (NIOSH-IREP), DEEOIC does not have the authority to *alter* the guidelines to take into account the particular non-covered employment exposures the claimant alleges that the employee experienced both prior to and away from her covered employment at Hangar 481 as "other relevant factors" when determining the probability of causation for her pancreatic cancer under Part B. On the contrary, as Paragraph 2.0 of the *User's Guide the for the Interactive RadioEpidemiological Program (NIOSH-IREP)* states:

The NIOSH-IREP computer code is a web-based program that estimates the probability that an employee's cancer was caused by his or her individual radiation dose. Personal information (*e.g.*, birth year, year of cancer diagnosis, gender) and exposure information (*e.g.*, exposure year, dose) may be entered manually or through the use of an input file. For application by the U.S. Department of Labor (DOL), *the input file option is used to preset all personal information, exposure information, and system variables. These input files are created by NIOSH for each individual claim and transmitted to the appropriate DOL district office for processing*.[4] (emphasis added)

Accordingly, the claimant's third argument also does not warrant granting his request to reconsider FAB's November 30, 2010 decision.

In the fourth argument in support of the claimant's request, he contends that the employee's alleged radiation exposures "in other employments" should have been taken into account and "added to the worker's total exposure" as "other relevant factors." As FAB's November 30, 2010 decision noted, the issue of what radiation dose to include is exclusively under the control of NIOSH, pursuant to the President's assignment of the task of performing dose reconstructions to the Secretary of HHS (which then re-delegated it to NIOSH) in Sec. 2(b)(iii) of Executive Order 13179. Also, the statute itself, at § 7384n(d)(1), restricts the dose to be used to determine probability of causation to radiation exposure that occurred solely "at a facility," which in the employee's case, means the dose she received when Hangar 481 was a DOE facility—March 1, 1989 through June 30, 1994. HHS has issued regulations governing the dose reconstruction process at 42 C.F.R. part 82, and those regulations do not provide for any consideration of pre-employment and non-employment radiation exposures in estimating radiation

dose incurred at a DOE facility, regardless of the claimant's belief that principles of workers' compensation require such consideration. Because consideration of the "other relevant factors" referred to in 42 U.S.C. § 7384n(c)(3)(C), which as noted above, refers solely to the determination of probability of causation, this fourth argument also does not warrant reconsideration of the November 30, 2010 FAB decision on the claim.

Finally, in the fifth argument, the claimant asserts that FAB should have returned his Part B claim to the district office for referral to NIOSH, so NIOSH could consider his contention that the dose reconstruction for the employee should have included non-employment and "other employments" exposures. While there is no dispute that NIOSH is "the agency which most logically has the expertise to evaluate the merits" of his position, the fact remains that the claimant was provided with the opportunity, at multiple points during the dose reconstruction process at NIOSH, to submit whatever evidence he had regarding the employee's radiation exposures for consideration by NIOSH. Further, as discussed above, the types of exposures at issue here are simply not covered under EEOICPA. Therefore, there was no reason for FAB to return the Part B claim to the district office for referral to NIOSH, and this final argument, like the preceding four, does not provide a sufficient basis for reconsidering FAB's November 30, 2010 decision.

I must deny the request for reconsideration because the claimant has not submitted any argument or evidence which justifies reconsideration of the November 30, 2010 final decision. That decision of FAB is therefore final on the date of issuance of this denial of the request for reconsideration. *See* 20 C.F.R. § 30.319(c)(2).

Cleveland

Tracy Smart

Hearing Representative

Final Adjudication Branch

[1] The sources of authority for administering EEOICPA are set out at 20 C.F.R. § 30.1,which states that the Director of the Office of Workers' Compensation Programs (and his designee the Director of DEEOIC) has the primary responsibility to administer EEOICPA, except for those activities assigned to other agencies. This responsibility includes the "exclusive authority to. . . interpret the provisions of EEOICPA," among them the statutory definition of "Department of Energy facility" at § 7384l(12).

[2] The case file also contains numerous other modifications of Contract No. DE-AC04-76DP03276, but those other modifications also do not include a "Statement of Work" provision identifying the location where Ross Aviation was to perform its work; thus, they are not described above. For example, modification number M062 extended the provisions of that contract to cover the period from March 1, 1984 through February 28, 1989 (during which the employee began working for Ross Aviation), but contained no language whatsoever that described where Ross Aviation performed its work for DOE.

[3] *See also* 20 C.F.R. § 30.2(b) (". . .HHS has promulgated regulations at 42 CFR part 81 that set out guidelines that OWCP follows when it assesses the compensability of an employee's radiogenic cancer") and 20 C.F.R. § 30.213(b) ("HHS's regulations satisfy the legal requirements in section 7384n(c) of the Act, which also sets out OWCP's obligation to use them in its adjudication of claims for radiogenic cancer filed under Part B of the Act, and provide the factual basis for OWCP to determine if the 'probability of causation' (PoC) that an employee's cancer was sustained in the performance of duty is 50% or greater (*i.e.*, it is 'at least as likely as not' causally related to employment), as required under section 7384n(b)").

[4] *See:* http://www.cdc.gov/niosh/ocas/pdfs/irep/irepug56.pdf(last visited April 13, 2011).

EEOICPA Fin. Dec. No. 51955-2009 (Dep't of Labor, December 18, 2009)

NOTICE OF FINAL DECISION FOLLOWING REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch (FAB), following a review of the written record, concerning the above claim filed under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq.* For the reasons set forth below, the claim for thirty primary cancers under Part B is denied. Adjudication of the claim for these same cancers under Part E of EEOICPA is deferred pending further development.

STATEMENT OF THE CASE

On December 5, 2003, **[Employee]** filed a claim for benefits under Part B of EEOICPA for cancers of the "skin, facial, squamous, basal cell (10-12)" and the "neck-myoepithelial." On the same date, **[Employee]** filed a request for assistance with the Department of Energy (DOE) under former Part D of EEOICPA for the same conditions. Following the repeal of Part D and the enactment of Part E, the request for assistance was considered a claim for benefits under Part E.

On Form EE-3, **[Employee]** indicated that from 1963 to 1992 he worked for Precision Forge in both Santa Monica and Oxnard, California, and also indicated that 90% of his work was for the Rocky Flats Plant. **[Employee]** described his work and positions as follows:

Forging operator (10 years); foreman of forge shop (12 years); manufacturing supervisor – forged parts from depleted uranium. Did experimental forging of beryllium.

In a November 12, 2003 document that he submitted with his claim, **[Employee]** stated the following:

I have worked for a small forging company in California from 1962 until retirement in 1992. Precision Forge was originally a private company, which sub-contracted to Dow Chemical when Rocky Flats started. We became part of Rockwell Corporation around 1985 and then later to EG&G. . . . The last ten years I worked as a facility engineer and finally product development. The period of concern was approximately 1965 thru 1980 when the plant was in Santa Monica, California.

On a Form EE-5 dated January 8, 2004, DOE verified that **[Employee]** was a DOE contractor employee for Dow Chemical, Rockwell International, and EG&G Rocky Flats, Inc., all DOE contractors, from July 10, 1963 to August 31, 1992 at the Rocky Flats Plant, a DOE facility.[1] The verification did not indicate **[Employee]**'s specific work location.

To determine the probability that **[Employee]**'s diagnosed cancers were related to occupational exposure to radiation at a DOE facility, the district office referred the claim for radiation dose reconstruction to the National Institute for Occupational Safety and Health (NIOSH) on April 23, 2004. Based on medical evidence that **[Employee]** had submitted, the referral specified the diagnosis dates and locations of six basal cell carcinomas (BCC's), three squamous cell carcinomas (SCC's), myoepithelioma (right neck), and salivary gland carcinoma. The employment location and dates of employment provided to NIOSH were as follows: Rocky Flats Plant, 7/10/1963 – 8/31/1992.

On June 4, 2004, the district office received medical records establishing diagnoses of two primary

BCC's that were not previously claimed. Therefore, on June 7, 2004, the district office submitted an amended referral to NIOSH, specifying the additional BCC locations and diagnosis dates.

During a June 24, 2004 dose reconstruction interview conducted by NIOSH, **[Employee]** indicated that his work location was at 2052 Colorado St., Santa Monica, California, not at the Rocky Flats Plant.

On January 28 and January 31, 2005, the district office received medical records that established the diagnosis and treatment of four primary SCC's that were not previously claimed. As a result, on April 20, 2005, the district office submitted a second amended referral to NIOSH specifying the additional SCC locations and diagnosis dates.

In view of apparent discrepancies between **[Employee]**'s work locations as provided on his EE-1 claim form, his EE-3 Employment History (Santa Monica and Oxnard, California), and his statement of work location (Santa Monica, California) during the June 24, 2004 NIOSH telephone interview, all of which indicated that he did not work at the Rocky Flats Plant, and the DOE verification of his employment at the Rocky Flats Plant in Golden, Colorado during the same employment period, clarification of **[Employee]**'s work location and period of covered employment became necessary. On November 28, 2006, during a telephone conversation with the a claims examiner, **[Employee]** again stated that he worked for Precision Forge in California, which did work for the Rocky Flats Plant. By letter of December 4, 2006, the district office summarized that telephone conversation and informed the employee that Precision Forge and Macrodyne were not covered facilities under EEOICPA.

On March 1, 2007, the district office referred the question of **[Employee]**'s covered employment period to the Division of Energy Employees Occupational Illness Compensation (DEEOIC), Branch of Policy, Regulation and Procedures (BPRP) for resolution. The question presented was whether in adjudicating **[Employee]**'s claim, the district office should use the employment verified by the DOE—July 10, 1963 to August 31, 1992 at the Rocky Flats Plant.

In a memorandum dated July 16, 2007, BPRP noted that a review of all of the employment evidence of record revealed that **[Employee]** did not work at the Rocky Flats Plant. Instead, he worked from 1962 through 1980 for Precision Forge in Santa Monica, California and then for Macrodyne Industries, which purchased Precision Forge and moved the facility to Oxnard, California. BPRP noted that Precision Forge/Macrodyne produced parts for the Rocky Flats Plant and determined that in 1984, DOE purchased the Oxnard plant and transferred employees onto the same contract as those personnel operating the Rocky Flats Plant.

Based on a review of the activities at Precision Forge/Macrodyne prior to its acquisition by DOE in 1984, BPRP determined that prior to the 1984 acquisition, neither the Santa Monica location nor the Oxnard location could be considered a "DOE facility," as that statutory term is defined in EEOICPA, because DOE had no "proprietary interest" in either location and had not entered into a contract with an entity for management and operation, management and integration, environmental remediation services, construction or maintenance services at either location. Accordingly, BPRP determined that neither **[Employee]**'s employment at the Santa Monica location nor his employment at the Oxnard location prior to 1984 constituted covered employment under EEOICPA.

However, BPRP further found that upon its acquisition by DOE in 1984, when the facility became known as the High Energy Rate Forging (HERF) Facility, the Oxnard location satisfied the statutory requirements to be regarded as a DOE facility because DOE owned the HERF Facility in Oxnard and

used its management and operating contractor to run the plant. Thus, BPRP also concluded that the HERF Facility should be considered a DOE facility for EEOICPA purposes for the period 1984-1997. Based on the above-noted findings, BPRP directed the district office to proceed with adjudication with a finding that **[Employee] was** an EEOICPA covered employee for the period from 1984 to August 31, 1992.

On August 27, 2007, **[Employee]** submitted medical records establishing the diagnosis of additional skin cancers. In addition, the district office obtained records from the DOE Case Management System, which included diagnostic evidence of additional unclaimed primary skin cancers: four BCC's, three SCC's, myeloepithelial carcinoma of the left cheek, and carcinoma of the face. On September 25, 2007, the district office submitted an amended NIOSH referral summary specifying 26 diagnosed cancers and diagnosis dates. This amendment also identified the employee's covered employment location as the HERF Facility with a start date of January 1, 1984 and ending date of August 31, 1992.

By letter dated September 26, 2007, **[Employee]** informed the district office that he had been assigned to oversee the installation and start-up of a new large HERF Hammer at the Hanford facility in Washington. On December 14, 2007, DOE verified that **[Employee]** had visited the Hanford Site, a DOE facility, from October 28, 1986 to December 13, 1986; from November 27 to 30, 1990; and from February 5, 1991 to March 9, 1991. Because a Department of Labor Health Physicist determined that the additional Hanford employment could affect the dose reconstruction, on January 8, 2008, the district office resubmitted **[Employee]**'s dose reconstruction referral to NIOSH with the Hanford facility employment included.

On October 2, 2008, **[Employee]** submitted medical evidence establishing the diagnosis of two primary BCC's that had not been previously claimed and on October 8, 2008, the district office submitted an amended NIOSH referral including those cancers. On May 27, 2009, the district office submitted yet another amended NIOSH referral summary that included two more BCC's shown by previously submitted medical records (but not reported to NIOSH), thus increasing the number of reported diagnosed primary cancers to 30. The final amended referral provided the diagnosis dates and locations of the additional cancers.

Altogether, in support of **[Employee]**'s claim, the district office received medical evidence that established pathological diagnoses of the following 30 primary cancers reported to NIOSH for dose reconstruction:

- SCC of the forehead, diagnosed June 13, 1996.
- BCC of the upper lip, diagnosed July 15, 1996.
- BCC - 3 of the face, diagnosed October 1, 1997.
- BCC - 2 of the face, diagnosed October 1, 1997.
- BCC of the face, diagnosed January 4, 2000.
- BCC -2 of the right shoulder, diagnosed August 18, 2001.
- BCC, of the right cheek, diagnosed October 3, 2001.

- BCC of the forehead, diagnosed October 3, 2001.
- SCC of the nose, diagnosed January 8, 2002.
- Myoepithelial carcinoma of the right cheek, diagnosed February 1, 2002;
- Myoepithelioma of the right neck, diagnosed February 8, 2002.
- Carcinoma of the salivary gland, diagnosed February 20, 2002.
- SCC of the right nasal tissue, diagnosed August 20, 2002.
- SCC of the upper right neck, diagnosed September 10, 2002.
- SCC of the lower right neck, diagnosed September 10, 2002.
- SCC of the right nasal tissue, diagnosed April 7, 2003.
- SCC of the right cheek, diagnosed April 18, 2003.
- BCC of the right posterior ear, diagnosed August 22, 2003.
- SCC of the right eyebrow, diagnosed August 22, 2003.
- SCC of the left check, diagnosed November 8, 2004.
- SCC of the face, diagnosed November 30, 2004.
- Carcinoma of the face, diagnosed June 12, 2007.
- BCC of the right ear, diagnosed August 17, 2007.
- SCC of the right superior pinna, diagnosed August 17, 2007.
- BCC of the forehead, diagnosed March 13, 2008.
- BCC of the left shoulder, diagnosed June 3, 2008.

On July 1, 2009, **[Employee]** signed Form OCAS-1, indicating that he was not in possession of any additional information that had not already been provided to NIOSH for completing his dose reconstruction.

On July 23, 2009, the district office received the final NIOSH Report of Dose Reconstruction and used the information provided in that report to determine that there was a 4.76% probability that **[Employee]**'s cancers were caused by radiation exposures during employment at a covered facility. On August 21, 2009, the district office issued a recommended decision to deny the claim under Part B, on the ground that it was not "at least as likely as not" that **[Employee]**'s cancers were caused by employment-related radiation exposures.

The Notice of Recommended Decision was mailed to an incomplete address and was returned undelivered. On August 31, 2009, the Notice of Recommended Decision was reissued and mailed to the correct address of record.

OBJECTIONS

On October 5, 2009, FAB received **[Employee]**'s September 25, 2009 statement of objections to the recommended decision. **[Employee]** did not submit additional evidence with his statement of objections. His objections are as follows:

1. The recommended decision was mailed to an incorrect address, which delayed his receipt of the correspondence.

2. Finding of fact # 2 of the recommended decision showed him as visiting the Hanford Site from November 27, 1990 to November 20, 1990.

3. Finding of fact # 3 said that "Mr. Johnson was diagnosed. . . ."

4. The recommendation was based on the last ten years of a 30-year career in the nuclear weapons complex. Ninety percent of all work done in the early years 1964-1980 (by Precision Forge in Santa Monica) were projects initiated by engineers at the Rocky Flats Plant, the Sandia Laboratory, the Lawrence Livermore National Laboratory and involved experimental work on depleted uranium for other organizations.

Objections 1, 2 and 3 pertain to regrettable administrative errors. Although, these errors should not have occurred, they do not affect the outcome of **[Employee]**'s Part B claim. The recommended decision was mailed to an incorrect address. To preserve **[Employee]**'s right to object, the recommended decision was reissued with a new date. The correct starting and ending dates for **[Employee]**'s 1990 Hanford visit, as verified by DOE, are November 27 to 30, 1990. Referring to "November 20, 1990" as the ending date of this visit is an obvious typographical error that should have been caught. However, the dates of **[Employee]**'s Hanford visits reported to NIOSH for use in dose reconstruction were correct. The reported dates for his Hanford visits are as follows: October 28, 1986 to December 13, 1986; November 27 to 30, 1990; and February 5, 1991 to March 9, 1991. There is no explanation for the appearance of an incorrect name in finding of fact # 3. The information regarding cancer diagnoses and dates were drawn from **[Employee]**'s medical records. In reviewing **[Employee]**'s claim, FAB has independently examined each of his medical records and compared the results to the information used by NIOSH in preparing the dose reconstruction. These administrative errors are unfortunate, but do not affect the decision on **[Employee]**'s claim.

Objection 4 objects to limiting **[Employee]**'s covered employment to his employment at the HERF Facility in Oxnard from the time the facility was acquired by DOE in 1984 to his retirement in 1992. **[Employee]** based his objection on his earlier work as a Precision Forge employee, which he stated involved work on projects initiated by engineers at a number of covered facilities, as well as experimental work with depleted uranium for DARPA (Defense Advanced Research Projects Agency). Other than **[Employee]**'s employment at the HERF Facility from 1984 until his 1992 retirement and his visits to the Hanford facility, neither **[Employee]**'s objections nor any of the statements made during the development of his claim has indicated that he performed work at any DOE facility as the employee of a DOE contractor or subcontractor. Moreover, **[Employee]** has not submitted any

additional evidence to establish that prior to his covered employment at the HERF Facility and at Hanford, he had covered employment as a contractor or subcontractor employee at other DOE facilities.

DEEOIC has considered the question of whether **[Employee]**'s employment with Precision Forge prior to the acquisition of the HERF Facility by DOE in 1984 constitutes covered employment under EEOICPA. Based on a thorough review of the evidence, DEEOIC has determined that the Precision Forge facility in Santa Monica was not a covered DOE facility, and that the Macrodyne facility in Oxnard was not a covered DOE facility under EEOICPA until it was acquired by DOE in 1984. In addition, DEEOIC has considered whether the Precision Forge/Macrodyne locations prior to 1984 could be considered Atomic Weapons Employer (AWE) facilities and found that the sites had not been designated as AWE facilities by the Secretary of Energy, as required by the statute, and found no factual basis to support a making a recommendation to DOE that the sites be officially designated as AWE facilities. **[Employee]**'s objection # 4 does not present any information that has not already been considered by DEEOIC, and no evidence was submitted that warrants further development.

Based on a review of the evidence in the case file, FAB hereby makes the following:

FINDINGS OF FACT

1. On December 5, 2003, **[Employee]** filed a claim for benefits under EEOICPA.
2. **[Employee]** was a DOE contractor employee at the HERF Facility, a DOE facility, from January 1, 1984 to August 31, 1992.
3. DEEOIC has determined that the Precision Forge facility in Santa Monica, California, and the Macrodyne facility at Oxnard, California, prior to its acquisition by DOE in 1984, were not DOE facilities, nor had DOE designated them as AWE facilities under EEOICPA.
4. NIOSH reported annual dose estimates for **[Employee]**'s cancers from the date of initial radiation exposure during covered employment to the dates of diagnosis for each cancer. A summary and explanation of information and methods applied to produce these dose estimates, including his involvement through an interview and review of the dose report, are documented in the final "NIOSH Report of Dose Reconstruction under EEOICPA."
5. Based on the dose reconstruction performed by NIOSH, FAB calculated the probability of causation (the likelihood that the cancers were caused by radiation exposure incurred while working at a covered facility) for **[Employee]**'s multiple cancers to be 4.76%, which is less than 50%.

Therefore, based on a review of the aforementioned facts, FAB also makes the following:

CONCLUSIONS OF LAW

Section 30.111(a) of the implementing regulations states that "Except where otherwise provided in the Act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category set forth in § 30.110 [and] the claimant also bears the burden of providing to OWCP all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in these regulations." 20 C.F.R. § 30.111(a) (2009). **[Employee]** did not submit any additional evidence following issuance of the recommended decision.

Part B of EEOICPA provides compensation for DOE employees or DOE contractor employees who contracted cancer after beginning employment at a DOE facility, or Atomic Weapons Employees who

contracted cancer after beginning employment at an AWE facility, as a covered employee with cancer, if and only if that individual is determined to have sustained cancer in the performance of duty. 42 U.S.C. § 7384l(9)(B). An employee with cancer shall be determined to have sustained that cancer in the performance of duty if and only if the cancer was at least as likely as not related to employment at the facility. 42 U.S.C. § 7384(n)(b). A cancer is at least as likely as not related to employment if the probability of causation that the cancer was sustained in the performance of duty is 50% or greater. *See* 20 C.F.R. § 30.213(b).

[Employee] has urged that his entire employment with Precision Forge and Macrodyne beginning in 1963 should be considered as covered employment under EEOICPA. DEEOIC has determined that the Precision Forge facility in Santa Monica and the Oxnard site prior to its acquisition by DOE in 1984 did not meet the requirements for being considered DOE facilities because DOE did not have a proprietary interest in those sites and had not entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services at those locations. *See* 42 U.S.C. § 7384l(12). However, DEEOIC has determined that from 1984 to 1997, DOE owned the HERF Facility in Oxnard and used its management and operating contractor to run the plant, thereby meeting the legal definition of a DOE facility during that period.

As provided by § 7384n(c) of EEOICPA and the implementing regulations, **[Employee]**'s periods of covered employment at the HERF Facility and his Hanford visits were reported to NIOSH, together with **[Employee]**'s 30 cancer diagnoses and diagnosis dates, for radiation dose reconstruction. Pursuant to § 81.20 and § 81.25 of the Health and Human Services (HHS) regulations, FAB used the information provided in the final NIOSH Report of Dose Reconstruction to determine that there was a 4.76% probability that that **[Employee]**'s cancers were caused by occupational radiation exposure during covered employment at a DOE facility. 42 C.F.R. §§ 81.20, 81.25 (2009). *See also* 20 C.F.R § 30.213(b).[2]

Pursuant to §§ 7384l(9)(B) and 7384n(b) of EEOICPA, "a covered employee with cancer" is an individual who is determined to have sustained his/her cancer in the performance of duty if that cancer was "at least as likely as not" (a 50% or greater probability) related to employment at a covered facility. Using data from the NIOSH dose reconstruction, FAB has determined that the probability of causation that **[Employee]**'s cancers are related to covered employment is 4.76%, which is less than 50%. Therefore, the evidence does not establish that **[Employee]**'s cancers were "at least as likely as not" related to his employment at a covered facility. Accordingly, **[Employee]**'s claim for benefits for multiple cancers under Part B.

Washington, DC

John P. Davidson

Hearing Representative

Final Adjudication Branch

[1] *See* http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/showfacility.cfm (retrieved December 10, 2009)..

[2] This regulation states that HHS regulations satisfy the legal requirements in § 7384n(c), which also sets out OWCP's obligation to use them in its adjudication of claims under Part B, and provide the factual basis for OWCP to determine if the

probability of causation that an employee's cancer was sustained in the performance of duty is 50% or greater (*i.e.*, it is "at least as likely as not" causally related to employment).

EEOICPA Fin. Dec. No. 54251-2004 (Dep't of Labor, November 1, 2004)

NOTICE OF FINAL DECISION

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 for benefits is denied. A copy of this decision was mailed to your authorized representative.

STATEMENT OF THE CASE

On February 9, 2004, you filed a Form EE-2, Claim for Survivor's Benefits under the EEOICPA. The claim was based, in part, on the assertion that your late husband was an employee of a Department of Energy (DOE) contractor at a DOE facility. You stated on the Form EE-2 that you were filing for the lung and brain cancer of **[Employee]** (hereinafter "the employee"). You submitted evidence that the employee was diagnosed with lung cancer on March 27, 2003, with metastasis to the brain.

On the Form EE-3, Employment History, you stated the employee was employed by Reactive Metals, Inc., Ashtabula, Ohio, from December 6, 1965 through August 11, 1992. The district office confirmed this employment through the corporate verifier as December 6, 1965 to August 11, 1992, at the Sodium, not the Extrusion, Plant. According to the corporate verifier, the Extrusion Plant is the only EEOICPA covered plant at the Reactive Metals facility.

Because the file did not contain verification of covered employment, the district office sent you letters dated February 23, 2004, March 24, 2004, May 19, 2004 and July 19, 2004. The letters explained the needed information, requested such evidence, and allowed time for response.

In response to these letters, you submitted retirement and pension information and tax documents concerning employment with Reactive Metals. This information did not place the employee at the Extrusion Plant, or in other EEOICPA covered employment.

The Energy Employees Occupational Illness Compensation Program Act established a compensation program to provide a lump sum payment of $150,000 and medical benefits as compensation to eligible covered employees who have been diagnosed with a specific occupational illness incurred as a result of their exposure to radiation, beryllium, or silica while in the performance of duty for the DOE and certain of its vendors, contractors, and subcontractors. Eligible survivors may receive lump sum compensation, if applicable. Those "occupational illnesses" covered by the EEOICPA are specifically described in § 7384l(15) of the Act as "covered beryllium illness, cancer referred to in section 7384l(9)(B)[1] of this title, specified cancer, or chronic silicosis, as the case may be." 42 U.S.C. § 7384l(15). There are no provisions under the EEOICPA to cover any other illnesses, even if that illness may be related to employment at a covered facility. To be covered under the Act, employees with cancer must have worked at an atomic weapons employer facility or a Department of Energy facility as defined in the Act, and designated in the DOE Facility List Database. 42 U.S.C. §§ 7384l(5), 7384l(12). In this case, although the employee worked at the Reactive Metals, Inc. facility in Ashtabula, Ohio, he was not employed at the Extrusion Plant and thus not a covered employee under the Act.

Because the file contained no evidence of covered employment, the Cleveland district office issued a recommended denial on August 25, 2004. The decision found that the evidence did not establish the employee could be considered a covered employee with cancer as defined in the Act.

Attached to the recommended decision was a notice of claimant rights, which stated that you had 60 days in which to file an objection to the recommended decision and/or request a hearing. You were also advised that, if there was no timely objection filed, the recommended decision would be affirmed and you would be deemed to have waived the right to challenge the decision. This 60-day period expired on October 24, 2004.

The implementing regulations provide that "Within 60 days from the date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision, including HHS's reconstruction of the radiation dose to which the employee was exposed (if any), and whether a hearing is desired." 20 C.F.R. § 30.310(a). The implementing regulations further state that, "If the claimant does not file a written statement that objects to the recommended decision and/or requests a hearing with the period of time allotted in section 30.310, or if the claimant waives any objections to all or part of the recommended decision, the FAB will issue a decision accepting the recommendation of the district office, either in whole or in part." 20 C.F.R. § 30.316(a). In this case, you did not file any objections to the recommended decision or a hearing request.

FINDINGS OF FACT

1. On February 9, 2004, you filed a Form EE-2, Claim for Benefits under the EEOICPA.

2. You claimed the following medical conditions: lung and brain cancer.

3. The employee was diagnosed with lung cancer with metastasis to the brain.

4. The employee was employed at the Sodium Plant, Reactive Metals, Inc., Ashtabula, Ohio, from December 6, 1965 to August 11, 1992.

5. In proof of your survivorship, you submitted your marriage certificate and the employee's death certificate. Therefore, you have established that you are a survivor as defined by the implementing regulations. 20 C.F.R. § 30.5(ee).

6. The district office issued the recommended decision on August 25, 2004.

CONCLUSIONS OF LAW

The undersigned has reviewed the facts and the recommended decision issued by the district office on August 25, 2004, and finds that the evidence does not establish that the employee was employed at an atomic weapons employer facility or a Department of Energy facility as defined in the Act and designated in the DOE Facility List Database. 42 U.S.C. §§ 7384l(5), 7384l(12). For that reason, you are not entitled to compensation as the survivor of the employee.

42 U.S.C. §§ 7384s(a), 7384s(e).

Jacksonville, FL

Jeana F. LaRock

District Manager

[1] 42 U.S.C. § 7384l(9)(B) describes a "covered employee with cancer" as "An individual with cancer specified in subclause (I), (II), or (III) of clause (ii), if and only if that individual is deemed to have sustained that cancer in the performance of duty in accordance with section 7384n(b)" of the EEOICPA. Clause (ii) states that to be covered for cancer, the employee must have been a DOE employee, DOE contractor employee or an atomic weapons employee who contracted the cancer after beginning such employment.

EEOICPA Fin. Dec. No. 56578-2004 (Dep't of Labor, September 30, 2004)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On April 9, 2004, you filed Form EE-2 (Claim for Survivor Benefits under the EEOICPA) based on the condition of liver cancer (metastatic hepatobiliary carcinoma). You also submitted a Form EE-3 (Employment History), on which you indicated that **[Employee]** (the employee) worked at Bechtel Plant Machinery, Incorporated (Westinghouse Plant Apparatus Division) from October 1970 to August 1989, and with Westinghouse at the Naval Reactors Facility in Scoville, Idaho, from July 1, 1957 to July 31, 1961, July 1, 1965 to September 30, 1967, and September 1, 1968 to October 31, 1970. You also provided dosimetry records associated with the Bettis Atomic Power Laboratory, the New London Submarine Base, the Westinghouse Plant Apparatus Division, and the Naval Reactors Facility.

The medical documentation of record indicated that the employee was diagnosed as having moderately to poorly differentiated adenocarcinoma of the liver (favored to be a hepatobiliary primary cancer).

Information obtained from a Department of Energy representative and the Oak Ridge Institute for Science and Education (ORISE) database was negative for employment information pertaining to the employee.

By letters dated April 26 and June 9, 2004, the Seattle district office notified you that they had completed the initial review of your claim for benefits under the EEOICPA, but that additional employment evidence was needed in order to establish a claim. You were also notified that employment related to the Naval Nuclear Propulsion Program was specifically excluded from coverage under the EEOICPA. You were requested to provide documentation of covered employment under the Act within thirty days of the district office letters.

By letter received on May 16, 2004, you advised the Seattle district office that you previously provided the employee's complete employment history and documentation, which only included work performed

at facilities dedicated to the Naval Nuclear Propulsion Program.

On July 26, 2004, the Seattle district office recommended denial of your claim for compensation. The district office concluded that the employee does not qualify as a covered employee under § 7384l of the Act. *See* 42 U.S.C. §§ 7384l. The district office also concluded that the evidence of record was insufficient to establish that the employee was present at a covered facility, while working for the Department of Energy or any of its covered contractors, subcontractors or vendors, during a covered time period. *See* 42 U.S.C. § 7384l(10)-(12). Finally, the district office concluded that you are not entitled to compensation as outlined under § 7384s of the EEOICPA. *See* 42 U.S.C. § 7384s.

FINDINGS OF FACT

1. You filed a claim for survivor benefits on April 9, 2004.

2. The employee was diagnosed as having liver cancer, a covered occupational illness under the EEOICPA.

3. You did not provide sufficient evidence to establish that the employee engaged in covered employment under the EEOICPA.

CONCLUSIONS OF LAW

The undersigned has reviewed the recommended decision issued by the Seattle district office on July 26, 2004. I find that you have not filed any objections to the recommended decision as provided by § 30.316(a) of the regulations, and that the sixty-day period for filing such objections, as provided for in § 30.310(a) has expired. *See* 20 C. F. R. §§ 30.310(a), 30.316(a).

In order to be afforded coverage under Part B of the Energy Employees Occupational Illness Compensation Program Act, you must establish that the employee was diagnosed with a designated occupational illness incurred as a result of exposure to silica, beryllium, and/or radiation: *cancer, beryllium sensitivity, chronic beryllium disease*, and *silicosis*. *See* 42 U.S.C. § 7384l(15); 20 C.F.R. § 30.110(a). Further, the illness must have been incurred while in the performance of duty for the Department of Energy and certain of its vendors, contractors, and subcontractors, or for an atomic weapons employer or facility. *See* 42 U.S.C. § 7384l(4)-(7), (9) and (11).

In order to be afforded coverage as a "covered employee with cancer," you must show that the employee was a DOE employee, a DOE contractor employee, or an atomic weapons employee, who contracted cancer after beginning employment at a DOE facility or an atomic weapons employer facility. *See* 42 U.S.C. § 7384l(9); 20 C.F.R. § 30.210(b).

Further, § 7384l(12) of the Act provides a definition of a Department of Energy facility and specifically exempts the Nuclear Propulsion Program.

The term "Department of Energy facility" means any building, structure, or premise, including the grounds upon which such building, structure, or premise is located—

> (A) in which operations are, or have been, conducted by, or on behalf of, the Department of Energy (except for buildings, structures, premises, grounds,

> or operations covered by Executive Order No. 12344, dated February 1, 1982 (42 U.S.C. 7158 note), pertaining to the Naval Nuclear Propulsion Program) (emphasis added).

42 U.S.C. § 7384l(12)(A).

In this case, the employment evidence you provided indicated that the employee worked at the Naval Reactors Facility (NRF), the New London Submarine Base, the Westinghouse Plant Apparatus Division (Bechtel Plant Machinery, Inc.) and the Bettis Atomic Power Laboratory, which provided products and services to the Naval Nuclear Propulsion Program. Consequently, this employment is specifically excluded from coverage under the Act. *See* 42 U.S.C. § 7384l(12)(A).

It is the claimant's responsibility to establish entitlement to benefits under the Act. The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of each and every criterion under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing to the Office of Workers' Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

For the above reasons, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

Seattle, WA

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA Fin. Dec. No. 10038639-2007 (Dep't of Labor, Nov. 12, 2008)

NOTICE OF FINAL DECISION FOLLOWING REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch (FAB) concerning the above claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons stated below, the claim for chronic obstructive pulmonary disease (COPD) under Part E of EEOICPA is denied.

STATEMENT OF THE CASE

On August 9, 2005, the employee filed a claim for benefits under Part E of EEOICPA and alleged that he had contracted COPD. In support of his claim, he submitted an employment history stating that he was employed as a security officer by EG&G Special Projects at the Nevada Test Site (NTS) from January 1981 to October 1990, and that he wore a dosimetry badge while employed. The Oak Ridge Institute for Science and Education (ORISE) database did not contain information to verify this employment. The Department of Energy (DOE) verified the employee's employment with Edgerton, Germeshausen, and Grier Special Projects and stated, "This was not a DOE-funded project and was not

associated with the DOE Nevada Test Site work."

On June 15, 2007, the district office issued a recommended decision to deny the claim on the ground that the medical evidence of record was insufficient to establish the diagnosis of COPD. However, on December 20, 2007, FAB issued an order remanding the case for further development after the employee submitted medical evidence that supported the diagnosis of COPD. As a result, the claim was returned to the district office for further development and the issuance of a new recommended decision.

By letter dated January 25, 2008, the Seattle district office informed the employee that under Part E of EEOICPA, an employee must have worked for a DOE contractor or subcontractor at a DOE facility during a covered time period, and that to date, DOE had verified his employment by EG&G Special Projects at the Nevada Test Site from January 1, 1981 to October 31, 1990. He was informed that DOE had indicated that EG&G Special Projects was not a DOE funded project and that any employment for these projects took place outside the borders of the NTS, and therefore was not covered employment under EEOICPA. The district office asked him to submit evidence to establish that EG&G Special Projects was involved in operations for DOE or on behalf of DOE at the NTS.

In a response received by the district office on February 14, 2008, the employee submitted an affidavit on Form EE-4 from a work associate, who asserted that the employee was employed as a security officer by EG&G Special Projects at NTS from January 5, 1981 to October 15, 1990. The employee also submitted an affidavit from his wife, who asserted that he was employed as a security officer by EG&G Special Projects at NTS from January 5, 1981 to October 15, 1990.

On February 29, 2008, the district office issued a new recommended decision to deny the employee's claim for COPD under Part E, on the ground that the evidence was insufficient to establish that he was present at a covered facility while working for DOE or any of its covered contractors, subcontractors, or vendors during a covered time period.

OBJECTIONS

On March 12, 2008, FAB received the employee's written objections to the recommended decision. In his objection letter, he stated the following:

I am submitting a copyrighted article from the Las Vegas Review Journal dated Thursday, December 16, 1999. In this article there is a discussion of President Clinton signing into law, under the military lands withdrawal act of 1999. The document in question was signed on , and the Department of Energy released the article to the press approximately two months later. In the document President Clinton signed over to the Air Force control over Department of Energy property in the rectangle around Groom Lake which is the northeastern corner of the test site this land was previously used by the Air Force under an agreement with the Atomic Energy Commission that dates back to 1958, the location is commonly known as Area 51. This article makes perfectly clear, prior to the property was under the control of the Department of Energy. As to the funding of EG&G Special Projects, their funding came directly from the Department of Energy in the form of laundered money that was approved for projects approved by Congress for the Nevada Test Site. The cost overruns were then used to fund the black projects at Area 51. By using approved monies in this manner, further protected the activities that occurred at Area 51 (projects that cannot be investigated by Congress). Also the general manager for all projects at Area 51, that person's name is was **[General Manager]**, who was in charge of all

subcontractors at Area 51. **[General Manager]** was an employee of Reynolds Electrical & Engineering the prime contractor at the NTS, a company owned by EG&G.

On August 5, 2008, the Division of Energy Employees Occupational Illness Compensation (DEEOIC) issued EEOICPA Circular No. 08-06 which states the following:

The Nevada Test Site is a covered DOE facility for the period 1951-present. The DEEOIC considers Area 51 part of NTS for the period 1958-1999. The DOE categorizes Reynolds Electrical and Engineering Company (REECo) and Bechtel , Inc. as "captive contractors," for the DOE and its predecessors, including both the Atomic Energy Commission (AEC) and the Energy Research and Development Agency (ERDA). This means that employees of REECo and Bechtel who worked at the NTS, including Area 51, are DOE contractor employees, regardless of what information may previously have been received from DOE.

By letter dated October 17, 2008, DOE confirmed for FAB that EG&G Special Projects was not a DOE contractor at the Nevada Test Site.

After considering the evidence of record, FAB hereby makes the following:

FINDINGS OF FACT

1. The employee was employed by EG&G Special Projects from January 5, 1981 to October 15, 1990.

2. The case file does not contain sufficient evidence to establish that the employee worked for a DOE contractor or subcontractor at the NTS.

Based on the above-noted findings of fact, FAB also hereby makes the following:

CONCLUSIONS OF LAW

The term "covered DOE contractor employee" used in Part E is defined as a DOE contractor employee determined to have contracted a covered illness through exposure at a DOE facility. *See* 42 U.S.C. § 7385s(1). The term "covered illness" means an illness or death resulting from exposure to a toxic substance. 42 U.S.C. § 7385s(2).

DEEOIC has researched the issue of claimed employment at Area 51 of NTS, and considers Area 51 to be part of NTS for the period 1958-1999. As noted above, DOE categorizes REECo and Bechtel Nevada, Inc. as "captive contractors" for DOE and its predecessors; this means that employees of REECo and Bechtel who worked at NTS (including Area 51 during the period 1958-1999) are DOE contractor employees. Also as noted above, DOE has confirmed that EG&G Special Projects was not a DOE contractor at NTS.

It is the claimant's responsibility to establish entitlement to benefits under EEOICPA. The regulations at 20 C.F.R. § 30.111(a) state that the claimant bears the burden of proving, by a preponderance of the evidence, the existence of each and every criterion under any compensable claim category. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. *See* 20 C.F.R. § 30.111(a) (2008).

As found above, the evidence of record establishes that the employee worked for EG&G Special Projects, but does not establish that he is a "covered DOE contractor employee" as defined by 42 U.S.C. § 7385s(1), because he did not work for a DOE contractor or subcontractor. Therefore, the claim must be denied for lack of covered employment under Part E of EEOICPA.

Washington,

Amanda M. Fallon

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 10043931-2006 (Dep't of Labor, March 10, 2008)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) on the employee's claim for benefits under Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the employee's claim is denied.

STATEMENT OF THE CASE

On May 31, 2002, the employee filed a claim for benefits under Part B of EEOICPA and alleged that he had contracted beryllium sensitivity, chronic beryllium disease (CBD) and pulmonary insufficiency due to occupational exposure to beryllium as a mechanical engineer at the Massachusetts Institute of Technology campus in Cambridge, Massachusetts (MIT). In support of his claim, he filed a Form EE-3 on which he alleged that he had been employed by "U.S. Army, (T-4) Special Engineering Detachment, Manhattan District, Corps of Engineers, assigned to Metallurgical Project, U of Chicago, Mass. Inst. of Tech Location," at Oak Ridge, Tennessee, and as a radiation monitor at Bikini Atoll from May through August 1946. On that form, the employee alleged that he was assigned to the "Beryllium Group" at MIT from November 1945 to May 1946.

By letter dated June 10, 2002, the Denver district office of the Division of Energy Employees Occupational Illness Compensation (DEEOIC) confirmed receipt of the employee's claim and informed him that coverage under EEOICPA is limited to civilian employees of the Department of Energy (DOE), its predecessor agencies and certain of its contractors and subcontractors, and that military personnel are not similarly covered. The employee then submitted several documents regarding his employment, including a June 17, 2002 letter in which he clarified that: (1) he joined the Army in 1942; (2) he was called to active duty in May 1943; and (3) he was assigned to the K-25 Gaseous Diffusion Plant in Oak Ridge in September 1944. He stated that shortly afterward, he was transferred to the "Metallurgical Project" at MIT, still as an enlisted member of the Army, and worked there until May 1946 when he was transferred back to Oak Ridge and trained for his subsequent job at Operation Crossroads in the Pacific.

Employment records provided by MIT on April 24, 2003 indicate: (1) that the employee was initially assigned to work at MIT as an enlisted member of the U.S. Army on December 1, 1944; (2) that on January 26, 1945, a change in his Army status allowed MIT to hire him directly as a civilian employee on the same project; and (3) that he was recalled to active military duty in the Army on October 22,

1945, but continued to work on the project at MIT until May 2, 1946. In a letter dated May 10, 2003, the employee provided a detailed work history, with supporting documents, that was consistent with the information provided by MIT and confirmed that he was a civilian employee of MIT at MIT's Cambridge campus from January 26, 1945 to October 22, 1945. Neither DOE nor its Oak Ridge Operations Office was able to verify the employee's alleged employment at Oak Ridge or at Bikini Atoll, but the enlistment records in his case file are consistent with his claim of military employment at these two locations.

On May 15, 2003, the Denver district office issued a recommended decision to accept the employee's claim for beryllium sensitivity, and on May 30, 2003 the FAB issued a final decision consistent with the district office's recommendation. In that decision, the FAB awarded the employee medical benefits and monitoring for his beryllium sensitivity, retroactive to his filing date of May 31, 2002. Thereafter, on September 11, 2003, the Denver district office issued a recommended decision to accept the employee's Part B claim for CBD, based on the recommended findings that he had covered civilian employment at MIT from January 26, 1945 to October 22, 1945, and that he had been diagnosed with CBD on July 2, 2003. On September 22, 2003, the FAB issued a final decision accepting the employee's Part B claim for CBD and awarding him a lump-sum of $150,000.00 plus medical benefits for his CBD, retroactive to May 31, 2002. In this final decision, the FAB concluded that the employee was a "covered beryllium employee" and that he had been diagnosed with CBD consistent with the criteria set out in EEOICPA.

Following the 2004 amendments to EEOICPA that included the enactment of new Part E[1], the employee filed a claim based on his CBD under Part E of EEOICPA on November 25 , 2005. Shortly thereafter, the employee's new Part E claim was transferred to the Cleveland district office of DEEOIC for adjudication. By letter dated March 9, 2006, the Cleveland district office informed the employee that he did not meet the eligibility requirements under Part E of EEOICPA. The district office explained that Part E differs from Part B in that Part E only provides benefits for civilian employees of DOE contractors and subcontractors (or their eligible survivors), but does not provide benefits for employees of the other types of employers that are covered under Part B, *i.e.*, atomic weapons employers or beryllium vendors. The letter provided the employee with an opportunity to submit additional evidence "[i]f you intend to claim additional employment or intend to provide evidence that MIT should be designated as a DOE facility. . . ." Included with the letter was a print-out of the Department of Energy (DOE) Facility List entry for MIT, which indicated that at that time, MIT's Cambridge campus was designated only as an atomic weapons employer (AWE) facility and a beryllium vendor facility, but not a DOE facility.[2]

On April 17, 2006, the Cleveland district office issued a recommended decision to deny the employee's Part E claim for his CBD, based on their recommended finding that the evidence in the file was insufficient to establish that he was a "covered DOE contractor employee," as that term is defined in § 7384l(11) of EEOICPA, because it failed to establish that his civilian employment at MIT was at a "Department of Energy facility," as that second term is defined in § 7384l(12) of EEOICPA. The employee filed objections to the recommended decision in letters to the FAB dated May 4, 2006, June 26, 2006, September 17, 2006 and October 26, 2006, and submitted several affidavits, exhibits and other factual evidence in support of his objections. All of the employee's objections were made in support of his position on one point—that DEEOIC should determine that MIT's Cambridge campus, or a portion thereof, is a "DOE facility" for the purposes of his Part E claim.

On June 6, 2006, the FAB referred the employee's Part E claim to DEEOIC's Branch of Policy, Regulations and Procedures (BPRP) for guidance on the issue of whether the evidence submitted by the

employee warranted the requested determination regarding MIT's Cambridge campus. On December 21, 2006, BPRP referred the issue to the Office of the Solicitor of Labor (SOL). On March 14, 2007, SOL issued an opinion in which it concluded that the evidence in the case file was insufficient to establish that MIT's campus meets the statutory definition of a "Department of Energy facility." Based on that conclusion, SOL advised BPRP that DEEOIC could reasonably determine that the employee was ineligible for benefits under Part E as he was not a "covered Department of Energy contractor employee."

On May 4, 2007, the FAB issued a final decision denying the employee's Part E claim. In its final decision, the FAB restated both the employee's objections and the opinion of SOL. The FAB found that while MIT's Cambridge campus was recognized as both an AWE facility and a beryllium vendor facility during the period of the employee's civilian employment there, the evidence was insufficient to establish that it also satisfied the statutory definition of a "DOE facility" during that time period. Thus, the FAB concluded that the employee was not a "covered DOE contractor employee," as that term is defined in EEOICPA.

By letter dated May 24, 2007, the employee filed a request for reconsideration of the FAB's final decision and on July 17, 2007, the FAB issued a denial of the employee's request. In its denial, the FAB restated the employee's objections and based its denial on the conclusion that he had not submitted any new evidence or arguments that would justify reconsidering the May 4, 2007 final decision. On January 25, 2008, the Director of DEEOIC issued an Order vacating both the FAB's May 4, 2007 final decision on the employee's Part E claim and its July 17, 2007 denial of the employee's request for reconsideration. In his Order, the Director indicated that while the FAB had restated the employee's objections in its final decision, it had not explicitly analyzed each of those objections. Because of this, the Director vacated the FAB's decisions and returned the employee's Part E claim to the FAB "for issuance of a new final decision that gives appropriate consideration to the employee's objections to the Cleveland district office of DEEOIC's recommended denial of his Part E claim."

OBJECTIONS

As noted above, the employee objected to the recommended denial of his Part E claim in a letter dated May 4, 2006 and urged that MIT's Cambridge campus was misclassified and should be determined to be a DOE facility. The employee's first argument urged that the work of the Metallurgical Project at MIT was "nuclear weapons related." The evidence supports this argument. The DOE Facility List entry for MIT describes the uranium metallurgical work and beryllium work performed at MIT in support of the U.S. Army Corps of Engineers Manhattan Engineer District (MED) during the period 1942 through 1946.[3] This work—a portion of which was performed by the employee—supports the determination that MIT's Cambridge campus is both an AWE facility from 1942 through 1946, and a beryllium vendor facility from 1943 through 1946.

The employee's second argument was that DEEOIC previously determined that MIT's Cambridge campus was a DOE facility. In support of this position, the employee correctly pointed out that in its May 15, 2003 recommended decision on his Part B claim, the Denver district office stated that "Massachusetts Institute of Technology initially became a DOE facility in 1942." The FAB acknowledges that the Denver district office made that erroneous historical statement in its recommended decision on the employee's Part B claim; however, that error was not carried forward in any of the subsequent recommended decisions on the employee's several claims, nor was it repeated in any finding of fact or conclusion of law in any of the FAB's final decisions issued on the employee's several claims. In issuing a final agency decision on a claim under EEOICPA, the FAB is not bound by a historical inaccuracy contained in a recommended decision issued by a DEEOIC district office. *See* EEOICPA Fin. Dec. No. 10028664-2006 (Dep't of Labor, August 24, 2006).

The employee also argued that the MED was a predecessor agency of DOE. The FAB agrees with this historical point. 42 U.S.C. § 7384l(10).

The employee argued that "beryllium work was done at MIT and that acute beryllium disease resulted." The FAB agrees. The DOE Facility List description of the work that was performed at MIT describes beryllium work performed at the MIT Cambridge campus, and that work supports the designation of MIT as a beryllium vendor during the period 1943 through 1946. That description also refers to "a number of cases of beryllium disease at MIT" prior to the fall of 1946.[4]

The employee submitted evidence that the Metallurgical Laboratory (Met Lab) in Chicago, Illinois, is classified as an AWE facility, a beryllium vendor facility and a DOE facility, and argued that the work performed at MIT's Cambridge campus "was just an extension of" the work performed under Dr. Arthur Compton at the Met Lab. The FAB agrees that the Met Lab was designated as an AWE facility (1942-1952), a beryllium vendor facility (1942-1946) and a DOE facility (1982-1983, 1987).[5] The FAB notes, however, that like MIT's Cambridge campus, the Met Lab is classified only as an AWE facility and a beryllium vendor facility during the time of their early uranium and metallurgical work in the 1940s. The Met Lab is classified as a DOE facility only during the periods of remediation work that was performed there in the 1980s. These classifications are consistent with those for MIT's Cambridge campus. The FAB concludes that the evidence in the file is insufficient to establish that the work performed at MIT's Cambridge campus "was just an extension of" the work performed at the Met Lab. The work performed at MIT's Cambridge campus was performed pursuant to a contract between the MED and MIT, and there is no evidence in the file to corroborate the employee's claim that the Met Lab directed or controlled the MIT Metallurgical Project.

The employee also submitted evidence showing that the Ames Laboratory in Ames, Iowa, is classified as a DOE facility, but made no argument in his May 4, 2006 letter as to the relevance of this information. In a letter dated February 7, 2008, the employee clarified his argument regarding the Ames Laboratory by asserting that the Met Lab and the Ames Laboratory "were both classified as DOE Employers while MIT was not, even though the work was analogous and facilities in all cases were owned by the universities. . . . The precedents established by these classifications seems not to have been considered." The FAB acknowledges that the Ames Laboratory is designated as a DOE facility (1942-present),[6] but points out that there is no probative evidence in the case file that corroborates the employee's argument that the work performed at the Ames Laboratory was analogous to the work that was performed at MIT's Cambridge campus, or that the contracts for such work were similar in type to the pertinent MED contract with MIT, or that the buildings used at the Ames Laboratory were owned by the associated university.[7] The regulations governing EEOICPA place upon the claimant the burden to produce evidence necessary to establish all criteria for benefits and to prove the existence of all elements necessary to establish eligibility for benefits. 20 C.F.R. § 30.111(a). The employee's bare assertions regarding the Met Lab and the Ames Laboratory are not, without supporting factual evidence, sufficient to establish his precedent argument and, thus, do not provide probative support for his claim.

The employee also argued that his work was recognized by the Secretary of War as "essential to the production of the Atomic Bomb." The FAB does not dispute this point.

In his letter dated June 26, 2006, the employee modified his objection to the recommended decision by stating that the MIT Metallurgical Project (MMP), not the entire MIT Cambridge campus, should be classified as a DOE facility. In support of that objection, he argued that "if the MMP was reclassified to meet the requirements of 'Department of Energy' Facility,'" then he would satisfy the statutory requirements of a "Department of Energy contractor employee." Based on the totality of the evidence in the case file, the FAB concludes that the evidence does not provide sufficient support for this argument. Even if the MMP were to be classified as a DOE facility during the employee's period of civilian employment there, he would still have to submit factual evidence sufficient to establish that he was employed by "(i) an entity that contracted with the Department of Energy to provide management

and operating, management and integration, or environmental remediation at the facility; or (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility." 42 U.S.C. § 7384l(11)(B). The evidence does not support a conclusion that he was so employed, because it does not establish that his employer, MIT, contracted with DOE (or any of its predecessor agencies) "to provide management and operating, management and integration, [] environmental remediation, [or] services, including construction and maintenance, at the facility."

The employee also argued that the MMP meets the first part of the two-part statutory definition of a "DOE facility." In support of this argument, he asserted that the evidence in the file proves that the MMP is a building, structure or premise "in which operations are, or have been, conducted by, or on behalf of, the Department of Energy," pursuant to 42 U.S.C. § 7384l(12)(A). The FAB agrees that the evidence supports this conclusion. During the development of the employee's Part E claim, his file was referred to the SOL, and on March 14, 2007, that office issued a memorandum in which it found that the evidence supports a conclusion that the employee's "work on the Metallurgical Project was performed pursuant to Contract No. W-7405-eng-175 between MIT and the MED, thus meeting the test of § 7384l(12)(A)." The FAB agrees with that conclusion.

The employee then argued that the MMP also meets the second part of the two-part statutory definition of a "DOE facility," in that the MED had "a proprietary interest" in the MMP, as required by subsection (i) of 42 U.S.C. § 7384l(12)(B). In support of this position, the employee alleged that "The MED paid all bills, provided all priorities, met all needs for civilian or military personnel, which would indicate a clear proprietary interest in the MMP." As set forth more fully in the Conclusions of Law section of this final decision, the evidence in the file does not provide sufficient support for the employee's argument that the MED had "a proprietary interest" in the MMP. In their March 14, 2007 memorandum, SOL concluded that there is no evidence in the employee's case file that the MED had "a proprietary interest" in any of the buildings, structures or premises in which he worked as a civilian employee at MIT's Cambridge campus. That conclusion is part of the totality of the evidence that FAB has considered in this case, and FAB agrees with that conclusion.

That conclusion is also supported by the employee's own statements regarding ownership of the buildings in which he worked at MIT's Cambridge campus. His first identification of the buildings in which he worked during his civilian employment at MIT's Cambridge campus was more than two years after he filed his Part E claim. In a letter dated February 7, 2008, submitted after his claim was reopened by order of the Director of DEEOIC, the employee stated that all of his work for the MMP was performed in Buildings 4, 8 and 16 on MIT's Cambridge campus. He also asserted that those buildings were analogous to the buildings used at the Met Lab and the Ames Laboratory for MED work during that same time period and argued that the classification of all three facilities should be the same because "facilities in all cases were owned by the universities." Consistent with the employee's assertion that MIT owned the buildings and laboratories in which MMP research was performed, there is no probative evidence in the file establishing that the MED had a proprietary interest in any of these three buildings.

Alternatively, the employee argued that the MMP meets the second part of the two-part statutory definition of a "DOE facility" because the MED "entered into a contract with [MIT] to provide management and operation," as required by subsection (ii) of 42 U.S.C. § 7384l(12)(B). In support of this position, he argued that:

> The MED clearly entered into a contract with MIT to provide management and scientific operations. I have never seen this contract. . . . However, the Division of Industrial Cooperation at MIT did not do *pro bono* work. A contract is certainly implied by analogy to other universities such as Chicago's MetLab and Iowa State's Ames Lab, both of which, by the way, have DOE classifications.

However, the employee did not submit a contract or any other evidence that establishes that a "management and operation" contract was entered into between the MED and MIT for the work

performed by the MMP. As noted above, SOL concluded in their March 14, 2007 memorandum that the work of the MIT Metallurgical Project was performed pursuant to a contract between MIT and the MED—Contract No. W-7405-eng-175. The employee's case file does not include a copy of the actual contract and FAB has not been able to locate a copy of that contract.[8] However, the SOL memorandum cites a page from Book VII, Volume I, Appendix K of the Manhattan District History, which describes the contract as follows: "Contract W-7405 eng-175 with Massachusetts Institute of Technology is a research and development contract involving work with Be as well as other metals and compounds."[9] Thus, based on available evidence, SOL concluded that the contract was not a contract "to provide management and operation," but was, rather, a "research and development contract." This conclusion is consistent with DOE's description of the facility at MIT's Cambridge campus in the DOE Facility List. That description references contract W-7405-eng-175 and the beryllium-related research that was conducted at MIT's Cambridge campus pursuant to the contract.[10] There is no probative evidence in the file that the MIT-MED contract under which the employee worked was a "management or operation" contract, as asserted by the employee. Thus, based on the totality of the evidence, the FAB concludes that the evidence is insufficient to establish that MIT's Cambridge campus satisfies the statutory requirements of § 7384l(12)(B)(ii).

By letter dated September 17, 2006, the employee supplemented his objection concerning the "proprietary interest" test of 42 U.S.C. § 7384l(11)(B)(i). In that letter, the employee argued that Roget's Thesaurus lists several synonyms for the term "proprietary interest," including "vested interest" and "beneficiary interest," and that by these broader definitions, the MED had a "proprietary interest" in the MMP. The employee argued that since "all work of the MIT project was paid for by and directly benefited the MED," the MED had a "proprietary interest" in the buildings in which the MMP work was performed.

The FAB finds that the evidence supports the employee's statement that the work on the MMP project was paid for by and directly benefited the MED. Both the SOL memorandum and the DOE Facilities List support a finding that the MMP work was performed pursuant to Contract No. W-7405-eng-175 between MIT and the MED, and FAB will assume that the MED met its payment obligations to MIT under the contract. However, payment for work performed under the contract and receipt of benefits from the performance of the contract do not establish that the MED had a proprietary interest in the *buildings* in which the contract's work was performed. The structure of the statutory definition of a "Department of Energy facility" supports this conclusion. The Act defines the term "Department of Energy facility" as:

> [A]ny building, structure, or premise, including the grounds upon which such building, structure, or premise is located—
>
> (A) in which operations are, or have been, conducted by, or on behalf of, the Department of Energy. . .; and
>
> (B) with regard to which the Department of Energy has or had—
>
> (i) a proprietary interest, or
>
> (ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services.

42 U.S.C. § 7384l(12). Thus, in order to satisfy the requirements of subsection (B) of the statutory definition, it must be established that DOE (or its predecessors, including the MED) either (i) had a proprietary interest in the buildings in which **[Employee]** worked, or (ii) had a contract with MIT to provide at least one of the specific types of services listed in the definition. Thus, the "proprietary interest" test of subsection (B)(i) is an alternative to the "contract" test of subsection (B)(ii). If evidence of payment and receipt of benefits under a type (B)(ii) contract was sufficient to meet the "proprietary interest" test of (B)(i), as the employee urged, there would be no need to have the alternative subsection (B)(i) test. Thus, the meaning of "proprietary interest" proffered by the

employee would render subsection (B)(i) superfluous.
Additionally, as set forth more fully in the Conclusions of Law section of this decision, the employee's alternative definitions of the phrase "proprietary interest" are not consistent with its ordinary meaning, that is, an interest characterized by ownership, use and control. The employee has made no allegation, nor proffered any evidence, that the buildings in which he worked on MIT's Cambridge campus during his civilian employment from January 26, 1945 to October 22, 1945, *i.e.*, Buildings 4, 8 and 16, were owned, rented, or controlled by the MED for use by the MMP. In fact, he repeatedly refers to those buildings as labs of the MIT Metallurgical Department owned by MIT, not labs owned by the MED. [11]
Finally, under cover letter dated October 26, 2006, the employee supplied additional factual evidence in support of his argument that there was a contract between the MED and MIT for the MMP, and therefore the "contract" test of 42 U.S.C. § 7384l(11)(B)(ii) is satisfied and the MMP should be classified as a DOE facility. As described above, FAB acknowledges that the employee's civilian work at MIT was performed pursuant to a contract between MIT and the MED, but concludes that there is insufficient evidence to establish that the contract in question meets the requirements of 42 U.S.C. § 7384l(12)(B)(ii), and therefore the buildings used for the MMP do not satisfy the statutory definition of a "DOE facility."
After reviewing the written record of the case file and the employee's objections described above, the FAB hereby makes the following:

FINDINGS OF FACT

1. On May 31, 2002, the employee filed a claim for benefits under Part B of EEOICPA based on the allegation that he had contracted beryllium sensitivity, CBD and pulmonary insufficiency due to his occupational exposure to beryllium as a mechanical engineer at MIT's campus in Cambridge, Massachusetts.

2. The employee was a civilian employee of MIT from January 26, 1945 to October 22, 1945, and worked on the MMP during that time period.

3. During his period of civilian employment by MIT, the employee worked in Buildings 4, 8 and 16 on MIT's Cambridge campus. The MED did not have a "proprietary interest" in any of those three buildings, which were instead owned by MIT.

4. The employee's work on the MMP was performed pursuant to Contract No. W-7405-eng-175 between MIT and the MED (a predecessor agency of DOE).

5. During the period of the employee's civilian employment by MIT, Contract No. W-7405-eng-175 was a research and development contract and was not a contract to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services at MIT's Cambridge campus.

6. Prior to January 26, 1945 and after October 22, 1945, the employee was an active enlisted member of the U.S. Army.

7. On May 30, 2003, the FAB issued a final decision accepting the employee's Part B claim for beryllium sensitivity and awarding him medical benefits and sensitivity monitoring retroactive to his filing date of May 31, 2002.

8. The employee was diagnosed with CBD on July 2, 2003.

9. On August 5, 2003, the employee filed a second claim under Part B of EEOICPA for his CBD.

10. On September 22, 2003, the FAB issued a final decision accepting the employee's Part B claim for CBD and awarding him a lump sum of $150,000.00, plus medical benefits for his CBD retroactive to May 31, 2002.

11. On November 25, 2005, the employee filed a claim under Part E of EEOICPA based on his CBD.

12. For purposes of EEOICPA, MIT's Cambridge campus is classified as an AWE facility for the time period 1942 through 1946, and as a beryllium vendor facility for the time period 1943 through 1946. While MIT's Cambridge campus is not classified as a DOE facility, the Hood Building, which was located adjacent to MIT's Cambridge campus prior to its demolition, is classified as a DOE facility for the time period 1946 through 1963.

Based on the above findings of fact, the undersigned makes the following:

CONCLUSIONS OF LAW

Regulations governing the implementation of EEOICPA allow claimants 60 days from the date of the district office's recommended decision to submit to the FAB any written objections to the recommended decision, or a written request for a hearing. *See* 20 C.F.R. §§ 30.310 and 30.311. On May 4, 2006, June 26, 2006, September 17, 2006 and October 26, 2006, the employee filed written objections to the recommended decision, but did not request a hearing. Pursuant to 20 C.F.R. §§ 30.312 and 30.313, the FAB has considered the objections by means of a review of the written record of this case. After a thorough review of the record in this case, the FAB concludes that no further investigation of the employee's objections is warranted, and the FAB now issues a final decision on the employee's Part E claim.

In order to be afforded coverage under Part E of EEOICPA, a claimant must establish that, among other things, he is a "covered DOE contractor employee." 42 U.S.C. §§ 7385s(1), 7385s-1, 7385s-8. To prove that he is a "covered DOE contractor employee" for purposes of Part E eligibility, the employee must establish: (1) that he was a "DOE contractor employee" and (2) that he "contracted a covered illness through exposure at a Department of Energy facility." 42 U.S.C. § 7385s(1). As a result of this statutory scheme, only DOE contractor employees are eligible for benefits under Part E, whereas employees of an AWE or a beryllium vendor are excluded from such coverage.[12]

The Act defines the term "Department of Energy contractor employee," in pertinent part, as follows: "An individual who is or was **employed at a Department of Energy facility** by—(i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or (ii) a contractor or subcontractor that provided services, including construction and maintenance at the facility." 42 U.S.C. § 7384l(11)(B) (emphasis added). Thus, in order to be considered a "Department of Energy contractor employee," a claimant must have been employed at a DOE facility. The statutory definition of a "Department of Energy facility" is:

"[A]ny building, structure, or premise, including the grounds upon which such building, structure, or premise is located—

> (A) in which operations are, or have been, conducted by, or on behalf of, the Department of Energy. . .; and
> (B) with regard to which the Department of Energy has or had—
>> (i) a proprietary interest, or
>> (ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services.

42 U.S.C. § 7384l(12). Therefore, in order to be eligible for benefits under Part E, a claimant must prove that he is or was employed as a civilian employee of a DOE contractor or subcontractor at a facility that meets the requirements of both subsection (A) and subsection (B) of § 7384l(12).

The FAB concludes that the employee has established that he was a civilian employee of MIT from January 26, 1945 to October 22, 1945, and that he worked in various laboratories in Buildings 4, 8 and 16 on the MIT campus in Cambridge, Massachusetts, during that time period. The evidence further establishes that the employee's work for the MMP during that period was performed pursuant to a contract that MIT entered into with the MED to perform research and development on beryllium and other metals and compounds in support of the Manhattan Project. Based on the totality of the evidence, FAB concludes that MIT's Cambridge campus satisfies subsection (A) of the statutory definition of a "Department of Energy facility." 42 U.S.C. § 7384l(12)(A).

The evidence in support of subsection (B) of § 7384l(12), however, is lacking. Subsection (B) requires that in order for a building, structure or premise to be deemed a "Department of Energy facility," the evidence must establish that it is a building, structure, or premise "with regard to which the Department of Energy has or had—(i) a proprietary interest, or (ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services." Neither the "proprietary interest" test nor the alternative "contract" test has been satisfied by a preponderance of the evidence in this claim.

The statute and the governing regulations do not define the term "proprietary interest," as that term is used in subsection (B)(i) of § 7384l(12). Black's Law Dictionary defines the term as: "The interest of an owner of property together with all rights appurtenant thereto such as the right to vote shares of stock and right to participate in managing if the person has a proprietary interest in the shares." *Black's Law Dictionary*, p.1098 (5th ed. 1979). *See also Evans v. U. S.*, 349 F.2d 653, 658 (5th Cir. 1965) (holding that the phrase "proprietary interest" is "not so technical, or ambiguous, as to require a specific definition" and assuming that the jury in that case gave the phrase "its common ordinary meaning, such as 'one who has an interest in, control of, or present use of certain property.'") Employing the common accepted definition of the term, in order to meet the "proprietary interest" test, the evidence must establish that the MED had rights of ownership, use, or control in the buildings in which the employee worked at MIT's Cambridge campus from January 26, 1945 to October 22, 1945. The employee has proffered no such evidence. To the contrary, in a letter dated February 7, 2008, he asserted that those buildings were owned by MIT, and in a May 30, 2006 email he referred to the laboratories in those buildings as "Metallurgical Dept labs." He has likewise offered no probative evidence that the MED controlled the buildings in question or rented space in them.

With regard to the "contract" test of subsection (B)(ii) of § 7384l(12), there is evidence of the existence of a contract between MIT and the MED for the work that was performed by the employee's group on

the MMP; specifically, Contract No. W-7405-eng-175. However, based on the totality of the evidence, the FAB concludes that that contract was not entered into "to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services"; rather, it was a much narrower "research and development contract involving work with Be [beryllium] as well as other metals and compounds." Since the contract was not one of the limited types enumerated by Congress in its statutory definition of "Department of Energy facility," the FAB concludes that Congress did not intend buildings such as those in which the employee worked to be designated as DOE facilities for purposes of EEOICPA.

The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving "by a preponderance of the evidence" the existence of every criterion under any compensable claim category set forth in § 30.110. "Proof by a preponderance of the evidence means it is more likely than not that a given proposition is true." 20 C.F.R. § 30.111(a). The FAB concludes that the totality of the evidence in the case file is insufficient to establish by a preponderance of the evidence that the employee meets the statutory definition of a "Department of Energy contractor employee" because the evidence is insufficient to establish that he was employed at a "Department of Energy facility" during his civilian employment at MIT's Cambridge campus. *Accord* EEOICPA Fin. Dec. No. 10033981-2006 (Dep't of Labor, November 27, 2006). Therefore, the employee has not established that he is a "covered DOE contractor employee" and he is not entitled to benefits under Part E of EEOICPA. As a result, the FAB hereby denies the employee's claim under Part E.

Washington, DC

Thomas R. Daugherty

Hearing Representative

Final Adjudication Branch

[1] Pub. Law 108-375, § 3161 (October 28, 2004).

[2] As of the date of the March 9, 2006 letter, MIT's campus was designated as an AWE facility and a beryllium vendor facility for the time period 1942 through 1963. On October 10, 2007, the designation of MIT's campus was modified in two ways; first, the dates of the AWE facility and beryllium vendor facility designations were changed such that MIT's Cambridge campus is now designated as an AWE facility from 1942 through 1946 and as a beryllium vendor facility from 1943 through 1946; second, the Hood Building, which was adjacent to MIT's campus, was determined to be a DOE facility for the period 1946 through 1963. *See* EEOICPA Circular No. 08-01 (issued October 10, 2007) and the entry for MIT on the DOE Facility List at http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/showfacility.cfm.

[3] *See* the entry for MIT on the DOE Facility List at http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/showfacility.cfm.

[4] *Id.*

[5] *See* the entry for the Metallurgical Laboratory on the DOE Facility List at http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/showfacility.cfm.

[6] *See* the entry for the Ames Laboratory on the DOE Facility List at http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/showfacility.cfm.

[7] The Ames Laboratory was established at Iowa State College in Ames, Iowa, on May 17, 1947. The college was

subsequently renamed Iowa State University. Work done for the MED at Iowa State College between 1942 and May 16, 1947 is covered under the DOE facility designation, as is all work done in the Ames Laboratory facilities since that date. *See* http://www.external.ameslab.gov/final/About/Aboutindex.htm.

[8]The FAB notes that it is the claimant's responsibility to establish entitlement to benefits under the Act. Subject to certain limited exceptions expressly provided in the Act and regulations, the claimant bears the burden of providing "all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in these regulations." 20 C.F.R. § 30.111(a). *See also* EEOICPA Fin Dec. No. 10432-2004 (Dep't of Labor, September 13, 2004).

[9] A copy of this page has been placed in the case file and a copy has been forwarded to the employee with this decision.

[10] *See* the entry for MIT on the DOE Facility List at http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/showfacility.cfm.

[11] *See* the employee's email to the EEOICPA Ombudsman dated May 30, 2006, and his letter to FAB dated February 7, 2008.

[12] Although they are not covered under Part E of EEOICPA, atomic weapons employees and beryllium vendor employees are covered under Part B of EEOICPA. Additionally, Congress has stated that EEOICPA was established to compensate "civilian" men and women who performed duties uniquely related to nuclear weapons production and testing. *See* 42 U.S.C. § 7384(a)(8). Consequently, members of the military are not covered by EEOICPA. *See* EEOICPA Fin. Dec. No. 57276-2004 (Dep't of Labor, October 26, 2004).

Naval nuclear propulsion program

EEOICPA Fin. Dec. No. 10568-2003 (Dep't of Labor, June 16, 2003)

NOTICE OF FINAL DECISION REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch (FAB) 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). On March 29, 2003, you wrote to the FAB and filed an objection to the March 11, 2003 recommended decision of the Cleveland district office. Your objection has been considered by means of a review of the written record.

STATEMENT OF THE CASE

On September 24, 2002, you filed a claim (Form EE-2), for survivor benefits under the EEOICPA and identified bladder cancer as the diagnosed condition being claimed. You submitted an employment history form (EE-3) in which you stated that Morrison Knudson Co. employed your husband from September 29, 1974 to February 28, 1976, General Dynamics employed your husband from September 26, 1976 to November 24, 1976, and that Cleveland Wrecking employed your husband until May 31, 1988[1]. You stated that your husband wore a dosimetry badge while employed. You submitted a copy of your husband's death certificate which indicates he died on April 9, 1998 due to bladder cancer and renal failure. You submitted a copy of your marriage certificate which shows that you were married to the deceased employee on June 14, 1956. You submitted medical evidence which included Dr. Karen Harris' December 30, 1997 needle aspirate report in which she diagnosed your husband with transitional cell carcinoma. The medical evidence also included a copy of the Sewickley Valley Hospital discharge summary in which Dr. Scott Piranian diagnosed your husband with transitional cell

carcinoma of the bladder with bony metastases and lymphatic metastases.

On November 14, 2001, Department of Energy (DOE) representative Roger Anders advised the district office via Form EE-5 that the employment history you provided contained information that was not accurate. In an attachment, Mr. Anders advised that your husband worked at a portion of a facility whose activities came under the auspices of the DOE's Naval Nuclear Propulsion Program. The Cleveland district office issued a recommended decision on March 11, 2003, in which it concluded that the evidence of record did not establish that your husband was a covered employee with cancer under § 7384l(9) of the EEOICPA because he was not a DOE employee or contractor employee at a DOE facility, nor an atomic weapons employee at an atomic weapons employer facility as those facilities are defined in §§ 7384l(4) and 7384l(12) of the EEOICPA. 42 U.S.C. §§ 7384l(4), 7384l(9), 7384l(12).

OBJECTIONS

Section 30.310(a) of the EEOICPA implementing regulations provides that, "[w]ithin 60 days from the date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision, including HHS's reconstruction of the radiation dose to which the employee was exposed (if any), and whether a hearing is desired." 20 C.F.R. § 30.310(a). Section 30.312 of the EEOICPA implementing regulations provides that, "[i]f the claimant files a written statement that objects to the recommended decision within the period of time allotted in § 30.310 but does not request a hearing, the FAB will consider any objections by means of a review of the written record." 20 C.F.R. § 30.312. On March 29, 2003, you wrote to the FAB and advised that you objected to the recommended decision of the Cleveland district office. You stated that your husband worked as a laborer dismantling the old atomic power plant at Shippingport, PA and he worked side by side with employees that were covered. You stated that it was discrimination for your husband not to be considered covered under the EEOICPA. Your objection has been considered by means of review of the written record.

STATEMENT OF THE LAW

The EEOICPA was established to provide compensation benefits to covered employees (or their eligible survivors) that have been diagnosed with designated illnesses incurred as a result of their exposure to radiation, beryllium, or silica, while in the performance of duty for the DOE and certain of its vendors, contractors and subcontractors. The EEOICPA, at § 7384l(1), defines the term "covered employee" as (A) a covered beryllium employee, (B) a covered employee with cancer, and (C) to the extent provided in § 7384r, a covered employee with chronic silicosis (as defined in that section). 42 U.S.C. §§ 7384l(1), 7384r. To establish entitlement to benefits under the EEOICPA due to cancer, you must establish that the deceased employee contracted the cancer after beginning work at a DOE or atomic weapons employer facility. 42 U.S.C. § 73841(9). The EEOICPA, at § 7384l(12)(A), defines the term DOE facility "as any building, structure, or premise, including the grounds upon which such building, structure, or premise is located…in which operations are, or have been, conducted by, or on behalf of, the Department of Energy (except for buildings, structures, premises, grounds, or operations covered by Executive Order No. 12344, dated February 1, 1982 (42 U.S.C. § 7158 note), pertaining to the Naval Nuclear Propulsion Program)." 42 U.S.C. § 7384l(12).

It is the claimant's responsibility to establish entitlement to benefits under the EEOICPA. The EEOICPA regulation at § 30.111(a) states, "the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish

eligibility under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and these regulations, the claimant also bears the burden of providing to OWCP all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in these regulations." 20 C.F.R. §§ 30.110, 30.111(a).

After considering the written record of the claim and after conducting further development of the claim as was deemed necessary, the FAB hereby makes the following:

FINDINGS OF FACT

1. You filed a claim for survivor benefits under the EEOICPA on September 24, 2001.

2. Your husband was employed at the Shippingport Atomic Power Plant with the portion of the facility whose activities came under the auspices of the Department of Energy's Naval Nuclear Propulsion Program.

3. Dr. Karen Harris diagnosed your husband with transitional cell carcinoma on December 30, 1997.

4. Your husband died on April 9, 1998, due to bladder cancer and renal failure.

5. You are the surviving spouse of **[Employee]**.

Based on the above-noted findings of fact in this claim, the FAB hereby also makes the following:

CONCLUSION OF LAW

Pursuant to § 7384l(12)(A) of the EEOICPA and § 30.5(v)(1) of the implementing regulations, employees engaged in Naval Nuclear Propulsion Program activities are excluded from coverage under the EEOICPA. The evidence of record establishes that your husband was a Naval Nuclear Propulsion Program employee; therefore he does not meet the definition of a covered employee with cancer as defined in § 7384l(9) of the EEOICPA and § 30.210 of the implementing regulations. Because your husband was not a covered employee with cancer, your claim for benefits is denied.

Washington, DC

Thomasyne L. Hill

Hearing Representative

Final Adjudication Branch

[1] The beginning date indicated on the employment history form was distorted during the creation of the claim record.

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On April 9, 2004, you filed Form EE-2 (Claim for Survivor Benefits under the EEOICPA) based on the condition of liver cancer (metastatic hepatobiliary carcinoma). You also submitted a Form EE-3 (Employment History), on which you indicated that **[Employee]** (the employee) worked at Bechtel Plant Machinery, Incorporated (Westinghouse Plant Apparatus Division) from October 1970 to August 1989, and with Westinghouse at the Naval Reactors Facility in Scoville, Idaho, from July 1, 1957 to July 31, 1961, July 1, 1965 to September 30, 1967, and September 1, 1968 to October 31, 1970. You also provided dosimetry records associated with the Bettis Atomic Power Laboratory, the New London Submarine Base, the Westinghouse Plant Apparatus Division, and the Naval Reactors Facility.

The medical documentation of record indicated that the employee was diagnosed as having moderately to poorly differentiated adenocarcinoma of the liver (favored to be a hepatobiliary primary cancer).

Information obtained from a Department of Energy representative and the Oak Ridge Institute for Science and Education (ORISE) database was negative for employment information pertaining to the employee.

By letters dated April 26 and June 9, 2004, the Seattle district office notified you that they had completed the initial review of your claim for benefits under the EEOICPA, but that additional employment evidence was needed in order to establish a claim. You were also notified that employment related to the Naval Nuclear Propulsion Program was specifically excluded from coverage under the EEOICPA. You were requested to provide documentation of covered employment under the Act within thirty days of the district office letters.

By letter received on May 16, 2004, you advised the Seattle district office that you previously provided the employee's complete employment history and documentation, which only included work performed at facilities dedicated to the Naval Nuclear Propulsion Program.

On July 26, 2004, the Seattle district office recommended denial of your claim for compensation. The district office concluded that the employee does not qualify as a covered employee under § 7384l of the Act. *See* 42 U.S.C. §§ 7384l. The district office also concluded that the evidence of record was insufficient to establish that the employee was present at a covered facility, while working for the Department of Energy or any of its covered contractors, subcontractors or vendors, during a covered time period. *See* 42 U.S.C. § 7384l(10)-(12). Finally, the district office concluded that you are not entitled to compensation as outlined under § 7384s of the EEOICPA. *See* 42 U.S.C. § 7384s.

FINDINGS OF FACT

1. You filed a claim for survivor benefits on April 9, 2004.

2. The employee was diagnosed as having liver cancer, a covered occupational illness under the EEOICPA.

3. You did not provide sufficient evidence to establish that the employee engaged in covered employment under the EEOICPA.

CONCLUSIONS OF LAW

The undersigned has reviewed the recommended decision issued by the Seattle district office on July 26, 2004. I find that you have not filed any objections to the recommended decision as provided by § 30.316(a) of the regulations, and that the sixty-day period for filing such objections, as provided for in § 30.310(a) has expired. *See* 20 C. F. R. §§ 30.310(a), 30.316(a).

In order to be afforded coverage under Part B of the Energy Employees Occupational Illness Compensation Program Act, you must establish that the employee was diagnosed with a designated occupational illness incurred as a result of exposure to silica, beryllium, and/or radiation: *cancer, beryllium sensitivity, chronic beryllium disease*, and *silicosis*. *See* 42 U.S.C. § 7384l(15); 20 C.F.R. § 30.110(a). Further, the illness must have been incurred while in the performance of duty for the Department of Energy and certain of its vendors, contractors, and subcontractors, or for an atomic weapons employer or facility. *See* 42 U.S.C. § 7384l(4)-(7), (9) and (11).

In order to be afforded coverage as a "covered employee with cancer," you must show that the employee was a DOE employee, a DOE contractor employee, or an atomic weapons employee, who contracted cancer after beginning employment at a DOE facility or an atomic weapons employer facility. *See* 42 U.S.C. § 7384l(9); 20 C.F.R. § 30.210(b).

Further, § 7384l(12) of the Act provides a definition of a Department of Energy facility and specifically exempts the Nuclear Propulsion Program.

> The term "Department of Energy facility" means any building, structure, or premise, including the grounds upon which such building, structure, or premise is located—
>
> (A) in which operations are, or have been, conducted by, or on behalf of, the Department of Energy (except for buildings, structures, premises, grounds, or operations covered by Executive Order No. 12344, dated February 1, 1982 (42 U.S.C. 7158 note), pertaining to the Naval Nuclear Propulsion Program) (emphasis added).

42 U.S.C. § 7384l(12)(A).

In this case, the employment evidence you provided indicated that the employee worked at the Naval Reactors Facility (NRF), the New London Submarine Base, the Westinghouse Plant Apparatus Division (Bechtel Plant Machinery, Inc.) and the Bettis Atomic Power Laboratory, which provided products and services to the Naval Nuclear Propulsion Program. Consequently, this employment is specifically excluded from coverage under the Act. *See* 42 U.S.C. § 7384l(12)(A).

It is the claimant's responsibility to establish entitlement to benefits under the Act. The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of each and every criterion under any compensable claim category set forth in §

30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing to the Office of Workers' Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

For the above reasons, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

Seattle, WA

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA

Amendments to

EEOICPA Fin. Dec. No. 9855-2002 (Dep't of Labor, August 26, 2002)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) 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 stated below, your claim for benefits is denied.

On September 20, 2001, you filed Form EE-2, Claim for Survivor Benefits under the Energy Employees Occupational Illness Compensation Program, with the Denver district office. You stated that your husband, **[Employee]**, had died on May 15, 1991 as a result of adenocarcinoma in the liver, and that he was employed at a Department of Energy facility. You included with your application, a copy of your marriage certificate, **[Employee]**'s resume/biography, and his death certificate. You submitted a letter dated January 5, 2000, from Allen M. Goldman, Institute of Technology, School of Physics and Astronomy, and a packet of information which included the university's files relating to your husband based on your request for his personnel, employee exposure, and medical records. Also submitted was a significant amount of medical records that did establish your husband had been diagnosed with adenocarcinoma in the liver.

On March 1, 2002, Loretta from the Española Resource Center telephoned the Denver district office to request the status of your claim. The claims examiner returned her telephone call on the same date and explained the provision in the Act which states that in order to be eligible for compensation, the spouse must have been married to the worker for at least one year prior to the date of his death. Your marriage certificate establishes you were married on, May 30, 1990. **[Employee]**'s death certificate establishes he died on May 15, 1991.

On March 5, 2002, the Denver district office issued a recommended decision finding that the evidence

of record had not established that you were married for one year prior to your husband's death, and therefore you were not entitled to compensation benefits under the EEOICPA.

Pursuant to § 30.316(a) of the implementing regulations, a claimant has 60 days in which to file objections to the recommended decision, as allowed under § 30.310(b) of the implementing regulations (20 C.F.R. § 30.310(b)).

On April 12, 2002, the Final Adjudication Branch received a letter from you that stated you objected to the findings of the recommended decision. You requested a hearing and a review of the written record. You stated that the original law signed by President Clinton provided you with coverage, but when the law changed to include children under 18, the change in the law adversely affected you. You stated that you had documents that demonstrated you had a 10-year courtship with your spouse. You also stated you presented testimony as an advocate in Española. Included with your letter of objection were the following documents:

- a copy of Congressman Tom Udall's "Floor Statement on the Atomic Workers Compensation Act";

- an e-mail from Bob Simon regarding the inclusion of Los Alamos National Laboratory workers in the Senate Bill dated July 5, 2000;

- an e-mail from Louis Schrank regarding the Resource Center in Española;

- a "Volunteer Experience Verification Form", establishing you volunteered as a "Policy Advisor and Volunteer Consultant to the Department of Energy, Members of Congress, Congressional Committees, and many organizations on critical health issues effecting nuclear weapons workers with occupational illnesses";

- a transcript of proceedings from the March 18, 2000 Public Hearing in Española , New Mexico;

- a letter from you to John Puckett, HSE Division Leader, Chairperson, "Working Group Formed to Address Issues Raised by Recent Reports of Excess Brain Tumors in the Community of Los Alamos" and dated June 27, 1991;

- a letter to you from Terry L. Thomas, Ph.D., dated July 31, 1991, regarding the epidemiologic studies planned for workers at Los Alamos National Laboratory; a memorandum entitled "LANL Employee Representative for Cancer Steering Committee", dated September 25, 1991;

- a copy of the "Draft Charter of the Working Group to Address Los Alamos Community Health Concerns", dated June 27, 1991;

- an article entitled "Register of the Repressed: Women's Voice and Body in the Nuclear Weapons Organization"; and

- a psychological report from Dr. Anne B. Warren; which mentions you and **[Employee]** had a "10 or 11 year courtship".

On May 20, 2002, you submitted a copy of the Last Will and Testament of **[Employee]**, wherein he "devises to you, his wife, the remainder of his estate if you survive him for a period of seven hundred twenty (720) hours." You stated you believed this provided you with common law marriage rights for the 720 hours mentioned in the will.

An oral hearing was held on June 18, 2002 at the One-Stop Career Center in Española, New Mexico. You presented additional evidence for consideration that included: a copy of a house "Inspection Report" by Architect Steven G. Shaw, addressed to both you and **[Employee]**, dated August 11, 1989 (exhibit one); a copy of a Quitclaim Deed (Joint Tenants) for you and **[Employee]**, dated October 27, 1989 (exhibit two); a Los Alamos County Assessor Notice of Valuation or Tentative Notice of Value (undated), for a home on Walnut Street, and addressed to both you and **[Employee]** (exhibit three); and a Power of Attorney dated August 5, 1989, between you and **[Employee]** (exhibit four).

Pursuant to § 30.314(f) of the implementing regulations, a claimant has 30 days after the hearing is held to submit additional evidence or argument.

No further evidence was submitted for consideration within that time period.

Section 30.111(a) of the regulations (20 C.F.R. § 30.111(a)) states that, "Except where otherwise provided in the Act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and these regulations, the claimant also bears the burden of providing to OWCP all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in these regulations."

The undersigned has carefully reviewed the hearing transcript and additional evidence received at the hearing, as well as the evidence of record and the recommended decision issued on March 5, 2002.

The record fails to establish that you were married to **[Employee]** one year prior to his death, as required by the EEOICPA. The entire record and the exhibits were thoroughly reviewed. Included in Exhibit One, was the August 11, 1989 inspection report of the home located on Walnut Street, a copy of a bill addressed to both you and **[Employee]** for the inspection service, and an invoice from A-1 Plumbing, Piping & Heat dated August 14, 1989. Although some of these items were addressed to both you and **[Employee]**, none of the records submitted are sufficient to establish that you were married to your husband for one year prior to his death as required under the Act. 42 U.S.C. § 7384s(e)(3)(A).

The evidence entered into the record as Exhibit Two, consists of a Quitclaim Deed dated October 27, 1989, showing **[Employee]**, a single man, and **[Claimant]**, a single woman living at the same address on Walnut Street as joint tenants. Exhibit Three consists of a Notice of Valuation of the property on Walnut Street in Los Alamos County and is addressed to both you and **[Employee]**. Although this evidence establishes you were living together in 1989 in Los Alamos County, New Mexico, it is not sufficient evidence to establish you were married to your husband for one year prior to his death as required under the Act. 42 U.S.C. § 7384s(e)(3)(A).

Exhibit Four consists of a copy of a Power of Attorney between you and **[Employee]** regarding the real estate located on Walnut Street. This evidence is not sufficient to establish you were married for one

year prior to his death. 42 U.S.C. § 7384s(e)(3)(A).

The Act is clear in that it states, "the "spouse" of an individual is a wife or husband of that individual who was married to that individual for at least one year immediately before the death of that individual."

During the hearing you stated that there is a federal law, the Violence Against Women Act, that acknowledges significant other relationships and provides protection for a woman regardless of whether she is married to her husband one year or not. You also stated that you believed there was "a lack of dialogue" between the RECA program and the EEOICP concerning issues such as yours. Additionally, on August 15, 2002, you sent an email to the Final Adjudication Branch. The hearing transcript was mailed out on July 23, 2002. Pursuant to § 30.314(e) of the implementing regulations, a claimant is allotted 20 days from the date it is sent to the claimant to submit any comments to the reviewer. Although your email was beyond the 20-day period, it was reviewed and considered in this decision. In your email you stated the issue of potential common law marriage was raised. You stated that you presented the appropriate documentation that may support a common law marriage to the extent permitted by New Mexican law. You stated that the one-year requirement was adopted from the RECA and that you have not been able to determine how DOJ has interpreted this provision. Also, you stated that the amendments of December 28, 2001 should not apply to your case because you filed your claim prior to the enactment of the amendments. You stated you did not believe the amendments should be applied retroactively.

Section 7384s (e)(3)(A), Compensation and benefits to be provided, states:

The "spouse" of an individual is a wife or husband of that individual who was married to that individual for at least one year immediately before the death of that individual."

Section 7384s(f) states:

EFFECTIVE DATE—This section shall take effect on July 31, 2001, unless Congress otherwise provides in an Act enacted before that date.

There is no previous enacted law that relates to compensation under the EEOICPA. Therefore, the amendments apply retroactively to all claimants.

A couple cannot become legally married in New Mexico by living together as man and wife under New Mexico's laws. However, a couple legally married via common law in another state is regarded as married in all states. The evidence of record does not establish you lived with **[Employee]** in a common law state. Because New Mexico does not recognize common law marriages, the time you lived with **[Employee]** prior to your marriage is insufficient to establish you were married to him for one year prior to his death.

Regarding your reference to the difference between how Native American widows are treated and recognized in their marriages, and how you are recognized in your marriage, Indian Law refers primarily to that body of law dealing with the status of the Indian tribes and their special relationship to the federal government. The existing federal-tribal government-to-government relationship is significant given that the United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court

decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection and has affirmed the Navajo Nation's sovereignty. The laws that apply to the Native Americans do not apply in your case.

The undersigned finds that you have not established you are an eligible survivor as defined in 42 U.S.C. § 7384s(e)(3)(A). It is the decision of the Final Adjudication Branch that your claim is denied.

August 26, 2002

Denver, CO

Janet R. Kapsin

Hearing Representative

Final Adjudication Branch

In general

EEOICPA Fin. Dec. No. 37038-2003 (Dep't of Labor, November 7, 2007)

NOTICE OF FINAL DECISION FOLLOWING REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch (FAB) concerning the above claims for compensation under Part B and Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons stated below, **[Claimant #1]**'s claim for survivor benefits under Part B and Part E are denied. **[Claimant #2]**'s claim for survivor benefits under Part B is accepted, but his claim under Part E is denied.

STATEMENT OF THE CASE

On October 15, 2002, **[Claimant #1]** filed a Form EE-2 with the Seattle district office of the Division of Energy Employees Occupational Illness Compensation (DEEOIC) in which he claimed survivor benefits under Part B of EEOICPA as a child of **[Employee]**. In support of his claim, he alleged that **[Employee]** had been employed by J.A. Jones Construction, a Department of Energy (DOE) subcontractor at the Hanford site, and that **[Employee]** had been diagnosed with lung cancer in 1999. **[Claimant #1]** submitted a large number of documents in support of his claim that included, among other things: copies of a September 24, 1992 court order documenting the legal change of his name from "**[Claimant #1's former name]**" to "**[Claimant #1]**" and his October 6, 1992 amended birth certificate with this new name[1]; medical evidence of **[Employee]**'s lung cancer; copies of the death certificates for both **[Employee]** and **[Employee's Spouse]**; a copy of "Letters Testamentary" documenting that **[Claimant #1]** was an executor of **[Employee]**'s estate; a U.S. Marine Corps Form D-214 noting **[Claimant #1]**'s use of the name "**[Claimant #1]**" when he was transferred to the Marine Corps Reserve on September 4, 1964; and a September 21, 2001 statement in which **[Claimant #1]** related the following about his childhood:

As my real dad was unknown. My mother died when I was 6. **[Claimant #1's Father as listed on his birth certificate]** was a family friend of my mom's. Just to give me a last name as she was unwed &

pregnant with me. My Dad **[Employee]** & My Mom **[Employee's Spouse]** actually was my uncle & aunt but I lived with them from the time I was 3 years old. So I consider them my Dad & Mom. As I joined the USMC with the **[Employee's Surname]** name. . . .

On December 16, 2002, the Seattle district office verified **[Employee]**'s employment by consulting the ORISE database and on December 17, 2002, it issued a recommended decision to deny **[Claimant #1]**'s Part B claim. The recommendation to deny was based on the conclusion that **[Claimant #1]** had failed to submit sufficient evidence to establish his eligibility as a surviving child of **[Employee]**. On January 29, 2003, FAB issued an order remanding the claim to the Seattle district office for further development on the issue of whether **[Claimant #1]** was **[Employee]**'s stepchild. In that order, FAB noted that new procedures had gone into effect shortly after the recommended decision had been issued that required all claims in which claimants were alleging to be stepchildren of deceased covered workers to be forwarded to the National Office of DEEOIC for referral to the Office of the Solicitor, and directed the Seattle district office to comply with those procedures upon completion of further development on the question of whether **[Claimant #1]** was **[Employee]**'s stepchild.

By letter dated February 11, 2003, **[Claimant #1]**'s representative submitted a February 6, 2003 statement from **[Employee's Sister]**, who stated the following:

[Claimant #1] came to live with **[Employee]** and **[Employee's Spouse]** in 1946 and he was three years old at the time. He lived with them until he was 18 or 19. At that time he joined the Marines. **[Employee]** was his soul [*sic*] provider during those years and loved him as his son. Their relationship has always been that of a father and son and continued until **[Employee]** passed away a few years ago.

[Claimant #1]'s representative also submitted copies of **[Claimant #1]**'s "Pupil Health Card" and "Pupil's Cumulative Record" from the Kiona-Benton School District, both of which listed **[Claimant #1]**'s last name as "**[Claimant #1's Stepfather's surname]**" (crossed out and replaced with "**[Employee's surname]**") and noted that he lived with his "Uncle." The "Pupil's Cumulative Record" also listed "**[Claimant #1's Stepfather]**" as **[Claimant #1]**'s father. Shortly thereafter, **[Claimant #2]** filed a claim for survivor benefits on March 31, 2003 and alleged that he was the stepson of **[Employee]**.

In an April 10, 2003 inquiry, the Seattle district office asked **[Claimant #1]** who **[Claimant #1's Stepfather]** was (his father on the "Pupil's Cumulative Record"). In an April 12, 2003 reply, **[Claimant #1]** stated the following:

My mother **[Claimant #1's Mother]** married **[Claimant #1's Stepfather]** [in] 1945[.] They had (2) girls **[Claimant #1's Stepsisters]**. . . **[Claimant #1's Stepfather]** was my stepfather until **[Claimant #1's Mother]**'s death in 1949 at which time the girls & I were separated as **[Claimant #1's Stepfather]** didn't like me as I wasn't his child. The girls were adopted out and I went with my parents **[Employee]** & **[Employee's Spouse]**.

* * *

[I lived with **[Employee and Employee's Spouse]** in] 1943-1944 as **[Claimant #1's Mother]** was unwed. Then my mother **[]** passed away [January] 23, 1949. I lived with **[Employee]** & **[Employee's Spouse]** from 1949-1960. They were my sole survivorship [*sic*]. Then I went in USMC 1960.

In a response to a separate April 10, 2003 inquiry that was received by the Seattle district office on April 23, 2003, **[Claimant #2]** indicated that his mother **[Employee's Spouse]** had married **[Employee]** (his alleged step-parent) on October 24, 1940 when he was five years old, and that he had resided in their household for the next 15 years. **[Claimant #2]** also submitted a copy of his birth certificate, which showed that his mother was "**[Employee's Spouse]**," and his father was "**[Claimant #2's Father]**."

By letters dated May 1, 2003, the district office notified both **[Claimant #1]** and **[Claimant #2]** that the case had been referred to the National Institute for Occupational Safety and Health (NIOSH) for reconstruction of **[Employee]**'s radiation dose. Thereafter, on June 19, 2003, the district office transferred the case to the National Office of DEEOIC for referral to the Office of the Solicitor as directed in the January 29, 2003 remand order of the FAB. However, rather than taking this action[2], the National Office returned the case to the district office on September 29, 2003 with a memorandum from the Chief of the Branch of Policies, Regulations and Procedures (BPRP) of the same date. In that memorandum, the Chief reviewed the evidence then in the case file and concluded that while **[Claimant #2]** met the statutory definition of **[Employee]**'s "child," **[Claimant #1]** would not absent the submission of additional evidence showing that he had been legally adopted by **[Employee]**. Upon return of the file, the Seattle district office wrote to **[Claimant #1]** on October 3 and 21, 2003 and requested that he submit any evidence in his possession that would establish that he had been legally adopted by **[Employee]**. No response was received to these requests.

No further action took place with respect to this matter pending receipt of NIOSH's dose reconstruction report until June 9, 2005, on which date **[Claimant #1]**'s representative informed the district office that his client wished to expand his Part B claim to include a claim under the recently enacted Part E of EEOICPA. On October 27, 2005, the district office sent a third letter to **[Claimant #1]** stating that while he had provided sufficient evidence to show that he had lived as a dependent in his uncle and aunt's household, no documentation had been provided showing that he had ever been adopted by his uncle. In a November 3, 2005 response to that letter, **[Claimant #1]**'s representative argued that because the definition of "child" in EEOICPA is inclusive rather than exclusive, **[Claimant #1]** met the definition of "child" by being the "*de facto* child" of **[Employee]**, based on a recent state court decision in a Washington child visitation case (issued that same day) that adopted an equitable theory of *de facto* parentage. In the visitation case cited, the court created a four-part test for an individual to be a considered a "*de facto* parent" and to be granted the rights and privileges of a parent.[3]

[Claimant #1]'s representative also argued that **[Claimant #1]** should be considered a child of **[Employee]** under the definition of the term "child" that appears in Title 51 of the Washington Revised Code, which codifies that state's industrial insurance law.[4] The term "child" is defined therein as, among other things, a "dependent child that is in legal custody and control of the worker." The term "dependent" under that title is defined as including relatives of the worker who at the time of the accident are actually and necessarily dependent on the worker. Through a letter dated November 10, 2005, **[Claimant #1]**'s representative added to his prior argument by alleging that "**[Employee]** would have adopted **[Claimant #1]** , but it wasn't necessary at the time because the schools he attended and the military accepted **[Employee]** as **[Claimant #1]**'s father and allowed **[Employee]** to sign legal documents on **[Claimant #1]**'s behalf when he was still a minor."

On October 18, 2005, the Seattle district office received the "NIOSH Report of Dose Reconstruction under EEOICPA," dated September 29, 2005, which provided estimated doses of radiation to the primary cancer site of the lung. Based on these dose estimates, the district office calculated the probability of causation (PoC) for **[Employee]**'s lung cancer by entering his specific information into a

computer program developed by NIOSH called NIOSH-IREP. The PoC was determined using the "upper 99% credibility limit," which helps minimize the possibility of denying claims of employees with cancers that are likely to have been caused by occupational radiation exposures. The PoC for the primary cancer of the lung was determined to be 52.89% using NIOSH-IREP. Based on this PoC, the Seattle district office issued a November 16, 2005 recommended decision to accept **[Claimant #2]**'s Part B claim. However, it recommended denial of **[Claimant #2]**'s Part E claim on the ground that he was not a "covered child" under that other Part. It also recommended denying **[Claimant #1]**'s Part B and E claims on the ground that he had failed to establish that he was a surviving child of **[Employee]**. The recommended decision, however, did not fully discuss the legal arguments for the expansion of the term "child" made by **[Claimant #1]**'s representative. In a January 12, 2006 letter that was received on January 17, 2006, **[Claimant #1]**'s representative objected to this recommended decision and requested an oral hearing before FAB, which took place on March 30, 2006. At the hearing, **[Claimant #1]**'s representative made the same arguments he had made in his written objections.

On July 15, 2006, FAB returned the case to BPRP for guidance on the legal arguments raised by **[Claimant #1]**'s representative at the March 30, 2006 hearing. On December 12, 2006[5], BPRP requested a legal opinion on the matter from the Office of the Solicitor and on February 26, 2007, the Office of the Solicitor provided BPRP with a legal opinion that evaluated the arguments raised by **[Claimant #1]**'s representative. On March 1, 2007, BPRP contacted FAB and advised it of the guidance it had received. However, by that point in time, the November 16, 2005 recommended decision had automatically become a "final" decision of the FAB on January 17, 2007 pursuant to 20 C.F.R. § 30.316(c), the one-year anniversary of the date the representative's objections to the recommended decision were received by FAB.

On March 9, 2007, **[Claimant #1]** filed a petition in the United States District Court for the Eastern District of Washington seeking review of the January 17, 2007 "final decision" on his claim under Parts B and E of EEOICPA (Civil Action No. CV-07-5011-EFS). Shortly thereafter, the Director of DEEOIC issued an order on April 30, 2007 vacating that same "final decision" on the claims of both **[Claimant #1]** and **[Claimant #2]** and returning them to the Seattle district office for further development and consideration of the Office of the Solicitor's February 26, 2007 opinion, to be followed by the issuance of new recommended and final decisions. The case was subsequently transferred to the national office of DEEOIC for further action in light of the filing of the above-noted petition.

On September 14, 2007, the national office of DEEOIC issued a recommended decision: (1) to deny **[Claimant #1]**'s claim for survivor benefits under Parts B and E on the ground that he was not a surviving "child" of **[Employee]**, as that statutory term is defined in §§ 7384s(e)(3) and 7385s-3(d)(3) of EEOICPA; (2) to accept **[Claimant #2]**'s claim for survivor benefits under Part B on the ground that as **[Employee]**'s stepchild, he was a surviving "child" of **[Employee]** under § 7384s(e)(3); and (3) to deny **[Claimant #2]**'s claim for survivor benefits under Part E on the ground that although he was a "child" of **[Employee]** under § 7385s-3(d)(3), he did not meet the definition of a "covered child" in § 7385s-3(d)(2). The case was transferred to FAB and on October 3, 2007, it received **[Claimant #2]**'s signed, written waiver of all objections to the September 14, 2007 recommended decision. On October 17, 2007, **[Claimant #2]** also submitted a signed statement indicating that had not received any money from a tort suit for **[Employee]**'s radiation exposure, and that he had not been convicted of fraud in connection with any application for or receipt of EEOICPA benefits or any other state or federal workers' compensation benefits. On September 27, 2007, FAB received written objections to the September 14, 2007 recommended decision and a request for review of the written record from **[Claimant #1]**'s representative, dated September 26, 2007.

OBJECTIONS

In his September 26, 2007 submission, **[Claimant #1]**'s representative objected to the seventh "Conclusion of Law" in the recommended decision, which is the one that concluded that **[Claimant #1]** was not a surviving "child" of **[Employee]** under either Part B or Part E of EEOICPA and rejected the representative's contentions that Washington workers' compensation law and a child visitation decision supported **[Claimant #1]**'s claim. The representative repeated his earlier argument regarding the non-exhaustive nature of the definition of "child" under EEOICPA and alleged that DEEOIC had ignored this point when it "made its recommended decision of denial on the basis that **[Claimant #1]** does not qualify as a surviving child of **[Employee]** since **[Claimant #1]** was neither a recognized natural child, a stepchild or an adopted child [of **[Employee]**."[6]

[Claimant #1]'s representative also repeated his argument that Washington workers' compensation law should apply in **[Claimant #1]**'s EEOICPA claim because EEOICPA is a "federal worker's [*sic*] compensation statute." Based on this premise, the representative asserted that the concept of dependence alone should be determinative of **[Claimant #1]**'s status as **[Employee]**'s child.

Finally, the representative argued that the "general rule of law" pronounced in the child visitation case was "not limited to the facts in the particular case." Rather, he asserted, "the application of the *de facto* concept is broadly [*sic*] subject only to the factors enumerated in the general rule developed in the decision." The representative then quoted from the portion of the decision in which the court set out four criteria that an individual would have to meet in order to have "standing as a *de facto* parent" in a child visitation proceeding, and asserted that **[Claimant #1]** was **[Employee]**'s "*de facto* child."

After considering the recommended decision and all of the evidence in the case file, FAB hereby makes the following:

FINDINGS OF FACT

1. **[Claimant #1]** and **[Claimant #2]** filed claims for survivor benefits under Part B of EEOICPA on October 15, 2002 and March 31, 2003, respectively, and both later expanded their claims to include Part E.

2. **[Employee]** was employed at the Hanford facility by DOE subcontractors from January 1, 1950 to April 15, 19 55, from September 14, 1956 to March 15, 1957, from March 22, 1957 to April 26, 1957, from March 3 to 4, 1960, and from September 14, 1960 to March 4, 1977.

3. On July 1, 1999, **[Employee]** was diagnosed with lung cancer. The date of this diagnosis was after he had begun covered employment.

4. NIOSH reported annual dose estimates for the lung from the date of initial radiation exposure during covered employment to the date of the cancer's first diagnosis. A summary and explanation of the information and methods applied to produce these dose estimates, including **[Claimant #1]**'s and **[Claimant #2]**'s involvement through their interviews and reviews of the draft dose reconstruction report, are documented in the "NIOSH Report of Dose Reconstruction under EEOICPA" dated September 29, 2005.

5. Using the dose estimates from NIOSH's September 29, 2005 report, DEEOIC determined that

the probability of causation (PoC) was 52.89% and established that it was "at least as likely as not" that **[Employee]**'s lung cancer was sustained in the performance of duty.

6. **[Claimant #1]** was born on June 14, 1942 and is the child of **[Claimant #1's Mother]** and an unknown father. From 1943 to 1944, he lived with his uncle and aunt, **[Employee and Employee's Spouse]** (**[Sister of Claimant #1's Mother]**). In 1945, **[Claimant #1's Mother]** married **[Claimant #1's Stepfather]**, and **[Claimant #1]** was reunited with his mother and lived with her and **[Claimant #1's Stepfather]**. **[Claimant #1's Mother]** died on January 23, 1949, after which **[Claimant #1]** was again sent to live with his aunt and uncle. **[Claimant #1]**'s stepfather died in 1952. **[Claimant #1]** lived with his uncle the employee, his aunt and his cousin **[Claimant #2]** from 1949 until he enlisted in the U.S. Marine Corps in 1960.

7. **[Claimant #2]** is the stepchild of **[Employee]** as established by his birth certificate, his school records, and the marriage of his mother **[Employee's Spouse]** to **[Employee]**.

8. At the time of **[Employee]**'s death, **[Claimant #2]** was not under the age of 18, or under the age of 23 and continuously enrolled as a full-time student in an institution of higher learning, or any age and incapable of self-support.

Based on the above-noted findings of fact, and after considering the objections to the recommended decision in this case, FAB hereby makes the following:

CONCLUSIONS OF LAW

The first issue in this case is whether **[Employee]** qualifies as a "covered employee with cancer" for the purposes of Part B of EEOICPA. For this case, the relevant portion of the definition of a "covered employee with cancer" is "[a] Department of Energy contractor employee who contracted that cancer after beginning employment at a Department of Energy facility, [] if and only if that individual is determined to have sustained that cancer in the performance of duty in accordance with section 7384n(b) of this title." 42 U.S.C. § 7384l(9)(B). As found above, **[Employee]** was employed at the Hanford facility by DOE subcontractors for intermittent periods from January 1, 1950 to March 4, 1977, and was first diagnosed with lung cancer after he had begun working at the Hanford facility.

In accordance with 42 U.S.C. § 7384n(d), NIOSH produced dose estimates of the annual radiation exposures to **[Employee]**'s lungs, and DEEOIC calculated the PoC for his lung cancer based on those estimates consistent with § 7384n(c)(3). Since the PoC was calculated to be 52.89%, it established that it was "at least as likely as not" that **[Employee]**'s lung cancer was sustained in the performance of duty under § 7384n(b). Therefore, **[Employee]** qualifies as a "covered employee with cancer" under Part B, as that term is defined by § 7384l(9)(B), because he was employed at a DOE facility by DOE subcontractors and sustained cancer in the performance of duty. As a result, his cancer is an "occupational illness" under Part B, as defined by § 7384l(15), and he is also a "covered employee," as that term is defined by § 7384l(1)(B). Pursuant to 42 U.S.C. § 7385s-4(a), this conclusion also constitutes a determination under Part E of EEOICPA that **[Employee]** contracted his lung cancer through exposure to a toxic substance at a DOE facility. However, because he is a *deceased* covered employee, only his eligible survivors are entitled to share in the compensation payable under Part B and Part E of EEOICPA.

The second issue in this case is whether **[Claimant #1]** or **[Claimant #2]** is a "child" of **[Employee]**

under both Parts B and E of EEOICPA. The statutory term "child," which has the same definition in both Parts B and E, "includes a recognized natural child, a stepchild who lived with an individual in a regular parent-child relationship, and an adopted child." 42 U.S.C. §§ 7384s(e)(3)(B), 7385s-3(d)(3). Both of these definitions use the non-exhaustive term "includes" and identify three classes of persons that are considered to be children of an individual for purposes of paying survivor benefits under Parts B and E of EEOICPA.

There are well-established definitions for the three classes of persons included in the two statutory provisions at issue: (1) a "recognized natural child" is an illegitimate child of an individual, who has been recognized or acknowledged as a child by that individual; (2) a "stepchild" is someone who meets the criteria currently described in Chapter 2-200.5c (September 2004) of the Federal (EEOICPA) Procedure Manual; and (3) an "adopted child" is someone who satisfies the legal criteria for that status under state law.

The use of the term "includes" in both § 7384s(e)(3) and § 7385s-3(d)(3) is evidence that Congress intended the term "child" to refer to more than just the three classes of persons noted above, as is the fact that those three specified classes do not include legitimate issue (and posthumously born legitimate issue). Thus, the definition of the term "child" is properly left to DEEOIC as the agency that is charged with the administration of the compensation programs established by EEOICPA. *See* 20 C.F.R. § 30.1 (2007). As an exercise of that authority, DEEOIC concludes that there is no dispute that legitimate issue are children of an individual. Furthermore, unrecognized or unacknowledged illegitimate issue (and posthumously born illegitimate issue) also fall within the definition of "child" since denying EEOICPA survivor benefits to these other illegitimate children would violate the Constitution.[7] For brevity's sake, DEEOIC will use the term "biological" children to mean *all* issue of an individual (including posthumously born issue), whether legitimate or illegitimate. Under this terminology, a "recognized natural child" is one type of biological child. Accordingly, DEEOIC concludes that a "child" of an individual under both Part B and Part E of EEOICPA can only be a biological child, a stepchild, or an adopted child of that individual.

As noted above in the "Objections" section of this decision, **[Claimant #1]**'s representative argues that Washington workers' compensation law should apply in **[Claimant #1]**'s EEOICPA claim because EEOICPA is a "federal worker's [*sic*] compensation statute." In his view, **[Claimant #1]** should be found to be a "child" under EEOICPA because he meets the definition of a "child" in Title 51 of Washington's Revised Code, which defines a "child" as "every natural born child, posthumous child, stepchild, child legally adopted prior to the injury, child born after the injury. . .and dependent child in the *legal custody* and control of the worker. . . ."(emphasis added).[8] However, there is no evidence in the case file that **[Claimant #1]** is the natural born child, posthumous child, stepchild, child legally adopted prior to the injury or child born after the injury of **[Employee]**.

There is also no allegation or evidence in the case file that **[Employee or Employee's Spouse]** ever had legal custody of **[Claimant #1]**. Instead, it appears that after the death of his mother, **[Claimant #1]** merely lived with his aunt and uncle who had, at most, *physical* custody of their nephew. Even assuming that **[Employee]** had "legal custody" of **[Claimant #1]** (a prerequisite of the definitional phrase at issue), there is nothing in either § 7384s(e)(3) or § 7385s-3(d)(3), or in EEOICPA as a whole, that suggests that a person claiming to be a "child" of a deceased covered employee should be able to establish that status by proving merely that they are or were "dependant" on that individual. Therefore, DEEOIC has concluded that persons who are or were only "dependant" on an individual are not "children" of that individual under EEOICPA, which is not a "federal worker's [*sic*] compensation statute" (those types of statutes are "wage-replacement" statutes[9]), as **[Claimant #1]**'s representative

believes, where issues of dependency are often relevant to questions of survivor eligibility.[10]

[Claimant #1]'s representative also argues that **[Claimant #1]** should be considered a "*de facto* child" of **[Employee]** based on a recent decision in a visitation dispute in Washington. The dispute involved two parties who could not legally marry one another but had agreed to raise a biological child of one of the parties together. When the party who had no biological or legal relationship to the child sued to obtain visitation rights after the parties had terminated their agreement, the court considered whether the party was a "*de facto* parent."[11] **[Claimant #1]**'s representative argues that **[Employee]** would have met the court's four-part test[12] to be his client's "*de facto* parent" and as a consequence, **[Claimant #1]** should be considered to be the "*de facto* child" of **[Employee]**. There are, however, two flaws in this argument. First, both the decision at issue and subsequent cases that have relied upon it are clearly within the state law realm of child custody and/or parental rights. State courts in these types of cases are primarily concerned with the "best interests of the child," which is an equitable concern that does not enter into EEOICPA's definitions of "child," and involve the creation or definition of rights and obligations of *parents*, not children. Secondly, the decision cited by **[Claimant #1]**'s representative only contains a discussion of who can be considered a "*de facto* parent," not a "*de facto* child." Therefore, the representative's reliance on this decision is flawed not only because it is not controlling in the EEOICPA claims adjudication process, but also because it is based on an overly expansive reading of what the court actually stated.

Returning to the second issue in this case, DEEOIC concludes that **[Claimant #2]** is a "child" of **[Employee]** under Part B, as that term is defined in § 7384s(e)(3)(B), because he is **[Employee]**'s stepchild. **[Claimant #2]** is also a "child" of **[Employee]** under Part E, as that term is defined in § 7385s-3(d)(3), for the same reason—because he is **[Employee]**'s stepchild. However, DEEOIC concludes that **[Claimant #1]** is not a "child" of **[Employee]** under either Part B or Part E because he is not a biological child of **[Employee]**, or a stepchild of **[Employee]**, or an adopted child of **[Employee]**.

The third issue in this case is whether **[Claimant #1]** or **[Claimant #2]** is a "covered child" of **[Employee]** under Part E of EEOICPA. In order to be eligible to receive a payment as a "child" of a deceased covered employee under Part E, a child of that employee must be a "covered child," which is defined as "a child of the employee who, as of the employee's death—(A) had not attained the age of 18 years; (B) had not attained the age of 23 years and was a full-time student who had been continuously enrolled as a full-time student in one or more educational institutions since attaining the age of 18 years; or (C) had been incapable of self-support." 42 U.S.C. § 7385s-3(d)(2).

In this case, while **[Claimant #2]** is a "child" of **[Employee]** under Part E, he is not a "covered child," as that term is defined in § 7385s-3(d)(2), because at the time of **[Employee]**'s death on February 21, 2000, he was not under the age of 18, or under the age of 23 and continuously enrolled as a full-time student in an institution of higher learning, or any age and incapable of self-support. As for **[Claimant #1]**, since he is not a "child" of **[Employee]**, as that term is defined in § 7385s-3(d)(3), because he is not a biological child, a stepchild or an adopted child of **[Employee]**, he cannot be a "covered child" of **[Employee]** under Part E because an individual alleging that status must also be a "child" in order to be a "covered child" under the terms of § 7385s-3(d)(2).

Accordingly, **[Claimant #2]** is entitled to survivor benefits for **[Employee]**'s lung cancer under Part B, as outlined in 42 U.S.C. § 7384s(a)(1), and the FAB hereby awards him lump-sum benefits of $150,000.00 for that occupational illness under Part B. **[Claimant #2]**'s claim for survivor benefits under Part E for **[Employee]**'s death due to lung cancer is denied. **[Claimant #1]**'s claim for survivor

benefits under Parts B and E of EEOICPA for **[Employee]**'s condition of lung cancer and his death due to lung cancer, respectively, is denied.

Washington, D.C.

Carrie Rhodes

Hearing Representative

Final Adjudication Branch

[1] On this birth certificate, **[Claimant #1]** is reported to be the child of "**[Claimant #1's Mother]**" and "**[Claimant #1's Father as listed on his birth certificate]**," and **[Claimant #1's Mother]** is reported to be married. The informant for the birth certificate is listed as "**[Mother of Claimant #1's Mother]**".

[2] Subsequent to FAB's remand of the case for referral to the Office of the Solicitor, DEEOIC's policy in this area changed again such that the contemplated referral was not required. This later change in policy was documented in EEOICPA Transmittal No. 04-01 (issued October 22, 2003).

[3] *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005).

[4] Wash. Rev. Code § 51.08.030 (2006).

[5] This request was misdated by BPRP as April 13, 2004. It was actually received in the Office of the Solicitor on December 12, 2006.

[6] Despite this assertion, the seventh "Conclusion of Law" in the September 14, 2007 recommended decision actually stated that **[Claimant #1]** is not a "child" of **[Employee]** "because he is not a *biological* child of **[Employee]**, or a stepchild of **[Employee]**, or an adopted child of **[Employee]**." (emphasis added) The significance of the term "biological" in the quoted phrase is discussed at length below.

[7] *See Weber v. Aetna Cas. & Sur. Company*, 406 U.S. 164 (1972).

[8] Wash. Rev. Code § 51.08.030 (2006).

[9] Rather than replacing an injured worker's wages during a period of disability with regular, periodic payments consisting of a set percentage of the worker's pre-injury wages, EEOICPA benefits are single, lump-sum payments in dollar amounts that are set by the terms of the statute. For an in-depth discussion of the "wage-replacement" nature of workers' compensation statutes, see *Larson's Workers' Compensation Law*, §§ 1.02 and 80.05[3] (2006).

[10] DEEOIC's position that dependency alone does not establish that an individual is a "child" is consistent with other systems where actual familial ties are paramount, such as Washington's statutory provision on the subject of intestate succession. *See* Wash. Rev. Code § 11.04.015.

[11] Before an individual who is not a biological, adoptive or stepparent can be considered a "*de facto* parent" of a child, such individual must prove that: the natural or legal parent of the child consented to and fostered the parent-like relationship; the individual and the child lived together in the same household; the individual assumed the many obligations of parenthood without expectation of financial compensation; and the individual has been in a parental role for a length of time sufficient to have established a bonded, dependent parental relationship with the child. *In re Parentage of L.B.*, 122 P.3d at 176.

[12] Without conceding that the court's four-part test is applicable in this matter, DEEOIC notes that there is no evidence in the file that **[Claimant #1's Mother]** gave her consent to have her son live with **[Employee and Employee's Spouse]** after her death in 1949.

Election of Remedies Under Part B

In general

EEOICPA Fin. Dec. No. 2442-2004 (Dep't of Labor, December 1, 2004)

REVIEW OF THE WRITTEN RECORD AND NOTICE OF FINAL DECISION

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 (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On July 25, 2001, you filed a Form EE-1 (Claim for Employee Benefits under the EEOICPA). You identified beryllium sensitivity and tuberculosis as the conditions being claimed. As the claim was submitted prior to the start of the program, the date of filing is considered to be July 31, 2001, the effective date of the Act.

You also provided a Form EE-3 (Employment History) in which you stated that you were employed at a Beryllium Plant in Reading, Pennsylvania sometime between 1943 and 1945. On April 29, 2003, the corporate verifier for NGK Metals Corporation/Beryllium Corporation (Berylco) verified that you were employed at Berylco from February 6, 1945 to October 23, 1945. Berylco is recognized by the Department of Energy (DOE) as a covered beryllium vendor from 1943 to 1979. *See* DOE, Office of Worker Advocacy Facility List.

You submitted medical records in support of your claim including three reports of abnormal beryllium lymphocyte proliferation tests (BeLPT's) performed on January 23, March 1, and May 11, 2001; as well as, a report of pulmonary testing performed on May 10, 2001. Also submitted was a letter from Milton D. Rossman, M.D., dated May 29, 2001, stating that you were referred for beryllium evaluation as a result of abnormal BeLPTs and slightly reduced pulmonary function test (PFT) results. The letter further stated that the PFTs exhibited reduced lung capacity and that a fiber-optic bronchoscopy yielded 19.8 percent lymphocytes. Dr. Rossman also identified abnormal findings in you chest x-rays. However, Dr. Rossman could not definitively state whether or not your symptoms were due to interstitial lung disease or congestive heart failure.

Based on the information submitted, the Cleveland district office determined that sufficient medical evidence existed to award medical benefits for beryllium sensitivity monitoring. Prior to issuing a decision awarding benefits, the district office on March 4, 2002, sent you Form EE/EN-15, and requested that you sign, complete, and return the documents, as they were required to determine whether or not you were a party to any litigation against a covered "beryllium vendor" or had received a settlement or court judgment arising out of litigation against a "beryllium vendor."

On April 2, 2002, you via legal counsel, requested withdrawal of your claim. Subsequently, on April 3, 2003, you via legal counsel, later verified as your authorized representative, requested a reopening of your claim. On May 8, 2003, the district office again sent you Form EE/EN-15, and requested that you

sign, complete, and return the documents. On June 9, 2003, the district office received a completed Form EN-15 signed by your authorized representative. In addition, your authorized representative indicated that you had not filed a tort suit against a beryllium vendor or atomic weapons employer in connection with either an occupational illness or a consequential injury for which you would be eligible to receive compensation under the EEOICPA. He listed the tort suit ***[Employee]**, et al. v. Cabot Corporation, et al.* and attached a copy of the complaint. The complaint seeks relief for damages allegedly sustained as a result of your alleged exposure to beryllium as "down-winders" living within six miles of the defendants' facility in Reading, Pennsylvania. Also, the complaint includes allegations that were based on your employment at the defendant's Reading, Pennsylvania facility. On June 10, 2003, the district office again sent you Form EE/EN-15, and requested that you sign, complete, and return the documents, as your authorized representative does not have the authority to sign on your behalf. *See* Federal (EEOICPA) Procedure Manual, Chapter 2-1200 (January 2002).

On June 30, 2003, the district office received a completed Form EN-15 signed by you, indicating the same effects initially indicated by your authorized representative. You also provided additional medical evidence in support of chronic beryllium disease (CBD) including a narrative report and pulmonary function studies from Milton D. Rossman, M.D., dated March 14, 2002, indicating a condition consistent with CBD. You submitted a computerized axial tomography (CT) scan of the chest dated April 11, 2002, showing scattered bilateral calcified and non-calcified lung nodules indicative of granulomas. Further, you provided a narrative report and pulmonary function studies from Dr. Rossman, dated August 5, 2002, indicating a condition consistent with CBD.

On July 7, 2003, the district office advised you that the medical information submitted was sufficient to establish a potential claim for CBD; however, it appeared that your lawsuit's cause of action was in part based on your covered employment, as well as, your beryllium illness, and thus could have an adverse affect on your claim for compensation. You were also notified that your complaint would be forwarded to our National Office, as well as, the Department of Labor's Solicitor's Office, to determine if the district office's interpretation of your lawsuit's cause of action was accurate. In addition, you were notified that according to the district office's present interpretation of your lawsuit's cause of action, as well as, the governing statute and regulations, you would not be eligible for compensation benefits. Further, the district office informed you that based on the medical evidence submitted you would have to dismiss your lawsuit by September 1, 2003, to not be disqualified for compensation.

On July 30, 2003, the district office received a statement from your authorized representative that "any reasonable interpretation of the Complaint, particularly viewing Paragraphs 16 through 20 inclusive of the Complaint, makes clear that **[Employee]**'s lawsuit is based upon his exposure as a resident near the Reading plant and nothing more." It is further indicated that the facts the district office is considering are "incidental to the main cause of action which is one for environmental harm."

In order to resolve the issue of whether or not your complaint against Cabot Corporation constituted a tort claim your case was forwarded to the Office of the Solicitor (SOL) for review and opinion. On January 15, 2004, the SOL concluded that, "since the date that **[Employee]** was required by § 7385d(c) to dismiss the portion of his tort suit that involved his employment-related exposure to beryllium passed before he did so, he is no longer potentially entitled to any EEOICPA benefits." Thus, you were required to and did not dismiss any parts of the complaint falling within that description on or before April 30, 2003, also because more than 30 months elapsed before your tort suit was dismissed your potential entitlement to EEOICPA benefits were barred by operation of law. *See* 42 U.S.C. § 7385d(c)(2).

On July 30, 2004, the Branch Chief of Policies, Regulations & Procedures, DEEOIC, sent a letter to the district office noting that, "§ 7385d of the Act states that the tort suit must be dismissed before April 30, 2003 or the date that is 30 months after the date the individual first became aware that an illness covered by subtitle B of a covered employee may be connected to the exposure of the covered employee in the performance of duty under section 3623. In this instance, a review of the medical evidence of file (and of the Form EE-1) reveals that the date you first became aware that your beryllium illness was related to employment was no later than May 29, 2001 (the date of Dr. Rossman's report indicated that you exhibited an abnormal proliferative response to beryllium, showed reduced lung capacity, and underwent a bronchoscopy yielding 19.8 percent lymphocytes, which serves as evidence that you had been diagnosed with a beryllium illness). While there are indications that you were made "aware" of your beryllium illness as early as January 23, 2001, the date of the first abnormal BeLPT, a full review of the medical evidence indicates that you became fully "aware" of your condition on May 29, 2001.

On July 28, 2004, the district office issued a recommended decision which concluded that you are a covered beryllium employee as defined by 42 U.S.C. § 7384l(7) and were exposed to beryllium in the performance of duty under 42 U.S.C. § 7384n. You were diagnosed with a beryllium illness, which is a covered occupational illness as defined by 42 U.S.C. § 7384l(8). The recommended decision further concluded that 42 U.S.C. § 7385d establishes different deadlines, varying according to the date of the filing of a lawsuit, by which an EEOICPA claimant must make the election of remedy. Because your lawsuit was filed on April 17, 2002, subsection 7385d(c) governs this date. That provision states, in subsection (c)(2), that "an otherwise eligible individual" must "dismiss" the "covered tort suit" on or before April 30, 2003 or the date that is 30 months after the date the individual first became aware that an illness covered by Part B may be connected to the exposure of the covered employee in the performance of duty under § 3623. In this instance, the 30 month date was November 29, 2003. Therefore, the recommended decision also concluded that, since the lawsuit was not dismissed until December 17, 2003, you are not eligible for compensation under the Act. Further, the district office concluded that tuberculosis is not an occupational illness as defined by § 7384l(15) of the EEOICPA.

On September 17, 2004, an objection to the recommended decision was received via fax from your authorized representative. The objections were based on issues related to your lawsuit, as well as, evidence in support of CBD.

FINDINGS OF FACT

1. You filed a claim for benefits effective July 31, 2001 based on beryllium sensitivity and tuberculosis.

2. You were employed with Berylco, from February 6, 1945 to October 23, 1945.

3. Berylco is a beryllium vendor.

4. You are a covered beryllium employee, working at Berylco during a covered time period when beryllium was present.

5. You were diagnosed with beryllium sensitivity and submitted medical evidence in support of the post-January 1, 1993 requirements for CBD, both considered occupational illnesses under the EEOICPA.

6. Tuberculosis is not an occupational illness covered under the EEOICPA.

7. Your lawsuit against Cabot Corporation alleges a claim against a beryllium vendor arising out of a covered beryllium employee's employment-related exposure to beryllium.

8. You did not dismiss your lawsuit by November 29 , 2003.

CONCLUSIONS OF LAW

The regulations provide that a claimant may object to any or all of the findings of fact or conclusions of law in the recommended decision. *See* 20 C.F.R. § 30.310. Further, the regulations provide that the Final Adjudication Branch will consider objections by means of a review of the written record, in the absence of a request for a hearing. *See* 20 C.F.R. § 30.312.

The Final Adjudication Branch reviewer will review the record forwarded by the district office and any additional evidence and/or argument submitted by the claimant. *See* 20 C.F.R. § 30.313. Consequently, the Final Adjudication Branch will consider all of the evidence of record in reviewing the claim, including evidence and argument included with the objection(s).

In order to be afforded coverage under the EEOICPA, you must establish that you had been diagnosed with a designated occupational illness resulting from the exposure to silica, beryllium, and/or radiation: *cancer, beryllium sensitivity, chronic beryllium disease*, and *silicosis*. *See* 42 U.S.C. § 7384l(15); 20 C.F.R. § 30.110(a). Further, the illness must have been incurred while in the performance of duty for the Department of Energy and certain of its vendors, contractors, and subcontractors, or for an atomic weapons employer. *See* 42 U.S.C. § 7384l(4)-(7), (9), (11).

The Final Adjudication Branch considered your objections to the recommended decision. First, you indicate that your claim is not merely for beryllium sensitivity under the Act, but for CBD, which was diagnosed in your favor as of August 2002. In addition, you submitted several duplicate copies of Dr. Rossman's diagnostic report dated August 5, 2002. On June 30, 2003, the district office received medical evidence in support of CBD. You submitted a narrative report and pulmonary function studies from Dr. Rossman, dated March 14, 2002, indicating a condition consistent with CBD. You submitted a CT scan of the chest dated April 11, 2002, showing scattered bilateral calcified and non-calcified lung nodules indicative of granulomas. Further, you provided narrative report and pulmonary function studies from Dr. Rossman, dated August 5, 2002, indicating a condition consistent with CBD.

The Final Adjudication Branch notes that all medical evidence submitted to date is post-1993, and thus the statutory criteria on or after January 1, 1993, would apply. For diagnoses on or after January 1, 1993, beryllium sensitivity [based on an abnormal BeLPT], together with lung pathology consistent with CBD, including one of the following: 1) a lung biopsy showing granulomas or a lymphocytic process consistent with CBD; 2) a CT scan showing changes consistent with CBD; or 3) pulmonary function or exercise testing showing pulmonary deficits consistent with CBD. *See* 42 U.S.C. § 7384l(13)(A). One of the three reports of abnormal BeLPT's performed on January 23, March 1, and May 11, 2001, respectively, in combination with the results of Dr. Rossman's pulmonary function study, dated March 14, 2002, are consistent with a diagnosis of CBD after January 1, 1993. However, the condition of CBD is not in dispute, as the July 7, 2003 letter from the district office advised you that the medical information submitted was sufficient to establish a potential claim for CBD.

Second, you indicate that, although you did bring a tort claim against a beryllium vendor, it proceeded solely on the basis of long-standing, non-occupational exposure based upon nearby residency and employment outside of the beryllium vendor's plant, not occupational exposure while employed by a beryllium vendor. The SOL opined that six counts set forth in your April 17, 2002 complaint, rely, at least in part, upon your exposure to beryllium while working for the defendant beryllium vendor, including one count brought by your spouse for loss of consortium. Specifically, paragraphs 6 and 21 of the complaint alleged that you had also been exposed to beryllium in the course of your employment at the defendants' Reading plant in the early 1940's. In addition, paragraph 24 of the complaint alleged that you had sustained CBD due to the above exposures, and paragraph 48 alleged that your spouse "has and will in the future be deprived of her husband's services, companionship and society and hereby claims loss of consortium to her great detriment and loss." The SOL concluded that paragraph 6 and 21 of the complaint alleged that you had been exposed to beryllium while working at the defendants' Reading plant, and these paragraphs were incorporated into all six of the claims raised in the complaint.

Third, you indicate that based on an expert medical report prepared in connection with your legal claim concludes that your exposures from residing and working within the community was the medical cause of your CBD. In addition, you submitted several duplicate copies of the expert medical report from Lisa Maier, M.D., M.S.P.H. You specifically refer to page 17 of the report for conclusion on causation. On page 17 of the report, Dr. Maier states that "it is my medical opinion that his exposures primarily from residing and working with the community surrounding the beryllium facility caused or contributed substantially to his development of chronic beryllium disease." In addition, on page 16 of the report, Dr. Maier states that "he may have also had some exposure while working for a very limited time in the Reading beryllium facility." This report is in further support of your beryllium illness, which, as previously discussed, is not in dispute. Further, issues related to environmental exposure are not issues covered under the EEOICPA, as there is no provision under the EEOICPA for conditions that are not occupationally related.

The Final Adjudication Branch notes that issues related to environmental exposure will not be considered as it has no bearing on the outcome of the decision

In the fourth, fifth, sixth, and seventh parts of your objection, you indicate the following: 1) "The Department of Labor, through its solicitor's office, has clearly ruled in previous claims that a claimant may bring an action for his environment or non-occupational exposure to beryllium and simultaneously maintain a claim under the Act;" 2) As you are not a plaintiff in any lawsuit which requires dismissal under the Act, there is therefore, no obligation to dismiss such a lawsuit as contemplated under 42 U.S.C. § 7385d(c); 3) Notwithstanding that you did not have an obligation to dismiss a lawsuit, your lawsuit, "was marked dismissed upon the dockets, as noted by the recommended decision of July 28, 2004, on December 17, 2003;" and 4) "As the claim herein one for CBD, of which the claimant was made "aware" as defined under 20 C.F.R § 30.618(c)(2), a dismissal of a lawsuit occurred within 30 months after the date of the claimant's diagnosis for CBD on August 5, 2002." Based on these objections you demanded that your claim for benefits be approved.

As noted by the SOL, each of the six counts were based at least in part, upon your exposure to beryllium while working for the defendant beryllium vendor and you were required to dismiss any parts of your complaint arising out of your employment-related exposure to beryllium at the Reading facility. While as you indicated that the SOL has previously opined that an eligible claimant can maintain a lawsuit without the need for dismissal of an environmental claim and simultaneous present a claim under the EEOICPA, your complaint is not solely an environmental claim, as your environmental

claim is not an issue in dispute. As discussed in the SOL's opinion you were required to dismiss any parts of your complaint arising out of your employment-related exposure to beryllium at the Reading facility and did not do so by the date required under the Act.

In order to be eligible for benefits you must also satisfy the requirements under 42 U.S.C. § 7385d. SOL determined that in order to have preserved your eligibility for compensation under the EEOICPA, you were required to dismiss any parts of your complaint arising out of your employment related exposure to beryllium at the Reading facility by April 30, 2003. The Branch of Policies, Regulations and Procedures noted that in addition to the April 30, 2003 date, the Act provides that if the date that is 30 months after the date the individual first became aware that an illness covered by subtitle B of a covered employee may be connected to the exposure of the covered employee in the performance of duty under section 3623 is later, that later date is the date by which the complaint must be dismissed.

Section 30.111(a) of the regulations states that, "Except where otherwise provided in the Act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category set forth in 20 C.F.R. § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing to the Office of Workers Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in these regulations." *See* 20 C.F.R. § 30.111(a).

In addition to meeting the EEOICPA requirements for a covered occupational illness and for covered employment, in cases where tort claims have been filed, 42 U.S.C. § 7385d establishes different deadlines, varying according to the date of the filing of a lawsuit, by which an EEOICPA claimant must make the election of remedy. If an otherwise eligible individual filed a tort case after the date of the enactment of the National Defense Authorization Act for Fiscal Year 2002, subsection 7385d(c) governs this date. That provision states, in subsection (c)(2), that "an otherwise eligible individual" must "dismiss" the "covered tort suit" on or before April 30, 2003 or the date that is 30 months after the date the individual first became aware that an illness covered by Part B may be connected to the exposure of the covered employee in the performance of duty under section 7384n.

On July 7, 2003, the district office advised you that the medical information submitted was sufficient to establish a potential claim for CBD; however, it appeared that your lawsuit's cause of action was in part based on your covered employment, as well as, your beryllium illness, and thus could have an adverse affect on your claim for compensation. Further, the district office informed you that based on the medical evidence submitted you would have to dismiss your lawsuit by September 1, 2003, to not be disqualified for compensation. While there are indications that you were made "aware" of your beryllium illness as early as January 23, 2001, the date of the first abnormal BeLPT, a full review of the medical evidence indicates that you became fully "aware" of your condition on May 29, 2001. Based on the medical evidence of record, you had until November 29, 2003, in order to dismiss the portions of your lawsuit based on occupational exposure to beryllium. However, you did not do so until December 17, 2003.

I have reviewed the evidence in the record and the recommended decision issued by the district office. A review of the evidence shows that you are a covered beryllium employee as defined by 42 U.S.C. § 7384l(7) and were exposed to beryllium in the performance of duty under 42 U.S.C. § 7384n. You also were diagnosed with CBD, which is a covered occupational illness as defined by 42 U.S.C. § 7384(8)

(B) and met the criteria established for this diagnosis under 42 U.S.C. § 7384l(13)(A). However, you did not dismiss the covered tort case as required by 42 U.S.C. § 7385d(c)(2).

Since no evidence was submitted establishing that the lawsuit was timely dismissed your claim for compensation is denied pursuant to the provisions of 42 U.S.C. § 7385d(c)(2). In addition your claim based on tuberculosis is denied, as tuberculosis is not a covered occupational illness defined by § 7384l(15) of the EEOICPA.

Cleveland, Ohio

Debra A. Benedict

Acting District Manager

Final Adjudication Branch

EEOICPA Fin. Dec. No. 5781-2002 (Dep't of Labor, September 12, 2006)

NOTICE OF FINAL DECISION FOLLOWING A REVIEW OF THE WRITTEN RECORD

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 stated below, your claim for benefits is denied, effective June 4, 2003.

STATEMENT OF THE CASE

On August 2, 2001, you filed a Form EE-1 (Claim for Benefits under EEOICPA) based on beryllium sensitivity. You provided a copy of a report of Proliferation Studies, dated March 6, 1998, stated that a significant proliferative response to beryllium salts was observed. The Department of Energy (DOE) verified that you worked at the Beryllium Corporation of America in Reading, PA, from January 13, 1960 to February 28, 1993. The Beryllium Corporation of America in Reading, PA, is recognized as a covered beryllium vendor from 1947 to 1979. *See* DOE, Office of Worker Advocacy, Facility List.

On July 29, 2002, the Cleveland district office received a completed Form EN-15, signed and dated by you on July 24, 2002. In response to a question on that form, you stated that you had not filed a tort suit against a beryllium vendor in connection with an occupational illness for which you would be eligible to receive compensation under the EEOICPA. Above your signature, that form notified you that you must immediately report to OWCP (Office of Workers' Compensation Programs) any third party settlements you receive and any tort suits you file against a beryllium vendor.

On October 29, 2002, the Final Adjudication Branch (FAB) issued a final decision which concluded that, because you are a covered beryllium employee who had been found to have beryllium sensitivity, you were entitled to beryllium sensitivity monitoring beginning on August 2, 2001.

On June 4, 2003, you and approximately 50 other plaintiffs filed a tort suit against the Beryllium Corporation of America and its successors in the Court of Common Pleas of Philadelphia County, PA. Paragraph 55 of the complaint stated that the plaintiffs "resided and/or worked in close proximity to the plant, commuted to and/or worked within the plant. . . ." Paragraph 65 stated that "[d]uring each of the plaintiffs' residence and/or employment. . .they were exposed to unlawful, dangerous and unhealthful emissions of beryllium resulting in serious and permanent injury, or the need for medical monitoring. . . ." Under Count I (Paragraph 80) of that suit, you alleged that, as a direct and proximate result of the negligence, carelessness, and recklessness, of the defendants, you sustained, "occupational and non-occupational exposure resulting in beryllium sensitivity," for which you demanded "judgment against the defendants. . .in an amount in excess of Fifty Thousand ($50,000) Dollars."

The complaint was dismissed by the court on August 5, 2003. The court ruled that the complaint had improperly joined multiple unrelated plaintiffs and ordered that the plaintiffs be severed. You filed an amended complaint on September 18, 2003, and second and third amended complaints in April and May 2004. Each amended complaint alleged damages from your occupational exposure to beryllium. No evidence has been received to show that this tort suit has been dismissed.

The tort suit was reviewed by the Counsel for Energy Employees Compensation, Division of Federal Employees' and Energy Workers' Compensation. The Counsel reported in a memorandum dated January 4, 2005, that an examination of your complaint revealed that your claims relied, at least in part, on your exposure to beryllium while working at the Reading plant and that your wife's consortium claim was derivative of your work-related exposure to beryllium. For that reason, it was determined that at least some aspects of your suit clearly fall within the statutory definition of a covered tort case subject to 42 U.S.C. § 7385d, because it includes claims against beryllium vendors that arise out of the exposure of a covered beryllium employee, while so employed, to beryllium.

The Counsel further noted that 42 U.S.C. § 7385d(c) explicitly bars further receipt of benefits under Part B of the Act by any beneficiary who files a tort suit covered under 42 U.S.C. § 7385d(d) after April 30, 2003, if that date is more than 30 months after the diagnosis of a covered beryllium disease. Because you filed your suit on June 4, 2003, you could not have dismissed that suit within the time limits specified in 42 U.S.C. § 7385d(c). For those reasons, the Counsel determined that you no longer had any eligibility for benefits under Part B of the Act, by operation of law, as of June 4, 2003.

The Counsel also noted that a claimant who accepts EEOICPA benefits has legal obligations under the Act. At the time you accepted benefits, you had signed a Form EN-15 and certified that you knew you must immediately report to OWCP any tort suit you filed against a beryllium vendor.

On March 28, 2006, the Director, Division of Energy Employees Occupational Illness Compensation (DEEOIC), issued an order vacating the final decision of October 29, 2002, and directing the Cleveland district office to issue a new recommended decision terminating entitlement to benefits under EEOICPA effective June 4, 2003. On April 19, 2006, the district office issued a recommended decision pursuant to the Director's order.

OBJECTIONS

On June 16, 2006, the Final Adjudication Branch received your statement of objection to the recommended decision. You presented the following objections:

1. You argue that bases for your claims in your tort suit are environmental in nature.

2. You argue that a Memorandum Opinion of an Associate Solicitor for Employee Benefits in the matter of **[Name Deleted]** affirmed that a claimant can maintain both a claim under the EEOICPA for occupational exposure to beryllium and a separate tort suit for environmental exposure to beryllium

3. You argue that your complaint is identical to the one filed by **[Name Deleted]**, Docket No. 12401-2002, who brought an exposure claim as a result of the operations of the Reading plant. You state that your and **[Name Deleted]** lawsuits are identical and that **[Name Deleted]** was awarded benefits by the Final Adjudication Branch.

While a claimant may maintain a claim under the EEOICPA based on occupational exposure to beryllium and a separate tort suit based on environmental exposure to beryllium, your tort suit specifically alleges occupational and environmental exposure to beryllium. A review of **[Name Deleted]**'s suit fails to reveal any reference to occupational exposure as the basis of his claim for damages. For that reason, your tort suit and **[Name Deleted]**'s tort suit are not identical.

Because your complaint and demand for damages relies, at least in part, on your exposure to beryllium while working at the Reading plant, and because your wife's consortium claim is derivative of your work-related exposure to beryllium, your suit is a "covered tort case" under the provisions of 42 U.S.C. § 7385d(d). As such, 42 U.S.C. § 7385d(c) requires that your suit must be dismissed no later than April 30, 2003; as that date is later than the date that is 30 months from the date you were determined to have been sensitized to beryllium. (Beryllium sensitivity was first identified on March 6, 1998. September 6, 2000, is 30 months from that date.)

FINDINGS OF FACT

1. You were awarded medical monitoring for beryllium sensitivity, effective August 2, 2001, by final decision issued on October 29, 2002.

2. You filed a tort suit on June 4, 2003, against a beryllium vendor based on injuries incurred on account of exposure for which you had been found to be entitled to compensation under Part B of the Act in the form of medical monitoring for beryllium sensitivity.

3. The Director, DEEOIC, vacated the final decision of October 29, 2002.

CONCLUSIONS OF LAW

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, pursuant to 20 C.F.R. § 30.310. In reviewing any objections submitted, the FAB will review the written record, in the manner specified in 20 C.F.R. § 30.313, to include any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. I have reviewed the record in this case, as well as the written objections and must conclude that no further investigation is warranted.

I find that the tort suit you and your wife filed on June 4, 2003, against a beryllium vendor, is a "covered tort suit" as defined by 42 U.S.C. § 7385d(d). Because you could not have dismissed that suit by the latest date provided by 42 U.S.C. § 7385d(c)(3), April 30, 2003, I find that you are no longer entitled to medical monitoring for beryllium sensitivity effective June 4, 2003.
Cleveland, OH

Anthony Zona

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 2442-2004 (Dep't of Labor, December 1, 2004)

REVIEW OF THE WRITTEN RECORD AND NOTICE OF FINAL DECISION

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 (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On July 25, 2001, you filed a Form EE-1 (Claim for Employee Benefits under the EEOICPA). You identified beryllium sensitivity and tuberculosis as the conditions being claimed. As the claim was submitted prior to the start of the program, the date of filing is considered to be July 31, 2001, the effective date of the Act.

You also provided a Form EE-3 (Employment History) in which you stated that you were employed at a Beryllium Plant in Reading, Pennsylvania sometime between 1943 and 1945. On April 29, 2003, the corporate verifier for NGK Metals Corporation/Beryllium Corporation (Berylco) verified that you were employed at Berylco from February 6, 1945 to October 23, 1945. Berylco is recognized by the Department of Energy (DOE) as a covered beryllium vendor from 1943 to 1979. *See* DOE, Office of Worker Advocacy Facility List.

You submitted medical records in support of your claim including three reports of abnormal beryllium lymphocyte proliferation tests (BeLPT's) performed on January 23, March 1, and May 11, 2001; as well as, a report of pulmonary testing performed on May 10, 2001. Also submitted was a letter from

Milton D. Rossman, M.D., dated May 29, 2001, stating that you were referred for beryllium evaluation as a result of abnormal BeLPTs and slightly reduced pulmonary function test (PFT) results. The letter further stated that the PFTs exhibited reduced lung capacity and that a fiber-optic bronchoscopy yielded 19.8 percent lymphocytes. Dr. Rossman also identified abnormal findings in you chest x-rays. However, Dr. Rossman could not definitively state whether or not your symptoms were due to interstitial lung disease or congestive heart failure.

Based on the information submitted, the Cleveland district office determined that sufficient medical evidence existed to award medical benefits for beryllium sensitivity monitoring. Prior to issuing a decision awarding benefits, the district office on March 4, 2002, sent you Form EE/EN-15, and requested that you sign, complete, and return the documents, as they were required to determine whether or not you were a party to any litigation against a covered "beryllium vendor" or had received a settlement or court judgment arising out of litigation against a "beryllium vendor."

On April 2, 2002, you via legal counsel, requested withdrawal of your claim. Subsequently, on April 3, 2003, you via legal counsel, later verified as your authorized representative, requested a reopening of your claim. On May 8, 2003, the district office again sent you Form EE/EN-15, and requested that you sign, complete, and return the documents. On June 9, 2003, the district office received a completed Form EN-15 signed by your authorized representative. In addition, your authorized representative indicated that you had not filed a tort suit against a beryllium vendor or atomic weapons employer in connection with either an occupational illness or a consequential injury for which you would be eligible to receive compensation under the EEOICPA. He listed the tort suit ***[Employee]****, et al. v. Cabot Corporation, et al.* and attached a copy of the complaint. The complaint seeks relief for damages allegedly sustained as a result of your alleged exposure to beryllium as "down-winders" living within six miles of the defendants' facility in Reading, Pennsylvania. Also, the complaint includes allegations that were based on your employment at the defendant's Reading, Pennsylvania facility. On June 10, 2003, the district office again sent you Form EE/EN-15, and requested that you sign, complete, and return the documents, as your authorized representative does not have the authority to sign on your behalf. *See* Federal (EEOICPA) Procedure Manual, Chapter 2-1200 (January 2002).

On June 30, 2003, the district office received a completed Form EN-15 signed by you, indicating the same effects initially indicated by your authorized representative. You also provided additional medical evidence in support of chronic beryllium disease (CBD) including a narrative report and pulmonary function studies from Milton D. Rossman, M.D., dated March 14, 2002, indicating a condition consistent with CBD. You submitted a computerized axial tomography (CT) scan of the chest dated April 11, 2002, showing scattered bilateral calcified and non-calcified lung nodules indicative of granulomas. Further, you provided a narrative report and pulmonary function studies from Dr. Rossman, dated August 5, 2002, indicating a condition consistent with CBD.

On July 7, 2003, the district office advised you that the medical information submitted was sufficient to establish a potential claim for CBD; however, it appeared that your lawsuit's cause of action was in part based on your covered employment, as well as, your beryllium illness, and thus could have an adverse affect on your claim for compensation. You were also notified that your complaint would be forwarded to our National Office, as well as, the Department of Labor's Solicitor's Office, to determine if the district office's interpretation of your lawsuit's cause of action was accurate. In addition, you were notified that according to the district office's present interpretation of your lawsuit's cause of action, as well as, the governing statute and regulations, you would not be eligible for compensation benefits. Further, the district office informed you that based on the medical evidence submitted you would have to dismiss your lawsuit by September 1, 2003, to not be disqualified for compensation.

On July 30, 2003, the district office received a statement from your authorized representative that "any reasonable interpretation of the Complaint, particularly viewing Paragraphs 16 through 20 inclusive of the Complaint, makes clear that **[Employee]**'s lawsuit is based upon his exposure as a resident near the Reading plant and nothing more." It is further indicated that the facts the district office is considering are "incidental to the main cause of action which is one for environmental harm."

In order to resolve the issue of whether or not your complaint against Cabot Corporation constituted a tort claim your case was forwarded to the Office of the Solicitor (SOL) for review and opinion. On January 15, 2004, the SOL concluded that, "since the date that **[Employee]** was required by § 7385d(c) to dismiss the portion of his tort suit that involved his employment-related exposure to beryllium passed before he did so, he is no longer potentially entitled to any EEOICPA benefits." Thus, you were required to and did not dismiss any parts of the complaint falling within that description on or before April 30, 2003, also because more than 30 months elapsed before your tort suit was dismissed your potential entitlement to EEOICPA benefits were barred by operation of law. *See* 42 U.S.C. § 7385d(c)(2).

On July 30, 2004, the Branch Chief of Policies, Regulations & Procedures, DEEOIC, sent a letter to the district office noting that, "§ 7385d of the Act states that the tort suit must be dismissed before April 30, 2003 or the date that is 30 months after the date the individual first became aware that an illness covered by subtitle B of a covered employee may be connected to the exposure of the covered employee in the performance of duty under section 3623. In this instance, a review of the medical evidence of file (and of the Form EE-1) reveals that the date you first became aware that your beryllium illness was related to employment was no later than May 29, 2001 (the date of Dr. Rossman's report indicated that you exhibited an abnormal proliferative response to beryllium, showed reduced lung capacity, and underwent a bronchoscopy yielding 19.8 percent lymphocytes, which serves as evidence that you had been diagnosed with a beryllium illness). While there are indications that you were made "aware" of your beryllium illness as early as January 23, 2001, the date of the first abnormal BeLPT, a full review of the medical evidence indicates that you became fully "aware" of your condition on May 29, 2001.

On July 28, 2004, the district office issued a recommended decision which concluded that you are a covered beryllium employee as defined by 42 U.S.C. § 7384l(7) and were exposed to beryllium in the performance of duty under 42 U.S.C. § 7384n. You were diagnosed with a beryllium illness, which is a covered occupational illness as defined by 42 U.S.C. § 7384l(8). The recommended decision further concluded that 42 U.S.C. § 7385d establishes different deadlines, varying according to the date of the filing of a lawsuit, by which an EEOICPA claimant must make the election of remedy. Because your lawsuit was filed on April 17, 2002, subsection 7385d(c) governs this date. That provision states, in subsection (c)(2), that "an otherwise eligible individual" must "dismiss" the "covered tort suit" on or before April 30, 2003 or the date that is 30 months after the date the individual first became aware that an illness covered by Part B may be connected to the exposure of the covered employee in the performance of duty under § 3623. In this instance, the 30 month date was November 29, 2003. Therefore, the recommended decision also concluded that, since the lawsuit was not dismissed until December 17, 2003, you are not eligible for compensation under the Act. Further, the district office concluded that tuberculosis is not an occupational illness as defined by § 7384l(15) of the EEOICPA.

On September 17, 2004, an objection to the recommended decision was received via fax from your authorized representative. The objections were based on issues related to your lawsuit, as well as, evidence in support of CBD.

FINDINGS OF FACT

1. You filed a claim for benefits effective July 31, 2001 based on beryllium sensitivity and tuberculosis.

2. You were employed with Berylco, from February 6, 1945 to October 23, 1945.

3. Berylco is a beryllium vendor.

4. You are a covered beryllium employee, working at Berylco during a covered time period when beryllium was present.

5. You were diagnosed with beryllium sensitivity and submitted medical evidence in support of the post-January 1, 1993 requirements for CBD, both considered occupational illnesses under the EEOICPA.

6. Tuberculosis is not an occupational illness covered under the EEOICPA.

7. Your lawsuit against Cabot Corporation alleges a claim against a beryllium vendor arising out of a covered beryllium employee's employment-related exposure to beryllium.

8. You did not dismiss your lawsuit by November 29 , 2003.

CONCLUSIONS OF LAW

The regulations provide that a claimant may object to any or all of the findings of fact or conclusions of law in the recommended decision. *See* 20 C.F.R. § 30.310. Further, the regulations provide that the Final Adjudication Branch will consider objections by means of a review of the written record, in the absence of a request for a hearing. *See* 20 C.F.R. § 30.312.

The Final Adjudication Branch reviewer will review the record forwarded by the district office and any additional evidence and/or argument submitted by the claimant. *See* 20 C.F.R. § 30.313. Consequently, the Final Adjudication Branch will consider all of the evidence of record in reviewing the claim, including evidence and argument included with the objection(s).

In order to be afforded coverage under the EEOICPA, you must establish that you had been diagnosed with a designated occupational illness resulting from the exposure to silica, beryllium, and/or radiation: *cancer, beryllium sensitivity, chronic beryllium disease*, and *silicosis*. *See* 42 U.S.C. § 7384l(15); 20 C.F.R. § 30.110(a). Further, the illness must have been incurred while in the performance of duty for the Department of Energy and certain of its vendors, contractors, and subcontractors, or for an atomic weapons employer. *See* 42 U.S.C. § 7384l(4)-(7), (9), (11).

The Final Adjudication Branch considered your objections to the recommended decision. First, you indicate that your claim is not merely for beryllium sensitivity under the Act, but for CBD, which was diagnosed in your favor as of August 2002. In addition, you submitted several duplicate copies of Dr. Rossman's diagnostic report dated August 5, 2002. On June 30, 2003, the district office received medical evidence in support of CBD. You submitted a narrative report and pulmonary function studies from Dr. Rossman, dated March 14, 2002, indicating a condition consistent with CBD. You submitted

a CT scan of the chest dated April 11, 2002, showing scattered bilateral calcified and non-calcified lung nodules indicative of granulomas. Further, you provided narrative report and pulmonary function studies from Dr. Rossman, dated August 5, 2002, indicating a condition consistent with CBD.

The Final Adjudication Branch notes that all medical evidence submitted to date is post-1993, and thus the statutory criteria on or after January 1, 1993, would apply. For diagnoses on or after January 1, 1993, beryllium sensitivity [based on an abnormal BeLPT], together with lung pathology consistent with CBD, including one of the following: 1) a lung biopsy showing granulomas or a lymphocytic process consistent with CBD; 2) a CT scan showing changes consistent with CBD; or 3) pulmonary function or exercise testing showing pulmonary deficits consistent with CBD. *See* 42 U.S.C. § 7384l(13)(A). One of the three reports of abnormal BeLPT's performed on January 23, March 1, and May 11, 2001, respectively, in combination with the results of Dr. Rossman's pulmonary function study, dated March 14, 2002, are consistent with a diagnosis of CBD after January 1, 1993. However, the condition of CBD is not in dispute, as the July 7, 2003 letter from the district office advised you that the medical information submitted was sufficient to establish a potential claim for CBD.

Second, you indicate that, although you did bring a tort claim against a beryllium vendor, it proceeded solely on the basis of long-standing, non-occupational exposure based upon nearby residency and employment outside of the beryllium vendor's plant, not occupational exposure while employed by a beryllium vendor. The SOL opined that six counts set forth in your April 17, 2002 complaint, rely, at least in part, upon your exposure to beryllium while working for the defendant beryllium vendor, including one count brought by your spouse for loss of consortium. Specifically, paragraphs 6 and 21 of the complaint alleged that you had also been exposed to beryllium in the course of your employment at the defendants' Reading plant in the early 1940's. In addition, paragraph 24 of the complaint alleged that you had sustained CBD due to the above exposures, and paragraph 48 alleged that your spouse "has and will in the future be deprived of her husband's services, companionship and society and hereby claims loss of consortium to her great detriment and loss." The SOL concluded that paragraph 6 and 21 of the complaint alleged that you had been exposed to beryllium while working at the defendants' Reading plant, and these paragraphs were incorporated into all six of the claims raised in the complaint.

Third, you indicate that based on an expert medical report prepared in connection with your legal claim concludes that your exposures from residing and working within the community was the medical cause of your CBD. In addition, you submitted several duplicate copies of the expert medical report from Lisa Maier, M.D., M.S.P.H. You specifically refer to page 17 of the report for conclusion on causation. On page 17 of the report, Dr. Maier states that "it is my medical opinion that his exposures primarily from residing and working with the community surrounding the beryllium facility caused or contributed substantially to his development of chronic beryllium disease." In addition, on page 16 of the report, Dr. Maier states that "he may have also had some exposure while working for a very limited time in the Reading beryllium facility." This report is in further support of your beryllium illness, which, as previously discussed, is not in dispute. Further, issues related to environmental exposure are not issues covered under the EEOICPA, as there is no provision under the EEOICPA for conditions that are not occupationally related.

The Final Adjudication Branch notes that issues related to environmental exposure will not be considered as it has no bearing on the outcome of the decision.

In the fourth, fifth, sixth, and seventh parts of your objection, you indicate the following: 1) "The Department of Labor, through its solicitor's office, has clearly ruled in previous claims that a claimant

may bring an action for his environment or non-occupational exposure to beryllium and simultaneously maintain a claim under the Act;" 2) As you are not a plaintiff in any lawsuit which requires dismissal under the Act, there is therefore, no obligation to dismiss such a lawsuit as contemplated under 42 U.S.C. § 7385d(c); 3) Notwithstanding that you did not have an obligation to dismiss a lawsuit, your lawsuit, "was marked dismissed upon the dockets, as noted by the recommended decision of July 28, 2004, on December 17, 2003;" and 4) "As the claim herein one for CBD, of which the claimant was made "aware" as defined under 20 C.F.R § 30.618(c)(2), a dismissal of a lawsuit occurred within 30 months after the date of the claimant's diagnosis for CBD on August 5, 2002." Based on these objections you demanded that your claim for benefits be approved.

As noted by the SOL, each of the six counts were based at least in part, upon your exposure to beryllium while working for the defendant beryllium vendor and you were required to dismiss any parts of your complaint arising out of your employment-related exposure to beryllium at the Reading facility. While as you indicated that the SOL has previously opined that an eligible claimant can maintain a lawsuit without the need for dismissal of an environmental claim and simultaneous present a claim under the EEOICPA, your complaint is not solely an environmental claim, as your environmental claim is not an issue in dispute. As discussed in the SOL's opinion you were required to dismiss any parts of your complaint arising out of your employment-related exposure to beryllium at the Reading facility and did not do so by the date required under the Act.

In order to be eligible for benefits you must also satisfy the requirements under 42 U.S.C. § 7385d. SOL determined that in order to have preserved your eligibility for compensation under the EEOICPA, you were required to dismiss any parts of your complaint arising out of your employment related exposure to beryllium at the Reading facility by April 30, 2003. The Branch of Policies, Regulations and Procedures noted that in addition to the April 30, 2003 date, the Act provides that if the date that is 30 months after the date the individual first became aware that an illness covered by subtitle B of a covered employee may be connected to the exposure of the covered employee in the performance of duty under section 3623 is later, that later date is the date by which the complaint must be dismissed.

Section 30.111(a) of the regulations states that, "Except where otherwise provided in the Act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category set forth in 20 C.F.R. § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing to the Office of Workers Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in these regulations." *See* 20 C.F.R. § 30.111(a).

In addition to meeting the EEOICPA requirements for a covered occupational illness and for covered employment, in cases where tort claims have been filed, 42 U.S.C. § 7385d establishes different deadlines, varying according to the date of the filing of a lawsuit, by which an EEOICPA claimant must make the election of remedy. If an otherwise eligible individual filed a tort case after the date of the enactment of the National Defense Authorization Act for Fiscal Year 2002, subsection 7385d(c) governs this date. That provision states, in subsection (c)(2), that "an otherwise eligible individual" must "dismiss" the "covered tort suit" on or before April 30, 2003 or the date that is 30 months after the date the individual first became aware that an illness covered by Part B may be connected to the exposure of the covered employee in the performance of duty under section 7384n.

On July 7, 2003, the district office advised you that the medical information submitted was sufficient to establish a potential claim for CBD; however, it appeared that your lawsuit's cause of action was in part based on your covered employment, as well as, your beryllium illness, and thus could have an adverse affect on your claim for compensation. Further, the district office informed you that based on the medical evidence submitted you would have to dismiss your lawsuit by September 1, 2003, to not be disqualified for compensation. While there are indications that you were made "aware" of your beryllium illness as early as January 23, 2001, the date of the first abnormal BeLPT, a full review of the medical evidence indicates that you became fully "aware" of your condition on May 29, 2001. Based on the medical evidence of record, you had until November 29, 2003, in order to dismiss the portions of your lawsuit based on occupational exposure to beryllium. However, you did not do so until December 17, 2003.

I have reviewed the evidence in the record and the recommended decision issued by the district office. A review of the evidence shows that you are a covered beryllium employee as defined by 42 U.S.C. § 7384l(7) and were exposed to beryllium in the performance of duty under 42 U.S.C. § 7384n. You also were diagnosed with CBD, which is a covered occupational illness as defined by 42 U.S.C. § 7384(8)(B) and met the criteria established for this diagnosis under 42 U.S.C. § 7384l(13)(A). However, you did not dismiss the covered tort case as required by 42 U.S.C. § 7385d(c)(2).

Since no evidence was submitted establishing that the lawsuit was timely dismissed your claim for compensation is denied pursuant to the provisions of 42 U.S.C. § 7385d(c)(2). In addition your claim based on tuberculosis is denied, as tuberculosis is not a covered occupational illness defined by § 7384l(15) of the EEOICPA.

Cleveland, Ohio

Debra A. Benedict

Acting District Manager

Final Adjudication Branch

EEOICPA Fin. Dec. No. 5781-2002 (Dep't of Labor, September 12, 2006)

NOTICE OF FINAL DECISION FOLLOWING A REVIEW OF THE WRITTEN RECORD

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 stated below, your claim for benefits is denied, effective June 4, 2003.

STATEMENT OF THE CASE

On August 2, 2001, you filed a Form EE-1 (Claim for Benefits under EEOICPA) based on beryllium sensitivity. You provided a copy of a report of Proliferation Studies, dated March 6, 1998, stated that a significant proliferative response to beryllium salts was observed. The Department of Energy (DOE) verified that you worked at the Beryllium Corporation of America in Reading, PA, from January 13, 1960 to February 28, 1993. The Beryllium Corporation of America in Reading, PA, is recognized as a

covered beryllium vendor from 1947 to 1979. *See* DOE, Office of Worker Advocacy, Facility List.

On July 29, 2002, the Cleveland district office received a completed Form EN-15, signed and dated by you on July 24, 2002. In response to a question on that form, you stated that you had not filed a tort suit against a beryllium vendor in connection with an occupational illness for which you would be eligible to receive compensation under the EEOICPA. Above your signature, that form notified you that you must immediately report to OWCP (Office of Workers' Compensation Programs) any third party settlements you receive and any tort suits you file against a beryllium vendor.

On October 29, 2002, the Final Adjudication Branch (FAB) issued a final decision which concluded that, because you are a covered beryllium employee who had been found to have beryllium sensitivity, you were entitled to beryllium sensitivity monitoring beginning on August 2, 2001.

On June 4, 2003, you and approximately 50 other plaintiffs filed a tort suit against the Beryllium Corporation of America and its successors in the Court of Common Pleas of Philadelphia County, PA. Paragraph 55 of the complaint stated that the plaintiffs "resided and/or worked in close proximity to the plant, commuted to and/or worked within the plant. . . ." Paragraph 65 stated that "[d]uring each of the plaintiffs' residence and/or employment. . .they were exposed to unlawful, dangerous and unhealthful emissions of beryllium resulting in serious and permanent injury, or the need for medical monitoring. . . ." Under Count I (Paragraph 80) of that suit, you alleged that, as a direct and proximate result of the negligence, carelessness, and recklessness, of the defendants, you sustained, "occupational and non-occupational exposure resulting in beryllium sensitivity," for which you demanded "judgment against the defendants. . .in an amount in excess of Fifty Thousand ($50,000) Dollars."

The complaint was dismissed by the court on August 5, 2003. The court ruled that the complaint had improperly joined multiple unrelated plaintiffs and ordered that the plaintiffs be severed. You filed an amended complaint on September 18, 2003, and second and third amended complaints in April and May 2004. Each amended complaint alleged damages from your occupational exposure to beryllium. No evidence has been received to show that this tort suit has been dismissed.

The tort suit was reviewed by the Counsel for Energy Employees Compensation, Division of Federal Employees' and Energy Workers' Compensation. The Counsel reported in a memorandum dated January 4, 2005, that an examination of your complaint revealed that your claims relied, at least in part, on your exposure to beryllium while working at the Reading plant and that your wife's consortium claim was derivative of your work-related exposure to beryllium. For that reason, it was determined that at least some aspects of your suit clearly fall within the statutory definition of a covered tort case subject to 42 U.S.C. § 7385d, because it includes claims against beryllium vendors that arise out of the exposure of a covered beryllium employee, while so employed, to beryllium.

The Counsel further noted that 42 U.S.C. § 7385d(c) explicitly bars further receipt of benefits under Part B of the Act by any beneficiary who files a tort suit covered under 42 U.S.C. § 7385d(d) after April 30, 2003, if that date is more than 30 months after the diagnosis of a covered beryllium disease. Because you filed your suit on June 4, 2003, you could not have dismissed that suit within the time limits specified in 42 U.S.C. § 7385d(c). For those reasons, the Counsel determined that you no longer had any eligibility for benefits under Part B of the Act, by operation of law, as of June 4, 2003.

The Counsel also noted that a claimant who accepts EEOICPA benefits has legal obligations under the Act. At the time you accepted benefits, you had signed a Form EN-15 and certified that you knew you must immediately report to OWCP any tort suit you filed against a beryllium vendor.

On March 28, 2006, the Director, Division of Energy Employees Occupational Illness Compensation (DEEOIC), issued an order vacating the final decision of October 29, 2002, and directing the Cleveland district office to issue a new recommended decision terminating entitlement to benefits under EEOICPA effective June 4, 2003. On April 19, 2006, the district office issued a recommended decision pursuant to the Director's order.

OBJECTIONS

On June 16, 2006, the Final Adjudication Branch received your statement of objection to the recommended decision. You presented the following objections:

1. You argue that bases for your claims in your tort suit are environmental in nature.

2. You argue that a Memorandum Opinion of an Associate Solicitor for Employee Benefits in the matter of **[Name Deleted]** affirmed that a claimant can maintain both a claim under the EEOICPA for occupational exposure to beryllium and a separate tort suit for environmental exposure to beryllium

3. You argue that your complaint is identical to the one filed by **[Name Deleted]**, Docket No. 12401-2002, who brought an exposure claim as a result of the operations of the Reading plant. You state that your and **[Name Deleted]** lawsuits are identical and that **[Name Deleted]** was awarded benefits by the Final Adjudication Branch.

While a claimant may maintain a claim under the EEOICPA based on occupational exposure to beryllium and a separate tort suit based on environmental exposure to beryllium, your tort suit specifically alleges occupational and environmental exposure to beryllium. A review of **[Name Deleted]**'s suit fails to reveal any reference to occupational exposure as the basis of his claim for damages. For that reason, your tort suit and **[Name Deleted]**'s tort suit are not identical.

Because your complaint and demand for damages relies, at least in part, on your exposure to beryllium while working at the Reading plant, and because your wife's consortium claim is derivative of your work-related exposure to beryllium, your suit is a "covered tort case" under the provisions of 42 U.S.C. § 7385d(d). As such, 42 U.S.C. § 7385d(c) requires that your suit must be dismissed no later than April 30, 2003; as that date is later than the date that is 30 months from the date you were determined to have been sensitized to beryllium. (Beryllium sensitivity was first identified on March 6, 1998. September 6, 2000, is 30 months from that date.)

FINDINGS OF FACT

1. You were awarded medical monitoring for beryllium sensitivity, effective August 2, 2001, by final decision issued on October 29, 2002.

2. You filed a tort suit on June 4, 2003, against a beryllium vendor based on injuries incurred on account of exposure for which you had been found to be entitled to compensation under Part B of the Act in the form of medical monitoring for beryllium sensitivity.

3. The Director, DEEOIC, vacated the final decision of October 29, 2002.

CONCLUSIONS OF LAW

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, pursuant to 20 C.F.R. § 30.310. In reviewing any objections submitted, the FAB will review the written record, in the manner specified in 20 C.F.R. § 30.313, to include any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. I have reviewed the record in this case, as well as the written objections and must conclude that no further investigation is warranted.

I find that the tort suit you and your wife filed on June 4, 2003, against a beryllium vendor, is a "covered tort suit" as defined by 42 U.S.C. § 7385d(d). Because you could not have dismissed that suit by the latest date provided by 42 U.S.C. § 7385d(c)(3), April 30, 2003, I find that you are no longer entitled to medical monitoring for beryllium sensitivity effective June 4, 2003.
Cleveland, OH

Anthony Zona

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 4846-2004 (Dep't of Labor, November 23, 2004)

REVIEW OF THE WRITTEN RECORD AND NOTICE OF FINAL DECISION

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 (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On August 1, 2001, you filed a claim, Form EE-1, for benefits under the EEOICPA. You identified the diagnosed condition being claimed as chronic beryllium disease (CBD). You provided medical documentation showing findings consistent with CBD as of January 31, 2000. You provided a pulmonary function test report, dated February 5, 2002, which shows an obstructive ventilatory defect of moderate severity and the report of a beryllium lymphocyte proliferation test, based on blood drawn on January 31, 2000, which was normal. A pathology report of a biopsy specimen taken on January 31, 2000, shows findings of non-necrotizing granulomas, which the pathologist stated is a feature consistent with a clinical diagnosis of pulmonary berylliosis. Dr. Raed A. Dweik reviewed the results of that test and reported on March 17, 2000, that non-necrotizing granulomas were superimposed on features of emphysema. He states that these findings are consistent with CBD superimposed on emphysema.

You also provided a Form EE-3 (Employment History) in which you state that you worked for Pinkerton Guard at Brush Wellman Inc., in Elmore, OH, from 1976 to 1980. Based on evidence from Brush Wellman Inc., information in a doctor's narrative filed in support of an Ohio Bureau of Workers'

Compensation claim, and information in a Journal Entry and Opinion from the Cuyahoga Court of Common Pleas, it was determined that you had been employed as a subcontractor employee at Brush Wellman Inc., in Elmore, OH, from at least the end of 1975 to the beginning of 1978. The Brush Beryllium Co. in Elmore, OH, is recognized as a covered beryllium vendor from 1957 to 2001. *See* DOE Office of Worker Advocacy Facility List.

You also provided a copy of a tort suit that you had filed against Brush Wellman Inc. in which you alleged that you had developed CBD due to exposure to beryllium in the course of your employment. The date of filing of this tort suit was not indicated.

On January 17, 2003, the Cleveland district office sent you a letter which advised you that you must report the outcome of your lawsuit against Brush Wellman. You were instructed to report whether the suit had been dismissed, if you had received a settlement, and the amount of any such settlement. On January 30, 2003, the district office received your statement that you had filed the suit in early February or March 2000 and that you had taken no action regarding the suit as of January 26, 2003. In a telephone conversation with the district office on April 17, 2003, you stated that you had not dropped the lawsuit, but would consider doing so within the next 30 days. You were advised that, if the suit was not dismissed by December 30, 2003, benefits could not be paid even if you were found to be otherwise entitled to compensation under the EEOICPA. This conversation was followed by a letter to you from the district office on April 24, 2003, in which you expressed your awareness that you must dismiss the suit prior to December 31, 2003, in order to be eligible for benefits under the EEOICPA. You were provided a pamphlet titled, "How a Tort Action Affects Your Right to EEOICPA Benefits."

On August 26, 2003, the district office sent you a letter in response to a telephone call from your wife in which she had stated that your lawsuit had been dismissed. You were requested to provide evidence that the suit was dismissed and a statement of any monies paid to you or your wife by Brush Wellman within 14 days of that letter. On October 2, 2003, the district office received a copy of a Notice of Dismissal from the Court of Appeals, Eighth Appellate District, Cuyahoga County, filed with the court on September 26, 2003, requesting the court to issue an order dismissing the appeal with prejudice. On October 15, 2003, the district office received a letter from your authorized representative stating that neither you, nor any other person, had received compensation from a third party, other than Ohio Workers' Compensation benefits, as a result of any legal action filed on your behalf. On November 11, 2003, the district office received a Journal Entry and Opinion of the Cuyahoga Court of Common Pleas stating that defendant Brush Wellman's Motion for Summary Judgment was granted. The document is undated.

On February 5, 2004, the district office issued a recommended decision concluding that you are a covered beryllium employee who has been diagnosed with CBD and that you are entitled to compensation in the amount of $150,000 pursuant to 42 U.S.C. § 7384s(a)(1). The district office also concluded that you are entitled to medical benefits for CBD, effective August 1, 2001, as those benefits are described in 42 U.S.C. § 7384t.

On February 10, 2004, the Final Adjudication Branch (FAB) received written notification that you waive any and all objections to the recommended decision. Also on that date, the FAB obtained a copy of the docket of your tort suit from the Cuyahoga Court of Common Pleas. The docket shows that you filed your complaint on July 18, 2000. The Motion for Summary Judgment by Brush Wellman was granted on July 18, 2003. You filed a Notice of Appeal on August 18, 2003. On October 8, 2003, your Notice of Dismissal was treated by the court as a Motion to Dismiss and was granted.

Because the FAB was unable to determine on the facts in the record of your case whether your tort action was pending or had been dismissed as of December 31, 2003, within the meaning of 42 U.S.C. § 7385d, your claim was remanded to the Cleveland district office for further development of this issue.

The district office referred the issue of whether or not you had dismissed your tort action by December 31, 2003, to the Branch of Policies, Regulations, and Procedures of DEEOIC for guidance. The Branch ascertained that the matter was a covered tort case within the meaning of 42 U.S.C. § 7384d(d), and had to have been dismissed before December 31, 2003, to preserve your potential eligibility for benefits under the EEOICPA. Therefore, because your tort suit was not dismissed prior to that deadline, you are not eligible for benefits by operation of law.

On June 21, 2004, the Cleveland district office issued a recommended decision concluding that you are not eligible for compensation under the Act because you had filed a tort case before October 30, 2000, which had remained pending as of December 28, 2001, and that your tort case was not dismissed before December 31, 2003, as required by 42 U.S.C. § 7384d(a).

On June 29, 2004, the FAB received your statement objecting to the recommended decision and requesting an oral hearing. You were advised by letter of July 19, 2004, that a hearing was scheduled for August 20, 2004. In a letter dated August 26, 2004, the FAB indicated that your communications had agreed that you were withdrawing your request for a hearing and that a period of 30 days was being allowed for you to submit additional evidence and/or arguments regarding your objection. On September 1, 2004, the FAB received additional arguments and evidence regarding your objection to the recommended decision of June 21, 2004.

FINDINGS OF FACT

1. You filed a claim for benefits on August 1, 2001.

2. You were employed at the Brush Beryllium Company in Elmore, OH, as a subcontractor employee with Pinkerton, from approximately 1975 to 1978.

3. The medical evidence is consistent with a diagnosis of CBD from at least January 31, 2000.

4. You had filed a tort case against Brush Wellman Inc., on July 18, 2000, which remained pending on December 28, 2001, and was not dismissed before December 31, 2003.

CONCLUSIONS OF LAW

The regulations provide that a claimant may object to any or all of the findings of fact or conclusions of law in the recommended decision. Further, the regulations provide that the Final Adjudication Branch will consider objections by means of a review of the written record, in the absence of a request for a hearing. *See* 20 C.F.R. §§ 30.310 and 30.312.

You filed a claim for benefits under the EEOICPA based on CBD due to exposure to beryllium while employed by a beryllium vendor listed in 42 U.S.C. § 7384l(6). You provided evidence sufficient to establish that you had been exposed to beryllium while employed at Brush Beryllium Company in Elmore, OH, (later known as Brush Wellman Inc.), and provided medical findings consistent with a diagnosis of CBD.

The EEOICPA requires an election of remedy for beryllium employees. The law states that, if an otherwise eligible individual filed a tort case alleging a claim against a beryllium vendor before October 30, 2000, and if such case remained pending on December 28, 2001, the date of enactment of the National Defense Authorization Act for Fiscal Year 2002, and if such individual does not dismiss such tort case before December 31, 2003, such individual shall not be eligible for compensation or benefits under the Act. *See* 42 U.S.C. § 7385d(a) and (d).

The evidence shows that you filed a tort case on July 18, 2000, against Brush Wellman Inc. This case was filed against a beryllium vendor listed in 42 U.S.C. § 7384l(6)(B) and was filed before October 30, 2000.

On August 1, 2001, you filed a claim for benefits under the Act based on CBD due to exposure to beryllium while employed at Brush Beryllium Company, later known as Brush Wellman Inc. On August 14, 2001, the district office received a copy of the complaint (tort case) which you had filed against Brush Wellman Inc. The date of filing was not shown on that document. On December 28, 2001, the National Defense Authorization Act for Fiscal Year 2002 was enacted.

On January 17, 2003, the Cleveland district office sent you a letter which advised you that you must report the outcome of your lawsuit against Brush Wellman. You were instructed to report whether the suit had been dismissed, if you had received a settlement, and the amount of any such settlement. On January 30, 2003, the district office received your statement that you had filed the suit in early February or March 2000 and that you had taken no action regarding the suit as of January 26, 2003.

In a telephone conversation with the district office on April 17, 2003, you stated that you had not dropped the lawsuit, but would consider doing so within the next 30 days. You were advised that, if the suit was not dismissed by December 30, 2003, benefits could not be paid even if you were found to be otherwise entitled to compensation under the EEOICPA. This conversation was followed by a letter to you from the district office on April 24, 2003, which stated that you had expressed your awareness that you must dismiss the suit prior to December 31, 2003, in order to be eligible for benefits under the EEOICPA. You were provided a pamphlet titled, “How a Tort Action Affects Your Right to EEOICPA Benefits.”

On July 18, 2003, a Motion for Summary Judgment, filed by Brush Wellman, was granted. You filed a Notice of Appeal in the Court of Appeals, Eighth Appellate District, Cuyahoga County, Ohio, on August 18, 2003. On October 8, 2003, your Notice of Dismissal was treated by that court as a Motion to Dismiss and was granted.

In your objection you agree that you filed a tort case against Brush Wellman Inc., on July 18, 2000. You state that a summary judgment was granted in favor of Brush Wellman Inc., on July 17, 2003, and that an appeal of that judgment was filed with the Eighth District Court of Appeals. You argue that, by appealing this matter, you preserved all right to the underlying lawsuit until a review of the matter was conducted by the higher court and that, on that basis, the case was still "alive and viable" during the appeal process. You state that you filed a Notice of Dismissal with the Appeals Court on October 9, 2003, which the court granted. Each of these stipulations is, essentially, consistent with the evidence described above.

You argue that Ohio law governs the dismissal action and the FAB agrees with that argument. You further state that by dismissing your appeal of the Summary Judgment of the Court of Common Pleas, you "voluntarily allowed the dismissal of [your] underlying suit to become effective." However, there is no evidence showing that your underlying suit was dismissed when your appeal from the Summary Judgment of the Court of Common Pleas was dismissed. Your "Notice of Dismissal", stamped as filed with the Clerk of Courts of Cuyahoga County on September 26, 2003, requests the court for an order "dismissing his appeal with prejudice." A copy of the docket of your case as recorded by the Cuyahoga Court of Common Pleas contains an entry dated October 8, 2003, which states, "Appellant's notice of dismissal is treated as a motion to dismiss and is granted at appellant's costs." The subsequent entry, dated October 9, 2003, states, "***C/A***J.E. sua sponte, appeal is dismissed per entry No. 352851. . .Notice issued." The FAB agrees that the appeal was voluntarily dismissed. However, the evidence of record makes no mention of any change of status in the summary judgment granted in favor of Brush Wellman Inc. on July 18, 2003. On the basis of the evidence of record, that summary judgment stands as the final action on your tort case against Brush Wellman Inc.; originally filed on July 18, 2000. No evidence has been presented to show that, under Ohio law, your underlying suit was dismissed.

You argue that a reasonable reading of 20 C.F.R. § 30.618(a) would lead one to conclude that any dismissal as a result of a "final court decision against (the claimant)" in suits prior to December 28, 2001, would not be fatal to your claim. Alternatively, you argue that if you did not dismiss your claim because there was an adverse ruling in the lower court, then "Section 30.618 of the Rules recognizes this situation and creates a mechanism by which [you] can still receive benefits." The cited section, 20 C.F.R. § 30.618, is titled, *What happens if this type of tort suit is filed after December 28, 2001?*" This section of the regulations corresponds with 42 U.S.C. § 7384d(c), and both the statute and the regulation specifically apply to tort cases filed after December 28, 2001. As demonstrated by the evidence and as you have stipulated, your tort case was filed before October 30, 2000. As such, the status of your claim for benefits under the EEOICPA is governed by 42 U.S.C. § 7385d(a) and 20 C.F.R. § 30.616. The cited section, 20 C.F.R. § 30.618(a), does not apply to your case.

You argue that administrative agencies are required to adhere to their own precedents or to explain any deviations from them. You cite three EEOICPA cases in which the claimants had a summary judgment against them in the lower court, appealed that judgment, subsequently dismissed their appeal, and were awarded compensation under the Act. You state that you relied on the procedures in those cases and would not have dismissed your appeal but for the fact that you believed that benefits were available to you under the Act. However, neither the statute nor the Department of Labor's implementing

regulations provide that final decisions under the Act are always precedential in nature. You were advised in April 2003 that your tort case must be dismissed prior to December 31, 2003. In spite of that notice you elected to continue with litigation of your case, resulting in a summary judgment against you in July 2003. Your continuation of litigation after you had been placed on notice that your case must be dismissed in order to be eligible for compensation under the EEOICPA is an election of litigation as your remedy rather than compensation under the Act. The manner in which similar cases may have been decided has no bearing on the application of statutory requirements to the facts in your claim.

Finally, you state that the administration, Congress, and various agencies have publicly stated that their policy was to give the benefit of the doubt to the worker when determining eligibility for awards. You refer to the dose reconstruction regulations of the National Institute for Occupational Safety and Health, 42 C.F.R. part 82, which states that any uncertainties in a dose reconstruction will be handled to the advantage, rather than the detriment, of a claim. The standard for accomplishing dose reconstruction is found in 42 U.S.C. § 7384n(b) which provides that cancer shall be determined to have been sustained in the performance of duty if, and only if, the cancer was *at least as likely as not* sustained in the performance of duty. Because of that statutory standard, a probability of causation of 50% or more is sufficient to establish that a cancer was sustained in the performance of duty. That standard was also adopted by NIOSH for consideration of other aspects of dose reconstruction.

However, the Act does not specify the standard of proof to be used by the Office of Workers' Compensation Programs (OWCP) in determining entitlement to benefits under the Act. The OWCP published 20 C.F.R. § 30.111(a) to specify the claimant's responsibility with regard to burden of proof. That regulation provides that, "[e]xcept where otherwise provided in the Act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category."

Even if the standard of proof was to give the benefit of the doubt to the claimant, you have not established that any doubt existed in the processing of your claim. You were advised that you must dismiss your tort case in order to be eligible for payment of compensation under the Act, but chose to proceed with your litigation against Brush Wellman, resulting in a summary judgment in their favor. That judgment of the court was not vacated and the tort suit was not dismissed before December 31, 2003. On the basis of those facts there is no "doubt" to be resolved in your favor.

Your lawsuit was filed on July 18, 2000, and was still pending before the Court of Common Pleas for Cuyahoga County, Ohio, as of December 28, 2001, thus 42 U.S.C. § 7385d(a)(2) governs this matter. That section provides that a claimant with a covered tort case within that time frame must "dismiss such tort case before December 31, 2003," in order to be eligible for EEOICPA benefits.

The mere dismissal of your appeal to the Court of Appeals was insufficient to satisfy the requirement of 42 U.S.C. § 7385d(a)(2) that the tort case be dismissed. Without more, the dismissal of your appeal of your tort suit only resulted in the underlying judgment for the defendant becoming final. The statutory requirement cannot be met by an order allowing summary judgment on the merits to become final and effective.

Under Rule 41(A) of the Ohio Rules of Civil Procedure, a plaintiff may not "voluntarily dismiss" an action in a Court of Common Pleas once judgment has been entered. Thus, in order for you to have timely dismissed your tort suit you would have had to have obtained an order of the Court of Appeals

vacating the Court of Common Pleas' entry of summary judgment or otherwise gotten the Court of Common Pleas judgment vacated and, once successful in vacating the judgment, then dismissed your tort suit prior to December 31, 2003.

Since you did not dismiss your tort case prior to December 31, 2003, as required by 42 U.S.C. § 7385d(a)(2), your claim must be denied because your entitlement to benefits under the Act is barred by operation of law.

Cleveland, Ohio

Debra A. Benedict

Acting District Manager

Final Adjudication Branch

EEOICPA Fin. Dec. No. 80675-2007 (Dep't of Labor, December 19, 2006)

NOTICE OF FINAL DECISION

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

STATEMENT OF THE CASE

On November 23, 2004, the FAB issued a final decision on **[Employee]**'s claim for benefits for chronic beryllium disease (CBD) under Part B of EEOICPA.[1] The FAB found that **[Employee]** had filed a tort case against Brush Wellman, Inc. on July 18, 2000, which remained pending on December 28, 2001, and was not dismissed before December 31, 2003. For that reason, the FAB denied his claim because entitlement to benefits under the Act is barred by operation of law under those circumstances.

On September 22, 2005, the U.S. District Court for the Northern District of Ohio, Western Division, dismissed **[Employee]**'s petition seeking review of the November 23, 2004 final decision.[2] The Court held that **[Employee]** did not dismiss his case within the time required by the EEOICPA.

On September 21, 2006, you filed a Form EE-2 claiming benefits as the surviving spouse of **[Employee]**. You identified the diagnosed condition being claimed as CBD. You did not provide a copy of a marriage certificate showing that you and **[Employee]** were husband and wife for at least one year immediately prior to his death. You submitted a copy of **[Employee]**'s death certificate showing that he died on June 16, 2006, and identifying **[Employee's wife]** as his surviving spouse.

A review of the complaint filed against Brush Wellman, Inc. on July 18, 2000 identifies you as a plaintiff in that tort action. A motion for summary judgment filed by Brush Wellman, Inc. was granted by the court on July 18, 2003.

On October 5, 2006, the Cleveland district office recommended denial of your claim for compensation as you are not eligible for compensation because you were a party to a tort suit, filed before October 30, 2000, which had not been dismissed by December 31, 2003, as required by the Act. For that reason, the district office recommended that your claim be denied.

After considering the recommended decision and all the evidence in the case file, the FAB hereby makes the following:

FINDINGS OF FACT

1. You filed a claim for benefits on September 21, 2006.

2. You filed a tort suit against Brush Wellman, Inc. on July 18, 2000, which remained pending on December 28, 2001 and was not dismissed before December 31, 2003.

Based on the above-noted findings of fact in this claim, the FAB hereby makes the following:

CONCLUSIONS OF LAW

I have reviewed the recommended decision issued by the district office on October 5, 2006. I find that you have not filed any objections to the recommended decision and that the sixty-day period for filing such objections has expired. *See* 20 C.F.R. §§ 30.310(a) and 30.316(a).

The FAB finds that because the tort suit, filed on July 18, 2000, in which you were a plaintiff against Brush Wellman, Inc. and which was based on **[Employee]** having incurred CBD during his employment at that facility, was resolved by the granting of summary judgment for Brush Wellman, Inc. on July 18, 2003. Your tort suit was pending on December 28, 2001 and, as required by 42 U.S.C. § 7385d(a)(2), must have been dismissed by December 31, 2003. As explained by the U.S. District Court in its decision of September 22, 2005, "[t]he Act required [you] to either choose between statutory benefits or attempt recovery through a tort suit against the employer. By pursuing [your] claim until an adverse summary judgment, [you] elected litigation."

For the above reasons, the FAB concludes that entitlement to benefits under the Act is barred by operation of law. Accordingly, your claim for benefits is denied.

Cleveland, OH

Anthony Zona, Hearing Representative

Final Adjudication Branch

[1] EEOICPA Fin. Dec. No. 4846-2004 (Dep't of Labor, November 23, 2004).

[2] *[Employee] v. Chao*, 395 F. Supp. 2d 625 (N.D. Ohio 2005).

Final Adjudication Branch

Discretion of

EEOICPA Fin. Dec. No. 4216-2002 (Dep't of Labor, April 18, 2005)

FINAL DECISION AFTER A REVIEW OF WRITTEN RECORD

This is the decision of the Final Adjudication Branch (FAB) concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA or the Act). 42 U.S.C. § 7384 *et seq.*

Since you filed a letter of objection, but did not specifically request a hearing, a review of the written record was performed, in accordance with 20 C.F.R. § 30.312 of the implementing regulations. A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, in accordance with 20 C.F.R. § 30.310 of the implementing regulations. The same section of the regulations provides that in filing objections, the claimant must identify his/her objections as specifically as possible. In reviewing any objections submitted, under 20 C.F.R. § 30.313 of the implementing regulations, the Final Adjudication Branch will review the written record, any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case.

For the reasons set forth below, the FAB accepts your claim for medical benefits for the conditions of bladder cancer to include the carcinoma in situ of the right distal ureter; and reverses the decision of the district office denying entitlement to medical benefits for prostate cancer. Thus the FAB also accepts your claim for medical benefits for metastatic prostate cancer.

STATEMENT OF THE CASE

You were previously awarded benefits under the EEOICPA which included a lump sum payment of $150,000, and medical benefits effective July 31, 2001, for bladder cancer (specifically papillary transitional cell carcinoma of the left ureter).

You subsequently submitted a new Form EE-1 (Claim for Benefits under the EEOICPA) on July 21, 2004, which identified bladder cancer diagnosed on May 30, 2004, and prostate cancer diagnosed on June 3, 2004. You submitted medical evidence which included a surgical pathology consultation from the Mayo Clinic, dated June 12, 2004, based on a biopsy of the bladder on May 30, 2004, and prostate chips from a transurethral resection, obtained on June 3, 2004, that shows final diagnoses of urothelial carcinoma in situ and non-invasive papillary urothelial carcinoma of the urinary bladder; and invasive grade 3 urothelial carcinoma of the prostate chips. A narrative report from Daniel W. Visscher, M.D., at the Mayo Clinic, dated June 11, 2004, was also submitted in which he discusses that they agree with the assessment that the focus of invasive carcinoma in the prostate chips correspond to a urothelial carcinoma, and the fact that they did not identify any areas of conventional prostatic adenocarcinoma. A narrative report from Dr. Christopher Schmidt, dated October 21, 2004, noted that you underwent a transurethral resection of the prostate on June 3, 2004, and noted that the pathology report revealed a microscopic focus of invasive urothelial carcinoma. He noted that in summary, you now had a transitional cell carcinoma that had spread from the bladder and was now invasive into the prostatic ducts.

You previously had submitted your employment history on Form EE-3, indicating that you worked at the Portsmouth Gaseous Diffusion Plant (GDP) in Piketon, Ohio, from November 1980 to October 1994, and that you did wear a dosimetry badge. On September 21, 2001, the Department of Energy verified your employment at Portsmouth GDP from November 3, 1980 to November 30, 1994. The Portsmouth Gaseous Diffusion Plant in Piketon, Ohio is recognized as a Department of Energy facility from 1954 to July 28, 1998; from July 29, 1998 to present (remediation); and from May 2001 to present (cold standby). *See* Department of Energy, Office of Worker Advocacy Facilities List.

On December 22, 2004, the Cleveland district office issued a recommended decision that concluded you are a member of the Special Exposure Cohort, as defined 42 U.S.C. § 7384l(14)(A). Further, the district office concluded that you were diagnosed with bladder cancer, which is a specified cancer as defined by 42 U.S.C. § 7384l(17)(A). In addition, the district office concluded that since you were previously compensated in the amount of $150,000, pursuant to 42 U.S.C. § 7384s(a)(1), for left ureter cancer, you are not eligible for an additional payment. The district office concluded that you are entitled to medical benefits for bladder cancer, effective July 21, 2004, pursuant to 42 U.S.C. § 7384t. The district office also concluded that they did not receive evidence, required by 20 C.F.R. §§ 30.211 and 30.214, to establish that you had prostate cancer, and thus you are not established as a covered employee with prostate cancer as shown in 42 U.S.C. § 7384l(9).

OBJECTIONS

On February 2, 2005, the Final Adjudication Branch received your written objection to the recommended decision. You indicated that you disagreed with the conclusion of law in the recommended decision that the district office did not receive evidence that you had prostate cancer. You indicated that the bladder cancer had invaded the prostate and that only option was surgery to remove both the bladder and the prostate due to the bladder cancer. You noted that you had surgery on January 6, 2005, to remove the bladder and the prostate. You indicated that Dr. Hafez, University of Michigan Medical Center, was the doctor who performed your surgery. You stated “We feel **[Employee]** should have coverage for anything pertaining to his prostate due to the bladder cancer that invaded the prostate”. Dr. Khaled Hafez M.D. signed your objection and stated that he “was in agreement with the above letter and am available for any further information regarding this case.” You also attached additional medical evidence to your objection that included a copy of a surgical pathology report, from biopsies of the bladder and prostate, obtained on November 18, 2004, that shows diagnoses of urothelial carcinoma (CIS) of the bladder; and invasive high grade urolthelial carcinoma, and flat carcinoma in situ of the prostate. You also submitted an operative report that shows you underwent a radical cystoprostatectomy, right pelvic lymph node dissection, and ileal conduit urinary diversion on January 6, 2005. You also submitted the subsequent surgical pathology report, from these procedures performed on January 6, 2005, that shows diagnoses of urothelial carcinoma in situ of the right distal ureter; and invasive urothelial carcinoma and flat carcinoma in situ, of the urinary bladder and prostate.

FINDINGS OF FACT

1. You filed a claim for employee benefits under the EEOICPA based on bladder and prostate cancer on July 21, 2004.

2. You were employed at the Portsmouth GDP in Piketon, Ohio, from November 3, 1980 to November 30, 1994.

3. You were employed at the Portsmouth GDP for a number of work days aggregating at least 250 work days prior to February 1, 1992, and during such employment was monitored through the use of dosimetry badges.

4. On May 30, 2004, you were diagnosed with urothelial carcinoma in situ, and non-invasive papillary urothelial carcinoma of the urinary bladder; on June 3, 2004, with invasive urothelial carcinoma of the prostate; and on January 6, 2005, with urothelial carcinoma in situ of the right distal ureter.

CONCLUSIONS OF LAW

In order for you to be considered a "member of the Special Exposure Cohort," you must have been a Department of Energy (DOE) employee, DOE contractor employee, or an atomic weapons employee who was so employed for a number of work days aggregating at least 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, and, during such employment worked in a job that was monitored through the use of dosimetry badges for exposure at the plant of the external parts of employee's body; or had exposures comparable to a job that is or was monitored through the use of dosimetry badges, as outlined in 42 U.S.C. § 7384l(14)(A).

The evidence of record establishes that you worked in covered employment at the Portsmouth GDP from November 3, 1980 to November 30, 1994. Portsmouth GDP is a covered facility beginning on September 1, 1954. Consequently, you met the requirement of working more than an aggregate 250 days at a covered facility. *See* 42 U.S.C. § 7384l(14)(A). On your employment history (Form EE-3) you stated that you did wear a dosimetry badge and DOE confirmed that you wore a dosimetry badge to monitor for radiation exposure while employed at the facility. On that basis, you are found to meet the dosimetry badge requirement.

Bladder cancer (specifically urothelial carcinoma of the bladder diagnosed on May 30, 2004, and urothelial carcinoma in situ of the right distal ureter diagnosed on January 6, 2005) are specified cancers under the Act and the medical evidence of record establishes a diagnosis of these bladder cancers. Therefore, you are a member of the Special Exposure Cohort, who was diagnosed with a specified cancer. *See* 42 U.S.C. § 7384l(17)(A). Although prostate cancer is not a specified cancer, the medical evidence clearly establishes that you were diagnosed with invasive urothelial carcinoma of the prostate on June 3, 2004, due to the spread of the urothelial carcinoma of the bladder that invaded the prostate. Therefore, based on the additional medical evidence submitted with your objection, and the signed statement from Dr. Dr. Khaled Hafez M.D. contained in your objection, I find that the prostate cancer is a consequential disease under 20 C.F.R. §§ 30.210(c) and 30.214(b), because the evidence shows that it metastasized from your urothelial carcinoma of the bladder.

For the reasons stated above, I accept your claim for benefits based on bladder cancer to include the right distal ureter cancer, and prostate cancer. You are not entitled to any additional payment since you were previously compensated in the amount of $150,000, for your bladder cancer (specifically papillary transitional cell carcinoma of the left ureter previously diagnosed on September 20, 1996) , pursuant to 42 U.S.C. § 7384s. You are entitled to medical benefits for your additional bladder cancers (specifically urothelial carcinoma of the urinary bladder, and urothelial carcinoma in situ of the right distal ureter) and for your prostate cancer that metastasized from your bladder cancer, effective July 21, 2004. *See* 42 U.S.C. § 7384t.

Cleveland, Ohio

Debra A. Benedict

District Manager

Final Adjudication Branch

EEOICPA Fin. Dec. No. 47148-2006 (Dep't of Labor, May 16, 2008)

NOTICE OF FINAL DECISION

This decision of the Final Adjudication Branch (FAB) concerns the above claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, FAB accepts the claim under Part B of EEOICPA in the amount of $150,000.00 and under Part E in the amount of $125,000.00. Adjudication of the claim for survivor benefits for the conditions of diabetes and hypertension under Part E will not be undertaken, as maximum survivor benefits are being awarded.

STATEMENT OF THE CASE

On July 15, 2003, **[Claimant]** filed a Form EE-2 claiming for survivor benefits under EEOICPA with the Department of Labor as the surviving spouse of **[Employee]**. She based her claim on the employee's metastatic renal cell carcinoma. On December 28, 2006, **[Claimant]** filed a second Form EE-2 for the conditions of renal cell carcinoma, diabetes, and hypertension.

[Claimant] also submitted a Form EE-3 in which she alleged that **[Employee]** worked at the Lawrence Livermore National Laboratory (LLNL) as a designer from June 19, 1956 to March 2, 2000. The district office used the Oak Ridge Institute for Science and Education (ORISE) database to verify that **[Employee]** worked at LLNL from June 19, 1956 to March 2, 2000. The Department of Energy (DOE) verified that **[Employee]** was employed by the University of California Radiation Laboratory (UCRL) at LLNL beginning on June 19, 1956, and that he had dosimetry badges issued in association with his work with UCRL/LLNL at the Nevada Test Site (NTS) on March 13, 1972, March 30, 1972, May 5, 1972 and April 24, 1973. Employment records obtained from DOE indicate that **[Employee]** was employed as a draftsman and designer at LLNL.

The record includes a copy of a marriage certificate showing **[Claimant]** and the employee were married on May 18, 1963, and a copy of **[Employee]**'s death certificate showing **[Claimant]** was married to the employee at the time of his death on March 2, 2000. The death certificate identifies the immediate cause of death as respiratory failure and metastatic renal cell carcinoma, with diabetes mellitus, hypertension and hyperlipidemia listed as conditions that contributed to his death. The medical evidence of record includes a November 16, 1999 pathology report in which Dr. Lena Scherba diagnosed metastatic renal cell carcinoma with metastases to the left pleura.

On March 15, 2006, FAB issued a final decision under Part B to deny **[Claimant]**'s claim for benefits, concluding that the employee's renal cell carcinoma was not "at least as likely as not" (a 50% or greater probability) caused by radiation doses incurred while employed at LLNL. On March 20, 2007, the Seattle district office issued a recommended decision to deny **[Claimant]**'s claim for benefits

under Part E of the Act. The district office concluded that she did not provide sufficient evidence to show that toxic exposure at a DOE facility was "at least as likely as not" a significant factor in aggravating, contributing to or causing the employee's metastatic renal cell carcinoma.

On March 29, 2007, the National Institute for Occupational Safety and Health (NIOSH) issued OCAS-PEP-012, entitled "Program Evaluation Plan: Evaluation of Highly Insoluble Plutonium Compounds." The PEP provided NIOSH's plan for evaluating dose reconstructions for certain claims to determine the impact of highly insoluble plutonium compounds at particular sites, and specifically concluded that the existence of highly insoluble plutonium at LLNL should be considered for Type Super S plutonium in the dose reconstruction. This change went into effect on February 6, 2007 and affected those cases with a dose reconstruction performed prior to that date that resulted in a less than 50% Probability of Causation (PoC) with verified employment at LLNL.

On June 18, 2007, FAB remanded **[Claimant]**'s Part E claim for survivor benefits and instructed the district office to refer the case to NIOSH for rework of the dose reconstruction pursuant to EEOICPA Bulletin No. 07-19 (issued May 16, 2007), which determined that the existence of the highly insoluble plutonium at LLNL should be considered for Type Super S plutonium in the dose reconstruction.

On June 26, 2007, the Seattle district office returned the claim to NIOSH for a rework of the dose reconstruction. On October 23, 2007, the district office received the NIOSH Report of Dose Reconstruction dated September 19, 2007. Using the information provided in this report, the district office utilized the Interactive Radio Epidemiological Program (IREP) to determine the PoC of the employee's renal cell carcinoma and reported in its recommended decision that there was a 26.76% probability that the employee's metastatic renal cell carcinoma was caused by exposure to radiation at LLNL.

On November 9, 2007, a Director's Order was issued vacating the final decision dated March 15, 2006, and reopening **[Claimant]**'s claim under Part B of EEOICPA. The Director's Order directed the district office to reopen her claim under Part B based on EEOICPA Bulletin No. 07-27 (issued August 7, 2007) to reflect the revised dose reconstruction methodology to the calculation of the PoC and provided procedures for processing claims with a final decision to deny that may be affected by NIOSH's OCAS-PEP-012.

On February 7, 2008, the Seattle district office recommended denial of **[Claimant]**'s claim for survivor benefits under Part B and Part E, finding that the employee's cancer was not "at least as likely as not" (a 50% or greater probability) caused by radiation doses incurred while employed at the LLNL. The district office concluded that the employee did not qualify as a "covered employee with cancer" under Part B; that the dose reconstruction estimates and the PoC calculations were properly performed, and that **[Claimant]** was not entitled to survivor benefits under Part B. Further, the district office concluded that under Part E, the totality of the evidence did not provide sufficient evidence to show that exposure to a toxic substance at a DOE facility was "at least as likely as not" a significant factor in aggravating, contributing to or causing the claimed conditions of renal cell carcinoma, diabetes or hypertension.

In a letter received by FAB on May 15, 2008, **[Claimant]** indicated that neither she nor **[Employee]** had filed a lawsuit or received a settlement based on the claimed conditions. She also indicated that they had never filed for or received any payments, awards or benefits from a state workers' compensation claim in relation to the claimed illnesses, or pled guilty to or been convicted of any

charges connected with an application for or receipt of federal or state workers' compensation. Further, she indicated that **[Employee]** had no minor children or children incapable of self-support, who were not her natural or adopted children, at the time of his death.

On March 3, 2008, the Secretary of Health and Human Services (HHS) designated the following class of employees for addition to the Special Exposure Cohort (SEC) in a report to Congress: Employees of DOE, its predecessor agencies and DOE contractors or subcontractors who were monitored for radiation exposure while working at LLNL from January 1, 1950 through December 31, 1973 for a number of work days aggregating at least 250 work days or in combination with work days within the parameters established for one or more other classes of employees in the SEC. This addition to the SEC became effective April 2, 2008.

After considering the evidence of record, FAB hereby makes the following:

FINDINGS OF FACT

1. On July 15, 2003 and December 28, 2006, **[Claimant]** filed a claim for benefits under EEOICPA.
2. **[Claimant]** is the surviving spouse of the employee and was married to him for at least one year immediately prior to his death.

3. The employee worked at LLNL for an aggregate of at least 250 work days from June 19, 1956 to March 2, 2000, and was issued visitor dosimetry badges at the NTS on March 13, 1972, March 30, 1972, May 5, 1972 and April 24, 1973. The employee was monitored for radiation exposure, and qualifies as a member of the SEC.
4. The employee was diagnosed with metastatic renal cell carcinoma, which is a "specified" cancer, on November 16, 1999, after starting work at a DOE facility.
5. The evidence of record supports a causal connection between the employee's death due to metastatic renal cell carcinoma and his exposure to radiation and/or a toxic substance at a DOE facility.

6. **[Claimant]** has not filed or received any money (settlement, compensation, benefits, etc.) from a tort action or from a state workers' compensation program based on the claimed condition. She has never pled guilty to or been convicted of any charges of having committed fraud in connection with an application for or receipt of benefits under EEOICPA or any federal or state workers' compensation law. The employee had no minor children or children incapable of self-support, who were not **[Claimant]**'s natural or adopted children, at the time of his death.

Based on the above-noted findings of fact, FAB hereby also makes the following:

CONCLUSIONS OF LAW

The undersigned has reviewed the recommended decision issued by the district office on February 7, 2008. **[Claimant]** has not filed any objections to the recommended decision, and the sixty-day period for filing such objections has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

As noted above, on April 2, 2008 a new addition to the SEC became effective. The evidence of record indicates that the employee worked in covered employment at LLNL from June 19, 1956 to March 2, 2000, that he was issued visitor dosimetry badges at the NTS on March 13, 1972, March 30, 1972, May

5, 1972 and April 24, 1973, and that he was monitored for radiation exposure during his employment. The medical evidence shows that **[Employee]** was diagnosed with metastatic renal cell carcinoma on November 16, 1999, more than 5 years after his initial exposure to radiation.

FAB may reverse a recommended decision to deny a claim if the portion of the claim denied by the district office is in posture for acceptance. The evidence is sufficient to establish that the employee is a member of the class added to the SEC who was diagnosed with metastatic renal cell carcinoma, a "specified" cancer, more than five years after initial exposure, and is therefore a "covered employee with cancer" under section 7384l(9)(A) of EEOICPA. Further, **[Claimant]** is the surviving spouse of the employee, as defined by § 7384s(e)(1)(A), and is entitled to compensation in the amount of $150,000.00 under Part B.

Under § 7385s-4(a) of EEOICPA, if an employee has engaged in covered employment at a DOE facility and was determined under Part B to have contracted an "occupational" illness, the employee is presumed to have contracted a covered illness through exposure at that facility. Further, if the employee would have been entitled to compensation under Part E and it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing the death of such employee, an eligible survivor would be entitled to survivor benefits under Part E.. *See* 42 U.S.C. § 7385s-3(1)(A) and (B).

The evidence of record establishes that the employee was a "covered DOE contractor employee" who was diagnosed with a "covered" illness, and therefore he would be eligible for benefits under Part E. Further, it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing the death of the employee. **[Claimant]** is the employee's "covered" spouse as defined by § 7385s-3(d)(1) and is therefore entitled to additional compensation in the amount of $125,000.00 under Part E.

Accordingly, FAB reverses the recommended decision and accepts the claim for survivor benefits under Part B of $150,000.00, and also under Part E for an additional $125,000.00.

Seattle, Washington

Keiran Gorny

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 62339-2005 (Dep't of Labor, November 18, 2005)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) 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 October 4, 2004, you filed a Form EE-1, Claim for Benefits under the EEOICPA, for beryllium sensitivity. A review of the medical evidence revealed that along with beryllium sensitivity you were diagnosed with multiple skin cancers: basal cell carcinoma (BCC) of the right temple, diagnosed July 25, 1995; BCC of the left face, diagnosed April 11, 2000; BCC of the right face, diagnosed March 12, 2001[1], and BCCs of the upper and lower face, diagnosed August 2, 2004.[2]

On the Form EE-3, Employment History, you stated you were employed as a laborer by F. H. McGraw at the Paducah gaseous diffusion plant (GDP) in Paducah, Kentucky, for the period of January 1, 1951 to December 25, 1954. The evidence of record establishes you worked for F. H. McGraw at Paducah GDP for the claimed period of employment.

On February 1, 2005, a final decision and remand order was issued by the FAB accepting your claim for beryllium sensitivity and remanding your case for further development of chronic beryllium disease (CBD). The district office referred your claim to a district medical consultant (DMC) for review on September 14, 2005.
On the Form EE-1, you indicated that you were a member of the Special Exposure Cohort (SEC). You established that you were diagnosed with multiple skin cancers. To determine the probability of whether you sustained your cancer in the performance of duty, as required to establish entitlement under Part B of the Act, the district office referred your application package to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction. NIOSH reported annual dose estimates from the date of initial radiation exposure during covered employment, to the date the cancer was first diagnosed. A summary and explanation of information and methods applied to produce these dose estimates, including your involvement through an interview and review of the dose report, are documented in the "NIOSH Report of Dose Reconstruction under EEOICPA." On August 24, 2005, you signed Form OCAS-1, indicating that you had reviewed the NIOSH Draft Report of Dose Reconstruction and agreed that it identified all of the relevant information you provided to NIOSH. The district office received the final NIOSH Report of Dose Reconstruction on August 29, 2005.

Pursuant to the implementing NIOSH regulations, the district office used the information provided in this report to determine that there was a 55.97% combined probability that your cancers[3] were caused by radiation exposure at the Paducah GDP. 42 C.F.R. § 81.20. The Final Adjudication Branch confirmed the 55.97% combined probability.

On September 14, 2005, the Jacksonville district office issued a recommended decision finding that your skin cancer(s) were at least as likely as not caused by your employment at a Department of Energy (DOE) facility and concluding that that you are entitled to compensation in the amount of $150,000. The district office's recommended decision also concluded that you are entitled to medical benefits beginning October 4, 2004 for skin cancer.

On September 19, 2005, the Final Adjudication Branch received written notification that you waived any and all objections to the recommended decision.

The district office had deferred adjudication of your claim for CBD until receipt of the DMC's report. On October 6, 2005, the FAB received the October 2, 2005 report from Dr. Robert E. Sandblom. Dr. Sandblom verified that the pulmonary function tests on record were consistent with chronic beryllium disease.

FINDINGS OF FACT

1. You filed a Form EE-1, for beryllium sensitivity and review of the medical records revealed evidence of skin cancer and possible chronic beryllium disease.

2. You were diagnosed with skin cancer (BCC) on July 25, 1995, April 11, 2000, and August 2, 2004 (x2).

3. You were employed at the Paducah GDP from January 1, 1951 to December 25, 1954.

4. The probability that your cancer was caused by radiation at the Paducah GDP is 55.97%.

5. On September 14, 2005, the Jacksonville district office issued a recommended decision.

6. On September 19, 2005, the Final Adjudication Branch received written notification that you waived any and all objections to the recommended decision.

7. On October 6, 2005, the FAB received a report from the DMC, confirming a statutory diagnosis of CBD.

CONCLUSIONS OF LAW

I have reviewed the evidence of record and the recommended decision.

To qualify as a member of the SEC under the Act, the following requirements must be satisfied:

The employee was so employed for a number of work days aggregating at least 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee. . . . 42 U.S.C. § 7384l(14)(A).

The evidence shows that you worked at the Paducah GDP from January 1, 1951 to December 25, 1954, which equals more than 250 days prior to February 1, 1992. Therefore, you qualify as a member of the SEC.

However, in order to be entitled to benefits as a member of the SEC, you must have been diagnosed with a specified cancer as defined by the Act and implementing regulations. 42 U.S.C. § 7384l(17); 20 C.F.R. § 30.5(ff) (2005). Skin cancers are not a specified cancer.

A cancer is considered to have been sustained in the performance of duty if it was at least as likely as not (a 50% or greater probability) related to radiation doses incurred while working at a DOE facility. 42 U.S.C. § 7384n(b); 42 C.F.R. Part 81. I conclude that your skin cancers were at least as likely as not caused by your employment at a Department of Energy (DOE) facility. 42 U.S.C. § 7384n(b). Therefore, you are a covered employee with cancer. 42 U.S.C. § 7384l(9)(B).

The medical evidence is sufficient to establish that you have CBD. Under Part B of the Act, CBD may be 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.
>
> 42 U.S.C. § 7384l(13).

The beryllium lymphocyte proliferation test (BeLPT) of July 28, 2004 was positive. Therefore, you have beryllium sensitivity, as previously established by final decision dated February 1, 2005. 42 U.S.C. § 7384l(8).

The DMC verified in his report of October 2, 2005 that pulmonary function tests on record were consistent with chronic beryllium disease, meeting criterion iii. Office policy allows the FAB to accept a claimed medical condition based on new evidence, if the case was in posture for acceptance of benefits for another condition.[4] Therefore, I conclude that you are a covered beryllium employee and that your chronic beryllium disease is a covered occupational illness. 42 U.S.C. §§ 7384l(7), 7384l(13); 20 C.F.R. § 30.207.

In accordance with Part B of the Act, you are entitled to $150,000 and medical benefits beginning October 4, 2004 for skin cancer and chronic beryllium disease. 42 U.S.C. §§ 7384s(a), 7384t.

Jacksonville, FL

Sidne Valdivieso
Hearing Representative

[1] Review of the pathology report shows this was not a BCC but rather a pilomatricoma, which may be either benign or malignant. The pathology report did not specify which. Therefore, this should not have been utilized in the dose reconstruction. However, you had an additional cancer that was not utilized by NIOSH in the dose reconstruction, the BCC of the right lower face, diagnosed August 2, 2004, that the DOL health physicist has determined could be substituted for the pilomatricoma without negatively impacting the combined probability of causation.

[2] You did not file a Form EE-1 for skin cancer or chronic beryllium disease, but any written communication that requests benefits under the Act will be considered a claim, including the submission of new medical evidence for review.

[3] NIOSH computed the percentage of causation for four BCCs to arrive at 55.97%. When the percentage of causation is over 50% establishing that those cancers were at least as likely as not related to employment at a covered facility, calculation of the percentage of causation for the remaining cancers is not necessary.

[4] EEOICPA Bulletin No. 03-29 (issued June 30, 2003).

EEOICPA Fin. Dec. No. 10016501-2007 (Dep't of Labor, May 7, 2007)

NOTICE OF FINAL DECISION

This is the final decision of the Final Adjudication Branch (FAB) concerning the above claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the FAB reverses the recommended decision of the district office and accepts the claim under Part E of EEOICPA for medical benefits based on the covered illness of brain tumor (meningioma).

STATEMENT OF CASE

On December 18, 2002, **[Employee]** filed a claim for benefits under Part B and the former Part D of EEOICPA claiming he developed a brain tumor, diagnosed in February of 1993, as the result of his work at a Department of Energy (DOE) facility. On October 28, 2004, Part E of EEOICPA was enacted when Congress repealed Part D. **[Employee]** alleged on his Form EE-3 that he was employed as a Hazard Reduction Technician (HRT) from April 14, 1984 to the date of his signature (December 18, 2002) at the Rocky Flats Plant.[1] DOE confirmed his employment at the Rocky Flats Plant from April 16, 1984 to January 15, 2003.

[Employee] submitted medical records in support of his claim. Included in these medical records were several surgical pathology reports, MRI reports and medical narratives, which document he was diagnosed with meningioma (a non-cancerous brain tumor) in February 1993 at the age of 31. Then, he developed several recurrences of the initial meningioma as well as new lesions in other parts of his brain. Notably, his tumors were always referred to in these records as being "atypical, aggressive, and skull-based" and have resulted in his loss of hearing and other neurological deficits.

On May 14, 2003, FAB issued a final decision denying **[Employee]**'s claim under Part B of EEOICPA, because non-cancerous tumors of the brain are not compensable "occupational" illnesses under that Part.

In September 2006, the district office initiated development of **[Employee]**'s claim under Part E. Under that Part, once the medical evidence substantiates a diagnosis of a claimed condition, the district office proceeds with a causation analysis to make a determination as to whether there is a causal connection between that condition and exposure to a toxic substance or substances at a DOE facility. The standard by which causation between an illness and employment is established is explained in Federal (EEOICPA) Procedure Manual Chapter E-500.3b:

Causation Test for Toxic Exposure. Evidence must establish that there is a relationship between exposure to a toxic substance and an employee's illness or death. The evidence must show that it is "at least as likely as not" that such exposure at a covered DOE facility during a covered time period was a **significant factor** in aggravating, contributing to, or causing the employee's illness or death, **and** that it is "at least as likely as not" that exposure to a toxic substance(s) was related to employment at a DOE facility.

To assist employees in meeting this standard, the Division of Energy Employees Occupational Illness Compensation (DEEOIC) undertakes a variety of steps to collect necessary information to show that a claimed illness is linked to a toxic exposure. Principally, DEEOIC has undertaken extensive data collection efforts with regard to the various types of toxic substances present at particular DOE facilities and the health effects these substances have on workers. This data has been organized into the Site Exposure Matrices (SEM). SEM allows DEEOIC claims staff to identify illnesses linked to particular toxic substances, site locations where toxic materials were used, exposures based on different

job processes or job titles, and other pertinent facility data.

In addition to the SEM data, DEEOIC works directly with DOE to collect individual employee exposure and medical records. Contact is also made in certain situations to obtain information from Former Worker Screening Programs or trade groups that may have relevant exposure or medical information. Relevant specialists in the areas of industrial hygiene and toxicology are also utilized in certain situations to evaluate and render opinions on claims made by employees. DEEOIC also works directly with treating physicians or other medical specialists in an effort to obtain the necessary medical evidence to satisfy the causation standard delineated under EEOICPA.

On September 20, 2006, the district office notified **[Employee]** that after conducting extensive research, they had been unable to establish a causal connection between the development of his meningioma and exposure to a toxic substance or substances at the Rocky Flats Plant. He was afforded a period of 30 days to provide factual or medical evidence that established such a link.

On October 17, 2006, the district office received a letter from **[Employee]**'s authorized representative, in which he indicated that he believed that **[Employee]**'s exposure to plutonium and his work in the glove boxes where he was exposed to radiation contributed to the development of his brain tumor. He requested a copy of the file, which was provided by the district office on November 14, 2006.

On December 4, 2006, a letter was received from **[Employee]**'s representative, in which he detailed several instances, based on his review of **[Employee]**'s exposure records, when he had experienced plutonium contamination.

Subsequently, on January 31, 2007, the district office issued a recommended decision to deny the claim under Part E of EEOICPA, finding that the evidence of record was not sufficient to establish a causal relationship between the development of **[Employee]**'s meningioma and his exposure to toxic substances at the Rocky Flats Plant. The recommended decision was then forwarded to FAB for review.

[Employee]'s representative requested an oral hearing on February 12, 2007, and reiterated his contention that **[Employee]**'s exposure to radiation had contributed to the development of his meningioma. By letter dated February 27, 2007, the representative provided results of his research into the relationship between the development of meningioma and exposure to radiation. He referenced fourteen medical articles that suggested such a relationship existed.

Upon review of the record, FAB determined that based on the contamination records in the file; **[Employee]**'s age at the time of diagnosis; his length of exposure to radiation at the time of diagnosis; the location of his meningiomas, the description of his meningiomas as being atypical, aggressive and skull-based; and the fact that the medical literature appears to support a relationship between exposure to radiation and the development of these types of tumor, that **[Employee]**'s record should be referred to a DEEOIC toxicologist.

On April 11, 2007, a statement of accepted facts detailing **[Employee]**'s employment dates, labor categories, the work processes he had been engaged in, the buildings that he worked in, his exposure history, the number of positive contamination events he had experienced with resulting acute intakes of plutonium, as well as his medical and case history was referred to a toxicologist. The toxicologist was asked to provide an opinion as to whether there was current scientific and/or medical evidence

supporting a causal link between exposure to radiation and the development of meningioma and, if so, whether based on the specifics of **[Employee]**'s case, it is as likely as not that his exposure to radiation at the Rocky Flats Plant was a significant factor in causing, contributing to, or aggravating his meningioma.

On April 26, 2007, the toxicologist stated that the scientific and medical literature does support a "causal" relationship between ionizing radiation and meningiomas at levels below 1 siever (SV). Further, she opined with a reasonable degree of scientific certainty "[t]hat it is as likely as not that exposure to a toxic substance at a DOE facility during a covered time period was a significant factor in aggravating, contributing to, or causing the employee's illness, and that it is 'at least as likely as not' that exposure to a toxic substance was related to employment at a DOE facility."

On May 7, 2007, **[Employee]** affirmed he had never filed for or received any benefits for meningioma associated with a tort suit or state workers' compensation claim. Additionally, he stated that he had never pled guilty to or been convicted of any charges of fraud in connection with a state or federal workers' compensation claim.

After a careful review of the case file, FAB hereby makes the following:

FINDINGS OF FACT

1. On December 18, 2002, **[Employee]** filed a claim under Part E of EEOICPA for a brain tumor.

2. **[Employee]** was employed by DOE contractors from April 16, 1984 to January 15, 2003 at the Rocky Flats Plant, a covered DOE facility.

3. During **[Employee]**'s employment he was exposed to ionizing radiation.

4. **[Employee]** was diagnosed with meningioma, a non-cancerous tumor of the brain, after he began his employment at the Rocky Flats Plant.

5. The evidence of record supports a causal relationship between the development of **[Employee]**'s meningioma and exposure to ionizing radiation at the Rocky Flat Plant.

6. Ionizing radiation is as least as likely as not a significant factor in causing, contributing to, or aggravating **[Employee]**'s meningioma.

Based on the above-noted findings of fact in this claim, FAB hereby also makes the following:

CONCLUSIONS OF LAW

Pursuant to the regulations implementing EEOICPA, a claimant has 60 days from the date of issuance of the recommended decision to raise objections to that decision to FAB. 20 C.F.R § 30.310(a). If an objection is not raised during the 60-day period, FAB will consider any and all objections to the recommended decision waived and issue a final decision affirming the district office's recommended decision. 20 C.F.R. § 30.316(a).

FAB received the letter of objection and request for an oral hearing. A hearing was scheduled, but

upon review of the evidence in the case file, FAB determined the claim was not in posture for a final decision and required a review by a toxicologist. Based on this review, the recommended decision is hereby reversed and **[Employee]'s** claim for meningioma is accepted. On May 7, 2007, he submitted a written statement affirming that he agreed with the final decision to reverse the recommended decision and to accept his claim for meningioma.

FAB concludes that **[Employee]** is a covered DOE contractor employee with a covered illness who contracted that illness through exposure to a toxic substance at a DOE facility pursuant to 42 U.S.C. § 7385s-4(c). Therefore, **[Employee]**'s claim under Part E is accepted and he is awarded medical benefits for the treatment of meningioma pursuant to 42 U.S.C. § 7385s-8.

Denver, CO

Paula Breitling

Hearing Representative

Final Adjudication Branch

[1] According to DOE's website at: http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/showfacility.cfm, the Rocky Flats Plant in Golden, Colorado is a covered DOE facility from 1951 to the present.

EEOICPA Fin. Dec. No. 10017018-2006 (Dep't of Labor, July 18, 2007)

NOTICE OF FINAL DECISION AFTER REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch (FAB) concerning the above claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. After a review of the record, FAB accepts the claim for impairment benefits under Part E of EEOICPA based on the covered illness of pharyngeal cancer and consequential condition of an unspecified disorder of the teeth and supporting structures.

STATEMENT OF THE CASE

On February 19, 2002, **[Employee]** filed a request for a review by a Physicians Panel under the former Part D of EEOICPA with the Department of Energy (DOE), and on July 16, 2003 he filed a Form EE-1 claiming for benefits under Part B with the Department of Labor. Both of these claims were based on cancer of the tongue, throat and lymph nodes.

On May 21, 2002, FAB issued a final decision accepting **[Employee]**'s claim for pharyngeal cancer under Part B. In that decision, FAB concluded that he was a member of the Special Exposure Cohort because he belonged to the class of employees who worked at the Amchitka Island Nuclear Explosion Site and had been diagnosed with a "specified" cancer (of the pharynx) on October 31, 2001. FAB therefore awarded **[Employee]** $150,000.00 and medical benefits for cancer of the pharynx.

On March 31, 2006, FAB also issued a final decision accepting **[Employee]**'s claim for pharyngeal cancer under Part E, as well as for a consequential condition of an unspecified disorder of the teeth and supporting structures. In that second decision, FAB concluded that he was a covered DOE contractor employee with a "covered" illness (pharyngeal cancer), and that he had contracted that covered illness

through exposure to a toxic substance while working at a DOE facility. FAB therefore awarded him medical benefits under Part E of EEOICPA, retroactive to February 19, 2002, for both his pharyngeal cancer and the consequential condition of an unspecified disorder of the teeth and supporting structures.

On May 10, 2006, the district office received **[Employee]**'s letter requesting an impairment rating for his cancer of the pharynx and his accepted consequential condition. An impairment rating was performed by a District Medical Consultant (DMC), Dr. Coleen Weese. In her March 16, 2007 report, Dr. Weese concluded that **[Employee]** had a 15% permanent impairment of the whole person due to his pharyngeal cancer with metastasis to the lymph nodes.

The district office then referred the claim to another DMC, Dr. Marc Bodow, for a complete impairment rating that also included the accepted consequential condition of an unspecified disorder of the teeth and supporting structures, including xerostomia. In his April 7, 2007 report, Dr. Bodow indicated that **[Employee]** had a 21% impairment of the whole person due to the pharyngeal cancer (with metastasis) and the disorder of the teeth and supporting structures.

The Seattle district office conducted a telephone interview with **[Employee]** in which he stated that he had received a settlement of $18,231.62 of state workers' compensation benefits related to the medical conditions for which he had claimed EEOICPA benefits. The record includes a Compromise and Release from the Alaska Workers' Compensation Board that establishes that he received a settlement of $18,231.62 for his cancer due to radiation exposure on Amchitka Island.

On April 12, 2007, the Seattle district office issued a recommended decision to accept **[Employee]**'s claim for permanent impairment based on his cancer of the pharynx and the consequential disorder of the teeth and supporting structures under Part E. The district office found that he had a 21% impairment of the whole body as the result of those covered illnesses, and that he was entitled to $2,500.00 for each percentage point (21 x $2,500.00 = $52,500.00), which had to be coordinated with the $18,231.62 he had received in state workers' compensation benefits, leaving a net recommended award of $34,268.38.

On April 23, 2007, FAB received **[Employee]**'s affirmation that neither he nor anyone in his family had ever filed for or received any settlement or award from a tort suit related to his exposure to radiation, and that he had not pled guilty to or been convicted of any charges connected with an application for or receipt of federal or state workers' compensation. He also confirmed that he had filed for and received an $18,231.62 settlement of a state workers' compensation claim for the same medical conditions he had claimed for under EEOICPA.

OBJECTIONS

On May 7, 2007, FAB received **[Employee]**'s letter objecting to the recommended decision, indicating that he felt that 21% was not completely fair, and that he could only do 30% of what he used to do before he was diagnosed with cancer in 2001. In that letter **[Employee]**, listed a number of ways in which he alleged that his quality of life had decreased, such as the weakness he experienced due to the radiation treatments he was receiving for his cancer, and his inability to enjoy activities or travel. Lastly, he disagreed with the coordination of his Part E benefits with the settlement he had received from the Alaska Workers' Compensation program.

In a subsequent June 4, 2007 submission, **[Employee]** provided FAB with letters written by his two best friends with their observations of his condition. He also indicated that he had had an appointment three weeks ago with his physician, who had told him that his exhaustion was due to the radiation doses he had been receiving in his neck and throat. Once the recommended decision on impairment has been issued and forwarded to FAB for the issuance of a final decision, an employee may submit new medical evidence or an additional impairment evaluation to challenge the evaluation upon which the recommended decision was based. However, the employee bears the burden of proving that the new medical evidence or new impairment evaluation is of greater probative value than the evaluation used by the district office to determine the impairment rating. 20 C.F.R. § 30.908 (2007). In this case, **[Employee]** did not provide any medical evidence or an impairment evaluation that is of greater probative value than the impairment evaluation received from the second DMC. In his report, that DMC provided medical rationale supporting his whole body permanent impairment rating of 21%, and explained how he had arrived at that percentage using the Fifth Edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (the *Guides*).

As for the state workers' compensation benefits **[Employee]** received, 20 C.F.R. § 30.626 notes that the Division of Energy Employees Occupational Illness Compensation (DEEOIC) must reduce the compensation payable under Part E by the amount of benefits the claimant receives from a state workers' compensation program by reason of the same covered illness, after deducting the reasonable costs to the claimant of obtaining those benefits. If a covered Part E employee or a survivor of such employee receives benefits through a state workers' compensation program pursuant to a claim for the same covered illness, DEEOIC will first determine the dollar value of the benefits received from a state workers' compensation program by including all benefits, other than medical and vocational rehabilitation benefits, received for the same covered illness or injury sustained as a consequence of a covered illness. DEEOIC will then deduct the reasonable costs of obtaining those state workers' compensation benefits, such as attorney fees and certain itemized costs (like filing, travel expenses, witness fees, and court reporter costs for transcripts), provided that adequate supporting documentation is submitted to DEEOIC for its consideration. The Part E benefits that will be reduced consist of any unpaid monetary payments payable in the future and medical benefits payable in the future. In those cases where it has not yet paid Part E benefits, DEEOIC will reduce such benefits on a dollar-for-dollar basis, beginning with the current monetary payments first. If the amount to be subtracted exceeds the monetary payments currently payable, DEEOIC will reduce ongoing EEOICPA medical benefits payable in the future by the amount of any remaining surplus. This means that OWCP will apply the amount it would otherwise pay to reimburse the covered Part E employee for any ongoing medical treatment to the remaining surplus until it is absorbed (or until further monetary benefits become payable that are sufficient to absorb the surplus).

The record establishes that **[Employee]** received a state workers' compensation settlement in the amount of $18,231.62 for mouth and throat cancer due to his work-related exposure to radiation at Amchitka Island. It also establishes that his employers and the employers' insurance carriers paid a separate amount of $6,768.38 for his attorney fees.

After considering the evidence of record, FAB hereby makes the following:

FINDINGS OF FACT

1. On February 19, 2002, **[Employee]** filed a claim under EEOICPA with DOE, and also with the Department of Labor on July 16, 2003.

2. FAB issued a final decision accepting **[Employee]**'s Part B claim for cancer of the pharynx on May 21, 2002.

3. FAB also issued a final decision accepting **[Employee]**'s Part E claim for cancer of the pharynx with metastasis to the lymph nodes and a consequential disorder of the teeth and supporting structures on March 31, 2006.

4. **[Employee]** has a 21% whole body permanent impairment due to cancer of the pharynx with metastasis to the lymph nodes and a consequential disorder of the teeth and supporting structures, resulting in a gross impairment award of $52,500.00. Following coordination of this gross award with **[Employee]**'s state workers' compensation benefits of $18,231.62, the net impairment award payable is $34,268.38.

Based on the above-noted findings of fact, FAB hereby also makes the following:

CONCLUSIONS OF LAW

[Employee] has previously been determined to be a covered DOE contractor employee who contracted cancer of the pharynx with metastasis to the lymph nodes and a consequential disorder of the teeth through exposure to a toxic substance (radiation) at a DOE facility, the Amchitka Island Nuclear Explosion Site. Applying the provisions of 42 U.S.C. § 7385s-2 and 20 C.F.R. § 30.901, he has an impairment rating of 21% in accordance with the *Guides* and the gross amount of his impairment award is $52,500.00. However, **[Employee]** received a state workers' compensation settlement in the amount of $18,231.62 for the same accepted conditions. Therefore, his Part E benefits must be coordinated with those state workers' compensation benefits, and the net amount of impairment benefits payable following coordination is $34,268.38.

The undersigned notes **[Employee]**'s objections to the recommended decision; however, they do not change the outcome of this case. FAB is bound by the provisions of EEOICPA and the regulations, and has no authority to depart from them. Accordingly, **[Employee]** is entitled to compensation for his permanent impairment in the amount of $34,268.38 under Part E.

Seattle, Washington

Kelly Lindlief

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 10033309-2006 (Dep't of Labor, November 9, 2007)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch (FAB) concerning the above claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claim is approved for an award of impairment benefits under Part E of EEOICPA in the amount of $17,300.00

(an award of 17% in impairment benefits of $42,500.00, reduced because of the required coordination with state workers' compensation benefits by $25,200.00) based on the employee's covered illness of lung cancer. A decision on the claim for prostate cancer under both Parts B and E is deferred pending further development.

STATEMENT OF THE CASE

On November 4, 2002, **[Employee]** filed a claim for benefits under Part B and Part E (which was formerly Part D) of EEOICPA. At that time, he identified lung cancer as the condition resulting from your employment at a Department of Energy (DOE) facility. DOE confirmed that **[Employee]** was employed at the K-25 Plant in Oak Ridge, Tennessee from July 6, 1953 to April 7, 1961, and at the Y-12 Plant in Oak Ridge, Tennessee from January 16, 1967 to July 31, 1985. In support of his claim, **[Employee]** submitted an August 11, 1994 surgical pathology report, signed by Dr. Stephen H. Harrison, showing a diagnosis of moderately to poorly differentiated adenocarcinoma of the left lung.

On January 7, 2002, FAB issued a final decision accepting his claim under Part B, finding that he was a member of the Special Exposure Cohort, that he had been diagnosed with lung cancer, which is a "specified" cancer under EEOICPA, and awarding him compensation in the amount of $150,000.00 and medical benefits under Part B for lung cancer. On April 17, 2006, FAB also accepted **[Employee]**'s claim under Part E, finding that he had contracted lung cancer through exposure to a toxic substance at a DOE facility, and awarded him medical benefits for his "covered" illness of lung cancer under Part E.

On June 5, 2006, the district office received **[Employee]**'s request for an impairment evaluation under Part E and elected to have a Department of Labor physician perform the rating. To determine his impairment rating, the district office referred **[Employee]**'s case file to a District Medical Consultant (DMC). In a March 29, 2007 report, the DMC reviewed the medical evidence of record and concluded that it established that **[Employee]** had reached maximum medical improvement. Using the Fifth Edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (the *Guides*), the DMC concluded that **[Employee]** had a 5% whole person impairment due to his accepted lung cancer.

On November 8, 2006, the district office received a copy of **[Employee]**'s state workers' compensation settlement of $25,200.00 for the condition of lung cancer.

On March 15, 2007, the Jacksonville district office issued a recommended decision finding that **[Employee]**'s covered illness of lung cancer resulted in a 5% whole body impairment and that he was entitled to $12,500.00 in impairment benefits under Part E of EEOICPA. The district office also recommended that the $25,200.00 state workers' compensation settlement be coordinated with his impairment benefits, leaving a surplus of $12,700.00 to be recovered out of future medical benefits until it was absorbed.

OBJECTIONS

On May 14, 2007, **[Employee]** timely filed a written objection to the recommended decision's proposed award and requested an oral hearing to present his objections, which was held on August 1, 2007 in Oak Ridge, Tennessee. **[Employee]** was represented by Christopher H. Hayes, an attorney with the Energy Workers' Legal Resource Center. On August 8, 2007, a copy of the transcript of the

hearing was sent to **[Employee]**.

[Employee] submitted exhibits at the hearing, as follows:

- A copy of his state workers' compensation settlement agreement, showing that he was paid $25,200.00.

- A copy of an April 5, 2005 report by Dr. William R.C. Stewart, III, concluding that **[Employee]** had a 15% impairment to the whole person based on his lung cancer, without recurrence, which also noted that his impairment would be much higher if the cancer returned.

- A copy of an August 23, 2006 letter and attached medical report from Dr. R. Hal Hughes, noting that **[Employee]** was seen in his office on that date and that he had a 50% impairment to the whole person, based on the Fifth Edition of the *Guides*, Table 5-12.

- A copy of a June 13, 2007 report of a medical examination, in which Dr. Norm Walton concluded that **[Employee]** had a 17% impairment of the whole person based on his lung cancer.

At the hearing, **[Employee]** presented the following objections:

1. He stated that he was seen by Dr. Stewart to obtain an impairment rating of 15% in 2005, and that that was the report upon which his state workers' compensation settlement was based. **[Employee]** also stated that on August 23, 2006, Dr. Hughes, his current treating physician, supplied a letter referencing a 50% impairment to the whole person. He stated that he saw Dr. Norm Walton at his attorney's request on June 13, 2007, and that he gave him a 17% impairment rating to the whole person after a "hands-on examination" and "repeat breathing tests."

2. **[Employee]** stated that when he is seen in a doctors' office, it is usually after he has taken his medication, such as an inhaler, which improves his breathing function. He stated that his condition varies from day to day and within the day, being worse at night, especially if he does sleep propped up, and that he is not able to do activities such as "mow the yard." **[Employee]** argued that the DMC's report did not take these considerations into account. He also stated that he was not given the opportunity to review the DMC's report and object prior to the issuance of the recommended decision.

3. **[Employee]** argued that, as to the probative value of these varying impairment rating reports, three of the four doctors writing reports had actually examined him, and that these physicians in terms of their opinions, present a picture that's more probative to the Department of Labor and present a more clear, clinical assessment of his impairment than the DMC's evaluation based on the records with which he was provided. He argued that the report of his treating doctor, Dr. Hughes, would have the most probative opinion, as pulmonary function testing may be "somewhat variable" despite his being at maximum medical improvement, and he is Dr. Hughes' regular patient.

4. **[Employee]** also stated that his pulmonary function has been getting progressively worse, as compared to the mid-1990s when he had his surgery. Thus, he alleged that he was worse than

he was in 2005, when Dr. Stewart did his evaluation.

Regarding these objections, FAB notes that impairment ratings are based on an individual's current condition at maximum medical improvement, and that **[Employee]** has four separate impairment rating reports in his file from four different physicians. The DMC's opinion is the only one given without benefit of a physical examination and gave a 5% impairment rating. **[Employee]** alleges that his condition has worsened since the 2005 examination by Dr. Stewart, which gave a 15% impariment rating. His treating physician gave a 50% impairment rating on August 23, 2006, and he states that this is the doctor who is most familiar with his condition. The latest impairment rating in the file, that of 17% by Dr. Walton, was done based on a physical examination on June 13, 2007 and was specifically obtained for **[Employee]**'s Part E claim.

Under the regulations implementing Part E of EEOICPA, the employee bears the burden of proving that the new impairment evidence he has submitted has more probative value than the evaluation used by the district office to determine the impairment rating. The weighing of the probative value of these impairment ratings must take many variables into consideration, such as whether that the opining physician possesses the requisite skills and requirements to provide a rating as set out under the regulations, whether the evaluation was conducted within 1 year of its receipt by the Division of Energy Employees Occupational Illness Compensation, whether the report addresses the covered illness, and whether the whole body percentage of impairment is listed with a clearly rationalized medical opinion as to its relationship to the covered illness. *See* Federal (EEOICPA) Procedure Manual, Chapter E-900(10)(b).

As noted above, the DMC never actually examined **[Employee]** and the 2005 impairment rating was done more than 1 year before it was submitted to FAB. Thus, neither of these reports has the most probative value for EEOICPA purposes. FAB also notes that both Dr. Hughes and Dr. Walton submitted medical reports that are clear and well-rationalized with regard to the causal relationship of **[Employee]**'s impairment to the covered illness of lung cancer. **[Employee]** testified that his condition is getting progressively worse and has been since his 1994 diagnosis and subsequent surgery for lung cancer. The most recent impairment rating in the file was done in June 2007 by Dr. Walton, nearly a year after the next more recent, which was done in August 2006 by Dr. Hughes. Dr. Walton's impairment rating also appears to be more consistent with the other impairment ratings that have been done for **[Employee]** by other physicians, in terms of the percentage of impairment. Thus, FAB concludes that the most probative opinion with regard to **[Employee]**'s current level of impariment is the most current impariment rating by Dr. Walton, which gives a 17% impairment rating of the whole person.

At the hearing, **[Employee]** acknowledged that if his condition worsened, he could claim for additional impairment based on the same covered illness after the passage of two years from his award. FAB also notes that **[Employee]** has a pending claim based on the condition of prostate cancer and that he may seek an impairment rating on a different covered illness *before* the passage of two years. *See* 20 C.F.R. § 30.912.

Following an independent review of the evidence of record, the undersigned hereby makes the following:

FINDINGS OF FACT

1. On November 4, 2002, **[Employee]** filed a claim for benefits under Part B and Part E of EEOICPA. At that time, he identified lung cancer as the condition resulting from his employment at a DOE facility.

2. On January 7, 2002, FAB issued a final decision that accepted **[Employee]**'s claim under Part B, finding that he was are a member of the Special Exposure Cohort, that he had been were diagnosed with lung cancer (a "specified" cancer), and awarding him a lump-sum of $150,000.00 and medical benefits for lung cancer.

3. On April 17, 2006, FAB also accepted **[Employee]**'s claim under Part E, finding that he had contracted his lung cancer through exposure to a toxic substance at a DOE facility and awarding him medical benefits for lung cancer under Part E.

4. On March 5, 2007, a DMC reviewed the medical evidence of record and determined that according to the *Guides*, **[Employee]** had a 5% whole person impairment resulting from his accepted covered illness of lung cancer.

5. On June 14, 2007, Dr. Norm Walton examined **[Employee]** and determined that he had a current impairment raring of 17% to the whole person as a result of his lung cancer.

6. **[Employee]** received a state workers' compensation settlement of $25,200.00 for his claimed condition of lung cancer.

Based on the above-noted facts, the undersigned also hereby makes the following:

CONCLUSIONS OF LAW

Under Part E of EEOICPA, a "covered DOE contractor employee" with a "covered illness" shall be entitled to impairment benefits based upon the extent of whole person impairment of all organs and body functions that are compromised or otherwise affected by his or her "covered illness." *See* 42 U.S.C § 7385s-2(a); 20 C.F.R. § 30.901(a). The impairment rating of an employee shall be determined in accordance with the Fifth Edition of the *Guides*. 42 U.S.C. § 7385s-2(b). Section 7385s-2(a)(1) provides that for each percentage point of the impairment rating that is the result of a covered illness, the covered DOE contractor employee shall receive $2,500.00.

As noted above, **[Employee]** is a covered DOE contractor employee with the covered illness of lung cancer, and he has an impairment rating of 17% of the whole person as a result of his covered illness based on the *Guides*. The physician giving this impairment rating, Dr. Walton, evaluated **[Employee]**'s condition based on a physical examination and also carefully reviewed his medical records, and his is the most probative medical opinion on impairment in the file, as discussed above. **[Employee]** is therefore entitled to $42,500.00 in impairment benefits (17 x $2,500.00 = $42,500.00) under Part E of EEOICPA. This amount must be coordinated with the amount **[Employee]** received in a state workers' compensation settlement for his lung cancer, which was $25,200.00. Thus, his net award of impairment benefits based on his lung cancer is $17,300.00. A decision on **[Employee]**'s claim under Parts B and E for prostate cancer is deferred pending further development.

Washington, D.C.

Carrie A. Rhoads

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 10043931-2006 (Dep't of Labor, March 10, 2008)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) on the employee's claim for benefits under Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the employee's claim is denied.

STATEMENT OF THE CASE

On May 31, 2002, the employee filed a claim for benefits under Part B of EEOICPA and alleged that he had contracted beryllium sensitivity, chronic beryllium disease (CBD) and pulmonary insufficiency due to occupational exposure to beryllium as a mechanical engineer at the Massachusetts Institute of Technology campus in Cambridge, Massachusetts (MIT). In support of his claim, he filed a Form EE-3 on which he alleged that he had been employed by "U.S. Army, (T-4) Special Engineering Detachment, Manhattan District, Corps of Engineers, assigned to Metallurgical Project, U of Chicago, Mass. Inst. of Tech Location," at Oak Ridge, Tennessee, and as a radiation monitor at Bikini Atoll from May through August 1946. On that form, the employee alleged that he was assigned to the "Beryllium Group" at MIT from November 1945 to May 1946.

By letter dated June 10, 2002, the Denver district office of the Division of Energy Employees Occupational Illness Compensation (DEEOIC) confirmed receipt of the employee's claim and informed him that coverage under EEOICPA is limited to civilian employees of the Department of Energy (DOE), its predecessor agencies and certain of its contractors and subcontractors, and that military personnel are not similarly covered. The employee then submitted several documents regarding his employment, including a June 17, 2002 letter in which he clarified that: (1) he joined the Army in 1942; (2) he was called to active duty in May 1943; and (3) he was assigned to the K-25 Gaseous Diffusion Plant in Oak Ridge in September 1944. He stated that shortly afterward, he was transferred to the "Metallurgical Project" at MIT, still as an enlisted member of the Army, and worked there until May 1946 when he was transferred back to Oak Ridge and trained for his subsequent job at Operation Crossroads in the Pacific.

Employment records provided by MIT on April 24, 2003 indicate: (1) that the employee was initially assigned to work at MIT as an enlisted member of the U.S. Army on December 1, 1944; (2) that on January 26, 1945, a change in his Army status allowed MIT to hire him directly as a civilian employee on the same project; and (3) that he was recalled to active military duty in the Army on October 22, 1945, but continued to work on the project at MIT until May 2, 1946. In a letter dated May 10, 2003, the employee provided a detailed work history, with supporting documents, that was consistent with the information provided by MIT and confirmed that he was a civilian employee of MIT at MIT's Cambridge campus from January 26, 1945 to October 22, 1945. Neither DOE nor its Oak Ridge Operations Office was able to verify the employee's alleged employment at Oak Ridge or at Bikini Atoll, but the enlistment records in his case file are consistent with his claim of military employment at these two locations.

On May 15, 2003, the Denver district office issued a recommended decision to accept the employee's claim for beryllium sensitivity, and on May 30, 2003 the FAB issued a final decision consistent with the district office's recommendation. In that decision, the FAB awarded the employee medical benefits and monitoring for his beryllium sensitivity, retroactive to his filing date of May 31, 2002. Thereafter, on September 11, 2003, the Denver district office issued a recommended decision to accept the employee's Part B claim for CBD, based on the recommended findings that he had covered civilian employment at MIT from January 26, 1945 to October 22, 1945, and that he had been diagnosed with CBD on July 2, 2003. On September 22, 2003, the FAB issued a final decision accepting the employee's Part B claim for CBD and awarding him a lump-sum of $150,000.00 plus medical benefits for his CBD, retroactive to May 31, 2002. In this final decision, the FAB concluded that the employee was a "covered beryllium employee" and that he had been diagnosed with CBD consistent with the criteria set out in EEOICPA.

Following the 2004 amendments to EEOICPA that included the enactment of new Part E[1], the employee filed a claim based on his CBD under Part E of EEOICPA on November 25 , 2005. Shortly thereafter, the employee's new Part E claim was transferred to the Cleveland district office of DEEOIC for adjudication. By letter dated March 9, 2006, the Cleveland district office informed the employee that he did not meet the eligibility requirements under Part E of EEOICPA. The district office explained that Part E differs from Part B in that Part E only provides benefits for civilian employees of DOE contractors and subcontractors (or their eligible survivors), but does not provide benefits for employees of the other types of employers that are covered under Part B, *i.e.*, atomic weapons employers or beryllium vendors. The letter provided the employee with an opportunity to submit additional evidence "[i]f you intend to claim additional employment or intend to provide evidence that MIT should be designated as a DOE facility. . . ." Included with the letter was a print-out of the Department of Energy (DOE) Facility List entry for MIT, which indicated that at that time, MIT's Cambridge campus was designated only as an atomic weapons employer (AWE) facility and a beryllium vendor facility, but not a DOE facility.[2]

On April 17, 2006, the Cleveland district office issued a recommended decision to deny the employee's Part E claim for his CBD, based on their recommended finding that the evidence in the file was insufficient to establish that he was a "covered DOE contractor employee," as that term is defined in § 7384l(11) of EEOICPA, because it failed to establish that his civilian employment at MIT was at a "Department of Energy facility," as that second term is defined in § 7384l(12) of EEOICPA. The employee filed objections to the recommended decision in letters to the FAB dated May 4, 2006, June 26, 2006, September 17, 2006 and October 26, 2006, and submitted several affidavits, exhibits and other factual evidence in support of his objections. All of the employee's objections were made in support of his position on one point—that DEEOIC should determine that MIT's Cambridge campus, or a portion thereof, is a "DOE facility" for the purposes of his Part E claim.

On June 6, 2006, the FAB referred the employee's Part E claim to DEEOIC's Branch of Policy, Regulations and Procedures (BPRP) for guidance on the issue of whether the evidence submitted by the employee warranted the requested determination regarding MIT's Cambridge campus. On December 21, 2006, BPRP referred the issue to the Office of the Solicitor of Labor (SOL). On March 14, 2007, SOL issued an opinion in which it concluded that the evidence in the case file was insufficient to establish that MIT's campus meets the statutory definition of a "Department of Energy facility." Based on that conclusion, SOL advised BPRP that DEEOIC could reasonably determine that the employee was ineligible for benefits under Part E as he was not a "covered Department of Energy contractor employee."

On May 4, 2007, the FAB issued a final decision denying the employee's Part E claim. In its final decision, the FAB restated both the employee's objections and the opinion of SOL. The FAB found that while MIT's Cambridge campus was recognized as both an AWE facility and a beryllium vendor facility during the period of the employee's civilian employment there, the evidence was insufficient to establish that it also satisfied the statutory definition of a "DOE facility" during that time period. Thus, the FAB concluded that the employee was not a "covered DOE contractor employee," as that term is defined in EEOICPA.

By letter dated May 24, 2007, the employee filed a request for reconsideration of the FAB's final decision and on July 17, 2007, the FAB issued a denial of the employee's request. In its denial, the FAB restated the employee's objections and based its denial on the conclusion that he had not submitted any new evidence or arguments that would justify reconsidering the May 4, 2007 final decision. On January 25, 2008, the Director of DEEOIC issued an Order vacating both the FAB's May 4, 2007 final decision on the employee's Part E claim and its July 17, 2007 denial of the employee's request for reconsideration. In his Order, the Director indicated that while the FAB had restated the employee's objections in its final decision, it had not explicitly analyzed each of those objections. Because of this, the Director vacated the FAB's decisions and returned the employee's Part E claim to the FAB "for issuance of a new final decision that gives appropriate consideration to the employee's objections to the Cleveland district office of DEEOIC's recommended denial of his Part E claim."

OBJECTIONS

As noted above, the employee objected to the recommended denial of his Part E claim in a letter dated May 4, 2006 and urged that MIT's Cambridge campus was misclassified and should be determined to be a DOE facility. The employee's first argument urged that the work of the Metallurgical Project at MIT was "nuclear weapons related." The evidence supports this argument. The DOE Facility List entry for MIT describes the uranium metallurgical work and beryllium work performed at MIT in support of the U.S. Army Corps of Engineers Manhattan Engineer District (MED) during the period 1942 through 1946.[3] This work—a portion of which was performed by the employee—supports the determination that MIT's Cambridge campus is both an AWE facility from 1942 through 1946, and a beryllium vendor facility from 1943 through 1946.

The employee's second argument was that DEEOIC previously determined that MIT's Cambridge campus was a DOE facility. In support of this position, the employee correctly pointed out that in its May 15, 2003 recommended decision on his Part B claim, the Denver district office stated that "Massachusetts Institute of Technology initially became a DOE facility in 1942." The FAB acknowledges that the Denver district office made that erroneous historical statement in its recommended decision on the employee's Part B claim; however, that error was not carried forward in any of the subsequent recommended decisions on the employee's several claims, nor was it repeated in any finding of fact or conclusion of law in any of the FAB's final decisions issued on the employee's several claims. In issuing a final agency decision on a claim under EEOICPA, the FAB is not bound by a historical inaccuracy contained in a recommended decision issued by a DEEOIC district office. *See* EEOICPA Fin. Dec. No. 10028664-2006 (Dep't of Labor, August 24, 2006).

The employee also argued that the MED was a predecessor agency of DOE. The FAB agrees with this historical point. 42 U.S.C. § 7384l(10).

The employee argued that "beryllium work was done at MIT and that acute beryllium disease resulted." The FAB agrees. The DOE Facility List description of the work that was performed at MIT describes beryllium work performed at the MIT Cambridge campus, and that work supports the designation of MIT as a beryllium vendor during the period 1943 through 1946. That description also refers to "a number of cases of beryllium disease at MIT" prior to the fall of 1946.[4]

The employee submitted evidence that the Metallurgical Laboratory (Met Lab) in Chicago, Illinois, is

classified as an AWE facility, a beryllium vendor facility and a DOE facility, and argued that the work performed at MIT's Cambridge campus "was just an extension of" the work performed under Dr. Arthur Compton at the Met Lab. The FAB agrees that the Met Lab was designated as an AWE facility (1942-1952), a beryllium vendor facility (1942-1946) and a DOE facility (1982-1983, 1987).[5] The FAB notes, however, that like MIT's Cambridge campus, the Met Lab is classified only as an AWE facility and a beryllium vendor facility during the time of their early uranium and metallurgical work in the 1940s. The Met Lab is classified as a DOE facility only during the periods of remediation work that was performed there in the 1980s. These classifications are consistent with those for MIT's Cambridge campus. The FAB concludes that the evidence in the file is insufficient to establish that the work performed at MIT's Cambridge campus "was just an extension of" the work performed at the Met Lab. The work performed at MIT's Cambridge campus was performed pursuant to a contract between the MED and MIT, and there is no evidence in the file to corroborate the employee's claim that the Met Lab directed or controlled the MIT Metallurgical Project.

The employee also submitted evidence showing that the Ames Laboratory in Ames, Iowa, is classified as a DOE facility, but made no argument in his May 4, 2006 letter as to the relevance of this information. In a letter dated February 7, 2008, the employee clarified his argument regarding the Ames Laboratory by asserting that the Met Lab and the Ames Laboratory "were both classified as DOE Employers while MIT was not, even though the work was analogous and facilities in all cases were owned by the universities. . . . The precedents established by these classifications seems not to have been considered." The FAB acknowledges that the Ames Laboratory is designated as a DOE facility (1942-present),[6] but points out that there is no probative evidence in the case file that corroborates the employee's argument that the work performed at the Ames Laboratory was analogous to the work that was performed at MIT's Cambridge campus, or that the contracts for such work were similar in type to the pertinent MED contract with MIT, or that the buildings used at the Ames Laboratory were owned by the associated university.[7] The regulations governing EEOICPA place upon the claimant the burden to produce evidence necessary to establish all criteria for benefits and to prove the existence of all elements necessary to establish eligibility for benefits. 20 C.F.R. § 30.111(a). The employee's bare assertions regarding the Met Lab and the Ames Laboratory are not, without supporting factual evidence, sufficient to establish his precedent argument and, thus, do not provide probative support for his claim.

The employee also argued that his work was recognized by the Secretary of War as "essential to the production of the Atomic Bomb." The FAB does not dispute this point.

In his letter dated June 26, 2006, the employee modified his objection to the recommended decision by stating that the MIT Metallurgical Project (MMP), not the entire MIT Cambridge campus, should be classified as a DOE facility. In support of that objection, he argued that "if the MMP was reclassified to meet the requirements of 'Department of Energy' Facility,'" then he would satisfy the statutory requirements of a "Department of Energy contractor employee." Based on the totality of the evidence in the case file, the FAB concludes that the evidence does not provide sufficient support for this argument. Even if the MMP were to be classified as a DOE facility during the employee's period of civilian employment there, he would still have to submit factual evidence sufficient to establish that he was employed by "(i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility." 42 U.S.C. § 7384l(11)(B). The evidence does not support a conclusion that he was so employed, because it does not establish that his employer, MIT, contracted with DOE (or any of its predecessor agencies) "to provide management and operating, management and integration, [] environmental remediation, [or] services, including construction and maintenance, at the facility."

The employee also argued that the MMP meets the first part of the two-part statutory definition of a "DOE facility." In support of this argument, he asserted that the evidence in the file proves that the

MMP is a building, structure or premise "in which operations are, or have been, conducted by, or on behalf of, the Department of Energy," pursuant to 42 U.S.C. § 7384l(12)(A). The FAB agrees that the evidence supports this conclusion. During the development of the employee's Part E claim, his file was referred to the SOL, and on March 14, 2007, that office issued a memorandum in which it found that the evidence supports a conclusion that the employee's "work on the Metallurgical Project was performed pursuant to Contract No. W-7405-eng-175 between MIT and the MED, thus meeting the test of § 7384l(12)(A)." The FAB agrees with that conclusion.

The employee then argued that the MMP also meets the second part of the two-part statutory definition of a "DOE facility," in that the MED had "a proprietary interest" in the MMP, as required by subsection (i) of 42 U.S.C. § 7384l(12)(B). In support of this position, the employee alleged that "The MED paid all bills, provided all priorities, met all needs for civilian or military personnel, which would indicate a clear proprietary interest in the MMP." As set forth more fully in the Conclusions of Law section of this final decision, the evidence in the file does not provide sufficient support for the employee's argument that the MED had "a proprietary interest" in the MMP. In their March 14, 2007 memorandum, SOL concluded that there is no evidence in the employee's case file that the MED had "a proprietary interest" in any of the buildings, structures or premises in which he worked as a civilian employee at MIT's Cambridge campus. That conclusion is part of the totality of the evidence that FAB has considered in this case, and FAB agrees with that conclusion.

That conclusion is also supported by the employee's own statements regarding ownership of the buildings in which he worked at MIT's Cambridge campus. His first identification of the buildings in which he worked during his civilian employment at MIT's Cambridge campus was more than two years after he filed his Part E claim. In a letter dated February 7, 2008, submitted after his claim was reopened by order of the Director of DEEOIC, the employee stated that all of his work for the MMP was performed in Buildings 4, 8 and 16 on MIT's Cambridge campus. He also asserted that those buildings were analogous to the buildings used at the Met Lab and the Ames Laboratory for MED work during that same time period and argued that the classification of all three facilities should be the same because "facilities in all cases were owned by the universities." Consistent with the employee's assertion that MIT owned the buildings and laboratories in which MMP research was performed, there is no probative evidence in the file establishing that the MED had a proprietary interest in any of these three buildings.

Alternatively, the employee argued that the MMP meets the second part of the two-part statutory definition of a "DOE facility" because the MED "entered into a contract with [MIT] to provide management and operation," as required by subsection (ii) of 42 U.S.C. § 7384l(12)(B). In support of this position, he argued that:

> The MED clearly entered into a contract with MIT to provide management and scientific operations. I have never seen this contract. . . . However, the Division of Industrial Cooperation at MIT did not do *pro bono* work. A contract is certainly implied by analogy to other universities such as Chicago's MetLab and Iowa State's Ames Lab, both of which, by the way, have DOE classifications.

However, the employee did not submit a contract or any other evidence that establishes that a "management and operation" contract was entered into between the MED and MIT for the work performed by the MMP. As noted above, SOL concluded in their March 14, 2007 memorandum that the work of the MIT Metallurgical Project was performed pursuant to a contract between MIT and the MED—Contract No. W-7405-eng-175. The employee's case file does not include a copy of the actual contract and FAB has not been able to locate a copy of that contract.[8] However, the SOL memorandum cites a page from Book VII, Volume I, Appendix K of the Manhattan District History, which describes the contract as follows: "Contract W-7405 eng-175 with Massachusetts Institute of Technology is a research and development contract involving work with Be as well as other metals and compounds."[9] Thus, based on available evidence, SOL concluded that the contract was not a

contract "to provide management and operation," but was, rather, a "research and development contract." This conclusion is consistent with DOE's description of the facility at MIT's Cambridge campus in the DOE Facility List. That description references contract W-7405-eng-175 and the beryllium-related research that was conducted at MIT's Cambridge campus pursuant to the contract.
[10] There is no probative evidence in the file that the MIT-MED contract under which the employee worked was a "management or operation" contract, as asserted by the employee. Thus, based on the totality of the evidence, the FAB concludes that the evidence is insufficient to establish that MIT's Cambridge campus satisfies the statutory requirements of § 7384l(12)(B)(ii).
By letter dated September 17, 2006, the employee supplemented his objection concerning the "proprietary interest" test of 42 U.S.C. § 7384l(11)(B)(i). In that letter, the employee argued that Roget's Thesaurus lists several synonyms for the term "proprietary interest," including "vested interest" and "beneficiary interest," and that by these broader definitions, the MED had a "proprietary interest" in the MMP. The employee argued that since "all work of the MIT project was paid for by and directly benefited the MED," the MED had a "proprietary interest" in the buildings in which the MMP work was performed.
The FAB finds that the evidence supports the employee's statement that the work on the MMP project was paid for by and directly benefited the MED. Both the SOL memorandum and the DOE Facilities List support a finding that the MMP work was performed pursuant to Contract No. W-7405-eng-175 between MIT and the MED, and FAB will assume that the MED met its payment obligations to MIT under the contract. However, payment for work performed under the contract and receipt of benefits from the performance of the contract do not establish that the MED had a proprietary interest in the *buildings* in which the contract's work was performed. The structure of the statutory definition of a "Department of Energy facility" supports this conclusion. The Act defines the term "Department of Energy facility" as:

> [A]ny building, structure, or premise, including the grounds upon which such building, structure, or premise is located—
> (A) in which operations are, or have been, conducted by, or on behalf of, the Department of Energy. . .; and
> (B) with regard to which the Department of Energy has or had—
>
> (i) a proprietary interest, or
> (ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services.

42 U.S.C. § 7384l(12). Thus, in order to satisfy the requirements of subsection (B) of the statutory definition, it must be established that DOE (or its predecessors, including the MED) either (i) had a proprietary interest in the buildings in which **[Employee]** worked, or (ii) had a contract with MIT to provide at least one of the specific types of services listed in the definition. Thus, the "proprietary interest" test of subsection (B)(i) is an alternative to the "contract" test of subsection (B)(ii). If evidence of payment and receipt of benefits under a type (B)(ii) contract was sufficient to meet the "proprietary interest" test of (B)(i), as the employee urged, there would be no need to have the alternative subsection (B)(i) test. Thus, the meaning of "proprietary interest" proffered by the employee would render subsection (B)(i) superfluous.
Additionally, as set forth more fully in the Conclusions of Law section of this decision, the employee's alternative definitions of the phrase "proprietary interest" are not consistent with its ordinary meaning, that is, an interest characterized by ownership, use and control. The employee has made no allegation, nor proffered any evidence, that the buildings in which he worked on MIT's Cambridge campus during his civilian employment from January 26, 1945 to October 22, 1945, *i.e.*, Buildings 4, 8 and 16, were owned, rented, or controlled by the MED for use by the MMP. In fact, he repeatedly refers to those buildings as labs of the MIT Metallurgical Department owned by MIT, not labs owned by the MED.

[11]
Finally, under cover letter dated October 26, 2006, the employee supplied additional factual evidence in support of his argument that there was a contract between the MED and MIT for the MMP, and therefore the "contract" test of 42 U.S.C. § 7384l(11)(B)(ii) is satisfied and the MMP should be classified as a DOE facility. As described above, FAB acknowledges that the employee's civilian work at MIT was performed pursuant to a contract between MIT and the MED, but concludes that there is insufficient evidence to establish that the contract in question meets the requirements of 42 U.S.C. § 7384l(12)(B)(ii), and therefore the buildings used for the MMP do not satisfy the statutory definition of a "DOE facility."
After reviewing the written record of the case file and the employee's objections described above, the FAB hereby makes the following:

FINDINGS OF FACT

1. On May 31, 2002, the employee filed a claim for benefits under Part B of EEOICPA based on the allegation that he had contracted beryllium sensitivity, CBD and pulmonary insufficiency due to his occupational exposure to beryllium as a mechanical engineer at MIT's campus in Cambridge, Massachusetts.

2. The employee was a civilian employee of MIT from January 26, 1945 to October 22, 1945, and worked on the MMP during that time period.

3. During his period of civilian employment by MIT, the employee worked in Buildings 4, 8 and 16 on MIT's Cambridge campus. The MED did not have a "proprietary interest" in any of those three buildings, which were instead owned by MIT.

4. The employee's work on the MMP was performed pursuant to Contract No. W-7405-eng-175 between MIT and the MED (a predecessor agency of DOE).

5. During the period of the employee's civilian employment by MIT, Contract No. W-7405-eng-175 was a research and development contract and was not a contract to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services at MIT's Cambridge campus.

6. Prior to January 26, 1945 and after October 22, 1945, the employee was an active enlisted member of the U.S. Army.

7. On May 30, 2003, the FAB issued a final decision accepting the employee's Part B claim for beryllium sensitivity and awarding him medical benefits and sensitivity monitoring retroactive to his filing date of May 31, 2002.

8. The employee was diagnosed with CBD on July 2, 2003.

9. On August 5, 2003, the employee filed a second claim under Part B of EEOICPA for his CBD.

10. On September 22, 2003, the FAB issued a final decision accepting the employee's Part B claim for CBD and awarding him a lump sum of $150,000.00, plus medical benefits for his CBD retroactive to May 31, 2002.

11. On November 25, 2005, the employee filed a claim under Part E of EEOICPA based on his CBD.

12. For purposes of EEOICPA, MIT's Cambridge campus is classified as an AWE facility for the time period 1942 through 1946, and as a beryllium vendor facility for the time period 1943 through 1946. While MIT's Cambridge campus is not classified as a DOE facility, the Hood Building, which was located adjacent to MIT's Cambridge campus prior to its demolition, is classified as a DOE facility for the time period 1946 through 1963.

Based on the above findings of fact, the undersigned makes the following:

CONCLUSIONS OF LAW

Regulations governing the implementation of EEOICPA allow claimants 60 days from the date of the district office's recommended decision to submit to the FAB any written objections to the recommended decision, or a written request for a hearing. *See* 20 C.F.R. §§ 30.310 and 30.311. On May 4, 2006, June 26, 2006, September 17, 2006 and October 26, 2006, the employee filed written objections to the recommended decision, but did not request a hearing. Pursuant to 20 C.F.R. §§ 30.312 and 30.313, the FAB has considered the objections by means of a review of the written record of this case. After a thorough review of the record in this case, the FAB concludes that no further investigation of the employee's objections is warranted, and the FAB now issues a final decision on the employee's Part E claim.

In order to be afforded coverage under Part E of EEOICPA, a claimant must establish that, among other things, he is a "covered DOE contractor employee." 42 U.S.C. §§ 7385s(1), 7385s-1, 7385s-8. To prove that he is a "covered DOE contractor employee" for purposes of Part E eligibility, the employee must establish: (1) that he was a "DOE contractor employee" and (2) that he "contracted a covered illness through exposure at a Department of Energy facility." 42 U.S.C. § 7385s(1). As a result of this statutory scheme, only DOE contractor employees are eligible for benefits under Part E, whereas employees of an AWE or a beryllium vendor are excluded from such coverage.[12]

The Act defines the term "Department of Energy contractor employee," in pertinent part, as follows: "An individual who is or was **employed at a Department of Energy facility** by—(i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or (ii) a contractor or subcontractor that provided services, including construction and maintenance at the facility." 42 U.S.C. § 7384l(11)(B) (emphasis added). Thus, in order to be considered a "Department of Energy contractor employee," a claimant must have been employed at a DOE facility. The statutory definition of a "Department of Energy facility" is:

"[A]ny building, structure, or premise, including the grounds upon which such building, structure, or premise is located—

> (A) in which operations are, or have been, conducted by, or on behalf of, the Department of Energy. . .; and
> (B) with regard to which the Department of Energy has or had—
>> (i) a proprietary interest, or
>> (ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation

services, construction, or maintenance services.
42 U.S.C. § 7384l(12). Therefore, in order to be eligible for benefits under Part E, a claimant must prove that he is or was employed as a civilian employee of a DOE contractor or subcontractor at a facility that meets the requirements of both subsection (A) and subsection (B) of § 7384l(12).

The FAB concludes that the employee has established that he was a civilian employee of MIT from January 26, 1945 to October 22, 1945, and that he worked in various laboratories in Buildings 4, 8 and 16 on the MIT campus in Cambridge, Massachusetts, during that time period. The evidence further establishes that the employee's work for the MMP during that period was performed pursuant to a contract that MIT entered into with the MED to perform research and development on beryllium and other metals and compounds in support of the Manhattan Project. Based on the totality of the evidence, FAB concludes that MIT's Cambridge campus satisfies subsection (A) of the statutory definition of a "Department of Energy facility." 42 U.S.C. § 7384l(12)(A).

The evidence in support of subsection (B) of § 7384l(12), however, is lacking. Subsection (B) requires that in order for a building, structure or premise to be deemed a "Department of Energy facility," the evidence must establish that it is a building, structure, or premise "with regard to which the Department of Energy has or had—(i) a proprietary interest, or (ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services." Neither the "proprietary interest" test nor the alternative "contract" test has been satisfied by a preponderance of the evidence in this claim.

The statute and the governing regulations do not define the term "proprietary interest," as that term is used in subsection (B)(i) of § 7384l(12). Black's Law Dictionary defines the term as: "The interest of an owner of property together with all rights appurtenant thereto such as the right to vote shares of stock and right to participate in managing if the person has a proprietary interest in the shares." *Black's Law Dictionary*, p.1098 (5th ed. 1979). *See also Evans v. U. S.*, 349 F.2d 653, 658 (5th Cir. 1965) (holding that the phrase "proprietary interest" is "not so technical, or ambiguous, as to require a specific definition" and assuming that the jury in that case gave the phrase "its common ordinary meaning, such as 'one who has an interest in, control of, or present use of certain property.'") Employing the common accepted definition of the term, in order to meet the "proprietary interest" test, the evidence must establish that the MED had rights of ownership, use, or control in the buildings in which the employee worked at MIT's Cambridge campus from January 26, 1945 to October 22, 1945. The employee has proffered no such evidence. To the contrary, in a letter dated February 7, 2008, he asserted that those buildings were owned by MIT, and in a May 30, 2006 email he referred to the laboratories in those buildings as "Metallurgical Dept labs." He has likewise offered no probative evidence that the MED controlled the buildings in question or rented space in them.

With regard to the "contract" test of subsection (B)(ii) of § 7384l(12), there is evidence of the existence of a contract between MIT and the MED for the work that was performed by the employee's group on the MMP; specifically, Contract No. W-7405-eng-175. However, based on the totality of the evidence, the FAB concludes that that contract was not entered into "to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services"; rather, it was a much narrower "research and development contract involving work with Be [beryllium] as well as other metals and compounds." Since the contract was not one of the limited types enumerated by Congress in its statutory definition of "Department of Energy facility," the FAB concludes that Congress did not intend buildings such as those in which the employee worked to be designated as DOE facilities for purposes of EEOICPA.

The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving "by a preponderance of the evidence" the existence of every criterion under any compensable claim category set forth in § 30.110. "Proof by a preponderance of the evidence means it is more likely than not that a given proposition is true." 20 C.F.R. § 30.111(a). The FAB concludes that the totality of the evidence in the case file is insufficient to establish by a preponderance of the evidence that the employee meets the statutory definition of a "Department of Energy contractor employee" because the evidence is insufficient to establish that he was employed at a "Department of Energy facility" during his civilian employment at MIT's Cambridge campus. *Accord* EEOICPA Fin. Dec. No. 10033981-2006 (Dep't of Labor, November 27, 2006). Therefore, the employee has not established that he is a "covered DOE contractor employee" and he is not entitled to benefits under Part E of EEOICPA. As a result, the FAB hereby denies the employee's claim under Part E.

Washington, DC

Thomas R. Daugherty

Hearing Representative

Final Adjudication Branch

[1] Pub. Law 108-375, § 3161 (October 28, 2004).

[2] As of the date of the March 9, 2006 letter, MIT's campus was designated as an AWE facility and a beryllium vendor facility for the time period 1942 through 1963. On October 10, 2007, the designation of MIT's campus was modified in two ways; first, the dates of the AWE facility and beryllium vendor facility designations were changed such that MIT's Cambridge campus is now designated as an AWE facility from 1942 through 1946 and as a beryllium vendor facility from 1943 through 1946; second, the Hood Building, which was adjacent to MIT's campus, was determined to be a DOE facility for the period 1946 through 1963. *See* EEOICPA Circular No. 08-01 (issued October 10, 2007) and the entry for MIT on the DOE Facility List at http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/showfacility.cfm.

[3] *See* the entry for MIT on the DOE Facility List at http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/showfacility.cfm.

[4] *Id.*

[5] *See* the entry for the Metallurgical Laboratory on the DOE Facility List at http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/showfacility.cfm.

[6] *See* the entry for the Ames Laboratory on the DOE Facility List at http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/showfacility.cfm.

[7] The Ames Laboratory was established at Iowa State College in Ames, Iowa, on May 17, 1947. The college was subsequently renamed Iowa State University. Work done for the MED at Iowa State College between 1942 and May 16, 1947 is covered under the DOE facility designation, as is all work done in the Ames Laboratory facilities since that date. *See* http://www.external.ameslab.gov/final/About/Aboutindex.htm.

[8]The FAB notes that it is the claimant's responsibility to establish entitlement to benefits under the Act. Subject to certain limited exceptions expressly provided in the Act and regulations, the claimant bears the burden of providing "all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in these regulations." 20 C.F.R. § 30.111(a). *See also* EEOICPA Fin Dec. No. 10432-2004 (Dep't of Labor, September 13, 2004).

[9] A copy of this page has been placed in the case file and a copy has been forwarded to the employee with this decision.

[10] *See* the entry for MIT on the DOE Facility List at http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/showfacility.cfm.

[11] *See* the employee's email to the EEOICPA Ombudsman dated May 30, 2006, and his letter to FAB dated February 7, 2008.

[12] Although they are not covered under Part E of EEOICPA, atomic weapons employees and beryllium vendor employees are covered under Part B of EEOICPA. Additionally, Congress has stated that EEOICPA was established to compensate "civilian" men and women who performed duties uniquely related to nuclear weapons production and testing. *See* 42 U.S.C. § 7384(a)(8). Consequently, members of the military are not covered by EEOICPA. *See* EEOICPA Fin. Dec. No. 57276-2004 (Dep't of Labor, October 26, 2004).

Effect of Director's determination

EEOICPA Fin. Dec. No. 10032182-2006 (Dep't of Labor, March 3, 2008)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, your claim is approved for impairment benefits in the amount of $195,000.00 based on lung cancer under Part E of EEOICPA, approved for $55,000.00 in wage-loss benefits under Part E, and approved for the consequential illness of coronary artery disease under Part E. You received state workers' compensation benefits of $126,173.60 for your covered illness of lung cancer, and this will be coordinated with your Part E benefits, leaving your net entitlement to compensation under Part E as $123,826.40.

STATEMENT OF THE CASE

On October 15, 2001, you filed a claim for benefits under Part E (formerly Part D) of EEOICPA and identified lung cancer as the illness that allegedly resulted from your employment at a Department of Energy (DOE) facility. On February 20, 2004, the FAB issued a final decision concluding that you were entitled to lump-sum monetary and medical benefits for your lung cancer under Part B of EEOICPA. Based on that conclusion, you were awarded $150,000.00 and medical benefits for your lung cancer under Part B. On August 9, 2006, the FAB issued a final decision that also awarded you medical benefits under Part E of EEOICPA for your lung cancer.

On January 8, 2007, the district office received your request for impairment and wage-loss benefits under Part E based on your lung cancer. You elected to have a physician selected by the Department of Labor perform the impairment rating. You also you stated that you first experienced wage-loss beginning in 1997, when you were "officially medically retired from work at Westinghouse Savannah River Plant" and that this wage-loss has continued since then.

The DOE confirmed your employment at the Savannah River Site (SRS) in Aiken, South Carolina from April 23, 1984 to November 1, 1997. You worked for E.I. DuPont and Westinghouse, two DOE contractors, during your employment at the SRS. The medical evidence includes a January 3, 1995 pathology report, signed by Dr. Sharon Daspit, which confirms a diagnosis of squamous cell carcinoma of the left lung. On April 25, 2007, the district office also received your request that your coronary

artery disease be accepted as a consequential illness of your lung cancer, as it is related to your radiation treatment for your lung cancer.

To determine your "minimum impairment rating" (the percentage rating representing the extent of whole person impairment, based on the organ and body functions affected by your covered illnesses and the extent of the impairment attributable to your covered illnesses), the district office referred your file material to a District Medical Consultant (DMC).

On April 18, 2007, the DMC reviewed the medical evidence of record and determined that pursuant to Table 8-2 of the Fifth Edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, your covered illness of lung cancer resulted in a Class 4 respiratory disorder that translated to a 73% whole person impairment. The DMC also determined that pursuant to Table 3.6a of the *Guides*, your coronary artery disease resulted in an 18% whole person impairment. Using the combined values chart contained in the *Guides*, the DMC concluded that you had a 78% whole person impairment due to your covered illnesses of lung cancer and coronary artery disease. The DMC explicitly stated that your cardiac condition is "due to the radiation of the lung cancer, and such is a known complication of chest radiation."

You submitted your Social Security Administration earnings statement, which shows that you last had recorded wages in 1997. An April 8, 1997 letter from Dr. James R. Mobley states that your pulmonary and cardiovascular systems "are so marginal that any stress will possibly cause an exacerbation" of your problems, and that in his opinion you should be considered totally disabled from gainful employment.

You submitted a copy of your "Compromise Settlement Agreement and Petition for Approval" confirming that you received a settlement of your state workers' compensation claim totaling $126,713.60 for your lung cancer.

On June 8, 2007, the Jacksonville district office issued a recommended decision finding that your coronary artery disease was a consequential illness related to your lung cancer treatment, that your accepted illnesses of lung cancer and coronary artery disease resulted in a 78% whole body impairment, that you were entitled to $195,000.00 in impairment benefits, and calculating your wage-loss benefits as $55,000, which was capped when the total amount of Part E monetary benefits reached $250,000.00. From this combined maximum amount of $250,000.00, the district office subtracted your $126,173.60 in state workers' compensation benefits and recommended that you be awarded a net payment of $123,826.40 in monetary benefits under Part E of EEOICPA.

In its recommended decision, the district office stated that you had no earnings reported to Social Security for the years 1998 through 2006; however, it stated that since total Part E compensation was statutorily capped at $250,000.00 and it was recommending that you receive $195,000.00 in impairment benefits, your wage-loss benefits were only calculated for the years 1998 through 2001 (you are entitled to $15,000 in wage-loss benefits for the qualifying calendar years 1998 through 2000, and $10,000.00 for the qualifying calendar year 2001). This totals $55,000.00 in wage-loss benefits.

On June 15, 2007, the FAB received your waiver of your right to object to the findings of fact and conclusions of law contained in the recommended decision.

On July 13, 2007, the FAB remanded your claim, and stated that the recommended decision did not

take into account the full amount of wage-loss benefits to which you are entitled. The FAB stated that, "It is true that total compensation, excluding medical benefits, under Part E may not exceed $250,000; however, it is the final number after coordination of state workers' compensation benefits that cannot exceed $250,000, not the benefit amount before state workers' compensation benefits are subtracted."

On November 21, 2007, the Director of DEEOIC issued a Director's Order vacating the July 13, 2007 remand order issued by the FAB. The Director's Order stated that the only way to interpret the regulations at 20 C.F.R. § 30.626(a), which state "the OWCP will reduce the compensation payable under Part E by the amount of benefits the claimant receives from a state workers' compensation program by reason of the same covered illness," is to stop calculating the benefits an employee is entitled to under Part E at $250,000.00, and then coordinate the state workers' compensation benefits.

Following an independent review of the evidence of record, the undersigned hereby makes the following:

FINDINGS OF FACT

1. On October 15, 2001, you filed a claim for benefits under Part E (formerly Part D) of EEOICPA. You identified lung cancer as the illness you alleged resulted from your employment at a DOE facility.

2. On February 20, 2004, the FAB issued a final decision determining that you were entitled to lump-sum and medical benefits for your lung cancer under Part B, and awarding you $150,000.00 and medical benefits for your lung cancer under Part B.

3. On August 9, 2006, the FAB issued a final decision awarding you medical benefits under Part E of EEOICPA for your covered illness of lung cancer.

4. Your coronary artery disease is a consequential illness of your lung cancer.

5. On April 18, 2007, the DMC reviewed the medical evidence of record and determined that your covered illness of lung cancer and covered consequential illness of coronary artery disease resulted in a 78% whole person impairment.

6. You last had recorded wages in 1997. Your doctor states that your pulmonary and cardiovascular systems "are so marginal that any stress will possibly cause an exacerbation" of your problems, and that in his opinion you should be considered totally disabled from gainful employment.

7. You were born on October 5, 1942 and turned 55 years old in 1997. Your normal Social Security retirement age is 65 years.

8. You received $126,173.60 in state workers' compensation benefits for your lung cancer, based on exposure to ionizing radiation.

Based on these facts, the undersigned hereby makes the following:

CONCLUSIONS OF LAW

If the claimant waives any objections to all or part of the recommended decision, the FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part. 20 C.F.R. § 30.316(a). You have waived your right to file objections to the findings of fact and conclusions of law issued in the May 9, 2007 recommended decision.

Under Part E of EEOICPA, a "covered DOE contractor employee" with a "covered illness" shall be entitled to impairment benefits based upon the extent of whole person impairment of all organs and body functions that are compromised or otherwise affected by the employee's "covered illness." *See* 42 U.S.C § 7385s-2(a); 20 C.F.R. § 30.901(a). This "minimum impairment rating" shall be determined in accordance with the Fifth Edition of the *Guides*. *See* 42 U.S.C. § 7385s-2(b). The statute provides that for each percentage point of the "minimum impairment rating" that is a result of a "covered illness," the "covered DOE contractor employee" shall receive $2,500.00. *See* 42 U.S.C. § 7385s-2(a)(1).

The evidence of record indicates that you are a covered DOE contractor employee with a covered illness of lung cancer and a covered consequential illness of coronary artery disease. You have a "minimum impairment rating" of 78% of your whole body as a result of your covered illnesses of lung cancer and coronary artery disease, based on the *Guides*. You are therefore entitled to $195,000.00 in impairment benefits (78 x $2,500 = $195,000.00) under Part E of EEOICPA.

In order to be entitled to wage-loss benefits under Part E, you must submit factual evidence of your wage-loss and medical evidence that is of sufficient probative value to establish that the period of wage-loss at issue is causally related to your covered illness. *See* Federal (EEOICPA) Procedure Manual, Chapter E-800.6b (September 2005). You were born on October 5, 1942 and turned 55 years old in 1997. Your normal Social Security retirement age is 65 years. You last had recorded wages in 1997 and have not had any wages since then. Your doctor states that your pulmonary and cardiovascular systems "are so marginal that any stress will possibly cause an exacerbation" of your problems, and that in his opinion you should be considered totally disabled from gainful employment. This is sufficient to show that you had wage-loss related to your covered illnesses of lung cancer and coronary artery disease beginning in 1998.

Accordingly, your claim for wage-loss benefits under Part E of EEOICPA is accepted in the amount of $55,000.00. You are entitled to $15,000.00 in wage-loss benefits for the qualifying calendar years 1998 through 2000, and $10,000.00 for the qualifying calendar year 2001. This totals $55,000.00 in wage-loss benefits, which together with your $195,000.00 in impairment benefits, totals the statutory maximum of $250,000.00. Therefore, your wage-loss eligibility ends there.

All benefits payable under Part E of EEOICPA must be coordinated with the amount of any state workers' compensation benefits that were paid to the claimant for the same covered illness or illnesses. *See* 42 U.S.C. § 7385s-11. Based on the evidence in the file, this results in a reduction of the maximum amount payable to you in impairment and wage-loss benefits, $250,000.00, by $126,173.60, resulting in a net entitlement of $123,826.40.

Therefore, your claim for the consequential illness of coronary artery disease is accepted under Part E. Your claim for impairment and wage-loss benefits under Part E for your lung cancer and coronary artery disease is also accepted, and you are awarded a net amount of $123,826.40.

Washington, DC

Carrie A. Rhoads

Hearing Representative

Final Adjudication Branch

Hearings before

EEOICPA Fin. Dec. No. 9855-2002 (Dep't of Labor, August 26, 2002)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) 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 stated below, your claim for benefits is denied.

On September 20, 2001, you filed Form EE-2, Claim for Survivor Benefits under the Energy Employees Occupational Illness Compensation Program, with the Denver district office. You stated that your husband, **[Employee]**, had died on May 15, 1991 as a result of adenocarcinoma in the liver, and that he was employed at a Department of Energy facility. You included with your application, a copy of your marriage certificate, **[Employee]**'s resume/biography, and his death certificate. You submitted a letter dated January 5, 2000, from Allen M. Goldman, Institute of Technology, School of Physics and Astronomy, and a packet of information which included the university's files relating to your husband based on your request for his personnel, employee exposure, and medical records. Also submitted was a significant amount of medical records that did establish your husband had been diagnosed with adenocarcinoma in the liver.

On March 1, 2002, Loretta from the Española Resource Center telephoned the Denver district office to request the status of your claim. The claims examiner returned her telephone call on the same date and explained the provision in the Act which states that in order to be eligible for compensation, the spouse must have been married to the worker for at least one year prior to the date of his death. Your marriage certificate establishes you were married on, May 30, 1990. **[Employee]**'s death certificate establishes he died on May 15, 1991.

On March 5, 2002, the Denver district office issued a recommended decision finding that the evidence of record had not established that you were married for one year prior to your husband's death, and therefore you were not entitled to compensation benefits under the EEOICPA.

Pursuant to § 30.316(a) of the implementing regulations, a claimant has 60 days in which to file objections to the recommended decision, as allowed under § 30.310(b) of the implementing regulations (20 C.F.R. § 30.310(b)).

On April 12, 2002, the Final Adjudication Branch received a letter from you that stated you objected to the findings of the recommended decision. You requested a hearing and a review of the written record. You stated that the original law signed by President Clinton provided you with coverage, but when the law changed to include children under 18, the change in the law adversely affected you. You stated that you had documents that demonstrated you had a 10-year courtship with your spouse. You also stated

you presented testimony as an advocate in Española. Included with your letter of objection were the following documents:

- a copy of Congressman Tom Udall's "Floor Statement on the Atomic Workers Compensation Act";

- an e-mail from Bob Simon regarding the inclusion of Los Alamos National Laboratory workers in the Senate Bill dated July 5, 2000;

- an e-mail from Louis Schrank regarding the Resource Center in Española;

- a "Volunteer Experience Verification Form", establishing you volunteered as a "Policy Advisor and Volunteer Consultant to the Department of Energy, Members of Congress, Congressional Committees, and many organizations on critical health issues effecting nuclear weapons workers with occupational illnesses";

- a transcript of proceedings from the March 18, 2000 Public Hearing in Española , New Mexico;

- a letter from you to John Puckett, HSE Division Leader, Chairperson, "Working Group Formed to Address Issues Raised by Recent Reports of Excess Brain Tumors in the Community of Los Alamos" and dated June 27, 1991;

- a letter to you from Terry L. Thomas, Ph.D., dated July 31, 1991, regarding the epidemiologic studies planned for workers at Los Alamos National Laboratory; a memorandum entitled "LANL Employee Representative for Cancer Steering Committee", dated September 25, 1991;

- a copy of the "Draft Charter of the Working Group to Address Los Alamos Community Health Concerns", dated June 27, 1991;

- an article entitled "Register of the Repressed: Women's Voice and Body in the Nuclear Weapons Organization"; and

- a psychological report from Dr. Anne B. Warren; which mentions you and **[Employee]** had a "10 or 11 year courtship".

On May 20, 2002, you submitted a copy of the Last Will and Testament of **[Employee]**, wherein he "devises to you, his wife, the remainder of his estate if you survive him for a period of seven hundred twenty (720) hours." You stated you believed this provided you with common law marriage rights for the 720 hours mentioned in the will.

An oral hearing was held on June 18, 2002 at the One-Stop Career Center in Española, New Mexico. You presented additional evidence for consideration that included: a copy of a house "Inspection Report" by Architect Steven G. Shaw, addressed to both you and **[Employee]**, dated August 11, 1989 (exhibit one); a copy of a Quitclaim Deed (Joint Tenants) for you and **[Employee]**, dated October 27, 1989 (exhibit two); a Los Alamos County Assessor Notice of Valuation or Tentative Notice of Value (undated), for a home on Walnut Street, and addressed to both you and **[Employee]** (exhibit three); and

a Power of Attorney dated August 5, 1989, between you and **[Employee]** (exhibit four).

Pursuant to § 30.314(f) of the implementing regulations, a claimant has 30 days after the hearing is held to submit additional evidence or argument.

No further evidence was submitted for consideration within that time period.

Section 30.111(a) of the regulations (20 C.F.R. § 30.111(a)) states that, "Except where otherwise provided in the Act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and these regulations, the claimant also bears the burden of providing to OWCP all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in these regulations."

The undersigned has carefully reviewed the hearing transcript and additional evidence received at the hearing, as well as the evidence of record and the recommended decision issued on March 5, 2002.

The record fails to establish that you were married to **[Employee]** one year prior to his death, as required by the EEOICPA. The entire record and the exhibits were thoroughly reviewed. Included in Exhibit One, was the August 11, 1989 inspection report of the home located on Walnut Street, a copy of a bill addressed to both you and **[Employee]** for the inspection service, and an invoice from A-1 Plumbing, Piping & Heat dated August 14, 1989. Although some of these items were addressed to both you and **[Employee]**, none of the records submitted are sufficient to establish that you were married to your husband for one year prior to his death as required under the Act. 42 U.S.C. § 7384s(e)(3)(A).

The evidence entered into the record as Exhibit Two, consists of a Quitclaim Deed dated October 27, 1989, showing **[Employee]**, a single man, and **[Claimant]**, a single woman living at the same address on Walnut Street as joint tenants. Exhibit Three consists of a Notice of Valuation of the property on Walnut Street in Los Alamos County and is addressed to both you and **[Employee]**. Although this evidence establishes you were living together in 1989 in Los Alamos County, New Mexico, it is not sufficient evidence to establish you were married to your husband for one year prior to his death as required under the Act. 42 U.S.C. § 7384s(e)(3)(A).

Exhibit Four consists of a copy of a Power of Attorney between you and **[Employee]** regarding the real estate located on Walnut Street. This evidence is not sufficient to establish you were married for one year prior to his death. 42 U.S.C. § 7384s(e)(3)(A).

The Act is clear in that it states, “the “spouse” of an individual is a wife or husband of that individual who was married to that individual for at least one year immediately before the death of that individual.”

During the hearing you stated that there is a federal law, the Violence Against Women Act, that acknowledges significant other relationships and provides protection for a woman regardless of whether she is married to her husband one year or not. You also stated that you believed there was “a lack of dialogue” between the RECA program and the EEOICP concerning issues such as yours. Additionally, on August 15, 2002, you sent an email to the Final Adjudication Branch. The hearing

transcript was mailed out on July 23, 2002. Pursuant to § 30.314(e) of the implementing regulations, a claimant is allotted 20 days from the date it is sent to the claimant to submit any comments to the reviewer. Although your email was beyond the 20-day period, it was reviewed and considered in this decision. In your email you stated the issue of potential common law marriage was raised. You stated that you presented the appropriate documentation that may support a common law marriage to the extent permitted by New Mexican law. You stated that the one-year requirement was adopted from the RECA and that you have not been able to determine how DOJ has interpreted this provision. Also, you stated that the amendments of December 28, 2001 should not apply to your case because you filed your claim prior to the enactment of the amendments. You stated you did not believe the amendments should be applied retroactively.

Section 7384s (e)(3)(A), Compensation and benefits to be provided, states:

The "spouse" of an individual is a wife or husband of that individual who was married to that individual for at least one year immediately before the death of that individual."

Section 7384s(f) states:

EFFECTIVE DATE—This section shall take effect on July 31, 2001, unless Congress otherwise provides in an Act enacted before that date.

There is no previous enacted law that relates to compensation under the EEOICPA. Therefore, the amendments apply retroactively to all claimants.

A couple cannot become legally married in New Mexico by living together as man and wife under New Mexico's laws. However, a couple legally married via common law in another state is regarded as married in all states. The evidence of record does not establish you lived with **[Employee]** in a common law state. Because New Mexico does not recognize common law marriages, the time you lived with **[Employee]** prior to your marriage is insufficient to establish you were married to him for one year prior to his death.

Regarding your reference to the difference between how Native American widows are treated and recognized in their marriages, and how you are recognized in your marriage, Indian Law refers primarily to that body of law dealing with the status of the Indian tribes and their special relationship to the federal government. The existing federal-tribal government-to-government relationship is significant given that the United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection and has affirmed the Navajo Nation's sovereignty. The laws that apply to the Native Americans do not apply in your case.

The undersigned finds that you have not established you are an eligible survivor as defined in 42 U.S.C. § 7384s(e)(3)(A). It is the decision of the Final Adjudication Branch that your claim is denied.

August 26, 2002

Denver, CO

Janet R. Kapsin

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 43114-2003 (Dep't of Labor, September 22, 2003)

FINAL DECISION AFTER REVIEW OF THE WRITTEN RECORD

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). Since you submitted a letter of objection, but did not specifically request a hearing, a review of the written record was performed, in accordance with § 30.312 of the implementing regulations. 20 C.F.R. § 30.312.

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, in accordance with § 30.310 of the implementing regulations. 20 C.F.R. § 30.310. In reviewing any objections submitted, under § 30.313 of the implementing regulations, the Final Adjudication Branch will review the written record, any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. 20 C.F.R. § 30.313.

For the reasons set forth below, your claim for benefits is denied.

STATEMENT OF CASE

On March 18, 2003, you filed a claim for survivor benefits under the EEOICPA as the spouse of the employee. On May 19, 2003, the Department of Justice (DOJ) verified that on May 31, 2002, you accepted compensation under § 4 of the Radiation Exposure Compensation Act in the amount of $75,000.

42 U.S.C. § 7385j of the Energy Employees Occupational Illness Compensation Program Act states: "Except in accordance with § 7384u[1] of this title, an individual may not receive compensation or benefits under the compensation program for cancer and also receive compensation under the Radiation Exposure Compensation Act (42 U.S.C. 2210 note) or § 1112 (c) of Title 38."

The Denver district office advised you of the deficiencies in your claim and afforded you the opportunity to correct them. There is no evidence in the file to indicate that you provided additional evidence to the district office for review.

By a recommended decision dated July 2, 2003, the Denver district office recommended that your claim for benefits under the EEOICPA be denied. In the recommendation, the district office found that:

1. You filed a claim under EEOICPA on March 18, 2003;

2. You did not establish entitlement under the EEOICPA as you did not receive an

award from the Department of Justice under § 5 of RECA. You have not provided evidence that your husband could be covered under the EEOICPA as an employee of the Department of Energy or Atomic Weapons facility. You have not claimed that your husband had a medical condition other than stomach cancer, a condition for which you have already been awarded benefits as your husband's eligible survivor, under § 4 of RECA as an on-site participant.

By your letter of July 30, 2003, you requested assistance from Daniel K. Akaka, United States Senate in "appealing the decision that denied me compensation as an eligible beneficiary of a covered employee under the Energy Employees' Occupational Illness Compensation Program Act (EEOICPA) …." You did not state specific objections to the recommended decision. You included medical and employment records with your letter to Senator Akaka.

FINDINGS OF FACT

On May 31, 2002, you accepted compensation under § 4 of the RECA for your husband's cancer.

The additional medical records do not indicate that your husband was diagnosed with a condition covered under the EEOICPA, other than cancer.

CONCLUSIONS OF LAW

In accordance with 20 C.F.R. §30.313, I have reviewed the record in this case and conclude that no further investigation is warranted.

I find that the decision of the district office is supported by the evidence and the law, and cannot be changed based on the objections and the additional evidence you submitted. As explained in § 30.110(b) of the implementing regulations, "Any claim that does not meet all of the criteria for at least one of these categories, as set forth in these regulations, must be denied." 20 C.F.R. § 30.110(b). The undersigned hereby denies payment of lump sum compensation and medical benefits.

Washington, DC

Linda M. Parker

Hearing Representative

[1] § 7384u states: "An individual who receives, or has received, $100,000 under section 5 of the Radiation Exposure Compensation Act (42 U.S.C. 2210 note) for a claim made under that Act (hereinafter in this section referred to as a "covered uranium employee"), or the survivor of that covered uranium employee if the employee is deceased, shall receive compensation under this section in the amount of $50,000."

Objections to a recommended decision

EEOICPA Fin. Dec. No. 1704-2003 (Dep't of Labor, February 10, 2003)

NOTICE OF FINAL DECISIONREVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA). On January 22, 2003, Attorney Mike G. Nassios, your authorized representative, wrote to the FAB and filed objections to the November 27, 2002 recommended decision of the Jacksonville district office. Your objections have been considered by means of a review of the written record.

STATEMENT OF THE CASE

On August 9, 2001, you filed a claim (Form EE-1) for benefits under the EEOICPA. You identified lung cancer as the diagnosed condition being claimed. You stated that Paul Rankin employed you as a pipe layer and laborer at the K-25 and Y-12 Plants at Oak Ridge from 1958 to 1964. Based upon the evidence of record, the Jacksonville district office issued a recommended decision on November 27, 2002, in which it concluded that you were not employed as a contracted or subcontracted employee at an atomic weapons employer or facility, nor at a Department of Energy facility, as those terms are defined in § 7384l of the EEOICPA and § 30.5 of the EEOICPA regulations. 42 U.S.C. § 7384l. 20 C.F.R. § 30.5. The district office also concluded that you are not a covered employee as that term is defined in § 7384l(1) of the EEOICPA. 42 U.S.C. § 7384l(1).

OBJECTIONS

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, pursuant to § 30.310 of the EEOICPA regulations. 20 C.F.R. § 30.310. On January 22, 2003, your attorney filed objection to the recommended decision of the district office. Your attorney stated it was your position that you have proven by a preponderance of the evidence that you were employed as a contracted or subcontracted employee at an atomic weapons employer or facility or a Department of Energy (DOE) facility as those terms are defined in §§ 7384l of the EEOICPA and 30.5 of the EEOICPA regulations. 42 U.S.C. § 7384l. 20 C.F.R. § 30.5. He also stated it was your position that you had presented more evidence than a self-serving affidavit of yourself, in that you presented the affidavit of other individuals and the DOE cannot legitimately rebut this proof in that the DOE records are not always all inclusive. On January 30, 2003, your attorney submitted an affidavit from Fay Webb in which she stated that you were employed by Paul Rankin from February 1958 until December 1958 at the Y-12 Plant and from October 1964 to December 1964 at the K-25 plant. Mrs. Webb identified herself as the wife of your co-worker.

You stated in your employment history (Form EE-3) that Paul Rankin employed you as a pipe layer and laborer from 1958 to 1964 at the K-25 and Y-12 Plants in Oak Ridge, TN. You submitted a copy of the Social Security Administration (SSA) statement of earnings which show Paul Rankin employed you in the third quarter of 1958 and the fourth quarter of 1964. Mr. Franklin Whetsell, who identified himself as a work associate, and your wife signed affidavits (Form EE-4) stating that you were employed by Paul Rankin from 1958 to 1964. On June 7, 2002, you advised the district office in writing that you worked for Paul Rankin at Oak Ridge for two different jobs. You stated that the first job began around February 1958 and ended December 1958 at Y-12 and the second job at K-25 began and ended in 1964. On September 5, 2002, Frank Whetsell wrote to the district office in regards to the affidavit he submitted and advised that “his father” worked for Paul Rankin during the years 1958 through 1964. Mr. Whetsell explained that he was a “kid” at the time so he doesn’t remember specific dates but he does recall his father “talking about working out there.”

ANALYSIS

The DOE has advised that it has no employment information regarding you. There has been no evidence submitted that establishes that Paul Rankin, the employer for whom you claim you worked, was a contractor at the Y-12 or K-25 plant. The employment history (Form EE-3) you submitted conflicts with the SSA earnings statement and the information in your letter of June 7, 2002. You stated in your employment history that you worked for Paul Rankin at the Y-12 and K-25 plants from 1958 to 1964 but you stated in your June 7, 2002 letter to the district office that you worked at Oak Ridge on two different jobs. You stated that the first job was at the Y-12 plant and began around February 1958 and ended December 1958. The second job was at the K-25 plant and it began and ended in 1964. You also stated in your June 7, 2002 letter that you have no exact recollection of the dates. The SSA earnings statement only shows earnings for the third quarter in 1958 and the fourth quarter in 1964 which would not total the 250 days required to establish that you are a member of the Special Exposure Cohort. You submitted an affidavit from Franklin Whetsell in which he identified himself as a "work associate" and in response to the question to describe his knowledge of your employment history, he stated you were employed by Paul Rankin from 1958 to 1964 at the DOE facilities in Oak Ridge, TN (K-25 and Y-12). However, on September 5, 2002, Mr. Whetsell advised the district office, by letter, that his father worked with you during the years 1958 through 1964. He also stated that he was a kid at the time and he did not remember specific dates. Mr. Whetsell's letter conflicts with the information provided on his affidavit. Your wife submitted an affidavit in which she stated that you worked for Paul Rankin at the Oak Ridge Facilities from 1958 to 1964 which conflicts with the information that you provided as clarification in your June 7, 2002 letter. The information provided by Mrs. Webb in her affidavit is in conflict with the SSA earnings statement.

The EEOICPA regulations at § 30.111(c) allows for the acceptance of written affidavits or declarations as evidence of employment history for the purpose of establishing eligibility. Pursuant to the EEOICPA regulations at § 30.111(a), the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. 20 C.F.R. §§ 30.111(a), 30.111(c). A claimant will not be entitled to any presumption otherwise provided for in the EEOICPA regulations if substantial evidence exists that rebuts the existence of the fact that is the subject of the presumption. *See* 20 C.F.R. § 30.111(d). The evidence of record is not sufficient to establish you are a covered employee as defined in the EEOICPA. *See* 42 U.S.C. §§ 7384l(1), 7384l(4), 7384l(7), 7384l(9), 7384l(11), 7384l(14). The evidence of record is not sufficient to establish that Paul Rankin was a contractor for the DOE.

CONCLUSION:

Based on my review of your case record and pursuant to the authority granted by § 30.316(b) of the EEOICPA regulations, I find that the district office's November 27, 2002 recommended decision is correct and I accept those findings and the recommendation of the district office.

Therefore, I find that you are not entitled to benefits under the Act, and that your claim for compensation must be denied.

Washington, DC

Thomasyne L. Hill

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 30971-2002 (Dep't of Labor, March 15, 2004)

NOTICE OF FINAL DECISIONREVIEW OF THE WRITTEN RECORD

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 stated below, your claim for benefits is denied.

STATEMENT OF THE CASE

On June 10, 2002, you filed a Claim for Survivor Benefits under the EEOICPA, form EE-2, with the Denver district office, as the spouse of the employee, for multiple myeloma. You indicated on the EE-3 form that your husband was employed by the U.S. Coast and Geodetic Survey at various locations, including the Nevada Test Site, from early 1951 to December 1953.

You also submitted marriage certificate and death certificates establishing that you were married to the employee from March 7, 1953 until his death on November 5, 1999, tax forms confirming his employment with the U.S. Coast and Geodetic Survey in 1951 and 1952 and a document from the Nevada Field Office of the Department of Energy (DOE) indicating that they had records of your husband having been exposed to radiation in 1951 and 1952. Additionally, you submitted a document stating that your claim under the Radiation Exposure Compensation Act had been approved in the amount of $75,000; you stated that you had declined to accept the award and that was confirmed by a representative of the Department of Justice on August 12, 2002.

On July 1, 2002, you were informed of the medical evidence needed to support that your husband had cancer. You submitted records of medical treatment, including a pathology report of April 19, 1993, confirming that he was diagnosed with multiple myeloma.

On July 22, 2002, a DOE official stated that, to her knowledge, your husband's employers were not Department of Energy contractors or subcontractors. On July 29, 2002, you were advised of the type of evidence you could submit to support that your husband had employment which would give rise to coverage under the Act, and given 30 days to submit such evidence. You submitted statements from co-workers confirming that he did work at the Nevada Test Site for a period from October to December 1951 and again for a few weeks in the spring of 1952.

On August 29, 2002, the district office issued a recommended decision that concluded that you were not entitled to compensation benefits because the evidence did not establish that your husband was a covered employee.

By letter dated September 20, 2002, your representative objected to the recommended decision, stating that your husband was a covered employee in that he worked at the Test Site while employed by the U.S. Coast and Geodetic Survey, which was a contractor of the Atomic Energy Commission (AEC), a

predecessor agency of the DOE. The representative also submitted documents which indicated that the U.S. Coast and Geodetic Survey performed work, including offering technical advice and conducting surveys, for other government agencies, including the AEC and the military, and that it was covered by a cooperative agreement between the Secretary of Commerce and the Secretary of the Army. On April 1, 2003, the case was remanded to the district office for the purpose of determining whether your husband's work at the Nevada Test Site was performed under a "contract" between the DOE and the U.S. Coast and Geodetic Survey.

The documents submitted by your representative were forwarded to the DOE, which responded on May 28, 2003 that dosimetry records existed for your husband "showing that he was with the USC&GS but after further research it was established that the USC&GS was in fact not a contractor or subcontractor of the AEC during those years." The documents were also reviewed by the Branch of Policy, Regulations and Procedures in our National Office. On November 7, 2003, the district office issued a recommended decision to deny your claim. The decision stated that the evidence submitted did not support that the U.S. Coast and Geodetic Survey was a contractor of the DOE at the Nevada Test Site, and, concluded that you were not entitled to benefits under § 7384s of the EEOICPA as your husband was not a covered employee under § 7384l. 42 U.S.C. §§ 7384l and 7384s.

In a letter dated January 7, 2004, your representative objected to the recommended decision. He did not submit additional evidence but did explain why he believes the evidence already submitted was sufficient to support that your husband was a covered employee under the Act. Specifically, he stated that the evidence supported that your husband worked at the Nevada Test Site in 1951 and 1952 in the course of his employment with the U.S. Coast and Geodetic Survey, an agency which was performing a survey at the request of the AEC, and that the latter agency issued him a badge which established that he was exposed to radiation while working there. He argued that one must reasonably conclude from these facts that his work at the Nevada Test Site did constitute covered employment under the EEOICPA.

FINDINGS OF FACT

You filed a claim for survivor benefits under the EEOICPA on June 10, 2002.

You were married to the employee from March 7, 1953 until his death on November 5, 1999.

Medical records, including a pathology report, confirmed he was diagnosed with multiple myeloma in April 1993.

In the course of his employment by the U.S. Coast and Geodetic Survey, your husband worked, and was exposed to radiation, at the Nevada Test Site, a DOE facility.

The evidence does not support, and the Department of Energy has denied, that the U.S. Coast and Geodetic Survey was a contractor of the DOE at the time your husband worked at the Nevada Test Site.

CONCLUSIONS OF LAW

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, pursuant to 20 C.F.R. § 30.310. The same section of the regulations provides that in filing objections, the claimant must identify his objections as specifically as possible. In reviewing any

objections submitted, under 20 C.F.R. § 30.313, the Final Adjudication Branch will review the written record, any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. I have reviewed the record in this case and your representative's letter of January 2, 2004 and must conclude that no further investigation is warranted.

The purpose of the EEOICPA, as stated in its § 7384d(b), is to provide for "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." 42 U.S.C. § 7384d(b).

A "covered employee with cancer" includes, pursuant to § 7384l(9)(B) of the Act, an individual who is a "Department of Energy contractor employee who contracted…cancer after beginning employment at a Department of Energy facility." Under § 7384l(11), a "Department of Energy contractor employee" may be an individual who "was employed at a Department of energy facility by…an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or…a contractor or subcontractor that provided services, including construction and maintenance, at the facility." 42 U.S.C. § 7384l(9)(B), (11).

EEOICPA Bulletin NO. 03-26 states that "a civilian employee of a state or federal government agency can be considered a 'DOE contractor employee' if the government agency employing that individual is (1) found to have entered into a contract with DOE for the accomplishment of…services it was not statutorily obligated to perform, and (2) DOE compensated the agency for that activity." The same Bulletin goes on to define a "contract" as "an agreement that something specific is to be done in return for some payment or consideration."

Section 30.111(a) states that "Except where otherwise provided in the Act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category set forth in § 30.110." 20 C.F.R. § 30.111(a).

As noted above, the evidence supports that your husband was exposed to radiation while working for the U.S. Coast and Geodetic Survey at the Nevada Test Site in late 1951 and early 1952, that he was diagnosed with multiple myeloma in April 1993, and that you were married to him from March 7, 1953 until his death on November 5, 1999.

It does not reasonably follow from the evidence in the file that his work at the Nevada Test Site must have been performed under a "contract" between the U.S. Coast and Geodetic Survey and the AEC. Government agencies are not private companies and often cooperate with and provide services for other agencies without reimbursement. The DOE issued radiation badges to military personnel, civilian employees of other government agencies, and visitors, who were authorized to be on a site but were not DOE employees or DOE contractor employees. No evidence has been submitted that your husband's work at the Nevada Test Site was pursuant to a "contract" between the U.S. Coast and Geodetic Survey and the AEC and the DOE has specifically denied that his employing agency was a contractor or subcontractor at that time. Therefore, there is no basis under the Act to pay compensation benefits for his cancer.

For the foregoing reasons, the undersigned must find that you have not established your claim for

compensation under the EEOICPA and hereby denies that claim.

Washington, DC

Richard Koretz

Hearing Representative

EEOICPA Fin. Dec. No. 43114-2003 (Dep't of Labor, September 22, 2003)

FINAL DECISION AFTER REVIEW OF THE WRITTEN RECORD

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). Since you submitted a letter of objection, but did not specifically request a hearing, a review of the written record was performed, in accordance with § 30.312 of the implementing regulations. 20 C.F.R. § 30.312.

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, in accordance with § 30.310 of the implementing regulations. 20 C.F.R. § 30.310. In reviewing any objections submitted, under § 30.313 of the implementing regulations, the Final Adjudication Branch will review the written record, any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. 20 C.F.R. § 30.313.

For the reasons set forth below, your claim for benefits is denied.

STATEMENT OF CASE

On March 18, 2003, you filed a claim for survivor benefits under the EEOICPA as the spouse of the employee. On May 19, 2003, the Department of Justice (DOJ) verified that on May 31, 2002, you accepted compensation under § 4 of the Radiation Exposure Compensation Act in the amount of $75,000.

42 U.S.C. § 7385j of the Energy Employees Occupational Illness Compensation Program Act states: "Except in accordance with § 7384u[1] of this title, an individual may not receive compensation or benefits under the compensation program for cancer and also receive compensation under the Radiation Exposure Compensation Act (42 U.S.C. 2210 note) or § 1112 (c) of Title 38."

The Denver district office advised you of the deficiencies in your claim and afforded you the opportunity to correct them. There is no evidence in the file to indicate that you provided additional evidence to the district office for review.

By a recommended decision dated July 2, 2003, the Denver district office recommended that your claim for benefits under the EEOICPA be denied. In the recommendation, the district office found that:

1. You filed a claim under EEOICPA on March 18, 2003;

2. You did not establish entitlement under the EEOICPA as you did not receive an award from the Department of Justice under § 5 of RECA. You have not provided evidence that your husband could be covered under the EEOICPA as an employee of the Department of Energy or Atomic Weapons facility. You have not claimed that your husband had a medical condition other than stomach cancer, a condition for which you have already been awarded benefits as your husband's eligible survivor, under § 4 of RECA as an on-site participant.

By your letter of July 30, 2003, you requested assistance from Daniel K. Akaka, United States Senate in "appealing the decision that denied me compensation as an eligible beneficiary of a covered employee under the Energy Employees' Occupational Illness Compensation Program Act (EEOICPA) …." You did not state specific objections to the recommended decision. You included medical and employment records with your letter to Senator Akaka.

FINDINGS OF FACT

On May 31, 2002, you accepted compensation under § 4 of the RECA for your husband's cancer.

The additional medical records do not indicate that your husband was diagnosed with a condition covered under the EEOICPA, other than cancer.

CONCLUSIONS OF LAW

In accordance with 20 C.F.R. §30.313, I have reviewed the record in this case and conclude that no further investigation is warranted.

I find that the decision of the district office is supported by the evidence and the law, and cannot be changed based on the objections and the additional evidence you submitted. As explained in § 30.110(b) of the implementing regulations, "Any claim that does not meet all of the criteria for at least one of these categories, as set forth in these regulations, must be denied." 20 C.F.R. § 30.110(b). The undersigned hereby denies payment of lump sum compensation and medical benefits.

Washington, DC

Linda M. Parker

Hearing Representative

[1] § 7384u states: "An individual who receives, or has received, $100,000 under section 5 of the Radiation Exposure Compensation Act (42 U.S.C. 2210 note) for a claim made under that Act (hereinafter in this section referred to as a "covered uranium employee"), or the survivor of that covered uranium employee if the employee is deceased, shall receive compensation under this section in the amount of $50,000."

EEOICPA Fin. Dec. No. 10568-2003 (Dep't of Labor, June 16, 2003)

REVIEW OF THE WRITTEN RECORD NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) 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). On March 29, 2003, you wrote to the FAB and filed an objection to the March 11, 2003 recommended decision of the Cleveland district office. Your objection has been considered by means of a review of the written record.

STATEMENT OF THE CASE

On September 24, 2002, you filed a claim (Form EE-2), for survivor benefits under the EEOICPA and identified bladder cancer as the diagnosed condition being claimed. You submitted an employment history form (EE-3) in which you stated that Morrison Knudson Co. employed your husband from September 29, 1974 to February 28, 1976, General Dynamics employed your husband from September 26, 1976 to November 24, 1976, and that Cleveland Wrecking employed your husband until May 31, 1988[1]. You stated that your husband wore a dosimetry badge while employed. You submitted a copy of your husband's death certificate which indicates he died on April 9, 1998 due to bladder cancer and renal failure. You submitted a copy of your marriage certificate which shows that you were married to the deceased employee on June 14, 1956. You submitted medical evidence which included Dr. Karen Harris' December 30, 1997 needle aspirate report in which she diagnosed your husband with transitional cell carcinoma. The medical evidence also included a copy of the Sewickley Valley Hospital discharge summary in which Dr. Scott Piranian diagnosed your husband with transitional cell carcinoma of the bladder with bony metastases and lymphatic metastases.

On November 14, 2001, Department of Energy (DOE) representative Roger Anders advised the district office via Form EE-5 that the employment history you provided contained information that was not accurate. In an attachment, Mr. Anders advised that your husband worked at a portion of a facility whose activities came under the auspices of the DOE's Naval Nuclear Propulsion Program. The Cleveland district office issued a recommended decision on March 11, 2003, in which it concluded that the evidence of record did not establish that your husband was a covered employee with cancer under § 7384l(9) of the EEOICPA because he was not a DOE employee or contractor employee at a DOE facility, nor an atomic weapons employee at an atomic weapons employer facility as those facilities are defined in §§ 7384l(4) and 7384l(12) of the EEOICPA. 42 U.S.C. §§ 7384l(4), 7384l(9), 7384l(12).

OBJECTIONS

Section 30.310(a) of the EEOICPA implementing regulations provides that, "[w]ithin 60 days from the date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision, including HHS's reconstruction of the radiation dose to which the employee was exposed (if any), and whether a hearing is desired." 20 C.F.R. § 30.310(a). Section 30.312 of the EEOICPA implementing regulations provides that, "[i]f the claimant files a written statement that objects to the recommended decision within the period of time allotted in § 30.310 but does not request a hearing, the FAB will consider any objections by means of a review of the written record." 20 C.F.R. § 30.312. On March 29, 2003, you wrote to the FAB and advised that you objected to the recommended decision of the Cleveland district office. You stated that your husband worked as a laborer dismantling the old atomic power plant at Shippingport, PA and he worked side by side with employees that were covered. You stated that it was discrimination for your husband not to be considered covered under the EEOICPA. Your objection has been considered by means of review of the written record.

STATEMENT OF THE LAW

The EEOICPA was established to provide compensation benefits to covered employees (or their eligible survivors) that have been diagnosed with designated illnesses incurred as a result of their exposure to radiation, beryllium, or silica, while in the performance of duty for the DOE and certain of its vendors, contractors and subcontractors. The EEOICPA, at § 7384l(1), defines the term "covered employee" as (A) a covered beryllium employee, (B) a covered employee with cancer, and (C) to the extent provided in § 7384r, a covered employee with chronic silicosis (as defined in that section). 42 U.S.C. §§ 7384l(1), 7384r. To establish entitlement to benefits under the EEOICPA due to cancer, you must establish that the deceased employee contracted the cancer after beginning work at a DOE or atomic weapons employer facility. 42 U.S.C. § 73841(9). The EEOICPA, at § 7384l(12)(A), defines the term DOE facility "as any building, structure, or premise, including the grounds upon which such building, structure, or premise is located…in which operations are, or have been, conducted by, or on behalf of, the Department of Energy (except for buildings, structures, premises, grounds, or operations covered by Executive Order No. 12344, dated February 1, 1982 (42 U.S.C. § 7158 note), pertaining to the Naval Nuclear Propulsion Program)." 42 U.S.C. § 7384l(12).

It is the claimant's responsibility to establish entitlement to benefits under the EEOICPA. The EEOICPA regulation at § 30.111(a) states, "the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and these regulations, the claimant also bears the burden of providing to OWCP all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in these regulations." 20 C.F.R. §§ 30.110, 30.111(a).

After considering the written record of the claim and after conducting further development of the claim as was deemed necessary, the FAB hereby makes the following:

FINDINGS OF FACT

1. You filed a claim for survivor benefits under the EEOICPA on September 24, 2001.

2. Your husband was employed at the Shippingport Atomic Power Plant with the portion of the facility whose activities came under the auspices of the Department of Energy's Naval Nuclear Propulsion Program.

3. Dr. Karen Harris diagnosed your husband with transitional cell carcinoma on December 30, 1997.

4. Your husband died on April 9, 1998, due to bladder cancer and renal failure.

5. You are the surviving spouse of **[Employee]**.

Based on the above-noted findings of fact in this claim, the FAB hereby also makes the following:

CONCLUSION OF LAW

Pursuant to § 7384l(12)(A) of the EEOICPA and § 30.5(v)(1) of the implementing regulations,

employees engaged in Naval Nuclear Propulsion Program activities are excluded from coverage under the EEOICPA. The evidence of record establishes that your husband was a Naval Nuclear Propulsion Program employee; therefore he does not meet the definition of a covered employee with cancer as defined in § 7384l(9) of the EEOICPA and § 30.210 of the implementing regulations. Because your husband was not a covered employee with cancer, your claim for benefits is denied.

Washington, DC

Thomasyne L. Hill

Hearing Representative

Final Adjudication Branch

[1] The beginning date indicated on the employment history form was distorted during the creation of the claim record.

EEOICPA Fin. Dec. No. 15444-2003 (Dep't of Labor, August 19, 2003)

REVIEW OF THE WRITTEN RECORD 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). On July 22, 2003, **[Claimant 3]** wrote to the FAB and filed objections to the June 26, 2003 recommended decision. On July 26, 2003, **[Claimant 2]** submitted additional evidence in support of his claim for benefits under the EEOICPA. The objections and additional evidence have been considered by means of a review of the written record.

STATEMENT OF THE CASE

On November 21, 2001, **[Claimant 1]**, filed a claim for benefits as the surviving spouse of the deceased employee under the EEOICPA. On November 21, 2001 and December 26, 2001, **[Claimant 2]** and **[Claimant 3]** respectively filed claims for survivor benefits as the surviving children of the deceased employee under the EEOICPA. The claimants identified lung and kidney cancer as the diagnosed conditions on which their claims were based. **[Claimant 1]** submitted an employment history form (Form EE-3) in which she stated that Bethlehem Steel Co. employed the deceased employee in March 1950. The claimants submitted a copy of a death certificate which shows the employee died on May 11, 1970, due to lung and kidney cancer and that **[Claimant 1]** was his surviving spouse. **[Claimant 1]** submitted a copy of a marriage certificate which shows she married the deceased employee on September 1, 1951. **[Claimant 2]** and **[Claimant 3]** submitted copies of their birth certificates which show the deceased employee was their father. The claimants submitted a copy of Dr. R. Medina's July 10, 1968 pathology report in which he diagnosed the deceased employee with clear cell adenocarcinoma of the kidney.

On June 20, 2002, Department of Energy (DOE) representative Roger Anders advised, via Form EE-5, that the DOE had no employment information regarding the deceased employee. Subsequently on July 10, 2002, Mr. Anders advised, via Form EE-5, that the employment history provided by the claimants was correct, but that DOE had additional employment information that was relevant to the claim. In an attached statement, Mr. Anders advised that Bethlehem Steel (Lackawanna, NY) employed the deceased employee from July 26, 1945 to September 8, 1945 and from March 22, 1950 to November

27, 1969. **[Claimant 1]** submitted an employment affidavit form (Form EE-4) in which she stated that Bethlehem Steel employed the deceased employee from March 22, 1950 to 1969 as a boiler repairman.

On October 30, 2002, the Cleveland district office referred the evidence of record to the National Institute of Occupational Safety and Health (NIOSH) to assist in determining if the employee's cancer was, at least as likely as not, related to his employment at Bethlehem Steel. On November 19, 2002, NIOSH informed the claimants of the receipt of their claims for benefits under the EEOICPA and provided them an explanation of the dose reconstruction procedures. On May 20, 2003, **[Claimant 1]** and **[Claimant 3]** each signed a Form OCAS-1, indicating that they had reviewed the NIOSH Draft Report of Dose Reconstruction and agreed that it identified all of the relevant information they provided to NIOSH. On May 21, 2003, **[Claimant 2]** signed Form OCAS-1 indicating that he had reviewed the NIOSH Draft Report of Dose Reconstruction and agreed that it identified all of the relevant information he provided to NIOSH. On May 29, 2003, NIOSH provided the district office with the Final Report of Dose Reconstruction under the EEOICPA.

Based upon the evidence of record, the Cleveland district office issued a recommended decision on June 26, 2003, in which it found that:

1. **[Claimant 1]**, **[Claimant 3]**, and **[Claimant 2]** each filed a claim for survivor benefits on November 21, 2001, December 26, 2001 and November 21, 2001 respectively.

2. **[Claimant 1]** is the surviving spouse of **[Employee]**, as she was married to him at the time of and for at least one year immediately prior to his death. There is no evidence that there is a living minor child of **[Employee]**.

3. **[Employee]** had covered employment and worked at Bethlehem Steel in Lackawanna, NY during a covered period.

4. On July 10, 1968, **[Employee]** was diagnosed with kidney cancer which metastasized to the lungs, ribs, cerebral area and abdominal area.

5. The diagnosis of cancer was after **[Employee]** began covered employment.

6. NIOSH reported annual dose estimates for the kidney cancer from the date of initial radiation exposure during covered employment, to the date of the cancer's first diagnosis. A summary and explanation of information and methods applied to produce these dose estimates, including the claimants' involvement through an interview and review of the dose report, are documented in the "NIOSH Report of Dose Reconstruction under EEOICPA," dated May 29, 2003.

7. Based on the dose reconstruction performed by NIOSH, the Cleveland district office calculated the probability of causation (the likelihood that the cancer was caused by radiation exposure incurred while working at a covered facility) for the kidney cancer. The Cleveland district office determined that the kidney cancer was "at least as likely as not" (a 50% or greater probability) related to employment at the covered facility, as required by the EEOICPA.

In light of its findings of fact in connection with this claim, the district office made the following conclusions of law:

[Employee] was a covered employee under § 7384l(1)(B) of the EEOICPA as he was a covered employee with cancer as that term is defined by § 7384l(9)(B) of the EEOICPA. 42 U.S.C. § 7384l(1)(B), 7384l(9)(B).

NIOSH performed dose reconstruction estimates in accordance with § 7384n(d) of the EEOICPA and § 82.26 of the HHS regulations. 42 U.S.C. § 7384n(d), 42 C.F.R. § 82.26. The Department of Labor completed the Probability of Causation calculation in accordance with § 7384n(c)(3) of the EEOICPA and § 30.213 of the EEOICPA regulations, which references subpart E of 42 C.F.R. Part 81. 42 U.S.C. § 7384n(c)(3), 20 C.F.R. 30.213.

As **[Employee]** was a covered employee and is now deceased, his survivor is entitled to compensation of $150,000.00, pursuant to § 7384s(a)(1) of the EEOICPA. 42 U.S.C. § 7384s(a)(1). **[Claimant 1]** is the spouse of **[Employee]**, pursuant to § 7384s(e)(3)(A) of the EEOICPA. 42 U.S.C. § 7384s(e)(3)(A). As there is no evidence of a living minor child of **[Employee]**, the exception provided by § 7384s(e)(1)(F) of the EEOICPA does not apply and pursuant to § 7384s(e)(1)(A) of the EEOICPA, **[Claimant 1]** is thus entitled to the aforementioned compensation of $150,000.00. 42 U.S.C. §§ 7384ls(e)(1)(F), 7384s(e)(1)(A).

On July 28, 2003, the Final Adjudication Branch received written notification from **[Claimant 1]** waiving any and all objections to the recommended decision.

OBJECTIONS

Section 30.310(a) of the EEOICPA implementing regulations provides that, "[w]ithin 60 days from the date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision, including HHS's reconstruction of the radiation dose to which the employee was exposed (if any), and whether a hearing is desired." 20 C.F.R. § 30.310(a). On July 22, 2003, **[Claimant 3]** filed written objections to the June 26, 2003 recommended decision. In her letter, **[Claimant 3]** described the mental and financial hardship she experienced after her father's death. She also advised she was concerned that if her mother "passes on," the case may be subjected to closure and she may never see the funds due her. On July 26, 2003, **[Claimant 2]** submitted a copy of his birth certificate and high school diploma to the FAB for review. He stated in his letter that he considered himself a minor going to school and that he graduated in June 1972.

Section 30.313 of the EEOICPA implementing regulations provides that, in reviewing any objections submitted the Final Adjudication Branch will review the written record, any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. 20 C.F.R. § 30.313.

After considering the written record of the claim forwarded by the Cleveland district office, the objections of **[Claimant 3]** and the evidence submitted by **[Claimant 2]**, the FAB hereby makes the following:

FINDINGS OF FACT

1. **[Claimant 1]** and **[Claimant 2]** filed claims for survivor benefits on November 21, 2001. **[Claimant 3]** filed a claim for survivor benefits on December 26, 2001.

2. The Department of Energy confirmed that the deceased employee was employed from July 26, 1945 to September 8, 1945 and from March 22, 1950 to November 27, 1969, by Bethlehem Steel (Lackawanna, NY), an atomic weapons employer.[1]

3. The deceased employee was diagnosed with clear cell adenocarcinoma of the kidney on July 10, 1968.

4. The deceased employee died on May 11, 1970, due to lung and kidney cancer.

5. **[Claimant 1]** was married to the deceased employee on September 1, 1951, and was his spouse at the time of death.

6. On May 29, 2003, NIOSH completed a Final Report of Dose Reconstruction under the EEOICPA based on the evidence of record provided by the Cleveland district office. The Final Adjudication Branch independently analyzed the information in that report and confirmed the 52.34% probability determined by NIOSH.

Based on the above-noted findings of fact in this claim, the FAB hereby also makes the following:

CONCLUSIONS OF LAW

To establish eligibility for compensation as a result of cancer, it must first be established that the deceased employee was: (1) a member of the Special Exposure Cohort (SEC) who was a DOE employee, a DOE contractor employee, or an atomic weapons employee who contracted a specified cancer after beginning such employment; or (2) a DOE employee, a DOE contractor employee or an atomic weapons employee who contracted cancer (that has been determined pursuant to guidelines promulgated by Health and Human Services, "to be at least as likely as not related to such employment"), after beginning such employment. 42 U.S.C. § 7384l(9) and 20 C.F.R. § 30.210.

Section 7384s(e)(1) of the EEOICPA provides that: "[i]n the case of a covered employee who is deceased at the time of payment of compensation under this section, whether or not the death is the result of the covered employee's occupational illness, such payment may be made only as follows:

(A) If the covered employee is survived by a spouse who is living at the time of payment, such payment shall be made to such surviving spouse.

(B) If there is no surviving spouse described in subparagraph (A), such payment shall be made in equal shares to all children of the covered employee who are living at the time of payment.

[Employee] was an atomic weapons employee as defined by § 7384l(3) of the EEOICPA and he was a covered employee with cancer as defined by § 7384l(9)(B) as his renal cancer was at least as likely as not caused by his employment at an AWE facility, within the meaning of § 7384n of the Act. 42 U.S.C. §§ 7384l(3), 7384l(9)(B), 7384n. **[Claimant 1]** is entitled to compensation benefits in the amount of $150,000.00 as the eligible surviving spouse of **[Employee]** in accordance with §§ 7384s(a) and 7384s(e) of the EEOICPA. 42 U.S.C. §§ 7384s(a), 7384s(e). Additionally, **[Claimant 3]** and **[Claimant 2]** are surviving children of **[Employee]** but they are not entitled to benefits under the EEOICPA pursuant to § 7384s(e)(1)(B), which states that only "[if] there is no surviving spouse… payment shall be made in equal shares to all children of the covered employee who are living at the

time of payment." 42 U.S.C. § 7384s(e)(1)(B).

Washington, DC

Thomasyne L. Hill

Hearing Representative

Final Adjudication Branch

[1] U.S. Department of Energy. *Bethlehem Steel*. Worker Advocacy Facility List. Available: http://tis.eh.doe.gov/advocacy/faclist/showfacility.cfm [retrieved August 8, 2003].

EEOICPA Fin. Dec. No. 34771-2003 (Dep't of Labor, July 21, 2003)

REVIEW OF THE WRITTEN RECORD AND NOTICE OF FINAL DECISION

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 for benefits is denied.

STATEMENT OF THE CASE

On August 14, 2002, you filed a Form EE-2 (Survivor's Claim for Benefits under EEOICPA) seeking compensation as the eligible surviving beneficiary of your husband, **[Employee]**. On the EE-2 form, you indicated that he had been diagnosed with colon cancer. In support of your claim, you submitted medical evidence that confirmed the diagnosis of the claimed condition. You also indicated that **[Employee]** was a member of the Special Exposure Cohort having been employed at the West Kentucky Wildlife Management area near the Paducah Gaseous Diffusion Plant.

On September 10, 2002, the district office advised you that the corporate verifier, Oak Ridge Institute for Science and Education, had sent notice to the district office that it had no employment records for **[Employee]**, and that the Social Security Earnings statement and affidavits submitted detail employment for the Department of Fish and Wildlife for the State of Kentucky. The district office requested that you provide proof of employment with a contractor or subcontractor for the Department of Energy (DOE) within thirty days. You did not respond to this request.

The district office reviewed the record and found that you submitted a claim for compensation under the EEOICPA. It was further found that no evidence was submitted that supported the claim that **[Employee]** had been employed at a facility covered under the Act. Therefore, on October 30, 2002, the district office recommended the denial of your claim.

Section 30.316(b) of the EEOICPA implementing regulations states that if the claimant files objections to all or part of the recommended decision, the FAB reviewer will issue a decision on the claim after either the hearing or the review of the written record, and after completing such further development of the case as he or she may deem necessary. 20 C.F.R. § 30.316(b). On November 19, 2002, the Final Adjudication Branch received your letter of appeal. In your statement of appeal, you objected to the conclusion that you did not submit evidence establishing employment at a covered facility for

[Employee]. On May 21, 2003, you submitted additional evidence regarding employment for **[Employee]**. This additional evidence consisted of a licensing agreement between the Commonwealth of Kentucky and the U.S. Atomic Energy Commission dated October 22, 1959, and a 1989 wildlife compliance inspection of the area conducted by the General Services Administration.

FINDINGS OF FACT

1. You filed a claim for compensation as an eligible surviving beneficiary of **[Employee]**.

2. **[Employee]** was employed by the Kentucky Department of Fish and Wildlife Resources.

3. The Department of Energy indicated that there was no record of **[Employee]**'s employment at the Paducah Gaseous Diffusion Plant.

4. You did not establish that there was a contractual relationship between the State of Kentucky, Department of Fish and Wildlife Resources and the Department of Energy.

CONCLUSIONS OF LAW

In determining whether **[Employee]** was employed by a Department of Energy contractor due to services being rendered pursuant to a contract, the Final Adjudication Branch must examine two critical issues. Firstly, we must establish how a DOE contactor is defined under the Act. Secondly, we must determine the nature of the agreement between the parties, and if that agreement contains the essential elements of a contract, i.e., mutual intent to contract and the exchange of consideration or payment.

I conclude that the employee was not a DOE contractor employee. The EEOICPA program has established how a DOE contractor and subcontractor are to be defined. Program bulletin 03-27 sets forth the following definitions:

Contractor – An entity engaged in a contractual business arrangement with the Department of Energy to provide services, produce materials or manage operations at a beryllium vendor or Department of Energy facility.

Subcontractor – An entity engaged in a contracted business arrangement with a beryllium vendor contractor or a contractor of the Department of Energy to provide a service at a beryllium vendor or Department of Energy facility. EEOICPA Bulletin No. 03-27, 2003.

Therefore, an entity must be engaged in a contractual business arrangement to provide services to the DOE in order to be a contractor or subcontractor.

The evidence submitted does not support the claim that **[Employee]**'s employer, the Kentucky Department of Fish and Wildlife Resources, had contracted with the Atomic Energy Commission or DOE to provide management and operating, management and integration, or environmental remediation at the facility. Consequently, **[Employee]**'s employer does not meet the definition of a DOE contractor. Furthermore, the mere existence of a formal written document authorizing a state or federal entity to perform work for DOE does not automatically make the entity a DOE contractor if the document and arrangement lack the elements necessary to constitute a contract. The license in this case permitted the state of Kentucky, Department of Fish and Wildlife Resources to utilize DOE land as

a field trial area.

The Act is clear that its provisions extend compensation only to certain employees. These "covered employees" are defined as covered employees with cancer, covered beryllium employees, and covered employees with silicosis. The definition of a covered employee with cancer (who is a member of the Special Exposure Cohort[1]) is found in § 7384l(9)(A) of the Act. That section states that in order to be considered a covered employee with cancer one must have been a Department of Energy employee or contractor employee who contracted the cancer after beginning employment at a Department of Energy facility, or an atomic weapons employee who contracted cancer after beginning employment at an atomic weapons facility. 42 U.S.C. § 7384l(9)(A).

Based on the review of the record, the undersigned hereby concludes that the record supports the finding that **[Employee]** did not have covered employment as defined under the Act. Because you have not established, with the required evidence, employment covered under the EEOICPA, your claim for compensation must be denied.

Washington, DC

David E. Benedict

Hearing Representative

[1] The Special Exposure Cohort differs from other Department of Energy and atomic weapon employees in that is comprised of individuals who were so employed for a number of work days aggregating at least 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, and, during such employment were monitored through the use of dosimetry badges; or worked in a job that had exposures comparable to a job that is or was monitored through the use of dosimetry badges. The Cohort also includes employees that were employed before January 1, 1974, by the Department of Energy or a Department of Energy contractor or subcontractor on Amchitka Island, Alaska, and was exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests. Individuals designated as a member of the Special Exposure Cohort by the President for purposes of the compensation program under section 7384q of this title are also included. 42 U.S.C. § 7384l(9)(A); 42 U.S.C. § 7384l(14).

EEOICPA Fin. Dec. No. 10006507-2006 (Dep't of Labor, November 25, 2009)

NOTICE OF FINAL DECISION FOLLOWING REVIEW OF THE WRITTEN RECORD

This decision of the Final Adjudication Branch (FAB) concerns the above claim for impairment benefits under Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq.* For the reasons stated below, the claim for an impairment award is accepted.

STATEMENT OF THE CASE

On June 10, 2003, the employee filed a claim for benefits under Part B of EEOICPA as a uranium worker. On December 10, 2003, FAB issued a final decision in which it found that the employee was a uranium worker who had received $100,000.00 under section 5 of the Radiation Exposure Compensation Act (42 U.S.C. § 2210 note) for pneumoconiosis, pulmonary fibrosis and fibrosis of the lung. Therefore, FAB concluded that the employee was entitled to a lump-sum award of $50,000.00 under Part B and medical benefits for his pneumoconiosis, pulmonary fibrosis and fibrosis of the lung,

retroactive to June 10, 2003.

On February 14, 2005**,** the employee filed a claim under Part E for pneumoconiosis, fibrosis of the lung and pulmonary fibrosis. On June 7, 2006, FAB issued a final decision finding that the employee's pneumoconiosis, pulmonary fibrosis and fibrosis of the lung were due to work-related exposure to toxic substances. Therefore, FAB concluded that the employee was entitled to medical benefits for the covered illnesses of pneumoconiosis, pulmonary fibrosis and fibrosis of the lung under Part E of EEOICPA. On December 13, 2006, FAB issued another final decision in which it found that the employee had a 25% permanent impairment of the whole body as a result of his accepted pneumoconiosis, pulmonary fibrosis and fibrosis of the lung, and awarded him $62,500.00 in impairment benefits under Part E of EEOICPA.

On April 3, 2008, the employee filed another claim for benefits under Part E of EEOICPA, for squamous cell cancer of the right upper lobe of the lung. By final letter decision dated October 23, 2008, the district office accepted that the employee's lung cancer was a consequence of his accepted pneumoconiosis, pulmonary fibrosis and fibrosis of the lung.

On January 22, 2009, the district office received the employee's claim for an increased impairment award. In his letter to the district office, the employee indicated that he wished to have the Department of Labor arrange for a qualified physician to perform the impairment evaluation. Accordingly, to determine the employee's impairment rating (the percentage rating representing the extent of whole body impairment, based on the organ and body functions affected by his covered illnesses), his case was referred for review to a district medical consultant (DMC). In a medical report dated April 7, 2009, the DMC stated that the employee had reached maximum medical improvement for his accepted pneumoconiosis, pulmonary fibrosis, fibrosis of the lung and lung cancer. Using the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA's *Guides*), and based on pulmonary function tests performed on January 15, 2009, the DMC concluded that the employee had a 26% whole body impairment as a result of his covered illnesses.

In a letter dated June 17, 2009, the employee indicated that he had not filed for or received any money under a state workers' compensation program or related to a tort action for his covered illnesses.

On August 17, 2009, the Denver district office issued a recommended decision in which it found that the employee had a 26% whole body impairment attributable to his pneumoconiosis, pulmonary fibrosis, fibrosis of the lung and lung cancer. Therefore, the district office recommended that the employee be awarded compensation in the amount of $65,000.00, less the $62,500.00 that was previously awarded, under Part E of EEOICPA.

OBJECTION

On August 28, 2009, FAB received the employee's objection to the recommended decision, in which he indicated that he would forward an impairment evaluation from another physician. Thereafter, the employee submitted a September 10, 2009 medical report by Dr. Karen B. Mulloy, an osteopath, in which she concluded that the employee had reached maximum medical improvement. Dr. Mulloy used the AMA's *Guides* and opined that the employee had a Class 3 impairment due to an FEV_1 of 58% of predicted. *See* AMA's *Guides*, table 5-12, page 107. In addition, Dr. Mulloy identified the need for oxygen and reduced oxygen saturation, and indicated that the employee's covered illnesses interfered with some of his activities of daily living, such as walking up stairs and doing activities around the

house that require any exertion. Based upon the foregoing, Dr. Mulloy concluded that the employee had a permanent impairment of 35% of the whole body as a result of his accepted pneumoconiosis, pulmonary fibrosis, fibrosis of the lung and lung cancer.

The employee also submitted an October 7, 2009 medical report by Dr. Annyce Mayer. In that report, Dr. Mayer opined that the employee had a Class 3 impairment based on a limitation in his exercise tolerance, at least in part related to respiratory abnormalities. Dr. Mayer also stated that the employee had a gas exchange abnormality that required the use of oxygen and that he does not perform activities that require much exertion. Dr. Mayer did not indicate that the employee had reached maximum medical improvement or provide an opinion on the percentage of his whole person impairment as a result of his respiratory problems.

After considering the evidence of record, FAB hereby makes the following:

FINDINGS OF FACT

1. On June 7, 2006, FAB issued a final decision finding that the employee's pneumoconiosis, pulmonary fibrosis and fibrosis of the lung were due to exposure to toxic substances, accepted his claim under Part E of EEOICPA and awarded him medical benefits for his covered illnesses.

2. On December 13, 2006, FAB issued another final decision finding that the employee had a permanent impairment of 25% of the whole body due to his covered illnesses of pneumoconiosis, pulmonary fibrosis and fibrosis of the lung and awarded him $62,500.00 in impairment benefits.

3. By letter decision dated October 23, 2008, the district office accepted that the employee's lung cancer was a consequence of his accepted pneumoconiosis, pulmonary fibrosis and fibrosis of the lung.

4. Based on the Fifth Edition of the AMA's *Guides*, the medical evidence establishes that the impairment rating attributed to the employee's pulmonary conditions is 35%.

5. The employee has not received any settlement or award from a tort suit or state workers' compensation claim in connection with his covered illnesses.

Based on the above-noted findings of fact, FAB hereby also makes the following:

CONCLUSIONS OF LAW

Once a recommended decision on impairment has been issued and forwarded to the FAB, the employee may submit new medical evidence or an additional impairment evaluation to challenge the impairment determination in the recommended decision. When this occurs, the FAB reviewer must take many variables into consideration when weighing impairment evaluations for probative value. In general, probative means "believable" and the FAB reviewer evaluates each report to determine which one, on the whole, is more believable based on the medical rationale provided and the evidence at hand. Federal (EEOICPA) Procedure Manual, Chapter 2-1300.10 (May 2009). The FAB reviewer will determine the minimum impairment rating after he or she has evaluated all relevant evidence and

argument in the record. 20 C.F.R. § 30.908(c) (2009).

The AMA's *Guides,* at page 107, indicates that

The classification system in Table #5-12 considers only pulmonary function measurements for an impairment rating. It is recognized that pulmonary impairment can occur that does not significantly impact pulmonary function and exercise results but that does impact the ability to perform activities of daily living. . . . In these limited cases, the physician may assign an impairment rating based on the extent and severity of pulmonary dysfunction and the inability to perform activities of daily living.

All three doctors identified pulmonary function test results that indicated the employee has an impairment at the lower end of Class 3. However, Dr. Mayer and Dr. Mulloy identified the need for oxygen and indicated that the employee's accepted pneumoconiosis, pulmonary fibrosis, fibrosis of the lung and lung cancer affect his activities of daily living, while the DMC only considered the results of pulmonary function tests.

As Dr. Mulloy considered additional issues in evaluating the employee's impairment, FAB concludes that Dr. Mulloy's impairment report has greater probative value than the report relied upon by the district office. Thus, FAB concludes that the employee has a permanent impairment that is due to the covered illnesses of pneumoconiosis, pulmonary fibrosis, fibrosis of the lung and lung cancer, and that his impairment rating is 35%.

FAB further concludes that the employee is entitled to $2,500 for each percentage point of his impairment rating of 35%, and that the employee is entitled to compensation for impairment in the amount of $87,500.00, less the previously awarded $62,500.00, pursuant to 42 U.S.C. § 7385s-2(a)(1). Accordingly, FAB awards the employee net impairment benefits of $25,000.00 under Part E of EEOICPA.

Washington, DC

Tom Daugherty

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 10010178-2007 (Dep't of Labor, March 25, 2008)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This decision of the Final Adjudication Branch (FAB) concerns the employee's claim for impairment benefits under Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons stated below, the claim for an impairment award under Part E is approved. A decision on the claim for wage-loss benefits under Part E of EEOICPA is deferred pending further development.

STATEMENT OF THE CASE

On June 7, 2002, the employee filed claims for benefits under Part B and former Part D of EEOICPA. On February 23, 2007, the FAB issued a final decision finding that he was employed by a covered Department of Energy (DOE) contractor at the Portsmouth Gaseous Diffusion Plant from May 11, 1953 to November 16, 1954; that he was diagnosed with kidney cancer on August 5, 1976, lung cancer on January 22, 2001, colon cancer on March 30, 2001, rectal cancer on October 22, 2001, and prostate cancer on November 10, 2004; that these cancers were at least as likely as not related to radiation exposure during his employment at a DOE facility; and that they were also related to his exposure to toxic substances during his employment at a DOE facility. As a result, the FAB found that the employee was entitled to benefits under both Parts B and E of EEOICPA.

Earlier on January 16, 2007, the district office received the employee's claim for wage-loss benefits and an impairment award under Part E of EEOICPA. In support of his claim, the employee submitted a pulmonary function analysis, dated February 28, 2007, from Kennewick General Hospital, which indicated that his FVC was 91% of normal, FEV-1 was 42% of normal, and DLCO was 56% of predicted. In a March 5, 2007 medical report, Dr. Arthur Cain identified lowered creatinine levels, post-radiation rectal pain, urinary frequency, and erectile dysfunction.

To determine the percentage rating representing the extent of whole person impairment, based on the organ and body functions affected by the employee's covered illness, the case was referred for review to a District Medical Consultant (DMC). The DMC submitted a medical report, dated June 30, 2007, which indicated that the employee had reached maximum medical improvement for all of his covered illnesses. Using the Fifth Edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (the *Guides*), the DMC opined that the employee had 10% impairment of the whole person due to his kidney cancer, based on the loss of one kidney and satisfactory kidney functions. For the employee's prostate cancer, the DMC found that there was a Class 1 impairment due to prostate and seminal vesicle dysfunction signs and symptoms, that the employee had not had surgery, and that he did not require continuous treatment. The DMC found that there was 5% impairment of the whole person due to dysfunction secondary to radiation treatment for the prostate cancer. Regarding the employee's rectal cancer, the DMC found that there was Class 1 impairment based on no need for further treatment, no further complications, no diarrhea and no residual findings. The DMC found that there was 0% impairment of the whole person due to radiation treatment for the colon cancer. Finally, as for the employee's lung cancer, the DMC found that his FVC was 91% of normal and his FEV-1 was 42% of normal, and that that placed him in Class 2 (Table 5-12, page 107 of the *Guides*). The DMC found that there was 10% impairment of the whole person due to the lung condition. However, the DMC indicated that 50% of this last impairment should be attributed to the employee's smoking and non-covered illness emphysema. Using the Combined Values Chart on page 604 of the *Guides*, 10% for kidney cancer, 5% for prostate cancer, 0% for colon cancer, and 5% impairment for the lung cancer equates to a 19% impairment of the whole person.

In a letter dated July 13, 2007, the employee indicated that he had not filed for or received any money from a state workers' compensation program or related to a tort action for any of his covered illnesses.

On August 4, 2007, the Cleveland district office issued a recommended decision to award the employee Part E benefits for a 19% whole person impairment attributable to his kidney, colon/rectal, lung, and prostate cancers. The district office recommended that he receive an impairment award in the amount of $47,500.00, and deferred making a recommendation on the employee's claim for wage-loss pending further development.

OBJECTIONS

On September 27, 2007, the FAB received the written objections of the employee's authorized representative and a request for an oral telephonic hearing, which was held on November 27, 2007. A review of the written objections, an October 4, 2007 impairment evaluation performed by Dr. David P. Suchard, Dr. Suchard's testimony during the telephonic hearing, and evidence the representative submitted subsequent to the hearing reveals the following:

In his October 4, 2007 evaluation and hearing testimony, Dr. Suchard indicated that the employee had reached maximum medical improvement for all of his covered illnesses. Using the Fifth Edition of the *Guides*, he found that the employee's FVC was 91% of normal, FEV-1 was 42% of normal, and DLCO was 56% of predicted, and placed him in Class 3 (Table 5-12 on page 107 of the *Guides*). Dr. Suchard concluded that the employee had a 40% impairment of the whole person based on his lungs. Dr. Suchard found that based on the loss of one kidney, no evidence of recurrence of cancer, occasional sharp pains associated with the surgical scar, and serum creatine reduction to 46 ml/min, that the employee was in the mid-range of a Class 2 impairment (Table 7-1, page 146), resulting in a 23% whole person impairment based on the employee's kidneys. Regarding the employee's colorectal cancer, Dr. Suchard found that there was a Class 1 impairment based on a condition that required surgery and the need for ongoing periodic surveillance colonoscopies and the risk of developing new or recurrent colorectal cancer (Table 6-4, page 128). Dr. Suchard found that there was a 5% whole person impairment because of dysfunction secondary to radiation and treatment for the colon cancer.

For the prostate cancer, Dr. Suchard found that the employee had an anal impairment associated with his radiation-induced proctitis and that this was a Class 2 impairment due to signs and symptoms of organic anal disease or anatomic loss or alteration associated with continual anal symptoms incompletely controlled by treatment (Table 6-5 on page 131). Dr. Suchard found that there was a 15% whole person impairment related to this anal disease. Due to lower urinary tract function associated with the employee's prostate cancer, Dr. Suchard found a Class 1 impairment due to lower urinary symptoms of urinary frequency, nocturia, and urinary hesitancy with decreased force of the urinary stream (Table 7-4 on page 153), resulting in a 5% whole person impairment related to his radiation-induced obstructive urethral disease. Based on his reduced sexual function, Dr. Suchard also found a Class 1 impairment due to difficulties in maintaining an erection of sufficient rigidity and duration for sexual intercourse (Section 7.7 on page 156), resulting in a 10% whole person impairment related to decreased penile function. However, because the *Guides* direct the evaluator to decrease the percentage impairments concerning male reproductive organs by 50% for men over 65, Dr. Suchard found that the employee only had a 5% whole person impairment with regard to his decreased penile function. Using the Combined Values Chart on page 604 of the *Guides*, Dr. Suchard concluded that 15% for anal disease, 5% for urethral disease, and 5% for sexual dysfunction equated to a 23% impairment to the whole person for the employee's prostate cancer.

Using the same Combined Values Chart, Dr. Suchard concluded that 40% for the lung cancer, 23% for the kidney cancer, 5% for the colon cancer, and 23% for the prostate cancer equated to a 67% impairment of the whole person due to all of the employee's covered illnesses. Subsequent to the hearing, the authorized representative submitted a pulmonary function analysis dated November 29, 2007 and the results of a December 11, 2007 endoscopy. In an email dated December 21, 2007, Dr. Suchard indicated that the "pulmonary condition remains Class 2, no change in impairment assessment." He also indicated that the employee continued to have a 5% whole person impairment with regard to his Class 1 colorectal disorder impairment.

On the other hand and as noted above, in his June 30, 2007 report, the DMC noted that the employee's FVC was 91% of normal and FEV-1 was 42% of normal, and placed him in Class 2. However, Table

5-12 of the *Guides* states that if the FEV-1 is between 41% and 59%, this would place an individual in Class 3. Also, the DMC did not consider the DLCO test results, which were 56% of predicted and would also place an individual in Class 3. Finally, the FAB notes that the DMC apportioned the impairment of the employee's lungs to reflect the presence of a non-covered illness (emphysema). Regarding his kidney cancer, the FAB notes that the DMC did not take into consideration the pain from the surgical site and the lowered serum creatine level. In addition, he did not consider the need for ongoing periodic surveillance colonoscopies and the risk of developing new or recurrent colorectal cancer. Finally, the FAB notes that the DMC did not consider any impairment that resulted from the employee's anal problems that were associated with radiation-induced proctitis, lower urinary tract functions associated with prostate cancer, and reduced sexual function.

Once a recommended decision on impairment has been issued, an employee may submit new medical evidence or an additional impairment evaluation to challenge the determination of the impairment in the recommended decision. When this occurs, the FAB reviewer must take many variables into consideration when weighing the probative value of competing impairment evaluations. While by no means exhaustive, the FAB reviewer considers whether the physician possesses the requisite skills and requirements to provide a rating; whether the evaluation was conducted within 1 year of its receipt by DEEOIC; whether it addresses the covered illness; and whether the whole body percentage of impairment is listed with a clearly rationalized medical opinion as to its relationship to the covered illness. In general, probative means "believable" and the FAB reviewer considers each competing report to determine which one, on the whole, is more believable based on the medical rationale provided and the evidence in the case file. *See* Federal (EEOICPA) Procedure Manual, Chapter E-900.10 (February 2006). As noted above, the employee submitted medical evidence that the FAB concludes is well rationalized and of greater probative value than the DMC's evaluation that was used by the district office to determine his percentage of permanent impairment.

After considering the evidence of record, the FAB hereby makes the following:

FINDINGS OF FACT

1. On February 23, 2007, the FAB issued a final decision finding that the employee was employed by a DOE contractor at the Portsmouth Gaseous Diffusion Plant from May 11, 1953 to November 16, 1954; that he was diagnosed with kidney cancer on August 5, 1976, lung cancer on January 22, 2001, colon cancer on March 30, 2001, rectal cancer on October 22, 2001, and prostate cancer on November 10, 2004; that these "occupational illnesses" were at least as likely as not related to radiation exposure during employment at a DOE facility; and that they were also "covered illnesses" related to toxic substance exposure during employment at a DOE facility. Consequently, it was found that he was entitled to benefits under both Parts B and E of EEOICPA.

2. Based on the Fifth Edition of the *Guides*, the employee has a 40% impairment based on his lung cancer, 23% based on his kidney cancer, 5% based on his colon cancer, and 23% based on his prostate cancer, for a total whole-body impairment of 67%.

3. The employee has not received any settlement or award from a lawsuit or workers' compensation claim in connection with his covered illnesses.

Based on the above-noted findings of fact, the FAB hereby also makes the following:

CONCLUSIONS OF LAW

Section 30.316(b) of the implementing regulations provides that "if the claimant objects to all or part of the recommended decision, the FAB reviewer will issue a final decision on the claim after either the hearing or the review of the written record, and after completing such further development of the case as he or she may deem necessary." 20 C.F.R. § 30.316(b). The undersigned has reviewed the record, including the employee's objections in this case, and concludes that no further investigation is warranted.

If an employee submits an additional impairment evaluation that differs from the impairment evaluation relied upon by the district office, the FAB will review all relevant evidence of impairment in the record, and will base its determinations regarding impairment upon the evidence it considers to be most probative. The FAB will determine the minimum impairment rating after it has evaluated all relevant evidence and argument in the record. *See* 20 C.F.R. § 30.908(c).

The FAB finds that Dr. Suchard's impairment evaluation is more probative than the one relied on by the district office to determine the employee's recommended whole person impairment, and that based on Dr. Suchard's evaluation, his impairment rating is calculated to be 67%. The FAB also finds that the employee is entitled to $2,500.00 for each percentage point of the impairment rating attributed to his covered illnesses. Therefore, the employee is hereby awarded impairment benefits under Part E of EEOICPA in the amount of $167,500.00 ($2,500.00 x 67) pursuant to 42 U.S.C. § 7385s-2(a)(1).

Washington, DC

Tom Daugherty

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 10033981-2006 (Dep't of Labor, November 27, 2006)

NOTICE OF FINAL DECISION

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

STATEMENT OF THE CASE

On August 1, 2003, you filed a Form EE-2, Claim for Survivor Benefits, and a Request for Review by a Physicians Panel for the brain cancer of your late father, **[Employee]**, hereinafter referred to as "the employee." The death certificate lists the cause of death on July 25, 2001 as malignant brain tumor with metastases. In support of your claim for survivorship, you did not submit a birth certificate. The death certificate indicates that the employee was divorced at the time of death.

On the form EE-3, Employment History, you stated the employee was employed by Gardinier, Inc. and

Cargill Fertilizer, Inc. in Bartow, Florida, from 1970 to March 2000. The district office verified employment with Gardinier and Cargill from December 1969 to March 2000. The U.S. Phosphoric Plant Uranium Recovery Unit[1] in Tampa, Florida, was a covered atomic weapons employer from 1951 to 1954 and from 1956 to 1961, prior to the employee's employment there.

On February 9, 2004, the FAB issued a final decision to deny compensation to you under Part B of the Act, because you did not establish covered employment. A request for reopening was denied on June 13, 2005. March 23, 2006, the Jacksonville district office issued a recommended decision concluding that your claim for benefits under Part E of the Act should be denied. The recommended decision was returned by the U.S. Postal Service as undeliverable. The recommended decision was reissued to the correct address on April 13, 2006. The recommended decision informed you that you had sixty days to file any objections, and that period ended on June 12, 2006. You have not filed an objection to the recommended decision. After considering the recommended decision and all the evidence in the case file, the FAB hereby makes the following:

FINDINGS OF FACT

1. You filed a claim for survivor benefits under the Act based on the brain cancer of the employee.

2. You have not submitted evidence to establish you are a child of the employee.

3. Employment at a covered DOE facility has not been verified.

Based on the above-noted findings of fact in this claim, the FAB hereby makes the following:

CONCLUSIONS OF LAW

The implementing regulations provide that within 60 days from the date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision and whether a hearing is desired. 20 C.F.R. § 30.310(a) (2005). If the claimant does not file a written statement that objects to the recommended decision within the period of time allotted or if the claimant waives any objections to the recommended decision, the FAB may issue a decision accepting the recommendation of the district office. 20 C.F.R. § 30.316(a).

The eligibility criteria for claims under Part E of EEOICPA are discussed in § 30.230 of the regulations, which state that "the employee is a Department of Energy contractor employee as defined in § 30.5(w). . . ." 20 C.F.R. § 30.230(a). Section 30.5(w) of the regulations and § 7384l of the Act define a Department of Energy contractor employee to be (1) an individual who is or was in residence at a DOE facility as a researcher for one or more periods aggregating at least 24 months; or (2) an individual who is or was employed at a DOE facility by: (i) an entity that contracted with the DOE to provide management and operating, management and integration, or environmental remediation at the facility; or (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility. 20 C.F.R. § 30.5(w); 42 U.S.C. § 7384l(11).

I have reviewed the evidence of file and the recommended decision of the Jacksonville district office. Based upon a review of the case file materials, there is insufficient evidence to establish employment at a covered facility during a covered period. Furthermore, employees of atomic weapons employers are

not DOE contractor employees.

Since the evidence does not establish that the employee was a Department of Energy contractor employee, you are not entitled to benefits under the Act, and the claim for compensation is denied. 42 U.S.C. §§ 7385s-4(c) and 7385s-3(a).

Jacksonville, FL

Sidne M. Valdivieso

Hearing Representative

Final Adjudication Branch

[1] Other names for the plant were Gardinier, Inc.; Cargill Fertilizer, Inc.; and U.S. Phosphoric Products Division of The Tennessee Corp.

Reconsideration before

EEOICPA Fin. Dec. No. 17520-2004 (Dep't of Labor, September 14, 2004)

DENIAL OF REQUEST FOR RECONSIDERATION

By letter dated June 28, 2004, you each requested an oral hearing in objection to the June 9, 2004 final decision of the Final Adjudication Branch. Pursuant to § 30.319(c) of the implementing regulations, "a hearing is not available as part of the reconsideration process." 20 C.F.R. § 30.319(c). For the reasons set forth below, your requests for reconsideration are denied.

The May 20, 2004 final decision found that you did not provide sufficient evidence to establish that the employee's colon cancer was "at least as likely as not" caused by her employment at the Savannah River Site. It was on this basis that your claims for survivor benefits under the EEOICPA were denied.

I must deny your requests for reconsideration because you have not submitted any argument or evidence which justifies reconsideration of the final decision. The decision of the Final Adjudication Branch is final on the date of issuance of this denial of your requests for reconsideration. 20 C.F.R. § 30.319(c).

Washington, DC

Richard Koretz

Hearing Representative

EEOICPA Order No. 10001762-2007 (Dep't of Labor, November 10, 2008)

ORDER GRANTING REQUEST FOR RECONSIDERATION AND REMAND ORDER

This is in response to the employee's November 6, 2007 request for reconsideration of the November 3,

2007 final decision of the Final Adjudication Branch (FAB). For the reasons set forth below, the request for reconsideration is granted.

Pursuant to the authority granted by § 30.317 of the EEOICPA regulations, and for the reasons set forth below, the employee's claim is remanded to the Seattle district office for further development and the issuance of a new decision. *See* 20 C.F.R. § 30.317 (2007).

On December 14, 2004, **[Employee]** filed a claim under Part E of the Act, identifying "plaque in the left lung" as the claimed medical condition. In an employment history, the employee stated that he worked as a pipe fitter and welder with J.A. Jones at the Hanford site in Richland, Washington from May 1, 1974 to March 31, 1985. The employee also stated that he worked at the Hanford site with the following employers:

· United Nuclear Corporation (UNC) as a pipe fitter with unspecified dates of employment

· Rockwell Hanford as a pipe fitter from February 1, 1987 to June 28, 1987

· Westinghouse Hanford as a maintenance supervisor from June 29, 1987 to September 31, 1996

· Dyncorp as a mechanical supervisor from October 10, 1996 to December 31, 2002

· Fluor Hanford as a mechanical supervisor from January 1, 2003 to May 31, 2004

· Delgen as a mechanical supervisor from June 1, 2004 until December 14, 2004

The Department of Energy (DOE) verified that the employee was employed at the Pacific Northwest National Laboratory (PNNL) in Richland, Washington from August 9, 1965 to January 21, 1966. DOE also verified that he was employed at the Hanford site as listed below:

· Douglas United Nuclear from March 16, 1966 to July 8, 1966 and August 22, 1966 to October 7, 1966

· J.A. Jones from May 31, 1973 to August 31, 1973, May 7, 1974 to February 4, 1975, and February 6, 1975 to March 26, 1982

· UNC from August 26, 1985 to December 19, 1985 and December 27, 1985 to January 17, 1986

· Rockwell Hanford Operations from February 18, 1987 to June 28, 1987

· Westinghouse Hanford Company from June 29, 1988 to April 8, 1988 and April 13, 1988 to September 30, 1996

· Dyncorp from October 1, 1996 to February 18, 2001

· Fluor Hanford from February 19, 2001 to December 31, 2005 (the date of verification)

On November 3, 2007, FAB issued a final decision under Part E of EEOICPA finding that the employee was not entitled to benefits for his claim for pleural plaques, on the ground that he had not

submitted medical evidence to substantiate a diagnosis of pleural plaques.

On November 6, 2007, the employee submitted medical records to support a diagnosis of asbestos-related pleural plaques. Dr. Lee W. Vance, in a medical narrative report dated June 3, 2002, diagnosed "pleural plaques compatible with lung disease due to asbestos exposure." Dr. Vance also confirmed that the employee had no evidence of interstitial lung disease or asbestosis. Dr. Randol James, in a chest x-ray report dated June 14, 2002, diagnosed the employee with pleural thickening in the right interior. The employee also submitted a CT scan of his chest, signed by Dr. Clarence May on December 21, 2001, that confirmed his diagnosis of pleural plaques due to a "previous asbestos exposure."

Submitted along with this evidence was a document called "Notice of Decision" from the Washington Department of Labor & Industries confirming the employee's claim for state workers' compensation, which was allowed for an asbestos-related lung disease. The additional evidence that the employee submitted from the Washington Department of Labor & Industries indicates that he might have received compensation and/or medical benefits due to asbestos-related pleural plaques. Due to the submission of this new medical documentation, additional development is needed to determine whether the employee's pleural plaques condition is related to toxic substance exposures while he was employed by DOE contractors/subcontractors at a DOE facility.

The employee has clearly submitted a timely request for reconsideration, and FAB hereby grants his request. Under 20 C.F.R. § 30.319(c)(1), instead of issuing a final decision after granting a request for reconsideration, FAB may remand the claim to the district office for further development. Therefore, pursuant to that authority, as well as that granted by 20 C.F.R § 30.317, FAB remands this case to the Seattle district office. On remand, the Seattle district office will consider the medical and other evidence in the file regarding the employee's claimed condition and develop for further information as it deems necessary. If the Seattle district office determines that the employee is entitled to benefits due to pleural plaques, it will need to determine whether his medical benefits need to be coordinated with any state workers' compensation the employee may have received. Upon further development, the employee will receive a new recommended decision with regard to his asbestos-related pleural plaques claim under Part E.

Washington, D.C.

Susan G. Price

Hearing Representative

Final Adjudication Branch

Time limit for issuance of final decision

EEOICPA Fin. Dec. No. 37038-2003 (Dep't of Labor, November 7, 2007)

NOTICE OF FINAL DECISION FOLLOWING REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch (FAB) concerning the above claims for compensation under Part B and Part E of the Energy Employees Occupational Illness Compensation

Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons stated below, **[Claimant #1]**'s claim for survivor benefits under Part B and Part E are denied. **[Claimant #2]**'s claim for survivor benefits under Part B is accepted, but his claim under Part E is denied.

STATEMENT OF THE CASE

On October 15, 2002, **[Claimant #1]** filed a Form EE-2 with the Seattle district office of the Division of Energy Employees Occupational Illness Compensation (DEEOIC) in which he claimed survivor benefits under Part B of EEOICPA as a child of **[Employee]**. In support of his claim, he alleged that **[Employee]** had been employed by J.A. Jones Construction, a Department of Energy (DOE) subcontractor at the Hanford site, and that **[Employee]** had been diagnosed with lung cancer in 1999. **[Claimant #1]** submitted a large number of documents in support of his claim that included, among other things: copies of a September 24, 1992 court order documenting the legal change of his name from "**[Claimant #1's former name]**" to "**[Claimant #1]**" and his October 6, 1992 amended birth certificate with this new name[1]; medical evidence of **[Employee]**'s lung cancer; copies of the death certificates for both **[Employee]** and **[Employee's Spouse]**; a copy of "Letters Testamentary" documenting that **[Claimant #1]** was an executor of **[Employee]**'s estate; a U.S. Marine Corps Form D-214 noting **[Claimant #1]**'s use of the name "**[Claimant #1]**" when he was transferred to the Marine Corps Reserve on September 4, 1964; and a September 21, 2001 statement in which **[Claimant #1]** related the following about his childhood:

As my real dad was unknown. My mother died when I was 6. **[Claimant #1's Father as listed on his birth certificate]** was a family friend of my mom's. Just to give me a last name as she was unwed & pregnant with me. My Dad **[Employee]** & My Mom **[Employee's Spouse]** actually was my uncle & aunt but I lived with them from the time I was 3 years old. So I consider them my Dad & Mom. As I joined the USMC with the **[Employee's Surname]** name. . . .

On December 16, 2002, the Seattle district office verified **[Employee]**'s employment by consulting the ORISE database and on December 17, 2002, it issued a recommended decision to deny **[Claimant #1]**'s Part B claim. The recommendation to deny was based on the conclusion that **[Claimant #1]** had failed to submit sufficient evidence to establish his eligibility as a surviving child of **[Employee]**. On January 29, 2003, FAB issued an order remanding the claim to the Seattle district office for further development on the issue of whether **[Claimant #1]** was **[Employee]**'s stepchild. In that order, FAB noted that new procedures had gone into effect shortly after the recommended decision had been issued that required all claims in which claimants were alleging to be stepchildren of deceased covered workers to be forwarded to the National Office of DEEOIC for referral to the Office of the Solicitor, and directed the Seattle district office to comply with those procedures upon completion of further development on the question of whether **[Claimant #1]** was **[Employee]**'s stepchild.

By letter dated February 11, 2003, **[Claimant #1]**'s representative submitted a February 6, 2003 statement from **[Employee's Sister]**, who stated the following:

[Claimant #1] came to live with **[Employee]** and **[Employee's Spouse]** in 1946 and he was three years old at the time. He lived with them until he was 18 or 19. At that time he joined the Marines. **[Employee]** was his soul [*sic*] provider during those years and loved him as his son. Their relationship has always been that of a father and son and continued until **[Employee]** passed away a few years ago.

[Claimant #1]'s representative also submitted copies of **[Claimant #1]**'s "Pupil Health Card" and

"Pupil's Cumulative Record" from the Kiona-Benton School District, both of which listed **[Claimant #1]**'s last name as "**[Claimant #1's Stepfather's surname]**" (crossed out and replaced with "**[Employee's surname]**") and noted that he lived with his "Uncle." The "Pupil's Cumulative Record" also listed "**[Claimant #1's Stepfather]**" as **[Claimant #1]**'s father. Shortly thereafter, **[Claimant #2]** filed a claim for survivor benefits on March 31, 2003 and alleged that he was the stepson of **[Employee]**.

In an April 10, 2003 inquiry, the Seattle district office asked **[Claimant #1]** who **[Claimant #1's Stepfather]** was (his father on the "Pupil's Cumulative Record"). In an April 12, 2003 reply, **[Claimant #1]** stated the following:

My mother **[Claimant #1's Mother]** married **[Claimant #1's Stepfather]** [in] 1945[.] They had (2) girls **[Claimant #1's Stepsisters]**. . . **[Claimant #1's Stepfather]** was my stepfather until **[Claimant #1's Mother]**'s death in 1949 at which time the girls & I were separated as **[Claimant #1's Stepfather]** didn't like me as I wasn't his child. The girls were adopted out and I went with my parents **[Employee]** & **[Employee's Spouse]**.

* * *

[I lived with **[Employee and Employee's Spouse]** in] 1943-1944 as **[Claimant #1's Mother]** was unwed. Then my mother **[]** passed away [January] 23, 1949. I lived with **[Employee]** & **[Employee's Spouse]** from 1949-1960. They were my sole survivorship [*sic*]. Then I went in USMC 1960.

In a response to a separate April 10, 2003 inquiry that was received by the Seattle district office on April 23, 2003, **[Claimant #2]** indicated that his mother **[Employee's Spouse]** had married **[Employee]** (his alleged step-parent) on October 24, 1940 when he was five years old, and that he had resided in their household for the next 15 years. **[Claimant #2]** also submitted a copy of his birth certificate, which showed that his mother was "**[Employee's Spouse]**," and his father was "**[Claimant #2's Father]**."

By letters dated May 1, 2003, the district office notified both **[Claimant #1]** and **[Claimant #2]** that the case had been referred to the National Institute for Occupational Safety and Health (NIOSH) for reconstruction of **[Employee]**'s radiation dose. Thereafter, on June 19, 2003, the district office transferred the case to the National Office of DEEOIC for referral to the Office of the Solicitor as directed in the January 29, 2003 remand order of the FAB. However, rather than taking this action[2], the National Office returned the case to the district office on September 29, 2003 with a memorandum from the Chief of the Branch of Policies, Regulations and Procedures (BPRP) of the same date. In that memorandum, the Chief reviewed the evidence then in the case file and concluded that while **[Claimant #2]** met the statutory definition of **[Employee]**'s "child," **[Claimant #1]** would not absent the submission of additional evidence showing that he had been legally adopted by **[Employee]**. Upon return of the file, the Seattle district office wrote to **[Claimant #1]** on October 3 and 21, 2003 and requested that he submit any evidence in his possession that would establish that he had been legally adopted by **[Employee]**. No response was received to these requests.

No further action took place with respect to this matter pending receipt of NIOSH's dose reconstruction report until June 9, 2005, on which date **[Claimant #1]**'s representative informed the district office that his client wished to expand his Part B claim to include a claim under the recently enacted Part E of EEOICPA. On October 27, 2005, the district office sent a third letter to **[Claimant #1]** stating that

while he had provided sufficient evidence to show that he had lived as a dependent in his uncle and aunt's household, no documentation had been provided showing that he had ever been adopted by his uncle. In a November 3, 2005 response to that letter, **[Claimant #1]**'s representative argued that because the definition of "child" in EEOICPA is inclusive rather than exclusive, **[Claimant #1]** met the definition of "child" by being the "*de facto* child" of **[Employee]**, based on a recent state court decision in a Washington child visitation case (issued that same day) that adopted an equitable theory of *de facto* parentage. In the visitation case cited, the court created a four-part test for an individual to be a considered a "*de facto* parent" and to be granted the rights and privileges of a parent.[3]

[Claimant #1]'s representative also argued that **[Claimant #1]** should be considered a child of **[Employee]** under the definition of the term "child" that appears in Title 51 of the Washington Revised Code, which codifies that state's industrial insurance law.[4] The term "child" is defined therein as, among other things, a "dependent child that is in legal custody and control of the worker." The term "dependent" under that title is defined as including relatives of the worker who at the time of the accident are actually and necessarily dependent on the worker. Through a letter dated November 10, 2005, **[Claimant #1]**'s representative added to his prior argument by alleging that "**[Employee]** would have adopted **[Claimant #1]** , but it wasn't necessary at the time because the schools he attended and the military accepted **[Employee]** as **[Claimant #1]**'s father and allowed **[Employee]** to sign legal documents on **[Claimant #1]**'s behalf when he was still a minor."

On October 18, 2005, the Seattle district office received the "NIOSH Report of Dose Reconstruction under EEOICPA," dated September 29, 2005, which provided estimated doses of radiation to the primary cancer site of the lung. Based on these dose estimates, the district office calculated the probability of causation (PoC) for **[Employee]**'s lung cancer by entering his specific information into a computer program developed by NIOSH called NIOSH-IREP. The PoC was determined using the "upper 99% credibility limit," which helps minimize the possibility of denying claims of employees with cancers that are likely to have been caused by occupational radiation exposures. The PoC for the primary cancer of the lung was determined to be 52.89% using NIOSH-IREP. Based on this PoC, the Seattle district office issued a November 16, 2005 recommended decision to accept **[Claimant #2]**'s Part B claim. However, it recommended denial of **[Claimant #2]**'s Part E claim on the ground that he was not a "covered child" under that other Part. It also recommended denying **[Claimant #1]**'s Part B and E claims on the ground that he had failed to establish that he was a surviving child of **[Employee]**. The recommended decision, however, did not fully discuss the legal arguments for the expansion of the term "child" made by **[Claimant #1]**'s representative. In a January 12, 2006 letter that was received on January 17, 2006, **[Claimant #1]**'s representative objected to this recommended decision and requested an oral hearing before FAB, which took place on March 30, 2006. At the hearing, **[Claimant #1]**'s representative made the same arguments he had made in his written objections.

On July 15, 2006, FAB returned the case to BPRP for guidance on the legal arguments raised by **[Claimant #1]**'s representative at the March 30, 2006 hearing. On December 12, 2006[5], BPRP requested a legal opinion on the matter from the Office of the Solicitor and on February 26, 2007, the Office of the Solicitor provided BPRP with a legal opinion that evaluated the arguments raised by **[Claimant #1]**'s representative. On March 1, 2007, BPRP contacted FAB and advised it of the guidance it had received. However, by that point in time, the November 16, 2005 recommended decision had automatically become a "final" decision of the FAB on January 17, 2007 pursuant to 20 C.F.R. § 30.316(c), the one-year anniversary of the date the representative's objections to the recommended decision were received by FAB.

On March 9, 2007, **[Claimant #1]** filed a petition in the United States District Court for the Eastern

District of Washington seeking review of the January 17, 2007 "final decision" on his claim under Parts B and E of EEOICPA (Civil Action No. CV-07-5011-EFS). Shortly thereafter, the Director of DEEOIC issued an order on April 30, 2007 vacating that same "final decision" on the claims of both **[Claimant #1]** and **[Claimant #2]** and returning them to the Seattle district office for further development and consideration of the Office of the Solicitor's February 26, 2007 opinion, to be followed by the issuance of new recommended and final decisions. The case was subsequently transferred to the national office of DEEOIC for further action in light of the filing of the above-noted petition.

On September 14, 2007, the national office of DEEOIC issued a recommended decision: (1) to deny **[Claimant #1]**'s claim for survivor benefits under Parts B and E on the ground that he was not a surviving "child" of **[Employee]**, as that statutory term is defined in §§ 7384s(e)(3) and 7385s-3(d)(3) of EEOICPA; (2) to accept **[Claimant #2]**'s claim for survivor benefits under Part B on the ground that as **[Employee]**'s stepchild, he was a surviving "child" of **[Employee]** under § 7384s(e)(3); and (3) to deny **[Claimant #2]**'s claim for survivor benefits under Part E on the ground that although he was a "child" of **[Employee]** under § 7385s-3(d)(3), he did not meet the definition of a "covered child" in § 7385s-3(d)(2). The case was transferred to FAB and on October 3, 2007, it received **[Claimant #2]**'s signed, written waiver of all objections to the September 14, 2007 recommended decision. On October 17, 2007, **[Claimant #2]** also submitted a signed statement indicating that had not received any money from a tort suit for **[Employee]**'s radiation exposure, and that he had not been convicted of fraud in connection with any application for or receipt of EEOICPA benefits or any other state or federal workers' compensation benefits. On September 27, 2007, FAB received written objections to the September 14, 2007 recommended decision and a request for review of the written record from **[Claimant #1]**'s representative, dated September 26, 2007.

OBJECTIONS

In his September 26, 2007 submission, **[Claimant #1]**'s representative objected to the seventh "Conclusion of Law" in the recommended decision, which is the one that concluded that **[Claimant #1]** was not a surviving "child" of **[Employee]** under either Part B or Part E of EEOICPA and rejected the representative's contentions that Washington workers' compensation law and a child visitation decision supported **[Claimant #1]**'s claim. The representative repeated his earlier argument regarding the non-exhaustive nature of the definition of "child" under EEOICPA and alleged that DEEOIC had ignored this point when it "made its recommended decision of denial on the basis that **[Claimant #1]** does not qualify as a surviving child of **[Employee]** since **[Claimant #1]** was neither a recognized natural child, a stepchild or an adopted child [of **[Employee]**."[6]

[Claimant #1]'s representative also repeated his argument that Washington workers' compensation law should apply in **[Claimant #1]**'s EEOICPA claim because EEOICPA is a "federal worker's [*sic*] compensation statute." Based on this premise, the representative asserted that the concept of dependence alone should be determinative of **[Claimant #1]**'s status as **[Employee]**'s child.

Finally, the representative argued that the "general rule of law" pronounced in the child visitation case was "not limited to the facts in the particular case." Rather, he asserted, "the application of the *de facto* concept is broadly [*sic*] subject only to the factors enumerated in the general rule developed in the decision." The representative then quoted from the portion of the decision in which the court set out four criteria that an individual would have to meet in order to have "standing as a *de facto* parent" in a child visitation proceeding, and asserted that **[Claimant #1]** was **[Employee]**'s "*de facto* child."

After considering the recommended decision and all of the evidence in the case file, FAB hereby makes the following:

FINDINGS OF FACT

1. **[Claimant #1]** and **[Claimant #2]** filed claims for survivor benefits under Part B of EEOICPA on October 15, 2002 and March 31, 2003, respectively, and both later expanded their claims to include Part E.

2. **[Employee]** was employed at the Hanford facility by DOE subcontractors from January 1, 1950 to April 15, 19 55, from September 14, 1956 to March 15, 1957, from March 22, 1957 to April 26, 1957, from March 3 to 4, 1960, and from September 14, 1960 to March 4, 1977.

3. On July 1, 1999, **[Employee]** was diagnosed with lung cancer. The date of this diagnosis was after he had begun covered employment.

4. NIOSH reported annual dose estimates for the lung from the date of initial radiation exposure during covered employment to the date of the cancer's first diagnosis. A summary and explanation of the information and methods applied to produce these dose estimates, including **[Claimant #1]**'s and **[Claimant #2]**'s involvement through their interviews and reviews of the draft dose reconstruction report, are documented in the "NIOSH Report of Dose Reconstruction under EEOICPA" dated September 29, 2005.

5. Using the dose estimates from NIOSH's September 29, 2005 report, DEEOIC determined that the probability of causation (PoC) was 52.89% and established that it was "at least as likely as not" that **[Employee]**'s lung cancer was sustained in the performance of duty.

6. **[Claimant #1]** was born on June 14, 1942 and is the child of **[Claimant #1's Mother]** and an unknown father. From 1943 to 1944, he lived with his uncle and aunt, **[Employee and Employee's Spouse]** (**[Sister of Claimant #1's Mother]**). In 1945, **[Claimant #1's Mother]** married **[Claimant #1's Stepfather]**, and **[Claimant #1]** was reunited with his mother and lived with her and **[Claimant #1's Stepfather]**. **[Claimant #1's Mother]** died on January 23, 1949, after which **[Claimant #1]** was again sent to live with his aunt and uncle. **[Claimant #1]**'s stepfather died in 1952. **[Claimant #1]** lived with his uncle the employee, his aunt and his cousin **[Claimant #2]** from 1949 until he enlisted in the U.S. Marine Corps in 1960.

7. **[Claimant #2]** is the stepchild of **[Employee]** as established by his birth certificate, his school records, and the marriage of his mother **[Employee's Spouse]** to **[Employee]**.

8. At the time of **[Employee]**'s death, **[Claimant #2]** was not under the age of 18, or under the age of 23 and continuously enrolled as a full-time student in an institution of higher learning, or any age and incapable of self-support.

Based on the above-noted findings of fact, and after considering the objections to the recommended decision in this case, FAB hereby makes the following:

CONCLUSIONS OF LAW

The first issue in this case is whether **[Employee]** qualifies as a "covered employee with cancer" for the purposes of Part B of EEOICPA. For this case, the relevant portion of the definition of a "covered employee with cancer" is "[a] Department of Energy contractor employee who contracted that cancer after beginning employment at a Department of Energy facility, [] if and only if that individual is determined to have sustained that cancer in the performance of duty in accordance with section 7384n(b) of this title." 42 U.S.C. § 7384l(9)(B). As found above, **[Employee]** was employed at the Hanford facility by DOE subcontractors for intermittent periods from January 1, 1950 to March 4, 1977, and was first diagnosed with lung cancer after he had begun working at the Hanford facility.

In accordance with 42 U.S.C. § 7384n(d), NIOSH produced dose estimates of the annual radiation exposures to **[Employee]**'s lungs, and DEEOIC calculated the PoC for his lung cancer based on those estimates consistent with § 7384n(c)(3). Since the PoC was calculated to be 52.89%, it established that it was "at least as likely as not" that **[Employee]**'s lung cancer was sustained in the performance of duty under § 7384n(b). Therefore, **[Employee]** qualifies as a "covered employee with cancer" under Part B, as that term is defined by § 7384l(9)(B), because he was employed at a DOE facility by DOE subcontractors and sustained cancer in the performance of duty. As a result, his cancer is an "occupational illness" under Part B, as defined by § 7384l(15), and he is also a "covered employee," as that term is defined by § 7384l(1)(B). Pursuant to 42 U.S.C. § 7385s-4(a), this conclusion also constitutes a determination under Part E of EEOICPA that **[Employee]** contracted his lung cancer through exposure to a toxic substance at a DOE facility. However, because he is a *deceased* covered employee, only his eligible survivors are entitled to share in the compensation payable under Part B and Part E of EEOICPA.

The second issue in this case is whether **[Claimant #1]** or **[Claimant #2]** is a "child" of **[Employee]** under both Parts B and E of EEOICPA. The statutory term "child," which has the same definition in both Parts B and E, "includes a recognized natural child, a stepchild who lived with an individual in a regular parent-child relationship, and an adopted child." 42 U.S.C. §§ 7384s(e)(3)(B), 7385s-3(d)(3). Both of these definitions use the non-exhaustive term "includes" and identify three classes of persons that are considered to be children of an individual for purposes of paying survivor benefits under Parts B and E of EEOICPA.

There are well-established definitions for the three classes of persons included in the two statutory provisions at issue: (1) a "recognized natural child" is an illegitimate child of an individual, who has been recognized or acknowledged as a child by that individual; (2) a "stepchild" is someone who meets the criteria currently described in Chapter 2-200.5c (September 2004) of the Federal (EEOICPA) Procedure Manual; and (3) an "adopted child" is someone who satisfies the legal criteria for that status under state law.

The use of the term "includes" in both § 7384s(e)(3) and § 7385s-3(d)(3) is evidence that Congress intended the term "child" to refer to more than just the three classes of persons noted above, as is the fact that those three specified classes do not include legitimate issue (and posthumously born legitimate issue). Thus, the definition of the term "child" is properly left to DEEOIC as the agency that is charged with the administration of the compensation programs established by EEOICPA. *See* 20 C.F.R. § 30.1 (2007). As an exercise of that authority, DEEOIC concludes that there is no dispute that legitimate issue are children of an individual. Furthermore, unrecognized or unacknowledged illegitimate issue (and posthumously born illegitimate issue) also fall within the definition of "child" since denying EEOICPA survivor benefits to these other illegitimate children would violate the Constitution.[7] For brevity's sake, DEEOIC will use the term "biological" children to mean *all* issue of an individual (including posthumously born issue), whether legitimate or illegitimate. Under this terminology, a

"recognized natural child" is one type of biological child. Accordingly, DEEOIC concludes that a "child" of an individual under both Part B and Part E of EEOICPA can only be a biological child, a stepchild, or an adopted child of that individual.

As noted above in the "Objections" section of this decision, **[Claimant #1]**'s representative argues that Washington workers' compensation law should apply in **[Claimant #1]**'s EEOICPA claim because EEOICPA is a "federal worker's [*sic*] compensation statute." In his view, **[Claimant #1]** should be found to be a "child" under EEOICPA because he meets the definition of a "child" in Title 51 of Washington's Revised Code, which defines a "child" as "every natural born child, posthumous child, stepchild, child legally adopted prior to the injury, child born after the injury. . .and dependent child in the *legal custody* and control of the worker. . . ."(emphasis added).[8] However, there is no evidence in the case file that **[Claimant #1]** is the natural born child, posthumous child, stepchild, child legally adopted prior to the injury or child born after the injury of **[Employee]**

There is also no allegation or evidence in the case file that **[Employee or Employee's Spouse]** ever had legal custody of **[Claimant #1]**. Instead, it appears that after the death of his mother, **[Claimant #1]** merely lived with his aunt and uncle who had, at most, *physical* custody of their nephew. Even assuming that **[Employee]** had "legal custody" of **[Claimant #1]** (a prerequisite of the definitional phrase at issue), there is nothing in either § 7384s(e)(3) or § 7385s-3(d)(3), or in EEOICPA as a whole, that suggests that a person claiming to be a "child" of a deceased covered employee should be able to establish that status by proving merely that they are or were "dependant" on that individual. Therefore, DEEOIC has concluded that persons who are or were only "dependant" on an individual are not "children" of that individual under EEOICPA, which is not a "federal worker's [*sic*] compensation statute" (those types of statutes are "wage-replacement" statutes[9]), as **[Claimant #1]**'s representative believes, where issues of dependency are often relevant to questions of survivor eligibility.[10]

[Claimant #1]'s representative also argues that **[Claimant #1]** should be considered a "*de facto* child" of **[Employee]** based on a recent decision in a visitation dispute in Washington. The dispute involved two parties who could not legally marry one another but had agreed to raise a biological child of one of the parties together. When the party who had no biological or legal relationship to the child sued to obtain visitation rights after the parties had terminated their agreement, the court considered whether the party was a "*de facto* parent."[11] **[Claimant #1]**'s representative argues that **[Employee]** would have met the court's four-part test[12] to be his client's "*de facto* parent" and as a consequence, **[Claimant #1]** should be considered to be the "*de facto* child" of **[Employee]**. There are, however, two flaws in this argument. First, both the decision at issue and subsequent cases that have relied upon it are clearly within the state law realm of child custody and/or parental rights. State courts in these types of cases are primarily concerned with the "best interests of the child," which is an equitable concern that does not enter into EEOICPA's definitions of "child," and involve the creation or definition of rights and obligations of *parents*, not children. Secondly, the decision cited by **[Claimant #1]**'s representative only contains a discussion of who can be considered a "*de facto* parent," not a "*de facto* child." Therefore, the representative's reliance on this decision is flawed not only because it is not controlling in the EEOICPA claims adjudication process, but also because it is based on an overly expansive reading of what the court actually stated.

Returning to the second issue in this case, DEEOIC concludes that **[Claimant #2]** is a "child" of **[Employee]** under Part B, as that term is defined in § 7384s(e)(3)(B), because he is **[Employee]**'s stepchild. **[Claimant #2]** is also a "child" of **[Employee]** under Part E, as that term is defined in § 7385s-3(d)(3), for the same reason—because he is **[Employee]**'s stepchild. However, DEEOIC concludes that **[Claimant #1]** is not a "child" of **[Employee]** under either Part B or Part E because he

is not a biological child of **[Employee]**, or a stepchild of **[Employee]**, or an adopted child of **[Employee]**.

The third issue in this case is whether **[Claimant #1]** or **[Claimant #2]** is a "covered child" of **[Employee]** under Part E of EEOICPA. In order to be eligible to receive a payment as a "child" of a deceased covered employee under Part E, a child of that employee must be a "covered child," which is defined as "a child of the employee who, as of the employee's death—(A) had not attained the age of 18 years; (B) had not attained the age of 23 years and was a full-time student who had been continuously enrolled as a full-time student in one or more educational institutions since attaining the age of 18 years; or (C) had been incapable of self-support." 42 U.S.C. § 7385s-3(d)(2).

In this case, while **[Claimant #2]** is a "child" of **[Employee]** under Part E, he is not a "covered child," as that term is defined in § 7385s-3(d)(2), because at the time of **[Employee]**'s death on February 21, 2000, he was not under the age of 18, or under the age of 23 and continuously enrolled as a full-time student in an institution of higher learning, or any age and incapable of self-support. As for **[Claimant #1]**, since he is not a "child" of **[Employee]**, as that term is defined in § 7385s-3(d)(3), because he is not a biological child, a stepchild or an adopted child of **[Employee]**, he cannot be a "covered child" of **[Employee]** under Part E because an individual alleging that status must also be a "child" in order to be a "covered child" under the terms of § 7385s-3(d)(2).

Accordingly, **[Claimant #2]** is entitled to survivor benefits for **[Employee]**'s lung cancer under Part B, as outlined in 42 U.S.C. § 7384s(a)(1), and the FAB hereby awards him lump-sum benefits of $150,000.00 for that occupational illness under Part B. **[Claimant #2]**'s claim for survivor benefits under Part E for **[Employee]**'s death due to lung cancer is denied. **[Claimant #1]**'s claim for survivor benefits under Parts B and E of EEOICPA for **[Employee]**'s condition of lung cancer and his death due to lung cancer, respectively, is denied.

Washington, D.C.

Carrie Rhodes

Hearing Representative

Final Adjudication Branch

[1] On this birth certificate, **[Claimant #1]** is reported to be the child of "**[Claimant #1's Mother]**" and "**[Claimant #1's Father as listed on his birth certificate]**," and **[Claimant #1's Mother]** is reported to be married. The informant for the birth certificate is listed as "**[Mother of Claimant #1's Mother]**".

[2] Subsequent to FAB's remand of the case for referral to the Office of the Solicitor, DEEOIC's policy in this area changed again such that the contemplated referral was not required. This later change in policy was documented in EEOICPA Transmittal No. 04-01 (issued October 22, 2003).

[3] *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005).

[4] Wash. Rev. Code § 51.08.030 (2006).

[5] This request was misdated by BPRP as April 13, 2004. It was actually received in the Office of the Solicitor on December 12, 2006.

[6] Despite this assertion, the seventh "Conclusion of Law" in the September 14, 2007 recommended decision actually stated that **[Claimant #1]** is not a "child" of **[Employee]** "because he is not a *biological* child of **[Employee]**, or a stepchild of **[Employee]**, or an adopted child of **[Employee]**." (emphasis added) The significance of the term "biological" in the quoted phrase is discussed at length below.

[7] *See Weber v. Aetna Cas. & Sur. Company*, 406 U.S. 164 (1972).

[8] Wash. Rev. Code § 51.08.030 (2006).

[9] Rather than replacing an injured worker's wages during a period of disability with regular, periodic payments consisting of a set percentage of the worker's pre-injury wages, EEOICPA benefits are single, lump-sum payments in dollar amounts that are set by the terms of the statute. For an in-depth discussion of the "wage-replacement" nature of workers' compensation statutes, see *Larson's Workers' Compensation Law*, §§ 1.02 and 80.05[3] (2006).

[10] DEEOIC's position that dependency alone does not establish that an individual is a "child" is consistent with other systems where actual familial ties are paramount, such as Washington's statutory provision on the subject of intestate succession. *See* Wash. Rev. Code § 11.04.015.

[11] Before an individual who is not a biological, adoptive or stepparent can be considered a "*de facto* parent" of a child, such individual must prove that: the natural or legal parent of the child consented to and fostered the parent-like relationship; the individual and the child lived together in the same household; the individual assumed the many obligations of parenthood without expectation of financial compensation; and the individual has been in a parental role for a length of time sufficient to have established a bonded, dependent parental relationship with the child. *In re Parentage of L.B.*, 122 P.3d at 176.

[12] Without conceding that the court's four-part test is applicable in this matter, DEEOIC notes that there is no evidence in the file that **[Claimant #1's Mother]** gave her consent to have her son live with **[Employee and Employee's Spouse]** after her death in 1949.

Impairment Benefits

Assessing impairment evaluations at FAB

EEOICPA Fin. Dec. No. 10005910-2006 (Dep't of Labor, July 31, 2007)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch (FAB) concerning the above claim for impairment benefits under Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claim for impairment benefits under Part E of EEOICPA based on the claimed condition of multiple myeloma disease is accepted.

STATEMENT OF THE CASE

On January 20, 2004, **[Employee]** filed claims under both Part B and former Part D of EEOICPA. He identified multiple myeloma as the claimed condition he alleged resulted from exposure to toxic substances during his employment at a Department of Energy (DOE) facility. Subsequent to his filing a request for assistance under former Part D, Congress amended EEOICPA by repealing Part D and enacting new Part E, which is administered by the Department of Labor. The filing of a request for assistance under former Part D is treated as a claim for benefits under Part E.

On April 6, 2004, FAB issued a final decision accepting **[Employee]**'s claim under Part B of EEOICPA, finding that he was a member of the Special Exposure Cohort with the "specified" cancer (an "occupational" illness) of multiple myeloma. On May 12, 2006, FAB issued another final decision accepting **[Employee]**'s claim for medical benefits under Part E the "covered" illness of multiple myeloma.

The evidence of record establishes that **[Employee]** was employed at the Oak Ridge Gaseous Diffusion Plant for at least 250 work days prior to February 1, 1992. During his employment at this facility he was employed by DOE contractors. The medical evidence establishes that he was diagnosed with multiple myeloma on December 24, 2003.

On February 6, 2006, **[Employee]** filed a claim for impairment and wage-loss benefits under Part E. To ascertain his impairment rating, and pursuant to his request, the district office had **[Employee]**'s medical records reviewed by a District Medical Consultant (DMC). On September 13, 2006, the DMC opined that based on the Fifth Edition of the American Medical Association's *Guides to the Evaluation of Physical Impairment* (the *Guides*), **[Employee]**'s multiple myeloma was ratable because he had reached maximum medical improvement for this condition. However, he opined that **[Employee]**'s peripheral neuropathy, which is a consequential condition of his multiple myeloma, was not at maximum medical improvement and thus could be currently rated. Using the proper sections and charts of the *Guides*, the DMC assessed **[Employee]**'s whole person impairment based on his multiple myeloma at 11%.

The claim file contains **[Employee]**'s written declaration that he has not filed any tort suits or claims for state workers' compensation benefits, or received any settlements or state workers' compensation benefit awards in connection with his multiple myeloma.

On December 5, 2006, the district office issued a recommended decision to award **[Employee]** an impairment award for his 11% whole person permanent impairment based on multiple myeloma, and that he was entitled to receive a lump-sum benefit under Part E of EEOICPA based on that award of $27,500.00. Accompanying the district office's recommended decision was a letter explaining **[Employee]**'s rights and responsibilities in regard to that decision.

OBJECTIONS

On February 1, 2007, FAB received **[Employee]**'s letter objecting to the recommended decision and requesting an oral hearing, which was held on April 17, 2007. At that hearing, both **[Employee]** and **[Employee's spouse]** presented testimony and evidence. **[Employee]** also submitted two exhibits at this hearing: (1) **[Employee]**'s letter dated April 17, 2007 summarizing his objections to the recommended decision; and (2) a document entitled "Concise Review of the Disease and Treatment Options Multiple Myeloma Cancer of the Bone Marrow" by Brian G. M. Durie, M.D.

Objection No. 1: **[Employee]** objected to the DMC's assessment of his impairment by arguing that the DMC should have considered additional factors, such as his bone damage, bone destruction, bone lesions, his thrombocytopenia and decreased platelet count, his infections and suppressed immune system, his weakness, fatigue and shortness of breath, his renal insufficiency, his daily activities, and the probability of his premature death in assessing his impairment.

Objection No. 2: **[Employee]** argued that his peripheral neuropathy should be rated because he

believed that it was at maximum medical impairment, and objected to the impairment rating because the DMC did not include his peripheral neuropathy condition in assessing his impairment.

Objection No. 3: **[Employee]** objected to the impairment rating because the DMC did not have all of your medical records, and no effort was made to obtain those records for the DMC to review.

Objection No. 4: **[Employee]** argued that the DMC's report contains incorrect information about him regaining his previous state of good health.

Objection No. 5: **[Employee]** argued that the "shallowness" of the impairment evaluation process was not consistent with EEOICPA, nor was it consistent with his agreement to forego other legal remedies if he was fairly compensated.

Subsequent to the hearing a copy of the transcript of that hearing was sent to **[Employee]**. On May 4, 2007, FAB received his letter dated April 30, 2007 and medical records he had attached to that letter, including a March 1, 2007 report from Dr. Bart Barlogie and laboratory results dated February 27, 2007, February 10, 2006, September 23, 2005 and December 15, 2004.

[Employee]'s first, second and third objections concern whether the impairment rating that formed the basis for the recommended decision was correct. He did not submit any medical evidence indicating that a physician had rated his impairment differently than the DMC had. The regulations specify how FAB will evaluate new medical evidence submitted to challenge the impairment evaluation in the recommended decision. Those regulations provide that if the employee submits an additional impairment evaluation that differs from the impairment evaluation relied upon by the district office, FAB will not consider the additional impairment evaluation if it is not performed by a physician who meets the criteria that have been established for physicians performing impairment evaluations for the pertinent covered illness in accordance with the *Guides*. *See* 20 C.F.R. §§ 30.905, 30.908 (2007). The medical evidence **[Employee]** submitted did not include an assessment of his impairment based on the claimed condition in accordance with the *Guides*. A determination regarding **[Employee]**'s impairment rating must be based upon a consideration of the totality of all relevant evidence of impairment in the record, and that determination must be based upon the most probative evidence. *See* 20 C.F.R. § 908(c). After reviewing the evidence of record, FAB concludes that the impairment rating by the DMC is the most probative evidence of your whole person impairment from your multiple myeloma. **[Employee]** may apply for a new impairment rating for this condition in two years. *See* 20 C.F.R. § 30.912. Additionally, because his peripheral neuropathy was not assessed in the DMC's impairment rating because he had not reached maximum medical improvement for that condition, **[Employee]** may apply for an impairment rating for that condition anytime, but the medical evidence must establish that he has reached maximum medical improvement for that condition.

[Employee]'s fourth objection concerns statements in the DMC's report about him regaining his normal state of health. **[Employee]** made reference to a statement in the DMC report which implies it is debatable whether **[Employee]** has actually regained his previous state of normal good health. However, the statement in question was in quotations in the DMC's report, indicating that the DMC did not make that statement. The DMC's report indicates that while you were in remission, you were not in your previous state of normal good health.

[Employee]'s fifth objection concerns the "shallowness" of the impairment evaluation process under EEOICPA. However, when it enacted Part E, Congress provided that impairment benefits must be

based on impairment ratings derived from the *Guides*. *See* 42 U.S.C. § 7385s-2(b). The Department of Labor must administer Part E as provided by Congress and does not have the authority to base impairment benefits on anything other than the *Guides*.

After reviewing the evidence in the file, **[Employee]**'s objections to the recommended decision and the evidence he submitted, FAB hereby makes the following:

FINDINGS OF FACT

1. **[Employee]** filed a claim for benefits under EEOICPA on January 20, 2004.

2. **[Employee]** was employed at the Oak Ridge Gaseous Diffusion Plant (a DOE facility) for more than 250 work days prior to February 1, 1992. During his employment at this facility, he was employed by DOE contractors.

3. On May 12, 2006, FAB accepted **[Employee]**'s Part E claim for medical benefits for the "covered" illness of multiple myeloma.

4. **[Employee]** has a minimum impairment rating of his whole person as a result of his multiple myeloma of 11%.

5. **[Employee]** has not received compensation or benefits from a tort suit or a state workers' compensation claim based on his multiple myeloma.

Based on the above-noted findings of fact, FAB also hereby makes the following:

CONCLUSIONS OF LAW

On May 12, 2006, FAB issued a final decision under Part E of EEOICPA that accepted **[Employee]**'s claim for medical benefits for the covered illness of multiple myeloma, finding that his exposure to toxic substances during the performance of his duties at a DOE facility was a significant factor in aggravating, contributing to, or causing his multiple myeloma. 42 U.S.C. § 7385s-4(a). He is therefore a "covered DOE contractor employee."

Part E of EEOICPA provides that a "covered DOE contractor employee" with a "covered" illness shall be entitled to impairment benefits based on the extent of whole person impairment of all organs and body functions that are compromised or otherwise affected by the employee's "covered" illness. *See* 42 U.S.C § 7385s-2(a) and 20 C.F.R. § 30.901(a). Part E also provides that the employee's impairment rating is to be determined in accordance with the Fifth Edition of the *Guides*, and that for each percentage point of impairment that is a result of a "covered" illness, a "covered DOE contractor employee" is to receive $2,500.00. *See* 42 U.S.C. § 7385s-2(a)(1) and (b). The evidence of record establishes that **[Employee]** has an impairment rating of 11% of the whole person as a result of his "covered" illness of multiple myeloma, based on the *Guide*s.

[Employee] therefore qualifies for $27,500.00 in impairment benefits under Part E of EEOICPA, pursuant to 42 U.S.C. § 7385s-2(a)(1), and his claim for those benefits is accepted for that amount.

Washington, DC

William J. Elsenbrock

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 10006507-2006 (Dep't of Labor, November 25, 2009)

NOTICE OF FINAL DECISION FOLLOWING REVIEW OF THE WRITTEN RECORD

This decision of the Final Adjudication Branch (FAB) concerns the above claim for impairment benefits under Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq.* For the reasons stated below, the claim for an impairment award is accepted.

STATEMENT OF THE CASE

On June 10, 2003, the employee filed a claim for benefits under Part B of EEOICPA as a uranium worker. On December 10, 2003, FAB issued a final decision in which it found that the employee was a uranium worker who had received $100,000.00 under section 5 of the Radiation Exposure Compensation Act (42 U.S.C. § 2210 note) for pneumoconiosis, pulmonary fibrosis and fibrosis of the lung. Therefore, FAB concluded that the employee was entitled to a lump-sum award of $50,000.00 under Part B and medical benefits for his pneumoconiosis, pulmonary fibrosis and fibrosis of the lung, retroactive to June 10, 2003.

On February 14, 2005**,** the employee filed a claim under Part E for pneumoconiosis, fibrosis of the lung and pulmonary fibrosis. On June 7, 2006, FAB issued a final decision finding that the employee's pneumoconiosis, pulmonary fibrosis and fibrosis of the lung were due to work-related exposure to toxic substances. Therefore, FAB concluded that the employee was entitled to medical benefits for the covered illnesses of pneumoconiosis, pulmonary fibrosis and fibrosis of the lung under Part E of EEOICPA. On December 13, 2006, FAB issued another final decision in which it found that the employee had a 25% permanent impairment of the whole body as a result of his accepted pneumoconiosis, pulmonary fibrosis and fibrosis of the lung, and awarded him $62,500.00 in impairment benefits under Part E of EEOICPA.

On April 3, 2008, the employee filed another claim for benefits under Part E of EEOICPA, for squamous cell cancer of the right upper lobe of the lung. By final letter decision dated October 23, 2008, the district office accepted that the employee's lung cancer was a consequence of his accepted pneumoconiosis, pulmonary fibrosis and fibrosis of the lung.

On January 22, 2009, the district office received the employee's claim for an increased impairment award. In his letter to the district office, the employee indicated that he wished to have the Department of Labor arrange for a qualified physician to perform the impairment evaluation. Accordingly, to determine the employee's impairment rating (the percentage rating representing the extent of whole body impairment, based on the organ and body functions affected by his covered illnesses), his case was referred for review to a district medical consultant (DMC). In a medical report dated April 7, 2009, the DMC stated that the employee had reached maximum medical improvement for his accepted pneumoconiosis, pulmonary fibrosis, fibrosis of the lung and lung cancer. Using the American Medical

Association's *Guides to the Evaluation of Permanent Impairment* (AMA's *Guides*), and based on pulmonary function tests performed on January 15, 2009, the DMC concluded that the employee had a 26% whole body impairment as a result of his covered illnesses.

In a letter dated June 17, 2009, the employee indicated that he had not filed for or received any money under a state workers' compensation program or related to a tort action for his covered illnesses.

On August 17, 2009, the Denver district office issued a recommended decision in which it found that the employee had a 26% whole body impairment attributable to his pneumoconiosis, pulmonary fibrosis, fibrosis of the lung and lung cancer. Therefore, the district office recommended that the employee be awarded compensation in the amount of $65,000.00, less the $62,500.00 that was previously awarded, under Part E of EEOICPA.

OBJECTION

On August 28, 2009, FAB received the employee's objection to the recommended decision, in which he indicated that he would forward an impairment evaluation from another physician. Thereafter, the employee submitted a September 10, 2009 medical report by Dr. Karen B. Mulloy, an osteopath, in which she concluded that the employee had reached maximum medical improvement. Dr. Mulloy used the AMA's *Guides* and opined that the employee had a Class 3 impairment due to an FEV_1 of 58% of predicted. *See* AMA's *Guides*, table 5-12, page 107. In addition, Dr. Mulloy identified the need for oxygen and reduced oxygen saturation, and indicated that the employee's covered illnesses interfered with some of his activities of daily living, such as walking up stairs and doing activities around the house that require any exertion. Based upon the foregoing, Dr. Mulloy concluded that the employee had a permanent impairment of 35% of the whole body as a result of his accepted pneumoconiosis, pulmonary fibrosis, fibrosis of the lung and lung cancer.

The employee also submitted an October 7, 2009 medical report by Dr. Annyce Mayer. In that report, Dr. Mayer opined that the employee had a Class 3 impairment based on a limitation in his exercise tolerance, at least in part related to respiratory abnormalities. Dr. Mayer also stated that the employee had a gas exchange abnormality that required the use of oxygen and that he does not perform activities that require much exertion. Dr. Mayer did not indicate that the employee had reached maximum medical improvement or provide an opinion on the percentage of his whole person impairment as a result of his respiratory problems.

After considering the evidence of record, FAB hereby makes the following:

FINDINGS OF FACT

1. On June 7, 2006, FAB issued a final decision finding that the employee's pneumoconiosis, pulmonary fibrosis and fibrosis of the lung were due to exposure to toxic substances, accepted his claim under Part E of EEOICPA and awarded him medical benefits for his covered illnesses.

2. On December 13, 2006, FAB issued another final decision finding that the employee had a permanent impairment of 25% of the whole body due to his covered illnesses of pneumoconiosis, pulmonary fibrosis and fibrosis of the lung and awarded him $62,500.00 in impairment benefits.

3. By letter decision dated October 23, 2008, the district office accepted that the employee's lung cancer was a consequence of his accepted pneumoconiosis, pulmonary fibrosis and fibrosis of the lung.

4. Based on the Fifth Edition of the AMA's *Guides*, the medical evidence establishes that the impairment rating attributed to the employee's pulmonary conditions is 35%.

5. The employee has not received any settlement or award from a tort suit or state workers' compensation claim in connection with his covered illnesses.

Based on the above-noted findings of fact, FAB hereby also makes the following:

CONCLUSIONS OF LAW

Once a recommended decision on impairment has been issued and forwarded to the FAB, the employee may submit new medical evidence or an additional impairment evaluation to challenge the impairment determination in the recommended decision. When this occurs, the FAB reviewer must take many variables into consideration when weighing impairment evaluations for probative value. In general, probative means "believable" and the FAB reviewer evaluates each report to determine which one, on the whole, is more believable based on the medical rationale provided and the evidence at hand. Federal (EEOICPA) Procedure Manual, Chapter 2-1300.10 (May 2009). The FAB reviewer will determine the minimum impairment rating after he or she has evaluated all relevant evidence and argument in the record. 20 C.F.R. § 30.908(c) (2009).

The AMA's *Guides*, at page 107, indicates that

The classification system in Table #5-12 considers only pulmonary function measurements for an impairment rating. It is recognized that pulmonary impairment can occur that does not significantly impact pulmonary function and exercise results but that does impact the ability to perform activities of daily living. . . . In these limited cases, the physician may assign an impairment rating based on the extent and severity of pulmonary dysfunction and the inability to perform activities of daily living.

All three doctors identified pulmonary function test results that indicated the employee has an impairment at the lower end of Class 3. However, Dr. Mayer and Dr. Mulloy identified the need for oxygen and indicated that the employee's accepted pneumoconiosis, pulmonary fibrosis, fibrosis of the lung and lung cancer affect his activities of daily living, while the DMC only considered the results of pulmonary function tests.

As Dr. Mulloy considered additional issues in evaluating the employee's impairment, FAB concludes that Dr. Mulloy's impairment report has greater probative value than the report relied upon by the district office. Thus, FAB concludes that the employee has a permanent impairment that is due to the covered illnesses of pneumoconiosis, pulmonary fibrosis, fibrosis of the lung and lung cancer, and that his impairment rating is 35%.

FAB further concludes that the employee is entitled to $2,500 for each percentage point of his impairment rating of 35%, and that the employee is entitled to compensation for impairment in the amount of $87,500.00, less the previously awarded $62,500.00, pursuant to 42 U.S.C. § 7385s-2(a)(1). Accordingly, FAB awards the employee net impairment benefits of $25,000.00 under Part E of

EEOICPA.

Washington, DC

Tom Daugherty

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 10010178-2007 (Dep't of Labor, March 25, 2008)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This decision of the Final Adjudication Branch (FAB) concerns the employee's claim for impairment benefits under Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons stated below, the claim for an impairment award under Part E is approved. A decision on the claim for wage-loss benefits under Part E of EEOICPA is deferred pending further development.

STATEMENT OF THE CASE

On June 7, 2002, the employee filed claims for benefits under Part B and former Part D of EEOICPA. On February 23, 2007, the FAB issued a final decision finding that he was employed by a covered Department of Energy (DOE) contractor at the Portsmouth Gaseous Diffusion Plant from May 11, 1953 to November 16, 1954; that he was diagnosed with kidney cancer on August 5, 1976, lung cancer on January 22, 2001, colon cancer on March 30, 2001, rectal cancer on October 22, 2001, and prostate cancer on November 10, 2004; that these cancers were at least as likely as not related to radiation exposure during his employment at a DOE facility; and that they were also related to his exposure to toxic substances during his employment at a DOE facility. As a result, the FAB found that the employee was entitled to benefits under both Parts B and E of EEOICPA.

Earlier on January 16, 2007, the district office received the employee's claim for wage-loss benefits and an impairment award under Part E of EEOICPA. In support of his claim, the employee submitted a pulmonary function analysis, dated February 28, 2007, from Kennewick General Hospital, which indicated that his FVC was 91% of normal, FEV-1 was 42% of normal, and DLCO was 56% of predicted. In a March 5, 2007 medical report, Dr. Arthur Cain identified lowered creatinine levels, post-radiation rectal pain, urinary frequency, and erectile dysfunction.

To determine the percentage rating representing the extent of whole person impairment, based on the organ and body functions affected by the employee's covered illness, the case was referred for review to a District Medical Consultant (DMC). The DMC submitted a medical report, dated June 30, 2007, which indicated that the employee had reached maximum medical improvement for all of his covered illnesses. Using the Fifth Edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (the *Guides*), the DMC opined that the employee had 10% impairment of the whole person due to his kidney cancer, based on the loss of one kidney and satisfactory kidney functions. For the employee's prostate cancer, the DMC found that there was a Class 1 impairment due to prostate and seminal vesicle dysfunction signs and symptoms, that the employee had not had

surgery, and that he did not require continuous treatment. The DMC found that there was 5% impairment of the whole person due to dysfunction secondary to radiation treatment for the prostate cancer. Regarding the employee's rectal cancer, the DMC found that there was Class 1 impairment based on no need for further treatment, no further complications, no diarrhea and no residual findings. The DMC found that there was 0% impairment of the whole person due to radiation treatment for the colon cancer. Finally, as for the employee's lung cancer, the DMC found that his FVC was 91% of normal and his FEV-1 was 42% of normal, and that that placed him in Class 2 (Table 5-12, page 107 of the *Guides*). The DMC found that there was 10% impairment of the whole person due to the lung condition. However, the DMC indicated that 50% of this last impairment should be attributed to the employee's smoking and non-covered illness emphysema. Using the Combined Values Chart on page 604 of the *Guides*, 10% for kidney cancer, 5% for prostate cancer, 0% for colon cancer, and 5% impairment for the lung cancer equates to a 19% impairment of the whole person.

In a letter dated July 13, 2007, the employee indicated that he had not filed for or received any money from a state workers' compensation program or related to a tort action for any of his covered illnesses.

On August 4, 2007, the Cleveland district office issued a recommended decision to award the employee Part E benefits for a 19% whole person impairment attributable to his kidney, colon/rectal, lung, and prostate cancers. The district office recommended that he receive an impairment award in the amount of $47,500.00, and deferred making a recommendation on the employee's claim for wage-loss pending further development.

OBJECTIONS

On September 27, 2007, the FAB received the written objections of the employee's authorized representative and a request for an oral telephonic hearing, which was held on November 27, 2007. A review of the written objections, an October 4, 2007 impairment evaluation performed by Dr. David P. Suchard, Dr. Suchard's testimony during the telephonic hearing, and evidence the representative submitted subsequent to the hearing reveals the following:

In his October 4, 2007 evaluation and hearing testimony, Dr. Suchard indicated that the employee had reached maximum medical improvement for all of his covered illnesses. Using the Fifth Edition of the *Guides*, he found that the employee's FVC was 91% of normal, FEV-1 was 42% of normal, and DLCO was 56% of predicted, and placed him in Class 3 (Table 5-12 on page 107 of the *Guides*). Dr. Suchard concluded that the employee had a 40% impairment of the whole person based on his lungs. Dr. Suchard found that based on the loss of one kidney, no evidence of recurrence of cancer, occasional sharp pains associated with the surgical scar, and serum creatine reduction to 46 ml/min, that the employee was in the mid-range of a Class 2 impairment (Table 7-1, page 146), resulting in a 23% whole person impairment based on the employee's kidneys. Regarding the employee's colorectal cancer, Dr. Suchard found that there was a Class 1 impairment based on a condition that required surgery and the need for ongoing periodic surveillance colonoscopies and the risk of developing new or recurrent colorectal cancer (Table 6-4, page 128). Dr. Suchard found that there was a 5% whole person impairment because of dysfunction secondary to radiation and treatment for the colon cancer.

For the prostate cancer, Dr. Suchard found that the employee had an anal impairment associated with his radiation-induced proctitis and that this was a Class 2 impairment due to signs and symptoms of organic anal disease or anatomic loss or alteration associated with continual anal symptoms incompletely controlled by treatment (Table 6-5 on page 131). Dr. Suchard found that there was a 15%

whole person impairment related to this anal disease. Due to lower urinary tract function associated with the employee's prostate cancer, Dr. Suchard found a Class 1 impairment due to lower urinary symptoms of urinary frequency, nocturia, and urinary hesitancy with decreased force of the urinary stream (Table 7-4 on page 153), resulting in a 5% whole person impairment related to his radiation-induced obstructive urethral disease. Based on his reduced sexual function, Dr. Suchard also found a Class 1 impairment due to difficulties in maintaining an erection of sufficient rigidity and duration for sexual intercourse (Section 7.7 on page 156), resulting in a 10% whole person impairment related to decreased penile function. However, because the *Guides* direct the evaluator to decrease the percentage impairments concerning male reproductive organs by 50% for men over 65, Dr. Suchard found that the employee only had a 5% whole person impairment with regard to his decreased penile function. Using the Combined Values Chart on page 604 of the *Guides*, Dr. Suchard concluded that 15% for anal disease, 5% for urethral disease, and 5% for sexual dysfunction equated to a 23% impairment to the whole person for the employee's prostate cancer.

Using the same Combined Values Chart, Dr. Suchard concluded that 40% for the lung cancer, 23% for the kidney cancer, 5% for the colon cancer, and 23% for the prostate cancer equated to a 67% impairment of the whole person due to all of the employee's covered illnesses. Subsequent to the hearing, the authorized representative submitted a pulmonary function analysis dated November 29, 2007 and the results of a December 11, 2007 endoscopy. In an email dated December 21, 2007, Dr. Suchard indicated that the "pulmonary condition remains Class 2, no change in impairment assessment." He also indicated that the employee continued to have a 5% whole person impairment with regard to his Class 1 colorectal disorder impairment.

On the other hand and as noted above, in his June 30, 2007 report, the DMC noted that the employee's FVC was 91% of normal and FEV-1 was 42% of normal, and placed him in Class 2. However, Table 5-12 of the *Guides* states that if the FEV-1 is between 41% and 59%, this would place an individual in Class 3. Also, the DMC did not consider the DLCO test results, which were 56% of predicted and would also place an individual in Class 3. Finally, the FAB notes that the DMC apportioned the impairment of the employee's lungs to reflect the presence of a non-covered illness (emphysema). Regarding his kidney cancer, the FAB notes that the DMC did not take into consideration the pain from the surgical site and the lowered serum creatine level. In addition, he did not consider the need for ongoing periodic surveillance colonoscopies and the risk of developing new or recurrent colorectal cancer. Finally, the FAB notes that the DMC did not consider any impairment that resulted from the employee's anal problems that were associated with radiation-induced proctitis, lower urinary tract functions associated with prostate cancer, and reduced sexual function.

Once a recommended decision on impairment has been issued, an employee may submit new medical evidence or an additional impairment evaluation to challenge the determination of the impairment in the recommended decision. When this occurs, the FAB reviewer must take many variables into consideration when weighing the probative value of competing impairment evaluations. While by no means exhaustive, the FAB reviewer considers whether the physician possesses the requisite skills and requirements to provide a rating; whether the evaluation was conducted within 1 year of its receipt by DEEOIC; whether it addresses the covered illness; and whether the whole body percentage of impairment is listed with a clearly rationalized medical opinion as to its relationship to the covered illness. In general, probative means "believable" and the FAB reviewer considers each competing report to determine which one, on the whole, is more believable based on the medical rationale provided and the evidence in the case file. *See* Federal (EEOICPA) Procedure Manual, Chapter E-900.10 (February 2006). As noted above, the employee submitted medical evidence that the FAB concludes is well rationalized and of greater probative value than the DMC's evaluation that was used

by the district office to determine his percentage of permanent impairment.

After considering the evidence of record, the FAB hereby makes the following:

FINDINGS OF FACT

1. On February 23, 2007, the FAB issued a final decision finding that the employee was employed by a DOE contractor at the Portsmouth Gaseous Diffusion Plant from May 11, 1953 to November 16, 1954; that he was diagnosed with kidney cancer on August 5, 1976, lung cancer on January 22, 2001, colon cancer on March 30, 2001, rectal cancer on October 22, 2001, and prostate cancer on November 10, 2004; that these "occupational illnesses" were at least as likely as not related to radiation exposure during employment at a DOE facility; and that they were also "covered illnesses" related to toxic substance exposure during employment at a DOE facility. Consequently, it was found that he was entitled to benefits under both Parts B and E of EEOICPA.

2. Based on the Fifth Edition of the *Guides*, the employee has a 40% impairment based on his lung cancer, 23% based on his kidney cancer, 5% based on his colon cancer, and 23% based on his prostate cancer, for a total whole-body impairment of 67%.

3. The employee has not received any settlement or award from a lawsuit or workers' compensation claim in connection with his covered illnesses.

Based on the above-noted findings of fact, the FAB hereby also makes the following:

CONCLUSIONS OF LAW

Section 30.316(b) of the implementing regulations provides that "if the claimant objects to all or part of the recommended decision, the FAB reviewer will issue a final decision on the claim after either the hearing or the review of the written record, and after completing such further development of the case as he or she may deem necessary." 20 C.F.R. § 30.316(b). The undersigned has reviewed the record, including the employee's objections in this case, and concludes that no further investigation is warranted.

If an employee submits an additional impairment evaluation that differs from the impairment evaluation relied upon by the district office, the FAB will review all relevant evidence of impairment in the record, and will base its determinations regarding impairment upon the evidence it considers to be most probative. The FAB will determine the minimum impairment rating after it has evaluated all relevant evidence and argument in the record. *See* 20 C.F.R. § 30.908(c).

The FAB finds that Dr. Suchard's impairment evaluation is more probative than the one relied on by the district office to determine the employee's recommended whole person impairment, and that based on Dr. Suchard's evaluation, his impairment rating is calculated to be 67%. The FAB also finds that the employee is entitled to $2,500.00 for each percentage point of the impairment rating attributed to his covered illnesses. Therefore, the employee is hereby awarded impairment benefits under Part E of EEOICPA in the amount of $167,500.00 ($2,500.00 x 67) pursuant to 42 U.S.C. § 7385s-2(a)(1).

Washington, DC

Tom Daugherty

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 10033309-2006 (Dep't of Labor, November 9, 2007)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch (FAB) concerning the above claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claim is approved for an award of impairment benefits under Part E of EEOICPA in the amount of $17,300.00 (an award of 17% in impairment benefits of $42,500.00, reduced because of the required coordination with state workers' compensation benefits by $25,200.00) based on the employee's covered illness of lung cancer. A decision on the claim for prostate cancer under both Parts B and E is deferred pending further development.

STATEMENT OF THE CASE

On November 4, 2002, **[Employee]** filed a claim for benefits under Part B and Part E (which was formerly Part D) of EEOICPA. At that time, he identified lung cancer as the condition resulting from your employment at a Department of Energy (DOE) facility. DOE confirmed that **[Employee]** was employed at the K-25 Plant in Oak Ridge, Tennessee from July 6, 1953 to April 7, 1961, and at the Y-12 Plant in Oak Ridge, Tennessee from January 16, 1967 to July 31, 1985. In support of his claim, **[Employee]** submitted an August 11, 1994 surgical pathology report, signed by Dr. Stephen H. Harrison, showing a diagnosis of moderately to poorly differentiated adenocarcinoma of the left lung.

On January 7, 2002, FAB issued a final decision accepting his claim under Part B, finding that he was a member of the Special Exposure Cohort, that he had been diagnosed with lung cancer, which is a "specified" cancer under EEOICPA, and awarding him compensation in the amount of $150,000.00 and medical benefits under Part B for lung cancer. On April 17, 2006, FAB also accepted **[Employee]**'s claim under Part E, finding that he had contracted lung cancer through exposure to a toxic substance at a DOE facility, and awarded him medical benefits for his "covered" illness of lung cancer under Part E.

On June 5, 2006, the district office received **[Employee]**'s request for an impairment evaluation under Part E and elected to have a Department of Labor physician perform the rating. To determine his impairment rating, the district office referred **[Employee]**'s case file to a District Medical Consultant (DMC). In a March 29, 2007 report, the DMC reviewed the medical evidence of record and concluded that it established that **[Employee]** had reached maximum medical improvement. Using the Fifth Edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (the *Guides*), the DMC concluded that **[Employee]** had a 5% whole person impairment due to his accepted lung cancer.

On November 8, 2006, the district office received a copy of **[Employee]**'s state workers' compensation settlement of $25,200.00 for the condition of lung cancer.

On March 15, 2007, the Jacksonville district office issued a recommended decision finding that **[Employee]**'s covered illness of lung cancer resulted in a 5% whole body impairment and that he was entitled to $12,500.00 in impairment benefits under Part E of EEOICPA. The district office also recommended that the $25,200.00 state workers' compensation settlement be coordinated with his impairment benefits, leaving a surplus of $12,700.00 to be recovered out of future medical benefits until it was absorbed.

OBJECTIONS

On May 14, 2007, **[Employee]** timely filed a written objection to the recommended decision's proposed award and requested an oral hearing to present his objections, which was held on August 1, 2007 in Oak Ridge, Tennessee. **[Employee]** was represented by Christopher H. Hayes, an attorney with the Energy Workers' Legal Resource Center. On August 8, 2007, a copy of the transcript of the hearing was sent to **[Employee]**.

[Employee] submitted exhibits at the hearing, as follows:

- A copy of his state workers' compensation settlement agreement, showing that he was paid $25,200.00.

- A copy of an April 5, 2005 report by Dr. William R.C. Stewart, III, concluding that **[Employee]** had a 15% impairment to the whole person based on his lung cancer, without recurrence, which also noted that his impairment would be much higher if the cancer returned.

- A copy of an August 23, 2006 letter and attached medical report from Dr. R. Hal Hughes, noting that **[Employee]** was seen in his office on that date and that he had a 50% impairment to the whole person, based on the Fifth Edition of the *Guides*, Table 5-12.

- A copy of a June 13, 2007 report of a medical examination, in which Dr. Norm Walton concluded that **[Employee]** had a 17% impairment of the whole person based on his lung cancer.

At the hearing, **[Employee]** presented the following objections:

1. He stated that he was seen by Dr. Stewart to obtain an impairment rating of 15% in 2005, and that that was the report upon which his state workers' compensation settlement was based. **[Employee]** also stated that on August 23, 2006, Dr. Hughes, his current treating physician, supplied a letter referencing a 50% impairment to the whole person. He stated that he saw Dr. Norm Walton at his attorney's request on June 13, 2007, and that he gave him a 17% impairment rating to the whole person after a "hands-on examination" and "repeat breathing tests."

2. **[Employee]** stated that when he is seen in a doctors' office, it is usually after he has taken his medication, such as an inhaler, which improves his breathing function. He stated that his condition varies from day to day and within the day, being worse at night, especially if he does sleep propped up, and that he is not able to do activities such as "mow the yard." **[Employee]** argued that the DMC's report did not take these considerations into account. He also stated that he was not given the opportunity to review the DMC's report and object prior to the issuance of

the recommended decision.

3. **[Employee]** argued that, as to the probative value of these varying impairment rating reports, three of the four doctors writing reports had actually examined him, and that these physicians in terms of their opinions, present a picture that's more probative to the Department of Labor and present a more clear, clinical assessment of his impairment than the DMC's evaluation based on the records with which he was provided. He argued that the report of his treating doctor, Dr. Hughes, would have the most probative opinion, as pulmonary function testing may be "somewhat variable" despite his being at maximum medical improvement, and he is Dr. Hughes' regular patient.

4. **[Employee]** also stated that his pulmonary function has been getting progressively worse, as compared to the mid-1990s when he had his surgery. Thus, he alleged that he was worse than he was in 2005, when Dr. Stewart did his evaluation.

Regarding these objections, FAB notes that impairment ratings are based on an individual's current condition at maximum medical improvement, and that **[Employee]** has four separate impairment rating reports in his file from four different physicians. The DMC's opinion is the only one given without benefit of a physical examination and gave a 5% impairment rating. **[Employee]** alleges that his condition has worsened since the 2005 examination by Dr. Stewart, which gave a 15% impariment rating. His treating physician gave a 50% impairment rating on August 23, 2006, and he states that this is the doctor who is most familiar with his condition. The latest impairment rating in the file, that of 17% by Dr. Walton, was done based on a physical examination on June 13, 2007 and was specifically obtained for **[Employee]**'s Part E claim.

Under the regulations implementing Part E of EEOICPA, the employee bears the burden of proving that the new impairment evidence he has submitted has more probative value than the evaluation used by the district office to determine the impairment rating. The weighing of the probative value of these impairment ratings must take many variables into consideration, such as whether that the opining physician possesses the requisite skills and requirements to provide a rating as set out under the regulations, whether the evaluation was conducted within 1 year of its receipt by the Division of Energy Employees Occupational Illness Compensation, whether the report addresses the covered illness, and whether the whole body percentage of impairment is listed with a clearly rationalized medical opinion as to its relationship to the covered illness. *See* Federal (EEOICPA) Procedure Manual, Chapter E-900(10)(b).

As noted above, the DMC never actually examined **[Employee]** and the 2005 impairment rating was done more than 1 year before it was submitted to FAB. Thus, neither of these reports has the most probative value for EEOICPA purposes. FAB also notes that both Dr. Hughes and Dr. Walton submitted medical reports that are clear and well-rationalized with regard to the causal relationship of **[Employee]**'s impairment to the covered illness of lung cancer. **[Employee]** testified that his condition is getting progressively worse and has been since his 1994 diagnosis and subsequent surgery for lung cancer. The most recent impairment rating in the file was done in June 2007 by Dr. Walton, nearly a year after the next more recent, which was done in August 2006 by Dr. Hughes. Dr. Walton's impairment rating also appears to be more consistent with the other impairment ratings that have been done for **[Employee]** by other physicians, in terms of the percentage of impairment. Thus, FAB concludes that the most probative opinion with regard to **[Employee]**'s current level of impariment is the most current impariment rating by Dr. Walton, which gives a 17% impairment rating of the whole person.

At the hearing, **[Employee]** acknowledged that if his condition worsened, he could claim for additional impairment based on the same covered illness after the passage of two years from his award. FAB also notes that **[Employee]** has a pending claim based on the condition of prostate cancer and that he may seek an impairment rating on a different covered illness *before* the passage of two years. *See* 20 C.F.R. § 30.912.

Following an independent review of the evidence of record, the undersigned hereby makes the following:

FINDINGS OF FACT

1. On November 4, 2002, **[Employee]** filed a claim for benefits under Part B and Part E of EEOICPA. At that time, he identified lung cancer as the condition resulting from his employment at a DOE facility.

2. On January 7, 2002, FAB issued a final decision that accepted **[Employee]**'s claim under Part B, finding that he was are a member of the Special Exposure Cohort, that he had been were diagnosed with lung cancer (a "specified" cancer), and awarding him a lump-sum of $150,000.00 and medical benefits for lung cancer.

3. On April 17, 2006, FAB also accepted **[Employee]**'s claim under Part E, finding that he had contracted his lung cancer through exposure to a toxic substance at a DOE facility and awarding him medical benefits for lung cancer under Part E.

4. On March 5, 2007, a DMC reviewed the medical evidence of record and determined that according to the *Guides*, **[Employee]** had a 5% whole person impairment resulting from his accepted covered illness of lung cancer.

5. On June 14, 2007, Dr. Norm Walton examined **[Employee]** and determined that he had a current impairment raring of 17% to the whole person as a result of his lung cancer.

6. **[Employee]** received a state workers' compensation settlement of $25,200.00 for his claimed condition of lung cancer.

Based on the above-noted facts, the undersigned also hereby makes the following:

CONCLUSIONS OF LAW

Under Part E of EEOICPA, a "covered DOE contractor employee" with a "covered illness" shall be entitled to impairment benefits based upon the extent of whole person impairment of all organs and body functions that are compromised or otherwise affected by his or her "covered illness." *See* 42 U.S.C § 7385s-2(a); 20 C.F.R. § 30.901(a). The impairment rating of an employee shall be determined in accordance with the Fifth Edition of the *Guides*. 42 U.S.C. § 7385s-2(b). Section 7385s-2(a)(1) provides that for each percentage point of the impairment rating that is the result of a covered illness, the covered DOE contractor employee shall receive $2,500.00.

As noted above, **[Employee]** is a covered DOE contractor employee with the covered illness of lung cancer, and he has an impairment rating of 17% of the whole person as a result of his covered illness

based on the *Guides*. The physician giving this impairment rating, Dr. Walton, evaluated **[Employee]**'s condition based on a physical examination and also carefully reviewed his medical records, and his is the most probative medical opinion on impairment in the file, as discussed above. **[Employee]** is therefore entitled to $42,500.00 in impairment benefits (17 x $2,500.00 = $42,500.00) under Part E of EEOICPA. This amount must be coordinated with the amount **[Employee]** received in a state workers' compensation settlement for his lung cancer, which was $25,200.00. Thus, his net award of impairment benefits based on his lung cancer is $17,300.00. A decision on **[Employee]**'s claim under Parts B and E for prostate cancer is deferred pending further development.

Washington, D.C.

Carrie A. Rhoads

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 10010178-2007 (Dep't of Labor, March 25, 2008)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This decision of the Final Adjudication Branch (FAB) concerns the employee's claim for impairment benefits under Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons stated below, the claim for an impairment award under Part E is approved. A decision on the claim for wage-loss benefits under Part E of EEOICPA is deferred pending further development.

STATEMENT OF THE CASE

On June 7, 2002, the employee filed claims for benefits under Part B and former Part D of EEOICPA. On February 23, 2007, the FAB issued a final decision finding that he was employed by a covered Department of Energy (DOE) contractor at the Portsmouth Gaseous Diffusion Plant from May 11, 1953 to November 16, 1954; that he was diagnosed with kidney cancer on August 5, 1976, lung cancer on January 22, 2001, colon cancer on March 30, 2001, rectal cancer on October 22, 2001, and prostate cancer on November 10, 2004; that these cancers were at least as likely as not related to radiation exposure during his employment at a DOE facility; and that they were also related to his exposure to toxic substances during his employment at a DOE facility. As a result, the FAB found that the employee was entitled to benefits under both Parts B and E of EEOICPA.

Earlier on January 16, 2007, the district office received the employee's claim for wage-loss benefits and an impairment award under Part E of EEOICPA. In support of his claim, the employee submitted a pulmonary function analysis, dated February 28, 2007, from Kennewick General Hospital, which indicated that his FVC was 91% of normal, FEV-1 was 42% of normal, and DLCO was 56% of predicted. In a March 5, 2007 medical report, Dr. Arthur Cain identified lowered creatinine levels, post-radiation rectal pain, urinary frequency, and erectile dysfunction.

To determine the percentage rating representing the extent of whole person impairment, based on the organ and body functions affected by the employee's covered illness, the case was referred for review

to a District Medical Consultant (DMC). The DMC submitted a medical report, dated June 30, 2007, which indicated that the employee had reached maximum medical improvement for all of his covered illnesses. Using the Fifth Edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (the *Guides*), the DMC opined that the employee had 10% impairment of the whole person due to his kidney cancer, based on the loss of one kidney and satisfactory kidney functions. For the employee's prostate cancer, the DMC found that there was a Class 1 impairment due to prostate and seminal vesicle dysfunction signs and symptoms, that the employee had not had surgery, and that he did not require continuous treatment. The DMC found that there was 5% impairment of the whole person due to dysfunction secondary to radiation treatment for the prostate cancer. Regarding the employee's rectal cancer, the DMC found that there was Class 1 impairment based on no need for further treatment, no further complications, no diarrhea and no residual findings. The DMC found that there was 0% impairment of the whole person due to radiation treatment for the colon cancer. Finally, as for the employee's lung cancer, the DMC found that his FVC was 91% of normal and his FEV-1 was 42% of normal, and that that placed him in Class 2 (Table 5-12, page 107 of the *Guides*). The DMC found that there was 10% impairment of the whole person due to the lung condition. However, the DMC indicated that 50% of this last impairment should be attributed to the employee's smoking and non-covered illness emphysema. Using the Combined Values Chart on page 604 of the *Guides*, 10% for kidney cancer, 5% for prostate cancer, 0% for colon cancer, and 5% impairment for the lung cancer equates to a 19% impairment of the whole person.

In a letter dated July 13, 2007, the employee indicated that he had not filed for or received any money from a state workers' compensation program or related to a tort action for any of his covered illnesses.

On August 4, 2007, the Cleveland district office issued a recommended decision to award the employee Part E benefits for a 19% whole person impairment attributable to his kidney, colon/rectal, lung, and prostate cancers. The district office recommended that he receive an impairment award in the amount of $47,500.00, and deferred making a recommendation on the employee's claim for wage-loss pending further development.

OBJECTIONS

On September 27, 2007, the FAB received the written objections of the employee's authorized representative and a request for an oral telephonic hearing, which was held on November 27, 2007. A review of the written objections, an October 4, 2007 impairment evaluation performed by Dr. David P. Suchard, Dr. Suchard's testimony during the telephonic hearing, and evidence the representative submitted subsequent to the hearing reveals the following:

In his October 4, 2007 evaluation and hearing testimony, Dr. Suchard indicated that the employee had reached maximum medical improvement for all of his covered illnesses. Using the Fifth Edition of the *Guides*, he found that the employee's FVC was 91% of normal, FEV-1 was 42% of normal, and DLCO was 56% of predicted, and placed him in Class 3 (Table 5-12 on page 107 of the *Guides*). Dr. Suchard concluded that the employee had a 40% impairment of the whole person based on his lungs. Dr. Suchard found that based on the loss of one kidney, no evidence of recurrence of cancer, occasional sharp pains associated with the surgical scar, and serum creatine reduction to 46 ml/min, that the employee was in the mid-range of a Class 2 impairment (Table 7-1, page 146), resulting in a 23% whole person impairment based on the employee's kidneys. Regarding the employee's colorectal cancer, Dr. Suchard found that there was a Class 1 impairment based on a condition that required surgery and the need for ongoing periodic surveillance colonoscopies and the risk of developing new or recurrent colorectal cancer (Table 6-4, page 128). Dr. Suchard found that there was a 5% whole person

impairment because of dysfunction secondary to radiation and treatment for the colon cancer.

For the prostate cancer, Dr. Suchard found that the employee had an anal impairment associated with his radiation-induced proctitis and that this was a Class 2 impairment due to signs and symptoms of organic anal disease or anatomic loss or alteration associated with continual anal symptoms incompletely controlled by treatment (Table 6-5 on page 131). Dr. Suchard found that there was a 15% whole person impairment related to this anal disease. Due to lower urinary tract function associated with the employee's prostate cancer, Dr. Suchard found a Class 1 impairment due to lower urinary symptoms of urinary frequency, nocturia, and urinary hesitancy with decreased force of the urinary stream (Table 7-4 on page 153), resulting in a 5% whole person impairment related to his radiation-induced obstructive urethral disease. Based on his reduced sexual function, Dr. Suchard also found a Class 1 impairment due to difficulties in maintaining an erection of sufficient rigidity and duration for sexual intercourse (Section 7.7 on page 156), resulting in a 10% whole person impairment related to decreased penile function. However, because the *Guides* direct the evaluator to decrease the percentage impairments concerning male reproductive organs by 50% for men over 65, Dr. Suchard found that the employee only had a 5% whole person impairment with regard to his decreased penile function. Using the Combined Values Chart on page 604 of the *Guides*, Dr. Suchard concluded that 15% for anal disease, 5% for urethral disease, and 5% for sexual dysfunction equated to a 23% impairment to the whole person for the employee's prostate cancer.

Using the same Combined Values Chart, Dr. Suchard concluded that 40% for the lung cancer, 23% for the kidney cancer, 5% for the colon cancer, and 23% for the prostate cancer equated to a 67% impairment of the whole person due to all of the employee's covered illnesses. Subsequent to the hearing, the authorized representative submitted a pulmonary function analysis dated November 29, 2007 and the results of a December 11, 2007 endoscopy. In an email dated December 21, 2007, Dr. Suchard indicated that the "pulmonary condition remains Class 2, no change in impairment assessment." He also indicated that the employee continued to have a 5% whole person impairment with regard to his Class 1 colorectal disorder impairment.

On the other hand and as noted above, in his June 30, 2007 report, the DMC noted that the employee's FVC was 91% of normal and FEV-1 was 42% of normal, and placed him in Class 2. However, Table 5-12 of the *Guides* states that if the FEV-1 is between 41% and 59%, this would place an individual in Class 3. Also, the DMC did not consider the DLCO test results, which were 56% of predicted and would also place an individual in Class 3. Finally, the FAB notes that the DMC apportioned the impairment of the employee's lungs to reflect the presence of a non-covered illness (emphysema). Regarding his kidney cancer, the FAB notes that the DMC did not take into consideration the pain from the surgical site and the lowered serum creatine level. In addition, he did not consider the need for ongoing periodic surveillance colonoscopies and the risk of developing new or recurrent colorectal cancer. Finally, the FAB notes that the DMC did not consider any impairment that resulted from the employee's anal problems that were associated with radiation-induced proctitis, lower urinary tract functions associated with prostate cancer, and reduced sexual function.

Once a recommended decision on impairment has been issued, an employee may submit new medical evidence or an additional impairment evaluation to challenge the determination of the impairment in the recommended decision. When this occurs, the FAB reviewer must take many variables into consideration when weighing the probative value of competing impairment evaluations. While by no means exhaustive, the FAB reviewer considers whether the physician possesses the requisite skills and requirements to provide a rating; whether the evaluation was conducted within 1 year of its receipt by DEEOIC; whether it addresses the covered illness; and whether the whole body percentage of

impairment is listed with a clearly rationalized medical opinion as to its relationship to the covered illness. In general, probative means "believable" and the FAB reviewer considers each competing report to determine which one, on the whole, is more believable based on the medical rationale provided and the evidence in the case file. *See* Federal (EEOICPA) Procedure Manual, Chapter E-900.10 (February 2006). As noted above, the employee submitted medical evidence that the FAB concludes is well rationalized and of greater probative value than the DMC's evaluation that was used by the district office to determine his percentage of permanent impairment.

After considering the evidence of record, the FAB hereby makes the following:

FINDINGS OF FACT

1. On February 23, 2007, the FAB issued a final decision finding that the employee was employed by a DOE contractor at the Portsmouth Gaseous Diffusion Plant from May 11, 1953 to November 16, 1954; that he was diagnosed with kidney cancer on August 5, 1976, lung cancer on January 22, 2001, colon cancer on March 30, 2001, rectal cancer on October 22, 2001, and prostate cancer on November 10, 2004; that these "occupational illnesses" were at least as likely as not related to radiation exposure during employment at a DOE facility; and that they were also "covered illnesses" related to toxic substance exposure during employment at a DOE facility. Consequently, it was found that he was entitled to benefits under both Parts B and E of EEOICPA.

2. Based on the Fifth Edition of the *Guides*, the employee has a 40% impairment based on his lung cancer, 23% based on his kidney cancer, 5% based on his colon cancer, and 23% based on his prostate cancer, for a total whole-body impairment of 67%.

3. The employee has not received any settlement or award from a lawsuit or workers' compensation claim in connection with his covered illnesses.

Based on the above-noted findings of fact, the FAB hereby also makes the following:

CONCLUSIONS OF LAW

Section 30.316(b) of the implementing regulations provides that "if the claimant objects to all or part of the recommended decision, the FAB reviewer will issue a final decision on the claim after either the hearing or the review of the written record, and after completing such further development of the case as he or she may deem necessary." 20 C.F.R. § 30.316(b). The undersigned has reviewed the record, including the employee's objections in this case, and concludes that no further investigation is warranted.

If an employee submits an additional impairment evaluation that differs from the impairment evaluation relied upon by the district office, the FAB will review all relevant evidence of impairment in the record, and will base its determinations regarding impairment upon the evidence it considers to be most probative. The FAB will determine the minimum impairment rating after it has evaluated all relevant evidence and argument in the record. *See* 20 C.F.R. § 30.908(c).

The FAB finds that Dr. Suchard's impairment evaluation is more probative than the one relied on by the district office to determine the employee's recommended whole person impairment, and that based

on Dr. Suchard's evaluation, his impairment rating is calculated to be 67%. The FAB also finds that the employee is entitled to $2,500.00 for each percentage point of the impairment rating attributed to his covered illnesses. Therefore, the employee is hereby awarded impairment benefits under Part E of EEOICPA in the amount of $167,500.00 ($2,500.00 x 67) pursuant to 42 U.S.C. § 7385s-2(a)(1).

Washington, DC

Tom Daugherty

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 10017018-2006 (Dep't of Labor, July 18, 2007)

NOTICE OF FINAL DECISION AFTER REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch (FAB) concerning the above claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. After a review of the record, FAB accepts the claim for impairment benefits under Part E of EEOICPA based on the covered illness of pharyngeal cancer and consequential condition of an unspecified disorder of the teeth and supporting structures.

STATEMENT OF THE CASE

On February 19, 2002, **[Employee]** filed a request for a review by a Physicians Panel under the former Part D of EEOICPA with the Department of Energy (DOE), and on July 16, 2003 he filed a Form EE-1 claiming for benefits under Part B with the Department of Labor. Both of these claims were based on cancer of the tongue, throat and lymph nodes.

On May 21, 2002, FAB issued a final decision accepting **[Employee]**'s claim for pharyngeal cancer under Part B. In that decision, FAB concluded that he was a member of the Special Exposure Cohort because he belonged to the class of employees who worked at the Amchitka Island Nuclear Explosion Site and had been diagnosed with a "specified" cancer (of the pharynx) on October 31, 2001. FAB therefore awarded **[Employee]** $150,000.00 and medical benefits for cancer of the pharynx.

On March 31, 2006, FAB also issued a final decision accepting **[Employee]**'s claim for pharyngeal cancer under Part E, as well as for a consequential condition of an unspecified disorder of the teeth and supporting structures. In that second decision, FAB concluded that he was a covered DOE contractor employee with a "covered" illness (pharyngeal cancer), and that he had contracted that covered illness through exposure to a toxic substance while working at a DOE facility. FAB therefore awarded him medical benefits under Part E of EEOICPA, retroactive to February 19, 2002, for both his pharyngeal cancer and the consequential condition of an unspecified disorder of the teeth and supporting structures.

On May 10, 2006, the district office received **[Employee]**'s letter requesting an impairment rating for his cancer of the pharynx and his accepted consequential condition. An impairment rating was performed by a District Medical Consultant (DMC), Dr. Coleen Weese. In her March 16, 2007 report,

Dr. Weese concluded that **[Employee]** had a 15% permanent impairment of the whole person due to his pharyngeal cancer with metastasis to the lymph nodes.

The district office then referred the claim to another DMC, Dr. Marc Bodow, for a complete impairment rating that also included the accepted consequential condition of an unspecified disorder of the teeth and supporting structures, including xerostomia. In his April 7, 2007 report, Dr. Bodow indicated that **[Employee]** had a 21% impairment of the whole person due to the pharyngeal cancer (with metastasis) and the disorder of the teeth and supporting structures.

The Seattle district office conducted a telephone interview with **[Employee]** in which he stated that he had received a settlement of $18,231.62 of state workers' compensation benefits related to the medical conditions for which he had claimed EEOICPA benefits. The record includes a Compromise and Release from the Alaska Workers' Compensation Board that establishes that he received a settlement of $18,231.62 for his cancer due to radiation exposure on Amchitka Island.

On April 12, 2007, the Seattle district office issued a recommended decision to accept **[Employee]**'s claim for permanent impairment based on his cancer of the pharynx and the consequential disorder of the teeth and supporting structures under Part E. The district office found that he had a 21% impairment of the whole body as the result of those covered illnesses, and that he was entitled to $2,500.00 for each percentage point (21 x $2,500.00 = $52,500.00), which had to be coordinated with the $18,231.62 he had received in state workers' compensation benefits, leaving a net recommended award of $34,268.38.

On April 23, 2007, FAB received **[Employee]**'s affirmation that neither he nor anyone in his family had ever filed for or received any settlement or award from a tort suit related to his exposure to radiation, and that he had not pled guilty to or been convicted of any charges connected with an application for or receipt of federal or state workers' compensation. He also confirmed that he had filed for and received an $18,231.62 settlement of a state workers' compensation claim for the same medical conditions he had claimed for under EEOICPA.

OBJECTIONS

On May 7, 2007, FAB received **[Employee]**'s letter objecting to the recommended decision, indicating that he felt that 21% was not completely fair, and that he could only do 30% of what he used to do before he was diagnosed with cancer in 2001. In that letter **[Employee]**, listed a number of ways in which he alleged that his quality of life had decreased, such as the weakness he experienced due to the radiation treatments he was receiving for his cancer, and his inability to enjoy activities or travel. Lastly, he disagreed with the coordination of his Part E benefits with the settlement he had received from the Alaska Workers' Compensation program.

In a subsequent June 4, 2007 submission, **[Employee]** provided FAB with letters written by his two best friends with their observations of his condition. He also indicated that he had had an appointment three weeks ago with his physician, who had told him that his exhaustion was due to the radiation doses he had been receiving in his neck and throat. Once the recommended decision on impairment has been issued and forwarded to FAB for the issuance of a final decision, an employee may submit new medical evidence or an additional impairment evaluation to challenge the evaluation upon which the recommended decision was based. However, the employee bears the burden of proving that the new medical evidence or new impairment evaluation is of greater probative value than the evaluation used

by the district office to determine the impairment rating. 20 C.F.R. § 30.908 (2007). In this case, **[Employee]** did not provide any medical evidence or an impairment evaluation that is of greater probative value than the impairment evaluation received from the second DMC. In his report, that DMC provided medical rationale supporting his whole body permanent impairment rating of 21%, and explained how he had arrived at that percentage using the Fifth Edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (the *Guides*).

As for the state workers' compensation benefits **[Employee]** received, 20 C.F.R. § 30.626 notes that the Division of Energy Employees Occupational Illness Compensation (DEEOIC) must reduce the compensation payable under Part E by the amount of benefits the claimant receives from a state workers' compensation program by reason of the same covered illness, after deducting the reasonable costs to the claimant of obtaining those benefits. If a covered Part E employee or a survivor of such employee receives benefits through a state workers' compensation program pursuant to a claim for the same covered illness, DEEOIC will first determine the dollar value of the benefits received from a state workers' compensation program by including all benefits, other than medical and vocational rehabilitation benefits, received for the same covered illness or injury sustained as a consequence of a covered illness. DEEOIC will then deduct the reasonable costs of obtaining those state workers' compensation benefits, such as attorney fees and certain itemized costs (like filing, travel expenses, witness fees, and court reporter costs for transcripts), provided that adequate supporting documentation is submitted to DEEOIC for its consideration. The Part E benefits that will be reduced consist of any unpaid monetary payments payable in the future and medical benefits payable in the future. In those cases where it has not yet paid Part E benefits, DEEOIC will reduce such benefits on a dollar-for-dollar basis, beginning with the current monetary payments first. If the amount to be subtracted exceeds the monetary payments currently payable, DEEOIC will reduce ongoing EEOICPA medical benefits payable in the future by the amount of any remaining surplus. This means that OWCP will apply the amount it would otherwise pay to reimburse the covered Part E employee for any ongoing medical treatment to the remaining surplus until it is absorbed (or until further monetary benefits become payable that are sufficient to absorb the surplus).

The record establishes that **[Employee]** received a state workers' compensation settlement in the amount of $18,231.62 for mouth and throat cancer due to his work-related exposure to radiation at Amchitka Island. It also establishes that his employers and the employers' insurance carriers paid a separate amount of $6,768.38 for his attorney fees.

After considering the evidence of record, FAB hereby makes the following:

FINDINGS OF FACT

1. On February 19, 2002, **[Employee]** filed a claim under EEOICPA with DOE, and also with the Department of Labor on July 16, 2003.

2. FAB issued a final decision accepting **[Employee]**'s Part B claim for cancer of the pharynx on May 21, 2002.

3. FAB also issued a final decision accepting **[Employee]**'s Part E claim for cancer of the pharynx with metastasis to the lymph nodes and a consequential disorder of the teeth and supporting structures on March 31, 2006.

4. **[Employee]** has a 21% whole body permanent impairment due to cancer of the pharynx with metastasis to the lymph nodes and a consequential disorder of the teeth and supporting structures, resulting in a gross impairment award of $52,500.00. Following coordination of this gross award with **[Employee]**'s state workers' compensation benefits of $18,231.62, the net impairment award payable is $34,268.38.

Based on the above-noted findings of fact, FAB hereby also makes the following:

CONCLUSIONS OF LAW

[Employee] has previously been determined to be a covered DOE contractor employee who contracted cancer of the pharynx with metastasis to the lymph nodes and a consequential disorder of the teeth through exposure to a toxic substance (radiation) at a DOE facility, the Amchitka Island Nuclear Explosion Site. Applying the provisions of 42 U.S.C. § 7385s-2 and 20 C.F.R. § 30.901, he has an impairment rating of 21% in accordance with the *Guides* and the gross amount of his impairment award is $52,500.00. However, **[Employee]** received a state workers' compensation settlement in the amount of $18,231.62 for the same accepted conditions. Therefore, his Part E benefits must be coordinated with those state workers' compensation benefits, and the net amount of impairment benefits payable following coordination is $34,268.38.

The undersigned notes **[Employee]**'s objections to the recommended decision; however, they do not change the outcome of this case. FAB is bound by the provisions of EEOICPA and the regulations, and has no authority to depart from them. Accordingly, **[Employee]** is entitled to compensation for his permanent impairment in the amount of $34,268.38 under Part E.

Seattle, Washington

Kelly Lindlief

Hearing Representative

Final Adjudication Branch

In general

EEOICPA Fin. Dec. No. 24496-2003 (Dep't of Labor, March 14, 2006)

NOTICE OF FINAL DECISION

This is a decision of the Final Adjudication Branch (FAB) 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 stated below, your claim for medical benefits for your diagnosis of chronic beryllium disease pursuant to Part E is approved. Furthermore, your claim for chronic beryllium disease, bladder cancer and throat cancer for impairment pursuant to Part E is approved.

A decision on **[Employee]**'s claim for medical benefits for basal cell carcinoma of the upper left lip is pending results from the National Institute for Occupational Safety and Health (NIOSH).

The Recommended decision dated December 29, 2005 omitted reference to chronic beryllium disease as being accepted under Part E. Therefore, in addition to addressing impairment, this decision accepts chronic beryllium disease for medical benefits pursuant to Part E.

STATEMENT OF THE CASE

On March 6, 2002, you filed a claim Form (EE-1) for benefits under EEOICPA with the Department of Labor. On the EE-1 form you identified vocal cord cancer, lip cancer, chronic beryllium disease and other lung condition as the conditions being claimed. You also submitted an employment history form (EE-3) on which you stated that you worked at the Iowa Ordnance Plant[1] in Burlington Iowa from March 19, 1951 through March 28,1991. You also indicated that you wore a dosimetry badge while you were employed with each company.

The Department of Energy (DOE) verified your employment with the Iowa Ordnance Plant in Burlington, Iowa, from March 19, 1951 through March 28, 1991.

August 29, 2003, the FAB issued a final decision in which it concluded that you were a covered beryllium employee and you were awarded compensation under Part B of EEOICPA in the amount of $150,000, and medical benefits for the treatment of your chronic beryllium disease.

On December 16, 2003, the district office received additional medical evidence, including a pathology report dated August 12, 2003, establishing your bladder cancer diagnosis. Subsequently, additional medical reports, including a pathology report dated September 23, 2005, established that you were diagnosed with throat cancer.

On January 24, 2006, the FAB issued a final decision which concluded that you were a covered employee with cancer and you were awarded medical benefits under Part B and Part E for cancer of the throat and cancer of the bladder.

On January 19, 2006, the district office received a letter from Dr. Fuortes in which he indicated that you had reached maximum medical improvement, and that using the AMA's *Guides to the Evaluation of Permanent Impairment*, 5th Edition, Page 262, Table 11-7, Chapter 11. You had a 40-60% impairment of the whole person because of the anatomic loss post-surgically of much of the epiglottis and your inability to swallow, and being nutritionally dependent upon a gastronomy and gastric feeding tube. Dr. Fuortes concluded that you had a 60% impairment of the whole person.

Dr. Fuortes further stated that you are significantly impaired on the basis of pulmonary disease. He stated that your impairment from respiratory disease based on a DLCO deficit would be in the Class 4 range using Table 5-12, page 107, with severe dyspnea (Table 5-1, page 89) resulting in an estimated 51-100% range impairment of the whole person. He stated that given the severity of your symptoms and with hypoxia at rest, your rating would be in the upper range or 85% impairment of the whole person from pulmonary disease.

Using the combined values chart for combining impairments, pages 604-606, a combined rating of 94% of the impairment of the whole person was assigned.

On March 1, 2006, the Denver district office issued a recommended decision concluding that you are a covered employee; that you contracted the covered illnesses, throat cancer, bladder cancer and chronic

beryllium disease, due to your exposure to a toxic substance which is related to your employment at a DOE facility; an impairment rating was established representing your permanent impairment; and that you are entitled to impairment compensation of $235,000.

FINDINGS OF FACT

1. You filed a claim for benefits under Part B of the EEOICPA on March 6, 2002.

2. You were diagnosed with chronic beryllium disease, bladder cancer and throat cancer.

3. You were employed with Iowa Ordnance Plant in Burlington Iowa from March 19, 1951 through March 28, 1991.

4. On August 29, 2003, the FAB issued a final decision finding that you were a covered beryllium employee and you were awarded compensation benefits pursuant to Part B of the EEOICPA.

5. On January 24, 2006, the FAB issued a final decision which concluded that you were a covered employee with cancer and you were awarded medical benefits under Part B and Part E for cancer of the throat and cancer of the bladder.

6. You contracted chronic beryllium disease, throat cancer and bladder cancer through exposure to a toxic substance at a DOE facility site, which resulted in whole body impairment.

7. You have a 94% whole body impairment due to the combination of your chronic beryllium disease, throat cancer and bladder cancer, resulting in impairment compensation totaling $235,000.

8. You never received any payment from a lawsuit or tort settlement for your diagnoses of chronic beryllium disease, throat cancer and bladder cancer.

Based on the above noted findings of fact in this claim, the FAB hereby also makes the following:

CONCLUSIONS OF LAW

Section 30.310(a) of the EEOICPA implementing regulations provides that "Within 60 days from the date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision, including HHS's reconstruction of the radiation dose to which the employee was exposed (if any), and whether a hearing is desired." 20 C.F.R. § 30.310(a).

Section 30.316(a) of those regulations further states that, "If the claimant does not file a written statement that objects to the recommended decision and/or requests a hearing within the period of time allotted in § 30.310, or if the claimant waives any objections to all or part of the recommended decision, the FAB will issue a decision accepting the recommendation of the district office, either in whole or in part." 20 C.F.R. § 30.316(a). On March 8, 2006, the FAB received written notification from you waiving any and all objections to the recommended decision.

Pursuant to § 7385s-4 of the EEOICPA, "A determination under part B that a Department of Energy

contractor employee is entitled to compensation under that part for an occupational illness shall be treated for purposes of this part as a determination that the employee contracted that illness through exposure at a Department of Energy facility." 42 U.S.C. § 7385s-4(a). You received an award for compensation under Part B for CBD, and it is therefore determined that you are a covered DOE contractor employee who contracted CBD through exposure at a DOE facility.

Applying the provisions of 42 U.S.C. § 7385s-2 and 20 C.F.R. § 30.901, you have a permanent impairment of 94% determined in accordance with the AMA's *Guides to the Evaluation of Permanent Impairment*. Your gross compensation amount for that impairment rating is $2500 multiplied by 94, or $235,000 pursuant to 42 U.S.C. § 7385s-2 (a)(1), 20 C.F.R. § 30.902.

You are entitled to medical benefits for chronic beryllium disease effective March 6, 2002, pursuant to 42 U.S.C. § 7385s-8 of the Act.

Denver, Colorado

Sandra Vicens-Pecenka

Hearing Representative

Final Adjudication Branch

[1] According to the Department of Energy's (DOE) Office of Worker Advocacy on the DOE website at http://www.eh.doe.gov/advocacy/faclist/showfacility.cfm, the Iowa Ordnance Plant in Burlington, IA is a covered DOE facility from 1947 to 1974.

EEOICPA Fin. Dec. No. 10001639-2005 (Dep't of Labor, October 21, 2005)

NOTICE OF FINAL DECISION

This decision of the Final Adjudication Branch (FAB) concerns your claim for survivor compensation benefits under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended, 42 U.S.C. § 7384 *et seq.* (EEOICPA). Your claim is approved for compensation in the amount of $125,000.00.

STATEMENT OF THE CASE

On April 7, 2005, the Final Adjudication Branch issued a Notice of Final Decision during the Interim Administration Period. Based on your confirmed employment with Union Carbide and Martin Marietta Energy Systems at the Y-12 Plant from April 24, 1967 to July 31, 1994, and a positive determination for asbestosis by a panel accepted by the Secretary of Energy under former Part D, the FAB found you to be a "covered DOE contractor employee." As such, the FAB awarded you medical benefits for asbestosis and asbestos related lung disease beginning on your March 17, 2003 filing date and deferred adjudication for wage loss and/or impairment.

You submitted an impairment evaluation, dated August 3, 2005, from Dr. Angelisa Janssen who found a 50% impairment rating due to your respiratory disease. To determine your "minimum impairment rating" (the percentage rating representing the extent of whole person impairment, based on the organ and body functions affected by the covered condition and the extent of the impairment attributable to

your covered condition), your case was referred for review to a Department of Labor Medical Consultant, Dr. Sylvie Cohen. Dr. Cohen used the American Medical Association's (AMA) *Guides to the Evaluation of Permanent Impairment* and opined that you have a class 3 impairment classification with a range of 26-50% impairment. *See* AMA's Guides *to the Evaluation of Permanent Impairment* (5th Edit. 2005) tables 5-12. Dr. Cohen calculated your minimum impairment rating to be 50%, all of which is attributed to the accepted covered condition, asbestosis.

On September 23, 2005, the district office issued a recommended decision finding that you are entitled to $2,500 for each of the 50 percentage points Dr. Cohen found to be a result of the accepted covered illness. As such the district office concluded that you are entitled to compensation in the amount of $125,000.00 pursuant to 42 U.S.C. § 7385s-2(a)(1).

On September 28, 2005, the FAB received written notification that you waive any and all objections to the September 23, 2005 recommended decision.

After considering the evidence of record and your waiver of objections, the FAB hereby makes the following:

FINDINGS OF FACT

1. A final decision was issued by the Department of Labor under § 7385s of the Act on April 7, 2005, concluding that you are a covered DOE contractor employee and awarded you medical benefits for asbestosis commencing on your March 17, 2003 filing date.

2. Based on the 5th edition of the AMA's *Guides*, your minimum impairment rating for asbestosis is calculated to be 50%.

3. You confirmed in writing that you never received any settlement or award from a lawsuit or workers' compensation claim in connection with the accepted condition.

Based on the above noted findings of fact, the FAB hereby also makes the following:

CONCLUSIONS OF LAW

The Final Adjudication Branch hereby finds that you have been determined to have an impairment that is the result of the accepted covered illness, asbestosis, and that your minimum impairment rating is calculated to be 50%. The FAB further finds that you are entitled to $2,500 for each percentage point (50) of your minimum impairment rating attributed to the accepted condition amounting to $125,000.00. Therefore, the Final Adjudication Branch hereby concludes that you are entitled to compensation for impairment in the amount of $125,000.00 pursuant to 42 U.S.C. § 7382s-2(a)(1)(A) and (B).

Washington, DC

David E. Benedict

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 10001749-2005 (Dep't of Labor, December 14, 2005)

NOTICE OF FINAL DECISION

This decision of the Final Adjudication Branch (FAB) concerns your claim for impairment benefits under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended, 42 U.S.C. § 7384 *et seq.* (EEOICPA). Your claim is approved for compensation in the amount of $62,500. Adjudication of this claim will not preclude your potential entitlement to additional compensation under the Act for wage-loss and/or increased impairment.

STATEMENT OF THE CASE

On March 22, 2005, the Final Adjudication Branch issued a Notice of Final Decision During the Interim Administration Period. Based on your confirmed employment with Union Carbide, Martin Marietta and Lockheed Martin at the Paducah Gaseous Diffusion Plant (PGDP) from October 3, 1955 through June 30, 1999, and a positive determination for asbestosis by a panel accepted by the Secretary of Energy under former Part D, the FAB found you to be a "covered DOE contractor employee" as defined by 42 U.S.C. § 7385s(1). As such, the FAB awarded you medical benefits for asbestosis in accordance with 42 U.S.C. § 7384t beginning on your May 15, 2002 Department of Energy filing date. The FAB deferred adjudication for wage-loss and/or impairment.

On September 8, 2005, the district office received your statement of intent to pursue a claim for impairment benefits. To determine your "minimum impairment rating" (the percentage rating representing the extent of whole person impairment, based on the organ and body functions affected by the covered condition and the extent of the impairment attributable to your covered condition), your case was referred for review to a Department of Labor Medical Consultant. The medical consultant used the American Medical Association's *Guides to the Evaluation of Permanent Impairment* and opined that you have a class 2 impairment classification with a range of 10-25% impairment (*See* AMA's *Guides to the Evaluation of Permanent Impairment*, 5th Ed. 2005). Given your physical findings, current treatment and severely compromised activities of daily living (ADL), the medical consultant calculated your minimum impairment rating attributed to the accepted covered condition, asbestosis, to be 25%.

On November 8, 2005, the Cleveland district office issued a recommended decision finding that you are entitled to $2,500 for each of the twenty five percentage points the medical consultant found to be a result of the accepted covered illness. As such the district office concluded that you are entitled to compensation in the amount of $62,500.

On November 23, 2005, the FAB received written notification that you waive any and all objections to the November 8, 2005 recommended decision. On December 14, 2005, the FAB received your written confirmation that you have not received any settlement or award from a lawsuit or workers' compensation claim in connection with the accepted condition.

After considering the evidence of record and your waiver of objections, the FAB hereby makes the following:

FINDINGS OF FACT

1. You filed a claim under EEOICPA with the Department of Labor on July 31, 2001.

2. You filed a claim under EEOICPA with the Department of Energy on May 15, 2002.

3. A final decision was issued by the Department of Labor under Part E of the Act on March 22, 2005, concluding that you are a covered DOE contractor employee who contracted asbestosis due to work-related exposure to a toxic substance, and awarded you medical benefits for asbestosis commencing on your May 15, 2002 filing date.

4. Based on the 5th edition of the AMA's *Guides*, your minimum impairment rating due to asbestosis is calculated to be 25%.

5. You confirmed in writing that you never received any settlement or award from a lawsuit or workers' compensation claim in connection with the accepted condition.

Based on the above noted findings of fact, the FAB hereby also makes the following:

CONCLUSIONS OF LAW

The Final Adjudication Branch hereby finds that you have a permanent impairment that is the result of the accepted covered condition, asbestosis, and that your minimum impairment rating is calculated to be 25%. The FAB further finds that you are entitled to $2,500 for each percentage point of your minimum impairment rating attributed to the accepted condition. Therefore, the Final Adjudication Branch hereby concludes that you are entitled to compensation for impairment in the amount of $62,500 under 42 U.S.C. § 7382s-2(a)(1)(A) and (B).

In addition, the May 22, 2005 final decision awarded you medical benefits commencing on your May 15, 2002 Department of Energy filing. This decision should serve as a correction. Your entitlement to medical benefits is retroactive to the earliest date of filing and that would be the July 31, 2001 Department of Labor filing date. Accordingly, the Final Adjudication Branch hereby concludes that you are also entitled to medical benefits for asbestosis commencing on July 31, 2001.

Washington, DC

Vawndalyn B. Feagins

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 10005910-2006 (Dep't of Labor, July 31, 2007)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch (FAB) concerning the above claim for impairment benefits under Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claim for impairment benefits under Part E of EEOICPA based on the claimed condition of multiple myeloma disease is accepted.

STATEMENT OF THE CASE

On January 20, 2004, **[Employee]** filed claims under both Part B and former Part D of EEOICPA. He identified multiple myeloma as the claimed condition he alleged resulted from exposure to toxic substances during his employment at a Department of Energy (DOE) facility. Subsequent to his filing a request for assistance under former Part D, Congress amended EEOICPA by repealing Part D and enacting new Part E, which is administered by the Department of Labor. The filing of a request for assistance under former Part D is treated as a claim for benefits under Part E.

On April 6, 2004, FAB issued a final decision accepting **[Employee]**'s claim under Part B of EEOICPA, finding that he was a member of the Special Exposure Cohort with the "specified" cancer (an "occupational" illness) of multiple myeloma. On May 12, 2006, FAB issued another final decision accepting **[Employee]**'s claim for medical benefits under Part E the "covered" illness of multiple myeloma.

The evidence of record establishes that **[Employee]** was employed at the Oak Ridge Gaseous Diffusion Plant for at least 250 work days prior to February 1, 1992. During his employment at this facility he was employed by DOE contractors. The medical evidence establishes that he was diagnosed with multiple myeloma on December 24, 2003.

On February 6, 2006, **[Employee]** filed a claim for impairment and wage-loss benefits under Part E. To ascertain his impairment rating, and pursuant to his request, the district office had **[Employee]**'s medical records reviewed by a District Medical Consultant (DMC). On September 13, 2006, the DMC opined that based on the Fifth Edition of the American Medical Association's *Guides to the Evaluation of Physical Impairment* (the *Guides*), **[Employee]**'s multiple myeloma was ratable because he had reached maximum medical improvement for this condition. However, he opined that **[Employee]**'s peripheral neuropathy, which is a consequential condition of his multiple myeloma, was not at maximum medical improvement and thus could be currently rated. Using the proper sections and charts of the *Guides*, the DMC assessed **[Employee]**'s whole person impairment based on his multiple myeloma at 11%.

The claim file contains **[Employee]**'s written declaration that he has not filed any tort suits or claims for state workers' compensation benefits, or received any settlements or state workers' compensation benefit awards in connection with his multiple myeloma.

On December 5, 2006, the district office issued a recommended decision to award **[Employee]** an impairment award for his 11% whole person permanent impairment based on multiple myeloma, and that he was entitled to receive a lump-sum benefit under Part E of EEOICPA based on that award of $27,500.00. Accompanying the district office's recommended decision was a letter explaining **[Employee]**'s rights and responsibilities in regard to that decision.

OBJECTIONS

On February 1, 2007, FAB received **[Employee]**'s letter objecting to the recommended decision and requesting an oral hearing, which was held on April 17, 2007. At that hearing, both **[Employee]** and **[Employee's spouse]** presented testimony and evidence. **[Employee]** also submitted two exhibits at this hearing: (1) **[Employee]**'s letter dated April 17, 2007 summarizing his objections to the recommended decision; and (2) a document entitled "Concise Review of the Disease and Treatment Options Multiple Myeloma Cancer of the Bone Marrow" by Brian G. M. Durie, M.D.

Objection No. 1: **[Employee]** objected to the DMC's assessment of his impairment by arguing that the DMC should have considered additional factors, such as his bone damage, bone destruction, bone lesions, his thrombocytopenia and decreased platelet count, his infections and suppressed immune system, his weakness, fatigue and shortness of breath, his renal insufficiency, his daily activities, and the probability of his premature death in assessing his impairment.

Objection No. 2: **[Employee]** argued that his peripheral neuropathy should be rated because he believed that it was at maximum medical impairment, and objected to the impairment rating because the DMC did not include his peripheral neuropathy condition in assessing his impairment.

Objection No. 3: **[Employee]** objected to the impairment rating because the DMC did not have all of your medical records, and no effort was made to obtain those records for the DMC to review.

Objection No. 4: **[Employee]** argued that the DMC's report contains incorrect information about him regaining his previous state of good health.

Objection No. 5: **[Employee]** argued that the "shallowness" of the impairment evaluation process was not consistent with EEOICPA, nor was it consistent with his agreement to forego other legal remedies if he was fairly compensated.

Subsequent to the hearing a copy of the transcript of that hearing was sent to **[Employee]**. On May 4, 2007, FAB received his letter dated April 30, 2007 and medical records he had attached to that letter, including a March 1, 2007 report from Dr. Bart Barlogie and laboratory results dated February 27, 2007, February 10, 2006, September 23, 2005 and December 15, 2004.

[Employee]'s first, second and third objections concern whether the impairment rating that formed the basis for the recommended decision was correct. He did not submit any medical evidence indicating that a physician had rated his impairment differently than the DMC had. The regulations specify how FAB will evaluate new medical evidence submitted to challenge the impairment evaluation in the recommended decision. Those regulations provide that if the employee submits an additional impairment evaluation that differs from the impairment evaluation relied upon by the district office, FAB will not consider the additional impairment evaluation if it is not performed by a physician who meets the criteria that have been established for physicians performing impairment evaluations for the pertinent covered illness in accordance with the *Guides*. *See* 20 C.F.R. §§ 30.905, 30.908 (2007). The medical evidence **[Employee]** submitted did not include an assessment of his impairment based on the claimed condition in accordance with the *Guides*. A determination regarding **[Employee]**'s impairment rating must be based upon a consideration of the totality of all relevant evidence of impairment in the record, and that determination must be based upon the most probative evidence. *See* 20 C.F.R. § 908(c). After reviewing the evidence of record, FAB concludes that the impairment rating by the DMC is the most probative evidence of your whole person impairment from your multiple myeloma. **[Employee]** may apply for a new impairment rating for this condition in two years. *See* 20

C.F.R. § 30.912. Additionally, because his peripheral neuropathy was not assessed in the DMC's impairment rating because he had not reached maximum medical improvement for that condition, **[Employee]** may apply for an impairment rating for that condition anytime, but the medical evidence must establish that he has reached maximum medical improvement for that condition.

[Employee]'s fourth objection concerns statements in the DMC's report about him regaining his normal state of health. **[Employee]** made reference to a statement in the DMC report which implies it is debatable whether **[Employee]** has actually regained his previous state of normal good health. However, the statement in question was in quotations in the DMC's report, indicating that the DMC did not make that statement. The DMC's report indicates that while you were in remission, you were not in your previous state of normal good health.

[Employee]'s fifth objection concerns the "shallowness" of the impairment evaluation process under EEOICPA. However, when it enacted Part E, Congress provided that impairment benefits must be based on impairment ratings derived from the *Guides*. *See* 42 U.S.C. § 7385s-2(b). The Department of Labor must administer Part E as provided by Congress and does not have the authority to base impairment benefits on anything other than the *Guides*.

After reviewing the evidence in the file, **[Employee]**'s objections to the recommended decision and the evidence he submitted, FAB hereby makes the following:

FINDINGS OF FACT

1. **[Employee]** filed a claim for benefits under EEOICPA on January 20, 2004.

2. **[Employee]** was employed at the Oak Ridge Gaseous Diffusion Plant (a DOE facility) for more than 250 work days prior to February 1, 1992. During his employment at this facility, he was employed by DOE contractors.

3. On May 12, 2006, FAB accepted **[Employee]**'s Part E claim for medical benefits for the "covered" illness of multiple myeloma.

4. **[Employee]** has a minimum impairment rating of his whole person as a result of his multiple myeloma of 11%.

5. **[Employee]** has not received compensation or benefits from a tort suit or a state workers' compensation claim based on his multiple myeloma.

Based on the above-noted findings of fact, FAB also hereby makes the following:

CONCLUSIONS OF LAW

On May 12, 2006, FAB issued a final decision under Part E of EEOICPA that accepted **[Employee]**'s claim for medical benefits for the covered illness of multiple myeloma, finding that his exposure to toxic substances during the performance of his duties at a DOE facility was a significant factor in aggravating, contributing to, or causing his multiple myeloma. 42 U.S.C. § 7385s-4(a). He is therefore a "covered DOE contractor employee."

Part E of EEOICPA provides that a "covered DOE contractor employee" with a "covered" illness shall be entitled to impairment benefits based on the extent of whole person impairment of all organs and body functions that are compromised or otherwise affected by the employee's "covered" illness. *See* 42 U.S.C § 7385s-2(a) and 20 C.F.R. § 30.901(a). Part E also provides that the employee's impairment rating is to be determined in accordance with the Fifth Edition of the *Guides*, and that for each percentage point of impairment that is a result of a "covered" illness, a "covered DOE contractor employee" is to receive $2,500.00. *See* 42 U.S.C. § 7385s-2(a)(1) and (b). The evidence of record establishes that **[Employee]** has an impairment rating of 11% of the whole person as a result of his "covered" illness of multiple myeloma, based on the *Guide*s.

[Employee] therefore qualifies for $27,500.00 in impairment benefits under Part E of EEOICPA, pursuant to 42 U.S.C. § 7385s-2(a)(1), and his claim for those benefits is accepted for that amount.

Washington, DC

William J. Elsenbrock

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 10007316-2007 (Dep't of Labor, January 31, 2008)

REMAND ORDER

This order of the Final Adjudication Branch (FAB) concerns the above claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. Pursuant to the authority granted by 20 C.F.R. § 30.317 (2007), the claim for impairment under Part E of EEOICPA based on pulmonary fibrosis and silicosis, moderate to severe, is remanded to the Denver district office of the Division of Energy Employees Occupational Illness Compensation (DEEOIC) to obtain clarification from the District Medical Consultant (DMC) who performed the impairment evaluation, and for the issuance of a new recommended decision.

On December 13, 2004, **[Employee]** filed a claim under Part B of EEOICPA for pulmonary fibrosis and silicosis. On February 8, 2005, a final decision was issued awarding him monetary and medical benefits under Part B for the condition of pulmonary fibrosis and silicosis, moderate to severe, after confirmation was received from the Department of Justice that he was awarded $100,000.00 under section 5 of the Radiation Exposure Compensation Act (RECA) for the same conditions. Another final decision was issued by FAB on May 25, 2007, awarding him medical benefits for the treatment of pulmonary fibrosis and silicosis under Part E.

On April 16, 2007, **[Employee]** notified the district office of his desire to pursue a claim for impairment and wage-loss benefits under Part E. He elected to have his impairment evaluation conducted by a Department of Labor DMC in lieu of a physician of his choosing, so on October 24, 2007, the case file was referred to a DMC for an impairment evaluation. On November 13, 2007, the district office received a copy of that impairment evaluation. Evaluating the results of **[Employee]**'s June 13, 2007 medical history, physical examination and pulmonary function test (PFT) results, as well

as a review of the medical evidence in the file, the DMC determined that he was at maximum medical improvement and rated his whole body impairment as 0%, based on the Fifth Edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, Chapter 5.

On November 14, 2007, the Denver district office issued a recommended decision under Part E to deny the claim for impairment benefits based on the DMC's 0% impairment rating. The case was then forwarded to FAB for the issuance of a final decision.

Upon review of the impairment evaluation, FAB notes that the DMC obviously reviewed the medical evidence with the purpose of determining whether or not the conditions accepted by the Department of Justice under RECA, and subsequently by DEEOIC under Parts B and E of EEOICPA, were supported by the medical evidence prior to assigning a rating, because fully five pages of this ten-page evaluation were devoted to an analysis of what diagnoses were supported by the objective medical evidence and which were not. However, the role of a DMC in an impairment evaluation is not to question, or to seek to disprove, a medical finding made by an adjudicatory agency, especially if that agency must use a legal/administrative definition of a disease rather than one that is generally accepted in the medical profession.

As noted above, **[Employee]** received an award under section 5 of RECA from the Department of Justice, based on their rules and regulations for the medical conditions of pulmonary fibrosis and silicosis. The Department of Justice has the exclusive authority to adjudicate claims filed under section 5 of RECA, and determines which, if any, of the medical conditions compensable under section 5 have been established. Under Part B of EEOICPA, DEEOIC pays an additional $50,000.00 in monetary benefits to recipients of an award under section 5 of RECA and provides the employee (if the employee was the recipient of the award) with medical benefits to treat the conditions that were accepted by the Department of Justice. These same conditions are then automatically presumed under Part E of EEOICPA to have arisen of the exposure of the employee to toxic substances at a covered facility, *i.e.*, to be "covered" illnesses.

The following excerpts from the impairment evaluation indicate the intent of the DMC was to disprove **[Employee]**'s covered illnesses, rather than to assess his lung function:

[Employee] has been accepted as having been exposed to the environmental hazards of uranium mining, primarily silicosis/pulmonary fibrosis. . . . There are certain conditions required for the diagnosis of pulmonary fibrosis/silicosis. **[Employee]** has no radiological findings of pulmonary fibrosis/silicosis, which would include bilateral nodules and perhaps calcification of hilar lymph nodes (the radiological findings are inconsistent with silicosis/pulmonary fibrosis; positive findings are necessary for a diagnosis of silicosis/pulmonary fibrosis).

* * *

[Employee] was a uranium worker/miner, but we have no information on his actual exposure (an actual exposure history is necessary for a diagnosis of silicosis/pulmonary fibrosis). Observers are cautioned not to attribute pulmonary function testing results to silicosis when the patient has other medical problems such as obesity (**[Employee]** is/was obese), has asthma (**[Employee]** has severe persistent asthma), hay fever (**[Employee]** has multiple environmental allergies and rhinitis), and a history of chest trauma ([chest x-ray] revealed old scapula fracture). Consequently, due to **[Employee]**'s history of severe persistent asthma, COPD resultant from the asthma and/or smoking history, obesity,

environmental allegories, history of chest trauma, inadequate exposure history, and reversibility of pulmonary function results with a bronchodilator, it must be concluded that **[Employee]**'s pulmonary function testing results are not due to his exposures while working as a uranium miner.

* * *

If there is a component of his lung disease that is due to his pulmonary fibrosis/silicosis, it is minimal at this time and cannot be used as a basis for an impairment rating. . . .

[Employee]'s impairment rating was 0% whole person impairment, even though the DMC conceded that he had considerable respiratory impairment and opined that this impairment is due to severe and persistent asthma, obesity, history of chest trauma, and respiratory allegories (environmental allergies).

The Federal (EEOICPA) Procedure Manual, Chapter E-900 (February 2006) precludes the apportionment of the permanent impairment of an organ or body function, which in this case is the lung, between an employee's covered and non-covered illnesses. If any portion of the impairment is due to a covered illness, the entire percentage of impairment for that organ is compensable. In the present case, the DMC admits in her findings that **[Employee]** may have minimal impairment of the lung due to pulmonary fibrosis/ silicosis, and then proceeds to apportion the majority of that impairment to other non-covered illnesses and conditions, thereby justifying a 0% impairment based on the covered illnesses as found by both the Department of Justice and DEEOIC.

Pursuant to 20 C.F.R. § 30.317, FAB may "at any time before the issuance of its decision remand the claim to the district office for further development without issuing a decision." Accordingly, FAB remands this case to the Denver district office of DEEOIC so it can ask the DMC who conducted **[Employee]**'s impairment rating to provide the percentage of impairment for the entire permanent loss of his lung function, without any apportionment. Following its receipt of this clarification, a new recommended decision should be issued on this claim for impairment benefits under Part E. If the DMC is unable to provide this clarification, then the case should be referred to another DMC for a proper impairment evaluation.

Denver, Colorado

Paula Breitling

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 10015379-2006 (Dep't of Labor, March 16, 2006)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) 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 stated below, your claim for medical benefits and impairment under Part E of the Act for chronic beryllium disease is accepted.

STATEMENT OF THE CASE

On July 31, 2001, you filed Form EE-1, Claim for Benefits under the Energy Employees Occupational Illness Compensation Program Act. You claimed you were diagnosed with beryllium sensitivity on April 16, 1992, and you were employed at a Department of Energy facility. On September 26, 2001, you filed Form EE-1 claiming that you were diagnosed with chronic beryllium disease on August 21, 2001.

On Form EE-3, Employment History, you indicated you were employed in several positions at the Rocky Flats Plant in Golden, Colorado from June 30, 1969 until October 22, 1993.[1] The Department of Energy (DOE) confirmed that you were employed at Rocky Flats as reported.

Peripheral blood lymphocyte transformation tests dated April, May, and June 1992, revealed abnormal responses to beryllium sulfate. A fiberoptic bronchoscopy with transbronchial biopsy was performed on July 12, 2001, and the resulting bronchoalveolar lavage lymphocyte transformation test revealed an abnormal response to beryllium sulfate. Lee S. Newman, M.D. in his report dated September 17, 2001, explained that the bronchoalveolar lavage lymphocyte proliferation test showed lymphocytosis at 65% consistent with chronic beryllium disease.

On March 21, 2002, the Final Adjudication Branch issued a final decision which concluded that you were a covered beryllium employee under Part B of EEOICPA and you were awarded compensation in the amount of $150,000.00, and medical benefits for the treatment of your chronic beryllium disease.

By letter dated September 23, 2004, the Department of Energy (DOE) notified you of a positive determination for chronic beryllium disease and beryllium sensitivity from a Physicians Panel as a result of the Part D claim you filed with the DOE. You were also advised of the procedure to follow if you wished to file for state workers' compensation benefits. On April 7, 2005, you were notified by the Department of Labor (DOL) that your Part D claim had been transferred to the DOL to develop the claim under Part E of the Act. You subsequently indicated that you wished to establish an impairment rating under Part E of the Act.

E. Brigitte Gottschall, M.D., in her medical report dated January 4, 2006, assigned an impairment rating of 10% of the whole person based on Table 5-12, Page 107 of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (5th Edition) for the employee's chronic beryllium disease based on pulmonary function and exercise tolerance tests; the need for daily treatment of his CBD with Advair; and multiple symptoms including shortness of breath with daily activities such as walking. Kathryn L. Mueller, M.D., who is certified by the American Board of Independent Medical Examiners (ABIME), reviewed and concurred with Dr. Gottschall's evaluation and impairment rating.

In your letter dated March 1, 2006, you stated that you did not wish to pursue a claim for wage-loss.

On March 7, 2006, the Denver district office issued a recommended decision concluding that you are a covered beryllium employee who contracted chronic beryllium disease due to your exposure to a toxic substance related to your employment at a DOE facility with impairment rating established to represent the percent of permanent impairment compensable due to a toxic substance exposure while employed at a DOE facility, and that you are entitled to impairment compensation of $25,000 ($2,500 x 10 = $25,000).

After considering the record of the claim forwarded by the district office, the Final Adjudication Branch makes the following:

FINDINGS OF FACT

1. You filed a claim for benefits under Part B of EEOICPA on July 31, 2001.

2. You were diagnosed with chronic beryllium disease on July 12, 2001.

3. You were employed at the Rocky Flats Plant from June 30, 1969 until October 22, 1993. Throughout the course of its operations, the potential for beryllium exposure existed at the Rocky Flats Plant, due to beryllium use, residual contamination, and decontamination activities.

4. On March 21, 2002, the FAB issued a final decision finding that you were a covered beryllium employee and you were awarded compensation benefits pursuant to Part B of EEOICPA.

5. You filed a claim with the Department of Energy under the former Part D program.

6. You contracted chronic beryllium disease through exposure to a toxic substance, at a DOE facility site, which resulted in permanent impairment.

7. You have a 10% whole body impairment due to your chronic beryllium disease as evidenced by abnormalities on pulmonary function and exercise tolerance tests, associated shortness of breath with daily living activities, and daily treatment of your disease with Advair resulting in an impairment compensation totaling $25,000.

8. The evidence of record also contains your signed statement that you have not filed for or received any tort settlements or received any state workers' compensation benefits for the claimed condition of chronic beryllium disease.

Based on the above noted findings of fact in this claim, the FAB hereby also makes the following:

CONCLUSIONS OF LAW

Pursuant to the regulations implementing EEOICPA, a claimant has 60 days from the date of issuance of the recommended decision to raise objections to that decision to the Final Adjudication Branch. 20 C.F.R. § 30.310(a). If an objection is not raised during the 60-day period, the Final Adjudication Branch will consider any and all objections to the recommended decision waived and issue a final decision affirming the district office's recommended decision. 20 C.F.R. § 30.316(a).

Section 30.316(a) of those regulations further states, "If the claimant does not file a written statement that objects to the recommended decision and/or requests a hearing within the period of time allotted in § 30.310, or if the claimant waives any objections to all or part of the recommended decision, the FAB will issue a decision accepting the recommendation of the district office, either in whole or in part." 20 C.F.R. § 30.316(a). On March 9, 2006, the FAB received written notification from you waiving any and all objections to the recommended decision.

Pursuant to § 7385s-4(a) of EEOICPA, "A determination under Part B that a Department of Energy

contractor employee is entitled to compensation under that part for an occupational illness shall be treated for purposes of this part as a determination that the employee contracted that illness through exposure at a Department of Energy facility." 42 U.S.C. § 7385s-4(a). You received an award for compensation under Part B for chronic beryllium disease; therefore it is determined that you are a covered DOE contractor employee who contracted chronic beryllium disease through exposure at a DOE facility.

You have a minimum impairment rating of 10 percentage points determined in accordance with the AMA's *Guides to the Evaluation of Permanent Impairment*, pursuant to 42 U.S.C. § 7385s-2(a)(1) and 20 C.F.R. § 30.901. Your gross compensation amount for that impairment rating is $2500 multiplied by 10, or $25,000, pursuant to 42 U.S.C. § 7385s-2(a)(1); 20 C.F.R. § 30.902.

You are entitled to medical benefits for chronic beryllium disease effective July 31, 2001, pursuant to 42 U.S.C. § 7385s-8 of the Act.

It is the decision of the Final Adjudication Branch that your claim for impairment and medical benefits for chronic beryllium disease is accepted.

Denver, Colorado

Anna Navarro

Hearing Representative

[1] According to the Department of Energy's (DOE) Office of Worker Advocacy on the DOE website at http://www.eh.doe.gov/advocacy/faclist/showfacility.cfm, the Rocky Flats Plant is a designated Department of Energy (DOE) facility from 1951 to the present.

Filing for increase in impairment

EEOICPA Fin. Dec. No. 10013332-2007 (Dep't of Labor, April 7, 2008)

NOTICE OF FINAL DECISION

This decision of the Final Adjudication Branch (FAB) concerns the employee's claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claim for additional impairment benefits is accepted under Part E of EEOICPA.

STATEMENT OF THE CASE

On May 20, 2003, the employee filed Form EE-1 with the Department of Labor, claiming benefits under Part B of EEOICPA, and also a request for assistance under former Part D of EEOICPA with the Department of Energy (DOE), for the condition of lung cancer. Thereafter, on October 28, 2004, Congress repealed Part D of EEOICPA and enacted new Part E. Because of this, DEEOIC proceeded to adjudicate the employee's Part D claim under Part E and on August 31, 2007, the FAB issued a final decision awarding the employee impairment benefits for a 10% whole-body impairment due to his "covered illness" of lung cancer.

On December 13, 2007, the employee filed another Form EE-1, claiming additional benefits under Part E for the illness of asbestosis. On February 1, 2008, the FAB issued a final decision finding that he was diagnosed with the covered illness of asbestosis on November 2, 2007, and concluding that he was a DOE contractor employee entitled to medical benefits for the accepted illness of asbestosis under Part E of the Act.

On February 5, 2008, the Jacksonville district office of the Division of Energy Employees Occupational Illness Compensation (DEEOIC) received the employee's request for increased impairment benefits based on his additional covered illness of asbestosis. The employee elected to have Dr. Ronald R. Cherry, of Sweetwater Hospital Association in Sweetwater, Tennessee, rate his impairment.[1] In a February 27, 2008 impairment evaluation, Dr. Cherry determined, using the Fifth Edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, Table 5-12, that the employee had reached maximum medical improvement and that he had a whole-body impairment of 37% based on his covered illnesses of both lung cancer and asbestosis.

On March 4, 2008, the Jacksonville district office of DEEOIC issued a recommended decision finding that the employee's whole-body impairment of 37% for both asbestosis and lung cancer, less the previously paid impairment benefits of 10% for lung cancer, yielded a net increased whole-body impairment of 27%. Accordingly, the district office recommended that the employee be awarded a lump-sum of $67,500.00 for his additional 27 percentage points of whole-body impairment.

On March 10, 2008, the FAB received the employee's statement waiving the right to object to the recommended decision. Accordingly, the undersigned hereby makes the following:

FINDINGS OF FACT

1. On May 20, 2003, the employee filed a claim under former Part D of EEOICPA for lung cancer and under Part E on December 13, 2007 for asbestosis.

2. On August 31, 2007, the FAB issued a final decision awarding the employee benefits under Part E of a 10% whole-body impairment due to lung cancer.

3. On October 18, 2007, the FAB issued a final decision concluding that the employee was also entitled to Part E benefits for the additional covered illness of asbestosis.

4. The employee's whole-body impairment rating for lung cancer and asbestosis is 37%.

Based on the above-noted findings of fact, the undersigned hereby makes the following conclusions of law:

CONCLUSIONS OF LAW

The implementing regulations state that if a claimant "waives any objections to all or part of the recommended decision, the FAB may issue a decision accepting the recommendation of the district office, either in whole or in part." 20 C.F.R. § 30.316(a).

Because the employee has a whole-body impairment due to the covered illnesses of lung cancer and asbestosis, he is eligible for impairment benefits under Part E of the Act. 20 C.F.R. § 30.900(b). The

employee's whole-body impairment rating of 37% for asbestosis and lung cancer, less the previously paid 10% whole-body impairment for lung cancer alone, yields a remaining balance of 27% whole-body impairment. Therefore, the employee is entitled to payment of an additional $67,500.00. This amount represents the remaining balance for both conditions of 27% whole-body impairment ($2,500.00 multiplied by 27 percentage points of impairment).

Jacksonville, FL

Armando J. Pinelo

Hearing Representative

Final Adjudication Branch

[1] Dr. Cherry submitted copies of certificates showing that he is licensed to practice as a medical doctor in the State of Tennessee, that he is Board-certified in internal medicine and in the subspecialty of pulmonary disease. He also submitted a statement that is sufficient to satisfy DEEOIC's criteria of knowledge and experience in the use of the *Guides*, as well as work experience in performing impairment ratings. Therefore, Dr. Cherry is qualified to perform the employee's impairment evaluation. *See* Federal (EEOICPA) Procedure Manual, Chapter E-900.3(2) (February 2006).

EEOICPA Fin. Dec. No. 10013332-2007 (Dep't of Labor, April 7, 2008)

NOTICE OF FINAL DECISION

This decision of the Final Adjudication Branch (FAB) concerns the employee's claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claim for additional impairment benefits is accepted under Part E of EEOICPA.

STATEMENT OF THE CASE

On May 20, 2003, the employee filed Form EE-1 with the Department of Labor, claiming benefits under Part B of EEOICPA, and also a request for assistance under former Part D of EEOICPA with the Department of Energy (DOE), for the condition of lung cancer. Thereafter, on October 28, 2004, Congress repealed Part D of EEOICPA and enacted new Part E. Because of this, DEEOIC proceeded to adjudicate the employee's Part D claim under Part E and on August 31, 2007, the FAB issued a final decision awarding the employee impairment benefits for a 10% whole-body impairment due to his "covered illness" of lung cancer.

On December 13, 2007, the employee filed another Form EE-1, claiming additional benefits under Part E for the illness of asbestosis. On February 1, 2008, the FAB issued a final decision finding that he was diagnosed with the covered illness of asbestosis on November 2, 2007, and concluding that he was a DOE contractor employee entitled to medical benefits for the accepted illness of asbestosis under Part E of the Act.

On February 5, 2008, the Jacksonville district office of the Division of Energy Employees Occupational Illness Compensation (DEEOIC) received the employee's request for increased impairment benefits based on his additional covered illness of asbestosis. The employee elected to have Dr. Ronald R. Cherry, of Sweetwater Hospital Association in Sweetwater, Tennessee, rate his

impairment.[1] In a February 27, 2008 impairment evaluation, Dr. Cherry determined, using the Fifth Edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, Table 5-12, that the employee had reached maximum medical improvement and that he had a whole-body impairment of 37% based on his covered illnesses of both lung cancer and asbestosis.

On March 4, 2008, the Jacksonville district office of DEEOIC issued a recommended decision finding that the employee's whole-body impairment of 37% for both asbestosis and lung cancer, less the previously paid impairment benefits of 10% for lung cancer, yielded a net increased whole-body impairment of 27%. Accordingly, the district office recommended that the employee be awarded a lump-sum of $67,500.00 for his additional 27 percentage points of whole-body impairment.

On March 10, 2008, the FAB received the employee's statement waiving the right to object to the recommended decision. Accordingly, the undersigned hereby makes the following:

FINDINGS OF FACT

1. On May 20, 2003, the employee filed a claim under former Part D of EEOICPA for lung cancer and under Part E on December 13, 2007 for asbestosis.

2. On August 31, 2007, the FAB issued a final decision awarding the employee benefits under Part E of a 10% whole-body impairment due to lung cancer.

3. On October 18, 2007, the FAB issued a final decision concluding that the employee was also entitled to Part E benefits for the additional covered illness of asbestosis.

4. The employee's whole-body impairment rating for lung cancer and asbestosis is 37%.

Based on the above-noted findings of fact, the undersigned hereby makes the following conclusions of law:

CONCLUSIONS OF LAW

The implementing regulations state that if a claimant "waives any objections to all or part of the recommended decision, the FAB may issue a decision accepting the recommendation of the district office, either in whole or in part." 20 C.F.R. § 30.316(a).

Because the employee has a whole-body impairment due to the covered illnesses of lung cancer and asbestosis, he is eligible for impairment benefits under Part E of the Act. 20 C.F.R. § 30.900(b). The employee's whole-body impairment rating of 37% for asbestosis and lung cancer, less the previously paid 10% whole-body impairment for lung cancer alone, yields a remaining balance of 27% whole-body impairment. Therefore, the employee is entitled to payment of an additional $67,500.00. This amount represents the remaining balance for both conditions of 27% whole-body impairment ($2,500.00 multiplied by 27 percentage points of impairment).

Jacksonville, FL

Armando J. Pinelo

Hearing Representative

Final Adjudication Branch

[1] Dr. Cherry submitted copies of certificates showing that he is licensed to practice as a medical doctor in the State of Tennessee, that he is Board-certified in internal medicine and in the subspecialty of pulmonary disease. He also submitted a statement that is sufficient to satisfy DEEOIC's criteria of knowledge and experience in the use of the *Guides*, as well as work experience in performing impairment ratings. Therefore, Dr. Cherry is qualified to perform the employee's impairment evaluation. *See* Federal (EEOICPA) Procedure Manual, Chapter E-900.3(2) (February 2006).

Medical Benefits

Date of commencement

EEOICPA Fin. Dec. No. 10522-2004 (Dep't of Labor, November 14, 2003)

NOTICE OF FINAL DECISION

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

STATEMENT OF THE CASE

On September 24, 2001, you filed a Form EE-1 (Claim for Employee Benefits under the EEOICPA), based on skin cancer. A representative of the Department of Energy (DOE) verified that you engaged in covered employment at the Hanford site for General Electric from December 5, 1955 to November 8, 1957 and for J.A. Jones/Kaiser Engineers Hanford from September 13, 1960 to February 4, 1975, February 6, 1975 to October 11, 1976, and November 30, 1976 to September 30, 1987. The Hanford site is recognized as a covered DOE facility from 1942 to the present. *See* Department of Energy Worker Advocacy Facility List.

You provided a medical record summary from David L. Adams, M.D., of Tri-City Derm Management, Inc., that indicates you had surgical excisions diagnosed as basal cell carcinoma on the following twelve dates: December 14, 1977 (right sideburn area); March 17, 1982 (right anterior sideburn area); March 18, 1982 (right anterior sideburn area); March 23, 1982 (right anterior sideburn area); March 25, 1982 (right anterior sideburn area); March 29, 1982 (right anterior sideburn area); March 25, 1986 (right lateral face); September 16, 1986 (mid posterior chest); December 23, 1986 (right sideburn area); June 7, 1989 (right cheek of face); February 22, 1995 (right face) and March 8, 1995 (right side of face).

You submitted four operative reports related to your cancers as follows: March 17, 1982 (basal cell carcinoma); March 18, 1982 (Mohs microscopic controlled surgery – subsequent treatment. "The second layer shows cancer still present."); March 23, 1982 ("The third layer shows cancer still present."); and March 25, 1982 ("The 4^{th} layer shows cancer still present."). Also, you submitted five pathology reports related to your cancer as follows: December 14, 1977 (basal cell epithelioma); February 22, 1995 ("Basosquamous carcinoma"); March 8, 1995 (ulcerated multifocal superficial basal cell carcimoma); December 21, 1995 (right pre-auricular basal cell carcinoma); and February 28,

1996 (basal cell carcinoma right lateral cheek skin). Further, you submitted a pathology report dated January 5, 1996 that diagnosed seborrheic keratosis, a non-covered condition. You also submitted chart notes dated February 28, 1996 that indicate "a large recurrent basal cell carcinoma on the right preauricular lateral cheek area," and "Right lateral cheek, preauricular skin." Consequently, the medical evidence includes a medical record summary, operative reports and pathology reports showing your diagnoses of skin cancer.

To determine the probability of whether you sustained these cancers in the performance of duty, the Seattle district office referred your claim to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction in accordance with § 30.115 of the EEOICPA regulations. *See* 20 C.F.R. § 30.115. The district office received the final NIOSH Report of Dose Reconstruction on October 22, 2003. *See* 42 U.S.C. § 7384n(d); 42 C.F.R. Part 82, § 82.26 (NIOSH report of dose reconstruction results). In its report, NIOSH indicated, in its "Dose Reconstruction Overview," that it performed radiation dose reconstructions on only four of your basal cell carcinomas that were diagnosed as follows: February 28, 1996 (left cheek); March 9, 1995 (auricular skin); March 9, 1995 (right side of the face); and March 17, 1982 (right sideburn area of the face).

Using the information provided in the Report of Dose Reconstruction, the Seattle district office utilized the Interactive RadioEpidemiological Program (IREP) to determine the probability of causation of your cancer and reported in its Recommended Decision that there was a 52.35% probability that your basal cell carcinoma of the skin was caused by radiation exposure at the INEEL site. The district office continued, in its recommended decision, that "Based on the dose reconstruction performed by NIOSH, the probability of causation (the likelihood that a cancer was caused by radiation exposure incurred by the employee while working at a DOE covered facility) was calculated for the four primary cancers."

On November 3, 2003, the Seattle district office recommended acceptance of your claim for compensation, and on November 7, 2003, the Seattle Final Adjudication Branch received written notification from you indicating that you waive any and all rights to file objections to the recommended decision.

FINDINGS OF FACT

1. You filed a claim for employee benefits on September 24, 2001.
2. You were employed at the Hanford site by General Electric from December 5, 1955 to November 8, 1957; and by J.A. Jones/Kaiser Engineers Hanford from September 13, 1960 to February 4, 1975, February 6, 1975 to October 11, 1976, and November 30, 1976 to September 30, 1987.
3. You are a covered employee as defined by § 7384l(9)(B) of the EEOICPA. *See* 42 U.S.C. § 7384l(9)(B)
4. You were diagnosed with multiple skin cancers.
5. Your cancer diagnoses were made after you began employment with the Department of Energy.
6. The NIOSH Interactive RadioEpidemiological Program indicated a 52.35% probability that your basal cell carcinoma was caused by radiation exposure at the Hanford site.
7. The dose reconstruction estimate was performed in accordance with § 7384n(d) of the EEOICPA and 42 C.F.R. Part 82. *See* 42 U.S.C. § 7384n(d); 42 C.F.R. Part 82 § 82.26.
8. The Probability of Causation was completed in accordance with § 7384n(c)(3) of the EEOICPA and 42 C.F.R. Part 81. The calculation of the probability of causation was based on four basal cell carcinoma primary cancer sites and was completed in accordance with 42 C.F.R. Part 81. *See* 42 U.S.C. § 7384n(c)(3); 42 C.F.R. Part 81, Subpart E.

9. After determining that the probability of causation for your basal cell carcinoma was 50% or greater, NIOSH determined that sufficient research and analysis had been conducted to end the dose reconstruction as it was evident the estimated cumulative dose is sufficient to qualify you for compensation. Additional calculations of probability of causation were not required to be determined. *See* 42 C.F.R. § 82.10(k).

CONCLUSIONS OF LAW

The DOE verified your employment at the Hanford site by General Electric from December 5, 1955 to November 8, 1957; and by J.A. Jones/Kaiser Engineers Hanford from September 13, 1960 to February 4, 1975, February 6, 1975 to October 11, 1976, and November 30, 1976 to September 30, 1987.

The medical documentation submitted in support of your claim shows that you were diagnosed with skin cancer on December 14, 1977 (right sideburn area); March 17, 1982 (right anterior sideburn area); March 18, 1982 (right anterior sideburn area); March 23, 1982 (right anterior sideburn area); March 25, 1982 (right anterior sideburn area); March 29, 1982 (right anterior sideburn area); March 25, 1986 (right lateral face); September 16, 1986 (mid posterior chest); December 23, 1986 (right sideburn area); June 7, 1989 (right cheek of face); February 22, 1995 (right face) and March 8, 1995 (right side of face). Operative reports you submitted indicated cancer-related excisions on the following dates: March 17, 1982 (basal cell carcinoma); March 18, 1982 (Mohs microscopic controlled surgery – subsequent treatment. "The second layer shows cancer still present."); March 23, 1982 ("The third layer shows cancer still present."); and March 25, 1982 ("The 4th layer shows cancer still present."). You submitted pathology reports providing cancer diagnoses as follows: December 14, 1977 (basal cell epithelioma); February 22, 1995 ("Basosquamous carcinoma"); March 8, 1995 (ulcerated multifocal superficial basal cell carcimoma); December 21, 1995 (right pre-auricular basal cell carcinoma); and February 28, 1996 (basal cell carcinoma right lateral cheek skin).

Based on your covered employment at the Hanford site and the medical documentation showing diagnoses of multiple skin cancers, you are a "covered employee with cancer" under the EEOICPA. *See* 42 U.S.C. § 7384l(9)(B)(i).

The undersigned notes that there is no indication in the case file of diagnosis of an auricular skin cancer, on March 9, 1995, as indicated in the NIOSH Report of Dose Reconstruction. But, there is a diagnosis of a right pre-auricular basal cell carcinoma on December 21, 1995 as well as a reference to a basal cell carcinoma on the "right preauricular lateral cheek area" in the chart notes dated February 28, 1996**.** It is also noted that the IREP probability of causation results show that the auricular primary cancer was diagnosed in 1995, and that no month or day was used in the computer calculation of the results. Consequently, any discrepancy in the date of diagnosis of pre-auricular basal cell carcinoma in 1995 would not affect the outcome of this case.

To determine the probability of whether you sustained cancer in the performance of duty, the district office referred your claim to NIOSH for radiation dose reconstruction on January 10, 2002, in accordance with § 30.115 of the EEOICPA regulations. *See* 20 C.F.R. § 30.115. On October 22, 2003, the Seattle district office received the final NIOSH Report of Dose Reconstruction.

Using the information provided in the Report of Dose Reconstruction for basal cell carcinoma, the district office utilized the Interactive RadioEpidemiological Program (NIOSH-IREP), pursuant to §§ 81.20, 81.21, 81.22, and 81.25 of the implementing NIOSH regulations, to determine a 52.35% probability that your cancer was caused by radiation exposure while employed at the Hanford site. *See*

42 C.F.R. §§ 81.20 (Required use of NIOSH-IREP), 81.21 (Cancers requiring the use of NIOSH-IREP), 81.22 (General guidelines for use of NIOSH-IREP), 81.25 (Guidelines for claims involving two or more primary cancers). The Final Adjudication Branch also analyzed the information in the NIOSH report, confirming the 52.35% probability. Thus, the evidence shows that your cancer was at least as likely as not related to your employment at the Hanford site and no further determinations of probability of causation were required.

You are a "covered employee with cancer," which is defined in § 7384l(9)(B)(i) and (ii) of the EEOICPA. *See* 42 U.S.C. § 7384l(9)(B)(i) and (ii). Pursuant to §§ 81.20, 81.21, 81.22, and 81.25 of the NIOSH implementing regulations, your cancer was at least as likely as not related to your employment at the Hanford site. *See* 42 C.F.R. §§ 81.20, 81.21, 81.22, and 81.25.

The record indicates that you filed Form EE-1, Claim for Employee Benefits under the EEOICPA, on September 24, 2001. The date you filed your claim is the date you became eligible for medical benefits for cancer. *See* 42 U.S.C. § 7384t(d).

Pursuant to Bulletin 03-24, if all primary cancers claimed have not gone through dose reconstruction when the 50% threshold has been reached, NIOSH will not complete dose reconstruction for the rest of the cancers. The calculation of additional POCs for the remaining primary cancers, which were not calculated, would only make the final numerical value of the POC larger, and all of the cancers, including those for which NIOSH did not perform a dose calculation, are covered for medical benefits. Consequently, you are entitled to compensation and medical benefits for skin cancer retroactive to September 24, 2001. *See* EEOICPA Bulletin No. 03-24 (issued May 2, 2003).

For the foregoing reasons, the undersigned hereby accepts your claim for skin cancer. You are entitled to compensation in the amount of $150,000 pursuant to § 7384s(a) of the Act. You are also entitled to medical benefits related to skin cancer, since September 24, 2001. *See* 42 U.S.C. § § 7384s, 7384t.

Seattle, WA

Rosanne M. Dummer, District Manager

Final Adjudication Branch Seattle

EEOICPA Fin. Dec. No. 28766-2003 (Dep't of Labor, June 20, 2003)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq.* For the reasons set forth below, the Final Adjudication Branch accepts and approves your claim for bladder cancer. Your claim for the condition of prostate cancer is deferred pending further adjudication.

STATEMENT OF THE CASE

On May 6, 2002, you filed a Form EE-1 (Claim for Employee Benefits under the EEOICPA), claiming compensation due to prostate cancer. Medical documentation submitted in support of your claim

shows that you were diagnosed as having prostate cancer on November 13, 2000. You later submitted a pathology report indicating that you were diagnosed as having bladder cancer on May 9, 2003.

You also completed a Form EE-3, Employment History, in which you indicated that you had worked as a helicopter pilot on Amchitka Island for Anchorage Helicopter Service from June 25, 1971 to December 1, 1971, and from May 1974 to June 1974; and, for Evergreen Helicopters from May 13, 1972 to November 17, 1972. You also submitted a narrative report of your experiences on Amchitka Island; a commendation letter from the resident manager, of Holmes & Narver, Incorporated, dated November 20, 1971, recognizing your work under hazardous conditions on Amchitka Island on November 6, 1971; and, a copy of a letter outlining the start of the operational period for Project Cannikin, which included attachments describing security procedures and issuance of film badges. The record also includes a completed Form EE-4 from your friend and work associate, Ian Mercier, in which he averred that you had worked as chief helicopter pilot for Anchorage Helicopter Service and Evergreen Helicopters, under contract to Holmes & Narver, prime contractor to the Atomic Energy Commission on Amchitka Island, Alaska, from June 24, 1971 to June 1, 1974.

In correspondence dated May 16, 2002 and August 29, 2002, representatives of the Department of Energy (DOE) indicated that they had no employment information pertaining to you; however, they were able to verify that you had been issued a film badge at the Amchitka Test Site on August 2, September 3, September 30 and October 29, 1971, and attached an employment affidavit from a work associate, Paul J. Mudra, who indicated that you had worked for Anchorage Helicopter Service from June to December 1971 and that he had had direct contact with you during the Cannikin underground testing on Amchitka Island, Alaska, during several months in the fall of 1971. The Manager's Completion Report, Amchitka Island, Alaska, Milrow and Cannikin, recognizes Anchorage Helicopter, as a covered subcontractor for a prime Atomic Energy Commission contractor, Holmes & Narver, Incorporated, on Amchitka Island from June to December 1971, for purposes of providing helicopter service. *See* Atomic Energy Commission's Manager's Completion Report, Amchitka Island, Alaska, Milrow and Cannikin (January 1973).

On June 16, 2003, the Seattle district office issued a recommended decision that concluded that you were a covered employee as defined in § 7384l(9)(A) of the Act and an eligible member of the Special Exposure Cohort as defined in § 7384l(14)(B) of the EEOICPA, who was diagnosed as having a specified cancer, specifically bladder cancer, as defined in § 7384l(17) of the Act. *See* 42 U.S.C. 7384l(9)(A), (14)(B), (17). The district office further concluded that you were entitled to compensation in the amount of $150,000 pursuant to § 7384s(a)(1) of the EEOICPA. *See* 42 U.S.C. § 7384s(a)(1). The district office's recommended decision also concluded that, pursuant to § 7384t of the EEOICPA, you were entitled to medical benefits for bladder cancer retroactive to May 6, 2002. *See* 42 U.S.C. § 7384t.

On June 18, 2003, the Final Adjudication Branch received written notification that you waive any and all rights to file objections to the recommended decision.

CONCLUSIONS OF LAW

In order for an employee to be afforded coverage under the "Special Exposure Cohort," the employee must be a "covered employee," which is defined in § 7384l(14)(B) of the EEOICPA, in relevant part as follows:

The employee must have been a Department of Energy (DOE) employee, DOE contractor employee, or an atomic weapons employee who was so employed before January 1, 1974, by DOE or a DOE contractor or subcontractor on Amchitka Island, Alaska and was exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests.

See 42 U.S.C. § 7384l(14)(B); 20 C.F.R. § 30.214(a)(2). Further, in order to be entitled to benefits for specified cancer, § 7384l(17) of the EEOICPA indicates that the covered employee must have any of the following:

A. A specified disease, as that term is defined in § 4(b)(2) of the Radiation Exposure Compensation Act (42 U.S.C. § 2210 note).

B. Bone cancer.

C. Renal cancers.

D. Leukemia (other than chronic lymphocytic leukemia) if initial occupational exposure occurred before 21 years of age and onset occurred more than two years after initial occupational exposure.

See 42 U.S.C. § 7384l(17); 20 C.F.R. § 30.5(dd).

The employment evidence of record demonstrates that you were an employee of Anchorage Helicopters, a covered subcontractor for a prime Atomic Energy Commission contractor, Holmes & Narver, Incorporated, located on Amchitka Island, Alaska, from June to December 1971, and that your employment was consistent with the type and kind of work performed by this subcontractor for the Department of Energy (DOE) at this site. *See* Atomic Energy Commission's Manager's Completion Report, Amchitka Island, Alaska, Milrow and Cannikin (January 1973). Consequently, this evidence establishes that you were "employed before January 1, 1974, by the Department of Energy or a Department of Energy contractor or subcontractor on Amchitka Island, Alaska." *See* 42 U.S.C. § 7384l(14)(B).

The Act requires that the covered employee must show that they were exposed to ionizing radiation in the performance of duty related to the underground tests on Amchitka. *See* 42 U.S.C. § 7384l(14)(B). In a memorandum to the Director, Division of Energy Employees Occupational Illness Compensation Program, a Certified Health Physicist, Branch of Policies, Regulations and Procedures, concluded that, in his professional opinion, radioactivity from the Long Shot nuclear test was released to the atmosphere a month after the detonation on October 29, 1965. Therefore, as a result of the releases, employees who worked on Amchitka Island were exposed to ionizing radiation from the nuclear tests beginning a month after the detonation.

The record indicates that you were present on Amchitka Island, Alaska, from at least June to December 1971. The undersigned acknowledges that such evidence shows that you have met the requirement of being exposed to ionizing radiation in the performance of duty, before January 1, 1974. *See* 42 U.S.C. § 7384l(14)(B).

You filed a claim based on bladder cancer. A pathology report from the Northwest Urology Clinic shows that you were diagnosed as having bladder cancer in May 2003. Consequently, you are a member of the Special Exposure Cohort, who was diagnosed with a specified cancer under the

EEOICPA. *See* 42 U.S.C. § 7384l(17)(A); 20 C.F.R.§ 30.5(dd)(5)(iii)(K).

You are a covered "Special Exposure Cohort" employee which is defined in § 7384l(14)(B) of the EEOICPA. *See* 42 U.S.C. § 7384l(14)(B). Bladder cancer is a "specified cancer" as that term is defined in § 7384l(17) of the Act and § 30.5(dd)(5)(iii)(K) of the EEOICPA regulations. *See* 42 U.S.C. § 7384l(17); 20 C.F.R. § 30.5(dd)(5)(iii)(K).

For the foregoing reasons, the undersigned hereby accepts your claim for bladder cancer. You are entitled to compensation in the amount of $150,000, pursuant to § 7384s of the EEOICPA. *See* 42 U.S.C. § 7384s. Further, you are entitled to medical benefits related to bladder cancer, retroactive to May 6, 2002, the date your claim was filed, pursuant to § 7384t of the Act. *See* 42 U.S.C. § 7384t; 20 C.F.R. § 30.400(a).

Your claim for prostate cancer is deferred pending further adjudication.

Seattle, Washington

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA Fin. Dec. No. 10522-2004 (Dep't of Labor, November 14, 2003)

NOTICE OF FINAL DECISION

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

STATEMENT OF THE CASE

On September 24, 2001, you filed a Form EE-1 (Claim for Employee Benefits under the EEOICPA), based on skin cancer. A representative of the Department of Energy (DOE) verified that you engaged in covered employment at the Hanford site for General Electric from December 5, 1955 to November 8, 1957 and for J.A. Jones/Kaiser Engineers Hanford from September 13, 1960 to February 4, 1975, February 6, 1975 to October 11, 1976, and November 30, 1976 to September 30, 1987. The Hanford site is recognized as a covered DOE facility from 1942 to the present. *See* Department of Energy Worker Advocacy Facility List.

You provided a medical record summary from David L. Adams, M.D., of Tri-City Derm Management, Inc., that indicates you had surgical excisions diagnosed as basal cell carcinoma on the following twelve dates: December 14, 1977 (right sideburn area); March 17, 1982 (right anterior sideburn area); March 18, 1982 (right anterior sideburn area); March 23, 1982 (right anterior sideburn area); March 25, 1982 (right anterior sideburn area); March 29, 1982 (right anterior sideburn area); March 25, 1986 (right lateral face); September 16, 1986 (mid posterior chest); December 23, 1986 (right sideburn area); June 7, 1989 (right cheek of face); February 22, 1995 (right face) and March 8, 1995 (right side of face).

You submitted four operative reports related to your cancers as follows: March 17, 1982 (basal cell carcinoma); March 18, 1982 (Mohs microscopic controlled surgery – subsequent treatment. "The second layer shows cancer still present."); March 23, 1982 ("The third layer shows cancer still present."); and March 25, 1982 ("The 4th layer shows cancer still present."). Also, you submitted five pathology reports related to your cancer as follows: December 14, 1977 (basal cell epithelioma); February 22, 1995 ("Basosquamous carcinoma"); March 8, 1995 (ulcerated multifocal superficial basal cell carcimoma); December 21, 1995 (right pre-auricular basal cell carcinoma); and February 28, 1996 (basal cell carcinoma right lateral cheek skin). Further, you submitted a pathology report dated January 5, 1996 that diagnosed seborrheic keratosis, a non-covered condition. You also submitted chart notes dated February 28, 1996 that indicate "a large recurrent basal cell carcinoma on the right preauricular lateral cheek area," and "Right lateral cheek, preauricular skin." Consequently, the medical evidence includes a medical record summary, operative reports and pathology reports showing your diagnoses of skin cancer.

To determine the probability of whether you sustained these cancers in the performance of duty, the Seattle district office referred your claim to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction in accordance with § 30.115 of the EEOICPA regulations. *See* 20 C.F.R. § 30.115. The district office received the final NIOSH Report of Dose Reconstruction on October 22, 2003. *See* 42 U.S.C. § 7384n(d); 42 C.F.R. Part 82, § 82.26 (NIOSH report of dose reconstruction results). In its report, NIOSH indicated, in its "Dose Reconstruction Overview," that it performed radiation dose reconstructions on only four of your basal cell carcinomas that were diagnosed as follows: February 28, 1996 (left cheek); March 9, 1995 (auricular skin); March 9, 1995 (right side of the face); and March 17, 1982 (right sideburn area of the face).

Using the information provided in the Report of Dose Reconstruction, the Seattle district office utilized the Interactive RadioEpidemiological Program (IREP) to determine the probability of causation of your cancer and reported in its Recommended Decision that there was a 52.35% probability that your basal cell carcinoma of the skin was caused by radiation exposure at the INEEL site. The district office continued, in its recommended decision, that "Based on the dose reconstruction performed by NIOSH, the probability of causation (the likelihood that a cancer was caused by radiation exposure incurred by the employee while working at a DOE covered facility) was calculated for the four primary cancers."

On November 3, 2003, the Seattle district office recommended acceptance of your claim for compensation, and on November 7, 2003, the Seattle Final Adjudication Branch received written notification from you indicating that you waive any and all rights to file objections to the recommended decision.

FINDINGS OF FACT

1. You filed a claim for employee benefits on September 24, 2001.
2. You were employed at the Hanford site by General Electric from December 5, 1955 to November 8, 1957; and by J.A. Jones/Kaiser Engineers Hanford from September 13, 1960 to February 4, 1975, February 6, 1975 to October 11, 1976, and November 30, 1976 to September 30, 1987.
3. You are a covered employee as defined by § 7384l(9)(B) of the EEOICPA. *See* 42 U.S.C. § 7384l(9)(B).
4. You were diagnosed with multiple skin cancers.
5. Your cancer diagnoses were made after you began employment with the Department of Energy.

6. The NIOSH Interactive RadioEpidemiological Program indicated a 52.35% probability that your basal cell carcinoma was caused by radiation exposure at the Hanford site.
7. The dose reconstruction estimate was performed in accordance with § 7384n(d) of the EEOICPA and 42 C.F.R. Part 82. *See* 42 U.S.C. § 7384n(d); 42 C.F.R. Part 82 § 82.26.
8. The Probability of Causation was completed in accordance with § 7384n(c)(3) of the EEOICPA and 42 C.F.R. Part 81. The calculation of the probability of causation was based on four basal cell carcinoma primary cancer sites and was completed in accordance with 42 C.F.R. Part 81. *See* 42 U.S.C. § 7384n(c)(3); 42 C.F.R. Part 81, Subpart E.
9. After determining that the probability of causation for your basal cell carcinoma was 50% or greater, NIOSH determined that sufficient research and analysis had been conducted to end the dose reconstruction as it was evident the estimated cumulative dose is sufficient to qualify you for compensation. Additional calculations of probability of causation were not required to be determined. *See* 42 C.F.R. § 82.10(k).

CONCLUSIONS OF LAW

The DOE verified your employment at the Hanford site by General Electric from December 5, 1955 to November 8, 1957; and by J.A. Jones/Kaiser Engineers Hanford from September 13, 1960 to February 4, 1975, February 6, 1975 to October 11, 1976, and November 30, 1976 to September 30, 1987.

The medical documentation submitted in support of your claim shows that you were diagnosed with skin cancer on December 14, 1977 (right sideburn area); March 17, 1982 (right anterior sideburn area); March 18, 1982 (right anterior sideburn area); March 23, 1982 (right anterior sideburn area); March 25, 1982 (right anterior sideburn area); March 29, 1982 (right anterior sideburn area); March 25, 1986 (right lateral face); September 16, 1986 (mid posterior chest); December 23, 1986 (right sideburn area); June 7, 1989 (right cheek of face); February 22, 1995 (right face) and March 8, 1995 (right side of face). Operative reports you submitted indicated cancer-related excisions on the following dates: March 17, 1982 (basal cell carcinoma); March 18, 1982 (Mohs microscopic controlled surgery – subsequent treatment. "The second layer shows cancer still present."); March 23, 1982 ("The third layer shows cancer still present."); and March 25, 1982 ("The 4th layer shows cancer still present."). You submitted pathology reports providing cancer diagnoses as follows: December 14, 1977 (basal cell epithelioma); February 22, 1995 ("Basosquamous carcinoma"); March 8, 1995 (ulcerated multifocal superficial basal cell carcimoma); December 21, 1995 (right pre-auricular basal cell carcinoma); and February 28, 1996 (basal cell carcinoma right lateral cheek skin).

Based on your covered employment at the Hanford site and the medical documentation showing diagnoses of multiple skin cancers, you are a "covered employee with cancer" under the EEOICPA. *See* 42 U.S.C. § 7384l(9)(B)(i).

The undersigned notes that there is no indication in the case file of diagnosis of an auricular skin cancer, on March 9, 1995, as indicated in the NIOSH Report of Dose Reconstruction. But, there is a diagnosis of a right pre-auricular basal cell carcinoma on December 21, 1995 as well as a reference to a basal cell carcinoma on the "right preauricular lateral cheek area" in the chart notes dated February 28, 1996**.** It is also noted that the IREP probability of causation results show that the auricular primary cancer was diagnosed in 1995, and that no month or day was used in the computer calculation of the results. Consequently, any discrepancy in the date of diagnosis of pre-auricular basal cell carcinoma in 1995 would not affect the outcome of this case.

To determine the probability of whether you sustained cancer in the performance of duty, the district

office referred your claim to NIOSH for radiation dose reconstruction on January 10, 2002, in accordance with § 30.115 of the EEOICPA regulations. *See* 20 C.F.R. § 30.115. On October 22, 2003, the Seattle district office received the final NIOSH Report of Dose Reconstruction.

Using the information provided in the Report of Dose Reconstruction for basal cell carcinoma, the district office utilized the Interactive RadioEpidemiological Program (NIOSH-IREP), pursuant to §§ 81.20, 81.21, 81.22, and 81.25 of the implementing NIOSH regulations, to determine a 52.35% probability that your cancer was caused by radiation exposure while employed at the Hanford site. *See* 42 C.F.R. §§ 81.20 (Required use of NIOSH-IREP), 81.21 (Cancers requiring the use of NIOSH-IREP), 81.22 (General guidelines for use of NIOSH-IREP), 81.25 (Guidelines for claims involving two or more primary cancers). The Final Adjudication Branch also analyzed the information in the NIOSH report, confirming the 52.35% probability. Thus, the evidence shows that your cancer was at least as likely as not related to your employment at the Hanford site and no further determinations of probability of causation were required.

You are a "covered employee with cancer," which is defined in § 7384l(9)(B)(i) and (ii) of the EEOICPA. *See* 42 U.S.C. § 7384l(9)(B)(i) and (ii). Pursuant to §§ 81.20, 81.21, 81.22, and 81.25 of the NIOSH implementing regulations, your cancer was at least as likely as not related to your employment at the Hanford site. *See* 42 C.F.R. §§ 81.20, 81.21, 81.22, and 81.25.

The record indicates that you filed Form EE-1, Claim for Employee Benefits under the EEOICPA, on September 24, 2001. The date you filed your claim is the date you became eligible for medical benefits for cancer. *See* 42 U.S.C. § 7384t(d).

Pursuant to Bulletin 03-24, if all primary cancers claimed have not gone through dose reconstruction when the 50% threshold has been reached, NIOSH will not complete dose reconstruction for the rest of the cancers. The calculation of additional POCs for the remaining primary cancers, which were not calculated, would only make the final numerical value of the POC larger, and all of the cancers, including those for which NIOSH did not perform a dose calculation, are covered for medical benefits. Consequently, you are entitled to compensation and medical benefits for skin cancer retroactive to September 24, 2001. *See* EEOICPA Bulletin No. 03-24 (issued May 2, 2003).

For the foregoing reasons, the undersigned hereby accepts your claim for skin cancer. You are entitled to compensation in the amount of $150,000 pursuant to § 7384s(a) of the Act. You are also entitled to medical benefits related to skin cancer, since September 24, 2001. *See* 42 U.S.C. § § 7384s, 7384t.

Seattle, WA

Rosanne M. Dummer, District Manager

Final Adjudication Branch Seattle

EEOICPA Fin. Dec. No. 12177-2002 (Dep't of Labor, September 17, 2004)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act).

See 42 U.S.C. § 7384 *et seq.* For the reasons set forth below, the Final Adjudication Branch approves your claim for chronic beryllium disease.

STATEMENT OF THE CASE

On April 1, 2004, you submitted a Form EE-1 (Claim for Employee Benefits under the EEOICPA), to the Portsmouth Resource Center, based on chronic beryllium disease (CBD). You had previously submitted a claim for beryllium sensitivity on October 16, 2001. A previous recommended decision granting medical monitoring for beryllium sensitivity effective October 16, 2001, was issued by the Cleveland district office on April 24, 2002, and a prior final decision affirming this recommended decision was issued by FAB on June 11, 2002.

You also had previously submitted a Form EE-3 (Employment History) that indicated that you worked at the Rocky Flats Plant in Golden, Colorado from 1990 to 1992 and the Feed Materials Production Center (FMPC) in Fernald, Ohio from 1992 to the present. Both of these facilities are designated by the Department of Energy (DOE) as Department of Energy facilities from 1951 to present and both throughout the course of their operations had the potential for beryllium exposure at the site, due to beryllium use, residual contamination and decontamination activities. *See* The DOE, Office of Worker Advocacy Facility List.

On November 13, 2001, DOE verified your employment at the FMPC from June 1, 1992 to present. The DOE had no records to confirm that you were employed directly by the Rocky Flats Plant.

You submitted medical records, including a lymphocyte transformation test dated August 25, 1995 that showed an abnormal response to beryllium sulfate. A medical report from Lee S. Newman, M.D., F.C.C.P., at National Jewish Medical Center and Research Center, dated February 24, 2004, described a pulmonary function test which demonstrated a progressive gas exchange abnormality which had worsened since 2002 and a CT scan of the thorax that indicated parenchymal findings consistent with chronic beryllium disease. There is also a medical consultation from Milton D. Rossman, M.D., at the University of Pennsylvania Medical Center, dated August 1, 2004, who opined that the findings from the CT scan and the pulmonary function tests performed in February 2004 are both consistent with chronic beryllium disease. Dr. Rossman stated that the specific CT scan findings were that of nodular lesions consistent with granulomas, air trapping and evidence of ground glass abnormalities and that the specific pulmonary function test finding was that of an abnormality of the diffusion capacity.

On August 31, 2004, the Cleveland district office issued a recommended decision concluding that you are a covered beryllium employee as that term is defined by 42 USC § 7384l(7), you were exposed to beryllium in the performance of duty, pursuant to 42 U.S.C. § 7384n, and are shown to have a covered beryllium illness shown in 42 USC § 7384l(8)(B), as you have chronic beryllium disease per the evidentiary criteria shown in 42 U.S.C. § 7384l(13). The district office further concluded that as a covered employee, you are entitled to compensation in the amount of $150,000, pursuant to 42 U.S.C. § 7384s(a)(1). The district office also concluded that pursuant to 42 U.S.C. § 7384s(b), you are also entitled to medical benefits for chronic beryllium disease, effective June 11, 2002, as those benefits are described in 42 U.S.C. § 7384t.

On September 8, 2004, the Final Adjudication Branch received written notification from you, indicating that you waive any and all rights to file objections to the recommended decision.

FINDINGS OF FACT

1. You filed a claim for employee benefits for chronic beryllium disease on April 1, 2004.

2. You were employed at the Feed Materials Production Center in Fernald, Ohio, a Department of Energy facility, from June 1, 1992 to at least November 13, 2001.

3. You are a covered beryllium employee who worked at Feed Materials Production Center in Fernald, Ohio, during a period when beryllium dust particles or vapor may have been present.

4. On February 24, 2004, you were diagnosed with chronic beryllium disease. The August 25, 1995, results of the beryllium lymphocyte proliferation test in addition to the February 2004 CT scan showing changes consistent with CBD and the February 2004 pulmonary function testing showing pulmonary deficits consistent with CBD, indicate that you have chronic beryllium disease meeting the statutory criteria for a diagnosis on or after January 1, 1993.

5. The effective date of medical benefits for the CBD is October 16, 2001, the same date as the effective date of medical benefits for the beryllium sensitivity.

CONCLUSIONS OF LAW

In order to be afforded coverage as a "covered beryllium employee," you must show that you were exposed to beryllium while in the performance of duty while employed at a DOE, or under certain circumstances, while present at a DOE facility or a facility owned and operated by a beryllium vendor, during a period when beryllium dust, particles, or vapor may have been present at such a facility. *See* 42 U.S.C. §§ 7384l(7); 7384n(a). Based on your covered employment at the FMPC during a period when beryllium dust, particles or vapor may have been present, you were exposed to beryllium in the performance of duty.

In addition, there must be medical documentation of the condition in order to be eligible for benefits based on chronic beryllium disease. The requirements for diagnoses on or after January 1, 1993 are: the employee must have beryllium sensitivity [based on a positive lymphocyte proliferation test], together with lung pathology consistent with chronic beryllium disease, including—a lung biopsy showing granulomas or a lymphocytic process consistent with chronic beryllium disease; a computerized axial tomography scan (CT) showing changes consistent with chronic beryllium disease; or pulmonary function or exercise testing showing pulmonary deficits consistent with chronic beryllium disease. *See* 42 U.S.C. § 7384l(13)(A).

The record contains the results of your BeLPT test showing an abnormal response to beryllium sulfate, and the findings from the CT scan and pulmonary function test which are consistent with a diagnosis of CBD. *See* 42 U.S.C. § 7384l(13)(A).

You are a "covered beryllium employee" as defined in § 7384l(7) of the Act, who was exposed to beryllium in the performance of duty as defined in § 7384n(a) of the EEOICPA. *See* 42 U.S.C. §§ 7384l(7); 7384n(a). Further, the medical evidence shows the presence of CBD, as provided for in § 7384l(13)(A) of the Act. *See* 42 U.S.C. § 7384l(13)(A).

For the foregoing reasons, the undersigned hereby approves your claim for CBD. You are entitled to

compensation in the amount of $150,000, pursuant to § 7384s(a) of the EEOICPA. *See* 42 U.S.C. § 7384s(a).

The Final Adjudication Branch notes that the district office in their recommended decision concluded that you were entitled to medical benefits for CBD from June 11, 2002, the date of the Final Decision which affirmed your entitlement to medical monitoring for beryllium sensitivity. The Final Adjudication Branch finds that you are entitled to medical benefits for CBD from October 16, 2001, which is the same medical status effective date for the beryllium sensitivity. Therefore, you are entitled to reimbursement of medical expenses related to your condition of CBD, retroactive to October 16, 2001. *See* 42 U.S.C. § 7384t; 20 C.F.R. § 30.400(a).

Cleveland, Ohio

Debra A. Benedict

Acting District Manager

Final Adjudication Branch

EEOICPA Fin. Dec. No. 10001749-2005 (Dep't of Labor, December 14, 2005)

NOTICE OF FINAL DECISION

This decision of the Final Adjudication Branch (FAB) concerns your claim for impairment benefits under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended, 42 U.S.C. § 7384 *et seq.* (EEOICPA). Your claim is approved for compensation in the amount of $62,500. Adjudication of this claim will not preclude your potential entitlement to additional compensation under the Act for wage-loss and/or increased impairment.

STATEMENT OF THE CASE

On March 22, 2005, the Final Adjudication Branch issued a Notice of Final Decision During the Interim Administration Period. Based on your confirmed employment with Union Carbide, Martin Marietta and Lockheed Martin at the Paducah Gaseous Diffusion Plant (PGDP) from October 3, 1955 through June 30, 1999, and a positive determination for asbestosis by a panel accepted by the Secretary of Energy under former Part D, the FAB found you to be a "covered DOE contractor employee" as defined by 42 U.S.C. § 7385s(1). As such, the FAB awarded you medical benefits for asbestosis in accordance with 42 U.S.C. § 7384t beginning on your May 15, 2002 Department of Energy filing date. The FAB deferred adjudication for wage-loss and/or impairment.

On September 8, 2005, the district office received your statement of intent to pursue a claim for impairment benefits. To determine your "minimum impairment rating" (the percentage rating representing the extent of whole person impairment, based on the organ and body functions affected by the covered condition and the extent of the impairment attributable to your covered condition), your case was referred for review to a Department of Labor Medical Consultant. The medical consultant used the American Medical Association's *Guides to the Evaluation of Permanent Impairment* and opined that you have a class 2 impairment classification with a range of 10-25% impairment (*See* AMA's *Guides to the Evaluation of Permanent Impairment*, 5th Ed. 2005). Given your physical

findings, current treatment and severely compromised activities of daily living (ADL), the medical consultant calculated your minimum impairment rating attributed to the accepted covered condition, asbestosis, to be 25%.

On November 8, 2005, the Cleveland district office issued a recommended decision finding that you are entitled to $2,500 for each of the twenty five percentage points the medical consultant found to be a result of the accepted covered illness. As such the district office concluded that you are entitled to compensation in the amount of $62,500.

On November 23, 2005, the FAB received written notification that you waive any and all objections to the November 8, 2005 recommended decision. On December 14, 2005, the FAB received your written confirmation that you have not received any settlement or award from a lawsuit or workers' compensation claim in connection with the accepted condition.

After considering the evidence of record and your waiver of objections, the FAB hereby makes the following:

FINDINGS OF FACT

1. You filed a claim under EEOICPA with the Department of Labor on July 31, 2001.

2. You filed a claim under EEOICPA with the Department of Energy on May 15, 2002.

3. A final decision was issued by the Department of Labor under Part E of the Act on March 22, 2005, concluding that you are a covered DOE contractor employee who contracted asbestosis due to work-related exposure to a toxic substance, and awarded you medical benefits for asbestosis commencing on your May 15, 2002 filing date.

4. Based on the 5th edition of the AMA's *Guides*, your minimum impairment rating due to asbestosis is calculated to be 25%.

5. You confirmed in writing that you never received any settlement or award from a lawsuit or workers' compensation claim in connection with the accepted condition.

Based on the above noted findings of fact, the FAB hereby also makes the following:

CONCLUSIONS OF LAW

The Final Adjudication Branch hereby finds that you have a permanent impairment that is the result of the accepted covered condition, asbestosis, and that your minimum impairment rating is calculated to be 25%. The FAB further finds that you are entitled to $2,500 for each percentage point of your minimum impairment rating attributed to the accepted condition. Therefore, the Final Adjudication Branch hereby concludes that you are entitled to compensation for impairment in the amount of $62,500 under 42 U.S.C. § 7382s-2(a)(1)(A) and (B).

In addition, the May 22, 2005 final decision awarded you medical benefits commencing on your May 15, 2002 Department of Energy filing. This decision should serve as a correction. Your entitlement to medical benefits is retroactive to the earliest date of filing and that would be the July 31, 2001 Department of Labor filing date. Accordingly, the Final Adjudication Branch hereby concludes that you are also entitled to medical benefits for asbestosis commencing on July 31, 2001.

Washington, DC

Vawndalyn B. Feagins

Hearing Representative

Final Adjudication Branch

Entitlement to

EEOICPA Fin. Dec. No. 10522-2004 (Dep't of Labor, November 14, 2003)

NOTICE OF FINAL DECISION

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

STATEMENT OF THE CASE

On September 24, 2001, you filed a Form EE-1 (Claim for Employee Benefits under the EEOICPA), based on skin cancer. A representative of the Department of Energy (DOE) verified that you engaged in covered employment at the Hanford site for General Electric from December 5, 1955 to November 8, 1957 and for J.A. Jones/Kaiser Engineers Hanford from September 13, 1960 to February 4, 1975, February 6, 1975 to October 11, 1976, and November 30, 1976 to September 30, 1987. The Hanford site is recognized as a covered DOE facility from 1942 to the present. *See* Department of Energy Worker Advocacy Facility List.

You provided a medical record summary from David L. Adams, M.D., of Tri-City Derm Management, Inc., that indicates you had surgical excisions diagnosed as basal cell carcinoma on the following twelve dates: December 14, 1977 (right sideburn area); March 17, 1982 (right anterior sideburn area); March 18, 1982 (right anterior sideburn area); March 23, 1982 (right anterior sideburn area); March 25, 1982 (right anterior sideburn area); March 29, 1982 (right anterior sideburn area); March 25, 1986 (right lateral face); September 16, 1986 (mid posterior chest); December 23, 1986 (right sideburn area); June 7, 1989 (right cheek of face); February 22, 1995 (right face) and March 8, 1995 (right side of face).

You submitted four operative reports related to your cancers as follows: March 17, 1982 (basal cell carcinoma); March 18, 1982 (Mohs microscopic controlled surgery – subsequent treatment. "The second layer shows cancer still present."); March 23, 1982 ("The third layer shows cancer still present."); and March 25, 1982 ("The 4^{th} layer shows cancer still present."). Also, you submitted five

pathology reports related to your cancer as follows: December 14, 1977 (basal cell epithelioma); February 22, 1995 ("Basosquamous carcinoma"); March 8, 1995 (ulcerated multifocal superficial basal cell carcimoma); December 21, 1995 (right pre-auricular basal cell carcinoma); and February 28, 1996 (basal cell carcinoma right lateral cheek skin). Further, you submitted a pathology report dated January 5, 1996 that diagnosed seborrheic keratosis, a non-covered condition. You also submitted chart notes dated February 28, 1996 that indicate "a large recurrent basal cell carcinoma on the right preauricular lateral cheek area," and "Right lateral cheek, preauricular skin." Consequently, the medical evidence includes a medical record summary, operative reports and pathology reports showing your diagnoses of skin cancer.

To determine the probability of whether you sustained these cancers in the performance of duty, the Seattle district office referred your claim to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction in accordance with § 30.115 of the EEOICPA regulations. *See* 20 C.F.R. § 30.115. The district office received the final NIOSH Report of Dose Reconstruction on October 22, 2003. *See* 42 U.S.C. § 7384n(d); 42 C.F.R. Part 82, § 82.26 (NIOSH report of dose reconstruction results). In its report, NIOSH indicated, in its "Dose Reconstruction Overview," that it performed radiation dose reconstructions on only four of your basal cell carcinomas that were diagnosed as follows: February 28, 1996 (left cheek); March 9, 1995 (auricular skin); March 9, 1995 (right side of the face); and March 17, 1982 (right sideburn area of the face).

Using the information provided in the Report of Dose Reconstruction, the Seattle district office utilized the Interactive RadioEpidemiological Program (IREP) to determine the probability of causation of your cancer and reported in its Recommended Decision that there was a 52.35% probability that your basal cell carcinoma of the skin was caused by radiation exposure at the INEEL site. The district office continued, in its recommended decision, that "Based on the dose reconstruction performed by NIOSH, the probability of causation (the likelihood that a cancer was caused by radiation exposure incurred by the employee while working at a DOE covered facility) was calculated for the four primary cancers."

On November 3, 2003, the Seattle district office recommended acceptance of your claim for compensation, and on November 7, 2003, the Seattle Final Adjudication Branch received written notification from you indicating that you waive any and all rights to file objections to the recommended decision.

FINDINGS OF FACT

1. You filed a claim for employee benefits on September 24, 2001.
2. You were employed at the Hanford site by General Electric from December 5, 1955 to November 8, 1957; and by J.A. Jones/Kaiser Engineers Hanford from September 13, 1960 to February 4, 1975, February 6, 1975 to October 11, 1976, and November 30, 1976 to September 30, 1987.
3. You are a covered employee as defined by § 7384l(9)(B) of the EEOICPA. *See* 42 U.S.C. § 7384l(9)(B).
4. You were diagnosed with multiple skin cancers.
5. Your cancer diagnoses were made after you began employment with the Department of Energy.
6. The NIOSH Interactive RadioEpidemiological Program indicated a 52.35% probability that your basal cell carcinoma was caused by radiation exposure at the Hanford site.
7. The dose reconstruction estimate was performed in accordance with § 7384n(d) of the EEOICPA and 42 C.F.R. Part 82. *See* 42 U.S.C. § 7384n(d); 42 C.F.R. Part 82 § 82.26.
8. The Probability of Causation was completed in accordance with § 7384n(c)(3) of the EEOICPA

and 42 C.F.R. Part 81. The calculation of the probability of causation was based on four basal cell carcinoma primary cancer sites and was completed in accordance with 42 C.F.R. Part 81. *See* 42 U.S.C. § 7384n(c)(3); 42 C.F.R. Part 81, Subpart E.

9. After determining that the probability of causation for your basal cell carcinoma was 50% or greater, NIOSH determined that sufficient research and analysis had been conducted to end the dose reconstruction as it was evident the estimated cumulative dose is sufficient to qualify you for compensation. Additional calculations of probability of causation were not required to be determined. *See* 42 C.F.R. § 82.10(k).

CONCLUSIONS OF LAW

The DOE verified your employment at the Hanford site by General Electric from December 5, 1955 to November 8, 1957; and by J.A. Jones/Kaiser Engineers Hanford from September 13, 1960 to February 4, 1975, February 6, 1975 to October 11, 1976, and November 30, 1976 to September 30, 1987.

The medical documentation submitted in support of your claim shows that you were diagnosed with skin cancer on December 14, 1977 (right sideburn area); March 17, 1982 (right anterior sideburn area); March 18, 1982 (right anterior sideburn area); March 23, 1982 (right anterior sideburn area); March 25, 1982 (right anterior sideburn area); March 29, 1982 (right anterior sideburn area); March 25, 1986 (right lateral face); September 16, 1986 (mid posterior chest); December 23, 1986 (right sideburn area); June 7, 1989 (right cheek of face); February 22, 1995 (right face) and March 8, 1995 (right side of face). Operative reports you submitted indicated cancer-related excisions on the following dates: March 17, 1982 (basal cell carcinoma); March 18, 1982 (Mohs microscopic controlled surgery – subsequent treatment. "The second layer shows cancer still present."); March 23, 1982 ("The third layer shows cancer still present."); and March 25, 1982 ("The 4th layer shows cancer still present."). You submitted pathology reports providing cancer diagnoses as follows: December 14, 1977 (basal cell epithelioma); February 22, 1995 ("Basosquamous carcinoma"); March 8, 1995 (ulcerated multifocal superficial basal cell carcimoma); December 21, 1995 (right pre-auricular basal cell carcinoma); and February 28, 1996 (basal cell carcinoma right lateral cheek skin).

Based on your covered employment at the Hanford site and the medical documentation showing diagnoses of multiple skin cancers, you are a "covered employee with cancer" under the EEOICPA. *See* 42 U.S.C. § 7384l(9)(B)(i).

The undersigned notes that there is no indication in the case file of diagnosis of an auricular skin cancer, on March 9, 1995, as indicated in the NIOSH Report of Dose Reconstruction. But, there is a diagnosis of a right pre-auricular basal cell carcinoma on December 21, 1995 as well as a reference to a basal cell carcinoma on the "right preauricular lateral cheek area" in the chart notes dated February 28, 1996**.** It is also noted that the IREP probability of causation results show that the auricular primary cancer was diagnosed in 1995, and that no month or day was used in the computer calculation of the results. Consequently, any discrepancy in the date of diagnosis of pre-auricular basal cell carcinoma in 1995 would not affect the outcome of this case.

To determine the probability of whether you sustained cancer in the performance of duty, the district office referred your claim to NIOSH for radiation dose reconstruction on January 10, 2002, in accordance with § 30.115 of the EEOICPA regulations. *See* 20 C.F.R. § 30.115. On October 22, 2003, the Seattle district office received the final NIOSH Report of Dose Reconstruction.

Using the information provided in the Report of Dose Reconstruction for basal cell carcinoma, the

district office utilized the Interactive RadioEpidemiological Program (NIOSH-IREP), pursuant to §§ 81.20, 81.21, 81.22, and 81.25 of the implementing NIOSH regulations, to determine a 52.35% probability that your cancer was caused by radiation exposure while employed at the Hanford site. *See* 42 C.F.R. §§ 81.20 (Required use of NIOSH-IREP), 81.21 (Cancers requiring the use of NIOSH-IREP), 81.22 (General guidelines for use of NIOSH-IREP), 81.25 (Guidelines for claims involving two or more primary cancers). The Final Adjudication Branch also analyzed the information in the NIOSH report, confirming the 52.35% probability. Thus, the evidence shows that your cancer was at least as likely as not related to your employment at the Hanford site and no further determinations of probability of causation were required.

You are a "covered employee with cancer," which is defined in § 7384l(9)(B)(i) and (ii) of the EEOICPA. *See* 42 U.S.C. § 7384l(9)(B)(i) and (ii). Pursuant to §§ 81.20, 81.21, 81.22, and 81.25 of the NIOSH implementing regulations, your cancer was at least as likely as not related to your employment at the Hanford site. *See* 42 C.F.R. §§ 81.20, 81.21, 81.22, and 81.25.

The record indicates that you filed Form EE-1, Claim for Employee Benefits under the EEOICPA, on September 24, 2001. The date you filed your claim is the date you became eligible for medical benefits for cancer. *See* 42 U.S.C. § 7384t(d).

Pursuant to Bulletin 03-24, if all primary cancers claimed have not gone through dose reconstruction when the 50% threshold has been reached, NIOSH will not complete dose reconstruction for the rest of the cancers. The calculation of additional POCs for the remaining primary cancers, which were not calculated, would only make the final numerical value of the POC larger, and all of the cancers, including those for which NIOSH did not perform a dose calculation, are covered for medical benefits. Consequently, you are entitled to compensation and medical benefits for skin cancer retroactive to September 24, 2001. *See* EEOICPA Bulletin No. 03-24 (issued May 2, 2003).

For the foregoing reasons, the undersigned hereby accepts your claim for skin cancer. You are entitled to compensation in the amount of $150,000 pursuant to § 7384s(a) of the Act. You are also entitled to medical benefits related to skin cancer, since September 24, 2001. *See* 42 U.S.C. § § 7384s, 7384t.

Seattle, WA

Rosanne M. Dummer, District Manager

Final Adjudication Branch Seattle

EEOICPA Fin. Dec. No. 22218-2003 (Dep't of Labor, May 8, 2003)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) 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 stated below, your claim for pneumoconiosis is accepted.

STATEMENT OF THE CASE

On April 29, 2003, the District Office issued a recommended decision concluding that you had received an award under § 5 of the Radiation Exposure Compensation Act, and that you are entitled to additional compensation in the amount of $50,000 pursuant to 42 U.S.C. § 7384u(a) for pneumoconiosis, the medical condition for which you received an award under the Radiation Exposure Compensation Act. The District Office's recommended decision also concluded that pursuant to 42 U.S.C. § 7384t, you are entitled to medical benefits from January 29, 2002 for the treatment of pneumoconiosis.

On May 7, 2003, the Final Adjudication Branch received your written notification waiving any and all objections to the recommended decision.

CONCLUSIONS OF LAW

The undersigned has thoroughly reviewed the case record and recommended decision and finds that it is in accordance with the facts and the law in this case. It is the decision of the Final Adjudication Branch that your claim is accepted.

DENVER, CO

May 8, 2003

Janet R. Kapsin

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 59062-2004 (Dep't of Labor, September 13, 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 (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the Final Adjudication Branch accepts and approves your claims for survivor compensation for the condition of chronic beryllium disease.

STATEMENT OF THE CASE

On June 2, 2003, the employee filed a claim for compensation under the EEOICPA based on asbestosis and other lung condition. That claim was recommended for denial by the Seattle district office; however, additional medical documentation was received by the Final Adjudication Branch, who vacated the recommended decision by Remand Order dated September 8, 2003. The district office performed additional development of the medical evidence and recommended acceptance of the claim and medical benefits for chronic beryllium disease and denial of the claim for asbestosis, which was affirmed by Final Decision of the Final Adjudication Branch on July 6, 2004. Before payment could be issued, however, the employee passed away on June 12, 2004, and the claim was administratively closed. On June 25 (**[Claimant 1, Claimant 2, and Claimant 3]**) and June 28 (**[Claimant 4]**), 2004, you filed claims for survivor benefits under the EEOICPA based on chronic beryllium disease (CBD). A Form EE-3 (Employment History) previously filed by the employee indicated he worked at the Idaho

National Environmental and Engineering Laboratory (INEEL) for Keiser Construction from January 1, 1954 to August 30, 1954 and for Phillips Petroleum, Idaho Nuclear, Aerojet General, and EG&G Idaho from October 1, 1954 to March 1, 1992. A representative of the Department of Energy (DOE) verified the worker's employment at INEEL from October 7, 1957 to March 2, 1992. INEEL is recognized as a covered DOE facility, from 1949 to the present, where the potential for beryllium exposure existed throughout the course of its operations because of beryllium use, residual contamination, and decontamination activities. *See* DOE, Office of Worker Advocacy, Facility List.

Medical evidence of record includes a chest x-ray and a CT scan, both dated October 13, 1992, that indicated the employee had multiple pleural plaques, and a chest x-ray, dated May 1, 2002, that indicated emphysematous changes within his lungs, densely calcified pleural plaques on the left lung, and scarring and associated bullous changes within the right lung base. In addition, the record includes a history of a clinical course of treatment of the employee for asbestosis and chronic obstructive pulmonary disease (COPD) dating from October 1992 to March 2003. The employee's pulmonary function test results, from October 13, 1992, showed an FVC of 3.62 and an FEV1 of 1.57, with an FEV1/FVC ratio of 43% before bronchodilators, and an FVC of 4.6 and FEV1 of 1.59 after bronchodilators. The employee's DLCO was markedly diminished at 11.77 or 35% of predicted.

District Medical Consultant Robert E. Sandblom, M.D., reviewed the employee's medical records, in a report dated January 5, 2004, and indicated the claimant had chest radiographic (or CT) abnormalities characteristic of CBD, restrictive or obstructive lung physiology testing or diffusing lung capacity defect, and a clinical course consistent with a chronic respiratory disorder.

You provided copies of your birth certificates that indicate each of you is the natural child of the employee, and copies of the certificates of marriage of **[Claimant 1]** and **[Claimant 4]** documenting your name changes. The file also contains a copy of the employee's certificate of death that indicates the employee was widowed when he passed away on June 12, 2004.

The Seattle district office determined that the employee was a covered beryllium employee as defined in § 7384l(7) of the EEOICPA. *See* 42 U.S.C. § 7384l(7). Further, the Seattle district office determined that the evidence submitted meets the criteria necessary to establish a diagnosis of chronic beryllium disease as defined by § 7384l(13), a covered occupational illness as defined by § 7384l(8)(B). *See* 42 U.S.C. § 7384l(8)(B) and (13). Also, the district office determined that you are the survivors of the employee, as defined by § 7384s(e)(3), and that you are entitled to compensation in the amount of $37,500.00 each pursuant to §§ 7384s(a)(1) and (e)(1) of the EEOICPA. *See* 42 U.S.C. § §7384s(a)(1) and (e)(1). In addition, the district office concluded that you are entitled to reimbursement of medical expenses for the employee's chronic beryllium disease, retroactive to the date he filed his claim, June 2, 2003, through June 12, 2004, the date he passed away.

FINDINGS OF FACT

1. The employee filed a claim for asbestosis and other lung condition, on June 2, 2003.

2. You filed claims for survivor benefits for chronic beryllium disease on June 25 (**[Claimant 1, Claimant 2, and Claimant 3]**) and June 28 (**[Claimant 4]**), 2004.

3. The employee was employed at INEEL, a covered DOE facility, from October 7, 1957 to March 2, 1992.

4. INEEL is recognized as a covered DOE facility, from 1949 to the present, where the potential for beryllium exposure existed throughout the course of its operations because of beryllium use, residual contamination, and decontamination activities.

5. The employee is a covered beryllium employee who worked at INEEL during a period when beryllium dust, particles or vapor may have been present.

6. The findings in the medical evidence are consistent with a diagnosis of chronic beryllium disease based on the statutory criteria for a diagnosis before January 1, 1993.

7. The onset of the employee's chronic beryllium disease on October 13, 1992, occurred after his exposure to beryllium in the performance of duty.

8. The employee passed away on June 12, 2004, and was not survived by a spouse.

9. You are the natural children and survivors of the employee.

CONCLUSIONS OF LAW

On August 20 (**[Claimant 4]**), August 23 (**[Claimant 2 and Claimant 1]**), and September 1 (**[Claimant 3]**), 2004, the Final Adjudication Branch received your written notifications that you waive any and all rights to file objections to the recommended decision.

In order to be afforded coverage under § 7384n(a) of the EEOICPA as a "covered beryllium employee," the employee must have worked for a beryllium vendor and sustained occupational exposure to beryllium while:

(1) employed at a Department of Energy facility; or

(2) present at Department of Energy facility, or a facility owned and operated by a beryllium vendor, because of employment by the United States, a beryllium vendor, or a contractor or subcontractor of the Department of Energy;

during a period when beryllium dust, particles, or vapor may have been present at such a facility. Further, the requisite exposure must be shown to have been "in the performance of duty," which is presumed, absent substantial evidence to the contrary. *See* 42 U.S.C. § 7384n(a); 20 C.F.R. § 30.205(1), (2) and (3).

In addition, there must be medical documentation of the condition in order to be eligible for survivor's benefits based on 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 radiograph (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 chronic respiratory disorder.

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

See 42 U.S.C. § 7384l(13)(B). Based on the employee's covered employment at a DOE facility, he was exposed to beryllium in the performance of duty. *See* 42 U.S.C. § 7384n(a).
The record contains medical evidence to show a diagnosis of CBD. Medical reports include a chest x-ray and a CT scan that are characteristic of chronic beryllium disease showing that the employee had multiple pleural plaques. The employee also had an abnormal pulmonary function test, and he was treated for lung disease over a period of years. A review of the employee's medical records by District Medical Consultant Robert E. Sandblom, M.D., dated January 5, 2004, indicated the claimant had abnormal chest radiographs characteristic of CBD, restrictive or obstructive lung physiology testing or diffusing lung capacity defect, and a clinical course consistent with a chronic respiratory disorder. This evidence satisfies a required three of five criteria for a diagnosis of chronic beryllium disease before January 1, 1993. *See* 42 U.S.C. § 7384l(13)(B). The medical evidence indicates that a diagnosis of chronic beryllium disease existed at least by October 13, 1992. Consequently, the Final Adjudication Branch has determined that sufficient evidence of record exists to accept your claims for chronic beryllium disease based on the statutory criteria for a diagnosis of chronic beryllium disease before January 1, 1993.

The record includes copies of each of your birth certificates indicating you are each a natural child of the employee, documentation showing the legal change of names of **[Claimant 1]** and **[Claimant 4]**, and a copy of the employee's death certificate that indicates he was widowed at the time of his death.

The employee was a "covered beryllium employee" as defined in § 7384l(7) of the Act, and was exposed to beryllium in the performance of duty as defined in § 7384n(a) of the EEOICPA. *See* 42 U.S.C. §§ 7384l(7); 7384n(a). Further, the medical evidence shows the presence of chronic beryllium disease, as provided for in § 7384l(13)(B) of the Act. *See* 42 U.S.C. § 7384l(13)(B).

For the foregoing reasons, the undersigned hereby accepts your claims for chronic beryllium disease. You are each entitled to compensation in the amount of $37,500.00 pursuant to § 7384s(e)(A) of the Act. *See* 42 U.S.C. § 7384s(e)(A). Further, you are entitled to reimbursement of medical expenses the employee may have incurred, retroactive to the date of his application on June 2, 2003, for the condition of chronic beryllium disease. *See* 42 U.S.C. § 7384t.

Seattle, Washington

James T. Carender

Hearing Representative, Final Adjudication Branch

EEOICPA Fin. Dec. No. 61108-2004 (Dep't of Labor, November 4, 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 stated below, your claims are accepted.

STATEMENT OF THE CASE

On December 21, 2001, **[Employee]**, (hereinafter referred to as the employee), filed a claim for benefits under the EEOICPA, Form EE-1, in which he indicated that he suffered from ulcers, thyroid problems, a kidney cyst and prostate cancer. On July 7, 2004, the employee filed a second claim for benefits, Form EE-1, in which he identified lung cancer with brain metastases as the medical condition being claimed. On the EE-3 form, the employee indicated that he worked at the Oak Ridge Gaseous Diffusion Plant (K-25) from April, 1957 until an unspecified date and that he worked at Y-12 from September of an unspecified year until September, 1995.[1] The Department of Energy verified that the employee worked at K-25 from May 27, 1957 until September 1, 1985 and at Y-12 from September 2, 1985 until September 29, 1995. The DOE also verified that the employee was monitored through the use of a dosimetry badge.

As part of the medical documentation that the employee submitted was a January 25, 2001 pathology report by Dr. Stephen C. Lawhorn, in which he diagnosed adenocarcinoma of the prostate, and a June 25, 2004 pathology report by Dr. Joseph B. Eatherly, in which he diagnosed large cell carcinoma of the left lung. On July 28, 2004, the district office issued a recommended decision, which concluded that as a member of the Special Exposure Cohort the employee was entitled to compensation and benefits for his specified lung cancer.

On August 10, 2004, **[Claimant 1]**, and on August 13, 2004, **[Claimant 2]**, **[Claimant 3]**, **[Claimant 4]** and **[Claimant 5]** each filed a claim for survivor benefits, Form EE-2. You each indicated on your EE-2 forms that your late father, the employee, died on August 1, 2004 from lung cancer with brain metastases. You submitted the following evidence in support of your claims as the employee's eligible surviving beneficiaries: the employee's death certificate, which indicated that he was divorced when he died on August 1, 2004; each of your birth certificates; **[Claimant 1]**'s, **[Claimant 3]**'s, and **[Claimant 4]**'s marriage certificates; and **[Claimant 5]**'s marriage certificates and divorce decrees.

On September 8, 2004, the Final Adjudication Branch (FAB) vacated the July 28, 2004 recommended decision and remanded the employee's claim to the district office for development of your survivor claims. On September 28, 2004, the district office issued a new recommended decision, which concluded that the employee suffered from lung cancer, that the employee was a member of the Special Exposure Cohort in that he worked at least 250 aggregate days at K-25 in a job that was monitored through the use of a dosimetry badge and that you were the employee's surviving beneficiaries. As such, the district office recommended that you each be entitled to $30,000 in survivor's compensation, in addition to medical benefits for medical bills that were incurred between July 7, 2004 and August 1, 2004 for treatment of the employee's lung cancer. The district office also concluded in their recommended decision that the employee's claimed conditions of ulcers, thyroid problems and a kidney cyst are not covered occupational illnesses under the Act. On October 5, 2004, **[Claimant 1]**, on October 6, 2004, **[Claimant 3]**, and on October 8, 2004, **[Claimant 2]**, **[Claimant 4]** and **[Claimant 5]** each submitted their waivers of objection to the recommended decision.

With regard to the employee's established prostate cancer, as this is not a specified cancer the district office submitted an application package to the National Institute for Occupational Safety and Health (NIOSH) for dose reconstruction on May 10, 2002, in accordance with § 30.115 of the implementing regulations. 20 C.F.R. § 30.115. The district office indicated in their new recommended decision that they were awaiting the NIOSH final report of dose reconstruction prior to determining whether or not the employee's prostate cancer was "at least as likely as not" related to his covered employment.

Therefore, based upon a review of the case file evidence, I make the following:

FINDINGS OF FACT

1. On December 21, 2001, and again on July 1, 2004, the employee filed a claim for benefits under the EEOICPA, Form EE-1.

2. The employee's employment from May 27, 1957 until September 1, 1985 at K-25 and from September 2, 1985 until September 29, 1995 at Y-12 was verified.

3. The employee provided medical evidence, which established that he was diagnosed with prostate cancer on January 25, 2001 and with lung cancer on June 25, 2004.

4. The employee's claimed conditions of ulcers, a kidney cyst and thyroid problems are not covered occupational illnesses under the Act.

5. On July 28, 2004, the district office issued a recommended decision, which concluded that the employee was entitled to compensation and medical benefits for lung cancer.

6. On August 10, 2004, **[Claimant 1]**, and on August 13, 2004, **[Claimant 2]**, **[Claimant 3]**, **[Claimant 4]** and **[Claimant 5]** each filed a claim for survivor benefits, Form EE-2.

7. On September 8, 2004, the FAB remanded the employee's claim to the district office for development of your survivor claims.

8. You established that you are the late employee's eligible surviving beneficiaries.

9. The district office issued a recommended decision on September 28, 2004, which concluded that you each were entitled to $30,000 in survivors' compensation, in addition to medical benefits for medical bills that were incurred between July 7, 2004 and August 1, 2004 for treatment of the late employee's lung cancer.

Therefore, based upon a review of the case file evidence, I make the following:

CONCLUSIONS OF LAW

Pursuant to § 7384l(15) of the Act, a covered occupational illness "means a covered beryllium illness, cancer referred to in § 7384l(9)(B) of this title, specified cancer, or chronic silicosis, as the case may be." 42 U.S.C. § 7384l(15). The late employee's claimed conditions of ulcers, a kidney cyst and thyroid problems are not covered occupational illnesses under the Act.

Pursuant to § 7384l(14)(A)(i) of the Act, a member of the Special Exposure Cohort (SEC) is defined as a Department of Energy employee, Department of Energy contractor employee, or atomic weapons employee who was employed for at least 250 aggregate workdays before February 1, 1992 at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, "and, during such employment (i) was monitored through the use of dosimetry badges for exposure at the plant of the external parts of the employee's body to radiation." 42 U.S.C. § 7384l(14)(A)(i). The evidence of record established that the employee worked at least 250 days during a covered time period at K-25 and that he worked in a job that was monitored through the use of a dosimetry badge. Therefore, the undersigned finds that the employee was a member of the SEC, pursuant to § 7384l(14)(A)(i) of the Act. Pursuant to § 30.5(dd)(5)(2) of the implementing regulations, lung cancer is considered a specified cancer provided that its onset occurred at least five years after the employee's first exposure to radiation. 20 C.F.R. § 30.5(dd)(5)(2). Additionally, pursuant to § 7384l(9)(A) of the Act, a covered employee with cancer is "an individual with a specified cancer who is a member of the Special Exposure Cohort, if and only if that individual contracted that specified cancer after beginning employment at a Department of Energy facility (in the case of a Department of Energy employee or Department of Energy contractor employee) or at an atomic weapons employer facility (in the case of an atomic weapons employee)." 42 U.S.C. § 7384l(9)(A). The evidence of record established that as a member of the SEC the employee was diagnosed with lung cancer more than five years after he began his employment at K-25. Therefore, the undersigned finds that the employee was a covered employee with cancer, pursuant to § 7384l(9)(A) of the Act.

The undersigned has reviewed the facts and the district office's September 28, 2004 recommended decision and finds that you each are entitled to $30,000 in survivor's compensation for the employee's lung cancer, pursuant to §§ 7384s(a), 7384s(e)(1)(A) of the Act, and that you are entitled to medical benefits for medical bills that were incurred between July 7, 2004 and August 1, 2004 for the treatment of the employee's left lung cancer, pursuant to § 7384t of the Act. 42 U.S.C. §§ 7384s(a), 7384s(e)(1)(A),7384t.

Washington, DC

Richard Koretz

Hearing Representative

[1] According to the Department of Energy's (DOE) Office of Worker Advocacy on the DOE website at http://tis.eh.doe.gov/advocacy/faclist/showfacility.cfm, Y-12 in Oak Ridge, TN is a covered DOE facility from 1942 to the present, and the Oak Ridge Gaseous Diffusion Plant (K-25) in Oak Ridge, TN is a covered DOE facility from 1943 to the present.

EEOICPA Fin. Dec. No. 10000216-2005 (Dep't of Labor, March 4, 2005)

NOTICE OF FINAL DECISION

This decision of the Final Adjudication Branch (FAB) concerns 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). Your claim for medical benefits under Part E of the Act is hereby accepted.

On February 24, 2005, the Jacksonville district office issued a recommended decision finding that you

are a covered employee and were employed at a Department of Energy (DOE) facility by a DOE contractor in accordance with 42 U.S.C. § 7385s(1); and that you are entitled to medical benefits in accordance with 42 U.S.C. § 7385s-8 for the condition of lung scarring related to asbestosis. Consequently, the district office concluded that you are entitled to medical benefits in accordance with 42 U.S.C. § 7385s-4(b). On March 3, 2005, the Final Adjudication Branch received your written notification that you waive any and all objections to the recommended decision.

The evidence of record establishes that your application meets the statutory criteria for compensability for medical benefits as defined in Part E of the EEOICPA. In this instance, the evidence confirms that you had covered employment with Union Carbide Corporation and Martin Marietta Energy Systems in Oak Ridge, Tennessee at the Y-12 plant from July 13, 1970 to March 30, 1975; at the K-25 gaseous diffusion plant from March 31, 1975 to July 31, 1982; and at the Y-12 plant from August 1, 1982 to September 15, 1994, and supports a causal connection between your condition and your work-related exposure to a toxic substance at a DOE facility. Specifically, the evidence of record establishes that a Physicians Panel review under former Part D of the EEOICPA has been completed, and that the Secretary of Energy accepted the Panel's affirmative determination of your covered illness at a DOE facility. This evidence establishes your entitlement to medical benefits under Part E of the EEOICPA.

The Final Adjudication Branch hereby finds that **[Employee]** is a covered employee as defined in 42 U.S.C. § 7385s(1), and contracted lung scarring related to asbestosis due to work-related exposure to a toxic substance at a DOE facility. Therefore, the Final Adjudication Branch hereby concludes that you are entitled to medical benefits effective November 8, 2001 under Part E of the EEOICPA for lung scarring related to asbestosis. Adjudication of your potential entitlement to additional compensation (based on wage loss and/or impairment) is deferred until after the effective date of the Interim Final Regulations.

Jacksonville, FL

Sidne M. Valdivieso

Hearing Representative

EEOICPA Fin. Dec. No. 10002490-2005 (Dep't of Labor, July 8, 2005)

FINAL DECISION FOLLOWING A REVIEW OF THE WRITTEN RECORD

This is a 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.* For the reasons set forth below, your claim is accepted in part and deferred in part. Since you submitted a letter of objection, but did not specifically request a hearing, a review of the written record was performed, in accordance with the implementing regulations. 20 C.F.R. § 30.312.

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, in accordance with the implementing regulations. 20 C.F.R. § 30.310. In reviewing any objections submitted, the Final Adjudication Branch will review the written record, any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case.

STATEMENT OF THE CASE

On December 16, 2001, according to the Paducah Resource Center, you filed a Claim for Benefits under the EEOICPA, for beryllium sensitivity, chronic beryllium disease, brain tumor, bronchitis, and pneumonia. On the Form EE-3, Employment History, you stated you were employed as a senior lab analyst by Union Carbide and Martin Marietta at the gaseous diffusion plant in Paducah, Kentucky, for the period of January 7, 1975 to January 19, 1986. The evidence of record establishes you worked for Union Carbide and Martin Marietta at the gaseous diffusion plant in Paducah, Kentucky, for the period of January 7, 1975 to January 19, 1986.
A previous Final Decision was issued by the Department of Labor on May 29, 2002, denying your claim for compensation because you did not provide medical evidence sufficient to establish a diagnosis of an occupational illness under the Act. 42 U.S.C. § 7384l(15).

You submitted medical evidence establishing you were diagnosed with bronchitis and pneumonia. A Physicians Panel review under former Part D of the Act has been completed. The Secretary of Energy accepted the Panel's affirmative determination that your bronchitis and pneumonia were due to exposure to a toxic substance at a DOE facility. This supports a finding that you contracted your illnesses through your exposure to a toxic substance at the gaseous diffusion plant in Paducah,

Kentucky, a DOE facility. 42 U.S.C. § 7385s-4(b). On September 28, 2004, the DOE advised you of the Panel's affirmative determination.

On January 31, 2005, you were contacted by the Jacksonville district office and requested to provide additional information. You indicated that you had not received any settlement or award from a lawsuit or workers' compensation claim in connection with the accepted condition.

On March 7, 2005, the Jacksonville district office issued a recommended decision concluding that you are entitled to medical benefits for bronchitis and pneumonia beginning December 16, 2001.

Attached to the recommended decision was a notice of claimant rights, which stated that you had 60 days in which to file an objection to the recommended decision and/or request a hearing. These 60 days expired on May 6, 2005. On April 8, 2005, the Final Adjudication Branch received your letter of objection dated March 29, 2005.

OBJECTIONS

In the letter of objection, you stated that you agreed with the positive determination for bronchitis and pneumonia but disagreed with the negative determination for brain tumor. However, the recommended decision did not address your claim for brain tumor and noted that conditions not accepted by the physicians' panel will be deferred for additional development. The information you submitted will be included in your case file for future reference during development and adjudication of any additional entitlement.

FINDINGS OF FACT

1. On December 16, 2001, you filed a Form EE-1, Claim for Benefits under the EEOICPA, for beryllium sensitivity, chronic beryllium disease, brain tumor, bronchitis, and pneumonia.

2. The evidence of record establishes you worked for Union Carbide and Martin Marietta at the gaseous diffusion plant in Paducah, Kentucky, for the period of January 7, 1975 to January 19, 1986.

3. You submitted medical evidence establishing you were diagnosed with bronchitis and pneumonia. A Physicians Panel review under former Part D of the Act has been completed. The Secretary of Energy accepted the Panel's affirmative determination that your bronchitis and pneumonia were due to exposure to a toxic substance at a DOE facility. This supports a finding that you contracted your illnesses through your exposure to a toxic substance at the gaseous diffusion plant in Paducah, Kentucky, a DOE facility. On September 28, 2004, the DOE advised you of the Panel's affirmative determination.

4. You indicated that you had not received any settlement or award from a lawsuit or workers' compensation claim in connection with the accepted condition.

5. On March 7, 2005 the Jacksonville district office issued a recommended decision.

6. On April 8, 2005, the Final Adjudication Branch received your letter of objection dated March 29, 2005. The objections are insufficient to warrant a change to the recommended decision.

CONCLUSIONS OF LAW

The undersigned has reviewed the record, the recommended decision issued by the Jacksonville district office on March 7, 2005, and the subsequently submitted objections. I find that the decision of the Jacksonville district office is supported by the evidence and the law, and cannot be changed.

The Final Adjudication Branch has reviewed the record and the recommended decision of March 7, 2005 and concludes that you were a DOE contractor employee with bronchitis and pneumonia due to exposure to a toxic substance at a DOE facility. 42 U.S.C. §§ 7385s(1), 7385s-4. Therefore, the Final Adjudication Branch hereby concludes that you are entitled to medical benefits for bronchitis and pneumonia effective December 16, 2001. 42 U.S.C. § 7385s-8.

Jacksonville, FL

Sidne M. Valdivieso

Hearing Representative

Termination of

EEOICPA Fin. Dec. No. 5781-2002 (Dep't of Labor, September 12, 2006)

NOTICE OF FINAL DECISION FOLLOWING A REVIEW OF THE WRITTEN RECORD

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 stated below, your claim for benefits is denied, effective June 4, 2003.

STATEMENT OF THE CASE

On August 2, 2001, you filed a Form EE-1 (Claim for Benefits under EEOICPA) based on beryllium sensitivity. You provided a copy of a report of Proliferation Studies, dated March 6, 1998, stated that a significant proliferative response to beryllium salts was observed. The Department of Energy (DOE) verified that you worked at the Beryllium Corporation of America in Reading, PA, from January 13, 1960 to February 28, 1993. The Beryllium Corporation of America in Reading, PA, is recognized as a covered beryllium vendor from 1947 to 1979. *See* DOE, Office of Worker Advocacy, Facility List.

On July 29, 2002, the Cleveland district office received a completed Form EN-15, signed and dated by you on July 24, 2002. In response to a question on that form, you stated that you had not filed a tort suit against a beryllium vendor in connection with an occupational illness for which you would be eligible to receive compensation under the EEOICPA. Above your signature, that form notified you that you must immediately report to OWCP (Office of Workers' Compensation Programs) any third party settlements you receive and any tort suits you file against a beryllium vendor.

On October 29, 2002, the Final Adjudication Branch (FAB) issued a final decision which concluded that, because you are a covered beryllium employee who had been found to have beryllium sensitivity, you were entitled to beryllium sensitivity monitoring beginning on August 2, 2001.

On June 4, 2003, you and approximately 50 other plaintiffs filed a tort suit against the Beryllium Corporation of America and its successors in the Court of Common Pleas of Philadelphia County, PA. Paragraph 55 of the complaint stated that the plaintiffs "resided and/or worked in close proximity to the plant, commuted to and/or worked within the plant. . . ." Paragraph 65 stated that "[d]uring each of the plaintiffs' residence and/or employment. . .they were exposed to unlawful, dangerous and unhealthful emissions of beryllium resulting in serious and permanent injury, or the need for medical monitoring. . . ." Under Count I (Paragraph 80) of that suit, you alleged that, as a direct and proximate result of the negligence, carelessness, and recklessness, of the defendants, you sustained, "occupational and non-occupational exposure resulting in beryllium sensitivity," for which you demanded "judgment against the defendants. . .in an amount in excess of Fifty Thousand ($50,000) Dollars."

The complaint was dismissed by the court on August 5, 2003. The court ruled that the complaint had improperly joined multiple unrelated plaintiffs and ordered that the plaintiffs be severed. You filed an amended complaint on September 18, 2003, and second and third amended complaints in April and May 2004. Each amended complaint alleged damages from your occupational exposure to beryllium. No evidence has been received to show that this tort suit has been dismissed.

The tort suit was reviewed by the Counsel for Energy Employees Compensation, Division of Federal Employees' and Energy Workers' Compensation. The Counsel reported in a memorandum dated January 4, 2005, that an examination of your complaint revealed that your claims relied, at least in part, on your exposure to beryllium while working at the Reading plant and that your wife's consortium claim was derivative of your work-related exposure to beryllium. For that reason, it was determined that at least some aspects of your suit clearly fall within the statutory definition of a covered tort case subject to 42 U.S.C. § 7385d, because it includes claims against beryllium vendors that arise out of the exposure of a covered beryllium employee, while so employed, to beryllium.

The Counsel further noted that 42 U.S.C. § 7385d(c) explicitly bars further receipt of benefits under Part B of the Act by any beneficiary who files a tort suit covered under 42 U.S.C. § 7385d(d) after April 30, 2003, if that date is more than 30 months after the diagnosis of a covered beryllium disease. Because you filed your suit on June 4, 2003, you could not have dismissed that suit within the time limits specified in 42 U.S.C. § 7385d(c). For those reasons, the Counsel determined that you no longer had any eligibility for benefits under Part B of the Act, by operation of law, as of June 4, 2003.

The Counsel also noted that a claimant who accepts EEOICPA benefits has legal obligations under the Act. At the time you accepted benefits, you had signed a Form EN-15 and certified that you knew you must immediately report to OWCP any tort suit you filed against a beryllium vendor.

On March 28, 2006, the Director, Division of Energy Employees Occupational Illness Compensation (DEEOIC), issued an order vacating the final decision of October 29, 2002, and directing the Cleveland district office to issue a new recommended decision terminating entitlement to benefits under EEOICPA effective June 4, 2003. On April 19, 2006, the district office issued a recommended decision pursuant to the Director's order.

OBJECTIONS

On June 16, 2006, the Final Adjudication Branch received your statement of objection to the recommended decision. You presented the following objections:

1. You argue that bases for your claims in your tort suit are environmental in nature.

2. You argue that a Memorandum Opinion of an Associate Solicitor for Employee Benefits in the matter of **[Name Deleted]** affirmed that a claimant can maintain both a claim under the EEOICPA for occupational exposure to beryllium and a separate tort suit for environmental exposure to beryllium

3. You argue that your complaint is identical to the one filed by **[Name Deleted]**, Docket No. 12401-2002, who brought an exposure claim as a result of the operations of the Reading plant. You state that your and **[Name Deleted]** lawsuits are identical and that **[Name Deleted]** was awarded benefits by the Final Adjudication Branch.

While a claimant may maintain a claim under the EEOICPA based on occupational exposure to beryllium and a separate tort suit based on environmental exposure to beryllium, your tort suit specifically alleges occupational and environmental exposure to beryllium. A review of **[Name Deleted]**'s suit fails to reveal any reference to occupational exposure as the basis of his claim for damages. For that reason, your tort suit and **[Name Deleted]**'s tort suit are not identical.

Because your complaint and demand for damages relies, at least in part, on your exposure to beryllium while working at the Reading plant, and because your wife's consortium claim is derivative of your work-related exposure to beryllium, your suit is a "covered tort case" under the provisions of 42 U.S.C. § 7385d(d). As such, 42 U.S.C. § 7385d(c) requires that your suit must be dismissed no later than April 30, 2003; as that date is later than the date that is 30 months from the date you were determined to have been sensitized to beryllium. (Beryllium sensitivity was first identified on March 6, 1998. September 6, 2000, is 30 months from that date.)

FINDINGS OF FACT

1. You were awarded medical monitoring for beryllium sensitivity, effective August 2, 2001, by final decision issued on October 29, 2002.

2. You filed a tort suit on June 4, 2003, against a beryllium vendor based on injuries incurred on account of exposure for which you had been found to be entitled to compensation under Part B of the Act in the form of medical monitoring for beryllium sensitivity.

3. The Director, DEEOIC, vacated the final decision of October 29, 2002.

CONCLUSIONS OF LAW

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, pursuant to 20 C.F.R. § 30.310. In reviewing any objections submitted, the FAB will review the written record, in the manner specified in 20 C.F.R. § 30.313, to include any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. I have reviewed the record in this case, as well as the written objections and must conclude that no further investigation is warranted.

I find that the tort suit you and your wife filed on June 4, 2003, against a beryllium vendor, is a "covered tort suit" as defined by 42 U.S.C. § 7385d(d). Because you could not have dismissed that suit by the latest date provided by 42 U.S.C. § 7385d(c)(3), April 30, 2003, I find that you are no longer entitled to medical monitoring for beryllium sensitivity effective June 4, 2003.
Cleveland, OH

Anthony Zona

Hearing Representative

Final Adjudication Branch

Offset of Benefits

Effect of surplus

EEOICPA Fin. Dec. No. 10008601-2006 (Dep't of Labor, March 20, 2009)

NOTICE OF FINAL DECISION FOLLOWING A REVIEW OF THE WRITTEN RECORD

This decision of the Final Adjudication Branch (FAB) concerns the above claim under Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claim for impairment benefits under Part E is accepted.

STATEMENT OF THE CASE

On March 4, 2003, the employee filed Form EE-1, claiming for benefits under EEOICPA for asbestosis (among other conditions). On November 4, 2008, FAB issued a Final Decision accepting the Part E claim for the covered illness of asbestosis and awarding medical benefits for asbestosis, subject to the absorption of a surplus of $22,466.37.[1]
The employee subsequently filed a claim for impairment benefits for his accepted asbestosis on December 4, 2008 and selected a private physician to perform the impairment rating. In a December 15, 2008 report, Dr. Norm Walton rated the employee's impairment based on his asbestosis and calculated that the employee's whole body impairment was 10%, in accordance with the Fifth Edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA's *Guides*). Dr. Walton indicated that the employee's asbestosis had reached maximum medical improvement and listed the tables and pages from the AMA's *Guides* used in the rating.
The employee indicated that he had not received any additional settlement or award from a tort suit or

state workers' compensation claim in connection with the covered illness of asbestosis.

On December 24, 2008, the Jacksonville district office issued a recommended decision to accept the employee's impairment claim in the amount of $2,533.63 for a 10% whole body impairment due to his asbestosis, after absorbing the outstanding surplus of $22,466.37.

On January 6, 2009, FAB received the employee's objection letter, which is discussed below.

OBJECTION

In the objection letter, the employee's attorney questioned the recommendation to absorb the surplus by deducting it from the gross amount of the impairment award. The attorney argued that the surplus should not be absorbed out of the gross amount of the employee's impairment benefits for asbestosis because the tort suit recovery that required an offset of EEOICPA benefits (and the resulting surplus) concerned the exposures that led to the development of both the employee's asbestosis and his colon cancer. In support of this argument, the attorney referred to the exception to the required coordination of Part E benefits with state workers' compensation benefits when the beneficiary of those state workers' compensation benefits receives them for an illness other than the "covered illness" under Part E, or for both a covered and a non-covered illness.[2]

However, the exceptions referenced by the employee's attorney in support of his argument that the surplus remaining after the required offset to reflect the employee's tort recovery should not be absorbed out of this impairment award involve an entirely separate and distinct statutory requirement, that being the requirement to coordinate Part E benefits with certain types of state workers' compensation benefits received for the same covered illness. As a result, the statutory and regulatory rules governing the coordination of Part E benefits are obviously different from those governing the offset of EEOICPA benefits to reflect certain tort recoveries and cannot be applied as the attorney suggests. *See* 42 U.S.C §§ 7385, 7385s-11; 20 C.F.R §§ 30.505, 30.626 (2008).

Section 7385 of EEOICPA specifically states that a payment of compensation to an individual, or to a survivor of that individual, shall be offset by the amount of any payment made pursuant to a final award or settlement on a claim (other than a claim for workers' compensation), against any person, that is based on injuries incurred by that individual *on account of the exposure for which compensation is payable under EEOICPA*. Please remember that the basis of the tort suit that resulted in the recovery that was used to calculate the offset (and the remaining surplus that is the focus of this objection), as noted by FAB in the November 4, 2008 Final Decision, was for asbestos exposure—the very same exposure used to accept the employee's asbestosis claim.

Furthermore, the regulations establish that the EEOICPA benefits that will be reduced to reflect an offset consist of any unpaid payments payable in the future. *See* 20 C.F.R. § 30.505(b)(2)(iii). Therefore, the district office's recommendation that the outstanding surplus be absorbed by using it to reduce the amount of impairment benefits payable to the employee is consistent with both the statute and the regulations.

After considering the evidence in the case file and the objection to the recommended decision of the district office, FAB hereby makes the following:

FINDINGS OF FACT

1. The employee filed a claim for impairment benefits under Part E based on the covered illness of asbestosis.

2. A previous Final Decision accepted the employee's claim for asbestosis and awarded him medical benefits under Part E for that illness, subject to the outstanding surplus in the amount of $22,466.37.

3. The employee's whole body impairment due to asbestosis is 10%.

Based on the above-noted findings of fact, FAB also hereby makes the following:

CONCLUSIONS OF LAW

I have reviewed the evidence of record and the recommended decision and I conclude that the employee was a DOE contractor employee with asbestosis due to exposure to a toxic substance (asbestos) at a DOE facility. 42 U.S.C. §§ 7385s(1), 7385s-4(b). The medical evidence of record establishes that the employee has a whole body impairment of 10% as result of the covered illness of asbestosis. 20 C.F.R. § 30.900.

The gross amount of impairment benefits payable for a whole body impairment of 10% would be $25,000.00.[3] However, because an outstanding surplus of $22,466.37 exists and must be absorbed out of this gross amount, the net amount of compensation awarded to the employee for his permanent impairment is $2,533.63.

Jacksonville, FL

Wendell Perez

Hearing Representative

Final Adjudication Branch

[1] In another Final Decision dated May 4, 2007, FAB awarded the employee impairment benefits for the covered illnesses of colon cancer and bladder cancer.

[2] Federal (EEOICPA) Procedure Manual, Chapter E1000.5.a (September 2005).

[3] The number of percentage points multiplied by $2,500.00 results in a gross award of $25,000.00. *See* 20 C.F.R. § 30.902.

EEOICPA Fin. Dec. No. 10014306-2006 (Dep't of Labor, August 23, 2006)

FINAL DECISION

This decision of the Final Adjudication Branch (FAB) concerns your claim for compensation benefits under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended, 42 U.S.C. § 7384 *et seq.* (EEOICPA or the Act). Your claim under Part E of the Act is hereby accepted as compensable for medical benefits for asbestosis (subject to absorption of a surplus due to a tort settlement) and chronic obstructive pulmonary disease (COPD), and denied for medical benefits for beryllium sensitivity and chronic beryllium disease (CBD).

STATEMENT OF THE CASE

On September 17, 2002 and August 2, 2004, you filed Claims for Benefits under EEOICPA, claiming benefits for the conditions of asbestosis, beryllium sensitivity, and chronic beryllium disease.

On the Form EE-3, Employment History, you stated you were employed as an insulator at the Savannah River Site in Aiken, South Carolina, from 1982 to 2002. The district office verified that you worked for DuPont at the Savannah River Site from May 16, 1983 to October 21, 1983; January 29, 1985 to June 11, 1997; and August 13, 1997 to December 2, 2002.

You submitted medical evidence establishing you were diagnosed with asbestosis on August 12, 1982 and chronic obstructive pulmonary disease (COPD) on July 13, 1983. You did not submit any medical evidence that provided a diagnosis of beryllium sensitivity or chronic beryllium disease. A positive Physicians Panel report determined that you were diagnosed with asbestosis prior to employment at the Savannah River Site, but the employment by a contractor at the Department of Energy (DOE) facility likely contributed to your illness.

The district office performed a search of the U. S. Department of Labor Site Exposure Matrices (SEM). The source documents used to compile SEM establish that an insulator could have been exposed to asbestos and borosilicates at the Savannah River Site, and that asbestosis is a specific health effect of exposure to asbestos. The district office also referred the medical evidence of record to a district medical consultant (DMC) for an opinion.

On July 20, 2006, the Jacksonville district office recommended acceptance of your claim for compensation under Part E of the Act, finding that your diagnosed asbestosis and COPD were covered illnesses caused by exposure to a toxic substance in the course of your employment at the Savannah River Site. The recommended decision found that you are entitled to compensation for medical benefits for asbestosis, less an offset amount of $12,235.01 for payments received from a lawsuit. The offset surplus is to be paid down by any medical benefits due for asbestosis from the date of filing until the surplus is absorbed. The district office also recommended acceptance of your claim for medical benefits for COPD, and denial of your claim for beryllium sensitivity and chronic beryllium disease under Part E of the Act.

On July 25, 2006, the Final Adjudication Branch received written notification that you waived any and all objections to the recommended decision.

FINDINGS OF FACT

1. On September 17, 2002, you filed a claim under the Act for asbestosis, beryllium sensitivity, and chronic beryllium disease.

2. You were diagnosed with asbestosis on August 12, 1982 and COPD on July 13, 1983.

3. You were employed by DuPont at the Savannah River Site from May 16, 1983 to October 21, 1983; January 29, 1985 to June 11, 1997; and August 13, 1997 to December 2, 2002, and were exposed to asbestos during this employment.

CONCLUSIONS OF LAW

I have reviewed the evidence of record and the recommended decision.

You were employed as a covered DOE employee at a covered DOE facility for more than one year and were exposed to asbestos during that employment. Your asbestosis was diagnosed prior to first exposure at a DOE facility, but was contributed to by that exposure. Based upon a review of the case file materials, the U.S. Department of Labor Site Exposure Matrices (SEM), and the opinion of the district medical consultant, the evidence of record establishes that it is at least as likely as not that exposure to asbestos at the Savannah River Site was a significant factor in aggravating, contributing to or causing your asbestosis, and it is at least as likely as not that the exposure to asbestos was related to your employment at the Savannah River Site. 42 U.S.C. § 7385s-4(c). Therefore, I conclude that you are entitled to medical benefits for asbestosis retroactive to September 17, 2002. 42 U.S.C. § 7385s-8.

However, under § 7385 of the Act, a payment of compensation to an individual shall be offset by the amount of any payment made pursuant to a final award or settlement on a claim against any person, that is based on injuries incurred by that individual on account of the exposure for which compensation is payable. 42 U.S.C. § 7385. The evidence of record indicates that you have received settlements totaling $20, 273.11, with a resulting surplus of $12,235.01. This surplus will be absorbed out of medical benefits payable for asbestosis under the Act (and any further lump-sum payments due in the future in Part E claims).

The district office submitted the medical evidence of record to a district medical consultant (DMC) for review. In his report of June 13, 2006, Dr. John Ellis stated that COPD was due to exposures to toxic substances at the Savannah River Site, including asbestos and borosilicates. Based upon a review of the case file materials, and the district medical consultant's report, the evidence of record establishes that it is at least as likely as not that exposure to toxic substances at the Savannah River Site was a significant factor in aggravating, contributing to or causing your COPD, and it is at least as likely as not that the exposure to toxic substances was related to your employment at the Savannah River Site. 42 U.S.C. § 7385s-4(c). Therefore, I conclude that you are entitled to medical benefits for COPD retroactive to September 17, 2002. 42 U.S.C. § 7385s-8.

Beryllium sensitivity is established by an abnormal beryllium lymphocyte proliferation test (LPT) or a diagnosis of beryllium sensitivity. You have not submitted any LPT results or a diagnosis of beryllium sensitivity. The medical evidence is insufficient to establish that you were diagnosed with the claimed condition of beryllium sensitivity. 20 C.F.R. § 30.207. Therefore, you are not entitled to medical benefits under Part E of the Act for beryllium sensitivity.

There is no medical evidence to establish that you were diagnosed with the claimed condition of chronic beryllium disease. 20 C.F.R. § 30.207. Therefore, you are not entitled to compensation or medical benefits under Part E of the Act for that condition.

Jacksonville, FL

Sidne M. Valdivieso

Hearing Representative

In general

EEOICPA Fin. Dec. No. 18655-2002 (Dep't of Labor, December 15, 2005)

ATTENTION *** ATTENTION *** ATTENTION
The FAB decision or order you are about to view is no longer considered to be of precedential value and will not be considered binding on DEEOIC in its adjudication of future claims under the EEOICPA. This could have occurred because a later FAB decision was issued that overturned one or more of the conclusions of law contained in this decision or order, or because a portion of the EEOICPA relevant to this decision was amended by Congress after it was issued by the FAB. Even though the FAB decision or order you are about to view is no longer considered to be of precedential value, it has been retained in the database you are searching to document that there has been a change.

NOTICE OF FINAL DECISION

This is a 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.[1] A copy of this decision is being sent to your power of attorney.

STATEMENT OF THE CASE

On April 4, 2005, you filed a Form EE-2, Claim for Survivor Benefits, for the chronic beryllium disease (CBD) of your late spouse, **[Employee]**, hereinafter referred to as "the employee." Previously, you filed a Request for Review by Medical Panels for the asbestosis of the employee.

On the Form EE-3, Employment History, you stated the employee was employed as a senior production supervisor by Dupont at the Savannah River Site in Aiken, South Carolina, for the period of January 1953 through December 31, 1985. The Jacksonville district office found the employee worked at the Savannah River Site for the period of January 26, 1953 through December 31, 1953.

The medical evidence in the case file includes a September 2, 1993 chest x-ray report that shows interstitial pulmonary fibrosis and a November 19, 1993 CT scan report that shows local interstitial fibrosis. The file also includes a report of a pulmonary function test performed on March 29, 1994 that shows a mild obstruction. The medical evidence also shows the employee had chronic obstructive lung disease, a chronic respiratory disorder, since October 1992.

In support of your claim for survivorship, you submitted your marriage certificate, showing you married the employee on August 20, 1949, and the employee's death certificate, showing you were the employee's spouse on the date of his death, May 4, 1997.

A Physicians Panel review under former Part D of the Act was completed. The Secretary of Energy accepted the Panel's affirmative determination that the employee's asbestosis and chronic obstructive pulmonary disease (COPD) were due to exposure to a toxic substance at a DOE facility. On April 22, 2005, the DOE advised you of the Panel's affirmative determination.

The employee's death certificate shows that the cause of his death was cardiac arrest as a consequence of hypoxemia due to pulmonary fibrosis as a consequence of asbestosis.

On May 25, 2005, the Jacksonville district office issued a recommended decision, concluding that you are entitled to survivor benefits in the amount of $125,000 for the employee's death caused by asbestosis.

On June 1, 2005, the Final Adjudication Branch received written notification from your power of attorney that you waived any and all objections to the recommended decision. The power of attorney also informed the Final Adjudication Branch that you had received settlements from several manufacturers of asbestos for the death of the employee.

On June 3, 2005, the claim was remanded for additional development because the Final Adjudication Branch had received evidence that that you had received a lawsuit settlement that may require offset.

On August 10, 2005, the Jacksonville district office received documentation of the third party settlements received by you for the employee's asbestos exposure. The documentation included the Summons for Relief and Complaint, filed on November 5, 1996, and an accounting of the gross settlement in the amount of $47,873.50.

The settlement was paid to the estate of the employee and to you as the spouse and to your daughter; therefore, the district office applied a standard allocation of 50% to the award and subtracted a percentage for the costs of the suit and the attorney's fees, which left a net settlement of $13,789.85. This amount was used to reduce your EEOICPA survivor benefits of $125,000, which left a balance of $111,210.16 due to you.

On October 7, 2005, the Jacksonville district office issued a recommended decision, concluding that you are entitled to survivor benefits of $125,000, less a $13,789.85 offset, for a total of $111,210.16 for the employee's asbestosis and COPD.
On October 12, 2005, the Final Adjudication Branch received written notification that you waived any and all objections to the recommended decision of October 7, 2005.

On November 17, 2005, the Jacksonville district office issued a recommended decision, concluding that you are entitled to $150,000 in survivor benefits for the employee's CBD.

On November 25, 2005, the Final Adjudication Branch received written notification that you waived any and all objections to the recommended decision of November 17, 2005.

FINDINGS OF FACT

1. On April 4, 2005, you filed a Form EE-2, Claim for Survivor Benefits, for the CBD of your late spouse. You also filed a Request for Review by Physicians Panel for the asbestosis of your late spouse.

2. The employee was employed by Dupont at the Savannah River Site in Aiken, South Carolina, for the period of January 26, 1953 through December 31, 1953. Beryllium was present at this facility during the time of this employment.

3. A Physicians Panel review under former Part D of EEOICPA has been completed and the Secretary of Energy accepted the Panel's affirmative determination that your spouse's asbestosis and COPD were due to exposure to a toxic substance at a DOE facility.

4. The employee's death certificate shows that the immediate cause of his death was cardiac arrest as a consequence of hypoxemia due to pulmonary fibrosis as a consequence of asbestosis. Therefore, asbestosis is established as contributing to the employee's death.

5. Third party settlements for the employee's asbestosis were received in the gross amount of $47,873.50.

CONCLUSIONS OF LAW

The Final Adjudication Branch has reviewed the record and the recommended decision of October 7, 2005, and concludes that the employee was a DOE contractor employee with asbestosis and COPD due to exposure to a toxic substance at a DOE facility and that asbestosis caused his death. 42 U.S.C. §§ 7384s(1), 7385s-4. Under the Act, you are the covered spouse and survivor. 42 U.S.C. §§ 7835s-3(d)(1), 7385s-3(c)(1).

A gross settlement was received from third parties for the employee's asbestos exposure which must be used to offset your entitlement to survivor benefits in the amount of $125,000. 42 U.S.C. §§ 7385, 7385s-3(a)(1). The Final Adjudication Branch has independently computed the amount of the offset using the EEOICPA Part B/E Benefits Offset Worksheet, and finds the net settlement amount to be $13,789.96. 20 C.F.R. § 30.505. Therefore, the Final Adjudication Branch concludes that you are entitled to survivor benefits in the amount of $111,210.04 for the employee's asbestosis. 42 U.S.C. § 7385s-3(a)(1).

Further, the Final Adjudication Branch has reviewed the medical evidence and finds that it is sufficient to establish that the employee had CBD. Under Part B of the Act, CBD may be 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 case file does not contain evidence to establish a diagnosis of beryllium sensitivity, therefore the criteria for a diagnosis of CBD after January 1, 1993 cannot be met.

Applying the criteria for a diagnosis of CBD prior to the 1993, the evidence in the case file includes a September 2, 1993, chest x-ray report that shows interstitial pulmonary fibrosis and a November 19, 1993, CT scan report that shows local interstitial fibrosis. These findings are characteristic chest radiographic abnormalities of CBD which meets criteria I. The file also includes a report of a pulmonary function test taken on March 29, 1994, that shows a mild obstruction that meets criteria II; and the employee is shown to have a clinical course consistent with a chronic respiratory disorder since October 1992 which meets criteria IV. Therefore, the evidence in the case file meets three of the criteria for a diagnosis of CBD before January 1, 1993 and a diagnosis of CBD is established under the Act.

The record and the recommended decision of November 17, 2005 have been reviewed and the employee is a covered beryllium employee, as that term is defined in the Act; and the employee's CBD is a covered occupational illness under Part B of the Act and implementing regulations.
42 U.S.C. §§ 7384l(7), 7384l(13), 20 C.F.R. § 30.207.

The November 17, 2005 recommended decision is in accordance with the facts and the law in this case, and you are entitled to lump-sum survivor benefits in the amount of $150,000 for the employee's chronic beryllium disease, pursuant to Part B of the Act. 42 U.S.C. § 7384s(a).

Jacksonville, FL

J. Mark Nolan

Hearing Representative

[1] This is the third decision on your claim by the Final Adjudication Branch (FAB). On July 22, 2002, the FAB denied your claim for the reason that the evidence in the case file did not establish that the employee had an occupational illness

covered under the Act. On June 3, 2005, the claim was remanded for additional development because the FAB had received evidence that you had received a lawsuit settlement that may require offset.

EEOICPA Order No. 10074228-2009 (Dep't of Labor, September 30, 2010)

REMAND ORDER

This remand order of the Final Adjudication Branch (FAB) concerns the above claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claim for lung cancer under Part E of EEOICPA is remanded to the Jacksonville district office for further consideration and the issuance of a new decision consistent with this remand order.

On April 11, 2008, the employee filed a Form EE-1 claiming benefits for asbestos-related lung disease. On December 9, 2009, he also filed a claim for lung cancer.

On November 3, 2008, FAB issued a final decision to accept the claim for asbestosis under Part E and found that the employee was a covered Department of Energy (DOE) contractor employee at the Oak Ridge National Laboratory (X-10) and Y-12 facilities in Oak Ridge, Tennessee. On March 13, 2009, FAB issued another final decision that awarded him impairment benefits in the amount of $127,500.00 for his 51% whole body impairment due to asbestosis. At the time of that decision, the employee confirmed that he had filed a tort suit based on asbestos exposure and a state workers' compensation claim based on asbestosis, but had not received any settlements.

On August 25, 2010, the Jacksonville district office issued a recommended decision to accept the claim for lung cancer under Part E. The district office based its recommendation on the opinion of a district medical consultant (DMC) who stated that the employee's lung cancer was at least as likely as not caused, contributed to, or aggravated by his asbestos exposure at both X-10 and Y-12. The district office calculated a surplus of $7,486.13 due to the receipt of tort suit settlements from the employee's asbestos exposure lawsuit, which would be absorbed from payments for his medical treatment and from future lump-sum compensation payments.[1]

Section 7385 of EEOICPA directs that payment of compensation to an individual, or to a survivor of that individual, shall be offset by the amount of any payment made pursuant to a final award or settlement on a claim (other than a claim for workers' compensation), against any person, that is based on injuries incurred by that individual on account of the exposure for which compensation is payable under the Act. Before paying any benefits, all necessary steps must be taken to determine the correct amount of any offset. 20 C.F.R. § 30.505(a).

The district office used a Client Summary Settlement Detail and an Open Case Expenses report provided by the employee's attorney to calculate the offset.[2] The Open Case Expenses report indicates that there are two line items of $750.00 and $51.45 that are due to medical providers but have not yet been paid by the employee or deducted from a settlement amount. Reasonable out-of-pocket costs and expenses involved in bringing a lawsuit are included in the calculation of the offset; this includes filing fees, travel expenses, record copy services, witness fees, court reporter costs, postage and long distance telephone calls.[3] However, costs of suit must be paid before they can be used in the offset calculations. The district office included these amounts in their calculation of the costs of the suit, although there was no indication that the employee had paid the bills. Elimination of those two items from the calculation results in a surplus amount of $8,281.95, a larger surplus than that calculated

by the district office. Since it appears likely that further settlement payments will be forthcoming, the deduction of these costs may occur at a future date, when additional compensation under Part E becomes payable.

The regulations provide that at any time before the issuance of its decision, FAB may remand the claim to the district office for further development without issuing a decision. 20 C.F.R. § 30.317. Therefore, in light of the fact that calculation of the correct surplus amount is required, FAB is not issuing a final decision and the case is remanded to the district office.

Upon remand, the district office should review the tort suit settlement documents, verify that these are correct and complete, and correctly calculate and subtract the offset amount from the employee's entitlement. This will require contact with the attorney of record to clarify the pending status of the costs in question. After obtaining the appropriate information and reviewing the facts, the district office should issue a new recommended decision under Part E.

Jacksonville, FL

Sidne M. Valdivieso

Hearing Representative

Final Adjudication Branch

[1] The district office did not discuss the employee's state workers' compensation claim, but the most recent documentation from his attorney's office indicates it has not been settled yet.

[2] Federal (EEOICPA) Procedure Manual, Chapter 3-0400 (September 2009).

[3] These amounts reduce the amount of the offset. Disallowable expenses include co-counsel fees or normal office expenses such as secretary/paralegal services or in-house copying costs. Federal (EEOICPA) Procedure Manual, Chapter 3-400.5b.

EEOICPA Order No. 20120607-12007-1 (Dep't of Labor, July 12, 2012)

EMPLOYEE: **[Name Deleted]**

CLAIMANT: **[Name Deleted]**

FILE NUMBER: **[Number Deleted]**

DOCKET NUMBER: **20120607-12007-1**

DECISION DATE: **July 12, 2012**

REMAND ORDER

This remand order of the Final Adjudication Branch (FAB) concerns the above survivor claim under Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, this survivor claim based on the employee's death due to asbestosis and pulmonary fibrosis is remanded to the Jacksonville district office for further development, to be followed by the issuance of a new recommended decision consistent with this remand order.

On November 10, 2005, **[Employee]** filed a claim for benefits under Part E for the alleged conditions of asbestosis and pulmonary fibrosis. On May 29, 2009, FAB issued a final decision under Part E that accepted the employee's claim for medical benefits, in part, for the covered illnesses of asbestosis, pulmonary fibrosis, and consequential heart disease as a covered Department of Energy (DOE) contractor employee who developed the illnesses during the performance of his duties at the Oak Ridge Gaseous Diffusion Plant (K-25) from August 28, 1953 to June 6, 1958, and at the Oak Ridge National Laboratory (X-10) from September 1958 to July 31, 1982. Both facilities are DOE facilities.[1] The awarded medical benefits were payable, however, subject to the absorption of a surplus in the amount $30,927.00 that resulted from the settlement of a tort suit for asbestos exposure. On May 3, 2010, FAB issued a second final decision under Part E, concluding that the employee was entitled to $167,500.00 for his 67% whole body impairment due to his asbestosis, pulmonary fibrosis and consequential heart disease reduced by the surplus of $30,927.00, leaving an award to him of $136,573.00. The employee died on March 28, 2012.

On August 24, 2012, the claimant filed a survivor claim under Part E of EEOICPA as the spouse of the employee, for his death due to asbestosis and pulmonary fibrosis. In support of this claim, the spouse submitted a copy of the employee's death certificate, which verified his death on March 28, 2012, identified her as the employee's surviving spouse, and listed the cause of death as asbestosis and pulmonary fibrosis. The claimant also submitted a marriage certificate showing that she had married the employee on June 10, 1946.

On May 10, 2012, the district office received a signed Form EN-16 in which the claimant stated that she had not received an additional settlement or award from a tort suit related to an exposure for which she or the employee would be eligible to receive compensation under EEOICPA since the issuance of the May 3, 2010 final decision. In this same form, the claimant indicated that neither she nor the employee had filed for or received any state workers' compensation benefits on account of the employee's covered illnesses.

On June 7, 2012, the Jacksonville district office issued a recommended decision to accept the claimant's survivor claim under Part E based on the employee's death due to his asbestosis and pulmonary fibrosis, and to award her $113,427.00 in survivor benefits. This recommended decision noted that the maximum amount of compensation payable on account of an employee's covered illnesses under Part E was $250,000.00, and that the employee was paid $136,573.00 in Part E monetary benefits. It also informed the claimant that she had 60 days within which to file any objections to the recommended decision. On June 12, 2012, FAB received the claimant's written notification that she waived any and all objections to the recommended decision.

Since the evidence establishes that the employee contracted pulmonary fibrosis from exposure to toxic substances at a DOE facility, this condition is a "covered illness" as defined under Part E of EEOICPA; therefore, the employee is a "covered DOE contractor employee." And because the condition of pulmonary fibrosis caused the employee's death, the claimant is entitled to survivor benefits for the employee's death due to pulmonary fibrosis.

The basic survivor benefit under Part E of EEOICPA is $125,000.00. However, the maximum amount of compensation payable for all Part E claims related to an individual covered employee is $250,000.00. Therefore, the claimant's award and the award to the employee together may not exceed $250,000.00. 42 U.S.C. § 7385s-12.

In this case, the district office calculated that the claimant's entitlement to survivor benefits was $113,427.00 by subtracting the amount of the monetary award to the employee, *after* that award was reduced to absorb the surplus resulting from his tort settlement, from the maximum amount of compensation payable under Part E ($250,000.00 - $136,573.00 = $113,427.00). This was not correct. Doing so would result in a payment to the surviving spouse, when combined with the amount of the award to which the employee was *entitled* by virtue of his whole body impairment rating of 67%, that would exceed the $250,000.00 maximum cap ($167,500.00 + $113,427.00 = $280,927.00). It is important to remember that the employee received a monetary tort settlement that needed to be offset against his impairment award so as to avoid the "double recovery" that would otherwise result if he were compensated *both* by his tort suit and under EEOICPA.

Because accounting for a payment received due to a tort suit (as occurred here) or under a state workers' compensation system will lower one or both of the amounts of the EEOICPA awards that are actually received, applying the maximum cap in the way that the district office did here can result in similarly situated claimants for which no offset or coordination is required being treated differently. The application of the maximum cap on EEOICPA benefits can only work fairly when it is applied uniformly. Therefore, the district office must reduce the maximum amount payable under Part E by the total impairment compensation awarded *prior* to the offset reduction ($250,000.00 - $167,500.00 = $82,500.00).

The regulations provide that at any time before the issuance of its decision, FAB may remand the claim to the district office for further development without issuing a decision. 20 C.F.R. § 30.317 (2012). Therefore, in light of the need for recalculation of the amount of the claimant's survivor award, FAB is not issuing a final decision and the case is remanded to the district office. Upon return of the file, the district office should determine the spouse's entitlement to survivor benefits consistent with this order and issue a new recommended decision.

Jacksonville, FL

Jeana F. LaRock

Hearing Representative

Final Adjudication Branch

[1] *See* http://www.hss.energy.gov/HealthSafety/FWSP/Advocacy/faclist/findfacility.cfm (retrieved July 2, 2012).

When offset not required

EEOICPA Fin. Dec. No. 1861-2006 (Dep't of Labor, March 7, 2006)

NOTICE OF FINAL DECISION

This decision of the Final Adjudication Branch (FAB) concerns your claim for survivor benefits under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended, 42 U.S.C. § 7384 *et seq.* (EEOICPA). Your claim is approved for compensation in the amount of $275,000.

STATEMENT OF THE CASE

On August 2, 2001, you filed a claim (Form EE-2) for survivor benefits under EEOICPA with the Department of Labor (Part B) as the surviving spouse of **[Employee]**. The file contains a marriage certificate documenting **[Employee]**'s marriage to **[Employee's spouse]** on January 26, 1948 and the death certificate of **[Employee]** stating that he was married to **[Employee's spouse]** (maiden name) at the time of his death on July 4, 1991.

On October 27, 2003, you also filed a claim (Form DOE 350.3) for assistance under EEOICPA with the Department of Energy (former Part D). On October 28, 2004, the President signed into law an amendment that replaces the former Part D program with a new program called Part E. Accordingly, the Part D claim you filed with the Department of Energy (DOE) was transferred to the Department of Labor for adjudication under Part E.

On the claim forms, you identified lung cancer as **[Employee]**'s diagnosed condition for which you sought compensation. A pathology report, dated November 26, 1990, shows **[Employee]**'s diagnosis of undifferentiated carcinoma, bronchial tissue and an operative note, signed by Vijay R. Patil, M.D., provides **[Employee]**'s pre and post operative diagnosis as non-small cell carcinoma, right upper lobe. In addition, **[Employee]**'s death certificate identifies "carcinoma - right lung" as "other significant condition" contributing to his death.

On the Employment History Form (EE-3), you stated that **[Employee]** worked for Union Carbide at the Y-12 and X-10 plants from 1950 through 1969. The Department of Energy (DOE) verified **[Employee]**'s employment with Union Carbide at the X-10 plant from March 15, 1948 through November 20, 1953 and again from October 6, 1958 through August 1, 1969 and at the Y-12 plant from May 25, 1954 through January 27, 1956 and November 12, 1956 through July 11, 1958[1].

To determine the probability of whether **[Employee]** sustained lung cancer due to exposure to radiation during his employment at the Y-12 and X-10 plants, on November 19, 2002 the district office forwarded a complete copy of the case record to the National Institute for Occupational Safety and Health (NIOSH) for dose reconstruction. On December 6, 2005, you signed Form OCAS-1, indicating that you had reviewed the NIOSH Draft Report of Dose Reconstruction and agreed that it identified all of the relevant information provided to NIOSH. On December 12, 2005, NIOSH provided the district office with a copy of the dose reconstruction report. Using the dose estimates provided by NIOSH and the software program NIOSH-IREP version 5.4, the district office calculated the probability of causation for your spouse's lung cancer as 69.72%.[2]

On January 17, 2006, the district office received your written confirmation that neither you nor the employee had received state workers' compensation benefits in connection with the accepted condition, and that you do not believe the employee experienced wage-loss due to this illness. You also stated that the employee, at the time of death, had no minor children or children incapable of self support, who were not your natural or adopted children.

In addition, you stated that you received a settlement in the amount of $119,933.15 (less 1/3 attorney's fee and $2,430.52 in expenses) in connection with a third party asbestos exposure personal injury lawsuit. The file contains a copy of the short form complaint you filed in the circuit court for Knox County, TN, which shows the cause of action taken against various employers for **[Employee]**'s lung cancer due to asbestos exposure.

On January 26, 2006, the Jacksonville district office issued a recommended decision finding that you are entitled to compensation under EEOICPA in the amount of $275,000. On February 6, 2006, the FAB received written notification that you waive any and all objections to the January 26, 2006 recommended decision.

After considering the evidence of record and your waiver of objections, the FAB hereby makes the following:

FINDINGS OF FACT

1. **[Employee]** worked for a covered contractor, Union Carbide, at covered DOE facilities, the Y-12 and X-10 plants, during a covered period intermittently from March 15, 1948 through August 1, 1969.

2. **[Employee]** was diagnosed with a lung cancer after beginning employment at the Y-12 and X-10 plants.

3. The probability of whether **[Employee]**'s lung cancer was caused by exposure to radiation during his employment at the Y-12 and X-10 plants was computed to be 74.89%.

4. You are the surviving spouse of **[Employee]**.

5. You confirmed in writing that neither you nor the employee had received state workers' compensation benefits in connection with the accepted condition, and that the employee, at the time of death, had no minor children or children incapable of self-support, who were not your natural or adopted children.

6. You confirmed in writing, and provided supporting documentation, that the settlement you received from a lawsuit due to your spouse's lung cancer was based on his exposure to asbestos.

Based on the above noted findings of fact, the FAB hereby also makes the following:

CONCLUSIONS OF LAW

To facilitate a claim for cancer under Part B, the Act defines a "covered employee with cancer" as, among other things, a DOE or DOE contractor employee who contracted that cancer after beginning employment at a DOE facility, if and only if that individual is determined to have sustained that cancer in the performance of duty. 42 U.S.C. § 7384l(9)(B). To establish that the employee "sustained that cancer in the performance of duty," § 30.115 of the implementing regulations instructs OWCP to forward a complete copy of the case record to NIOSH for dose reconstruction to determine whether the

cancer was “at least as likely as not” (50% probability or higher) caused by exposure to radiation while employed at a DOE facility. 20 C.F.R. § 30.115.

The dose reconstruction was performed in accordance with 42 C.F.R. Part 82, Methods for Radiation Dose Reconstruction under the EEOICPA and the probability of causation was computed in accordance with 42 C.F.R. Part 81, Guidelines for Determining the Probability of Causation Under the EEOICPA. The FAB independently analyzed the information in the NIOSH report, confirming that the factual evidence reviewed by NIOSH was properly addressed, and that there is a 74.89% probability that **[Employee]**’s cancer was related to his employment at the Y-12 and X-10 plants. Since the probability of causation is greater than 50%, it is determined that your spouse incurred cancer in the performance of duty at a DOE facility. Therefore, the evidence of record establishes your spouse as a “covered employee with cancer” as defined above.

The evidence of records further establishes that you are the employee’s “spouse,” as defined by 42 U.S.C. § 7384s(e)(3), and his sole eligible beneficiary. As such, the FAB hereby finds that you are entitled to compensation under Part B of EEOICPA in the amount of $150,000 pursuant to 42 U.S.C. § 7384s(e)(1)(A).

To facilitate a claim under Part E, the Act defines a “covered DOE contractor employee” as a DOE contractor employee determined to have contracted a covered illness through exposure at a DOE facility. 42 U.S.C. § 7385s(1). To establish that the employee contracted an illness through toxic exposure, § 7385s-4 provides that “A determination under part B that a Department of Energy contractor employee is entitled to compensation under that part for an occupational illness shall be treated for purposes of this part as a determination that the employee contracted that illness through exposure at a DOE facility.” 42 U.S.C. § 7385s-4(a). Moreover, in order to receive the basic survivor benefits payable under Part E, which provides additional compensation for DOE contractor employees, the evidence must further show that the accepted condition was a significant factor in aggravating, contributing to or causing the employee’s death.

Based on the acceptance of your claim for the employee’s lung cancer under Part B of EEOICPA in this decision, it is further determined that your spouse contracted lung cancer due to exposure to a toxic substance, radiation, at a DOE facility. Therefore, the evidence of record establishes your spouse as a “covered DOE contractor employee,” as defined above, with a covered illness which aggravated, contributed to, or caused his death. 42 U.S.C. §§ 7385s-4(a) and 7385s-3(a).

The evidence of record further establishes that you are the employee’s “covered spouse,” as defined by 42 U.S.C. § 7385s-3(d), and his sole eligible beneficiary. As such, the Final Adjudication Branch further finds that you are entitled to compensation under Part E of EEOICPA in the amount of $125,000 pursuant to 42 U.S.C. § 7385s-3(a)(1).

Section 7385 of the Act states that compensation under EEOICPA shall be offset by the amount of any payment made pursuant to a final award or settlement on a claim (other than a claim for workers’ compensation), against any person, that is based on injuries incurred by that individual on account of the exposure for which compensation is payable under this subchapter. 42 U.S.C. § 7385. The evidence of file shows that you received a settlement award based on your spouse’s exposure to asbestos. Since compensation awarded to you in this decision is based on exposure to radiation, the FAB concludes that an offset is not required.

Accordingly, your claim for compensation under EEOICPA in the amount of $275,000, as provided for under 42 U.S.C. §§ 7384s and 7385s-3(a)(1), is hereby approved.

Washington, DC

Vawndalyn B. Feagins

Hearing Representative

Final Adjudication Branch

[1] The Y-12 plant is identified on the DOE Covered Facility List as a DOE facility with Union Carbide listed as a covered contractor from 1947 through 1984. The X-10 plant is identified as a DOE facility with Union Carbide listed a covered contractor from 1948 through 1984. http://www.eh.doe.gov/advocacy/faclist/showfacility.cfm (As of March 1, 2006)

[2] Effective February 28, 2006, NIOSH-IREP lung model version 5.5 replaced version 5.4 which increased **[Employee]'s** PoC to 74.89%.

EEOICPA Fin. Dec. No. 10010854-2006 (Dep't of Labor, June 7, 2006)

NOTICE OF FINAL DECISION FOLLOWING A REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch (FAB) 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*. For the reasons set forth below, your claim is accepted.

STATEMENT OF THE CASE

On November 10, 2003, you filed a Request for Review by Physicians Panel with the Department of Energy, based on the lung cancer of your late spouse, **[Employee]**, hereinafter referred to as "the employee." A pathology report establishes the employee was diagnosed with lung cancer on July 3, 2000.

The evidence of record establishes that the employee worked for Maxon Construction and Charles Hobson Company at the K-25 gaseous diffusion plant for a period in excess of 250 workdays prior to 1992 and was monitored through the use of dosimetry badges for exposure to radiation.

A previous Final Decision was issued by the Department of Labor under Part B of the Act on April 12, 2005, concluding that you were entitled to compensation for the employee's lung cancer since he was a member of the Special Exposure Cohort with a specified cancer. This mandates a finding that the employee's illness was contracted through exposure to a toxic substance at the DOE facilities where he worked. 42 U.S.C. § 7385s-4(a). The employee's death certificate shows that the employee died as a consequence of lung cancer. 42 U.S.C. § 7385s-3.

In support of your claim for survivorship, you submitted your marriage certificate and the employee's death certificate. The marriage certificate, showing you married the employee on May 6, 1953, and the employee's death certificate, showing you were married to the employee on the date of his death, October 5, 2001, establishes that you were the employee's spouse for at least a year prior the date of his death.

On August 23, 2005, the district office received your written confirmation that neither you nor the employee had received any settlement or award from a workers' compensation claim in connection with the accepted condition, and that the employee, at the time of his death, had no minor children or children incapable of self-support,who were not your natural or adopted children, and that you were not asserting a claim for wage-loss.

On April 14, 2006, the Jacksonville district office issued a recommended decision, concluding that you are entitled to survivor benefits of $125,000 for the employee's death due to lung cancer. The recommended decision also offset this award by $17,705.37 based on your recovery in a tort suit.

OBJECTION

On April 20, 2006, the Final Adjudication Branch received written notification that you objected to this offset because the tort suit arose out of the employee's toxic exposure to asbestos.

The statute states that, "payment of compensation to an individual, or to a survivor of that individual, under this subchapter shall be offset by the amount of any payment made pursuant to a final award or settlement on a claim (other than a claim for worker's compensation), against any person, that is based on injuries incurred by that individual on account of the exposure for which compensation is payable under this subchapter." 42 U.S.C. § 7385. This statute states that the offset requirement is triggered when the compensation payable under EEOICPA and the lawsuit settlement are based on the same exposure.

The tort complaint filed on October 26, 1994, by you and the employee in the Circuit Court for Knox County, Tennessee, was based strictly on exposure to asbestos.

In contrast, the April 14, 2006 recommended decision concluding that you were entitled to $125,000 was based on 42 U.S.C. § 7385s-4(a) which states that a determination under Part B that the employee was a Department of Energy (DOE) contractor employee entitled to compensation for an occupational illness is treated as an automatic determination that the employee contracted that illness through work-related exposure to a toxic substance at the DOE facility under Part E.

Since the Part B claim was based on the finding that the employee contracted lung cancer due to exposure to radiation, the automatic determination under Part E that the employee was entitled compensation must necessarily be based on the same radiation exposure that led to the award under Part B.

Therefore, as the claim under Part E and the lawsuit were based on exposure to two different toxic substances – radiation and asbestos – the offset requirement of 42 U.S.C. § 7385 is not triggered. There is no need for any offset of the Part E award due to the lawsuit settlement that was received.

FINDINGS OF FACT

1. On November 10, 2003, you filed a Request for Review by Physicians Panel with the Department of Energy under EEOICPA.

2. The evidence of record establishes that the employee was employed by Maxon Construction and Charles Hobson Company at the K-25 gaseous diffusion plant.

3. You submitted medical evidence establishing that the employee was diagnosed with lung cancer on July 3, 2000.

4. A final decision was issued by the Department of Labor under Part B of the Act on April 12, 2005, concluding that the employee was a covered employee, and that you were entitled to compensation for the employee's lung cancer. This requires a finding that the employee's illness was contracted through exposure to a toxic substance at the K-25 gaseous diffusion plant, a DOE facility.

5. The employee's death certificate shows that his death was a consequence of lung cancer.

6. You meet the definition of a survivor under Part E.

7. You confirmed in writing that neither you nor the employee had received any settlement or award from a lawsuit (based on exposure to radiation) or workers' compensation claim in connection with the accepted condition, and that the employee, at the time of his death, had no minor children or children incapable of self-support, who were not your natural or adopted children.

8. On April 14, 2006, the Jacksonville district office issued a recommended decision which included an offset for your tort award.

9. On April 20, 2006, the Final Adjudication Branch received written notification that you objected to this offset because the tort suit arose out of the employee's exposure to asbestos.

CONCLUSIONS OF LAW

The Final Adjudication Branch has reviewed the record and the recommended decision of April 14, 2006, and concludes that the employee was a DOE contractor employee with lung cancer due to exposure to a toxic substance at a DOE facility and that his death was a consequence of this condition. 42 U.S.C. §§ 7385s-1, 7385s-4. Therefore, the Final Adjudication Branch hereby concludes that you are entitled to survivor benefits of $125,000 for the employee's lung cancer. 42 U.S.C. § 7385s-3(a)(1).

As the claim under Part E and the lawsuit were based on exposure to two different toxic substances – radiation and asbestos – the offset requirement of 42 U.S.C. § 7385 is not triggered. There is no need for any offset of the Part E award due to the lawsuit settlement that was received.

Jacksonville, FL

Douglas J. Helsing

Hearing Representative

Other Law, Reference to

Native American law

EEOICPA Fin. Dec. No. 32576-2004 (Dep't of Labor, November 19, 2004)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) 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 stated below, your claims for benefits are hereby accepted in part and denied in part.

STATEMENT OF THE CASE

On September 10, 2004**,** the district office issued a recommended decision concluding that **[Spouse]** had received an award as the widow of the **[Employee]** under section 5 of the Radiation Exposure Compensation Act. **[Employee]** and **[Spouse]** were married on June 9, 1955. The death certificate of record establishes that **[Employee]** died on March 18, 1990. Another death certificate of record establishes that **[Spouse]**, the employee's wife, died on October 15, 2001. Subsequently, nine survivors filed claims for benefits as follows:

On July 1, 2002**, [Claimant 1]** filed Form EE-2, Claim for Survivor Benefits under EEOICPA, as a surviving child. She provided a copy of her adoption papers from the Navajo Nation, verifying that the employee and his widow adopted her on July 15, 1969. **[Claimant 1]** also provided a copy of her marriage certificate to support her name change.
On July 12, 2002, **[Claimant 2]** filed Form EE-2, Claim for Survivor Benefits under EEOICPA as a surviving child. **[Claimant 2]** provided a copy of his birth certificate which listed the employee as his father.
On July 19, 2002, **[Claimant 3]** filed Form EE-2, Claim for Survivor Benefits under EEOICPA as a surviving child. **[Claimant 3]** provided a copy of her adoption papers from the Navajo Nation, verifying that the employee and his widow adopted her on July 15, 1969. She provided a copy of her marriage certificate to support her name change.
On January 21, 2003, **[Claimant 4]** filed Form EE-2, Claim for Survivor Benefits under EEOICPA as a surviving child. At the time **[Spouse]**, the widow, married the employee, **[Claimant 4]** was 30 years old. Based on documents in the file, **[Claimant 4]** is the daughter of **[Spouse]** and **[Claimant 4's Natural Father]**.
On January 22, 2003, **[Claimant 5]** filed Form EE-2, Claim for Survivor Benefits under EEOICPA as a surviving child. **[Claimant 5]** provided a copy of her birth certificate which listed **[Spouse]** as her mother and **[Claimant 5's Natural Father]** as her father. When **[Spouse]** married the employee, **[Claimant 5]** was a minor child and resided in the home of **[Spouse]** and **[Employee]**.
On January 23, 2003, **[Claimant 6]** filed Form EE-2, Claim for Survivor Benefits under EEOICPA as a surviving child. **[Claimant 6]** provided a copy of her birth certificate which listed **[Spouse]** as her mother and **[Claimant 6's Natural Father]** as her father. At the time **[Spouse]** married the employee **[Claimant 6]** was 28 years old.
On January 24, 2003, **[Claimant 7]** filed Form EE-2, Claim for Survivor Benefits under EEOICPA as a surviving child. **[Claimant 7]** provided a copy of her birth certificate which listed **[Employee]** as her mother and **[Claimant 7's Natural Father]** as her father. When **[Spouse]** married the employee, **[Claimant 7]** was a minor child and lived in the home of **[Spouse]** and **[Employee]**.
On January 31, 2003, **[Claimant 8]** filed Form EE-2, Claim for Survivor Benefits under EEOICPA as a surviving child. **[Claimant 8]** provided a copy of her marriage certificate which verified that she was married in August 1949, prior to her mother's marriage to the employee.
On February 24, 2004, **[Claimant 9]** filed form EE-2, Claim for Survivor Benefits under EEOICPA as a surviving child. **[Claimant 9]** provided a certified copy of a clinical record from Northern Navajo Medical Center Indian Health Services, Shiprock Service Unit, in Shiprock, New Mexico, certifying

that her name was **[Claimant 9]** and that she had previously used **[Claimant 9's Former Name]** and **[Claimant 9's Former Name]**. The clinic record shows **[Employee]** as her father**, [Claimant 9's Step-father's Name]** as her step-father and that she was legally adopted by her uncle **[Claimant 9's Adoptive Father's Name]**.

On August 3, 2004, the district office requested that **[Claimant 9]** provide verification of either a final decree of adoption or a final judgment of adoption. The district office informed **[Claimant 9]** that the evidence submitted supports that she was legally adopted by **[Claimant 9's Adoptive Father's Name]**. Evidence to show that she was not legally adopted by **[Claimant 9's Adoptive Father's Name]** would need to be submitted, for her to be an eligible survivor on **[Employee]**'s record. She was provided 30 days to submit this evidence. No evidence was submitted.

On September 10, 2004, the district office issued a recommended decision recommending that **[Claimant 1]**, **[Claimant 2]**, **[Claimant 3]**, **[Claimant 5]**, and **[Claimant 7]** were eligible surviving children of **[Employee]** and that **[Claimant 4]**, **[Claimant 6]**, **[Claimant 8]**, and **[Claimant 9]** did not establish that they were eligible surviving children of the employee.

[Claimant 1], **[Claimant 2]**, **[Claimant 3]**, **[Claimant 5]**, and **[Claimant 7]** have provided evidence to establish they are surviving children or have had step-children relationships with the employee, and therefore as his survivors, are entitled to additional compensation in the amount of $50,000.00, to be divided equally pursuant to 42 U.S.C. § 7384u(a). **[Claimant 1]**, **[Claimant 2]**, **[Claimant 3]**, **[Claimant 5]**, and **[Claimant 7]** are each entitled to $10,000. **[Claimant 4]**, **[Claimant 6]**, **[Claimant 8]**, and **[Claimant 9]** are not entitled to compensation because they have not established that they are an eligible survivor.

On the dates listed below, the Final Adjudication Branch received written notification that you waive any and all objections to the recommended decision:

[Claimant 1]	September 21, 2004
[Claimant 2]	September 22, 2004
[Claimant 3]	September 20, 2004
[Claimant 5]	September 21, 2004
[Claimant 7]	September 17, 2004

Pursuant to the regulations implementing the EEOICPA, a claimant has 60 days from the date of issuance of the recommended decision to raise objections to that decision to the Final Adjudication Branch. 20 C.F.R. § 30.310(a). If an objection is not raised during the 60-day period, the Final Adjudication Branch will consider any and all evidence submitted to the record and issue a final decision affirming the district office's recommended decision. 20 C.F.R. § 30.316(a). No objections were raised nor waivers received from **[Claimant 4]**, **[Claimant 6]**, **[Claimant 8]**, and **[Claimant 9]**.

After considering the record of the claim forwarded by the district office, the Final Adjudication Branch makes the following:

FINDINGS OF FACT

1. On September 10, 2004**,** the district office issued a recommended decision concluding that **[Spouse]** had received an award as the widow of the **[Employee]** under section 5 of the Radiation Exposure Compensation Act**. [Employee**] and **[Spouse]** were married on June 9,

1955. The record establishes that **[Employee]** died on March 18, 1990. The record establishes that **[Spouse]**, the employee's wife, died on October 15, 2001. Subsequently, **[Claimant 1]**, **[Claimant 2]**, **[Claimant 3]**, **[Claimant 4]**, **[Claimant 5]**, **[Claimant 6]**, **[Claimant 7]**, **[Claimant 8]**, and **[Claimant 9]** filed claims for benefits

2. **[Claimant 1]**, **[Claimant 2]**, **[Claimant 3]**, **[Claimant 5]**, and **[Claimant 7]** have provided evidence to establish they are surviving children or have had step-children relationships with the employee.

3. **[Claimant 4]**, **[Claimant 6]**, **[Claimant 8]**, and **[Claimant 9]** are not entitled to compensation because they have not established that they are eligible survivors of the employee.

4. In cases involving a stepchild who was an adult at the time of marriage, supportive evidence may consist of documentation showing that the stepchild was the primary contact in medical dealings with the deceased employee, the stepchild provided financial support for the deceased employee, and/or had the deceased employee living with him/her, etc. In addition, evidence consisting of medical reports, letters from the physician, receipts showing that the stepchild purchased medical equipment, supplies or medicine for the employee may be helpful. Also, evidence such as copies of insurance policies, wills, photographs *(i.e.*, attendance in the stepchild's wedding as the father or mother), and newspaper articles *(i.e.*, obituary) may be considered. No evidence has been submitted to support this type of relationship with **[Claimant 4]**, **[Claimant 6]**, or **[Claimant 8]** and the employee.

Based on the above noted findings of fact in this claim, the Final Adjudication Branch hereby also makes the following:

CONCLUSIONS OF LAW

Per Chapter 2-200 (September 2004) of the Federal (EEOICPA) Procedure Manual, a stepchild is considered a child if he or she lived with the employee in a regular parent-child relationship. **[Claimant 1]**, **[Claimant 2]**, **[Claimant 3]**, **[Claimant 5]**, and **[Claimant 7]** have established they lived with the employee in a regular child/step-child relationship with **[Employee]** pursuant to 42 U.S.C. § 7384u(e)(1)(B) of the EEOICPA and are entitled to compensation in the amount of $10,000.00 each.

[Claimant 9] has established that she was adopted by **[Claimant 9's Adoptive Father's Name]** and pursuant to 25 U.S.C. § 1911 of the Indian Child Welfare Laws, Indian tribes have exclusive jurisdiction over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where jurisdiction is otherwise vested in the State by existing Federal law. Pursuant to the Navajo Nation Code, 9 NNC § 611 (1960), the natural parents of the adoptive child, except a natural parent who is also an adoptive parent or the spouse of an adoptive parent, shall be relieved of all parental responsibilities for such child or to his property by descent or distribution or otherwise.

Accordingly, an adopted Navajo child may claim EEOICPA benefits only as a survivor of her adopted father, not her natural father. Please note that in order to terminate parental rights under Navajo law there must be a "final decree of adoption" – not just a "final judgment of adoption." Therefore **[Claimant 9]** is not an eligible surviving child of the employee.

[Claimant 4], **[Claimant 6]**, and **[Claimant 8]** are not considered eligible surviving children of **[Employee]**, because they did not establish a relationship pursuant to Chapter 2-200 (September 2004) of the Federal (EEOICPA) Procedure Manual and 42 U.S.C. § 7384s(e)(3)(B) and are not entitled to compensation.

The undersigned has reviewed the record and the recommended decision issued by the district office on September 10, 2004, and finds that your claims are in accordance with the facts and the law in this case. It is the decision of the Final Adjudication Branch that your claims are accepted in part and denied in part.

DENVER, CO

Joyce L. Terry

District Manager

EEOICPA Fin. Dec. No. 63743-2006 (Dep't of Labor, November 21, 2006)

NOTICE OF FINAL DECISION FOLLOWINGREVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch (FAB) concerning the claims of **[Claimant #1]**, **[Claimant # 6]**, **[Claimant #7]**, **[Claimant #8]**and **[Claimant # 9]** for compensation under Part B, and of **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]** under Part E, of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA or the Act), 42 U.S.C. § 7384 *et seq*. For the reasons stated below, the claims of **[Claimant #1]** under Parts B and E, as well as the claims of **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]** under Part E are denied, and the claims of **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** under Part B are approved.

STATEMENT OF THE CASE

On November 29, 2004, **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant # 6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** filed Forms EE-2, claiming survivor benefits under Parts B and E of EEOICPA as the children of the employee. **[Claimant #1]** filed such a claim on June 14, 2005, as the spouse of the employee. The Department of Justice (DOJ) confirmed on January 11, 2005 that **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and**[Claimant #9]** received, on November 22, 2004, an award under Section 5 of the Radiation Exposure Compensation Act (RECA), as the eligible surviving beneficiaries of the employee, for the condition of pneumoconiosis.

Documents, including birth, marriage and death certificates, birth affidavits and a marital status and family profile issued by the Navajo Nation, and a decree issued by a judge on December 22, 1978, confirmed that **[Claimant #2]**, born on **[Date of Birth]**, **[Claimant #3]**, born on **[Date of Birth]**, **[Claimant #4]**, born on **[Date of Birth]**, **[Claimant #5]**, born on **[Date of Birth]**, **[Claimant #7]**, born on **[Date of Birth]**, **[Claimant #8]**, born on **[Date of Birth]** and **[Claimant #9]**, born on **[Date of Birth]**, are children of the employee. Another birth certificate states that **[Claimant #6]** was born on **[Date of Birth]** and that her mother was **[Claimant #6's mother]**, who is also listed as the mother on the birth certificates of **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]**. Subsequently, an obituary

from a newspaper was submitted which listed **[Claimant #6]** as a surviving daughter of the employee.

The death certificate of the employee states that he died on December 1, 1990 and that, at the time of his death, he was married to **[Claimant #1's maiden name]**. A marriage certificate confirms that **[Claimant #1's maiden name]** was the name of **[Claimant #1]** until her marriage to the employee, on June 18, 1950. The death certificate states that the "informant" was **[Claimant #2]**, who, according to his birth affidavit, is the son of the employee and **[Claimant #1]**.

The file also includes a Decree of Dissolution of Marriage, concerning the marriage of the employee and **[Claimant #1]**. The Decree states that an "absolute divorce" was "granted to the plaintiff," **[Employee]**, and that this was ordered, on December 22, 1978, by a judge of the Court of the Navajo Nation. A marital status and family profile, issued by the Vital Records and Tribal Enrollment Program of the Navajo Nation, on January 10, 2002, also stated that the employee and **[Claimant #1]** were divorced on December 22, 1978.

The DOJ submitted a document signed on October 8, 2002 by "**[Claimant #1]**" on which a box was checked indicating that she was not in a legal or common-law marriage to the employee for at least one year prior to his death. On August 1, 2005, her representative submitted an undated affidavit signed by "**[Claimant #1]**" stating that she was never divorced from the employee, that she did not knowingly check the box on the DOJ document, that she always uses her middle initial (**[Middle initial]**) when signing her name, that she needs translation of all documents into Navajo and that she relied on the assistance of the Shiprock Office of the Navajo Uranium Workers in pursuing her claim.

The case was referred to the Office of the Solicitor and the Solicitor responded with an opinion dated December 7, 2005. The district office then obtained statements from **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]**, confirming that they had not filed for, or received any benefits from, a lawsuit or a state workers' compensation claim, for the employee's exposure or illness. On April 6, 2006, the district office sent letters to **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]** and **[Claimant #5]**, asking if they had filed for, or received any benefits from, a lawsuit or a state workers' compensation claim, for the employee's exposure or illness. No response to those letters has been received.

On April 11, 2006, the Denver district office issued a recommended decision, concluding that **[Claimant #1]** is not entitled to compensation under Part B of the Act, but that **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** were each entitled to $6,250 (1/8th of $50,000) under Part B. The recommended decision also concluded that **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]** and **[Claimant # 4]** are not entitled to compensation under part E of the Act, since the evidence did not support they are eligible survivors of the employee, as defined in 42 U.S.C. § 7385s-3. The recommended decision also described the criteria which have to be met to be considered a "covered child" under Part E.

The recommended decision held in abeyance the claims of **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]** and **[Claimant #5]** under Part B, until their response to the inquiry as to whether they had ever filed, or received benefits under, a lawsuit or state workers' compensation claim. It also stated that further development of the evidence must take place before a decision could be issued on the claims of **[Claimant #5]**, **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** under Part E.

On April 21, 2006, the FAB received **[Claimant #6]**'s, **[Claimant #7]**'s and **[Claimant #8]**'s waivers

of their right to object to the recommended decision. On June 7, 2006, the FAB received a letter from Lorenzo Williams, the representative of **[Claimant #1]**, expressing objections to the recommended decision and requesting a hearing. Mr. Williams submitted another letter, dated July 3, 2006, which again stated his objections to the recommended decision, withdrew the request for a hearing and requested a review of the written record. On September 18, 2006, **[Claimant #1]**, through her representative, was provided twenty days to submit any additional evidence she wished considered. No additional evidence was submitted.

OBJECTIONS

The letters of objection included numerous allegations of inappropriate conduct by DOJ, DEEOIC, the Solicitor, government agencies of the Navajo Nation, the Office of Navajo Uranium Workers and **[Claimant #1]**'s previous representative. No evidence was submitted confirming that any such conduct occurred which would have had any bearing on the outcome of the case.

The basic objection of Lorenzo Williams is that the evidence as to whether **[Claimant #1]** was married to the employee at the time of his death was not properly evaluated. In particular, he objected that the affidavit made by **[Claimant #1]** on August 1, 2005, indicating that she was never divorced from the employee, was not considered. However, its evidentiary value must be weighed in light of the other evidence in the file. It is true that the employee's death certificate states that, at that time, he was married to **[Claimant #1]**. However, it also indicates that the information was based solely on information received from **[Claimant #2]**.

On the other hand, the document which appears to have been signed by **[Claimant #1]** on October 8, 2002 states that she was not married to the employee at the time of his death. It should be noted that another document in the file, her marriage certificate, includes a signature of **[Claimant #1]** without a middle initial.

Furthermore, an official document was issued by a judge on December 22, 1978 stating that a divorce was granted dissolving the marriage of **[Claimant #1]** and the employee. A stamp from the clerk of the court states that the copy in the file is an accurate copy of the document. Lorenzo Williams, the representative of **[Claimant #1]** has noted that the document incorrectly states that the two were married in 1951, rather than 1950, as stated in the marriage certificate, and that there is also a stamp indicating the document was "received" in 1991, after the death of the employee. However, he presented no argument or evidence that these facts would in any way invalidate the divorce decree, which was ordered and signed by the judge on December 22, 1978.

In addition, the file includes another official document, a marital status and family profile, issued by the Vital Records and Tribal Enrollment Program of the Navajo Nation on January 10, 2002, which further confirms that **[Claimant #1]** and the employee were divorced on December 22, 1978.

The probative value of these two official documents far outweigh the unclear and conflicted statements from **[Claimant #1]** and the statement on the death certificate which simply repeated information obtained from one of her children with the employee.

Also, it should be noted that the evidence supports that, after December 22, 1978, the employee had at least three more children with another woman, **[Employee's second wife]**. This does not, in and of itself, constitute evidence of the employee's marital status. It does, however, lend some credence to the

proposition that the employee no longer considered himself married to **[Claimant #1]**.

Finally, as the Solicitor noted in the opinion of December 7, 2005, 42 U.S.C. § 7384u provides for payment of compensation to an individual "who receives, or has received" an award under section 5 of the RECA. A determination is made by DEEOIC concerning an eligible survivor under that section only if all the individuals who received the RECA award are deceased. Since, in this case, the individuals who received the award under section 5 of the RECA are still alive, **[Claimant #1]** would not be eligible for benefits under Part B of the EEOICPA even if it were determined that she was an eligible surviving spouse under § 7384u(e).

Upon review of the case record, the undersigned makes the following:

FINDINGS OF FACT

1. You all filed claims for benefits under Parts B and E of EEOICPA.

2. **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** received compensation for the condition of pneumoconiosis, as eligible surviving beneficiaries of the employee, under Section 5 of RECA.

3. The employee died on December 1, 1990. At the time of his death, **[Claimant #2]** was 36 years old, **[Claimant #3]** was 28, **[Claimant #4]** was 26, **[Claimant #5]** was 19, **[Claimant #6]** was 11, **[Claimant #7]** was 9, **[Claimant #8]** was 7 and **[Claimant #9]** was 6. **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]** were not incapable of self-support when the employee died.

4. **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** are children of the employee.

5. **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** did not receive any settlement or award from a lawsuit or state workers' compensation in connection with the accepted exposure or illness. **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]** and **[Claimant #5]** have not confirmed whether or not they received a settlement or award from a lawsuit or state workers' compensation in connection with the accepted exposure or illness.

6. **[Claimant #1]** was married to the employee from June 18, 1950 until December 22, 1978, when they were divorced.

Based on these facts, the undersigned makes the following:

CONCLUSIONS OF LAW

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, pursuant to 20 C.F.R. § 30.310. In reviewing any objections submitted under 20 C.F.R. § 30.313, the FAB will review the written record, any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. I have reviewed the record in this case, including the letters of objection, and must conclude that no further investigation is warranted.

The EEOICPA provides, under Part E, for payment of compensation to survivors of covered employees. It specifically states in 42 U.S.C. § 7385s-3 that if "there is no covered spouse. . . payment shall be made in equal shares to all covered children who are alive." It defines a "covered spouse" as "a spouse of the employee who was married to the employee for at least one year immediately before the employee's death," and a "covered child" as "a child of the employee who, as of the employee's death. . .had not attained the age of 18 years. . .had not attained the age of 23 years and was a full-time student who had been continuously enrolled as a full time student. . .since attaining the age of 18 years; or. . .had been incapable of self-support."

For the foregoing reasons, the undersigned finds that the evidence does not support that **[Claimant #1]** was a "covered spouse" or that **[Claimant #2]**, **[Claimant #3]** or **[Claimant #4]** were "covered" children, and their claims for benefits under Part E of EEOICPA are hereby denied.

The EEOICPA provides, under 42 U.S.C. § 7384u, for payment of compensation in the amount of $50,000 to an "individual who receives, or has received, $100,000 under section 5 of the Radiation Exposure Compensation Act." **[Claimant #1]** did not receive an award under section 5 of RECA and, therefore, she is not entitled to compensation under Part B.

[Claimant #2], **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** did receive an award under section 5 of RECA and, therefore, they each have an entitlement to $6,250 ($50,000 divided by 8) under Part B. Since **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** have affirmed that they have not received a payment from a tort suit for the employee's exposure, there is no offset to their entitlement, under 42 U.S.C. § 7385 of the Act, and compensation is hereby awarded to **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]**, in the amount of $6,250 each.

When **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]** and **[Claimant #5]** have responded to the inquiry as to whether they have received a payment from a lawsuit based upon their father's employment-related exposure, decisions will be issued on their claims for compensation under Part B of the Act.

Upon further development of the evidence, decisions will be issued on the claims of **[Claimant #5]**, **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** for compensation under Part E.

Washington, DC

Richard Koretz, Hearing Representative

Final Adjudication Branch

State law

EEOICPA Fin. Dec. No. 9855-2002 (Dep't of Labor, August 26, 2002)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) 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 stated below, your claim for benefits is denied.

On September 20, 2001, you filed Form EE-2, Claim for Survivor Benefits under the Energy Employees Occupational Illness Compensation Program, with the Denver district office. You stated that your husband, **[Employee]**, had died on May 15, 1991 as a result of adenocarcinoma in the liver, and that he was employed at a Department of Energy facility. You included with your application, a copy of your marriage certificate, **[Employee]**'s resume/biography, and his death certificate. You submitted a letter dated January 5, 2000, from Allen M. Goldman, Institute of Technology, School of Physics and Astronomy, and a packet of information which included the university's files relating to your husband based on your request for his personnel, employee exposure, and medical records. Also submitted was a significant amount of medical records that did establish your husband had been diagnosed with adenocarcinoma in the liver.

On March 1, 2002, Loretta from the Española Resource Center telephoned the Denver district office to request the status of your claim. The claims examiner returned her telephone call on the same date and explained the provision in the Act which states that in order to be eligible for compensation, the spouse must have been married to the worker for at least one year prior to the date of his death. Your marriage certificate establishes you were married on, May 30, 1990. **[Employee]**'s death certificate establishes he died on May 15, 1991.

On March 5, 2002, the Denver district office issued a recommended decision finding that the evidence of record had not established that you were married for one year prior to your husband's death, and therefore you were not entitled to compensation benefits under the EEOICPA.

Pursuant to § 30.316(a) of the implementing regulations, a claimant has 60 days in which to file objections to the recommended decision, as allowed under § 30.310(b) of the implementing regulations (20 C.F.R. § 30.310(b)).

On April 12, 2002, the Final Adjudication Branch received a letter from you that stated you objected to the findings of the recommended decision. You requested a hearing and a review of the written record. You stated that the original law signed by President Clinton provided you with coverage, but when the law changed to include children under 18, the change in the law adversely affected you. You stated that you had documents that demonstrated you had a 10-year courtship with your spouse. You also stated you presented testimony as an advocate in Española. Included with your letter of objection were the following documents:

- a copy of Congressman Tom Udall's "Floor Statement on the Atomic Workers Compensation Act";

- an e-mail from Bob Simon regarding the inclusion of Los Alamos National Laboratory workers in the Senate Bill dated July 5, 2000;

- an e-mail from Louis Schrank regarding the Resource Center in Española;

- a "Volunteer Experience Verification Form", establishing you volunteered as a "Policy Advisor and Volunteer Consultant to the Department of Energy, Members of Congress, Congressional Committees, and many organizations on critical health issues effecting nuclear

weapons workers with occupational illnesses";

· a transcript of proceedings from the March 18, 2000 Public Hearing in Española , New Mexico;

· a letter from you to John Puckett, HSE Division Leader, Chairperson, "Working Group Formed to Address Issues Raised by Recent Reports of Excess Brain Tumors in the Community of Los Alamos" and dated June 27, 1991;

· a letter to you from Terry L. Thomas, Ph.D., dated July 31, 1991, regarding the epidemiologic studies planned for workers at Los Alamos National Laboratory; a memorandum entitled "LANL Employee Representative for Cancer Steering Committee", dated September 25, 1991;

· a copy of the "Draft Charter of the Working Group to Address Los Alamos Community Health Concerns", dated June 27, 1991;

· an article entitled "Register of the Repressed: Women's Voice and Body in the Nuclear Weapons Organization"; and

· a psychological report from Dr. Anne B. Warren; which mentions you and **[Employee]** had a "10 or 11 year courtship".

On May 20, 2002, you submitted a copy of the Last Will and Testament of **[Employee]**, wherein he "devises to you, his wife, the remainder of his estate if you survive him for a period of seven hundred twenty (720) hours." You stated you believed this provided you with common law marriage rights for the 720 hours mentioned in the will.

An oral hearing was held on June 18, 2002 at the One-Stop Career Center in Española, New Mexico. You presented additional evidence for consideration that included: a copy of a house "Inspection Report" by Architect Steven G. Shaw, addressed to both you and **[Employee]**, dated August 11, 1989 (exhibit one); a copy of a Quitclaim Deed (Joint Tenants) for you and **[Employee]**, dated October 27, 1989 (exhibit two); a Los Alamos County Assessor Notice of Valuation or Tentative Notice of Value (undated), for a home on Walnut Street, and addressed to both you and **[Employee]** (exhibit three); and a Power of Attorney dated August 5, 1989, between you and **[Employee]** (exhibit four).

Pursuant to § 30.314(f) of the implementing regulations, a claimant has 30 days after the hearing is held to submit additional evidence or argument.

No further evidence was submitted for consideration within that time period.

Section 30.111(a) of the regulations (20 C.F.R. § 30.111(a)) states that, "Except where otherwise provided in the Act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and these regulations, the claimant also bears the burden of providing to OWCP all written medical documentation, contemporaneous records, or other records and documents

necessary to establish any and all criteria for benefits set forth in these regulations."

The undersigned has carefully reviewed the hearing transcript and additional evidence received at the hearing, as well as the evidence of record and the recommended decision issued on March 5, 2002.

The record fails to establish that you were married to **[Employee]** one year prior to his death, as required by the EEOICPA. The entire record and the exhibits were thoroughly reviewed. Included in Exhibit One, was the August 11, 1989 inspection report of the home located on Walnut Street, a copy of a bill addressed to both you and **[Employee]** for the inspection service, and an invoice from A-1 Plumbing, Piping & Heat dated August 14, 1989. Although some of these items were addressed to both you and **[Employee]**, none of the records submitted are sufficient to establish that you were married to your husband for one year prior to his death as required under the Act. 42 U.S.C. § 7384s(e)(3)(A).

The evidence entered into the record as Exhibit Two, consists of a Quitclaim Deed dated October 27, 1989, showing **[Employee]**, a single man, and **[Claimant]**, a single woman living at the same address on Walnut Street as joint tenants. Exhibit Three consists of a Notice of Valuation of the property on Walnut Street in Los Alamos County and is addressed to both you and **[Employee]**. Although this evidence establishes you were living together in 1989 in Los Alamos County, New Mexico, it is not sufficient evidence to establish you were married to your husband for one year prior to his death as required under the Act. 42 U.S.C. § 7384s(e)(3)(A).

Exhibit Four consists of a copy of a Power of Attorney between you and **[Employee]** regarding the real estate located on Walnut Street. This evidence is not sufficient to establish you were married for one year prior to his death. 42 U.S.C. § 7384s(e)(3)(A).

The Act is clear in that it states, “the “spouse” of an individual is a wife or husband of that individual who was married to that individual for at least one year immediately before the death of that individual.”

During the hearing you stated that there is a federal law, the Violence Against Women Act, that acknowledges significant other relationships and provides protection for a woman regardless of whether she is married to her husband one year or not. You also stated that you believed there was “a lack of dialogue” between the RECA program and the EEOICP concerning issues such as yours. Additionally, on August 15, 2002, you sent an email to the Final Adjudication Branch. The hearing transcript was mailed out on July 23, 2002. Pursuant to § 30.314(e) of the implementing regulations, a claimant is allotted 20 days from the date it is sent to the claimant to submit any comments to the reviewer. Although your email was beyond the 20-day period, it was reviewed and considered in this decision. In your email you stated the issue of potential common law marriage was raised. You stated that you presented the appropriate documentation that may support a common law marriage to the extent permitted by New Mexican law. You stated that the one-year requirement was adopted from the RECA and that you have not been able to determine how DOJ has interpreted this provision. Also, you stated that the amendments of December 28, 2001 should not apply to your case because you filed your claim prior to the enactment of the amendments. You stated you did not believe the amendments should be applied retroactively.

Section 7384s (e)(3)(A), Compensation and benefits to be provided, states:

The “spouse” of an individual is a wife or husband of that individual who was married to that

individual for at least one year immediately before the death of that individual."

Section 7384s(f) states:

EFFECTIVE DATE—This section shall take effect on July 31, 2001, unless Congress otherwise provides in an Act enacted before that date.

There is no previous enacted law that relates to compensation under the EEOICPA. Therefore, the amendments apply retroactively to all claimants.

A couple cannot become legally married in New Mexico by living together as man and wife under New Mexico's laws. However, a couple legally married via common law in another state is regarded as married in all states. The evidence of record does not establish you lived with **[Employee]** in a common law state. Because New Mexico does not recognize common law marriages, the time you lived with **[Employee]** prior to your marriage is insufficient to establish you were married to him for one year prior to his death.

Regarding your reference to the difference between how Native American widows are treated and recognized in their marriages, and how you are recognized in your marriage, Indian Law refers primarily to that body of law dealing with the status of the Indian tribes and their special relationship to the federal government. The existing federal-tribal government-to-government relationship is significant given that the United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection and has affirmed the Navajo Nation's sovereignty. The laws that apply to the Native Americans do not apply in your case.

The undersigned finds that you have not established you are an eligible survivor as defined in 42 U.S.C. § 7384s(e)(3)(A). It is the decision of the Final Adjudication Branch that your claim is denied.

August 26, 2002

Denver, CO

Janet R. Kapsin

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 44377-2004 (Dep't of Labor, October 6, 2005)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is a 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*

STATEMENT OF THE CASE

You each filed a Form EE-2, Claim for Survivor Benefits, for the bladder cancer of your late husband and father, **[Employee]**, hereinafter referred to as "the employee."
On the Form EE-3, Employment History, you stated the employee was employed as a pipefitter with several sub-contractors in Oak Ridge, Tennessee, at the K-25 gaseous diffusion plant, Y-12 plant, and Oak Ridge National Laboratory (X-10) with no listed dates other than at least 3 years at K-25 and several years at Y-12; and in Paducah, Kentucky, at the gaseous diffusion plant for 3-4 months in the 1950s. The evidence of record establishes that the employee worked at the K-25 gaseous diffusion plant (GDP) for Rust Engineering from 1975 to 1978, along with other periods of employment for various contractors at each of the Oak Ridge plants.

On the Forms EE-2, you indicated the employee was a member of the Special Exposure Cohort (SEC). To qualify as a member of the SEC, the following requirements must be satisfied:

> (A) The employee was so employed for a number of work days aggregating at least 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, and, during such employment - -
>
> > (i) was monitored through the use of dosimetry badges for exposure at the plant of the external parts of employee's body to radiation; or
> >
> > (ii) worked on a job that had exposures comparable to a job that is or was monitored through the use of dosimetry badges. 42 U.S.C. § 7384l(14)(A).

The employee worked at the K-25 gaseous diffusion plant (GDP) for intermittent periods from at least 1975 to 1978. For SEC purposes, the employee is shown to have worked more than 250 work days prior to February 1, 1992, and was monitored through the use of dosimetry badge number **[Number Deleted]**. Therefore, the employment meets the criteria for inclusion in the SEC. 42 U.S.C. § 7384l(14).

The medical evidence establishes the employee was diagnosed with bladder cancer on January 21, 1992. Bladder cancer is a specified cancer as defined by the Act and implementing regulations, if onset is at least five years after first radiation exposure. 42 U.S.C § 7384l(17), 20 C.F.R. § 30.5(ff).

In support of your claim for survivorship, you (**[Employee's Spouse/Claimant #1]**) submitted your marriage certificate which states that you married the employee on September 10, 1994, and the employee's death certificate, which states that you were married to the employee on the date of his death, October 31, 1996.

In support of your claims for survivorship, the living children of the employee submitted birth certificates and marriage certificates.

On April 26, 2005, the Jacksonville district office issued a recommended decision[1], concluding that the living spouse is the only entitled survivor and is entitled to survivor benefits in the amount of $150,000 for the employee's bladder cancer. The district office recommended denial of the claims of

the living children.

Attached to the recommended decision was a notice of claimant rights, which stated that claimants had 60 days in which to file an objection to the recommended decision and/or request a hearing. These 60 days expired on June 25, 2005. On May 5, 2005, the Final Adjudication Branch received written notification that **[Employee's Spouse]** waived any and all objections to the recommended decision. On May 27, 2005, the Final Adjudication Branch received an objection to the recommended decision and request for an oral hearing signed by all the living children. The hearing was held by the undersigned in Oak Ridge, Tennessee, on August 2, 2005. **[Claimant #2]**, **[Claimant #4]**, **[Claimant #3]**, and **[Claimant #7]** were duly affirmed to provide truthful testimony.

OBJECTIONS

In the letter of objection, you stated that you believe the rules and regulations governing the Act are contradictory. You also stated you believe your privacy rights have been violated under the Privacy Act of 1974. During the hearing, you stated that the pre-marital agreement, which you believe is valid under the rules of the State of Tennessee, should be recognized by the Federal government; that the employee's will should take precedence over the way the Act breaks down survivor entitlement; that the documentation you gathered was used to benefit **[Employee's Spouse]** without her having to do anything and that the documentation you gathered should have been maintained for your benefit only; and that new information concerning the survivorship amendment to the Act in December 2002 should have been forwarded to all claimants, since you were basing your actions on a pamphlet released in August of 2002. You were provided with a copy of the Privacy Act of 1974 which includes instructions on filing a claim under that Act.

In accordance with §§ 30.314(e) and (f) of the implementing regulations, a claimant is allowed thirty days after the hearing is held to submit additional evidence or argument, and twenty days after a copy of the transcript is sent to them to submit any changes or corrections to that record. 20 C.F.R. §§ 30.314(e), 30.314(f). By letters dated August 23, 2005, the transcript was forwarded to you. On September 15, 2005, the Final Adjudication Branch received a letter from **[Claimant #2]**, clarifying statements made during the hearing.

The law, as written and amended by Congress, establishes the precedence of survivors in each section of the Act and the apportionment of any lump-sum compensation. Section 7384s(e) of the Act (also known as Part B) explains who is entitled to compensation if the covered employee is deceased:

(e) PAYMENTS IN THE CASE OF DECEASED PERSONS—(1) In the case of a covered employee who is deceased at the time of payment of compensation under this section, whether or not the death is the result of the covered employee's occupational illness, such payment may be made only as follows:

> (A) If the covered employee is survived by a spouse who is living at the time of payment, such payment shall be made to such surviving spouse.
>
> (B) If there is no surviving spouse described in subparagraph (A), such payment shall be made in equal shares to all children of the covered employee who are living at the time of payment.
>
> (C) If there is no surviving spouse described in subparagraph (A) and if there are no

children described in subparagraph (B), such payment shall be made in equal shares to the parents of the covered employee who are living at the time of payment.

(D) If there is no surviving spouse described in subparagraph (A), and if there are no children described in subparagraph (B) or parents described in subparagraph (C), such payment shall be made in equal shares to all grandchildren of the covered employee who are living at the time of payment.

(E) If there is no surviving spouse described in subparagraph (A), and if there are no children described in subparagraph (B), parents described in subparagraph (C), or grandchildren described in subparagraph (D), then such payment shall be made in equal shares to the grandparents of the covered employee who are living at the time of payment.

(F) Notwithstanding the other provisions of this paragraph, if there is—

(i) a surviving spouse described in subparagraph (A); and

(ii) at least one child of the covered employee who is living and a minor at the time of payment and who is not a recognized natural child or adopted child of such surviving spouse, then half of such payment shall be made to such surviving spouse, and the other half of such payment shall be made in equal shares to each child of the covered employee who is living and a minor at the time of payment. 42 U.S.C. § 7384s(e).

Section 7384s(e)(3)(B) of the Act explains that a "child" includes a recognized child, a stepchild who lived with an individual in a regular parent-child relationship, and an adopted child. 42 U.S.C. §§ 7384s(e)(3)(B).

The Office of the Solicitor provided an opinion, dated December 1, 2004, concerning the pre-nuptial agreement signed on September 9, 1994, by the employee and **[Employee's Spouse]**. In that opinion, the Solicitor determined that a widow with a valid claim under the Act is not bound by an otherwise legally valid agreement, such as a pre-nuptial agreement or a will, in which she promised to forego that award. The opinion did not contain a ruling on the validity of the pre-nuptial agreement itself; only that the Energy Employees Occupational Illness Compensation Program Act specifically maintains that a beneficiary cannot be deprived of an award that he or she is entitled to under the statute.

FINDINGS OF FACT

1. You each filed a Form EE-2, Claim for Survivor Benefits.

2. The employee was diagnosed with bladder cancer on January 21, 1992.

3. The employee was employed at the K-25 gaseous diffusion plant (GDP) for intermittent periods from at least 1975 to 1978 and was monitored through the use of dosimetry badge number **[Number Deleted]**.

4. The employee is a member of the Special Exposure Cohort.

5. The employee's bladder cancer is a specified cancer.

6. **[Employee's Spouse]** was the employee's spouse at the time of his death and at least one year prior.

7. On April 26, 2005, the Jacksonville district office issued a recommended decision.

8. On May 5, 2005, the Final Adjudication Branch received written notification that **[Employee's Spouse]** waived any and all objections to the recommended decision.

9. The Final Adjudication Branch received a letter of objection from **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant #6]**, and **[Claimant #7]**, and a hearing was held on August 2, 2005.

CONCLUSIONS OF LAW

The undersigned has reviewed the record and the recommended decision dated April 26, 2005 and concludes that the employee is a member of the Special Exposure Cohort, as defined by the Act, and that the employee's bladder cancer is a specified cancer, as defined by the Act and implementing regulations. 42 U.S.C. §§ 7384l(14)(A), 7384l(17), 20 C.F.R. § 30.5(ff).

I find that the recommended decision is in accordance with the facts and the law in this case, and that **[Employee's Spouse]**, the eligible living spouse, is entitled to survivor benefits in the amount of $150,000 for the employee's bladder cancer, pursuant to the Act. 42 U.S.C. §§ 7384s(a). I also find that **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant #6]**, and **[Claimant #7]** are not eligible survivors under the Act, and your claims for compensation are denied.

Jacksonville, FL

Sidne M. Valdivieso

Hearing Representative

[1] A previous recommended decision, dated March 4, 2004, was remanded on October 6, 2004 by the Final Adjudication Branch for a legal opinion concerning a pre-nuptial agreement signed by the employee and spouse.

EEOICPA Fin. Dec. No. 55875-2004 (Dep't of Labor, November 15, 2005)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

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, the Final Adjudication Branch accepts **[Claimant #1/Employee's Spouse's]** claim for compensation under 42 U.S.C. § 7384 and denies **[Claimant #2's]**, **[Claimant #3's]** and **[Claimant #4's]** claims for compensation under 42 U.S.C. § 7384.

STATEMENT OF THE CASE

On March 22, 2004, **[Claimant #2]** filed a Form EE-2 (Claim for Survivor Benefits under EEOICPA)

claiming benefits as a surviving child of **[Employee]**. On March 29, 2004, **[Employee's Spouse]** filed a Form EE-2 claiming benefits as the surviving spouse of **[Employee]**.

[Claimant #2] claimed that her father had been diagnosed with leukemia, melanoma (skin cancer) and prostate cancer. **[Employee's Spouse]** claimed that her husband had been diagnosed with lymphoma, hairy cell leukemia, basal and squamous cell cancer, and b-cell lymphoma. The medical evidence of record includes several pathology reports which diagnose various squamous cell cancers of the skin. A pathology report dated January 29, 1997, presents a diagnosis of malignant lymphoma, diffuse, large cell type, and subsequent records support that diagnosis. A reference is noted regarding a history of hairy cell leukemia in September 1994.

A copy of a marriage certificate shows that **[Employee's Spouse's previous name]** and **[Employee]** were wed on June 16, 1986. This document indicates that both parties were widowed at the time of marriage and that **[Employee's Spouse's previous name]** parents' last name was **[Employee's Spouse's maiden name]**. A copy of the employee's death certificate shows that he died on September 15, 1997, and identifies **[Employee's Spouse's maiden name]** as his surviving spouse. A copy of a death certificate for **[Employee's Spouse's first husband]** shows that he died on October 7, 1984, and identifies **[Employee's Spouse's previous name]** as his surviving spouse. A copy of a birth certificate identifies **[Claimant #2's maiden name]** as the child of **[Employee]** and a copy of a marriage certificate establishes the change of her last name to **[Claimant #2's married name]**. **[Claimant #3]** and **[Claimant #4]** also provided their birth certificates showing **[Employee]** as their father. **[Claimant #4]** provided a marriage certificate showing her change in surname from **[Claimant #4's maiden name]** to **[Claimant #4's married name]**.

[Employee's Spouse] provided a Form EE-3 (Employment History) in which she states that her husband worked as a pipefitter for Grinnell at the Portsmouth Gaseous Diffusion Plant (GDP) in Portsmouth, OH, from 1953 to 1955. **[Claimant #2]** provided an employment history in which she states that her father worked as a pipefitter for Grinnell and Myer Brothers at the Portsmouth GDP in Piketon, OH. She indicates that she does not know the dates of employment. Neither claimant indicates that the employee wore a dosimetry badge. The Portsmouth GDP in Piketon, OH, is recognized as a covered DOE facility from 1954 to July 28, 1998; from July 29, 1998 to the present for remediation; and from May 2001 to the present in cold standby status. *See* DOE Worker Advocacy Facility List.

An affidavit was provided by Allen D. Volney, a work associate, who reports that **[Employee]** was employed by the Grinnell Corp at the Portsmouth GDP as a pipefitter from 1953 to 1955 and that he worked with the employee at that location during that time period.

An itemized statement of earnings from the Social Security Administration (SSA) shows that the employee was paid wages by the Blaw-Knox Company and by the ITT Grinnell Corp. during the fourth quarter (October to December) of 1953, and by the ITT Grinnell Corp. beginning in the first quarter (January to March) of 1954 and ending in the third quarter (July to September) of 1955. This is because the maximum taxable earnings were met for the year during that quarter.

The DOE was unable to confirm the reported employment. However, they provided a personnel clearance master card documenting that **[Employee]** was granted a security clearance with Blaw-Knox (Eichleay Corp.) and (Peter Kiewit Sons Co.) on January 8, 1954. No termination date is shown.

On April 8, 2004, the district office received a copy of an ante-nuptial agreement, signed by **[Employee]** and **[Employee's Spouse's previous name]** on June 9, 1968, which was recorded in the office of the County Clerk for Pike County, Kentucky, on June 10, 1986. In pertinent part, that document states that "each party hereby releases and discharges completely and forever, the other from. . .benefits or privileges accruing to either party by virtue of said marriage relationship, or otherwise, and whether the same are conferred by statutory law or the commonlaw of Kentucky, or any other state or of the United States. It is the understanding between the parties that this agreement, except as otherwise provided herein, forever and completely adjusts, settles, disposes of and completely terminates any and all rights, claims, privileges and benefits that each now has, or may have reason to believe each has against the other, arising out of said marriage relationship or otherwise, and whether the same are conferred by the laws of the Commonwealth of Kentucky, of any other state, or of the United States, and which are now, or which may hereafter be, in force or effect."

In a letter dated April 12, 2004, the district office advised **[Claimant #2]** that a review of the rules and regulations of this program found them to be silent with regard to a "pre-nuptial agreement." The letter further stated that adult children may be eligible for compensation as survivors if there is no surviving spouse of the employee.

On May 6, 2004, the Cleveland district office issued a recommended decision concluding that **[Employee]** is a DOE contractor employee as defined by 42 U.S.C. § 7384l(11)(B)(ii) and a member of the Special Exposure Cohort (SEC), as defined by 42 U.S.C. § 7384l(14), who was diagnosed with malignant lymphoma, which is a specified cancer under 42 U.S.C. § 7384l(17). For those reasons the district office concluded that **[Employee's Spouse]**, as his surviving spouse, is entitled to compensation in the amount of $150,000, pursuant to 42 U.S.C. § 7384s. The district office also concluded that **[Claimant #2]** is not entitled to compensation as a surviving child, because the employee is survived by a spouse. *See* 42 U.S.C. § 7384s(e)(1)(A). The district office also stated that Grinnell Corp. is a known subcontractor to Peter Kiewit Son's Co. at the Portsmouth facility in the 1950s.

On June 18, 2004, the Final Adjudication Branch (FAB) received a letter of objection from **[Claimant #2]**. **[Claimant #2]** stated that she believes that **[Employee's Spouse]** gave up any rights to any benefits based on the ante-nuptial agreement and that the benefits granted to **[Employee's Spouse]** by the May 6, 2004, recommended decision should be awarded to the surviving children.

On June 21, 2004, the FAB received a letter from the authorized representative of the three children/claimants objecting to the recommended decision of May 6, 2004, on behalf of each of them. On June 22, 2004, the FAB advised the representative that **[Claimant #4]** and **[Claimant #3]** had not filed claims for benefits and that only claimants who had been issued a recommended decision may object to such a decision. On July 2, 2004, the FAB received a letter from the authorized representative of **[Claimant #3]** and **[Claimant #4]** to the effect that they were claiming entitlement to benefits under the EEOICPA as surviving children of **[Employee]**. On July 6, 2004, the FAB received a copy of a death certificate which shows that **[Employee's first wife]** died on March 13, 1985, and identifies **[Employee]** as her surviving spouse. On July 23, 2004, the FAB issued a remand order which vacated the recommended decision and returned the case to the district office to adjudicate the new claims, to include any additional development which might be warranted, and to issue a new recommended decision to all claimants.

On August 16, 2004, **[Claimant #3]** and **[Claimant #4]** filed Forms EE-2 (Claim for Survivor Benefits under EEOICPA) claiming benefits as surviving children of **[Employee]**. Both claimants state

that the employee had been diagnosed with leukemia, myeloma, and lymphoma.

On August 20, 2004, the Cleveland district office issued a recommended decision concluding that **[Employee]** is a DOE contractor employee as defined by 42 U.S.C. § 7384l(11)(B)(ii) and a member of the Special Exposure Cohort (SEC), as defined by 42 U.S.C. § 7384l(14), who was diagnosed with malignant lymphoma, which is a specified cancer under 42 U.S.C. § 7384l(17). For those reasons the district office concluded that **[Employee's Spouse]**, as his surviving spouse, is entitled to compensation in the amount of $150,000, pursuant to 42 U.S.C. § 7384s. The district office also concluded that **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]** are not entitled to compensation as surviving children, because the employee is survived by a spouse. *See* 42 U.S.C. § 7384s(e)(1)(A). The district office also finds that **[Employee]** was employed by Grinnell Corp. as a DOE subcontractor employee from September 1, 1954, to December 31, 1955.

On August 27, 2004, the FAB received written notification that **[Employee's Spouse]** waives any and all rights to file objections to the recommended decision. On September 17, 2004, the FAB received a letter from **[Claimant #4]** objecting to the award of benefits to **[Employee's Spouse]**. On October 19, 2004, the FAB received a letter from the authorized representative of the three children/claimants based on a "valid ante-nuptial agreement" between **[Employee's Spouse]** and **[Employee]** in which she expressly waived all rights to benefits which might arise from their marital relationship. It is argued that, although **[Employee's Spouse]** is a "surviving spouse" pursuant to 42 U.S.C. § 7384s(e)(3)(A), she waived any and all rights as the surviving spouse of **[Employee]** to receive benefits under the Act by entering into an ante-nuptial agreement by which she clearly waived the right to any federal benefits arising after the date of the agreement. It is argued that, in the absence of a clear mandate from the statute to ignore a valid ante-nuptial agreement, there is no reason that the Department should not follow the current state of the law and honor the ante-nuptial agreement. Finally, it is argued that, because **[Employee's Spouse]** has waived any and all rights to the benefits provided under the Act, the children/claimants are entitled to benefits pursuant to 42 U.S.C. § 7384s(e)(1)(B).

Pursuant to the authority granted by 20 C.F.R. § 30.317, the recommended decision was vacated and the case was remanded to the district office on November 19, 2004, so that a determination could be made regarding the effect of the ante-nuptial agreement on the claimants' entitlement to compensation under the Act.

On March 18, 2005, the Cleveland district office issued a recommended decision in which they note that the issue of the effect of the ante-nuptial agreement was referred to the Branch of Policies, Regulations, & Procedures for review, and was subsequently forwarded to the Solicitor of Labor (SOL) for expert guidance. On January 4, 2005, the SOL opined that Congress intended, through 42 U.S.C. § 7385f(a), that persons with valid claims under the statute are not permitted to transfer or assign those claims. SOL determined that **[Employee's Spouse]** is entitled to any award payable under the EEOICPA even if she knowingly entered into an otherwise legally valid agreement in which she promised to forego that award. Since it has been determined that the deceased employee is a covered employee with cancer, by operation of 42 U.S.C. §§ 7384s(e)(1)(A) and 7385f(a), **[Employee's Spouse]** is entitled to receive the award payable in this claim. In conclusion, SOL opined, "an agreement to waive benefits to which one is entitled to under the EEOICPA, or to otherwise assign, or transfer the right to such payments, is legally prohibited, and has no effect on the party to whom an award is paid under the statute. The order of precedence established must be followed in this case and as a result, **[Employee's Spouse]** is entitled to payment."

Based on that opinion, the Cleveland district office found that **[Employee's Spouse's]** ante-nuptial

agreement did not affect her entitlement to payment. The district office concluded that **[Employee]** is a covered employee under 42 U.S.C. § 7384l(1)(B), as he is a covered employee with cancer as that term is defined by 42 U.S.C. § 7384l(9)(A). **[Employee]** is a member of the Special Exposure Cohort, as defined by 42 U.S.C. § 7384l(14)(A)(ii), and was diagnosed with malignant lymphoma cancer, which is a specified cancer per 42 U.S.C. § 7384l(17)(A). The district office also concluded that as **[Employee]** is a covered employee and is now deceased, his eligible survivor is entitled to compensation of $150,000.00, per 42 U.S.C. § 7384s(a)(1). Lastly, the district office concluded that **[Employee's Spouse]** is the surviving spouse of **[Employee]**, per 42 U.S.C. § 7384s(e)(3)(A); and, as there is no evidence of a living minor child of **[Employee]**, the exception provided by 42 U.S.C. § 7384s(e)(1)(F) does not apply and, pursuant to 42 U.S.C. § 7384s(e)(1)(A), **[Employee's Spouse]** is thus entitled to the above mentioned compensation of $150,000.00, and that **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]** are not entitled to compensation pursuant to 42 U.S.C. § 7384s(e)(1)(A).

On March 28, 2005, the Final Adjudication Branch received written notification that **[Employee's Spouse]** waives any and all rights to file objections to the recommended decision. On April 15 and May 17, 2005, the Final Adjudication Branch received **[Claimant #2's]**, **[Claimant #3's]**, and **[Claimant #4's]** objections to the district office's March 18, 2005, recommended decision denying their claims, and a request for an oral hearing to present their objections. The hearing was held on August 23, 2005, in Bowling Green, KY.

In accordance with the implementing regulations, a claimant is allowed thirty days after the hearing is held to submit additional evidence or argument, and twenty days after a copy of the transcript is sent to them to submit any changes or corrections to that record. 20 C.F.R. § 30.314(e), and (f). By letter dated September 9, 2005, the transcript was forwarded to **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]**. By letter dated September 30, 2005, the transcript was forwarded to **[Employee's Spouse]**. **[Claimant #4]** provided her comments on the transcript. No other responses were received.

OBJECTIONS

The following objections were presented:

1. The claimants disagreed with the SOL January 4, 2005, opinion, and argued that the SOL improperly relied upon judicial interpretations of statutory provisions in other federal programs when it was concluded that an ante-nuptial agreement cannot override EEOICPA's statutory provision of survivor benefits to the spouse of a deceased covered employee.

2. It was requested that the FAB issue a finding regarding the legality of the prenuptial agreement that **[Employee]** and **[Employee's Spouse]** signed on June 9, 1986. Copies of the decisions in *Callahan v. Hutsell, Callahan & Buchino, P.S.C., Revised Profit Sharing Plan, et al.*, 813 F. Supp. 541 (W.D. Ky. 1992), *vacated and remanded*, 14 F.2d 600 (Table), 1993 WL 533557 (6th Cir. 1993), were submitted in support of the proposition that contractual rights in ante-nuptial agreements in Kentucky have been recognized by the Court of Appeals for the Sixth Circuit, and also as support for their contention that EEOICPA's prohibition against transfers or assignments is for the protection of covered employees only and not their survivors.

3. It was requested that the FAB change the "finding of fact" in the March 18, 2005, recommended decision that the Cleveland district office received the SOL legal opinion that **[Employee's Spouse's]** antenuptial agreement did not affect her entitlement to an award to a "conclusion of law."

The first objection is in regard to whether a prenuptial agreement can effect a waiver of a claim for survivor benefits under EEOICPA. A spouse's right to survivor benefits under EEOICPA is an entitlement or interest that is personal to the spouse and independent of any belonging to a covered employee. Section 7384s(e)(1)(A) of EEOICPA provides that if a covered Part B employee is deceased at the time of payment of compensation, "payment may be made only as follows: (A) If the covered employee is survived by a spouse who is living at the time of payment, such payment shall be made to the surviving spouse." The term "spouse" is defined in Part B as a "wife or husband of [the deceased covered Part B employee] who was married to that individual for at least one year immediately before the death of that individual. . . ." 42 U.S.C. § 7384s(e)(3)(A). As a result, it is clear that at the time **[Employee's Spouse]** signed the prenuptial agreement on June 9, 1986, she was not yet a "spouse" because she did not satisfy the above-noted definition for Part B of EEOICPA. Therefore, she had no entitlement to or interest in survivor benefits at that time that she could have attempted to waive.

Whether or not **[Employee's Spouse]** waived any rights under EEOICPA when she signed the prenuptial agreement, she is currently a "surviving spouse" as that term is defined in EEOICPA. Section 7384s(e) provides that payment shall be made to children of a covered employee *only* "[i]f there is no surviving spouse." Accordingly, even if **[Employee's Spouse]** has waived her right to survivor benefits, the covered Part B employee's children are precluded from receiving those benefits as long as **[Employee's Spouse]** is alive.

In *Duxbury v. Office of Personnel Management*, 232 F.3d 913 (Table), 2000 WL 380085 (Fed. Cir. 2000), the court denied a claim of a deceased employee's children from a prior marriage that they were entitled, as opposed to the deceased employee's widow, to any benefits attributable to their father's civil service retirement contributions based upon a prenuptial agreement signed by their father and his widow. In upholding the administrative denial of their claim, the court noted that it is the "widow" or "widower" of a federal employee covered by the Civil Service Retirement System who is entitled to a survivor annuity under 5 U.S.C. § 8341(d), and that "widow" is statutorily defined as "the surviving wife of an employee" who was married to him for at least nine months immediately before his death. Noting that the prenuptial agreement governed property distribution and did not speak to the validity of the marriage, the court concluded that "because the petitioners cannot establish that [the widow] is ineligible for a survivor annuity under federal law, the Board did not err in affirming OPM's decision denying the [children's] claims." *Duxbury*, 2000 WL 38005 at **3.

Even if a claimant could waive his or her entitlement to survivor benefits by signing a prenuptial agreement, such a waiver would be barred by 42 U.S.C. § 7385f(a), which states that "[n]o claim cognizable under [EEOICPA] shall be assignable or transferable." Interpreting the anti-alienation provision within § 7385f(a) to prohibit the waiver of any interest in survivor benefits is consistent with the interpretation of other anti-alienation provisions by both the government and federal courts.

With regard to the second issue, under Part B of EEIOCPA, survivor benefits are paid to a "surviving spouse," defined as an individual who was married to the deceased covered Part B employee for at least 12 months prior to the employee's death. As in *Duxbury*, the prenuptial agreement signed by **[Employee's Spouse]** would be relevant to Division of the Energy Employees Occupational Illness Compensation's (DEEOIC) determination of her claim for survivor benefits only to the extent that it addresses the validity of **[Employee's Spouse's]** marriage to **[Employee]**. Since it does not, there is no reason for DEEOIC to consider the terms of the agreement, let alone make a finding on the legality of the agreement under Kentucky law, as requested by the claimants' authorized representative.

With regard to the third issue, the FAB finds that the referenced sentence is most properly a conclusion

of law rather than a finding of fact, and it is so stated below.

FINDINGS OF FACT

1. **[Claimant #2]** filed a claim for survivor benefits on March 22, 2004. **[Employee's Spouse]** filed a claim for survivor benefits on March 22, 2004. **[Claimant #3]** and **[Claimant #4]** filed claims for survivor benefits on August 16, 2004.

2. **[Employee]** worked at the Portsmouth GDP, a covered DOE facility, from December 3, 1953 to December 21, 1955.

3. **[Employee]** worked for a number of work days aggregating at least 250 work days during the period of September 1954 to February 1, 1992.

4. **[Employee]** was diagnosed with malignant lymphoma cancer, a specified cancer, on January 29, 1997.

5. **[Employee's Spouse]** is the surviving spouse of **[Employee]** and was married to him for at least one year immediately prior to his death.

6. **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]** are the surviving children of **[Employee]**.

CONCLUSIONS OF LAW

A claimant who receives a recommended decision from the district office is entitled to file objections to the decision, pursuant to 20 C.F.R. § 30.310. In reviewing any objections submitted, the FAB will review the written record, in the manner specified in 20 C.F.R. § 30.314, to include any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. I have reviewed the record in this case, as well as the objections raised and the evidence submitted before, during, or after the hearing, and must conclude that no further investigation is warranted.

Under the EEOICPA, for **[Employee]** to be considered a "member of the Special Exposure Cohort," he must have been a Department of Energy (DOE) employee, DOE contractor employee, or an atomic weapons employee who was so employed for a number of work days aggregating at least 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, and, during such employment worked in a job that was monitored through the use of dosimetry badges for exposure at the plant of the external parts of employee's body; or had exposures comparable to a job that is or was monitored through the use of dosimetry badges, as outlined in 42 U.S.C. § 7384l(14)(A).

The evidence of record establishes that **[Employee]** worked in covered employment at the Portsmouth GDP, in Piketon, Ohio from December 3, 1953 to December 21, 1955. For SEC purposes, only employment from September 1954 to before February 1992 may be considered. His employment at the Portsmouth GDP from September 1, 1954 to December 21, 1955 meets the requirement of working more than an aggregate 250 days at a covered facility. *See* 42 U.S.C. § 7384l(14)(A). The record does not show whether **[Employee]** wore a dosimetry badge. However, the Division of Energy Employees Occupational Illness Compensation (DEEOIC) has determined that employees who worked at the Portsmouth GDP between September 1954 and February 1, 1992, performed work that was comparable

to a job that was monitored through the use of dosimetry badges. *See* Federal (EEOICPA) Procedure Manual, Chapter 2-500 (June 2002). On that basis, **[Employee]** meets the dosimetry badge requirement. The Portsmouth GDP is recognized as a covered DOE facility from 1952 to July 28, 1998; from July 29, 1998 to the present for remediation; and from May 2001 to the present in cold standby status. *See* DOE, Office of Worker Advocacy, Facility List. The evidence of record also establishes that **[Employee]** was diagnosed with malignant lymphoma, a specified cancer under 42 U.S.C. § 7384l(17)(A).
Based on the discussion above, **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]** have not presented objections or evidence showing that **[Employee's Spouse]** waived her eligibility to survivor benefits by signing the June 9, 1986 pre-nuptial agreement.

I have reviewed the record on this claim and the recommended decision issued by the district office. I find that the recommended decision is in accordance with the facts and the law in this case, and that **[Employee's Spouse]**, as the surviving spouse of the **[Employee]**, is entitled to compensation in the amount of $150,000.00, pursuant to 42 U.S.C. § 7384s. I also find that **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]** are not entitled to compensation pursuant to 42 U.S.C. § 7384s(e)(1)(A).

Cleveland, Ohio

Tracy Smart

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 95118-2010 (Dep't of Labor, July 12, 2010)

NOTICE OF FINAL DECISION AFTER REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch (FAB) concerning two claims for survivor benefits under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claim of **[Claimant #1]** for survivor benefits based on the employee's conditions of bladder cancer, lung cancer and bone cancer is approved for compensation in the amount of $150,000.00 under Part B of EEOICPA. Her claim for survivor benefits based on the employee's condition of metastatic liver cancer is denied under Part B. The claim of **[Claimant #2]** for survivor benefits based on the employee's condition of lung cancer is denied under Part B. The Estate of **[Employee]** is also entitled to reimbursement of medical expenses that were paid by the employee for treatment of bladder cancer and bone cancer beginning February 1, 2005 and ending February 3, 2007. A decision on the claims of **[Claimant #1]** and **[Claimant #2]** for survivor benefits under Part E of EEOICPA is deferred pending further development by the district office.

STATEMENT OF THE CASE

On February 1, 2005, **[Employee]** filed a claim for benefits (Form EE-1) under EEOICPA. He identified bone cancer, bladder cancer and kidney failure as the conditions resulting from his employment at a Department of Energy (DOE) facility. On , the district office received the death certificate of the employee which shows that he died on . The district office administratively closed the

employee's claim on .

On April 25, 2008, **[Claimant #1]** filed a claim for survivor benefits (Form EE-2) as the surviving common-law wife of the employee. She identified bladder cancer, lung cancer and liver cancer as the conditions resulting from the employee's work at a DOE facility. On February 16, 2010, **[Claimant #2]** filed a claim for survivor benefits (Form EE-2) as a surviving child of the employee. He identified lung cancer as the employee's condition resulting from his employment at a DOE facility.

The employee completed an employment history form (Form EE-3) on . He stated he worked as an electrician and electrical superintendent for REECo at the Nevada Test Site in the 1970's and from 1981 until 1991.[1] DOE verified that the employee worked for REECo at the Nevada Test Site from August 11, 1982 until March 15, 1991, from August 18, 1981 until September 21, 1981, and from October 23, 1970 until September 22, 1972 as a wireman and operations superintendent and assistant superintendent.

The employee and both claimants submitted the following medical reports: a pathology report from Dr. Kokila S. Vasanawala, dated November 7, 2002, with a diagnosis of papillary transitional cell carcinoma of the bladder; a report on whole body bone scan from Dr. Mihai Iancu, dated January 17, 2003, with a diagnosis of metastatic bone cancer; a pathology report from Dr. Leena Shroff, dated November 7, 2005, with a diagnosis of adenocarcinoma of the right upper lung lobe; a consultation report from Dr. James A. Corwin, dated November 15, 2002, with the diagnosis of "widespread metastatic disease" including the bone; and a pathology report from Dr. Terry R. Burns, dated January 16, 2007, with a diagnosis of metastatic adenocarcinoma of the liver.

The employee's death certificate states that he died on , at the age of 74 years, and that there was no surviving spouse.

[Claimant #1] submitted evidence in support of her status as the common-law wife of the employee. She submitted a letter dated August 22, 2009, which enclosed a certified copy of a Final Decree of Divorce between **[Claimant #1]** and **[Claimant #1's ex-husband]** which changed her name to **[Claimant #1]** and a Marital Settlement Agreement between **[Employee]** and **[Employee's ex-wife]** issued by the Clark County, Nevada District Court on November 10, 1992. She also submitted a letter dated , in which she detailed her relationship with the employee beginning on , in the State of , when she and the employee exchanged vows at her sister's home in , and continuing until the employee's death on . She describes in the letter that she and the employee lived together in for several years after exchanging vows until they went to other states to find work. She related that they returned to , in October 2000 and lived there together until the employee's death. She also submitted numerous documents showing she and the employee engaged in joint financial transactions, including applying for credit accounts and holding title real and personal property together. The Form EE-1 signed by the employee states she is his dependent and common-law wife. **[Claimant #2]** submitted a written statement on September 21, 2009, that he knew the employee and **[Claimant #1]** to have been together since 1983 and that he regarded them as married until she told him they were not. Numerous signed statements were submitted from third parties, including non-relatives, to the effect that the employee and **[Claimant #1]** were considered husband and wife. **[Claimant #2]** submitted his birth certificate which shows that he is a biological child of the employee born on October 25, 1966. His mother's name is shown as **[Employee's ex-wife]**.

On April 6, 2010, the district office issued a decision recommending that the claim of **[Claimant #1]**

for survivor benefits based on the employee's conditions of bladder cancer, lung cancer and liver cancer be denied under Part B of EEOICPA. The basis for the recommendation was the district office's conclusion that the probability of causation (PoC) that the employee's bladder cancer and liver cancer were related to his exposure to radiation during his covered employment was less than the 50% threshold PoC required for compensation under Part B of EEOICPA. The district office also concluded that **[Claimant #1]** was the surviving spouse of the employee under Part B based on its determination that she was married to him as his common-law spouse under the laws of the State of Texas on the date of the employee's death and for at least one year prior to that date. The district office also recommended that the claim of **[Claimant #2]** for survivor benefits based on the employee's condition of lung cancer be denied under Part B. The basis for the decision was the conclusion that he did not qualify as an eligible survivor of the employee under Part B. The district office deferred making a decision on both of the claims for survivor benefits under Part E of EEOICPA. Accompanying the recommended decision was a letter explaining the claimants' rights and responsibilities with regard to findings of fact and conclusions of law contained in the recommended decision.

On April 28, 2010, FAB received an undated letter from **[Claimant #2]** objecting to the decision issued by the district office on April 6, 2010. On May 7, 2010, FAB sent a letter acknowledging receipt of **[Claimant #2]**'s letter of objection and advising him that if he had additional evidence for FAB to consider prior to issuance of a final decision, he should submit that evidence by June 7, 2010. The claim file does not show that he submitted any additional evidence in response. His letter of objection is part of the evidence of record. His objections were as follows:

He stated he is the son of the employee and the only living survivor of the employee. He is in prison, he was diagnosed with hepatitis C in October 2005, and he cannot work in the food or culinary arts industries in which he has been trained because of his medical condition. He stated he intended to file a claim for benefits under Part E only and not under Part B. He stated his authorized representative was supposed to get medical records in support of his claim that he was incapable of self-support at the time of his father's death, and that is the reason he asked the district office to grant a sixty-day extension of time to respond to its letter dated . He claimed **[Claimant #1]** forced his father to sign documents while he was sick acknowledging her as his common-law wife. He concluded that he believes he is the one entitled to receive any benefits available under EEOICPA on account of his father.

On July 9, 2010, FAB received a signed statement from **[Claimant #1]** that neither she nor anyone else has filed for or received any settlement or award from a lawsuit related to the employee's exposure to toxic substances or filed for or received any payments, awards or benefits from a state workers' compensation claim based on the employee's lung cancer and that she has never pled guilty to or been convicted of fraud in connection with an application for or receipt of any federal or state workers' compensation benefits.

Based on an independent review of the evidence of record, the undersigned hereby makes the following:

FINDINGS OF FACT

1. On February 1, 2005, **[Employee]** filed a claim for benefits under EEOICPA for bone cancer, bladder cancer and kidney failure resulting from his employment at a DOE facility.
2. The employee worked for REECo, a DOE contractor, at the Nevada Test Site, a DOE facility,

from August 11, 1982 until March 15, 1991, from August 18, 1981 until September 21, 1981, and from October 23, 1970 until September 22, 1972. The employee worked for an aggregate of at least 250 work days at the Nevada Test Site between January 1,1963 and December 31, 1992.

3. The employee was diagnosed with bladder cancer on November 7, 2002, metastatic bone cancer on January 17, 2003, lung cancer on November 7, 2005, and adenocarcinoma of the liver on January 16, 2007. These diagnoses were at least five years after the employee's first exposure during covered employment.

4. The employee died on February 3, 2007, at the age of 74 years.

5. **[Claimant #1]** and the employee exchanged vows before others and entered into a common-law marriage on July 5, 1993 in Texas which continued until the employee's death on February 3, 2007. During that period of time they lived together in and represented to others in that they were married to each other. **[Claimant #1]** was married to the employee on the date of his death and for at least one year prior to the employee's death.

6. **[Claimant #2]** was born on October 25, 1966. He is a biological child of the employee. He is 43 years of age. He is not the recognized natural child or adopted child of **[Claimant #1]**.

7. **[Claimant #1]** stated that neither she nor anyone else has filed for or received any settlement or award from a lawsuit related to the employee's exposure to toxic substances or filed for or received any payments, awards or benefits from a state workers' compensation claim based on the employee's lung cancer and that she has never pled guilty to or been convicted of fraud in connection with an application for or receipt of any federal or state workers' compensation benefits.

Based on these facts, the undersigned makes the following:

CONCLUSIONS OF LAW

This final decision, and the district office decision issued April 6, 2010, addresses **[Claimant #2]**'s claim for benefits under Part B of EEOICPA only. It does not address his claim for benefits under Part E. His objections related to his incapacity for self-support relate only to his eligibility as a surviving child under Part E and are not relevant to the determination whether he is an eligible child under Part B. The district office may have been unaware he did not want to pursue a claim under Part B. Regardless, it was proper for the district office to address whether he is an eligible survivor of the employee under Part B of EEOICPA.

In order for the employee's son to be eligible as a surviving child of the employee under Part B, he must be a minor on the date Part B benefits are paid and not the recognized natural child or adopted child of **[Claimant #1]**. That is because FAB has determined that **[Claimant #1]** qualifies under Part B as a surviving spouse of the employee based on her common-law marriage to the employee. His allegation that **[Claimant #1]** forced the employee to sign documents is not supported by any evidence and is contradicted by his own statement submitted to the district office on September 21, 2009. It is also contradicted by the numerous documents and written statements from other individuals submitted by **[Claimant #1]**. His allegation is not credible and is insufficient to change the conclusion by FAB that **[Claimant #1]** and the employee were in a valid common-law marriage under the laws of Texas and she is the eligible surviving spouse of the employee.

Eligibility for EEOICPA compensation based on cancer may be established by demonstrating that the employee is a member of the Special Exposure Cohort (SEC) who contracted a specified cancer after beginning employment at a DOE facility (in the case of a DOE employee or DOE contractor employee). 42 U.S.C. §§ 7384l(9)(A), 7384l(14)(A).

On April 25, 2010, the Secretary of Health and Human Services designated a class of employees as an

addition to the SEC under § 7384l(14)(C) of EEOICPA. This new class included all employees of DOE, its predecessor agencies, and its contractors and subcontractors who worked at the Nevada Test Site from January 1, 1963 through December 31, 1992, for a number of work days aggregating at least 250 work days, occurring either solely under this employment or in combination with work days within the parameters established for one or more other classes of the SEC. This designation became effective on . *See* EEOICPA Bulletin No. 10-13 (issued). This addition to the SEC was not in effect when the district office issued its decision recommending that the claims be denied under Part B.

The employee worked for an aggregate of at least 250 work days for a DOE contractor at the Nevada Test Site between and . The totality of evidence therefore demonstrates that the employee qualifies as a member of the SEC.

The employee was diagnosed with bladder cancer on November 7, 2002, metastatic bone cancer on , lung cancer on , and metastatic liver cancer on January 16, 2007 . Those diagnoses occurred more than five years after he began employment at a covered facility. Lung cancer and bone cancer are specified cancers when diagnosed after first exposure, as they were in his case. 20 C.F.R. § 30.5(ff)(2), (3). Bladder cancer is also a specified cancer when diagnosed more than five years after first exposure, as it was in his case. 20 C.F.R. § 30.5(ff)(5)(iii)(K). As a member of the SEC who was diagnosed with a specified cancer, the employee is a "covered employee with cancer." 42 U.S.C. § 7584l(9). The employee's liver cancer is not a specified cancer because it was diagnosed as a metastatic cancer. Liver cancer is a specified cancer only when it is a primary cancer. 20 C.F.R. § 30.5(iii)(O).

A covered employee, or the survivor of that employee, shall receive compensation for the disability or death of that employee from that employee's occupational illness in the amount of $150,000.00. The evidence of record establishes that the employee is deceased. Part B provides that where a covered employee is deceased at the time benefits are to be paid, payments are to be made to the employee's eligible surviving spouse if that person is living. 42 U.S.C. § 7384s(e)(1)(A). The eligible spouse of an employee is the husband or wife of the employee who was married to the employee for at least one year immediately before the death of the employee. 42 U.S.C. § 7384s(e)(3)(A). The Act does not define marriage, so the Division of Energy Employees Occupational Illness Compensation (DEEOIC) looks to the law of the most applicable state to determine whether a claimant was married to the employee. Federal (EEOICPA) Procedure Manual, Chapter 2-1200.5.b(2) (August 2009). If state law recognizes the existence of a marital relationship, that relationship must be recognized by DEEOIC in its adjudication of EEOICPA survivor claims. Common-law Marriage Handbook, p. 10 (April 2010).

[Claimant #1] claimed to be the surviving spouse of the employee based on a common-law marriage entered into by her and the employee in Texas. The undersigned concludes the law of is the most applicable law to use in determining whether **[Claimant #1]** was married to the employee. recognizes common-law marriages contracted within its borders when three elements are satisfied concurrently. Those elements are: (1) the parties agreed to be married; (2) after the agreement, they lived together in as husband and wife; and (3) they held themselves out to others as husband and wife. Common-law Marriage Handbook, Appendix p. 9 (April 2010). The undersigned has considered the totality of the evidence including the 10-page letter submitted by **[Claimant #1]** describing her relationship with the employee, the numerous financial, legal and other documents she submitted, and the statements of numerous third parties. I find the totality of the evidence establishes that **[Claimant #1]** and the employee agreed to enter into a common-law marriage on July 5, 1993, that after entering into that agreement they lived together in Texas as husband and wife for two periods of time (from July 5, 1993 until approximately January 1, 1996 and from October 2000 until the employee's death on February 3, 2007), and that during those periods of time they held themselves out to others as husband and wife. I

therefore find that **[Claimant #1]** is the eligible surviving spouse of the employee.

Under Part B of the Act, if there is an eligible surviving spouse of the employee, then payment shall be made to such surviving spouse unless there is also a child[2] of the employee who is not a recognized natural child or adopted child of the surviving spouse and who is a minor at the time of payment. 42 U.S.C. § 7384s(e)(1)(F). The evidence establishes that **[Claimant #2]** is a biological child of the employee and not a recognized natural child or adopted child of **[Claimant #1]**. Accordingly, because he is not also a minor, I find that he is not an eligible surviving child of the employee and his claim for survivor benefits based on the employee's condition of lung cancer under Part B of the Act is denied.

Therefore, **[Claimant #1]** is the only person to whom compensation may be paid under Part B of EEOICPA. Her claim for survivor benefits based on the employee's conditions of bladder cancer and lung cancer under Part B is approved for compensation in the amount of $150,000.00. As the maximum benefits provided for under Part B are being paid to her based on the employee's conditions of bladder cancer and bone cancer and there is no possible benefit to her in adjudicating her claim for the employee's condition of metastatic liver cancer, her claim for survivor benefits based on the employee's condition of metastatic liver cancer under Part B is denied.

The statute provides that medical benefits should be provided to a covered employee with an occupational illness for the treatment of that covered illness. These benefits are retroactive to the employee's application date. The evidence of record establishes that the employee is a covered employee with the occupational illnesses of bladder cancer and bone cancer under Part B. He filed a claim for benefits based on bladder cancer and bone cancer prior to his death. He is entitled to medical benefits for treatment of bladder cancer and bone cancer beginning February 1, 2005 and ending . Accordingly, the Estate of **[Employee]** is awarded medical benefits for the employee's condition of bladder cancer and bone cancer beginning February 1, 2005 and ending February 3, 2007.

A decision on the claims of **[Claimant #1]** and **[Claimant #2]** for survivor benefits under Part E of EEOICPA is deferred pending further development by the district office.

William B. Talty

Hearing Representative

Final Adjudication Branch

[1] The Nevada Test Site is a covered DOE facility beginning in 1951 to the present. Reynolds Electrical & Engineering Company (REECo) was a DOE contractor there from 1952 to 1995. *See* Department of Energy's weblisting at: http://www.hss.energy.gov/HealthSafety/FWSP/Advocacy/faclist/findfacility.cfm (verified by FAB on July 7, 2010).

[2] The statutory definition for the term "child" has been interpreted for the purposes of EEOICPA as meaning a biological child, adopted child or stepchild of an individual. *See* EEOICPA Circular No. 08-08 (issued September 23, 2008).

Payment of Monetary Benefits

Beryllium sensitivity

EEOICPA Fin. Dec. No. 58229-2004 (Dep't of Labor, September 17, 2004)

NOTICE OF FINAL DECISION

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

STATEMENT OF THE CASE

On June 7, 2004, you submitted Form EE-1, Claim for Employee Benefits under the EEOICPA, based on beryllium sensitivity. You also submitted Form EE-3, Employment History for Claim under the EEOICPA, based on your employment at the Nevada Test Site (NTS), indicating you worked for EG&G from 1990 to 1991.

A representative of the Department of Energy (DOE) verified your employment at NTS from September 17, 1990 to November 4, 1991. NTS is recognized as a covered Department of Energy (DOE) facility from 1951 to the present. Throughout the course of its operations, the potential for beryllium exposure existed at NTS, due to beryllium use, residual contamination, and decontamination activities. *See* DOE, Office of Worker Advocacy, Facility List.

You submitted the results of an abnormal beryllium lymphocyte proliferation test performed by National Jewish Medical and Research Center, dated March 27, 2004, which confirms your sensitivity to beryllium.

On August 11, 2004, the Seattle district office issued a recommended decision concluding that you are a covered beryllium employee, as defined in § 7384l(7) of the EEOICPA, who has been diagnosed with beryllium sensitivity, a covered occupational illness as defined by § 7384l(8)(A) of the Act. *See* 42 U.S.C. § 7384l(7), (8)(A). The recommended decision also concluded that, pursuant to § 7384s(c) of the EEOICPA, you are entitled to medical benefits for the treatment and monitoring of beryllium sensitivity retroactive to June 7, 2004. *See* 42 U.S.C. § 7384s(c)(1) and (2), 20 C.F.R. §§ 30.506, 30.507.

On September 7, 2004, the Final Adjudication Branch received written notification that you waive any and all rights to file objections to the recommended decision.

FINDINGS OF FACT

1. You filed a claim for employee benefits on June 7, 2004.

2. You were employed at NTS, a covered DOE site, from September 17, 1990 to November 4, 1991.

3. You are a covered beryllium employee who was present at NTS during a period when beryllium dust, particles or vapor may have been present.

4. You were diagnosed with beryllium sensitivity on March 27, 2004.

5. The onset of beryllium sensitivity occurred after your initial exposure to beryllium during a period of covered employment.

CONCLUSIONS OF LAW

In order to be afforded coverage as a “covered beryllium employee,” you must show that you sustained

occupational exposure to beryllium while employed at a DOE facility, or under certain circumstances, while present at a DOE facility or a facility owned, operated, or occupied by a beryllium vendor, during a period when beryllium dust, particles or vapor may have been present at such a facility. *See* 42 U.S.C. §§ 7384l(7) and 7384n(a)(1).
In addition, under § 7384l(8) of the Act, the covered beryllium employee must have medical evidence to show a diagnosis of beryllium sensitivity using an abnormal beryllium lymphocyte proliferation test (LPT) performed on either blood or lung lavage cells. *See* 42 U.S.C. § 7384l(8); 20 C.F.R. § 30.205(b).
Based on your employment with a DOE contractor or subcontractor at NTS, you are a covered beryllium employee and, in the absence of substantial evidence to the contrary, you are determined to have been exposed to beryllium in the performance of duty. *See* 42 U.S.C. §§ 7384l(7), 7384n.

You provided the results of a lymphocyte proliferation test conducted on March 27, 2004 showing that you have an abnormal lymphocyte transformation to beryllium sulfate. Therefore, you have a covered beryllium illness as defined in § 7384l(8)(A) of the EEOICPA. *See* 42 U.S.C. § 7684l(8)(A).

For the foregoing reasons, the undersigned hereby accepts your claim for beryllium sensitivity. You are a covered beryllium employee as defined in § 7384l(7) of the EEOICPA, diagnosed as having beryllium sensitivity, which is a covered occupational illness as defined by § 7384l(8)(A) of the Act. *See* 42 U.S.C. § 7384l(7), (8)(A).

The EEOICPA provides that a covered employee shall receive, in the case of beryllium sensitivity:

(1) A thorough medical examination to confirm the nature and extent of the individual's established beryllium sensitivity.

(2) Regular medical examinations thereafter to determine whether that individual has developed established chronic beryllium disease.

See 42 U.S.C. § 7384s(c)(1) and (2).

No monetary compensation is available for beryllium sensitivity. *See* 42 U.S.C. § 7384s(a)(2). At this time, you are not entitled to any lump sum payment provided under the Act. *See* 20 C.F.R. §§ 30.506, 30.507 and 30.508.

The record indicates that you filed your claim for beryllium sensitivity on June 7, 2004. The date your claim was filed is the date you became eligible for beryllium sensitivity monitoring, as well as medical benefits for the treatment of beryllium sensitivity. *See* 42 U.S.C. § 7384t(d). Therefore, you are entitled to medical monitoring benefits retroactive to June 7, 2004.

Seattle, Washington

James T. Carender

Hearing Representative, Final Adjudication Branch

Death of awardee

EEOICPA Fin. Dec. No. 10078623-2009 (Dep't of Labor, April 9, 2010)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch (FAB) concerning the above claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons stated below, the claim for survivor benefits under Part E of EEOICPA for the death of the employee is accepted. No benefits are payable, however, since compensation paid to the employee after his death has not been recouped, and the amount of this compensation exceeds the claimant's entitlement to survivor compensation.

STATEMENT OF THE CASE

On August 14, 2001, **[Employee]** filed a Form EE-1 claiming benefits under EEOICPA for skin cancer. On February 10, 2004, **[Employee]** also filed a request for assistance with a state workers' compensation claim for skin cancer, a lung condition and hearing problems with the Department of Energy (DOE) under former Part D of EEOICPA. On May 17, 2006, **[Employee]** also filed a Form EE-1 based on mantle cell lymphoma.

On August 2, 2005, FAB issued a final decision accepting **[Employee]**'s claim for compensation under Part B for skin cancer. On January 29, 2007, FAB also issued a final decision accepting **[Employee]**'s claim under Part E for skin cancer, and under Parts B and E for lymphoma. On August 29, 2007, FAB issued a final decision denying **[Employee]**'s claim under Part E for his hearing loss. On December 27, 2007, FAB issued a final decision to accept **[Employee]**'s claim under Part E for chronic obstructive pulmonary disease (COPD). As part of these decisions, FAB found that **[Employee]** was a DOE contractor employee at the Portsmouth Gaseous Diffusion Plant (GDP) from October 5, 1953 to July 1, 1985.

On August 14, 2008, FAB issued a final decision accepting **[Employee]**'s claim under Part E for a 79% whole-person impairment resulting from his covered illnesses of skin cancer, lymphoma and COPD, and awarding him impairment benefits in the amount of $197,500.00. On August 28, 2008, the Cleveland district office received a Form EN-20 signed by **[Claimant]** as attorney-in-fact for **[Employee]**. Accompanying the Form EN-20 was a three-page document entitled "General Power of Attorney," in which **[Employee]** appointed **[Claimant]** as his attorney-in-fact. On September 8, 2008, the U.S. Department of Labor's Counsel for Energy Employees Compensation concluded that the "General Power of Attorney" executed by **[Employee]** is legally sufficient to grant **[Claimant]** authority to execute the Form EN-20 on **[Employee]**'s behalf.

On September 10, 2008, the Cleveland district office authorized payment of $197,500.00 to be deposited by electronic funds transfer to the National City Bank savings account of **[Employee]** and **[Claimant]**.

On October 2, 2008, **[Claimant]** filed a Form EE-2 claiming benefits under EEOICPA as the surviving spouse of **[Employee]**. She also submitted a copy of **[Employee]**'s death certificate, showing that he died on August 11, 2008 as a result of mantle cell lymphoma, and that she was his surviving spouse. The claimant also submitted a copy of her marriage certificate, showing that she and **[Employee]** were married on August 9, 1947.

Since the evidence showed that **[Employee]** died prior to the issuance of the payment, the Cleveland district office sent an October 28, 2008 letter to National City Bank requesting return of the $197,500.00 transferred to **[Employee]**'s savings account via electronic funds transfer to the United States Treasury. There is no record indicating that these funds have been returned to the Treasury. On November 3, 2008, the Cleveland district office referred this case to the Branch of Policies, Regulations and Procedures for guidance on the appropriate procedures for adjudication of a claim for survivor compensation when payment has been issued to an employee after that employee's death. On August 14, 2009, the Branch instructed the district office to proceed with the adjudication of this claim for survivor benefits, noting that "if [you are] found eligible to receive compensation, there will be a balance of overpaid funds no matter the outcome as the maximum award [you] could receive as a survivor is less than the previously paid impairment award."

On August 26, 2009, the district office issued a recommended decision to accept the claimant's survivor claim, and that she is entitled to compensation in the amount of $125,000.00 under Part E as **[Employee]**'s surviving spouse. The district office determined, however, that because a payment in the amount of $197,500.00 had been issued to **[Employee]** after his death, and that this payment had not been returned to the district office, an overpayment of $72,500.00 existed. Accordingly, the district office concluded that survivor benefits were not payable.

OBJECTIONS

On October 16, 2009, the claimant's authorized representative objected to the recommended decision and requested a hearing, which was held on January 5, 2010. The representative argued that the adjudication of **[Employee]**'s claim for impairment benefits was unjustifiably delayed, and that this delay resulted in the payment of the impairment award after **[Employee]**'s death. The representative also introduced a timeline showing the actions taken between the time that **[Employee]** filed a claim for impairment benefits and the issuance of the final decision awarding such benefits. (Exhibit 1). He argued that because of this delay, the claimant should be entitled to receive the impairment award in addition to any survivor compensation due. The authorized representative also argued that the claimant was not at fault in the creation of any overpayment, and that collection of any overpayment should be waived.

Based on the evidence in the case file, and after considering the objections to the recommended decision and the testimony at the oral hearing, FAB hereby makes the following:

FINDINGS OF FACT

1. On January 29, 2007 and December 27, 2007, FAB issued final decisions accepting **[Employee]**'s claim under Part E for skin cancer and lymphoma, and for COPD. In these final decisions, FAB determined that **[Employee]** was a covered DOE contractor employee at the Portsmouth GDP from October 5, 1953 to July 1, 1985.

2. **[Employee]** died on August 11, 2008 as a result of lymphoma.

3. On August 14, 2008, FAB issued a final decision accepting **[Employee]**'s claim for a 79% whole-person impairment resulting from his covered illnesses of skin cancer, lymphoma and COPD, and awarded impairment benefits in the amount of $197,500.00

4. On September 10, 2008, the Cleveland district office authorized payment of $197,500.00 to be deposited by electronic funds transfer to the National City Bank savings account of **[Employee]** and **[Claimant]**.

5. On October 2, 2008, **[Claimant]** filed a claim as the surviving spouse of **[Employee]**.

6. The claimant is the surviving spouse of **[Employee]** and was married to him for at least one year prior to his death.

Based on the above findings of fact, FAB hereby also makes the following:

CONCLUSIONS OF LAW

Part E of EEOICPA provides for payment of compensation to a survivor of a DOE contractor employee if the evidence establishes: (1) that the employee would have been entitled to compensation for a covered illness; and (2) that it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing the death of such employee. 42 U.S.C. § 7385s-3.

As found above, **[Employee]** qualifies as a covered DOE contractor employee because he was employed by a DOE contractor at a DOE facility, and has been determined to have contracted a covered illness, lymphoma, through exposure at a DOE facility. Also as found above, the evidence establishes that it is at least as likely as not that his covered illness of lymphoma was a significant factor causing or contributing to his death. Therefore, as his surviving spouse, the claimant is entitled to survivor compensation in the amount of $125,000.00 under 42 U.S.C. § 7385s-3(a)(1).

The statute provides that in the event that a covered DOE contractor employee's death occurs after the employee applied for compensation under Part E, but before compensation was paid, and the employee's death occurred solely from a cause other than the covered illness of the employee, the survivor of that employee may elect to receive, in lieu of compensation under § 7385s-3(a), the amount that the employee would have received based on impairment or wage-loss, if the employee's death had not occurred before compensation was paid. 42 U.S.C. § 7385s-1(2)(b). The implementing regulations further provide that "if the claimant dies before the payment is received, the person who receives the payment shall return it to [the Office of Workers' Compensation Programs] for re-determination of the correct disbursement of the payment. No payment shall be made until OWCP has made a determination concerning the survivors related to a respective claim for benefits." 20 C.F.R. § 30.505(c) (2009).

EEOICPA procedures define an overpayment as "any amount of compensation paid under 42 U.S.C. §§ 7384s, 7384t, 7384u, 7385s-2 or 7385s-3 to a recipient that, at the time of payment, is paid where no amount is payable or where payment exceeds the correct amount of compensation determined by DEEOIC." Federal (EEOICPA) Procedure Manual, Chapter 3-0800. The procedures further set forth a process for the review, identification, and for the issuance of decisions regarding overpayments.

In response to the objections in this matter, I note that the evidence in the case file shows that **[Employee]**'s cause of death was mantle cell lymphoma, which has been established as a covered illness under Part E. As a result, the claimant may not elect to receive the impairment award to which **[Employee]** was entitled. Since the evidence establishes that compensation was paid to **[Employee]**

after his death on August 11, 2008, and this payment (which was for a sum greater than the award the claimant could receive as a survivor) has not been returned to OWCP, no further compensation can be paid until the status of any overpayment has been determined.

Accordingly, the claim for survivor benefits under Part E is accepted, but there is no entitlement to compensation.

Cleveland, OH

Greg Knapp

Hearing Representative

Final Adjudication Branch

Exclusiveness of remedy

EEOICPA Fin. Dec. No. 2597-2002 (Dep't of Labor, July 8, 2003)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA).

On June 6, 2003, the Jacksonville district office issued a decision recommending that you are entitled to medical benefits effective April 28, 2003 for colon cancer.

The district office referred the claims for skin cancer and cancer of the pyriform sinus to the National Institute for Occupational Safety and Health (NIOSH). However, the pyriform sinus is part of the hypo pharynx. EEOICPA Bulletin No. 02-28, Effective September 5, 2002, further defines that the hypo pharynx is one of three parts of the pharynx. The pharynx is a Special Exposure Cohort (SEC) cancer as defined in § 7384l(17)(A) of the Act, and § 30.5(dd)(5)(iii)(E) of the implementing regulations. 42 U.S.C. § 7384l(17)(A), 20 C.F.R. § 30.5(dd)(5)(iii)(E). Therefore, I find that **[Employee]** has cancer of the pharynx, and is entitled to medical benefits for the treatment of pharynx cancer. As the pyriform sinus (pharynx cancer) is an SEC cancer, there is no need for dose reconstruction by NIOSH. The condition of skin cancer remains for dose reconstruction at NIOSH.

On June 16, 2003, the Final Adjudication Branch received your written notification that you waive any and all objections to the recommended decision. I have reviewed the record on this claim and the recommended decision issued by the district office on June 6, 2003. I find that you are a member of the Special Exposure Cohort, as that term is defined in § 7384l(14)(A) of the Act; and that your colon cancer and pharynx (pyriform sinus) cancer are specified cancers under § 7384l(17)(A) of the Act and §§ 30.5(dd)(5)(iii)(M) and (E) of the implementing regulations. 42 U.S.C. §§ 7384l(14)(A), 7384l(17)(A), 20 C.F.R. §§ 30.5(dd)(5)(iii)(M), 30.5(dd)(5)(iii)(E).

A claimant is entitled to compensation one time in the amount of $150,000 for a disability from a covered occupational illness. Since you were previously awarded $150,000 for lung cancer, this decision is for medical benefits only. I find that the recommended decision is in accordance with the

facts and the law in this case, and that you are entitled to medical benefits effective April 28, 2003 for colon cancer, and effective August 9, 2001 for pharynx cancer (pyriform sinus), pursuant to § 7384t of the Act. 42 U.S.C. § 7384t.

Jacksonville, FL

July 8, 2003

Jeana F. LaRock

District Manager

Final Adjudication Branch

EEOICPA Fin. Dec. No. 53272-2004 (Dep't of Labor, March 31, 2004)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjubudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq.* Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On June 27, 2002, the Final Adjudication Branch issued a Final Decision concluding that **[Employee]** (the employee) was a covered employee with chronic silicosis as defined in § 7384r of the Act (and therefore entitled to compensation in the amount of $150,000), and that he was entitled to medical benefits related to chronic silicosis retroactive to September 17, 2001, pursuant to § 7384t of the Act. *See* 42 U.S.C. § 7384t. Payment of compensation was processed on July 25, 2002. The Final Adjudication Branch also denied the employee's claims based on chronic beryllium disease and asbestosis.

On January 20, 2004, you filed a Form EE-2 (Claim for Survivor Benefits Under EEOICPA) seeking compensation as the spouse of the employee.

On March 11, 2004, the Seattle district office recommended denial of your claim for benefits. The district office concluded that the employee's acceptance of compensation in the amount of $150,000 pursuant to § 7384s(a)(1) of the Act, was in full satisfaction of all claims of or on behalf of the employee against the United States, a Department of Energy contractor or subcontractor, beryllium vendor or atomic weapons employer, or against any person with respect to that person's performance of a contract with the United States, that arise out of an exposure referred to in § 7385 of the Act. *See* 42 U.S.C. §§ 7384s(a)(1), 7385b.

On March 29, 2004, the Final Adjudication Branch received written notification from you indicating that you waive any and all rights to file objections to the recommended decision.

FINDINGS OF FACT

1. On September 17, 2001, the employee filed a claim for benefits under the EEOICPA based, in part, on the condition of chronic silicosis.

2. On June 27, 2002, the Final Adjudication Branch accepted the employee's claim for chronic silicosis, and determined that he was entitled to compensation in the amount of $150,000 and medical benefits related to the treatment of chronic silicosis retroactive to September 17, 2001.

3. Payment of compensation in the amount of $150,000 was tendered on July 25, 2002.

4. On January 20, 2004, you filed a claim for survivor benefits.

CONCLUSIONS OF LAW

Section 7384s(a)(1) of the Act specifically provides that "[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." *See* 42 U.S.C. § 7384s(a)(1). The record in this case shows that, on July 25, 2002, the employee was issued compensation in the amount of $150,000 based on his diagnosis of chronic silicosis, a covered occupational illness under the Act.

Further § 7385b provides that the one-time payment under the Act is a full settlement of an EEOICPA claim:

The acceptance by an individual of payment of compensation under Part B of this subchapter with respect to a covered employee shall be in full satisfaction of all claims of or on behalf of that individual against the United States, against a Department of Energy contractor of subcontractor, beryllium vendor or atomic weapons employer, or against any person with respect to that person's performance of a contract with the United States, that arise out of an exposure referred to in section 7385 of this title.

42 U.S.C. § 7385b.

Since you are claiming eligibility as the surviving spouse of an employee who previously received $150,000 under the EEOICPA, no additional compensation is available to you. Therefore, your claim must be denied.

For the above reasons, the Final Adjudication Branch concludes that the evidence of record does not allow compensation under the Act. Accordingly, your claim for benefits is denied.

Seattle, Washington

Julie L. Salas

Hearing Representative, Final Adjudication Branch

Forfeiture of entitlement to

EEOICPA Fin. Dec. No. 105159-2010 (Dep't of Labor, March 19, 2010)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning the above claims for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, FAB approves the claims of **[Claimant #2]** and **[Claimant #3]** under Part B of EEOICPA, and they are each awarded compensation in the amount of $75,000.00. **[Claimant #1]**'s claim under Part B is denied.

STATEMENT OF THE CASE

On November 8, 2002, **[Employee's wife]** filed a Form EE-2 claiming survivor benefits under EEOICPA for both the employee's death and his lung cancer and chronic obstructive pulmonary disease (COPD). By final decision dated May 12, 2009, FAB accepted her Part E claim for the employee's death due to COPD, and she was awarded $125,000.00. **[Employee's spouse]** died on July 1, 2009, and her pending Part B claim was administratively closed.

On August 12, 2009, **[Claimant #1]** filed a Form EE-2 claiming benefits based on the condition of lung cancer with metastasis to the adrenal gland. On September 9, 2009, **[Claimant #2]** and **[Claimant #3]** filed Forms EE-2 claiming benefits based on the same condition. A Department of Energy (DOE) representative verified **[Employee]**'s employment at the site, a DOE facility, by J.A. Jones, a DOE contractor, from January 20, 1981 to June 10, 1981. Dosimetry records verified additional employment by J.A. Jones intermittently from June 11, 1981 to December 4, 1986, and by H.B. Painters, another DOE contractor, from January 18, 1983 to January 19, 1983, and from January 25, 1988 to December 14, 1988. The site is a DOE facility from 1942 to present.[1] The medical evidence submitted in support of the claim includes a cytology report dated March 11, 1997, which diagnosed small cell carcinoma (lung cancer). Finally, **[Claimant #1]**, **[Claimant #2]** and **[Claimant #3]** each submitted birth certificates which verify that **[Employee]** is their father.

To determine the probability of whether **[Employee]** contracted lung cancer in the performance of duty, the Seattle district office had referred the case to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction in connection with the claim filed by **[Employee's wife]**. On July 2, 2009, the district office received the NIOSH report, and using the dose information provided in this report, the district office utilized the NIOSH-Interactive RadioEpidemiological Program (NIOSH-IREP) to calculate a 57.57% probability that **[Employee]**'s lung cancer was related to radiation exposure at the Hanford site.

On September 9, 2009, the district office received a letter from **[Claimant #1]**, in which she stated that on August 2, 1999 she entered a guilty plea regarding charges of having made false statements to obtain federal workers' compensation. On December 18 and 19, 2009, the district office received signed letters in which **[Claimant #2]** and **[Claimant #3]** each affirmed that they never filed for or received any settlement or award from a tort suit related to the employee's lung cancer, they never pled guilty to or were convicted on any charges connected with an application for or receipt of federal or state workers' compensation, and have never filed for or received any payments, awards or benefits from a state workers' compensation claim.

On January 28, 2010, the Seattle district office issued a recommended decision to accept the claims of

[Claimant #2] and **[Claimant #3]** for compensation under Part B, based on lung cancer, concluding that **[Employee]** was a covered employee with cancer, that the NIOSH dose estimates were completed in accordance with EEOICPA and its implementing regulations, and as he was a covered employee who is now deceased, his survivors are entitled to compensation in the amount of $150,000.00. The district office determined that **[Claimant #2]** and **[Claimant #3]** are **[Employee]**'s only eligible survivors, however, because **[Claimant #1]**'s entitlement under EEOICPA is forfeited, based on 42 U.S.C. § 7385i, and the district office recommended denial of her claim. The district office determined that **[Claimant #2]** and **[Claimant #3]** are entitled to compensation in the amount of $50,000.00 each.

On February 1, 2010, FAB received written notification from **[Claimant #2]** and **[Claimant #3]** indicating they waive all rights to file objections to the findings of fact and conclusions of law contained in the recommended decision. On February 17, 2010, FAB received notification from **[Claimant #1]** who affirmed the same.

After considering the evidence of record, FAB hereby makes the following:

FINDINGS OF FACT

1. On August 12, 2009, **[Claimant #1]** filed a claim under Part B, and on September 9, 2009, **[Claimant #2]** and **[Claimant #3]** also filed claims.

2. **[Employee]** was employed at the site, a DOE facility, by DOE contractors, from January 20, 1981 to December 4, 1986, from January 18, 1983 to January 19, 1983, and from January 25, 1988 to December 14, 1988.

3. **[Employee]** was diagnosed with lung cancer on March 11, 1997.

4. The NIOSH-IREP calculated a 57.57% probability that **[Employee]**'s lung cancer was caused by radiation exposure at the site.

5. **[Claimant #2]** and **[Claimant #3]** affirmed they never filed for or received any settlement or award from a tort suit in relation to lung cancer, have never pled guilty to or been convicted on any charges connected with an application for or receipt of federal or state workers' compensation, and have never filed for or received any payments, awards or benefits from a state workers' compensation claim.
6. **[Claimant #2]** and **[Claimant #3]** are **[Employee]**'s eligible survivors.
7. **[Claimant #1]** is not entitled to compensation under Part B due to a guilty plea to making false statements to obtain federal workers' compensation.
Based on the above-noted findings of fact, FAB hereby also makes the following:

CONCLUSIONS OF LAW

The regulations at § 30.111(a) state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of each and every criterion under any compensable claim category. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the statute and regulations, the claimant also bears the burden of providing to the Office of Workers' Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to

establish any and all criteria for benefits set forth in the regulations. 20 C.F.R. §§ 30.110, 30.111(a) (2009).

In order to be afforded coverage under Part B, the claimants must establish that **[Employee]** was diagnosed with an occupational illness incurred as a result of exposure to silica, beryllium, and/or radiation: cancer, beryllium sensitivity, chronic beryllium disease, and/or silicosis. Furthermore, the illness must have been incurred while in the performance of duty for DOE or certain of its vendors, contractors, subcontractors, or for an atomic weapons employer.

As found above, the evidence of record verifies that **[Employee]** was employed at the site, a DOE facility, by DOE contractors, and that he was diagnosed with lung cancer on March 11, 1997. FAB utilized NIOSH-IREP to confirm a 57.57% probability that **[Employee]**'s lung cancer was caused by radiation exposure while employed at the site. Therefore, he is a "covered employee with cancer" and as he would be entitled to compensation but is now deceased, his survivors are entitled to compensation in the amount of $150,000.00. 42 U.S.C. § 7384s(a)(1).

[Claimant #2] and **[Claimant #3]** are **[Employee]**'s eligible surviving children as defined by 42 U.S.C. § 7384s(e)(3)(B). However, pursuant to 42 U.S.C. § 7385i, any individual convicted of a violation of any federal or state criminal statute relating to fraud in either the application for or the receipt of benefits under any federal or state workers' compensation law shall forfeit any entitlement to benefits under EEOICPA. **[Claimant #1]** entered a guilty plea regarding charges of having made false statements to obtain federal workers' compensation. Accordingly, **[Claimant #1]**'s claim under Part B is denied. Though the district office determined that **[Claimant #2]** and **[Claimant #3]** are each entitled to compensation under Part B in the amount of $50,000.00, they are both awarded compensation in the amount of $75,000.00.

Seattle,

Aaron M. Warren

Hearing Representative

Final Adjudication Branch

[1] *See* DOE's web listing at: http://www.hss.energy.gov/healthsafety/FWSP/advocacy/faclist/showfacility.cfm (retrieved March 19, 2010).

Increase over basic survivor benefit amount payable under Part E

EEOICPA Fin. Dec. No. 3831-2005 (Dep't of Labor, August 10, 2005)

NOTICE OF FINAL DECISION

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, the Final Adjudication Branch accepts and approves your claim for compensation.

STATEMENT OF THE CASE

On August 16, 2001, you (**[Claimant #1/Employee's Spouse]** and **[Claimant #2]**) filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA), based on the employee's condition of acute myelomonocytic leukemia. Also, on January 26, 2005, you (**Employee's Spouse**) filed a Form DOE F 350.3 (Claim Under EEOICPA, Part D-DOE State Workers' Compensation Assistance Program), as the surviving spouse of the employee, based on the condition of acute myelomonocytic leukemia. Your claim form is considered an application for survivor compensation under Part E, 42 U.S.C. § 7385s, as a covered spouse of the employee.

Also submitted was a Form EE-3 (Employment History) indicating that the employee worked at the Los Alamos National Laboratory from February 24, 1959 to December 1, 1975, and at the Hanford site from December 8, 1975 to May, 1981. A representative of the Department of Energy (DOE) verified that the employee was employed by the University of California, a DOE contractor, at the Los Alamos National Laboratory from February 24, 1959 to December 1, 1975; and by Vitro Engineering Corp. and Exxon Nuclear, DOE contractors, at the Hanford site from December 8, 1975 to May 1, 1981.

Medical documentation was submitted including a pathology report dated May 1, 1982, which indicated a diagnosis of acute myelomonocytic leukemia.

The record includes a copy of a marriage certificate showing **[Employee's Spouse]** and the employee were married on December 18, 1968, and a copy of **[Employee's]** death certificate showing they were married at the time of his death on December 10, 1982. The death certificate listed his cause of death as pseudomonas pneumonia due to chemotherapy-induced neutropenia as a consequence of acute myelomonocytic leukemia (AMML).

You (**[Claimant #2]**) submitted a copy of your birth certificate, dated March 4, 1973, showing that **[Employee]** was your father. You also submitted a marriage certificate documenting your most recent last name change to **[Claimant #2's new surname]**.

To determine the probability of whether **[Employee]** sustained acute myelomonocytic leukemia in the performance of duty, the Seattle district office referred your case to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction in accordance with § 30.115 of the EEOICPA regulations. *See* 20 C.F.R. § 30.115. The district office received the final NIOSH Report of Dose Reconstruction dated May 6, 2005. *See* 42 U.S.C. § 7384n(d). The radiation dose reconstruction report indicates that an efficiency model was used for the dose reconstruction. NIOSH determined that the internal dose was of sufficient magnitude to consider the dose reconstruction complete. That is, the calculated dose produced a probability of causation of 50% or greater. The doses reported are an "underestimate" of the employee's total occupational radiation dose. NIOSH Report of Dose Reconstruction, p. 4.

Using the information provided in this report, the Seattle district office utilized the Interactive RadioEpidemiological Program (IREP) to determine the probability of causation of the employee's cancer and reported in its recommended decision that there was an 89.18% probability that **[Employee's]** cancer was caused by his radiation exposure at the Los Alamos National Laboratory.

The evidence of record includes a letter dated June 17, 2005, in which you (**[Employee's Spouse]**) indicated that neither you nor your spouse had filed a lawsuit or received state workers' compensation

based on the claimed conditions. Further you indicated that you and your spouse had no minor children or children incapable of self-support, who were not your natural or adopted children, at the time of his death.

On July 12, 2005, the Seattle district office issued a recommended decision to accept your claim based on the condition of acute myelomonocytic leukemia and to award you (**[Employee's Spouse]**) compensation in the amount of $300,000.00. The district office concluded that the employee is a covered employee under 42 U.S.C. § 7384l(1)(B); and was a covered employee with cancer as that term is defined by 42 U.S.C. § 7384l(9)(B). Further, the National Institute for Occupational Safety and Health performed dose reconstruction estimates in accordance with 42 U.S.C. § 7384n(d) and 42 C.F.R. § 82.10; and the Department of Labor completed the probability of causation calculation in accordance with 42 U.S.C. § 7384n(c)(3) and 20 C.F.R. § 30.213, which references Subpart E of 42 C.F.R. Part 81. In addition, the employee is a covered employee under 42 U.S.C. § 7385s(1), and is a covered employee with a covered illness as that term is defined by 42 U.S.C. § 7384s(2).

The district office determined that **[Employee's Spouse]** is entitled to compensation in the amount of $150,000.00 per 42 U.S.C. § 7384s(a)(1), as **[Employee's Spouse]** is the spouse of the employee per 42 U.S.C. § 7384s(e)(3)(A) and 42 U.S.C. § 7385s-3(d)(1); and **[Employee's Spouse]** is entitled to compensation in the amount of $150,000 in accordance with 42 U.S.C. § 7385s-3(a)(1), for a total amount of $300,000.00. Lastly, the District Office concluded that **[Claimant #2]** is not entitled to compensation under 42 U.S.C. § 7384 or 42 U.S.C. § 7385s as she is the child of **[Employee's Spouse]** and the employee.

On July 19, 2005, the Final Adjudication Branch received written notification from you (**[Employee's Spouse]** and **[Claimant #2]**) indicating that you waive all rights to file objections to the findings of fact and conclusions of law pertaining to the award of benefits in the recommended decision.

FINDINGS OF FACT

1. On August 16, 2001, you (**[Employee's Spouse]** and **[Claimant #2]**) filed a claim for survivor benefits with the Department of Labor.
2. On January 26, 2005, you (**[Employee's Spouse]**) filed a claim for survivor benefits with the Department of Energy.
3. The employee worked for University of California at Los Alamos National Laboratory, a covered DOE facility, from February 24, 1959 to December 1, 1975; and for Vitro Engineering Corp. and Exxon Nuclear at the Hanford facility from December 8, 1975 to May 1, 1981.
4. The employee was diagnosed with acute myelomonocytic leukemia on May 1, 1982, after starting work at a DOE facility.
5. **The NIOSH Interactive RadioEpidemiological Program indicated an 89.18% probability that the employee's cancer was caused by radiation exposure at the Los Alamos National Laboratory.**
6. The employee's cancer was at least as likely as not related to his employment at a Department of Energy facility.
7. You (**[Employee's Spouse]**) were married to the employee on December 18, 1968, and you were the employee's spouse at the time of his death.
8. You (**[Claimant #2]**) are a child of the employee and were an adult at the time of his death.
9. The death certificate lists the cause of **[Employee's]** death as pseudomonas pneumonia due to chemotherapy-induced neutropenia as a consequence of acute myelomonocytic leukemia (AMML).
10. The evidence of record supports a causal connection between the employee's death due to lung

cancer and his exposure to radiation and/or a toxic substance at a DOE facility.

CONCLUSIONS OF LAW

Section 30.316(a) of the EEOICPA regulations provides that, if the claimant waives any objections to all or part of the recommended decision, the Final Adjudication Branch may issue a final decision accepting the recommendation of the district office, either in whole or in part. 20 C.F.R. § 30.316(a). You waived your right to file objections to the findings of fact and conclusions of law pertaining to the award of benefits in the recommended decision.

The Final Adjudication Branch calculated the probability of causation for the employee's acute myelomonocytic leukemia using the NIOSH IREP software program, confirming that there is an 89.18% probability that the employee's cancer was caused by radiation exposure while employed at the Los Alamos National Laboratory. *See* 42 C.F.R. § 81.20 *et seq.* Thus, the evidence shows that the employee's acute myelomonocytic leukemia was at least as likely as not related to his employment at the Los Alamos National Laboratory.

Under the EEOICPA, eligibility is based on survivorship status. If an employee is survived by a spouse, children are not eligible under Part B. *See* 42 U.S.C. §§ 7384s(e)(1)(A), (3)(A). Further, if the child is an adult child of the employee at the time of death, the child is not eligible for compensation under Part E. *See* 42 U.S.C. § 7385s-3(c). The evidence of record indicates the employee was survived by a spouse (**[Employee's Spouse]**); therefore, **[Claimant #2]** is not an eligible survivor.

The evidence of record establishes that the employee was diagnosed with acute myelomonocytic leukemia, an "occupational illness" as defined by 42 U.S.C. § 7384l(15). The employee was a covered employee under 42 U.S.C. § 7384l(1)(B), and was a covered employee with cancer as that term is defined by 42 U.S.C. § 7384l(9)(B). You (**[Employee's Spouse]**) are the employee's eligible surviving spouse as defined by 42 U.S.C. § 7384s(e)(3)(A) and you are entitled to compensation benefits in the amount of $150,000.00 pursuant to 42 U.S.C. § 7384s(a)(1).

Further, the evidence of record also establishes that the employee was diagnosed with a "covered illness," acute myelomonocytic leukemia, as defined by 42 U.S.C. § 7385s(2). The employee contracted that "covered illness" through exposure to radiation at a DOE facility pursuant to 42 U.S.C. § 7385s-4(a). The employee was a DOE contractor employee as defined by 42 U.S.C. § 7385s(1).

The employee had wage-loss for a period of more than 10 calendar years, but less than 20 calendar years. He passed away at age 49, 16 years prior to his normal retirement age of 65, and there was an aggregate period of not less than 10 years before the employee attained normal retirement age (for purposes of the Social Security Act) that he died, and the employee did not have an annual wage. You are the employee's eligible surviving spouse as defined by 42 U.S.C. § 7385s-3(d)(1), and you are entitled to compensation benefits in the amount of $150,000.00 pursuant to 42 U.S.C. § 7385s-3(a)(2) (Category Two). Accordingly, you are entitled to compensation in the full amount of $300,000.00.

Seattle, Washington,

Rosanne M. Dummer, District Manager

Final Adjudication Branch

EEOICPA Fin. Dec. No. 10036412-2006 (Dep't of Labor, June 13, 2007)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning the above claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claim for compensation filed by **[Claimant]** is accepted under Part E and she is awarded $125,000.00 plus an additional $25,000.00 in survivor benefits.

STATEMENT OF THE CASE

On July 1, 2005, **[Claimant]** filed a claim for survivor benefits under Part E of EEOICPA as the spouse of the employee. She identified heart bypass surgery and diabetes, Type II, as the conditions resulting from the employee's work at a Department of Energy (DOE) facility. A representative from DOE verified the employee's work as a physicist for the University of California at the Lawrence Livermore National Laboratory (LLNL) from September 1, 1955 to July 25, 1988, and that he was also present at the Nevada Test Site, the Salmon Site, the Gasbuggy Site and Amchitka Island.[1]

The evidence of record includes a June 20, 1985 electrocardiogram report in which Dr. Calder Burton diagnosed an anteroseptal myocardial infarction. It also includes a January 20, 1986 consultation report in which Dr. Rory O'Connor related a history of diabetes mellitus, LLNL medical records with a diagnosis of diabetes mellitus as early as November 4, 1976, and a June 18, 1985 hospital record noting the **[Employee]** was admitted on June 18, 1985 for diabetes mellitus, angina pectoris and coronary artery disease.

A copy of the employee's death certificate showed that he died on July 29, 1988 at the age of 54, and that **[Claimant]** was the employee's spouse at the time of his death. A copy of a marriage certificate indicates that **[Claimant]** and the employee were married on September 1, 1956. The death certificate, signed by Dr. M.T. McEneny, identified the immediate cause of the employee's death as myocardial infarction and coronary artery disease. Based on the employee's date of birth of March 22, 1934, his normal retirement age under the Social Security Act would have been 65.

On July 26, 2006, FAB issued a final decision and remand order, denying the claim filed by **[Employee's Daughter]** on the ground that she was an ineligible survivor and vacating and remanding the decision denying **[Claimant]**'s claim under Part E. FAB directed the district office to further develop the likelihood of the employee's exposure to carbon disulfide, and further explore the link between his heart conditions and his LLNL employment.

Source documents in the U.S. Department of Labor's Site Exposure Matrices (SEM) show that carbon disulfide and lead were present at LLNL. The SEM is a database of occupational categories, the locations where those occupational categories would have performed their duties, a list of process activities at the facility and the locations where those processes occurred, a list of toxic substances and the locations where those toxic substances were located, and a list of medical conditions and the toxic substances associated with those conditions. SEM did not show a connection between the toxic substances of carbon disulfide and lead and the employee's heart conditions.

On August 15, 2006, the district office referred the file to a District Medical Consultant (DMC) to determine if the employee's work history and potential exposure to toxic substances at a DOE facility show that it is "at least as likely as not" that the toxic substances were a significant factor in causing,

contributing to, or aggravating his coronary artery disease, myocardial infarction or diabetes mellitus. In a September 2, 2006 report, the DMC concluded that, pending further information on the employee's exposure to carbon disulfide, the medical evidence of record did not establish that it was "at least as likely as not" that exposure to toxic substances was a significant factor in causing, contributing to, or aggravating the employee's coronary artery disease, myocardial infarction or diabetes mellitus.

On October 1, 2006, the district office forwarded a synopsis of the claim to an Industrial Hygienist for an opinion on the parameters of the employee's exposure to carbon disulfide and lead while he was employed as a physicist at LLNL or while he was present on site at the Nevada Test Site, Salmon Site, Gasbuggy Site and Amchitka Island. On December 7, 2006, the district office followed up by referring the entire file to the Industrial Hygienist for this purpose.

On November 6, 2006, the district office sent **[Claimant]** a letter requesting factual or medical evidence which would establish that the employee's coronary artery disease, myocardial infarction or diabetes mellitus have a known link to exposure to toxic substances. On December 6, 2006, the district office received her submission of medical studies indicating that exposure to carbon disulfide contributes to atherosclerotic disease. **[Claimant]**'s authorized representative stated that the employee's job duties as a physicist at LLNL in the 1970s required him to work in the area of a shale oil retort, a process that results in the release of carbon disulfide in excess of the threshold level for exposure.

On February 28, 2007, the district office received a report in which the Industrial Hygienist concluded that the employee's duties as a physicist did not involve work that would have exposed him to lead. The Industrial Hygenist noted that LLNL was tasked with researching and developing methods for the extraction (or "retorting") of oil shale in the 1970s, and that LLNL focused in particular on underground methods of production and extraction. The Industrial Hygenist determined that the employee's expertise in the physics of chimney formation, underground chamber formation and stability made it likely that he would have been involved in the gas production research and the shale oil research, both on site and off. The employee's exposure to carbon disulfide and other sulfur-containing chemicals would have been low to moderately high during the time he spent operating shale oil retort facilities, and would not have been during major periods of each year. The primary route for exposure was through inhalation.

On April 4, 2007, the district office forwarded the Industrial Hygenist's report to the DMC. On April 12, 2007, the DMC determined that, given the employee's work history and exposure to carbon disulfides, it was "at least as likely as not" that the exposures were a significant factor in causing, contributing to, or aggravating the employee's claimed conditions of coronary artery disease and myocardial infarction. The DMC also determined that there is no known toxic exposure that would be a significant factor in causing, contributing to, or aggravating the employee's claimed condition of diabetes mellitus.

On April 27, 2007, the Jacksonville district office issued a recommended decision finding that the employee was employed at a DOE facility by DOE contractors; that the employee's death was caused by coronary artery disease and myocardial infarction; that the employee's normal retirement age would have been 65, and that it was "at least as likely as not" that the employee contracted his conditions of coronary artery disease and myocardial infarction through work-related exposure to a toxic substance at a DOE facility under Part E. The district office also recommended that **[Claimant]** be awarded $125,000.00 plus an additional $25,000.00 in survivor benefits under Part E of EEOICPA.

On May 14, 2006, FAB received **[Claimant]**'s signed waiver of her right to object to any of the findings of fact or conclusions of law contained in the recommended decision. On the same date, the district office received her signed statement advising that neither she nor the employee had filed any lawsuits or received any settlements or awards in connection with the conditions claimed under EEOICPA, and that neither she nor the employee had ever filed for or received an award of state workers' compensation for the claimed conditions.

Following a review of the evidence of record, the undersigned hereby makes the following:

FINDINGS OF FACT

1. On July 1, 2005, **[Claimant]** filed a claim for survivor benefits under Part E of EEOICPA as the spouse of the employee.

2. **[Claimant]** identified heart bypass surgery and diabetes, Type II, as the conditions resulting from the employee's work at a DOE facility.

3. The employee worked as a physicist for the University of California at LLNL from September 1, 1955 to July 25, 1988, and he was also present at the Nevada Test Site, the Salmon Site, the Gasbuggy Site and Amchitka Island.

4. On June 18 and 20, 1985, the employee was diagnosed with coronary artery disease and a myocardial infarction. On November 4, 1976, the employee was diagnosed with diabetes mellitus. These dates are after he began work at a covered DOE facility.

5. The employee died on July 29, 1988 at the age of 54 and the immediate cause of the employee's death was coronary artery disease and myocardial infarction.

6. **[Claimant]** was married to the employee on September 1, 1956, and she was the employee's spouse at the time of his death.

7. On April 12, 2007, a DMC concluded that it was "at least as likely as not" that the employee's exposures to toxic substances at DOE facilities were a significant factor in causing, contributing to, or aggravating the employee's claimed conditions of coronary artery disease and myocardial infarction.

8. The DMC also determined that there is no known toxic exposure that would be a significant factor in causing, contributing to, or aggravating the employee's claimed condition of diabetes mellitus.

9. The employee's normal retirement age would have been 65, based on his birth date of March 22, 1934. As he died at age 54, the employee died more than ten years but less than 20 years before his normal retirement age.

10. Neither **[Claimant]** nor the employee have ever filed a lawsuit or received a payment from a lawsuit, or ever filed for or received any state workers' compensation benefits for the conditions claimed under EEOICPA.

Based on these facts, the undersigned makes the following:

CONCLUSIONS OF LAW

Section 30.316(a) of the EEOICPA regulations provides that if the claimant waives any objections to all or part of the recommended decision, FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part. 20 C.F.R. § 30.316(a). **[Claimant]** has waived her rights to file objections to the findings of fact and conclusions of law in the recommended decision.

Part E of EEOICPA provides compensation and medical benefits to DOE contractor employees determined to have contracted a covered illness through exposure to toxic substances at a DOE facility. The term "covered illness" means an illness or death resulting from exposure to a toxic substance. 42 U.S.C. § 7385s(2). The employee's work for the University of California at LLNL from September 1, 1955 to July 25, 1988 establishes that the employee was a DOE contractor employee, as defined by 42 U.S.C. § 7384l(11).

In order to be entitled to benefits under Part E of EEOICPA, **[Claimant]** must provide medical evidence that establishes a specific diagnosis and the date of that diagnosis. She must also submit evidence that establishes a reasonable likelihood of **[Employee]**'s occupational exposure to a toxic substance at a DOE facility prior to the diagnosis of the claimed condition. Finally, she must establish that there is a relationship between his exposure to a toxic substance and the claimed medical condition such that it can be concluded that exposure to a toxic substance during employment by a DOE contractor at a DOE facility was "at least as likely as not" a significant factor in aggravating, contributing to, or causing the claimed medical condition. *See* 42 U.S.C. § 7385s-4(c), 20 C.F.R. §§ 30.230 to 30.232.

The survivor of a DOE contractor employee will receive $125,000.00 if the employee would have been entitled to compensation under § 7385s-4 for a covered illness, and it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing the death of such employee. 42 U.S.C. § 7385s-3(a)(1).

As noted above, the file was submitted to a DMC who gave his opinion that, based on information received from an Industrial Hygenist about the employee's exposure to carbon disulfide in the course of his employment at a DOE facility, it was "at least as likely as not" that the exposures were a significant factor in causing, contributing to, or aggravating the employee's claimed conditions of coronary artery disease and myocardial infarction. The DMC also concluded that there is no known toxic exposure that would be a significant factor in causing, contributing to, or aggravating the employee's claimed condition of diabetes mellitus.

Based upon the totality of evidence including the employee's employment history, his medical evidence of record, and the DMC's report, FAB concludes that the evidence of record establishes that it is "at least as likely as not" that the employee's occupational exposure to a toxic substance during covered employment was a significant factor in aggravating, contributing to, or causing the employee's myocardial infarction and coronary artery disease. The evidence of record is not sufficient to establish that it is "at least as likely as not" that the employee's work exposure to a toxic substance during covered employment was a significant factor in aggravating, contributing to, or causing the employee's diabetes mellitus. *See* 42 U.S.C. § 7385s-4(c)(1).

The evidence of record therefore establishes that the employee was a DOE contractor employee, and that he was diagnosed with coronary artery disease and myocardial infarction, which are both "covered illnesses" as defined by 42 U.S.C. § 7385s(2). The employee contracted the covered illnesses through exposure to a toxic substance at a DOE facility. Therefore, he would have been entitled to benefits under § 7385s-4 for a covered illness. The employee died on January 13, 1993 and the immediate cause of the employee's death was listed as coronary artery disease and myocardial infarction. This is sufficient to establish that it is "at least as likely as not" that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing the employee's death.

Eligibility for survivor benefits under Part E is delineated at 42 U.S.C. § 7385s-3(c)(1), which provides that such benefits shall be paid to the "covered spouse," if alive at the time of payment. Part E defines a "covered spouse" as a "spouse of the employee who was married to the employee for at least one year immediately before the employee's death." 42 U.S.C. § 7385s-3(d)(1). **[Claimant]** was married to the employee for at least one year immediately before his death and she is therefore his "covered spouse." Therefore, she is entitled to $125,000.00 in basic survivor benefits for the employee's death due to the covered illnesses of coronary artery disease and myocardial infarction.

Under Part E of EEOICPA, the survivor of a covered employee is eligible to receive additional survivor benefits of $25,000.00 if there was an aggregate period of not less than 10 years before the employee attained his or her normal retirement age, during which as the result of any covered illness contracted by that employee through exposure to a toxic substance at a DOE facility the employee's annual wage did not exceed 50% of the employee's average annual wage. The employee in this case died at age 54. Under the Social Security Act, the normal retirement age for an employee born on March 22, 1934 is 65. *See* Federal (EEOICPA) Procedure Manual, Chapter E-800(3)(d)(September 2005). Therefore, **[Claimant]** is entitled to additional survivor benefits of $25,000.00.

Accordingly, **[Claimant]**'s claim based on the employee's death due to coronary artery disease and myocardial infarction is accepted, and she is awarded $125,000.00 in basic survivor benefits and an additional $25,000.00, for a total award of $150,000.00. **[Claimant]**'s claim based on the employee's death due to diabetes mellitus is denied under Part E.

Washington, DC

Carrie A. Rhoads

Hearing Representative

Final Adjudication Branch

[1] LLNL was a covered DOE facility beginning in 1950 to the present. DOE and the University of California jointly operate the site. The Nevada Test Site in Mercury, Nevada is a covered DOE facility from 1951 to the present. The Salmon Site was a covered DOE facility from 1964 to 1972. The Gasbuggy Site was a covered DOE facility from 1967 to 1973, 1978, and 1998 to the present (remediation). Amchitka Island was a covered DOE facility beginning in 1951 to the present. *See* DOE's facility listings at http://www.hss.energy.gov/healthsafety/FWSP/advocacy/faclist/findfacility.cfm (visited June 12, 2007).

Maximum amounts payable

EEOICPA Fin. Dec. No. 9813-2007 (Dep't of Labor, January 25, 2007)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA or the Act), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the FAB accepts and approves your claim for compensation in the amount of $150,000.00 under Part B and $125,000.00 under Part E, with an additional $25,000.00 awarded under Part E for wage-loss.

STATEMENT OF THE CASE

On September 10, 2001, you filed a Form EE-2 under Part B as the surviving spouse of **[Employee]**, indicating that he was diagnosed with kidney cancer as the result of his employment at a Department of Energy (DOE) facility. You filed a new Form EE-2 on May 24, 2006, under Part B and Part E of the EEOICPA, based on the conditions of renal, bone, lung and brain cancers.

You submitted a Form EE-3 (Employment History), indicating that **[Employee]** was employed at the Nevada Test Site (NTS) from 1961 to 1976. The DOE confirmed that **[Employee]** was employed at the NTS by Reynolds Electrical & Engineering Company, Inc. (REECo), a DOE contractor, from December 4, 1961 to January 21, 1963, from February 19, 1965 to June 3, 1970, and from April 19, 1971 to July 14, 1972.

You submitted medical evidence in support of your claim, including a pathology report concerning tissue from a left upper lung lobectomy performed on January 9, 1974, in which Dr. F. Ali and Dr. J. Mirra diagnosed clear cell carcinoma, with the origin most likely from a kidney primary. In a pathology report concerning the right kidney which was excised on March 4, 1974, Dr. M. Janssen and Dr. Mirra confirmed a diagnosis of well-differentiated metastatic renal cell carcinoma.

You submitted a copy of a marriage certificate showing that **[Employee]** and you (**[Employee's wife]**) were married on March 12, 1945. A copy of **[Employee]**'s death certificate showed that his date of birth was August 26, 1922, and that you were married to him at the time of his death on March 17, 1977. The death certificate, signed by Dr. Russell Miller, listed **[Employee]**'s cause of death as hypernephroma of the kidney with metastases. You also submitted documentation evidencing your name change from **[Employee's last name]** to **[Employee's wife's current last name]**.

On January 10, 2002, the Seattle district office referred the case to the National Institute for Occupational Safety and Health (NIOSH) to determine whether **[Employee]'**s renal cancer was "at least as likely as not" related to his covered employment. However, the case was returned on August 7, 2006, based on the designation on June 26, 2006 by the Secretary of Health and Human Services (HHS) of certain NTS employees as an addition to the Special Exposure Cohort (SEC).

On October 31, 2006, the Seattle district office recommended that your claim for survivor benefits be accepted. The district office concluded that under Part B, **[Employee]** is a member of the SEC and he was diagnosed with renal cell carcinoma, which is a specified cancer under the Act. The district office further concluded that a DOE contractor employee that is entitled to compensation for an occupational illness under Part B is treated for purposes of Part E as a determination that the employee contracted that illness through exposure at a DOE facility. The district office concluded that, as **[Employee]** is now deceased as a result of the accepted condition of renal cancer, you, as his eligible survivor, are entitled to receive the basic survivor benefit of $150,000.00 under Part B, $125,000.00 under Part E,

plus an additional $25,000.00 under Part E because **[Employee]** died not less than 10 years before attaining his normal retirement age of 65, for total compensation in the amount of $300,000.00. The district office noted that no determination on your claim for survivor benefits for the conditions of bone, lung, and brain cancers would be made since you were being awarded the maximum possible survivor benefits under the Act.

On October 31, 2006, the Seattle district office received a signed, dated statement from you indicating that neither you nor **[Employee]** had ever filed for or received any settlement or award from a tort suit related to the claimed exposure to radiation; that neither you nor **[Employee]** had ever filed for or received any payments, awards or benefits from a state workers' compensation claim in relation to any of the claimed conditions; that neither you nor **[Employee]** had ever pled guilty to or been convicted of any charges connected with an application for or receipt of federal or state workers' compensation; and that **[Employee]** did not have children under the age of 18 or under the age of 23 and enrolled in school full-time from age 18, or children incapable of self-support, at the time of his death.

On November 7, 2006, the FAB received written notification from you indicating that you waive all rights to file objections to the findings of fact and conclusions of law contained in the recommended decision.

After considering the evidence of record, the FAB hereby makes the following:

FINDINGS OF FACT

1. You filed a claim for survivor benefits under Part B of EEOICPA on September 10, 2001, and under Parts B and E on May 24, 2006.

2. You are the surviving spouse of the employee, **[Employee],** and were married to him for at least one year immediately prior to his death.

3. **[Employee]** was employed at the NTS, a covered DOE facility, with REECo, a DOE contractor, for an aggregate of at least 250 work days, between the dates of January 27, 1951 and December 31, 1962; specifically, from December 4, 1961 to January 21, 1963; as well as from February 19, 1965 to June 3, 1970; and from April 19, 1971 to July 14, 1972. This employment qualifies **[Employee]** as a member of the SEC.

4. **[Employee]** was diagnosed with renal cancer, which is a specified cancer under EEOICPA, on January 9, 1974, after starting work at a DOE facility.

5. **[Employee]** was born on August 26, 1922, and his normal retirement would have been at age 65. He died on March 17, 1977, at the age of 54, not less than 10 years prior to his normal retirement age.

6. The evidence of record supports a causal connection between the employee's death due to metastatic renal cancer and his exposure to radiation at a DOE facility.

7. Neither you nor **[Employee]** had ever filed for or received any settlement or award from a tort suit related to the claimed exposure to radiation; neither you nor **[Employee]** had ever filed for or received any payments, awards or benefits from a state workers' compensation claim in relation to any

of the claimed conditions; neither you nor **[Employee]** had ever pled guilty to or been convicted of any charges connected with an application for or receipt of federal or state workers' compensation; and **[Employee]** did not have any children under the age of 18 or under the age of 23 and enrolled in school full-time from age 18, or children incapable of self-support, at the time of his death.

Based on the above noted findings of fact, the FAB hereby also makes the following:

CONCLUSIONS OF LAW

Section 30.316(a) of the EEOICPA regulations provides that, if the claimant waives any objections to all or part of the recommended decision, the FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part. *See* 20 C.F.R. § 30.316(a). You waived your right to file objections to the findings of fact and conclusions of law contained in the recommended decision issued on your claim for compensation benefits under the EEOICPA.

On June 26, 2006, the Secretary of HHS designated a class of certain employees as an addition to the SEC, *i.e.*, DOE employees or DOE contractor or subcontractor employees who worked at the NTS from January 27, 1951 through December 31, 1962, for a number of work days aggregating at least 250 work days, either solely under this employment or in combination with work days within the parameters (excluding aggregate work day requirements) established for other classes of employees included in the SEC, and who were monitored or should have been monitored. This SEC became effective July 26, 2006.

The employment evidence is sufficient to establish that the employee was employed at the NTS for an aggregate of at least 250 work days of covered SEC employment, specifically, from December 4, 1961 to January 21, 1963; as well as from February 19, 1965 to June 3, 1970; and from April 19, 1971 to July 14, 1972.

The employee was a member of the SEC pursuant to § 7384l(14) of the Act, who was diagnosed with renal cancer, which is a specified cancer under 20 C.F.R. § 30.5(ff)(4); and is, therefore, a "covered employee with cancer" under § 7384l(9)(A) of the Act. *See* 42 U.S.C. §§ 7384l(14) and 7384l(9)(A); 20 C.F.R. § 30.5(ff)(4). Further, you are the surviving spouse of the employee under 42 U.S.C. § 7384s(e)(1)(A) and you are entitled to compensation in the amount of $150,000.00. *See* 42 U.S.C. §§ 7384s(e)(1)(A), 7384s(a)(2).

The determination that a DOE contractor employee is entitled to compensation under Part B is treated for purposes of Part E that the employee contracted that illness through exposure at a DOE facility. *See* 42 U.S.C. § 7385s-4(a).

The evidence of record establishes that the employee was a "covered DOE contractor employee" as defined by § 7385s(1) in accordance with § 7385s-4(a); and the employee was diagnosed with a "covered illness," metastatic bone cancer, as defined by § 7385s(2). Further, it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing the death of the employee. You are the employee's covered spouse as defined by § 7385s-3(d)(1). As your spouse died at the age of 54, which is not less than at least 10 years before his normal retirement age of 65, you are then entitled, pursuant to 42 U.S.C. § 7385s-3(a)(2), to compensation in the amount of $150,000.00. *See* 42 U.S.C. §§ 7385s(1), 7385s(2), 7385s-4(a), 7385s-3(d)(1) and 7385s-3(a)(2).

Accordingly, you are entitled to total compensation in the amount of $300,000.00. No adjudication of your claim for survivor benefits for the conditions of bone, lung, and brain cancers will be rendered, as you are being awarded the maximum possible survivor benefits under the Act. *See* 20 C.F.R. § 30.506(b); 42 U.S.C. § 7385s-3(b).

Seattle, WA

Keith Klose, Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 105471-2009 (Dep't of Labor, October 8, 2009)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) on the above claim under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claim under Part B of EEOICPA for survivor benefits is denied. The claim under Part E for the employee's whole body impairment is accepted in the amount of $12,500.00.

STATEMENT OF THE CASE

On October 9, 2001, **[Employee]** filed a Form EE-1, claiming under Part B for his bladder cancer. Medical records, including pathology reports, confirmed that the employee was diagnosed with bladder cancer on April 16, 1993, as well as a squamous cell carcinoma of the left ear on June 8, 1999, and squamous cell carcinoma of the right cheek on August 20, 2003.

The employee submitted a Form EE-3, on which he stated that he wore a dosimetry badge while working for the Union Carbide Corporation, a Department of Energy (DOE) contractor, from September 3, 1945 to July 31, 1981. DOE confirmed the employee's employment for Carbon and Carbon Chemicals Company (a former name of Union Carbide) at the Oak Ridge Gaseous Diffusion Plant (K-25) in Oak Ridge, Tennessee, from September 17, 1945 to January 28, 1947, and from July 25, 1947 to July 31, 1981.

On July 3, 2002, FAB issued a final decision accepting the employee's claim under Part B as a member of the Special Exposure Cohort (SEC) with bladder cancer, and awarded him $150,000.00 and medical benefits for that illness. On January 17, 2006, FAB issued another final decision under Part B, accepting the employee's claim and awarding him medical benefits for his squamous cell carcinomas of the left ear and right cheek on the ground that those cancers were "at least as likely as not" (a 50% or greater probability) related to radiation exposure. And on July 11, 2008, FAB issued a final decision accepting the employee's claim and awarding him medical benefits under Part E of EEOICPA for the same conditions—bladder cancer and squamous cell carcinoma of the left ear and right cheek.

On July 30, 2008, the employee requested impairment benefits for his covered illnesses under Part E of EEOICPA. However, he died on November 17, 2008, prior to the adjudication of his impairment claim.

On December 11, 2008, **[Claimant]** submitted a Form EE-2 to the district office, claiming for survivor benefits under Parts B and E of EEOICPA. In support of her claim, **[Claimant]** submitted a marriage certificate showing that she married the employee on April 10, 1950, and the employee's death certificate showing his cause of death as fractures of the first and second cervical vertebrae. The death certificate also indicated that **[Claimant]** was the employee's spouse on the date of his death.

As specified under Part E, permanent impairment is defined as a decreased function in a body part(s) or organ(s) established by medical evidence as the result of the covered employee contracting a covered illness through exposure to a toxic substance at a DOE facility. In a letter dated May 16, 2009, **[Claimant]** requested that the district office proceed with the impairment portion of her claim. By letter dated July 13, 2009, **[Claimant]**'s authorized representative requested that the impairment rating be performed by a district medical consultant (DMC). Therefore, the case was referred to a DMC for an impairment rating. In his report dated August 3, 2009, the DMC opined that the employee had reached maximum medical improvement for his conditions of bladder and skin cancers and had a whole body impairment rating for the accepted conditions of bladder cancer and skin cancers of 5%.

On September 2, 2009, the district office issued a recommended decision, concluding that under Part E, **[Claimant]** is entitled to $12,500.00 for the employee's 5% whole body impairment due to his bladder cancer and skin cancers. The total percentage points were multiplied by $2,500 to calculate the amount of the recommended award. The district office also recommended denial of **[Claimant]**'s claim under Part B since the employee had previously received the compensation benefits payable under that Part.

On September 9, 2009, the Final Adjudication Branch received written notification that **[Claimant]** waived any and all objections to the recommended decision. After reviewing the evidence in the case file, FAB hereby makes the following:

FINDINGS OF FACT

1. On October 9, 2001, the employee filed a claim for benefits under EEOICPA.

2. The employee was diagnosed with bladder cancer, squamous cell carcinoma of the left ear, and skin cancer of the right cheek.

3. FAB issued a final decision under Part B that awarded the employee the full amount of monetary benefits payable for his bladder cancer, squamous cell carcinoma of the left ear and skin cancer of the right cheek. It also issued a final decision awarding the employee medical benefits under Part E for those same conditions.

4. The employee filed a request for impairment benefits, but died prior to the adjudication of that request. His cause of death was listed as cervical fractures of that C1 and C2 vertebrae.

5. **[Claimant]** filed a claim for survivor benefits and established that she was the employee's spouse at the time of death and had been married to him for at least one year prior to that date.

6. The medical evidence establishes that prior to his death, the employee had reached maximum medical improvement and had a whole body impairment due to his bladder and skin cancers of 5%.

Based on the above-noted findings of fact, FAB hereby also makes the following:

CONCLUSIONS OF LAW

The regulations provide that within 60 days from the date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision and whether a hearing is desired. 20 C.F.R. § 30.310(a) (2009). If the claimant does not file a written statement that objects to the recommended decision and/or requests a hearing within the period of time allotted, or if the claimant waives any objections to the recommended decision, FAB may issue a decision accepting the recommendation of the district office. 20 C.F.R. § 30.316(a).

[Claimant] meets the definition of a survivor under Part B and Part E of the Act. 42 U.S.C. §§ 7384s(e)(3)(A), 7385s-3(d)(1). However, with respect to her survivor claim under Part B, the record establishes that the employee already received the lump-sum benefit of $150,000.00 available under Part B. Therefore, because the lump-sum available under Part B has already been paid, **[Claimant]** is not entitled to any additional compensation under that Part, and her claim for compensation is denied. 42 U.S.C. § 7384s(a).

As for her claim under Part E of EEOICPA, if a covered Part E employee dies after filing a claim but before monetary benefits under Part E are paid, and his or her death was solely caused by a non-covered illness or illnesses, then the survivor may choose the monetary benefits that would otherwise have been payable to the covered Part E employee if he or she had not died prior to receiving payment. Under those circumstances, the survivor would not be entitled to the $125,000.00 lump-sum survivor payment under Part E because the employee's death would not have been caused by the covered illness(es). 42 U.S.C. § 7385s-1(2)(B).

As found above, the employee in this matter died as a result of fractures of C1 and C2 vertebrae, which were not related to his work-related exposure to toxic substances. Therefore, **[Claimant]** is entitled to the amount of contractor employee compensation that the employee would have received if his death had not occurred before compensation was paid, in this case, his impairment benefits.

The amount of contractor employee compensation under Part E for a covered DOE contractor employee is based, in part, on a determination of the employee's minimum impairment rating in accordance with the Fifth Edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, expressed as a number of percentage points. The employee (or the survivor in this case) is eligible to receive an amount equal to $2,500 multiplied by the number of percentage points. 42 U.S.C. §§ 7385s-1(2)(B), 7385s-2(b).

The medical evidence shows that the employee had a whole body impairment of 5% as result of his accepted covered illnesses. **[Claimant]**, standing in the shoes of the employee following her election, is therefore entitled to monetary benefits of $12,500.00 for impairment due to the employee's bladder cancer and skin cancers. *See* 42 U.S.C. §7385s-2(a)(2).

Jacksonville, FL

Jeana F. LaRock

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 10014587-2006 (Dep't of Labor, August 3, 2007)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning the above claim for benefits under Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons stated below, the claim for wage-loss benefits under Part E is accepted in the amount of $50,000. Adjudication of the claim for benefits based on skin cancer is deferred pending additional development.

STATEMENT OF THE CASE

On October 24, 2001, **[Employee]** filed claims for benefits under Part B and former Part D of EEOICPA. He identified microscopic polyangitis, systemic necrotizing vasculitis, leukocytoclastic vasculitis, glomerularnephritis, irritable bowel disease, hypoglycemia, Eustachian tube rupture, migratory joint pain, vascular lesion, subdural hematoma, pulmonary emboli secondary to vasculitis, necrotizing glomerular nephritis and interstitial fibrosis as the claimed conditions resulting from his employment at a Department of Energy (DOE) facility. On July 5, 2007, **[Employee]** filed an additional claim under EEOICPA for skin cancer. Subsequent to his filing a claim under Part D, Congress amended EEOICPA by repealing Part D and enacting Part E, which is administered by the Department of Labor. The filing of a claim under former Part D is treated as a claim for benefits under Part E.

On March 27, 2003, FAB issued a final decision denying **[Employee]**'s Part B claim, as the evidence did not establish that he had been diagnosed with an illness that would qualify as an "occupational" illness under Part B. Part B is limited to the occupational illnesses of cancer, beryllium sensitivity, chronic beryllium disease, and chronic silicosis. On August 4, 2006, **[Employee]** withdrew his claim based on the conditions of irritable bowel disease, hypoglycemia, Eustachian tube rupture, migratory joint pain, vascular lesion, subdural hematoma, pulmonary emboli, and necrotizing glomerular nephritis.

On August 31, 2006, FAB issued another final decision accepting **[Employee]**'s claim for medical benefits under Part E of EEOICPA for the "covered" illnesses of microscopic polyangitis, systemic necrotizing vasculitis, leukocytoclastic vasculitis, pulmonary interstitial fibrosis, and glomerulornephritis. This final decision also awarded him a lump-sum of $200,000.00 in impairment benefits based on those covered illnesses.

The evidence of record establishes that **[Employee]** was employed by a DOE contractor at the Lawrence Livermore National Laboratory (LLNL) from July 9, 1962 to October 14, 1966, at the Los Alamos National Laboratory (LANL) from October 24, 1966 to December 31, 1990, and at the Nevada Test Site (NTS) periodically from January 25, 1972 to September 10, 1990.[1]The record establishes that **[Employee]** was diagnosed with glomerulonephritis on June 8, 1992, with systemic necrotizing vasculitis and leukocytoclastic vasculitis on December 22, 1997, with microscopic polyangitis on June 24, 1999, and with pulmonary interstitial fibrosis on May 10, 2001. The evidence further establishes

that he was exposed to toxic substances during the performance of his duties at these facilities, and that such exposure was a significant factor in aggravating, contributing to, or causing his glomerulonephritis, systemic necrotizing vasculitis and leukocytoclastic vasculitis, microscopic polyangitis and pulmonary interstitial fibrosis. **[Employee]** has a minimum impairment rating to the whole person as a result of these conditions of 80%, and 80 x $2,500.00 = his $200,000.00 impairment award.

On October 23, 2006, **[Employee]** filed a claim for wage-loss benefits under Part E of EEOICPA and alleged that his wage-loss began in January 1991. He submitted Form W-2 Statement of Earnings from his employer indicating that he earned $30,508.97 in 1988, $31,256.65 in 1989, and $35,829.17 in 1990. On May 16, 2007, a representative from the Social Security Administration (SSA) indicated that you had earnings from 1978 to 1990 and no reported earnings after 1990.

[Employee] submitted medical records from his healthcare providers, which document the nature and extent of his covered illnesses. In a January 10, 2006 medical report, Dr. Karen B. Mulloy, M.D. indicated that **[Employee]** has not been able to work since 1991 due to the severity of his chronic renal disease and interstitial fibrosis. A July 20, 2006 report from a District Medical Consultant (DMC) confirms that **[Employee]**'s health is poor and continues to deteriorate such that his life is probably at risk.

On Form EE-1, **[Employee]** indicated that he was born on September 29, 1936. That date of birth is confirmed in the medical records from his healthcare providers and his personnel and occupational clinic records from the DOE facilities where he worked. The SSA indicates that the normal retirement age for purposes of the Social Security Act for a person born on September 29, 1936 is age 65.[2]

On June 20, 2007, the district office issued a recommended decision to accept the claim for wage-loss benefits under Part E in the amount of $50,000.00. Accompanying the recommended decision was a letter explaining **[Employee]**'s rights and responsibilities in regard to the recommended decision. On July 5, 2007, FAB received his signed waiver of objections to the findings of fact and conclusions of law in the recommended decision. On the same date, FAB received his written declaration that he had not filed for or received a settlement, award, payment, or benefit from a tort suit or state workers' compensation program for the medical conditions of microscopic polyangitis, systemic necrotizing vasculitis, leukocytoclastic vasculitis, pulmonary interstitial fibrosis and glomerulonephritis.

After reviewing the evidence in the case file, FAB hereby makes the following:

FINDINGS OF FACT

1. **[Employee]** filed a claim for benefits under Parts B and E of EEOICPA on October 24, 2001.

2. **[Employee]** was employed at LLNL, LANL and NTS intermittently from July 9, 1962 to December 31, 1990. During his employment at these facilities, he was employed by a DOE contractor.

3. On October 23, 2006, FAB accepted the claim for medical benefits under Part E for the covered illnesses of microscopic polyangitis, systemic necrotizing vasculitis, leukocytoclastic vasculitis, pulmonary interstitial fibrosis, and glomerulornephritis and awarded impairment benefits in the amount of $200,000.00 based on those conditions.

4. **[Employee]** was born on September 29, 1936 and attained normal retirement age for purposes of the Social Security Act on September 29, 2001.

5. **[Employee]** began experiencing wage-loss as a result of his covered illnesses in January 1991.

6. His average annual wage from 1988 to 1990 was $32,531.59.

7. **[Employee]** experienced 11 calendar years of qualifying wage-loss from 1991 to 2001 as a result of his covered illnesses, during which his wages did not exceed 50% of his average annual wage for the 36-month period immediately preceding the calendar month he first experienced wage-loss as a result of any covered illness.

8. **[Employee]** has not recovered compensation or benefits from a state workers' compensation program or tort suit based on his accepted covered illnesses of polyangitis, systemic necrotizing vasculitis, leukocytoclastic vasculitis, pulmonary interstitial fibrosis and glomerulornephritis.

Based on the above-noted findings of fact, the undersigned hereby makes the following:

CONCLUSIONS OF LAW

The regulations at 20 C.F.R. § 30.316(a) (2007) provide that if a claimant waivers any objections to all or part of the recommended decision, then FAB may issue a final decision accepting the recommended decision of the district office either in whole or in part. On July 5, 2007, FAB received **[Employee]**'s waiver of objections to the recommended decision

On October 23, 2006, FAB issued a final decision under Part E of EEOICPA accepting the claim for medical benefits for the covered illnesses of microscopic polyangitis, systemic necrotizing vasculitis, leukocytoclastic vasculitis, pulmonary interstitial fibrosis and glomerulornephritis. In that decision, FAB found that **[Employee]**'s exposure to toxic substances during the performance of his duties at a DOE facility was a significant factor in aggravating, contributing to, or causing his microscopic polyangitis, systemic necrotizing vasculitis, eukocytoclastic vasculitis, pulmonary interstitial fibrosis and glomerulornephritis.

Part E of EEOICPA provides that a "covered DOE contractor employee" with a "covered illness" shall be entitled to wage-loss benefits if the employee sustained wage-loss as a result of any covered illness and meets certain qualifying criteria as to the percentage of the employee's wage-loss. It provides that for each calendar year prior to normal retirement age during which as a result of any covered illness the employee's wages did not exceed 50% of his average annual wage for the 36-month period immediately preceding the calendar year in which the employee first experienced wage-loss as a result of the covered illness, the employee shall receive $15,000. It further provides that for each calendar year prior to normal retirement age during which as a result of any covered illness, the employee's wages exceeded 50% but did not exceed 75% of his average annual wage, the employee shall receive $10,000. *See* 42 U.S.C. §7385s-2(a)(2).

A determination regarding entitlement to wage-loss benefits must be based upon the totality of the evidence. I have reviewed the evidence of record and conclude that the evidence establishes that **[Employee]** experienced 11 calendar years of qualifying wage-loss prior to attaining his normal retirement age during which his wages did not exceed 50% of his average annual wage. Based on 11

calendar years of wage-loss at $15,000.00 per year, **[Employee]** qualifies for $165,000.00 in wage-loss benefits under Part E.

However, Part E also provides that the maximum aggregate compensation (other than medical benefits) an employee or survivor may receive under that Part shall not exceed $250,000.00. *See* 42 U.S.C. § 7385s-12. **[Employee]** has previously received $200,000.00 in impairment benefits under Part E, and the remaining amount he may recieve (other than medical benefits) is therefore $50,000.00. His potential wage-loss benefits of $165,000.00, coupled with the $200,000.00 he has already received in impairment benefits, exceeds the maximum aggregate compensation available to him under Part E. Therefore, **[Employee]**'s claim for wage-loss benefits under Part E must be capped at the maximum aggregate compensation limit, and accordingly his your claim for wage-loss benefits under Part E is accepted for $50,000.00.

Washington, DC

William J. Elsenbrock

Hearing Representative

Final Adjudication Branch

[1] According to DOE's website at http://www.hss.energy.gov/healthsafety/FWSP/advocacy/faclist/showfacility.cfm, LLNL is a covered DOE facility from 1950 to the present, LANL is a covered DOE facility from 1942 to the present, and NTSe is a covered DOE facility from 1951 to the present (retrieved August 3, 2007).

[2] See SSA's website at http://www.socialsecurity.gov/retire2/agereduction.htm (retrieved August 3, 2007).

EEOICPA Fin. Dec. No. 10032182-2006 (Dep't of Labor, March 3, 2008)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, your claim is approved for impairment benefits in the amount of $195,000.00 based on lung cancer under Part E of EEOICPA, approved for $55,000.00 in wage-loss benefits under Part E, and approved for the consequential illness of coronary artery disease under Part E. You received state workers' compensation benefits of $126,173.60 for your covered illness of lung cancer, and this will be coordinated with your Part E benefits, leaving your net entitlement to compensation under Part E as $123,826.40.

STATEMENT OF THE CASE

On October 15, 2001, you filed a claim for benefits under Part E (formerly Part D) of EEOICPA and identified lung cancer as the illness that allegedly resulted from your employment at a Department of Energy (DOE) facility. On February 20, 2004, the FAB issued a final decision concluding that you were entitled to lump-sum monetary and medical benefits for your lung cancer under Part B of EEOICPA. Based on that conclusion, you were awarded $150,000.00 and medical benefits for your lung cancer under Part B. On August 9, 2006, the FAB issued a final decision that also awarded you medical benefits under Part E of EEOICPA for your lung cancer.

On January 8, 2007, the district office received your request for impairment and wage-loss benefits under Part E based on your lung cancer. You elected to have a physician selected by the Department of Labor perform the impairment rating. You also you stated that you first experienced wage-loss beginning in 1997, when you were "officially medically retired from work at Westinghouse Savannah River Plant" and that this wage-loss has continued since then.

The DOE confirmed your employment at the Savannah River Site (SRS) in Aiken, South Carolina from April 23, 1984 to November 1, 1997. You worked for E.I. DuPont and Westinghouse, two DOE contractors, during your employment at the SRS. The medical evidence includes a January 3, 1995 pathology report, signed by Dr. Sharon Daspit, which confirms a diagnosis of squamous cell carcinoma of the left lung. On April 25, 2007, the district office also received your request that your coronary artery disease be accepted as a consequential illness of your lung cancer, as it is related to your radiation treatment for your lung cancer.

To determine your "minimum impairment rating" (the percentage rating representing the extent of whole person impairment, based on the organ and body functions affected by your covered illnesses and the extent of the impairment attributable to your covered illnesses), the district office referred your file material to a District Medical Consultant (DMC).

On April 18, 2007, the DMC reviewed the medical evidence of record and determined that pursuant to Table 8-2 of the Fifth Edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, your covered illness of lung cancer resulted in a Class 4 respiratory disorder that translated to a 73% whole person impairment. The DMC also determined that pursuant to Table 3.6a of the *Guides*, your coronary artery disease resulted in an 18% whole person impairment. Using the combined values chart contained in the *Guides*, the DMC concluded that you had a 78% whole person impairment due to your covered illnesses of lung cancer and coronary artery disease. The DMC explicitly stated that your cardiac condition is "due to the radiation of the lung cancer, and such is a known complication of chest radiation."

You submitted your Social Security Administration earnings statement, which shows that you last had recorded wages in 1997. An April 8, 1997 letter from Dr. James R. Mobley states that your pulmonary and cardiovascular systems "are so marginal that any stress will possibly cause an exacerbation" of your problems, and that in his opinion you should be considered totally disabled from gainful employment.

You submitted a copy of your "Compromise Settlement Agreement and Petition for Approval" confirming that you received a settlement of your state workers' compensation claim totaling $126,713.60 for your lung cancer.

On June 8, 2007, the Jacksonville district office issued a recommended decision finding that your coronary artery disease was a consequential illness related to your lung cancer treatment, that your accepted illnesses of lung cancer and coronary artery disease resulted in a 78% whole body impairment, that you were entitled to $195,000.00 in impairment benefits, and calculating your wage-loss benefits as $55,000, which was capped when the total amount of Part E monetary benefits reached $250,000.00. From this combined maximum amount of $250,000.00, the district office subtracted your $126,173.60 in state workers' compensation benefits and recommended that you be awarded a net payment of $123,826.40 in monetary benefits under Part E of EEOICPA.

In its recommended decision, the district office stated that you had no earnings reported to Social Security for the years 1998 through 2006; however, it stated that since total Part E compensation was statutorily capped at $250,000.00 and it was recommending that you receive $195,000.00 in impairment benefits, your wage-loss benefits were only calculated for the years 1998 through 2001 (you are entitled to $15,000 in wage-loss benefits for the qualifying calendar years 1998 through 2000, and $10,000.00 for the qualifying calendar year 2001). This totals $55,000.00 in wage-loss benefits.

On June 15, 2007, the FAB received your waiver of your right to object to the findings of fact and conclusions of law contained in the recommended decision.

On July 13, 2007, the FAB remanded your claim, and stated that the recommended decision did not take into account the full amount of wage-loss benefits to which you are entitled. The FAB stated that, "It is true that total compensation, excluding medical benefits, under Part E may not exceed $250,000; however, it is the final number after coordination of state workers' compensation benefits that cannot exceed $250,000, not the benefit amount before state workers' compensation benefits are subtracted."

On November 21, 2007, the Director of DEEOIC issued a Director's Order vacating the July 13, 2007 remand order issued by the FAB. The Director's Order stated that the only way to interpret the regulations at 20 C.F.R. § 30.626(a), which state "the OWCP will reduce the compensation payable under Part E by the amount of benefits the claimant receives from a state workers' compensation program by reason of the same covered illness," is to stop calculating the benefits an employee is entitled to under Part E at $250,000.00, and then coordinate the state workers' compensation benefits.

Following an independent review of the evidence of record, the undersigned hereby makes the following:

FINDINGS OF FACT

1. On October 15, 2001, you filed a claim for benefits under Part E (formerly Part D) of EEOICPA. You identified lung cancer as the illness you alleged resulted from your employment at a DOE facility.

2. On February 20, 2004, the FAB issued a final decision determining that you were entitled to lump-sum and medical benefits for your lung cancer under Part B, and awarding you $150,000.00 and medical benefits for your lung cancer under Part B.

3. On August 9, 2006, the FAB issued a final decision awarding you medical benefits under Part E of EEOICPA for your covered illness of lung cancer.

4. Your coronary artery disease is a consequential illness of your lung cancer.

5. On April 18, 2007, the DMC reviewed the medical evidence of record and determined that your covered illness of lung cancer and covered consequential illness of coronary artery disease resulted in a 78% whole person impairment.

6. You last had recorded wages in 1997. Your doctor states that your pulmonary and cardiovascular systems "are so marginal that any stress will possibly cause an exacerbation" of your problems, and that in his opinion you should be considered totally disabled from gainful

employment.

7. You were born on October 5, 1942 and turned 55 years old in 1997. Your normal Social Security retirement age is 65 years.

8. You received $126,173.60 in state workers' compensation benefits for your lung cancer, based on exposure to ionizing radiation.

Based on these facts, the undersigned hereby makes the following:

CONCLUSIONS OF LAW

If the claimant waives any objections to all or part of the recommended decision, the FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part. 20 C.F.R. § 30.316(a). You have waived your right to file objections to the findings of fact and conclusions of law issued in the May 9, 2007 recommended decision.

Under Part E of EEOICPA, a "covered DOE contractor employee" with a "covered illness" shall be entitled to impairment benefits based upon the extent of whole person impairment of all organs and body functions that are compromised or otherwise affected by the employee's "covered illness." *See* 42 U.S.C § 7385s-2(a); 20 C.F.R. § 30.901(a). This "minimum impairment rating" shall be determined in accordance with the Fifth Edition of the *Guides*. *See* 42 U.S.C. § 7385s-2(b). The statute provides that for each percentage point of the "minimum impairment rating" that is a result of a "covered illness," the "covered DOE contractor employee" shall receive $2,500.00. *See* 42 U.S.C. § 7385s-2(a)(1).

The evidence of record indicates that you are a covered DOE contractor employee with a covered illness of lung cancer and a covered consequential illness of coronary artery disease. You have a "minimum impairment rating" of 78% of your whole body as a result of your covered illnesses of lung cancer and coronary artery disease, based on the *Guides*. You are therefore entitled to $195,000.00 in impairment benefits (78 x $2,500 = $195,000.00) under Part E of EEOICPA.

In order to be entitled to wage-loss benefits under Part E, you must submit factual evidence of your wage-loss and medical evidence that is of sufficient probative value to establish that the period of wage-loss at issue is causally related to your covered illness. *See* Federal (EEOICPA) Procedure Manual, Chapter E-800.6b (September 2005). You were born on October 5, 1942 and turned 55 years old in 1997. Your normal Social Security retirement age is 65 years. You last had recorded wages in 1997 and have not had any wages since then. Your doctor states that your pulmonary and cardiovascular systems "are so marginal that any stress will possibly cause an exacerbation" of your problems, and that in his opinion you should be considered totally disabled from gainful employment. This is sufficient to show that you had wage-loss related to your covered illnesses of lung cancer and coronary artery disease beginning in 1998.

Accordingly, your claim for wage-loss benefits under Part E of EEOICPA is accepted in the amount of $55,000.00. You are entitled to $15,000.00 in wage-loss benefits for the qualifying calendar years 1998 through 2000, and $10,000.00 for the qualifying calendar year 2001. This totals $55,000.00 in wage-loss benefits, which together with your $195,000.00 in impairment benefits, totals the statutory maximum of $250,000.00. Therefore, your wage-loss eligibility ends there.

All benefits payable under Part E of EEOICPA must be coordinated with the amount of any state workers' compensation benefits that were paid to the claimant for the same covered illness or illnesses. *See* 42 U.S.C. § 7385s-11. Based on the evidence in the file, this results in a reduction of the maximum amount payable to you in impairment and wage-loss benefits, $250,000.00, by $126,173.60, resulting in a net entitlement of $123,826.40.

Therefore, your claim for the consequential illness of coronary artery disease is accepted under Part E. Your claim for impairment and wage-loss benefits under Part E for your lung cancer and coronary artery disease is also accepted, and you are awarded a net amount of $123,826.40.

Washington, DC

Carrie A. Rhoads

Hearing Representative

Final Adjudication Branch

Overpayments

EEOICPA Fin. Dec. No. 10078623-2009 (Dep't of Labor, April 9, 2010)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch (FAB) concerning the above claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons stated below, the claim for survivor benefits under Part E of EEOICPA for the death of the employee is accepted. No benefits are payable, however, since compensation paid to the employee after his death has not been recouped, and the amount of this compensation exceeds the claimant's entitlement to survivor compensation.

STATEMENT OF THE CASE

On August 14, 2001, **[Employee]** filed a Form EE-1 claiming benefits under EEOICPA for skin cancer. On February 10, 2004, **[Employee]** also filed a request for assistance with a state workers' compensation claim for skin cancer, a lung condition and hearing problems with the Department of Energy (DOE) under former Part D of EEOICPA. On May 17, 2006, **[Employee]** also filed a Form EE-1 based on mantle cell lymphoma.

On August 2, 2005, FAB issued a final decision accepting **[Employee]**'s claim for compensation under Part B for skin cancer. On January 29, 2007, FAB also issued a final decision accepting **[Employee]**'s claim under Part E for skin cancer, and under Parts B and E for lymphoma. On August 29, 2007, FAB issued a final decision denying **[Employee]**'s claim under Part E for his hearing loss. On December 27, 2007, FAB issued a final decision to accept **[Employee]**'s claim under Part E for chronic obstructive pulmonary disease (COPD). As part of these decisions, FAB found that **[Employee]** was a DOE contractor employee at the Portsmouth Gaseous Diffusion Plant (GDP) from October 5, 1953 to July 1, 1985.

On August 14, 2008, FAB issued a final decision accepting **[Employee]**'s claim under Part E for a 79% whole-person impairment resulting from his covered illnesses of skin cancer, lymphoma and COPD, and awarding him impairment benefits in the amount of $197,500.00. On August 28, 2008, the Cleveland district office received a Form EN-20 signed by **[Claimant]** as attorney-in-fact for **[Employee]**. Accompanying the Form EN-20 was a three-page document entitled "General Power of Attorney," in which **[Employee]** appointed **[Claimant]** as his attorney-in-fact. On September 8, 2008, the U.S. Department of Labor's Counsel for Energy Employees Compensation concluded that the "General Power of Attorney" executed by **[Employee]** is legally sufficient to grant **[Claimant]** authority to execute the Form EN-20 on **[Employee]**'s behalf.

On September 10, 2008, the Cleveland district office authorized payment of $197,500.00 to be deposited by electronic funds transfer to the National City Bank savings account of **[Employee]** and **[Claimant]**.

On October 2, 2008, **[Claimant]** filed a Form EE-2 claiming benefits under EEOICPA as the surviving spouse of **[Employee]**. She also submitted a copy of **[Employee]**'s death certificate, showing that he died on August 11, 2008 as a result of mantle cell lymphoma, and that she was his surviving spouse. The claimant also submitted a copy of her marriage certificate, showing that she and **[Employee]** were married on August 9, 1947.

Since the evidence showed that **[Employee]** died prior to the issuance of the payment, the Cleveland district office sent an October 28, 2008 letter to National City Bank requesting return of the $197,500.00 transferred to **[Employee]**'s savings account via electronic funds transfer to the United States Treasury. There is no record indicating that these funds have been returned to the Treasury. On November 3, 2008, the Cleveland district office referred this case to the Branch of Policies, Regulations and Procedures for guidance on the appropriate procedures for adjudication of a claim for survivor compensation when payment has been issued to an employee after that employee's death. On August 14, 2009, the Branch instructed the district office to proceed with the adjudication of this claim for survivor benefits, noting that "if [you are] found eligible to receive compensation, there will be a balance of overpaid funds no matter the outcome as the maximum award [you] could receive as a survivor is less than the previously paid impairment award."

On August 26, 2009, the district office issued a recommended decision to accept the claimant's survivor claim, and that she is entitled to compensation in the amount of $125,000.00 under Part E as **[Employee]**'s surviving spouse. The district office determined, however, that because a payment in the amount of $197,500.00 had been issued to **[Employee]** after his death, and that this payment had not been returned to the district office, an overpayment of $72,500.00 existed. Accordingly, the district office concluded that survivor benefits were not payable.

OBJECTIONS

On October 16, 2009, the claimant's authorized representative objected to the recommended decision and requested a hearing, which was held on January 5, 2010. The representative argued that the adjudication of **[Employee]**'s claim for impairment benefits was unjustifiably delayed, and that this delay resulted in the payment of the impairment award after **[Employee]**'s death. The representative also introduced a timeline showing the actions taken between the time that **[Employee]** filed a claim for impairment benefits and the issuance of the final decision awarding such benefits. (Exhibit 1). He argued that because of this delay, the claimant should be entitled to receive the impairment award in

addition to any survivor compensation due. The authorized representative also argued that the claimant was not at fault in the creation of any overpayment, and that collection of any overpayment should be waived.

Based on the evidence in the case file, and after considering the objections to the recommended decision and the testimony at the oral hearing, FAB hereby makes the following:

FINDINGS OF FACT

1. On January 29, 2007 and December 27, 2007, FAB issued final decisions accepting **[Employee]**'s claim under Part E for skin cancer and lymphoma, and for COPD. In these final decisions, FAB determined that **[Employee]** was a covered DOE contractor employee at the Portsmouth GDP from October 5, 1953 to July 1, 1985.

2. **[Employee]** died on August 11, 2008 as a result of lymphoma.

3. On August 14, 2008, FAB issued a final decision accepting **[Employee]**'s claim for a 79% whole-person impairment resulting from his covered illnesses of skin cancer, lymphoma and COPD, and awarded impairment benefits in the amount of $197,500.00

4. On September 10, 2008, the Cleveland district office authorized payment of $197,500.00 to be deposited by electronic funds transfer to the National City Bank savings account of **[Employee]** and **[Claimant]**.

5. On October 2, 2008, **[Claimant]** filed a claim as the surviving spouse of **[Employee]**.

6. The claimant is the surviving spouse of **[Employee]** and was married to him for at least one year prior to his death.

Based on the above findings of fact, FAB hereby also makes the following:

CONCLUSIONS OF LAW

Part E of EEOICPA provides for payment of compensation to a survivor of a DOE contractor employee if the evidence establishes: (1) that the employee would have been entitled to compensation for a covered illness; and (2) that it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing the death of such employee. 42 U.S.C. § 7385s-3.

As found above, **[Employee]** qualifies as a covered DOE contractor employee because he was employed by a DOE contractor at a DOE facility, and has been determined to have contracted a covered illness, lymphoma, through exposure at a DOE facility. Also as found above, the evidence establishes that it is at least as likely as not that his covered illness of lymphoma was a significant factor causing or contributing to his death. Therefore, as his surviving spouse, the claimant is entitled to survivor compensation in the amount of $125,000.00 under 42 U.S.C. § 7385s-3(a)(1).

The statute provides that in the event that a covered DOE contractor employee's death occurs after the employee applied for compensation under Part E, but before compensation was paid, and the

employee's death occurred solely from a cause other than the covered illness of the employee, the survivor of that employee may elect to receive, in lieu of compensation under § 7385s-3(a), the amount that the employee would have received based on impairment or wage-loss, if the employee's death had not occurred before compensation was paid. 42 U.S.C. § 7385s-1(2)(b). The implementing regulations further provide that "if the claimant dies before the payment is received, the person who receives the payment shall return it to [the Office of Workers' Compensation Programs] for re-determination of the correct disbursement of the payment. No payment shall be made until OWCP has made a determination concerning the survivors related to a respective claim for benefits." 20 C.F.R. § 30.505(c) (2009).

EEOICPA procedures define an overpayment as "any amount of compensation paid under 42 U.S.C. §§ 7384s, 7384t, 7384u, 7385s-2 or 7385s-3 to a recipient that, at the time of payment, is paid where no amount is payable or where payment exceeds the correct amount of compensation determined by DEEOIC." Federal (EEOICPA) Procedure Manual, Chapter 3-0800. The procedures further set forth a process for the review, identification, and for the issuance of decisions regarding overpayments.

In response to the objections in this matter, I note that the evidence in the case file shows that **[Employee]**'s cause of death was mantle cell lymphoma, which has been established as a covered illness under Part E. As a result, the claimant may not elect to receive the impairment award to which **[Employee]** was entitled. Since the evidence establishes that compensation was paid to **[Employee]** after his death on August 11, 2008, and this payment (which was for a sum greater than the award the claimant could receive as a survivor) has not been returned to OWCP, no further compensation can be paid until the status of any overpayment has been determined.

Accordingly, the claim for survivor benefits under Part E is accepted, but there is no entitlement to compensation.

Cleveland, OH

Greg Knapp

Hearing Representative

Final Adjudication Branch

Relationship between Parts B and E

EEOICPA Fin. Dec. No. 12914-2002 (Dept. of Labor, February 8, 2005)

NOTICE OF FINAL DECISION

This decision of the Final Adjudication Branch (FAB) concerns 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). Your claim under Part E of the Act is hereby accepted as compensable.

On January 28, 2005, the Jacksonville district office issued a recommended decision finding that the employee was employed at a Department of Energy (DOE) facility by a DOE contractor in accordance

with 42 U.S.C. § 7385s(1); that you are the eligible survivor in accordance with 42 U.S.C. § 7385s-3(d); that a positive determination by DEEOIC under Part B is treated for the purposes of Part E as a determination that the employee contracted that illness through work-related exposure to a toxic substance at a DOE facility in accordance with 42 U.S.C. § 7385s-4(a); and that you are entitled to $125,000.00 in accordance with 42 U.S.C. § 7385s-3(a)(1). Consequently, the district office recommended that your survivor claim be accepted in accordance with 42 U.S.C. § 7385s-4(a). On January 31, 2005, the Final Adjudication Branch received your written notification that you waive any and all objections to the recommended decision.

The evidence of record establishes that your claim meets the statutory criteria for compensability as defined in Part E of the EEOICPA. In this instance, the evidence confirms that your spouse had covered employment with Union Carbide Corporation and Martin Marietta Energy Systems from April 1, 1975 to April 1, 1984 and April 2, 1984 to December 18, 1987, and supports a causal connection between your spouse's death and his exposure to a toxic substance at the K-25 gaseous diffusion plant and the X-10 Oak Ridge National Laboratory, DOE facilities. The evidence of record indicates that a completed Physicians Panel review under former Part D of the EEOICPA concluded that no causally related condition exists. However, a separate determination was made by DEEOIC under Part B which concluded that the employee was a covered employee entitled to compensation for brain cancer. Under these circumstances, your claim meets the standards for adjudication during the Preliminary Administration Period consistent with EEOICPA Bulletin No. 05-01 (issued November 23, 2004).

The file contains the employee's death certificate, which shows that his covered illness caused or contributed to his death, and also contains a copy of your marriage certificate. This evidence establishes your entitlement to basic survivor benefits under Part E of the EEOICPA. The file also contains your statement that the employee did not file or receive any state workers' compensation benefits for the claimed condition. In addition, you stated that the employee, at the time of death, had no minor children or children incapable of self support, who were not your natural or adopted children.

The Final Adjudication Branch hereby finds that the employee is a covered DOE contractor employee as defined in 42 U.S.C. § 7385s(1); that a positive determination of entitlement by DEEOIC under Part B was made for the illness of brain cancer; and that you are the eligible survivor of the employee. Therefore, the Final Adjudication Branch hereby concludes that you are entitled to compensation in the amount of $125,000 under Part E of the EEOICPA. Adjudication of your potential entitlement to additional compensation is deferred until after the effective date of the Interim Final Regulations as per EEOICPA Bulletin No. 05-01 (issued November 23, 2004).

Jacksonville, FL

Sidne M. Valdivieso

Hearing Representative

EEOICPA Fin. Dec. No. 41882-2007 (Dep't of Labor, December 21, 2007)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning the above claims for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000,

as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claim filed by **[Claimant #1]** is accepted under Part B and Part E of EEOICPA. The claim filed by **[Claimant #2]** under Part E is denied.

STATEMENT OF THE CASE

On April 5, 2002, **[Claimant #2]** filed a Form EE-2 claiming for survivor benefits under EEOICPA as a surviving child of **[Employee]**. On February 19, 2003, **[Claimant #1]** filed also filed a Form EE-2 as the surviving spouse of the employee. They both identified lung cancer as the diagnosed condition of the employee. **[Claimant #2]** submitted an employment history, Form EE-3, completed on October 25, 2001 by **[Individual with same surname as Employee]**, which indicated that the employee worked for Atomics International, in the Santa Susana Hills, from 1958 to 1964, and for Gulf General Atomics in San Diego, California and Idaho Falls, Idaho, from 1964 to an unknown date.

The Department of Energy (DOE) verified that the employee worked for Atomics International, a DOE contractor, at Area IV of the Santa Susana Field Laboratory, a DOE facility, from May 19, 1958 to October 16, 1964. General Atomics confirmed that the employee worked for General Atomics from October 19, 1964 to September 8, 1972, and that during this period the employee did some work at Gulf in Idaho Falls, Idaho. The Idaho National Engineering & Environmental Laboratory (INEEL), in Idaho Falls, Idaho, confirmed that INEEL had dosimetry data for the employee, and that he might have worked for General Atomics during 1965, 1966 and 1967.

The General Atomics human resources department provided documentation establishing that the employee was monitored for radiation on 9 separate occasions while working at the General Atomics facility in La Jolla, California, in the LINAC complex and the HTGR-Critical Facility, between January 20, 1967 and November 18, 1969.

As medical evidence, **[Claimant #1 and Claimant #2]** submitted numerous medical records, including the following:

1. A medical report dated April 21, 1977 from B.M. Kim, M.D., which provides an assessment of primary bronchial carcinoma.

2. A copy of a radiation oncology consultation, dated May 9, 1977, from Charles Campbell, M.D., which provides a diagnosis of bronchogenic, large cell, undifferentiated adenocarcinoma.

In support of her claim, **[Claimant #2]** provided a copy of her birth certificate, indicating that she was born on March 26, 1958, and that **[Employee]** was her father. She provided a copy of the employee's death certificate, indicating that he died on August 28, 1977 at age 43, due to respiratory failure secondary to bronchogenic carcinoma, and that he was married to **[Claimant #1's maiden name]** at the time of death. **[Claimant #1]** submitted a copy of her marriage certificate that memorialized her marriage to **[Employee]** on July 1, 1972. **[Claimant #2]** and **[Claimant #1]** provided copies of marriage certificates that document their surname changes.

On December 17, 2002, FAB issued a final decision denying the claim of **[Claimant #2]** under Part B of EEOICPA, as the evidence of record did not establish that the widow of the employee at the time of his death was no longer alive.

In a February 16, 2007 report to Congress, the Secretary of Health and Human Services (HHS) designated the following class of employees for addition to the Special Exposure Cohort (SEC):

Atomic Weapons Employer (AWE) employees who were monitored or should have been monitored for exposure to ionizing radiation while working at the General Atomics facility in La Jolla, California, at the following locations: Science Laboratories A,B, and C (Building 2); Experimental Building (Building 9); Maintenance (Building 10); Service Building (Building 11); Buildings 21 and 22: Hot Cell Facility (Building 23); Waste Yard (Buildings 25 and 26); Experimental Area (Building 27 and 27-1); LINAC Complex (Building 30); HTGR-TCF (Building 31); Fusion Building (Building 33); Fusion Doublet III (Building 34); SV-A (Building 37); SV-B (Building 39); and SV-D (no building number) for a number of work days aggregating at least 250 work days from January 1, 1960 through December 31, 1969, or in combination with work days within the parameters established for one or more other classes of employees in the SEC.

The SEC designation for this class became effective on March 18, 2007.

On July 30, 2007, the district office sent a letter to **[Claimant #2]** advising her of the criteria to establish that she is a "covered" child under Part E of EEOICPA and asked her to provide evidence establishing her eligibility as a covered child. The record reflects that on September 24, 2007, **[Claimant #2]** advised the district office via a telephone call that she did not meet the eligibility requirements under Part E.

On September 26, 2007, the Seattle district office issued a recommended decision concluding that **[Claimant #2]** is not an eligible survivor of the employee under Part E; that the employee is a member of the SEC; that he developed lung cancer, a "specified" cancer, after beginning his employment at General Atomics; that the occupational exposure was at least as likely as not a significant factor in aggravating, contributing to, or causing the employees' death; that **[Claimant #1]** is the surviving spouse of **[Employee]**; and that **[Claimant #1]** is entitled to survivor benefits under Part B of EEOICPA in the amount of $150,000.00, and under Part E in the amount of $175,000.00, for a total of $325,000.00.

The record contains **[Claimant #1]**'s correspondence of October 3, 2007, advising that she never filed for, or received, any settlements or awards for the claimed condition of lung cancer, from either a civil lawsuit or a state workers' compensation claim. She also advised that the employee did not have any children who were not her natural or adopted children at the time of the employees' death.

The FAB has received separate correspondence from **[Claimant #1 and Claimant #2]** waiving any objections to the findings of fact or conclusions of law in the recommended decision.

Based upon a review of the evidence in the record, I make the following:

FINDINGS OF FACT

1. **[Claimant #1 and Claimant #2]** filed claims for benefits under EEIOCPA as the survivors of **[Employee]**.

2. **[Employee]** worked for Atomics International, a DOE contractor, at Area IV of the Santa Susana Field Laboratory, a DOE facility, from May 19, 1958 to October 16, 1964.

3. **[Employee]** was employed by General Atomics, an Atomic Weapons Employer, at their La Jolla, California facility, from October 19, 1964 to September 8, 1972.

4. During the period from January 1, 1960 through December 31, 1969, the employee worked an aggregate of at least 250 work days in buildings specified for the General Atomics SEC, where the employee was monitored or should have been monitored for exposure to ionizing radiation.

5. **[Employee]** was first diagnosed with lung cancer in April 1977.

6. **[Claimant #1]** is the surviving spouse of the employee, who died on August 28, 1977 (at the age of 43) due to respiratory failure secondary to bronchogenic carcinoma.

7. **[Claimant #2]** is a biological child of **[Employee]**, and was 19 years old at the time of her father's death.

8. There is no evidence that **[Claimant #2]** was a full-time student or incapable of self-support at the time of her father's death.

Based upon a review of the aforementioned facts, FAB hereby also makes the following:

CONCLUSIONS OF LAW

Section 30.316(a) of the implementing regulations provides that if the claimant does not file a written statement that objects to the recommended decision and/or requests a hearing within the period of time allotted in § 30.310, or if the claimant waives any objection to all or part of the recommended decision, the FAB reviewer may issue a decision accepting the recommendation of the district office, either in whole or in part. 20 C.F.R. § 30.316(a) (2007). Both claimants have submitted their written waivers.

The term "covered" child means a child of the employee who, at the time of the employee's death, was: under the age of 18 years; or under the age of 23 years and a full-time student who was continuously enrolled in an educational institution since attaining the age of 18 years; or incapable of self-support. *See* 42 U.S.C. § 7385s-3(d)(2).

The record establishes that **[Claimant #2]** was 19 years old at the time of her father's death. There is no evidence showing that she was a full-time student or incapable of self-support at the time of her father's death. Therefore, FAB concludes that **[Claimant #2]**'s claim under Part E of EEOICPA must be denied because she does not meet the definition of a "covered" child set out in 42 U.S.C. § 7385s-3(d)(2).

Eligibility for Part B compensation based on cancer may be established by demonstrating that the employee is a member of the SEC who contracted a "specified" cancer after beginning employment at a DOE facility (in the case of a DOE employee or DOE contractor employee). 42 U.S.C. §§ 7384l(9)(A), 7384l(14)(A).

The record establishes that during the period from January 1, 1960 through December 31, 1969, the employee worked an aggregate of at least 250 work days in buildings specified for the General Atomics SEC. The record also establishes that the employee was diagnosed with lung cancer in 1977, which is more than 2 years after beginning his employment at the General Atomics' La Jolla, California facility.

Lung cancer is a "specified" cancer as defined by 20 C.F.R. § 30.5(ff)(2) (2007). The employee was, therefore, a "covered employee with cancer." 42 U.S.C. § 7384l(9).

The record also establishes that **[Claimant #1]** is the surviving spouse of the employee. As the employee's surviving spouse, she is entitled to compensation benefits under Part B of the Act in the amount of $150,000.00, pursuant to 42 U.S.C. §§ 7384s(a) and (e)(A).

Section 7385s-4(a) of EEOICPA states that a determination under Part B that a DOE contractor employee is entitled to compensation under that part for an occupational illness shall serve as a determination under Part E that the employee contracted that illness through exposure at a DOE facility.

In this case, FAB is basing the award of compensation to **[Claimant #1]** under Part B on **[Employee]**'s employment at an Atomic Weapons Employer, which qualifies him as a member of the SEC. **[Employee]** also had documented employment with Atomics International, a DOE contractor, at Area IV of the Santa Susana Field Laboratory, a DOE facility, from May 19, 1958 to October 16, 1964. On September 19, 2007, the Division of Energy Employees Occupational Illness Compensation (DEEOIC) determined that in a surviving spouse's claim that is accepted under Part B based on the employee's status as both an atomic weapons employee and a member of the SEC, if the employee also had any verified employment by a DOE contractor at a DOE facility, then the provisions of 42 U.S.C. § 7385s-4(a) would apply such that the spouse would be entitled to a determination under Part E that the employee's illness was contracted through exposure to a toxic substance at the DOE facility. Accordingly, **[Claimant #1]** is entitled to compensation pursuant to 42 U.S.C. §7385s-3(a)(3), since the employee would have been entitled to compensation under Part B, *and* it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing the death of the employee.

Therefore, the evidence of record, in conjunction with the September 19, 2007 determination by DEEOIC, establishes that the employee was diagnosed with a "covered illness," lung cancer, as that term is defined by 42 U.S.C. § 7385s(2), and that the employee contracted that "covered illness" through exposure to a toxic substance at a DOE facility pursuant to 42 U.S.C. § 7385s-4(a). The FAB concludes that the evidence of record is also sufficient to establish that the employee's lung cancer was a significant factor in aggravating, contributing to, or causing his death. The death certificate, signed by a physician, lists the cause of death as being due to or as a consequence of bronchogenic carcinoma (lung cancer), which is the accepted condition under Part B of EEOICPA. The record also indicates that there was an aggregate of not less than 20 years between the employee's death and his normal retirement age (for purposes of the Social Security Act).

Accordingly, **[Claimant #1]** is entitled to compensation under Part E in the amount of $175,000.00 as a covered spouse, pursuant to 42 U.S.C. §7385s-3(a)(3), for a total lump-sum award in the amount of $325,000.00.

Washington, D.C.

Susan Price

Hearing Representative

Final Adjudication Branch

Requirements for

EEOICPA Fin. Dec. No. 2029-2002 (Dep't of Labor, January 10, 2005)

NOTICE OF FINAL DECISION

This decision of the Final Adjudication Branch (FAB) concerns 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). Your claim under Part E of the Act is hereby accepted as compensable.

The Jacksonville district office issued a recommended decision finding that **[Employee]** was employed at a Department of Energy (DOE) facility by a DOE contractor in accordance with Part E, 42 U.S.C. § 7385s(1); that you are the eligible survivor in accordance with Part E, 42 U.S.C. § 7385s-3(c)(1); and that you are entitled to $125,000 in accordance with Part E, 42 U.S.C. § 7385s-3(a)(1). Consequently, the district office concluded your survivor claim is accepted in accordance with Part E, 42 U.S.C. § 7385s-4(b). On December 28, 2004, the Final Adjudication Branch received your written notification that you waive any and all objections to the recommended decision.

The evidence of record establishes that your application meets the statutory criteria for compensability as defined in Part E of the EEOICPA. In this instance the evidence confirms that your spouse had covered employment with the gaseous diffusion plant in Paducah, Kentucky, for the period of March 24, 1952 to January 15, 1982, and supports a causal connection between your spouse's death and his exposure to a toxic substance at a DOE facility. Specifically, the evidence of record establishes that a Physicians Panel review under former Part D of the EEOICPA has been completed, and that the Secretary of Energy accepted the Panel's affirmative determination of **[Employee]**'s pulmonary fibrosis due to exposure to a toxic substance at a DOE facility. The file contains **[Employee]**'s death certificate listing the causes of death as cardiogenic shock and pneumonia, the medical opinion of Dr. Kalindi Narayan concluding that pulmonary fibrosis contributed to the employee's death, and a copy of your marriage certificate. This evidence establishes your entitlement to basic survivor benefits under Part E of the EEOICPA.

The Final Adjudication Branch hereby finds that **[Employee]** was a DOE contractor employee with pulmonary fibrosis due to exposure to a toxic substance at a DOE facility; and that you are the eligible survivor of **[Employee]**. Therefore, the Final Adjudication Branch hereby concludes that you are entitled to compensation in the amount of $125,000 under Part E of the EEOICPA. Adjudication of your potential entitlement to additional compensation is deferred until after the effective date of the Interim Final Regulations.

Sidne M. Valdivieso

Hearing Representative

EEOICPA Fin. Dec. No. 25528-2004 (Dep't of Labor, September 30, 2004)

NOTICE OF FINAL DECISION

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 March 15, 2002, you filed a Form EE-2, Claim for Survivor's Benefits under the EEOICPA. The claim was based, in part, on the assertion that **[Employee]** (hereafter known as "the employee") was an employee of a Department of Energy (DOE) contractor at a DOE facility. You stated on the Form EE-2 that you were filing for the employee's lung cancer, bladder cancer, kidney cancer, other lung condition, and renal disease.[1] Sufficient medical evidence was submitted to establish the claimed conditions of lung cancer and bladder cancer.

On the Form EE-3, Employment History, you stated the employee was employed as a maintenance superintendent by Dupont at the Savannah River Site in Aiken, South Carolina from 1951 to an ending date in the 1980's. The Department of Energy verified this employment as March 12, 1951 to December 31, 1974.

To determine the probability of whether the employee sustained a cancer in the performance of duty, the district office referred your application package to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction. 20 C.F.R. § 30.115. On March 22, 2004, you signed Form OCAS-1, indicating that you had reviewed the NIOSH Draft Report of Dose Reconstruction and agreed that it identified all of the relevant information you provided to NIOSH. The district office received the final NIOSH Report of Dose Reconstruction on March 31, 2004.

Pursuant to the implementing NIOSH regulations, the district office used the information provided in this report to determine that there was a 52.50% probability that the employee's lung and bladder cancers were caused by radiation exposure at the Savannah River Site in Aiken, South Carolina. 42 C.F.R. § 81.20. The Final Adjudication Branch independently analyzed the information in the NIOSH report, confirming the 52.50% probability.

On September 15, 2004, the district office issued a recommended decision finding that the employee's lung and bladder cancers were at least as likely as not caused by his employment at a Department of Energy (DOE) facility and concluding that you are entitled to compensation in the amount of $150,000. 42 U.S.C. §§ 7384n, 7384s.

On September 23, 2004, the Final Adjudication Branch received written notification that you waive any and all objections to the recommended decision.

FINDINGS OF FACT

1) You filed a Form EE-2, Claim for Survivor's Benefits, on March 15, 2002.

2) The claimed conditions of lung cancer and bladder cancer is supported by the medical evidence.

3) The employee was employed at the Savannah River Site in Aiken, South Carolina for the period of March 12, 1951 to December 31, 1974. The employee is a covered employee as defined in § 7384l(1)

of the Act. 42 U.S.C. § 7384l(1).

4) In proof of your survivorship, you submitted your birth certificate and a copy of the employee's death certificate and your mother's death certificate. Therefore, you have established that you are a survivor as defined by § 30.5(ee) of the implementing regulations. 20 C.F.R. § 30.5(ee).

5) The district office issued a recommended decision on September 15, 2004.

6) The dose reconstruction estimates were performed in accordance with § 7384n(d) of the Act and § 82.10 of the implementing NIOSH regulations. 42 U.S.C. § 7384n(d), 42 C.F.R. § 82.10.

7) The probability of causation, found to be 52.50%, was completed in accordance with § 7384n(c)(3) of the Act. 42 U.S.C. § 7384n(c)(3).

8) The employee's lung cancer and bladder cancer were at least as likely as not caused by his employment at a Department of Energy (DOE) facility, within the meaning of § 7384n of the Act. 42 U.S.C. § 7384n.

9) On September 23, 2004, the Final Adjudication Branch received your written notification that you waive any and all objections to the recommended decision.

CONCLUSIONS OF LAW

The undersigned has reviewed the facts and the recommended decision issued by the district office on September 15, 2004, and finds that the employee's lung cancer and bladder cancer were at least as likely as not caused by his employment at a Department of Energy (DOE) facility, within the meaning of § 7384n of the Act; and that you are the eligible surviving beneficiary of the employee as defined under § 7384s(e)(1)(A) of the Act and § 30.501(a) of the implementing regulations. 42 U.S.C. §§ 7384n, 7384s(e)(1)(A), 20 C.F.R. § 30.501(a). The undersigned hereby affirms the award of $150,000, in accordance with § 7384s(a) of the Act and §§ 30.500 and 30.501 of the implementing regulations. 42 U.S.C. § 7384s(a), 20 C.F.R. §§ 30.500, 30.501.

Jacksonville, FL

James Bibeault

Hearing Representative

[1] Since this is a survivor claim and you are entitled to the maximum allowable benefits of $150,000, a final decision will not be issued regarding the claimed conditions of kidney cancer, renal disease, and other lung condition.

EEOICPA Fin. Dec. No. 63743-2006 (Dep't of Labor, November 21, 2006)

NOTICE OF FINAL DECISION FOLLOWING REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch (FAB) concerning the claims of **[Claimant #1]**, **[Claimant # 6]**, **[Claimant #7]**, **[Claimant #8]**and **[Claimant # 9]** for compensation under Part B, and of **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]** under Part E, of the Energy

Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA or the Act), 42 U.S.C. § 7384 *et seq*. For the reasons stated below, the claims of **[Claimant #1]** under Parts B and E, as well as the claims of **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]** under Part E are denied, and the claims of **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** under Part B are approved.

STATEMENT OF THE CASE

On November 29, 2004, **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant # 6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** filed Forms EE-2, claiming survivor benefits under Parts B and E of EEOICPA as the children of the employee. **[Claimant #1]** filed such a claim on June 14, 2005, as the spouse of the employee. The Department of Justice (DOJ) confirmed on January 11, 2005 that **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and**[Claimant #9]** received, on November 22, 2004, an award under Section 5 of the Radiation Exposure Compensation Act (RECA), as the eligible surviving beneficiaries of the employee, for the condition of pneumoconiosis.

Documents, including birth, marriage and death certificates, birth affidavits and a marital status and family profile issued by the Navajo Nation, and a decree issued by a judge on December 22, 1978, confirmed that **[Claimant #2]**, born on **[Date of Birth]**, **[Claimant #3]**, born on **[Date of Birth]**, **[Claimant #4]**, born on **[Date of Birth]**, **[Claimant #5]**, born on **[Date of Birth]**, **[Claimant #7]**, born on **[Date of Birth]**, **[Claimant #8]**, born on **[Date of Birth]** and **[Claimant #9]**, born on **[Date of Birth]**, are children of the employee. Another birth certificate states that **[Claimant #6]** was born on **[Date of Birth]** and that her mother was **[Claimant #6's mother]**, who is also listed as the mother on the birth certificates of **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]**. Subsequently, an obituary from a newspaper was submitted which listed **[Claimant #6]** as a surviving daughter of the employee.

The death certificate of the employee states that he died on December 1, 1990 and that, at the time of his death, he was married to **[Claimant #1's maiden name]**. A marriage certificate confirms that **[Claimant #1's maiden name]** was the name of **[Claimant #1]** until her marriage to the employee, on June 18, 1950. The death certificate states that the "informant" was **[Claimant #2]**, who, according to his birth affidavit, is the son of the employee and **[Claimant #1]**.

The file also includes a Decree of Dissolution of Marriage, concerning the marriage of the employee and **[Claimant #1]**. The Decree states that an "absolute divorce" was "granted to the plaintiff," **[Employee]**, and that this was ordered, on December 22, 1978, by a judge of the Court of the Navajo Nation. A marital status and family profile, issued by the Vital Records and Tribal Enrollment Program of the Navajo Nation, on January 10, 2002, also stated that the employee and **[Claimant #1]** were divorced on December 22, 1978.

The DOJ submitted a document signed on October 8, 2002 by "**[Claimant #1]**" on which a box was checked indicating that she was not in a legal or common-law marriage to the employee for at least one year prior to his death. On August 1, 2005, her representative submitted an undated affidavit signed by "**[Claimant #1]**" stating that she was never divorced from the employee, that she did not knowingly check the box on the DOJ document, that she always uses her middle initial (**[Middle initial]**) when signing her name, that she needs translation of all documents into Navajo and that she relied on the assistance of the Shiprock Office of the Navajo Uranium Workers in pursuing her claim.

The case was referred to the Office of the Solicitor and the Solicitor responded with an opinion dated December 7, 2005. The district office then obtained statements from **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]**, confirming that they had not filed for, or received any benefits from, a lawsuit or a state workers' compensation claim, for the employee's exposure or illness. On April 6, 2006, the district office sent letters to **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]** and **[Claimant #5]**, asking if they had filed for, or received any benefits from, a lawsuit or a state workers' compensation claim, for the employee's exposure or illness. No response to those letters has been received.

On April 11, 2006, the Denver district office issued a recommended decision, concluding that **[Claimant #1]** is not entitled to compensation under Part B of the Act, but that **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** were each entitled to $6,250 (1/8th of $50,000) under Part B. The recommended decision also concluded that **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]** and **[Claimant # 4]** are not entitled to compensation under part E of the Act, since the evidence did not support they are eligible survivors of the employee, as defined in 42 U.S.C. § 7385s-3. The recommended decision also described the criteria which have to be met to be considered a "covered child" under Part E.

The recommended decision held in abeyance the claims of **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]** and **[Claimant #5]** under Part B, until their response to the inquiry as to whether they had ever filed, or received benefits under, a lawsuit or state workers' compensation claim. It also stated that further development of the evidence must take place before a decision could be issued on the claims of **[Claimant #5]**, **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** under Part E.

On April 21, 2006, the FAB received **[Claimant #6]**'s, **[Claimant #7]**'s and **[Claimant #8]**'s waivers of their right to object to the recommended decision. On June 7, 2006, the FAB received a letter from Lorenzo Williams, the representative of **[Claimant #1]**, expressing objections to the recommended decision and requesting a hearing. Mr. Williams submitted another letter, dated July 3, 2006, which again stated his objections to the recommended decision, withdrew the request for a hearing and requested a review of the written record. On September 18, 2006, **[Claimant #1]**, through her representative, was provided twenty days to submit any additional evidence she wished considered. No additional evidence was submitted.

OBJECTIONS

The letters of objection included numerous allegations of inappropriate conduct by DOJ, DEEOIC, the Solicitor, government agencies of the Navajo Nation, the Office of Navajo Uranium Workers and **[Claimant #1]**'s previous representative. No evidence was submitted confirming that any such conduct occurred which would have had any bearing on the outcome of the case.

The basic objection of Lorenzo Williams is that the evidence as to whether **[Claimant #1]** was married to the employee at the time of his death was not properly evaluated. In particular, he objected that the affidavit made by **[Claimant #1]** on August 1, 2005, indicating that she was never divorced from the employee, was not considered. However, its evidentiary value must be weighed in light of the other evidence in the file. It is true that the employee's death certificate states that, at that time, he was married to **[Claimant #1]**. However, it also indicates that the information was based solely on information received from **[Claimant #2]**.

On the other hand, the document which appears to have been signed by **[Claimant #1]** on October 8, 2002 states that she was not married to the employee at the time of his death. It should be noted that another document in the file, her marriage certificate, includes a signature of **[Claimant #1]** without a middle initial.

Furthermore, an official document was issued by a judge on December 22, 1978 stating that a divorce was granted dissolving the marriage of **[Claimant #1]** and the employee. A stamp from the clerk of the court states that the copy in the file is an accurate copy of the document. Lorenzo Williams, the representative of **[Claimant #1]** has noted that the document incorrectly states that the two were married in 1951, rather than 1950, as stated in the marriage certificate, and that there is also a stamp indicating the document was "received" in 1991, after the death of the employee. However, he presented no argument or evidence that these facts would in any way invalidate the divorce decree, which was ordered and signed by the judge on December 22, 1978.

In addition, the file includes another official document, a marital status and family profile, issued by the Vital Records and Tribal Enrollment Program of the Navajo Nation on January 10, 2002, which further confirms that **[Claimant #1]** and the employee were divorced on December 22, 1978.

The probative value of these two official documents far outweigh the unclear and conflicted statements from **[Claimant #1]** and the statement on the death certificate which simply repeated information obtained from one of her children with the employee.

Also, it should be noted that the evidence supports that, after December 22, 1978, the employee had at least three more children with another woman, **[Employee's second wife]**. This does not, in and of itself, constitute evidence of the employee's marital status. It does, however, lend some credence to the proposition that the employee no longer considered himself married to **[Claimant #1]**.

Finally, as the Solicitor noted in the opinion of December 7, 2005, 42 U.S.C. § 7384u provides for payment of compensation to an individual "who receives, or has received" an award under section 5 of the RECA. A determination is made by DEEOIC concerning an eligible survivor under that section only if all the individuals who received the RECA award are deceased. Since, in this case, the individuals who received the award under section 5 of the RECA are still alive, **[Claimant #1]** would not be eligible for benefits under Part B of the EEOICPA even if it were determined that she was an eligible surviving spouse under § 7384u(e).

Upon review of the case record, the undersigned makes the following:

FINDINGS OF FACT

1. You all filed claims for benefits under Parts B and E of EEOICPA.

2. **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** received compensation for the condition of pneumoconiosis, as eligible surviving beneficiaries of the employee, under Section 5 of RECA.

3. The employee died on December 1, 1990. At the time of his death, **[Claimant #2]** was 36 years old, **[Claimant #3]** was 28, **[Claimant #4]** was 26, **[Claimant #5]** was 19, **[Claimant #6]** was 11, **[Claimant #7]** was 9, **[Claimant #8]** was 7 and **[Claimant #9]** was 6. **[Claimant #2]**, **[Claimant #3]**

and **[Claimant #4]** were not incapable of self-support when the employee died.

4. **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** are children of the employee.

5. **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** did not receive any settlement or award from a lawsuit or state workers' compensation in connection with the accepted exposure or illness. **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]** and **[Claimant #5]** have not confirmed whether or not they received a settlement or award from a lawsuit or state workers' compensation in connection with the accepted exposure or illness.

6. **[Claimant #1]** was married to the employee from June 18, 1950 until December 22, 1978, when they were divorced.

Based on these facts, the undersigned makes the following:

CONCLUSIONS OF LAW

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, pursuant to 20 C.F.R. § 30.310. In reviewing any objections submitted under 20 C.F.R. § 30.313, the FAB will review the written record, any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. I have reviewed the record in this case, including the letters of objection, and must conclude that no further investigation is warranted.

The EEOICPA provides, under Part E, for payment of compensation to survivors of covered employees. It specifically states in 42 U.S.C. § 7385s-3 that if "there is no covered spouse. . . payment shall be made in equal shares to all covered children who are alive." It defines a "covered spouse" as "a spouse of the employee who was married to the employee for at least one year immediately before the employee's death," and a "covered child" as "a child of the employee who, as of the employee's death. . .had not attained the age of 18 years. . .had not attained the age of 23 years and was a full-time student who had been continuously enrolled as a full time student. . .since attaining the age of 18 years; or. . .had been incapable of self-support."

For the foregoing reasons, the undersigned finds that the evidence does not support that **[Claimant #1]** was a "covered spouse" or that **[Claimant #2]**, **[Claimant #3]** or **[Claimant #4]** were "covered" children, and their claims for benefits under Part E of EEOICPA are hereby denied.

The EEOICPA provides, under 42 U.S.C. § 7384u, for payment of compensation in the amount of $50,000 to an "individual who receives, or has received, $100,000 under section 5 of the Radiation Exposure Compensation Act." **[Claimant #1]** did not receive an award under section 5 of RECA and, therefore, she is not entitled to compensation under Part B.

[Claimant #2], **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** did receive an award under section 5 of RECA and, therefore, they each have an entitlement to $6,250 ($50,000 divided by 8) under Part B. Since **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** have affirmed that they have not received a payment from a tort suit for the employee's exposure, there is no offset to their entitlement, under 42 U.S.C. §

7385 of the Act, and compensation is hereby awarded to **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]**, in the amount of $6,250 each.

When **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]** and **[Claimant #5]** have responded to the inquiry as to whether they have received a payment from a lawsuit based upon their father's employment-related exposure, decisions will be issued on their claims for compensation under Part B of the Act.

Upon further development of the evidence, decisions will be issued on the claims of **[Claimant #5]**, **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** for compensation under Part E.

Washington, DC

Richard Koretz, Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 72762-2006 (Dep't of Labor, December 2, 2005)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning these claims for compensation under Part B of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended, 42 U.S.C. § 7384 *et seq.* (EEOICPA or the Act). These claims are accepted in the amount of $25,000 per claimant for a total of $150,000.

STATEMENT OF THE CASE

On June 21, 2002, **[Employee's spouse]** filed a claim (Form EE-2) under EEOICPA as the surviving spouse of **[Employee]**. The file contains the death certificate of **[Employee]** showing that **[Employee]** died on January 17, 1994 and identifies **[Employee's spouse]** (maiden name) as his surviving spouse. The file also contains the marriage certificate confirming that **[Employee's spouse]** married **[Employee]** on October 13, 1939. In addition, the file contains verification from Diebold, Inc. confirming that **[Employee]** worked for Diebold (AKA Herring-Hall Marvin Safe Company[1]) from February 13, 1941 through October 1, 1982. The file further contains pathology reports and medical records confirming **[Employee]**'s diagnosis of basal cell carcinoma of the left sideburn in 1994, basal cell carcinoma of the right nasal ala in 1993 and lung cancer in 1994.

On September 11, 2002, the case record was forwarded to the National Institute for Occupational Safety and Health (NIOSH) to determine the probably that **[Employee]** sustained cancer in the performance of duty while employed at the AWE/DOE facility. Using the dose estimates provided by NIOSH and the software program NIOSH-IREP, the district office calculated the probability of causation (PoC) for the lung cancer. These calculations show that the probability that **[Employee's]** lung cancer was caused by exposure to radiation during his employment with Diebold is 96.55%. Including the basal cell carcinomas in the dose reconstruction would increase the PoC; therefore, these cancers are considered causally related.

On June 21, 2005, the Cleveland district office issued a recommended decision. The district office

found **[Employee]** to be a "covered employee with cancer" and recommended acceptance of **[Employee's spouse]**'s claim. The district office's recommendations were accepted by the Final Adjudication Branch and on July 28, 2005 the FAB issued a final decision which awarded **[Employee's spouse]** compensation in the amount of $150,000. On August 19, 2005 payment in the amount of $150,000 was authorized to **[Employee's spouse]**. The payment was deposited in her account by electronic funds transfer (EFT) on August 31, 2005. On September 2, 2005, the Fiscal Office received the death certificate of **[Employee's spouse]** showing that she died on August 2, 2005. On September 7, 2005, the Fiscal Office received notification that the lump sum payment to **[Employee's spouse]** was reversed and returned to the Department of Treasury.

On September 22, 2005, **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]** and **[Claimant #6]** filed claims (Form EE-2) as the surviving children of **[Employee]**. The claimants each submitted their birth certificate showing **[Employee's spouse]** and **[Employee]** as their parents. In addition, **[Claimant #1]**, **[Claimant #2]** and **[Claimant #5]** submitted their marriage certificates documenting their surname change.

On October 13, 2005, the Director of the Division of Energy Employee Occupational Illness Compensation issued a Director's Order which vacated the final decision awarding benefits to **[Employee's spouse]**. Since **[Employee's spouse]** died prior to payment, the Director found that compensation shall be paid in equal shares to all living children of the employee.

Accordingly, on October 20, 2005, the Cleveland district office issued a recommended decision awarding benefits to **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]** and **[Claimant #6]**. On November 2, 2005, the FAB received signed waivers of any and all objections to the recommended decision from each claimant. After considering the evidence of record, the waivers of objections, and the NIOSH report, the FAB hereby makes the following:

FINDINGS OF FACT

1. **[Employee]** worked at a covered facility, Diebold (AKA Herring-Hall Marvin Save Company) during a period of residual contamination and AWE facility designation.

2. **[Employee]** was diagnosed with lung cancer and multiple basal cell carcinomas after beginning employment at the covered facility.

3. There is at least a 96.55% probability that **[Employee's]** cancers were caused by exposure to radiation during his employment at Diebold.

4. **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]** and **[Claimant #6]** are the surviving children of **[Employee]** and his eligible beneficiaries.

Based on the above noted findings of fact, the FAB hereby also makes the following:

CONCLUSIONS OF LAW

To facilitate a claim for cancer under Part B of EEOICPA, the Act explains that a "covered employee with cancer" is, among other things, an AWE employee who contracted that cancer after beginning employment at an AWE facility, if and only if that individual is determined to have sustained that

cancer in the performance of duty. 42 U.S.C. § 7384l(9)(B). To establish that the employee "sustained that cancer in the performance of duty," § 30.115 of the implementing regulations instructs OWCP to forward a complete copy of the case record to NIOSH for dose reconstruction.[2] 20 C.F.R. § 30.115.

The FAB independently analyzed the information in the NIOSH report, confirming that the factual evidence reviewed by NIOSH was properly addressed, and that there is at least a 96.55% probability that **[Employee]**'s cancers were related to his employment at Diebold. Since the probability of causation is greater than 50%, it is determined that **[Employee]** incurred cancer in the performance of duty at an AWE facility.

Section 7384s of the EEOICPA, which provides the order of payment for compensation payable under Part B of the Act, states that if there is no surviving spouse at the time payment, such payment shall be made in equal shares to all children of the covered employee. The submissions of the employee's death certificate as well as the death certificate of his surviving spouse and the claimants birth certificates showing the employee as their father is sufficient to establish that **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]** and **[Claimant #6]** are the employee's surviving children and eligible beneficiaries.

Accordingly, these claims for compensation in the amount of $25,000 each for a total of $150,000 are hereby approved.

Washington, DC

Vawndalyn B. Feagins

Hearing Representative

Final Adjudication Branch

[1] According to the DOE Covered Facility List, Herring-Hall is identified as an AWE facility from 1943 through 1951; residual radiation from 1952 through 1993; and a DOE facility from 1994 through 1995 due to remediation http://www.eh.doe.gov/advocacy/faclist/showfacility.cfm (As of December 2, 2005).

[2] NIOSH's approach to conclude the dose reconstruction process based on claimant-favorable assumptions is consistent with its methodology. Section 30.318 of the regulations states that "The methodology used by HHS in arriving at reasonable estimates of the radiation doses received. . .is binding on the FAB." 20 C.F.R. § 30.318.

To survivors living at time of payment

EEOICPA Fin. Dec. No. 10045849-2007 (Dep't of Labor, December 31, 2007)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning the claimant's claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claimant's claim under Part E of EEOICPA is accepted. The claimant is entitled to the full survivor benefit payable under Part E, as the claimant's sister, **[Employee's Child #2]**, died prior to her receipt of her survivor

share under Part E.

STATEMENT OF THE CASE

On November 21, 2006, FAB issued a final decision under Part B of EEOICPA, finding that **[Employee]** (the employee) was employed by Department of Energy (DOE) contractors at the K-25 Plant, a DOE facility, and at the Los Alamos National Laboratory (LANL), a DOE facility; that he is a member of the Special Exposure Cohort and was diagnosed with liver cancer and colon cancer; that **[Employee]** died on August 5, 1958, at the age of 48, due to carcinoma of the liver; that **[Employee's Child #1]**, **[Employee's Child #2]** and **[Claimant]** are the covered employee's children and eligible surviving beneficiaries under Part B; that **[Employee's Child #1]** was 26 years old at the time of his father's death and capable of self-support, **[Employee's Child #2]** was 15 years old at the time of her father's death, and **[Claimant]** was 13 years old at the time of his father's death.

On August 1, 2007, FAB issued a final decision under Part E of EEOICPA, concluding that **[Employee]** was a covered DOE contractor employee; that **[Employee's Child #1]** does not qualify as a covered child under Part E of EEOICPA; and that **[Employee's Child #2]** and **[Claimant]**, as covered children, are each entitled to compensation in the amount of $75,000.00 under Part E.

On August 17, 2007, the Seattle district office received notification that **[Employee's Child #2]** had passed away on August 16, 2007. A copy of **[Employee's Child #2]**'s death certificate confirms that she died on August 16, 2007. On September 21, 2007, the Seattle district office issued a recommended decision that concluded that the claimant was entitled to the full survivor benefit payable under Part E, as the claimant's sister, **[Employee's Child #2]**, died prior to receipt of her share of the Part E survivor benefits.

On December 26, 2007, the Director of the Division of Energy Employees Occupational Illness Compensation issued a Director's Order reopening the claimant's claim for compensation, and returning the case record to FAB for review of the September 21, 2007 recommended decision, and issuance of a new final decision regarding the applicable survivor benefit payable.

After considering the written record of the claim forwarded by the Director's Office, and after conducting any further development of the claim as was deemed necessary, FAB hereby makes the following:

FINDINGS OF FACT

1. **[Employee's Child #1]**, **[Employee's Child #2]**, and **[Claimant]** filed claims for benefits under EEOICPA as the surviving children of **[Employee]**.

2. The claimant's father, **[Employee]**, was employed by DOE contractors at the K-25 Plant, a DOE facility, and at LANL, a DOE facility.

3. **[Employee]** was diagnosed with colon cancer in July of 1956 and with liver cancer in August 1958.

4. **[Employee]** died on August 5, 1958, at the age of 48, due to carcinoma of the liver.

5. On November 21, 2006, FAB issued a final decision under Part B of EEOICPA, finding that **[Employee]** is a member of the Special Exposure Cohort and was diagnosed with liver cancer and colon cancer; that **[Employee's Child #1]**, **[Employee's Child #2]** and **[Claimant]** are the covered employee's children and eligible surviving beneficiaries under Part B; that **[Employee's Child #1]** was 26 years old at the time of his father's death and capable of self-support, **[Employee's Child #2]** was 15 years old at the time of her father's death, and **[Claimant]** was 13 years old at the time of his father's death.

6. On August 1, 2007, FAB issued a final decision under Part E of EEOICPA, concluding that **[Employee]** was a covered DOE contractor employee; that **[Employee's Child #1]** does not qualify as a covered child under Part E, and that **[Employee's Child #2]** and **[Claimant]**, as covered children, are each entitled to compensation in the amount of $75,000.00 under Part E.

7. **[Employee's Child #2]** died on August 16, 2007, prior to receiving her $75,000.00 share of the Part E survivor benefits.

Based on the above-noted findings of fact in this claim, and pursuant to the authority granted by the EEOICPA regulations, FAB hereby also makes the following:

CONCLUSIONS OF LAW

If one of the survivors on a multiple survivor claim dies before payment is issued, the compensation is reapportioned among the remaining survivors. *See* Federal (EEOICPA) Procedure Manual, Chapter E-600.8c (September 2005).

The term "covered child" under Part E of EEOICPA means a child of the employee who, at the time of the employee's death, was under the age of 18 years, or under the age of 23 years and a full-time student who was continuously enrolled in an educational institution since attaining the age of 18 years, or incapable of self-support. *See* 42 U.S.C. § 7385s-3(d)(2).

The evidence of record establishes that the employee died on August 5, 1958, at the age of 48, due to carcinoma of the liver, a covered condition. The evidence of record also establishes that **[Employee's Child #2]** died on August 16, 2007, prior to receiving her $75,000.00 share of the Part E survivor benefits. **[Claimant]** is, therefore, the only eligible beneficiary of the employee under Part E. 42 U.S.C. § 7385s-3(d)(2). The record also shows that that there was an aggregate of not less than 10 years, before **[Employee]**'s normal retirement age (for purposes of the Social Security Act), during which, as the direct result of his covered illness, his annual wage did not exceed 50% of his average annual wage. 42 U.S.C. § 7385s-3(a)(2).

Accordingly, **[Claimant]**, as a covered child, is entitled to compensation under Part E in the amount of $150,000.00, less any survivor benefits previously paid to him under Part E in this case, pursuant to 42 U.S.C. § 7385s-3(a)(2), and Chapter E-600.8c of the Procedure Manual.

Washington, DC

Amanda M. Fallon

Hearing Representative

Final Adjudication Branch

Radiation Exposure Compensation Act

Compensable illnesses under section 5

EEOICPA Fin. Dec. No. 22218-2003 (Dep't of Labor, May 8, 2003)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) 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 stated below, your claim for pneumoconiosis is accepted.

STATEMENT OF THE CASE

On April 29, 2003, the District Office issued a recommended decision concluding that you had received an award under § 5 of the Radiation Exposure Compensation Act, and that you are entitled to additional compensation in the amount of $50,000 pursuant to 42 U.S.C. § 7384u(a) for pneumoconiosis, the medical condition for which you received an award under the Radiation Exposure Compensation Act. The District Office's recommended decision also concluded that pursuant to 42 U.S.C. § 7384t, you are entitled to medical benefits from January 29, 2002 for the treatment of pneumoconiosis.

On May 7, 2003, the Final Adjudication Branch received your written notification waiving any and all objections to the recommended decision.

CONCLUSIONS OF LAW

The undersigned has thoroughly reviewed the case record and recommended decision and finds that it is in accordance with the facts and the law in this case. It is the decision of the Final Adjudication Branch that your claim is accepted.

DENVER, CO

May 8, 2003

Janet R. Kapsin

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 59390-2005 (Dep't of Labor, January 21, 2005)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under

Part B of the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits under Part B of the Act is denied.

STATEMENT OF THE CASE

On July 13, 2004, you filed a Form EE-1 (Claim for Benefits under the EEOICPA) based on esophageal cancer. You provided medical documentation in support of your claim related to esophageal cancer. You also indicated that you had received an award letter from the Department of Justice under the Radiation Exposure Compensation Act (RECA).

You provided a Form EE-3 (Employment History) in which you stated that you worked with Holmes and Narver, at the Nevada Test Site, from May 1, 1963 to June 30, 1971. A review of the Oak Ridge Institute for Science and Education database indicated that you worked at the Nevada Test Site from May 2, 1969 to June 3, 1971.

You also provided a letter dated June 5, 2002, which indicated that you had been awarded $50,000 under the RECA.

On September 1, 2004, the U.S. Department of Justice reported that you accepted an award of $50,000 under Section 4 of the RECA on July 10, 2002, and that you had not filed a claim under Section 5 of the RECA.

On November 9, 2004, the Seattle district office recommended denial of your claim for benefits under the EEOICPA. The district office concluded that you are not entitled to compensation or benefits under the Act, as you did not meet the required exception to receive compensation for cancer under both the EEOICPA and the RECA. *See* 42 U.S.C. §§ 7384u, 7385j.

FINDINGS OF FACT

1. You filed a claim for benefits under the EEOICPA on July 13, 2004.

2. On July 10, 2002, you accepted compensation in the amount of $50,000 under Section 4 of the RECA.

CONCLUSIONS OF LA

The undersigned has reviewed the recommended decision issued by the Seattle district office on November 9, 2004. I find that you have not filed any objections to the recommended decision as provided by § 30.316(a) of the regulations, and that the sixty-day period for filing such objections, as provided for in § 30.310(a) has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

The Energy Employees Occupational Illness Compensation Program Act was established to provide compensation benefits to covered employees who have been diagnosed with designated occupational illnesses incurred as a result of exposure to silica, beryllium, and/or radiation: *cancer, beryllium sensitivity, chronic beryllium disease,* and/or *silicosis. See* 42 U.S.C. § 7384l(15). Further, these illnesses must have been incurred while in the performance of duty for the Department of Energy and

certain of its vendors, contractors, and subcontractors, or for an atomic weapons employer. *See* 42 U.S.C. § 7384l(4)-(7), (9), (11).

The Energy Employees Occupational Illness Compensation Program Act states that, except as provided by § 7384u, an individual may not receive compensation or benefits under the EEOICPA for cancer and also receive compensation under the RECA. See 42 U.S.C. § 7385j. The exception pertains to RECA awards under Section 5, and only those claimants are eligible to receive compensation under the EEOICPA. *See* 42 U.S.C. § 7384u.

The undersigned notes that, in order to be afforded coverage under the Act as a "covered uranium employee," an individual must receive, or have received $100,000 under Section 5 of the RECA for a claim made under that Act. *See* 42 U.S.C. § 7384u.

The record in this case shows that you did not provide documentation that you had received an award under Section 5 of the RECA. Rather, the evidence shows that you accepted compensation under Section 4 of the RECA. Consequently, the exception for a RECA award under Section 5 in the amount of $100,000 (and an award under Part B under the EEOICPA in the amount of $50,000) does not apply to you, and you are not eligible for an award under Part B of the EEOICPA.

For the above reasons, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under Part B of the Act. Accordingly, your claim for employee benefits under Part B of the Act is denied.

Seattle, WA

Sandie Howley

Hearing Representative, Final Adjudication Branch

Effect of award under section 4

EEOICPA Fin. Dec. No. 15686-2007 (Dep't of Labor, April 23, 2007)

NOTICE OF FINAL DECISION FOLLOWING REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch (FAB)concerning your claims for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA or the Act), 42 U.S.C. § 7384 *et seq*. Upon a careful review of the facts and an independent review of the record, the FAB accepts and approves your claims for compensation in the amount of $30,000.00 each under Part B of the Act.

The FAB also concludes that the evidence of record is insufficient to allow compensation under Part E of the Act. Accordingly, **[Claimant #2]** and **[Claimant #3]**'s claims for survivor benefits under Part E of the Act are denied.

A decision is deferred on **[Claimant #1]**'s claim for survivor benefits under Part E of the Act, pending further development.

STATEMENT OF THE CASE

On November 21, 2001 (**[Claimant #1]**) and November 3, 2006 (**[Claimant #2]** and **[Claimant #3]**) each filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA) as surviving children of **[Employee]** under Part B of the Act, based on the condition of glioblastoma multiforme (brain cancer). Your claim forms are also considered an application for survivor compensation under Part E of the Act. You submitted a copy of **[Employee]**'s death certificate, which indicates he was widowed at the time of his death on March 11, 1996, due to a malignant brain tumor. You also provided copies of your birth certificates, showing that you are children of **[Employee]**. **[Claimant #2]** and **[Claimant #3]** submitted copies of their marriage certificates documenting their changes of name.

[Claimant #1] also submitted a Form EE-3 (Employment History) on which he stated that **[Employee]** was employed at the Nevada Test Site from February 1955 to May 1959, and at the Lawrence Radiation Laboratory between May 1959 and April 1961. A representative of the DOE verified that **[Employee]** was employed at the Nevada Test Site for the Reynolds Electrical and Engineering Company, Inc. (REECO) from February 7, 1955 to April 30, 1959. Additionally, the DOE verified that the employee had dosimetry records associated with the Lawrence Livermore National Laboratory (LLNL) from 1959 to 1961; with Diesel Electric Service Company from 1961 to 1966; with the Public Health Service/U.S. Environmental Protection Agency from 1967 to 1969; and with the Weather Service during the period of June 1969 to June 1970. The LLNL confirmed that **[Employee]** was employed at the LLNL from May 5, 1959 through April 29, 1961, and was rehired on January 31, 1963 through September 6, 1963.

You submitted medical documentation including a pathology report, dated January 17, 1996, showing the employee had a diagnosis of glioblastoma multiforme.

On June 26, 2003, the Seattle district office referred the case to the National Institute for Occupational Safety and Health (NIOSH) to determine whether **[Employee]**'s brain cancer was "at least as likely as not" related to his covered employment. However, the case was returned on August 7, 2006, based on the designation on June 26, 2006 by the Secretary of Health and Human Services (HHS) of certain Nevada Test Site employees as an addition to the Special Exposure Cohort (SEC).

The claim forms submitted indicated that you had applied for an award under the Radiation Exposure Compensation Act (RECA), but had declined the award. You also identified two other surviving children of the employee, **[Employee's two non-claiming children]**, indicating that they accepted the RECA award. Claim forms were not received from **[Employee's two non-claiming children]**.

On December 8, 2006, the district office received a response from the Department of Justice indicating that on August 30, 2006, **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3 and Employee's two non-claiming children]** were approved (as the eligible surviving beneficiaries of **[Employee]**) under section 4 of the RECA for equal shares of the award in the total amount of $75,000.00, for the condition of brain cancer. Further, it was stated that **[Employee's two non-claiming children]** accepted their 1/5th shares of the award and **[Claimant #1]**, **[Claimant #2]** and **[Claimant #3]** rejected their 1/5 shares of the RECA award in order to pursue a claim under EEOICPA.

On December 20, 2006, **[Claimant #2]** and **[Claimant #3]** signed statements indicating that they had never filed tort suit or state workers' compensation claim, nor had they ever received a settlement or award from such based on the claimed exposure or illness. Further, they indicated that they have not

pled guilty to or been convicted of fraud in connection with an application for or the receipt of federal or state workers' compensation benefits. They also confirmed that at the time of the employee's death, he had 5 children, and they were not under the age of 18 years, under the age of 23 and in college, or incapable of self-support at that time. Finally, it was acknowledged that they have not received any benefit under RECA.

On December 20, 2006, the Seattle district office issued a recommended decision to accept your claims for survivor benefits under Part B of the Act. The district office concluded that **[Employee]** is a member of the SEC based on his employment at the Nevada Test Site from February 7, 1955 to December 31, 1962, for an aggregate of at least 250 work days; was diagnosed with brain cancer, a specified cancer under the Act; and that **[Claimant #1]**, **[Claimant #2]** and **[Claimant #3]** are each eligible survivors entitled to equal shares of compensation in the total amount of $90,000.00 under Part B of the Act. Additionally, the district office recommended denial of **[Claimant #2]** and **[Claimant #3]**'s claims for survivor benefits under Part E of the Act, as they did not meet the definition of a "covered child" under this part of the Act. The district office deferred a decision on **[Claimant #1]**'s claim for survivor benefits under Part E of the Act, pending further development as to whether he meets the criteria of a "covered child."

On January 3, 2007, the FAB received a letter from **[Claimant #1]** in response to his eligibility as a "covered child" under Part E of the Act. **[Claimant #1]** stated that at the time of the employee's death he was not under age 18, was not under the age of 23 and continuously enrolled full-time in school, and he was capable of self-support.

OBJECTIONS

On February 5, 6 and 8, 2007, the FAB received your letters of objection to the recommended decision in the form of a "Request for Clarification." In summary, you indicated that there is conflicting information provided in the recommended decision, specifically:

1. Conclusions of Law – Statement 3: **[Employee]** is a covered employee and is now deceased, his survivors are entitled to compensation in the amount of $150,000.00 per 42 U.S.C. § 7384s(a)(1).

2. Conclusions of Law – Statement 4: **[Claimant #1]**, **[Claimant #2]** and **[Claimant #3]** are the survivors of **[Employee]** per 42 U.S.C. § 7384s(e). **[Claimant #1]**, **[Claimant #2]** and **[Claimant #3]** are thus entitled to the above mentioned compensation totaling $150,000.00.

3. Notice of Recommended Decision – Paragraph 1: The District Office recommends that the claims of **[Claimant #1]**, **[Claimant #2]** and **[Claimant #3]** for benefits under Part B of the EEOICPA be accepted in the amount of $90,000.00.

Based on these statements, you indicated that the district office first informed you that the entire $150,000.00 would be distributed to the three of you, but that in a later conversation with the district office the sum of $90,000.00 was mentioned, and that your telephone calls to resolve this have gone unanswered. You asked for the applicable language or statute regarding this reduction of the total amount to be distributed and did not wish for an oral hearing on this matter, requesting that the FAB respond to your request for clarification of the matter.

Your objection relates to the definition of an eligible survivor and payment of compensation under Part

B of the Act, and how this is determined when some of the eligible survivors have accepted an award under the RECA, while others have not.

Under the EEOICPA, payment in the case of a deceased employee is made first to the employee's surviving spouse, or if there is no surviving spouse, in equal shares to all children of the covered employee who are living at the time of payment. *See* 42 U.S.C. § 7384s(e)(1)(A) and (B). Accordingly, all five living children of the employee meet this definition.

The Radiation Exposure Compensation Act states in section 6(e) that the acceptance of payment by an individual under RECA shall be in full satisfaction of all claims of or on behalf of that individual against the United States, or against any person with respect to that person's performance of a contract with the United States, that arise out of exposure to radiation, from open air nuclear testing, in the affected area, or exposure to radiation in a uranium mine at any time during the period described in section 5(a). Further, the EEIOCPA states that, except in accordance with § 7384u of EEOICPA, an individual may not receive compensation or benefits under EEOICPA for cancer and also receive compensation under RECA (42 U.S.C. § 2210 note) or § 1112(c) of Title 38. *See* 42 U.S.C. § 7385j.

Two of the five eligible children, **[Employee's two non-claiming children]**, elected to receive payment as surviving beneficiaries under RECA versus pursing a claim under EEOICPA. As stated in the above-cited statutes, they cannot also receive survivor compensation or benefits for the condition of brain cancer under EEOICPA.

As the total potential award under Part B of the Act is $150,000.00, to be divided evenly among all surviving children, each child is eligible for compensation in the amount of $30,000.00. The three children who rejected their section 4 RECA awards therefore retain their potential eligibility for compensation under EEOICPA, and their share of the total award is still governed by § 7384s(e)(1)(B), which limits each survivor to 1/5th of the total compensation award of $150,000.00, which is $30,000.00 each.

After considering the evidence of record and your objections to the recommended decision, the FAB hereby makes the following:

FINDINGS OF FACT

1. On November 21, 2001 and November 3, 2006, you filed claims for survivor benefits under EEOICPA.

2. You are three of the five surviving children of **[Employee]**. **[Claimant #1]** was born on April 15, 1949, **[Claimant #2]** was born on October 26, 1953, and **[Claimant #3]** was born on July 23, 1954, and were 46, 42 and 41 years of age, respectively, at the time of **[Employee]**'s death on March 11, 1996.

3. **[Employee]** was employed at the Nevada Test Site, a covered DOE facility, by DOE contractors, from February 7, 1955 to at least December 31, 1962. This employment meets or exceeds 250 aggregate work days, and qualifies the employee as a member of the SEC.

4. The employee had a diagnosis of brain cancer, which is a specified cancer, on January 17, 1996, after starting work at a DOE facility.

5. The evidence of record supports a causal connection between the employee's cancer and his exposure to radiation at a DOE facility.
6. At the time of the employee's death you were over the age of 18 years, not under 23 years of age and enrolled full-time in school, and were not incapable of self-support.
7. You have never filed a tort suit or state workers' compensation claim, nor have you received a settlement or award from a tort suit or state workers' compensation claim based on radiation or brain cancer. Further, you have not pled guilty to or been convicted of fraud in connection with an application for or the receipt of federal or state workers' compensation benefits, nor have you received any award under RECA.
Based on the above noted findings of fact, the FAB hereby also makes the following:

CONCLUSIONS OF LAW

On June 26, 2006, the Secretary of HHS designated a class of certain employees as an addition to the SEC, *i.e.*, DOE employees or DOE contractor or subcontractor employees who worked at the Nevada Test Site between January 27, 1951 and December 31, 1962, for a number of work days aggregating at least 250 work days, either solely under this employment or in combination with work days within the parameters (excluding aggregate work day requirements) established for other classes of employees included in the SEC, and who were monitored or should have been monitored. This class of SEC became effective July 26, 2006. The employment evidence is sufficient to establish that **[Employee]** was employed at the Nevada Test Site for an aggregate of at least 250 work days, between February 7, 1955 and December 31, 1962.

[Employee] is a member of the SEC pursuant to § 7384l(14)(C) and was diagnosed with brain cancer, which is a specified cancer pursuant to 20 C.F.R. § 30.5(ff)(5)(iii)(L); and he is, therefore, a "covered employee with cancer" under § 7384l(9)(A) of the Act. *See* 42 U.S.C. §§ 7384l(14)(C), 7384l(17) and 7384l(9)(A); 20 C.F.R. § 30.210(a)(1)(i).

[Claimant #1], **[Claimant #2]**, **[Claimant #3 and Employee's two non-claiming children]** are the surviving children of **[Employee]**, pursuant to 42 U.S.C. § 7384s(e)(1)(B) of the Act. **[Employee's two non-claiming children]** accepted their 1/5th shares of a total award of $75,000.00 under RECA, and are therefore not eligible to receive a payment for the occupational illness of brain cancer under EEOICPA. 42 U.S.C. § 7385j. **[Claimant #1]**, **[Claimant #2]** and **[Claimant #3]** rejected an award of their shares of compensation under RECA, and are therefore eligible for the payment of their 1/5th shares of compensation under EEOICPA. Accordingly, **[Claimant #1]**, **[Claimant #2]** and **[Claimant #3]** are entitled to compensation in the amount of $30,000.00 each under Part B of the Act.

The term "covered child" under Part E is defined as a child of the employee who, as of the date of the employee's death had not attained the age of 18 years, had not attained the age of 23 years and was a full-time student who had been continuously enrolled in one or more educational institutions since attaining the age of 18 years, or had been incapable of self-support. *See* 42 U.S.C. § 7385s-3(d)(2).

The evidence of record shows that **[Claimant #1]**, **[Claimant #2]** and **[Claimant #3]** were 46, 42, and 41 years of age, respectively, at the time of the employee's death. There is no evidence showing that the claimants were incapable of self-support at the time of the employee's death on March 11, 1996. The Seattle district office recommended that a determination on **[Claimant #1]**'s claim for survivor benefits under this part of the Act be deferred, pending further development as to whether he met the criteria of a "covered child." Subsequently, **[Claimant #1]** provided a written statement to the FAB,

dated December 20, 2006, stating he does not meet any of the criteria of a "covered child" under § 7385s-3(d)(2) of the Act. The evidence of record and the recommended decision support that **[Claimant #2]** and **[Claimant #3]** are not eligible as a "covered child" under Part E of the Act.

For the forgoing reasons, the FAB concludes that the evidence of record is insufficient to allow compensation under Part E. Accordingly, **[Claimant #2]** and **[Claimant #3]**'s claims for survivor benefits under Part E of the Act are denied.

A decision on **[Claimant #1]**'s claim for survivor benefits under Part E is deferred, pending further development and issuance of a recommended decision by the district office.

Seattle, Washington

Kelly Lindlief, Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 30971-2002 (Dep't of Labor, March 15, 2004)

NOTICE OF FINAL DECISION REVIEW OF THE WRITTEN RECORD

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 stated below, your claim for benefits is denied.

STATEMENT OF THE CASE

On June 10, 2002, you filed a Claim for Survivor Benefits under the EEOICPA, form EE-2, with the Denver district office, as the spouse of the employee, for multiple myeloma. You indicated on the EE-3 form that your husband was employed by the U.S. Coast and Geodetic Survey at various locations, including the Nevada Test Site, from early 1951 to December 1953.

You also submitted marriage certificate and death certificates establishing that you were married to the employee from March 7, 1953 until his death on November 5, 1999, tax forms confirming his employment with the U.S. Coast and Geodetic Survey in 1951 and 1952 and a document from the Nevada Field Office of the Department of Energy (DOE) indicating that they had records of your husband having been exposed to radiation in 1951 and 1952. Additionally, you submitted a document stating that your claim under the Radiation Exposure Compensation Act had been approved in the amount of $75,000; you stated that you had declined to accept the award and that was confirmed by a representative of the Department of Justice on August 12, 2002.

On July 1, 2002, you were informed of the medical evidence needed to support that your husband had cancer. You submitted records of medical treatment, including a pathology report of April 19, 1993, confirming that he was diagnosed with multiple myeloma.

On July 22, 2002, a DOE official stated that, to her knowledge, your husband's employers were not

Department of Energy contractors or subcontractors. On July 29, 2002, you were advised of the type of evidence you could submit to support that your husband had employment which would give rise to coverage under the Act, and given 30 days to submit such evidence. You submitted statements from co-workers confirming that he did work at the Nevada Test Site for a period from October to December 1951 and again for a few weeks in the spring of 1952.

On August 29, 2002, the district office issued a recommended decision that concluded that you were not entitled to compensation benefits because the evidence did not establish that your husband was a covered employee.

By letter dated September 20, 2002, your representative objected to the recommended decision, stating that your husband was a covered employee in that he worked at the Test Site while employed by the U.S. Coast and Geodetic Survey, which was a contractor of the Atomic Energy Commission (AEC), a predecessor agency of the DOE. The representative also submitted documents which indicated that the U.S. Coast and Geodetic Survey performed work, including offering technical advice and conducting surveys, for other government agencies, including the AEC and the military, and that it was covered by a cooperative agreement between the Secretary of Commerce and the Secretary of the Army. On April 1, 2003, the case was remanded to the district office for the purpose of determining whether your husband's work at the Nevada Test Site was performed under a "contract" between the DOE and the U.S. Coast and Geodetic Survey.

The documents submitted by your representative were forwarded to the DOE, which responded on May 28, 2003 that dosimetry records existed for your husband "showing that he was with the USC&GS but after further research it was established that the USC&GS was in fact not a contractor or subcontractor of the AEC during those years." The documents were also reviewed by the Branch of Policy, Regulations and Procedures in our National Office. On November 7, 2003, the district office issued a recommended decision to deny your claim. The decision stated that the evidence submitted did not support that the U.S. Coast and Geodetic Survey was a contractor of the DOE at the Nevada Test Site, and, concluded that you were not entitled to benefits under § 7384s of the EEOICPA as your husband was not a covered employee under § 7384l. 42 U.S.C. §§ 7384l and 7384s.

In a letter dated January 7, 2004, your representative objected to the recommended decision. He did not submit additional evidence but did explain why he believes the evidence already submitted was sufficient to support that your husband was a covered employee under the Act. Specifically, he stated that the evidence supported that your husband worked at the Nevada Test Site in 1951 and 1952 in the course of his employment with the U.S. Coast and Geodetic Survey, an agency which was performing a survey at the request of the AEC, and that the latter agency issued him a badge which established that he was exposed to radiation while working there. He argued that one must reasonably conclude from these facts that his work at the Nevada Test Site did constitute covered employment under the EEOICPA.

FINDINGS OF FACT

You filed a claim for survivor benefits under the EEOICPA on June 10, 2002.

You were married to the employee from March 7, 1953 until his death on November 5, 1999.

Medical records, including a pathology report, confirmed he was diagnosed with multiple myeloma in

April 1993.

In the course of his employment by the U.S. Coast and Geodetic Survey, your husband worked, and was exposed to radiation, at the Nevada Test Site, a DOE facility.

The evidence does not support, and the Department of Energy has denied, that the U.S. Coast and Geodetic Survey was a contractor of the DOE at the time your husband worked at the Nevada Test Site.

CONCLUSIONS OF LAW

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, pursuant to 20 C.F.R. § 30.310. The same section of the regulations provides that in filing objections, the claimant must identify his objections as specifically as possible. In reviewing any objections submitted, under 20 C.F.R. § 30.313, the Final Adjudication Branch will review the written record, any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. I have reviewed the record in this case and your representative's letter of January 2, 2004 and must conclude that no further investigation is warranted.

The purpose of the EEOICPA, as stated in its § 7384d(b), is to provide for "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." 42 U.S.C. § 7384d(b).

A "covered employee with cancer" includes, pursuant to § 7384l(9)(B) of the Act, an individual who is a "Department of Energy contractor employee who contracted…cancer after beginning employment at a Department of Energy facility." Under § 7384l(11), a "Department of Energy contractor employee" may be an individual who "was employed at a Department of energy facility by…an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or…a contractor or subcontractor that provided services, including construction and maintenance, at the facility." 42 U.S.C. § 7384l(9)(B), (11).

EEOICPA Bulletin NO. 03-26 states that "a civilian employee of a state or federal government agency can be considered a 'DOE contractor employee' if the government agency employing that individual is (1) found to have entered into a contract with DOE for the accomplishment of…services it was not statutorily obligated to perform, and (2) DOE compensated the agency for that activity." The same Bulletin goes on to define a "contract" as "an agreement that something specific is to be done in return for some payment or consideration."

Section 30.111(a) states that "Except where otherwise provided in the Act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category set forth in § 30.110." 20 C.F.R. § 30.111(a).

As noted above, the evidence supports that your husband was exposed to radiation while working for the U.S. Coast and Geodetic Survey at the Nevada Test Site in late 1951 and early 1952, that he was diagnosed with multiple myeloma in April 1993, and that you were married to him from March 7, 1953 until his death on November 5, 1999.

It does not reasonably follow from the evidence in the file that his work at the Nevada Test Site must have been performed under a "contract" between the U.S. Coast and Geodetic Survey and the AEC. Government agencies are not private companies and often cooperate with and provide services for other agencies without reimbursement. The DOE issued radiation badges to military personnel, civilian employees of other government agencies, and visitors, who were authorized to be on a site but were not DOE employees or DOE contractor employees. No evidence has been submitted that your husband's work at the Nevada Test Site was pursuant to a "contract" between the U.S. Coast and Geodetic Survey and the AEC and the DOE has specifically denied that his employing agency was a contractor or subcontractor at that time. Therefore, there is no basis under the Act to pay compensation benefits for his cancer.

For the foregoing reasons, the undersigned must find that you have not established your claim for compensation under the EEOICPA and hereby denies that claim.

Washington, DC

Richard Koretz

Hearing Representative

EEOICPA Fin. Dec. No. 47856-2005 (Dep't of Labor, July 21, 2005)

NOTICE OF FINAL DECISION

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

STATEMENT OF THE CASE

On August 30, 2001, the employee's surviving spouse filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA), based on lymphoma and peripheral bronchogenic carcinoma, and on July 24, 2003, she passed away, and her claim was administratively closed. On August 7 (**[Claimant #1]**) and September 9 (**[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**), 2003, you filed Forms EE-2 under the EEOICPA, based on bronchogenic carcinoma and lymphoma.

The record includes a Form EE-3 (Employment History Affidavit) that indicates the worker was employed by Reynolds Electrical and Engineering Company (REECo) at the Nevada Test Site (NTS) intermittently from 1957 to 1978, and that he wore a dosimetry badge. A representative of the Department of Energy confirmed the employee was employed at NTS by REECo intermittently from August 23, 1958 to February 4, 1978.

Medical documentation received included a copy of a Nevada Central Cancer Registry report that indicated an aspiration biopsy was performed on February 1, 1978, and it showed the employee was diagnosed with primary lung cancer. A Valley Hospital discharge summary, dated February 4, 1978, indicated the employee had a tumor in the right upper lobe of the lung. The record does not contain documentation demonstrating the employee was diagnosed with lymphoma.

To determine the probability of whether the employee sustained the cancer in the performance of duty, the Seattle district office referred your case to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction in accordance with 20 C.F.R. § 30.115. The district office received the final NIOSH Report of Dose Reconstruction dated April 20, 2005. *See* 42 U.S.C. § 7384n(d). NIOSH noted the employee had worked at NTS intermittently from August 23, 1958 to February 4, 1978. However, in order to expedite the claim, only the employment from 1966 through 1970 was assessed. NIOSH determined that the employee's dose as reconstructed under the EEOICPA was 71.371 rem to the lung, and the dose was calculated only for this organ because of the specific type of cancer associated with the claim. NIOSH also determined that in accordance with the provisions of 42 C.F.R. § 82.10(k)(1), calculation of internal dose alone was of sufficient magnitude to consider the dose reconstruction complete. Further, NIOSH indicated, the calculated internal dose reported is an "*underestimate*" of the employee's total occupational radiation dose. *See* NIOSH Report of Dose Reconstruction, pp. 4, 5, 6, and 7.

Using the information provided in the Report of Dose Reconstruction, the Seattle district office utilized the Interactive RadioEpidemiological Program (IREP) to determine the probability of causation of the employee's cancer, and reported in its recommended decision that the probability the employee's lung cancer was caused by his exposure to radiation while employed at NTS was at least 50%.

You provided copies of the death certificates of the employee and his spouse, copies of your birth certificates showing you are the natural children of the employee, and documentation verifying your changes of names, as appropriate.

The record shows that you (**[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**) and **[Claimant #5]** filed claims with the Department of Justice (DOJ) for compensation under the Radiation Exposure Compensation Act (RECA). By letter dated May 20, 2005, a representative of the DOJ reported that an award under § 4 of the RECA was approved for you; however, the award was rejected by **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**.

On June 14, 2005, the Seattle district office recommended acceptance of your claims for survivor compensation for the condition of lung cancer, and denial of your claims based on lymphoma.

On June 12 (**[Claimant #1]** and June 20 (**[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**), 2005, the Final Adjudication Branch received written notification from you indicating that you waive any and all rights to file objections to the recommended decision.

FINDINGS OF FACT

1. On August 7 (**[Claimant #1]**) and September 9 (**[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**), 2003, you filed claims for survivor benefits.

2. Documentation of record shows that the employee and his surviving spouse have passed away, you (**[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**) are the children of the employee, and you are his survivors.

3. You (**[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**) have rejected an award of compensation under the Radiation Exposure Compensation Act.

4. The worker was employed at NTS by REECo, intermittently, from August 23, 1958 to February 4, 1978.

5. The employee was diagnosed with lung cancer on February 1, 1978.

6. The NIOSH Interactive RadioEpidemiological Program indicated at least a 50% probability that the employee's cancer was caused by radiation exposure at NTS.

7. The employee's cancer was at least as likely as not related to his employment at a Department of Energy facility.

CONCLUSIONS OF LAW

The evidence of record indicates that the worker was employed at NTS by REECo, intermittently, from August 23, 1958 to February 6, 1978. Medical documentation provided indicated the employee was diagnosed with lung cancer on February 1, 1978; however, there is no evidence showing the employee was diagnosed with lymphoma, and your claims based on lymphoma must be denied.

After establishing that a partial dose reconstruction provided sufficient information to produce a probability of causation of 50% or greater, NIOSH determined that sufficient research and analysis had been conducted to end the dose reconstruction, and the dose reconstruction was considered complete. *See* 42 C.F.R. § 82.10(k)(1).

The Final Adjudication Branch analyzed the information in the NIOSH Report of Dose Reconstruction and utilized the NIOSH-IREP to confirm the 63.34% probability that the employee's cancer was caused by his employment at NTS. *See* 42 C.F.R. § 81.20. (Use of NIOSH-IREP). Thus, the evidence shows that the employee's cancer was at least as likely as not related to his employment at NTS.

The Final Adjudication Branch notes that, in its Conclusions of Law, the recommended decision erroneously indicates the employee, **[Employee]**, is entitled to compensation in the amount of $150,000.00; therefore, that Conclusion of Law must be vacated as the employee is deceased. *See* 42 U.S.C. § 7384s(a)(1).

The Final Adjudication Branch notes that the record shows the employee passed away on February 4, 1978. However, his employment history indicates he worked at NTS until February 6, 1978. Consequently, for purposes of administration of the Act, his employment is considered to have ended on February 4, 1978.

Based on the employee's covered employment at NTS, the medical documentation showing his diagnosis of lung cancer, and the determination that the employee's lung cancer was "at least as likely as not" related to his occupational exposure at NTS, and thus sustained in the performance of duty, the employee is a "covered employee with cancer," under 42 U.S.C. § 7384l. *See* 42 U.S.C. § 7384l(9)(B); 20 C.F.R. § 30.213(b); 42 C.F.R. § 81.2. Further, as the record indicates there is one other potential beneficiary under the EEOICPA, you are each (**[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**) entitled to survivor compensation under 42 U.S.C. § 7384 in the amount of $30,000.00. As there is evidence that another survivor is a child of the employee, and potentially an

eligible survivor under the Act, the potential share ($30,000.00) of the compensation must remain in the EEOICPA Fund. *See* Federal (EEOICPA) Procedure Manual, Chapter 2-200.7c(2) (June 2004).

Seattle, WA

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA Fin. Dec. No. 43114-2003 (Dep't of Labor, September 22, 2003)

FINAL DECISION AFTER REVIEW OF THE WRITTEN RECORD

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). Since you submitted a letter of objection, but did not specifically request a hearing, a review of the written record was performed, in accordance with § 30.312 of the implementing regulations. 20 C.F.R. § 30.312.

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, in accordance with § 30.310 of the implementing regulations. 20 C.F.R. § 30.310. In reviewing any objections submitted, under § 30.313 of the implementing regulations, the Final Adjudication Branch will review the written record, any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. 20 C.F.R. § 30.313.

For the reasons set forth below, your claim for benefits is denied.

STATEMENT OF CASE

On March 18, 2003, you filed a claim for survivor benefits under the EEOICPA as the spouse of the employee. On May 19, 2003, the Department of Justice (DOJ) verified that on May 31, 2002, you accepted compensation under § 4 of the Radiation Exposure Compensation Act in the amount of $75,000.

42 U.S.C. § 7385j of the Energy Employees Occupational Illness Compensation Program Act states: "Except in accordance with § 7384u[1] of this title, an individual may not receive compensation or benefits under the compensation program for cancer and also receive compensation under the Radiation Exposure Compensation Act (42 U.S.C. 2210 note) or § 1112 (c) of Title 38."

The Denver district office advised you of the deficiencies in your claim and afforded you the opportunity to correct them. There is no evidence in the file to indicate that you provided additional evidence to the district office for review.

By a recommended decision dated July 2, 2003, the Denver district office recommended that your claim for benefits under the EEOICPA be denied. In the recommendation, the district office found that:

1. You filed a claim under EEOICPA on March 18, 2003;

2. You did not establish entitlement under the EEOICPA as you did not receive an award from the Department of Justice under § 5 of RECA. You have not provided evidence that your husband could be covered under the EEOICPA as an employee of the Department of Energy or Atomic Weapons facility. You have not claimed that your husband had a medical condition other than stomach cancer, a condition for which you have already been awarded benefits as your husband's eligible survivor, under § 4 of RECA as an on-site participant.

By your letter of July 30, 2003, you requested assistance from Daniel K. Akaka, United States Senate in "appealing the decision that denied me compensation as an eligible beneficiary of a covered employee under the Energy Employees' Occupational Illness Compensation Program Act (EEOICPA) …." You did not state specific objections to the recommended decision. You included medical and employment records with your letter to Senator Akaka.

FINDINGS OF FACT

On May 31, 2002, you accepted compensation under § 4 of the RECA for your husband's cancer.

The additional medical records do not indicate that your husband was diagnosed with a condition covered under the EEOICPA, other than cancer.

CONCLUSIONS OF LAW

In accordance with 20 C.F.R. §30.313, I have reviewed the record in this case and conclude that no further investigation is warranted.

I find that the decision of the district office is supported by the evidence and the law, and cannot be changed based on the objections and the additional evidence you submitted. As explained in § 30.110(b) of the implementing regulations, "Any claim that does not meet all of the criteria for at least one of these categories, as set forth in these regulations, must be denied." 20 C.F.R. § 30.110(b). The undersigned hereby denies payment of lump sum compensation and medical benefits.

Washington, DC

Linda M. Parker

Hearing Representative

[1] § 7384u states: "An individual who receives, or has received, $100,000 under section 5 of the Radiation Exposure Compensation Act (42 U.S.C. 2210 note) for a claim made under that Act (hereinafter in this section referred to as a "covered uranium employee"), or the survivor of that covered uranium employee if the employee is deceased, shall receive compensation under this section in the amount of $50,000."

Section 5 claims under Part B

EEOICPA Fin. Dec. No. 58768-2005 (Dep't of Labor, January 25, 2005)

REVIEW OF THE WRITTEN RECORD AND REMAND ORDER

This is a review of the written record and remand order of the Final Adjudication Branch concerning this claim for compensation under Part B of 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, the recommended decision of the Denver district office dated October 14, 2004 is vacated, and the matter is remanded to the district office for further consideration and a new decision consistent with this remand order.

On June 25, 2004, you filed a Form EE-2 as the surviving spouse of a uranium worker seeking benefits under the Energy Employees Occupational Illness Compensation Program Act. You indicated on your claim form that the **[Employee]** contracted lung cancer and GI malignancy due to his employment exposure. You also stated that you or the employee had not filed a claim for benefits under Section 5 of the Radiation Exposure Compensation Act (RECA) with the Department of Justice (DOJ).

The district office contacted the DOJ to verify RECA filing and on August 2, 2004, notified the Denver district office that no one had filed a Section 5 RECA claim on behalf of the employee. On August 4, 2004, the district office sent you a letter informing you of the requirements to receive compensation under the EEOICPA and affording you 60 days to apply with the Department of Justice. They also advised you that failure to file with the DOJ within the allotted time period would result in a decision being made based upon the information in file.

On October 14, 2004, the Denver district office denied your claim on the basis that you had not received an award under Section 5 of the Radiation Exposure Compensation Act, and therefore, were not entitled to compensation pursuant to § 7384u of the EEOICPA. The case was forwarded to the Final Adjudication Branch. On October 18, 2004, you wrote to the Final Adjudication Branch to object to the recommended decision. A hearing was scheduled in your case, but on January 12, 2005, the Final Adjudication Branch contacted you to remind you of the hearing and learned that you had filed a RECA claim with DOJ and you had written to DOL to withdraw the hearing request. Based upon the information from the claimant, the hearing was cancelled.

The Federal (EEOICPA) Procedure Manual states that if a claimant has indicated on the claim form that the employee was/is a uranium worker, or that a RECA award has been granted, the claim is to be developed in accordance with 20 C.F.R. 30.300.[1] Additionally, for claims filed for EEOICPA benefits concurrently with or prior to filing for RECA benefits, the DOJ should be contacted to determine if the individual has filed under Section 5, and concurrently a development letter should be sent to the claimant advising that benefits can only be provided through EEOICPA if the covered employee has received an award under Section 5 of the RECA. Additionally the letter should advise the claimant that they have 60 days in which to file with DOJ, and if a claim is not filed within the time period, a decision will be rendered on the claim.[2]

The Denver district office followed the correct procedures in this case. However, on January 12, 2004, the Final Adjudication Branch learned that you had filed a RECA claim with DOJ. The Final Adjudication Branch contacted the Department of Justice and learned that you had filed a claim with RECA, and that it is still pending.

This case is not in posture for a decision. Therefore, the undersigned hereby vacates the October 14, 2004 recommended decision, and remands the case to the Denver district office. Upon receipt the

claims examiner should:

1. Administratively close the case,

2. Notify the claimant of such action

3. Issue a new recommended decision upon notification that a decision has been rendered by the Department of Justice.

Denver, CO

Joyce L. Terry

District Manager

[1] 20 C.F.R. § 30.211 and the Federal (EEOICPA) Procedure Manual, Chapter 2-900.2 (September 2004).

[2] Federal (EEOICPA) Procedure Manual, Chapter 2-900.4 (September 2004).

Section 5 claims under Part E

EEOICPA Fin. Dec. No. 10009704-2007 (Dep't of Labor, February 22, 2010)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning the above-captioned claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claim for benefits based on lymphoma is denied under Part E of EEOICPA.

STATEMENT OF THE CASE

On March 19, 2002, the employee filed a claim for benefits under Part B of EEOICPA and alleged that he had contracted pulmonary fibrosis and lymphoma due to his employment as a uranium miner. On May 11, 2004, he also filed a Request for Review by Physicians Panel with the Department of Energy (DOE) under former Part D of EEOICPA for pulmonary fibrosis and lymphoma. With the repeal of Part D and the enactment of Part E, the employee's Part D claim was treated as a claim for benefits under Part E.

On August 16, 2002, FAB issued a final decision accepting the claim under Part B for pulmonary fibrosis and awarded the employee $50,000.00 in lump-sum compensation. In that decision, FAB noted that the Department of Justice (DOJ) confirmed that the employee was an award recipient under section 5 of the Radiation Exposure Compensation Act (RECA), 42 U.S.C. 2210 note, for the condition of pulmonary fibrosis. On May 21, 2007, FAB issued another final decision that accepted the claim for pulmonary fibrosis, this time under Part E, and awarded the employee medical benefits under Part E for that covered illness. On November 3, 2008, FAB also issued a final decision that awarded the

employee impairment benefits under Part E based on his accepted pulmonary fibrosis; the award of $142,500.00 was for his 57% whole body impairment.

In support of his Part E claim for lymphoma, the employee submitted an employment history on Form EE-3, showing that he had worked as a miner for Kerr-McGee at the KerMac 24 Mine in Grants, New Mexico, from approximately September 1, 1959 to March 1, 1960, and for Phillips Petroleum/Sandstone at the Ambrosia Lake Mine, from approximately March 1, 1960 to November 30, 1960. DOJ submitted employment evidence it had collected in connection with his RECA claim, including an Itemized Statement of Earnings from the Social Security Administration and a Uranium Miner's study, both of which verified that the employee worked as a uranium miner for Kerr-McGee in Section 24 from January 1, 1959 to September 30, 1960, and for Phillips Petroleum at Sandstone from October 1, 1960 to December 31, 1960. The employee also submitted a pathology report, dated November 10, 1998, in which Dr. Glenn H. Segal diagnosed B-cell non-Hodgkin's lymphoma involving bone marrow. He also submitted a November 18, 1998 report in which Dr. Jo-Ann Andriko confirmed the diagnosis of malignant lymphoma.

The district office reviewed source documents used to compile the U. S. Department of Labor's Site Exposure Matrices (SEM)[1]to determine whether it was possible that, given the employee's labor category and the work processes in which he was engaged, he was exposed to a toxic substance in the course of his employment that has a causal link with his claimed lymphoma. The district office determined that SEM did not have such a link and by letters dated August 14, 2009, and September 14, 2009, it advised the employee that there was insufficient evidence to establish that exposure to a toxic substance at a DOE facility or section 5 mine was a significant factor in aggravating, contributing to or causing his lymphoma. The district office requested that he provide further evidence of the link necessary to support his claim and afforded him 30 days to provide the requested evidence. In response, on October 13, 2009, he submitted a letter in which he stated that his lymphoma was the result of his employment as a uranium miner. The letter was accompanied by the following documents:

1. An article entitled "Radon Exposure and Mortality Among White and American Indian Uranium Miners: An Update of the Colorado Plateau Cohort."

2. An article entitled "Radiation Exposure Tied to Lymphoma Risk in Men."

3. An article entitled "Occupational Exposures and Non-Hodgkin's Lymphoma: Canadian Case-Control Study."

4. An article on non-Hodgkin's lymphoma.

5. An abstract from the update of mortality from all causes among white uranium miners from the Colorado plateau study group.

6. A section from the Federal Register Notice regarding changes to the dose reconstruction target organ selection for lymphoma under EEOICPA.

7. A letter dated August 17, 2001 in which Dr. Thomas P. Hyde opined that it was highly likely that the employee's lymphoma was caused by his exposure to radiation during his employment as a uranium miner.

To determine the probability of whether the employee contracted cancer in the performance of duty under Part E due to radiation, the district office referred his claim to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction. On November 10, 2009, the district office received the final NIOSH Report of Dose Reconstruction and used the information provided in that report to determine the probability of causation (PoC). The district office calculated that there was a 17.10% probability that the employee's lymphoma was caused by radiation exposure at the uranium mines in which he worked.

On December 10, 2009, the district office issued a recommended decision to deny the employee's Part E claim for lymphoma on the ground that it was not "at least as likely as not" (a 50% or greater probability) that his lymphoma was caused by his employment at the uranium mines where he worked. The district office further concluded that there was no evidence meeting the "at least as likely as not" causation standard that exposure to a toxic substance other than radiation at either a DOE facility or a section 5 mine was a significant factor in aggravating, contributing to or causing the claimed illness of lymphoma.

Following issuance of the recommended decision, FAB independently analyzed the information in the NIOSH report and confirmed the district office's PoC calculation of 17.10%. Based on a thorough review of the case file, FAB hereby makes the following:

FINDINGS OF FACT

1. The employee worked as a uranium miner for Kerr-McGee in Section 24 from January 1, 1959 to September 30, 1960, and for Phillips Petroleum at Sandstone from October 1, 1960 to December 31, 1960.

2. He was diagnosed with lymphoma on November 10, 1998.

3. Based on the dose reconstruction performed by NIOSH, the PoC (the likelihood that the cancer was caused by radiation exposure incurred while working at a covered facility) for the employee's lymphoma was 17.10%, which is less than 50%.

4. There is insufficient evidence in the file to establish that it is "at least as likely as not" that exposure to toxic substances other than radiation at a covered DOE facility or section 5 mine was a significant factor in aggravating, contributing to or causing the employee's lymphoma.

Based on a review of the aforementioned facts, FAB also hereby makes the following:

CONCLUSIONS OF LAW

Part E of EEOICPA provides compensation to covered DOE contractor employees who have contracted a "covered illness" through exposure at a DOE facility in accordance with § 7385s-2. Section 7385s(2) defines a "covered DOE contractor employee" as any DOE contractor employee determined under § 7385s-4 to have contracted a covered illness through exposure at a DOE facility, and § 7385s(2) defines a "covered illness" as an illness or death resulting from exposure to a toxic substance. Pursuant to 42 U.S.C. § 7385s-5(2), a section 5 uranium worker determined under § 7385s-4(c) to have contracted a covered illness through exposure to a toxic substance at a section 5 mine or mill will be eligible for Part E benefits to the same extent as a DOE contractor employee determined under §

7385s-4 to have contracted a covered illness through exposure to a toxic substance at a DOE facility.

To establish eligibility for benefits for radiogenic cancer under Part E of EEOICPA, an employee must show that he or she has been diagnosed with cancer; was a civilian DOE contractor employee or a civilian RECA section 5 uranium worker who contracted that cancer after beginning employment at a DOE facility or a RECA section 5 facility; and that the cancer was at least as likely as not related to exposure to radiation at a DOE facility or a RECA section 5 facility. Section 30.213 of the implementing regulations (20 C.F.R. § 30.213(c) (2009)) states that:

The Office of Workers' Compensation Programs (OWCP) also uses the Department of Health and Human Services (HHS) regulations when it makes the determination required by § 7385s-4(c)(1)(A) of the Act, since those regulations provide the factual basis for OWCP to determine if "it is at least as likely as not" that exposure to radiation at a DOE facility or RECA section 5 facility, as appropriate, was a significant factor in aggravating, contributing to or causing the employee's radiogenic cancer claimed under Part E of the Act. For cancer claims under Part E of the Act, if the PoC is less than 50% and the employee alleges that he was exposed to additional toxic substances, OWCP will determine if the claim is otherwise compensable pursuant to § 30.230(d) of this part.

FAB notes that the PoC calculations in this case were performed in accordance with 20 C.F.R. § 30.213. FAB independently analyzed the information in the NIOSH report, confirming the district office's PoC calculation of 17.10%.

Section 30.111(a) of the regulations states that "Except where otherwise provided in the Act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true." 20 C.F.R. § 30.111(a). As found above, the case file does not contain sufficient evidence to enable the employee to meet his burden of proof to establish that it is "at least as likely as not" that exposure to toxic substances other than radiation at a covered DOE facility or section 5 mine was a significant factor in aggravating, contributing to or causing his lymphoma.

In the absence of evidence to support that it is at least as likely as not that exposure to a toxic or radiological substance at a DOE facility or a RECA section 5 facility was a significant factor in aggravating, contributing to, or causing his lymphoma, FAB concludes that the employee has failed to establish that he contracted the "covered illness" of lymphoma, and his claim under Part E of EEOICPA is denied.

Kathleen M. Graber

Hearing Representative

Final Adjudication Branch

[1] SEM is a database of occupational categories, the locations where those occupational categories would have been performed, a list of process activities at the facility and the locations where those processes occurred, a list of toxic substances and the locations where those toxic substances were located, and a list of medical conditions and the toxic substances associated with those conditions.

Survivors

EEOICPA Fin. Dec. No. 63743-2006 (Dep't of Labor, November 21, 2006)

NOTICE OF FINAL DECISION FOLLOWING REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch (FAB) concerning the claims of **[Claimant #1]**, **[Claimant # 6]**, **[Claimant #7]**, **[Claimant #8]**and **[Claimant # 9]** for compensation under Part B, and of **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]** under Part E, of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA or the Act), 42 U.S.C. § 7384 *et seq*. For the reasons stated below, the claims of **[Claimant #1]** under Parts B and E, as well as the claims of **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]** under Part E are denied, and the claims of **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** under Part B are approved.

STATEMENT OF THE CASE

On November 29, 2004, **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant # 6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** filed Forms EE-2, claiming survivor benefits under Parts B and E of EEOICPA as the children of the employee. **[Claimant #1]** filed such a claim on June 14, 2005, as the spouse of the employee. The Department of Justice (DOJ) confirmed on January 11, 2005 that **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and**[Claimant #9]** received, on November 22, 2004, an award under Section 5 of the Radiation Exposure Compensation Act (RECA), as the eligible surviving beneficiaries of the employee, for the condition of pneumoconiosis.

Documents, including birth, marriage and death certificates, birth affidavits and a marital status and family profile issued by the Navajo Nation, and a decree issued by a judge on December 22, 1978, confirmed that **[Claimant #2]**, born on **[Date of Birth]**, **[Claimant #3]**, born on **[Date of Birth]**, **[Claimant #4]**, born on **[Date of Birth]**, **[Claimant #5]**, born on **[Date of Birth]**, **[Claimant #7]**, born on **[Date of Birth]**, **[Claimant #8]**, born on **[Date of Birth]** and **[Claimant #9]**, born on **[Date of Birth]**, are children of the employee. Another birth certificate states that **[Claimant #6]** was born on **[Date of Birth]** and that her mother was **[Claimant #6's mother]**, who is also listed as the mother on the birth certificates of **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]**. Subsequently, an obituary from a newspaper was submitted which listed **[Claimant #6]** as a surviving daughter of the employee.

The death certificate of the employee states that he died on December 1, 1990 and that, at the time of his death, he was married to **[Claimant #1's maiden name]**. A marriage certificate confirms that **[Claimant #1's maiden name]** was the name of **[Claimant #1]** until her marriage to the employee, on June 18, 1950. The death certificate states that the "informant" was **[Claimant #2]**, who, according to his birth affidavit, is the son of the employee and **[Claimant #1]**.

The file also includes a Decree of Dissolution of Marriage, concerning the marriage of the employee and **[Claimant #1]**. The Decree states that an "absolute divorce" was "granted to the plaintiff," **[Employee]**, and that this was ordered, on December 22, 1978, by a judge of the Court of the Navajo Nation. A marital status and family profile, issued by the Vital Records and Tribal Enrollment Program of the Navajo Nation, on January 10, 2002, also stated that the employee and **[Claimant #1]** were divorced on December 22, 1978.

The DOJ submitted a document signed on October 8, 2002 by "**[Claimant #1]**" on which a box was

checked indicating that she was not in a legal or common-law marriage to the employee for at least one year prior to his death. On August 1, 2005, her representative submitted an undated affidavit signed by "**[Claimant #1]**" stating that she was never divorced from the employee, that she did not knowingly check the box on the DOJ document, that she always uses her middle initial (**[Middle initial]**) when signing her name, that she needs translation of all documents into Navajo and that she relied on the assistance of the Shiprock Office of the Navajo Uranium Workers in pursuing her claim.

The case was referred to the Office of the Solicitor and the Solicitor responded with an opinion dated December 7, 2005. The district office then obtained statements from **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]**, confirming that they had not filed for, or received any benefits from, a lawsuit or a state workers' compensation claim, for the employee's exposure or illness. On April 6, 2006, the district office sent letters to **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]** and **[Claimant #5]**, asking if they had filed for, or received any benefits from, a lawsuit or a state workers' compensation claim, for the employee's exposure or illness. No response to those letters has been received.

On April 11, 2006, the Denver district office issued a recommended decision, concluding that **[Claimant #1]** is not entitled to compensation under Part B of the Act, but that **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** were each entitled to $6,250 (1/8th of $50,000) under Part B. The recommended decision also concluded that **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]** and **[Claimant # 4]** are not entitled to compensation under part E of the Act, since the evidence did not support they are eligible survivors of the employee, as defined in 42 U.S.C. § 7385s-3. The recommended decision also described the criteria which have to be met to be considered a "covered child" under Part E.

The recommended decision held in abeyance the claims of **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]** and **[Claimant #5]** under Part B, until their response to the inquiry as to whether they had ever filed, or received benefits under, a lawsuit or state workers' compensation claim. It also stated that further development of the evidence must take place before a decision could be issued on the claims of **[Claimant #5]**, **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** under Part E.

On April 21, 2006, the FAB received **[Claimant #6]**'s, **[Claimant #7]**'s and **[Claimant #8]**'s waivers of their right to object to the recommended decision. On June 7, 2006, the FAB received a letter from Lorenzo Williams, the representative of **[Claimant #1]**, expressing objections to the recommended decision and requesting a hearing. Mr. Williams submitted another letter, dated July 3, 2006, which again stated his objections to the recommended decision, withdrew the request for a hearing and requested a review of the written record. On September 18, 2006, **[Claimant #1]**, through her representative, was provided twenty days to submit any additional evidence she wished considered. No additional evidence was submitted.

OBJECTIONS

The letters of objection included numerous allegations of inappropriate conduct by DOJ, DEEOIC, the Solicitor, government agencies of the Navajo Nation, the Office of Navajo Uranium Workers and **[Claimant #1]**'s previous representative. No evidence was submitted confirming that any such conduct occurred which would have had any bearing on the outcome of the case.

The basic objection of Lorenzo Williams is that the evidence as to whether **[Claimant #1]** was married

to the employee at the time of his death was not properly evaluated. In particular, he objected that the affidavit made by **[Claimant #1]** on August 1, 2005, indicating that she was never divorced from the employee, was not considered. However, its evidentiary value must be weighed in light of the other evidence in the file. It is true that the employee's death certificate states that, at that time, he was married to **[Claimant #1]**. However, it also indicates that the information was based solely on information received from **[Claimant #2]**.

On the other hand, the document which appears to have been signed by **[Claimant #1]** on October 8, 2002 states that she was not married to the employee at the time of his death. It should be noted that another document in the file, her marriage certificate, includes a signature of **[Claimant #1]** without a middle initial.

Furthermore, an official document was issued by a judge on December 22, 1978 stating that a divorce was granted dissolving the marriage of **[Claimant #1]** and the employee. A stamp from the clerk of the court states that the copy in the file is an accurate copy of the document. Lorenzo Williams, the representative of **[Claimant #1]** has noted that the document incorrectly states that the two were married in 1951, rather than 1950, as stated in the marriage certificate, and that there is also a stamp indicating the document was "received" in 1991, after the death of the employee. However, he presented no argument or evidence that these facts would in any way invalidate the divorce decree, which was ordered and signed by the judge on December 22, 1978.

In addition, the file includes another official document, a marital status and family profile, issued by the Vital Records and Tribal Enrollment Program of the Navajo Nation on January 10, 2002, which further confirms that **[Claimant #1]** and the employee were divorced on December 22, 1978.

The probative value of these two official documents far outweigh the unclear and conflicted statements from **[Claimant #1]** and the statement on the death certificate which simply repeated information obtained from one of her children with the employee.

Also, it should be noted that the evidence supports that, after December 22, 1978, the employee had at least three more children with another woman, **[Employee's second wife]**. This does not, in and of itself, constitute evidence of the employee's marital status. It does, however, lend some credence to the proposition that the employee no longer considered himself married to **[Claimant #1]**.

Finally, as the Solicitor noted in the opinion of December 7, 2005, 42 U.S.C. § 7384u provides for payment of compensation to an individual "who receives, or has received" an award under section 5 of the RECA. A determination is made by DEEOIC concerning an eligible survivor under that section only if all the individuals who received the RECA award are deceased. Since, in this case, the individuals who received the award under section 5 of the RECA are still alive, **[Claimant #1]** would not be eligible for benefits under Part B of the EEOICPA even if it were determined that she was an eligible surviving spouse under § 7384u(e).

Upon review of the case record, the undersigned makes the following:

FINDINGS OF FACT

1. You all filed claims for benefits under Parts B and E of EEOICPA.

2. **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** received compensation for the condition of pneumoconiosis, as eligible surviving beneficiaries of the employee, under Section 5 of RECA.

3. The employee died on December 1, 1990. At the time of his death, **[Claimant #2]** was 36 years old, **[Claimant #3]** was 28, **[Claimant #4]** was 26, **[Claimant #5]** was 19, **[Claimant #6]** was 11, **[Claimant #7]** was 9, **[Claimant #8]** was 7 and **[Claimant #9]** was 6. **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]** were not incapable of self-support when the employee died.

4. **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** are children of the employee.

5. **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** did not receive any settlement or award from a lawsuit or state workers' compensation in connection with the accepted exposure or illness. **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]** and **[Claimant #5]** have not confirmed whether or not they received a settlement or award from a lawsuit or state workers' compensation in connection with the accepted exposure or illness.

6. **[Claimant #1]** was married to the employee from June 18, 1950 until December 22, 1978, when they were divorced.

Based on these facts, the undersigned makes the following:

CONCLUSIONS OF LAW

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, pursuant to 20 C.F.R. § 30.310. In reviewing any objections submitted under 20 C.F.R. § 30.313, the FAB will review the written record, any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. I have reviewed the record in this case, including the letters of objection, and must conclude that no further investigation is warranted.

The EEOICPA provides, under Part E, for payment of compensation to survivors of covered employees. It specifically states in 42 U.S.C. § 7385s-3 that if "there is no covered spouse. . . payment shall be made in equal shares to all covered children who are alive." It defines a "covered spouse" as "a spouse of the employee who was married to the employee for at least one year immediately before the employee's death," and a "covered child" as "a child of the employee who, as of the employee's death. . .had not attained the age of 18 years. . .had not attained the age of 23 years and was a full-time student who had been continuously enrolled as a full time student. . .since attaining the age of 18 years; or. . .had been incapable of self-support."

For the foregoing reasons, the undersigned finds that the evidence does not support that **[Claimant #1]** was a "covered spouse" or that **[Claimant #2]**, **[Claimant #3]** or **[Claimant #4]** were "covered" children, and their claims for benefits under Part E of EEOICPA are hereby denied.

The EEOICPA provides, under 42 U.S.C. § 7384u, for payment of compensation in the amount of $50,000 to an "individual who receives, or has received, $100,000 under section 5 of the Radiation Exposure Compensation Act." **[Claimant #1]** did not receive an award under section 5 of RECA and,

therefore, she is not entitled to compensation under Part B.

[Claimant #2], **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** did receive an award under section 5 of RECA and, therefore, they each have an entitlement to $6,250 ($50,000 divided by 8) under Part B. Since **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** have affirmed that they have not received a payment from a tort suit for the employee's exposure, there is no offset to their entitlement, under 42 U.S.C. § 7385 of the Act, and compensation is hereby awarded to **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]**, in the amount of $6,250 each.

When **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]** and **[Claimant #5]** have responded to the inquiry as to whether they have received a payment from a lawsuit based upon their father's employment-related exposure, decisions will be issued on their claims for compensation under Part B of the Act.

Upon further development of the evidence, decisions will be issued on the claims of **[Claimant #5]**, **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** for compensation under Part E.

Washington, DC

Richard Koretz, Hearing Representative

Final Adjudication Branch

Special Exposure Cohort

Designation by HHS

EEOICPA Fin. Dec. No. 787-2005 (Dep't of Labor, June 29, 2005)

NOTICE OF FINAL DECISION

This is the final decision of the Office of Workers' Compensation Programs (OWCP) concerning your claim for compensation under 42 U.S.C. § 7384 *et seq.*, the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended, (EEOICPA or the Act). For the reasons stated below, your claim for survivor benefits is accepted. Adjudication of your claim under § 7385s-3 is deferred pending further development.

STATEMENT OF THE CASE

You filed a claim for compensation as the surviving spouse of **[Employee]**, (the employee), under § 7384s(e) of the Energy Employees Occupational Illness Compensation Program Act (EEOICPA) on August 3, 2001. On Form EE-3 (Employment History for Claim under EEOICPA) you stated that he had been employed as a chemical operator by Mallinckrodt Chemical at the Mallinckrodt Destrehan Street Plant located in St. Louis, Missouri from 1945 until an unknown date. The Department of Energy (DOE) has identified the Mallinckrodt Destrehan Street Plant as a DOE facility from 1942 through 1962. On November 5, 2001, the DOE confirmed and verified the employee's dates of employment at the Mallinckrodt Destrehan Street Plant from 1951 through 1966. You stated that as a

result of his exposure to radiation at the Mallinckrodt Destrehan Street Plant he developed brain cancer first diagnosed in 1983. The employee died on September 12, 1983. You submitted a death certificate for the employee and a record of your marriage to the employee.

Medical evidence was submitted in support of the claim. This evidence included the employee's death certificate that indicated the immediate cause of death on March 9, 1989 was pulmonary embolus and listed other significant conditions as brain tumor. The evidence also included a pathology report describing a specimen of the employee's brain tumor obtained on or about August 26, 1983 that provided a diagnosis of grade II astrocytoma, right frontal lobe (brain cancer). The diagnosis was confirmed by a consultation report of Dr. Walter E. Stevens, MD completed on August 30, 1983.

The district office evaluated the employment and medical evidence and determined that the claim required referral to the National Institute for Occupational Safety and Health (NIOSH) to perform a dose reconstruction for the primary brain cancer. A copy of the case file and the NIOSH Referral Summary Document were forwarded to NIOSH on November 20, 2001.

The term "covered employee with cancer" may include an individual with a specified cancer who is a member of the Special Exposure Cohort, if and only if that individual contracted that specified cancer after beginning employment at a Department of Energy facility (in the case of a Department of Energy employee or Department of Energy contractor employee) or at an atomic weapons employer facility (in the case of an atomic weapons employee). An employee who is a member of the Special Exposure Cohort and has a specified cancer does not require a specific finding of "the cancer is at least 50% as likely as not" related to the employment.

EEOICPA authorizes the addition of a class of employees to the Special Exposure Cohort (SEC) if the Secretary of HHS finds:

(1) it is not feasible to estimate with sufficient accuracy the radiation dose that the class received; and (2) there is a reasonable likelihood that such radiation dose may have endangered the health of members of the class.
On April 11, 2005, The Secretary of HHS designated as members of the SEC all employees who worked in the Uranium Division at the Mallinckrodt Destrehan Street facility between 1942-1948 based upon his finding that it was not feasible to estimate the radiation dose that the class received. This designation became effective May 12, 2005.

NIOSH identified your claim as qualifying for inclusion in the SEC. Therefore, NIOSH discontinued dose reconstruction under EEOICPA and the case file was returned to the district office on May 23, 2005.

On May 26, 2005, the Denver district office issued a recommended decision indicating the employee was a member of the Special Exposure Cohort. The employee was diagnosed with a specified cancer. As his surviving spouse you are entitled to compensation in the amount of $150,000 pursuant to 42 U.S.C. § 7384s(e)(1)(A).

On June 3, 2005, the Final Adjudication Branch received your written notification that you waive any and all objections to the recommended decision.

After reviewing the evidence in your claim, the Final Adjudication Branch makes the following:

FINDINGS OF FACT

1. The employee died on September 12, 1983. You filed a claim for compensation, as the eligible surviving spouse of the employee, on August 3, 2001.

2. The Department of Energy (DOE) verified the employment dates for the employee at the Mallinckrodt Destrehan Street Plant from January 1, 1943 until December 31, 1966.

3. The employee was diagnosed with grade II astrocytoma, right frontal lobe (brain cancer) on or about August 26, 1983. The initial diagnosis was made after he began employment at the Mallinckrodt Destrehan Street Plant.

4. The employee had employment aggregating to at least 250 work days between 1942 and 1948 in the Uranium Division at the Mallinckrodt Destrehan Street Plant and is eligible for inclusion in the Special Exposure Cohort as he was diagnosed with a specified cancer.

Based on the above noted findings of fact in this claim, the Final Adjudication Branch also makes the following:

CONCLUSIONS OF LAW

1. The employee qualified as a member of the Special Exposure Cohort (SEC) as he was a DOE employee meeting the requirements pursuant to 42 U.S.C. §§ 7384l(14)(C) and 7384q of the Act.

2. The employee had a specified cancer pursuant to § 7384l(17).

3. The evidence establishes that the employee was a covered employee pursuant to 42 U.S.C. § 7384l(1).

4. You have established that you are the current eligible survivor of the employee pursuant to 42 U.S.C. § 7384s.

5. You are entitled to compensation in the amount of $150,000 as outlined under 42 U.S.C. § 7384s(e)(1)(A) of the Act.

6. Pulmonary embolus is not a covered condition under the Act as defined in § 7384l(15).

The undersigned has thoroughly reviewed the case record and finds that it is in accordance with the facts and the law in this case. The evidence of record establishes that that the employee meets the criteria of a covered employee with cancer as a qualified member of the Special Exposure Cohort with a specified cancer. It is the decision of the Final Adjudication Branch that your claim for survivor benefits is accepted.

Denver, Colorado

June 29, 2005

Joyce L. Terry

District Manager

EEOICPA Fin. Dec. No. 18528-2006 (Dep't of Labor, February 8, 2008)

NOTICE OF FINAL DECISION

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

STATEMENT OF THE CASE

On January 3, 2002, you filed a claim for survivor benefits under EEOICPA as a surviving parent of **[Employee]**. You claimed the employee was employed by Dow Chemical, Rockwell International and EG&G at the Rocky Flats Plant[1] from 1964 to 1966, and from June 1, 1981 to 1993. The Department of Energy verified the employee was employed at the Rocky Flats Plant from September 17, 1964 to July 25, 1966, and from June 1, 1981 to June 29, 1995.

You claimed the employee was diagnosed with ovarian cancer. The pathology report of the tissue obtained on December 28, 1995 described a diagnosis of moderately differentiated endometrioid-type adenocarcinoma of the left ovary.

The employee's death certificate showed she was born on March 31, 1946; died on January 25, 2001 at the age of 54; and was widowed. The death certificate also listed **[Employee's Spouse]** as her spouse; **[Employee's Father]** as her father; and **[Claimant]** as her mother. The death certificate for **[Employee's Spouse]** showed he died on February 15, 2000, and was married to **[Employee]** (maiden name given). The employee's birth and hospital certificates showed **[Employee]** was born on March 31, 1946; to **[Employee's Father]**and **[Claimant]**. **[Employee's Father]**'s death certificate showed he died on November 27, 1993.

On December 2, 2002, the district office forwarded a complete copy of the case record to the National Institute for Occupational Safety and Health (NIOSH) for reconstruction of the radiation dose the employee received in the course of her employment at the Rocky Flats Plant. On February 17, 2006, a final decision was issued under Part B of EEOICPA denying your claim for survivor benefits based on a probability of causation of 26.93%, which showed that the employee's cancer did not meet the 50% "at least likely as not" mandated level for compensability.

On August 6, 2007, the Secretary of the Department of Health and Human Services (HHS) designated the following classes of employees for addition to the Special Exposure Cohort (SEC): Employees of DOE, its predecessor agencies, or DOE contractors or subcontractors who were monitored or should have been monitored for neutron exposures while working at the Rocky Flats Plant in Golden, Colorado, for a number of work days aggregating at least 250 work days from April 1, 1952 through December 31, 1958 and/or January 1, 1959 through December 31, 1966, or in combination with work days within the parameters established for one or more other classes of employees in the Special Exposure Cohort. The SEC designations for these classes became effective on September 5, 2007.

A review of the evidence of record indicates that the employee had a period of employment

aggregating 250 days during the SEC period (January 1, 1959 through December 31, 1966); was monitored for neutron exposures, as her name appears on the Neutron Dose Report (NDR)[2]; and was diagnosed with ovarian cancer, a specified cancer, more than five years after her first exposure to radiation at the Rocky Flats Plant. Based on the SEC determinations for certain employees at the Rocky Flats Plant, a Director's Order was issued on December 28, 2007 that vacated the prior decision issued under Part B.

On December 28, 2007, the district office issued a recommended decision to accept your claim for survivor benefits under Part B of EEOICPA and referred the case to the FAB for an independent assessment of the evidence and a final decision on your claim.

On January 11, 2008, the FAB received your signed statement certifying that neither you nor the employee filed any lawsuits, tort suits, or state workers' compensation claims; or received any awards or benefits related to ovarian cancer; that you have not pled guilty or been convicted of any charges connected with an application for or receipt of federal or state workers' compensation; and the employee had no children.

After considering the recommended decision and all evidence in the case, the FAB hereby makes the following:

FINDINGS OF FACT

1. On January 3, 2002, you filed a claim for survivor benefits as the surviving parent of **[Employee]**.

2. You are the surviving parent of **[Employee]**, as supported by birth and death certificates.

3. The employee was employed at the Rocky Flats Plant, a covered DOE facility, from September 17, 1964 to July 25, 1966, and from June 1, 1981 to June 29, 1995.

4. Effective September 5, 2007, employees at the Rocky Flats Plant that worked from April 1, 1952 through December 31, 1958, and/or January 1, 1959, through December 31, 1966, and were monitored or should have been monitored for neutron exposure, were added to the SEC.

5. The employee has a period of employment at the Rocky Flats Plant aggregating 250 days during the SEC period, September 17, 1964 through July 25, 1966.

6. The employee was monitored for neutron dose exposure during the period September 17, 1964 to July 25, 1966, as confirmed by the NDR.

7. The employee was diagnosed with ovarian cancer (a specified cancer) on December 28, 1995. This diagnosis occurred more than five years after her first exposure to radiation at the Rocky Flats Plant.

8. The evidence of record contains your signed statement certifying that neither you nor the employee filed a lawsuit, tort suits, or state workers' compensation claims; received any awards or benefits related to ovarian cancer; that you have not pled guilty or been convicted of any charges connected with an application for or receipt of federal or state workers' compensation;

and the employee had no children.

Based on the above-noted findings of fact in this claim, the FAB hereby also makes the following:

CONCLUSIONS OF LAW

Pursuant to the regulations implementing the EEOICPA, a claimant has 60 days from the date of issuance of the recommended decision to raise objections to that decision to the FAB. 20 C.F.R § 30.310(a). If an objection is not raised during the 60-day period, the FAB will consider any and all objections to the recommended decision waived and issue a final decision affirming the district office's recommended decision. 20 C.F.R. § 30.316(a). On January 11, 2008, the FAB received your written notification waiving any and all objections to the recommended decision.

Part B of EEOICPA provides benefits for an employee diagnosed with a specified cancer who is a member of the SEC if, and only if, that employee contracted the specified cancer after beginning employment at a DOE facility. Such employee is considered "a covered employee with cancer."

On August 6, 2007, the Secretary of HHS designated the following classes of employees for addition to the SEC: Employees of DOE, its predecessor agencies, or DOE contractors or subcontractors who were monitored or should have been monitored for neutron exposures while working at the Rocky Flats Plant in Golden, Colorado, for a number of work days aggregating at least 250 work days from April 1, 1952 through December 31, 1958 and/or January 1, 1959 through December 31, 1966, or in combination with work days within the parameters established for one or more other classes of employees in the SEC. The SEC designations for these classes became effective September 5, 2007.

The employee is a member of the SEC as designated above and defined by 42 U.S.C. §§ 7384l(14)(C) and 7384q of the Act, and has been diagnosed with ovarian cancer, a specified cancer. The FAB concludes that the employee is a "covered employee with cancer" pursuant to the requirements of 42 U.S.C. § 7384l(9)(A).

You have established that you are the employee's eligible survivor, pursuant to 42 U.S.C. § 7384s(e)(3)(C) of the Act. Therefore, you are entitled to compensation in the amount of $150,000.00, pursuant to 42 U.S.C. § 7384s(a)(1) and (e)(1)(C).

Accordingly, your claim for survivor benefits for the employee's ovarian cancer is approved for compensation under Part B of the Act.

Denver, Colorado

Anna Navarro

Hearing Representative

Final Adjudication Branch

[1] According to the Department of Energy's (DOE) Office of Worker Advocacy on the DOE website at http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/showfacility.cfm., the Rocky Flats Plant in Golden, Colorado is a covered DOE facility from 1951 to present.

[2] *The Rocky Flats Neutron Dosimetry Reconstruction Project (NDRP)* was a historical project undertaken to better reconstruct neutron dose for workers at the Rocky Flats Plant. As part of that Project, a list of 5,308 names was compiled. Every name on the list represents someone who was monitored for neutron dose.

EEOICPA Fin. Dec. No. 25854-2006 (Dep't of Labor, January 14, 2008)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning the above claim for survivor benefits under Parts B and E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons stated below, the claim is hereby accepted.

STATEMENT OF THE CASE

On March 25, 2002, **[Claimant]** filed a claim for survivor benefits under EEOICPA as the surviving spouse of **[Employee]**. She reported that the employee was employed as a metallurgical operator/scheduler and general clerk at the Rocky Flats Plant[1] from February 1963 to February 1972. The Department of Energy (DOE) verified that the employee was employed at the Rocky Flats Plant from February 25, 1963 to February 3, 1972. Additional records received from DOE documented that the employee by employed by Dow Chemical, a DOE contractor, during his employment at Rocky Flats.

In support of her claim, **[Claimant]** alleged that the employee was diagnosed with metastatic kidney cancer. A pathology report of the tissue obtained on January 17, 1972 described a diagnosis of clear cell adenocarcinoma of the left kidney. An autopsy report dated February 22, 1972 also provided a diagnosis of adenocarcinoma of the left kidney with metastatic carcinoma to the right adrenal gland, both lungs, pancreatic lymph nodes, and right paravertebral lymph nodes.

The employee's death certificate reported that he was born on February 22, 1925, that he died on February 2, 1972 at the age of 46, that he was married to **[Claimant's maiden name]**, and the cause of death was cardiorespiratory arrest due to massive gastrointestinal bleeding and metastatic adenocarcinoma of the left kidney. **[Claimant]**'s marriage certificate showed that **[Employee]** and **[Claimant's maiden name]** married on October 1, 1939.

On September 10, 2002, the district office forwarded a complete copy of the case record to the National Institute for Occupational Safety and Health (NIOSH) for reconstruction of the radiation dose the employee received in the course of his employment at the Rocky Flats Plant. On October 2, 2006, FAB issued a final decision denying the claim under Part B of EEOICPA for survivor benefits on the ground that the probability of causation was only 30.40%, based on NIOSH's dose reconstruction.

On August 6, 2007, the Secretary of Health and Human Services (HHS) designated the following classes for addition to the Special Exposure Cohort (SEC): employees of DOE, its predecessor agencies, or DOE contractors or subcontractors who were monitored or should have been monitored for neutron exposures while working at the Rocky Flats Plant in Golden, Colorado, for a number of work days aggregating at least 250 work days from April 1, 1952 through December 31, 1958 and/or January 1, 1959 through December 31, 1966, or in combination with work days within the parameters established for one or more other classes of employees in the Special Exposure Cohort. The SEC designations for these classes became effective September 5, 2007.

A review of the evidence of record indicates that the employee had a period of employment aggregating at least 250 days during the SEC periods of April 1, 1952 through December 31, 1958, and January 1, 1959 through December 31, 1966, and his name appears on the report of the Neutron Dosimetry Reconstruction Project Report (NDRP).[2] The employee was diagnosed with kidney cancer, a "specified" cancer, more than five years after his first exposure to radiation at the Rocky Flats Plant.

Based on the new designation of two classes of employees at the Rocky Flats Plant as members of the SEC, a Director's Order was issued on December 4, 2007 that vacated the prior decision on this claim under Part B. On December 12, 2007, the district office issued a recommended decision to accept the claim for survivor benefits under Parts B and E of EEOICPA for kidney cancer and referred the case to FAB for the issuance of a final decision.

On December 13, 2007, FAB received **[Claimant]**'s signed statement certifying that neither she nor the employee had filed any tort suits or state workers' compensation claims, that they had not received any awards or benefits related to kidney cancer, that they had not pled guilty or been convicted of any charges connected with an application for or receipt of federal or state workers' compensation, and the employee, at the time of his death, had no minor children or children incapable of self support, who were not **[Claimant]**'s natural or adopted children.

After considering the record of the claim, FAB hereby makes the following:

FINDINGS OF FACT

1. On March 25, 2002, **[Claimant]** filed a claim for survivor benefits under EEOICPA.

2. **[Claimant]** is the employee's surviving spouse as supported by death and marriage certificates.

3. The employee worked for Dow Chemical, a DOE contractor, at the Rocky Flats Plant, a DOE facility, from February 25, 1963 to February 3, 1972, which is more than 250 days, and the employee's name appears on the report of the NDRP.

4. The employee was diagnosed with kidney cancer on January 17, 1972, which was at least five years after he first began employment at a DOE facility.

5. Based on the employee's reported date of birth of February 22, 1925, his normal retirement age (for purposes of the Social Security Act) would have been 65.

6. Neither **[Claimant]** nor the employee filed a tort suit or a state workers' compensation claim, received any awards or benefits related to kidney cancer, have not pled guilty or been convicted of any charges connected with an application for or receipt of federal or state workers' compensation, and the employee, at the time of death, had no minor children or children incapable of self support, who were not **[Claimant]**'s natural or adopted children.

Based on the above-noted findings of fact in this claim, FAB hereby makes the following:

CONCLUSIONS OF LAW

A claimant has 60 days from the date of issuance of the recommended decision to raise objections to that decision to FAB. 20 C.F.R § 30.310(a) (2008). If an objection is not raised during the 60-day

period, FAB may issue a final decision accepting the district office's recommended decision. 20 C.F.R. § 30.316(a). On December 20, 2007, FAB received written notification from **[Claimant]** waiving any and all objections to the recommended decision.

As found above, the employee worked at the Rocky Flats Plant for a period of at least 250 work days, during the SEC periods of April 1, 1952 through December 31, 1958, and January 1, 1959 through December 31, 1966. Part B of EEOICPA provides benefits for an employee diagnosed with a "specified" cancer who is a member of the SEC if, and only if, that employee contracted the specified cancer after beginning employment at a DOE facility. Such employee is considered "a covered employee with cancer."

FAB concludes that the employee is a member of the SEC, and because he was diagnosed with kidney cancer, a "specified" cancer. Therefore, FAB also concludes that the employee is a "covered employee with cancer" under Part B since he satisfies the requirements of 42 U.S.C. § 7384l(9)(A).

Under 42 U.S.C. § 7385s-4(a), it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing the employee's death. As used in Part E, the term "covered illness" means an illness or death resulting from exposure to a toxic substance.

Pursuant to 20 C.F.R. § 30.800, years of wage-loss occurring prior to normal retirement age that are the result of a covered illness contracted by a covered Part E employee through work-related exposure to a toxic substance at a DOE facility may be compensable under Part E. In this case, the evidence of record supports that employee experienced wage-loss for the years 1972 through 1990 (when he would have attained his normal Social Security retirement age); thus, additional compensation in the amount of $25,000.00 is payable in addition to the basic survivor award under Part E of $125,000.00.

[Claimant] has established that she is the surviving spouse of the employee as defined by Parts B and E of EEOICPA. Accordingly, she is entitled to compensation under Part B in the amount of $150,000.00, as outlined in 42 U.S.C. § 7384s(a)(1). She is also entitled to compensation under Part E in the amount of $150,000.00 pursuant to 42 U.S.C. §7385s-3(a)(2).

Denver, Colorado

Anna Navarro

Hearing Representative

Final Adjudication Branch

[1] According to the Department of Energy (DOE) website at ttp://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/showfacility.cfm, the Rocky Flats Plant in Golden, CO is a covered DOE facility from 1951 to present.

[2] *The Rocky Flats Neutron Dosimetry Reconstruction Project (NDRP)* was a historical project undertaken to better reconstruct neutron dose for workers at the Rocky Flats Plant. As part of that Project, a list of 5,308 names was compiled. Every name on the list represents someone who was monitored for neutron dose.

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning the above claims for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claim filed by **[Claimant #1]** is accepted under Part B and Part E of EEOICPA. The claim filed by **[Claimant #2]** under Part E is denied.

STATEMENT OF THE CASE

On April 5, 2002, **[Claimant #2]** filed a Form EE-2 claiming for survivor benefits under EEOICPA as a surviving child of **[Employee]**. On February 19, 2003, **[Claimant #1]** filed also filed a Form EE-2 as the surviving spouse of the employee. They both identified lung cancer as the diagnosed condition of the employee. **[Claimant #2]** submitted an employment history, Form EE-3, completed on October 25, 2001 by **[Individual with same surname as Employee]**, which indicated that the employee worked for Atomics International, in the Santa Susana Hills, from 1958 to 1964, and for Gulf General Atomics in San Diego, California and Idaho Falls, Idaho, from 1964 to an unknown date.

The Department of Energy (DOE) verified that the employee worked for Atomics International, a DOE contractor, at Area IV of the Santa Susana Field Laboratory, a DOE facility, from May 19, 1958 to October 16, 1964. General Atomics confirmed that the employee worked for General Atomics from October 19, 1964 to September 8, 1972, and that during this period the employee did some work at Gulf in Idaho Falls, Idaho. The Idaho National Engineering & Environmental Laboratory (INEEL), in Idaho Falls, Idaho, confirmed that INEEL had dosimetry data for the employee, and that he might have worked for General Atomics during 1965, 1966 and 1967.

The General Atomics human resources department provided documentation establishing that the employee was monitored for radiation on 9 separate occasions while working at the General Atomics facility in La Jolla, California, in the LINAC complex and the HTGR-Critical Facility, between January 20, 1967 and November 18, 1969.

As medical evidence, **[Claimant #1 and Claimant #2]** submitted numerous medical records, including the following:

1. A medical report dated April 21, 1977 from B.M. Kim, M.D., which provides an assessment of primary bronchial carcinoma.

2. A copy of a radiation oncology consultation, dated May 9, 1977, from Charles Campbell, M.D., which provides a diagnosis of bronchogenic, large cell, undifferentiated adenocarcinoma.

In support of her claim, **[Claimant #2]** provided a copy of her birth certificate, indicating that she was born on March 26, 1958, and that **[Employee]** was her father. She provided a copy of the employee's death certificate, indicating that he died on August 28, 1977 at age 43, due to respiratory failure secondary to bronchogenic carcinoma, and that he was married to **[Claimant #1's maiden name]** at the time of death. **[Claimant #1]** submitted a copy of her marriage certificate that memorialized her marriage to **[Employee]** on July 1, 1972. **[Claimant #2]** and **[Claimant #1]** provided copies of marriage certificates that document their surname changes.

On December 17, 2002, FAB issued a final decision denying the claim of **[Claimant #2]** under Part B of EEOICPA, as the evidence of record did not establish that the widow of the employee at the time of his death was no longer alive.

In a February 16, 2007 report to Congress, the Secretary of Health and Human Services (HHS) designated the following class of employees for addition to the Special Exposure Cohort (SEC):

Atomic Weapons Employer (AWE) employees who were monitored or should have been monitored for exposure to ionizing radiation while working at the General Atomics facility in La Jolla, California, at the following locations: Science Laboratories A,B, and C (Building 2); Experimental Building (Building 9); Maintenance (Building 10); Service Building (Building 11); Buildings 21 and 22: Hot Cell Facility (Building 23); Waste Yard (Buildings 25 and 26); Experimental Area (Building 27 and 27-1); LINAC Complex (Building 30); HTGR-TCF (Building 31); Fusion Building (Building 33); Fusion Doublet III (Building 34); SV-A (Building 37); SV-B (Building 39); and SV-D (no building number) for a number of work days aggregating at least 250 work days from January 1, 1960 through December 31, 1969, or in combination with work days within the parameters established for one or more other classes of employees in the SEC.

The SEC designation for this class became effective on March 18, 2007.

On July 30, 2007, the district office sent a letter to **[Claimant #2]** advising her of the criteria to establish that she is a "covered" child under Part E of EEOICPA and asked her to provide evidence establishing her eligibility as a covered child. The record reflects that on September 24, 2007, **[Claimant #2]** advised the district office via a telephone call that she did not meet the eligibility requirements under Part E.

On September 26, 2007, the Seattle district office issued a recommended decision concluding that **[Claimant #2]** is not an eligible survivor of the employee under Part E; that the employee is a member of the SEC; that he developed lung cancer, a "specified" cancer, after beginning his employment at General Atomics; that the occupational exposure was at least as likely as not a significant factor in aggravating, contributing to, or causing the employees' death; that **[Claimant #1]** is the surviving spouse of **[Employee]**; and that **[Claimant #1]** is entitled to survivor benefits under Part B of EEOICPA in the amount of $150,000.00, and under Part E in the amount of $175,000.00, for a total of $325,000.00.

The record contains **[Claimant #1]**'s correspondence of October 3, 2007, advising that she never filed for, or received, any settlements or awards for the claimed condition of lung cancer, from either a civil lawsuit or a state workers' compensation claim. She also advised that the employee did not have any children who were not her natural or adopted children at the time of the employees' death.

The FAB has received separate correspondence from **[Claimant #1 and Claimant #2]** waiving any objections to the findings of fact or conclusions of law in the recommended decision.

Based upon a review of the evidence in the record, I make the following:

FINDINGS OF FACT

1. **[Claimant #1 and Claimant #2]** filed claims for benefits under EEIOCPA as the survivors of

[Employee].

2. **[Employee]** worked for Atomics International, a DOE contractor, at Area IV of the Santa Susana Field Laboratory, a DOE facility, from May 19, 1958 to October 16, 1964.

3. **[Employee]** was employed by General Atomics, an Atomic Weapons Employer, at their La Jolla, California facility, from October 19, 1964 to September 8, 1972.

4. During the period from January 1, 1960 through December 31, 1969, the employee worked an aggregate of at least 250 work days in buildings specified for the General Atomics SEC, where the employee was monitored or should have been monitored for exposure to ionizing radiation.

5. **[Employee]** was first diagnosed with lung cancer in April 1977.

6. **[Claimant #1]** is the surviving spouse of the employee, who died on August 28, 1977 (at the age of 43) due to respiratory failure secondary to bronchogenic carcinoma.

7. **[Claimant #2]** is a biological child of **[Employee]**, and was 19 years old at the time of her father's death.

8. There is no evidence that **[Claimant #2]** was a full-time student or incapable of self-support at the time of her father's death.

Based upon a review of the aforementioned facts, FAB hereby also makes the following:

CONCLUSIONS OF LAW

Section 30.316(a) of the implementing regulations provides that if the claimant does not file a written statement that objects to the recommended decision and/or requests a hearing within the period of time allotted in § 30.310, or if the claimant waives any objection to all or part of the recommended decision, the FAB reviewer may issue a decision accepting the recommendation of the district office, either in whole or in part. 20 C.F.R. § 30.316(a) (2007). Both claimants have submitted their written waivers.

The term "covered" child means a child of the employee who, at the time of the employee's death, was: under the age of 18 years; or under the age of 23 years and a full-time student who was continuously enrolled in an educational institution since attaining the age of 18 years; or incapable of self-support. *See* 42 U.S.C. § 7385s-3(d)(2).

The record establishes that **[Claimant #2]** was 19 years old at the time of her father's death. There is no evidence showing that she was a full-time student or incapable of self-support at the time of her father's death. Therefore, FAB concludes that **[Claimant #2]**'s claim under Part E of EEOICPA must be denied because she does not meet the definition of a "covered" child set out in 42 U.S.C. § 7385s-3(d)(2).

Eligibility for Part B compensation based on cancer may be established by demonstrating that the employee is a member of the SEC who contracted a "specified" cancer after beginning employment at

a DOE facility (in the case of a DOE employee or DOE contractor employee). 42 U.S.C. §§ 7384l(9)(A), 7384l(14)(A).

The record establishes that during the period from January 1, 1960 through December 31, 1969, the employee worked an aggregate of at least 250 work days in buildings specified for the General Atomics SEC. The record also establishes that the employee was diagnosed with lung cancer in 1977, which is more than 2 years after beginning his employment at the General Atomics' La Jolla, California facility. Lung cancer is a "specified" cancer as defined by 20 C.F.R. § 30.5(ff)(2) (2007). The employee was, therefore, a "covered employee with cancer." 42 U.S.C. § 7384l(9).

The record also establishes that **[Claimant #1]** is the surviving spouse of the employee. As the employee's surviving spouse, she is entitled to compensation benefits under Part B of the Act in the amount of $150,000.00, pursuant to 42 U.S.C. §§ 7384s(a) and (e)(A).

Section 7385s-4(a) of EEOICPA states that a determination under Part B that a DOE contractor employee is entitled to compensation under that part for an occupational illness shall serve as a determination under Part E that the employee contracted that illness through exposure at a DOE facility.

In this case, FAB is basing the award of compensation to **[Claimant #1]** under Part B on **[Employee]**'s employment at an Atomic Weapons Employer, which qualifies him as a member of the SEC. **[Employee]** also had documented employment with Atomics International, a DOE contractor, at Area IV of the Santa Susana Field Laboratory, a DOE facility, from May 19, 1958 to October 16, 1964. On September 19, 2007, the Division of Energy Employees Occupational Illness Compensation (DEEOIC) determined that in a surviving spouse's claim that is accepted under Part B based on the employee's status as both an atomic weapons employee and a member of the SEC, if the employee also had any verified employment by a DOE contractor at a DOE facility, then the provisions of 42 U.S.C. § 7385s-4(a) would apply such that the spouse would be entitled to a determination under Part E that the employee's illness was contracted through exposure to a toxic substance at the DOE facility. Accordingly, **[Claimant #1]** is entitled to compensation pursuant to 42 U.S.C. §7385s-3(a)(3), since the employee would have been entitled to compensation under Part B, *and* it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing the death of the employee.

Therefore, the evidence of record, in conjunction with the September 19, 2007 determination by DEEOIC, establishes that the employee was diagnosed with a "covered illness," lung cancer, as that term is defined by 42 U.S.C. § 7385s(2), and that the employee contracted that "covered illness" through exposure to a toxic substance at a DOE facility pursuant to 42 U.S.C. § 7385s-4(a). The FAB concludes that the evidence of record is also sufficient to establish that the employee's lung cancer was a significant factor in aggravating, contributing to, or causing his death. The death certificate, signed by a physician, lists the cause of death as being due to or as a consequence of bronchogenic carcinoma (lung cancer), which is the accepted condition under Part B of EEOICPA. The record also indicates that there was an aggregate of not less than 20 years between the employee's death and his normal retirement age (for purposes of the Social Security Act).

Accordingly, **[Claimant #1]** is entitled to compensation under Part E in the amount of $175,000.00 as a covered spouse, pursuant to 42 U.S.C. §7385s-3(a)(3), for a total lump-sum award in the amount of $325,000.00.

Washington, D.C.

Susan Price

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 47148-2006 (Dep't of Labor, May 16, 2008)

NOTICE OF FINAL DECISION

This decision of the Final Adjudication Branch (FAB) concerns the above claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, FAB accepts the claim under Part B of EEOICPA in the amount of $150,000.00 and under Part E in the amount of $125,000.00. Adjudication of the claim for survivor benefits for the conditions of diabetes and hypertension under Part E will not be undertaken, as maximum survivor benefits are being awarded.

STATEMENT OF THE CASE

On July 15, 2003, **[Claimant]** filed a Form EE-2 claiming for survivor benefits under EEOICPA with the Department of Labor as the surviving spouse of **[Employee]**. She based her claim on the employee's metastatic renal cell carcinoma. On December 28, 2006, **[Claimant]** filed a second Form EE-2 for the conditions of renal cell carcinoma, diabetes, and hypertension.

[Claimant] also submitted a Form EE-3 in which she alleged that **[Employee]** worked at the Lawrence Livermore National Laboratory (LLNL) as a designer from June 19, 1956 to March 2, 2000. The district office used the Oak Ridge Institute for Science and Education (ORISE) database to verify that **[Employee]** worked at LLNL from June 19, 1956 to March 2, 2000. The Department of Energy (DOE) verified that **[Employee]** was employed by the University of California Radiation Laboratory (UCRL) at LLNL beginning on June 19, 1956, and that he had dosimetry badges issued in association with his work with UCRL/LLNL at the Nevada Test Site (NTS) on March 13, 1972, March 30, 1972, May 5, 1972 and April 24, 1973. Employment records obtained from DOE indicate that **[Employee]** was employed as a draftsman and designer at LLNL.

The record includes a copy of a marriage certificate showing **[Claimant]** and the employee were married on May 18, 1963, and a copy of **[Employee]**'s death certificate showing **[Claimant]** was married to the employee at the time of his death on March 2, 2000. The death certificate identifies the immediate cause of death as respiratory failure and metastatic renal cell carcinoma, with diabetes mellitus, hypertension and hyperlipidemia listed as conditions that contributed to his death. The medical evidence of record includes a November 16, 1999 pathology report in which Dr. Lena Scherba diagnosed metastatic renal cell carcinoma with metastases to the left pleura.

On March 15, 2006, FAB issued a final decision under Part B to deny **[Claimant]**'s claim for benefits, concluding that the employee's renal cell carcinoma was not "at least as likely as not" (a 50% or greater probability) caused by radiation doses incurred while employed at LLNL. On March 20, 2007, the Seattle district office issued a recommended decision to deny **[Claimant]**'s claim for benefits

under Part E of the Act. The district office concluded that she did not provide sufficient evidence to show that toxic exposure at a DOE facility was "at least as likely as not" a significant factor in aggravating, contributing to or causing the employee's metastatic renal cell carcinoma.

On March 29, 2007, the National Institute for Occupational Safety and Health (NIOSH) issued OCAS-PEP-012, entitled "Program Evaluation Plan: Evaluation of Highly Insoluble Plutonium Compounds." The PEP provided NIOSH's plan for evaluating dose reconstructions for certain claims to determine the impact of highly insoluble plutonium compounds at particular sites, and specifically concluded that the existence of highly insoluble plutonium at LLNL should be considered for Type Super S plutonium in the dose reconstruction. This change went into effect on February 6, 2007 and affected those cases with a dose reconstruction performed prior to that date that resulted in a less than 50% Probability of Causation (PoC) with verified employment at LLNL.

On June 18, 2007, FAB remanded **[Claimant]**'s Part E claim for survivor benefits and instructed the district office to refer the case to NIOSH for rework of the dose reconstruction pursuant to EEOICPA Bulletin No. 07-19 (issued May 16, 2007), which determined that the existence of the highly insoluble plutonium at LLNL should be considered for Type Super S plutonium in the dose reconstruction.

On June 26, 2007, the Seattle district office returned the claim to NIOSH for a rework of the dose reconstruction. On October 23, 2007, the district office received the NIOSH Report of Dose Reconstruction dated September 19, 2007. Using the information provided in this report, the district office utilized the Interactive Radio Epidemiological Program (IREP) to determine the PoC of the employee's renal cell carcinoma and reported in its recommended decision that there was a 26.76% probability that the employee's metastatic renal cell carcinoma was caused by exposure to radiation at LLNL.

On November 9, 2007, a Director's Order was issued vacating the final decision dated March 15, 2006, and reopening **[Claimant]**'s claim under Part B of EEOICPA. The Director's Order directed the district office to reopen her claim under Part B based on EEOICPA Bulletin No. 07-27 (issued August 7, 2007) to reflect the revised dose reconstruction methodology to the calculation of the PoC and provided procedures for processing claims with a final decision to deny that may be affected by NIOSH's OCAS-PEP-012.

On February 7, 2008, the Seattle district office recommended denial of **[Claimant]**'s claim for survivor benefits under Part B and Part E, finding that the employee's cancer was not "at least as likely as not" (a 50% or greater probability) caused by radiation doses incurred while employed at the LLNL. The district office concluded that the employee did not qualify as a "covered employee with cancer" under Part B; that the dose reconstruction estimates and the PoC calculations were properly performed, and that **[Claimant]** was not entitled to survivor benefits under Part B. Further, the district office concluded that under Part E, the totality of the evidence did not provide sufficient evidence to show that exposure to a toxic substance at a DOE facility was "at least as likely as not" a significant factor in aggravating, contributing to or causing the claimed conditions of renal cell carcinoma, diabetes or hypertension.

In a letter received by FAB on May 15, 2008, **[Claimant]** indicated that neither she nor **[Employee]** had filed a lawsuit or received a settlement based on the claimed conditions. She also indicated that they had never filed for or received any payments, awards or benefits from a state workers' compensation claim in relation to the claimed illnesses, or pled guilty to or been convicted of any

charges connected with an application for or receipt of federal or state workers' compensation. Further, she indicated that **[Employee]** had no minor children or children incapable of self-support, who were not her natural or adopted children, at the time of his death.

On March 3, 2008, the Secretary of Health and Human Services (HHS) designated the following class of employees for addition to the Special Exposure Cohort (SEC) in a report to Congress: Employees of DOE, its predecessor agencies and DOE contractors or subcontractors who were monitored for radiation exposure while working at LLNL from January 1, 1950 through December 31, 1973 for a number of work days aggregating at least 250 work days or in combination with work days within the parameters established for one or more other classes of employees in the SEC. This addition to the SEC became effective April 2, 2008.

After considering the evidence of record, FAB hereby makes the following:

FINDINGS OF FACT

1. On July 15, 2003 and December 28, 2006, **[Claimant]** filed a claim for benefits under EEOICPA.
2. **[Claimant]** is the surviving spouse of the employee and was married to him for at least one year immediately prior to his death.

3. The employee worked at LLNL for an aggregate of at least 250 work days from June 19, 1956 to March 2, 2000, and was issued visitor dosimetry badges at the NTS on March 13, 1972, March 30, 1972, May 5, 1972 and April 24, 1973. The employee was monitored for radiation exposure, and qualifies as a member of the SEC.
4. The employee was diagnosed with metastatic renal cell carcinoma, which is a "specified" cancer, on November 16, 1999, after starting work at a DOE facility.
5. The evidence of record supports a causal connection between the employee's death due to metastatic renal cell carcinoma and his exposure to radiation and/or a toxic substance at a DOE facility.

6. **[Claimant]** has not filed or received any money (settlement, compensation, benefits, etc.) from a tort action or from a state workers' compensation program based on the claimed condition. She has never pled guilty to or been convicted of any charges of having committed fraud in connection with an application for or receipt of benefits under EEOICPA or any federal or state workers' compensation law. The employee had no minor children or children incapable of self-support, who were not **[Claimant]**'s natural or adopted children, at the time of his death.

Based on the above-noted findings of fact, FAB hereby also makes the following:

CONCLUSIONS OF LAW

The undersigned has reviewed the recommended decision issued by the district office on February 7, 2008. **[Claimant]** has not filed any objections to the recommended decision, and the sixty-day period for filing such objections has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

As noted above, on April 2, 2008 a new addition to the SEC became effective. The evidence of record indicates that the employee worked in covered employment at LLNL from June 19, 1956 to March 2, 2000, that he was issued visitor dosimetry badges at the NTS on March 13, 1972, March 30, 1972, May

5, 1972 and April 24, 1973, and that he was monitored for radiation exposure during his employment. The medical evidence shows that **[Employee]** was diagnosed with metastatic renal cell carcinoma on November 16, 1999, more than 5 years after his initial exposure to radiation.

FAB may reverse a recommended decision to deny a claim if the portion of the claim denied by the district office is in posture for acceptance. The evidence is sufficient to establish that the employee is a member of the class added to the SEC who was diagnosed with metastatic renal cell carcinoma, a "specified" cancer, more than five years after initial exposure, and is therefore a "covered employee with cancer" under section 7384l(9)(A) of EEOICPA. Further, **[Claimant]** is the surviving spouse of the employee, as defined by § 7384s(e)(1)(A), and is entitled to compensation in the amount of $150,000.00 under Part B.

Under § 7385s-4(a) of EEOICPA, if an employee has engaged in covered employment at a DOE facility and was determined under Part B to have contracted an "occupational" illness, the employee is presumed to have contracted a covered illness through exposure at that facility. Further, if the employee would have been entitled to compensation under Part E and it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing the death of such employee, an eligible survivor would be entitled to survivor benefits under Part E.. *See* 42 U.S.C. § 7385s-3(1)(A) and (B).

The evidence of record establishes that the employee was a "covered DOE contractor employee" who was diagnosed with a "covered" illness, and therefore he would be eligible for benefits under Part E. Further, it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing the death of the employee. **[Claimant]** is the employee's "covered" spouse as defined by § 7385s-3(d)(1) and is therefore entitled to additional compensation in the amount of $125,000.00 under Part E.

Accordingly, FAB reverses the recommended decision and accepts the claim for survivor benefits under Part B of $150,000.00, and also under Part E for an additional $125,000.00.

Seattle, Washington

Keiran Gorny

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 50784-2007 (Dep't of Labor, November 22, 2006)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA or the Act), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the FAB accepts and approves your claim for compensation in the amount of $150,000.00 under Part B and $125,000.00 under Part E, as well as medical benefits under Part B and E.

STATEMENT OF THE CASE

On October 28, 2002, **[Employee]** filed a Form EE-1 (Claim for Benefits under the EEOICPA) with the Department of Labor (DOL), based on the condition of hepatocellular carcinoma (liver cancer). He submitted medical evidence, including a pathology report dated July 22, 2002, indicating a diagnosis of well-differentiated hepatocellular carcinoma.

[Employee] also submitted a Form EE-3 indicating that he worked at the Nevada Test Site (NTS) for EG&G from June 1956 to an unspecified date in 1965, and at the Pacific Proving Grounds (PPG) from April 1958 to July 1958. A representative of the Department of Energy (DOE) verified that the employee worked at the NTS for EG&G from May 25, 1957 to June 29, 1957; from October 1, 1958 to November 5, 1958; from June 13, 1960 to June 24, 1960; from August 29, 1961 to November 20, 1961; and from January 3, 1962 to September 10, 1962; and at the PPG from May 1, 1958 to June 30, 1962; and at the NTS with EG&G from March 21, 1963 to May 1, 1963; from November 13, 1963 to November 26, 1963; from February 10, 1964 to February 10, 1964; May 5, 1964 to May 5, 1964; from August 11, 1964 to August 11, 1964; from November 3, 1964 to November 3, 1964; from January 21, 1965 to May 11, 1965; from July 21, 1965 to July 21, 1965; and from October 12, 1965 to October 12, 1965. **[Employee]** died on May 31, 2003, and his claim was administratively closed.

On October 21, 2003, you filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA) as the surviving spouse of the employee, based on the condition of liver cancer. The record includes a copy of your marriage certificate showing you and the employee were married on September 27, 1996, and a copy of your spouse's death certificate showing you were married to the employee at the time of his death on May 31, 2003. The death certificate identifies the immediate cause of death as renal failure, liver failure and hepatocellular carcinoma.

On November 10, 2003, the Seattle district office referred the case to the National Institute for Occupational Safety and Health to determine whether the employee's lung cancer was "at least as likely as not" related to his covered employment. However, the case was returned on July 26, 2006, based on the designation on June 26, 2006 by the Secretary of Health and Human Services (HHS), of certain NTS employees as an addition to the Special Exposure Cohort (SEC).

On October 26, 2006, the Seattle district office issued a recommended decision to accept your claim based on the condition of liver cancer. The district office concluded that under Part B, the employee is a member of the SEC, and he was diagnosed with liver cancer which is a specified cancer under the Act. The district office further concluded that a determination that a DOE contractor employee is entitled to compensation for an occupational illness under Part B is treated for purposes of Part E as a determination that the employee contracted that illness through exposure at a DOE facility. The district office also concluded that you are the surviving spouse of the employee, and you are entitled to compensation in the amount of $150,000.00 under Part B, and $125,000.00 under Part E, for a total amount of $275,000.00. Further, the district office concluded that you are entitled to reimbursement of **[Employee]**'s medical expenses under Part B and E, from October 28, 2002 (the date he filed his claim) until his date of death.

The evidence of record also includes a letter you signed on October 20, 2006, in which you indicated that neither you nor your spouse have filed a lawsuit or received a settlement based on the claimed exposure to radiation. You also indicated that you and your spouse have never filed for or received any payments, awards or benefits from a state workers' compensation claim for the claimed illness, or pled

guilty to or been convicted of any charges connected with an application for or receipt of federal or state workers' compensation. Further, you indicated that your spouse had no minor children or children incapable of self-support who were not your natural or adopted children at the time of his death.

On October 30, 2006, the FAB received written notification from you indicating that you waived all rights to file objections to the findings of fact and conclusions of law in the recommended decision. After considering the evidence of record, the FAB hereby makes the following:

FINDINGS OF FACT

1. On October 28, 2002, **[Employee]** filed a claim for benefits under EEOICPA. **[Employee]** died on May 31, 2003, and his claim was administratively closed.
2. On October 21, 2003, you filed a claim for survivor benefits under EEOICPA.
3. You are the surviving spouse of the employee.

4. The employee worked at the NTS, a covered DOE facility, for an aggregate of 250 work days, from May 25, 1957 to June 29, 1957; from October 1, 1958 to November 5, 1958; from June 13, 1960 to June 24, 1960; from August 29, 1961 to November 20, 1961; and from January 3, 1962 to September 10, 1962; and at the PPG from May 1, 1958 to June 30, 1962; and at the NTS with EG&G from March 21, 1963 to May 1, 1963; from November 13, 1963 to November 26, 1963; from February 10, 1964 to February 10, 1964; from May 5, 1964 to May 5, 1964; from August 11, 1964 to August 11, 1964; from November 3, 1964 to November 3, 1964; from January 21, 1965 to May 11, 1965; from July 21, 1965 to July 21, 1965; and from October 12, 1965 to October 12, 1965. This employment qualifies **[Employee]** as a member of the SEC.

5. The employee was diagnosed with hepatocellular carcinoma (liver cancer), which is a specified cancer, on July 22, 2002, after starting work at a DOE facility.
6. The evidence of record supports a causal connection between the employee's death due to renal failure, liver failure and hepatocellular carcinoma and his exposure to radiation at a DOE facility.

Based on the above-noted findings of fact, the FAB hereby also makes the following:

CONCLUSIONS OF LAW

Section 30.316(a) of the EEOICPA regulations provides that, if the claimant waives any objections to all or part of the recommended decision, the FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part. *See* 20 C.F.R. § 30.316(a). You waived your right to file objections to the findings of fact and conclusions of law contained in the recommended decision issued on your claim for compensation benefits under EEOICPA.

On June 26, 2006, the Secretary of HHS designated a class of certain employees as an addition to the SEC, *i.e.*, DOE employees or DOE contractor or subcontractor employees who worked at the NTS from January 27, 1951 through December 31, 1962, for a number of work days aggregating at least 250 work days, either solely under this employment or in combination with work days within the parameters (excluding aggregate work day requirements) established for other classes of employees included in the SEC, and who were monitored or should have been monitored. This addition to the SEC became effective July 26, 2006.

The employment evidence is sufficient to establish that the employee was employed at the NTS for an aggregate of at least 250 work days of covered SEC employment, as he worked from May 25, 1957 to June 29, 1957; from October 1, 1958 to November 5, 1958; from June 13, 1960 to June 24, 1960; from August 29, 1961 to November 20, 1961; and from January 3, 1962 to September 10, 1962.

The employee was a member of the NTS addition to the SEC pursuant to § 7384l(14) of the Act, who was diagnosed with liver cancer, which is a specified cancer under § 7384l(17)(A) of the Act, and is therefore a "covered employee with cancer" under § 7384l(9)(A) of the Act. *See* 42 U.S.C. §§ 7384l(14), 7384l(17)(A) and 7384l(9)(A). Further, you are the surviving spouse of the employee under § 7384s(e)(1)(A) and you are entitled to compensation in the amount of $150,000.00. 42 U.S.C. §§ 7384s(e)(1)(A), 7384s(a)(2).

The determination that a DOE contractor employee is entitled to compensation under Part B is treated for purposes of Part E that the employee contracted that illness through exposure at a DOE facility. *See* 42 U.S.C. § 7385s-4(a).

The evidence of record establishes that the employee was a "covered DOE contractor employee" as defined by § 7385s(1) in accordance with § 7385s-4(a); and the employee was diagnosed with a "covered illness," liver cancer, as defined by § 7385s(2). Further, it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing the death of the employee. You are the employee's covered spouse as defined by § 7385s-3(d)(1) and you are entitled to compensation in the amount of $125,000.00 pursuant to § 7385s-3(a)(1). *See* 42 U.S.C. §§ 7385s(1), 7385s(2), 7385s-4(a), 7385s-3(d)(1) and 7385s-3(a)(1).

Accordingly, you are entitled to compensation in the total amount of $275,000.00.

In addition, you are entitled to medical benefits related to the employee's cancer under Parts B and E of EEOICPA, retroactive to the employee's application date of October 28, 2002, and up to May 31, 2003, the date the employee died. *See* 42 U.S.C. §§ 7384s(b) and 7385s-8.

Seattle, Washington

Kelly Lindief, Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 72816-2007 (Dep't of Labor, April 7, 2008)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch (FAB) concerning the claimant's claims for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the recommended decision to deny the claims is reversed and both claims for survivor benefits under Part B of EEOICPA are accepted.

STATEMENT OF THE CASE

On October 11, 2005, **[Claimant #1 and Claimant #2]** filed claims for survivor benefits under Parts B and E of EEOICPA as the children of **[Employee]**, hereinafter referred to as the employee. **[Claimant #1 and Claimant #2]** identified gall bladder and skin cancers and gastrointestinal hemorrhage as the claimed conditions for the employee. On June 15, 2006, FAB issued a final decision, finding that **[Claimant #1 and Claimant #2]** were not covered children as defined under Part E of EEOICPA. Therefore, their claims for survivor benefits under Part E were denied.

[Claimant #1] stated on the Form EE-3 that the employee was employed as a carpenter at the Nevada Test Site[1] from 1940 to 1961. The Department of Energy (DOE) verified the employee's employment as a carpenter with Reynolds Electrical and Engineering from March 12, 1953 to April 17, 1953, and from April 30, 1957 to July 19, 1957 at the Nevada Test Site.

[Claimant #1 and Claimant #2] submitted a death certificate, which indicated the employee died on February 5, 1987, that the cause of death was gastrointestinal hemorrhage, and that he was widowed at the time of his death. A death certificate for **[Employee's Child]**, father's name was **[Employee]**, was submitted. **[Claimant #1]** submitted a birth certificate, which indicated the employee was her father. A birth certificate for **[Claimant #2]** indicated the employee was his father. An Order for Name Change dated May 16, 1979 indicated that **[Claimant #2]**'s name was changed to **[Claimant #2]**.

A March 10, 1987 autopsy report, from Drs. Stephen Ovanessoff and Roy I. Davis, indicated a final autopsy diagnosis of hepatocellular carcinoma with direct invasion of the gallbladder.

To determine the probability of whether the employee sustained his cancer in the performance of duty, the district office referred the case to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction. The dose reconstruction was based on the periods of employment at the Nevada Test Site from March 12, 1953 to April 17, 1953 and from April 30, 1957 to July 19, 1957. On July 3, 2007 and August 12, 2007, respectively, **[Claimant #1 and Claimant #2]** signed Form OCAS-1 indicating that they had reviewed the NIOSH Draft Report of Dose Reconstruction and agreed that it identified all of the relevant information that they provided to NIOSH.

The district office received the final NIOSH Report of Dose Reconstruction dated August 24, 2007. The district office used the information provided in this report to determine that there was a 15.57% probability that the employee's liver cancer was caused by radiation exposure at the Nevada Test Site.

On August 31, 2007, the Seattle district office issued a recommended decision finding that the employee's cancer was not "at least as likely as not" caused by employment at the Nevada Test Site. Therefore, the district office concluded that **[Claimant #1 and Claimant #2]** were not entitled to compensation under Part B of EEOICPA.

OBJECTIONS

On October 10, 2007, FAB received **[Claimant #2]**'s October 10, 2007 objection to the recommended decision and request for an oral hearing. On January 8, 2008, a hearing was held to hear the objections of **[Claimant #1 and Claimant #2]**. However, the equipment to record the hearing malfunctioned and another hearing was held by telephone on February 20, 2008.

During the January 8, 2008 hearing, **[Claimant #2]** submitted a four-page letter in support of his

objections. This letter was read at both the January 8, 2008 and February 20, 2008 hearings. One of his objections was regarding the finding that **[Claimant #1 and Claimant #2]** were not "covered" children as that term is defined under Part E of EEOICPA. With reference to this objection, FAB issued a final decision, finding that **[Claimant #1 and Claimant #2]** were not "covered" children as defined under Part E. Therefore, their claims for survivor benefits under Part E were denied. After FAB has issued a final decision pursuant to 20 C.F.R. § 30.316, only the Director for Division of Energy Employees Occupational Illness Compensation may reopen a claim and return it to FAB for issuance of new decision. 20 C.F.R. § 30.320. There is no intervening Director's Order regarding **[Claimant #1 and Claimant #2]**'s claims for survivor benefits under Part E of EEOICPA. Therefore, no new final decision will be issued on their claims for benefits under Part E.

During the February 20, 2008 hearing, **[Claimant #1]** indicated that the employee lived on site during his employment at the Nevada Test Site. In support of this statement, she indicated that the employee "made a custom or habit of staying at a camp site near his work place if the distance was too far to travel." In addition, she indicated that the employee had an old truck and that it was always breaking down.

Effective July 26, 2006, the Secretary of Health and Human Services designated certain employees of the Nevada Test Site in Mercury, Nevada as members of the Special Exposure Cohort (SEC), who were employed for a number of work days aggregating at least 250 work days, either solely under this employment or in combination with work days of employment occurring within the parameters established for classes of employees included in the SEC, based on work performed for the period from January 27, 1951 to December 31, 1962.

As noted above, DOE verified the employee's employment as a carpenter with Reynolds Electrical and Engineering from March 12, 1953 to April 17, 1953 and from April 30, 1957 to July 19, 1957 at the Nevada Test Site. However, in a review of records from DOE a Personnel Action Slip from Reynolds Electrical and Engineering was found that indicated a date of hire of April 3, 1957. A July 19, 1957 Radiation Exposure memo indicated that the employee was exposed to radiation from April 3, 1957 to June 30, 1957. Based upon the foregoing information, the correct periods of employment are March 12, 1953 to April 17, 1953 and from April 3, 1957 to July 19, 1957. In addition, the following documents were submitted by DOE:

1. A March 12, 1953 application for employment, which indicated a home address in Las Vegas, Nevada and a temporary address in Mercury, Nevada.

2. A May 3, 1957 application for employment, which indicated a home address in Las Vegas, Nevada and a temporary address in Mercury, Nevada.

3. A June 17, 1957 accident report indicated a mailing address in Mercury, Nevada.

Pursuant to EEOICPA Bulletin No. 06-16 (issued September 12, 2006), if the employee was present (either worked or lived) on site at the Nevada Test Site for a 24-hour period in a day, the claims examiner is to credit the employee with the equivalent of three (8-hour) work days. If there is evidence that the employee was present on site at the Nevada Test Site for 24 hours in a day for 83 days, the employee would have the equivalent of 250 work days and would meet the 250 work day requirement for the SEC. In addition, the Nevada Test Site includes the town of Mercury, which is located in the southwest corner of the site.

The preponderance of evidence of record establishes that the employee lived and worked at the Nevada Test Site from March 12, 1953 to April 17, 1953 and from April 3, 1957 to July 19, 1957. These periods represent a total of 101 work days. Crediting the employee with three days of exposure for each day worked, the employee would have had 303 days of exposure during the periods from March 12, 1953 to April 17, 1953 and from April 3, 1957 to July 19, 1957.

There were other objections to the denial of survivor benefits under Part B of EEOICPA; however, they are not being addressed because the evidence of record is sufficient to accept **[Claimant #1 and Claimant #2]**'s claims for survivor benefits under Part B of EEOICPA.

On their claims for survivor benefits, **[Claimant #1 and Claimant #2]** indicated that neither they nor the employee had filed any lawsuits or received any settlements or awards for the employee's claimed condition. In addition, **[Claimant #1 and Claimant #2]** indicated that there are no other living children of the employee.

After considering the evidence of record, FAB hereby makes the following:

FINDINGS OF FACT

1. **[Claimant #1 and Claimant #2]** filed claims for survivor benefits under Parts B and E of EEOICPA.

2. On June 15, 2006, FAB issued a final decision, finding that **[Claimant #1 and Claimant #2]** were not "covered" children as defined under Part E of EEOICPA.

3. The employee was employed and lived at the Nevada Test Site for at least 250 workdays, by Reynolds Electrical and Engineering, from March 12, 1953 to April 17, 1953 and from April 30, 1957 to July 19, 1957.

4. The employee was first diagnosed liver cancer on February 5, 1987.

5. The employee was widowed on his February 5, 1987 date of death.

6. **[Claimant #1 and Claimant #2]** are the surviving children of the employee.

Based on these facts, the undersigned hereby makes the following:

CONCLUSIONS OF LAW

Section 30.316(b) of the EEOICPA regulations provides that "if the claimant objects to all or part of the recommended decision, the FAB reviewer will issue a final decision on the claim after either the hearing or the review of the written record, and after completing such further development of the case as he or she may deem necessary." 20 C.F.R. § 30.316(b). The undersigned has reviewed the record, including **[Claimant #1 and Claimant #2]**'s objections, and concludes that no further investigation is warranted.

On July 12, 2006, the Secretary of Health and Human Services designated the following class of employees as an addition to the SEC: "Department of Energy (DOE) employees or DOE contractor or

subcontractor employees who worked at the Nevada Test Site in Mercury, Nevada from January 27, 1951 to December 31, 1962 and who were employed for a number of work days aggregating at least 250 work days, either solely under this employment or in combination with work days of employment occurring within the parameters (excluding aggregate work day requirements) established for other classes of employees included in the SEC." This designation became effective July 26, 2006. *See* 71 Fed. Reg. 44298 (August 4, 2006).

The evidence of record supports that the employee worked for a DOE contractor and lived at the Nevada Test Site in excess of 250 workdays from March 12, 1953 to April 17, 1953 and from April 3, 1957 to July 19, 1957, which is during the relevant period of the SEC class. This employment qualifies him for inclusion within the SEC. As a member of the SEC who was diagnosed with liver cancer, which is a "specified cancer" pursuant to 20 C.F.R. § 30.5(ff) and constitutes an "occupational illness" under 42 U.S.C. § 7384l(15), he meets the definition of a "covered employee with cancer." 42 U.S.C. § 7384l(9). **[Claimant #1 and Claimant #2]** are the employee's only eligible surviving beneficiaries, as defined at 42 U.S.C. § 7384s(e)(1)(B). As an eligible survivor of a "covered employee with cancer, I conclude that their claims for survivor benefits should be accepted and that **[Claimant #1 and Claimant #2]** are each entitled to $75,000.00 for a total of $150,000.00 in compensation benefits under Part B of EEOICPA.

Washington, DC

Tom Daugherty

Hearing Representative

Final Adjudication Branch

[1] The Nevada Test Site is a DOE facility from 1951 to present according to the DOE Facility List (http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/findfacility.cfm).

EEOICPA Fin. Dec. No. 75271-2007 (Dep't of Labor, August 29, 2007)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning the claimants' claims for survivor benefits under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, FAB accepts and approves the claims for compensation under Part B of EEOICPA.

STATEMENT OF THE CASE

On January 26, 2006, the claimants each filed a Form EE-2 claiming for survivor benefits under EEOICPA as surviving children of **[Employee]**, based on the condition of chondrosarcoma (bone cancer). They submitted a copy of **[Employee]**'s death certificate, which indicates his marital status was "divorced" at the time of his death on January 29, 2002 due to chondrosarcoma with lung metastases. They also provided copies of their birth certificates showing that they are children of **[Employee]**. **[Claimant #1]** also provided copies of her marriage certificates documenting her changes of name.

[Claimant #1 and Claimant #2] submitted medical evidence including a pathology report showing **[Employee]** had a diagnosis of metastatic high grade chondrosarcoma on December 19, 2001.

A representative of the Department of Energy (DOE) verified that **[Employee]** was employed by the U.S. Geological Survey (USGS) at the Grand Junction Field Office from August 8, 1951 to March 8, 1978, and stated that he was issued dosimetry badges associated with USGS at the Nevada Test Site on 66 separate occasions between November 5, 1958 and July 11, 1966. Additionally, other official government records including security clearances, applications for federal employment, and personnel actions were submitted, indicating that **[Employee]** was employed by USGS and resided in Mercury, Nevada from September 25, 1958 to June 11, 1962. Mercury, Nevada was a town that was within the perimeter of the Nevada Test Site and housed those who worked at the site.

On May 18, 2007, the Seattle district office issued a recommended decision to accept **[Claimant #1 and Claimant #2]**'s claims based on the employee's condition of chondrosarcoma. The district office concluded that the employee was a member of the Special Exposure Cohort (SEC), and was diagnosed with chondrosarcoma (bone cancer), which is a "specified" cancer under EEOICPA. The district office therefore concluded that **[Claimant #1 and Claimant #2]** were entitled to compensation in equal shares in the total amount of $150,000.00 under Part B.

The evidence of record includes letters received by FAB on May 23 and June 1, 2007, signed by **[Claimant #2 and Claimant #1**, respectively, whereby they both indicated that they have never filed for or received any payments, awards, or benefits from a lawsuit, tort suit, third party claim, or state workers' compensation program, based on the employee's condition. Further, they confirmed that they have never pled guilty to or been convicted of fraud in connection with an application for, or receipt of, federal or state workers' compensation.

On May 26 and June 6, 2007, FAB received written notification from **[Claimant #2 and Claimant #1]**, respectively, indicating that they waive all rights to file objections to the findings of fact and conclusions of law in the recommended decision.

After considering the evidence of record, FAB hereby makes the following:

FINDINGS OF FACT

1. On January 26, 2006, **[Claimant #1 and Claimant #2]** filed claims for survivor benefits under EEOICPA.
2. **[Claimant #1 and Claimant #2]** provided sufficient documentation establishing that they are the eligible surviving children of **[Employee]**.
3. A representative of DOE verified that **[Employee]** was issued dosimetry badges for his employment at the Nevada Test Site, a covered DOE facility, in association with USGS, a DOE contractor, from November 5, 1958 to July 11, 1966.
4. **[Employee]** was diagnosed with chondrosarcoma (bone cancer), which is a "specified" cancer under EEOICPA, on December 19, 2001, after beginning employment at a DOE facility.
5. The evidence of record supports a causal connection between the employee's cancer and his exposure to radiation and/or a toxic substance at a DOE facility while employed in covered employment under EEOICPA.

Based on the above-noted findings of fact, FAB hereby also makes the following:

CONCLUSIONS OF LAW

Section 30.316(a) of the regulations provides that, if the claimant waives any objections to all or part of the recommended decision, FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part. *See* 20 C.F.R. § 30.316(a). **[Claimant #1 and Claimant #2]** waived their right to file objections to the findings of fact and conclusions of law contained in the recommended decision issued on their claims for survivor benefits under EEOICPA.

On June 26, 2006, the Secretary of HHS designated a class of certain employees as an addition to the SEC: DOE employees or DOE contractor or subcontractor employees who worked at the Nevada Test Site between January 27, 1951 and December 31, 1962, for a number of work days aggregating at least 250 work days, either solely under this employment or in combination with work days within the parameters (excluding aggregate work day requirements) established for other classes of employees included in the SEC, and who were monitored or should have been monitored. This addition to the SEC became effective July 26, 2006.

The employment evidence in this case is sufficient to establish that the employee was present at the Nevada Test Site for an aggregate of at least 250 work days, from September 1958 through at least November 2, 1962, and qualifies him as a member of the SEC. However, for this employment to be considered covered employment, it must also be determined that the employee was employed at a DOE facility by DOE, a DOE contractor, subcontractor or vendor. In this regard, the case was referred to the Branch of Policies, Regulations and Procedures (BPRP) for review and determination.

In its written determination dated August 6, 2007, BPRP indicated that a civilian employee of a state or federal government agency can be considered a "DOE contractor employee" if the government agency employing that individual is: (1) found to have entered into a contract with DOE for the accomplishment of services it was not statutorily obligated to perform; and (2) DOE compensated that agency for that activity. *See* EEOICPA Bulletin No. 03-26 (issued June 3, 2003). BPRP evaluated the evidence of record including the following pertinent documents:

- An October 5, 1956 letter from the Acting Director for USGS to the Director of Finance of the AEC's Albuquerque Operations Office, which states:

  > In accordance with an agreement between our respective agencies, an advance of funds $56,400 is requested to finance the 1957 fiscal year program to be performed by the Geological Survey for the Division of Military Application (DMA).[1]

- AEC Staff Paper 944/33. This September 1957 document shows clearly that it was the AEC's DMA that had oversight over the USGS geological work at the NTS.

- A document dated March 23, 1959, from the United States Department of the Interior Geological Survey summarizing a letter to the AEC Albuquerque Operations Office. The summary states in part:

  > Advised that your draft rewrite of Memorandum of Understanding No. AT(29-2)-474, has been reviewed and is acceptable to the GS except for following changes in Article IV, Budgeting & Finance. Also request that the amount available for NTS work in fiscal year 1959 be increased from

$750,000 to 837,000 and that available for the GNOME program be increased from $85,000 to $91,000.

- A June 26, 1959 letter from the Director of USGS to **[Employee]**, complimenting him on his efforts at the NTS and forwarding to him a letter from the AEC's Albuquerque Operations Office in which the AEC provides general compliments to USGS for their work at NTS during 1958.

- A technical report entitled, "A Summary Interpretation of Geologic, Hydrologic, and Geophysical Data for Yucca Valley, Nevada Test Site, Nye County, NV," detailing the work and outcome of the work performed by USGS at the Nevada Test Site. The report states that the work was undertaken at the behest of the AEC and also states, "Compilation of data, preparation of illustration, and writing of the report were completed during the period of December 26, 1958 to January 10, 1959. Some of the general conclusions must be considered as tentative until more data are available."

- Correspondence from 1957 between USGS and the AEC Raw Materials Division (not the Division of Military Application). These letters show that USGS provided assistance to the AEC in prospecting for uranium on the Colorado Plateau and other locations.

These documents clearly show that there was an agreement for payment, by which USGS performed work for the AEC at the Nevada Test Site.

BPRP then turned to the final issue to be addressed, which was whether the work performed by USGS at the Nevada Test Site was work that USGS was not statutorily obligated to perform. A review of the USGS website[2] showed that since being founded in 1879, its statutory obligations have changed. Primarily, its function has been topographical mapping and gathering information pertaining to soil and water resources. Also, with advances in science, USGS has similarly evolved to meet these changes. The USGS website makes it clear that in the post-war era, USGS was grappling to keep up its scientific pace and that it did so, in part, with money from the Defense Department, the AEC, and from the states. Further, BPRP noted that since the formation of USGS, legislation has changed its statutory obligations over the years, whereby seven legal changes to the USGS statutory obligations pertain in some way to DOE or its predecessor agencies. These changes include: geothermal energy; gathering information on energy and mineral potential; geological mapping of potential nuclear reactor sites and geothermal mapping; working with the Energy Research and Development Administration, a DOE predecessor, on coal hydrology; consulting with DOE on locating a suitable geological repository for the storage of high-level radioactive waste and a retrievable storage option; monitoring the domestic uranium industry; and to cooperate with DOE and other federal agencies on "continental scientific drilling".

Today, USGS describes itself in the following manner:

As the Nation's largest water, earth, and biological science and civilian mapping agency, the U.S. Geological Survey (USGS) collects, monitors, analyzes, and provides scientific understanding about natural resource conditions, issues, and problems. The diversity of our scientific expertise enables us to carry out large-scale, multi-disciplinary investigations and provide impartial scientific information to resource managers, planners, and other customers.

As described, while providing geological support to DOE may be part of what USGS is statutorily

obligated to perform in 2007, the totality of the evidence suggests this was not always true. Therefore, BPRP concluded that the Memorandum of Understanding between USGS and the AEC constituted a contract by which USGS provided services to the AEC that USGS was not statutorily obligated to perform through at least 1961, the last year of which their analysis pertained.

In considering the above analysis and determination, FAB concludes that **[Employee]** is a member of the SEC and was diagnosed with chondrosarcoma, which is a "specified" cancer (bone), and is, therefore, a "covered employee with cancer." *See* 42 U.S.C. §§ 7384l(14)(C), 7384l(17), 7384l(9)(A). **[Claimant #1 and Claimant #2]** are the eligible survivors of **[Employee]** as defined under EEOICPA, and are entitled to equal shares of the total compensation amount of $150,000.00. *See* 42 U.S.C. §§ 7384s(e) and 7384s(a)(1).

Accordingly, **[Claimant #1 and Claimant #2]** are each entitled to compensation in the amount of $75,000.00.

Seattle, Washington

Kelly Lindlief

Hearing Representative

Final Adjudication Branch

[1] The AEC's Division of Military Application (DMA) was the division responsible for nuclear weapons testing.

[2] Http://www.usgs.gov/aboutusgs/.

EEOICPA Fin. Dec. No. 55286-2006 (Dep't of Labor, August 22, 2008)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning your claims for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the FAB accepts the claims of **[Claimant #1]**, **[Claimant #2]**, and **[Claimant #3]** for compensation under Part B of EEOICPA in the amount of $150,000.00 ($50,000.00 payable to each) for the employee's occupational illness of prostate cancer metastasized to the bone.

STATEMENT OF THE CASE

On September 20, 2002, **[Employee's spouse]** filed a Form EE-2 with the Division of Energy Employees Occupational Illness Compensation (DEEOIC) and a Form DOE F 350.3 with the Department of Energy (DOE), seeking benefits as the surviving spouse of **[Employee]**. **[Employee's spouse]** identified the claimed conditions of prostate cancer and bone cancer. On May 8, 2003, **[Employee's spouse]** died and her claim was administratively closed under Part B on March 31, 2004, and under Part E on October 6, 2005.

[Claimant #1] (on March 10, 2004), **[Claimant #2]** (on April 5, 2004), and **[Claimant #3]** (on April 5, 2004) each submitted a Form EE-2 with DEEOIC as the surviving children of **[Employee]**. They

claimed **[Employee]** developed prostate cancer and bone cancer as a result of his employment at the Hanford site.

[Employee's spouse] had submitted a Form EE-3 in which she alleged that **[Employee]** was employed at the Hanford site as a truck driver with E.I. DuPont Nemours & Company (Du Pont) from December 1943 to December 1944, with General Electric Company (GE) as a millwright from July 6, 1954 to January 3, 1965, and as a millwright with Battelle-Northwest (Battelle) at the Pacific Northwest National Laboratory (PNNL) from January 4, 1965 to July 8, 1983. A representative of DOE verified that **[Employee]** was employed at the Hanford site, a DOE facility, by DuPont, a DOE contractor, from December 14, 1943 to December, 1944, and by GE, another DOE contractor, as a millwright from July 6, 1954 to December 31, 1964, and with Battelle at PNNL, a second DOE facility, from January 4, 1965 to July 29, 1983. The Oak Ridge Institute for Science and Education (ORISE) database contained information verifying that **[Employee]** was employed at the Hanford site starting on July 6, 1954. DOE records establish that **[Employee]** had worked in Area 200 West during his employment at the Hanford site.

The medical evidence of record includes a pathology report, dated October 3, 1988, in which Dr. Thomas D. Mahony diagnosed prostate cancer. The medical evidence of record also includes a whole body bone scan conducted on September 27, 1988, which noted the metastases of the prostate cancer to the bone of the skull, ribs, thoracic vertebra, pelvis and right femur.

The evidence of record includes a copy of the employee's death certificate, which indicates that **[Employee]** was married at the time of his death on October 4, 1991 to **[Employee's spouse]**. You also submitted a copy of **[Employee's spouse]**'s death certificate. **[Employee]**'s death certificate lists the cause of his death on October 4, 1991 as arrhythmia due to myocardial infarction, coronary heart disease, and cancer of the prostate metastases. In support of your claims, you each submitted a copy of your birth certificate showing that you are the biological children of **[Employee]** and that **[Claimant #1]** was born on May 26, 1957, **[Claimant #2]** was born on October 4, 1941, and that **[Claimant #3]** was born on March 3, 1950. At the time of the employee's death on October 4, 1991, **[Claimant #1]** was 34 years old, **[Claimant #2]** was 50 years old, and **[Claimant #3]** was 41years old. **[Claimant #1]** produced sufficient evidence to show the change in her surname.

To determine the probability that **[Employee]**'s prostate cancer was sustained in the performance of duty, the Seattle district office referred the case to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction. In a prior final decision dated May 8, 2006, the FAB denied the Part B claims of **[Claimant #1], [Claimant #2]**, and **[Claimant #3]** because there was only a 24.78% probability that the employee's prostate cancer was caused by radiation exposure at the Hanford site. The FAB concluded that **[Employee]** did not qualify as a covered employee with cancer under Part B, that the dose reconstruction estimates and the probability of causation calculations were performed according to EEOICPA and its regulations, and that **[Claimant #1]**, **[Claimant #2],** and **[Claimant #3]** were not entitled to survivor benefits under Part B of EEOICPA.

On March 29, 2007, NIOSH issued OCAS-PEP-012 Rev-00, entitled "Program Evaluation Plan: Evaluation of Highly Insoluble Plutonium Compounds." It was NIOSH's determination that the existence of the highly insoluble plutonium compound at the Hanford site should be considered Type Super S plutonium in dose reconstructions for employees at that site. The PEP provided NIOSH's plan for evaluating dose reconstructions for certain claims to determine the impact of highly insoluble plutonium compounds at particular sites. The change went into effect on February 6, 2007. *See* EEOICPA Bulletin No. 07-19 (issued May 16, 2007).

On April 2, 2008, a Director's Order was issued vacating the FAB's May 8, 2006 final decision and reopening the Part B claims of **[Claimant #1]**, **[Claimant #2]**, and **[Claimant #3]** for further development. The Director's Order instructed the Seattle district office to forward the case to NIOSH for rework of the employee's dose reconstruction pursuant to EEOICPA Bulletin No. 07-27 (issued August 8, 2007).

On April 7, 2008, your claims were returned to NIOSH for rework of the employee's radiation dose reconstruction; however the dose reconstruction was not completed following the addition of a particular class of Hanford employees to the Special Exposure Cohort (SEC).

On May 30, 2008, the Secretary of Health and Human Services (HHS) designated a class of employees at the Hanford site for inclusion in the SEC. This designation went into effect on June 29, 2008. The class consists of all employees of DOE, its predecessor agencies, and DOE contractors or subcontractors who worked from: (1) September 1, 1946 though December 31, 1961 in the 300 area; or (2) January 1, 1949 through December 31, 1968 in the 200 areas (East and West) at the Hanford Nuclear Reservation in Richland, Washington for a number of work days aggregating at least 250 work days occurring either solely under this employment or in combination with work days within the parameters established for one or more other classes of employees in the SEC.

On July 18, 2008, the Seattle district office recommended acceptance of your claims for survivor benefits under Part B, concluding that the employee is a member of the above-noted addition to the SEC, since he was employed at Hanford for an aggregate of 250 days or more during the SEC period and was diagnosed with prostate cancer that metastasized to the bone. Secondary (metastatic) bone cancer is a "specified" cancer under EEOICPA. The district office concluded that **[Claimant #1]**, **[Claimant #2]**, and **[Claimant #3]** are the surviving children of the employee and entitled to survivor benefits under Part B of the Act, in the amount of $150,000.00, to be divided equally among them in the amount of $50,000.00 each.

On July 21, 2008, the FAB received written notification from **[Claimant #2]** indicating that neither he, nor anyone in his family, had ever filed for or received any payments, awards, or benefits from a lawsuit, tort suit, third-party claim or state workers' compensation claim in relation to **[Employee]**'s cancer. **[Claimant #2]** stated that he has never pled guilty to or been convicted of fraud in connection with an application for or receipt of federal or state workers' compensation. Further, he averred that other than **[Claimant #1]** and **[Claimant #3]**, there were no other individuals who might qualify as a survivor of **[Employee]**. On July 21, 2008, the FAB also received **[Claimant #2]**'s written notification indicating that he waived all rights to file objections to the findings of fact and conclusions of law in the July 18, 2008 recommended decision.

On July 22, 2008, the FAB received written notification from **[Claimant #1]** indicating that neither she, nor anyone in her family, had ever filed for or received any payments, awards, or benefits from a lawsuit, tort suit, third party claim or state workers' compensation claim in relation to **[Employee]**'s cancer. **[Claimant #1]** further stated that she has never pled guilty to or been convicted of fraud in connection with an application for or receipt of federal or state workers' compensation. Further, she averred that other than **[Claimant #2]** and **[Claimant #3]**, there were no other individuals who might qualify as a survivor of **[Employee]**. On July 22, 2008, the FAB also received **[Claimant #1]**'s written notification indicating that she waived all rights to file objections to the findings of fact and conclusions of law in the July 18, 2008 recommended decision.

On July 24, 2008, the FAB received written notification from **[Claimant #3]** indicating that neither he, nor anyone in his family, had ever filed for or received any payments, awards, or benefits from a lawsuit, tort suit, third party claim or state workers' compensation claim in relation to **[Employee]**'s cancer. **[Claimant #3]** further stated that he has never pled guilty to or been convicted of fraud in connection with an application for or receipt of federal or state workers' compensation. Further, he indicated that other than **[Claimant #2]** and **[Claimant #1]**, there were no other individuals who might qualify as a survivor of **[Employee]**. On July 24, 2008, the FAB also received **[Claimant #3]**'s written notification indicating that he waived all rights to file objections to the findings of fact and conclusions of law in the July 18, 2008 recommended decision.

After considering the evidence of record, the FAB hereby makes the following:

FINDINGS OF FACT

1. On September 20, 2002, **[Employee's spouse]** filed a claim for benefits under EEOICPA as the surviving spouse of **[Employee]**. **[Employee's spouse]** died on May 8, 2003, and her claim was administratively closed under Part B on March 31, 2004, and under Part E on October 6, 2005.
2. **[Claimant #1], [Claimant #2]** and **[Claimant #3]** each submitted claims for survivor benefits under EEOICPA, as the surviving children of **[Employee]**.
3. **[Claimant #1], [Claimant #2]** and **[Claimant #3]** are the biological children of **[Employee]**. **[Claimant #1]**, **[Claimant #2]** and **[Claimant #3]** are the only children and eligible survivors of the employee.
4. The employee worked at the Hanford site, with DuPont from December 14, 1943 to December 31, 1944, with GE from July 6, 1954 to December 31, 1964, and at PNNL with Battelle from January 4, 1965 to July 29, 1983. The employee was monitored for radiation exposures and worked in Area 200 West during his employment at the Hanford site. This employment met or exceeded 250 aggregate work days, and qualifies **[Employee]** as a member of the SEC.
5. The employee was diagnosed with metastatic bone cancer of the skull, ribs, thoracic vertebra, pelvis, and right femur, which is a "specified" cancer, on September 27, 1988, after starting work at a DOE facility.
6. **[Claimant #1]**, **[Claimant #2]** and **[Claimant #3]** each stated that they, or anyone in their family, had never filed for or received any settlement or award from a lawsuit, tort suit, or third-party claim in relation to the illnesses claimed. **[Claimant #1]**, **[Claimant #2]** and **[Claimant #3]** have never pled guilty to or been convicted of any charges connected with an application for or receipt of federal or state workers' compensation, nor have they or anyone in their family ever filed for or received any payments, awards, or benefits for a state workers' compensation claim in relation to **[Employee]**'s cancer.

Based on the above noted findings of fact, the FAB hereby also makes the following:

CONCLUSIONS OF LAW

Section 30.316(a) of the EEOICPA regulations provides that, if the claimant waives any objections to all or part of the recommended decision, the FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part. *See* 20 C.F.R. § 30.316(a). **[Claimant #1]**, **[Claimant #2]** and **[Claimant #3]** waived their right to file objections to the findings of fact and conclusions of law contained in the July 18, 2008 recommended decision issued on their claims for benefits under EEOICPA.

In order to be afforded coverage under Part B of EEOICPA, you must establish that **[Employee]** has been diagnosed with an occupational illness incurred as a result of his exposure to silica, beryllium, and/or radiation. Further, the illness must have been incurred while he was in the performance of duty for DOE or certain of its contractors. The evidence of record indicates that the employee worked in covered employment at Hanford from December 14, 1943 to December 31, 1944, and from July 6, 1954 to December 31, 1964, and at PNNL from January 4, 1965 to July 29, 1983 in Area 200 West. The period of employment from July 6, 1954 to December 31, 1961 exceeds the 250-day requirement as set forth in the SEC designation. The medical evidence submitted in support of the claim shows that **[Employee]** was diagnosed with metastatic bone cancer of the skull, ribs, thoracic vertebra, pelvis and right femur, which is a "specified" cancer, on September 27, 1988, which was more than 5 years after his initial exposure to radiation.

Accordingly, the employee is a member of the SEC and is a "covered employee with cancer" under § 7384l(9)(A) of EEOICPA. *See* EEOICPA Bulletin No. 08-33 (issued June 30, 2008). Further, **[Claimant #1]**, **[Claimant #2]** and **[Claimant #3]** are the surviving children of the employee as defined by § 7384s(e)(1)(B) and are entitled to compensation in the amount of $150,000.00, to be divided equally.

Seattle, Washington

Keiran Gorny

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 59466-2007 (Dep't of Labor, December 15, 2006)

NOTICE OF FINAL DECISION

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

STATEMENT OF THE CASE

On July 12, 2004, you filed a claim for survivor benefits under EEOICPA, Form EE-2, and DOE F 350.3, as the surviving beneficiary of **[Employee]** (hereinafter referred to as the employee). The condition you claimed the employee developed as a result of his employment at a DOE facility was lung cancer. On Form EE-3 (Employment History), you indicated that the employee was employed from June 1, 1950 to May 31, 1986 at the Ames Laboratory, in Ames, Iowa. You stated he worked in production maintenance. The Department of Energy verified the employee was employed by Ames Laboratory[1] from May 15, 1951 to July 31, 1986.

In support of your claim as the eligible surviving beneficiary you submitted the employee's death certificate that showed he died as a result of lung cancer on July 23, 1998 at the age of 76. **[Employee's wife]** was noted as the surviving spouse. You submitted a marriage certificate showing **[Employee's**

wife] married **[Employee]** on August 10, 1943. You also submitted a medical report dated November 4, 1996 that provided a diagnosis of lung cancer with metastases to the nodes, liver and adrenal.

The district office evaluated the medical evidence and determined that the claim required referral to the National Institute for Occupational Safety and Health (NIOSH) to perform a dose reconstruction. On November 12, 2004, the district office forwarded a copy of the case file and referral summary to NIOSH to perform a dose reconstruction.

On August 8, 2006, the Secretary of HHS designated the following class for addition to the Special Exposure Cohort (SEC) in a report to Congress:

Department of Energy (DOE) employees or DOE contractor or subcontractor employees who worked at the Ames Laboratory in one or more of the following facilities/locations: Chemistry Annex 1(also known as "the old women's gymnasium" and "Little Ankeny"), Chemistry Annex 2, Chemistry Building (also known as "Gilman Hall"), Research Building, or the Metallurgical Building (also known as "Harley Wilhelm Hall") from January 1, 1942 through December 31, 1954 for a number of work days aggregating at least 250 work days, or in combination with work days within the parameters (excluding aggregate work day requirements) established for one or more classes of employees in the SEC, and who were monitored or should have been monitored.

On November 11, 2006, the Denver district office issued a recommended decision finding that the employee is a member of the SEC, that he was diagnosed with a specified cancer (lung cancer), and you are the only eligible survivor of the employee entitled to compensation in the amount of $150,000.00 under Part B of the Act. Additionally the decision found you are entitled to an additional $125,000.00 in compensation benefits under Part E. The case was transferred to the FAB on the same day.

After considering all evidence in the case, the FAB hereby makes the following:

FINDINGS OF FACT

1. You filed a claim for survivor benefits under EEOICPA.

2. The employee had covered employment at the Ames Laboratory from May 15, 1951 to July 31, 1986.

3. The employee was diagnosed with lung cancer, a specified cancer under the SEC provisions of the Act.

4. The employee worked at the Ames Laboratory for more the 250 days and his cancer was diagnosed more than 5 years after his first employment exposure.

5. The file also contains your signed statement that neither you nor the employee filed for or received any state workers' compensation benefits or filed any lawsuits for the claimed illness or exposure to radiation. The employee did not have any minor children or children incapable of self-support who were not recognized as your natural or adopted children at the time of his death.

Based on the above noted findings of fact in this claim, the FAB hereby makes the following:

CONCLUSIONS OF LAW

Pursuant to 20 C.F.R. § 30.316(a) of the EEOICPA regulations, "If the claimant does not file a written statement that objects to the recommended decision and/or requests a hearing within the period of time allotted in 20 C.F.R. § 30.310, or if the claimant waives any objections to all or part of the recommended decision, the FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part." 20 C.F.R. § 30.316(a). On November 22, 2006, the FAB received written notification you waiving any and all objections to the recommended decision.

On August 8, 2006, the Secretary of HHS designated the following class for addition to the SEC in a report to Congress:

Department of Energy (DOE) employees or DOE contractor or subcontractor employees who worked at the Ames Laboratory in one or more of the following facilities/locations: Chemistry Annex 1(also known as "the old women's gymnasium" and "Little Ankeny"), Chemistry Annex 2, Chemistry Building (also known as "Gilman Hall"), Research Building, or the Metallurgical Building (also known as "Harley Wilhelm Hall") from January 1, 1942 through December 31, 1954 for a number of work days aggregating at least 250 work days, or in combination with work days within the parameters (excluding aggregate work day requirements) established for one or more classes of employees in the SEC, and who were monitored or should have been monitored.

The employee is a member of the SEC as defined by 42 U.S.C. §§ 7384l(14)(C) and 7384q and was diagnosed with a specified cancer, lung cancer. The employee is a "covered employee with cancer" as defined in 42 U.S.C. § 7384l(9)(A).

The FAB hereby finds the employee was a covered DOE contractor employee with a covered illness who contracted that illness through exposure at a DOE facility pursuant to 42 U.S.C. § 7385s-4(a).

You have established that you are the eligible survivor of the employee as defined by 42 U.S.C. § 7384s(e)(1)(A) and are entitled to $150,000.00. You are also entitled to $125,000.00 under § 7385s-3(a)(1). You are entitled to $275,000.00 in total compensation.

The evidence in the record establishes that the employee met the criteria of a covered employee with cancer. You have established that you are the eligible survivor of the employee. It is the decision of the FAB to accept your claim.

Denver, Colorado

Sandra Vicens-Pecenka, Hearing Representative

Final Adjudication Branch

[1] According to the Department of Energy's (DOE) website at http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist, the Ames Laboratory in Ames, IA is a covered DOE facility from 1942 to present.

EEOICPA Fin. Dec. No. 71273-2006 (Dep't of Labor, July 14, 2006)

NOTICE OF FINAL DECISION FOLLOWING A DIRECTOR'S ORDER

This is the decision of the Final Adjudication Branch (FAB) concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA or the Act), 42 U.S.C. § 7384 *et seq*. Your claim is approved under Part B in the amount of $150,000.00 and under Parts B and E for medical benefits.

STATEMENT OF THE CASE

On August 18, 2005, you filed a claim (Form EE-1) for benefits under EEOICPA with the Paducah resource center. On the EE-1, you identified cancer of the parotid gland as the diagnosed condition for which you sought compensation. A pathology report, dated January 7, 1993, and a consultation report, dated January 18, 1993 confirm your diagnosis of adenocarcinoma of the salivary gland, left parotid.

On the Employment History (Form EE-3), you stated that you worked at the Mallinckrodt Destrehan Street Plant (MCW)[1] from April 15, 1950 through December 1, 1989. During your occupational history interview, you stated that you worked at MCW's Destrehan Street Facility in the Uranium Division from 1953 through 1954 and in the Chemical Division from 1950 through 1953 then again from 1954 through 1989.

Mallinckrodt was unable to locate your employment file, but verified your dates of employment from April 15, 1951 through November 30, 1989. In particular, MCW verified your employment as a Section Supervisor in the Technical Banch of Mallinckrodt's Uranium Division at the Weldon Spring Plant[2] from April 15, 1951 until 1966 and then in areas unrelated to uranium activites until your retirement from the company.

The Oak Ridge Institue for Science and Education (ORISE) verified your employment at MCW from March 5, 1953 through February 11, 1954. Employment and dosimetry records provided by the Department of Energy (DOE) show your employment at MCW's Destrehan Street Facility from March 5, 1953 through February 17, 1954.

The district office accepted your dates of employment with MCW, from April 15, 1951 through November 30, 1989, to establish that you worked at least 250 work days in the Uranium Division of Mallinckrodt's Destrehan Street facility. As such, and based on your diagnosis of a specified cancer, on January 3, 2006 the Denver district office issued a recommended decision to accept your claim pursuant to 42 U.S.C. §§ 7384s(a), 7384t and 7385s-8. On January 17, 2006, the FAB received written notification that you waive any and all objections to the January 3, 2006 recommended decision.

On February 16, 2006, the FAB issued a remand order concluding that the evidence of record establishes your employment with Mallinckrodt from April 15, 1951 through November 30, 1989 and that during the period from March 5, 1953 through February 17, 1954 you worked in the Uranium Division of MCW's Destrehan Street Facility which is less than the 250 work days required to establish membership in the Special Exposure Cohort (SEC). As such, the FAB remanded your claim to the district office for further employment development to ascertain whether the duration of your employment with MCW occurred in the Uranium Division of MCW's Destrehan Street Facility or occurred at the Weldon Spring Plant, as verified by Mallinckrodt.

On June 29, 2006, the Director of DEEOIC issued a Director's Order vacating the February 6, 2006 remand order. The Director's Order concluded that the AEC did not enter into a contract with MCW to operate the Weldon Spring Plant until June of 1957; therefore, any reference to uranium work performed by Mallinckrodt prior to June 1957 would have occurred at the Destrehan site. Accordingly, the Director's Order further concluded that you were employed in Mallinckrodt's Uranium Division for the period of at least 1951 through 1957. As such, your case file was returned to the FAB with instructions to issue a new final decision.

After considering the evidence of record and your waiver of objections, the FAB hereby makes the following:

FINDINGS OF FACT

1. You filed a claim under the EEOICPA on August 15, 2005.

2. You worked for a covered contractor, Mallinckrodt, at a covered facility, the Destrehan Street Plant, during a covered period, from April 15, 1951 through November 30, 1989.

3. You are a member of the SEC for having worked for at least 250 days in the Uranium Division of Mallinckrodt's Destrehan Street Plant from 1951 through 1957.

4. You were diagnosed with a specified cancer, adenocarcinoma of the salivary gland on January 7, 1993.

Based on the above noted findings of fact, the FAB hereby also makes the following:

CONCLUSIONS OF LAW

By the authority granted under 42 U.S.C. § 7384l(14)(C) effective November 13, 2005, employees of the DOE or DOE contractors or subcontractors employed by the Uranium Division of Mallinckrodt Chemical Works, Destrehan Street Facility, were added to the SEC providing that the employee worked between 1949 and 1957 and was employed for a number of work days aggregating at least 250 work days either solely under this employment or in combination with work days within the parameters (excluding aggregate work day requirements) established for other classes of employees included in the SEC. EEOICPA Bulletin No. 06-05 (issued December 27, 2005). Based on your confirmed employment in the Uranium Division at the Mallinckrodt Chemical Works, Destrehan Street Facility during the specified period, the evidence is sufficient to establish that you are a member of the SEC

To facilitate a claim for cancer under Part B, the Act explains that a "covered employee with cancer" is, among other things, "An individual with a specified cancer who is a member of the SEC, if and only if that individual contracted that specified cancer after beginning employment at a DOE facility. . . ." 42 U.S.C. § 7384l(9)(A). Primary cancer of the salivary gland is identified as a specified cancer pursuant to 20 C.F.R. § 30.5(ff)(5)(iii)(J) of the implementing regulations providing that the onset was at least 5 years after first exposure. The medical evidence shows that you were diagnosed with adenocarcinoma of the salivary gland over five years after your first exposure to radiation at Mallinckrodt's Destrehan Street Facility Uranium Division. As such, the evidence of record establishes you are a "covered employee with cancer" as defined above entitled to compensation payable under Part B.

To facilitate a claim under Part E, the Act defines a "covered DOE contractor employee" as a DOE contractor employee determined to have contracted a covered illness through exposure at a DOE facility. 42 U.S.C. § 7385s(1). In order to establish that the employee contracted an illness through toxic exposure, § 7385s-4 provides that "A determination under part B that a Department of Energy contractor employee is entitled to compensation under that part for an occupational illness shall be treated for purposes of this part as a determination that the employee contracted that illness through exposure at a DOE facility." 42 U.S.C. § 7385s-4(a). Based on your employment with a covered contractor and the acceptance of your claim for adenocarcinoma of the salivary gland under Part B of the EEOICPA in this decision, it is further determined that you contracted cancer of the salivary gland due to exposure to a toxic substance at a DOE facility. As such, you meet the statutory definition of a "covered DOE contractor employee," as defined above and are entitled to compensation payable under Part E.

Accordingly, your claim for compensation under EEOICPA in the amount of $150,000.00 under 42 U.S.C. § 7384s and medical benefits under 42 U.S.C. §§ 7384t and 7385s-8 is hereby approved.

Washington, DC

Vawndalyn B. Feagins, Hearing Representative

Final Adjudication Branch

[1] Mallinckrodt Chemical Co., Destrehan St. Plant (MCW) is identified on the DOE Covered Facility List as a DOE facility from 1942 through 1962 and in 1995 for remediation.

[2] The Weldon Spring Plant is listed on the DOE Covered Facility List as a DOE facility from 1955 through 1967 and from 1975 through the present for remediation with Mallinckrodt listed as a covered contractor from 1957 through 1966.

EEOICPA Fin. Dec. No. 82961-2008 (Dep't of Labor, March 27, 2008)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning the above claims for compensation under Parts B and E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, FAB accepts and approves the claims for benefits **[of Claimant #1, 2, 3, 4 and 5]** under Part B for the employee's epiglottis cancer, and awards compensation to those five persons in the total amount of $150,000.00, to be divided equally.

Further, FAB also accepts the claim of **[Claimant #5]** under Part E, and awards her additional compensation in the amount of $125,000.00.

STATEMENT OF THE CASE

On October 19, 2004, **[Employee's Spouse]** filed a Form EE-2 with the Department of Labor claiming for survivor benefits under Part B as the employee's widow, and a request for review by Physicians Panel under former Part D with the Department of Energy (DOE), based on the conditions of throat cancer and emphysema with possible chronic beryllium disease. The record includes a copy of **[Employee]**'s death certificate indicating he died on September 1, 1990 due to acute

bronchopneumonitis, with a contributing factor of coronary artery disease.

[Employee's Spouse] also submitted a Form EE-3 in which she alleged that **[Employee]** worked at the Los Alamos National Laboratory (LANL) from 1970 to 1980. DOE verified **[Employee]**'s employment at LANL as a security guard with the Atomic Energy Commission (AEC) from May 15, 1972 to January 9, 1981, and as a part-time employee with the University of California, a DOE contractor, as a Casual Messenger/Driver, from August 23, 1973 to October 29, 1973.

On October 16, 2005, **[Employee's Spouse]** died, and her claim was administratively closed.

On December 13, 2006, **[Claimant #1]** and **[Claimant #2]** each filed a Form EE-2 based on the employee's throat cancer, and on January 4, 2007, **[Claimant #3]**, **[Claimant #4]** and **[Claimant #5]** each filed a Form EE-2. Each claimed benefits as the surviving child of **[Employee]**.

[Claimant #2], **[Claimant #3]** and **[Claimant #4]** provided copies of their birth certificates showing they are the biological children of **[Employee],** and copies of their marriage certificates to document their changes in surname. **[Claimant #1]** provided a copy of a birth certificate identifying her name as **[Claimant #1's birth name]** and her parents as **[Claimant #1's Father on her birth certificate]** and **[Claimant #1's Mother on her birth certificate],** a Certificate of Baptism identifying her parents as **[Employee]** and **[Employee's Spouse],** letters from acquaintances stating that **[Employee and Employee's Spouse]** were her biological parents and that she was adopted by her grandparents, and marriage certificates to document her change in surname. The record contains adoption documents showing that **[Claimant #5]** was born on April 11, 1973, and was adopted by **[Employee and Employee's Spouse]**.

Medical documentation in the record includes a document from the New Mexico cancer registry that provides a diagnosis of cancer of the epiglottis on April 25, 1989; a January 11, 2005 letter from Dr. Charles McCanna, in which he indicated that **[Employee]** died from complications of epiglottis (throat) cancer; another letter from Dr. McCanna stating that the employee's medical records are no longer available; and a letter from St. Vincent Hospital dated January 24, 2005, indicating that their records had been destroyed.

On June 5, 2007, the Seattle district office referred the case to the National Institute for Occupational Safety and Health (NIOSH) to determine whether the employee's cancer of the epiglottis was "at least as likely as not" related to his covered employment. However, the case was returned on March 14, 2008 so the district office could review it to determine if the employee was included in the designation by the Secretary of Health and Human Services (HHS) of certain LANL employees as an addition to the Special Exposure Cohort (SEC).

On September 11, 2007, FAB issued a final decision on the Part E claims of **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]**, concluding that these claimants are not eligible "covered" children under Part E.

On March 14, 2008, the Seattle district office received information from a Department of Labor Health Physicist (HP) on the question of whether cancer of the epiglottis is a "specified" cancer. The HP stated the following:

National Office recently reviewed medical evidence to determine whether the epiglottis is a part of the pharynx. 20 C.F.R. § 30.5(ff)(5)(iii)(E) indicates that pharynx cancer is a "specified cancer" under EEOICPA. The National Cancer Institute (NCI) states that pharyngeal cancer is a cancer that forms in the tissues of the pharynx, and that the pharynx consists of the hollow tube inside the neck that starts behind the nose and ends at the top of the windpipe and esophagus. The National Office determined that because the location of the epiglottis is technically within the area encompassed by the pharynx, the epiglottis is a specified cancer.
On the same date, the district office issued a recommended decision to accept the claims **[of Claimant #1, 2, 3, 4 and 5]** under Part B based on the employee's cancer of the epiglottis, and to also accept the claim of **[Claimant #5]** under Part E. The district office concluded that **[Employee]** is a member of the SEC, that he was employed by a DOE contractor at a DOE facility, that he is a covered employee with a covered illness under Part E, and that he was diagnosed with epiglottis cancer, which is a "specified" cancer. The district office also concluded that as his eligible survivors, **[Claimant #1, 2, 3, 4 and 5]** are entitled to compensation under Part B, in the total amount of $150,000.00, to be divided equally. Further, the district office concluded that a determination that a DOE contractor employee and qualified member of the SEC is entitled to compensation for an occupational illness under Part B is treated for purposes of Part E as a determination that the employee contracted that illness through exposure at a DOE facility, and since **[Claimant #5]** was under the age of 18 at the time of **[Employee]**'s death, she is the only eligible survivor under Part E and is entitled to compensation in the amount of $125,000.00.

The claimants each indicated on their respective Forms EE-2 that neither they nor anyone in their family had ever filed for or received any proceeds from either a tort suit or a state workers' compensation claim related to the employee's epiglottis cancer, that they had never pled guilty to or been convicted of any charges connected with an application for or receipt of federal or state workers' compensation, and that they did not know of any other persons who may also be eligible to receive compensation under EEOICPA as a survivor of **[Employee]**.

On March 20, 2008, FAB received written notification from **[Claimant #1, 2, 4 and 5]**, indicating that they waive all rights to file objections to the findings of fact and conclusions of law in the recommended decision. On March 24, 2008, FAB received written notification from **[Claimant #3]**, indicating she also waives all rights to file objections to the findings of fact and conclusions of law in the recommended decision.

After considering the evidence of record, FAB hereby makes the following:

FINDINGS OF FACT

1. On December 13, 2006 **[Claimant #1]**and **[Claimant #2]**; and on January 4, 2007 **[Claimant #3]**, **[Claimant #4]** and **[Claimant #5]** each filed a claim for survivor benefits under EEOICPA.
2. **[Employee]** was diagnosed with epiglottis cancer on April 25, 1989.
3. **[Employee]** died on September 1, 1990, due to acute bronchopneumonitis, with a contributing factor of coronary artery disease; which were complications of his epiglottis (throat) cancer.
4. **[Employee]** worked at LANL as a security guard with the AEC from May 15, 1972 to January 9, 1981, and with the University of California, as a Casual Messenger/Driver, from August 23, 1973 to October 29, 1973.
5. There is a causal connection between the employee's death due to epiglottis cancer and his exposure to radiation and/or a toxic substance at a DOE facility.
6. **[Claimant #1, 2, 3, 4 and 5]** are the eligible children of **[Employee]** under Part B.

7. **[Claimant #5]** was 17 years of age at the time of **[Employee]**'s death.
8. All five claimants indicated on their respective Form EE-2 that neither they nor anyone in their family had ever filed for or received any proceeds from a tort suit or a state workers' compensation claim related to the employee's epiglottis cancer, that they had never pled guilty to or been convicted of any charges connected with an application for or receipt of federal or state workers' compensation, and that they did not know of any other persons who may also be eligible to receive compensation under EEOICPA as a survivor of [**Employee]**.

Based on the above-noted findings of fact, FAB hereby also makes the following:

CONCLUSIONS OF LAW

Section 30.316(a) of the regulations provides that, if the claimant waives any objections to all or part of the recommended decision, FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part. *See* 20 C.F.R. § 30.316(a). All five claimants waived their right to file objections to the findings of fact and conclusions of law contained in the recommended decision issued on their claims.

In order for him to be considered a covered Part B employee, the evidence must establish that **[Employee]** was diagnosed with an occupational illness incurred as the result of his exposure to silica, beryllium, or radiation, and those illnesses are cancer, beryllium sensitivity, chronic beryllium disease, and chronic silicosis. *See* 42 U.S.C. § 7384l(15); 20 C.F.R. § 30.110(a). Further, EEOICPA requires that the illness must have been incurred while the employee was "in the performance of duty" for DOE or certain of its vendors, contractors, subcontractors, or for an atomic weapons employer. *See* 42 U.S.C. §§ 7384l(4)-(7), (9), and (11).

On June 22, 2007, the Secretary of HHS designated a new class of employees as an addition to the SEC, consisting of DOE employees or DOE contractor or subcontractor employees who were monitored or should have been monitored for radiological exposures while working in operational Technical Areas with a history of radioactive material use at LANL for a number of work days aggregating at least 250 work days from March 15, 1943 through December 31, 1975, or in combination with work days within the parameters established for one or more classes of employees in the SEC. The new SEC class became effective on July 22, 2007.

The employment evidence is sufficient to establish that **[Employee]** was employed at LANL for an aggregate of at least 250 work days, as a security guard, and therefore he is considered to be an eligible member of the class of employees who worked at LANL from March 15, 1943 through December 31, 1975 that was added to the SEC.

[Employee] is a member of the SEC who was diagnosed with epiglottis cancer, which is cancer of a part of the pharynx (a "specified" cancer), more than 5 years after his initial exposure, and therefore he is a "covered employee with cancer." *See* 42 U.S.C. §§ 7384l(14)(C), 7384l(17), 7384l(9)(A) and 20 C.F.R. § 30.5(ff)(5)(iii)(E). Therefore, as the employee is now deceased, the five claimants are entitled to compensation in the total amount of $150,000.00, divided in equal shares of $30,000.00 each. *See* 42 U.S.C. § 7384s(a) and (e).

purposes of Part E, as a determination that the employee contracted that illness through exposure at a DOE facility. *See* 42 U.S.C. § 7385s-4(a). Consequently, **[Employee]**'s illness is deemed to be a "covered illness" contracted through exposure to toxic substances at a DOE facility. The medical evidence also establishes that epiglottis cancer was one of the causes of **[Employee]**'s death. As the employee would have been entitled to compensation for his covered illness under Part E; and it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing the death of the employee, his eligible survivors would be entitled to compensation pursuant to 42 U.S.C. § 7385s-3(a)(1). **[Claimant #5]** was 17 years of age at the time of **[Employee]**'s death, and is the only eligible survivor pursuant to § 7385s-3(d), and therefore she is entitled to compensation in the amount of $125,000.00. *See* 42 U.S.C. §§ 7385s-3(a)(1), 7385s-3(d).

Seattle, Washington

Keiran Gorny

Hearing Representative

Final Adjudication Branch

Membership not found

EEOICPA Fin. Dec. No. 87969-2008 (Dep't of Labor, November 19, 2008)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch (FAB) concerning the above claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claim for survivor benefits under Part B and Part E of EEOICPA is denied.

STATEMENT OF THE CASE

On June 22, 2007, **[Claimant]** filed a claim for benefits under EEOICPA as the surviving spouse of **[Employee]**. **[Claimant]** identified kidney cancer and a "lung condition" as the conditions resulting from the employee's work at a Department of Energy (DOE) facility. On the claim form, **[Claimant]** indicated that the employee had worked at a location with a class of employees in the Special Exposure Cohort (SEC).

[Claimant] submitted an Employment History (Form EE-3) stating that the employee was employed by the Department of the Army and/or the Atomic Energy Commission (AEC) at the Iowa Ordnance Plant (IOP) in Burlington, Iowa (also known as the Iowa Army Ammunition Plant (IAAP)) from 1936 to 1976. **[Claimant]** indicated that the employee worked on Line 1 and on other lines and facilities on site as a Laborer in 1936, a Security Guard from 1936-1939, a Quality Control Supervisor from 1944-1952, and a Quality Control Supervisor from 1952-1976. The portion of the IAAP considered a DOE facility includes the buildings and property/grounds of the IAAP identified as "Line 1." Line 1 of the IAAP encompasses a cluster of several buildings that were utilized for AEC activities. On July 26,

2007, DOE indicated that the employee worked for the Department of Defense (DOD) at the IAAP from September 9, 1960 to September 20, 1960 and from June 8, 1961 to September 22, 1961. DOE indicated that it could find no evidence that the employee worked for the AEC at the AEC part of the plant.

[Claimant] submitted a marriage certificate confirming that she married the employee on January 25, 1935. **[Claimant]** also submitted the employee's death certificate, signed by Dr. Sherman Williams, which indicated that the employee died on May 21, 1996 at the age of 84. The death certificate listed the cause of death as congestive heart failure due to pneumonia, and listed **[Claimant]** as the employee's surviving spouse. **[Claimant]** also submitted medical information in support of her claim. A July 2, 1992 pathology report by Dr. J.G. Lyday noted that the employee was diagnosed with renal cell adenocarcinoma on June 29, 1992.

The evidence of record includes information from the U. S. Department of Labor's Site Exposure Matrices (SEM) database. The SEM database provides information regarding occupational categories, process operations, building and area locations, toxic substances, incidents, and the locations at the facility where the occupational categories performed their job duties, the locations of the toxic substances, and the locations of various incidents of exposure. The SEM database includes the occupational category of security guard. The SEM database identifies Buildings AX-1, and AX-2, both on Line 1, as locations where a security guard would work. SEM identifies Line 1, Building 1-62 as a location where a fireman would work, and identifies Line 1 Building 1-70 and Building 1-99 as locations where a Foreman for Explosives Storage would work. This was independently verified by the undersigned on October 20, 2008. A needs assessment from the Burlington AEC Plant Former Worker Program also confirms that these labor categories were associated with Line 1.

The evidence of record also includes a Department of the Army document dated October 1, 1963, entitled "Permit to other Federal Government Department or Agency to Use Property on Iowa Army Ammunition Plant, Iowa." The permit indicates that the Army granted the AEC a revocable permit to use certain buildings and land within the IOP for a ten-year period, subject to conditions, including that the AEC pay the Army's cost for "producing and supplying any utilities and other services furnished" for the AEC's use.

On November 30, 2007, the Cleveland district office issued a decision recommending denial of **[Claimant]**'s claim under both Parts B and E of EEOICPA because the evidence did not show that the employee was a "DOE contractor employee" as defined at 42 U.S.C. § 7384l(11).

OBJECTIONS

On January 7, 2008, FAB received **[Claimant]**'s objections to the November 30, 2007 recommended decision. Along with her letter, **[Claimant]** submitted new factual evidence. **[Claimant]**'s letter also explained that since her authorized representative had not been copied on the district office's correspondence, the evidence had not been submitted earlier. On June 14, 2008, **[Claimant]** submitted the following relevant evidence to FAB with her objection letter in support of her claim: an April 19, 1974 letter from Lieutenant Colonel C. Frederick Kleis of the Department of the Army to the employee expressing appreciation for his service at the IAAP; an April 19, 1974 certificate of retirement, signed by Lieutenant Colonel Kleis, recognizing the employee's retirement from the federal service; a June 1, 1942 certificate from the IOP that recognized the employee's completion of training as a Plant Guard; a December 19, 1967 certificate issued to the employee (as an employee at the IAAP) by the AMC

Ammunition School, Savanna Army Depot upon his completion of a Quality Assurance Course; a Department of the Army Certificate of Service presented to the employee on May 29, 1963 for 20 years of federal service; a copy of Day & Zimmerman, Inc., IOP, Retired Employees Reunion badge dated May 17, 1986; and a Form DA-2496, dated April 1, 1974, that provided the employee's AMC career record maintained at the Tobyhanna Army Depot. The form indicated that the employee was employed by the Department of Army at the IAAP in Burlington, Iowa beginning June 29, 1943.

In summary, **[Claimant]** stated the following objections:

Objection 1: [Claimant] objected that the Findings of Fact numbered 4, 5, 6 and 7 in the November 30, 2007 recommended decision were incorrect. Finding of Fact No. 4 stated that "DOE verified **[Employee]** worked at the DOD part of the IOP from September 9, 1960 to September 20, 1960 and from June 8, 1961 to September 22, 1961." Finding of Fact No. 5 stated that "[t]he district office did not receive sufficient employment evidence to establish that the employee worked on Line 1 at the IOP during the SEC period." Finding of Fact No. 6 stated that "[t]he district office has not received evidence establishing entitlement to compensation on the basis of qualifying employment and a specified cancer for purposes of the SEC." Finding of Fact No. 7 stated that the district office advised **[Claimant]** of the deficiencies in her claim and provided her the opportunity to correct them."

[Claimant] requested an oral hearing to express her objections to the recommended decision and to review the records of the employee's work history. A hearing on her objections to the recommended decision was held before a FAB Hearing Representative on March 11, 2008 in Burlington, Iowa, with **[Claimant]**, **[Claimant]**'s son and authorized representative, another of **[Claimant]**'s sons, and her daughter-in-law in attendance. At the hearing, **[Claimant]**'s son and authorized representative testified that the employee's computation date for his employment at the IOP was 1943 but that he actually started working at the IOP in 1942 as a guard, and that the employee retired from the IOP in 1974. **[Claimant]**'s son also testified that **[Claimant]** was employed at the hospital as head nurse, that **[Claimant]** rode to work with the employee, and that **[Claimant]** knew that there was a time that the employee worked on Line 1. He stated that the documents indicate that the employee worked at the plant for 10,800 days and noted that the SEC requirement is 250 days. He stated that the employee's pay increase records, which he submitted after the hearing, prove the employee's length of employment. He explained that the DOE evidence indicating that the employee worked at the IOP from September 9, 1960 to September 20, 1960 and from June 8, 1961 to September 22, 1961 was erroneous and reflected his own employment at the plant. He explained that the mix-up by DOE occurred due to the fact that he and the employee have the same name. **[Claimant]**'s son testified that he obtained and reviewed the employee's employment records at the plant from 1942 through 1974. He submitted an email dated February 25, 2008, marked as Exhibit 1, from Marek Mikulski of the Burlington AEC Plant Former Workers Program, which confirms that DOE incorrectly verified the employee's employment at the Plant, by providing the employment dates of the employee's son, who also worked at the plant.

[Claimant]'s son testified that the employee worked at the fire department at the plant, and thus had access to Line 1. He testified that he lunched with the employee at Line 1. He stated that **[Claimant]** drove the employee to work every day and dropped him off at the guard gate at Line 1. He stated that the records submitted, including the employee's job descriptions, have numerous references to the employee having access to all lines at the IOP. **[Claimant]**'s son also read information from several affidavits into the record, noting that the actual affidavits would be submitted immediately after the hearing. He identified a photograph, submitted with the objection letter, of the employee wearing a badge that stated "all areas."

At the hearing, **[Claimant]** presented the following documents as evidence: a Department of the Army job description for an "Ammunition Loading Inspector, Leader," dated April 20, 1960; a Department of the Army job description for an "Ammunition Loading Inspector, Lead Foreman," dated February 15, 1965; a Department of the Army job description for an "Ammunition Loading Inspector, Lead Foreman," dated July 19, 1955; a Department of the Army Certificate of Training for "One Year Firefighter-Guard Training" given at the IOP dated May 29, 1950; a Department of Army Form 873, Certificate of Clearance dated May 29, 1957 from IOP; a Department of the Army Notification of Personnel Action dated October 30, 1950, which reflects the promotion of **[Employee]** from Guard (Crew Chief) to Guard (Captain); an affidavit by a friend of the employee who attested that the employee worked all over the IOP as a guard-quality control; an affidavit by a work associate of the employee who attested that he worked at the IOP on Line 1 as a guard and quality control from 1960 to April 1974, and that she and the employee had lunch and worked together on Line 1; an affidavit of a work associate of the employee who attested that she worked for the employee in the Quality Assurance Department on all lines; an affidavit by **[Claimant]**'s son and authorized representative, who identified himself as a work associate and son of the employee. In this affidavit, **[Claimant]**'s son and authorized representative attested that the employee worked in Quality Assurance and as a Guard at the IAAP as a federal employee. He stated that he knew this because he was employed to cut grass on Line 1 and that he had lunch with the employee there. He stated that the employee had clearance to be on Line 1 because he was not required to be accompanied by a guard. **[Claimant]** also submitted an affidavit by **[Claimant]**'s other son, who attested that his father worked at the AEC at IOP from December 1942 to April 1974 as a Guard and Quality Control supervisor; and her own affidavit, in which she attested that the employee worked at the IOP on Line 1. **[Claimant]** also attested that the employee was a Guard and Quality Control Supervisor working throughout the plant with access to all Lines. **[Claimant]** further stated that she rode to work with the employee and often let him off at Line 1 while she continued on to her job at the hospital.

A copy of the hearing transcript was sent to **[Claimant]** on March 24, 2008, who provided additional comments on the hearing transcript. On April 11, 2008, FAB received **[Claimant]**'s son and authorized representative's letter expressing his disappointment in the hearing because **[Claimant]** was not provided an opportunity to discover evidence from the Department of Labor indicating that the employee did not work on Line 1 for at least 250 days. **[Claimant]**'s son also provided a copy of Congressman Dave Loebsack's March 19, 2008 inquiry to the Department of Labor regarding the status of **[Claimant]**'s claim. The letter also referred to the FAB Hearing Representative's March 25, 2008 call confirming that kidney cancer is a "specified cancer." He stated his concern that the exhibits submitted at the hearing were not reproduced in the hearing transcript, and emphasized that the exhibits were more probative than the hearing testimony. He provided a summary of the content of the six affidavits and personnel records submitted at the hearing and expressed concern whether the documentation would be reviewed and considered.

Response: The additional documents **[Claimant]** submitted with her objections and at the hearing establish that the employment dates provided for the employee by DOE were incorrect and, in fact, reflected the employment dates of the employee's son, who also worked at the plant. Based on the new evidence **[Claimant]** submitted, a new finding has been made below that the employee was employed by the Department of the Army at the IAAP in Burlington, Iowa from June 29, 1943 to April 1, 1974.

from February 11, 1952 to at least June 20, 1959 as an ammunition loading inspector in the Inspection Division; from August 6, 1950 to February 10, 1952 as a Captain in the Guard Department; and from June 29, 1947 to May 27, 1949 as an Ammunition & Equipment Storage Foreman in the Transportation & Storage Division. **[Claimant]** submitted, with her objection, a June 20, 1959 Government employment application with a handwritten resume, signed by the employee. The application states he was employed at the IOP from June 29, 1947 to May 27, 1949 as an Ammo & Equipment Storage Foreman in the Transportation and Storage Division. A May 27, 1948 Application for Federal Employment, signed by the employee, states he was employed at the IOP as a Munitions Handler Foreman beginning June 1947; a Material Receiver and Checker from January 1947 to June 1947; a Guard from May 1946 to January 1947; and a Guard from December 1942 to May 1944 (shell and bomb loading). An October 30, 1950 Department of the Army Notification of Personnel Action reflects the promotion of the employee from Guard (Crew Chief) to Guard (Captain).

[Claimant] provided additional documentation, including EE-4 affidavits, work records for the employee, and testimony at the hearing indicating that the employee was employed by the Department of the Army at the IAAP from June 29, 1943 to April 1, 1974 and that the employee worked on Line 1 for at least 250 days during March 1949 through 1974. The evidence reflects that the employee was diagnosed with renal cell adenocarcinoma on June 29, 1992. All of the evidence **[Claimant]** submitted with her objections and at the hearing has been reviewed and considered by FAB

Objection 2: [Claimant] stated that the claim adjudication process was frustrating and difficult. She expressed her dissatisfaction with the way some of the claims examiners handled her claim.

Response: It is regrettable that **[Claimant]** experienced some difficulty during the processing of her claim. The Division of Energy Employees Occupational Illness Compensation (DEEOIC) customer service policy affirms DEEOIC's commitment to serving its customers with excellence. It is DEEOIC's responsibility to work with its customers to improve the practical value of the information, services, products, and distribution mechanisms it provides and the importance of interacting proactively with customers, identifying their needs, and integrating these needs into DEEOIC program planning and implementation. The highest level of customer service is expected in all dealings with individuals conducting business with DEEOIC. As representatives of DEEOIC, all staff members are expected to be courteous, professional, flexible, honest and helpful.

After considering the written record of the claim, **[Claimant]**'s letters of objection, along with the testimony and objections presented at the hearing, FAB hereby makes the following:

FINDINGS OF FACT

1. **[Claimant]** filed a claim for survivor benefits under EEOICPA on June 12, 2007.

2. The employee was employed by the Department of the Army at the IOP from June 29, 1943 to April 1, 1974. The employee worked for at least 250 work days on Line 1 during the period March 1949 through 1974.

3. The employee was diagnosed with renal cell adenocarcinoma on June 29, 1992.

4. The employee died on May 21, 1996 as a consequence of congestive heart failure due to pneumonia. **[Claimant]** is the surviving spouse of the employee.

5. An October 1, 1963 permit indicates that the Army granted the AEC a revocable permit to use certain buildings and land within the IOP for a ten year period, subject to conditions, including that the AEC pay the Army's cost in "producing and supplying any utilities and other services furnished" for the AEC's use. The permit did not obligate the Army to provide any specific services to the AEC, and does not in itself constitute a contract for the provision of services between the Army and the AEC by which the AEC paid the U.S. Army to provide services on Line 1.

Based on the above-noted findings of fact in this claim, FAB hereby makes the following:

CONCLUSIONS OF LAW

The undersigned has carefully reviewed the testimony, the evidence of record, and the November 30, 2007 recommended decision issued by the Cleveland district office. Based on **[Claimant]**'s objections, testimony at the hearing, and the evidence of record, **[Claimant]**'s survivor claim for benefits under Parts B and E for the employee's kidney cancer and "lung condition" is denied.

Part B of EEOICPA provides benefits to eligible current or former employees of DOE, and certain of its vendors, contractors and subcontractors, and to survivors of such individuals. To be eligible, an employee must have sustained cancer, chronic silicosis, beryllium sensitivity or chronic beryllium disease while in the performance of duty at a covered DOE facility, atomic weapons employer facility, or a beryllium vendor facility during a specified period of time.

With respect to claims for cancer arising out of work-related exposure to radiation under Part B, the SEC was established by Congress to allow the adjudication of certain claims without the completion of a radiation dose reconstruction. *See* 42 C.F.R. § 83.5 (2007). The Department of Labor (DOL) can move directly to a decision on cases involving a "specified cancer" contracted by a member of the SEC because the statute provides a presumption that specified cancers contracted by a member were caused by the worker's exposure to radiation at a covered facility. A "specified cancer" is any cancer described in the list appearing at 20 C.F.R. § 30.5(ff) (2007).

On June 19, 2005, employees of DOE or DOE contractors or subcontractors employed at the IOP/IAAP (Line 1) during the period March 1949 through 1974 who were employed for a number of work days aggregating at least 250 work days either solely under this employment or in combination with work days within the parameters (excluding aggregate work day requirements) established for other classes of employees in the SEC were added to the SEC. 70 Fed. Reg. 37409 (June 29, 2005).

In order for an employee to be afforded coverage under EEOICPA, the employee must be a "covered employee." 42 U.S.C. § 7384l(11)(B). The evidence of record demonstrates that the employee was employed by the Department of the Army at the IAAP from June 29, 1943 to April 1, 1974, and that he worked for at least 250 work days on Line 1 during the period March 1949 through 1974. He was diagnosed with kidney cancer on June 29, 1992, and kidney cancer is a specified cancer. However, the evidence is insufficient to show that the Department of the Army was a DOE contractor or subcontractor. Consequently, the employee does not qualify as a "covered employee with cancer," under EEOICPA. *See* 42 U.S.C. § 7384l(9)(A).

Part E of EEOICPA provides compensation and medical benefits to DOE contractor employees determined to have contracted a covered illness through exposure to a toxic substance at a DOE

facility. *See* 42 U.S.C. § 7385s(2); 20 C.F.R. § 30.5(p).

The term “Department of Energy contractor employee” means any of the following

(A) An individual who is or was in residence at a Department of Energy facility as a researcher for one or more periods aggregating at least 24 months.

(B) An individual who is or was employed at a Department of Energy facility by—

(i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or

(ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

42 U.S.C. § 7384l(11).

On June 3, 2003, DEEOIC issued EEOICPA Bulletin No. 03-26, which provides guidance to its staff with respect to the adjudication of EEOICPA claims filed by current or former employees of state or federal government agencies seeking coverage as a "DOE contractor employee.” The policy and procedures outlined in this Bulletin only apply to state and federal agencies that have/had a contract or an agreement with DOE. The Bulletin states that a civilian employee of a state or federal government agency can be considered a "DOE contractor employee" if the government agency employing that individual is: (1) found to have entered into a contract with DOE for the accomplishment of one or more services it was not statutorily obligated to perform, and (2) DOE compensated the agency for that activity. Thus, a civilian employee of DOD who meets the criteria required to be considered a DOE contractor employee is not excluded from EEOICPA coverage solely because they were employed by DOD.

The evidence of record includes an October 1, 1963 Department of the Army document entitled “Permit to other Federal Government Department or Agency to Use Property on Iowa Army Ammunition Plant, Iowa.” The permit indicates that the Army granted the AEC a revocable permit to use certain buildings and land within the IAAP for a ten-year period, subject to conditions, including that the AEC pay the Army’s cost in “producing and supplying any utilities and other services furnished” for the AEC’s use. Because the condition did not obligate the Army to provide any specific services to the AEC, it is insufficient to establish that a contract for the provision of services between the Army and the AEC existed by which the AEC paid the U.S. Army to provide services on Line 1 that the Army was not otherwise statutorily obligated to perform.

Section 30.110(c) of the regulations provides that any claim that does not meet all of the criteria for at least one of the categories including a “covered employee” (as defined in § 30.5(p)) as set forth in the regulations must be denied. *See* 20 C.F.R. §§ 30.5(p), 30.110(b) and (c).

The evidence of record does not show that the employee was employed by a DOE contractor or subcontractor as required by 42 U.S.C. § 7384l(11). Accordingly, **[Claimant]**’s claim under EEOICPA is denied.

Washington, D.C.

Susan von Struensee

Hearing Representative

Final Adjudication Branch

Specific employment requirements

EEOICPA Fin. Dec. No. 366-2002 (Dep't of Labor, June 3, 2003)

NOTICE OF FINAL DECISION REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq.* The recommended decision was to deny your claim. You submitted objections to that recommended decision. The Final Adjudication Branch carefully considered the objections and completed a review of the written record. *See* 20 C.F.R. § 30.312. The Final Adjudication Branch concludes that the evidence is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On July 31, 2001, you filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA), stating that you were the daughter of **[Employee]**, who was diagnosed with cancer, chronic silicosis, and emphysema. You completed a Form EE-3, Employment History for Claim under the EEOICPA, indicating that from December 2, 1944 to May 30, 1975, **[Employee]** was employed as a heavy mobile and equipment mechanic, for Alaska District, Corps of Engineers, Anchorage, Alaska.

On August 20, 2001, a representative of the Department of Energy (or DOE) indicated that "none of the employment history listed on the EE-3 form was for an employer/facility which appears on the Department of Energy Covered Facilities List." Also, on August 29, 2001, a representative of the DOE stated in Form EE-5 that the employment history contains information that is not accurate. The information from the DOE lacked indication of covered employment under the EEOICPA.

The record in this case contains other employment evidence for **[Employee]**. With the claim for benefits, you submitted a "Request and Authorization for TDY Travel of DOD Personnel" Form DD-1610, initiated on November 10, 1971 and approved on November 11, 1971. **[Employee]** was approved for TDY travel for three days to perform work on Amchitka Island, Alaska, for the Department of Defense, Alaska District Corps of Engineers beginning on November 15, 1971. He was employed as a Mobile Equipment Mechanic WG-12, and the purpose of the TDY was noted "to examine equipment for potential use on Blair Lake Project." The security clearance was noted as "Secret." You also submitted numerous personnel documents from **[Employee]**'s employment with the Alaska District Corp of Engineers. Those documents include a "Notification of Personnel Action" Form SF-50 stating that **[Employee]**'s service compensation date was December 2, 1944, for his work as a Heavy Mobile Equipment Mechanic; and at a WG-12, Step 5, and that he voluntarily retired on May 30, 1975.

The medical documentation of record shows that **[Employee]** was diagnosed with emphysema, small cell carcinoma of the lung, and chronic silicosis. A copy of **[Employee]**'s Death Certificate shows that he died on October 9, 1990, and the cause of death was due to or as a consequence of bronchogenic cancer of the lung, small cell type.

On September 6 and November 5, 2001, the district office wrote to you stating that additional evidence was needed to show that **[Employee]** engaged in covered employment. You were requested to submit a Form EE-4, Employment History Affidavit, or other contemporaneous records to show proof of **[Employee]**'s employment at the Amchitka Island, Alaska site covered under the EEOICPA. You did not submit any additional evidence and by recommended decision dated December 12, 2001, the Seattle district office recommended denial of your claim. The district office concluded that you did not submit employment evidence as proof that **[Employee]** worked during a period of covered employment as required by § 30.110 of the EEOICPA regulations. *See* 20 C.F.R. § 30.110.

On January 15 and February 6, 2002, you submitted written objections to the recommended denial decision. The DOE also forwarded additional employment information. On March 20, 2002, a representative of the DOE provided a Form EE-5 stating that the employment history is accurate and complete. However, on March 25, 2002, a representative of the DOE submitted a "corrected copy" Form EE-5 that indicated that the employment history provided in support of the claim for benefits "contains information that is not accurate." An attachment to Form EE-5 indicated that **[Employee]** was employed by the Army Corps of Engineers for the period July 25, 1944 to August 11, 1952, at Fort Richardson, Alaska; and from August 11, 1952 to May 30, 1975 at Elmendorf Air Force Base, Alaska. Further, the attachment included clarifying information:

Our records show that the Corps of Engineers' was a prime AEC contractor at Amchitka. **[Employee]**'s Official Personnel Folder (OPF) indicates that he was at Forth Richardson and Elmendorf AFB, both in Alaska. The OPF provided no indication that **[Employee]** worked at Amchitka, Alaska. To the best of our knowledge, Blair Lake Project was not a DOE project.

Also, on April 3, 2002, a representative of the DOE submitted a Form EE-5 indicating that Bechtel Nevada had no information regarding **[Employee]**, but he had a film badge issued at the Amchitka Test Site, on November 15, 1971. The record includes a copy of Appendix A-7 of a "Manager's Completion Report" which indicates that the U. S. Army Corps of Engineers was a prime AEC (Atomic Energy Commission) Construction, Operations and Support Contractor, on Amchitka Island, Alaska.

On December 10, 2002, a hearing representative of the Final Adjudication Branch issued a Remand Order. Noting the above evidence, the hearing representative determined that the "only evidence in the record with regard to the Army Corps of Engineers status as a contractor on Amchitka Island is the DOE verification of its listing as a prime AEC contractor . . . and DOE's unexplained and unsupported verification [of **[Employee]**'s employment, which] are not sufficient to establish that a contractual relationship existed between the AEC, as predecessor to the DOE, and the Army Corps of Engineers." The Remand Order requested the district office to further develop the record to determine whether the Army Corps of Engineers had a contract with the Department of Energy for work on Amchitka Island, Alaska, and if the work **[Employee]** performed was in conjunction with that contract. Further the Remand Order directed the district office to obtain additional evidence to determine if **[Employee]** was survived by a spouse, and since it did not appear that you were a natural child of **[Employee]**, if you could establish that you were a stepchild who lived with **[Employee]** in a regular parent-child relationship. Thus, the Remand Order requested additional employment evidence and proof of eligibility under the Act.

On January 9, 2003, the district office wrote to you requesting that you provide proof that the U.S. Army Corps of Engineers had a contract with the AEC for work **[Employee]** performed on his TDY assignment to Amchitka Island, Alaska for the three days in November 1971. Further, the district office requested that you provide proof of your mother's death, as well as evidence to establish your relationship to **[Employee]** as a survivor.

You submitted a copy of your birth certificate that indicated that you were born **[Name of Claimant at Birth]** on October 4, 1929, to your natural mother and natural father **[Natural Mother]** and **[Natural Father]**. You also submitted a Divorce Decree filed in Boulder County Court, Colorado, Docket No. 10948, which showed that your biological parents were divorced on October 10, 1931, and your mother, **[Natural Mother]** was awarded sole custody of the minor child, **[Name of Claimant at Birth]**. In addition, you submitted a marriage certificate that indicated that **[Natural Mother]** married **[Employee]** in the State of Colorado on November 10, 1934. Further, you took the name **[Name of Claimant Assuming Employee's Last Name]** at the time of your mother's marriage in 1934, as indicated by the sworn statement of your mother on March 15, 1943. You provided a copy of a Marriage Certificate to show that on August 19, 1949, you married **[Husband]**. In addition, you submitted a copy of the Death Certificate for **[Name of Natural Mother Assuming Employee's Last Name]** stating that she died on May 2, 1990. The record includes a copy of **[Employee]**'s Death Certificate showing he died on October 9, 1990.

You also submitted the following additional documentation on January 20, 2003: (1) A copy of **[Employee's]** Last Will and Testament indicated that you, **[Claimant]**, were the adult daughter and named her as Personal Representative of the Estate; (2) Statements by Jeanne Findler McKinney and Jean M. Peterson acknowledged on January 17, 2003, indicated that you lived in a parent-child relationship with **[Employee]** since 1945; (3) A copy of an affidavit signed by **[Name of Natural Mother Assuming Employee's Last Name]** (duplicate) indicated that at the time of your mother's marriage to **[Employee]**, you took the name **[Name of Claimant Assuming Employee's Last Name]**.

You submitted additional employment documentation on January 27, 2003: (1) A copy of **[Employee]**'s TDY travel orders (duplicate); (2) A Memorandum of Appreciation dated February 11, 1972 from the Department of the Air Force commending **[Employee]** and other employees, for their support of the Blair Lake Project; (3) A letter of appreciation dated February 18, 1972 from the Department of the Army for **[Employee]**'s contribution to the Blair Lake Project; and (4) Magazine and newspaper articles containing photographs of **[Employee]**, which mention the work performed by the

U.S. Army Corps of Engineers in Anchorage, Alaska.

The record also includes correspondence, dated March 27, 2003, from a DOE representative. Based on a review of the documents you provided purporting that **[Employee]** was a Department of Energy contractor employee working for the U.S. Army Corps of Engineers on TDY in November, 1971, the DOE stated that the Blair Lake Project was not a DOE venture, observing that "[i]f Blair Lake Project had been our work, we would have found some reference to it."

On April 4, 2003, the Seattle district office recommended denial of your claim for benefits. The district office concluded that the evidence of record was insufficient to establish that **[Employee]** was a covered employee as defined under § 7384l(9)(A). *See* 42 U.S.C. § 7384l(9)(A). Further, **[Employee]** was not a member of the Special Exposure Cohort, as defined by § 7384l(14)(B). *See* 42 U.S. C. § 7384l(14)(B). Also, **[Employee]** was not a "covered employee with silicosis" as defined under §§ 7384r(b) and 7384r(c). *See* 42 U.S.C. §§ 7384r(b) and (c). Lastly, the recommended decision found that you are not entitled to compensation under § 7384s. *See* 42 U.S.C. § 7384s.

On April 21, 2003, the Final Adjudication Branch received your letter of objection to the recommended decision and attachments. First, you contended that the elements of the December 10, 2002 Remand Order were fulfilled because you submitted a copy of your mother's death certificate and further proof that **[Employee]** was your stepfather; and that the letter from the district office on April 4, 2003 "cleared that question on page three – quote 'Our records show that the Corps of Engineers was a prime AEC contractor at Amchitka.'"

Second, you stated that further clarification was needed as to the condition you were claiming. You submitted a death certificate for **[Employee]** showing that he died due to bronchogenic cancer of the lung, small cell type, and noted that that was the condition you alleged as the basis of your claim on your first Form, associated with your claim under the EEOICPA.

Third, you alleged that, in **[Employee]**'s capacity as a "Mobile Industrial Equipment Mechanic" for the Army Corps of Engineers, "he was required to work not only for the DOD (Blair Lake project) but also for DOE on the Amchitka program. For example: on March 5, 1968 he was sent to Seward, Alaska to 'Inspect equipment going to Amchitka.' He was sent from the Blair Lake project (DOD) to Seward for the specified purpose of inspecting equipment bound for Amchitka (DOE). Thus, the DOE benefited from my father's [Corp of Engineers] expertise/service while on 'loan' from the DOD. Since the closure of the Amchitka project (DOE), the island has been restored to its original condition. . . . Therefore, my dad's trip to Amchitka to inspect equipment which might have been used at the Blair Lake project benefited not only DOD but also DOE. In the common law, this is known as the 'shared Employee' doctrine, and it subjects both employers to liability for various employment related issues."

On May 21, 2003, the Final Adjudication Branch received your letter dated May 21, 2003, along with various attachments. You indicated that the U.S. Army Corps of Engineers was a contractor to the DOE for the Amchitka Project, based upon page 319 of an unclassified document you had previously submitted in March 2002. Further, you indicated that **[Employee]** had traveled to Seward, Alaska to inspect equipment used at on-site operations for use on Amchitka Island by the Corps of Engineers for the DOE project, and referred to the copy of the Corps of Engineers TDY for Seward travel you submitted to the Final Adjudication Branch with your letter of April 18, 2003. Also, you indicated that **[Employee]** traveled to Amchitka, Island in November 1972 to inspect the equipment referenced above, which had been shipped from Seward, Alaska. You indicated that **[Employee]** was a mobile industrial equipment mechanic, and that his job required him to travel. You attached the following documents in support of your contention that the equipment **[Employee]** inspected could have included equipment belonging to the Corps of Engineers: Job Description, Alaska District, Corps of Engineers (previously submitted), and an Employee Performance Appraisal.

In addition, you indicated **[Employee]** was required to travel to remote sites throughout Alaska in order to perform his job with the Corps of Engineers, and in support of this you referred to your electronic mail sent to the Seattle District Office on January 7, 2003. You indicated that, since **[Employee]** was required to travel to Amchitka as a part of his regular duties as a mobile industrial equipment mechanic, it was possible that the equipment he inspected on the November 15, 1971 trip to Amchitka included equipment owned by the Corps as well as inspection of equipment owned by private contractors. You attached a copy of a document entitled, "Affidavit," dated May 21, 2003, signed by Erwin L. Long. Mr. Long stated that he was head of the Foundations Material Branch for the Corps of Engineers at the time of his retirement, and that in 1971 he had been Head of the Rock Design Section. Mr. Long indicated that he did not spend any time on Amchitka Island, that he had known **[Employee]** since 1948, and that he "believe[d]" **[Employee]**'s travel to Amchitka for his job would have required him to track equipment belonging to the Corps of Engineers, and that **[Employee]** would also have "performed required maintenance on the equipment before preparing [it] for shipping off Amchitka Island." Mr. Long also stated that **[Employee]** would not talk about his work on Amchitka since it was classified. Finally, you attached a TDY dated March 4, 1968, as well as a travel voucher/subvoucher dated March 15, 1968, to support that **[Employee]**'s mission to Amchitka had been completed.

FINDINGS OF FACT

1. On July 31, 2001, **[Claimant]** filed a claim for survivor benefits under the EEOICPA as the daughter of **[Employee]**.

2. **[Employee]** was diagnosed with small cell bronchogenic carcinoma of the lung and chronic silicosis.

3. **[Employee]** was employed by the U.S. Army Corps of Engineers for the period from July 25, 1944 to August 11, 1952, at Fort Richardson, Alaska; and from August 11, 1952 to May 30, 1975 at Elmendorf Air Force Base, Alaska.

4. **[Employee]**'s employment for the U.S. Army Corps of Engineers on TDY assignment at the Amchitka Island, Alaska site in November 1971 was in conjunction with a Department of Defense venture, the Blair Lakes Project.

CONCLUSIONS OF LAW

The EEOCIPA implementing regulations provide that a claimant may object to any or all of the findings of fact or conclusions of law, in the recommended decision. 20 C.F.R. § 30.310. Further, the regulations provide that the Final Adjudication Branch will consider objections by means of a review of the written record. 20 C.F.R. § 30.312. The Final Adjudication Branch reviewer will review the record forwarded by the district office and any additional evidence and/or argument submitted by the claimant. 20 C.F.R. § 30.313. Consequently, the Final Adjudication Branch will consider the overall evidence of record in reviewing the written record.

In order to be awarded benefits under the Energy Employees Occupational Illness Compensation Program Act, the covered employee (or his/her eligible survivors), must first establish that the employee has been diagnosed with beryllium illness, cancer, or chronic silicosis. *See* 42 U.S.C. § 7384l(15), 20 C.F.R. § 30.110(a). The evidence to show proof of an occupational illness is not in dispute in this case. The medical evidence establishes that **[Employee]** was diagnosed with cancer (bronchogenic cancer of the lung, small cell type) and chronic silicosis. Consequently, **[Employee]** was diagnosed with two illnesses potentially covered under the Act.

Employees of a DOE contractor (or their eligible survivors) are entitled under the EEOICPA to seek compensation for a cancer as a member of the Special Exposure Cohort (SEC) or through a determination that they incurred cancer that was at least as likely as not related to employment at a DOE facility. 42 U.S.C. §§ 7384l(14), 7384l(9)(B)(ii)(II). To be included in the SEC, a DOE employee, DOE contractor employee, or atomic weapons employee must have been employed for an aggregate of 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee or employed before January 1, 1974, by the DOE or a DOE contractor or subcontractor on Amchitka Island, Alaska, and have been exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests. 42 U.S.C. § 7384l(14). To qualify as a covered employee with cancer, members of the SEC need only establish that they contracted a "specified cancer", designated in section 7384l(17) of the EEOICPA, after beginning employment at a DOE facility or atomic weapons employer facility.

While the EEOICPA does not contain a specific definition of a DOE contractor, it does contain a definition of a DOE contractor employee that, in effect, defines what a DOE contractor is. Section 7384l(11) of the EEOICPA defines a DOE contractor employee as:

(A) An individual who is or was in residence at a Department of Energy facility as a researcher for one or more periods aggregating at least 24 months.
(B) An individual who is or was employed at a Department of Energy facility by-

management and operating, management and integration, or environmental remediation at the facility; or
(ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

The question presented in this case is whether **[Employee]**, an employee of the U.S. Army Corps of Engineers was, during the time he spent on Amchitka Island, providing management and operation, management and integration or environmental remediation services under a contract between the DOE and the Army Corps of Engineers.

The undersigned notes that the Atomic Energy Commission's Managers Completion Report refers to the U.S. Army Corp of Engineers, as a prime contractor for work on Milrow and Cannikin. The work to be performed under that contract consisted of "engineering, procurement, construction administration and inspection."

[Employee]'s "Request and Authorization for TDY Travel of DOD Personnel," initiated on November 10 and approved on November 11, 1971, was for the purpose of three days work on Amchitka Island, Alaska, for the Department of Defense, Alaska District Corps of Engineers. The purpose of the TDY was to "examine equipment for potential use on Blair Lake Project."

You submitted the following new documents along with your letter to the Final Adjudication Branch dated May 21, 2003: Employee Performance Appraisal for the period February 1, 1966 to January 31, 1967; Affidavit of Erwin L. Long dated May 21, 2003; Request and Authorization for Military Personnel TDY Travel and Civilian Personnel TDY and PCS Travel, dated March 4, 1968; and Travel Voucher or Subvoucher, dated March 15, 1968. None of the documents submitted establish that **[Employee]** was on Amchitka Island providing services pursuant to a contract with the DOE.

The preponderance of the evidence in this case supports the conclusion that **[Employee]** was on Amchitka Island in November 1971 for the sole purpose of inspecting equipment to be used by the Department of Defense on its Blair Lake Project. The documentation of record refers to the Blair Lake Project as a Department of Defense project, and the DOE noted in correspondence dated March 27, 2003, that research was not able to verify that Blair Lake was a DOE project.

While the DOE indicated that **[Employee]** was issued a dosimetry badge, such evidence may be used to establish that he was present on Amchitka Island, not to establish that he was a covered DOE employee. Therefore, **[Employee]**'s presence on Amchitka Island was to perform work for the Department of Defense, and not pursuant to a contract between the DOE and the U.S. Army Corps of Engineers.

The evidence is also insufficient to show covered employment under § 7384r(c) and (d) of the EEOICPA for chronic silicosis. To be a "covered employee with chronic silicosis" it must be established that the employee was:

A DOE employee or a DOE contractor employee, who was present for a number of workdays aggregating at least 250 work days during the mining of tunnels at a DOE facility located in Nevada or Alaska for test or experiments related to an atomic weapon.

See 42 U.S.C. § 7384r(c) and (d); 20 C.F.R. § 30.220(a). Consequently, even if the evidence showed DOE employment (which it does not since **[Employee]** worked for the DOD), he was present only

three days on Amchitka, which is not sufficient for the 250 days required under the Act as a covered employee with silicosis.

The undersigned notes that in your objection to the recommended decision, you referred to a "shared employee" doctrine which you believe should be applied to this claim. You contend that on March 5, 1968, **[Employee]** was sent to Seward, Alaska to "Inspect equipment going to Amchitka, which might have been used at the Blair Lake project [to benefit] not only DOD but also DOE." No provision in the Act refers to a "shared employee" doctrine. Given the facts of this case, coverage could only be established if **[Employee]** was on Amchitka Island providing services pursuant to a contract with the DOE, evidence of which is lacking in this case.

It is the claimant's responsibility to establish entitlement to benefits under the EEOICPA. The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of each and every criterion under any compensable claim category set forth in section 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing the Office of Workers' Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

Although you submitted medical evidence to show covered illnesses due to cancer and chronic silicosis, the evidence of record is insufficient to establish that **[Employee]** engaged in covered employment. Therefore, your claim must be denied for lack of proof of covered employment under the EEOICPA.

Seattle, Washington

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA Fin. Dec. No. 1400-2002 (Dep't of Labor, January 22, 2002);

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA).

On December 12, 2001, the Seattle District Office issued a recommended decision concluding that the deceased covered employee was a member of the Special Exposure Cohort, as that term is defined in § 7384l(14) of the EEOICPA, and that you are entitled to compensation in the amount of $150,000 pursuant to § 7384s of the EEOICPA as his survivor. On December 17, 2001, the Final Adjudication Branch received written notification from you waiving any and all objections to the recommended decision.

The undersigned has reviewed the evidence of record and the recommended decision issued by the Seattle district office on December 12, 2001, and finds that:

In a report dated August 20, 1996, Dr. John Mues diagnosed the deceased covered employee with mixed squamous/adenocarcinoma of the lung. The report states the diagnosis was based on the results of a thoracoscopy and nodule removal. Lung cancer is a specified disease as that term is defined in § 7384l(17)(A) of the EEOICPA and 20 CFR § 30.5(dd)(2) of the EEOICPA regulations.

You stated in the employment history that the deceased covered employee worked for S.S. Mullins on Amchitka Island, Alaska from April 21, 1967 to June 17, 1969. Nancy Shaw, General Counsel for the Teamsters Local 959 confirmed the employment by affidavit dated November 1, 2001. The affidavit is acceptable evidence in accordance with § 30.111 (c) of the EEOICPA regulations.

Jeffrey L. Kotch[1], a certified health physicist, has advised it is his professional opinion that radioactivity from the Long Shot underground nuclear test was released to the atmosphere a month after the detonation on October 29, 1965. He further states that as a result of those airborne radioactive releases, SEC members who worked on Amchitka Island, as defined in EEOICPA § 7384l(14)(B), could have been exposed to ionizing radiation from the Long Shot underground nuclear test beginning a month after the detonation, i.e., the exposure period could be from approximately December 1, 1965 through January 1, 1974 (the end date specified in EEOICPA, § 7384l(14)(B)). He supports his opinion with the Department of Energy study, *Linking Legacies*, DOE/EM-0319, dated January 1997, which reported that radioactive contamination on Amchitka Island occurred as a result of activities related to the preparation for underground nuclear tests and releases from Long Shot and Cannikin. Tables 4-4 and C-1, on pages 79 and 207, respectively, list Amchitka Island as a DOE Environmental Management site with thousands of cubic meters of contaminated soil resulting from nuclear testing.

The covered employee was a member of the Special Exposure Cohort as defined in § 7384l(14)(B) of the EEOICPA and §§ 30.210(a)(2) and 30.213(a)(2) of the EEOICPA regulations. This is supported by evidence that shows he was working on Amchitka Island for S.S. Mullins during the potential exposure period, December 1, 1965 to January 1, 1974.

The covered employee died February 17, 1999. Metastatic lung cancer was included as a immediate cause of death on the death certificate.

You were married to the covered employee August 18, 1961 and were his wife at the time of his death. You are the eligible surviving spouse of the covered employee as defined in § 7384s of the EEOICPA, as amended by the National Defense Authorization Act (NDAA) for Fiscal Year 2002 (Public Law 107-107, 115 Stat. 1012, 1371, December 28, 2001.[2]

The undersigned hereby affirms the award of $150,000.00 to you as recommended by the Seattle District Office.

Washington, DC

Thomasyne L. Hill

Hearing Representative

[1] Jeffrey L. Kotch is a certified health physicist employed with the Department of Labor, EEOICP, Branch of Policies, Regulations and Procedures. He provided his professional opinion in a December 6, 2001 memorandum to Peter Turcic, Director of EEOICP.

[2] Title XXXI of the National Defense Authorization Act for Fiscal Year 2002 amended the Energy Employees Occupational Illness Compensation Program Act.

EEOICPA Fin. Dec. No. 28766-2003 (Dep't of Labor, June 20, 2003)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq.* For the reasons set forth below, the Final Adjudication Branch accepts and approves your claim for bladder cancer. Your claim for the condition of prostate cancer is deferred pending further adjudication.

STATEMENT OF THE CASE

On May 6, 2002, you filed a Form EE-1 (Claim for Employee Benefits under the EEOICPA), claiming compensation due to prostate cancer. Medical documentation submitted in support of your claim shows that you were diagnosed as having prostate cancer on November 13, 2000. You later submitted a pathology report indicating that you were diagnosed as having bladder cancer on May 9, 2003.

You also completed a Form EE-3, Employment History, in which you indicated that you had worked as a helicopter pilot on Amchitka Island for Anchorage Helicopter Service from June 25, 1971 to December 1, 1971, and from May 1974 to June 1974; and, for Evergreen Helicopters from May 13, 1972 to November 17, 1972. You also submitted a narrative report of your experiences on Amchitka Island; a commendation letter from the resident manager, of Holmes & Narver, Incorporated, dated November 20, 1971, recognizing your work under hazardous conditions on Amchitka Island on November 6, 1971; and, a copy of a letter outlining the start of the operational period for Project Cannikin, which included attachments describing security procedures and issuance of film badges. The record also includes a completed Form EE-4 from your friend and work associate, Ian Mercier, in which he averred that you had worked as chief helicopter pilot for Anchorage Helicopter Service and Evergreen Helicopters, under contract to Holmes & Narver, prime contractor to the Atomic Energy Commission on Amchitka Island, Alaska, from June 24, 1971 to June 1, 1974.

In correspondence dated May 16, 2002 and August 29, 2002, representatives of the Department of Energy (DOE) indicated that they had no employment information pertaining to you; however, they were able to verify that you had been issued a film badge at the Amchitka Test Site on August 2, September 3, September 30 and October 29, 1971, and attached an employment affidavit from a work associate, Paul J. Mudra, who indicated that you had worked for Anchorage Helicopter Service from June to December 1971 and that he had had direct contact with you during the Cannikin underground testing on Amchitka Island, Alaska, during several months in the fall of 1971. The Manager's Completion Report, Amchitka Island, Alaska, Milrow and Cannikin, recognizes Anchorage Helicopter, as a covered subcontractor for a prime Atomic Energy Commission contractor, Holmes & Narver, Incorporated, on Amchitka Island from June to December 1971, for purposes of providing helicopter service. *See* Atomic Energy Commission's Manager's Completion Report, Amchitka Island, Alaska, Milrow and Cannikin (January 1973).

On June 16, 2003, the Seattle district office issued a recommended decision that concluded that you were a covered employee as defined in § 7384l(9)(A) of the Act and an eligible member of the Special Exposure Cohort as defined in § 7384l(14)(B) of the EEOICPA, who was diagnosed as having a

specified cancer, specifically bladder cancer, as defined in § 7384l(17) of the Act. *See* 42 U.S.C. 7384l(9)(A), (14)(B), (17). The district office further concluded that you were entitled to compensation in the amount of $150,000 pursuant to § 7384s(a)(1) of the EEOICPA. *See* 42 U.S.C. § 7384s(a)(1). The district office's recommended decision also concluded that, pursuant to § 7384t of the EEOICPA, you were entitled to medical benefits for bladder cancer retroactive to May 6, 2002. *See* 42 U.S.C. § 7384t.

On June 18, 2003, the Final Adjudication Branch received written notification that you waive any and all rights to file objections to the recommended decision.

CONCLUSIONS OF LAW

In order for an employee to be afforded coverage under the "Special Exposure Cohort," the employee must be a "covered employee," which is defined in § 7384l(14)(B) of the EEOICPA, in relevant part as follows:

The employee must have been a Department of Energy (DOE) employee, DOE contractor employee, or an atomic weapons employee who was so employed before January 1, 1974, by DOE or a DOE contractor or subcontractor on Amchitka Island, Alaska and was exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests.

See 42 U.S.C. § 7384l(14)(B); 20 C.F.R. § 30.214(a)(2). Further, in order to be entitled to benefits for specified cancer, § 7384l(17) of the EEOICPA indicates that the covered employee must have any of the following:

A. A specified disease, as that term is defined in § 4(b)(2) of the Radiation Exposure Compensation Act (42 U.S.C. § 2210 note).

B. Bone cancer.

C. Renal cancers.

D. Leukemia (other than chronic lymphocytic leukemia) if initial occupational exposure occurred before 21 years of age and onset occurred more than two years after initial occupational exposure.

See 42 U.S.C. § 7384l(17); 20 C.F.R. § 30.5(dd).

The employment evidence of record demonstrates that you were an employee of Anchorage Helicopters, a covered subcontractor for a prime Atomic Energy Commission contractor, Holmes & Narver, Incorporated, located on Amchitka Island, Alaska, from June to December 1971, and that your employment was consistent with the type and kind of work performed by this subcontractor for the Department of Energy (DOE) at this site. *See* Atomic Energy Commission's Manager's Completion Report, Amchitka Island, Alaska, Milrow and Cannikin (January 1973). Consequently, this evidence establishes that you were "employed before January 1, 1974, by the Department of Energy or a Department of Energy contractor or subcontractor on Amchitka Island, Alaska." *See* 42 U.S.C. § 7384l(14)(B).

The Act requires that the covered employee must show that they were exposed to ionizing radiation in

the performance of duty related to the underground tests on Amchitka. *See* 42 U.S.C. § 7384l(14)(B). In a memorandum to the Director, Division of Energy Employees Occupational Illness Compensation Program, a Certified Health Physicist, Branch of Policies, Regulations and Procedures, concluded that, in his professional opinion, radioactivity from the Long Shot nuclear test was released to the atmosphere a month after the detonation on October 29, 1965. Therefore, as a result of the releases, employees who worked on Amchitka Island were exposed to ionizing radiation from the nuclear tests beginning a month after the detonation.

The record indicates that you were present on Amchitka Island, Alaska, from at least June to December 1971. The undersigned acknowledges that such evidence shows that you have met the requirement of being exposed to ionizing radiation in the performance of duty, before January 1, 1974. *See* 42 U.S.C. § 7384l(14)(B).

You filed a claim based on bladder cancer. A pathology report from the Northwest Urology Clinic shows that you were diagnosed as having bladder cancer in May 2003. Consequently, you are a member of the Special Exposure Cohort, who was diagnosed with a specified cancer under the EEOICPA. *See* 42 U.S.C. § 7384l(17)(A); 20 C.F.R.§ 30.5(dd)(5)(iii)(K).

You are a covered "Special Exposure Cohort" employee which is defined in § 7384l(14)(B) of the EEOICPA. *See* 42 U.S.C. § 7384l(14)(B). Bladder cancer is a "specified cancer" as that term is defined in § 7384l(17) of the Act and § 30.5(dd)(5)(iii)(K) of the EEOICPA regulations. *See* 42 U.S.C. § 7384l(17); 20 C.F.R. § 30.5(dd)(5)(iii)(K).

For the foregoing reasons, the undersigned hereby accepts your claim for bladder cancer. You are entitled to compensation in the amount of $150,000, pursuant to § 7384s of the EEOICPA. *See* 42 U.S.C. § 7384s. Further, you are entitled to medical benefits related to bladder cancer, retroactive to May 6, 2002, the date your claim was filed, pursuant to § 7384t of the Act. *See* 42 U.S.C. § 7384t; 20 C.F.R. § 30.400(a).

Your claim for prostate cancer is deferred pending further adjudication.

Seattle, Washington

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA Fin. Dec. No. 2960-2002 (Dep't of Labor, December 12, 2001)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA).

On November 20, 2001, the district office issued a recommended decision finding that **[Employee]** was a member of the Special Exposure Cohort, as that term is defined in § 7384l(14) of the EEOICPA; that he was diagnosed with lung cancer, a specified cancer as listed in § 7384l(17) of EEOICPA and 20 C.F.R. § 30.5(dd)(2); and concluding that you, as the survivor of **[Employee]**, are entitled to

compensation in the amount of $150,000 pursuant to § 7384s of the EEOICPA.

In order to be afforded coverage under EEOICPA as an SEC member, the claimant must show that the covered employee: (1) was an SEC member under § 7384l(14); and (2) was diagnosed with a specified cancer as defined in § 7384l(17). To qualify as a member of the SEC under § 7384l(14) the following requirements must be satisfied:

> (A) The employee was so employed for a number of work days aggregating at least 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, and, during such employment - -
>
> > (i) was monitored through the use of dosimetry badges for exposure at the plant of the external parts of employee's body to radiation; or
> >
> > (ii) worked on a job that had exposures comparable to a job that is or was monitored through the use of dosimetry badges.

The Department of Energy has verified **[Employee]**'s employment as a Department of Energy contractor employee of more than 250 workdays prior to February 1, 1992 at the Oak Ridge, TN complex (at Y-12, K-25 (the GDP), and the Oak Ridge National Laboratory). However, contrary to the district office's recommended decision, there is no evidence in the case file which confirms its finding that **[Employee]** was monitored for exposure to radiation through the use of dosimetry badges. Rather, the appropriate portion of the EE-3 (Employment History) concerning dosimetry badges was left blank.

According to the Department of Energy sponsored report entitled *Recycled Uranium Mass Balance Project Oak Ridge Gaseous Diffusion Plant Site Report* (BJC/OR-584), released in June 2000, "worker radiation monitoring was in place since the site's earliest days of operation. Film badges or film rings (for potential hand exposures) were requested by supervisors for those employees routinely assigned to work in areas where penetrating radiation was likely to be encountered." Because the Department of Energy verified **[Employee]**'s employment as intermittently from 1969 through 1984, I find that **[Employee]**'s employment at the Oak Ridge GDP satisfies the requirements of EEOICPA § 7384l(14)(A).

On December 6, 2001, the Final Adjudication Branch received written notification that you waived any and all objections to the recommended decision. The undersigned has reviewed the facts and finds that **[Employee]** was a member of the Special Exposure Cohort, as that term is defined in § 7384l(14) of the EEOICPA; that **[Employee]**'s lung cancer is a specified cancer under § 7384l(17) of EEOICPA and 20 C.F.R. § 30.5(dd)(2); and that you are the eligible surviving beneficiary of **[Employee]** as defined under § 7384s of the EEOICPA and the implementing regulations. The undersigned hereby affirms the award of $150,000.

Jacksonville, FL

Sidne M. Valdivieso

Hearing Representative

EEOICPA Fin. Dec. No. 3092-2002 (Dep't of Labor, October 7, 2004)

NOTICE OF FINAL DECISION

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 September 30, 2003, 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 colon cancer. On the Form EE-3, Employment History, you stated you were employed by Union Carbide at the K-25 gaseous diffusion plant in Oak Ridge, Tennessee from 1952 to 1953. The Department of Energy verified this employment as June 30, 1952 through April 20, 1953. The medical evidence established that you were diagnosed with colon cancer on August 28, 2003.

On September 2, 2004, the Jacksonville district office issued a decision recommending that you are entitled to compensation in the amount of $150,000 for colon cancer. The district office's recommended decision also concluded that you are entitled to medical benefits effective September 30, 2003, for colon cancer.

On September 13, 2004, the Final Adjudication Branch received your written notification that you waive any and all objections to the recommended decision.

To qualify as a member of the Special Exposure Cohort (SEC) under section 7384l(14)(A) of the Act, the following requirements must be satisfied:

> (A) The employee was so employed for a number of work days aggregating at least 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, and, during such employment - -
>
> > (i) was monitored through the use of dosimetry badges for exposure at the plant of the external parts of employee's body to radiation; or
> >
> > (ii) worked on a job that had exposures comparable to a job that is or was monitored through the use of dosimetry badges.
> >
> > 42 U.S.C. § 7384l(14)(A).

The DOE confirmed that you were monitored for radiation exposure to the external parts of the body through the use of dosimetry badge #28543. The DOE verified employment equates to 42 weeks of employment at a gaseous diffusion plant, less than the necessary 250 workdays required for membership in the SEC. However, two co-worker affiants stated that these were six-day workweeks throughout the middle of the 1950's. The 250 workday requirement for SEC membership is satisfied by the 42 six-day workweeks found in the record. Therefore, the employee is a member of the SEC.

FINDINGS OF FACT

1. You filed a Form EE-1, Claim for Benefits under the EEOICPA, on September 30, 2003.

2. The medical evidence is sufficient to establish that you were diagnosed with colon cancer on August 28, 2003.

3. Colon cancer, diagnosed at least 5 years after first exposure in covered employment, is a specified cancer under the Act and the implementing regulations. 42 U.S.C. § 7384l(17)(A), 20 C.F.R. § 30.5(dd)(5)(iii)(M).

4. You were employed at the K-25 gaseous diffusion plant in Oak Ridge, Tennessee for six-day workweeks from June 30, 1952 through April 20, 1953. You are a covered employee as defined in the Act. 42 U.S.C. § 7384l(1).

5. You are a member of the Special Exposure Cohort as defined in the Act. 42 U.S.C. § 7384l(14)(A).

6. The district office issued the recommended decision on September 2, 2004.

7. On September 13, 2004, the Final Adjudication Branch received your 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 September 2, 2004. I find that you are a member of the Special Exposure Cohort, as that term is defined in the Act; and that your colon cancer diagnosed more than 5 years after first exposure in covered employment is a specified cancer under the Act and the implementing regulations. 42 U.S.C. §§ 7384l(14)(A), 7384l(17)(A); 20 C.F.R. § 30.5(dd)(5)(iii)(M).

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 September 30, 2003, for colon cancer. 42 U.S.C. §§ 7384s(a), 7384t.

Jacksonville, FL

J. Mark Nolan

Hearing Representative

EEOICPA Fin. Dec. No. 15100-2006 (Dep't of Labor, June 22, 2006)

NOTICE OF FINAL DECISION

This is a 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 November 15, 2001, you filed a Form EE-2, Claim for Survivor Benefits, for cancer of the breast with metastases to the bone of your late mother, **[Employee]**, hereinafter referred to as "the employee." A pathology report establishes that the employee was diagnosed with infiltrting adenocarcinoma of the breast on June 8, 1953. Medical reports indicate that the employee was diagnosed with secondary bone cancer as early as November 5, 1957.

In support of your claim for survivor benefits you submitted a copy of your birth certificate showing the employee as your mother and indicating that you were born on **[Claimant's date of birth]**. You also submitted a copy of the employee's death certificate showing that she was born on **[Employee's date of birth]**, that she died on May 10, 1959, and that she was married to **[Employee's spouse]** at the time of her death. The death certificate showed the employee died as a result of her carcinoma of the breast with metastasis. Also submitted was a copy of **[Employee's spouse's]** death certificate. The above evidence indicates that you were eleven (11) years old at the time of the employee's death.

The district office verified that the employee worked for Tennessee Eastman Corporation at the Y-12 plant in Oak Ridge, Tennessee, from October 28, 1944 to October 30, 1945. The Oak Ridge Institute for Science and Education (ORISE) database and plant records confirmed that she worked at theY-12 plant as a laboratory assistant and analyst.

Effective September 24, 2005, the Department of Health and Human Services designated certain employees of the Y-12 plant who were employed for a number of work days aggregating at least 250 work days, either solely under this employment or in combination with work days of employment occurring within the parameters established for classes of employees included in the SEC, as members of the Special Exposure Cohort (SEC) based on work performed in uranium enrichment, or other radiological activities at the Y-12 plant, for the period from March 1943 through December 1947.

On February 1, 2006, the Jacksonville district office issued a recommended decision, concluding that you are entitled to compensation of $325,000 under Parts B and E of the Act.

The Final Adjudication Branch (FAB) received your written confirmation dated February 3, 2006, that neither you nor the employee had received any settlement or award from a lawsuit or workers' compensation claim in connection with the accepted condition. You also indicated that at the time of the employee's death you were the employee's only child. On April 3, 2006, the FAB received your written confirmation that you waived your right to object to any of the findings of fact and/or conclusions of law contained in the recommended decision.

FINDINGS OF FACT

1. On November 15, 2001, you filed a claim for survivor benefits under the Act.

2. You were the employee's child and under the age of 18 years old at the time of her death. Her spouse at the time of her death is no longer living.

3. The employee was diagnosed with breast cancer on June 8, 1953, which metastasized to the bone. The bone metastasis was diagnosed as early as November 5, 1957.

4. The employee was employed by Tennessee Eastman Corporation at the Y-12 plant as a laboratory assistant and analyst from October 28, 1944 to October 30, 1945.

5. The employee's breast cancer with metastasis to the bone caused her death.

CONCLUSIONS OF LAW

On June 5, 2006, the DEEOIC issued EEOICPA Bulletin No. 06-11, which provided supplemental guidance for processing claims for the SEC class for the Y-12 plant. That bulletin establishes that the primary function of the Y-12 plant during 1943 to 1947 was to perform uranium enrichment using a calutron. Attachment 4 of the bulletin lists occupational titles for the Y-12 plant employees involved in "Other Radiological Activities."[1] The employee's job titles of laboratory assistant and analyst are not on the list as a likely employee title; however, the job title of laboratory technician was listed. An employee change form dated October 30, 1945, shows that her department was "Beta Production Analysis." The beta building was 9204, and calutron production was performed there. While there is no evidence that the employee worked in that building, her work most likely involved research/analysis for the beta building, which lends support to a finding that she was involved in "other radiological activities." Therefore, it is reasonable to conclude that the job titles of laboratory assistant and analyst should be considered as job titles involved in "other radiological activities." The evidence shows that the employee worked with Tennessee Eastman Corporation at the Y-12 plant in other radiological activities from October 28, 1944 to October 30, 1945. This period of employment was during the time frame the Y-12 plant was designated as a SEC facility.[2]

The employee worked in uranium enrichment activities or other radiological activities at Y-12 for more than 250 work days. Therefore, the employee qualifies as a member of the SEC. As a member of the SEC who was diagnosed with breast cancer and secondary bone cancer, which are "specified cancers" pursuant to 42 U.S.C. § 7384l(17)(A) and (B) and 20 C.F.R. § 30.5(ff)(3) and (5)(iii)(B) and constitute "occupational" illnesses under 42 U.S.C. § 7384l(15), the employee or the employee's survivor(s) qualify for benefits as a "covered employee with cancer." 42 U.S.C. § 7384l(9). You meet the definition of a survivor under Part B of the Act. 42 U.S.C. § 7384s(e)(3)(B). Therefore, you are entitled to $150,000 for the employee's breast cancer and secondary bone cancer. 42 U.S.C. §§ 7384s(a).

The employee was an employee of a Department of Energy (DOE) contractor at a DOE facility. 42 U.S.C. §§ 7384l(11), 7384l(12). A determination under Part B of the Act that a DOE contractor employee is entitled to compensation under that part for an occupational illness is treated as a determination that the employee contracted that illness through exposure at a DOE facility. 42 U.S.C. § 7385s-4(a). Therefore, the employee is a covered DOE contractor employee with a covered illness. 42 U.S.C. §§ 7385s(1), 7385s(2). You meet the definition of survivor under Part E of the Act. 42 U.S.C. § 7385s-3(d)(2). Therefore, you are also entitled to benefits in the amount of $125,000 for the employee's death due to breast cancer. 42 U.S.C. § 7385s-3.

The employee experienced presumed wage-loss for each calendar year subsequent to the calendar year of her death through and including the calendar year in which she would have reached normal retirement age. 20 C.F.R. § 30.815 (2005). This equals 21 years of wage-loss. Therefore, you are entitled to wage-loss compensation in the amount of $50,000. 42 U.S.C. § 7385s-3(a)(3).

Jacksonville, FL

Mark Stewart

Hearing Representative

[1] EEOICPA Bulletin No. 06-11 (issued June 5, 2006).

[2] EEOICPA Bulletin No. 06-04 (issued November 21, 2005).

EEOICPA Fin. Dec. No. 17556-2003 (Dep't of Labor, September 27, 2004)

NOTICE OF FINAL DECISION

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

STATEMENT OF THE CASE

On December 13, 2001, you filed a claim, Form EE-2 (Claim for Survivor Benefits under the EEOICPA), based on the employment of your late husband, **[Employee]** (the employee). You identified an unspecified cancer as the condition being claimed.

Medical evidence submitted with the claim included a December 19, 1989 medical report from St. Mary's Hospital, showing a diagnosis of poorly differentiated large cell carcinoma of the upper lobe of the right lung. You also submitted a copy of a pathology report which diagnosed lung cancer on December 15, 1989.

You provided a Form EE-3 (Employment History), indicating that your husband was employed with James Bolt, a subcontractor, while at the Portsmouth Gaseous Diffusion Plant (GDP) in Piketon, Ohio from approximately 1976 to 1985. The Department of Energy (DOE) was unable to verify your husband's employment. Following appropriate development, on December 11, 2002, the Cleveland district office issued a recommended decision to deny the claim based on the lack of established employment at a facility covered under the Act. On February 20, 2003, the Final Adjudication Branch affirmed the findings of the district office's recommended decision.

On January 13, 2004, you requested that your case be reopened. Along with your request, you submitted additional employment evidence. On April 23, 2004, as a result of the additional employment evidence you submitted, a Director's Order was issued vacating the February 20, 2003 final decision of the Final Adjudication Branch denying your claim for compensation under the EEOICPA. Your case was then returned to the Cleveland district office for consideration of the new evidence and issuance of a new recommended decision.

The Cleveland district office was able to verify that your husband was employed by James Bolt from about 1978 to 1985 based on an itemized statement of earnings provided by the Social Security Administration (SSA). You also provided several letters and Forms EE-4 (Employment History Affidavit) from Pat Spriggs (your husband's co-worker), Cassandra Bolt-Meredith (the wife of James Bolt, your husband's employer), and **[Name of Employee's son-in-law]** (your husband's son-in-law) placing your husband on site at the Portsmouth GDP as a part-time subcontractor employee from 1978 to 1985. In addition, a letter from Bruce E. Peterson, General Manager of Ledoux & Company stating that "Mr. James Bolt was an independent subcontractor for Ledoux & Company performing witnessing

services for various clients at the Portsmouth Gaseous Diffusion Nuclear Facility in Portsmouth, Ohio" supports that a contract existed between James Bolt, Ledoux & Company, and the Portsmouth GDP during the 1970's and 1980's.

You provided a copy of your marriage certificate, showing you and your husband were married on October 7, 1947. You provided a copy of your husband's death certificate showing he was married to you at his time of death on February 14, 1990.

On August 23, 2004, the Cleveland district office issued a recommended decision that concluded your husband is a member of the Special Exposure Cohort, as defined by § 7384l(14)(A). The district office further concluded that your husband was diagnosed with lung cancer, which is a specified cancer as defined by § 7384l(17)(A). In addition, the district office concluded that you are the surviving spouse of the employee, as defined by § 7384s, and, as such, you are entitled to compensation in the amount of $150,000.00 pursuant to § 7384s.

On August 30, 2004, the Final Adjudication Branch received written notification that you waive any and all rights to file objections to the recommended decision.

FINDINGS OF FACT

1. You filed a claim and presented medical evidence on December 13, 2001, based on your husband's lung cancer.

2. For the purposes of SEC membership, your husband was employed with James Bolt, a DOE subcontractor, at the Portsmouth GDP in Piketon, Ohio, from at least 1978 to 1985

3. Your husband was employed for a number of work days aggregating at least 250 work days from September 1, 1954, to February 1, 1992, and during such employment worked in a job that had exposures comparable to a job that is or was monitored through the use of dosimetry badges.

4. On December 15, 1989, your husband was diagnosed with lung cancer.

5. You are the surviving spouse of the employee and were married to him at least one year prior to his death.

CONCLUSIONS OF LAW

In order to be considered a "member of the Special Exposure Cohort," your husband must have been a Department of Energy (DOE) employee, DOE contractor employee, or an atomic weapons employee who was so employed for a number of work days aggregating at least 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, and, during such employment worked in a job that was monitored through the use of dosimetry badges for exposure at the plant of the external parts of the employee's body; or had exposures comparable to a job that is, or, was monitored through the use of dosimetry badges, as outlined in 42 U.S.C. § 7384l(14)(A).

The evidence of record establishes that your husband worked in covered employment at the Portsmouth

GDP from at least 1978 to 1985. Consequently, he met the requirement of working more than an aggregate 250 days at a covered facility. Also, the statute requires proof that the covered employee was monitored through the use of dosimetry badges for exposure at the plant of the external parts of employee's body. You indicated that you were not sure whether your husband wore a dosimetry badge. Under provisions of the Division of Energy Employees Occupational Illness Compensation (DEEOIC), employees who worked at the Portsmouth GDP between September 1, 1954 and February 1, 1992 performed work that was comparable to a job that was monitored through the use of dosimetry badges. *See* Federal (EEOICPA) Procedure Manual, Chapter 2-500.3 (June 2002). Thus, your husband met the dosimetry requirements of the Act.

The EEOICPA provides coverage for a specified cancer as defined in § 4(b)(2) of the Radiation Exposure Compensation Act (RECA) including cancer of the lung. The medical evidence of record indicates that your husband was diagnosed with lung cancer. Therefore, he is a member of the Special Exposure Cohort, who was diagnosed with a specified cancer under the Act. *See* 42 U.S.C. § 7384l(17)(A).

The employee is deceased and you have provided documentation that you are the surviving spouse of the employee, who was married to the employee at least one year immediately before his death. *See* 42 U.S.C. § 7384s(e)(3)(A).

For the foregoing reasons, the undersigned hereby accepts and approves your claim based on cancer of the lung. You are entitled to compensation in the amount of $150,000, pursuant to § 7384s of the EEOICPA. *See* 42 U.S.C. § 7384s(a)(1) and (e)(1)(A).

Cleveland, Ohio

Debra A. Benedict

Acting District Manager

Final Adjudication Branch

EEOICPA Fin. Dec. No. 59055-2004 (Dep't of Labor, September 17, 2004)

NOTICE OF FINAL DECISION

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

STATEMENT OF THE CASE

You filed a claim, Form EE-1 (Claim for Employee Benefits under the EEOICPA), on July 7, 2004, based on rectal cancer/colon cancer. You provided a copy of a histopathology report which diagnosed invasive adenocarcinoma, based on analysis of a rectal polyp obtained during a colonoscopy on February 24, 1997. An operative report shows that you underwent a low anterior resection due to rectal cancer on March 13, 1997. The post-surgical pathology report diagnoses moderately differentiated

adenocarcinoma of the colon.

You also provided a Form EE-3 (Employment History) in which you state that you worked for Dynamic Industrial (Dycon) at the Portsmouth Gaseous Diffusion Plant (GDP), in Piketon, OH, as a pipefitter from January 1983 to November 1984 and from January 1985 to June 1985. You also report that you worked for the Marley Cooling Tower Co. at the Portsmouth GDP during March 1985. You also state that you wore a dosimetry badge while so employed.

The Department of Energy (DOE) was unable to confirm your reported employment. You provided copies of Forms W-2 which show that you were paid wages by Dynamic Industrial Cons. Inc. during 1983, 1984, and 1985; and by the Marley Cooling Tower Co. in 1985. A letter from the Financial Secretary Treasurer of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 577, reports that you worked at the Portsmouth GDP for Dynamic Industrial from January 1983 to November 1984 and from January 1985 to June 1985; and for Marley Cooling Tower Co. during March 1985. A representative of the DOE provided information which establishes that Dycon was a subcontractor at the Portsmouth GDP from 1980 through 1986. The Portsmouth GDP is recognized as a Department of Energy (DOE) facility from 1954 to 1998. *See* Department of Energy, Office of Worker Advocacy Facilities List.

On August 6, 2004, the Cleveland district office issued a recommended decision concluding that you are a member of the Special Exposure Cohort (SEC), as defined by 42 U.S.C. § 7384l(14), who was diagnosed with rectal cancer, which is a specified cancer under 42 U.S.C. § 7384l(17). In addition the district office concluded that, as a covered employee, you are entitled to compensation in the amount of $150,000, pursuant to 42 U.S.C. § 7384s. The district office also concluded that, pursuant to 42 U.S.C. § 7384s(b), you are entitled to medical benefits, as described in 42 U.S.C. § 7384t, beginning July 7, 2004, for rectal cancer.

On August 19, 2004, the Final Adjudication Branch (FAB) received written notification that you waive any and all objections to the recommended decision.

The FAB received additional evidence subsequent to receipt of your waiver. The DOE provided a copy of a Personnel Clearance Master Card which shows that you were granted a security clearance with SWEC (Dynamic Indust.) on January 18, 1984. No termination date is shown. You submitted additional medical reports regarding your treatment for cancer. Some of these were duplicates of reports already of record. The remaining records discuss your treatment following surgery in March 1997.

FINDINGS OF FACT

1. You filed a claim for benefits on July 7, 2004.

2. For purposes of SEC membership, you worked at Portsmouth GDP for Dycon during the periods of January 1983 to November 1984 and January 1985 to June 1985.

3. The evidence of record establishes that Dycon was a subcontractor for the Portsmouth Gaseous Diffusion Plant from 1980 to 1986.

4. You were employed for a number of work days aggregating at least 250 work days during the

period of September 1, 1954, to February 1, 1992, and during such employment performed work that was comparable to a job that is or was monitored through the use of dosimetry badges.

5. You were diagnosed with rectal cancer on February 24, 1997.

CONCLUSIONS OF LAW

In order to be considered a "member of the Special Exposure Cohort," you must have been a Department of Energy (DOE) employee, DOE contractor employee, or an atomic weapons employee who was so employed for a number of work days aggregating at least 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, and, during such employment worked in a job that was monitored through the use of dosimetry badges for exposure at the plant of the external parts of employee's body; or had exposures comparable to a job that is or was monitored through the use of dosimetry badges, as outlined in 42 U.S.C. § 7384l(14)(A).

The evidence of record establishes that you worked in covered employment at the Portsmouth GDP from January 1983 to November 1984 and January 1985 to June 1985. This meets the requirement of working more than an aggregate 250 days at a covered facility. *See* 42 U.S.C. § 7384l(14)(A). The Division of Energy Employees Occupational Illness Compensation (DEEOIC) has determined that employees who worked at the Portsmouth GDP between September 1954 and February 1, 1992, performed work that was comparable to a job that was monitored through the use of dosimetry badges. *See* Federal (EEOICPA) Procedure Manual, Chapter 2-500.3a (June 2002). On that basis, you meet the dosimetry badge requirement.

The Final Adjudication Branch notes that you claimed benefits based on rectal cancer/colon cancer. The medical evidence of record interchangeably refers to adenocarcinoma of the rectum and the colon. Regardless of the term used, the evidence reveals only a single tumor located in the rectum. For that reason, your claim is considered to be based on a single occurrence of cancer in your rectum.

Rectal cancer is considered to be colon cancer, which is a specified cancer under the Act, and the medical evidence of record establishes a diagnosis of rectal cancer. Therefore, you are a member of the Special Exposure Cohort, who was diagnosed with a specified cancer. *See* 42 U.S.C. §§ 7384l(14)(A) and (17).

For the reasons stated above, I accept your claim for benefits based on rectal cancer. You are entitled to compensation in the amount of $150,000, pursuant to 42 U.S.C. § 7384s. Additionally, I conclude that, pursuant to 42 U.S.C. § 7384s(b), you are entitled to medical benefits, as described in 42 U.S.C. § 7384t, beginning July 7, 2004, for rectal cancer.

Cleveland, Ohio

Debra A. Benedict

Acting District Manager

Final Adjudication Branch

EEOICPA Fin. Dec. No. 18528-2006 (Dep't of Labor, February 8, 2008)

NOTICE OF FINAL DECISION

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

STATEMENT OF THE CASE

On January 3, 2002, you filed a claim for survivor benefits under EEOICPA as a surviving parent of **[Employee]**. You claimed the employee was employed by Dow Chemical, Rockwell International and EG&G at the Rocky Flats Plant[1] from 1964 to 1966, and from June 1, 1981 to 1993. The Department of Energy verified the employee was employed at the Rocky Flats Plant from September 17, 1964 to July 25, 1966, and from June 1, 1981 to June 29, 1995.

You claimed the employee was diagnosed with ovarian cancer. The pathology report of the tissue obtained on December 28, 1995 described a diagnosis of moderately differentiated endometrioid-type adenocarcinoma of the left ovary.

The employee's death certificate showed she was born on March 31, 1946; died on January 25, 2001 at the age of 54; and was widowed. The death certificate also listed **[Employee's Spouse]** as her spouse; **[Employee's Father]** as her father; and **[Claimant]** as her mother. The death certificate for **[Employee's Spouse]** showed he died on February 15, 2000, and was married to **[Employee]** (maiden name given). The employee's birth and hospital certificates showed **[Employee]** was born on March 31, 1946; to **[Employee's Father]**and **[Claimant]**. **[Employee's Father]**'s death certificate showed he died on November 27, 1993.

On December 2, 2002, the district office forwarded a complete copy of the case record to the National Institute for Occupational Safety and Health (NIOSH) for reconstruction of the radiation dose the employee received in the course of her employment at the Rocky Flats Plant. On February 17, 2006, a final decision was issued under Part B of EEOICPA denying your claim for survivor benefits based on a probability of causation of 26.93%, which showed that the employee's cancer did not meet the 50% "at least likely as not" mandated level for compensability.

On August 6, 2007, the Secretary of the Department of Health and Human Services (HHS) designated the following classes of employees for addition to the Special Exposure Cohort (SEC): Employees of DOE, its predecessor agencies, or DOE contractors or subcontractors who were monitored or should have been monitored for neutron exposures while working at the Rocky Flats Plant in Golden, Colorado, for a number of work days aggregating at least 250 work days from April 1, 1952 through December 31, 1958 and/or January 1, 1959 through December 31, 1966, or in combination with work days within the parameters established for one or more other classes of employees in the Special Exposure Cohort. The SEC designations for these classes became effective on September 5, 2007.

A review of the evidence of record indicates that the employee had a period of employment aggregating 250 days during the SEC period (January 1, 1959 through December 31, 1966); was monitored for neutron exposures, as her name appears on the Neutron Dose Report (NDR)[2]; and was diagnosed with ovarian cancer, a specified cancer, more than five years after her first exposure to radiation at the Rocky Flats Plant. Based on the SEC determinations for certain employees at the Rocky Flats Plant, a Director's Order was issued on December 28, 2007 that vacated the prior decision issued under Part B.

On December 28, 2007, the district office issued a recommended decision to accept your claim for survivor benefits under Part B of EEOICPA and referred the case to the FAB for an independent assessment of the evidence and a final decision on your claim.

On January 11, 2008, the FAB received your signed statement certifying that neither you nor the employee filed any lawsuits, tort suits, or state workers' compensation claims; or received any awards or benefits related to ovarian cancer; that you have not pled guilty or been convicted of any charges connected with an application for or receipt of federal or state workers' compensation; and the employee had no children.

After considering the recommended decision and all evidence in the case, the FAB hereby makes the following:

FINDINGS OF FACT

1. On January 3, 2002, you filed a claim for survivor benefits as the surviving parent of **[Employee]**.

2. You are the surviving parent of **[Employee]**, as supported by birth and death certificates.

3. The employee was employed at the Rocky Flats Plant, a covered DOE facility, from September 17, 1964 to July 25, 1966, and from June 1, 1981 to June 29, 1995.

4. Effective September 5, 2007, employees at the Rocky Flats Plant that worked from April 1, 1952 through December 31, 1958, and/or January 1, 1959, through December 31, 1966, and were monitored or should have been monitored for neutron exposure, were added to the SEC.

5. The employee has a period of employment at the Rocky Flats Plant aggregating 250 days during the SEC period, September 17, 1964 through July 25, 1966.

6. The employee was monitored for neutron dose exposure during the period September 17, 1964 to July 25, 1966, as confirmed by the NDR.

7. The employee was diagnosed with ovarian cancer (a specified cancer) on December 28, 1995. This diagnosis occurred more than five years after her first exposure to radiation at the Rocky Flats Plant.

8. The evidence of record contains your signed statement certifying that neither you nor the employee filed a lawsuit, tort suits, or state workers' compensation claims; received any awards or benefits related to ovarian cancer; that you have not pled guilty or been convicted of any charges connected with an application for or receipt of federal or state workers' compensation; and the employee had no children.

Based on the above-noted findings of fact in this claim, the FAB hereby also makes the following:

CONCLUSIONS OF LAW

Pursuant to the regulations implementing the EEOICPA, a claimant has 60 days from the date of

issuance of the recommended decision to raise objections to that decision to the FAB. 20 C.F.R § 30.310(a). If an objection is not raised during the 60-day period, the FAB will consider any and all objections to the recommended decision waived and issue a final decision affirming the district office's recommended decision. 20 C.F.R. § 30.316(a). On January 11, 2008, the FAB received your written notification waiving any and all objections to the recommended decision.

Part B of EEOICPA provides benefits for an employee diagnosed with a specified cancer who is a member of the SEC if, and only if, that employee contracted the specified cancer after beginning employment at a DOE facility. Such employee is considered "a covered employee with cancer."

On August 6, 2007, the Secretary of HHS designated the following classes of employees for addition to the SEC: Employees of DOE, its predecessor agencies, or DOE contractors or subcontractors who were monitored or should have been monitored for neutron exposures while working at the Rocky Flats Plant in Golden, Colorado, for a number of work days aggregating at least 250 work days from April 1, 1952 through December 31, 1958 and/or January 1, 1959 through December 31, 1966, or in combination with work days within the parameters established for one or more other classes of employees in the SEC. The SEC designations for these classes became effective September 5, 2007.

The employee is a member of the SEC as designated above and defined by 42 U.S.C. §§ 7384l(14)(C) and 7384q of the Act, and has been diagnosed with ovarian cancer, a specified cancer. The FAB concludes that the employee is a "covered employee with cancer" pursuant to the requirements of 42 U.S.C. § 7384l(9)(A).

You have established that you are the employee's eligible survivor, pursuant to 42 U.S.C. § 7384s(e)(3)(C) of the Act. Therefore, you are entitled to compensation in the amount of $150,000.00, pursuant to 42 U.S.C. § 7384s(a)(1) and (e)(1)(C).

Accordingly, your claim for survivor benefits for the employee's ovarian cancer is approved for compensation under Part B of the Act.

Denver, Colorado

Anna Navarro

Hearing Representative

Final Adjudication Branch

[1] According to the Department of Energy's (DOE) Office of Worker Advocacy on the DOE website at http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/showfacility.cfm., the Rocky Flats Plant in Golden, Colorado is a covered DOE facility from 1951 to present.

[2] *The Rocky Flats Neutron Dosimetry Reconstruction Project (NDRP)* was a historical project undertaken to better reconstruct neutron dose for workers at the Rocky Flats Plant. As part of that Project, a list of 5,308 names was compiled. Every name on the list represents someone who was monitored for neutron dose.

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning the above claim for survivor benefits under Parts B and E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons stated below, the claim is hereby accepted.

STATEMENT OF THE CASE

On March 25, 2002, **[Claimant]** filed a claim for survivor benefits under EEOICPA as the surviving spouse of **[Employee]**. She reported that the employee was employed as a metallurgical operator/scheduler and general clerk at the Rocky Flats Plant[1] from February 1963 to February 1972. The Department of Energy (DOE) verified that the employee was employed at the Rocky Flats Plant from February 25, 1963 to February 3, 1972. Additional records received from DOE documented that the employee by employed by Dow Chemical, a DOE contractor, during his employment at Rocky Flats.

In support of her claim, **[Claimant]** alleged that the employee was diagnosed with metastatic kidney cancer. A pathology report of the tissue obtained on January 17, 1972 described a diagnosis of clear cell adenocarcinoma of the left kidney. An autopsy report dated February 22, 1972 also provided a diagnosis of adenocarcinoma of the left kidney with metastatic carcinoma to the right adrenal gland, both lungs, pancreatic lymph nodes, and right paravertebral lymph nodes.

The employee's death certificate reported that he was born on February 22, 1925, that he died on February 2, 1972 at the age of 46, that he was married to **[Claimant's maiden name]**, and the cause of death was cardiorespiratory arrest due to massive gastrointestinal bleeding and metastatic adenocarcinoma of the left kidney. **[Claimant]**'s marriage certificate showed that **[Employee]** and **[Claimant's maiden name]** married on October 1, 1939.

On September 10, 2002, the district office forwarded a complete copy of the case record to the National Institute for Occupational Safety and Health (NIOSH) for reconstruction of the radiation dose the employee received in the course of his employment at the Rocky Flats Plant. On October 2, 2006, FAB issued a final decision denying the claim under Part B of EEOICPA for survivor benefits on the ground that the probability of causation was only 30.40%, based on NIOSH's dose reconstruction.

On August 6, 2007, the Secretary of Health and Human Services (HHS) designated the following classes for addition to the Special Exposure Cohort (SEC): employees of DOE, its predecessor agencies, or DOE contractors or subcontractors who were monitored or should have been monitored for neutron exposures while working at the Rocky Flats Plant in Golden, Colorado, for a number of work days aggregating at least 250 work days from April 1, 1952 through December 31, 1958 and/or January 1, 1959 through December 31, 1966, or in combination with work days within the parameters established for one or more other classes of employees in the Special Exposure Cohort. The SEC designations for these classes became effective September 5, 2007

A review of the evidence of record indicates that the employee had a period of employment aggregating at least 250 days during the SEC periods of April 1, 1952 through December 31, 1958, and January 1, 1959 through December 31, 1966, and his name appears on the report of the Neutron Dosimetry Reconstruction Project Report (NDRP).[2] The employee was diagnosed with kidney cancer, a "specified" cancer, more than five years after his first exposure to radiation at the Rocky Flats

Plant.

Based on the new designation of two classes of employees at the Rocky Flats Plant as members of the SEC, a Director's Order was issued on December 4, 2007 that vacated the prior decision on this claim under Part B. On December 12, 2007, the district office issued a recommended decision to accept the claim for survivor benefits under Parts B and E of EEOICPA for kidney cancer and referred the case to FAB for the issuance of a final decision.

On December 13, 2007, FAB received **[Claimant]**'s signed statement certifying that neither she nor the employee had filed any tort suits or state workers' compensation claims, that they had not received any awards or benefits related to kidney cancer, that they had not pled guilty or been convicted of any charges connected with an application for or receipt of federal or state workers' compensation, and the employee, at the time of his death, had no minor children or children incapable of self support, who were not **[Claimant]**'s natural or adopted children.

After considering the record of the claim, FAB hereby makes the following:

FINDINGS OF FACT

1. On March 25, 2002, **[Claimant]** filed a claim for survivor benefits under EEOICPA.

2. **[Claimant]** is the employee's surviving spouse as supported by death and marriage certificates.

3. The employee worked for Dow Chemical, a DOE contractor, at the Rocky Flats Plant, a DOE facility, from February 25, 1963 to February 3, 1972, which is more than 250 days, and the employee's name appears on the report of the NDRP.

4. The employee was diagnosed with kidney cancer on January 17, 1972, which was at least five years after he first began employment at a DOE facility.

5. Based on the employee's reported date of birth of February 22, 1925, his normal retirement age (for purposes of the Social Security Act) would have been 65.

6. Neither **[Claimant]** nor the employee filed a tort suit or a state workers' compensation claim, received any awards or benefits related to kidney cancer, have not pled guilty or been convicted of any charges connected with an application for or receipt of federal or state workers' compensation, and the employee, at the time of death, had no minor children or children incapable of self support, who were not **[Claimant]**'s natural or adopted children.

Based on the above-noted findings of fact in this claim, FAB hereby makes the following:

CONCLUSIONS OF LAW

A claimant has 60 days from the date of issuance of the recommended decision to raise objections to that decision to FAB. 20 C.F.R § 30.310(a) (2008). If an objection is not raised during the 60-day period, FAB may issue a final decision accepting the district office's recommended decision. 20 C.F.R. § 30.316(a). On December 20, 2007, FAB received written notification from **[Claimant]** waiving any and all objections to the recommended decision.

As found above, the employee worked at the Rocky Flats Plant for a period of at least 250 work days,

during the SEC periods of April 1, 1952 through December 31, 1958, and January 1, 1959 through December 31, 1966. Part B of EEOICPA provides benefits for an employee diagnosed with a "specified" cancer who is a member of the SEC if, and only if, that employee contracted the specified cancer after beginning employment at a DOE facility. Such employee is considered "a covered employee with cancer."

FAB concludes that the employee is a member of the SEC, and because he was diagnosed with kidney cancer, a "specified" cancer. Therefore, FAB also concludes that the employee is a "covered employee with cancer" under Part B since he satisfies the requirements of 42 U.S.C. § 7384l(9)(A).

Under 42 U.S.C. § 7385s-4(a), it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing the employee's death. As used in Part E, the term "covered illness" means an illness or death resulting from exposure to a toxic substance.

Pursuant to 20 C.F.R. § 30.800, years of wage-loss occurring prior to normal retirement age that are the result of a covered illness contracted by a covered Part E employee through work-related exposure to a toxic substance at a DOE facility may be compensable under Part E. In this case, the evidence of record supports that employee experienced wage-loss for the years 1972 through 1990 (when he would have attained his normal Social Security retirement age); thus, additional compensation in the amount of $25,000.00 is payable in addition to the basic survivor award under Part E of $125,000.00.

[Claimant] has established that she is the surviving spouse of the employee as defined by Parts B and E of EEOICPA. Accordingly, she is entitled to compensation under Part B in the amount of $150,000.00, as outlined in 42 U.S.C. § 7384s(a)(1). She is also entitled to compensation under Part E in the amount of $150,000.00 pursuant to 42 U.S.C. §7385s-3(a)(2).

Denver, Colorado

Anna Navarro

Hearing Representative

Final Adjudication Branch

[1] According to the Department of Energy (DOE) website at ttp://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/showfacility.cfm, the Rocky Flats Plant in Golden, CO is a covered DOE facility from 1951 to present.

[2] *The Rocky Flats Neutron Dosimetry Reconstruction Project (NDRP)* was a historical project undertaken to better reconstruct neutron dose for workers at the Rocky Flats Plant. As part of that Project, a list of 5,308 names was compiled. Every name on the list represents someone who was monitored for neutron dose.

EEOICPA Fin. Dec. No. 20772-2006 (Dep't of Labor, January 10, 2006)

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, the Final Adjudication Branch accepts your claims for compensation in the amount of $25,000 (one-sixth each of $150,000) under Part B. A decision on your claims under Part E is deferred pending additional development.

STATEMENT OF THE CASE

On January 22 ([**Claimant #1**]) and April 5, 2002 (**[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, and **[Claimant #6]**), you each filed a Form EE-2 (Claim for Survivor Benefits under the Energy Employees Occupational Illness Compensation Program Act), based on the employee's (**[Employee]**, your father) condition of metastatic carcinoma of the spinal cord.

The record includes medical summaries and operative reports indicating that the employee was diagnosed with metastatic carcinoma spinal cord tumor. On November 28, 1989, Patrick W. Hitchon, M.D., Professor of Neurosurgery, opined that primary sites of the cancer were likely the kidney and or the lung.

You submitted a Form EE-3 (Employment History) indicating that the employee worked for the Iowa Ordnance Plant, Mason & Hangar, for twenty-eight years, as a truck driver in "all areas of the plant as well as Line One." A representative of the Department of Energy was only able to verify the employee worked at the Iowa Ordnance Plant from November 19, 1951 to January 16, 1961.

Other evidence of record contains employment information. You provided a statement, based on information you obtained from talking to a foreman and co-workers of the employee. You stated that the employee worked at "Iowa Plant, Army Ammunition Plant, Line one building Middleton, Iowa." He was a "truck driver" who hauled "people (electricians, sheet metal workers, iron workers and carpenter) to [the] job site." Also, the employee "hauled materials and helped to upload materials." In addition, the employee worked at "Firing Site Test Area (FS12)" as he hauled "workers to perform their jobs."[1] He waited for workers to take them back. Also the employee hauled materials [for] "test bombs." In addition, you provided numerous medical records relating to the employee's medical treatment while he was an employee of "Mason & Hanger-Silas Mason Co., Inc." Specifically, one report, dated July 31, 1969, for a right index finger tip injury included the place of injury or illness on Line 1 noted as "East Gate of Line 1."

You provided a copy of the employee's death certificate showing he died on January 4, 1990, due to conditions including metastatic carcinoma with an unknown primary. The employee was survived by a spouse, your mother, who subsequently died on June 22, 1993. In addition, you provided copies of your birth certificates to show that you are a child of the employee, and marriage certificates to show name change (**[Claimant #2]** and **[Claimant #3]**).

The file was referred to the National Institute for Occupational Safety and Health for radiation dose reconstruction. Effective June 19, 2005, certain employees of the IAAP were added as members of the Special Exposure Cohort (SEC) based on work performed for the Department of Energy or the Atomic Energy Commission, for the time period March 1949 through 1974. 70 Fed. Reg. 37409 (June 29, 2005).

On November 8, 2005, the Denver district office issued a recommended decision to accept your claims based on the condition of metastatic carcinoma of the spinal cord, with the lung and/or kidney as probable primary sites, concluding that you are a surviving child and each of you are entitled to

$25,000 (one-sixth of $150,000).

On November 21 (**[Claimant #3]**) and December 30, 2005 (**[Claimant #1]**, **[Claimant #2]**, **[Claimant #4]**, **[Claimant #5]**, and **[Claimant #6]**), the Final Adjudication Branch received written notification from you indicating that you waive all rights to file objections to the findings of fact and conclusions of law in the recommended decision.

FINDINGS OF FACT

1. On January 22 and April 5, 2002, you filed claims for survivor compensation under EEOICPA.

2. The employee worked at the Iowa Ordnance Plant on Line One or Atomic Energy Commission operations at the Firing Site Area in excess of 250 days, between September 14, 1951 and September 8, 1988.

3. The employee was diagnosed with metastatic carcinoma spinal cord tumor, with primary sites noted as likely the kidney and/or the lung on November 28, 1989.

4. The employee contracted the cancer after beginning employment at a DOE facility.

5. The employee died on January 4, 1990 and was survived by a spouse who is now deceased.

6. Each of you is a surviving child of the employee.

CONCLUSIONS OF LAW

Section 30.316(a) of the EEOICPA regulations provides that, if the claimant waives any objections to all or part of the recommended decision, the Final Adjudication Branch may issue a final decision accepting the recommendation of the district office, either in whole or in part. 20 C.F.R. § 30.316(a). All of you waived your right to file objections to the findings of fact and conclusions of law in the recommended decision.

Pursuant to the authority granted by 42 U.S.C. § 7384q, and effective June 19, 2005, as provided for under 42 U.S.C. § 7384l(14)(C), the following class of employees was added to the Special Exposure Cohort: [e]mployees of the Department of Energy (DOE) or DOE contractors or subcontractors employed by the Iowa Army Ammunition Plant, Line 1, during the period March 1949 through 1974 and who were employed for a number of work days aggregating at least 250 work days either solely under this employment or in combination with workdays within the parameters (excluding aggregate work day requirements) established for other classes of the employees included in the SEC. 70 Fed. Reg. 37409 (June 29, 2005). Because your claim was filed prior to June 20, 2005, the presumption exists that the employee performed Atomic Energy Commission work. *See* EEOICPA Bulletin No. 05-06 (issued Sept. 6, 2005).

The sum of the employment evidence including information from the Department of Energy, medical records you submitted, and your statement that the employee worked on Line One and at the Firing Test Site (Atomic Energy Commission operations), confirms that the employee worked at the Iowa Ordnance Plant (also known as the IAAP) on Line One or performing Atomic Energy Commission operations, between September 14, 1951 and September 8, 1988. The employee worked in excess of

250 days at the IAAP on Line One or in Atomic Energy Commission activities from September 14, 1951 to September 8, 1988. Such employment qualifies the employee for SEC status.

As a member of the Special Exposure Cohort, who was diagnosed with metastatic carcinoma spinal cord tumor, with primary sites noted as likely the kidney and/or the lung, which qualifies as a specified cancer, 20 C.F.R. § 30.5(ff)(1) and (4), the employee is a "covered employee with cancer." 42 U.S.C. § 7384l(9)(A). You are each a surviving child of the employee under 42 U.S.C. § 7384s(e)(1)(B).

Accordingly, you are each entitled to compensation in the amount of $25,000 (one-sixth of $150,000.00) pursuant to 42 U.S.C. § 7384s(a)(2).

Washington, DC

Rosanne M. Dummer

Hearing Representative

[1] Based on information provided by a Certified Health Physicist for the Division of Energy Employees Occupational Illness Compensation, Line 1 is used in the Special Exposure Cohort designation at the Iowa Army Ammunition Plant to mean Atomic Energy Commission (AEC) operations. Other areas that were involved in AEC operations that were not Line 1 include: Yard C, Yard G, Yard L, Firing Site Area, Burning Field "B" and Storage Sites for Pits and Weapons including Buildings 73 and 77.

EEOICPA Fin. Dec. No. 27798-2003 (Dep't of Labor, June 20, 2003)

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 (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq.* Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claims for benefits are denied.

STATEMENT OF THE CASE

On April 11, 2002, **[Claimant 1]** filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA), stating that he was the son of **[Employee]**, who was diagnosed with pharyngeal cancer. An additional claim followed thereafter from **[Claimant 2]** on October 20, 2002. **[Claimant 1]** also completed a Form EE-3, Employment History, indicating that **[Employee]** worked for Standard Oil Company, from 1950 to 1961; the State of Alaska as Deputy Director of Veterans Affairs, from 1961 to 1964; the State of Alaska Department of Military Affairs, Alaska Disaster Office, from 1965 to 1979 (where it was believed he wore a dosimetry badge); and, for the American Legion from 1979 to 1985.

In correspondence dated June 24, 2002, a representative of the Department of Energy (DOE) indicated that they had no employment information regarding **[Employee]**, but that he had been issued film badges at the Amchitka Test Site on the following dates: October 28, 1965; September 30, 1969; and, September 21, 1970. You also submitted a completed Form EE-4 (Employment Affidavit) signed by Don Lowell, your father's supervisor at the State of Alaska, Department of Public Safety, Division of Civil Defense. According to Mr. Lowell, your father was a radiological officer for the State of Alaska

and accompanied him to Amchitka Island for Project Longshot on November 29, 1965, and the Milrow Test on October 2, 1969, as a representative of the State of Alaska.

Additional documentation submitted in support of your claim included copies of your birth certificates, a marriage certificate documenting **[Name of Claimant 2 at Birth]**'s marriage to **[Husband]**, and the death certificate for **[Employee]**, indicating that he was widowed at the time of his death on May 10, 1993. In addition, you provided medical documentation reflecting a diagnosis of squamous cell carcinoma of the pharyngeal wall in November 1991.

On November 8, 2002, the Seattle district office issued a recommended decision that concluded that **[Employee]** was a covered employee as defined in § 7384l(9)(A) of the Act and an eligible member of the Special Exposure Cohort as defined in § 7384l(14)(B) of the EEOICPA, who was diagnosed as having a specified cancer, specifically cancer of the hypopharynx, as defined in § 7384l(17) of the Act. *See* 42 U.S.C. 7384l(9)(A), (14)(B), (17). The district office further concluded that you were eligible survivors of **[Employee]** as outlined in § 7384s(e)(3) of the Act, and that you were each entitled to compensation in the amount of $75,000 pursuant to § 7384s(a)(1) and (e)(1) of the EEOICPA. *See* 42 U.S.C. §§ 7384s(a)(1) and (e)(1).

On December 20, 2002, the Final Adjudication Branch issued a Remand Order in this case on the basis that the evidence of record did not establish that **[Employee]** was a member of the "Special Exposure Cohort," as required by the Act. The Seattle district office was specifically directed to determine whether the Department of Energy and the State of Alaska, Department of Public Safety, Division of Civil Defense, had a contractual relationship.

In correspondence dated January 17, 2003, Don Lowell elaborated further on your father's employment and his reasons for attending the nuclear testing on Amchitka Island. According to Mr. Lowell, the Atomic Energy Commission (AEC) invited the governors of Alaska to send representatives to witness all three tests on Amchitka Island (Longshot, Milrow, and Cannikin). As such, **[Employee]** attended both the Longshot and Milrow tests as a guest of the Atomic Energy Commission, which provided transportation, housing and food, and assured the safety and security of those representatives.

On February 4, 2003, the district office received an electronic mail transmission from Karen Hatch, Records Management Program Officer at the National Nuclear Security Agency. Ms. Hatch indicated that she had been informed by the former senior DOE Operations Manager on Amchitka Island that escorts were not on the site to perform work for the AEC, but were most likely there to provide a service to the officials from the State of Alaska.

In correspondence dated February 11, 2003, a representative of the State of Alaska, Department of Public Safety, Division of Administrative Services, indicated that there was no mention of Amchitka or any sort of agreement with the Department of Energy in **[Employee]**'s personnel records, but that the absence of such reference did not mean that he did not go to Amchitka or that a contract did not exist. He further explained that temporary assignments were not always reflected in these records and suggested that the district office contact the Department of Military and Veterans Affairs to see if they had any record of an agreement between the State of Alaska and the DOE. By letter dated March 13, 2003, the district office contacted the Department of Military and Veterans Affairs and requested clarification as to **[Employee]**'s employment with the State of Alaska and assignment(s) to Amchitka Island. No response to this request was received.

On April 16, 2003, the S eattle district office recommended denial of your claims. The district office concluded that you did not submit employment evidence as proof that **[Employee]** was a member of the "Special Exposure Cohort" as defined by § 7384l(14)(B) of the Act, as the evidence did not establish that he had been present at a covered facility as defined under § 7384l(12) of the Act, while working for the Department of Energy or any of its covered contractors, subcontractors or vendors as defined under § 7384l(11) of the Act, during a covered time period. *See* 42 U.S.C. § 7384l(11), (12). The district office further concluded that you were not entitled to compensation as outlined under § 7384s(e)(1) of the Act. *See* 42 U.S.C. § 7384s(e)(1).

FINDINGS OF FACT

1. On April 11 and October 20, 2002, **[Claimant 1]** and **[Claimant 2]**, respectively, filed claims for survivor benefits under the EEOICPA as the children of **[Employee]**.

2. **[Employee]** was diagnosed as having squamous cell carcinoma of the hypopharynx.

3. **[Employee]** was employed by the State of Alaska, Civil Defense Division, and was present on Amchitka Island for Project Longshot on November 29, 1965, and the Milrow Test on October 2, 1969.

4. **[Employee]**'s employment with the State of Alaska, Civil Defense Division, on assignment to Amchitka Island, Alaska, was as a representative of the governor of Alaska.

CONCLUSIONS OF LAW

The undersigned has reviewed the recommended decision issued by the Seattle district office on April 16, 2003. I find that you have not filed any objections to the recommended decision as provided by § 30.316(a) of the regulations, and that the 60-day period for filing such objections, as provided for in § 30.310(a) has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

In order to be awarded benefits under the Energy Employees Occupational Illness Compensation Program Act, the covered employee (or his/her eligible survivors), must first establish that the employee has been diagnosed with beryllium illness, cancer, or chronic silicosis. *See* 42 U.S.C. § 7384l(15), 20 C.F.R. § 30.110(a). The evidence to show proof of an occupational illness is not in dispute in this case. The medical evidence establishes that **[Employee]** was diagnosed as having squamous cell carcinoma of the hypopharynx. Consequently, **[Employee]** was diagnosed with an illness covered under the Act.

Employees of a DOE contractor (or their eligible survivors) are entitled under the EEOICPA to seek compensation for a cancer as a member of the Special Exposure Cohort (SEC) or through a determination that they incurred cancer that was at least as likely as not related to employment at a DOE facility. 42 U.S.C. §§ 7384l(14), 7384l(9)(B)(ii)(II). To be included in the SEC, a DOE employee, DOE contractor employee, or atomic weapons employee must have been employed for an aggregate of 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, or employed before January 1, 1974, by the DOE or a DOE contractor or subcontractor on Amchitka Island, Alaska, and exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests. 42 U.S.C. § 7384l(14). To qualify as a covered employee with cancer, members of the

SEC need only establish that they contracted a "specified cancer," designated in § 7384l(17) of the EEOICPA, after beginning employment at a DOE facility or atomic weapons employer facility.

While the EEOICPA does not contain a specific definition of a DOE contractor, it does contain a definition of a DOE contractor employee that, in effect, defines what a DOE contractor is. Section 7384l(11) of the EEOICPA defines a DOE contractor employee as:

(A) An individual who is or was in residence at a Department of Energy facility as a researcher for one or more periods aggregating at least 24 months.
(B) An individual who is or was employed at a Department of Energy facility by

> (i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or
>
> (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

The question presented in this case is whether **[Employee]**, an employee of the State of Alaska, was, during the time he spent on Amchitka Island, providing management and operation, management and integration or environmental remediation services under a contract between the DOE and the State of Alaska.

The undersigned notes that the Atomic Energy Commission's Managers Completion Report refers to the State of Alaska as a prime contractor for work on Milrow and Cannikin. The work to be performed under that contract consisted of police protection.

According to Don Lowell, **[Employee]**'s supervisor at the time of his assignment to Amchitka Island, your father was not an employee of any contractor or the AEC at the time of his visit to Amchitka Island. Rather, he was an invited guest of the AEC requested to witness the atomic testing as a representative of the governor of Alaska.

The preponderance of the evidence in this case supports the conclusion that **[Employee]** was on Amchitka Island for the sole purpose of witnessing the atomic testing as a representative of the governor of Alaska. While the DOE indicated that **[Employee]** was issued a dosimetry badge on three occasions, such evidence may be used to establish that he was present on Amchitka Island, not to establish that he was a covered DOE employee. Therefore, **[Employee]**'s presence on Amchitka Island was to perform work for the State of Alaska, as a representative of the governor, and not pursuant to a contract between the DOE and the State of Alaska.

It is the claimant's responsibility to establish entitlement to benefits under the EEOICPA. The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of each and every criterion under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing the Office of Workers' Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

Although you submitted medical evidence to show a covered illness manifested by squamous cell carcinoma of the hypopharynx, the evidence of record is insufficient to establish that **[Employee]** engaged in covered employment. Therefore, your claims must be denied for lack of proof of covered employment under the EEOICPA.

Seattle, Washington

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA Fin. Dec. No. 37277-2006 (Dep't of Labor, June 27, 2006)

NOTICE OF FINAL DECISION

This is a 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 for $150,000 under Part B of the Act and medical benefits for colon cancer under Part B and Part E of the Act. Your claim for pancreatic cancer is denied under Part B and deferred pending further development under Part E of the Act.

STATEMENT OF THE CASE

On October 17, 2002, you filed a Form EE-1 (Claim for Benefits under EEOICPA) under Part B of the Act and a Form DOE F. 350.2 (Request for Review by Physicians Panel) under Part E (formerly Part D) of the Act. You stated that you were diagnosed with colon cancer and pancreatic cancer. You submitted a November 28, 1995 pathology report (based on a November 27, 1995 biopsy), signed by Janet D. Allen, M.D., providing a diagnosis of colon cancer. You also submitted a March 8, 1988 pathology report, signed by Katherine Tabatowski, M.D., providing diagnoses of chronic pancreatitis and cystadenoma, and a December 6, 1995 discharge summary, signed by Kenneth Miller, M.D., providing a diagnosis of cystadenoma.

You also submitted a Form EE-3, Employment History, in which you stated that you worked as a radiation safety superintendent in criticality and health physics for Tennessee Eastman Corporation and Union Carbide, contractors at the Y-12 Plant in Oak Ridge, Tennessee, from November 5, 1943 to February 29, 1984. On the Form EE-3, you stated that you "provided plant with safety limits and procedures relating to activity with enriched uranium" and "visited production and maintenance areas in my daily of monitoring (*sic*) enriched uranium—often holding it in my hands." The Oak Ridge Institute for Science and Education (ORISE) data base confirmed you worked at the Y-12 Plant from November 5, 1943 to February 29, 1984. Your job titles include trainee #1, worked from November 5, 1943 to April 15, 1944; technical assistant from April 16, 1944 to May 13, 1944; process foreman from May 14, 1944 to August 19, 1944; technical supervisor from August 20, 1944 to June 2, 1945; process engineer from June 3, 1945 to March 23, 1946; industrial hygienist from March 24, 1946 to May 3, 1947; and engineer from May 4, 1947 to August 31, 1947.

In a draft summary of the Computer Assisted Telephone Interview (CATI) with the National Institute for Occupational Safety and Health (NIOSH), you described your duties as "Casting, forming,

machining, and inspection of large natural uranium parts. Chemical and mechanical operations: conversion to metal—highly enriched uranium. Waste recovery and processing." You indicated you worked in all locations, including buildings 9212 and 9206.

Effective September 24, 2005, the Department of Health and Human Services designated certain employees of the Y-12 facility in Oak Ridge, Tennessee as members of the Special Exposure Cohort (SEC), based on work performed in uranium enrichment operations, or other radiological activities at the Y-12 Plant, for the period from March 1943 through December 1947.

The district office received your written confirmation dated February 15, 2006, that you had not filed or received any settlement or award from a law suit or workers' compensation claim in connection with the accepted condition.

On February 22, 2006, the Seattle district office issued a recommended decision to accept your claim concluding that you were entitled to compensation in the amount of $150,000 and medical benefits. On March 8, 2006, the Final Adjudication Branch received your written confirmation that you waived your right to object to any of the findings of fact and/or conclusions of law contained in the recommended decision.

FINDINGS OF FACT

1. On October 17, 2002, you filed a Form EE-1 and a Request for Review by Physicians Panel for colon cancer and pancreatic cancer.

2. You were diagnosed with colon cancer on a November 27, 1995. You also diagnosed with chronic pancreatitis and cystadenoma.

3. You worked at the Y-12 plant in Oak Ridge, Tennessee, for TEC and Union Carbide from November 5, 1943 to February 29, 1984. Your job titles include trainee #1, worked from November 5, 1943 to April 15, 1944; technical assistant from April 16, 1944 to May 13, 1944; process foreman from May 14, 1944 to August 19, 1944; technical supervisor from August 20, 1944 to June 2, 1945; process engineer from June 3, 1945 to March 23, 1946; industrial hygienist from March 24, 1946 to May 3, 1947; and engineer from May 4, 1947 to August 31, 1947.

CONCLUSIONS OF LAW

On June 5, 2006, the Director of the Division of Energy Employees Occupational Illness Compensation (DEEOIC) issued a bulletin establishing supplemental guidance for processing claims for the SEC class for the Y-12 Plant, March 1943 to December 1947.[1] This directive supplements the guidance provided in EEOICPA Bulletin 06-04 (issued November 21, 2005) for evaluating evidence of uranium enrichment operations or other radiological activities for the Y-12 SEC class.

The DEEOIC accepts that certain positions were affiliated with uranium enrichment operations at Y-12 Plant. While your job titles are not included in the list, the list is not all-inclusive. The DEEOIC notes that certain process descriptions are associated with uranium enrichment operations. EEOICPA Bulletin No. 06-11 (issued June 5, 2006) provides examples of these processes, including uranium processing, chemical conversion, and uranium recovery. Your description of your job duties shows that you were involved in all of these processes. Furthermore, you stated that you performed work in

buildings 9212 and 9206, both buildings listed as locations involving uranium enrichment activities (specifically, product processing and uranium recovery). Therefore, there is sufficient evidence linking you to uranium enrichment operations or other radiological activities.

You worked in uranium enrichment activities or other radiological activities at Y-12 for more than 250 work days. Therefore, you qualify as a member of the SEC. As a member of the SEC who was diagnosed with colon cancer, which is a "specified cancer" pursuant to 42 U.S.C. § 7384l(17)(A) and 20 C.F.R. § 30.5(ff)(5)(iii)(M) and constitutes an "occupational illness" under 42 U.S.C. § 7384l(15), you qualify for benefits as a "covered employee with cancer." 42 U.S.C. § 7384l(9). Therefore, you are entitled to $150,000 for your colon cancer. 42 U.S.C. § 7384s(a).

You were an employee of Department of Energy (DOE) contractors at a DOE facility. 42 U.S.C. §§ 7384l(11), 7384l(12). A determination under Part B of the Act that a DOE contractor employee is entitled to compensation under that part for an occupational illness is treated as a determination that the employee contracted that illness through exposure at a DOE facility. 42 U.S.C. § 7385s-4(a). Therefore, you are a covered DOE contractor employee with a covered illness. 42 U.S.C. §§ 7385s(1), 7385s(2).

Therefore, you are entitled to medical benefits for colon cancer effective October 17, 2002. 42 U.S.C. §§ 7384t, 7385s-8.

The medical evidence shows that you were diagnosed with chronic pancreatitis and cystadenoma, not pancreatic cancer. Therefore, your claim for benefits for pancreatic cancer is denied since you have submitted insufficient evidence to establish that you were diagnosed with pancreatic cancer. 20 C.F.R. § 30.211.

Jacksonville, Florida

Mark Stewart

Hearing Representative

[1] EEOICPA Bulletin No. 06-11 (issued June 5, 2006).

EEOICPA Fin. Dec. No. 48688-2005 (Dep't of Labor, September 14, 2005)

REMAND ORDER

This is a decision of the Final Adjudication Branch (FAB) 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.* For the reasons set forth below, the case is remanded to the Cleveland district office.

STATEMENT OF THE CASE

On July 23 2005, the Cleveland district office issued a recommended decision which concluded that you were entitled to benefits under 42 U.S.C. § 7384s of the EEOICPA, because your employment at the Iowa Army Ammunition Plant (IAAP) qualified you for benefits as a member of a Special

Exposure Cohort (SEC).

On your Form EE-3 (Employment History), you indicated that you worked for Silas Mason at the IAAP from October 1966 to December 1974. You further indicated that you performed duties at the IAAP on Lines 3A, 6 and 7.

Effective June 19, 2005, the following class of employees was added to the SEC: employees of the DOE or DOE contractors or subcontractors employed by the Iowa Ordnance Plant (Iowa Army Ammunition Plant), Line 1, during the period March 1949 through 1974 who were employed for a number of work days aggregating at least 250 work days either solely under this employment or in combination with work days within the parameters (excluding aggregate work day requirements) established for other classes of employees in the SEC. 70 Fed. Reg. 37409 (June 29, 2005) This class of employee eligible for the SEC designation has been further described to include all workers and activities involved in AEC operations at IAAP.

Duties performed on Line 3A at the IAAP involve the loading, assembling and packing operations for artillery and mortar rounds. Duties performed on Line 6 at the IAAP involve the production, storage and shipping of detonators, relays, and hand grenade fuses. Duties performed on Line 7 at the IAAP involve assembling and pack operation where artillery primers, rocket igniters and time fuses were assembled for World War II and the Korean War. The Department of Energy (DOE) verified your employment at the IAAP from October 12, 1966 through December 6, 1974. There is no evidence to support that the duties performed on Lines 3A, Line 6 or Line 7 at the IAAP involve Atomic Energy Commission (AEC) activities as required by the IAAP SEC designation. Your employment during the relevant time period was on Lines 3A, 6 and 7 at the IAAP and cannot be considered in calculating the required 250 days needed for IAAP SEC status. You have not alleged employment at IAAP in AEC operations.

Therefore, the case must be remanded to the district office for further development of employment evidence that might establish your employment for 250 days on AEC activities at the IAAP during the relevant time period. If no such evidence is available, the entire case file must be forwarded the National Institute for Occupational Safety and Health (NIOSH) in order to reconstruct the radiation dose received in the course of employment. Upon completion of the NIOSH Dose Reconstruction, the district office will determine whether the employee's cancer was "at least likely as not" due to exposure to radiation at a DOE facility.

Therefore, the final decision is vacated and the case is returned to the district office for further development.

Washington, DC

Curtis Johnson

Hearing Representative

EEOICPA Fin. Dec. No. 54503-2004 (Dep't of Labor, September 23, 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.

STATEMENT OF THE CASE

On February 20, 2004, **[Claimant 1]** filed a Form EE-2, Claim for Survivor Benefits under the EEOICPA. On March 12, 2004, **[Claimant 2]** filed a Form EE-2, Claim for Survivor Benefits under the EEOICPA. Your claims were based, in part, on the assertion that your 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 colon cancer.

On the Form EE-3, Employment History, you stated the employee was employed by F. H. McGraw at the gaseous diffusion plant (PGDP) in Paducah, Kentucky for the period of 1951 to 1953. The district office verified this employment as July 1, 1952 through December 22, 1953. The medical evidence established that the employee was diagnosed with colon cancer on

January 29, 1985.

On August 17, 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 $75,000 each, for the employee's colon cancer. You each submitted written notification that you waive any and all objections to the recommended decision. **[Claimant 2]** also submitted comments about the recommended decision, concerning M.W. Kellogg. F.H. McGraw was the prime contractor at the PGDP, while Kellogg would have held subcontractor status. Both companies held contracts with the Department of Energy, and sufficient employment with either of the companies qualifies the employee for SEC membership.

In order for the employee to qualify as a member of the Special Exposure Cohort (SEC) under § 7384l(14)(A) of the Act, the following requirements must be satisfied:

> (A) The employee was so employed for a number of work days aggregating at least 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, and, during such employment - -
>
> > (i) was monitored through the use of dosimetry badges for exposure at the plant of the external parts of employee's body to radiation; or
> >
> > (ii) worked in a job that had exposures comparable to a job that is or was monitored through the use of dosimetry badges.

By way of social security records, employment records, and affidavits, the Final Adjudication Branch confirmed the employee was employed at the PGDP from at least July 1, 1952[1] to December 22, 1953. This fulfills the requirement of 250 work days prior to February 1, 1992.

You indicated on the EE-3 (Employment History) that you did not know whether your father wore a dosimetry badge. According to the Department of Energy sponsored report entitled *Exposure Assessment Project at Paducah Gaseous Diffusion Plant*, released in December 2000, Section 4.2.1.1

External Dosimeters states: "Prior to 1961, select groups of employees considered to have the potential for radiation exposures were issued film badges. After [July 1] 1960, all employees were issued two combination security/film badges." Because the period of your father's employment fell within the time that some or all employees at the Paducah GDP were issued dosimetry badges, I find that the employee's employment at the Paducah GDP satisfies the requirements under § 7384l(14)(A) of the Act. 42 U.S.C. §7384l(14)(A).

FINDINGS OF FACT

1. On February 20, 2004, **[Claimant 1]** filed a Form EE-2, Claim for Survivor Benefits under the EEOICPA. On March 12, 2004, **[Claimant 2]** filed a Form EE-2, Claim for Survivor Benefits under the EEOICPA.

2. The medical evidence is sufficient to establish that the employee was diagnosed with colon cancer on January 29, 1985, more than five years after the first exposure to occupational radiation.

3. Colon cancer is a specified cancer under § 7384l(17)(A) of the Act and § 30.5(dd)(5)(iii)(M) of the implementing regulations. 42 U.S.C. § 7384l(17)(A),

20 C.F.R. § 30.5(dd)(5)(iii)(M).

4. The employee was employed at the PGDP from at least July 1, 1952 through December 22, 1953. The employee is a covered employee as defined in § 7384l(1) of the Act. 42 U.S.C. § 7384l(1).

5. In proof of survivorship, you submitted death certificates, a divorce decree, birth certificates and documentation of name changes. Therefore, you have established that you are survivors as defined by § 30.5(ee) of the implementing regulations. 20 C.F.R. § 30.5(ee).

6. The employee is a member of the Special Exposure Cohort, as defined in § 7384l(14)(A) of the Act. 42 U.S.C. § 7384l(14)(A).

7. The Jacksonville district office issued the recommended decision on August 17, 2004.

8. 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 Jacksonville district office on August 17, 2004. I find that the employee is a member of the Special Exposure Cohort, as that term is defined in the Act; and that the employee's colon cancer is a specified cancer under the Act. 42 U.S.C. §§ 7384l(14)(A), 7384l(17)(A)

I find that the recommended decision is in accordance with the facts and the law in this case, and that you are each entitled to one-half of the maximum $150,000 award, in the amount of $75,000 each, pursuant to the Act. 42 U.S.C. §§ 7384s(a), 7384s(e)(1)(B).

Jacksonville, FL

Sidne M. Valdivieso

Hearing Representative

[1] In accordance with the Federal (EEOICPA) Procedure Manual, Chapter 2-500.3a(2) (June 2002), if the claimant qualifies for inclusion in the SEC on the basis of working at a GDP, but has not indicated having worn a dosimeter on the EE-3 form, the DOL will be required to determine whether the claimant had exposure within a time period during which his/her exposure was comparable to a job that is or was monitored through the use of dosimetry badges. For the PGDP, the comparison dates of employment are 7/52 through 2/1/92. Therefore, the accepted beginning date of employment in this case is 7/1/52.

EEOICPA Fin. Dec. No. 72524-2006 (Dep't of Labor, April 13, 2006)

NOTICE OF FINAL DECISION

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 in part and deferred in part. A determination of your eligibility for wage-loss and impairment benefits is pending further development by the district office. A copy of this decision has been provided to your authorized representative.

STATEMENT OF THE CASE

On October 5, 2005, you filed a Form EE-1, Claim for Benefits under the EEOICPA, for breast cancer. A pathology report and other supporting medical records establish that you were diagnosed with cancer of the right breast on April 3, 1985. On the Form EE-1, you indicated that you were a member of the Special Exposure Cohort (SEC).

On the Form EE-3, Employment History, you stated you were employed as a laboratory worker by Tenessee Eastman Corporation at the Y-12 plant for the period of November 1, 1942 through August 6, 1945. The district office verified that you worked for Tenessee Eastman Corporation at the Y-12 plant for the period of November 22, 1944 through October 31, 1945 and were issued dosimetry badge number **[Badge number]**.

This period of employment equates to 49 work weeks. You submitted a contemporaneous copy of the Tennessee Eastman Corporation's Employees' Guidebook that states that the schedule at the Y-12 plant was six eight-hour shifts per week. This six day workweek was substantiated in a letter from **[Employee's co-worker]**, a chemist at the Y-12 plant during 1944 and 1945. **[Employee's co-worker]** asserted that this work schedule was necessitated by a 24 hours a day 7 days a week effort to produce every possible milligram of U-235.

The Department of Energy provided evidence that your duties at Y-12 were in the laboratory as an assistant lab technician and as an analyst. The letter from **[Employee's co-worker]** confirmed that this lab work involved applying analytic procedures required to account for U in the process streams in the plant and analyses for the total uranium content of various samples.

On March 2, 2006 the Jacksonville district office issued a recommended decision to accept your claim for compensation in the amount of $150,000.00 and medical benefits for cancer of the right breast.

This decision was based on a finding by the district office that you are a member of the SEC and that you were diagnosed with a specified cancer.

On March 8, 2006 the Final Adjudication Branch received written notification that you waived any and all objections to the recommended decision.

FINDINGS OF FACT

1. You filed a Form EE-1, Claim for Benefits under the EEOICPA, on October 5, 2005.

2. You were diagnosed with breast cancer on April 3, 1985.

3. You were employed at the Y-12 plant from November 22, 1944 through October 31, 1945 and while employed you worked six eight hour shifts per week.

4. You were employed in the laboratory where your duties involved radiological activities and you were issued a dosimetry badge in 1944.

5. On March 2, 2006 the Jacksonville district office issued a recommended decision.

CONCLUSIONS OF LAW

I have reviewed of the evidence of record and the recommended decision.

To qualify as a member of the SEC at the Y-12 facility under the Act, the following requirements must be satisfied:

Department of Energy (DOE) employees or DOE contractor or subcontractor employees who worked in uranium enrichment operations or other radiological activities at the Y-12 facility in Oak Ridge, Tennessee from March 1943 through December 1947 and who were employed for a number of work days aggregating at least 250 work days, either solely under this employment or in combination with work days within the parameters (excluding aggregate work day requirements) established for other classes of employees included in the SEC. EEOICPA Bulletin No. 06-04 (issued November 21, 2005).

The evidence shows that you worked at the Y-12 facility from November 22, 1944 through October 31, 1945 and were assigned a work schedule of six eight hour shifts per week during this employment. This employment equals more than 250 workdays at Y-12 between March 1943 and December 1947. You worked in a job that involved analyzing uranium content and accounting for uranium in the process stream. You wore a dosimetry badge during the time of your employment. This employment qualifies as a radiological activity. You qualify as a member of the SEC. 42 U.S.C. § 7384l(14)(C)(i).

Your breast cancer is a specified cancer as defined by the Act and implementing regulations. 42 U.S.C. § 7384l(17)(A); 20 C.F.R. § 30.5(ff)(5)(iii)(B) (2005).

Therefore, I conclude that you are entitled to $150,000 and medical benefits effective October 5, 2005, for breast cancer, pursuant to the Act. 42 U.S.C. §§ 7384s(a), 7384t.

I have reviewed the evidence of record and the recommended decision.

You were an employee of a DOE contractor at a DOE facility. 42 U.S.C. §§ 7384l(11), 7384l(12). A determination under Part B of the Act that a DOE contractor employee is entitled to compensation under that part for an occupational illness is treated as a determination that the employee contracted that illness through exposure at a DOE facility. 42 U.S.C. § 7385s-4(a). Therefore, you are a covered DOE contractor employee with a covered illness. 42 U.S.C. §§ 7385s(1), 7385s(2).

Therefore, I hereby conclude that you are entitled to medical benefits for breast cancer under Part E of the Act effective October 5, 2005. 42 U.S.C. § 7385s-8.

Jacksonville, FL

Douglas J. Helsing

Hearing Representative

EEOICPA Fin. Dec. No. 72816-2007 (Dep't of Labor, April 7, 2008)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch (FAB) concerning the claimant's claims for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the recommended decision to deny the claims is reversed and both claims for survivor benefits under Part B of EEOICPA are accepted.

STATEMENT OF THE CASE

On October 11, 2005, **[Claimant #1 and Claimant #2]** filed claims for survivor benefits under Parts B and E of EEOICPA as the children of **[Employee]**, hereinafter referred to as the employee. **[Claimant #1 and Claimant #2]** identified gall bladder and skin cancers and gastrointestinal hemorrhage as the claimed conditions for the employee. On June 15, 2006, FAB issued a final decision, finding that **[Claimant #1 and Claimant #2]** were not covered children as defined under Part E of EEOICPA. Therefore, their claims for survivor benefits under Part E were denied.

[Claimant #1] stated on the Form EE-3 that the employee was employed as a carpenter at the Nevada Test Site[1] from 1940 to 1961. The Department of Energy (DOE) verified the employee's employment as a carpenter with Reynolds Electrical and Engineering from March 12, 1953 to April 17, 1953, and from April 30, 1957 to July 19, 1957 at the Nevada Test Site.

[Claimant #1 and Claimant #2] submitted a death certificate, which indicated the employee died on February 5, 1987, that the cause of death was gastrointestinal hemorrhage, and that he was widowed at the time of his death. A death certificate for **[Employee's Child]**, father's name was **[Employee]**, was submitted. **[Claimant #1]** submitted a birth certificate, which indicated the employee was her father. A birth certificate for **[Claimant #2]** indicated the employee was his father. An Order for Name Change dated May 16, 1979 indicated that **[Claimant #2]**'s name was changed to **[Claimant #2]**.

A March 10, 1987 autopsy report, from Drs. Stephen Ovanessoff and Roy I. Davis, indicated a final autopsy diagnosis of hepatocellular carcinoma with direct invasion of the gallbladder.

To determine the probability of whether the employee sustained his cancer in the performance of duty, the district office referred the case to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction. The dose reconstruction was based on the periods of employment at the Nevada Test Site from March 12, 1953 to April 17, 1953 and from April 30, 1957 to July 19, 1957. On July 3, 2007 and August 12, 2007, respectively, **[Claimant #1 and Claimant #2]** signed Form OCAS-1 indicating that they had reviewed the NIOSH Draft Report of Dose Reconstruction and agreed that it identified all of the relevant information that they provided to NIOSH.

The district office received the final NIOSH Report of Dose Reconstruction dated August 24, 2007. The district office used the information provided in this report to determine that there was a 15.57% probability that the employee's liver cancer was caused by radiation exposure at the Nevada Test Site.

On August 31, 2007, the Seattle district office issued a recommended decision finding that the employee's cancer was not "at least as likely as not" caused by employment at the Nevada Test Site. Therefore, the district office concluded that **[Claimant #1 and Claimant #2]** were not entitled to compensation under Part B of EEOICPA.

OBJECTIONS

On October 10, 2007, FAB received **[Claimant #2]**'s October 10, 2007 objection to the recommended decision and request for an oral hearing. On January 8, 2008, a hearing was held to hear the objections of **[Claimant #1 and Claimant #2]**. However, the equipment to record the hearing malfunctioned and another hearing was held by telephone on February 20, 2008.

During the January 8, 2008 hearing, **[Claimant #2]** submitted a four-page letter in support of his objections. This letter was read at both the January 8, 2008 and February 20, 2008 hearings. One of his objections was regarding the finding that **[Claimant #1 and Claimant #2]** were not "covered" children as that term is defined under Part E of EEOICPA. With reference to this objection, FAB issued a final decision, finding that **[Claimant #1 and Claimant #2]** were not "covered" children as defined under Part E. Therefore, their claims for survivor benefits under Part E were denied. After FAB has issued a final decision pursuant to 20 C.F.R. § 30.316, only the Director for Division of Energy Employees Occupational Illness Compensation may reopen a claim and return it to FAB for issuance of new decision. 20 C.F.R. § 30.320. There is no intervening Director's Order regarding **[Claimant #1 and Claimant #2]**'s claims for survivor benefits under Part E of EEOICPA. Therefore, no new final decision will be issued on their claims for benefits under Part E.

During the February 20, 2008 hearing, **[Claimant #1]** indicated that the employee lived on site during his employment at the Nevada Test Site. In support of this statement, she indicated that the employee "made a custom or habit of staying at a camp site near his work place if the distance was too far to travel." In addition, she indicated that the employee had an old truck and that it was always breaking down.

Effective July 26, 2006, the Secretary of Health and Human Services designated certain employees of the Nevada Test Site in Mercury, Nevada as members of the Special Exposure Cohort (SEC), who were employed for a number of work days aggregating at least 250 work days, either solely under this employment or in combination with work days of employment occurring within the parameters established for classes of employees included in the SEC, based on work performed for the period from

January 27, 1951 to December 31, 1962.

As noted above, DOE verified the employee's employment as a carpenter with Reynolds Electrical and Engineering from March 12, 1953 to April 17, 1953 and from April 30, 1957 to July 19, 1957 at the Nevada Test Site. However, in a review of records from DOE a Personnel Action Slip from Reynolds Electrical and Engineering was found that indicated a date of hire of April 3, 1957. A July 19, 1957 Radiation Exposure memo indicated that the employee was exposed to radiation from April 3, 1957 to June 30, 1957. Based upon the foregoing information, the correct periods of employment are March 12, 1953 to April 17, 1953 and from April 3, 1957 to July 19, 1957. In addition, the following documents were submitted by DOE:

1. A March 12, 1953 application for employment, which indicated a home address in Las Vegas, Nevada and a temporary address in Mercury, Nevada.

2. A May 3, 1957 application for employment, which indicated a home address in Las Vegas, Nevada and a temporary address in Mercury, Nevada.

3. A June 17, 1957 accident report indicated a mailing address in Mercury, Nevada.

Pursuant to EEOICPA Bulletin No. 06-16 (issued September 12, 2006), if the employee was present (either worked or lived) on site at the Nevada Test Site for a 24-hour period in a day, the claims examiner is to credit the employee with the equivalent of three (8-hour) work days. If there is evidence that the employee was present on site at the Nevada Test Site for 24 hours in a day for 83 days, the employee would have the equivalent of 250 work days and would meet the 250 work day requirement for the SEC. In addition, the Nevada Test Site includes the town of Mercury, which is located in the southwest corner of the site.

The preponderance of evidence of record establishes that the employee lived and worked at the Nevada Test Site from March 12, 1953 to April 17, 1953 and from April 3, 1957 to July 19, 1957. These periods represent a total of 101 work days. Crediting the employee with three days of exposure for each day worked, the employee would have had 303 days of exposure during the periods from March 12, 1953 to April 17, 1953 and from April 3, 1957 to July 19, 1957.

There were other objections to the denial of survivor benefits under Part B of EEOICPA; however, they are not being addressed because the evidence of record is sufficient to accept **[Claimant #1 and Claimant #2]**'s claims for survivor benefits under Part B of EEOICPA.

On their claims for survivor benefits, **[Claimant #1 and Claimant #2]** indicated that neither they nor the employee had filed any lawsuits or received any settlements or awards for the employee's claimed condition. In addition, **[Claimant #1 and Claimant #2]** indicated that there are no other living children of the employee.

After considering the evidence of record, FAB hereby makes the following:

FINDINGS OF FACT

1. **[Claimant #1 and Claimant #2]** filed claims for survivor benefits under Parts B and E of EEOICPA.

2. On June 15, 2006, FAB issued a final decision, finding that **[Claimant #1 and Claimant #2]** were not "covered" children as defined under Part E of EEOICPA.

3. The employee was employed and lived at the Nevada Test Site for at least 250 workdays, by Reynolds Electrical and Engineering, from March 12, 1953 to April 17, 1953 and from April 30, 1957 to July 19, 1957.

4. The employee was first diagnosed liver cancer on February 5, 1987.

5. The employee was widowed on his February 5, 1987 date of death.

6. **[Claimant #1 and Claimant #2]** are the surviving children of the employee.

Based on these facts, the undersigned hereby makes the following:

CONCLUSIONS OF LAW

Section 30.316(b) of the EEOICPA regulations provides that "if the claimant objects to all or part of the recommended decision, the FAB reviewer will issue a final decision on the claim after either the hearing or the review of the written record, and after completing such further development of the case as he or she may deem necessary." 20 C.F.R. § 30.316(b). The undersigned has reviewed the record, including **[Claimant #1 and Claimant #2]**'s objections, and concludes that no further investigation is warranted.

On July 12, 2006, the Secretary of Health and Human Services designated the following class of employees as an addition to the SEC: "Department of Energy (DOE) employees or DOE contractor or subcontractor employees who worked at the Nevada Test Site in Mercury, Nevada from January 27, 1951 to December 31, 1962 and who were employed for a number of work days aggregating at least 250 work days, either solely under this employment or in combination with work days of employment occurring within the parameters (excluding aggregate work day requirements) established for other classes of employees included in the SEC." This designation became effective July 26, 2006. *See* 71 Fed. Reg. 44298 (August 4, 2006).

The evidence of record supports that the employee worked for a DOE contractor and lived at the Nevada Test Site in excess of 250 workdays from March 12, 1953 to April 17, 1953 and from April 3, 1957 to July 19, 1957, which is during the relevant period of the SEC class. This employment qualifies him for inclusion within the SEC. As a member of the SEC who was diagnosed with liver cancer, which is a "specified cancer" pursuant to 20 C.F.R. § 30.5(ff) and constitutes an "occupational illness" under 42 U.S.C. § 7384l(15), he meets the definition of a "covered employee with cancer." 42 U.S.C. § 7384l(9). **[Claimant #1 and Claimant #2]** are the employee's only eligible surviving beneficiaries, as defined at 42 U.S.C. § 7384s(e)(1)(B). As an eligible survivor of a "covered employee with cancer, I conclude that their claims for survivor benefits should be accepted and that **[Claimant #1 and Claimant #2]** are each entitled to $75,000.00 for a total of $150,000.00 in compensation benefits under Part B of EEOICPA.

Washington, DC

Tom Daugherty

Hearing Representative

Final Adjudication Branch

[1] The Nevada Test Site is a DOE facility from 1951 to present according to the DOE Facility List (http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/findfacility.cfm).

EEOICPA Fin. Dec. No. 82961-2008 (Dep't of Labor, March 27, 2008)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning the above claims for compensation under Parts B and E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, FAB accepts and approves the claims for benefits **[of Claimant #1, 2, 3, 4 and 5]** under Part B for the employee's epiglottis cancer, and awards compensation to those five persons in the total amount of $150,000.00, to be divided equally.

Further, FAB also accepts the claim of **[Claimant #5]** under Part E, and awards her additional compensation in the amount of $125,000.00.

STATEMENT OF THE CASE

On October 19, 2004, **[Employee's Spouse]** filed a Form EE-2 with the Department of Labor claiming for survivor benefits under Part B as the employee's widow, and a request for review by Physicians Panel under former Part D with the Department of Energy (DOE), based on the conditions of throat cancer and emphysema with possible chronic beryllium disease. The record includes a copy of **[Employee]**'s death certificate indicating he died on September 1, 1990 due to acute bronchopneumonitis, with a contributing factor of coronary artery disease.

[Employee's Spouse] also submitted a Form EE-3 in which she alleged that **[Employee]** worked at the Los Alamos National Laboratory (LANL) from 1970 to 1980. DOE verified **[Employee]**'s employment at LANL as a security guard with the Atomic Energy Commission (AEC) from May 15, 1972 to January 9, 1981, and as a part-time employee with the University of California, a DOE contractor, as a Casual Messenger/Driver, from August 23, 1973 to October 29, 1973.

On October 16, 2005, **[Employee's Spouse]** died, and her claim was administratively closed.

On December 13, 2006, **[Claimant #1]** and **[Claimant #2]** each filed a Form EE-2 based on the employee's throat cancer, and on January 4, 2007, **[Claimant #3]**, **[Claimant #4]** and **[Claimant #5]** each filed a Form EE-2. Each claimed benefits as the surviving child of **[Employee]**.

[Claimant #2], **[Claimant #3]** and **[Claimant #4]** provided copies of their birth certificates showing they are the biological children of **[Employee],** and copies of their marriage certificates to document their changes in surname. **[Claimant #1]** provided a copy of a birth certificate identifying her name as **[Claimant #1's birth name]** and her parents as **[Claimant #1's Father on her birth certificate]** and **[Claimant #1's Mother on her birth certificate],** a Certificate of Baptism identifying her parents as **[Employee]** and **[Employee's Spouse],** letters from acquaintances stating that **[Employee and Employee's Spouse]** were her biological parents and that she was adopted by her grandparents, and

marriage certificates to document her change in surname. The record contains adoption documents showing that **[Claimant #5]** was born on April 11, 1973, and was adopted by **[Employee and Employee's Spouse]**.

Medical documentation in the record includes a document from the New Mexico cancer registry that provides a diagnosis of cancer of the epiglottis on April 25, 1989; a January 11, 2005 letter from Dr. Charles McCanna, in which he indicated that **[Employee]** died from complications of epiglottis (throat) cancer; another letter from Dr. McCanna stating that the employee's medical records are no longer available; and a letter from St. Vincent Hospital dated January 24, 2005, indicating that their records had been destroyed.

On June 5, 2007, the Seattle district office referred the case to the National Institute for Occupational Safety and Health (NIOSH) to determine whether the employee's cancer of the epiglottis was "at least as likely as not" related to his covered employment. However, the case was returned on March 14, 2008 so the district office could review it to determine if the employee was included in the designation by the Secretary of Health and Human Services (HHS) of certain LANL employees as an addition to the Special Exposure Cohort (SEC).

On September 11, 2007, FAB issued a final decision on the Part E claims of **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]**, concluding that these claimants are not eligible "covered" children under Part E.

On March 14, 2008, the Seattle district office received information from a Department of Labor Health Physicist (HP) on the question of whether cancer of the epiglottis is a "specified" cancer. The HP stated the following:

Pharynx cancer is a specified cancer for SEC claims. With regard to epiglottis cancer, the National Office recently reviewed medical evidence to determine whether the epiglottis is a part of the pharynx. 20 C.F.R. § 30.5(ff)(5)(iii)(E) indicates that pharynx cancer is a "specified cancer" under EEOICPA. The National Cancer Institute (NCI) states that pharyngeal cancer is a cancer that forms in the tissues of the pharynx, and that the pharynx consists of the hollow tube inside the neck that starts behind the nose and ends at the top of the windpipe and esophagus. The National Office determined that because the location of the epiglottis is technically within the area encompassed by the pharynx, the epiglottis is a specified cancer.

On the same date, the district office issued a recommended decision to accept the claims **[of Claimant #1, 2, 3, 4 and 5]** under Part B based on the employee's cancer of the epiglottis, and to also accept the claim of **[Claimant #5]** under Part E. The district office concluded that **[Employee]** is a member of the SEC, that he was employed by a DOE contractor at a DOE facility, that he is a covered employee with a covered illness under Part E, and that he was diagnosed with epiglottis cancer, which is a "specified" cancer. The district office also concluded that as his eligible survivors, **[Claimant #1, 2, 3, 4 and 5]** are entitled to compensation under Part B, in the total amount of $150,000.00, to be divided equally. Further, the district office concluded that a determination that a DOE contractor employee and qualified member of the SEC is entitled to compensation for an occupational illness under Part B is treated for purposes of Part E as a determination that the employee contracted that illness through exposure at a DOE facility, and since **[Claimant #5]** was under the age of 18 at the time of **[Employee]**'s death, she is the only eligible survivor under Part E and is entitled to compensation in the amount of $125,000.00.

The claimants each indicated on their respective Forms EE-2 that neither they nor anyone in their family had ever filed for or received any proceeds from either a tort suit or a state workers' compensation claim related to the employee's epiglottis cancer, that they had never pled guilty to or been convicted of any charges connected with an application for or receipt of federal or state workers' compensation, and that they did not know of any other persons who may also be eligible to receive compensation under EEOICPA as a survivor of **[Employee]**.

On March 20, 2008, FAB received written notification from **[Claimant #1, 2, 4 and 5]**, indicating that they waive all rights to file objections to the findings of fact and conclusions of law in the recommended decision. On March 24, 2008, FAB received written notification from **[Claimant #3]**, indicating she also waives all rights to file objections to the findings of fact and conclusions of law in the recommended decision.

After considering the evidence of record, FAB hereby makes the following:

FINDINGS OF FACT

1. On December 13, 2006 **[Claimant #1]**and **[Claimant #2]**; and on January 4, 2007 **[Claimant #3]**, **[Claimant #4]** and **[Claimant #5]** each filed a claim for survivor benefits under EEOICPA.
2. **[Employee]** was diagnosed with epiglottis cancer on April 25, 1989.
3. **[Employee]** died on September 1, 1990, due to acute bronchopneumonitis, with a contributing factor of coronary artery disease; which were complications of his epiglottis (throat) cancer.
4. **[Employee]** worked at LANL as a security guard with the AEC from May 15, 1972 to January 9, 1981, and with the University of California, as a Casual Messenger/Driver, from August 23, 1973 to October 29, 1973.
5. There is a causal connection between the employee's death due to epiglottis cancer and his exposure to radiation and/or a toxic substance at a DOE facility.
6. **[Claimant #1, 2, 3, 4 and 5]** are the eligible children of **[Employee]** under Part B.
7. **[Claimant #5]** was 17 years of age at the time of **[Employee]**'s death.
8. All five claimants indicated on their respective Form EE-2 that neither they nor anyone in their family had ever filed for or received any proceeds from a tort suit or a state workers' compensation claim related to the employee's epiglottis cancer, that they had never pled guilty to or been convicted of any charges connected with an application for or receipt of federal or state workers' compensation, and that they did not know of any other persons who may also be eligible to receive compensation under EEOICPA as a survivor of [**Employee]**.

Based on the above-noted findings of fact, FAB hereby also makes the following:

CONCLUSIONS OF LAW

Section 30.316(a) of the regulations provides that, if the claimant waives any objections to all or part of the recommended decision, FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part. *See* 20 C.F.R. § 30.316(a). All five claimants waived their right to file objections to the findings of fact and conclusions of law contained in the recommended decision issued on their claims.

In order for him to be considered a covered Part B employee, the evidence must establish that **[Employee]** was diagnosed with an occupational illness incurred as the result of his exposure to silica,

beryllium, or radiation, and those illnesses are cancer, beryllium sensitivity, chronic beryllium disease, and chronic silicosis. *See* 42 U.S.C. § 7384l(15); 20 C.F.R. § 30.110(a). Further, EEOICPA requires that the illness must have been incurred while the employee was "in the performance of duty" for DOE or certain of its vendors, contractors, subcontractors, or for an atomic weapons employer. *See* 42 U.S.C. §§ 7384l(4)-(7), (9), and (11).

On June 22, 2007, the Secretary of HHS designated a new class of employees as an addition to the SEC, consisting of DOE employees or DOE contractor or subcontractor employees who were monitored or should have been monitored for radiological exposures while working in operational Technical Areas with a history of radioactive material use at LANL for a number of work days aggregating at least 250 work days from March 15, 1943 through December 31, 1975, or in combination with work days within the parameters established for one or more classes of employees in the SEC. The new SEC class became effective on July 22, 2007.

The employment evidence is sufficient to establish that **[Employee]** was employed at LANL for an aggregate of at least 250 work days, as a security guard, and therefore he is considered to be an eligible member of the class of employees who worked at LANL from March 15, 1943 through December 31, 1975 that was added to the SEC.

[Employee] is a member of the SEC who was diagnosed with epiglottis cancer, which is cancer of a part of the pharynx (a "specified" cancer), more than 5 years after his initial exposure, and therefore he is a "covered employee with cancer." *See* 42 U.S.C. §§ 7384l(14)(C), 7384l(17), 7384l(9)(A) and 20 C.F.R. § 30.5(ff)(5)(iii)(E). Therefore, as the employee is now deceased, the five claimants are entitled to compensation in the total amount of $150,000.00, divided in equal shares of $30,000.00 each. *See* 42 U.S.C. § 7384s(a) and (e).

The statute provides that if a determination has been made that a DOE contractor employee is entitled to compensation for an occupational illness under Part B, such determination shall be treated, for purposes of Part E, as a determination that the employee contracted that illness through exposure at a DOE facility. *See* 42 U.S.C. § 7385s-4(a). Consequently, **[Employee]**'s illness is deemed to be a "covered illness" contracted through exposure to toxic substances at a DOE facility. The medical evidence also establishes that epiglottis cancer was one of the causes of **[Employee]**'s death. As the employee would have been entitled to compensation for his covered illness under Part E; and it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing the death of the employee, his eligible survivors would be entitled to compensation pursuant to 42 U.S.C. § 7385s-3(a)(1). **[Claimant #5]** was 17 years of age at the time of **[Employee]**'s death, and is the only eligible survivor pursuant to § 7385s-3(d), and therefore she is entitled to compensation in the amount of $125,000.00. *See* 42 U.S.C. §§ 7385s-3(a)(1), 7385s-3(d).

Seattle, Washington

Keiran Gorny

Hearing Representative

Final Adjudication Branch

Specified cancers

EEOICPA Fin. Dec. No. 1400-2002 (Dep't of Labor, January 22, 2002)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA).

On December 12, 2001, the Seattle District Office issued a recommended decision concluding that the deceased covered employee was a member of the Special Exposure Cohort, as that term is defined in § 7384l(14) of the EEOICPA, and that you are entitled to compensation in the amount of $150,000 pursuant to § 7384s of the EEOICPA as his survivor. On December 17, 2001, the Final Adjudication Branch received written notification from you waiving any and all objections to the recommended decision.

The undersigned has reviewed the evidence of record and the recommended decision issued by the Seattle district office on December 12, 2001, and finds that:

In a report dated August 20, 1996, Dr. John Mues diagnosed the deceased covered employee with mixed squamous/adenocarcinoma of the lung. The report states the diagnosis was based on the results of a thoracoscopy and nodule removal. Lung cancer is a specified disease as that term is defined in § 7384l(17)(A) of the EEOICPA and 20 CFR § 30.5(dd)(2) of the EEOICPA regulations.

You stated in the employment history that the deceased covered employee worked for S.S. Mullins on Amchitka Island, Alaska from April 21, 1967 to June 17, 1969. Nancy Shaw, General Counsel for the Teamsters Local 959 confirmed the employment by affidavit dated November 1, 2001. The affidavit is acceptable evidence in accordance with § 30.111 (c) of the EEOICPA regulations.

Jeffrey L. Kotch[1], a certified health physicist, has advised it is his professional opinion that radioactivity from the Long Shot underground nuclear test was released to the atmosphere a month after the detonation on October 29, 1965. He further states that as a result of those airborne radioactive releases, SEC members who worked on Amchitka Island, as defined in EEOICPA § 7384l(14)(B), could have been exposed to ionizing radiation from the Long Shot underground nuclear test beginning a month after the detonation, i.e., the exposure period could be from approximately December 1, 1965 through January 1, 1974 (the end date specified in EEOICPA, § 7384l(14)(B)). He supports his opinion with the Department of Energy study, *Linking Legacies*, DOE/EM-0319, dated January 1997, which reported that radioactive contamination on Amchitka Island occurred as a result of activities related to the preparation for underground nuclear tests and releases from Long Shot and Cannikin. Tables 4-4 and C-1, on pages 79 and 207, respectively, list Amchitka Island as a DOE Environmental Management site with thousands of cubic meters of contaminated soil resulting from nuclear testing.

The covered employee was a member of the Special Exposure Cohort as defined in § 7384l(14)(B) of the EEOICPA and §§ 30.210(a)(2) and 30.213(a)(2) of the EEOICPA regulations. This is supported by evidence that shows he was working on Amchitka Island for S.S. Mullins during the potential exposure period, December 1, 1965 to January 1, 1974.

The covered employee died February 17, 1999. Metastatic lung cancer was included as a immediate

cause of death on the death certificate.

You were married to the covered employee August 18, 1961 and were his wife at the time of his death. You are the eligible surviving spouse of the covered employee as defined in § 7384s of the EEOICPA, as amended by the National Defense Authorization Act (NDAA) for Fiscal Year 2002 (Public Law 107-107, 115 Stat. 1012, 1371, December 28, 2001.[2]

The undersigned hereby affirms the award of $150,000.00 to you as recommended by the Seattle District Office.

Washington, DC

Thomasyne L. Hill

Hearing Representative

[1] Jeffrey L. Kotch is a certified health physicist employed with the Department of Labor, EEOICP, Branch of Policies, Regulations and Procedures. He provided his professional opinion in a December 6, 2001 memorandum to Peter Turcic, Director of EEOICP.

[2] Title XXXI of the National Defense Authorization Act for Fiscal Year 2002 amended the Energy Employees Occupational Illness Compensation Program Act.

EEOICPA Fin. Dec. No. 2597-2002 (Dep't of Labor, July 8, 2003)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA).

On June 6, 2003, the Jacksonville district office issued a decision recommending that you are entitled to medical benefits effective April 28, 2003 for colon cancer.

The district office referred the claims for skin cancer and cancer of the pyriform sinus to the National Institute for Occupational Safety and Health (NIOSH). However, the pyriform sinus is part of the hypo pharynx. EEOICPA Bulletin No. 02-28, Effective September 5, 2002, further defines that the hypo pharynx is one of three parts of the pharynx. The pharynx is a Special Exposure Cohort (SEC) cancer as defined in § 7384l(17)(A) of the Act, and § 30.5(dd)(5)(iii)(E) of the implementing regulations. 42 U.S.C. § 7384l(17)(A), 20 C.F.R. § 30.5(dd)(5)(iii)(E). Therefore, I find that **[Employee]** has cancer of the pharynx, and is entitled to medical benefits for the treatment of pharynx cancer. As the pyriform sinus (pharynx cancer) is an SEC cancer, there is no need for dose reconstruction by NIOSH. The condition of skin cancer remains for dose reconstruction at NIOSH.

On June 16, 2003, the Final Adjudication Branch received your written notification that you waive any and all objections to the recommended decision. I have reviewed the record on this claim and the recommended decision issued by the district office on June 6, 2003. I find that you are a member of the Special Exposure Cohort, as that term is defined in § 7384l(14)(A) of the Act; and that your colon cancer and pharynx (pyriform sinus) cancer are specified cancers under § 7384l(17)(A) of the Act and §§ 30.5(dd)(5)(iii)(M) and (E) of the implementing regulations. 42 U.S.C. §§ 7384l(14)(A), 7384l(17)

(A), 20 C.F.R. §§ 30.5(dd)(5)(iii)(M), 30.5(dd)(5)(iii)(E).

A claimant is entitled to compensation one time in the amount of $150,000 for a disability from a covered occupational illness. Since you were previously awarded $150,000 for lung cancer, this decision is for medical benefits only. I find that the recommended decision is in accordance with the facts and the law in this case, and that you are entitled to medical benefits effective April 28, 2003 for colon cancer, and effective August 9, 2001 for pharynx cancer (pyriform sinus), pursuant to § 7384t of the Act. 42 U.S.C. § 7384t.

Jacksonville, FL

July 8, 2003

Jeana F. LaRock

District Manager

Final Adjudication Branch

EEOICPA Fin. Dec. No. 23398-2004 (Dep't of Labor, September 10, 2004)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On February 21, 2002, you filed a Form EE-1 (Claim for Employee Benefits under the EEOICPA), based on uterine carcinoma. Medical documentation submitted in support of your claim shows that you were diagnosed as having endometrial adenocarcinoma on November 27, 2001.

You also provided a Form EE-3 (Employment History) in which you state that you worked for the Carbide and Carbon Chemical Corporation at the Oak Ridge Gaseous Diffusion Plant (GDP) from July 1948 to October 19, 1953, and for the Goodyear Atomic Corporation at the Portsmouth GDP from September 1, 1954 to August 1, 1955. You also report that you did not wear a dosimetry badge at either facility. A representative of the Department of Energy (DOE) verified that you worked at the Oak Ridge GDP from April 12, 1948, to October 19, 1953, and at the Portsmouth GDP from September 7, 1954, to September 15, 1955. The Oak Ridge GDP is recognized as a covered DOE facility from 1943 to the present and the Portsmouth GDP is recognized as a covered DOE facility from 1954 to 1998. *See* Department of Energy, Office of Worker Advocacy, Facility List.

Based on covered employment of more than 250 workdays at the Oak Ridge and Portsmouth GDPs, in a job that had exposures comparable to a job that is or was monitored through the use of dosimetry badges, you meet the requirements for Special Exposure Cohort membership. *See* 42 U.S.C. §

7384l(14). However, because the cancer with which you had been diagnosed, endometrial carcinoma, is not a specified cancer under 42 U.S.C. § 7384l(17), your case was referred to NIOSH in order to further consider your entitlement to compensation under the Act.

To determine the probability of whether you sustained cancer in the performance of duty, the district office referred your claim to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction in accordance with § 20 C.F.R. § 30.115. On June 16, 2004, you signed Form OCAS-1, indicating that you had reviewed the NIOSH Draft Report of Dose Reconstruction and agreeing that it identified all of the relevant information provided to NIOSH. On June 23, 2004, the district office received the final NIOSH Report of Dose Reconstruction. Using the information provided in this report, the Cleveland district office utilized the Interactive RadioEpidemiological Program (NIOSH-IREP) to determine the probability of causation of your cancer and reported in its recommended decision that there was a 7.57% probability that your cancer was caused by radiation exposure at the Oak Ridge and Portsmouth GDPs.

On June 29, 2004, the Cleveland district office recommended denial of your claim for compensation finding that your cancer was not "at least as likely as not" (a 50% or greater probability) caused by radiation doses incurred while employed at the Oak Ridge and Portsmouth GDPs. The district office concluded that the dose reconstruction estimates were performed in accordance with 42 U.S.C. § 7384n(d). Further, the district office concluded that the probability of causation was completed in accordance with 42 U.S.C. § 7384n(c)(3). The district office also concluded that you do not qualify as a covered employee with cancer as defined in 42 U.S.C. § 7384l(9)(B). Lastly, the district office concluded that you are not entitled to compensation, as outlined under 42 U.S.C. § 7384s.

FINDINGS OF FACT

1. You filed a claim for benefits on February 21, 2002.

2. You were employed at the Oak Ridge GDP and at the Portsmouth GDP, covered DOE facilities, from April 12, 1948, to October 19, 1953, and September 7, 1954, to September 15, 1955, respectively.

3. You were diagnosed as having endometrial adenocarcinoma on November 27, 2001.

4. The NIOSH Interactive RadioEpidemiological Program indicated a 7.57% probability that your cancer was caused by radiation exposure at the Oak Ridge GDP and at the Portsmouth GDP.
5. Your cancer was not "at least as likely as not" related to your employment at a DOE facility.

CONCLUSIONS OF LAW

I have reviewed the recommended decision issued by the Cleveland district office on June 29, 2004. I find that you have not filed any objections to the recommended decision and that the sixty-day period for filing such objections has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

To determine the probability of whether you sustained cancer in the performance of duty, the district office referred your claim to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction, in accordance with 20 C.F.R. § 30.115. The information and methods utilized to produce the dose reconstruction are summarized and explained in the NIOSH Report of Dose Reconstruction dated June 8, 2004. NIOSH assigned an overestimate of radiation dose using maximizing assumptions related to radiation exposure and intake, based on current science, documented experience, and relevant data, as well as information recorded during the computer-assisted telephone interview. *See* 42 C.F.R. §§ 82.25 and 82.26.

office utilized the NIOSH Interactive RadioEpidemiological Program to determine a 7.57% probability that your cancer was caused by radiation exposure while employed at the Oak Ridge and Portsmouth GDPs. The Final Adjudication Branch also analyzed the information in the NIOSH report, confirming the 7.57% probability.

Therefore, your claim must be denied because the evidence does not establish that you are a "covered employee with cancer", because your cancer was not determined to be "at least as likely as not" (a 50% or greater probability) related to radiation doses incurred in the performance of duty at the Oak Ridge and Portsmouth GDPs. *See* 42 U.S.C. §§ 7384l(1)(B), 7384l(9)(B).

For the above reasons, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

Cleveland, OH

Debra A. Benedict

Acting District Manager

Final Adjudication Branch

EEOICPA Fin. Dec. No. 26618-2006 (Dep't of Labor, June 27, 2006)

NOTICE OF FINAL DECISION

This is a 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 for $75,000 each, for a total of $150,000.

STATEMENT OF THE CASE

On November 27, 2001, your late father, **[Employee]**, hereinafter referred to as "the employee," filed a Form EE-1, Claim for Benefits, for his prostate cancer, kidney cancer, and lung cancer. Unfortunately, he died on March 12, 2002, prior to the adjudication of his claim. On April 5, 2002, you both filed a Form EE-2, Claim for Survivor Benefits, for the employee's prostate cancer, kidney cancer, and lung cancer.

An April 22, 1981 pathology report, signed by W. Allen Loy, M.D., establishes that the employee was diagnosed with urothelial carcinoma (bladder cancer). A June 9, 1995 pathology report (based on a June 6, 1995 biopsy), signed by Rebecca L. Foust, M.D., establishes that the employee was diagnosed with carcinoma of the left renal pelvis. An October 20, 2001 discharge summary, signed by William Hall, M.D., establishes that the employee was diagnosed with cancer of the right lung.[1]

On the Form EE-3, Employment History, the employee stated he was employed as a development engineer by Tennessee Eastman Corporation (TEC) and Union Carbide Corporation Nuclear Division at the Y-12 plant in Oak Ridge, Tennessee, from 1944 to 1963. The district office verified that the employee worked for Tennessee Eastman Corporation at the Y-12 plant from March 6, 1944 to July 1,

1963. The Oak Ridge Institute for Science and Education (ORISE) database shows the employee worked as a chemist from March 6, 1944 to August 5, 1944; as a shift foreman from August 6, 1944 to March 22, 1947; and as a chemist from March 23, 1947 to May 31, 1949.

The October 20, 2003 draft summary of the Computer Assisted Telephone Interview (CATI) performed by NIOSH provides additional information about the employee's job duties. You stated during the CATI that in 1944, he worked in building 9202. He was involved in uranium preparation and salvage. He also managed the stable isotope assay laboratory. It appears that he managed the laboratory starting in 1949.

Effective September 24, 2005, the Department of Health and Human Services designated certain employees of the Y-12 plant who were employed for a number of work days aggregating at least 250 work days, either solely under this employment or in combination with work days of employment occurring within the parameters established for classes of employees included in the SEC, as members of the Special Exposure Cohort, (SEC) based on work performed in uranium enrichment, or other radiological activities at the Y-12 plant, for the period from March 1943 through December 1947.

In support of your claim for survivorship, you submitted the death certificates of the employee, which showed that he died on March 12, 2002, and that he was a widower at the time of his death. In addition, you both submitted your birth certificates showing that you are the children of the employee, and **[Claimant #2]** submitted her marriage certificate documenting her name change.

On March 21, 2006, the Jacksonville district office issued a recommended decision, concluding that you were each entitled to compensation in the amount of $75,000 under Part B, for a total of $150,000. The Final Adjudication Branch received written notification that you each waived any and all objections to the recommended decision.

FINDINGS OF FACT

1. On November 27, 2001, your late father, **[Employee]**, hereinafter referred to as "the employee, filed a Form EE-1, Claim for Benefits, for his prostate cancer, kidney cancer, and lung cancer. Unfortunately, he died on March 12, 2002, prior to the adjudication of his claim. On April 5, 2002, you both filed a Form EE-2, Claim for Survivor Benefits, for the employee's prostate cancer, kidney cancer, and lung cancer.

2. The employee was diagnosed with bladder cancer on April 22, 1981 (more than 5 years after his first exposure); cancer of the renal pelvis on June 6, 1995; and cancer of the right lung on October 20, 2001. Cancer of the renal pelvis, as a part of the ureter, is considered by our office to be a form of bladder cancer rather than a form of kidney cancer.[2]

3. The employee was employed by Tennessee Eastman Corporation at the Y-12 plant in Oak Ridge, Tennessee, from March 6, 1944 to July 1, 1963. The employee worked as a chemist from March 6, 1944 to August 5, 1944; as a shift foreman from August 6, 1944 to March 22, 1947; and as a chemist from March 23, 1947 to May 31, 1949. Given that he worked as a chemist both before and after the period he worked as a shift foreman, it can be assumed that his duties as a shift foreman were similar to those performed as a chemist.

4. You are the employee's children. The employee was widowed at the time of his death.

CONCLUSIONS OF LAW

You each meet the definition of a survivor under Part B of the Act. 42 U.S.C. § 7384s(e)(3)(A).

On June 5, 2006, the DEEOIC issued EEOICPA Bulletin No. 06-11, which provided supplemental guidance for processing claims for the Special Exposure Cohort (SEC) class for the Y-12 plant. That bulletin establishes that the primary function of Y-12 during 1943 to 1947 was to perform uranium enrichment using a calutron. The employee's job duties as a chemist and shift foreman involved processes associated with uranium enrichment operations, including uranium preparation and salvage. (Although the employee's work as a manager of the isotope laboratory occurred after 1947, it provides a clearer picture of what his duties may have been as a chemist.) In addition, building 9202 was a Y-12 plant location involving uranium enrichment operations. [3]

The evidence shows that the employee worked at the Y-12 plant from March 6, 1944 through December 31, 1947, which equals more than 250 days during the SEC class period, and that he was involved in uranium enrichment operations and other radiological activities.[4] Therefore, the employee qualifies as a member of the SEC. As a member of the SEC who was diagnosed with lung cancer and bladder cancer, which are "specified cancers" pursuant to the Act and constitute "occupational illnesses" under the Act, the employee or the employee's survivor(s) qualify for benefits as a "covered employee with cancer." 42 U.S.C. §§ 7384l(17)(A), 7384l(15), 7384l(9); 20 C.F.R. §§ 30.5(ff)(2), 30.5(ff)(5)(iii)(K) (2005). Therefore, I conclude that you are entitled to $75,000 each, for a total of $150,000, for the employee's lung cancer and bladder cancer, pursuant to the Act. 42 U.S.C. § 7384s(a).

In addition, since the employee filed the claim for benefits prior to his death, you are entitled to seek reimbursement for out-of-pocket medical expenses and/or payment of any outstanding medical expenses for the employee's lung cancer, bladder cancer, and cancer of the renal pelvis from November 27, 2001 (the date he filed his claim) to March 12, 2002 (the date of his death).

Jacksonville, Florida

Mark Stewart

Hearing Representative

[1] Although a pathology report shows that cancer was discovered in the employee's prostate on May 27, 1981, it is unclear whether the cancer was a primary cancer or a secondary cancer metastasized from the bladder. However, further development is not necessary to adjudicate the claim.

[2] EEOICPA Bulletin No. 02-16 (issued June 12, 2002).

[3] EEOICPA Bulletin No. 06-11 (issued June 5, 2006).

[4] EEOICPA Bulletin No. 06-04 (issued November 21, 2005).

EEOICPA Fin. Dec. No. 50214-2005 (Dep't of Labor, March 2, 2005)

FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under Part B of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On October 16, 2003, you filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA) claiming benefits as the spouse of **[Employee]**. You identified the diagnosed condition being claimed as liver cancer (hepatocellular carcinoma). The medical documentation of record shows that your husband was diagnosed with liver cancer on September 15, 2003. Those records also show findings of cirrhosis of the liver. You also indicated that your husband was a member of the Special Exposure Cohort (SEC) based on his employment at the gaseous diffusion plant in Portsmouth, OH.

You submitted a copy of your marriage certificate which shows that you and your husband were wed on February 16, 2000. You also submitted a copy of your husband's death certificate showing that he died on September 20, 2003, and identifying you as his surviving spouse. The death certificate shows the cause of death as respiratory failure due to cirrhosis of the liver and cancer of the liver.

You also provided a Form EE-3 (Employment History) in which you stated that your husband worked for GAT, Lockheed Martin Marietta, and USEC from April 19, 1976, to September 20, 2003. You did not indicate the location of your husband's employment. The Department of Energy (DOE) verified that he worked at the Portsmouth Gaseous Diffusion Plant (GDP) from April 19, 1976, to September 20, 2003. The Portsmouth GDP is recognized as a covered DOE facility from 1954 to July 28, 1998; from July 29, 1998 to the present for remediation; and from May 2001 to the present in cold standby status. *See* DOE, Office of Worker Advocacy, Facility List.

To determine the probability of whether your husband sustained cancer in the performance of duty, the Cleveland district office referred your claim to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction in accordance with 20 C.F.R. § 30.115. On November 29, 2004, you signed Form OCAS-1, indicating that you had reviewed the NIOSH Draft Report of Dose Reconstruction and agreeing that it identified all of the relevant information provided to NIOSH. On December 9, 2004, the district office received the final NIOSH Report of Dose Reconstruction. Using the information provided in this report, the district office utilized the Interactive RadioEpidemiological Program (IREP) to determine the probability of causation of your husband's cancer and reported in its recommended decision that there was a 42.16% probability that liver cancer was caused by radiation exposure at the Portsmouth GDP.

On December 20, 2004, the Cleveland district office recommended denial of your claim for compensation finding that the employee's cancer was not "at least as likely as not" (a 50% or greater probability) caused by radiation doses incurred while employed at the Portsmouth GDP. The district office concluded that the dose reconstruction estimates were performed in accordance with 42 U.S.C. § 7384n(d). Further, the district office concluded that the probability of causation was completed in accordance with 42 U.S.C. § 7384n(c)(3). The district office also concluded that your husband does not qualify as a covered employee with cancer as defined in 42 U.S.C. § 7384l(9)(B). The district office noted that your husband's liver cancer cannot be a "specified cancer" because cirrhosis is also indicated by the evidence of record. Lastly, the district office concluded that you are not entitled to

compensation, as outlined under 42 U.S.C. § 7384s.

FINDINGS OF FACT

1. You filed a claim for benefits on October 16, 2003.

2. Your husband worked at Portsmouth GDP, a covered DOE facility, from April 19, 1976, to September 20, 2003.

3. Your husband was diagnosed with liver cancer on September 15, 2003. The medical evidence also indicated findings of cirrhosis.

4. The NIOSH Interactive RadioEpidemiological Program indicated a 42.16% probability that your husband's liver cancer was caused by radiation exposure at the Portsmouth GDP.

5. Your husband's cancer was not at least as likely as not related to his employment at a DOE facility

6. You are the surviving spouse of **[Employee]** and were married to him for at least one year immediately prior to his death.

CONCLUSIONS OF LAW

I have reviewed the recommended decision issued by the Cleveland district office on December 20, 2004. I find that you have not filed any objections to the recommended decision and that the sixty-day period for filing such objections has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

You filed a claim based on liver cancer. Under the EEOICPA, a claim for cancer must be demonstrated by medical evidence that sets forth the diagnosis of cancer and the date on which the diagnosis was made. *See* 20 C.F.R. § 30.211. Additionally, in order to be afforded coverage as a "covered employee with cancer," you must show that your husband was a DOE employee, a DOE contractor employee, or an atomic weapons employee, who contracted cancer after beginning employment at a DOE facility or an atomic weapons employer facility. *See* 42 U.S.C. § 7384l(9). The cancer must also be determined to have been sustained in the performance of duty, *i.e*., at least as likely as not related to employment at a DOE facility or atomic weapons employer facility. *See* 42 U.S.C. § 7384n(b).

Using the information provided in the Report of Dose Reconstruction for liver cancer, the district office utilized the NIOSH Interactive RadioEpidemiological Program to determine a 42.16% probability that your husband's cancer was caused by radiation exposure while employed at the Portsmouth GDP. The Final Adjudication Branch (FAB) also analyzed the information in the NIOSH report, confirming the 42.16% probability.

You also claimed entitlement to compensation due to your husband's status as a member of the SEC. The FAB finds that the medical evidence of record indicates the presence of cirrhosis of the liver. Based on that finding, your husband's liver cancer cannot be considered a "specified cancer" as defined by 42 U.S.C. § 7384l(17)(A). For that reason, although your husband's employment is sufficient to establish that he is a member of the SEC, he cannot be considered to be a covered employee with cancer as defined by 42 U.S.C. § 7384l(9)(A).

Therefore, your claim must be denied because the evidence does not establish that your husband is a "covered employee with cancer," because his cancer was not determined to be "at least as likely as not" (a 50% or greater probability) related to radiation doses incurred in the performance of duty at the Portsmouth GDP. Additionally, the evidence does not establish that your husband is a "covered employee with cancer," based on SEC membership and liver cancer, because cirrhosis is indicated by the medical evidence of record. *See* 42 U.S.C. § 7384l(1)(B), (9)(A) and (B), and (17)(A).

For the above reasons, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under Part B of the Act. Accordingly, your claim for benefits is denied.

Cleveland, OH

Tracy Smart

Acting FAB Manager

Final Adjudication Branch

EEOICPA Fin. Dec. No. 59055-2004 (Dep't of Labor, September 17, 2004)

NOTICE OF FINAL DECISION

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

STATEMENT OF THE CASE

You filed a claim, Form EE-1 (Claim for Employee Benefits under the EEOICPA), on July 7, 2004, based on rectal cancer/colon cancer. You provided a copy of a histopathology report which diagnosed invasive adenocarcinoma, based on analysis of a rectal polyp obtained during a colonoscopy on February 24, 1997. An operative report shows that you underwent a low anterior resection due to rectal cancer on March 13, 1997. The post-surgical pathology report diagnoses moderately differentiated adenocarcinoma of the colon.

You also provided a Form EE-3 (Employment History) in which you state that you worked for Dynamic Industrial (Dycon) at the Portsmouth Gaseous Diffusion Plant (GDP), in Piketon, OH, as a pipefitter from January 1983 to November 1984 and from January 1985 to June 1985. You also report that you worked for the Marley Cooling Tower Co. at the Portsmouth GDP during March 1985. You also state that you wore a dosimetry badge while so employed.

The Department of Energy (DOE) was unable to confirm your reported employment. You provided copies of Forms W-2 which show that you were paid wages by Dynamic Industrial Cons. Inc. during 1983, 1984, and 1985; and by the Marley Cooling Tower Co. in 1985. A letter from the Financial Secretary Treasurer of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 577, reports that you worked at the Portsmouth GDP for Dynamic Industrial from January 1983 to November 1984 and from January 1985 to June 1985; and for Marley Cooling Tower Co. during March 1985. A representative of the DOE provided information which establishes that Dycon was a subcontractor at the Portsmouth GDP from 1980 through 1986. The Portsmouth GDP is recognized as a Department of Energy (DOE) facility from 1954 to 1998. *See* Department of Energy, Office of Worker Advocacy Facilities List.

On August 6, 2004, the Cleveland district office issued a recommended decision concluding that you are a member of the Special Exposure Cohort (SEC), as defined by 42 U.S.C. § 7384l(14), who was diagnosed with rectal cancer, which is a specified cancer under 42 U.S.C. § 7384l(17). In addition the district office concluded that, as a covered employee, you are entitled to compensation in the amount of $150,000, pursuant to 42 U.S.C. § 7384s. The district office also concluded that, pursuant to 42 U.S.C. § 7384s(b), you are entitled to medical benefits, as described in 42 U.S.C. § 7384t, beginning July 7, 2004, for rectal cancer.

On August 19, 2004, the Final Adjudication Branch (FAB) received written notification that you waive any and all objections to the recommended decision.

The FAB received additional evidence subsequent to receipt of your waiver. The DOE provided a copy of a Personnel Clearance Master Card which shows that you were granted a security clearance with SWEC (Dynamic Indust.) on January 18, 1984. No termination date is shown. You submitted additional medical reports regarding your treatment for cancer. Some of these were duplicates of

reports already of record. The remaining records discuss your treatment following surgery in March 1997.

FINDINGS OF FACT

1. You filed a claim for benefits on July 7, 2004.

2. For purposes of SEC membership, you worked at Portsmouth GDP for Dycon during the periods of January 1983 to November 1984 and January 1985 to June 1985.

3. The evidence of record establishes that Dycon was a subcontractor for the Portsmouth Gaseous Diffusion Plant from 1980 to 1986.

4. You were employed for a number of work days aggregating at least 250 work days during the period of September 1, 1954, to February 1, 1992, and during such employment performed work that was comparable to a job that is or was monitored through the use of dosimetry badges.

5. You were diagnosed with rectal cancer on February 24, 1997.

CONCLUSIONS OF LAW

In order to be considered a "member of the Special Exposure Cohort," you must have been a Department of Energy (DOE) employee, DOE contractor employee, or an atomic weapons employee who was so employed for a number of work days aggregating at least 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, and, during such employment worked in a job that was monitored through the use of dosimetry badges for exposure at the plant of the external parts of employee's body; or had exposures comparable to a job that is or was monitored through the use of dosimetry badges, as outlined in 42 U.S.C. § 7384l(14)(A).

The evidence of record establishes that you worked in covered employment at the Portsmouth GDP from January 1983 to November 1984 and January 1985 to June 1985. This meets the requirement of working more than an aggregate 250 days at a covered facility. *See* 42 U.S.C. § 7384l(14)(A). The Division of Energy Employees Occupational Illness Compensation (DEEOIC) has determined that employees who worked at the Portsmouth GDP between September 1954 and February 1, 1992, performed work that was comparable to a job that was monitored through the use of dosimetry badges. *See* Federal (EEOICPA) Procedure Manual, Chapter 2-500.3a (June 2002). On that basis, you meet the dosimetry badge requirement.

The Final Adjudication Branch notes that you claimed benefits based on rectal cancer/colon cancer. The medical evidence of record interchangeably refers to adenocarcinoma of the rectum and the colon. Regardless of the term used, the evidence reveals only a single tumor located in the rectum. For that reason, your claim is considered to be based on a single occurrence of cancer in your rectum.

Rectal cancer is considered to be colon cancer, which is a specified cancer under the Act, and the medical evidence of record establishes a diagnosis of rectal cancer. Therefore, you are a member of the Special Exposure Cohort, who was diagnosed with a specified cancer. *See* 42 U.S.C. §§ 7384l(14)(A) and (17).

For the reasons stated above, I accept your claim for benefits based on rectal cancer. You are entitled to compensation in the amount of $150,000, pursuant to 42 U.S.C. § 7384s. Additionally, I conclude that,

pursuant to 42 U.S.C. § 7384s(b), you are entitled to medical benefits, as described in 42 U.S.C. § 7384t, beginning July 7, 2004, for rectal cancer.
Cleveland, Ohio

Debra A. Benedict

Acting District Manager

Final Adjudication Branch

EEOICPA Fin. Dec. No. 82961-2008 (Dep't of Labor, March 27, 2008)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning the above claims for compensation under Parts B and E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, FAB accepts and approves the claims for benefits **[of Claimant #1, 2, 3, 4 and 5]** under Part B for the employee's epiglottis cancer, and awards compensation to those five persons in the total amount of $150,000.00, to be divided equally.

Further, FAB also accepts the claim of **[Claimant #5]** under Part E, and awards her additional compensation in the amount of $125,000.00.

STATEMENT OF THE CASE

On October 19, 2004, **[Employee's Spouse]** filed a Form EE-2 with the Department of Labor claiming for survivor benefits under Part B as the employee's widow, and a request for review by Physicians Panel under former Part D with the Department of Energy (DOE), based on the conditions of throat cancer and emphysema with possible chronic beryllium disease. The record includes a copy of **[Employee]**'s death certificate indicating he died on September 1, 1990 due to acute bronchopneumonitis, with a contributing factor of coronary artery disease.

[Employee's Spouse] also submitted a Form EE-3 in which she alleged that **[Employee]** worked at the Los Alamos National Laboratory (LANL) from 1970 to 1980. DOE verified **[Employee]**'s employment at LANL as a security guard with the Atomic Energy Commission (AEC) from May 15, 1972 to January 9, 1981, and as a part-time employee with the University of California, a DOE contractor, as a Casual Messenger/Driver, from August 23, 1973 to October 29, 1973.

On October 16, 2005, **[Employee's Spouse]** died, and her claim was administratively closed.

On December 13, 2006, **[Claimant #1]** and **[Claimant #2]** each filed a Form EE-2 based on the employee's throat cancer, and on January 4, 2007, **[Claimant #3]**, **[Claimant #4]** and **[Claimant #5]** each filed a Form EE-2. Each claimed benefits as the surviving child of **[Employee]**.

[Claimant #1's birth name] and her parents as **[Claimant #1's Father on her birth certificate]** and **[Claimant #1's Mother on her birth certificate],** a Certificate of Baptism identifying her parents as **[Employee]** and **[Employee's Spouse],** letters from acquaintances stating that **[Employee and Employee's Spouse]** were her biological parents and that she was adopted by her grandparents, and marriage certificates to document her change in surname. The record contains adoption documents showing that **[Claimant #5]** was born on April 11, 1973, and was adopted by **[Employee and Employee's Spouse]**.

Medical documentation in the record includes a document from the New Mexico cancer registry that provides a diagnosis of cancer of the epiglottis on April 25, 1989; a January 11, 2005 letter from Dr. Charles McCanna, in which he indicated that **[Employee]** died from complications of epiglottis (throat) cancer; another letter from Dr. McCanna stating that the employee's medical records are no longer available; and a letter from St. Vincent Hospital dated January 24, 2005, indicating that their records had been destroyed.

On June 5, 2007, the Seattle district office referred the case to the National Institute for Occupational Safety and Health (NIOSH) to determine whether the employee's cancer of the epiglottis was "at least as likely as not" related to his covered employment. However, the case was returned on March 14, 2008 so the district office could review it to determine if the employee was included in the designation by the Secretary of Health and Human Services (HHS) of certain LANL employees as an addition to the Special Exposure Cohort (SEC).

On September 11, 2007, FAB issued a final decision on the Part E claims of **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]**, concluding that these claimants are not eligible "covered" children under Part E.

On March 14, 2008, the Seattle district office received information from a Department of Labor Health Physicist (HP) on the question of whether cancer of the epiglottis is a "specified" cancer. The HP stated the following:

Pharynx cancer is a specified cancer for SEC claims. With regard to epiglottis cancer, the National Office recently reviewed medical evidence to determine whether the epiglottis is a part of the pharynx. 20 C.F.R. § 30.5(ff)(5)(iii)(E) indicates that pharynx cancer is a "specified cancer" under EEOICPA. The National Cancer Institute (NCI) states that pharyngeal cancer is a cancer that forms in the tissues of the pharynx, and that the pharynx consists of the hollow tube inside the neck that starts behind the nose and ends at the top of the windpipe and esophagus. The National Office determined that because the location of the epiglottis is technically within the area encompassed by the pharynx, the epiglottis is a specified cancer.

On the same date, the district office issued a recommended decision to accept the claims **[of Claimant #1, 2, 3, 4 and 5]** under Part B based on the employee's cancer of the epiglottis, and to also accept the claim of **[Claimant #5]** under Part E. The district office concluded that **[Employee]** is a member of the SEC, that he was employed by a DOE contractor at a DOE facility, that he is a covered employee with a covered illness under Part E, and that he was diagnosed with epiglottis cancer, which is a "specified" cancer. The district office also concluded that as his eligible survivors, **[Claimant #1, 2, 3, 4 and 5]** are entitled to compensation under Part B, in the total amount of $150,000.00, to be divided equally. Further, the district office concluded that a determination that a DOE contractor employee and qualified member of the SEC is entitled to compensation for an occupational illness under Part B is treated for purposes of Part E as a determination that the employee contracted that illness through exposure at a DOE facility, and since **[Claimant #5]** was under the age of 18 at the time of

[Employee]'s death, she is the only eligible survivor under Part E and is entitled to compensation in the amount of $125,000.00.

The claimants each indicated on their respective Forms EE-2 that neither they nor anyone in their family had ever filed for or received any proceeds from either a tort suit or a state workers' compensation claim related to the employee's epiglottis cancer, that they had never pled guilty to or been convicted of any charges connected with an application for or receipt of federal or state workers' compensation, and that they did not know of any other persons who may also be eligible to receive compensation under EEOICPA as a survivor of **[Employee]**.

On March 20, 2008, FAB received written notification from **[Claimant #1, 2, 4 and 5]**, indicating that they waive all rights to file objections to the findings of fact and conclusions of law in the recommended decision. On March 24, 2008, FAB received written notification from **[Claimant #3]**, indicating she also waives all rights to file objections to the findings of fact and conclusions of law in the recommended decision.

After considering the evidence of record, FAB hereby makes the following:

FINDINGS OF FACT

1. On December 13, 2006 **[Claimant #1]**and **[Claimant #2]**; and on January 4, 2007 **[Claimant #3]**, **[Claimant #4]** and **[Claimant #5]** each filed a claim for survivor benefits under EEOICPA.
2. **[Employee]** was diagnosed with epiglottis cancer on April 25, 1989.
3. **[Employee]** died on September 1, 1990, due to acute bronchopneumonitis, with a contributing factor of coronary artery disease; which were complications of his epiglottis (throat) cancer.
4. **[Employee]** worked at LANL as a security guard with the AEC from May 15, 1972 to January 9, 1981, and with the University of California, as a Casual Messenger/Driver, from August 23, 1973 to October 29, 1973.
5. There is a causal connection between the employee's death due to epiglottis cancer and his exposure to radiation and/or a toxic substance at a DOE facility.
6. **[Claimant #1, 2, 3, 4 and 5]** are the eligible children of **[Employee]** under Part B.
7. **[Claimant #5]** was 17 years of age at the time of **[Employee]**'s death.
8. All five claimants indicated on their respective Form EE-2 that neither they nor anyone in their family had ever filed for or received any proceeds from a tort suit or a state workers' compensation claim related to the employee's epiglottis cancer, that they had never pled guilty to or been convicted of any charges connected with an application for or receipt of federal or state workers' compensation, and that they did not know of any other persons who may also be eligible to receive compensation under EEOICPA as a survivor of [**Employee]**.

Based on the above-noted findings of fact, FAB hereby also makes the following:

CONCLUSIONS OF LAW

Section 30.316(a) of the regulations provides that, if the claimant waives any objections to all or part of the recommended decision, FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part. *See* 20 C.F.R. § 30.316(a). All five claimants waived their right to file objections to the findings of fact and conclusions of law contained in the recommended decision issued on their claims.

In order for him to be considered a covered Part B employee, the evidence must establish that **[Employee]** was diagnosed with an occupational illness incurred as the result of his exposure to silica, beryllium, or radiation, and those illnesses are cancer, beryllium sensitivity, chronic beryllium disease, and chronic silicosis. *See* 42 U.S.C. § 7384l(15); 20 C.F.R. § 30.110(a). Further, EEOICPA requires that the illness must have been incurred while the employee was "in the performance of duty" for DOE or certain of its vendors, contractors, subcontractors, or for an atomic weapons employer. *See* 42 U.S.C. §§ 7384l(4)-(7), (9), and (11).

On June 22, 2007, the Secretary of HHS designated a new class of employees as an addition to the SEC, consisting of DOE employees or DOE contractor or subcontractor employees who were monitored or should have been monitored for radiological exposures while working in operational Technical Areas with a history of radioactive material use at LANL for a number of work days aggregating at least 250 work days from March 15, 1943 through December 31, 1975, or in combination with work days within the parameters established for one or more classes of employees in the SEC. The new SEC class became effective on July 22, 2007.

The employment evidence is sufficient to establish that **[Employee]** was employed at LANL for an aggregate of at least 250 work days, as a security guard, and therefore he is considered to be an eligible member of the class of employees who worked at LANL from March 15, 1943 through December 31, 1975 that was added to the SEC.

[Employee] is a member of the SEC who was diagnosed with epiglottis cancer, which is cancer of a part of the pharynx (a "specified" cancer), more than 5 years after his initial exposure, and therefore he is a "covered employee with cancer." *See* 42 U.S.C. §§ 7384l(14)(C), 7384l(17), 7384l(9)(A) and 20 C.F.R. § 30.5(ff)(5)(iii)(E). Therefore, as the employee is now deceased, the five claimants are entitled to compensation in the total amount of $150,000.00, divided in equal shares of $30,000.00 each. *See* 42 U.S.C. § 7384s(a) and (e).

The statute provides that if a determination has been made that a DOE contractor employee is entitled to compensation for an occupational illness under Part B, such determination shall be treated, for purposes of Part E, as a determination that the employee contracted that illness through exposure at a DOE facility. *See* 42 U.S.C. § 7385s-4(a). Consequently, **[Employee]**'s illness is deemed to be a "covered illness" contracted through exposure to toxic substances at a DOE facility. The medical evidence also establishes that epiglottis cancer was one of the causes of **[Employee]**'s death. As the employee would have been entitled to compensation for his covered illness under Part E; and it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing the death of the employee, his eligible survivors would be entitled to compensation pursuant to 42 U.S.C. § 7385s-3(a)(1). **[Claimant #5]** was 17 years of age at the time of **[Employee]**'s death, and is the only eligible survivor pursuant to § 7385s-3(d), and therefore she is entitled to compensation in the amount of $125,000.00. *See* 42 U.S.C. §§ 7385s-3(a)(1), 7385s-3(d).

Seattle, Washington

Keiran Gorny

Hearing Representative

Final Adjudication Branch

State Workers' Compensation Benefits

Coordination with Part E award

EEOICPA Fin. Dec. No. 53489-2006 (Dep't of Labor, December 14, 2005)

NOTICE OF FINAL DECISION

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, the Final Adjudication Branch accepts and approves your claim for compensation in the amount of $150,000 under Part B and $150,000 under Part E.

STATEMENT OF THE CASE

On January 16, 2004, you filed a Form EE-2 (Claim for Survivor Benefits under the Energy Employees Occupational Illness Compensation Program Act) with the Department of Labor and Request for Review by Medical Panels with the Department of Energy, based on **[Employee]**'s (the employee your spouse) condition of acute promyelocytic leukemia. This is considered an application for survivor compensation under Part B as a surviving spouse, and under Part E as a covered spouse of the employee.

You submitted a Form EE-3 (Employment History) indicating that the employee worked at the Feed Materials Production Center in Fernald, Ohio from 1953 to 1978. Based on information from the database of the Oak Ridge Institute for Science and Education the employee worked for National Lead of Ohio, which is a DOE contractor, at the Feed Materials Production Center (FMPC), Fernald, Ohio from December 7, 1953 to January 10, 1978. The FMPC is recognized as a covered DOE facility site from 1951 to the present. *See* DOE, Office of Worker Advocacy Facility List, http://www.eh.doe.gov/advocacy/faclist/showfacility.cfm (retrieved December 14, 2005).

The medical documentation you submitted included a December 14, 1977 pathology report showing a diagnosis of acute promyelocytic leukemia.

To determine the probability of whether the employee sustained cancer in the performance of duty, the Cleveland district office referred your claim to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction. The district office received the final NIOSH Report of Dose Reconstruction dated September 9, 2005.

The NIOSH radiation dose reconstruction report indicates that an efficiency model was used for the dose reconstruction. Only the partially reconstructed external dose was used. The dose reconstruction was 8.036 rem to the red bone marrow. NIOSH Report of Dose Reconstruction,

p. 4. Thus the dose reported is an "underestimate" of the employee's total occupational radiation dose. NIOSH Report of Dose Reconstruction, p. 7.

Using the information provided in the Report of Dose Reconstruction, the Cleveland district office utilized the Interactive RadioEpidemiological Program (IREP) to determine the probability of causation of acute promyelocytic leukemia and reported in its recommended decision that there was a greater than 50% probability that the employee's cancer was caused by radiation exposure at the FMPC.

The record includes a copy of your marriage certificate showing you and the employee were married on October 1, 1955, and a copy of the employee's death certificate showing you were married to him at the time of his death on January 10, 1978. The death certificate indicates that he passed away due to conditions including acute promyelocytic leukemia. The employee was born on July 6, 1931 and was age 46 at the time of his death.

You provided a letter that you signed on September 27, 2005 and attached documentation, indicating the employee had filed a State of Ohio Workers' Compensation claim which was approved for medical expenses. Further, you indicated that your spouse had no minor children or children incapable of self-support, who were not your natural or adopted children, at the time of his death. You further wrote on November 2, 2005 that you never received any money as a result of the employee's workers' compensation claim.

On November 9, 2005, the Cleveland district office issued a recommended decision to accept your claim based on the condition of acute promyelocytic leukemia, and to award you compensation in the amount of $150,000 per 42 U.S.C. § 7384s(a), and $150,000 per 42 U.S.C. § 7385s-3(a), for a total amount of $300,000.00.

On November 16, 2005, the Final Adjudication Branch received written notification from you indicating that you agree with the recommended decision.

FINDINGS OF FACT

1. On January 16, 2004, you filed a Form EE-2 (Claim for Survivor Benefits under the Energy Employee's Occupational Illness Compensation Program Act) with the Department of Labor under Part B and Request for Review by Medical Panels with the Department of Energy, which is accepted as a claim for benefits under Part E.
2. The employee worked for a Department of Energy contractor, at the Feed Materials Production Plant from December 7, 1953 to January 10, 1978.
3. The employee was diagnosed with acute promyelocytic leukemia on December 14, 1977, after starting work for the Department of Energy.
4. The NIOSH Interactive RadioEpidemiological Program indicated a 53.59% probability that the employee's cancer was caused by radiation exposure at the FMPC.
5. The employee was born on March 6, 1931, and he passed away on January 10, 1978, at the age of 46, which was 18 years and some months prior to his normal retirement age of 65.
6. You were married to the employee on October 1, 1955, and you were his spouse on the date

of his death.
7. The death certificate indicates the employee died due to conditions including acute promyelocytic leukemia.
8. The evidence of record supports a causal connection between the employee's death due to acute promyelocytic leukemia, and his exposure to radiation and/or a toxic substance at a DOE facility.
9. You never received any money for the employee's cancer from a state workers' compensation claim for the same condition being accepted. Your spouse had no minor children or children incapable of self-support, who were not your natural or adopted children, at the time of his death.

CONCLUSIONS OF LAW

Section 30.316(a) of the EEOICPA regulations provides that, if the claimant waives any objections to all or part of the recommended decision, the Final Adjudication Branch may issue a final decision accepting the recommendation of the district office, either in whole or in part. 20 C.F.R. § 30.316(a). You waived your right to file objections to the findings of fact and conclusions of law pertaining to the award of benefits in the recommended decision.

The Final Adjudication Branch calculated the probability of causation for acute promyelocytic leukemia using the NIOSH-IREP software program. These calculations confirmed the 53.59% probability of causation that the employee's cancer was "at least as likely as not" (a 50% or greater probability) caused by radiation exposure the employee incurred while employed at the FMPC.

Based on the employee's covered employment at a covered DOE facility site and the medical documentation showing a diagnosis of cancer, and the determination that the cancer was at least as likely as not related to the employee's occupational exposure at the FMPC, and thus sustained in the performance of duty, the employee is a "covered employee with cancer" under EEOICPA. *See* 42 U.S.C. § 7384l(1)(B), (9)(B); 20 C.F.R. § 30.213(b); 42 C.F.R. § 81.2.

This determination that a DOE contractor employee is entitled to compensation under Part B is treated for purposes of Part E as a determination that the employee contracted that illness through exposure at a Department of Energy facility. *See* 42 U.S.C. § 7385s-4(a).

The evidence of record establishes that the employee was a DOE contractor employee as defined by 42 U.S.C. § 7385s-1. The employee was diagnosed with a "covered illness," as defined by 42 U.S.C. § 7385s(2). The employee contracted that "covered illness" through exposure to a toxic substance at a DOE facility pursuant to 42 U.S.C. § 7385s-4(a).

You are entitled to compensation pursuant to 42 U.S.C. § 7385s-3(a)(1) since the employee would have been entitled to compensation for contracting of a covered illness under Part E; and it is 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 death of the employee. 42 U.S.C. § 7385s-3(a)(1).

The employee received medical benefits under a state workers' compensation program for the conditions of acute promyelogytic leukemia and strep sepsis. No coordination of benefits is required under Part E because you are a spouse of the employee and you reported you did not receive any state workers' compensation due to the death of the employee. Federal (EEOICPA) Procedure Manual, Chapter E-1000.4 (Sept. 2005).

The employee had presumed wage-loss for a period of more than 10 years, but less than 20 years. He passed away at age 46. Based on the Social Security Act, the normal retirement age is the age at which an employee may receive unreduced Social Security retirement benefits. For an employee born on July 6, 1931 (January 1, 1938 or earlier), the normal retirement age is age 65. Federal (EEOICPA) Procedure Manual, Chapter E-800.3d (Sept. 2005). Since the employee was age 46, 18 years and some months prior to his full retirement age of 65, there was an aggregate period of not less than 10 years, before the employee attained normal retirement age that he died, and the employee did not have an annual wage. This amount is determined to be $150,000 under 42 U.S.C. § 7385s-3(a)(2).

You are the surviving spouse of the employee pursuant to 42 U.S.C. § 7384s(e)(3)(A) and entitled to compensation in the amount of $150,000; and the covered spouse of the employee pursuant to 42 U.S.C. § 7385s-3(d)(1) and entitled to additional compensation in the amount of $150,000.

Accordingly, you are entitled to compensation in the total amount of $300,000.00.

Washington, DC

Rosanne M. Dummer

Hearing Representative

EEOICPA Fin. Dec. No. 70540-2005 (Dep't of Labor, October 26, 2005)

NOTICE OF FINAL DECISION

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 for benefits under §§ 7384 and 7385s of the Act is accepted.

STATEMENT OF THE CASE

On July 21, 2005, you filed a Form EE-2, Claim for Survivor Benefits under the EEOICPA[1], based on the employee's basal cell carcinoma and lung cancer with suspected metastases to the bone. A CT scan shows the employee was diagnosed with lung cancer on June 24, 2005.

of the Special Exposure Cohort (SEC). The evidence of record establishes the employee worked at the K-25 gaseous diffusion plant in Oak Ridge, Tennessee, from March 29, 1965 to February 16, 1996, and from August 29, 1996 to August 31, 1996. The employee indicated on his Form EE-3, Employment History, that he wore a dosimetry badge during this employment. In addition, the employee worked at the Y-12 plant in Oak Ridge from December 3, 1962 to March 28, 1965, and from May 15, 2002 to June 28, 2005.

In support of your claim for survivorship, you submitted your marriage certificate, showing you married the employee on October 24, 1959, and the employee's death certificate, showing you were married to the employee on the date of his death, September 26, 2005. The death certificate shows the employee died as a result of metastatic lung cancer.

On September 20, 2005, the Jacksonville district office issued a decision recommending that you are entitled to compensation for the employee's lung cancer in the amount of $150,000 under § 7384 of the Act and $125,000 under § 7385s of the Act. In addition, the district office recommended that you be entitled to medical benefits for the employee's metastatic lung cancer from September 3, 2002 to June 28, 2005.

You submitted information showing the employee received a state workers' compensation settlement.

On September 26, 2005, the Final Adjudication Branch received written notification that you waive any and all objections to the recommended decision.

FINDINGS OF FACT

1) On July 21, 2005, you filed a Form EE-2 based on the employee's basal cell carcinoma and lung cancer with suspected metastases to the bone.

2) The employee was diagnosed with lung cancer on June 24, 2005.

3) The employee worked at the gaseous diffusion plant in Oak Ridge, Tennessee, from March 29, 1965 to February 16, 1996, and from August 29, 1996 to August 31, 1996.

4) The employee wore a dosimetry badge during this employment.

5) You were married to the employee for at least one year immediately before his death.

6) On September 20, 2005, the Jacksonville district office issued a decision recommending that you are entitled to compensation in the amount of $150,000 for the employee's lung cancer.

CONCLUSIONS OF LAW

In order for the employee to qualify as a member of the SEC, the following requirements must be satisfied:

The employee was so employed for a number of work days aggregating at least 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, and, during such employment - -

(i) was monitored through the use of dosimetry badges for exposure at the plant of the external parts of employee's body to radiation; or

(ii) worked on a job that had exposures comparable to a job that is or was monitored through the use of dosimetry badges.

42 U.S.C. § 7384l(14)(A).

The employee worked at the gaseous diffusion plant in Oak Ridge, Tennessee, for more than 250 work days prior to February 1, 1992, and wore a dosimetry badge during this employment. Therefore, the employee is a member of the SEC. 42 U.S.C. § 7384l(14).

The employee's lung cancer is a specified cancer under § 7384 of the Act and implementing regulations. 42 U.S.C. § 7384l(17)(A); 20 C.F.R. § 30.5(ff)(2).

You indicated in a letter received September 22, 2005 that the employee received a state workers' compensation settlement for his skin cancer only. You submitted a document concerning this settlement. While the document did not indicate the medical condition upon which the lump sum settlement was based, the document shows the employee was the recepient of the settlement. Survivor benefits under § 7385s of the Act are reduced when a *survivor* receives some form of state workers' compensation benefits.[2] Since you did not receive such a benefit, a reduction is not necessary.

On the other hand, the recommended award of medical benefits is based on the *employee's* entitlement under § 7385s, since he filed his claim prior to his death. If the workers' compensation settlement was due to the accepted lung cancer, these medical benefits would have to be reduced. Although the medical condition is not listed on the workers' compensation document, the document was issued on February 5, 2003. Since the employee's lung cancer was not diagnosed until June 24, 2005, our office may safely assume that the workers' compensation settlement is unrelated to the present entitlement to lung cancer under § 7385s of the Act.

You have established that you are a survivor. 42 U.S.C. §§ 7384s(e)(3), 7385s-3(d)(1).

I conclude that you, as the eligible survivor of the employee as defined by § 7384 of the Act, are entitled to compensation in the amount of $150,000 pursuant to § 7384 of the Act on the basis of the employee's lung cancer. 42 U.S.C. §§ 7384s(e)(1)(A), 7384s(a).

A determination under § 7384 that a DOE contractor employee is entitled to compensation for an occupational illness is treated as a determination that the employee contracted that illness through exposure to a toxic substance at a DOE facility. 42 U.S.C. § 7385s-4(a). Since the employee died of this illness, lung cancer, you are entitled to compensation in the amount of $125,000. 42 U.S.C. § 7385s-3(a)(1).

In addition, since the employee filed the claim for benefits prior to his death, you are entitled to seek reimbursement for out-of-pocket medical expenses and/or payment of any outstanding medical expenses for the employee's lung cancer with bone, liver, and lymph node metastases from September 3, 2002 to June 28, 2005.

Jacksonville, FL

Mark Stewart

Hearing Representative

[1] The employee originally filed claim for benefits under §§ 7384 and 7385s on September 3, 2002, for skin cancer and lung nodule.

[2] Federal (EEOICPA) Procedure Manual, Chapter E-1000.4 (issued September 2005).

EEOICPA Fin. Dec. No. 70540-2005 (Dep't of Labor, October 26, 2005)

NOTICE OF FINAL DECISION

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 for benefits under §§ 7384 and 7385s of the Act is accepted.

STATEMENT OF THE CASE

On July 21, 2005, you filed a Form EE-2, Claim for Survivor Benefits under the EEOICPA[1], based on the employee's basal cell carcinoma and lung cancer with suspected metastases to the bone. A CT scan shows the employee was diagnosed with lung cancer on June 24, 2005.

Your claim was based, in part, on the assertion that the employee worked for a Department of Energy (DOE) contractor at a DOE facility. You asserted on the Form EE-2 that the employee was a member of the Special Exposure Cohort (SEC). The evidence of record establishes the employee worked at the K-25 gaseous diffusion plant in Oak Ridge, Tennessee, from March 29, 1965 to February 16, 1996, and from August 29, 1996 to August 31, 1996. The employee indicated on his Form EE-3, Employment History, that he wore a dosimetry badge during this employment. In addition, the employee worked at the Y-12 plant in Oak Ridge from December 3, 1962 to March 28, 1965, and from May 15, 2002 to June 28, 2005.

In support of your claim for survivorship, you submitted your marriage certificate, showing you married the employee on October 24, 1959, and the employee's death certificate, showing you were married to the employee on the date of his death, September 26, 2005. The death certificate shows the employee died as a result of metastatic lung cancer.

On September 20, 2005, the Jacksonville district office issued a decision recommending that you are entitled to compensation for the employee's lung cancer in the amount of $150,000 under § 7384 of the Act and $125,000 under § 7385s of the Act. In addition, the district office recommended that you be entitled to medical benefits for the employee's metastatic lung cancer from September 3, 2002 to June 28, 2005.

You submitted information showing the employee received a state workers' compensation settlement.

On September 26, 2005, the Final Adjudication Branch received written notification that you waive any and all objections to the recommended decision.

FINDINGS OF FACT

1) On July 21, 2005, you filed a Form EE-2 based on the employee's basal cell carcinoma and lung cancer with suspected metastases to the bone.

2) The employee was diagnosed with lung cancer on June 24, 2005.

3) The employee worked at the gaseous diffusion plant in Oak Ridge, Tennessee, from March 29, 1965 to February 16, 1996, and from August 29, 1996 to August 31, 1996.

4) The employee wore a dosimetry badge during this employment.

5) You were married to the employee for at least one year immediately before his death.

6) On September 20, 2005, the Jacksonville district office issued a decision recommending that you are entitled to compensation in the amount of $150,000 for the employee's lung cancer.

CONCLUSIONS OF LAW

In order for the employee to qualify as a member of the SEC, the following requirements must be satisfied:

The employee was so employed for a number of work days aggregating at least 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, and, during such employment - -

> (i) was monitored through the use of dosimetry badges for exposure at the plant of the external parts of employee's body to radiation; or
>
> (ii) worked on a job that had exposures comparable to a job that is or was monitored through the use of dosimetry badges.
>
> 42 U.S.C. § 7384l(14)(A).

The employee worked at the gaseous diffusion plant in Oak Ridge, Tennessee, for more than 250 work days prior to February 1, 1992, and wore a dosimetry badge during this employment. Therefore, the employee is a member of the SEC. 42 U.S.C. § 7384l(14).

The employee's lung cancer is a specified cancer under § 7384 of the Act and implementing regulations. 42 U.S.C. § 7384l(17)(A); 20 C.F.R. § 30.5(ff)(2).

You indicated in a letter received September 22, 2005 that the employee received a state workers' compensation settlement for his skin cancer only. You submitted a document concerning this settlement. While the document did not indicate the medical condition upon which the lump sum settlement was based, the document shows the employee was the recepient of the settlement. Survivor benefits under § 7385s of the Act are reduced when a *survivor* receives some form of state workers' compensation benefits.[2] Since you did not receive such a benefit, a reduction is not necessary.

On the other hand, the recommended award of medical benefits is based on the *employee's* entitlement under § 7385s, since he filed his claim prior to his death. If the workers' compensation settlement was due to the accepted lung cancer, these medical benefits would have to be reduced. Although the medical condition is not listed on the workers' compensation document, the document was issued on February 5, 2003. Since the employee's lung cancer was not diagnosed until June 24, 2005, our office may safely assume that the workers' compensation settlement is unrelated to the present entitlement to lung cancer under § 7385s of the Act.

You have established that you are a survivor. 42 U.S.C. §§ 7384s(e)(3), 7385s-3(d)(1).

I conclude that you, as the eligible survivor of the employee as defined by § 7384 of the Act, are entitled to compensation in the amount of $150,000 pursuant to § 7384 of the Act on the basis of the employee's lung cancer. 42 U.S.C. §§ 7384s(e)(1)(A), 7384s(a).

A determination under § 7384 that a DOE contractor employee is entitled to compensation for an occupational illness is treated as a determination that the employee contracted that illness through exposure to a toxic substance at a DOE facility. 42 U.S.C. § 7385s-4(a). Since the employee died of this illness, lung cancer, you are entitled to compensation in the amount of $125,000. 42 U.S.C. § 7385s-3(a)(1).

In addition, since the employee filed the claim for benefits prior to his death, you are entitled to seek reimbursement for out-of-pocket medical expenses and/or payment of any outstanding medical expenses for the employee's lung cancer with bone, liver, and lymph node metastases from September 3, 2002 to June 28, 2005.

Jacksonville, FL

Mark Stewart

Hearing Representative

[1] The employee originally filed claim for benefits under §§ 7384 and 7385s on September 3, 2002, for skin cancer and lung nodule.

[2] Federal (EEOICPA) Procedure Manual, Chapter E-1000.4 (issued September 2005).

EEOICPA Fin. Dec. No. 10002848-2005 (Dep't of Labor, July 27, 2005)

NOTICE OF FINAL DECISION

This decision of the Final Adjudication Branch (FAB) concerns 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). Your claim for survivor benefits for acute radiation syndrome under § 7385s of the Act is hereby accepted.

STATEMENT 0F THE CASE

On September 3, 2002 you filed Form EE-2, Claim for Survivor Benefits under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). You claimed that your father,

[Employee], died of acute myocardial failure due to the central nervous system damage from massive ionizing radiation as a result of his employment at Los Alamos National Laboratory.

[Employee's] employment was verified at the Los Alamos National Laboratory from June 17, 1946 to January 1, 1959.

Evidence in the file establishes that the employee was in a massive explosion on December 30, 1958 at the Los Alamos National Laboratory. A death certificate signed by John S. Benson, M.D. shows that **[Employee]** died 35 hours after the incident.

You submitted the death certificate of **[Employee's]** spouse, **[Employee's Spouse]** and the death certificate of your brother, **[Claimant's brother]**. You also submitted a copy of your birth certificate that established you were the daughter of **[Employee]** and a minor child at the time of your father's death.

Your case was forwarded to the EEOICPA Physician Panel for a review of the medical evidence and a determination as to whether the acute radiation syndrome arose out of and in the course of your father's employment by a DOE employer and exposure to a toxic material at a DOE facility. On July 7, 2004, the Medical Director, Office of Worker Advocacy, Office of Environment, Safety & Health, reviewed the findings and determination of the EEOICPA Physician Panel and accepted the panel findings in favor of your case.

You indicated that your mother had received state workers' compensation benefits for the claimed condition of acute radiation syndrome. You submitted copies of the award granted to your mother. It was determined that because your mother received the state workers' compensation benefits and you did not receive the state workers' compensation benefits, you would be entitled to an award in the amount of $175,000.00.

On July 15, 2005, the Denver district office issued a recommended decision finding that you are the eligible surviving beneficiary of the covered employee and you were entitled to monetary benefits in the amount of $175,000.00. The case was forwarded to the Final Adjudication Branch for review.

Pursuant to the regulations implementing the EEOICPA, a claimant has 60 days from the date of issuance of the recommended decision to raise objections to that decision to the Final Adjudication Branch. 20 C.F.R § 30.310(a). If an objection is not raised during the 60-day period, the Final Adjudication Branch will consider any and all objections to the recommended decision waived and issue a final decision affirming the district office's recommended decision. 20 C.F.R. § 30.316(a).

On July 27, 2005, the Final Adjudication Branch received your written notification waiving any and all objections to the recommended decision.

After considering the record of the claim forwarded by the district office, the Final Adjudication Branch makes the following findings:

FINDINGS OF FACT

1. On September 3, 2002, you filed for survivor benefits under § 7385s of the Act.
2. **[Employee's]** employment was verified at the Los Alamos National Laboratory from June 17,

1946 to January 1, 1959.
3. Evidence in the file establishes that the employee was in a massive explosion on December 30, 1958 at the Los Alamos National Laboratory. A death certificate signed by John S. Benson, M.D. shows that **[Employee]** died 35 hours after the incident.
4. On July 7, 2004, the Medical Director, Office of Worker Advocacy, Office of Environment, Safety & Health, reviewed the findings and determination of the EEOICPA Physician Panel and accepted the panel findings in favor of your case.
5. On July 15, 2005 the Denver district office issued a recommended decision finding that you are the eligible surviving beneficiary of the covered employee and you were entitled to monetary benefits in the amount of $175,000.00.
6. You submitted the employee's death certificate, his spouse's death certificate, your brother's death certificate and your birth certificate, thus establishing that you are the eligible surviving beneficiary of **[Employee]**.
7. The file also contains your signed statement that neither you nor the employee filed for or received any state workers' compensation benefits for the claimed condition.
Based on the above noted findings of fact in this claim, the Final Adjudication Branch hereby also makes the following:

CONCLUSIONS OF LAW

1. The Final Adjudication Branch hereby finds the employee was a covered DOE contractor employee in accordance with 42 U.S.C. § 7385s-1.
2. You have established that you are the eligible survivor of the covered employee pursuant to § 7385s-3(d)(2).
3. **[Employee]** contracted a covered illness under § 7385s-4(b).
4. You are eligible to receive compensation in the amount of $175,000 pursuant to § 7385s-3(a)(3).
Denver, Colorado

Joyce L. Terry

District Manager

Relationship of coordination and the maximum amount payable

EEOICPA Fin. Dec. No. 10032182-2006 (Dep't of Labor, March 3, 2008)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, your claim is approved for impairment benefits in the amount of $195,000.00 based on lung cancer under Part E of EEOICPA, approved for $55,000.00 in wage-loss benefits under Part E, and approved for the consequential illness of coronary artery disease under Part E. You received state workers' compensation benefits of $126,173.60 for your covered illness of lung cancer, and this will be coordinated with your Part E benefits, leaving your net entitlement to compensation under Part E as $123,826.40.

STATEMENT OF THE CASE

On October 15, 2001, you filed a claim for benefits under Part E (formerly Part D) of EEOICPA and identified lung cancer as the illness that allegedly resulted from your employment at a Department of Energy (DOE) facility. On February 20, 2004, the FAB issued a final decision concluding that you were entitled to lump-sum monetary and medical benefits for your lung cancer under Part B of EEOICPA. Based on that conclusion, you were awarded $150,000.00 and medical benefits for your lung cancer under Part B. On August 9, 2006, the FAB issued a final decision that also awarded you medical benefits under Part E of EEOICPA for your lung cancer.

On January 8, 2007, the district office received your request for impairment and wage-loss benefits under Part E based on your lung cancer. You elected to have a physician selected by the Department of Labor perform the impairment rating. You also you stated that you first experienced wage-loss beginning in 1997, when you were "officially medically retired from work at Westinghouse Savannah River Plant" and that this wage-loss has continued since then.

The DOE confirmed your employment at the Savannah River Site (SRS) in Aiken, South Carolina from April 23, 1984 to November 1, 1997. You worked for E.I. DuPont and Westinghouse, two DOE contractors, during your employment at the SRS. The medical evidence includes a January 3, 1995 pathology report, signed by Dr. Sharon Daspit, which confirms a diagnosis of squamous cell carcinoma of the left lung. On April 25, 2007, the district office also received your request that your coronary artery disease be accepted as a consequential illness of your lung cancer, as it is related to your radiation treatment for your lung cancer.

To determine your "minimum impairment rating" (the percentage rating representing the extent of whole person impairment, based on the organ and body functions affected by your covered illnesses and the extent of the impairment attributable to your covered illnesses), the district office referred your file material to a District Medical Consultant (DMC).

On April 18, 2007, the DMC reviewed the medical evidence of record and determined that pursuant to Table 8-2 of the Fifth Edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, your covered illness of lung cancer resulted in a Class 4 respiratory disorder that translated to a 73% whole person impairment. The DMC also determined that pursuant to Table 3.6a of the *Guides*, your coronary artery disease resulted in an 18% whole person impairment. Using the combined values chart contained in the *Guides*, the DMC concluded that you had a 78% whole person impairment due to your covered illnesses of lung cancer and coronary artery disease. The DMC explicitly stated that your cardiac condition is "due to the radiation of the lung cancer, and such is a known complication of chest radiation."

You submitted your Social Security Administration earnings statement, which shows that you last had recorded wages in 1997. An April 8, 1997 letter from Dr. James R. Mobley states that your pulmonary and cardiovascular systems "are so marginal that any stress will possibly cause an exacerbation" of your problems, and that in his opinion you should be considered totally disabled from gainful employment.

You submitted a copy of your "Compromise Settlement Agreement and Petition for Approval" confirming that you received a settlement of your state workers' compensation claim totaling $126,713.60 for your lung cancer.

coronary artery disease was a consequential illness related to your lung cancer treatment, that your accepted illnesses of lung cancer and coronary artery disease resulted in a 78% whole body impairment, that you were entitled to $195,000.00 in impairment benefits, and calculating your wage-loss benefits as $55,000, which was capped when the total amount of Part E monetary benefits reached $250,000.00. From this combined maximum amount of $250,000.00, the district office subtracted your $126,173.60 in state workers' compensation benefits and recommended that you be awarded a net payment of $123,826.40 in monetary benefits under Part E of EEOICPA.

In its recommended decision, the district office stated that you had no earnings reported to Social Security for the years 1998 through 2006; however, it stated that since total Part E compensation was statutorily capped at $250,000.00 and it was recommending that you receive $195,000.00 in impairment benefits, your wage-loss benefits were only calculated for the years 1998 through 2001 (you are entitled to $15,000 in wage-loss benefits for the qualifying calendar years 1998 through 2000, and $10,000.00 for the qualifying calendar year 2001). This totals $55,000.00 in wage-loss benefits.

On June 15, 2007, the FAB received your waiver of your right to object to the findings of fact and conclusions of law contained in the recommended decision.

On July 13, 2007, the FAB remanded your claim, and stated that the recommended decision did not take into account the full amount of wage-loss benefits to which you are entitled. The FAB stated that, "It is true that total compensation, excluding medical benefits, under Part E may not exceed $250,000; however, it is the final number after coordination of state workers' compensation benefits that cannot exceed $250,000, not the benefit amount before state workers' compensation benefits are subtracted."

On November 21, 2007, the Director of DEEOIC issued a Director's Order vacating the July 13, 2007 remand order issued by the FAB. The Director's Order stated that the only way to interpret the regulations at 20 C.F.R. § 30.626(a), which state "the OWCP will reduce the compensation payable under Part E by the amount of benefits the claimant receives from a state workers' compensation program by reason of the same covered illness," is to stop calculating the benefits an employee is entitled to under Part E at $250,000.00, and then coordinate the state workers' compensation benefits.

Following an independent review of the evidence of record, the undersigned hereby makes the following:

FINDINGS OF FACT

1. On October 15, 2001, you filed a claim for benefits under Part E (formerly Part D) of EEOICPA. You identified lung cancer as the illness you alleged resulted from your employment at a DOE facility.

2. On February 20, 2004, the FAB issued a final decision determining that you were entitled to lump-sum and medical benefits for your lung cancer under Part B, and awarding you $150,000.00 and medical benefits for your lung cancer under Part B.

3. On August 9, 2006, the FAB issued a final decision awarding you medical benefits under Part E of EEOICPA for your covered illness of lung cancer.

4. Your coronary artery disease is a consequential illness of your lung cancer.

5. On April 18, 2007, the DMC reviewed the medical evidence of record and determined that your covered illness of lung cancer and covered consequential illness of coronary artery disease resulted in a 78% whole person impairment.

6. You last had recorded wages in 1997. Your doctor states that your pulmonary and cardiovascular systems "are so marginal that any stress will possibly cause an exacerbation" of your problems, and that in his opinion you should be considered totally disabled from gainful employment.

7. You were born on October 5, 1942 and turned 55 years old in 1997. Your normal Social Security retirement age is 65 years.

8. You received $126,173.60 in state workers' compensation benefits for your lung cancer, based on exposure to ionizing radiation.

Based on these facts, the undersigned hereby makes the following:

CONCLUSIONS OF LAW

If the claimant waives any objections to all or part of the recommended decision, the FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part. 20 C.F.R. § 30.316(a). You have waived your right to file objections to the findings of fact and conclusions of law issued in the May 9, 2007 recommended decision.

Under Part E of EEOICPA, a "covered DOE contractor employee" with a "covered illness" shall be entitled to impairment benefits based upon the extent of whole person impairment of all organs and body functions that are compromised or otherwise affected by the employee's "covered illness." *See* 42 U.S.C § 7385s-2(a); 20 C.F.R. § 30.901(a). This "minimum impairment rating" shall be determined in accordance with the Fifth Edition of the *Guides*. *See* 42 U.S.C. § 7385s-2(b). The statute provides that for each percentage point of the "minimum impairment rating" that is a result of a "covered illness," the "covered DOE contractor employee" shall receive $2,500.00. *See* 42 U.S.C. § 7385s-2(a)(1).

The evidence of record indicates that you are a covered DOE contractor employee with a covered illness of lung cancer and a covered consequential illness of coronary artery disease. You have a "minimum impairment rating" of 78% of your whole body as a result of your covered illnesses of lung cancer and coronary artery disease, based on the *Guides*. You are therefore entitled to $195,000.00 in impairment benefits (78 x $2,500 = $195,000.00) under Part E of EEOICPA.

In order to be entitled to wage-loss benefits under Part E, you must submit factual evidence of your wage-loss and medical evidence that is of sufficient probative value to establish that the period of wage-loss at issue is causally related to your covered illness. *See* Federal (EEOICPA) Procedure Manual, Chapter E-800.6b (September 2005). You were born on October 5, 1942 and turned 55 years old in 1997. Your normal Social Security retirement age is 65 years. You last had recorded wages in 1997 and have not had any wages since then. Your doctor states that your pulmonary and cardiovascular systems "are so marginal that any stress will possibly cause an exacerbation" of your problems, and that in his opinion you should be considered totally disabled from gainful employment. This is sufficient to show that you had wage-loss related to your covered illnesses of lung cancer and

coronary artery disease beginning in 1998.

Accordingly, your claim for wage-loss benefits under Part E of EEOICPA is accepted in the amount of $55,000.00. You are entitled to $15,000.00 in wage-loss benefits for the qualifying calendar years 1998 through 2000, and $10,000.00 for the qualifying calendar year 2001. This totals $55,000.00 in wage-loss benefits, which together with your $195,000.00 in impairment benefits, totals the statutory maximum of $250,000.00. Therefore, your wage-loss eligibility ends there.

All benefits payable under Part E of EEOICPA must be coordinated with the amount of any state workers' compensation benefits that were paid to the claimant for the same covered illness or illnesses. *See* 42 U.S.C. § 7385s-11. Based on the evidence in the file, this results in a reduction of the maximum amount payable to you in impairment and wage-loss benefits, $250,000.00, by $126,173.60, resulting in a net entitlement of $123,826.40.

Therefore, your claim for the consequential illness of coronary artery disease is accepted under Part E. Your claim for impairment and wage-loss benefits under Part E for your lung cancer and coronary artery disease is also accepted, and you are awarded a net amount of $123,826.40.

Washington, DC

Carrie A. Rhoads

Hearing Representative

Final Adjudication Branch

Settlement of claim

EEOICPA Fin. Dec. No. 10013372-2006 (Dep't of Labor, May 9, 2007)

NOTICE OF FINAL DECISION

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

STATEMENT OF THE CASE

On June 1, 2004, you filed a claim for medical benefits under Part E (then Part D) of the Act, based on your diagnosis of asbestos-related lung disease on August 24, 1992. Your Employment History asserts that you were employed by Union Carbide at Y-12 from April 1960 to December 1993. The Oak Ridge Institute of Science and Education (ORISE) verified that you were employed at the Y-12 Plant[1] in Oak Ridge, Tennessee, from April 25, 1960 to March 22, 1965, and from March 7, 1966 to September 30, 1997. Other employment documents on file indicate that you were employed by Department of Energy (DOE) contractor Union Carbide at the Y-12 Plant.

Report dated August 24, 1992, signed by Dr. Jeffrey S. Hecht, states that "it is probable that **[Employee]** has asbestos-related pulmonary disease." A medical report dated July 18, 2005, signed by Dr. Ronald R. Cherry, reports an impression of "asbestos-related pleural plaques" and "mild increased interstitial markings on chest x-ray, but the profusion is insufficient for the firm diagnosis of asbestosis." The district office concluded that the medical evidence in your case file was sufficient to establish a diagnosis of asbestos-related lung disease.

The district office also reviewed the U S. Department of Labor's Site Exposure Matrices (SEM) database and the National Institute of Health (NIH) HazMap Disease List. The SEM lists possible health effects of exposure to toxins that were present at certain buildings during specified timeframes at certain DOE facilities. The district office concluded that SEM identified asbestos as being present at Y-12 and that you could have been exposed to the toxic substance asbestos during your employment as a machinist at that facility.

By letter dated July 10, 2006, you informed the district office that: "Yes, a lawsuit has been filed and settlements have been received in connection with the claimed condition of asbestos-related lung disease." Your case file contains settlement documents and other evidence noting that your gross settlement amount for that lawsuit was $22,234.11, less attorney fees of $7,411.37 and suit costs/expenses of $776.00.

By that same letter, you informed the district office that you "filed for and received an award of state workers' compensation benefits for the condition of asbestos-related lung disease." Your case file contains settlement documents and other evidence noting that your gross settlement amount for that claim was $94,464.00, less attorney fees of $18,892.80 and suit costs/expenses of $1,323.50.

On August 8, 2006, the district office issued a recommended decision concluding that the evidence of record satisfies the criteria for a covered illness under Part E. Therefore, it was recommended that your Part E claim for medical benefits be accepted for the claimed condition of asbestos-related lung disease, subject to a surplus in the amount of $88,716.40.

OBJECTIONS

By letter dated August 15, 2006, your authorized representative objected to the recommended decision. The letter indicated that you do not object to the recommended decision's findings and conclusions relating to the tort suit that you filed, and that you do not object to the recommended offset due to the proceeds of that suit. The letter objects, however, to the coordination of the settlement proceeds of the state workers' compensation (SWC) claim with your EEOICPA benefits. As the basis for the objection, your representative asserts that "the state workers' compensation case was settled and paid for the conditions of any non-malignant respiratory injury and the asbestos-related lung disease." He argues that the SWC settlement was for the claimed condition plus an additional illness not claimed under the EEOICPA and that, therefore, the proceeds cannot be coordinated in such a manner as to reduce your Part E medical benefits.

The evidence in your case file, however, does not support your representative's assertion. The Order Approving Compromised Settlement of Workers' Compensation Claim, dated March 10, 2006 and signed by Judge Elledge, clearly states in paragraphs II, III, IV, V and elsewhere that the $94,464.00 settlement amount was arrived at based on disability from your "asbestos-related lung disease." Only once does the Order refer to "non-malignant respiratory injury" and that reference is not in the sections of the settlement Order which describe the basis for the $94,464.00 settlement amount. Additionally, your own characterization of the SWC settlement in your July 10, 2006 letter to the district office was as follows: "Yes, I have filed for and received an award of state workers' compensation benefits *for the condition of asbestos-related lung disease*" (emphasis added), clearly indicating your own

understanding that the SWC settlement was for the claimed condition of asbestos-related lung disease and not for other illnesses.
Based on the totality of the evidence, the FAB concludes that your SWC settlement was for your claimed condition of asbestos-related lung disease, and that, therefore, the amounts recovered from that claim must be coordinated with the award of benefits granted in your claim under the EEOICPA.

After reviewing the evidence in your case file, the FAB hereby makes the following:

FINDINGS OF FACT

1. On June 1, 2004, you filed a claim for medical benefits under Part E of the Act, based on the claim that you were diagnosed with asbestos-related lung disease on August 24, 1992.
2. You were a DOE contractor employee employed at the Y-12 Plant from April 25, 1960 to March 22, 1965, and from March 7, 1966 to September 30, 1997.
3. You were diagnosed with asbestos-related lung disease as early as 1992.

4. You filed a tort suit based on your exposure to asbestos and received a gross recovery of $22,234.11, less attorney fees of $7,411.37 and suit expenses of $776.00.
5. You filed a state workers' compensation claim based on your illness of asbestos-related lung disease and received a gross recovery of $94,464.00, less attorney fees of $18,892.80 and suit expenses of $1,323.50.

Based on these facts, the undersigned makes the following:

CONCLUSIONS OF LAW

Regulations governing the implementation of the Act allow claimants 60 days from the date of the district office's recommended decision to submit to the FAB any written objections to the recommended decision, or a written request for a hearing. *See* 20 C.F.R. §§ 30.310 and 30.311 (2006). On August 15, 2006, a timely written objection to the recommended decision was filed on your behalf. You did not request a hearing. Pursuant to 20 C.F.R. §§ 30.312 and 30.313, the FAB has considered your objection by means of a review of the written record of this case. The review did not include a review of any additional evidence because you failed to submit any new evidence. After a thorough review of the record in this case, the FAB concludes that no further investigation of your objection is warranted, and the FAB now issues a final decision on your Part E claim.

In order to prove eligibility for medical benefits under Part E of the Act, you must establish that you were a "covered DOE contractor employee" and that you "contracted a covered illness through exposure at a Department of Energy facility." *See* 42 U.S.C. §§ 7385s-4, 7385s(1) and 7385s-8. Part E further states that:

> [A] Department of Energy contractor employee shall be determined for purposes of [Part E] 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."

See 42 U.S.C. § 7385s-4(c)(1).

The totality of the evidence in the record establishes that you were a DOE contractor employee and that you contracted asbestos-related lung disease following the commencement of your DOE employment. The record also establishes that you were exposed to the toxic substance asbestos at the Y-12 Plant, a DOE facility, and that your exposure at that facility covered a period of at least 250 aggregate work days. The evidence further establishes that the latency period of your asbestosis exceeded 10 years in duration. Thus, your case satisfies the criteria required to benefit from the presumption that your asbestos-related lung disease was caused by exposure to a toxic substance at a DOE facility. *See* EEOICPA Bulletin No. 06-08 (issued April 25, 2006). Therefore, the FAB concludes that you are a "covered DOE contractor employee" who contracted a "covered illness" resulting from exposure to a toxic substance at a DOE facility, and that, therefore, you are entitled to medical benefits under Part E. *See* 42 U.S.C. §§ 7385s(1), 7385s(2), 7385s-4(b) and 7385s-8; EEOICPA Bulletin No. 06-08 (issued April 25, 2006).

Therefore, the FAB concludes that the evidence of record is sufficient to allow an award of medical benefits under Part E of the Act. Accordingly, your claim for Part E medical benefits is accepted and you are entitled to medical benefits retroactive to the date upon which you submitted your claim for Part E benefits, June 1, 2004, for the covered illness of asbestos-related lung disease.

However, the Act also requires that your Part E award of medical benefits be subject to offset based on amounts received from any tort suit judgment or settlement arising from your exposure to asbestos. *See* 42 U.S.C. § 7385; 20 C.F.R. § 30.505(b) (2006). The evidence establishes that you filed a tort suit based on your exposure to asbestos, and that you received certain amounts from various defendants, and that you incurred attorney fees and suit costs. Based on the amounts received and expenses and attorney fees incurred, the amount of your offset for your tort suit is $14,468.34, using the EEOICPA Part B/E Benefits Offset Worksheet. *See* EEOICPA Bulletin No. 07-12 (issued April 10, 2007).

The Act also requires that your Part E award of medical benefits be subject to coordination with amounts received from any state workers' compensation claim you filed for the covered illness of asbestos-related lung disease. *See* 42 U.S.C. § 7385s-11; 20 C.F.R. § 30.626. The evidence establishes that you filed a state workers' compensation claim based on your asbestos-related lung disease, and that you settled that claim for a certain amount, and that you incurred attorney fees and suit costs. Based on the amounts received and expenses and attorney fees incurred, the amount of your coordination for your SWC claim is $74,247.70, pursuant to the EEOICPA/SWC Coordination of Benefits Worksheet. *See* EEOICPA Bulletin 07-02 (issued October 18, 2006).

Accordingly, your Part E medical benefits for asbestos-related lung disease, herein awarded, are subject to offset and coordination in the total amount of $88,716.04, based on the EEOICPA Part B/E Benefits Offset Worksheet and the EEOICPA/SWC Coordination of Benefits Worksheet. Thus, your medical benefits herein awarded are reduced by $88,716.04, and the bills for treatment of your covered illness will only be payable under the EEOICPA after you, or others on your behalf, have paid the first $88,716.04 of those bills incurred on or after the effective date of June 1, 2004.

Washington, DC

Alan Kelly, Hearing Representative

[1] The Y-12 Plant is a DOE facility from 1942 to present. Listed prime contractors include: Tennessee Eastman Corp. (TEC) (1943-1947), Union Carbide & Carbon Corp. (1947-1984), Martin Marietta Energy Systems (1984-1994), Lockheed Martin Energy Systems, Inc. (1994-1998), Bechtel Jacobs (1998-2000), and BWXT (2000-present). *See* http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist (last visited May 4, 2007).

EEOICPA Fin. Dec. No. 10039710-2007 (Dep't of Labor, November 30, 2007)

ORDER GRANTING REQUEST FOR RECONSIDERATION AND FINAL DECISION

This is the final decision of the Final Adjudication Branch (FAB) concerning the employee's claim under Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons stated below, the employee's claim under Part E for the covered illness of asbestosis is accepted for the payment of medical benefits. However, a surplus in the amount of $132,065.71 must be absorbed before any Part E benefits may actually be paid to or on behalf of the employee. A determination as to whether the employee is entitled to any compensation for potential wage-loss and/or impairment benefits under Part E due to asbestosis is deferred at this time.

STATEMENT OF THE CASE

On , the employee filed a claim for benefits under Part E of EEOICPA and alleged that he had developed "asbestos lung disease" as the result of his employment in , from 1976 to 2001. On his claim form, the employee indicated that he had both filed a law suit and had received a settlement for the claimed condition of "asbestos lung disease." He also alleged that he had worked for three different Department of Energy (DOE) contractors at the Y-12 and K-25 Plants, and DOE subsequently verified that he was employed at the Y-12 and K-25 Plants from through .

In support of the claim, the employee's representative submitted an report in which Dr. Scutero reviewed the employee's medical records and x-rays and diagnosed asbestosis due to asbestos exposure, and a report in which Dr. Chirrona related an impression of probable asbestos-related lung disease and mild chronic obstructive pulmonary disease (COPD). In a July 3, 2006 response to a request for additional medical evidence from the Jacksonville district office of the Division of Energy Employees Occupational Illness Compensation (DEEOIC), the representative submitted October 21 and 31, 2005 reports in which Dr. Cherry diagnosed asbestosis due to asbestos exposure as confirmed by evidence of pleural plaques and pulmonary function testing, and COPD due to cigarette smoking, as well as the pulmonary function testing and computerized tomography findings upon which Dr. Cherry had based his opinions.

employee's representative also submitted copies of the "worker's compensation complaint" that the employee filed in the Circuit Court for Anderson County, Tennessee on November 15, 2005[2], an "Order Approving Compromised Settlement of Workers' Compensation Claim" dated September 15, 2006, and a list of itemized expenses related to that claim. The complaint alleged that the employee contracted "asbestosis or asbestos-related lung disease, due to, or as a consequence of his exposure to asbestos" at work, but did not also allege that the employee had contracted COPD due to his employment. In Sections II, III and V of the September 15, 2006 Order, the judge in that matter found that the employee had contracted one work-related illness, "asbestos-related lung disease," dismissed his claim against two of the three defendants, and decreed that upon payment of the settlement of $150,869.60 and its agreement to pay medical benefits, the third defendant would be relieved of all further liability to the employee for "the claimed occupational asbestos-related lung disease and any non-malignant respiratory injury."

On , the district office issued a recommended decision to accept the employee's Part E claim and found that the medical evidence established that the employee had contracted the covered illness of asbestosis due to his work-related exposure to asbestos. In that same recommended decision, the district office found that the employee had received a state workers' compensation settlement of $150,869.60 for his covered illness, and calculated that $119,392.18 of that settlement had to be coordinated with the employee's Part E benefits. Since the employee was not being awarded any monetary benefits at that time, the district office found that the entire $119,392.18 constituted a "surplus" that would have to be recovered from his future Part E benefits, including the medical benefits that it was recommending for acceptance. However, the district office made no findings of fact regarding the employee's tort recoveries.

In a letter, the employee's representative objected to the recommendation that the employee's Part E award for asbestosis be coordinated with his state workers' compensation settlement. In support of this objection, the representative asserted that the employee had both claimed for and received the settlement for both "any non-malignant respiratory injury" and either "asbestosis" or "asbestos lung disease," and argued that because the district office found that the employee had contracted only one covered illness—asbestosis—no coordination was required under DEEOIC's procedures.

On February 7, 2007, FAB issued a final decision accepting the employee's Part E claim. In its decision, FAB considered the representative's objection to the coordination of the employee's Part E benefits and rejected it because there was "no evidence that the employee was diagnosed with a non-malignant illness other than from asbestos exposure and that is not considered an asbestos-related pulmonary condition." Based on this finding, FAB accepted the district office's recommendation that payment for any medical treatment of the employee's asbestosis be suspended until the $119,392.18 "surplus" was fully absorbed. FAB also made no findings regarding the employee's tort recoveries.

On March 22, 2007, the employee filed a petition in the United States District Court for the Eastern District of Tennessee seeking review of the final decision on his Part E claim.[3] Shortly thereafter, on April 30, 2007 the Director of DEEOIC issued an order that vacated the February 7, 2007 final decision and reopened the employee's claim for both further development and the issuance of new recommended and final decisions. The order noted that neither the recommended nor the final decisions in this matter had discussed the recoveries that the employee had received from his tort action, and that the coordination of his Part E benefits with his state workers' compensation settlement was not correctly calculated using the proper worksheet.

July 5, 2007 letter in which it requested additional information regarding his tort recoveries. On July 12, 2007, the employee's representative responded to the July 5, 2007 development letter by submitting an updated "Settlement Detail" showing the receipt of another $3,000 payment from a defendant, a list of itemized expenses related to the employee's tort suit amounting to $1,703.96, and a cover letter in which he noted that attorney fees of $7,177.40 had been paid out of the recovery total of $21,532.43.

On August 15, 2007, the national office issued a recommended decision: (1) to accept the employee's Part E claim for the payment of medical benefits for the covered illness of asbestosis; (2) to offset the employee's Part E benefits with the $12,673.53 "surplus" recovery from his tort action for asbestos exposure; and (3) to coordinate the employee's Part E benefits with the $119,392.18 "surplus" of the state workers' compensation benefits he received for the same covered illness. The case was transferred to FAB on the same date; since no objections to the recommended decision were received within the 60-day period provided for under 20 C.F.R. § 30.310(a) (2007), FAB issued a decision on the employee's claim on October 25, 2007.

Thereafter, by letter dated November 2, 2007, the employee's representative made a timely request for reconsideration of the October 25, 2007 decision and submitted copies of an August 29, 2007 letter objecting to the August 15, 2007 recommended decision and an April 20, 2007 affidavit of Dr. Cherry that he alleged had been sent to FAB in a timely manner in support of his reconsideration request. Although there is no evidence that the August 29, 2007 objections or the April 20, 2007 affidavit were ever received by FAB, they appear to have been properly sent to the correct mailing address. Therefore, FAB hereby grants the request to reconsider the employee's claim to consider the following objections to the recommended decision:

OBJECTIONS

In his August 29, 2007 submission, the employee's representative argued that the recommended coordination of the employee's Part E benefits with the $119,392.18 "surplus" of the state workers' compensation benefits he had received was improper under 20 C.F.R. § 30.626(c)(3), and alleged that the state workers' compensation benefits at issue were for both asbestos-related lung disease (a covered illness) and COPD (a non-covered illness). In support of his argument, the representative asserted that Dr. Cherry's affidavit established that the employee's COPD was a "non-malignant lung injury." In his affidavit, Dr. Cherry indicated that he had examined the employee on , that he had diagnosed COPD based on his findings, and that COPD "is a non-malignant respiratory injury."

After considering the recommended decision, the objections to the recommended decision and all of the evidence in the case file, FAB hereby makes the following:

FINDINGS OF FACT

1. The employee filed a claim for benefits under Part E of EEOICPA on , and alleged that he had contracted "asbestos lung disease" due to his employment.

2. The employee was employed as a DOE contractor employee at two DOE facilities, the K-25 and Y-12 Plants in , , from through . This is more than 250 days of covered employment, during which the potential for asbestos exposure existed.

asbestosis due to exposure to asbestos by Dr. Scutero on October 7, 1997, more than ten years after he was first exposed to asbestos at a DOE facility, and that he was later diagnosed with nonwork-related COPD due to cigarette smoking by Dr. Cherry in reports dated October 21 and 31, 2005.

4. It is at least as likely as not that the employee's exposure to asbestos at two DOE facilities, the K-25 and Y-12 Plants, was a significant factor in aggravating, contributing to, or causing his asbestosis.

5. It is at least as likely as not that the employee's exposure to asbestos was related to his employment by a DOE contractor at the K-25 and Y-12 Plants.

6. The employee filed a tort suit in the Circuit Court for , on August 14, 1992 against 17 defendants, alleging that he had been exposed to asbestos at work at the K-25 and Y-12 Plants. As of July 12, 2007, the employee had received recoveries from the defendants of $21,532.43 and had paid out allowable attorney fees of $7,199.86 and allowable costs of suit of $1,681.50.

7. The employee also filed a "worker's compensation complaint" in the Circuit Court for Anderson County, Tennessee on November 15, 2005 seeking workers' compensation benefits for "asbestosis or asbestos-related lung disease." The employee did not seek state workers' compensation benefits for COPD in that action. In an "Order Approving Compromised Settlement of Workers' Compensation Claim" dated September 15, 2006, the judge in that matter found that the employee had contracted a single illness, "asbestos-related lung disease," and decreed that payment of the settlement of $150,869.60 would relieve the defendant of all future liability to the employee for "the claimed occupational asbestos-related lung disease and any non-malignant respiratory injury." Out of this settlement, the employee paid allowable attorney fees of $30,173.92 and allowable costs of suit of $1,303.50.

Based on the above-noted findings of fact, FAB hereby makes the following:

CONCLUSIONS OF LAW

The first issue in this case is whether the employee qualifies as a "covered Part E employee" under 20 C.F.R. § 30.5(p). For this case, the relevant portion of the definition of a "covered Part E employee" is "a Department of Energy contractor employee. . .who has been determined by OWCP to have contracted a covered illness. . .through exposure at a Department of Energy facility," and the claimed "covered illness" is "asbestos lung disease" or asbestosis.

DEEOIC has established criteria to allow for a presumption of causation in claims filed under Part E for asbestosis. If the evidence in the claim file is sufficient to establish that the employee was diagnosed with asbestosis, that he or she worked at least 250 aggregate days at a facility where the presence of asbestos has been confirmed, and that there was a latency period of at least 10 years between the employee's first exposure and the first diagnosis of asbestosis, DEEOIC can accept that it was at least as likely as not that the employee's exposure to asbestos at a DOE facility was a significant factor in aggravating, contributing to or causing his or her asbestosis.[4] *See* Federal (EEOICPA) Procedure Manual, Chapter E-500.17 (June 2006).

work-related exposure to asbestos, and this is the only "covered illness" that is supported by the medical evidence in the case file (the employee's COPD is not due to the same work-related exposure that resulted in his asbestosis and is instead due to nonwork-related cigarette smoking). The employee also had more than one year of covered employment with exposure to asbestos and was diagnosed with asbestosis more than ten years following his initial exposure to asbestos at a covered DOE facility. Therefore, he qualifies as a "covered Part E employee" under § 30.5(p) of the regulations for the condition of asbestosis, and the employee's claim for asbestosis is accepted pursuant to § 7385s-4(c) of EEOICPA. Since he is a "covered Part E employee," the employee is entitled to medical benefits for the "covered illness" of asbestosis pursuant to § 7385s-8 of EEOICPA, retroactive to the date he filed his claim for benefits on .

The second issue in this case is whether the employee's Part E benefits must be offset. Under § 7385 of EEOICPA and 20 C.F.R. § 30.505(b), Part E benefits must be offset to reflect payments made pursuant to a final judgment or a settlement received in litigation for the same exposure that EEOICPA benefits are payable. As found above, the employee filed a tort suit in the Circuit Court for , on against 17 defendants, alleging that he had been exposed to asbestos at work. Through , the employee has received total recoveries from the defendants of $21,532.43, and had paid out allowable attorney fees of $7,199.86 and allowable costs of suit of $1,681.50. Using the "EEOICPA Part B/E Benefits Offset Worksheet," the employee has a "surplus" recovery from his tort action of $12,673.53; this "surplus" must be absorbed from medical benefits and any lump-sum monetary benefits payable in the future before any Part E benefits can actually be paid to or on behalf of the employee.

The third issue in this case is whether the employee's Part E benefits also must be coordinated. Under § 7385s-11 of EEOICPA and 20 C.F.R. § 30.626, Part E benefits must be coordinated with any state workers' compensation benefits (other than medical or vocational rehabilitation benefits) that the claimant has received for the same covered illness. As found above, on November 15, 2005 the employee filed a "worker's compensation complaint" in the Circuit Court for Anderson County, Tennessee seeking state workers' compensation benefits solely for "asbestosis or asbestos-related lung disease." In an "Order Approving Compromised Settlement of Workers' Compensation Claim" dated September 15, 2006, the judge specifically found that the employee had contracted one illness, "asbestos-related lung disease," and decreed that the payment of the settlement of $150,869.60 would relieve the defendant of all future liability to the employee for "the claimed occupational asbestos-related lung disease and any non-malignant respiratory injury."

This does not mean, however, that the settlement was for anything other than the employee's "covered illness" of asbestosis, which is the only *work-related* lung disease that is established by the medical evidence of record. This conclusion is consistent with the medical evidence in the case file, the "worker's compensation complaint" that the employee filed, and the remainder of the Order itself, which explicitly states in Sections II, III and V that the employee contracted a single work-related illness of "asbestos-related lung disease," not that illness *and* a work-related non-malignant respiratory injury.[5] In his objection to the recommended decision, the employee's representative argued for the first time that Dr. Cherry's affidavit established that the employee's COPD is a non-malignant respiratory injury, and the medical evidence of record supports that particular conclusion. However, the record also establishes that the employee's COPD is due to his nonwork-related cigarette smoking rather than to his exposure to asbestos while employed at a DOE facility. Therefore, because the record does not establish that the employee received state workers' compensation benefits "for both a covered illness and a non-covered illness arising out of and in the course of the same work-related incident," coordination of the employee's Part E benefits for the "covered illness" of asbestosis with his $150,869.60 settlement is required. *See* 20 C.F.R. 30.626(c)(3). Out of this settlement, the employee

paid allowable attorney fees of $30,173.92 and allowable costs of suit of $1,303.50. Using the "EEOICPA/SWC Coordination of Benefits Worksheet," the employee has received "surplus" state workers' compensation benefits totaling $119,392.18 after deducting allowable attorney fees and costs of suit from his gross settlement. This second "surplus" must also be absorbed from the employee's medical benefits and any lump-sum monetary benefits payable in the future before any Part E benefits can actually be paid to or on behalf of the employee.

Accordingly, the employee is entitled to medical benefits for his asbestosis, retroactive to the date he filed his EEOICPA claim on . However, a total "surplus" in the amount of $132,065.71 must be absorbed pursuant to §§ 7385 and 7385s-11(a) of EEOICPA before any Part E benefits are actually payable.

Washington,

Tom Daugherty

Hearing Representative

Final Adjudication Branch

[1] No. 1-553-92.

[2] No. A5LA0597.

[3] No. 3:07-cv-103 (E.D. Tenn. Knoxville).

[4] The actual latency period for the development of asbestosis is a function of the duration and intensity of exposure to asbestos. Thus, if an employee's occupation was one that is not typically exposed to asbestos, or the potential for extreme exposure existed and the employee worked less than 250 aggregate work days, or there is a latency period of less than 10 years existing between the covered DOE or RECA section 5 employment and the onset of the illness, DEEOIC will evaluate all of the evidence in the file to determine whether a causal relationship exists in those instances.

[5] This interpretation of the September 15, 2006 Order is consistent with the way a similar order settling a Tennessee workers' compensation case was interpreted by the Tennessee Supreme Court in *Wilson v. National Healthcare Corp*., 2004 WL 1964909 *3 (Tenn. Workers' Comp. Panel Sept. 7, 2004).

EEOICPA Fin. Dec. No. 10068242-2008 (Dep't of Labor, July 25, 2008)

ORDER GRANTING REQUEST FOR RECONSIDERATIONAND FINAL DECISION

The Final Adjudication Branch (FAB) hereby grants the employee's timely request for reconsideration of its June 6, 2008 final decision, pursuant to 20 C.F.R. § 30.319(c) (2008), and issues this new final decision concerning the employee's claim under Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons stated below, the employee's claim under Part E for the covered illness of asbestosis is accepted for the payment of medical benefits. However, a "surplus" in the amount of $74,416.46 must be absorbed before any Part E benefits may actually be paid to or on behalf of the employee. A determination as to whether the employee is entitled to any compensation for potential wage-loss and/or impairment benefits under Part E due to his covered illness of asbestosis is deferred at this

time.

STATEMENT OF THE CASE

On August 13, 2007, the employee filed a Form EE-1 claiming benefits under Part E of EEOICPA and alleged that he had contracted "asbestos related lung disease" due to his employment as an electrician at the Y-12 Plant and K-25 Plant in Oak Ridge, Tennessee from 1977 to 1995. The employee also alleged that he was exposed to asbestos, radiation and toxic chemicals while working at those two facilities. Using the Oak Ridge Institute for Science and Education database, the Savannah River Resource Center verified that the employee had worked at the K-25 Plant from October 31, 1977 to August 28, 1981, and at the Y-12 Plant from August 22, 1983 to March 4, 1991. On his Form EE-1, the employee further indicated that he had filed a tort suit and a state workers' compensation claim related to his claimed illness, and that he had received settlements or other awards.

In support of his claim, the employee submitted pulmonary function and x-ray studies and a July 27, 2005 report from Dr. Ronald R. Cherry, a Board-certified pulmonary specialist. In that report, Dr. Cherry related the employee's belief that he had mild asthma, noted that he had smoked about one quarter pack of cigarettes a day for 10 years before he quit at age 35, and diagnosed "asbestosis" based on the results of his laboratory studies. In a follow-up note dated August 3, 2005, Dr. Cherry repeated his diagnosis of "asbestosis," causally related that one illness to the employee's work-related exposure to asbestos dust, and opined that the employee had a 17% permanent impairment of the whole person using the Fifth Edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*.

In a signed statement dated September 18, 2007, the employee confirmed that he and his wife had filed a tort suit for damages due to his alleged asbestos exposure in the Circuit Court for Knox County, Tennessee; he also noted that the suit was still pending and that they had received joint settlement payments as of that date amounting to $6,339.50, less attorneys fees of $2,113.14 and court costs of $708.62.[1] The employee also confirmed that he had received a settlement of his claim for state workers' compensation benefits[2] in the amount of $91,104.02, less attorney fees of $18,220.80 and $1,281.50 of expenses, and asserted that this payment was for "the claimed condition of asbestos related lung disease and any non-malignant respiratory injury (asthma)."

Accompanying the employee's statement was a copy of the short-form complaint against 14 defendants that he and his wife had filed in the tort suit, a settlement sheet showing that their law firm had received seven separate payments as of September 11, 2007, and an itemized list of court costs from that litigation. Also accompanying the above-noted statement was a certified copy of the March 10, 2006 "Order Approving Compromised Settlement of Workers' Compensation Claim," signed by Judge Donald R. Elledge of the Circuit Court for Anderson County, Tennessee, that settled the employee's state workers' compensation claim against his employer, and a list of expenses from that proceeding. In his March 10, 2006 Order, the Judge found that the employee had contracted "asbestos-related lung disease as a result of occupational exposure to asbestos," and decreed that payment of $91,104.02 would exonerate the employer "from any and all further liability with regard to [state workers' compensation] benefits which may be claimed by the [employee] or growing out of any injuries that have resulted, or may hereafter result, to [the employee] in reference to the claimed asbestos-related lung disease and any non-malignant respiratory injury. . . ."

On December 12, 2007, the Jacksonville district office issued a recommended decision to accept the

employee's Part E claim for asbestosis and to pay him medical benefits, once a combined surplus due to his receipt of payments from his tort suit and his state workers' compensation claim in the amount of $74,416.46 was absorbed.[3] By letter postmarked on January 29, 2008, the employee's representative filed an objection to the recommended decision and requested a review of the written record of the claim. In her submission, the employee's representative objected to the coordination of the employee's Part E benefits with the proceeds of the settlement of his state workers' compensation claim, which had accounted for $71,601.72 of the $74,416.46 "surplus" found by the district office. She alleged that the employee's settlement was "for the claimed conditions of both asbestos lung disease and any non-malignant respiratory injury" (emphasis in original) based on the "Order Approving Compromised Settlement of Workers' Compensation Claim," and further alleged that the employee had been diagnosed with "asthma, a non-malignant lung injury. . . ." Given these allegations, the representative argued that the recommendation to coordinate was improper because the employee "received his state workers' compensation for a covered and non-covered illness. . . ."

As noted above, FAB issued a June 6, 2008 final decision in which it confirmed the district office's recommendations to accept the employee's claim for the covered illness of "asbestosis" and awarded the employee medical benefits for his accepted illness, after the combined surplus of $74,416.46 was absorbed. However, on June 30, FAB received a timely request that it reconsider its June 6, 2008 decision from the employee's representative.[4] In her request, the representative alleged that the employee had received state workers' compensation benefits for both his covered illness of "asbestos related lung disease and any non-malignant respiratory injury (asthma and COPD). . . ." In support of her most recent allegation, the representative submitted office notes and accompanying consultation reports dated February 26, 2004, June 30, 2004, October 29, 2004, February 28, 2005, August 22, 2005, May 1, 2006 and April 28, 2008 by Dr. Richard M. Gaddis, the employee's attending osteopath. In his office notes, Dr. Gaddis diagnosed flare-ups of both asthma and COPD due to either burning wood in a wood stove and paint fumes; however, Dr. Gaddis did not causally relate either of these two medical conditions to the employee's work-related exposure to asbestos at the K-25 and Y-12 Plants.

After considering the recommended decision, the timely objections to the recommended decision, the evidence submitted in support of the timely request for reconsideration and all of the evidence in the case file, FAB hereby makes the following:

FINDINGS OF FACT

1. The employee filed a claim for benefits under Part E of EEOICPA on August 13, 2007, and alleged that he had contracted "asbestos related lung disease" due to his employment.

2. The employee was employed as a DOE contractor employee at two DOE facilities, the K-25 and Y-12 Plants in Oak Ridge, Tennessee, from October 31, 1977 through August 28, 1981, and from August 22, 1983 through March 4, 1991, respectively. This is more than 250 days of covered employment, during which the potential for asbestos exposure existed.

3. The medical evidence of record establishes that the employee was first diagnosed with asbestosis due to work-related asbestos exposure by Dr. Cherry in his August 3, 2005 report, more than ten years after he was first exposed to asbestos at a DOE facility.

4. The medical evidence of record also establishes that the employee was diagnosed with asthma and COPD by Dr. Gaddis. However, Dr. Gaddis did not causally relate either the employee's asthma or

his COPD to the same work-related asbestos exposure that led to the employee's asbestosis.

5. It is at least as likely as not that the employee's exposure to asbestos at two DOE facilities, the K-25 and Y-12 Plants in Oak Ridge, Tennessee was a significant factor in aggravating, contributing to, or causing his asbestosis.

6. It is at least as likely as not that the employee's exposure to asbestos was related to his employment by a DOE contractor at two DOE facilities, the K-25 and Y-12 Plants in Oak Ridge, Tennessee.

7. The employee and his wife filed a tort suit in the Circuit Court for Knox County, Tennessee, alleging that he had been exposed to asbestos while at work. As of September 11, 2007, the employee and his wife have received total recoveries from seven of the defendants of $6,339.50, and have paid out allowable attorney fees of $2,113.14 and allowable costs of suit of $708.62.

8. The employee also filed a workers' compensation complaint in the Circuit Court for Anderson County, Tennessee seeking state workers' compensation benefits for asbestos-related lung disease. In an "Order Approving Compromised Settlement of Workers' Compensation Claim" dated March 10, 2006, the judge in that matter found that the employee had contracted a single illness, "asbestos-related lung disease as a result of occupational exposure to asbestos," and decreed that payment of the settlement of $91,104.02 would relieve the employer of all future liability to the employee for "the claimed asbestos-related lung disease and any non-malignant respiratory injury." Out of this settlement, the employee paid allowable attorney fees of $18,220.80 and allowable costs of suit of $1,281.50.

Based on the above-noted findings of fact in the employee's Part E claim, FAB hereby makes the following:

CONCLUSIONS OF LAW

The first issue in this case is whether the employee qualifies as a "covered Part E employee" under 20 C.F.R. § 30.5(p). For this case, the relevant portion of the definition of a "covered Part E employee" is "a Department of Energy contractor employee. . .who has been determined by OWCP to have contracted a covered illness. . .through exposure at a Department of Energy facility," and the claimed "covered illness" is "asbestos-related lung disease" or asbestosis.

DEEOIC has established criteria to allow for a presumption of causation in claims filed under Part E for asbestosis. If the evidence in the claim file is sufficient to establish that the employee was diagnosed with asbestosis, that he or she worked at least 250 aggregate days at a facility where the presence of asbestos has been confirmed, and that there was a latency period of at least 10 years between the employee's first exposure and the first diagnosis of asbestosis, DEEOIC can accept that it was at least as likely as not that the employee's exposure to asbestos at a DOE facility was a significant factor in aggravating, contributing to or causing his or her asbestosis.[5] *See* Federal (EEOICPA) Procedure Manual, Chapter E-500.17 (June 2006).

As found above, the employee is a DOE contractor employee who was employed at two DOE facilities in Oak Ridge by DOE contractors and who contracted a "covered illness," as that term is defined in § 7385s(2) of EEOICPA. The "covered illness" that the employee contracted is asbestosis due to

work-related exposure to asbestos, and this is the only "covered illness" that is supported by the medical evidence in the case file. While there is medical evidence in the file that establishes that the employee has been diagnosed with both asthma and COPD, that same medical evidence does not establish that either of these two other illnesses were contracted through the same work-related exposure of the employee to asbestos (or any other toxic substance) at a DOE facility. The employee also had more than one year of covered employment with exposure to asbestos and was first diagnosed with asbestosis more than ten years following his initial exposure to asbestos at a covered DOE facility. Therefore, he qualifies as a "covered Part E employee" under § 30.5(p) of the regulations for the condition of asbestosis, and the employee's claim for asbestosis is accepted pursuant to § 7385s-4(c) of EEOICPA. Since he is a "covered Part E employee," the employee is entitled to medical benefits for the "covered illness" of asbestosis pursuant to § 7385s-8 of EEOICPA, retroactive to the date he filed his claim for benefits on August 13, 2007.

The second issue in this case is whether the employee's Part E benefits must be offset. Under § 7385 of EEOICPA and 20 C.F.R. § 30.505(b), Part E benefits must be offset to reflect payments made pursuant to a final judgment or a settlement received in litigation for the same exposure for which EEOICPA benefits are payable. As found above, the employee and his wife filed a tort suit in the Circuit Court for Knox County, Tennessee, alleging that he had been exposed to asbestos at work. Through September 11, 2007, the employee and his wife have received total joint recoveries from seven of the defendants of $6,339.50, and have paid out allowable attorney fees of $2,113.14 and allowable costs of suit of $708.62. Using the "EEOICPA Part B/E Benefits Offset Worksheet," the employee has a "surplus" recovery from his tort action of $2,814.74; this "surplus" must be absorbed from medical benefits and any lump-sum monetary benefits payable in the future before any Part E benefits can actually be paid to or on behalf of the employee.

The third issue in this case is whether the employee's Part E benefits also must be coordinated. Under § 7385s-11 of EEOICPA and 20 C.F.R. § 30.626, Part E benefits must be coordinated with any state workers' compensation benefits (other than medical or vocational rehabilitation benefits) that the claimant has received for the same covered illness. As found above, the employee filed a state workers' compensation complaint in the Circuit Court for Anderson County, Tennessee seeking workers' compensation benefits for asbestos-related lung disease. In an "Order Approving Compromised Settlement of Workers' Compensation Claim" dated March 10, 2006, the judge in that matter found that the employee had contracted a single illness, "asbestos-related lung disease as a result of occupational exposure to asbestos," and decreed that payment of the settlement of $91,104.02 would relieve the employer of all liability to the employee for "the claimed asbestos-related lung disease and any non-malignant respiratory injury."

This does not mean, however, that the above settlement was for anything other than the employee's "covered illness" of asbestosis. The scope of the settlement is important because pursuant to 20 C.F.R. § 30.626(c)(3), DEEOIC will not coordinate a claimant's Part E benefits with his or her state workers' compensation benefits for the same covered illness if the state workers' compensation benefits were received "for both a covered illness and a non-covered illness *arising out of and in the course of the same work-related incident*." (emphasis added) A close reading of Sections II, III, IV and V of the March 10, 2006 Order, however, reveals that the only lung disease specifically identified by the judge as resulting from work-related asbestos exposure was the same as the employee's covered illness—asbestosis or "asbestos-related lung disease." This conclusion is also consistent with the medical evidence in the case file, which does not establish that the employee's asthma and COPD are causally related to the same work-related exposure to asbestos that led to the development of his asbestosis. The mere fact that the judge in the employee's state workers' compensation proceeding wrote that

payment of $91,104.02 would exonerate the employer "from any and all further liability with regard to [state workers' compensation] benefits which may be claimed by the [employee] or growing out of any injuries that have resulted, or may hereafter result, to [the employee] in reference to the claimed asbestos-related lung disease and any non-malignant respiratory injury" in his March 10, 2006 Order does not mean that that the employee actually contracted both "asbestos-related lung disease as a result of occupational exposure to asbestos" and some other unidentified "non-malignant respiratory injury."[6] Therefore, coordination of the employee's Part E benefits for the "covered illness" of asbestosis with his $91,104.02 settlement is required. Out of this settlement, the employee paid allowable attorney fees of $18,220.80 and allowable costs of suit of $1,281.50. Using the "EEOICPA/SWC Coordination of Benefits Worksheet," the employee has received "surplus" state workers' compensation benefits totaling $71,601.72 after deducting allowable attorney fees and costs of suit from his gross settlement. This second "surplus" must also be absorbed from the employee's medical benefits and any lump-sum monetary benefits payable in the future before any Part E benefits can actually be paid to or on behalf of the employee.

Accordingly, the employee is entitled to medical benefits for his asbestosis, retroactive to the date he filed his EEOICPA claim on August 13, 2007. However, a total "surplus" in the amount of $74,416.46 must be absorbed pursuant to §§ 7385 and 7385s-11(a) of EEOICPA before any Part E benefits are actually payable.

Washington, DC

Kathleen M. Graber

Hearing Representative

Final Adjudication Branch

[1] No. 2-472-05 (filed August 31, 2005).

[2] No. A5LA0307.

[3] On February 25, 2008, FAB issued a final decision confirming the district office's recommendations to accept the employee's claim for the covered illness of asbestosis and to award the employee medical benefits for his accepted illness, after the combined surplus of $74,416.46 was absorbed. On April 9, 2008, the employee filed a petition with the United States District Court for the Eastern District of Tennessee, seeking review of the February 25, 2008 decision (No. 3:08-cv-125). Also on April 9, 2008, FAB received an April 7, 2008 submission in which the employee's authorized representative noted that she had submitted objections to the recommended decision, which FAB had not considered prior to issuing the February 25, 2008 decision. Because of this, the Director of the Division of Energy Employees Occupational Illness Compensation (DEEOIC) issued a May 20, 2008 order vacating the February 25, 2008 decision, reopening the employee's Part E claim and returning it to FAB for the issuance of an appropriate new final decision that considered the representative's timely objections to the December 12, 2007 recommended decision.

[4] By doing so, the representative revoked the finality of the June 6, 2008 decision. *See* 20 C.F.R. § 30.316(d).

[5] The actual latency period for the development of asbestosis is a function of the duration and intensity of exposure to asbestos. Thus, if an employee's occupation was one that is not typically exposed to asbestos, or the potential for extreme exposure existed and the employee worked less than 250 aggregate work days, or there is a latency period of less than 10 years existing between the covered DOE or RECA section 5 employment and the onset of the illness, DEEOIC will evaluate all of the evidence in the file to determine whether a causal relationship exists in those instances.

[6] This interpretation of the September 15, 2006 Order is consistent with the way a similar order settling a Tennessee

workers' compensation case was interpreted by the Tennessee Supreme Court in *Wilson v. National Healthcare Corp*., 2004 WL 1964909 *3 (Tenn. Workers' Comp. Panel Sept. 7, 2004

Subcontractors

Atomic weapons employers

EEOICPA Fin. Dec. No. 25833-2004 (Dep't of Labor, October 20, 2004)

NOTICE OF FINAL DECISION

This is the final decision of the Office of Workers' Compensation Programs (OWCP) on the above-designated 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 stated below, your claim for benefits is hereby denied.

STATEMENT OF THE CASE

You filed an EE-2 on March 18, 2002 claiming your spouse, the employee, was diagnosed with cancer and renal disease as a result of his employment at a DOE facility.

The Employment History Form you completed indicated he was employed with Emmett Lowry Construction Company at the Texas City Chemical Plant and "other construction companies" at the Texas City Chemical Plant. He worked out of Laborer's Local #116 from the 1950's to the 1960's.

You submitted a death certificate showing that he died on May 23, 1997 due to lung cancer and at the time of his death, you were his spouse. A pathology report dated April 2, 1997 established his diagnosis of lung cancer. On April 17, 2002 your EE-2 was faxed to the district office from Congressman Nick Lampson's office, and it is noted that on that EE-2, you checked "other lung condition" as well as cancer and renal disease.

On June 28, 2002, the U.S. Department of Energy responded to a request for confirmation that the employee worked at Texas City Chemicals, from the 1950's, 1960's and 1970's. They responded by stating that they had no information on the employee. An affidavit was received from Willie Williams stating he worked with the employee at Bellco Industrial Engineering American Oil Company and worked out of Labor Hall #116 for A.A. Pruitt Construction, American Oil Company, PG Bell Southwest Industrial Company, and for Amoco Chemical.

Another affidavit was received from Eligah Smith stating he worked at Amoco Chemical Company in 1957 to 1964 and saw the employee working with other construction workers. An affidavit from Lloyd C. Calhoun stated he worked for Bellco Industrial, American Oil Company out of Union Hall #116 from 1952 to 1954 with the employee and for Emmett Lowry Construction from 1954 to 1958. An affidavit from Henry Williams stated that he worked with the employee at Amoco Chemicals, Bellco Industrial Engineering in 1951 to 1955, and for A.A. Pruitt Construction at Amoco Chemical in the 1950's to the 1960's.

Amoco Chemical, *aka* Texas City Chemicals, Inc. was an Atomic Weapons Employer from 1952 to

1956.

Also received were your spouse's social security administration records. However none of the employment evidence showed the employee worked directly for Texas City Chemical. You submitted medical evidence that included a pathology report that diagnosed the employee with lung cancer on April 2, 1997. The district office erroneously forwarded your case to NIOSH for dose reconstruction.

On March 15, 2004 and March 22, 2004 the district office notified you by letter that contractors and subcontractors of Atomic Weapons Employers are not entitled to compensation under the EEOICPA and requested that you send evidence that the employee was directly employed with Texas City Chemicals. You were given 30 days to submit such evidence.

On March 22, 2004 and April 7, 2004 the claims examiner contacted you by telephone to discuss the EEOICPA and to explain that contractors and subcontractors at AWE facilities are not covered under the Act.

On April 15, 2004, the Denver district office recommended denial of your claim on the basis that the evidence submitted did not establish **[Employee]** was employed at a covered facility during a covered period.

Pursuant to the regulations implementing the EEOICPA, a claimant has 60 days from the date of issuance of the recommended decision to raise objections to that decision to the Final Adjudication Branch pursuant to 20 C.F.R. § 30.310(a). If an objection is not raised during the 60-day period, the Final Adjudication Branch will consider any and all objections to the recommended decision waived and issue a final decision affirming the district office's recommended decision pursuant to 20 C.F.R.§ 30.316(a).

On June 15, 2004 you filed an objection to the recommended decision, and stated you disagreed with the recommended decision. You requested an oral hearing.

A hearing was held on September 1, 2004 in Houston, Texas. You attended the hearing and were accompanied by Stephen Holmes, Galveston County Commissioner. At the hearing Mr. Holmes testified that the difference between atomic weapons employers and those that worked for the DOE is not very clear in the fact sheets provided by the Department of Labor. Also, contractors and subcontractor at other sites are covered. The contractors and subcontractors at the AWE facilities handled the same materials that employees of the DOE handled and they did the same type of work.

No exhibits were presented at the hearing. On October 3, 2004, the Final Adjudication Branch received a fax from you. The fax requested that I reconsider the recommendation of your claim. You stated that the EEOICPA Fact Sheet, the Federal Register and the list of Frequently Asked Questions stated that covered workers within Texas City Chemicals (American Oil Company, Borden, Inc. Smith-Douglas, Amoco Chemical Company) 1952-1956 will include contractors or subcontractors. You also stated that the district office sent your claim to NIOSH, your claim was in process before and after the amendment of October 27, 2003, that you were led to believe that EEOICPA had approved your claim.

After considering the case record of the claim, the recommended decision forwarded by the Denver district office, and your testimony at the hearing, the FAB hereby makes the following:

FINDINGS OF FACT

1. You filed a claim for survivor benefits under the EEOICPA on March 18, 2002.

2. You claimed the employee, **[Employee]**, contracted lung cancer as a result of his employment at a DOE facility, Texas City Chemicals.

3. You submitted medical evidence of lung cancer, a covered medical condition under the Act.

4. Texas City Chemicals is an Atomic Weapons Employer.

5. The employment evidence submitted does not establish **[Employee]** worked directly for Texas City Chemicals, rather, it shows he worked for subcontractors to Texas City Chemicals.

6. You submitted a marriage certificate establishing you are the eligible beneficiary of **[Employee]**. You also submitted a death certificate showing you were his spouse at the time of his death.

Based on the above-noted findings of fact in this claim, the FAB hereby also makes the following:

CONCLUSIONS OF LAW

1. The purpose of the EEOICPA, as stated in 42 U.S.C. § 7384d(b), is to provide for "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." Section 7384l(3) defines the term "atomic weapons employee" to mean an individual employed by an atomic weapons employer during a period when the employer was processing or producing, for the use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining and milling. In order to be afforded coverage as defined by 42 U.S.C. § 7384l(15) of the EEOICPA, a claimant must establish that the claimed employee was a covered employee who had been diagnosed with an "occupational illness" which means "a covered beryllium illness, cancer referred to in section 7384l(9)(B), specified cancer, or chronic silicosis, as the case may be." The evidence in your case establishes the employee was diagnosed with a covered condition, however, the evidence does not support he was a covered employee employed at a covered facility.

2. Chapter 2-500.6a (June 2002) of the Federal (EEOICPA) Procedure Manual states that subcontractors and contractors of AWE facilities are not covered.

3. 20 C.F.R. Parts 1 and 30, effective February 24, 2003 states that this new final rule will apply to all claims filed on or after this date, and all claims that are pending on February 24, 2003.

4. You have established that you are the eligible surviving beneficiary of the employee pursuant to 42 U.S.C. §7384s.

5. Other lung conditions and renal disease are not covered conditions under § 7384l(15) of the EEOICPA.

6. You not entitled to compensation pursuant to 42 U.S.C. § 7384l of the Energy Employees Occupational Illness Compensation Program Act.

Denver, CO

Janet R. Kapsin

Hearing Representative

EEOICPA Fin. Dec. No. 55211-2004 (Dep't of Labor, September 16, 2004)

NOTICE OF FINAL DECISION

This is the final decision of the Office of Workers' Compensation Programs (OWCP) on 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 reason discussed below, your claim for benefits is denied.

STATEMENT OF THE CASE

You filed a claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA), on March 8, 2004. You indicated your employment classification or type of employment as Atomic Weapons Employer. On Form EE-3 (Employment History for Claim under EEOICPA) you stated that you had been employed as a supervisor for the installation of refrigeration equipment and other work while employed by the Way Engineering Company at Texas City Chemical, Inc., located in Texas City, Texas from 1952 until 1956. The Department of Energy (DOE) has identified Texas City Chemicals as an Atomic Weapons Employer (AWE) for the time period 1952 through 1956. You stated that as a result of your exposure at Texas City Chemicals while employed by Way Engineering Co. that you developed a skin disease that was possibly skin cancer.

The district office reviewed your application and evidence. In seperate letters dated March 15, 2004, the district office noted that you had not submitted medical or employment evidence in support of your claim. The letter addressing employment evidence indicated that while we had initiated a request for proof of employment with the DOE, they had been unable to verify your employment at Texas City Chemical, Inc. The district office asked you to provide evidence of your employment and listed a variety of documents such as time and attendance forms, wage statements, or other records that could be used to establish employment. The letter included Form EE-4 (Affidavit of Employment) that you could use to have other individuals complete statements in support of your employment allegations. The Social Security Administration (SSA) Form SSA-581, which can be used to verify your Social Security employment and employer history with your authorization, was included with the letter for your use if you wished the district office to request the information directly from SSA. A follow-up request for medical information was sent to you on May 26, 2004.

On June 8, 2004, you had a telephone conversation with a district office claims examiner. You stated that you had been employed by Way Engineering which was a contractor at the Texas City Chemical site and you were not employed directly by Texas City Chemical, Inc. The claims examiner informed you that employees of contractors or subcontractors of an Atomic Weapons Employer were not

"covered employees" under the EEOICPA.

On June 9, 2004, the district office informed you in a letter that under the EEOICPA only employees hired directly by the AWE facility (such as Texas City Chemicals) were covered under the Act. The letter explained that the definition of an "atomic weapons employee" is an individual employed by an Atomic Weapons Employer during a period when the employer was processing or producing for the use by the United States material that emitted radiation and was used in the production of atomic weapons, excluding uranium mining and milling. The letter requested that you provide evidence that you were employed directly by Texas City Chemical, Inc. and explained that if additional employment evidence was not received within 30 days, a recommended decision would be issued based on the information in file.

On June 15, 2004, the district office received medical evidence provided by your physician, Dr. Anh V. Nguyen, M.D. This evidence included a pathology report describing a specimen from skin on your left forearm obtained on May 4, 2004 and provided a diagnosis of malignant melanoma (skin cancer).

On July 12, 2004, the district office issued a recommended decision to deny your claim. The recommended decision stated that the evidence of record did not establish that you could be considered a "covered employee" as that term is defined under 42 U.S.C. § 7384l. The file was transferred to the Final Adjudication Branch (FAB) on that date.

Pursuant to the regulations implementing the EEOICPA, a claimant has 60 days from the date of issuance of the recommended decision to raise objections to that decision to the Final Adjudication Branch pursuant to 20 C.F.R. § 30.310(a). If an objection is not raised during the 60-day period, the Final Adjudication Branch will consider any and all evidence in the record and issue a final decision affirming the district office's recommended decision pursuant to 20 C.F.R.§ 30.316(a).

You have not raised any objections to the district office's recommended decision pursuant to § 30.310(a) of the implementing regulations and the 60-day period for filing such objections, as allowed under § 30.310(a) of the implementing regulations (20 C.F.R. § 30.310 (a)), has expired.

Based on the evidence contained in the case record, the Final Adjudication Branch makes the following:

FINDINGS OF FACT

1. You filed a claim for compensation on March 8, 2004.

2. You did not provide evidence sufficient to establish that you had covered employment with a DOE or AWE facility.

3. You provided medical evidence that established you had been diagnosed with malignant melanoma (skin cancer) on May 5, 2004.

Based on the above noted findings of fact in this claim, the Final Adjudication Branch makes the following:

CONCLUSIONS OF LAW

Section 7384l states:

(1) The term “covered employee” means any of the following:

(A) A covered beryllium employee.

(B) A covered employee with cancer.

(C) To the extent provided in section 7384r of this title, a covered employee with chronic silicosis (as defined in that section).

(2) The term “atomic weapon” has the meaning given that term in section 11 d.* of the Atomic Energy Act of 1954 (42 U.S.C. 2014(d)).

(3) The term “atomic weapons employee” means an individual employed by an atomic weapons employer during a period when the employer was processing or producing, for the use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining and milling.

(4) The term “atomic weapons employer” means an entity, other than the United States, that—

(A) processed or produced, for use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining and milling; and

(B) is designated by the Secretary of Energy as an atomic weapons employer for purposes of the compensation program.

(5) The term “atomic weapons employer facility” means a facility, owned by an atomic weapons employer, that is or was used to process or produce, for use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining or milling.

Section 30.111(a) of the regulations (20 C.F.R. § 30.111(a)) states that, "Except where otherwise provided in the Act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category set forth in 20 C.F.R. § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing to the Office of Workers’ Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in these regulations."

You stated that you were employed by a subcontractor (The Way Engineering Co.) at an Atomic Weapons Employer facility (Texas City Chemicals, Inc.) and you were not an employee of Texas City Chemicals, Inc. EEOICPA coverage for Atomic Weapons Employers (AWE) is not extended to contractors and subcontractors of the AWE but only to individuals employed directly by the AWE. Your work at the AWE site is not qualifying because you worked for a company other than the AWE. Therefore, you are not a “covered employee” under the Act.

The undersigned has reviewed the recommended decision issued by the district office on July 12, 2004, and finds that it is in accordance with the facts and the law in this case. It is the decision of the Final Adjudication Branch that your claim for compensation is denied.

Denver, Colorado

September 16, 2004

Janet R. Kapsin

Hearing Representative

DOE contractors

EEOICPA Fin. Dec. No. 34291-2003 (Dep't of Labor, August 1, 2003)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

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 stated below, your claim for benefits is denied.

STATEMENT OF THE CASE

On August 2, 2002, you filed a Claim for Benefits under the EEOICPA, form EE-1, through the Paducah Resource Center. On the EE-1 form, you indicated that the condition for which you filed your claim was kidney cancer. You submitted medical records from 1993 to 2001 that showed you had a nephrectomy in April of 1996. Medical records from Western Baptist Hospital from April of 1996 included an operative report for a right radical nephrectomy and a pathology report that confirmed the diagnosis of large renal cell carcinoma.

You also submitted a Form EE-3 indicating that you were employed as a conservation office for the Kentucky Department of Fish and Wildlife at the Paducah Gaseous Diffusion Plant (GDP) from 1969 to 1973. You submitted a Department of Energy (DOE) License for Non-Federal Use of Property for the purpose of wildlife development beginning September 4, 1953 and continuing indefinitely. You also submitted a DOE License for Non-Federal Use of Property for the period January 1, 1990 to December 31, 1995, and you submitted a DOE License for Non-Federal Use of Property for bow deer hunts for the period January 1, 1996 to December 31, 2000.

In addition, you submitted a copy of the five year plan and budget for the West Kentucky Wildlife Management Area for the period July 1, 1985 to June 30, 1990. You submitted an April 4, 1958 letter from the "Assistant General Counsel" noting that a corrected Quitclaim Deed from the United States of America to the State of Kentucky had been prepared and an August 21, 1989 report from the General Services Administration concluding that the State of Kentucky, Fish and Wildlife Division, was in compliance with the terms of the conveyance of these lands. You submitted an October 6, 1959 letter from Atomic Energy Commission (AEC) referencing a grant to the Commonwealth of Kentucky and

the Department of Fish and Wildlife Resources of a license and permission to enter a portion of the AEC's lands for the purpose of developing the wildlife on the property and conducting bird dog field trials. This letter extended the license and permission to additional lands. In an October 14, 1959 letter, the Director of the Division of Game recommended to the Governor of Kentucky that the license and permission to use the AEC lands be accepted. He noted that the Division would have no pecuniary obligation for use of the land, apart from patrolling, posting and protecting the land licensed for use by the Division of Fish and Wildlife Resources.

You submitted forms EE-4 from Shirley Beauchamp and Phillip Scott Beauchamp stating you worked for the Department of Fish and Wildlife at the Paducah GDP from 1968 to 1973. Social Security Earnings records were submitted showing employment with the state of Kentucky from 1971 to 1973. The Department of Energy advised the district office, however, that DOE had no information regarding your employment.

On November 15, 2002, the district office issued a recommended decision concluding that you were not employed by an entity that contracted with the DOE to provide "management and operating, management and integration, or environmental remediation" as set forth in 42 U.S.C. § 7384l(11)(B)(i) and (ii) and that, accordingly, you were not a covered DOE contractor. The district office therefore recommended that benefits be denied.

On December 23, 2002, you filed an objection to the recommended decision and requested a hearing. An oral hearing was held on February 26, 2003. At the hearing, you testified that you worked for the Kentucky Department of Fish and Wildlife from 1971 to 1973 and that you worked at the Paducah GDP and its surrounding grounds. You testified that your duties included patrolling the perimeter of the fenced portion of the plant and building two bridges and that you entered the plant through the main gate on a regular basis to remove animals that got into the GDP. You testified that you did not enter any of the buildings inside the fenced area of the GDP. You described other duties you performed during this period of employment, and you testified that you checked hunting and fishing licenses and controlled hunting at the reserve. You testified also that you participated in game sampling in conjunction with the DOE prior to the hunting season and that DOE would collect specific body parts provided by the Department of Fish and Wildlife and ship them for sampling.

FINDINGS OF FACT

You filed a claim for benefits under the EEOICPA on August 2, 2002. You were employed by the State of Kentucky, Department of Fish and Wildlife from 1971 to 1973. You were diagnosed with kidney cancer on or about April 13, 1996. You have not established that you worked in employment covered under the EEOICPA.

CONCLUSIONS OF LAW

A covered employee is eligible for compensation under the EEOICPA for an "occupational illness," which is defined in § 7384l(15) of the EEOICPA as "a covered beryllium illness, cancer referred to in § 7384l(9)(B) of this title, specified cancer, or chronic silicosis, as the case may be." 42 U.S.C. § 7384l(15). A "covered employee" is eligible for compensation under EEOICPA for a specified "occupational illness." A "covered employee," as defined in §§ 7384l(1),7384l(3),7384l(7),7384l(9), 7384l(11) and § 7384r of the EEOICPA, includes employees of private companies (an entity "other than the United States", per § 7384l(4)) which provided radioactive materials to the United States for

the production of atomic weapons, employees at Department of Energy facilities or test sites (§ 7384l(12)), and employees of Department of Energy contractors, subcontractors, or beryllium vendors. 42 U.S.C. §§ 7384l(1),(3),(7),(9), (11); 7384r. Section 7384(l)(11)(B)(I and ii) defines a "Department of Energy contractor employee" to include

"An individual who is or was employed at a Department of Energy facility by—

(i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or

(ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility."

The DEEOIC has further addressed the issues of how a "contractor or subcontractor" may be defined, as well as whether employees of state or federal governments may be considered DOE contractor employees, in EEOICPA Bulletins No. 03-27 (issued May 28, 2003) and No. 03-26 (issued June 3, 2003). The following definitions have been adopted by the DEEOIC:

Contractor – An entity engaged in a contractual business arrangement with the Department of Energy to provide services, produce materials or manage operations at a beryllium vendor or Department of Energy facility.

Subcontractor – An entity engaged in a contracted business arrangement with a beryllium vendor contractor or a contractor of the Department of Energy to provide a service at a beryllium vendor or Department of Energy facility.

Contract - An agreement to perform a service in exchange for compensation, usually memorialized by a memorandum of understanding, a cooperative agreement, an actual written contract, or any form of written or implied agreement, is considered a contract for the purpose of determining whether an entity is a "DOE contractor."

For a civilian employee of a state or federal government agency to be considered a DOE contractor employee, it must be shown that the government agency employing that individual entered into a contract with the DOE for the accomplishment of one or more services it was not statutorily obligated to perform and that the DOE compensated the agency for that activity.

There is no evidence that the DOE compensated the State of Kentucky, Department of Fish and Wildlife Resources, for any services on behalf of the Department of Energy. The State of Kentucky was simply given permission to use federal land. The fact that the State of Kentucky was not required to provide any fees for use of federal property does not, conversely, show that the Department of Energy compensated the State of Kentucky for services provided by the State. The evidence of record shows simply that the Department of Energy or AEC gave permission for the State of Kentucky to use certain of its lands in order to conduct bird dog trials or hunting or fishing or similar activities. The Fish and Wildlife division was responsible for the activities that it would otherwise be responsible for under state law. The quitclaim deed to certain lands was not compensation to the State of Kentucky for any services performed for the Department of Energy, but was conveyed to the State of Kentucky for the purpose of management for wildlife purposes. The mere presence of an individual on DOE-owned

property does not confer covered employment status.

For the foregoing reasons, the undersigned must find that you have not established your claim for compensation under the EEOICPA and hereby denies your claim for compensation.

Cleveland, Ohio

Anthony Zona

Hearing Representative

EEOICPA Fin. Dec. No. 50247-2004 (Dep't of Labor, September 16, 2004)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This decision of the Final Adjudication Branch (FAB) concerns 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). For the reasons stated below, your claim for benefits is denied.

STATEMENT OF THE CASE

On October 15, 2003, you filed a claim for benefits under the EEOICPA as the surviving spouse of **[Employee]** and identified bladder cancer as the diagnosed condition being claimed. You submitted an Employment History Form (EE-3) on which you stated that Commercial Motor Freight employed your husband at the Portsmouth Gaseous Diffusion Plant (GDP) from December 11, 1954 to December 11, 1981. You did not state if your husband wore a dosimetry badge while employed. You submitted an affidavit from Connie Bighouse and J. Frank Bighouse in which they attested that they were employed by Commercial Motor Freight from 1958 to 1985 at the Chillicothe Terminal. Ms. Bighouse and Mr. Bighouse also attested that your husband worked for Commercial Motor Freight as a driver, delivering and picking up freight at the Goodyear Atomic Corporation. They did not provide dates of your husband's employment. You submitted a copy of your marriage certificate which shows you were married to **[Employee]** on December 9, 1947. You submitted a copy of your husband's death certificate which shows he died on April 30, 2000 due to myocardial rupture, myocardial infarction and arteriosclerotic cardiovascular disease. As medical evidence, you submitted a copy of Dr. W. G. Rice's February 9, 1978 pathology report in which your husband was diagnosed with transitional cell carcinoma of the bladder.

On October 22, 2003, the district office attempted to verify your husband's employment through the Oak Ridge Institute for Science and Education (ORISE) database but there were no records of your husband's employment. On November 18, 2003, Department of Energy (DOE) representative Roger Holt advised, via Form EE-5, that the DOE was unable to verify your husband's employment but other pertinent evidence existed. Mr. Holt submitted a copy of your husband's Personnel Clearance Master Card which shows your husband was granted a "Q" clearance at the request of Goodyear Atomic Corp. and Commercial Motor Freight, Inc. as a truck driver on April 27, 1970 and the clearance terminated on June 23, 1982. On December 4, 2003, the district office received a copy of your husband's Social Security Administration itemized statement of earnings which shows he had earnings from Lee Way Holding Company, which is now bankrupt, from 1954 to 1982. The district office verified, through the bankruptcy trustee, that the earnings from Lee Way Holding represented earnings from Commercial

Motor Freight, Inc. On December 9, 2003, DOE and Bechtel Jacobs Company representative Wendy L. Wilcox advised, via Form EE-5, that no evidence existed in regards to the employment you claimed. On January 5, 2004, at the request of the district office, Frank Bighouse and Connie Bighouse submitted a supplement to their affidavit regarding your husband's employment. Ms. Bighouse attested that she worked with your husband from 1967 until he left the company (no date provided). Ms. Bighouse and Mr. Bighouse also attested that your husband made deliveries to the GDP in the morning and pickups in the evenings five days a week. They also attested that he would spend approximately one to two hours on site for each pick up and each delivery.

Based upon the evidence of record, the district office issued a recommended decision on January 14, 2004, in which it concluded that **[Employee]** was a member of the Special Exposure Cohort as defined by 42 U.S.C. § 7384l(14)(A); that **[Employee]** was diagnosed with bladder cancer which is a specified cancer as defined by 42 U.S.C. § 7384l(17); and that you are the surviving spouse of **[Employee]** as defined in 42 U.S.C. § 7384s(e)(3)(A). The district office recommended payment of your claim for benefits based on its conclusions. On February 13, 2004, after reviewing the written record, the Cleveland FAB office found that the evidence did not establish that your husband was a contract employee as defined under the Act. The FAB vacated the recommended decision and remanded your claim to the district office for additional development and the issuance of a new recommended decision. On March 22, 2004, the district office issued a new recommended decision in which it concluded that the evidence of record did not establish that **[Employee]** was a "covered employee with cancer" as that term is defined under 42 U.S.C. § 7384l(9)(B). The district office recommended denial of your claim based on its conclusion.

Section 30.310(a) of the EEOICPA implementing regulations provide that, "Within 60 days from the date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision, including the HHS's reconstruction of the radiation dose to which the employee was exposed (if any), and whether a hearing is desired." 20 C.F.R. § 30.310(a). On April 13, 2004, you wrote to the FAB and advised that you disagreed with the recommended decision. You stated that you objected to the decision that your husband's sub-contracted employment did not constitute a service, but a mere delivery of goods and that he is not considered to be a covered employee with cancer. You submitted the following evidence in support of your position:

1. Copy of Dr. William Lutmer's September 1, 1997 medical report on which was circled the statement, "He does not smoke or drink."

2. March 19, 2004 statement from Malcolm Blosser who stated that he worked for Goodyear Atomic and Martin Marietta Corp. in Piketon. Mr. Blosser stated that your husband was a driver for Commercial Motor Freight, that your husband delivered freight to the GDP everyday, and that he helped your husband to unload the freight.

3. March 28, 2004 statement from Dale Reed, Maintenance Division of the United States Energy Corporation, in which he stated that the purpose of his letter was "a testimonial to the reasonable possibility of **[Employee]** being exposed to high levels of contamination, radiation and chemicals of both known and unknown measures." Mr. Reed attested to the high levels of exposure in the buildings that your husband entered on a regular basis. He included a copy of the Risk Mapping performed for union and company purposes as a guide to the exposures of each building.

You requested a hearing and such was held by the undersigned on June 8, 2004 in Piketon, OH. You appeared at the hearing with your son, **[Employee's son]**. **[Employee's son]** testified at the hearing that you disagree with the classification of your husband's employment as "a mere delivery of goods" because he had a security clearance which required him to come in and out of the plant for 11 years. **[Employee's son]** also testified that your husband spent two or three hours a day loading and unloading "classified" freight. Hearing Transcript (HT) 8-9. You submitted, as evidence, a statement from Mr. Malcolm Blosser dated June 7, 2004, in which he reiterated the information in his previous statement of March 19, 2004.

After considering the written record of the claim, your letter of objection, the testimony and objections presented at the hearing, the FAB hereby makes the following:

FINDINGS OF FACT

1. You filed a claim for survivor benefits under the EEOICPA on October 15, 2003.

2. Commercial Motor Freight Inc. employed your husband, as a truck driver, from 1954 to 1982.

3. **[Employee]** was diagnosed with bladder cancer on February 9, 1978.

4. **[Employee]** died on April 30, 2000 due to myocardial rupture, myocardial infarction and arteriosclerotic cardiovascular disease.

5. You are the surviving spouse of **[Employee]**.

Based on the above-noted findings of fact in this claim, the FAB hereby makes the following:

CONCLUSIONS OF LAW

The Energy Employees Occupational Illness Compensation Program Act was established to provide compensation benefits to covered employees (or their eligible survivors) who have been diagnosed with designated occupational illnesses incurred as a result of their exposure to radiation, beryllium, or silica, while in the performance of duty for Department of Energy and certain of its vendors, contractors and subcontractors. Occupational illness is defined in § 7384l(15) of the EEOICPA, as a covered beryllium illness, cancer referred to in § 7384l(9)(B)[1], specified cancer, or chronic silicosis, as the case may. 42 U.S.C. §§ 7384l(15), 7384l(9)(B).

To be eligible for compensation for cancer, an employee either must be: (1) a member of the Special Exposure Cohort (SEC) who was a DOE employee, a DOE contractor employee, or an atomic weapons employee who contracted a specified cancer after beginning such employment; or (2) a DOE employee, a DOE contractor employee or an atomic weapons employee who contracted cancer (that has been determined pursuant to guidelines promulgated by HHS, "to be at least as like as not related to such employment"), after beginning such employment. *See* 42 U.S.C. § 7384l(9) and 20 C.F.R. § 30.210. While the EEOICPA does not contain a specific definition of a DOE contractor, it does contain a definition of a DOE contractor employee that, in effect, defines what a DOE contractor is. Section 7384l(11) of the EEOICPA defines a DOE contractor employee as:

A. An individual who is or was in residence at a Department of Energy facility as a researcher for

one or more periods aggregating at least 24 months.

B. an individual who is or was employed at a Department of Energy facility by—

(i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or

(ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

The DEEOIC has further addressed the issues of how a "contractor or subcontractor" may be defined in EEOICPA Bulletin No. 03-27 (issued May 28, 2003). The following definitions have been adopted by the DEEOIC:

Contractor – An entity engaged in a contractual business arrangement with the Department of Energy to provide services, produce materials or manage operations at a beryllium vendor or Department of Energy facility.

Subcontractor – An entity engaged in a contracted business arrangement with a beryllium vendor contractor or a contractor of the Department of Energy to provide a service at a beryllium vendor or Department of Energy facility.

Service – In order for an individual working for a subcontractor to be determined to have performed a "service" at a covered facility, the individual must have performed work or labor for the benefit of another within the boundaries of a DOE or beryllium vendor facility. Example of workers providing such services would be janitors, construction and maintenance works.

Contract - An agreement to perform a service in exchange for compensation, usually memorialized by a memorandum of understanding, a cooperative agreement, an actual written contract, or any form of written or implied agreement, is considered a contract for the purpose of determining whether an entity is a "DOE contractor."

Delivery of Goods – The delivery and loading or unloading of goods alone is **not** a service and is not covered for any occupation, including construction and maintenance workers.

You submitted employment evidence that establishes your husband was employed as a truck driver, by Commercial Motor Freight, to deliver goods to the Portsmouth GDP, a Department of Energy facility. [2] In order for a contractor or subcontractor employee to be determined to have performed work or labor for DOE, the individual must have performed a "service" for the benefit of the DOE within the boundaries of a DOE facility. The mere delivery of goods alone is insufficient to establish that a service was performed for the benefit of DOE.[3] Because you did not submit evidence that establishes your husband is a "covered employee with cancer" as defined at § 7384l(9) of the EEOICPA, your claim for benefits is denied. 42 U.S.C. § 7384l(9).
Washington, DC

Thomasyne L. Hill

Hearing Representative

[1] Section 7384l(9)(B) refers to an individual with cancer specified in subclause (I), (II), or (III) of clause (ii), if and only if that individual is determined to have sustained that cancer in the performance of duty in accordance with § 7384n(b). Clause (ii) references DOE employees, DOE contractor employees and atomic weapons employees who contract cancer after beginning employee at the required facility.

[2] U.S. Department of Energy. *Portsmouth Gaseous Diffusion Plant*. Time Period: 1954-1998. Worker Advocacy Facility List. Available: http://tis.eh.doe.gov/advocacy/faclist/showfacility.cfm [retrieved October 21, 2003].

[3] EEOICPA Bulletin 03-27.

EEOICPA Fin. Dec. No. 61192-2005 (Dep't of Labor, April 5, 2005)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under Part B of 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 denied.

STATEMENT OF THE CASE

On August 31, 2004, you filed a claim for survivor benefits under Part B of the EEOICPA, Form EE-2, as the widow of **[Employee]**. You identified lung cancer as the claimed condition. You stated on the Employment History Form EE-3 that your husband was employed by the Illinois Central Railroad at the Paducah Gaseous Diffusion Plant in Paducah, Kentucky for an "unknown" period. The Department of Energy (DOE) was unable to verify **[Employee's]** employment at Paducah Gaseous Diffusion Plant. [1]

On September 17, 2004 and October 27, 2004, you were advised by the district office of the evidence that was required to support the claim that your husband was employed by a covered DOE contractor or subcontractor. To establish covered employment you need to submit evidence that your husband was employed at a DOE facility during a covered time frame and that there was a contract between the claimed contractor or subcontractor and the DOE to provide a service on the premises of the facility. The mere delivery and loading or unloading of goods alone is insufficient to establish that a service was performed for the benefit of the DOE.[2]

You submitted a statement in which you indicated your husband was employed by the Illinois Central Railroad from 1950 to January 31, 1982 and that he worked as a flagman and conductor. You also indicated that "he went to coal mines in Central City, KY, factories in Calvert City, KY and Bluford, IL, and atomic plant in Future City, KY." You submitted a notice from the United States of America Railroad Retirement Board indicating that you are eligible for monthly spousal benefits.

You have submitted a death certificate for **[Employee]** that indicated a date of death of March 3, 2001 and that the immediate cause of death was cardiopulmonary arrest. This death certificate also indicated the decedent was survived by his wife, **[Employee's Spouse]**. You submitted a marriage certificate showing that **[Employee]** and **[Employee's Spouse]** were married on July 23, 1949.

You submitted a December 29, 1982 operative report, from Ted Myre, M.D., which indicated a postoperative diagnosis of cancer of the left lung with invasion of the mediastinum. A December 30, 1982 pathology report, from James R. Naugh, M.D., indicated a diagnosis of moderately well differentiated squamous cell carcinoma of the left lung.

On January 22, 2005, the district office issued a recommended decision finding that you have not provided evidence proving that your husband's claimed employment meets the criteria of a covered employee in accordance with 42 U.S.C. §§ 7384l(1) and (11) and 20 C.F.R. §§ 30.5(p) and (u) Therefore, the district office concluded that you were not entitled to compensation under the Act.

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, pursuant to 20 C.F.R. § 30.310. You did not file an objection. I have reviewed the record in this case and must conclude that no further investigation is warranted. Based upon a review of the case file evidence, I make the following::

FINDINGS OF FACT

You filed a claim for survivor benefits on August 31, 2004, under Part B of the EEOICPA.

You were married to the employee from July 23, 1949, until his death on March 3, 2001.

You husband was first diagnosed with lung cancer on December 29, 1982.

Based on these facts, the undersigned makes the following:

CONCLUSIONS OF LAW

The evidence submitted does not establish that your husband meets the definition of covered employee, during a covered time period, as defined by §§ 42 U.S.C. §§ 7384l (1), (7) and (11). For that reason, you are not entitled to compensation under § 7384s of the Act.

You have not provided records or affidavits from co-workers or other sources in support of the employment that you are claiming. Section 30.111(a) states that "Except where otherwise provided in the Act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category set forth in § 30.110". *See* 20 C.F.R. § 30.111(a).

For the foregoing reasons, the undersigned hereby denies your claim for compensation for survivor benefits under Part B of the EEOICPA.

Washington, DC

Tom Daugherty

Hearing Representative

[1] The Paducah Gaseous Diffusion Plant was a DOE facility from 1952 to 1998, where radioactive material was present, according to the Department of Energy Office of Worker Advocacy Facility List

(http://www.hss.energy.gov/HealthSafety/FWSP/Advocacy/faclist/findfacility.cfm).

[2] Per EEOICPA Bulletin No. 03-27 (issued March 28, 2003).

Requirements for eligibility of

EEOICPA Fin. Dec. No. 55317-2004 (Dep't of Labor, September 21, 2004)

NOTICE OF FINAL DECISION

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 denied.

On March 8, 2004, you filed a claim for benefits under the EEOICPA, Form EE-1, wherein you identified emphysema and chronic beryllium disease (CBD) as the medical conditions being claimed. On the EE-3 form, you indicated that you were employed at the Paducah Gaseous Diffusion Plant (PGDP[1] during the early 1950's. On March 16, 2004, the district office searched the Oak Ridge Institute for Science and Education (ORISE) website database in an effort to verify your claimed employment, but no records were found. On April 6, April 28 and May 6, 2004, the Department of Energy (DOE) advised the district office that they found no evidence to verify your claimed employment. However, DOE did obtain a security clearance card, which indicated that you were given security clearance to work for Slater System, Inc./F.H. McGraw & Company at an unidentified DOE facility between May 22, 1952 and July 2, 1952 and clearance to work for Carbide & Carbon at an unidentified DOE facility between February 25, 1953 and May 11, 1953.

On April 8, 2004, the district office received your itemized statement of earnings from the Social Security Administration (SSA), Form SSA-1826, which covered the time period between January, 1949 and December, 1955. The earnings statement indicated that you received earnings from Slater System Maryland, Inc. during the second quarter of 1952. By letter dated March 24, 2004, the district office advised you of the kinds of employment evidence you would need to establish covered employment under the Act. By letter dated May 25, 2004, the district office requested that you submit an employment history affidavit, Form EE-4, from a co-worker to establish that you worked on-site at the PGDP during a covered time period. No response was received. Nonetheless, the district office erroneously concluded that the combination of your security clearance card and SSA earnings statement was sufficient to establish that you worked on-site at the PGDP from May 22, 1952 until July 2, 1952.

Specifically, pursuant to EEOICPA Bulletin No. 03-27 (issued May 28, 2003) Item #22, "if the CE [claims examiner] can verify that the employee worked for a subcontractor during a covered time frame on the premises of a designated DOE or beryllium vendor facility, a finding can be made for covered employment." Additionally, pursuant to Item #4, "security clearance documents just provide evidence that security clearance was requested but does not establish presence on the facility." And, finally, pursuant to Item #12, SSA records will not assist in determining the presence of the employee on the premises of the covered facility. Therefore, your security clearance card and SSA earnings statement are insufficient to establish that you worked on-site at the PGDP from May 22, 1952 until July 2, 1952.

By letter dated March 24, 2004, the district office advised you of the specific medical evidence

necessary to establish CBD under the Act and enclosed a Form EE-7, which listed the specific medical evidence necessary to establish a covered medical condition under the Act. The district office also advised you that emphysema is not a covered medical condition under the Act. On April 2, April 12, May 26, and June 10, 2004, the district office received medical records from the resource center, dated between March 12, 1992 and February 7, 2002, which established that you were diagnosed with sinusitis, hypertension and several other non-covered medical conditions.[2]

The following relevant medical records were included in the aforementioned medical evidence: 5 medical progress notes from Dr. N.L. Still, dated between August 11, 1992 and November 17, 1992, in which you were diagnosed with chronic obstructive pulmonary disease (COPD); a September 15, 1999 medical report by Dr. D. Patel, in which he stated that you saw a pulmonologist and were diagnosed with COPD; a January 18, 2000 medical report by Dr. D. Patel, in which he stated that you had acute bronchitis; a February 4, 2002 medical report by Dr. Hima Alturi in which he stated that you had a persistent cough; an October 30, 2002 medical report by Dr. D. Patel, in which he stated that you had "questionable emphysema;" a March 12,1992 radiology report from Decatur Hospital, in which they found "discoid atelectasis of both bases with minimal increase in the interstitial markings, otherwise negative chest;" a May 27, 1992 radiology report from Decatur Hospital, in which they found "minimal bibasilar discoid atelectasis; an August 12, 1992 radiology report from Decatur Hospital, in which they found "scarring or atelectasis" in the left lung; a December 2, 1994 x-ray report from Decatur Hospital, in which they found "bibasilar linear infiltrates which may represent atelectasis or fibrosis;" a February 11, 1995 x-ray report from Decatur Hospital, in which they found "no acute pulmonary disease;" and a July 28, 1995 radiology report from Decatur Hospital, in which they found "no acute disease of the chest."

By letter dated May 25, 2004, the district office advised you that the aforementioned medical evidence was insufficient to establish that you were diagnosed with CBD under the Act and listed the specific medical evidence necessary to establish the same. You were afforded 30 days to establish that you were diagnosed with a covered medical condition, but no response was received. A "covered employee," as defined in § 7384l(1),(3),(7),(9) and (11) and § 7384r of the EEOICPA, includes employees of private companies (an entity "other than the United States," per § 7384l(4)) which provided radioactive materials to the United States for the production of atomic weapons, employees at Department of Energy facilities or test sites (§ 7384l(12)), and employees of Department of Energy contractors, subcontractors, or beryllium vendors. 42 U.S.C. §§ 7384l(1),(3),(7),(9) and (11); 7384r.

Additionally, pursuant to § 7384l(13) of the EEOICPA, "The term 'established chronic beryllium disease' means chronic beryllium disease as established by the following: (A) For diagnosis 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 test showing pulmonary deficits consistent with chronic beryllium disease. (B) For diagnosis before January 1, 1993, the presence of-(i) occupational or environmental history, or epidemiologic evidence of beryllium exposure; and (iii) 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)." 42 U.S.C. § 7384l(13). And, finally, pursuant to § 7384l(15) of the Act, a covered occupational illness "means a covered beryllium illness, cancer referred to in § 7384l(9)(B) of this title, specified cancer, or

chronic silicosis, as the case may be." 42 U.S.C. § 7384l(15).

On June 8, 2004, the district office issued a recommended decision, which concluded that you were a covered beryllium employee, pursuant to § 7384l(7) of the Act, that you were exposed to beryllium in the performance of duty, pursuant to § 7384n(a) of the Act, that you failed to submit sufficient medical evidence to establish that you were diagnosed with CBD, pursuant to § 7384l(13) of the Act and that emphysema is not a covered occupational illness, pursuant to § 7384l(15) of the Act. 42 U.S.C. §§ 7384l(7),(13), and (15); 7384n(a). Therefore, it was recommended that benefits under the EEOICPA be denied.

Section 30.310(a) of the EEOICPA implementing regulations provides that "…Within 60 days from the date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision, including HHS's reconstruction of the radiation dose to which the employee was exposed (if any), and whether a hearing is desired." 20 C.F.R. § 30.310(a).

Section 30.316(a) of those regulations further states that, "If the claimant does not file a written statement that objects to the recommended decision and/or requests a hearing within the period of time allotted in § 30.310, or if the claimant waives any objections to all or part of the recommended decision, the FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part." 20 C.F.R. § 30.316(a). I find that you have not objected to the recommended decision within the 60 days allowed by § 30.310(a) of the EEOICPA regulations. 20 C.F.R. § 30.310(a).

Based on my review of the case record and pursuant to the authority granted by § 30.316(a) of the EEOICPA regulations, I find that there is insufficient evidence to establish that you are a covered employee, pursuant to § 7384l of the Act, and that there is insufficient evidence to establish that you were diagnosed with a covered medical condition, pursuant to § 7384l(15) of the Act. Therefore, I find that you are not entitled to benefits under the Act, and that your claim for compensation must be denied.

Washington, DC

Richard Koretz

Hearing Representative

[1] According to the Department of Energy's (DOE) Office of Worker Advocacy on the DOE website at http://tis.eh.doe.gov/advocacy/faclist/showfacility.cfm, the Paducah Gaseous Diffusion Plant (PGDP) in Paducah, KY is a covered DOE facility from 1952 to the present. Also, according to the Office of Worker Advocacy, the PGDP had throughout the course of its operations the potential for beryllium exposure.

[2] Benign prostate nodule, colon polyps, lumbar spinal stenosis, degenerative arthritis, leucopenia, chronic venous disease, sciatica, "questionable emphysema" and chronic obstructive pulmonary disease (COPD).

Survivors

Adopted children

EEOICPA Fin. Dec. No. 32576-2004 (Dep't of Labor, November 19, 2004)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) 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 stated below, your claims for benefits are hereby accepted in part and denied in part.

STATEMENT OF THE CASE

On September 10, 2004**,** the district office issued a recommended decision concluding that **[Spouse]** had received an award as the widow of the **[Employee]** under section 5 of the Radiation Exposure Compensation Act. **[Employee]** and **[Spouse]** were married on June 9, 1955. The death certificate of record establishes that **[Employee]** died on March 18, 1990. Another death certificate of record establishes that **[Spouse]**, the employee's wife, died on October 15, 2001. Subsequently, nine survivors filed claims for benefits as follows:

On July 1, 2002**, [Claimant 1]** filed Form EE-2, Claim for Survivor Benefits under EEOICPA, as a surviving child. She provided a copy of her adoption papers from the Navajo Nation, verifying that the employee and his widow adopted her on July 15, 1969. **[Claimant 1]** also provided a copy of her marriage certificate to support her name change.
On July 12, 2002, **[Claimant 2]** filed Form EE-2, Claim for Survivor Benefits under EEOICPA as a surviving child. **[Claimant 2]** provided a copy of his birth certificate which listed the employee as his father.
On July 19, 2002, **[Claimant 3]** filed Form EE-2, Claim for Survivor Benefits under EEOICPA as a surviving child. **[Claimant 3]** provided a copy of her adoption papers from the Navajo Nation, verifying that the employee and his widow adopted her on July 15, 1969. She provided a copy of her marriage certificate to support her name change.
On January 21, 2003, **[Claimant 4]** filed Form EE-2, Claim for Survivor Benefits under EEOICPA as a surviving child. At the time **[Spouse]**, the widow, married the employee, **[Claimant 4]** was 30 years old. Based on documents in the file, **[Claimant 4]** is the daughter of **[Spouse]** and **[Claimant 4's Natural Father]**.
On January 22, 2003, **[Claimant 5]** filed Form EE-2, Claim for Survivor Benefits under EEOICPA as a surviving child. **[Claimant 5]** provided a copy of her birth certificate which listed **[Spouse]** as her mother and **[Claimant 5's Natural Father]** as her father. When **[Spouse]** married the employee, **[Claimant 5]** was a minor child and resided in the home of **[Spouse]** and **[Employee]**.
On January 23, 2003, **[Claimant 6]** filed Form EE-2, Claim for Survivor Benefits under EEOICPA as a surviving child. **[Claimant 6]** provided a copy of her birth certificate which listed **[Spouse]** as her mother and **[Claimant 6's Natural Father]** as her father. At the time **[Spouse]** married the employee **[Claimant 6]** was 28 years old.
On January 24, 2003, **[Claimant 7]** filed Form EE-2, Claim for Survivor Benefits under EEOICPA as a surviving child. **[Claimant 7]** provided a copy of her birth certificate which listed **[Employee]** as her mother and **[Claimant 7's Natural Father]** as her father. When **[Spouse]** married the employee, **[Claimant 7]** was a minor child and lived in the home of **[Spouse]** and **[Employee]**.
On January 31, 2003, **[Claimant 8]** filed Form EE-2, Claim for Survivor Benefits under EEOICPA as a surviving child. **[Claimant 8]** provided a copy of her marriage certificate which verified that she was married in August 1949, prior to her mother's marriage to the employee.

a surviving child. **[Claimant 9]** provided a certified copy of a clinical record from Northern Navajo Medical Center Indian Health Services, Shiprock Service Unit, in Shiprock, New Mexico, certifying that her name was **[Claimant 9]** and that she had previously used **[Claimant 9's Former Name]** and **[Claimant 9's Former Name]**. The clinic record shows **[Employee]** as her father**, [Claimant 9's Step-father's Name]** as her step-father and that she was legally adopted by her uncle **[Claimant 9's Adoptive Father's Name]**.

On August 3, 2004, the district office requested that **[Claimant 9]** provide verification of either a final decree of adoption or a final judgment of adoption. The district office informed **[Claimant 9]** that the evidence submitted supports that she was legally adopted by **[Claimant 9's Adoptive Father's Name]**. Evidence to show that she was not legally adopted by **[Claimant 9's Adoptive Father's Name]** would need to be submitted, for her to be an eligible survivor on **[Employee]**'s record. She was provided 30 days to submit this evidence. No evidence was submitted.

On September 10, 2004, the district office issued a recommended decision recommending that **[Claimant 1]**, **[Claimant 2]**, **[Claimant 3]**, **[Claimant 5]**, and **[Claimant 7]** were eligible surviving children of **[Employee]** and that **[Claimant 4]**, **[Claimant 6]**, **[Claimant 8]**, and **[Claimant 9]** did not establish that they were eligible surviving children of the employee.

[Claimant 1], **[Claimant 2]**, **[Claimant 3]**, **[Claimant 5]**, and **[Claimant 7]** have provided evidence to establish they are surviving children or have had step-children relationships with the employee, and therefore as his survivors, are entitled to additional compensation in the amount of $50,000.00, to be divided equally pursuant to 42 U.S.C. § 7384u(a). **[Claimant 1]**, **[Claimant 2]**, **[Claimant 3]**, **[Claimant 5]**, and **[Claimant 7]** are each entitled to $10,000. **[Claimant 4]**, **[Claimant 6]**, **[Claimant 8]**, and **[Claimant 9]** are not entitled to compensation because they have not established that they are an eligible survivor.

On the dates listed below, the Final Adjudication Branch received written notification that you waive any and all objections to the recommended decision:

[Claimant 1]	September 21, 2004
[Claimant 2]	September 22, 2004
[Claimant 3]	September 20, 2004
[Claimant 5]	September 21, 2004
[Claimant 7]	September 17, 2004

Pursuant to the regulations implementing the EEOICPA, a claimant has 60 days from the date of issuance of the recommended decision to raise objections to that decision to the Final Adjudication Branch. 20 C.F.R. § 30.310(a). If an objection is not raised during the 60-day period, the Final Adjudication Branch will consider any and all evidence submitted to the record and issue a final decision affirming the district office's recommended decision. 20 C.F.R. § 30.316(a). No objections were raised nor waivers received from **[Claimant 4]**, **[Claimant 6]**, **[Claimant 8]**, and **[Claimant 9]**.

After considering the record of the claim forwarded by the district office, the Final Adjudication Branch makes the following:

FINDINGS OF FACT

[Spouse] had received an award as the widow of the **[Employee]** under section 5 of the Radiation Exposure Compensation Act**. [Employee**] and **[Spouse]** were married on June 9, 1955. The record establishes that **[Employee]** died on March 18, 1990. The record establishes that **[Spouse]**, the employee's wife, died on October 15, 2001. Subsequently, **[Claimant 1]**, **[Claimant 2]**, **[Claimant 3]**, **[Claimant 4]**, **[Claimant 5]**, **[Claimant 6]**, **[Claimant 7]**, **[Claimant 8]**, and **[Claimant 9]** filed claims for benefits

2. **[Claimant 1]**, **[Claimant 2]**, **[Claimant 3]**, **[Claimant 5]**, and **[Claimant 7]** have provided evidence to establish they are surviving children or have had step-children relationships with the employee.

3. **[Claimant 4]**, **[Claimant 6]**, **[Claimant 8]**, and **[Claimant 9]** are not entitled to compensation because they have not established that they are eligible survivors of the employee.

4. In cases involving a stepchild who was an adult at the time of marriage, supportive evidence may consist of documentation showing that the stepchild was the primary contact in medical dealings with the deceased employee, the stepchild provided financial support for the deceased employee, and/or had the deceased employee living with him/her, etc. In addition, evidence consisting of medical reports, letters from the physician, receipts showing that the stepchild purchased medical equipment, supplies or medicine for the employee may be helpful. Also, evidence such as copies of insurance policies, wills, photographs *(i.e.*, attendance in the stepchild's wedding as the father or mother), and newspaper articles *(i.e.*, obituary) may be considered. No evidence has been submitted to support this type of relationship with **[Claimant 4]**, **[Claimant 6]**, or **[Claimant 8]** and the employee.

Based on the above noted findings of fact in this claim, the Final Adjudication Branch hereby also makes the following:

CONCLUSIONS OF LAW

Per Chapter 2-200 (September 2004) of the Federal (EEOICPA) Procedure Manual, a stepchild is considered a child if he or she lived with the employee in a regular parent-child relationship. **[Claimant 1]**, **[Claimant 2]**, **[Claimant 3]**, **[Claimant 5]**, and **[Claimant 7]** have established they lived with the employee in a regular child/step-child relationship with **[Employee]** pursuant to 42 U.S.C. § 7384u(e)(1)(B) of the EEOICPA and are entitled to compensation in the amount of $10,000.00 each.

[Claimant 9] has established that she was adopted by **[Claimant 9's Adoptive Father's Name]** and pursuant to 25 U.S.C. § 1911 of the Indian Child Welfare Laws, Indian tribes have exclusive jurisdiction over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where jurisdiction is otherwise vested in the State by existing Federal law. Pursuant to the Navajo Nation Code, 9 NNC § 611 (1960), the natural parents of the adoptive child, except a natural parent who is also an adoptive parent or the spouse of an adoptive parent, shall be relieved of all parental responsibilities for such child or to his property by descent or distribution or otherwise.

Accordingly, an adopted Navajo child may claim EEOICPA benefits only as a survivor of her adopted father, not her natural father. Please note that in order to terminate parental rights under Navajo law

there must be a “final decree of adoption” – not just a “final judgment of adoption.” Therefore **[Claimant 9]** is not an eligible surviving child of the employee.

[Claimant 4], **[Claimant 6]**, and **[Claimant 8]** are not considered eligible surviving children of **[Employee]**, because they did not establish a relationship pursuant to Chapter 2-200 (September 2004) of the Federal (EEOICPA) Procedure Manual and 42 U.S.C. § 7384s(e)(3)(B) and are not entitled to compensation.

The undersigned has reviewed the record and the recommended decision issued by the district office on September 10, 2004, and finds that your claims are in accordance with the facts and the law in this case. It is the decision of the Final Adjudication Branch that your claims are accepted in part and denied in part.

DENVER, CO

Joyce L. Terry

District Manager

EEOICPA Fin. Dec. No. 82961-2008 (Dep’t of Labor, March 27, 2008)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning the above claims for compensation under Parts B and E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, FAB accepts and approves the claims for benefits **[of Claimant #1, 2, 3, 4 and 5]** under Part B for the employee’s epiglottis cancer, and awards compensation to those five persons in the total amount of $150,000.00, to be divided equally.

Further, FAB also accepts the claim of **[Claimant #5]** under Part E, and awards her additional compensation in the amount of $125,000.00.

STATEMENT OF THE CASE

On October 19, 2004, **[Employee’s Spouse]** filed a Form EE-2 with the Department of Labor claiming for survivor benefits under Part B as the employee’s widow, and a request for review by Physicians Panel under former Part D with the Department of Energy (DOE), based on the conditions of throat cancer and emphysema with possible chronic beryllium disease. The record includes a copy of **[Employee]**’s death certificate indicating he died on September 1, 1990 due to acute bronchopneumonitis, with a contributing factor of coronary artery disease.

[Employee’s Spouse] also submitted a Form EE-3 in which she alleged that **[Employee]** worked at the Los Alamos National Laboratory (LANL) from 1970 to 1980. DOE verified **[Employee]**’s employment at LANL as a security guard with the Atomic Energy Commission (AEC) from May 15, 1972 to January 9, 1981, and as a part-time employee with the University of California, a DOE contractor, as a Casual Messenger/Driver, from August 23, 1973 to October 29, 1973.

On October 16, 2005, **[Employee's Spouse]** died, and her claim was administratively closed.

On December 13, 2006, **[Claimant #1]** and **[Claimant #2]** each filed a Form EE-2 based on the employee's throat cancer, and on January 4, 2007, **[Claimant #3]**, **[Claimant #4]** and **[Claimant #5]** each filed a Form EE-2. Each claimed benefits as the surviving child of **[Employee]**.

[Claimant #2], **[Claimant #3]** and **[Claimant #4]** provided copies of their birth certificates showing they are the biological children of **[Employee],** and copies of their marriage certificates to document their changes in surname. **[Claimant #1]** provided a copy of a birth certificate identifying her name as **[Claimant #1's birth name]** and her parents as **[Claimant #1's Father on her birth certificate]** and **[Claimant #1's Mother on her birth certificate],** a Certificate of Baptism identifying her parents as **[Employee]** and **[Employee's Spouse],** letters from acquaintances stating that **[Employee and Employee's Spouse]** were her biological parents and that she was adopted by her grandparents, and marriage certificates to document her change in surname. The record contains adoption documents showing that **[Claimant #5]** was born on April 11, 1973, and was adopted by **[Employee and Employee's Spouse]**.

Medical documentation in the record includes a document from the New Mexico cancer registry that provides a diagnosis of cancer of the epiglottis on April 25, 1989; a January 11, 2005 letter from Dr. Charles McCanna, in which he indicated that **[Employee]** died from complications of epiglottis (throat) cancer; another letter from Dr. McCanna stating that the employee's medical records are no longer available; and a letter from St. Vincent Hospital dated January 24, 2005, indicating that their records had been destroyed.

On June 5, 2007, the Seattle district office referred the case to the National Institute for Occupational Safety and Health (NIOSH) to determine whether the employee's cancer of the epiglottis was "at least as likely as not" related to his covered employment. However, the case was returned on March 14, 2008 so the district office could review it to determine if the employee was included in the designation by the Secretary of Health and Human Services (HHS) of certain LANL employees as an addition to the Special Exposure Cohort (SEC).

On September 11, 2007, FAB issued a final decision on the Part E claims of **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]**, concluding that these claimants are not eligible "covered" children under Part E.

On March 14, 2008, the Seattle district office received information from a Department of Labor Health Physicist (HP) on the question of whether cancer of the epiglottis is a "specified" cancer. The HP stated the following:

Pharynx cancer is a specified cancer for SEC claims. With regard to epiglottis cancer, the National Office recently reviewed medical evidence to determine whether the epiglottis is a part of the pharynx. 20 C.F.R. § 30.5(ff)(5)(iii)(E) indicates that pharynx cancer is a "specified cancer" under EEOICPA. The National Cancer Institute (NCI) states that pharyngeal cancer is a cancer that forms in the tissues of the pharynx, and that the pharynx consists of the hollow tube inside the neck that starts behind the nose and ends at the top of the windpipe and esophagus. The National Office determined that because the location of the epiglottis is technically within the area encompassed by the pharynx, the epiglottis is a specified cancer.

#1, 2, 3, 4 and 5] under Part B based on the employee's cancer of the epiglottis, and to also accept the claim of **[Claimant #5]** under Part E. The district office concluded that **[Employee]** is a member of the SEC, that he was employed by a DOE contractor at a DOE facility, that he is a covered employee with a covered illness under Part E, and that he was diagnosed with epiglottis cancer, which is a "specified" cancer. The district office also concluded that as his eligible survivors, **[Claimant #1, 2, 3, 4 and 5]** are entitled to compensation under Part B, in the total amount of $150,000.00, to be divided equally. Further, the district office concluded that a determination that a DOE contractor employee and qualified member of the SEC is entitled to compensation for an occupational illness under Part B is treated for purposes of Part E as a determination that the employee contracted that illness through exposure at a DOE facility, and since **[Claimant #5]** was under the age of 18 at the time of **[Employee]**'s death, she is the only eligible survivor under Part E and is entitled to compensation in the amount of $125,000.00.

The claimants each indicated on their respective Forms EE-2 that neither they nor anyone in their family had ever filed for or received any proceeds from either a tort suit or a state workers' compensation claim related to the employee's epiglottis cancer, that they had never pled guilty to or been convicted of any charges connected with an application for or receipt of federal or state workers' compensation, and that they did not know of any other persons who may also be eligible to receive compensation under EEOICPA as a survivor of **[Employee]**.

On March 20, 2008, FAB received written notification from **[Claimant #1, 2, 4 and 5]**, indicating that they waive all rights to file objections to the findings of fact and conclusions of law in the recommended decision. On March 24, 2008, FAB received written notification from **[Claimant #3]**, indicating she also waives all rights to file objections to the findings of fact and conclusions of law in the recommended decision.

After considering the evidence of record, FAB hereby makes the following:

FINDINGS OF FACT

1. On December 13, 2006 **[Claimant #1]**and **[Claimant #2]**; and on January 4, 2007 **[Claimant #3]**, **[Claimant #4]** and **[Claimant #5]** each filed a claim for survivor benefits under EEOICPA.
2. **[Employee]** was diagnosed with epiglottis cancer on April 25, 1989.
3. **[Employee]** died on September 1, 1990, due to acute bronchopneumonitis, with a contributing factor of coronary artery disease; which were complications of his epiglottis (throat) cancer.
4. **[Employee]** worked at LANL as a security guard with the AEC from May 15, 1972 to January 9, 1981, and with the University of California, as a Casual Messenger/Driver, from August 23, 1973 to October 29, 1973.
5. There is a causal connection between the employee's death due to epiglottis cancer and his exposure to radiation and/or a toxic substance at a DOE facility.
6. **[Claimant #1, 2, 3, 4 and 5]** are the eligible children of **[Employee]** under Part B.
7. **[Claimant #5]** was 17 years of age at the time of **[Employee]**'s death.
8. All five claimants indicated on their respective Form EE-2 that neither they nor anyone in their family had ever filed for or received any proceeds from a tort suit or a state workers' compensation claim related to the employee's epiglottis cancer, that they had never pled guilty to or been convicted of any charges connected with an application for or receipt of federal or state workers' compensation, and that they did not know of any other persons who may also be eligible to receive compensation under EEOICPA as a survivor of [**Employee]**.

Based on the above-noted findings of fact, FAB hereby also makes the following:

CONCLUSIONS OF LAW

Section 30.316(a) of the regulations provides that, if the claimant waives any objections to all or part of the recommended decision, FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part. *See* 20 C.F.R. § 30.316(a). All five claimants waived their right to file objections to the findings of fact and conclusions of law contained in the recommended decision issued on their claims.

In order for him to be considered a covered Part B employee, the evidence must establish that **[Employee]** was diagnosed with an occupational illness incurred as the result of his exposure to silica, beryllium, or radiation, and those illnesses are cancer, beryllium sensitivity, chronic beryllium disease, and chronic silicosis. *See* 42 U.S.C. § 7384l(15); 20 C.F.R. § 30.110(a). Further, EEOICPA requires that the illness must have been incurred while the employee was "in the performance of duty" for DOE or certain of its vendors, contractors, subcontractors, or for an atomic weapons employer. *See* 42 U.S.C. §§ 7384l(4)-(7), (9), and (11).

On June 22, 2007, the Secretary of HHS designated a new class of employees as an addition to the SEC, consisting of DOE employees or DOE contractor or subcontractor employees who were monitored or should have been monitored for radiological exposures while working in operational Technical Areas with a history of radioactive material use at LANL for a number of work days aggregating at least 250 work days from March 15, 1943 through December 31, 1975, or in combination with work days within the parameters established for one or more classes of employees in the SEC. The new SEC class became effective on July 22, 2007.

The employment evidence is sufficient to establish that **[Employee]** was employed at LANL for an aggregate of at least 250 work days, as a security guard, and therefore he is considered to be an eligible member of the class of employees who worked at LANL from March 15, 1943 through December 31, 1975 that was added to the SEC.

[Employee] is a member of the SEC who was diagnosed with epiglottis cancer, which is cancer of a part of the pharynx (a "specified" cancer), more than 5 years after his initial exposure, and therefore he is a "covered employee with cancer." *See* 42 U.S.C. §§ 7384l(14)(C), 7384l(17), 7384l(9)(A) and 20 C.F.R. § 30.5(ff)(5)(iii)(E). Therefore, as the employee is now deceased, the five claimants are entitled to compensation in the total amount of $150,000.00, divided in equal shares of $30,000.00 each. *See* 42 U.S.C. § 7384s(a) and (e).

The statute provides that if a determination has been made that a DOE contractor employee is entitled to compensation for an occupational illness under Part B, such determination shall be treated, for purposes of Part E, as a determination that the employee contracted that illness through exposure at a DOE facility. *See* 42 U.S.C. § 7385s-4(a). Consequently, **[Employee]**'s illness is deemed to be a "covered illness" contracted through exposure to toxic substances at a DOE facility. The medical evidence also establishes that epiglottis cancer was one of the causes of **[Employee]**'s death. As the employee would have been entitled to compensation for his covered illness under Part E; and it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing the death of the employee, his eligible survivors would be entitled to compensation pursuant to 42 U.S.C. § 7385s-3(a)(1). **[Claimant #5]** was 17 years of age at

the time of **[Employee]**'s death, and is the only eligible survivor pursuant to § 7385s-3(d), and therefore she is entitled to compensation in the amount of $125,000.00. *See* 42 U.S.C. §§ 7385s-3(a)(1), 7385s-3(d).

Seattle, Washington

Keiran Gorny

Hearing Representative

Final Adjudication Branch

Children

EEOICPA Fin. Dec. No. 11890-2007 (Dep't of Labor, November 7, 2007)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning the above claims for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claims are accepted for a combined award of $150,000.00 (consisting of two equal shares of $75,000.00 each) in survivor compensation under Part B of EEOICPA, and for a second combined award of $125,000.00 (consisting of two equal shares of $62,500.00 each) in survivor compensation under Part E, based on the employee's colon cancer and his subsequent death, respectively. **[Claimant #1 and Claimant #2]** are each therefore approved for separate awards of $137,500.00 under Parts B and E of EEOICPA.

STATEMENT OF THE CASE

On October 11, 2001, **[Claimant #1 and Claimant #2]** filed claims for survivor benefits under Part B and Part E (formerly Part D) of EEOICPA as the children of the employee. They identified colon cancer as the condition resulting from the employee's work at a Department of Energy (DOE) facility. The file contains a Form EE-3 alleging that the employee was employed as a chemical engineer at the Los Alamos National Laboratory (LANL) for unspecified dates, at Brookhaven National Laboratory from July of 1947 to March of 1951, at North American Aviation from April of 1951 to July of 1952, and at Argonne National Laboratory - East from April 5, 1954 to September 9, 1992. DOE verified that the employee worked at LANL from August 7, 1944 to March 1, 1946, at Brookhaven National Laboratory from July 22, 1947 to March 29, 1951, at the Downey Facility from April 21, 1951 to June 27, 1952, and at Argonne National Laboratory - East from April 5, 1954 to September 9, 1992.[1] DOE also verified that the employee present at the Trinity Test Site for the first nuclear test in July of 1945.

[Claimant #1 and Claimant #2] submitted the following medical information in support of their claims: a June 29, 1991 medical report by Dr. E. Dvorak that cites a long history of recurrent adenocarcinoma of the colon; an August 3, 1991 discharge summary by Dr. J. Geraghty that reports a history of colon cancer beginning in 1965; and a July 15, 1991 pathology report of lumbar spine tissue and bone in which Dr. L. Ghosh diagnosed metastatic adenocarcinoma consistent with primary colon

cancer. The employee's death certificate shows that he died on November 20, 1992 at the age of 74 and that he was widowed at the time of his death. The immediate cause of death was listed as "metastatic carcinoma colon" and the interval between the onset of the condition and death is listed as "years."

In support of their survivor claims, **[Claimant #1 and Claimant #2]** submitted copies of their birth certificates, showing the employee as their father and showing **[Claimant #1]**'s birth date as August 15, 1976 and **[Claimant #2]**'s birth date as November 16, 1973. **[Claimant #2]** also submitted documentation related to his education showing that he graduated from high school in 1991, at the age of 17. **[Claimant #2]** turned 18 on November 16, 1991. A transcript shows that he entered North Central College as a special student on January 6, 1992, and attended classes there during the winter and spring sessions of the 1991-1992 school year, and a June 19, 1992 letter states he was awarded academic honors for Spring Term of 1991-92. A copy of an October 2, 1992 letter from the University of Chicago states that **[Claimant #2]** deferred his admission there until Fall of 1993. A May 27, 1992 letter from the University of Chicago shows his original admission date as Autumn Quarter of 1992. In a letter dated October 9, 2001, **[Claimant #2]** stated that he had deferred his admission to the University of Chicago "due to [his] father's illness." He also noted in the same letter that during that time he had no earned income and was dependent on the employee. A copy of a transcript from the University of Chicago showed that **[Claimant #2]** attended classes there from Autumn 1993 until Spring 1997 and that he was awarded a degree in Summer of 1997. The transcript also notes that **[Claimant #2]** attended Naperville Central High School in 1991 and North Central College in Naperville, Illinois in 1991-1992.

The district office referred their application package to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction, which was necessary to determine if the employee's colon cancer was "at least as likely as not" sustained in the performance of duty at a covered DOE facility (known as determining the probability of causation, or "PoC").

On June 22, 2007, a new class of employees was added to the Special Exposure Cohort (SEC). The new class included employees who were monitored or should have been monitored for radiological exposures while working in operational Technical Areas with a history of radioactive material use at LANL for an aggregate of 250 work days from March 15, 1943 through December 31, 1975, or in combination with other SEC employment designations. This designation took effect on July 22, 2007.

Thereafter, it was determined that the employee met the requirements for the above addition to the SEC, and the claims of **[Claimant #1 and Claimant #2]** were returned by NIOSH. The employee worked as a chemical engineer for more than 250 days at LANL, and his dosimetry badge records and likely job duties show that he would have been in several locations where radioactive materials were present.

On August 1 and 9, 2007, FAB received their signed statements that neither they nor the employee had received any settlement or award from a lawsuit or state workers' compensation claim for the employee's condition of colon cancer.

On August 18, 2007, the Cleveland district office issued a recommended decision finding that the employee qualified as a member of the SEC as he was diagnosed with colon cancer, which is a "specified" cancer, and he was employed for more than 250 days at LANL during the specified period. Accordingly, the district office recommended that **[Claimant #1 and Claimant #2]** be awarded

survivor benefits of $150,000.00 (to be shared equally) under Part B of EEOICPA, and $125,000.00 (to be shared equally) under Part E, based on the employee's colon cancer and his death due to that covered illness.

On August 21, 2007, FAB sent **[Claimant #2]** a letter requesting that he provide additional evidence to establish his eligibility as a covered child under Part E of EEOICPA. The letter noted that he was 19 years of age at the time of the employee's death and that he could be considered a covered child if he was a full-time student who had been continuously enrolled in one or more education institutions since attaining that age of 18 years or if he was incapable of self-support.

On August 24, 2007 and September 20, 2007, FAB received **[Claimant #1 and Claimant #2]**'s signed waivers of their right to object to any of the findings of fact or conclusions of law contained in the recommended decision.

After a careful review of the evidence in the case file, the undersigned hereby makes the following:

FINDINGS OF FACT

1. On October 11, 2001, **[Claimant #1 and Claimant #2]** filed claims for survivor benefits under Parts B and E (formerly Part D) of EEOICPA as the children of the employee. They identified colon cancer as the condition resulting from the employee's work at a DOE facility.

2. The employee worked as a chemical engineer at LANL for the University of California from August 7, 1944 to March 1, 1946. This is at least 250 days of employment at LANL.

3. The employee was diagnosed with colon cancer in 1965. This is at least five years after he began employment at a covered facility.

4. The employee qualifies as a member of the SEC.

5. The employee died on November 20, 1992 at the age of 74, and he was widowed at the time of his death. The immediate cause of death was listed as "metastatic carcinoma colon" and the interval between onset and death is listed as "years."

6. **[Claimant #1]**'s birth date is August 15, 1976, and she was 16 years old at the time of the employee's death.

7. **[Claimant #2]**'s birth date is November 16, 1973, and he was 19 years old at the time of the employee's death.

8. **[Claimant #2]** turned 18 on November 16, 1991 attended North Central College for the Winter and Spring sessions of the 1991-92 school year. He attended the University of Chicago beginning with the Autumn Quarter of 1993, after having deferred enrollment for one year due to the employee's illness. He attended the University of Chicago from Autumn of 1993 until he was awarded a degree in the Summer of 1997.

9. Neither **[Claimant #1 and Claimant #2]** nor the employee have received any settlement or award from a lawsuit or state workers' compensation claim for the employee's condition of

colon cancer.

Based on these facts, the undersigned also makes the following:

CONCLUSIONS OF LAW

Section 30.316(a) of the EEOICPA regulations provides that if the claimant waives any objections to all or part of the recommended decision, FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part. 20 C.F.R. § 30.316(a). **[Claimant #1 and Claimant #2]** have waived their rights to file objections to the findings of fact and conclusions of law in the recommended decision.

The employee worked as a chemical engineer at LANL for the University of California from August 7, 1944 to March 1, 1946. The employee's dosimetry badge records and likely job duties show that he would have been in several locations at LANL where radioactive materials were present. The employee was diagnosed with colon cancer in 1965. Provided the onset was at least five years after first exposure, which it was in this case as the employee's first exposure was in 1944, colon cancer is a "specified" cancer. *See* 20 C.F.R. § 30.5(ff)(5)(L). The totality of evidence therefore demonstrates that the employee qualifies as a member of the new addition to the SEC. As a member of the SEC who was diagnosed with a specified cancer which constitutes an "occupational illness" under 42 U.S.C. § 7384l(15), the employee qualifies as a "covered employee with cancer." 42 U.S.C. § 7384l(9).

Under Part B of EEOICPA, a covered employee, or the survivors of that employee, shall receive compensation for the employee's occupational illness in the amount of $150,000.00. The employee was a widower at the time of his death. Accordingly, as the employee's surviving children, **[Claimant #1 and Claimant #2]** are entitled to $150,000.00 (to be shared equally) in survivor benefits under Part B.

Part E of EEOICPA provides compensation and medical benefits to DOE contractor employees determined to have contracted a "covered illness" through exposure at a DOE facility. The term "covered DOE contractor employee" means any DOE contractor employee determined to have contracted a covered illness through exposure at a DOE facility. *See* 42 U.S.C. § 7385s(1). The term "covered illness" means an illness or death resulting from exposure to a toxic substance. 42 U.S.C. § 7385s(2).

A determination under Part B of EEOICPA that a DOE contractor employee is entitled to compensation under that Part for an occupational illness shall be treated for purposes of Part E as a determination that the employee contracted that illness through exposure at a DOE facility. 42 U.S.C. § 7385s-4(a). Under Part E, the survivor of a deceased covered Part E employee shall receive $125,000.00, if the employee would have been entitled to compensation for a covered illness, *and* it is "at least as likely as not" that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing the death of such employee. *See* 42 U.S.C. § 7385s-3(a)(1).

The employee's work for the University of California at LANL from August 7, 1944 to March 1, 1946 establishes that the employee was a DOE contractor employee, and he was diagnosed with colon cancer, a "covered illness," as that term is defined by 42 U.S.C. § 7385s(2). The employee contracted his "covered illness" through exposure to a toxic substance at a DOE facility pursuant to 42 U.S.C. § 7385s-4(a). The employee's death certificate indicates that the cause of death was "metastatic

carcinoma colon."

FAB therefore concludes that the employee would have been entitled to compensation under Part E for his covered illness, and that it is "at least as likely as not" that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing the death of the employee.

The term "covered" child means a child of the employee who, at the time of the employee's death, was under the age of 18, or under the age of 23 and a full-time student who was continuously enrolled in an educational institution since attaining the age of 18, or incapable of self-support. *See* 42 U.S.C. § 7385s-3(d)(2). **[Claimant #1]** was 16 years old at the time of the employee's death; thus, she is a covered child under Part E. The evidence of record shows that at the time of the employee's death, **[Claimant #2]** was 19 years old. The eligibility of a child who is between the ages of 18 and 23 at the time of the employee's death is evaluated under the following guidelines:

[T]he child must have been continuously enrolled as a full-time student in one or more educational institutions since attaining the age of 18 years and must not have reached the age of 23 years regardless of marital status or dependency on the employee for support. Enrollment as a full time student consists of a 12-month period, with a break of no more than 4 months, during each year of post-high school education. The full-time course of study or training at an accredited institution(s) is approximately four years of education beyond the high school level or until the student reaches age 23, whichever comes first. It is [within the Division of Energy Employees Occupational Illness Compensation (DEEOIC)]'s discretion to determine a period of reasonable duration if the student was prevented by reasons beyond his or her control, such as a brief but incapacitating illness, from continuing in school.

Federal (EEOICPA) Procedure Manual, Chapter E-600.5(b)(3) (September 2005).

The statute requires continuous enrollment since attaining the age of 18 in order for a surviving child to be eligible for survivor benefits under Part E. The Procedure Manual states that enrollment as a full-time student means a break of no more than four months in a 12-month period, unless prevented from continuing in school for a reason beyond the student's control. These criteria necessarily contain some discretion for case-by-case analysis of claims involving surviving children who were between the ages of 18 and 23 when the employee died. What reasonably qualifies as "a reason beyond the student's control" will depend on the facts and circumstances surrounding each claim and will involve some judgment on the part of DEEOIC.

[Claimant #2] graduated from high school in 1991, at the age of 17. He turned 18 on November 16, 1991, entered North Central College as a special student on January 6, 1992 and attended classes there full-time during the Winter and Spring sessions of the 1991-1992 school year. A copy of an October 2, 1992 letter from the University of Chicago states that **[Claimant #2]** deferred his admission there until Fall of 1993. A May 27, 1992 letter from the University of Chicago shows his original admission date as the Autumn quarter of 1992. A copy of a transcript from the University of Chicago shows that **[Claimant #2]** attended classes there from Autumn of 1993 until Spring of 1997 and that he was awarded a degree in Summer of 1997. The transcript also notes that he attended Naperville Central High School in 1991 and North Central College in Naperville, Illinois in 1991-1992.

University of Chicago "due to [his] father's illness." He also noted in the same letter that during that time he had no earned income and was dependent on the employee. These statements are consistent with the above documentation, in that they both support that **[Claimant #2]** would have begun classes in the Autumn quarter of 1992 at the University of Chicago but for the employee's illness. FAB notes that had he begun classes in the Autumn of 1992 as he had originally planned, there would have been no break of more than 4 months in his continuous education since he attained the age of 18.

[Claimant #2] stated, and there is no evidence in the file to contradict, that he deferred for one year his admission to the University of Chicago, from Autumn 1992 to Autumn of 1993, due to the employee's illness, and in fact the employee died shortly after the Autumn quarter of 1992 would have begun (November 20, 1992). Thus, the circumstances surrounding the break in his continuous enrollment since the age of 18 (*i.e.*, between Spring of 1992 and Fall of 1993) were reasonable and beyond **[Claimant #2]**'s control, such that he qualifies as a "covered child" who was "under the age of 23 years and a full-time student who was continuously enrolled in an educational institution since attaining the age of 18 years" under Part E of EEOICPA.

Accordingly, **[Claimant #1 and Claimant #2]** are entitled to survivor compensation of $150,000.00 (to be divided in equal shares of $75,000.00) under Part B as the surviving children of the employee, for the employee's occupational illness of colon cancer. They are also entitled to survivor compensation of $125,000.00 (to be divided in equal shares of $62,500.00) under Part E as the covered children of the employee, for the employee's death due to the covered illness of colon cancer. Thus, **[Claimant #1 and Claimant #2]** are each entitled to $137,500.00 in total EEOICPA survivor benefits.

Washington, DC

Carrie A. Rhoads

Hearing Representative,

Final Adjudication Branch

[1] The University of California is a contractor at LANL, which is a DOE facility beginning in 1942 to the present. *See* DOE's facility listings at: http://www.hss.energy.gov/healthsafety/ fwsp/advocacy/faclist/findfacility.cfm (visited November 5, 2007).

EEOICPA Fin. Dec. No. 37038-2003 (Dep't of Labor, November 7, 2007)

NOTICE OF FINAL DECISION FOLLOWING REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch (FAB) concerning the above claims for compensation under Part B and Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons stated below, **[Claimant #1]**'s claim for survivor benefits under Part B and Part E are denied. **[Claimant #2]**'s claim for survivor benefits under Part B is accepted, but his claim under Part E is denied.

STATEMENT OF THE CASE

On October 15, 2002, **[Claimant #1]** filed a Form EE-2 with the Seattle district office of the Division of Energy Employees Occupational Illness Compensation (DEEOIC) in which he claimed survivor

benefits under Part B of EEOICPA as a child of **[Employee]**. In support of his claim, he alleged that **[Employee]** had been employed by J.A. Jones Construction, a Department of Energy (DOE) subcontractor at the Hanford site, and that **[Employee]** had been diagnosed with lung cancer in 1999. **[Claimant #1]** submitted a large number of documents in support of his claim that included, among other things: copies of a September 24, 1992 court order documenting the legal change of his name from "**[Claimant #1's former name]**" to "**[Claimant #1]**" and his October 6, 1992 amended birth certificate with this new name[1]; medical evidence of **[Employee]**'s lung cancer; copies of the death certificates for both **[Employee]** and **[Employee's Spouse]**; a copy of "Letters Testamentary" documenting that **[Claimant #1]** was an executor of **[Employee]**'s estate; a U.S. Marine Corps Form D-214 noting **[Claimant #1]**'s use of the name "**[Claimant #1]**" when he was transferred to the Marine Corps Reserve on September 4, 1964; and a September 21, 2001 statement in which **[Claimant #1]** related the following about his childhood:

As my real dad was unknown. My mother died when I was 6. **[Claimant #1's Father as listed on his birth certificate]** was a family friend of my mom's. Just to give me a last name as she was unwed & pregnant with me. My Dad **[Employee]** & My Mom **[Employee's Spouse]** actually was my uncle & aunt but I lived with them from the time I was 3 years old. So I consider them my Dad & Mom. As I joined the USMC with the **[Employee's Surname]** name. . . .

On December 16, 2002, the Seattle district office verified **[Employee]**'s employment by consulting the ORISE database and on December 17, 2002, it issued a recommended decision to deny **[Claimant #1]**'s Part B claim. The recommendation to deny was based on the conclusion that **[Claimant #1]** had failed to submit sufficient evidence to establish his eligibility as a surviving child of **[Employee]**. On January 29, 2003, FAB issued an order remanding the claim to the Seattle district office for further development on the issue of whether **[Claimant #1]** was **[Employee]**'s stepchild. In that order, FAB noted that new procedures had gone into effect shortly after the recommended decision had been issued that required all claims in which claimants were alleging to be stepchildren of deceased covered workers to be forwarded to the National Office of DEEOIC for referral to the Office of the Solicitor, and directed the Seattle district office to comply with those procedures upon completion of further development on the question of whether **[Claimant #1]** was **[Employee]**'s stepchild.

By letter dated February 11, 2003, **[Claimant #1]**'s representative submitted a February 6, 2003 statement from **[Employee's Sister]**, who stated the following:

[Claimant #1] came to live with **[Employee]** and **[Employee's Spouse]** in 1946 and he was three years old at the time. He lived with them until he was 18 or 19. At that time he joined the Marines. **[Employee]** was his soul [*sic*] provider during those years and loved him as his son. Their relationship has always been that of a father and son and continued until **[Employee]** passed away a few years ago.

[Claimant #1]'s representative also submitted copies of **[Claimant #1]**'s "Pupil Health Card" and "Pupil's Cumulative Record" from the Kiona-Benton School District, both of which listed **[Claimant #1]**'s last name as "**[Claimant #1's Stepfather's surname]**" (crossed out and replaced with "**[Employee's surname]**") and noted that he lived with his "Uncle." The "Pupil's Cumulative Record" also listed "**[Claimant #1's Stepfather]**" as **[Claimant #1]**'s father. Shortly thereafter, **[Claimant #2]** filed a claim for survivor benefits on March 31, 2003 and alleged that he was the stepson of **[Employee]**.

In an April 10, 2003 inquiry, the Seattle district office asked **[Claimant #1]** who **[Claimant #1's**

Stepfather] was (his father on the "Pupil's Cumulative Record"). In an April 12, 2003 reply, **[Claimant #1]** stated the following:

My mother **[Claimant #1's Mother]** married **[Claimant #1's Stepfather]** [in] 1945[.] They had (2) girls **[Claimant #1's Stepsisters]**. . . **[Claimant #1's Stepfather]** was my stepfather until **[Claimant #1's Mother]**'s death in 1949 at which time the girls & I were separated as **[Claimant #1's Stepfather]** didn't like me as I wasn't his child. The girls were adopted out and I went with my parents **[Employee]** & **[Employee's Spouse]**.

* * *

[I lived with **[Employee and Employee's Spouse]** in] 1943-1944 as **[Claimant #1's Mother]** was unwed. Then my mother **[]** passed away [January] 23, 1949. I lived with **[Employee]** & **[Employee's Spouse]** from 1949-1960. They were my sole survivorship [*sic*]. Then I went in USMC 1960.

In a response to a separate April 10, 2003 inquiry that was received by the Seattle district office on April 23, 2003, **[Claimant #2]** indicated that his mother **[Employee's Spouse]** had married **[Employee]** (his alleged step-parent) on October 24, 1940 when he was five years old, and that he had resided in their household for the next 15 years. **[Claimant #2]** also submitted a copy of his birth certificate, which showed that his mother was "**[Employee's Spouse]**," and his father was "**[Claimant #2's Father]**."

By letters dated May 1, 2003, the district office notified both **[Claimant #1]** and **[Claimant #2]** that the case had been referred to the National Institute for Occupational Safety and Health (NIOSH) for reconstruction of **[Employee]**'s radiation dose. Thereafter, on June 19, 2003, the district office transferred the case to the National Office of DEEOIC for referral to the Office of the Solicitor as directed in the January 29, 2003 remand order of the FAB. However, rather than taking this action[2], the National Office returned the case to the district office on September 29, 2003 with a memorandum from the Chief of the Branch of Policies, Regulations and Procedures (BPRP) of the same date. In that memorandum, the Chief reviewed the evidence then in the case file and concluded that while **[Claimant #2]** met the statutory definition of **[Employee]**'s "child," **[Claimant #1]** would not absent the submission of additional evidence showing that he had been legally adopted by **[Employee]**. Upon return of the file, the Seattle district office wrote to **[Claimant #1]** on October 3 and 21, 2003 and requested that he submit any evidence in his possession that would establish that he had been legally adopted by **[Employee]**. No response was received to these requests.

No further action took place with respect to this matter pending receipt of NIOSH's dose reconstruction report until June 9, 2005, on which date **[Claimant #1]**'s representative informed the district office that his client wished to expand his Part B claim to include a claim under the recently enacted Part E of EEOICPA. On October 27, 2005, the district office sent a third letter to **[Claimant #1]** stating that while he had provided sufficient evidence to show that he had lived as a dependent in his uncle and aunt's household, no documentation had been provided showing that he had ever been adopted by his uncle. In a November 3, 2005 response to that letter, **[Claimant #1]**'s representative argued that because the definition of "child" in EEOICPA is inclusive rather than exclusive, **[Claimant #1]** met the definition of "child" by being the "*de facto* child" of **[Employee]**, based on a recent state court decision in a Washington child visitation case (issued that same day) that adopted an equitable theory of *de facto* parentage. In the visitation case cited, the court created a four-part test for an individual to be a considered a "*de facto* parent" and to be granted the rights and privileges of a parent.[3]

[Claimant #1]'s representative also argued that **[Claimant #1]** should be considered a child of **[Employee]** under the definition of the term "child" that appears in Title 51 of the Washington Revised Code, which codifies that state's industrial insurance law.[4] The term "child" is defined therein as, among other things, a "dependent child that is in legal custody and control of the worker." The term "dependent" under that title is defined as including relatives of the worker who at the time of the accident are actually and necessarily dependent on the worker. Through a letter dated November 10, 2005, **[Claimant #1]**'s representative added to his prior argument by alleging that "**[Employee]** would have adopted **[Claimant #1]** , but it wasn't necessary at the time because the schools he attended and the military accepted **[Employee]** as **[Claimant #1]**'s father and allowed **[Employee]** to sign legal documents on **[Claimant #1]**'s behalf when he was still a minor."

On October 18, 2005, the Seattle district office received the "NIOSH Report of Dose Reconstruction under EEOICPA," dated September 29, 2005, which provided estimated doses of radiation to the primary cancer site of the lung. Based on these dose estimates, the district office calculated the probability of causation (PoC) for **[Employee]**'s lung cancer by entering his specific information into a computer program developed by NIOSH called NIOSH-IREP. The PoC was determined using the "upper 99% credibility limit," which helps minimize the possibility of denying claims of employees with cancers that are likely to have been caused by occupational radiation exposures. The PoC for the primary cancer of the lung was determined to be 52.89% using NIOSH-IREP. Based on this PoC, the Seattle district office issued a November 16, 2005 recommended decision to accept **[Claimant #2]**'s Part B claim. However, it recommended denial of **[Claimant #2]**'s Part E claim on the ground that he was not a "covered child" under that other Part. It also recommended denying **[Claimant #1]**'s Part B and E claims on the ground that he had failed to establish that he was a surviving child of **[Employee]**. The recommended decision, however, did not fully discuss the legal arguments for the expansion of the term "child" made by **[Claimant #1]**'s representative. In a January 12, 2006 letter that was received on January 17, 2006, **[Claimant #1]**'s representative objected to this recommended decision and requested an oral hearing before FAB, which took place on March 30, 2006. At the hearing, **[Claimant #1]**'s representative made the same arguments he had made in his written objections.

On July 15, 2006, FAB returned the case to BPRP for guidance on the legal arguments raised by **[Claimant #1]**'s representative at the March 30, 2006 hearing. On December 12, 2006[5], BPRP requested a legal opinion on the matter from the Office of the Solicitor and on February 26, 2007, the Office of the Solicitor provided BPRP with a legal opinion that evaluated the arguments raised by **[Claimant #1]**'s representative. On March 1, 2007, BPRP contacted FAB and advised it of the guidance it had received. However, by that point in time, the November 16, 2005 recommended decision had automatically become a "final" decision of the FAB on January 17, 2007 pursuant to 20 C.F.R. § 30.316(c), the one-year anniversary of the date the representative's objections to the recommended decision were received by FAB.

On March 9, 2007, **[Claimant #1]** filed a petition in the United States District Court for the Eastern District of Washington seeking review of the January 17, 2007 "final decision" on his claim under Parts B and E of EEOICPA (Civil Action No. CV-07-5011-EFS). Shortly thereafter, the Director of DEEOIC issued an order on April 30, 2007 vacating that same "final decision" on the claims of both **[Claimant #1]** and **[Claimant #2]** and returning them to the Seattle district office for further development and consideration of the Office of the Solicitor's February 26, 2007 opinion, to be followed by the issuance of new recommended and final decisions. The case was subsequently transferred to the national office of DEEOIC for further action in light of the filing of the above-noted petition.

[Claimant #1]'s claim for survivor benefits under Parts B and E on the ground that he was not a surviving "child" of **[Employee]**, as that statutory term is defined in §§ 7384s(e)(3) and 7385s-3(d)(3) of EEOICPA; (2) to accept **[Claimant #2]**'s claim for survivor benefits under Part B on the ground that as **[Employee]**'s stepchild, he was a surviving "child" of **[Employee]** under § 7384s(e)(3); and (3) to deny **[Claimant #2]**'s claim for survivor benefits under Part E on the ground that although he was a "child" of **[Employee]** under § 7385s-3(d)(3), he did not meet the definition of a "covered child" in § 7385s-3(d)(2). The case was transferred to FAB and on October 3, 2007, it received **[Claimant #2]**'s signed, written waiver of all objections to the September 14, 2007 recommended decision. On October 17, 2007, **[Claimant #2]** also submitted a signed statement indicating that had not received any money from a tort suit for **[Employee]**'s radiation exposure, and that he had not been convicted of fraud in connection with any application for or receipt of EEOICPA benefits or any other state or federal workers' compensation benefits. On September 27, 2007, FAB received written objections to the September 14, 2007 recommended decision and a request for review of the written record from **[Claimant #1]**'s representative, dated September 26, 2007.

OBJECTIONS

In his September 26, 2007 submission, **[Claimant #1]**'s representative objected to the seventh "Conclusion of Law" in the recommended decision, which is the one that concluded that **[Claimant #1]** was not a surviving "child" of **[Employee]** under either Part B or Part E of EEOICPA and rejected the representative's contentions that Washington workers' compensation law and a child visitation decision supported **[Claimant #1]**'s claim. The representative repeated his earlier argument regarding the non-exhaustive nature of the definition of "child" under EEOICPA and alleged that DEEOIC had ignored this point when it "made its recommended decision of denial on the basis that **[Claimant #1]** does not qualify as a surviving child of **[Employee]** since **[Claimant #1]** was neither a recognized natural child, a stepchild or an adopted child [of **[Employee]**."[6]

[Claimant #1]'s representative also repeated his argument that Washington workers' compensation law should apply in **[Claimant #1]**'s EEOICPA claim because EEOICPA is a "federal worker's [*sic*] compensation statute." Based on this premise, the representative asserted that the concept of dependence alone should be determinative of **[Claimant #1]**'s status as **[Employee]**'s child.

Finally, the representative argued that the "general rule of law" pronounced in the child visitation case was "not limited to the facts in the particular case." Rather, he asserted, "the application of the *de facto* concept is broadly [*sic*] subject only to the factors enumerated in the general rule developed in the decision." The representative then quoted from the portion of the decision in which the court set out four criteria that an individual would have to meet in order to have "standing as a *de facto* parent" in a child visitation proceeding, and asserted that **[Claimant #1]** was **[Employee]**'s "*de facto* child."

After considering the recommended decision and all of the evidence in the case file, FAB hereby makes the following:

FINDINGS OF FACT

1. **[Claimant #1]** and **[Claimant #2]** filed claims for survivor benefits under Part B of EEOICPA on October 15, 2002 and March 31, 2003, respectively, and both later expanded their claims to include Part E.

2. **[Employee]** was employed at the Hanford facility by DOE subcontractors from January 1, 1950 to April 15, 19 55, from September 14, 1956 to March 15, 1957, from March 22, 1957 to April 26, 1957, from March 3 to 4, 1960, and from September 14, 1960 to March 4, 1977.

3. On July 1, 1999, **[Employee]** was diagnosed with lung cancer. The date of this diagnosis was after he had begun covered employment.

4. NIOSH reported annual dose estimates for the lung from the date of initial radiation exposure during covered employment to the date of the cancer's first diagnosis. A summary and explanation of the information and methods applied to produce these dose estimates, including **[Claimant #1]**'s and **[Claimant #2]**'s involvement through their interviews and reviews of the draft dose reconstruction report, are documented in the "NIOSH Report of Dose Reconstruction under EEOICPA" dated September 29, 2005.

5. Using the dose estimates from NIOSH's September 29, 2005 report, DEEOIC determined that the probability of causation (PoC) was 52.89% and established that it was "at least as likely as not" that **[Employee]**'s lung cancer was sustained in the performance of duty.

6. **[Claimant #1]** was born on June 14, 1942 and is the child of **[Claimant #1's Mother]** and an unknown father. From 1943 to 1944, he lived with his uncle and aunt, **[Employee and Employee's Spouse]** (**[Sister of Claimant #1's Mother]**). In 1945, **[Claimant #1's Mother]** married **[Claimant #1's Stepfather]**, and **[Claimant #1]** was reunited with his mother and lived with her and **[Claimant #1's Stepfather]**. **[Claimant #1's Mother]** died on January 23, 1949, after which **[Claimant #1]** was again sent to live with his aunt and uncle. **[Claimant #1]**'s stepfather died in 1952. **[Claimant #1]** lived with his uncle the employee, his aunt and his cousin **[Claimant #2]** from 1949 until he enlisted in the U.S. Marine Corps in 1960.

7. **[Claimant #2]** is the stepchild of **[Employee]** as established by his birth certificate, his school records, and the marriage of his mother **[Employee's Spouse]** to **[Employee]**.

8. At the time of **[Employee]**'s death, **[Claimant #2]** was not under the age of 18, or under the age of 23 and continuously enrolled as a full-time student in an institution of higher learning, or any age and incapable of self-support.

Based on the above-noted findings of fact, and after considering the objections to the recommended decision in this case, FAB hereby makes the following:

CONCLUSIONS OF LAW

The first issue in this case is whether **[Employee]** qualifies as a "covered employee with cancer" for the purposes of Part B of EEOICPA. For this case, the relevant portion of the definition of a "covered employee with cancer" is "[a] Department of Energy contractor employee who contracted that cancer after beginning employment at a Department of Energy facility, [] if and only if that individual is determined to have sustained that cancer in the performance of duty in accordance with section 7384n(b) of this title." 42 U.S.C. § 7384l(9)(B). As found above, **[Employee]** was employed at the Hanford facility by DOE subcontractors for intermittent periods from January 1, 1950 to March 4, 1977, and was first diagnosed with lung cancer after he had begun working at the Hanford facility.

In accordance with 42 U.S.C. § 7384n(d), NIOSH produced dose estimates of the annual radiation exposures to **[Employee]**'s lungs, and DEEOIC calculated the PoC for his lung cancer based on those estimates consistent with § 7384n(c)(3). Since the PoC was calculated to be 52.89%, it established that it was "at least as likely as not" that **[Employee]**'s lung cancer was sustained in the performance of duty under § 7384n(b). Therefore, **[Employee]** qualifies as a "covered employee with cancer" under Part B, as that term is defined by § 7384l(9)(B), because he was employed at a DOE facility by DOE subcontractors and sustained cancer in the performance of duty. As a result, his cancer is an "occupational illness" under Part B, as defined by § 7384l(15), and he is also a "covered employee," as that term is defined by § 7384l(1)(B). Pursuant to 42 U.S.C. § 7385s-4(a), this conclusion also constitutes a determination under Part E of EEOICPA that **[Employee]** contracted his lung cancer through exposure to a toxic substance at a DOE facility. However, because he is a *deceased* covered employee, only his eligible survivors are entitled to share in the compensation payable under Part B and Part E of EEOICPA.

The second issue in this case is whether **[Claimant #1]** or **[Claimant #2]** is a "child" of **[Employee]** under both Parts B and E of EEOICPA. The statutory term "child," which has the same definition in both Parts B and E, "includes a recognized natural child, a stepchild who lived with an individual in a regular parent-child relationship, and an adopted child." 42 U.S.C. §§ 7384s(e)(3)(B), 7385s-3(d)(3). Both of these definitions use the non-exhaustive term "includes" and identify three classes of persons that are considered to be children of an individual for purposes of paying survivor benefits under Parts B and E of EEOICPA.

There are well-established definitions for the three classes of persons included in the two statutory provisions at issue: (1) a "recognized natural child" is an illegitimate child of an individual, who has been recognized or acknowledged as a child by that individual; (2) a "stepchild" is someone who meets the criteria currently described in Chapter 2-200.5c (September 2004) of the Federal (EEOICPA) Procedure Manual; and (3) an "adopted child" is someone who satisfies the legal criteria for that status under state law.

The use of the term "includes" in both § 7384s(e)(3) and § 7385s-3(d)(3) is evidence that Congress intended the term "child" to refer to more than just the three classes of persons noted above, as is the fact that those three specified classes do not include legitimate issue (and posthumously born legitimate issue). Thus, the definition of the term "child" is properly left to DEEOIC as the agency that is charged with the administration of the compensation programs established by EEOICPA. *See* 20 C.F.R. § 30.1 (2007). As an exercise of that authority, DEEOIC concludes that there is no dispute that legitimate issue are children of an individual. Furthermore, unrecognized or unacknowledged illegitimate issue (and posthumously born illegitimate issue) also fall within the definition of "child" since denying EEOICPA survivor benefits to these other illegitimate children would violate the Constitution.[7] For brevity's sake, DEEOIC will use the term "biological" children to mean *all* issue of an individual (including posthumously born issue), whether legitimate or illegitimate. Under this terminology, a "recognized natural child" is one type of biological child. Accordingly, DEEOIC concludes that a "child" of an individual under both Part B and Part E of EEOICPA can only be a biological child, a stepchild, or an adopted child of that individual.

As noted above in the "Objections" section of this decision, **[Claimant #1]**'s representative argues that Washington workers' compensation law should apply in **[Claimant #1]**'s EEOICPA claim because EEOICPA is a "federal worker's [*sic*] compensation statute." In his view, **[Claimant #1]** should be found to be a "child" under EEOICPA because he meets the definition of a "child" in Title 51 of Washington's Revised Code, which defines a "child" as "every natural born child, posthumous child,

stepchild, child legally adopted prior to the injury, child born after the injury. . .and dependent child in the *legal custody* and control of the worker. . . ."(emphasis added).[8] However, there is no evidence in the case file that **[Claimant #1]** is the natural born child, posthumous child, stepchild, child legally adopted prior to the injury or child born after the injury of **[Employee]**.

There is also no allegation or evidence in the case file that **[Employee or Employee's Spouse]** ever had legal custody of **[Claimant #1]**. Instead, it appears that after the death of his mother, **[Claimant #1]** merely lived with his aunt and uncle who had, at most, *physical* custody of their nephew. Even assuming that **[Employee]** had "legal custody" of **[Claimant #1]** (a prerequisite of the definitional phrase at issue), there is nothing in either § 7384s(e)(3) or § 7385s-3(d)(3), or in EEOICPA as a whole, that suggests that a person claiming to be a "child" of a deceased covered employee should be able to establish that status by proving merely that they are or were "dependant" on that individual. Therefore, DEEOIC has concluded that persons who are or were only "dependant" on an individual are not "children" of that individual under EEOICPA, which is not a "federal worker's [*sic*] compensation statute" (those types of statutes are "wage-replacement" statutes[9]), as **[Claimant #1]**'s representative believes, where issues of dependency are often relevant to questions of survivor eligibility.[10]

[Claimant #1]'s representative also argues that **[Claimant #1]** should be considered a "*de facto* child" of **[Employee]** based on a recent decision in a visitation dispute in Washington. The dispute involved two parties who could not legally marry one another but had agreed to raise a biological child of one of the parties together. When the party who had no biological or legal relationship to the child sued to obtain visitation rights after the parties had terminated their agreement, the court considered whether the party was a "*de facto* parent."[11] **[Claimant #1]**'s representative argues that **[Employee]** would have met the court's four-part test[12] to be his client's "*de facto* parent" and as a consequence, **[Claimant #1]** should be considered to be the "*de facto* child" of **[Employee]**. There are, however, two flaws in this argument. First, both the decision at issue and subsequent cases that have relied upon it are clearly within the state law realm of child custody and/or parental rights. State courts in these types of cases are primarily concerned with the "best interests of the child," which is an equitable concern that does not enter into EEOICPA's definitions of "child," and involve the creation or definition of rights and obligations of *parents*, not children. Secondly, the decision cited by **[Claimant #1]**'s representative only contains a discussion of who can be considered a "*de facto* parent," not a "*de facto* child." Therefore, the representative's reliance on this decision is flawed not only because it is not controlling in the EEOICPA claims adjudication process, but also because it is based on an overly expansive reading of what the court actually stated.

Returning to the second issue in this case, DEEOIC concludes that **[Claimant #2]** is a "child" of **[Employee]** under Part B, as that term is defined in § 7384s(e)(3)(B), because he is **[Employee]**'s stepchild. **[Claimant #2]** is also a "child" of **[Employee]** under Part E, as that term is defined in § 7385s-3(d)(3), for the same reason—because he is **[Employee]**'s stepchild. However, DEEOIC concludes that **[Claimant #1]** is not a "child" of **[Employee]** under either Part B or Part E because he is not a biological child of **[Employee]**, or a stepchild of **[Employee]**, or an adopted child of **[Employee]**.

The third issue in this case is whether **[Claimant #1]** or **[Claimant #2]** is a "covered child" of **[Employee]** under Part E of EEOICPA. In order to be eligible to receive a payment as a "child" of a deceased covered employee under Part E, a child of that employee must be a "covered child," which is defined as "a child of the employee who, as of the employee's death—(A) had not attained the age of 18 years; (B) had not attained the age of 23 years and was a full-time student who had been continuously enrolled as a full-time student in one or more educational institutions since attaining the

age of 18 years; or (C) had been incapable of self-support." 42 U.S.C. § 7385s-3(d)(2).

In this case, while **[Claimant #2]** is a "child" of **[Employee]** under Part E, he is not a "covered child," as that term is defined in § 7385s-3(d)(2), because at the time of **[Employee]**'s death on February 21, 2000, he was not under the age of 18, or under the age of 23 and continuously enrolled as a full-time student in an institution of higher learning, or any age and incapable of self-support. As for **[Claimant #1]**, since he is not a "child" of **[Employee]**, as that term is defined in § 7385s-3(d)(3), because he is not a biological child, a stepchild or an adopted child of **[Employee]**, he cannot be a "covered child" of **[Employee]** under Part E because an individual alleging that status must also be a "child" in order to be a "covered child" under the terms of § 7385s-3(d)(2).

Accordingly, **[Claimant #2]** is entitled to survivor benefits for **[Employee]**'s lung cancer under Part B, as outlined in 42 U.S.C. § 7384s(a)(1), and the FAB hereby awards him lump-sum benefits of $150,000.00 for that occupational illness under Part B. **[Claimant #2]**'s claim for survivor benefits under Part E for **[Employee]**'s death due to lung cancer is denied. **[Claimant #1]**'s claim for survivor benefits under Parts B and E of EEOICPA for **[Employee]**'s condition of lung cancer and his death due to lung cancer, respectively, is denied.

Washington, D.C.

Carrie Rhodes

Hearing Representative

Final Adjudication Branch

[1] On this birth certificate, **[Claimant #1]** is reported to be the child of "**[Claimant #1's Mother]**" and "**[Claimant #1's Father as listed on his birth certificate]**," and **[Claimant #1's Mother]** is reported to be married. The informant for the birth certificate is listed as "**[Mother of Claimant #1's Mother]**".

[2] Subsequent to FAB's remand of the case for referral to the Office of the Solicitor, DEEOIC's policy in this area changed again such that the contemplated referral was not required. This later change in policy was documented in EEOICPA Transmittal No. 04-01 (issued October 22, 2003).

[3] *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005).

[4] Wash. Rev. Code § 51.08.030 (2006).

[5] This request was misdated by BPRP as April 13, 2004. It was actually received in the Office of the Solicitor on December 12, 2006.

[6] Despite this assertion, the seventh "Conclusion of Law" in the September 14, 2007 recommended decision actually stated that **[Claimant #1]** is not a "child" of **[Employee]** "because he is not a *biological* child of **[Employee]**, or a stepchild of **[Employee]**, or an adopted child of **[Employee]**." (emphasis added) The significance of the term "biological" in the quoted phrase is discussed at length below.

[7] *See Weber v. Aetna Cas. & Sur. Company*, 406 U.S. 164 (1972).

[8] Wash. Rev. Code § 51.08.030 (2006).

[9] Rather than replacing an injured worker's wages during a period of disability with regular, periodic payments consisting

of a set percentage of the worker's pre-injury wages, EEOICPA benefits are single, lump-sum payments in dollar amounts that are set by the terms of the statute. For an in-depth discussion of the "wage-replacement" nature of workers' compensation statutes, see *Larson's Workers' Compensation Law*, §§ 1.02 and 80.05[3] (2006).

[10] DEEOIC's position that dependency alone does not establish that an individual is a "child" is consistent with other systems where actual familial ties are paramount, such as Washington's statutory provision on the subject of intestate succession. *See* Wash. Rev. Code § 11.04.015.

[11] Before an individual who is not a biological, adoptive or stepparent can be considered a "*de facto* parent" of a child, such individual must prove that: the natural or legal parent of the child consented to and fostered the parent-like relationship; the individual and the child lived together in the same household; the individual assumed the many obligations of parenthood without expectation of financial compensation; and the individual has been in a parental role for a length of time sufficient to have established a bonded, dependent parental relationship with the child. *In re Parentage of L.B.*, 122 P.3d at 176.

[12] Without conceding that the court's four-part test is applicable in this matter, DEEOIC notes that there is no evidence in the file that **[Claimant #1's Mother]** gave her consent to have her son live with **[Employee and Employee's Spouse]** after her death in 1949.

EEOICPA Fin. Dec. No. 95118-2010 (Dep't of Labor, July 12, 2010)

NOTICE OF FINAL DECISIONAFTER REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch (FAB) concerning two claims for survivor benefits under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claim of **[Claimant #1]** for survivor benefits based on the employee's conditions of bladder cancer, lung cancer and bone cancer is approved for compensation in the amount of $150,000.00 under Part B of EEOICPA. Her claim for survivor benefits based on the employee's condition of metastatic liver cancer is denied under Part B. The claim of **[Claimant #2]** for survivor benefits based on the employee's condition of lung cancer is denied under Part B. The Estate of **[Employee]** is also entitled to reimbursement of medical expenses that were paid by the employee for treatment of bladder cancer and bone cancer beginning February 1, 2005 and ending February 3, 2007. A decision on the claims of **[Claimant #1]** and **[Claimant #2]** for survivor benefits under Part E of EEOICPA is deferred pending further development by the district office.

STATEMENT OF THE CASE

On February 1, 2005, **[Employee]** filed a claim for benefits (Form EE-1) under EEOICPA. He identified bone cancer, bladder cancer and kidney failure as the conditions resulting from his employment at a Department of Energy (DOE) facility. On , the district office received the death certificate of the employee which shows that he died on . The district office administratively closed the employee's claim on .

On April 25, 2008, **[Claimant #1]** filed a claim for survivor benefits (Form EE-2) as the surviving common-law wife of the employee. She identified bladder cancer, lung cancer and liver cancer as the conditions resulting from the employee's work at a DOE facility. On February 16, 2010, **[Claimant #2]** filed a claim for survivor benefits (Form EE-2) as a surviving child of the employee. He identified lung cancer as the employee's condition resulting from his employment at a DOE facility.

The employee completed an employment history form (Form EE-3) on . He stated he worked as an electrician and electrical superintendent for REECo at the Nevada Test Site in the 1970's and from 1981 until 1991.[1] DOE verified that the employee worked for REECo at the Nevada Test Site from August 11, 1982 until March 15, 1991, from August 18, 1981 until September 21, 1981, and from October 23, 1970 until September 22, 1972 as a wireman and operations superintendent and assistant superintendent.

The employee and both claimants submitted the following medical reports: a pathology report from Dr. Kokila S. Vasanawala, dated November 7, 2002, with a diagnosis of papillary transitional cell carcinoma of the bladder; a report on whole body bone scan from Dr. Mihai Iancu, dated January 17, 2003, with a diagnosis of metastatic bone cancer; a pathology report from Dr. Leena Shroff, dated November 7, 2005, with a diagnosis of adenocarcinoma of the right upper lung lobe; a consultation report from Dr. James A. Corwin, dated November 15, 2002, with the diagnosis of "widespread metastatic disease" including the bone; and a pathology report from Dr. Terry R. Burns, dated January 16, 2007, with a diagnosis of metastatic adenocarcinoma of the liver.

The employee's death certificate states that he died on , at the age of 74 years, and that there was no surviving spouse.

[Claimant #1] submitted evidence in support of her status as the common-law wife of the employee. She submitted a letter dated August 22, 2009, which enclosed a certified copy of a Final Decree of Divorce between **[Claimant #1]** and **[Claimant #1's ex-husband]** which changed her name to **[Claimant #1]** and a Marital Settlement Agreement between **[Employee]** and **[Employee's ex-wife]** issued by the Clark County, Nevada District Court on November 10, 1992. She also submitted a letter dated , in which she detailed her relationship with the employee beginning on , in the State of , when she and the employee exchanged vows at her sister's home in , and continuing until the employee's death on . She describes in the letter that she and the employee lived together in for several years after exchanging vows until they went to other states to find work. She related that they returned to , in October 2000 and lived there together until the employee's death. She also submitted numerous documents showing she and the employee engaged in joint financial transactions, including applying for credit accounts and holding title real and personal property together. The Form EE-1 signed by the employee states she is his dependent and common-law wife. **[Claimant #2]** submitted a written statement on September 21, 2009, that he knew the employee and **[Claimant #1]** to have been together since 1983 and that he regarded them as married until she told him they were not. Numerous signed statements were submitted from third parties, including non-relatives, to the effect that the employee and **[Claimant #1]** were considered husband and wife. **[Claimant #2]** submitted his birth certificate which shows that he is a biological child of the employee born on October 25, 1966. His mother's name is shown as **[Employee's ex-wife]**.

On April 6, 2010, the district office issued a decision recommending that the claim of **[Claimant #1]** for survivor benefits based on the employee's conditions of bladder cancer, lung cancer and liver cancer be denied under Part B of EEOICPA. The basis for the recommendation was the district office's conclusion that the probability of causation (PoC) that the employee's bladder cancer and liver cancer were related to his exposure to radiation during his covered employment was less than the 50% threshold PoC required for compensation under Part B of EEOICPA. The district office also concluded that **[Claimant #1]** was the surviving spouse of the employee under Part B based on its determination that she was married to him as his common-law spouse under the laws of the State of Texas on the date of the employee's death and for at least one year prior to that date. The district office also recommended that the claim of **[Claimant #2]** for survivor benefits based on the employee's condition

of lung cancer be denied under Part B. The basis for the decision was the conclusion that he did not qualify as an eligible survivor of the employee under Part B. The district office deferred making a decision on both of the claims for survivor benefits under Part E of EEOICPA. Accompanying the recommended decision was a letter explaining the claimants' rights and responsibilities with regard to findings of fact and conclusions of law contained in the recommended decision.

On April 28, 2010, FAB received an undated letter from **[Claimant #2]** objecting to the decision issued by the district office on April 6, 2010. On May 7, 2010, FAB sent a letter acknowledging receipt of **[Claimant #2]**'s letter of objection and advising him that if he had additional evidence for FAB to consider prior to issuance of a final decision, he should submit that evidence by June 7, 2010. The claim file does not show that he submitted any additional evidence in response. His letter of objection is part of the evidence of record. His objections were as follows:

He stated he is the son of the employee and the only living survivor of the employee. He is in prison, he was diagnosed with hepatitis C in October 2005, and he cannot work in the food or culinary arts industries in which he has been trained because of his medical condition. He stated he intended to file a claim for benefits under Part E only and not under Part B. He stated his authorized representative was supposed to get medical records in support of his claim that he was incapable of self-support at the time of his father's death, and that is the reason he asked the district office to grant a sixty-day extension of time to respond to its letter dated . He claimed **[Claimant #1]** forced his father to sign documents while he was sick acknowledging her as his common-law wife. He concluded that he believes he is the one entitled to receive any benefits available under EEOICPA on account of his father.

On July 9, 2010, FAB received a signed statement from **[Claimant #1]** that neither she nor anyone else has filed for or received any settlement or award from a lawsuit related to the employee's exposure to toxic substances or filed for or received any payments, awards or benefits from a state workers' compensation claim based on the employee's lung cancer and that she has never pled guilty to or been convicted of fraud in connection with an application for or receipt of any federal or state workers' compensation benefits.

Based on an independent review of the evidence of record, the undersigned hereby makes the following:

FINDINGS OF FACT

1. On February 1, 2005, **[Employee]** filed a claim for benefits under EEOICPA for bone cancer, bladder cancer and kidney failure resulting from his employment at a DOE facility.
2. The employee worked for REECo, a DOE contractor, at the Nevada Test Site, a DOE facility, from August 11, 1982 until March 15, 1991, from August 18, 1981 until September 21, 1981, and from October 23, 1970 until September 22, 1972. The employee worked for an aggregate of at least 250 work days at the Nevada Test Site between January 1,1963 and December 31, 1992.
3. The employee was diagnosed with bladder cancer on November 7, 2002, metastatic bone cancer on January 17, 2003, lung cancer on November 7, 2005, and adenocarcinoma of the liver on January 16, 2007. These diagnoses were at least five years after the employee's first exposure during covered employment.
4. The employee died on February 3, 2007, at the age of 74 years.
5. **[Claimant #1]** and the employee exchanged vows before others and entered into a common-law

marriage on July 5, 1993 in Texas which continued until the employee's death on February 3, 2007. During that period of time they lived together in and represented to others in that they were married to each other. **[Claimant #1]** was married to the employee on the date of his death and for at least one year prior to the employee's death.

6. **[Claimant #2]** was born on October 25, 1966. He is a biological child of the employee. He is 43 years of age. He is not the recognized natural child or adopted child of **[Claimant #1]**.

7. **[Claimant #1]** stated that neither she nor anyone else has filed for or received any settlement or award from a lawsuit related to the employee's exposure to toxic substances or filed for or received any payments, awards or benefits from a state workers' compensation claim based on the employee's lung cancer and that she has never pled guilty to or been convicted of fraud in connection with an application for or receipt of any federal or state workers' compensation benefits.

Based on these facts, the undersigned makes the following:

CONCLUSIONS OF LAW

This final decision, and the district office decision issued April 6, 2010, addresses **[Claimant #2]**'s claim for benefits under Part B of EEOICPA only. It does not address his claim for benefits under Part E. His objections related to his incapacity for self-support relate only to his eligibility as a surviving child under Part E and are not relevant to the determination whether he is an eligible child under Part B. The district office may have been unaware he did not want to pursue a claim under Part B. Regardless, it was proper for the district office to address whether he is an eligible survivor of the employee under Part B of EEOICPA.

In order for the employee's son to be eligible as a surviving child of the employee under Part B, he must be a minor on the date Part B benefits are paid and not the recognized natural child or adopted child of **[Claimant #1]**. That is because FAB has determined that **[Claimant #1]** qualifies under Part B as a surviving spouse of the employee based on her common-law marriage to the employee. His allegation that **[Claimant #1]** forced the employee to sign documents is not supported by any evidence and is contradicted by his own statement submitted to the district office on September 21, 2009. It is also contradicted by the numerous documents and written statements from other individuals submitted by **[Claimant #1]**. His allegation is not credible and is insufficient to change the conclusion by FAB that **[Claimant #1]** and the employee were in a valid common-law marriage under the laws of Texas and she is the eligible surviving spouse of the employee.

Eligibility for EEOICPA compensation based on cancer may be established by demonstrating that the employee is a member of the Special Exposure Cohort (SEC) who contracted a specified cancer after beginning employment at a DOE facility (in the case of a DOE employee or DOE contractor employee). 42 U.S.C. §§ 7384l(9)(A), 7384l(14)(A).

On April 25, 2010, the Secretary of Health and Human Services designated a class of employees as an addition to the SEC under § 7384l(14)(C) of EEOICPA. This new class included all employees of DOE, its predecessor agencies, and its contractors and subcontractors who worked at the Nevada Test Site from January 1, 1963 through December 31, 1992, for a number of work days aggregating at least 250 work days, occurring either solely under this employment or in combination with work days within the parameters established for one or more other classes of the SEC. This designation became effective on . *See* EEOICPA Bulletin No. 10-13 (issued). This addition to the SEC was not in effect when the district office issued its decision recommending that the claims be denied under Part B.

The employee worked for an aggregate of at least 250 work days for a DOE contractor at the Nevada Test Site between and . The totality of evidence therefore demonstrates that the employee qualifies as a member of the SEC.

The employee was diagnosed with bladder cancer on November 7, 2002, metastatic bone cancer on , lung cancer on , and metastatic liver cancer on January 16, 2007 . Those diagnoses occurred more than five years after he began employment at a covered facility. Lung cancer and bone cancer are specified cancers when diagnosed after first exposure, as they were in his case. 20 C.F.R. § 30.5(ff)(2), (3). Bladder cancer is also a specified cancer when diagnosed more than five years after first exposure, as it was in his case. 20 C.F.R. § 30.5(ff)(5)(iii)(K). As a member of the SEC who was diagnosed with a specified cancer, the employee is a "covered employee with cancer." 42 U.S.C. § 7584l(9). The employee's liver cancer is not a specified cancer because it was diagnosed as a metastatic cancer. Liver cancer is a specified cancer only when it is a primary cancer. 20 C.F.R. § 30.5(iii)(O).

A covered employee, or the survivor of that employee, shall receive compensation for the disability or death of that employee from that employee's occupational illness in the amount of $150,000.00. The evidence of record establishes that the employee is deceased. Part B provides that where a covered employee is deceased at the time benefits are to be paid, payments are to be made to the employee's eligible surviving spouse if that person is living. 42 U.S.C. § 7384s(e)(1)(A). The eligible spouse of an employee is the husband or wife of the employee who was married to the employee for at least one year immediately before the death of the employee. 42 U.S.C. § 7384s(e)(3)(A). The Act does not define marriage, so the Division of Energy Employees Occupational Illness Compensation (DEEOIC) looks to the law of the most applicable state to determine whether a claimant was married to the employee. Federal (EEOICPA) Procedure Manual, Chapter 2-1200.5.b(2) (August 2009). If state law recognizes the existence of a marital relationship, that relationship must be recognized by DEEOIC in its adjudication of EEOICPA survivor claims. Common-law Marriage Handbook, p. 10 (April 2010).

[Claimant #1] claimed to be the surviving spouse of the employee based on a common-law marriage entered into by her and the employee in Texas. The undersigned concludes the law of is the most applicable law to use in determining whether **[Claimant #1]** was married to the employee. recognizes common-law marriages contracted within its borders when three elements are satisfied concurrently. Those elements are: (1) the parties agreed to be married; (2) after the agreement, they lived together in as husband and wife; and (3) they held themselves out to others as husband and wife. Common-law Marriage Handbook, Appendix p. 9 (April 2010). The undersigned has considered the totality of the evidence including the 10-page letter submitted by **[Claimant #1]** describing her relationship with the employee, the numerous financial, legal and other documents she submitted, and the statements of numerous third parties. I find the totality of the evidence establishes that **[Claimant #1]** and the employee agreed to enter into a common-law marriage on July 5, 1993, that after entering into that agreement they lived together in Texas as husband and wife for two periods of time (from July 5, 1993 until approximately January 1, 1996 and from October 2000 until the employee's death on February 3, 2007), and that during those periods of time they held themselves out to others as husband and wife. I therefore find that **[Claimant #1]** is the eligible surviving spouse of the employee.

Under Part B of the Act, if there is an eligible surviving spouse of the employee, then payment shall be made to such surviving spouse unless there is also a child[2] of the employee who is not a recognized natural child or adopted child of the surviving spouse and who is a minor at the time of payment. 42 U.S.C. § 7384s(e)(1)(F). The evidence establishes that **[Claimant #2]** is a biological child of the employee and not a recognized natural child or adopted child of **[Claimant #1]**. Accordingly, because he is not also a minor, I find that he is not an eligible surviving child of the employee and his claim for

survivor benefits based on the employee's condition of lung cancer under Part B of the Act is denied.

Therefore, **[Claimant #1]** is the only person to whom compensation may be paid under Part B of EEOICPA. Her claim for survivor benefits based on the employee's conditions of bladder cancer and lung cancer under Part B is approved for compensation in the amount of $150,000.00. As the maximum benefits provided for under Part B are being paid to her based on the employee's conditions of bladder cancer and bone cancer and there is no possible benefit to her in adjudicating her claim for the employee's condition of metastatic liver cancer, her claim for survivor benefits based on the employee's condition of metastatic liver cancer under Part B is denied.

The statute provides that medical benefits should be provided to a covered employee with an occupational illness for the treatment of that covered illness. These benefits are retroactive to the employee's application date. The evidence of record establishes that the employee is a covered employee with the occupational illnesses of bladder cancer and bone cancer under Part B. He filed a claim for benefits based on bladder cancer and bone cancer prior to his death. He is entitled to medical benefits for treatment of bladder cancer and bone cancer beginning February 1, 2005 and ending . Accordingly, the Estate of **[Employee]** is awarded medical benefits for the employee's condition of bladder cancer and bone cancer beginning February 1, 2005 and ending February 3, 2007.

A decision on the claims of **[Claimant #1]** and **[Claimant #2]** for survivor benefits under Part E of EEOICPA is deferred pending further development by the district office.

William B. Talty

Hearing Representative

Final Adjudication Branch

[1] The Nevada Test Site is a covered DOE facility beginning in 1951 to the present. Reynolds Electrical & Engineering Company (REECo) was a DOE contractor there from 1952 to 1995. *See* Department of Energy's weblisting at: http://www.hss.energy.gov/HealthSafety/FWSP/Advocacy/faclist/findfacility.cfm (verified by FAB on July 7, 2010).

[2] The statutory definition for the term "child" has been interpreted for the purposes of EEOICPA as meaning a biological child, adopted child or stepchild of an individual. *See* EEOICPA Circular No. 08-08 (issued September 23, 2008).

EEOICPA Fin. Dec. No. 10003238-2005 (Dep't of Labor, October 28, 20bu05)

NOTICE OF FINAL DECISION

This is a decision of the Final Adjudication Branch (FAB) 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 Act). For the reasons set forth below, your claims are accepted.

STATEMENT OF THE CASE

On February 7, 2005, **[Claimant #1]** filed a Request for Review by Medical Panels form based on the colon cancer of **[Employee]**, hereinafter referred to as "the employee." On February 11, 2005, **[Claimant #2]** filed a Request for Review by Medical Panels form. A pathology report shows the

employee was diagnosed with colon cancer on April 29, 1991. The employee's death certificate shows that the employee died on May 15, 1991, as a consequence of colon cancer.

Prior to your filing, the employee's spouse at the time of his death, **[Employee's Spouse]**, filed a form EE-2, Claim for Survivor Benefits under the EEOICPA. On January 28, 2003, the Final Adjudication Branch issued a final decision awarding **[Employee's Spouse]** $150,000 on the basis of the employee's colon cancer since he was a member of the Special Exposure Cohort.
You submitted the death certificate of **[Employee's Spouse]**, showing she died on October 17, 2004. You also submitted birth certificates showing **[Claimant #1]** was born on April 5, 1972, and **[Claimant #2]** was born on May 25, 1974. In addition, you submitted documentation showing **[Claimant #1]** was a full-time student at the time of the employee's death. Although there was a lapse of several months when she was not enrolled in full-time studies, **[Claimant #1]** explained that the lapse was due to circumstances beyond her control, namely she had to wait for an opening at the institution in which she subsequently enrolled at her earliest opportunity.
On August 8, 2005, the Seattle district office received written confirmation from both of you stating that neither you nor the employee had received any settlement or award from a lawsuit or workers' compensation claim in connection with the accepted condition and that there were no other children of the employee who were covered under § 7385s of the Act.

Since the employee had five other children, the Seattle district office contacted these children by telephone and in writing. Each of the children responded by stating that they did not fit any of the following categories at the time of the employee's death:
A) had not attained the age of 18 years;
B) had not attained the age of 23 years and was a full-time student who had been continuously enrolled as a full-time student in one or more educational institutions since attaining the age of 18 years; or
C) had been incapable of self-support.
42 U.S.C. § 7385s-3(d).
On September 6, 2005, the Seattle district office issued a recommended decision, concluding that you are entitled to survivor benefits in the amount of $62,000 each for a total of $125,000 for the employee's death due to colon cancer.
On September 19, 2005, the Final Adjudication Branch received written notification that you both waived any and all objections to the recommended decision.

FINDINGS OF FACT

1) You each filed a Request for Review by Medical Panels form based on the employee's colon cancer.

2) On January 28, 2003, the Final Adjudication Branch issued a final decision awarding the employee's spouse at the time of his death $150,000 on the basis of the employee's colon cancer since he was a member of the Special Exposure Cohort.[1]
3) A pathology report shows the employee was diagnosed with colon cancer on April 29, 1991.

4) The employee's death certificate shows that the employee died as a consequence of colon cancer.

5) You are the natural children of the employee. At the time of the employee's death, **[Claimant #2]** had not attained the age of 18 and **[Claimant #1]** had not attained the age of 23 and was a full-time student who had been continuously[2] enrolled as a full-time student since attaining the age of 18.

6) You both meet the definition of a “covered” child.

7) On August 15, 2005, the Jacksonville district office issued a recommended decision.

CONCLUSIONS OF LAW

The Final Adjudication Branch has reviewed the record and the recommended decision of August 15, 2005, and makes the following conclusions.

The employee was an employee of a DOE contractor at a DOE facility, as defined under section 7384 of the Act. 42 U.S.C. §§ 7384l(11), 7384l(12).

The determination under § 7384 of the Act that a DOE contractor employee is entitled to compensation under that part for an occupational illness is treated as a determination that the employee contracted that illness through exposure at a DOE facility. 42 U.S.C. § 7385s-4(a). Therefore, the employee is a covered DOE contractor employee with a covered illness. 42 U.S.C. §§ 7385s(1), 7385s(2).

You are the covered children of the deceased employee, and the employee’s death certificate shows that the employee died as a consequence of lung cancer. 42 U.S.C. § 7385s-3(d)(2). Therefore, you are entitled to death benefits in the amount of $62,000 each for a total of $125,000 for the employee’s death due to colon cancer. 42 U.S.C. §§ 7385s-3(a)(1), 7385s-3(c)(2).

Jacksonville, FL

Mark Stewart

Hearing Representative

[1] As stated in the December 16, 2002 recommended decision, the employee was employed at the K-25 gaseous diffusion plant in Oak Ridge, Tennessee, from July 1, 1970 to June 28, 1985, and he wore a dosimetry badge.

[2] Although there was a lapse in her enrollment, as explained earlier in the decision the lapse was outside of her control, and she enrolled at her earliest opportunity.

EEOICPA Fin. Dec. No. 10012834-2006 (Dep’t of Labor, February 21, 2007)

NOTICE OF FINAL DECISION

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

STATEMENT OF THE CASE

On September 10, 2003, the FAB issued a final decision which concluded that your father was a member of the Special Exposure Cohort based on his employment at the Portsmouth Gaseous Diffusion Plant (GDP), a Department of Energy (DOE) facility, and that he was diagnosed with colon cancer after beginning that employment. For those reasons, the FAB concluded that you, as a surviving

child, were entitled to compensation under Part B.

On March 13, 2003, you filed a DOE F 350.2 (Request for Review by Physicians Panel) based on colon cancer having been caused by your father's work at a DOE facility. A copy of your father's death certificate shows that his death was due to metastatic mucinous adenocarcinoma. A copy of your father's autopsy report indicates that colon cancer had metastasized to the peritoneum, omentum, intestines, stomach and liver.

You submitted a copy of your birth certificate which shows that your date of birth is April 23, 1947. A copy of your father's death certificate shows that he was born on August 16, 1922, and died on November 26, 2002, and that he was widowed at the time of his death.

The Social Security Administration (SSA) provided an itemized statement of earnings for the period of January 2000 to December 2004 which shows that you had no earnings reported for that period. A letter from the Department of Veteran Affairs (DVA), Cleveland Regional Office, dated April 21, 2006, shows that you are entitled to receive benefits at the 100% rate, effective December 1, 1997, and that such entitlement continued to the date of this letter. Copies of DVA Rating Decisions, dated March 23, 1995 and April 29, 1997, show that you were found to be permanently and totally disabled from December 30, 1975, and that post-traumatic stress disorder (PTSD) was found to be totally disabling from March 9, 1994.

On January 10, 2007, the district office issued a recommended decision which concluded that because your father was a DOE contractor employee who was entitled to compensation under Part B of the Act, it was established that he contracted a covered illness through exposure to radiation at a DOE facility. The recommended decision also concluded that his death was at least as likely as not aggravated, contributed to, or caused by that radiation. The district office found that, at the time of your father's death, you were incapable of self-support. For those reasons, the district office concluded that you, as his surviving child, are entitled to $125,000.00 under Part E.

On January 22, 2007, the FAB received written notification that you waive any and all objections to the recommended decision. After considering the recommended decision and all the evidence in the case file, the FAB hereby makes the following:

FINDINGS OF FACT

1. You filed a claim for benefits on March 13, 2003.

2. By final decision dated September 10, 2003, the FAB determined that your father was employed at a DOE facility and was entitled to compensation under Part B for an occupational illness, colon cancer, which was diagnosed after the beginning of that employment.

3. Your father died on November 26, 2002, due to metastatic mucinous adenocarcinoma which had originated in the colon.

4. You are a surviving child of **[Employee]**, and were incapable of self-support at the time of his death.

Based on the above-noted findings of fact in this claim, the FAB hereby makes the following:

CONCLUSIONS OF LAW

The term "covered child" means a child of the employee who, at the time of the employee's death, was under the age of 18 years, or under the age of 23 years and a full-time student who was continuously enrolled in an educational institution since attaining the age of 18 years, or incapable of self-support. *See* 42 U.S.C. § 7385s-3(d)(2). You were 54 years old at the time of your father's death. Based on information provided by SSA and DVA, you had not been paid wages for at least the period of 2000 to 2004 and you were found to be totally (100%) disabled due to PTSD and other disabling conditions since at least March 9, 1994 and continuing until the time of your father's death on November 26, 2002.

Based on the final decision of September 10, 2003, I have determined that, as provided by 42 U.S.C. § 7385s-4(a), colon cancer (resulting in metastatic mucinous adenocarcinoma) was contracted by your father through exposure to a toxic substance at a DOE facility. The evidence of record establishes that his death was at least as likely as not aggravated, contributed to, or caused by that exposure. For those reasons, I conclude that, as his surviving child, you are entitled to $125,000.00 as provided by 42 U.S.C. § 7385s-3(a)(1).

Cleveland, OH

Tracy Smart, Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 10017360-2006 (Dep't of Labor, August 22, 2006)

NOTICE OF FINAL DECISION

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 stated below, your claim for benefits under Part E of the Act is denied.

STATEMENT OF THE CASE

On April 22, 2002, you filed a claim under EEOICPA for benefits as a surviving child of **[Employee]**. A copy of your mother's death certificate shows that she died on October 18, 1999. A copy of your birth certificate shows that your date of birth is **[Claimant's date of birth]**.

On February 16, 2006, the Cleveland district office advised you of the criteria which must be met to establish that you are a "covered child" under Part E of the Act and requested that you submit documentation of your underlying condition and its severity at the time of you mother's death.

In response to a telephone call from you to the district office, your were sent another letter on February 22, 2006, requesting that you provide medical evidence from your treating physician that provides a history of your condition(s), to include the first date of diagnosis and the first date of disability.

On March 3, 2006, the district office received a letter from Dr. Henry Gupton, dated February 23, 2006,

in which he states that you have been his patient since 1991. He lists your medical problems as including diabetes mellitus, fibromyalgia, crippling arthritis with need for a wheelchair at times, walker and/or cane as well. Dr. Gupton states that you also suffer from hypothyroidism, GERD, hyperlipedemia, cataracts, back spasms, depression, restless leg syndrome, sleep disturbances, hypertension, osteoporosis, dependent edema, a knee replacement, and other joint problems. He states that you were definitely incapable of self-support in October 1999. Also received were treatment records for the period of May 20, 1998, to October 7, 1998, regarding moderately severe carpal tunnel syndrome of the left wrist. An open carpal tunnel release was performed on July 13, 1998. The final post-surgical report of October 7, 1998, indicates that you were doing very well and had full range of motion.

Also received on March 3, 2006, was a summary of FICA earnings, stamped by the Social Security Administration office in Oak Ridge, TN, for the years of 1968 through 1976.

Because Dr. Gupton's summary of your medical status and his opinion that you were incapable of self-support at the time of your mother's death was not corroborated by the submitted medical evidence, the district office sent you a letter on May 3, 2006, which discussed the evidence you had submitted and explained that the evidence did not address your status as of the date of your mother's death. You were asked to provide medical records for 1998 and 1999 that documented all of your medical conditions and their severity as of October 1999. You were also asked to provide evidence, if any, showing that any other government agency had found you to be disabled as of October 1999.

On May 17, 2006, the district office received over 80 pages of medical records, the majority of which address the period after the time of your mother's death. Records from the latter part of 1999 refer to your complaints of sore knees, elbows, and wrists, and of your being upset because of your mother's death. You were treated for an upper respiratory infection in December 1999. Records which refer to your use of a walker, wheelchair and/or motorized scooter are all from the period subsequent to your mother's death. In a letter dated May 17, 2006, the district office discussed the contents of these records and the need for you to submit documentation of the severity of your medical conditions proximate to October 1999. You were again requested to provide evidence, if any, showing that any other government agency had found you to be disabled as of October 1999. You were advised to provide the requested information by June 3, 2006. There is no indication in the record that you responded to that request.

On June 9, 2006, the district office recommended denial of your claim for compensation finding that you do not meet the criteria defining "covered child" under Part E.

FINDINGS OF FACT

1. You filed a claim for benefits as a surviving child of **[Employee]**.

2. Your mother died on October 18, 1999.

3. You were over the age of 23 years on the date of your mother's death.

4. You did not provide evidence sufficient to establish that you were incapable of self-support on the date of your mother's death.

CONCLUSIONS OF LAW

I have reviewed the June 9, 2006 recommended decision. I find that you have not filed any objections to the recommended decision and that the 60-day period for filing such objections has expired. *See* 20 C.F.R. §§ 30.310(a), 30.316(a).

The term "covered child" means a child of the employee who, at the time of the employee's death, was: under the age of 18 years; or under the age of 23 years and a full-time student who was continuously enrolled in an educational institution since attaining the age of 18 years; or incapable of self-support. *See* 42 U.S.C. § 7385s-3(d)(2).

The evidence of record shows that you were 60 years old at the time of your mother's death. The evidence of record is not sufficient to establish that you were incapable of self-support on your mother's date of death.

Therefore, your claim must be denied because the evidence does not establish that you meet the definition of a "covered child" as defined by 42 U.S.C. § 7385s-3(d)(2).

Cleveland, OH

Anthony Zona

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 10037246-2005 (Dep't of Labor, November 2, 2005)

NOTICE OF FINAL DECISION

This decision of the Final Adjudication Branch (FAB) concerns 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). Your claim for survivor benefits for your father's lung cancer under § 7385s of the Act is hereby denied.

STATEMENT OF THE CASE

On January 23, 2002, you filed Form EE-2, Claim for Survivor Benefits under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act), under § 7384u of the EEOICPA. You stated your father, the employee, a uranium worker, was born on November 30, 1904 and died on October 10, 1972. You stated that you had applied for an award under the Radiation Exposure Compensation Act.

On March 4, 2002, the Department of Justice verified that you had filed as the eligible surviving beneficiary of the employee and had been approved for an award for $100,000.00 under section 5 of the Radiation Exposure Compensation Act on December 12, 1994 for the medical condition of lung cancer.

On August 7, 2002, a Final Decision was issued awarding you monetary benefits in the amount of $50,000.00 under §7384u(e).

On June 28, 2005, you filed a claim for benefits under § 7385s of the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act. You were sent a letter asking whether you were under the age of 18 at the time of the employee's death; whether you were a full time student under the age of 23 at the time of the employee's death or regardless of age, whether you were incapable of self support at the time of the employee's death. This letter also requested that you provide a copy of your birth certificate, a copy of the adoption decree, a copy of the death certificate. You were asked to answer the above questions and submit the requested documents within 30 days of the date of the request.

On August 25, 2005, the district office received your signed statement which indicated that you were not under the age of 18 at the employee's death; you were not a full time student under the age of 23 at the time of the employee's death nor were you incapable of self support at the time of the employee's death. You did not submit your birth certificate, adoption decree, marriage certificate or the employee's death certificate.

On August 29, 2005, the Denver district office issued a recommended decision finding that you are the surviving beneficiary of the covered employee but that you were not eligible to receive compensation. The case was forwarded to the Final Adjudication Branch for review.

Pursuant to the regulations implementing the EEOICPA, a claimant has 60 days from the date of issuance of the recommended decision to raise objections to that decision to the Final Adjudication Branch. 20 C.F.R § 30.310(a). If an objection is not raised during the 60-day period, the Final Adjudication Branch will consider any and all objections to the recommended decision waived and issue a final decision affirming the district office's recommended decision. 20 C.F.R. § 30.316(a).

On October 6, 2005, the Final Adjudication Branch received your written notification waiving any and all objections to the recommended decision.

After considering the record of the claim forwarded by the district office, the Final Adjudication Branch makes the following findings:

FINDINGS OF FACT

1. On June 28, 2005, you filed for survivor benefits under § 7385s of the Act.

2. On March 4, 2002, the Department of Justice verified that you had filed as the eligible surviving RECA beneficiary of the employee and had been approved for an award under section 5 of the Radiation Exposure Compensation Act on December 12, 1994 for your father's medical condition of lung cancer.

3. On August 7, 2002, a Final Decision was issued awarding you monetary benefits in the amount $50,000.00.

4. The Department of Justice verified that you were the eligible surviving beneficiary of the employee and had been approved for an award under section 5 of the Radiation Exposure

Compensation Act for lung cancer.

5. You did not submit the employee's death certificate or your birth certificate, adoption decree or marriage certificate.

6. You submitted your signed statement that you were not under the age of 18 at the time of the employee's death, you were not a full time student under the age of 23 at the time of the employee's death nor were you medically incapable of self support at the time of the employee's death.

Based on the above noted findings of fact in this claim, the Final Adjudication Branch hereby also makes the following:

CONCLUSIONS OF LAW

1. The Final Adjudication Branch hereby finds the employee was a section 5 uranium worker pursuant to 42 U.S.C. § 7385s-5(c) and contracted a covered illness through exposure to a toxic substance at a section 5 mine or mill.

2. You are a section 5 payment recipient pursuant to 42 U.S.C. § 7385s-5(b).

3. You have not established you are the eligible surviving beneficiary pursuant to § 7385s-3(d) of the Act.

4. You are not entitled to monetary benefits for the employee's lung cancer pursuant to § 7385s of the Act.

Denver, Colorado

Joyce L. Terry

District Manager

Election for survivors under Part E

EEOICPA Fin. Dec. No. 105471-2009 (Dep't of Labor, October 8, 2009)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) on the above claim under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claim under Part B of EEOICPA for survivor benefits is denied. The claim under Part E for the employee's whole body impairment is accepted in the amount of $12,500.00.

STATEMENT OF THE CASE

On October 9, 2001, **[Employee]** filed a Form EE-1, claiming under Part B for his bladder cancer. Medical records, including pathology reports, confirmed that the employee was diagnosed with bladder

cancer on April 16, 1993, as well as a squamous cell carcinoma of the left ear on June 8, 1999, and squamous cell carcinoma of the right cheek on August 20, 2003.

The employee submitted a Form EE-3, on which he stated that he wore a dosimetry badge while working for the Union Carbide Corporation, a Department of Energy (DOE) contractor, from September 3, 1945 to July 31, 1981. DOE confirmed the employee's employment for Carbon and Carbon Chemicals Company (a former name of Union Carbide) at the Oak Ridge Gaseous Diffusion Plant (K-25) in Oak Ridge, Tennessee, from September 17, 1945 to January 28, 1947, and from July 25, 1947 to July 31, 1981.

On July 3, 2002, FAB issued a final decision accepting the employee's claim under Part B as a member of the Special Exposure Cohort (SEC) with bladder cancer, and awarded him $150,000.00 and medical benefits for that illness. On January 17, 2006, FAB issued another final decision under Part B, accepting the employee's claim and awarding him medical benefits for his squamous cell carcinomas of the left ear and right cheek on the ground that those cancers were "at least as likely as not" (a 50% or greater probability) related to radiation exposure. And on July 11, 2008, FAB issued a final decision accepting the employee's claim and awarding him medical benefits under Part E of EEOICPA for the same conditions—bladder cancer and squamous cell carcinoma of the left ear and right cheek.

On July 30, 2008, the employee requested impairment benefits for his covered illnesses under Part E of EEOICPA. However, he died on November 17, 2008, prior to the adjudication of his impairment claim.

On December 11, 2008, **[Claimant]** submitted a Form EE-2 to the district office, claiming for survivor benefits under Parts B and E of EEOICPA. In support of her claim, **[Claimant]** submitted a marriage certificate showing that she married the employee on April 10, 1950, and the employee's death certificate showing his cause of death as fractures of the first and second cervical vertebrae. The death certificate also indicated that **[Claimant]** was the employee's spouse on the date of his death.

As specified under Part E, permanent impairment is defined as a decreased function in a body part(s) or organ(s) established by medical evidence as the result of the covered employee contracting a covered illness through exposure to a toxic substance at a DOE facility. In a letter dated May 16, 2009, **[Claimant]** requested that the district office proceed with the impairment portion of her claim. By letter dated July 13, 2009, **[Claimant]**'s authorized representative requested that the impairment rating be performed by a district medical consultant (DMC). Therefore, the case was referred to a DMC for an impairment rating. In his report dated August 3, 2009, the DMC opined that the employee had reached maximum medical improvement for his conditions of bladder and skin cancers and had a whole body impairment rating for the accepted conditions of bladder cancer and skin cancers of 5%.

On September 2, 2009, the district office issued a recommended decision, concluding that under Part E, **[Claimant]** is entitled to $12,500.00 for the employee's 5% whole body impairment due to his bladder cancer and skin cancers. The total percentage points were multiplied by $2,500 to calculate the amount of the recommended award. The district office also recommended denial of **[Claimant]**'s claim under Part B since the employee had previously received the compensation benefits payable under that Part.

On September 9, 2009, the Final Adjudication Branch received written notification that **[Claimant]** waived any and all objections to the recommended decision. After reviewing the evidence in the case file, FAB hereby makes the following:

FINDINGS OF FACT

1. On October 9, 2001, the employee filed a claim for benefits under EEOICPA.

2. The employee was diagnosed with bladder cancer, squamous cell carcinoma of the left ear, and skin cancer of the right cheek.

3. FAB issued a final decision under Part B that awarded the employee the full amount of monetary benefits payable for his bladder cancer, squamous cell carcinoma of the left ear and skin cancer of the right cheek. It also issued a final decision awarding the employee medical benefits under Part E for those same conditions.

4. The employee filed a request for impairment benefits, but died prior to the adjudication of that request. His cause of death was listed as cervical fractures of that C1 and C2 vertebrae.

5. **[Claimant]** filed a claim for survivor benefits and established that she was the employee's spouse at the time of death and had been married to him for at least one year prior to that date.

6. The medical evidence establishes that prior to his death, the employee had reached maximum medical improvement and had a whole body impairment due to his bladder and skin cancers of 5%.

Based on the above-noted findings of fact, FAB hereby also makes the following:

CONCLUSIONS OF LAW

The regulations provide that within 60 days from the date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision and whether a hearing is desired. 20 C.F.R. § 30.310(a) (2009). If the claimant does not file a written statement that objects to the recommended decision and/or requests a hearing within the period of time allotted, or if the claimant waives any objections to the recommended decision, FAB may issue a decision accepting the recommendation of the district office. 20 C.F.R. § 30.316(a).

[Claimant] meets the definition of a survivor under Part B and Part E of the Act. 42 U.S.C. §§ 7384s(e)(3)(A), 7385s-3(d)(1). However, with respect to her survivor claim under Part B, the record establishes that the employee already received the lump-sum benefit of $150,000.00 available under Part B. Therefore, because the lump-sum available under Part B has already been paid, **[Claimant]** is not entitled to any additional compensation under that Part, and her claim for compensation is denied. 42 U.S.C. § 7384s(a).

As for her claim under Part E of EEOICPA, if a covered Part E employee dies after filing a claim but before monetary benefits under Part E are paid, and his or her death was solely caused by a non-covered illness or illnesses, then the survivor may choose the monetary benefits that would otherwise have been payable to the covered Part E employee if he or she had not died prior to receiving payment. Under those circumstances, the survivor would not be entitled to the $125,000.00 lump-sum survivor payment under Part E because the employee's death would not have been caused by the covered illness(es). 42 U.S.C. § 7385s-1(2)(B).

As found above, the employee in this matter died as a result of fractures of C1 and C2 vertebrae, which were not related to his work-related exposure to toxic substances. Therefore, **[Claimant]** is entitled to the amount of contractor employee compensation that the employee would have received if his death had not occurred before compensation was paid, in this case, his impairment benefits.

The amount of contractor employee compensation under Part E for a covered DOE contractor employee is based, in part, on a determination of the employee's minimum impairment rating in accordance with the Fifth Edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, expressed as a number of percentage points. The employee (or the survivor in this case) is eligible to receive an amount equal to $2,500 multiplied by the number of percentage points. 42 U.S.C. §§ 7385s-1(2)(B), 7385s-2(b).

The medical evidence shows that the employee had a whole body impairment of 5% as result of his accepted covered illnesses. **[Claimant]**, standing in the shoes of the employee following her election, is therefore entitled to monetary benefits of $12,500.00 for impairment due to the employee's bladder cancer and skin cancers. *See* 42 U.S.C. §7385s-2(a)(2).

Jacksonville, FL

Jeana F. LaRock

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 10047228-2008 (Dep't of Labor, August 28, 2008)

NOTICE OF FINAL DECISION

This decision of the Final Adjudication Branch (FAB) concerns your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, your Part E claim for impairment benefits due to the employee's skin cancers has been approved for $40,000.00. You have also been approved for the employee's medical expenses for his skin cancers from the date of the employee's filing (August 15, 2001) to the date of his death (January 1, 2006).

STATEMENT OF THE CASE

On August 15, 2001, **[Employee]**, hereinafter referred to as the employee, filed an EE-1 in which he claimed for benefits under EEOICPA for basal cell carcinoma (BCC) and a deteriorating liver. On November 26, 2001, the employee filed a Request for Review by Medical Panels/Physician Panel form for the same conditions with the Department of Energy (DOE). A death certificate verifies the employee's death on January 1, 2006. On January 30, 2006, you filed a Form EE-2 in which you claimed for survivor benefits, based on the employee's BCC of the upper mid-chest, squamous cell carcinoma (SCC) *in situ* of the right sideburn, SCC of the left ear, and pancytopenia.
In cases where the employee dies due to non-covered illnesses after filing a claim under Part E of EEOICPA but before payment is issued, the survivor may elect to receive the amount the employee would have received under Part E if he or she had not died prior to payment. You chose to do so in a

letter received June 16, 2008.
While the employee did not specifically claim SCC, he did submit evidence supporting the diagnosis of SCC and a National Institute for Occupational Safety and Health (NIOSH) dose reconstruction was begun that incorporated both SCC and BCC prior to his death. This is sufficient to justify inclusion of the SCC in the impairment calculations.
On May 10, 2006, the FAB issued a final decision accepting your Part B claim for BCC of the upper chest, BCC of the right sideburn, and SCC *in situ* of the left helical rim. The decision found that the employee was diagnosed with BCC of the chest on November 23, 1992, BCC of the right sideburn on November 8, 1994, and SCC *in situ* of the left helical rim on January 19, 2000. The decision found that the employee had covered employment at the Oak Ridge Gaseous Diffusion Plant from December 28, 1945 to January 19, 1976, and at the Paducah Gaseous Diffusion Plant from January 20, 1976 to October 31, 1981. Personnel records verified that the employee worked for DOE contractor Union Carbide during his covered employment.
The employee's death certificate identified the only cause of death as gastrointestinal hemorrhage and a date of death of January 1, 2006. The certificate identifies you as the employee's spouse at the time of death. No evidence was submitted supporting the claimed conditions contributing or causing the employee's death. A marriage certificate verifies you were married to the employee for more than a year prior to his death.
A December 12, 2007 report by a District Medical Consultant (DMC) determined that toxic exposure at the covered facilities was not a significant factor in aggravating, contributing to, or causing the employee's death.
On June 16, 2008, the district office received your request for an impairment evaluation. Attached to the request was medical documentation to assist a DMC in making an impairment evaluation.
The district office received the DMC's report dated July 25, 2008. Following review of the medical evidence, the DMC calculated the employee's whole body impairment due to the accepted conditions of BCC of the sideburn and chest and SCC of the left ear in accordance with the 5th edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, and mentioned specific tables and page numbers of the *Guides* in support of the rating. The DMC also concluded that the employee was at maximum medical improvement. The DMC determined that the employee's whole body rating was 16% for the accepted conditions of three skin cancers.
On August 8, 2008, the Jacksonville district office issued a recommended decision finding that you are entitled to $40,000.00 in benefits for the employee's 16% whole body impairment due to his accepted conditions of BCC of the sideburn and chest and SCC of the left ear. The total percentage points of 16% were multiplied by $2,500 to calculate the amount of the award.[1] Attached to the recommended decision was a notice of claimant rights, which stated that you had 60 days in which to file an objection to the recommended decision and/or request a hearing.

On August 15, 2008, the FAB received written notification that you waived any and all objections to the recommended decision.

On August 15, 2008, you indicated that you had not received any settlement or award from a lawsuit or workers' compensation claim in connection with the accepted condition and that you had neither pled guilty to nor been convicted of workers' compensation fraud.

Following an independent review of the evidence in the file, the undersigned hereby makes the following:

FINDINGS OF FACT

1. You filed a claim for survivor benefits under Part E of EEOICPA based on BCC of the upper mid-chest, SCC *in situ* of the right sideburn, SCC of the left ear, and pancytopenia.

2. Your claim for the employee's BCC of the upper chest, BCC of the right sideburn, and SCC *in situ* of the left helical rim was previously accepted for medical benefits in a final decision issued by FAB under Part B on May 22, 2006. The accepted cancer of the sideburn was BCC rather than the claimed SCC.

3. The employee reached maximum medical improvement of his skin cancers at his death.

4. The DMC calculated a whole body impairment of 16% due to the employee's skin cancers.

5. Exposure to a toxic substance at the covered facilities where the employee worked was not a significant factor in aggravating, contributing to, or causing the employee's death. Also, the claimed illnesses did not cause or contribute to the employee's death.

6. You were married to the employee for over a year prior to his death and were married to him at the time of his death.

7. You elected to receive the amount the employee would have received under Part E if he had not died of a non-covered illness prior to payment.

Based on the above-noted findings of fact, the FAB hereby makes the following:

CONCLUSIONS OF LAW

The implementing regulations provide that within 60 days from the date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision and whether a hearing is desired. 20 C.F.R. § 30.310(a). If the claimant does not file a written statement that objects to the recommended decision and/or requests a hearing within the period of time allotted or if the claimant waives any objections to the recommended decision, the FAB may issue a decision accepting the recommendation of the district office. 20 C.F.R. § 30.316(a).

A determination under Part B that a DOE contractor employee is entitled to compensation under that Part for an occupational illness shall be treated for purposes of Part E as a determination that the employee contracted that illness through exposure at a DOE facility. 42 U.S.C. § 7385s-4(a).

The term "covered spouse" means a spouse of the employee who was married to the employee for at least one year immediately before the employee's death. 42 U.S.C. § 7385s-3(d)(1). You are the employee's covered spouse.

In a case in which the employee's death occurred after the employee applied under Part E and before compensation was paid to the employee, and the employee's death occurred solely from a cause other than the covered illness of the employee, the survivor of that employee may elect to receive the amount of compensation that the employee would have received due to wage-loss and/or permanent impairment if the employee's death had not occurred before compensation was paid to the employee. 42 U.S.C. § 7385s-1(2)(B). You chose to receive the amount of impairment benefits the employee

would have received for his skin cancers.

I conclude that the employee reached maximum medical improvement and that he has been determined to have had a whole body impairment of 16% as a result of his skin cancers. The amount of impairment benefits payable under Part E for a covered DOE contractor employee is based on a determination of the minimum impairment rating of the employee, in accordance with the *Guides*, expressed as a number of percentage points. The employee receives an amount equal to $2,500.00 multiplied by the number of percentage points. 42 U.S.C. § 7385s-2(a)(1), (b).

Therefore, I conclude that you are entitled to $40,000 in monetary benefits for the employee's 16% whole body impairment due to his BCC of the upper chest, BCC of the right sideburn, and SCC *in situ* of the left helical rim. You are also entitled to reimbursement of the employee's medical expenses for his skin cancers from the date of the employee's filing (August 15, 2001) to the date of his death (January 1, 2006).

Jacksonville, FL

Jeana F. LaRock

Hearing Representative

Final Adjudication Branch

[1] 20 C.F.R. § 30.902 (2008).

EEOICPA Fin. Dec. No. 10055714-2007 (Dep't of Labor, April 11, 2007)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

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

STATEMENT OF THE CASE

On January 31, 2003, **[Employee]** (hereinafter referred to as "the employee") filed a claim for benefits under the Act for the conditions of throat, tongue, and larynx cancer. In a final decision dated April 16, 2003, the FAB accepted the employee's cancer of the pharynx with metastasis, and awarded the employee $150,000.00 and medical benefits for cancer of the pharynx and complications of that condition.

On May 26, 2006, a final decision was issued accepting the employee's claim for pharynx and lung cancer for medical benefits under Part E of the Act. Another final decision was issued on June 21, 2006, finding that the employee was entitled to an impairment award of $240,000 based on a 96% impairment rating for his pharynx cancer and lung cancer. However, the employee died on July 1, 2006, prior to the payment of the funds awarded for impairment. By Director's Order of August 25,

2006, the June 21, 2006 decision was vacated and the case was returned to the district office for further development of a survivor claim.

On July 24, 2006, you submitted a claim for survivor benefits under the Part E of the Act. In support of your claim for survivorship, you submitted your marriage certificate, showing you married the employee on February 6, 1981, and the employee's death certificate, showing that you were the employee's spouse on the date of death, July 1, 2006, and that the employee died of squamous cell carcinoma of the larynx, non-small cell adenocarcinoma of the left lower lobe of the lung, with metastasis.

On September 30, 2006, the district office issued a recommended decision that you are entitled to receive a lump-sum survivor award of $125,000.00.

Attached to the recommended decision was a notice of claimant rights, which stated that you had 60 days in which to file an objection to the recommended decision and/or request a hearing. On October 16, 2006, the FAB received your letter of objection and request for a hearing dated October 16, 2006. The hearing was held on December 12, 2006 in Birmingham , Alabama.

A claimant is allowed thirty days after the hearing is held to submit additional evidence or argument, and twenty days after a copy of the transcript is sent to them to submit any changes or corrections to that record. By letter dated December 22, 2006, the transcript was forwarded to you. No response was received.

OBJECTIONS

At the hearing, you testified that the Jacksonville district office issued a recommended decision to accept the employee's claim for impairment benefits in the amount of $240,000.00. The money was to be paid by electronic funds transfer (EFT) into an account held jointly by you and the employee. The account had been opened as a SouthTrust Bank account. SouthTrust and Wachovia completed a merger in October of 2005.

You provided testimony, supported by documents submitted by your attorney and the case record, that you completed an EN-20 form, and provided account information to the Department of Labor (DOL) with the account number **[Number deleted]**. Your son, **[Employee's child]**, faxed and over-night mailed the EN-20 form to the DOL on June 28, 2006. On June 29, 2006, the Treasury Department attempted to send the electronic funds transfer (EFT) but the EFT could not be completed. DOL notified you of this occurrence on that same day and requested that you provide new account information. On June 29, 2006, **[Employee's child]** again faxed and over-night mailed a new EN-20 form to the DOL. On the new EN-20, you provided the Wachovia account number **[Number deleted]**. The employee passed away on July 1, 2006. On or about July 6, 2006, the Treasury Department transmitted the funds to your account. DOL subsequently determined that the employee had died before the $240,000.00 was actually paid the second time, and the $240,000.00 EFT was removed from your account.

You testified that the only difference between the SouthTrust account number and the Wachovia account number is that the Wachovia number has a "1000" at the beginning and a "1" at the end; the middle "**[Number Deleted]**" is identical in both numbers. You stated that you continue to use the SouthTrust account number.

Both at the hearing and in a December 13, 2006 letter, your attorney argued that since the Treasury Department paid the money before the employee died, the receipt of the money is immaterial. He cited the Procedure manual at E-600(8)(a)(1) which states, "If a clamant is alive at the time a final decision is issued and is to be paid via an EFT, the EFT should not be cancelled if the claimant subsequently dies."

The issue here is whether you are entitled to receive the impairment award issued prior to the employee's death, but rejected by your bank.

Your attorney argues that the procedure manual actually states if a clamant is alive at the time a final decision is issued and is to be paid via an EFT, the EFT should not be cancelled if the claimant subsequently dies. The section of the Procedure Manual quoted by your attorney, in its entirety, states:

If a paper check has been mailed to the employee, the payment must be cancelled. The employee must be able to endorse the check. If the payment is made via electronic fund transfer (EFT), the payment should not be cancelled. For more information on cancellation procedures, refer to EEOICPA Bulletin No. 04-10.[1]

EEOICPA Bulletin Nos. 02-12 (issued July 31, 2002) and 04-10 (issued March 16, 2004) describe the payment process as beginning when payment is authorized by DEEOIC and ending either when the payment is received in the beneficiary's account, or when Treasury (or the beneficiary) cancels the payment. If Treasury cancels the payment, the National Office voids the payment record and a new payment process is initiated. Action Item No. 9 in Bulletin No. 04-10 states that "The District Director must determine whether a repayment to the current payee will be required. For example, if the payment is cancelled because the employee or claimant died before receipt, he/she is not going to be paid a lump sum."

Therefore, in accordance with the policies of the DEEOIC, since the employee did not receive the impairment payment prior to his death, a new determination must be made concerning your entitlement as a survivor.

After considering the recommended decision and all the evidence in the case file, the FAB hereby makes the following:

FINDINGS OF FACT

1. On January 31, 2003, the employee filed a claim for benefits under the Act for the conditions of throat, tongue, and larynx cancer.

2. In a final decision dated April 16, 2003, the FAB accepted the employee's cancer of the pharynx with metastasis, and awarded the employee $150,000.00 and medical benefits for cancer of the pharynx and complications of that condition.

3. On May 26, 2006, a final decision was issued accepting the employee's claim for pharynx and lung cancer for medical benefits under Part E of the Act.

4. A final decision was issued on June 21, 2006, finding that the employee was entitled to an impairment award of $240,000.00 based on a 96% impairment rating for his pharynx cancer and lung

cancer.

5. The employee died on July 1, 2006, prior to the payment of the funds awarded for impairment.

6. By Director's Order of August 25, 2006, the June 21, 2006 decision was vacated and the case was returned to the district office for further development of a survivor claim.

7. On July 24, 2006 you filed a claim for survivor benefits under the Act.

8. You were the employee's spouse at the time of death and at least a year prior.

9. Squamous cell carcinoma of the larynx, non-small cell adenocarcinoma of the left lower lobe of the lung, with metastasis caused or contributed to the employee's death.

Based on the above-noted findings of fact in this claim, the FAB hereby makes the following:

CONCLUSIONS OF LAW

I have reviewed the record, the recommended decision issued by the Jacksonville district office on September 30, 2006 and the subsequently submitted objections.

You meet the definition of a survivor under Part E of the Act. 42 U.S.C. § 7385s-3(d)(1).

A prior final decision under Part B of the Act concluded that the employee was an employee of a contractor or subcontractor entitled to compensation for an occupational illness. A determination under Part B of the Act that a DOE contractor employee is entitled to compensation under that Part for an occupational illness is treated as a determination that the employee contracted that illness through exposure at a DOE facility. 42 U.S.C. § 7385s-4(a). Therefore, the employee is a covered DOE contractor employee with a covered illness. 42 U.S.C. §§ 7385s(1) and 7385s(2). The employee died as a result of squamous cell carcinoma of the larynx, and non-small cell adenocarcinoma of the left lower lobe of the lung.

Under the Act, if a covered Part E employee dies after filing a claim but before compensation is paid under Part E of the Act, and his or her death was solely caused by a non-covered illness or illnesses, then the survivor may choose the compensation that would otherwise have been payable to the covered Part E employee if he or she had not died prior to receiving payment. The survivor is not entitled to the $125,000.00 lump-sum payment because death was not caused by the claimed covered condition.

However, if the covered illness or illnesses aggravated, contributed to, or caused a covered Part E employee's death, then the survivor does not have the option to choose to receive the compensation that would have otherwise been payable to the covered Part E employee if living.[2]

I conclude that the employee was a DOE contractor employee with cancer of the pharynx and lung cancer due to exposure to a toxic substance at a DOE facility. 42 U.S.C. §§ 7385s(1) and 7385s-4(b). The employee's death was a result of squamous cell carcinoma of the larynx, non-small cell adenocarcinoma of the left lower lobe of the lung. Therefore, you are entitled to benefits in the amount of $125,000.00 for the employee's death due to squamous cell carcinoma of the larynx, non-small cell adenocarcinoma of the left lower lobe of the lung. 42 U.S.C. § 7385s-3.

Jacksonville, FL

Jeana F. LaRock, Hearing Representative

Final Adjudication Branch

[1] Federal (EEOICPA) Procedure Manual, Chapter E-600(8)(a)(1) (September 2005).

[2] Federal (EEOICPA) Procedure Manual, Chapter E-600.8.b(1)(a) (September 2005).

Eligibility

EEOICPA Fin. Dec. No. 37038-2003 (Dep't of Labor, November 7, 2007)

NOTICE OF FINAL DECISION FOLLOWING REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch (FAB) concerning the above claims for compensation under Part B and Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons stated below, **[Claimant #1]**'s claim for survivor benefits under Part B and Part E are denied. **[Claimant #2]**'s claim for survivor benefits under Part B is accepted, but his claim under Part E is denied.

STATEMENT OF THE CASE

On October 15, 2002, **[Claimant #1]** filed a Form EE-2 with the Seattle district office of the Division of Energy Employees Occupational Illness Compensation (DEEOIC) in which he claimed survivor benefits under Part B of EEOICPA as a child of **[Employee]**. In support of his claim, he alleged that **[Employee]** had been employed by J.A. Jones Construction, a Department of Energy (DOE) subcontractor at the Hanford site, and that **[Employee]** had been diagnosed with lung cancer in 1999. **[Claimant #1]** submitted a large number of documents in support of his claim that included, among other things: copies of a September 24, 1992 court order documenting the legal change of his name from "**[Claimant #1's former name]**" to "**[Claimant #1]**" and his October 6, 1992 amended birth certificate with this new name[1]; medical evidence of **[Employee]**'s lung cancer; copies of the death certificates for both **[Employee]** and **[Employee's Spouse]**; a copy of "Letters Testamentary" documenting that **[Claimant #1]** was an executor of **[Employee]**'s estate; a U.S. Marine Corps Form D-214 noting **[Claimant #1]**'s use of the name "**[Claimant #1]**" when he was transferred to the Marine Corps Reserve on September 4, 1964; and a September 21, 2001 statement in which **[Claimant #1]** related the following about his childhood:

As my real dad was unknown. My mother died when I was 6. **[Claimant #1's Father as listed on his birth certificate]** was a family friend of my mom's. Just to give me a last name as she was unwed & pregnant with me. My Dad **[Employee]** & My Mom **[Employee's Spouse]** actually was my uncle & aunt but I lived with them from the time I was 3 years old. So I consider them my Dad & Mom. As I joined the USMC with the **[Employee's Surname]** name. . . .

On December 16, 2002, the Seattle district office verified **[Employee]**'s employment by consulting the ORISE database and on December 17, 2002, it issued a recommended decision to deny **[Claimant #1]**'s Part B claim. The recommendation to deny was based on the conclusion that **[Claimant #1]** had failed to submit sufficient evidence to establish his eligibility as a surviving child of **[Employee]**. On

January 29, 2003, FAB issued an order remanding the claim to the Seattle district office for further development on the issue of whether **[Claimant #1]** was **[Employee]**'s stepchild. In that order, FAB noted that new procedures had gone into effect shortly after the recommended decision had been issued that required all claims in which claimants were alleging to be stepchildren of deceased covered workers to be forwarded to the National Office of DEEOIC for referral to the Office of the Solicitor, and directed the Seattle district office to comply with those procedures upon completion of further development on the question of whether **[Claimant #1]** was **[Employee]**'s stepchild.

By letter dated February 11, 2003, **[Claimant #1]**'s representative submitted a February 6, 2003 statement from **[Employee's Sister]**, who stated the following:

[Claimant #1] came to live with **[Employee]** and **[Employee's Spouse]** in 1946 and he was three years old at the time. He lived with them until he was 18 or 19. At that time he joined the Marines. **[Employee]** was his soul [*sic*] provider during those years and loved him as his son. Their relationship has always been that of a father and son and continued until **[Employee]** passed away a few years ago.

[Claimant #1]'s representative also submitted copies of **[Claimant #1]**'s "Pupil Health Card" and "Pupil's Cumulative Record" from the Kiona-Benton School District, both of which listed **[Claimant #1]**'s last name as "**[Claimant #1's Stepfather's surname]**" (crossed out and replaced with "**[Employee's surname]**") and noted that he lived with his "Uncle." The "Pupil's Cumulative Record" also listed "**[Claimant #1's Stepfather]**" as **[Claimant #1]**'s father. Shortly thereafter, **[Claimant #2]** filed a claim for survivor benefits on March 31, 2003 and alleged that he was the stepson of **[Employee]**.

In an April 10, 2003 inquiry, the Seattle district office asked **[Claimant #1]** who **[Claimant #1's Stepfather]** was (his father on the "Pupil's Cumulative Record"). In an April 12, 2003 reply, **[Claimant #1]** stated the following:

My mother **[Claimant #1's Mother]** married **[Claimant #1's Stepfather]** [in] 1945[.] They had (2) girls **[Claimant #1's Stepsisters]**. . . **[Claimant #1's Stepfather]** was my stepfather until **[Claimant #1's Mother]**'s death in 1949 at which time the girls & I were separated as **[Claimant #1's Stepfather]** didn't like me as I wasn't his child. The girls were adopted out and I went with my parents **[Employee]** & **[Employee's Spouse]**.

* * *

[I lived with **[Employee and Employee's Spouse]** in] 1943-1944 as **[Claimant #1's Mother]** was unwed. Then my mother **[]** passed away [January] 23, 1949. I lived with **[Employee]** & **[Employee's Spouse]** from 1949-1960. They were my sole survivorship [*sic*]. Then I went in USMC 1960.

In a response to a separate April 10, 2003 inquiry that was received by the Seattle district office on April 23, 2003, **[Claimant #2]** indicated that his mother **[Employee's Spouse]** had married **[Employee]** (his alleged step-parent) on October 24, 1940 when he was five years old, and that he had resided in their household for the next 15 years. **[Claimant #2]** also submitted a copy of his birth certificate, which showed that his mother was "**[Employee's Spouse]**," and his father was "**[Claimant #2's Father]**."

By letters dated May 1, 2003, the district office notified both **[Claimant #1]** and **[Claimant #2]** that

the case had been referred to the National Institute for Occupational Safety and Health (NIOSH) for reconstruction of **[Employee]**'s radiation dose. Thereafter, on June 19, 2003, the district office transferred the case to the National Office of DEEOIC for referral to the Office of the Solicitor as directed in the January 29, 2003 remand order of the FAB. However, rather than taking this action[2], the National Office returned the case to the district office on September 29, 2003 with a memorandum from the Chief of the Branch of Policies, Regulations and Procedures (BPRP) of the same date. In that memorandum, the Chief reviewed the evidence then in the case file and concluded that while **[Claimant #2]** met the statutory definition of **[Employee]**'s "child," **[Claimant #1]** would not absent the submission of additional evidence showing that he had been legally adopted by **[Employee]**. Upon return of the file, the Seattle district office wrote to **[Claimant #1]** on October 3 and 21, 2003 and requested that he submit any evidence in his possession that would establish that he had been legally adopted by **[Employee]**. No response was received to these requests.

No further action took place with respect to this matter pending receipt of NIOSH's dose reconstruction report until June 9, 2005, on which date **[Claimant #1]**'s representative informed the district office that his client wished to expand his Part B claim to include a claim under the recently enacted Part E of EEOICPA. On October 27, 2005, the district office sent a third letter to **[Claimant #1]** stating that while he had provided sufficient evidence to show that he had lived as a dependent in his uncle and aunt's household, no documentation had been provided showing that he had ever been adopted by his uncle. In a November 3, 2005 response to that letter, **[Claimant #1]**'s representative argued that because the definition of "child" in EEOICPA is inclusive rather than exclusive, **[Claimant #1]** met the definition of "child" by being the "*de facto* child" of **[Employee]**, based on a recent state court decision in a Washington child visitation case (issued that same day) that adopted an equitable theory of *de facto* parentage. In the visitation case cited, the court created a four-part test for an individual to be a considered a "*de facto* parent" and to be granted the rights and privileges of a parent.[3]

[Claimant #1]'s representative also argued that **[Claimant #1]** should be considered a child of **[Employee]** under the definition of the term "child" that appears in Title 51 of the Washington Revised Code, which codifies that state's industrial insurance law.[4] The term "child" is defined therein as, among other things, a "dependent child that is in legal custody and control of the worker." The term "dependent" under that title is defined as including relatives of the worker who at the time of the accident are actually and necessarily dependent on the worker. Through a letter dated November 10, 2005, **[Claimant #1]**'s representative added to his prior argument by alleging that "**[Employee]** would have adopted **[Claimant #1]** , but it wasn't necessary at the time because the schools he attended and the military accepted **[Employee]** as **[Claimant #1]**'s father and allowed **[Employee]** to sign legal documents on **[Claimant #1]**'s behalf when he was still a minor."

On October 18, 2005, the Seattle district office received the "NIOSH Report of Dose Reconstruction under EEOICPA," dated September 29, 2005, which provided estimated doses of radiation to the primary cancer site of the lung. Based on these dose estimates, the district office calculated the probability of causation (PoC) for **[Employee]**'s lung cancer by entering his specific information into a computer program developed by NIOSH called NIOSH-IREP. The PoC was determined using the "upper 99% credibility limit," which helps minimize the possibility of denying claims of employees with cancers that are likely to have been caused by occupational radiation exposures. The PoC for the primary cancer of the lung was determined to be 52.89% using NIOSH-IREP. Based on this PoC, the Seattle district office issued a November 16, 2005 recommended decision to accept **[Claimant #2]**'s Part B claim. However, it recommended denial of **[Claimant #2]**'s Part E claim on the ground that he was not a "covered child" under that other Part. It also recommended denying **[Claimant #1]**'s Part B and E claims on the ground that he had failed to establish that he was a surviving child of **[Employee]**.

The recommended decision, however, did not fully discuss the legal arguments for the expansion of the term "child" made by **[Claimant #1]**'s representative. In a January 12, 2006 letter that was received on January 17, 2006, **[Claimant #1]**'s representative objected to this recommended decision and requested an oral hearing before FAB, which took place on March 30, 2006. At the hearing, **[Claimant #1]**'s representative made the same arguments he had made in his written objections.

On July 15, 2006, FAB returned the case to BPRP for guidance on the legal arguments raised by **[Claimant #1]**'s representative at the March 30, 2006 hearing. On December 12, 2006[5], BPRP requested a legal opinion on the matter from the Office of the Solicitor and on February 26, 2007, the Office of the Solicitor provided BPRP with a legal opinion that evaluated the arguments raised by **[Claimant #1]**'s representative. On March 1, 2007, BPRP contacted FAB and advised it of the guidance it had received. However, by that point in time, the November 16, 2005 recommended decision had automatically become a "final" decision of the FAB on January 17, 2007 pursuant to 20 C.F.R. § 30.316(c), the one-year anniversary of the date the representative's objections to the recommended decision were received by FAB.

On March 9, 2007, **[Claimant #1]** filed a petition in the United States District Court for the Eastern District of Washington seeking review of the January 17, 2007 "final decision" on his claim under Parts B and E of EEOICPA (Civil Action No. CV-07-5011-EFS). Shortly thereafter, the Director of DEEOIC issued an order on April 30, 2007 vacating that same "final decision" on the claims of both **[Claimant #1]** and **[Claimant #2]** and returning them to the Seattle district office for further development and consideration of the Office of the Solicitor's February 26, 2007 opinion, to be followed by the issuance of new recommended and final decisions. The case was subsequently transferred to the national office of DEEOIC for further action in light of the filing of the above-noted petition.

On September 14, 2007, the national office of DEEOIC issued a recommended decision: (1) to deny **[Claimant #1]**'s claim for survivor benefits under Parts B and E on the ground that he was not a surviving "child" of **[Employee]**, as that statutory term is defined in §§ 7384s(e)(3) and 7385s-3(d)(3) of EEOICPA; (2) to accept **[Claimant #2]**'s claim for survivor benefits under Part B on the ground that as **[Employee]**'s stepchild, he was a surviving "child" of **[Employee]** under § 7384s(e)(3); and (3) to deny **[Claimant #2]**'s claim for survivor benefits under Part E on the ground that although he was a "child" of **[Employee]** under § 7385s-3(d)(3), he did not meet the definition of a "covered child" in § 7385s-3(d)(2). The case was transferred to FAB and on October 3, 2007, it received **[Claimant #2]**'s signed, written waiver of all objections to the September 14, 2007 recommended decision. On October 17, 2007, **[Claimant #2]** also submitted a signed statement indicating that had not received any money from a tort suit for **[Employee]**'s radiation exposure, and that he had not been convicted of fraud in connection with any application for or receipt of EEOICPA benefits or any other state or federal workers' compensation benefits. On September 27, 2007, FAB received written objections to the September 14, 2007 recommended decision and a request for review of the written record from **[Claimant #1]**'s representative, dated September 26, 2007.

OBJECTIONS

In his September 26, 2007 submission, **[Claimant #1]**'s representative objected to the seventh "Conclusion of Law" in the recommended decision, which is the one that concluded that **[Claimant #1]** was not a surviving "child" of **[Employee]** under either Part B or Part E of EEOICPA and rejected the representative's contentions that Washington workers' compensation law and a child visitation decision supported **[Claimant #1]**'s claim. The representative repeated his earlier argument regarding the non-exhaustive nature of the definition of "child" under EEOICPA and alleged that DEEOIC had

ignored this point when it "made its recommended decision of denial on the basis that **[Claimant #1]** does not qualify as a surviving child of **[Employee]** since **[Claimant #1]** was neither a recognized natural child, a stepchild or an adopted child [of **[Employee]**."[6]

[Claimant #1]'s representative also repeated his argument that Washington workers' compensation law should apply in **[Claimant #1]**'s EEOICPA claim because EEOICPA is a "federal worker's [*sic*] compensation statute." Based on this premise, the representative asserted that the concept of dependence alone should be determinative of **[Claimant #1]**'s status as **[Employee]**'s child.

Finally, the representative argued that the "general rule of law" pronounced in the child visitation case was "not limited to the facts in the particular case." Rather, he asserted, "the application of the *de facto* concept is broadly [*sic*] subject only to the factors enumerated in the general rule developed in the decision." The representative then quoted from the portion of the decision in which the court set out four criteria that an individual would have to meet in order to have "standing as a *de facto* parent" in a child visitation proceeding, and asserted that **[Claimant #1]** was **[Employee]**'s "*de facto* child."

After considering the recommended decision and all of the evidence in the case file, FAB hereby makes the following:

FINDINGS OF FACT

1. **[Claimant #1]** and **[Claimant #2]** filed claims for survivor benefits under Part B of EEOICPA on October 15, 2002 and March 31, 2003, respectively, and both later expanded their claims to include Part E.

2. **[Employee]** was employed at the Hanford facility by DOE subcontractors from January 1, 1950 to April 15, 19 55, from September 14, 1956 to March 15, 1957, from March 22, 1957 to April 26, 1957, from March 3 to 4, 1960, and from September 14, 1960 to March 4, 1977.

3. On July 1, 1999, **[Employee]** was diagnosed with lung cancer. The date of this diagnosis was after he had begun covered employment.

4. NIOSH reported annual dose estimates for the lung from the date of initial radiation exposure during covered employment to the date of the cancer's first diagnosis. A summary and explanation of the information and methods applied to produce these dose estimates, including **[Claimant #1]**'s and **[Claimant #2]**'s involvement through their interviews and reviews of the draft dose reconstruction report, are documented in the "NIOSH Report of Dose Reconstruction under EEOICPA" dated September 29, 2005.

5. Using the dose estimates from NIOSH's September 29, 2005 report, DEEOIC determined that the probability of causation (PoC) was 52.89% and established that it was "at least as likely as not" that **[Employee]**'s lung cancer was sustained in the performance of duty.

6. **[Claimant #1]** was born on June 14, 1942 and is the child of **[Claimant #1's Mother]** and an unknown father. From 1943 to 1944, he lived with his uncle and aunt, **[Employee and Employee's Spouse]** (**[Sister of Claimant #1's Mother]**). In 1945, **[Claimant #1's Mother]** married **[Claimant #1's Stepfather]**, and **[Claimant #1]** was reunited with his mother and lived with her and **[Claimant #1's Stepfather]**. **[Claimant #1's Mother]** died on January 23, 1949, after which **[Claimant #1]** was

again sent to live with his aunt and uncle. **[Claimant #1]**'s stepfather died in 1952. **[Claimant #1]** lived with his uncle the employee, his aunt and his cousin **[Claimant #2]** from 1949 until he enlisted in the U.S. Marine Corps in 1960.

7. **[Claimant #2]** is the stepchild of **[Employee]** as established by his birth certificate, his school records, and the marriage of his mother **[Employee's Spouse]** to **[Employee]**.

8. At the time of **[Employee]**'s death, **[Claimant #2]** was not under the age of 18, or under the age of 23 and continuously enrolled as a full-time student in an institution of higher learning, or any age and incapable of self-support.

Based on the above-noted findings of fact, and after considering the objections to the recommended decision in this case, FAB hereby makes the following:

CONCLUSIONS OF LAW

The first issue in this case is whether **[Employee]** qualifies as a "covered employee with cancer" for the purposes of Part B of EEOICPA. For this case, the relevant portion of the definition of a "covered employee with cancer" is "[a] Department of Energy contractor employee who contracted that cancer after beginning employment at a Department of Energy facility, [] if and only if that individual is determined to have sustained that cancer in the performance of duty in accordance with section 7384n(b) of this title." 42 U.S.C. § 7384l(9)(B). As found above, **[Employee]** was employed at the Hanford facility by DOE subcontractors for intermittent periods from January 1, 1950 to March 4, 1977, and was first diagnosed with lung cancer after he had begun working at the Hanford facility.

In accordance with 42 U.S.C. § 7384n(d), NIOSH produced dose estimates of the annual radiation exposures to **[Employee]**'s lungs, and DEEOIC calculated the PoC for his lung cancer based on those estimates consistent with § 7384n(c)(3). Since the PoC was calculated to be 52.89%, it established that it was "at least as likely as not" that **[Employee]**'s lung cancer was sustained in the performance of duty under § 7384n(b). Therefore, **[Employee]** qualifies as a "covered employee with cancer" under Part B, as that term is defined by § 7384l(9)(B), because he was employed at a DOE facility by DOE subcontractors and sustained cancer in the performance of duty. As a result, his cancer is an "occupational illness" under Part B, as defined by § 7384l(15), and he is also a "covered employee," as that term is defined by § 7384l(1)(B). Pursuant to 42 U.S.C. § 7385s-4(a), this conclusion also constitutes a determination under Part E of EEOICPA that **[Employee]** contracted his lung cancer through exposure to a toxic substance at a DOE facility. However, because he is a *deceased* covered employee, only his eligible survivors are entitled to share in the compensation payable under Part B and Part E of EEOICPA.

The second issue in this case is whether **[Claimant #1]** or **[Claimant #2]** is a "child" of **[Employee]** under both Parts B and E of EEOICPA. The statutory term "child," which has the same definition in both Parts B and E, "includes a recognized natural child, a stepchild who lived with an individual in a regular parent-child relationship, and an adopted child." 42 U.S.C. §§ 7384s(e)(3)(B), 7385s-3(d)(3). Both of these definitions use the non-exhaustive term "includes" and identify three classes of persons that are considered to be children of an individual for purposes of paying survivor benefits under Parts B and E of EEOICPA.

There are well-established definitions for the three classes of persons included in the two statutory

provisions at issue: (1) a "recognized natural child" is an illegitimate child of an individual, who has been recognized or acknowledged as a child by that individual; (2) a "stepchild" is someone who meets the criteria currently described in Chapter 2-200.5c (September 2004) of the Federal (EEOICPA) Procedure Manual; and (3) an "adopted child" is someone who satisfies the legal criteria for that status under state law.

The use of the term "includes" in both § 7384s(e)(3) and § 7385s-3(d)(3) is evidence that Congress intended the term "child" to refer to more than just the three classes of persons noted above, as is the fact that those three specified classes do not include legitimate issue (and posthumously born legitimate issue). Thus, the definition of the term "child" is properly left to DEEOIC as the agency that is charged with the administration of the compensation programs established by EEOICPA. *See* 20 C.F.R. § 30.1 (2007). As an exercise of that authority, DEEOIC concludes that there is no dispute that legitimate issue are children of an individual. Furthermore, unrecognized or unacknowledged illegitimate issue (and posthumously born illegitimate issue) also fall within the definition of "child" since denying EEOICPA survivor benefits to these other illegitimate children would violate the Constitution.[7] For brevity's sake, DEEOIC will use the term "biological" children to mean *all* issue of an individual (including posthumously born issue), whether legitimate or illegitimate. Under this terminology, a "recognized natural child" is one type of biological child. Accordingly, DEEOIC concludes that a "child" of an individual under both Part B and Part E of EEOICPA can only be a biological child, a stepchild, or an adopted child of that individual.

As noted above in the "Objections" section of this decision, **[Claimant #1]**'s representative argues that Washington workers' compensation law should apply in **[Claimant #1]**'s EEOICPA claim because EEOICPA is a "federal worker's [*sic*] compensation statute." In his view, **[Claimant #1]** should be found to be a "child" under EEOICPA because he meets the definition of a "child" in Title 51 of Washington's Revised Code, which defines a "child" as "every natural born child, posthumous child, stepchild, child legally adopted prior to the injury, child born after the injury. . .and dependent child in the *legal custody* and control of the worker. . . ."(emphasis added).[8] However, there is no evidence in the case file that **[Claimant #1]** is the natural born child, posthumous child, stepchild, child legally adopted prior to the injury or child born after the injury of **[Employee]**.

There is also no allegation or evidence in the case file that **[Employee or Employee's Spouse]** ever had legal custody of **[Claimant #1]**. Instead, it appears that after the death of his mother, **[Claimant #1]** merely lived with his aunt and uncle who had, at most, *physical* custody of their nephew. Even assuming that **[Employee]** had "legal custody" of **[Claimant #1]** (a prerequisite of the definitional phrase at issue), there is nothing in either § 7384s(e)(3) or § 7385s-3(d)(3), or in EEOICPA as a whole, that suggests that a person claiming to be a "child" of a deceased covered employee should be able to establish that status by proving merely that they are or were "dependant" on that individual. Therefore, DEEOIC has concluded that persons who are or were only "dependant" on an individual are not "children" of that individual under EEOICPA, which is not a "federal worker's [*sic*] compensation statute" (those types of statutes are "wage-replacement" statutes[9]), as **[Claimant #1]**'s representative believes, where issues of dependency are often relevant to questions of survivor eligibility.[10]

[Claimant #1]'s representative also argues that **[Claimant #1]** should be considered a "*de facto* child" of **[Employee]** based on a recent decision in a visitation dispute in Washington. The dispute involved two parties who could not legally marry one another but had agreed to raise a biological child of one of the parties together. When the party who had no biological or legal relationship to the child sued to obtain visitation rights after the parties had terminated their agreement, the court considered whether the party was a "*de facto* parent."[11] **[Claimant #1]**'s representative argues that **[Employee]** would

have met the court's four-part test[12] to be his client's "*de facto* parent" and as a consequence, **[Claimant #1]** should be considered to be the "*de facto* child" of **[Employee]**. There are, however, two flaws in this argument. First, both the decision at issue and subsequent cases that have relied upon it are clearly within the state law realm of child custody and/or parental rights. State courts in these types of cases are primarily concerned with the "best interests of the child," which is an equitable concern that does not enter into EEOICPA's definitions of "child," and involve the creation or definition of rights and obligations of *parents*, not children. Secondly, the decision cited by **[Claimant #1]**'s representative only contains a discussion of who can be considered a "*de facto* parent," not a "*de facto* child." Therefore, the representative's reliance on this decision is flawed not only because it is not controlling in the EEOICPA claims adjudication process, but also because it is based on an overly expansive reading of what the court actually stated.

Returning to the second issue in this case, DEEOIC concludes that **[Claimant #2]** is a "child" of **[Employee]** under Part B, as that term is defined in § 7384s(e)(3)(B), because he is **[Employee]**'s stepchild. **[Claimant #2]** is also a "child" of **[Employee]** under Part E, as that term is defined in § 7385s-3(d)(3), for the same reason—because he is **[Employee]**'s stepchild. However, DEEOIC concludes that **[Claimant #1]** is not a "child" of **[Employee]** under either Part B or Part E because he is not a biological child of **[Employee]**, or a stepchild of **[Employee]**, or an adopted child of **[Employee]**.

The third issue in this case is whether **[Claimant #1]** or **[Claimant #2]** is a "covered child" of **[Employee]** under Part E of EEOICPA. In order to be eligible to receive a payment as a "child" of a deceased covered employee under Part E, a child of that employee must be a "covered child," which is defined as "a child of the employee who, as of the employee's death—(A) had not attained the age of 18 years; (B) had not attained the age of 23 years and was a full-time student who had been continuously enrolled as a full-time student in one or more educational institutions since attaining the age of 18 years; or (C) had been incapable of self-support." 42 U.S.C. § 7385s-3(d)(2).

In this case, while **[Claimant #2]** is a "child" of **[Employee]** under Part E, he is not a "covered child," as that term is defined in § 7385s-3(d)(2), because at the time of **[Employee]**'s death on February 21, 2000, he was not under the age of 18, or under the age of 23 and continuously enrolled as a full-time student in an institution of higher learning, or any age and incapable of self-support. As for **[Claimant #1]**, since he is not a "child" of **[Employee]**, as that term is defined in § 7385s-3(d)(3), because he is not a biological child, a stepchild or an adopted child of **[Employee]**, he cannot be a "covered child" of **[Employee]** under Part E because an individual alleging that status must also be a "child" in order to be a "covered child" under the terms of § 7385s-3(d)(2).

Accordingly, **[Claimant #2]** is entitled to survivor benefits for **[Employee]**'s lung cancer under Part B, as outlined in 42 U.S.C. § 7384s(a)(1), and the FAB hereby awards him lump-sum benefits of $150,000.00 for that occupational illness under Part B. **[Claimant #2]**'s claim for survivor benefits under Part E for **[Employee]**'s death due to lung cancer is denied. **[Claimant #1]**'s claim for survivor benefits under Parts B and E of EEOICPA for **[Employee]**'s condition of lung cancer and his death due to lung cancer, respectively, is denied.

Washington, D.C.

Carrie Rhodes

Hearing Representative

Final Adjudication Branch

[1] On this birth certificate, **[Claimant #1]** is reported to be the child of "**[Claimant #1's Mother]**" and "**[Claimant #1's Father as listed on his birth certificate]**," and **[Claimant #1's Mother]** is reported to be married. The informant for the birth certificate is listed as "**[Mother of Claimant #1's Mother]**".

[2] Subsequent to FAB's remand of the case for referral to the Office of the Solicitor, DEEOIC's policy in this area changed again such that the contemplated referral was not required. This later change in policy was documented in EEOICPA Transmittal No. 04-01 (issued October 22, 2003).

[3] *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005).

[4] Wash. Rev. Code § 51.08.030 (2006).

[5] This request was misdated by BPRP as April 13, 2004. It was actually received in the Office of the Solicitor on December 12, 2006.

[6] Despite this assertion, the seventh "Conclusion of Law" in the September 14, 2007 recommended decision actually stated that **[Claimant #1]** is not a "child" of **[Employee]** "because he is not a *biological* child of **[Employee]**, or a stepchild of **[Employee]**, or an adopted child of **[Employee]**." (emphasis added) The significance of the term "biological" in the quoted phrase is discussed at length below.

[7] *See Weber v. Aetna Cas. & Sur. Company*, 406 U.S. 164 (1972).

[8] Wash. Rev. Code § 51.08.030 (2006).

[9] Rather than replacing an injured worker's wages during a period of disability with regular, periodic payments consisting of a set percentage of the worker's pre-injury wages, EEOICPA benefits are single, lump-sum payments in dollar amounts that are set by the terms of the statute. For an in-depth discussion of the "wage-replacement" nature of workers' compensation statutes, see *Larson's Workers' Compensation Law*, §§ 1.02 and 80.05[3] (2006).

[10] DEEOIC's position that dependency alone does not establish that an individual is a "child" is consistent with other systems where actual familial ties are paramount, such as Washington's statutory provision on the subject of intestate succession. *See* Wash. Rev. Code § 11.04.015.

[11] Before an individual who is not a biological, adoptive or stepparent can be considered a "*de facto* parent" of a child, such individual must prove that: the natural or legal parent of the child consented to and fostered the parent-like relationship; the individual and the child lived together in the same household; the individual assumed the many obligations of parenthood without expectation of financial compensation; and the individual has been in a parental role for a length of time sufficient to have established a bonded, dependent parental relationship with the child. *In re Parentage of L.B.*, 122 P.3d at 176.

[12] Without conceding that the court's four-part test is applicable in this matter, DEEOIC notes that there is no evidence in the file that **[Claimant #1's Mother]** gave her consent to have her son live with **[Employee and Employee's Spouse]** after her death in 1949.

EEOICPA Fin. Dec. No. 47856-2005 (Dep't of Labor, July 21, 2005)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claims for compensation under § 7384 of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended

(EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq.* For the reasons set forth below, the Final Adjudication Branch accepts and approves your claims for compensation under 42 U.S.C. § 7384.

STATEMENT OF THE CASE

On August 30, 2001, the employee's surviving spouse filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA), based on lymphoma and peripheral bronchogenic carcinoma, and on July 24, 2003, she passed away, and her claim was administratively closed. On August 7 (**[Claimant #1]**) and September 9 (**[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**), 2003, you filed Forms EE-2 under the EEOICPA, based on bronchogenic carcinoma and lymphoma.

The record includes a Form EE-3 (Employment History Affidavit) that indicates the worker was employed by Reynolds Electrical and Engineering Company (REECo) at the Nevada Test Site (NTS) intermittently from 1957 to 1978, and that he wore a dosimetry badge. A representative of the Department of Energy confirmed the employee was employed at NTS by REECo intermittently from August 23, 1958 to February 4, 1978.

Medical documentation received included a copy of a Nevada Central Cancer Registry report that indicated an aspiration biopsy was performed on February 1, 1978, and it showed the employee was diagnosed with primary lung cancer. A Valley Hospital discharge summary, dated February 4, 1978, indicated the employee had a tumor in the right upper lobe of the lung. The record does not contain documentation demonstrating the employee was diagnosed with lymphoma.

To determine the probability of whether the employee sustained the cancer in the performance of duty, the Seattle district office referred your case to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction in accordance with 20 C.F.R. § 30.115. The district office received the final NIOSH Report of Dose Reconstruction dated April 20, 2005. *See* 42 U.S.C. § 7384n(d). NIOSH noted the employee had worked at NTS intermittently from August 23, 1958 to February 4, 1978. However, in order to expedite the claim, only the employment from 1966 through 1970 was assessed. NIOSH determined that the employee's dose as reconstructed under the EEOICPA was 71.371 rem to the lung, and the dose was calculated only for this organ because of the specific type of cancer associated with the claim. NIOSH also determined that in accordance with the provisions of 42 C.F.R. § 82.10(k)(1), calculation of internal dose alone was of sufficient magnitude to consider the dose reconstruction complete. Further, NIOSH indicated, the calculated internal dose reported is an "*underestimate*" of the employee's total occupational radiation dose. *See* NIOSH Report of Dose Reconstruction, pp. 4, 5, 6, and 7.

Using the information provided in the Report of Dose Reconstruction, the Seattle district office utilized the Interactive RadioEpidemiological Program (IREP) to determine the probability of causation of the employee's cancer, and reported in its recommended decision that the probability the employee's lung cancer was caused by his exposure to radiation while employed at NTS was at least 50%.

You provided copies of the death certificates of the employee and his spouse, copies of your birth certificates showing you are the natural children of the employee, and documentation verifying your changes of names, as appropriate.

The record shows that you (**[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**) and **[Claimant #5]** filed claims with the Department of Justice (DOJ) for compensation under the

Radiation Exposure Compensation Act (RECA). By letter dated May 20, 2005, a representative of the DOJ reported that an award under § 4 of the RECA was approved for you; however, the award was rejected by **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**.

On June 14, 2005, the Seattle district office recommended acceptance of your claims for survivor compensation for the condition of lung cancer, and denial of your claims based on lymphoma.

On June 12 (**[Claimant #1]** and June 20 (**[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**), 2005, the Final Adjudication Branch received written notification from you indicating that you waive any and all rights to file objections to the recommended decision.

FINDINGS OF FACT

1. On August 7 (**[Claimant #1]**) and September 9 (**[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**), 2003, you filed claims for survivor benefits.

2. Documentation of record shows that the employee and his surviving spouse have passed away, you (**[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**) are the children of the employee, and you are his survivors.

3. You (**[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**) have rejected an award of compensation under the Radiation Exposure Compensation Act.

4. The worker was employed at NTS by REECo, intermittently, from August 23, 1958 to February 4, 1978.

5. The employee was diagnosed with lung cancer on February 1, 1978.

6. The NIOSH Interactive RadioEpidemiological Program indicated at least a 50% probability that the employee's cancer was caused by radiation exposure at NTS.

7. The employee's cancer was at least as likely as not related to his employment at a Department of Energy facility.

CONCLUSIONS OF LAW

The evidence of record indicates that the worker was employed at NTS by REECo, intermittently, from August 23, 1958 to February 6, 1978. Medical documentation provided indicated the employee was diagnosed with lung cancer on February 1, 1978; however, there is no evidence showing the employee was diagnosed with lymphoma, and your claims based on lymphoma must be denied.

After establishing that a partial dose reconstruction provided sufficient information to produce a probability of causation of 50% or greater, NIOSH determined that sufficient research and analysis had been conducted to end the dose reconstruction, and the dose reconstruction was considered complete. *See* 42 C.F.R. § 82.10(k)(1).

The Final Adjudication Branch analyzed the information in the NIOSH Report of Dose Reconstruction and utilized the NIOSH-IREP to confirm the 63.34% probability that the employee's cancer was caused

by his employment at NTS. *See* 42 C.F.R. § 81.20. (Use of NIOSH-IREP). Thus, the evidence shows that the employee's cancer was at least as likely as not related to his employment at NTS.

The Final Adjudication Branch notes that, in its Conclusions of Law, the recommended decision erroneously indicates the employee, **[Employee]**, is entitled to compensation in the amount of $150,000.00; therefore, that Conclusion of Law must be vacated as the employee is deceased. *See* 42 U.S.C. § 7384s(a)(1).

The Final Adjudication Branch notes that the record shows the employee passed away on February 4, 1978. However, his employment history indicates he worked at NTS until February 6, 1978. Consequently, for purposes of administration of the Act, his employment is considered to have ended on February 4, 1978.

Based on the employee's covered employment at NTS, the medical documentation showing his diagnosis of lung cancer, and the determination that the employee's lung cancer was "at least as likely as not" related to his occupational exposure at NTS, and thus sustained in the performance of duty, the employee is a "covered employee with cancer," under 42 U.S.C. § 7384l. *See* 42 U.S.C. § 7384l(9)(B); 20 C.F.R. § 30.213(b); 42 C.F.R. § 81.2. Further, as the record indicates there is one other potential beneficiary under the EEOICPA, you are each (**[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**) entitled to survivor compensation under 42 U.S.C. § 7384 in the amount of $30,000.00. As there is evidence that another survivor is a child of the employee, and potentially an eligible survivor under the Act, the potential share ($30,000.00) of the compensation must remain in the EEOICPA Fund. *See* Federal (EEOICPA) Procedure Manual, Chapter 2-200.7c(2) (June 2004).

Seattle, WA

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA Fin. Dec. No. 60958-2005 (Dep't of Labor, February 24, 2005)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under Part B of 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 stated below, your claim for benefits is denied.

STATEMENT OF THE CASE

On August 25, 2004, you filed a claim for survivor benefits, Form EE-2, under Part B of the EEOICPA, as the employee's sister, and on the basis that he had heart problems and lung cancer. Birth and death certificates confirmed that the employee was a widower when he died on August 6, 1998, that his parents pre-deceased him and that you are his sister. You submitted a pathology report of June 2, 1998, confirming that he had lung cancer. On the EE-3 Employment History Form, you stated that he worked at the Paducah Gaseous Diffusion Plant, for F.H. McGraw from 1951 to 1954, and again from

the mid 1970's to the mid 1980's. Social Security records and an affidavit from his sister-in-law (who was also a co-worker) confirmed that he worked for F.H. McGraw from 1951 to 1954.

On September 9, 2004, you were informed of the type of survivors of a deceased employee who may be eligible for benefits under Part B of the EEOICPA. You were specifically informed that an employee's sister is not such an eligible survivor.

On December 14, 2004, the district office issued a recommended decision concluding you were not entitled to compensation under Part B of the Act, since you are not an eligible survivor of the employee, as defined in 42 U.S.C. § 7384s(e) of the EEOICPA.

Upon review of the case record, the undersigned makes the following:

FINDINGS OF FACT

1. You filed a claim for survivor benefits under Part B of the EEOICPA on August 25, 2004.

2. You are the sister of the employee.

3. He was diagnosed with lung cancer in June 1998 and died on August 6, 1998.

Based on these facts, the undersigned makes the following:

CONCLUSIONS OF LAW

Section 30.310(a) of the EEOICPA implementing regulations provides that "Within 60 days from the date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision…and whether a hearing is desired." 20 C.F.R. § 30.310(a). You have not filed any objection to the recommended decision. I have reviewed the record in this case, and must conclude that no further investigation is warranted.

The purpose of the EEOICPA, as stated in its § 7384d(b), is to provide for "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." 42 U.S.C. § 7384d(b). In cases in which a covered employee is deceased, § 7384s of Part B of the Act provides that payment may be made "only" to a surviving spouse, children, parents, grandchildren or grandparents, of the covered employee. 42 U.S.C. § 7384s.

Since you are the sister of the deceased employee, there is no basis under Part B of the Act to pay compensation benefits to you.

For the foregoing reasons, the undersigned must find that you have not established your claim for compensation under Part B of the EEOICPA and hereby denies your claim. Adjudication of your Part E claim is deferred until issuance of the Interim Final Regulations.

Washington, DC

Richard Koretz

Hearing Representative

EEOICPA Fin. Dec. No. 72762-2006 (Dep't of Labor, December 2, 2005)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning these claims for compensation under Part B of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended, 42 U.S.C. § 7384 *et seq.* (EEOICPA or the Act). These claims are accepted in the amount of $25,000 per claimant for a total of $150,000.

STATEMENT OF THE CASE

On June 21, 2002, **[Employee's spouse]** filed a claim (Form EE-2) under EEOICPA as the surviving spouse of **[Employee]**. The file contains the death certificate of **[Employee]** showing that **[Employee]** died on January 17, 1994 and identifies **[Employee's spouse]** (maiden name) as his surviving spouse. The file also contains the marriage certificate confirming that **[Employee's spouse]** married **[Employee]** on October 13, 1939. In addition, the file contains verification from Diebold, Inc. confirming that **[Employee]** worked for Diebold (AKA Herring-Hall Marvin Safe Company[1]) from February 13, 1941 through October 1, 1982. The file further contains pathology reports and medical records confirming **[Employee]**'s diagnosis of basal cell carcinoma of the left sideburn in 1994, basal cell carcinoma of the right nasal ala in 1993 and lung cancer in 1994.

On September 11, 2002, the case record was forwarded to the National Institute for Occupational Safety and Health (NIOSH) to determine the probably that **[Employee]** sustained cancer in the performance of duty while employed at the AWE/DOE facility. Using the dose estimates provided by NIOSH and the software program NIOSH-IREP, the district office calculated the probability of causation (PoC) for the lung cancer. These calculations show that the probability that **[Employee's]** lung cancer was caused by exposure to radiation during his employment with Diebold is 96.55%. Including the basal cell carcinomas in the dose reconstruction would increase the PoC; therefore, these cancers are considered causally related.

On June 21, 2005, the Cleveland district office issued a recommended decision. The district office found **[Employee]** to be a "covered employee with cancer" and recommended acceptance of **[Employee's spouse]**'s claim. The district office's recommendations were accepted by the Final Adjudication Branch and on July 28, 2005 the FAB issued a final decision which awarded **[Employee's spouse]** compensation in the amount of $150,000. On August 19, 2005 payment in the amount of $150,000 was authorized to **[Employee's spouse]**. The payment was deposited in her account by electronic funds transfer (EFT) on August 31, 2005. On September 2, 2005, the Fiscal Office received the death certificate of **[Employee's spouse]** showing that she died on August 2, 2005. On September 7, 2005, the Fiscal Office received notification that the lump sum payment to **[Employee's spouse]** was reversed and returned to the Department of Treasury.

On September 22, 2005, **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]** and **[Claimant #6]** filed claims (Form EE-2) as the surviving children of **[Employee]**. The claimants each submitted their birth certificate showing **[Employee's spouse]** and **[Employee]** as their

parents. In addition, **[Claimant #1]**, **[Claimant #2]** and **[Claimant #5]** submitted their marriage certificates documenting their surname change.

On October 13, 2005, the Director of the Division of Energy Employee Occupational Illness Compensation issued a Director's Order which vacated the final decision awarding benefits to **[Employee's spouse]**. Since **[Employee's spouse]** died prior to payment, the Director found that compensation shall be paid in equal shares to all living children of the employee.

Accordingly, on October 20, 2005, the Cleveland district office issued a recommended decision awarding benefits to **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]** and **[Claimant #6]**. On November 2, 2005, the FAB received signed waivers of any and all objections to the recommended decision from each claimant. After considering the evidence of record, the waivers of objections, and the NIOSH report, the FAB hereby makes the following:

FINDINGS OF FACT

1. **[Employee]** worked at a covered facility, Diebold (AKA Herring-Hall Marvin Save Company) during a period of residual contamination and AWE facility designation.

2. **[Employee]** was diagnosed with lung cancer and multiple basal cell carcinomas after beginning employment at the covered facility.

3. There is at least a 96.55% probability that **[Employee's]** cancers were caused by exposure to radiation during his employment at Diebold.

4. **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]** and **[Claimant #6]** are the surviving children of **[Employee]** and his eligible beneficiaries.

Based on the above noted findings of fact, the FAB hereby also makes the following:

CONCLUSIONS OF LAW

To facilitate a claim for cancer under Part B of EEOICPA, the Act explains that a "covered employee with cancer" is, among other things, an AWE employee who contracted that cancer after beginning employment at an AWE facility, if and only if that individual is determined to have sustained that cancer in the performance of duty. 42 U.S.C. § 7384l(9)(B). To establish that the employee "sustained that cancer in the performance of duty," § 30.115 of the implementing regulations instructs OWCP to forward a complete copy of the case record to NIOSH for dose reconstruction.[2] 20 C.F.R. § 30.115.

The FAB independently analyzed the information in the NIOSH report, confirming that the factual evidence reviewed by NIOSH was properly addressed, and that there is at least a 96.55% probability that **[Employee]**'s cancers were related to his employment at Diebold. Since the probability of causation is greater than 50%, it is determined that **[Employee]** incurred cancer in the performance of duty at an AWE facility.

Section 7384s of the EEOICPA, which provides the order of payment for compensation payable under

Part B of the Act, states that if there is no surviving spouse at the time payment, such payment shall be made in equal shares to all children of the covered employee. The submissions of the employee's death certificate as well as the death certificate of his surviving spouse and the claimants birth certificates showing the employee as their father is sufficient to establish that **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]** and **[Claimant #6]** are the employee's surviving children and eligible beneficiaries.

Accordingly, these claims for compensation in the amount of $25,000 each for a total of $150,000 are hereby approved.

Washington, DC

Vawndalyn B. Feagins

Hearing Representative

Final Adjudication Branch

[1] According to the DOE Covered Facility List, Herring-Hall is identified as an AWE facility from 1943 through 1951; residual radiation from 1952 through 1993; and a DOE facility from 1994 through 1995 due to remediation http://www.eh.doe.gov/advocacy/faclist/showfacility.cfm (As of December 2, 2005).

[2] NIOSH's approach to conclude the dose reconstruction process based on claimant-favorable assumptions is consistent with its methodology. Section 30.318 of the regulations states that "The methodology used by HHS in arriving at reasonable estimates of the radiation doses received. . .is binding on the FAB." 20 C.F.R. § 30.318.

EEOICPA Fin. Dec. No. 10061144-2007 (Dep't of Labor, April 30, 2008)

NOTICE OF FINAL DECISION

This is the final decision of the Final Adjudication Branch (FAB) on the above claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claim for the employee's skin cancer under Part E of EEOICPA is denied.

STATEMENT OF THE CASE

On February 17, 2005, **[Employee]**, hereinafter referred to as "the employee," filed a Form EE-1 claiming for benefits for chronic obstructive pulmonary disease (COPD) and chronic beryllium disease (CBD), as well as a request for a review by a Physicians Panel for asbestosis, heart disease, COPD and CBD. On the Form EE-3, the employee alleged that he was employed as a driver in construction, an operator C & B, and a gulper at the Savannah River Site (SRS) for the period February 1, 1952 to January 31, 1957. He alleged that he worked in Building 221-F, the B-line, and the "sample aisle." The district office used the Oak Ridge Institute for Science and Education (ORISE) database to confirm that the employee worked at the SRS from March 26, 1952 to May 17, 1957. However, no job titles were listed by ORISE.

On June 5, 2006, the employee filed a new Form EE-1 in which he claimed for skin cancer. A pathology report in the record establishes that the employee was diagnosed with squamous cell

carcinoma (SCC) of the left helical rim on May 12, 2006.

On July 5, 2006, FAB issued a final decision accepting the employee's claim for asbestosis and COPD as "covered" illnesses under Part E of EEOICPA and denying his claim for CBD and asbestosis under Part B. That final decision also denied the employee's claim for CBD and asbestosis under Part E. As part of that decision, FAB remanded the employee's claim to the Jacksonville district office for consideration of the newly submitted Form EE-1 claiming for skin cancer.

On January 5, 2007, **[Claimant]** filed a Form EE-2 in which she claimed for survivor benefits based on the skin cancer, COPD, asbestosis and pulmonary hypertension of her late spouse, the employee. In support of her claim, **[Claimant]** submitted her marriage certificate showing that she married the employee on July 9, 1955, and the employee's death certificate showing that she was the employee's spouse when he died on December 31, 2006 from cardio-respiratory arrest that was due to or as a consequence of refractory hypertension with shock.

In a February 13, 2007 report, a District Medical Consultant (DMC) reviewed the evidence in the record and concluded that the medical evidence was insufficient to establish that the employee's claimed condition of skin cancer was at least as likely as not due to exposure to a toxic substance at a Department of Energy (DOE) facility and that such exposure was a significant factor in aggravating, contributing to, or causing the claimed condition of skin cancer.

On March 1, 2007, the Jacksonville district office sent **[Claimant]** a letter advising her of the deficiencies of her Part E claim for the employee's skin cancer. In that letter, the district office advised **[Claimant]** that it was unable to establish exposure to a specific toxic substance and/or that the toxic substance(s) caused, contributed to, or aggravated the employee's skin cancer. The district office explained the needed information and requested that she submit factual evidence of the types of toxic substances to which the employee was exposed and medical evidence from a physician that linked the employee's exposures to the claimed condition and allowed time for her response. No response or additional information was received.

On June 20, 2007, FAB issued a final decision accepting **[Claimant]**'s claim for the employee's death due to pulmonary hypertension under Part E of EEOICPA since it was at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing the employee's pulmonary hypertension, and that exposure to such toxic substances was related to employment at the DOE facility and was a significant factor that caused or contributed to the death of the employee. That decision also remanded her claim for the employee's skin cancer under Part B for a new dose reconstruction by the National Institute for Occupational Safety and Health (NIOSH).

The U.S. Department of Labor maintains a database called the Site Exposure Matrices (SEM). The district office performed a search of the SEM and found that there was insufficient evidence to establish a causal relationship between exposure to a toxic substance while employed at the SRS and the claimed condition of skin cancer.

On December 20, 2007, FAB issued another final decision denying **[Claimant]**'s claim under Part B of EEOICPA since it was not at least as likely as not that the employee's skin cancer was related to radiation doses incurred while working at a Department of Energy facility, based on the new dose reconstruction by NIOSH.

On February 14, 2008, the district office sent **[Claimant]** a second development letter regarding her claim for the employee's death due to skin cancer under Part E that advised her that there was no evidence to support a relationship between the employee's exposure to toxic substances and his skin cancer. In that letter, the district office explained the needed information, requested additional medical evidence (including the types of toxic substances to which the employee may have been exposured or any information from a physician that linked the employee's toxic exposure to the claimed condition) and allowed time for **[Claimant]** to respond. No response or additional information was received.

On February 19, 2008, the district office issued a recommended decision to deny the claim for survivor benefits based on the employee's death due to skin cancer under Part E of EEOICPA. The recommended decision informed **[Claimant]** that she had sixty days to file any objections, and she did not file any objections to the recommended decision within that period.

Following the issuance of the recommended decision, FAB performed another search of the SEM, which revealed that carbon has the potential to cause skin cancer and that the labor category of "operator" at the SRS could potentially be exposed to that toxic substance. The search also showed that arsenic benzo(a)pyrene and mineral oil, which can also cause skin cancer, were present in Building 221-F.

Thereafter, FAB referred the case file to a DMC for review of the new information and an opinion. The DMC reviewed the evidence in the record and concluded in an April 24, 2008 report that the available information was insufficient to establish that workplace toxic exposures at a DOE facility were a significant factor that caused, contributed to, or aggravated the claimed condition of skin cancer, even on an "at least as likely as not" basis. He further concluded that the medical evidence did not show that the employee's skin cancer played any role in his death.[1]

After considering the evidence of record, FAB hereby makes the following:

FINDINGS OF FACT

1. The employee filed a claim for benefits under EEOICPA for skin cancer.

2. The employee was diagnosed with skin cancer.

3. The employee was a DOE contractor employee at the SRS from March 26, 1952 to May 17, 1957.

4. The employee died on December 31, 2006 from cardio-respiratory arrest due to or as a consequence of refractory hypertension with shock.

5. **[Claimant]** filed a claim for survivor benefits under EEOICPA based on the employee's death due to skin cancer.

6. **[Claimant]** was the employee's spouse at the time of his death and for at least one year prior to his death.

7. The medical evidence is insufficient to establish a causal link between the employee's skin cancer and exposure to a toxic substance.

Based on the above-noted findings of fact, FAB also hereby makes the following:

CONCLUSIONS OF LAW

The implementing regulations provide that within 60 days from the date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision and whether a hearing is desired. 20 C.F.R. § 30.310(a) (2008). If the claimant does not file a written statement that objects to the recommended decision and/or requests a hearing within the period of time allotted or if the claimant waives any objections to the recommended decision, FAB may issue a decision accepting the recommendation of the district office. 20 C.F.R. § 30.316(a).

[Claimant] meets the definition of a survivor under Part E that appears at 42 U.S.C. § 7385s-3(d)(1). However, a survivor is only entitled to compensation under Part E if the employee would have been entitled to compensation under Part E for a covered illness *and* if it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing the illness and death of the employee. 42 U.S.C. § 7385s-4(c)(1).

The evidence does not establish that it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing the employee's skin cancer. Therefore, I conclude that **[Claimant]** is not entitled to benefits for the employee's death due to skin cancer under Part E because there is insufficient evidence to prove that the employee's skin cancer was related to toxic exposure at a DOE facility.

Jacksonville, FL

Jeana LaRock

Hearing Representative

Final Adjudication Branch

[1] The DMC was specifically asked, "Is it at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing the claimed condition of skin cancer?"

Grandchildren

EEOICPA Fin. Dec. No. 96582-2008 (Dep't of Labor, November 19, 2008)
NOTICE OF FINAL DECISION

This decision of the Final Adjudication Branch (FAB) concerns the above-noted claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq.* For the reasons set forth below, the survivor claim under Part B and Part E is denied.

STATEMENT OF THE CASE

On July 9, 2008, **[Claimant]** filed a Form EE-2, claiming for survivor benefits for the renal cell hypernephroma and the death of her late grandfather, **[Employee]**, hereinafter referred to as the

employee. **[Claimant]** submitted evidence that she is the grandchild of the employee. However, the case file contains evidence that three of the employee's children are still living.

Previously, on November 27, 2007, FAB issued a final decision accepting the claims of the employee's three surviving children under Part B of EEOICPA. FAB found that they were the employee's children and stepchildren, and that the employee's spouse at the time of his death was no longer living. FAB therefore concluded that the three surviving children of the employee were his only eligible survivors and awarded each child an equal share of the available benefits under Part B.
On March 13, 2008, FAB also issued a final decision under Part E of EEOICPA accepting the claim of the surviving child of the employee who was under the age of 18 at the time of the employee's death. FAB concluded that this one child of the employee was his only eligible survivor under Part E and awarded him the available benefits under that Part.
On July 10, 2008, the Jacksonville district office sent **[Claimant]** a development letter explaining the survivorship requirements under Part B and Part E and requested that she submit evidence that she met the requirements.
On September 5, 2008, the Jacksonville district office issued a recommended decision to deny **[Claimant's claim]**, concluding that as a grandchild of the employee, **[Claimant]** is not an eligible survivor of the employee under either Part B or Part E of EEOICPA. The district office noted in the recommended decision that under Part E grandchildren are ineligible, and that under Part B grandchildren are ineligible if there are living children of the employee.

The recommended decision informed **[Claimant]** that she had 60 days to file any objections, and that period ended on November 4, 2008. **[Claimant]** has not filed any objections.

After reviewing the evidence in the case file, FAB hereby makes the following:

FINDINGS OF FACT

1. On July 9, 2008, **[Claimant]** filed a claim for survivor benefits.

2. **[Claimant]** is a grandchild of the employee.

3. On November 27, 2007, a final decision was issued accepting the claims of the employee's three surviving children under Part B and awarding the maximum available Part B benefits.

Based on the above-noted findings of fact, FAB hereby makes the following:

CONCLUSIONS OF LAW

The regulations provide that within 60 days from the date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision and whether a hearing is desired. 20 C.F.R. § 30.310(a) (2008). If the claimant does not file a written statement that objects to the recommended decision and/or requests a hearing within the period of time allotted or if the claimant waives any objections to the recommended decision, FAB may issue a decision accepting the recommendation of the district office. 20 C.F.R. § 30.316(a).

Under Part B, grandchildren of the employee are only eligible survivors if there is not an eligible spouse, child or parent of the employee living at time of payment. 42 U.S.C. § 7384s(e)(1). Three of

the employee's children were living at time of payment and were determined to be the only eligible survivors under Part B in a prior final decision. Therefore, **[Claimant]** does not meet the definition of a survivor under Part B of EEOICPA.

Under Part E, only covered spouses or children of the employee who are living at time of payment are potentially eligible for benefits. 42 U.S.C. § 7385s-3(c). Grandchildren are not eligible for benefits under Part E. Therefore, **[Claimant]** does not meet the definition of a survivor under Part E of EEOICPA.

Jacksonville, FL

Jeana F. LaRock

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 98835-2009 (Dep't of Labor, January 30, 2009)
NOTICE OF FINAL DECISION

This decision of the Final Adjudication Branch (FAB) concerns the above claims for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, FAB accepts the claims of **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]** for survivor benefits under Part B of EEOICPA for the employee's lung cancer. Further, FAB denies the claims of **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]** under Part E for the employee's death.

STATEMENT OF THE CASE

On July 22, 2003, **[Employee's Spouse]** filed a Form EE-2 claiming for survivor benefits under Part B of EEOICPA. On July 24, 2003, she also filed a request for assistance with the Department of Energy (DOE) under former Part D of EEOICPA as the surviving spouse of **[Employee]**. She claimed that the employee had contracted oat cell cancer. In support of her claim and her request, she submitted an employment history indicating that **[Employee]** worked in security at the Lawrence Livermore National Laboratory (LLNL), from 1953 to 1996. A representative of DOE verified that **[Employee]** worked as a security officer at LLNL, a DOE facility, from August 30, 1954 to December 24, 1974. Employment records show that **[Employee]** was monitored for radiation exposure during his employment at LLNL.

The medical evidence of record includes an abstract from the Northern California Cancer Registry showing that **[Employee]** was diagnosed with lung cancer in June of 1967. In addition, **[Employee]**'s medical records include findings of a poorly differentiated carcinoma involving the right middle and right lower lobes of the lung with metastases following a thoracotomy performed on June 10, 1967.

On March 3, 2008, the Secretary of Health and Human Services (HHS) designated the following class for addition to the Special Exposure Cohort (SEC) in a report to Congress: Employees of DOE, its predecessor agencies, and DOE contractors or subcontractors who were monitored for radiation exposure while working at LLNL from January 1, 1950, through December 31, 1973, for a number of

work days aggregating at least 250 work days or in combination with work days within the parameters established for one or more other classes of employees in the Special Exposure Cohort. This SEC became effective April 2, 2008.

The record shows that **[Employee's Spouse]** and **[Employee]** were married on July 14, 1940, and a copy of **[Employee]**'s death certificate establishes that they were married at the time of his death on March 4, 1996. On September 4, 2008, FAB issued a final decision accepting the Part B claim of **[Employee's Spouse]** for the employee's lung cancer and her Part E claim for the employee's death and awarded total compensation to her in the amount of $275,000.00. However, prior to receiving payment, on September 21, 2008, **[Employee's Spouse]** died and her claim was administratively closed on October 8, 2008.

On October 6, 2008, **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]** each filed a Form EE-2 as the surviving grandchildren of **[Employee]**. Copies of a marriage certificate and a death certificate show that **[Employee's Son]** was the son of **[Employee]** and **[Employee's Spouse]**, while a statement from **[Employee's Spouse]** indicates that **[Employee's Son]** was the only child of **[Employee]**. The marriage certificate shows that **[Son's Wife's Maiden Name]** and **[Employee's Son]** were married on September 5, 1970, and the death certificate for **[Employee's Son]** shows that he was married to **[Son's Wife]** at the time of his death on April 10, 2008.

[Claimant #1] provided a copy of her birth certificate showing that she is the daughter of **[Name Deleted]** and **[Name Deleted]** and was born on January 8, 1962. She was seven years old at the time her mother married **[Employee's Son]**. **[Claimant #1]** provided evidence that she lived in a regular parent-child relationship with **[Employee's Son]**, evidence that she utilized the last name of **[Employee's Son]**, miscellaneous group family photos, and a photo of **[Employee's Son]** as "father of the bride" at her wedding. She also provided evidence of her change of name from **[Claimant #1's Maiden Name]** to **[Claimant #1's Married Name]**.

[Claimant #2] provided a copy of his birth certificate showing that he is the son of **[Name Deleted]** and **[Name Deleted]** and was born on January 12, 1956. He was fourteen years old at the time his mother married **[Employee's Son]**. **[Claimant #2]** provided evidence that he lived in a regular parent-child relationship with **[Employee's Son]**, evidence that he utilizes the last name of **[Employee's Son]** along with miscellaneous group family photos including weddings and outdoor activities.

[Claimant #3] provided a copy of her birth certificate showing that she is the daughter of **[Name Deleted]** and **[Name Deleted]** and was born on January 8, 1962. She was seven years old at the time her mother married **[Employee's Son]**. **[Claimant #3]** provided evidence that she lived in a regular parent-child relationship with **[Employee's Son]**, evidence that she utilized the last name of **[Employee's Son]**, along with miscellaneous group family photos, and a photo of **[Employee's Son]** as "father of the bride" at her wedding. She also provided evidence of her change of name from **[Claimant #3's Maiden Name]** to **[Claimant #3's Married Name]**.

[Claimant #4] provided a copy of his birth certificate showing that he is the son of **[Name Deleted]** and **[Name Deleted]** and was born on April 1, 1957. He was thirteen years old at the time his mother married **[Employee's Son]**. **[Claimant #4]** provided evidence that he lived in a regular parent-child relationship with **[Employee's Son]**, evidence that he utilizes the last name of **[Employee's Son]**, along with miscellaneous group family photos, and a photo of **[Employee's Son]** as "father of the

groom" at his wedding.

On December 17, 2008, the Seattle district office recommended acceptance of the claims of **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]** for survivor benefits under Part B of EEOICPA, on the ground that the employee is a member of the SEC who was diagnosed with lung cancer. In addition to finding that the employee was now deceased, the district office also found that there was no living spouse, children, or parents of the employee. The district office therefore concluded that **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]** are the surviving grandchildren of the employee and are entitled to equal shares of the $150,000.00 survivor benefit payable under Part B. The district office also recommended denial of their claims under Part E because grandchildren are not eligible to receive survivor benefits under Part E of EEOICPA.

On December 30, 2008, FAB received written statements from **[Claimant #1]**, **[Claimant #2]** and **[Claimant #4]** indicating that they had never filed a tort suit or received a settlement based on the claimed condition. They also indicated that they had never filed for or received any payments, awards or benefits from a state workers' compensation claim in relation to the claimed condition, or pled guilty to or been convicted of any charges connected with an application for or receipt of federal or state workers' compensation. Further, they confirmed that **[Employee]** had no other biological children, stepchildren or adopted children other than **[Employee's Son]**. On the same date, FAB received written notification indicating that **[Claimant #1]**, **[Claimant #2]**, and **[Claimant #4]** waived all rights to file objections to the findings of fact and conclusions of law contained in the December 17, 2008 recommended decision.

On January 2, 2009, FAB received a written statement from **[Claimant #3]** indicating that she had never filed a tort suit or received a settlement based on the claimed condition. She also indicated that she had never filed for or received any payments, awards or benefits from a state workers' compensation claim in relation to the claimed condition, or pled guilty to or been convicted of any charges connected with an application for or receipt of federal or state workers' compensation. Further, she confirmed that **[Employee]** had no other biological children, stepchildren or adopted children other than **[Employee's Son]**. She also submitted a written notification indicating that she waives all rights to file objections to the findings of fact and conclusions of law contained in the December 17, 2008 recommended decision.

On January 28, 2009, FAB received a written statement from **[Claimant #1]** confirming that the parents of **[Employee]**, **[Name Deleted],** and **[Name Deleted]** are no longer living.

After considering the evidence of record, FAB hereby makes the following:

FINDINGS OF FAC

1. On October 6, 2008, **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]** each filed a claim for survivor benefits as a surviving grandchild of **[Employee]** under EEOICPA
2. **[Employee's Son]** was the only child of **[Employee]**, and he died on April 10, 2008.

3. **[Employee]**'s parents are no longer living.

4. **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]** each lived in a regular parent-child relationship with **[Employee's Son]** and their mother was married to **[Employee's Son]**.

5. **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]** have not filed or received any money from a tort suit or from a state workers' compensation program based on the claimed condition, nor have they ever pled guilty to or been convicted of any charges of having committed fraud in connection with an application for or receipt of benefits under any federal or state workers' compensation law.

Based on the above-noted findings of fact, FAB hereby also makes the following:

CONCLUSIONS OF LAW

Section 30.316(a) of the EEOICPA regulations provides that if the claimant waives any objections to all or part of the recommended decision, FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part. *See* 20 C.F.R. § 30.316(a) (2008). **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]** each waived her/his right to file objections to the findings of fact and conclusions of law contained in the December 17, 2008 recommended decision issued on her/his claim for survivor benefits under EEOICPA.

In order to be afforded coverage under Part B, a survivor must establish that the employee was diagnosed with an "occupational illness" incurred as a result of exposure to silica, beryllium and/or radiation, *i.e.*, cancer, beryllium sensitivity, chronic beryllium disease or silicosis. *See* 42 U.S.C. § 7384l(15), 20 C.F.R. § 30.110(a). Furthermore, the illness must have been incurred while the employee was in the performance of duty. *See* 42 U.S.C. § 7384l(4)-(7), (9), (11). These findings were made in the previous final decision on the claim of **[Employee's Spouse]**, which was administratively closed after she died on September 21, 2008.

The order of eligibility in a survivor claim under Part B is the employee's spouse, then child, then parent, then grandchild, and finally grandparent. *See* Federal (EEOICPA) Procedure Manual, Chapter 2-0200.3 (September 2004). The term "child" includes a stepchild who lived with an employee in a regular parent-child relationship. *See* 42 U.S.C. § 7384s(e)(3)(B). The term "grandchild" of an employee is a child of a child of that employee. *See* 42 U.S.C. §§ 7384s(e)(1)(D), 7384s(e)(3)(B) and (D). **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]** are the surviving children of a child of the employee under § 7384s(e)(1)(D) and they are entitled to an equal share of the total survivor compensation payable under Part B ($150,000.00), which comes to $37,500.00 each. *See* 42 U.S.C. §§ 7384s(e)(1)(D), 7384s(a)(1).

Under Part E of EEOICPA, the only survivors eligible for benefits are the employee's spouse, or the employee's children who were under the age of 18 at the time of the employee's death, or under the age of 23 and a full-time student at the time of the employee's death, or any age and incapable of self-support at the time of the employee's death. The following survivors who are potentially eligible under Part B are *not* eligible for compensation under Part E of EEOICPA: adult children (with the exception of those incapable of self-support at the time of the employee's death), parents, grandchildren or grandparents of the deceased employee. *See* Federal (EEOICPA) Procedure Manual, Chapter E-600.3a (September 2005). **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]** are not eligible survivors under Part E. Accordingly, the claims of **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]** for survivor benefits under Part E are denied.

Seattle, Washington

Keiran Gorny

Hearing Representative

Final Adjudication Branch

Marriage and divorce

EEOICPA Fin. Dec. No. 9855-2002 (Dep't of Labor, August 26, 2002)
NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) 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 stated below, your claim for benefits is denied.

On September 20, 2001, you filed Form EE-2, Claim for Survivor Benefits under the Energy Employees Occupational Illness Compensation Program, with the Denver district office. You stated that your husband, **[Employee]**, had died on May 15, 1991 as a result of adenocarcinoma in the liver, and that he was employed at a Department of Energy facility. You included with your application, a copy of your marriage certificate, **[Employee]**'s resume/biography, and his death certificate. You submitted a letter dated January 5, 2000, from Allen M. Goldman, Institute of Technology, School of Physics and Astronomy, and a packet of information which included the university's files relating to your husband based on your request for his personnel, employee exposure, and medical records. Also submitted was a significant amount of medical records that did establish your husband had been diagnosed with adenocarcinoma in the liver.

On March 1, 2002, Loretta from the Española Resource Center telephoned the Denver district office to request the status of your claim. The claims examiner returned her telephone call on the same date and explained the provision in the Act which states that in order to be eligible for compensation, the spouse must have been married to the worker for at least one year prior to the date of his death. Your marriage certificate establishes you were married on, May 30, 1990. **[Employee]**'s death certificate establishes he died on May 15, 1991.

On March 5, 2002, the Denver district office issued a recommended decision finding that the evidence of record had not established that you were married for one year prior to your husband's death, and therefore you were not entitled to compensation benefits under the EEOICPA.

Pursuant to § 30.316(a) of the implementing regulations, a claimant has 60 days in which to file objections to the recommended decision, as allowed under § 30.310(b) of the implementing regulations (20 C.F.R. § 30.310(b)).

On April 12, 2002, the Final Adjudication Branch received a letter from you that stated you objected to the findings of the recommended decision. You requested a hearing and a review of the written record. You stated that the original law signed by President Clinton provided you with coverage, but when the law changed to include children under 18, the change in the law adversely affected you. You stated that you had documents that demonstrated you had a 10-year courtship with your spouse. You also stated you presented testimony as an advocate in Española. Included with your letter of objection were the following documents:

· a copy of Congressman Tom Udall's "Floor Statement on the Atomic Workers Compensation Act";

· an e-mail from Bob Simon regarding the inclusion of Los Alamos National Laboratory workers in the Senate Bill dated July 5, 2000;

· an e-mail from Louis Schrank regarding the Resource Center in Española;

· a "Volunteer Experience Verification Form", establishing you volunteered as a "Policy Advisor and Volunteer Consultant to the Department of Energy, Members of Congress, Congressional Committees, and many organizations on critical health issues effecting nuclear weapons workers with occupational illnesses";

· a transcript of proceedings from the March 18, 2000 Public Hearing in Española , New Mexico;

· a letter from you to John Puckett, HSE Division Leader, Chairperson, "Working Group Formed to Address Issues Raised by Recent Reports of Excess Brain Tumors in the Community of Los Alamos" and dated June 27, 1991;

· a letter to you from Terry L. Thomas, Ph.D., dated July 31, 1991, regarding the epidemiologic studies planned for workers at Los Alamos National Laboratory; a memorandum entitled "LANL Employee Representative for Cancer Steering Committee", dated September 25, 1991;

· a copy of the "Draft Charter of the Working Group to Address Los Alamos Community Health Concerns", dated June 27, 1991;

· an article entitled "Register of the Repressed: Women's Voice and Body in the Nuclear Weapons Organization"; and

· a psychological report from Dr. Anne B. Warren; which mentions you and **[Employee]** had a "10 or 11 year courtship".

On May 20, 2002, you submitted a copy of the Last Will and Testament of **[Employee]**, wherein he "devises to you, his wife, the remainder of his estate if you survive him for a period of seven hundred twenty (720) hours." You stated you believed this provided you with common law marriage rights for the 720 hours mentioned in the will.

An oral hearing was held on June 18, 2002 at the One-Stop Career Center in Española, New Mexico. You presented additional evidence for consideration that included: a copy of a house "Inspection Report" by Architect Steven G. Shaw, addressed to both you and **[Employee]**, dated August 11, 1989 (exhibit one); a copy of a Quitclaim Deed (Joint Tenants) for you and **[Employee]**, dated October 27, 1989 (exhibit two); a Los Alamos County Assessor Notice of Valuation or Tentative Notice of Value (undated), for a home on Walnut Street, and addressed to both you and **[Employee]** (exhibit three); and a Power of Attorney dated August 5, 1989, between you and **[Employee]** (exhibit four).

Pursuant to § 30.314(f) of the implementing regulations, a claimant has 30 days after the hearing is held to submit additional evidence or argument.

No further evidence was submitted for consideration within that time period.

Section 30.111(a) of the regulations (20 C.F.R. § 30.111(a)) states that, "Except where otherwise provided in the Act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and these regulations, the claimant also bears the burden of providing to OWCP all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in these regulations."

The undersigned has carefully reviewed the hearing transcript and additional evidence received at the hearing, as well as the evidence of record and the recommended decision issued on March 5, 2002.

The record fails to establish that you were married to **[Employee]** one year prior to his death, as required by the EEOICPA. The entire record and the exhibits were thoroughly reviewed. Included in Exhibit One, was the August 11, 1989 inspection report of the home located on Walnut Street, a copy of a bill addressed to both you and **[Employee]** for the inspection service, and an invoice from A-1 Plumbing, Piping & Heat dated August 14, 1989. Although some of these items were addressed to both you and **[Employee]**, none of the records submitted are sufficient to establish that you were married to your husband for one year prior to his death as required under the Act. 42 U.S.C. § 7384s(e)(3)(A).

The evidence entered into the record as Exhibit Two, consists of a Quitclaim Deed dated October 27, 1989, showing **[Employee]**, a single man, and **[Claimant]**, a single woman living at the same address on Walnut Street as joint tenants. Exhibit Three consists of a Notice of Valuation of the property on Walnut Street in Los Alamos County and is addressed to both you and **[Employee]**. Although this evidence establishes you were living together in 1989 in Los Alamos County, New Mexico, it is not sufficient evidence to establish you were married to your husband for one year prior to his death as required under the Act. 42 U.S.C. § 7384s(e)(3)(A).

Exhibit Four consists of a copy of a Power of Attorney between you and **[Employee]** regarding the real estate located on Walnut Street. This evidence is not sufficient to establish you were married for one year prior to his death. 42 U.S.C. § 7384s(e)(3)(A).

The Act is clear in that it states, “the “spouse” of an individual is a wife or husband of that individual who was married to that individual for at least one year immediately before the death of that individual.”

During the hearing you stated that there is a federal law, the Violence Against Women Act, that acknowledges significant other relationships and provides protection for a woman regardless of whether she is married to her husband one year or not. You also stated that you believed there was “a lack of dialogue” between the RECA program and the EEOICP concerning issues such as yours. Additionally, on August 15, 2002, you sent an email to the Final Adjudication Branch. The hearing transcript was mailed out on July 23, 2002. Pursuant to § 30.314(e) of the implementing regulations, a claimant is allotted 20 days from the date it is sent to the claimant to submit any comments to the reviewer. Although your email was beyond the 20-day period, it was reviewed and considered in this decision. In your email you stated the issue of potential common law marriage was raised. You stated that you presented the appropriate documentation that may support a common law marriage to the

extent permitted by New Mexican law. You stated that the one-year requirement was adopted from the RECA and that you have not been able to determine how DOJ has interpreted this provision. Also, you stated that the amendments of December 28, 2001 should not apply to your case because you filed your claim prior to the enactment of the amendments. You stated you did not believe the amendments should be applied retroactively.

Section 7384s (e)(3)(A), Compensation and benefits to be provided, states:

The "spouse" of an individual is a wife or husband of that individual who was married to that individual for at least one year immediately before the death of that individual."

Section 7384s(f) states:

EFFECTIVE DATE—This section shall take effect on July 31, 2001, unless Congress otherwise provides in an Act enacted before that date.

There is no previous enacted law that relates to compensation under the EEOICPA. Therefore, the amendments apply retroactively to all claimants.

A couple cannot become legally married in New Mexico by living together as man and wife under New Mexico's laws. However, a couple legally married via common law in another state is regarded as married in all states. The evidence of record does not establish you lived with **[Employee]** in a common law state. Because New Mexico does not recognize common law marriages, the time you lived with **[Employee]** prior to your marriage is insufficient to establish you were married to him for one year prior to his death.

Regarding your reference to the difference between how Native American widows are treated and recognized in their marriages, and how you are recognized in your marriage, Indian Law refers primarily to that body of law dealing with the status of the Indian tribes and their special relationship to the federal government. The existing federal-tribal government-to-government relationship is significant given that the United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection and has affirmed the Navajo Nation's sovereignty. The laws that apply to the Native Americans do not apply in your case.

The undersigned finds that you have not established you are an eligible survivor as defined in 42 U.S.C. § 7384s(e)(3)(A). It is the decision of the Final Adjudication Branch that your claim is denied.

August 26, 2002

Denver, CO

Janet R. Kapsin

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 63743-2006 (Dep't of Labor, November 21, 2006)

NOTICE OF FINAL DECISION FOLLOWINGREVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch (FAB) concerning the claims of **[Claimant #1]**, **[Claimant # 6]**, **[Claimant #7]**, **[Claimant #8]**and **[Claimant # 9]** for compensation under Part B, and of **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]** under Part E, of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA or the Act), 42 U.S.C. § 7384 *et seq*. For the reasons stated below, the claims of **[Claimant #1]** under Parts B and E, as well as the claims of **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]** under Part E are denied, and the claims of **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** under Part B are approved.

STATEMENT OF THE CASE

On November 29, 2004, **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant # 6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** filed Forms EE-2, claiming survivor benefits under Parts B and E of EEOICPA as the children of the employee. **[Claimant #1]** filed such a claim on June 14, 2005, as the spouse of the employee. The Department of Justice (DOJ) confirmed on January 11, 2005 that **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and**[Claimant #9]** received, on November 22, 2004, an award under Section 5 of the Radiation Exposure Compensation Act (RECA), as the eligible surviving beneficiaries of the employee, for the condition of pneumoconiosis.

Documents, including birth, marriage and death certificates, birth affidavits and a marital status and family profile issued by the Navajo Nation, and a decree issued by a judge on December 22, 1978, confirmed that **[Claimant #2]**, born on **[Date of Birth]**, **[Claimant #3]**, born on **[Date of Birth]**, **[Claimant #4]**, born on **[Date of Birth]**, **[Claimant #5]**, born on **[Date of Birth]**, **[Claimant #7]**, born on **[Date of Birth]**, **[Claimant #8]**, born on **[Date of Birth]** and **[Claimant #9]**, born on **[Date of Birth]**, are children of the employee. Another birth certificate states that **[Claimant #6]** was born on **[Date of Birth]** and that her mother was **[Claimant #6's mother]**, who is also listed as the mother on the birth certificates of **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]**. Subsequently, an obituary from a newspaper was submitted which listed **[Claimant #6]** as a surviving daughter of the employee.

The death certificate of the employee states that he died on December 1, 1990 and that, at the time of his death, he was married to **[Claimant #1's maiden name]**. A marriage certificate confirms that **[Claimant #1's maiden name]** was the name of **[Claimant #1]** until her marriage to the employee, on June 18, 1950. The death certificate states that the "informant" was **[Claimant #2]**, who, according to his birth affidavit, is the son of the employee and **[Claimant #1]**.

The file also includes a Decree of Dissolution of Marriage, concerning the marriage of the employee and **[Claimant #1]**. The Decree states that an "absolute divorce" was "granted to the plaintiff," **[Employee]**, and that this was ordered, on December 22, 1978, by a judge of the Court of the Navajo Nation. A marital status and family profile, issued by the Vital Records and Tribal Enrollment Program of the Navajo Nation, on January 10, 2002, also stated that the employee and **[Claimant #1]** were divorced on December 22, 1978.

The DOJ submitted a document signed on October 8, 2002 by "**[Claimant #1]**" on which a box was

checked indicating that she was not in a legal or common-law marriage to the employee for at least one year prior to his death. On August 1, 2005, her representative submitted an undated affidavit signed by "**[Claimant #1]**" stating that she was never divorced from the employee, that she did not knowingly check the box on the DOJ document, that she always uses her middle initial (**[Middle initial]**) when signing her name, that she needs translation of all documents into Navajo and that she relied on the assistance of the Shiprock Office of the Navajo Uranium Workers in pursuing her claim.

The case was referred to the Office of the Solicitor and the Solicitor responded with an opinion dated December 7, 2005. The district office then obtained statements from **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]**, confirming that they had not filed for, or received any benefits from, a lawsuit or a state workers' compensation claim, for the employee's exposure or illness. On April 6, 2006, the district office sent letters to **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]** and **[Claimant #5]**, asking if they had filed for, or received any benefits from, a lawsuit or a state workers' compensation claim, for the employee's exposure or illness. No response to those letters has been received.

On April 11, 2006, the Denver district office issued a recommended decision, concluding that **[Claimant #1]** is not entitled to compensation under Part B of the Act, but that **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** were each entitled to $6,250 (1/8th of $50,000) under Part B. The recommended decision also concluded that **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]** and **[Claimant # 4]** are not entitled to compensation under part E of the Act, since the evidence did not support they are eligible survivors of the employee, as defined in 42 U.S.C. § 7385s-3. The recommended decision also described the criteria which have to be met to be considered a "covered child" under Part E.

The recommended decision held in abeyance the claims of **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]** and **[Claimant #5]** under Part B, until their response to the inquiry as to whether they had ever filed, or received benefits under, a lawsuit or state workers' compensation claim. It also stated that further development of the evidence must take place before a decision could be issued on the claims of **[Claimant #5]**, **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** under Part E.

On April 21, 2006, the FAB received **[Claimant #6]**'s, **[Claimant #7]**'s and **[Claimant #8]**'s waivers of their right to object to the recommended decision. On June 7, 2006, the FAB received a letter from Lorenzo Williams, the representative of **[Claimant #1]**, expressing objections to the recommended decision and requesting a hearing. Mr. Williams submitted another letter, dated July 3, 2006, which again stated his objections to the recommended decision, withdrew the request for a hearing and requested a review of the written record. On September 18, 2006, **[Claimant #1]**, through her representative, was provided twenty days to submit any additional evidence she wished considered. No additional evidence was submitted.

OBJECTIONS

The letters of objection included numerous allegations of inappropriate conduct by DOJ, DEEOIC, the Solicitor, government agencies of the Navajo Nation, the Office of Navajo Uranium Workers and **[Claimant #1]**'s previous representative. No evidence was submitted confirming that any such conduct occurred which would have had any bearing on the outcome of the case.

The basic objection of Lorenzo Williams is that the evidence as to whether **[Claimant #1]** was married

to the employee at the time of his death was not properly evaluated. In particular, he objected that the affidavit made by **[Claimant #1]** on August 1, 2005, indicating that she was never divorced from the employee, was not considered. However, its evidentiary value must be weighed in light of the other evidence in the file. It is true that the employee's death certificate states that, at that time, he was married to **[Claimant #1]**. However, it also indicates that the information was based solely on information received from **[Claimant #2]**.

On the other hand, the document which appears to have been signed by **[Claimant #1]** on October 8, 2002 states that she was not married to the employee at the time of his death. It should be noted that another document in the file, her marriage certificate, includes a signature of **[Claimant #1]** without a middle initial.

Furthermore, an official document was issued by a judge on December 22, 1978 stating that a divorce was granted dissolving the marriage of **[Claimant #1]** and the employee. A stamp from the clerk of the court states that the copy in the file is an accurate copy of the document. Lorenzo Williams, the representative of **[Claimant #1]** has noted that the document incorrectly states that the two were married in 1951, rather than 1950, as stated in the marriage certificate, and that there is also a stamp indicating the document was "received" in 1991, after the death of the employee. However, he presented no argument or evidence that these facts would in any way invalidate the divorce decree, which was ordered and signed by the judge on December 22, 1978.

In addition, the file includes another official document, a marital status and family profile, issued by the Vital Records and Tribal Enrollment Program of the Navajo Nation on January 10, 2002, which further confirms that **[Claimant #1]** and the employee were divorced on December 22, 1978.

The probative value of these two official documents far outweigh the unclear and conflicted statements from **[Claimant #1]** and the statement on the death certificate which simply repeated information obtained from one of her children with the employee.

Also, it should be noted that the evidence supports that, after December 22, 1978, the employee had at least three more children with another woman, **[Employee's second wife]**. This does not, in and of itself, constitute evidence of the employee's marital status. It does, however, lend some credence to the proposition that the employee no longer considered himself married to **[Claimant #1]**.

Finally, as the Solicitor noted in the opinion of December 7, 2005, 42 U.S.C. § 7384u provides for payment of compensation to an individual "who receives, or has received" an award under section 5 of the RECA. A determination is made by DEEOIC concerning an eligible survivor under that section only if all the individuals who received the RECA award are deceased. Since, in this case, the individuals who received the award under section 5 of the RECA are still alive, **[Claimant #1]** would not be eligible for benefits under Part B of the EEOICPA even if it were determined that she was an eligible surviving spouse under § 7384u(e).

Upon review of the case record, the undersigned makes the following:

FINDINGS OF FACT

1. You all filed claims for benefits under Parts B and E of EEOICPA.

2. **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** received compensation for the condition of pneumoconiosis, as eligible surviving beneficiaries of the employee, under Section 5 of RECA.

3. The employee died on December 1, 1990. At the time of his death, **[Claimant #2]** was 36 years old, **[Claimant #3]** was 28, **[Claimant #4]** was 26, **[Claimant #5]** was 19, **[Claimant #6]** was 11, **[Claimant #7]** was 9, **[Claimant #8]** was 7 and **[Claimant #9]** was 6. **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]** were not incapable of self-support when the employee died.

4. **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** are children of the employee.

5. **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** did not receive any settlement or award from a lawsuit or state workers' compensation in connection with the accepted exposure or illness. **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]** and **[Claimant #5]** have not confirmed whether or not they received a settlement or award from a lawsuit or state workers' compensation in connection with the accepted exposure or illness.

6. **[Claimant #1]** was married to the employee from June 18, 1950 until December 22, 1978, when they were divorced.

Based on these facts, the undersigned makes the following:

CONCLUSIONS OF LAW

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, pursuant to 20 C.F.R. § 30.310. In reviewing any objections submitted under 20 C.F.R. § 30.313, the FAB will review the written record, any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. I have reviewed the record in this case, including the letters of objection, and must conclude that no further investigation is warranted.

The EEOICPA provides, under Part E, for payment of compensation to survivors of covered employees. It specifically states in 42 U.S.C. § 7385s-3 that if "there is no covered spouse. . . payment shall be made in equal shares to all covered children who are alive." It defines a "covered spouse" as "a spouse of the employee who was married to the employee for at least one year immediately before the employee's death," and a "covered child" as "a child of the employee who, as of the employee's death. . .had not attained the age of 18 years. . .had not attained the age of 23 years and was a full-time student who had been continuously enrolled as a full time student. . .since attaining the age of 18 years; or. . .had been incapable of self-support."

For the foregoing reasons, the undersigned finds that the evidence does not support that **[Claimant #1]** was a "covered spouse" or that **[Claimant #2]**, **[Claimant #3]** or **[Claimant #4]** were "covered" children, and their claims for benefits under Part E of EEOICPA are hereby denied.

The EEOICPA provides, under 42 U.S.C. § 7384u, for payment of compensation in the amount of $50,000 to an "individual who receives, or has received, $100,000 under section 5 of the Radiation Exposure Compensation Act." **[Claimant #1]** did not receive an award under section 5 of RECA and,

therefore, she is not entitled to compensation under Part B.

[Claimant #2], **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** did receive an award under section 5 of RECA and, therefore, they each have an entitlement to $6,250 ($50,000 divided by 8) under Part B. Since **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** have affirmed that they have not received a payment from a tort suit for the employee's exposure, there is no offset to their entitlement, under 42 U.S.C. § 7385 of the Act, and compensation is hereby awarded to **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]**, in the amount of $6,250 each.

When **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]** and **[Claimant #5]** have responded to the inquiry as to whether they have received a payment from a lawsuit based upon their father's employment-related exposure, decisions will be issued on their claims for compensation under Part B of the Act.

Upon further development of the evidence, decisions will be issued on the claims of **[Claimant #5]**, **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]** and **[Claimant #9]** for compensation under Part E.

Washington, DC

Richard Koretz, Hearing Representative

Final Adjudication Branch

Non-claiming individuals

EEOICPA Fin. Dec. No. 47856-2005 (Dep't of Labor, July 21, 2005)

NOTICE OF FINAL DECISION

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

STATEMENT OF THE CASE

On August 30, 2001, the employee's surviving spouse filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA), based on lymphoma and peripheral bronchogenic carcinoma, and on July 24, 2003, she passed away, and her claim was administratively closed. On August 7 (**[Claimant #1]**) and September 9 (**[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**), 2003, you filed Forms EE-2 under the EEOICPA, based on bronchogenic carcinoma and lymphoma.

The record includes a Form EE-3 (Employment History Affidavit) that indicates the worker was employed by Reynolds Electrical and Engineering Company (REECo) at the Nevada Test Site (NTS) intermittently from 1957 to 1978, and that he wore a dosimetry badge. A representative of the Department of Energy confirmed the employee was employed at NTS by REECo intermittently from August 23, 1958 to February 4, 1978.

Medical documentation received included a copy of a Nevada Central Cancer Registry report that indicated an aspiration biopsy was performed on February 1, 1978, and it showed the employee was diagnosed with primary lung cancer. A Valley Hospital discharge summary, dated February 4, 1978, indicated the employee had a tumor in the right upper lobe of the lung. The record does not contain documentation demonstrating the employee was diagnosed with lymphoma.

To determine the probability of whether the employee sustained the cancer in the performance of duty, the Seattle district office referred your case to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction in accordance with 20 C.F.R. § 30.115. The district office received the final NIOSH Report of Dose Reconstruction dated April 20, 2005. *See* 42 U.S.C. § 7384n(d). NIOSH noted the employee had worked at NTS intermittently from August 23, 1958 to February 4, 1978. However, in order to expedite the claim, only the employment from 1966 through 1970 was assessed. NIOSH determined that the employee's dose as reconstructed under the EEOICPA was 71.371 rem to the lung, and the dose was calculated only for this organ because of the specific type of cancer associated with the claim. NIOSH also determined that in accordance with the provisions of 42 C.F.R. § 82.10(k)(1), calculation of internal dose alone was of sufficient magnitude to consider the dose reconstruction complete. Further, NIOSH indicated, the calculated internal dose reported is an "*underestimate*" of the employee's total occupational radiation dose. *See* NIOSH Report of Dose Reconstruction, pp. 4, 5, 6, and 7.

Using the information provided in the Report of Dose Reconstruction, the Seattle district office utilized the Interactive RadioEpidemiological Program (IREP) to determine the probability of causation of the employee's cancer, and reported in its recommended decision that the probability the employee's lung cancer was caused by his exposure to radiation while employed at NTS was at least 50%.

You provided copies of the death certificates of the employee and his spouse, copies of your birth certificates showing you are the natural children of the employee, and documentation verifying your changes of names, as appropriate.

The record shows that you (**[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**) and **[Claimant #5]** filed claims with the Department of Justice (DOJ) for compensation under the Radiation Exposure Compensation Act (RECA). By letter dated May 20, 2005, a representative of the DOJ reported that an award under § 4 of the RECA was approved for you; however, the award was rejected by **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**.

On June 14, 2005, the Seattle district office recommended acceptance of your claims for survivor compensation for the condition of lung cancer, and denial of your claims based on lymphoma.

On June 12 (**[Claimant #1]** and June 20 (**[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**), 2005, the Final Adjudication Branch received written notification from you indicating that you waive any and all rights to file objections to the recommended decision.

FINDINGS OF FACT

1. On August 7 (**[Claimant #1]**) and September 9 (**[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**), 2003, you filed claims for survivor benefits.

2. Documentation of record shows that the employee and his surviving spouse have passed away,

you (**[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**) are the children of the employee, and you are his survivors.

3. You (**[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**) have rejected an award of compensation under the Radiation Exposure Compensation Act.

4. The worker was employed at NTS by REECo, intermittently, from August 23, 1958 to February 4, 1978.

5. The employee was diagnosed with lung cancer on February 1, 1978.

6. The NIOSH Interactive RadioEpidemiological Program indicated at least a 50% probability that the employee's cancer was caused by radiation exposure at NTS.

7. The employee's cancer was at least as likely as not related to his employment at a Department of Energy facility.

CONCLUSIONS OF LAW

The evidence of record indicates that the worker was employed at NTS by REECo, intermittently, from August 23, 1958 to February 6, 1978. Medical documentation provided indicated the employee was diagnosed with lung cancer on February 1, 1978; however, there is no evidence showing the employee was diagnosed with lymphoma, and your claims based on lymphoma must be denied.

After establishing that a partial dose reconstruction provided sufficient information to produce a probability of causation of 50% or greater, NIOSH determined that sufficient research and analysis had been conducted to end the dose reconstruction, and the dose reconstruction was considered complete. *See* 42 C.F.R. § 82.10(k)(1).

The Final Adjudication Branch analyzed the information in the NIOSH Report of Dose Reconstruction and utilized the NIOSH-IREP to confirm the 63.34% probability that the employee's cancer was caused by his employment at NTS. *See* 42 C.F.R. § 81.20. (Use of NIOSH-IREP). Thus, the evidence shows that the employee's cancer was at least as likely as not related to his employment at NTS.

The Final Adjudication Branch notes that, in its Conclusions of Law, the recommended decision erroneously indicates the employee, **[Employee]**, is entitled to compensation in the amount of $150,000.00; therefore, that Conclusion of Law must be vacated as the employee is deceased. *See* 42 U.S.C. § 7384s(a)(1).

The Final Adjudication Branch notes that the record shows the employee passed away on February 4, 1978. However, his employment history indicates he worked at NTS until February 6, 1978. Consequently, for purposes of administration of the Act, his employment is considered to have ended on February 4, 1978.

Based on the employee's covered employment at NTS, the medical documentation showing his diagnosis of lung cancer, and the determination that the employee's lung cancer was "at least as likely as not" related to his occupational exposure at NTS, and thus sustained in the performance of duty, the employee is a "covered employee with cancer," under 42 U.S.C. § 7384l. *See* 42 U.S.C. § 7384l(9)(B);

20 C.F.R. § 30.213(b); 42 C.F.R. § 81.2. Further, as the record indicates there is one other potential beneficiary under the EEOICPA, you are each (**[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]**) entitled to survivor compensation under 42 U.S.C. § 7384 in the amount of $30,000.00. As there is evidence that another survivor is a child of the employee, and potentially an eligible survivor under the Act, the potential share ($30,000.00) of the compensation must remain in the EEOICPA Fund. *See* Federal (EEOICPA) Procedure Manual, Chapter 2-200.7c(2) (June 2004).

Seattle, WA

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

Parents

EEOICPA Fin. Dec. No. 18528-2006 (Dep't of Labor, February 8, 2008)
NOTICE OF FINAL DECISION

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

STATEMENT OF THE CASE

On January 3, 2002, you filed a claim for survivor benefits under EEOICPA as a surviving parent of **[Employee]**. You claimed the employee was employed by Dow Chemical, Rockwell International and EG&G at the Rocky Flats Plant[1] from 1964 to 1966, and from June 1, 1981 to 1993. The Department of Energy verified the employee was employed at the Rocky Flats Plant from September 17, 1964 to July 25, 1966, and from June 1, 1981 to June 29, 1995.

You claimed the employee was diagnosed with ovarian cancer. The pathology report of the tissue obtained on December 28, 1995 described a diagnosis of moderately differentiated endometrioid-type adenocarcinoma of the left ovary.

The employee's death certificate showed she was born on March 31, 1946; died on January 25, 2001 at the age of 54; and was widowed. The death certificate also listed **[Employee's Spouse]** as her spouse; **[Employee's Father]** as her father; and **[Claimant]** as her mother. The death certificate for **[Employee's Spouse]** showed he died on February 15, 2000, and was married to **[Employee]** (maiden name given). The employee's birth and hospital certificates showed **[Employee]** was born on March 31, 1946; to **[Employee's Father]**and **[Claimant]**. **[Employee's Father]**'s death certificate showed he died on November 27, 1993.

On December 2, 2002, the district office forwarded a complete copy of the case record to the National Institute for Occupational Safety and Health (NIOSH) for reconstruction of the radiation dose the employee received in the course of her employment at the Rocky Flats Plant. On February 17, 2006, a final decision was issued under Part B of EEOICPA denying your claim for survivor benefits based on a probability of causation of 26.93%, which showed that the employee's cancer did not meet the 50%

"at least likely as not" mandated level for compensability.

On August 6, 2007, the Secretary of the Department of Health and Human Services (HHS) designated the following classes of employees for addition to the Special Exposure Cohort (SEC): Employees of DOE, its predecessor agencies, or DOE contractors or subcontractors who were monitored or should have been monitored for neutron exposures while working at the Rocky Flats Plant in Golden, Colorado, for a number of work days aggregating at least 250 work days from April 1, 1952 through December 31, 1958 and/or January 1, 1959 through December 31, 1966, or in combination with work days within the parameters established for one or more other classes of employees in the Special Exposure Cohort. The SEC designations for these classes became effective on September 5, 2007.

A review of the evidence of record indicates that the employee had a period of employment aggregating 250 days during the SEC period (January 1, 1959 through December 31, 1966); was monitored for neutron exposures, as her name appears on the Neutron Dose Report (NDR)[2]; and was diagnosed with ovarian cancer, a specified cancer, more than five years after her first exposure to radiation at the Rocky Flats Plant. Based on the SEC determinations for certain employees at the Rocky Flats Plant, a Director's Order was issued on December 28, 2007 that vacated the prior decision issued under Part B.

On December 28, 2007, the district office issued a recommended decision to accept your claim for survivor benefits under Part B of EEOICPA and referred the case to the FAB for an independent assessment of the evidence and a final decision on your claim.

On January 11, 2008, the FAB received your signed statement certifying that neither you nor the employee filed any lawsuits, tort suits, or state workers' compensation claims; or received any awards or benefits related to ovarian cancer; that you have not pled guilty or been convicted of any charges connected with an application for or receipt of federal or state workers' compensation; and the employee had no children.

After considering the recommended decision and all evidence in the case, the FAB hereby makes the following:

FINDINGS OF FACT

1. On January 3, 2002, you filed a claim for survivor benefits as the surviving parent of **[Employee]**.

2. You are the surviving parent of **[Employee]**, as supported by birth and death certificates.

3. The employee was employed at the Rocky Flats Plant, a covered DOE facility, from September 17, 1964 to July 25, 1966, and from June 1, 1981 to June 29, 1995.

4. Effective September 5, 2007, employees at the Rocky Flats Plant that worked from April 1, 1952 through December 31, 1958, and/or January 1, 1959, through December 31, 1966, and were monitored or should have been monitored for neutron exposure, were added to the SEC.

5. The employee has a period of employment at the Rocky Flats Plant aggregating 250 days during the SEC period, September 17, 1964 through July 25, 1966.

6. The employee was monitored for neutron dose exposure during the period September 17, 1964 to July 25, 1966, as confirmed by the NDR.

7. The employee was diagnosed with ovarian cancer (a specified cancer) on December 28, 1995. This diagnosis occurred more than five years after her first exposure to radiation at the Rocky Flats Plant.

8. The evidence of record contains your signed statement certifying that neither you nor the employee filed a lawsuit, tort suits, or state workers' compensation claims; received any awards or benefits related to ovarian cancer; that you have not pled guilty or been convicted of any charges connected with an application for or receipt of federal or state workers' compensation; and the employee had no children.

Based on the above-noted findings of fact in this claim, the FAB hereby also makes the following:

CONCLUSIONS OF LAW

Pursuant to the regulations implementing the EEOICPA, a claimant has 60 days from the date of issuance of the recommended decision to raise objections to that decision to the FAB. 20 C.F.R § 30.310(a). If an objection is not raised during the 60-day period, the FAB will consider any and all objections to the recommended decision waived and issue a final decision affirming the district office's recommended decision. 20 C.F.R. § 30.316(a). On January 11, 2008, the FAB received your written notification waiving any and all objections to the recommended decision.

Part B of EEOICPA provides benefits for an employee diagnosed with a specified cancer who is a member of the SEC if, and only if, that employee contracted the specified cancer after beginning employment at a DOE facility. Such employee is considered "a covered employee with cancer."

On August 6, 2007, the Secretary of HHS designated the following classes of employees for addition to the SEC: Employees of DOE, its predecessor agencies, or DOE contractors or subcontractors who were monitored or should have been monitored for neutron exposures while working at the Rocky Flats Plant in Golden, Colorado, for a number of work days aggregating at least 250 work days from April 1, 1952 through December 31, 1958 and/or January 1, 1959 through December 31, 1966, or in combination with work days within the parameters established for one or more other classes of employees in the SEC. The SEC designations for these classes became effective September 5, 2007.

The employee is a member of the SEC as designated above and defined by 42 U.S.C. §§ 7384l(14)(C) and 7384q of the Act, and has been diagnosed with ovarian cancer, a specified cancer. The FAB concludes that the employee is a "covered employee with cancer" pursuant to the requirements of 42 U.S.C. § 7384l(9)(A).

You have established that you are the employee's eligible survivor, pursuant to 42 U.S.C. § 7384s(e)(3)(C) of the Act. Therefore, you are entitled to compensation in the amount of $150,000.00, pursuant to 42 U.S.C. § 7384s(a)(1) and (e)(1)(C).

Accordingly, your claim for survivor benefits for the employee's ovarian cancer is approved for compensation under Part B of the Act.

Denver, Colorado

Anna Navarro

Hearing Representative

Final Adjudication Branch

[1] According to the Department of Energy's (DOE) Office of Worker Advocacy on the DOE website at http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/showfacility.cfm., the Rocky Flats Plant in Golden, Colorado is a covered DOE facility from 1951 to present.

[2] *The Rocky Flats Neutron Dosimetry Reconstruction Project (NDRP)* was a historical project undertaken to better reconstruct neutron dose for workers at the Rocky Flats Plant. As part of that Project, a list of 5,308 names was compiled. Every name on the list represents someone who was monitored for neutron dose.

Reimbursement of deceased employee's medical expenses

EEOICPA Fin. Dec. No. 59062-2004 (Dep't of Labor, September 13, 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 (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the Final Adjudication Branch accepts and approves your claims for survivor compensation for the condition of chronic beryllium disease.

STATEMENT OF THE CASE

On June 2, 2003, the employee filed a claim for compensation under the EEOICPA based on asbestosis and other lung condition. That claim was recommended for denial by the Seattle district office; however, additional medical documentation was received by the Final Adjudication Branch, who vacated the recommended decision by Remand Order dated September 8, 2003. The district office performed additional development of the medical evidence and recommended acceptance of the claim and medical benefits for chronic beryllium disease and denial of the claim for asbestosis, which was affirmed by Final Decision of the Final Adjudication Branch on July 6, 2004. Before payment could be issued, however, the employee passed away on June 12, 2004, and the claim was administratively closed. On June 25 (**[Claimant 1, Claimant 2, and Claimant 3]**) and June 28 (**[Claimant 4]**), 2004, you filed claims for survivor benefits under the EEOICPA based on chronic beryllium disease (CBD). A Form EE-3 (Employment History) previously filed by the employee indicated he worked at the Idaho National Environmental and Engineering Laboratory (INEEL) for Keiser Construction from January 1, 1954 to August 30, 1954 and for Phillips Petroleum, Idaho Nuclear, Aerojet General, and EG&G Idaho from October 1, 1954 to March 1, 1992. A representative of the Department of Energy (DOE) verified the worker's employment at INEEL from October 7, 1957 to March 2, 1992. INEEL is recognized as a covered DOE facility, from 1949 to the present, where the potential for beryllium exposure existed throughout the course of its operations because of beryllium use, residual contamination, and decontamination activities. *See* DOE, Office of Worker Advocacy, Facility List.

Medical evidence of record includes a chest x-ray and a CT scan, both dated October 13, 1992, that indicated the employee had multiple pleural plaques, and a chest x-ray, dated May 1, 2002, that

indicated emphysematous changes within his lungs, densely calcified pleural plaques on the left lung, and scarring and associated bullous changes within the right lung base. In addition, the record includes a history of a clinical course of treatment of the employee for asbestosis and chronic obstructive pulmonary disease (COPD) dating from October 1992 to March 2003. The employee's pulmonary function test results, from October 13, 1992, showed an FVC of 3.62 and an FEV1 of 1.57, with an FEV1/FVC ratio of 43% before bronchodilators, and an FVC of 4.6 and FEV1 of 1.59 after bronchodilators. The employee's DLCO was markedly diminished at 11.77 or 35% of predicted.

District Medical Consultant Robert E. Sandblom, M.D., reviewed the employee's medical records, in a report dated January 5, 2004, and indicated the claimant had chest radiographic (or CT) abnormalities characteristic of CBD, restrictive or obstructive lung physiology testing or diffusing lung capacity defect, and a clinical course consistent with a chronic respiratory disorder.

You provided copies of your birth certificates that indicate each of you is the natural child of the employee, and copies of the certificates of marriage of **[Claimant 1]** and **[Claimant 4]** documenting your name changes. The file also contains a copy of the employee's certificate of death that indicates the employee was widowed when he passed away on June 12, 2004.

The Seattle district office determined that the employee was a covered beryllium employee as defined in § 7384l(7) of the EEOICPA. *See* 42 U.S.C. § 7384l(7). Further, the Seattle district office determined that the evidence submitted meets the criteria necessary to establish a diagnosis of chronic beryllium disease as defined by § 7384l(13), a covered occupational illness as defined by § 7384l(8)(B). *See* 42 U.S.C. § 7384l(8)(B) and (13). Also, the district office determined that you are the survivors of the employee, as defined by § 7384s(e)(3), and that you are entitled to compensation in the amount of $37,500.00 each pursuant to §§ 7384s(a)(1) and (e)(1) of the EEOICPA. *See* 42 U.S.C. § §7384s(a)(1) and (e)(1). In addition, the district office concluded that you are entitled to reimbursement of medical expenses for the employee's chronic beryllium disease, retroactive to the date he filed his claim, June 2, 2003, through June 12, 2004, the date he passed away.

FINDINGS OF FACT

1. The employee filed a claim for asbestosis and other lung condition, on June 2, 2003.

2. You filed claims for survivor benefits for chronic beryllium disease on June 25 (**[Claimant 1, Claimant 2, and Claimant 3]**) and June 28 (**[Claimant 4]**), 2004.

3. The employee was employed at INEEL, a covered DOE facility, from October 7, 1957 to March 2, 1992.

4. INEEL is recognized as a covered DOE facility, from 1949 to the present, where the potential for beryllium exposure existed throughout the course of its operations because of beryllium use, residual contamination, and decontamination activities.

5. The employee is a covered beryllium employee who worked at INEEL during a period when beryllium dust, particles or vapor may have been present.

6. The findings in the medical evidence are consistent with a diagnosis of chronic beryllium disease based on the statutory criteria for a diagnosis before January 1, 1993.

7. The onset of the employee's chronic beryllium disease on October 13, 1992, occurred after his exposure to beryllium in the performance of duty.

8. The employee passed away on June 12, 2004, and was not survived by a spouse.

9. You are the natural children and survivors of the employee.

CONCLUSIONS OF LAW

On August 20 (**[Claimant 4]**), August 23 (**[Claimant 2 and Claimant 1]**), and September 1 (**[Claimant 3]**), 2004, the Final Adjudication Branch received your written notifications that you waive any and all rights to file objections to the recommended decision.

In order to be afforded coverage under § 7384n(a) of the EEOICPA as a "covered beryllium employee," the employee must have worked for a beryllium vendor and sustained occupational exposure to beryllium while:

(1) employed at a Department of Energy facility; or

(2) present at Department of Energy facility, or a facility owned and operated by a beryllium vendor, because of employment by the United States, a beryllium vendor, or a contractor or subcontractor of the Department of Energy;

during a period when beryllium dust, particles, or vapor may have been present at such a facility. Further, the requisite exposure must be shown to have been "in the performance of duty," which is presumed, absent substantial evidence to the contrary. *See* 42 U.S.C. § 7384n(a); 20 C.F.R. § 30.205(1), (2) and (3).

In addition, there must be medical documentation of the condition in order to be eligible for survivor's benefits based on 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 radiograph (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 chronic respiratory disorder.

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

See 42 U.S.C. § 7384l(13)(B). Based on the employee's covered employment at a DOE facility, he was exposed to beryllium in the performance of duty. *See* 42 U.S.C. § 7384n(a).

The record contains medical evidence to show a diagnosis of CBD. Medical reports include a chest x-ray and a CT scan that are characteristic of chronic beryllium disease showing that the employee had multiple pleural plaques. The employee also had an abnormal pulmonary function test, and he was treated for lung disease over a period of years. A review of the employee's medical records by District Medical Consultant Robert E. Sandblom, M.D., dated January 5, 2004, indicated the claimant had abnormal chest radiographs characteristic of CBD, restrictive or obstructive lung physiology testing or diffusing lung capacity defect, and a clinical course consistent with a chronic respiratory disorder. This evidence satisfies a required three of five criteria for a diagnosis of chronic beryllium disease before January 1, 1993. *See* 42 U.S.C. § 7384l(13)(B). The medical evidence indicates that a diagnosis of chronic beryllium disease existed at least by October 13, 1992. Consequently, the Final Adjudication Branch has determined that sufficient evidence of record exists to accept your claims for chronic beryllium disease based on the statutory criteria for a diagnosis of chronic beryllium disease before January 1, 1993.

The record includes copies of each of your birth certificates indicating you are each a natural child of the employee, documentation showing the legal change of names of **[Claimant 1]** and **[Claimant 4]**, and a copy of the employee's death certificate that indicates he was widowed at the time of his death.

The employee was a "covered beryllium employee" as defined in § 7384l(7) of the Act, and was exposed to beryllium in the performance of duty as defined in § 7384n(a) of the EEOICPA. *See* 42 U.S.C. §§ 7384l(7); 7384n(a). Further, the medical evidence shows the presence of chronic beryllium disease, as provided for in § 7384l(13)(B) of the Act. *See* 42 U.S.C. § 7384l(13)(B).

For the foregoing reasons, the undersigned hereby accepts your claims for chronic beryllium disease. You are each entitled to compensation in the amount of $37,500.00 pursuant to § 7384s(e)(A) of the Act. *See* 42 U.S.C. § 7384s(e)(A). Further, you are entitled to reimbursement of medical expenses the employee may have incurred, retroactive to the date of his application on June 2, 2003, for the condition of chronic beryllium disease. *See* 42 U.S.C. § 7384t.

Seattle, Washington

James T. Carender

Hearing Representative, Final Adjudication Branch

EEOICPA Fin. Dec. No. 10047228-2008 (Dep't of Labor, August 28, 2008)
NOTICE OF FINAL DECISION

This decision of the Final Adjudication Branch (FAB) concerns your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, your Part E claim for impairment benefits due to the employee's skin cancers has been approved for $40,000.00. You have also been approved for the employee's medical expenses for his skin cancers from the date of the employee's filing (August 15, 2001) to the date of his death (January 1, 2006).

STATEMENT OF THE CASE

On August 15, 2001, **[Employee]**, hereinafter referred to as the employee, filed an EE-1 in which he claimed for benefits under EEOICPA for basal cell carcinoma (BCC) and a deteriorating liver. On November 26, 2001, the employee filed a Request for Review by Medical Panels/Physician Panel form for the same conditions with the Department of Energy (DOE). A death certificate verifies the employee's death on January 1, 2006. On January 30, 2006, you filed a Form EE-2 in which you claimed for survivor benefits, based on the employee's BCC of the upper mid-chest, squamous cell carcinoma (SCC) *in situ* of the right sideburn, SCC of the left ear, and pancytopenia.

In cases where the employee dies due to non-covered illnesses after filing a claim under Part E of EEOICPA but before payment is issued, the survivor may elect to receive the amount the employee would have received under Part E if he or she had not died prior to payment. You chose to do so in a letter received June 16, 2008.

While the employee did not specifically claim SCC, he did submit evidence supporting the diagnosis of SCC and a National Institute for Occupational Safety and Health (NIOSH) dose reconstruction was begun that incorporated both SCC and BCC prior to his death. This is sufficient to justify inclusion of the SCC in the impairment calculations.

On May 10, 2006, the FAB issued a final decision accepting your Part B claim for BCC of the upper chest, BCC of the right sideburn, and SCC *in situ* of the left helical rim. The decision found that the employee was diagnosed with BCC of the chest on November 23, 1992, BCC of the right sideburn on November 8, 1994, and SCC *in situ* of the left helical rim on January 19, 2000. The decision found that the employee had covered employment at the Oak Ridge Gaseous Diffusion Plant from December 28, 1945 to January 19, 1976, and at the Paducah Gaseous Diffusion Plant from January 20, 1976 to October 31, 1981. Personnel records verified that the employee worked for DOE contractor Union Carbide during his covered employment.

The employee's death certificate identified the only cause of death as gastrointestinal hemorrhage and a date of death of January 1, 2006. The certificate identifies you as the employee's spouse at the time of death. No evidence was submitted supporting the claimed conditions contributing or causing the employee's death. A marriage certificate verifies you were married to the employee for more than a year prior to his death.

A December 12, 2007 report by a District Medical Consultant (DMC) determined that toxic exposure at the covered facilities was not a significant factor in aggravating, contributing to, or causing the employee's death.

On June 16, 2008, the district office received your request for an impairment evaluation. Attached to the request was medical documentation to assist a DMC in making an impairment evaluation.

The district office received the DMC's report dated July 25, 2008. Following review of the medical evidence, the DMC calculated the employee's whole body impairment due to the accepted conditions of BCC of the sideburn and chest and SCC of the left ear in accordance with the 5th edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, and mentioned specific tables and page numbers of the *Guides* in support of the rating. The DMC also concluded that the employee was at maximum medical improvement. The DMC determined that the employee's whole body rating was 16% for the accepted conditions of three skin cancers.

On August 8, 2008, the Jacksonville district office issued a recommended decision finding that you are entitled to $40,000.00 in benefits for the employee's 16% whole body impairment due to his accepted conditions of BCC of the sideburn and chest and SCC of the left ear. The total percentage points of 16% were multiplied by $2,500 to calculate the amount of the award.[1] Attached to the recommended decision was a notice of claimant rights, which stated that you had 60 days in which to file an objection to the recommended decision and/or request a hearing.

On August 15, 2008, the FAB received written notification that you waived any and all objections to the recommended decision.

On August 15, 2008, you indicated that you had not received any settlement or award from a lawsuit or workers' compensation claim in connection with the accepted condition and that you had neither pled guilty to nor been convicted of workers' compensation fraud.

Following an independent review of the evidence in the file, the undersigned hereby makes the following:

FINDINGS OF FACT

1. You filed a claim for survivor benefits under Part E of EEOICPA based on BCC of the upper mid-chest, SCC *in situ* of the right sideburn, SCC of the left ear, and pancytopenia.

2. Your claim for the employee's BCC of the upper chest, BCC of the right sideburn, and SCC *in situ* of the left helical rim was previously accepted for medical benefits in a final decision issued by FAB under Part B on May 22, 2006. The accepted cancer of the sideburn was BCC rather than the claimed SCC.

3. The employee reached maximum medical improvement of his skin cancers at his death.

4. The DMC calculated a whole body impairment of 16% due to the employee's skin cancers.

5. Exposure to a toxic substance at the covered facilities where the employee worked was not a significant factor in aggravating, contributing to, or causing the employee's death. Also, the claimed illnesses did not cause or contribute to the employee's death.

6. You were married to the employee for over a year prior to his death and were married to him at the time of his death.

7. You elected to receive the amount the employee would have received under Part E if he had not died of a non-covered illness prior to payment.

Based on the above-noted findings of fact, the FAB hereby makes the following:

CONCLUSIONS OF LAW

The implementing regulations provide that within 60 days from the date the recommended decision is issued, the claimant must state, in writing, whether he or she objects to any of the findings of fact and/or conclusions of law contained in such decision and whether a hearing is desired. 20 C.F.R. § 30.310(a). If the claimant does not file a written statement that objects to the recommended decision and/or requests a hearing within the period of time allotted or if the claimant waives any objections to the recommended decision, the FAB may issue a decision accepting the recommendation of the district office. 20 C.F.R. § 30.316(a).

A determination under Part B that a DOE contractor employee is entitled to compensation under that Part for an occupational illness shall be treated for purposes of Part E as a determination that the employee contracted that illness through exposure at a DOE facility. 42 U.S.C. § 7385s-4(a).

The term "covered spouse" means a spouse of the employee who was married to the employee for at

least one year immediately before the employee's death. 42 U.S.C. § 7385s-3(d)(1). You are the employee's covered spouse.

In a case in which the employee's death occurred after the employee applied under Part E and before compensation was paid to the employee, and the employee's death occurred solely from a cause other than the covered illness of the employee, the survivor of that employee may elect to receive the amount of compensation that the employee would have received due to wage-loss and/or permanent impairment if the employee's death had not occurred before compensation was paid to the employee. 42 U.S.C. § 7385s-1(2)(B). You chose to receive the amount of impairment benefits the employee would have received for his skin cancers.

I conclude that the employee reached maximum medical improvement and that he has been determined to have had a whole body impairment of 16% as a result of his skin cancers. The amount of impairment benefits payable under Part E for a covered DOE contractor employee is based on a determination of the minimum impairment rating of the employee, in accordance with the *Guides*, expressed as a number of percentage points. The employee receives an amount equal to $2,500.00 multiplied by the number of percentage points. 42 U.S.C. § 7385s-2(a)(1), (b).

Therefore, I conclude that you are entitled to $40,000 in monetary benefits for the employee's 16% whole body impairment due to his BCC of the upper chest, BCC of the right sideburn, and SCC *in situ* of the left helical rim. You are also entitled to reimbursement of the employee's medical expenses for his skin cancers from the date of the employee's filing (August 15, 2001) to the date of his death (January 1, 2006).

Jacksonville, FL

Jeana F. LaRock

Hearing Representative

Final Adjudication Branch

[1] 20 C.F.R. § 30.902 (2008).

Spouse

EEOICPA Fin. Dec. No. 9855-2002 (Dep't of Labor, August 26, 2002)
NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) 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 stated below, your claim for benefits is denied.

On September 20, 2001, you filed Form EE-2, Claim for Survivor Benefits under the Energy Employees Occupational Illness Compensation Program, with the Denver district office. You stated that your husband, **[Employee]**, had died on May 15, 1991 as a result of adenocarcinoma in the liver, and that he was employed at a Department of Energy facility. You included with your application, a

copy of your marriage certificate, **[Employee]**'s resume/biography, and his death certificate. You submitted a letter dated January 5, 2000, from Allen M. Goldman, Institute of Technology, School of Physics and Astronomy, and a packet of information which included the university's files relating to your husband based on your request for his personnel, employee exposure, and medical records. Also submitted was a significant amount of medical records that did establish your husband had been diagnosed with adenocarcinoma in the liver.

On March 1, 2002, Loretta from the Española Resource Center telephoned the Denver district office to request the status of your claim. The claims examiner returned her telephone call on the same date and explained the provision in the Act which states that in order to be eligible for compensation, the spouse must have been married to the worker for at least one year prior to the date of his death. Your marriage certificate establishes you were married on, May 30, 1990. **[Employee]**'s death certificate establishes he died on May 15, 1991.

On March 5, 2002, the Denver district office issued a recommended decision finding that the evidence of record had not established that you were married for one year prior to your husband's death, and therefore you were not entitled to compensation benefits under the EEOICPA.

Pursuant to § 30.316(a) of the implementing regulations, a claimant has 60 days in which to file objections to the recommended decision, as allowed under § 30.310(b) of the implementing regulations (20 C.F.R. § 30.310(b)).

On April 12, 2002, the Final Adjudication Branch received a letter from you that stated you objected to the findings of the recommended decision. You requested a hearing and a review of the written record. You stated that the original law signed by President Clinton provided you with coverage, but when the law changed to include children under 18, the change in the law adversely affected you. You stated that you had documents that demonstrated you had a 10-year courtship with your spouse. You also stated you presented testimony as an advocate in Española. Included with your letter of objection were the following documents:

· a copy of Congressman Tom Udall's "Floor Statement on the Atomic Workers Compensation Act";

· an e-mail from Bob Simon regarding the inclusion of Los Alamos National Laboratory workers in the Senate Bill dated July 5, 2000;

· an e-mail from Louis Schrank regarding the Resource Center in Española;

· a "Volunteer Experience Verification Form", establishing you volunteered as a "Policy Advisor and Volunteer Consultant to the Department of Energy, Members of Congress, Congressional Committees, and many organizations on critical health issues effecting nuclear weapons workers with occupational illnesses";

· a transcript of proceedings from the March 18, 2000 Public Hearing in Española , New Mexico;

· a letter from you to John Puckett, HSE Division Leader, Chairperson, "Working Group Formed to Address Issues Raised by Recent Reports of Excess Brain Tumors in the Community of Los Alamos" and dated June 27, 1991;

· a letter to you from Terry L. Thomas, Ph.D., dated July 31, 1991, regarding the epidemiologic studies planned for workers at Los Alamos National Laboratory; a memorandum entitled "LANL Employee Representative for Cancer Steering Committee", dated September 25, 1991;

· a copy of the "Draft Charter of the Working Group to Address Los Alamos Community Health Concerns", dated June 27, 1991;

· an article entitled "Register of the Repressed: Women's Voice and Body in the Nuclear Weapons Organization"; and

· a psychological report from Dr. Anne B. Warren; which mentions you and **[Employee]** had a "10 or 11 year courtship".

On May 20, 2002, you submitted a copy of the Last Will and Testament of **[Employee]**, wherein he "devises to you, his wife, the remainder of his estate if you survive him for a period of seven hundred twenty (720) hours." You stated you believed this provided you with common law marriage rights for the 720 hours mentioned in the will.

An oral hearing was held on June 18, 2002 at the One-Stop Career Center in Española, New Mexico. You presented additional evidence for consideration that included: a copy of a house "Inspection Report" by Architect Steven G. Shaw, addressed to both you and **[Employee]**, dated August 11, 1989 (exhibit one); a copy of a Quitclaim Deed (Joint Tenants) for you and **[Employee]**, dated October 27, 1989 (exhibit two); a Los Alamos County Assessor Notice of Valuation or Tentative Notice of Value (undated), for a home on Walnut Street, and addressed to both you and **[Employee]** (exhibit three); and a Power of Attorney dated August 5, 1989, between you and **[Employee]** (exhibit four).

Pursuant to § 30.314(f) of the implementing regulations, a claimant has 30 days after the hearing is held to submit additional evidence or argument.

No further evidence was submitted for consideration within that time period.

Section 30.111(a) of the regulations (20 C.F.R. § 30.111(a)) states that, "Except where otherwise provided in the Act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and these regulations, the claimant also bears the burden of providing to OWCP all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in these regulations."

The undersigned has carefully reviewed the hearing transcript and additional evidence received at the hearing, as well as the evidence of record and the recommended decision issued on March 5, 2002.

The record fails to establish that you were married to **[Employee]** one year prior to his death, as required by the EEOICPA. The entire record and the exhibits were thoroughly reviewed. Included in Exhibit One, was the August 11, 1989 inspection report of the home located on Walnut Street, a copy of a bill addressed to both you and **[Employee]** for the inspection service, and an invoice from A-1 Plumbing, Piping & Heat dated August 14, 1989. Although some of these items were addressed to both

you and **[Employee]**, none of the records submitted are sufficient to establish that you were married to your husband for one year prior to his death as required under the Act. 42 U.S.C. § 7384s(e)(3)(A).

The evidence entered into the record as Exhibit Two, consists of a Quitclaim Deed dated October 27, 1989, showing **[Employee]**, a single man, and **[Claimant]**, a single woman living at the same address on Walnut Street as joint tenants. Exhibit Three consists of a Notice of Valuation of the property on Walnut Street in Los Alamos County and is addressed to both you and **[Employee]**. Although this evidence establishes you were living together in 1989 in Los Alamos County, New Mexico, it is not sufficient evidence to establish you were married to your husband for one year prior to his death as required under the Act. 42 U.S.C. § 7384s(e)(3)(A).

Exhibit Four consists of a copy of a Power of Attorney between you and **[Employee]** regarding the real estate located on Walnut Street. This evidence is not sufficient to establish you were married for one year prior to his death. 42 U.S.C. § 7384s(e)(3)(A).

The Act is clear in that it states, "the "spouse" of an individual is a wife or husband of that individual who was married to that individual for at least one year immediately before the death of that individual."

During the hearing you stated that there is a federal law, the Violence Against Women Act, that acknowledges significant other relationships and provides protection for a woman regardless of whether she is married to her husband one year or not. You also stated that you believed there was "a lack of dialogue" between the RECA program and the EEOICP concerning issues such as yours. Additionally, on August 15, 2002, you sent an email to the Final Adjudication Branch. The hearing transcript was mailed out on July 23, 2002. Pursuant to § 30.314(e) of the implementing regulations, a claimant is allotted 20 days from the date it is sent to the claimant to submit any comments to the reviewer. Although your email was beyond the 20-day period, it was reviewed and considered in this decision. In your email you stated the issue of potential common law marriage was raised. You stated that you presented the appropriate documentation that may support a common law marriage to the extent permitted by New Mexican law. You stated that the one-year requirement was adopted from the RECA and that you have not been able to determine how DOJ has interpreted this provision. Also, you stated that the amendments of December 28, 2001 should not apply to your case because you filed your claim prior to the enactment of the amendments. You stated you did not believe the amendments should be applied retroactively.

Section 7384s (e)(3)(A), Compensation and benefits to be provided, states:

The "spouse" of an individual is a wife or husband of that individual who was married to that individual for at least one year immediately before the death of that individual."

Section 7384s(f) states:

EFFECTIVE DATE—This section shall take effect on July 31, 2001, unless Congress otherwise provides in an Act enacted before that date.

There is no previous enacted law that relates to compensation under the EEOICPA. Therefore, the amendments apply retroactively to all claimants.

A couple cannot become legally married in New Mexico by living together as man and wife under New Mexico's laws. However, a couple legally married via common law in another state is regarded as married in all states. The evidence of record does not establish you lived with **[Employee]** in a common law state. Because New Mexico does not recognize common law marriages, the time you lived with **[Employee]** prior to your marriage is insufficient to establish you were married to him for one year prior to his death.

Regarding your reference to the difference between how Native American widows are treated and recognized in their marriages, and how you are recognized in your marriage, Indian Law refers primarily to that body of law dealing with the status of the Indian tribes and their special relationship to the federal government. The existing federal-tribal government-to-government relationship is significant given that the United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection and has affirmed the Navajo Nation's sovereignty. The laws that apply to the Native Americans do not apply in your case.

The undersigned finds that you have not established you are an eligible survivor as defined in 42 U.S.C. § 7384s(e)(3)(A). It is the decision of the Final Adjudication Branch that your claim is denied.

August 26, 2002

Denver, CO

Janet R. Kapsin

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 30971-2002 (Dep't of Labor, March 15, 2004)

NOTICE OF FINAL DECISION REVIEW OF THE WRITTEN RECORD

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 stated below, your claim for benefits is denied.

STATEMENT OF THE CASE

On June 10, 2002, you filed a Claim for Survivor Benefits under the EEOICPA, form EE-2, with the Denver district office, as the spouse of the employee, for multiple myeloma. You indicated on the EE-3 form that your husband was employed by the U.S. Coast and Geodetic Survey at various locations, including the Nevada Test Site, from early 1951 to December 1953.

You also submitted marriage certificate and death certificates establishing that you were married to the employee from March 7, 1953 until his death on November 5, 1999, tax forms confirming his

employment with the U.S. Coast and Geodetic Survey in 1951 and 1952 and a document from the Nevada Field Office of the Department of Energy (DOE) indicating that they had records of your husband having been exposed to radiation in 1951 and 1952. Additionally, you submitted a document stating that your claim under the Radiation Exposure Compensation Act had been approved in the amount of $75,000; you stated that you had declined to accept the award and that was confirmed by a representative of the Department of Justice on August 12, 2002.

On July 1, 2002, you were informed of the medical evidence needed to support that your husband had cancer. You submitted records of medical treatment, including a pathology report of April 19, 1993, confirming that he was diagnosed with multiple myeloma.

On July 22, 2002, a DOE official stated that, to her knowledge, your husband's employers were not Department of Energy contractors or subcontractors. On July 29, 2002, you were advised of the type of evidence you could submit to support that your husband had employment which would give rise to coverage under the Act, and given 30 days to submit such evidence. You submitted statements from co-workers confirming that he did work at the Nevada Test Site for a period from October to December 1951 and again for a few weeks in the spring of 1952.

On August 29, 2002, the district office issued a recommended decision that concluded that you were not entitled to compensation benefits because the evidence did not establish that your husband was a covered employee.

By letter dated September 20, 2002, your representative objected to the recommended decision, stating that your husband was a covered employee in that he worked at the Test Site while employed by the U.S. Coast and Geodetic Survey, which was a contractor of the Atomic Energy Commission (AEC), a predecessor agency of the DOE. The representative also submitted documents which indicated that the U.S. Coast and Geodetic Survey performed work, including offering technical advice and conducting surveys, for other government agencies, including the AEC and the military, and that it was covered by a cooperative agreement between the Secretary of Commerce and the Secretary of the Army. On April 1, 2003, the case was remanded to the district office for the purpose of determining whether your husband's work at the Nevada Test Site was performed under a "contract" between the DOE and the U.S. Coast and Geodetic Survey.

The documents submitted by your representative were forwarded to the DOE, which responded on May 28, 2003 that dosimetry records existed for your husband "showing that he was with the USC&GS but after further research it was established that the USC&GS was in fact not a contractor or subcontractor of the AEC during those years." The documents were also reviewed by the Branch of Policy, Regulations and Procedures in our National Office. On November 7, 2003, the district office issued a recommended decision to deny your claim. The decision stated that the evidence submitted did not support that the U.S. Coast and Geodetic Survey was a contractor of the DOE at the Nevada Test Site, and, concluded that you were not entitled to benefits under § 7384s of the EEOICPA as your husband was not a covered employee under § 7384l. 42 U.S.C. §§ 7384l and 7384s.

In a letter dated January 7, 2004, your representative objected to the recommended decision. He did not submit additional evidence but did explain why he believes the evidence already submitted was sufficient to support that your husband was a covered employee under the Act. Specifically, he stated that the evidence supported that your husband worked at the Nevada Test Site in 1951 and 1952 in the course of his employment with the U.S. Coast and Geodetic Survey, an agency which was performing a

survey at the request of the AEC, and that the latter agency issued him a badge which established that he was exposed to radiation while working there. He argued that one must reasonably conclude from these facts that his work at the Nevada Test Site did constitute covered employment under the EEOICPA.

FINDINGS OF FACT

You filed a claim for survivor benefits under the EEOICPA on June 10, 2002.

You were married to the employee from March 7, 1953 until his death on November 5, 1999.

Medical records, including a pathology report, confirmed he was diagnosed with multiple myeloma in April 1993.

In the course of his employment by the U.S. Coast and Geodetic Survey, your husband worked, and was exposed to radiation, at the Nevada Test Site, a DOE facility.

The evidence does not support, and the Department of Energy has denied, that the U.S. Coast and Geodetic Survey was a contractor of the DOE at the time your husband worked at the Nevada Test Site.

CONCLUSIONS OF LAW

A claimant who receives a recommended denial from the district office is entitled to file objections to the decision, pursuant to 20 C.F.R. § 30.310. The same section of the regulations provides that in filing objections, the claimant must identify his objections as specifically as possible. In reviewing any objections submitted, under 20 C.F.R. § 30.313, the Final Adjudication Branch will review the written record, any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. I have reviewed the record in this case and your representative's letter of January 2, 2004 and must conclude that no further investigation is warranted.

The purpose of the EEOICPA, as stated in its § 7384d(b), is to provide for "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." 42 U.S.C. § 7384d(b).

A "covered employee with cancer" includes, pursuant to § 7384l(9)(B) of the Act, an individual who is a "Department of Energy contractor employee who contracted…cancer after beginning employment at a Department of Energy facility." Under § 7384l(11), a "Department of Energy contractor employee" may be an individual who "was employed at a Department of energy facility by…an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or…a contractor or subcontractor that provided services, including construction and maintenance, at the facility." 42 U.S.C. § 7384l(9)(B), (11).

EEOICPA Bulletin NO. 03-26 states that "a civilian employee of a state or federal government agency can be considered a 'DOE contractor employee' if the government agency employing that individual is (1) found to have entered into a contract with DOE for the accomplishment of…services it was not statutorily obligated to perform, and (2) DOE compensated the agency for that activity." The same

Bulletin goes on to define a "contract" as "an agreement that something specific is to be done in return for some payment or consideration."

Section 30.111(a) states that "Except where otherwise provided in the Act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category set forth in § 30.110." 20 C.F.R. § 30.111(a).

As noted above, the evidence supports that your husband was exposed to radiation while working for the U.S. Coast and Geodetic Survey at the Nevada Test Site in late 1951 and early 1952, that he was diagnosed with multiple myeloma in April 1993, and that you were married to him from March 7, 1953 until his death on November 5, 1999.

It does not reasonably follow from the evidence in the file that his work at the Nevada Test Site must have been performed under a "contract" between the U.S. Coast and Geodetic Survey and the AEC. Government agencies are not private companies and often cooperate with and provide services for other agencies without reimbursement. The DOE issued radiation badges to military personnel, civilian employees of other government agencies, and visitors, who were authorized to be on a site but were not DOE employees or DOE contractor employees. No evidence has been submitted that your husband's work at the Nevada Test Site was pursuant to a "contract" between the U.S. Coast and Geodetic Survey and the AEC and the DOE has specifically denied that his employing agency was a contractor or subcontractor at that time. Therefore, there is no basis under the Act to pay compensation benefits for his cancer.

For the foregoing reasons, the undersigned must find that you have not established your claim for compensation under the EEOICPA and hereby denies that claim.

Washington, DC

Richard Koretz

Hearing Representative

EEOICPA Fin. Dec. No. 44377-2004 (Dep't of Labor, October 6, 2005)
NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is a 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.*

STATEMENT OF THE CASE

You each filed a Form EE-2, Claim for Survivor Benefits, for the bladder cancer of your late husband and father, **[Employee]**, hereinafter referred to as "the employee."
On the Form EE-3, Employment History, you stated the employee was employed as a pipefitter with several sub-contractors in Oak Ridge, Tennessee, at the K-25 gaseous diffusion plant, Y-12 plant, and Oak Ridge National Laboratory (X-10) with no listed dates other than at least 3 years at K-25 and several years at Y-12; and in Paducah, Kentucky, at the gaseous diffusion plant for 3-4 months in the

1950s. The evidence of record establishes that the employee worked at the K-25 gaseous diffusion plant (GDP) for Rust Engineering from 1975 to 1978, along with other periods of employment for various contractors at each of the Oak Ridge plants.

On the Forms EE-2, you indicated the employee was a member of the Special Exposure Cohort (SEC). To qualify as a member of the SEC, the following requirements must be satisfied:

> (A) The employee was so employed for a number of work days aggregating at least 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, and, during such employment -
>
> > (i) was monitored through the use of dosimetry badges for exposure at the plant of the external parts of employee's body to radiation; or
> >
> > (ii) worked on a job that had exposures comparable to a job that is or was monitored through the use of dosimetry badges. 42 U.S.C. § 7384l(14)(A).

The employee worked at the K-25 gaseous diffusion plant (GDP) for intermittent periods from at least 1975 to 1978. For SEC purposes, the employee is shown to have worked more than 250 work days prior to February 1, 1992, and was monitored through the use of dosimetry badge number **[Number Deleted]**. Therefore, the employment meets the criteria for inclusion in the SEC. 42 U.S.C. § 7384l(14).

The medical evidence establishes the employee was diagnosed with bladder cancer on January 21, 1992. Bladder cancer is a specified cancer as defined by the Act and implementing regulations, if onset is at least five years after first radiation exposure. 42 U.S.C § 7384l(17), 20 C.F.R. § 30.5(ff).

In support of your claim for survivorship, you (**[Employee's Spouse/Claimant #1]**) submitted your marriage certificate which states that you married the employee on September 10, 1994, and the employee's death certificate, which states that you were married to the employee on the date of his death, October 31, 1996.

In support of your claims for survivorship, the living children of the employee submitted birth certificates and marriage certificates.

On April 26, 2005, the Jacksonville district office issued a recommended decision[1], concluding that the living spouse is the only entitled survivor and is entitled to survivor benefits in the amount of $150,000 for the employee's bladder cancer. The district office recommended denial of the claims of the living children.

Attached to the recommended decision was a notice of claimant rights, which stated that claimants had 60 days in which to file an objection to the recommended decision and/or request a hearing. These 60 days expired on June 25, 2005. On May 5, 2005, the Final Adjudication Branch received written notification that **[Employee's Spouse]** waived any and all objections to the recommended decision. On May 27, 2005, the Final Adjudication Branch received an objection to the recommended decision and request for an oral hearing signed by all the living children. The hearing was held by the undersigned in Oak Ridge, Tennessee, on August 2, 2005. **[Claimant #2]**, **[Claimant #4]**, **[Claimant #3]**, and **[Claimant #7]** were duly affirmed to provide truthful testimony.

OBJECTIONS

In the letter of objection, you stated that you believe the rules and regulations governing the Act are contradictory. You also stated you believe your privacy rights have been violated under the Privacy Act of 1974. During the hearing, you stated that the pre-marital agreement, which you believe is valid under the rules of the State of Tennessee, should be recognized by the Federal government; that the employee's will should take precedence over the way the Act breaks down survivor entitlement; that the documentation you gathered was used to benefit **[Employee's Spouse]** without her having to do anything and that the documentation you gathered should have been maintained for your benefit only; and that new information concerning the survivorship amendment to the Act in December 2002 should have been forwarded to all claimants, since you were basing your actions on a pamphlet released in August of 2002. You were provided with a copy of the Privacy Act of 1974 which includes instructions on filing a claim under that Act.

In accordance with §§ 30.314(e) and (f) of the implementing regulations, a claimant is allowed thirty days after the hearing is held to submit additional evidence or argument, and twenty days after a copy of the transcript is sent to them to submit any changes or corrections to that record. 20 C.F.R. §§ 30.314(e), 30.314(f). By letters dated August 23, 2005, the transcript was forwarded to you. On September 15, 2005, the Final Adjudication Branch received a letter from **[Claimant #2]**, clarifying statements made during the hearing.

The law, as written and amended by Congress, establishes the precedence of survivors in each section of the Act and the apportionment of any lump-sum compensation. Section 7384s(e) of the Act (also known as Part B) explains who is entitled to compensation if the covered employee is deceased:

(e) PAYMENTS IN THE CASE OF DECEASED PERSONS—(1) In the case of a covered employee who is deceased at the time of payment of compensation under this section, whether or not the death is the result of the covered employee's occupational illness, such payment may be made only as follows:

> (A) If the covered employee is survived by a spouse who is living at the time of payment, such payment shall be made to such surviving spouse.
>
> (B) If there is no surviving spouse described in subparagraph (A), such payment shall be made in equal shares to all children of the covered employee who are living at the time of payment.
>
> (C) If there is no surviving spouse described in subparagraph (A) and if there are no children described in subparagraph (B), such payment shall be made in equal shares to the parents of the covered employee who are living at the time of payment.
>
> (D) If there is no surviving spouse described in subparagraph (A), and if there are no children described in subparagraph (B) or parents described in subparagraph (C), such payment shall be made in equal shares to all grandchildren of the covered employee who are living at the time of payment.
>
> (E) If there is no surviving spouse described in subparagraph (A), and if there are no children described in subparagraph (B), parents described in subparagraph (C), or grandchildren described in subparagraph (D), then such payment shall be made in equal

shares to the grandparents of the covered employee who are living at the time of payment.

(F) Notwithstanding the other provisions of this paragraph, if there is—

(i) a surviving spouse described in subparagraph (A); and

(ii) at least one child of the covered employee who is living and a minor at the time of payment and who is not a recognized natural child or adopted child of such surviving spouse, then half of such payment shall be made to such surviving spouse, and the other half of such payment shall be made in equal shares to each child of the covered employee who is living and a minor at the time of payment. 42 U.S.C. § 7384s(e).

Section 7384s(e)(3)(B) of the Act explains that a "child" includes a recognized child, a stepchild who lived with an individual in a regular parent-child relationship, and an adopted child. 42 U.S.C. §§ 7384s(e)(3)(B).

The Office of the Solicitor provided an opinion, dated December 1, 2004, concerning the pre-nuptial agreement signed on September 9, 1994, by the employee and **[Employee's Spouse]**. In that opinion, the Solicitor determined that a widow with a valid claim under the Act is not bound by an otherwise legally valid agreement, such as a pre-nuptial agreement or a will, in which she promised to forego that award. The opinion did not contain a ruling on the validity of the pre-nuptial agreement itself; only that the Energy Employees Occupational Illness Compensation Program Act specifically maintains that a beneficiary cannot be deprived of an award that he or she is entitled to under the statute.

FINDINGS OF FACT

1. You each filed a Form EE-2, Claim for Survivor Benefits.

2. The employee was diagnosed with bladder cancer on January 21, 1992.

3. The employee was employed at the K-25 gaseous diffusion plant (GDP) for intermittent periods from at least 1975 to 1978 and was monitored through the use of dosimetry badge number **[Number Deleted]**.

4. The employee is a member of the Special Exposure Cohort.

5. The employee's bladder cancer is a specified cancer.

6. **[Employee's Spouse]** was the employee's spouse at the time of his death and at least one year prior.

7. On April 26, 2005, the Jacksonville district office issued a recommended decision.

8. On May 5, 2005, the Final Adjudication Branch received written notification that **[Employee's Spouse]** waived any and all objections to the recommended decision.

9. The Final Adjudication Branch received a letter of objection from **[Claimant #2]**, **[Claimant #3]**,

[Claimant #4], **[Claimant #5]**, **[Claimant #6]**, and **[Claimant #7]**, and a hearing was held on August 2, 2005.

CONCLUSIONS OF LAW

The undersigned has reviewed the record and the recommended decision dated April 26, 2005 and concludes that the employee is a member of the Special Exposure Cohort, as defined by the Act, and that the employee's bladder cancer is a specified cancer, as defined by the Act and implementing regulations. 42 U.S.C. §§ 7384l(14)(A), 7384l(17), 20 C.F.R. § 30.5(ff).

I find that the recommended decision is in accordance with the facts and the law in this case, and that **[Employee's Spouse]**, the eligible living spouse, is entitled to survivor benefits in the amount of $150,000 for the employee's bladder cancer, pursuant to the Act. 42 U.S.C. §§ 7384s(a). I also find that **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant #6]**, and **[Claimant #7]** are not eligible survivors under the Act, and your claims for compensation are denied.

Jacksonville, FL

Sidne M. Valdivieso

Hearing Representative

[1] A previous recommended decision, dated March 4, 2004, was remanded on October 6, 2004 by the Final Adjudication Branch for a legal opinion concerning a pre-nuptial agreement signed by the employee and spouse.

EEOICPA Fin. Dec. No. 53272-2004 (Dep't of Labor, March 31, 2004)
NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On June 27, 2002, the Final Adjudication Branch issued a Final Decision concluding that **[Employee]** (the employee) was a covered employee with chronic silicosis as defined in § 7384r of the Act (and therefore entitled to compensation in the amount of $150,000), and that he was entitled to medical benefits related to chronic silicosis retroactive to September 17, 2001, pursuant to § 7384t of the Act. *See* 42 U.S.C. § 7384t. Payment of compensation was processed on July 25, 2002. The Final Adjudication Branch also denied the employee's claims based on chronic beryllium disease and asbestosis.

On January 20, 2004, you filed a Form EE-2 (Claim for Survivor Benefits Under EEOICPA) seeking compensation as the spouse of the employee.

On March 11, 2004, the Seattle district office recommended denial of your claim for benefits. The district office concluded that the employee's acceptance of compensation in the amount of $150,000

pursuant to § 7384s(a)(1) of the Act, was in full satisfaction of all claims of or on behalf of the employee against the United States, a Department of Energy contractor or subcontractor, beryllium vendor or atomic weapons employer, or against any person with respect to that person's performance of a contract with the United States, that arise out of an exposure referred to in § 7385 of the Act. *See* 42 U.S.C. §§ 7384s(a)(1), 7385b.

On March 29, 2004, the Final Adjudication Branch received written notification from you indicating that you waive any and all rights to file objections to the recommended decision.

FINDINGS OF FACT

1. On September 17, 2001, the employee filed a claim for benefits under the EEOICPA based, in part, on the condition of chronic silicosis.

2. On June 27, 2002, the Final Adjudication Branch accepted the employee's claim for chronic silicosis, and determined that he was entitled to compensation in the amount of $150,000 and medical benefits related to the treatment of chronic silicosis retroactive to September 17, 2001.

3. Payment of compensation in the amount of $150,000 was tendered on July 25, 2002.

4. On January 20, 2004, you filed a claim for survivor benefits.

CONCLUSIONS OF LAW

Section 7384s(a)(1) of the Act specifically provides that "[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." *See* 42 U.S.C. § 7384s(a)(1). The record in this case shows that, on July 25, 2002, the employee was issued compensation in the amount of $150,000 based on his diagnosis of chronic silicosis, a covered occupational illness under the Act.

Further § 7385b provides that the one-time payment under the Act is a full settlement of an EEOICPA claim:

The acceptance by an individual of payment of compensation under Part B of this subchapter with respect to a covered employee shall be in full satisfaction of all claims of or on behalf of that individual against the United States, against a Department of Energy contractor of subcontractor, beryllium vendor or atomic weapons employer, or against any person with respect to that person's performance of a contract with the United States, that arise out of an exposure referred to in section 7385 of this title.

42 U.S.C. § 7385b.

Since you are claiming eligibility as the surviving spouse of an employee who previously received $150,000 under the EEOICPA, no additional compensation is available to you. Therefore, your claim must be denied.

For the above reasons, the Final Adjudication Branch concludes that the evidence of record does not allow compensation under the Act. Accordingly, your claim for benefits is denied.

Seattle, Washington

Julie L. Salas

Hearing Representative, Final Adjudication Branch

EEOICPA Fin. Dec. No. 55875-2004 (Dep't of Labor, November 15, 2005)
NOTICE OF FINAL DECISION FOLLOWING A HEARING

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, the Final Adjudication Branch accepts **[Claimant #1/Employee's Spouse's]** claim for compensation under 42 U.S.C. § 7384 and denies **[Claimant #2's]**, **[Claimant #3's]** and **[Claimant #4's]** claims for compensation under 42 U.S.C. § 7384.

STATEMENT OF THE CASE

On March 22, 2004, **[Claimant #2]** filed a Form EE-2 (Claim for Survivor Benefits under EEOICPA) claiming benefits as a surviving child of **[Employee]**. On March 29, 2004, **[Employee's Spouse]** filed a Form EE-2 claiming benefits as the surviving spouse of **[Employee]**.

[Claimant #2] claimed that her father had been diagnosed with leukemia, melanoma (skin cancer) and prostate cancer. **[Employee's Spouse]** claimed that her husband had been diagnosed with lymphoma, hairy cell leukemia, basal and squamous cell cancer, and b-cell lymphoma. The medical evidence of record includes several pathology reports which diagnose various squamous cell cancers of the skin. A pathology report dated January 29, 1997, presents a diagnosis of malignant lymphoma, diffuse, large cell type, and subsequent records support that diagnosis. A reference is noted regarding a history of hairy cell leukemia in September 1994.

A copy of a marriage certificate shows that **[Employee's Spouse's previous name]** and **[Employee]** were wed on June 16, 1986. This document indicates that both parties were widowed at the time of marriage and that **[Employee's Spouse's previous name]** parents' last name was **[Employee's Spouse's maiden name]**. A copy of the employee's death certificate shows that he died on September 15, 1997, and identifies **[Employee's Spouse's maiden name]** as his surviving spouse. A copy of a death certificate for **[Employee's Spouse's first husband]** shows that he died on October 7, 1984, and identifies **[Employee's Spouse's previous name]** as his surviving spouse. A copy of a birth certificate identifies **[Claimant #2's maiden name]** as the child of **[Employee]** and a copy of a marriage certificate establishes the change of her last name to **[Claimant #2's married name]**. **[Claimant #3]** and **[Claimant #4]** also provided their birth certificates showing **[Employee]** as their father. **[Claimant #4]** provided a marriage certificate showing her change in surname from **[Claimant #4's maiden name]** to **[Claimant #4's married name]**.

[Employee's Spouse] provided a Form EE-3 (Employment History) in which she states that her husband worked as a pipefitter for Grinnell at the Portsmouth Gaseous Diffusion Plant (GDP) in Portsmouth, OH, from 1953 to 1955. **[Claimant #2]** provided an employment history in which she states that her father worked as a pipefitter for Grinnell and Myer Brothers at the Portsmouth GDP in Piketon, OH. She indicates that she does not know the dates of employment. Neither claimant

indicates that the employee wore a dosimetry badge. The Portsmouth GDP in Piketon, OH, is recognized as a covered DOE facility from 1954 to July 28, 1998; from July 29, 1998 to the present for remediation; and from May 2001 to the present in cold standby status. *See* DOE Worker Advocacy Facility List.

An affidavit was provided by Allen D. Volney, a work associate, who reports that **[Employee]** was employed by the Grinnell Corp at the Portsmouth GDP as a pipefitter from 1953 to 1955 and that he worked with the employee at that location during that time period.

An itemized statement of earnings from the Social Security Administration (SSA) shows that the employee was paid wages by the Blaw-Knox Company and by the ITT Grinnell Corp. during the fourth quarter (October to December) of 1953, and by the ITT Grinnell Corp. beginning in the first quarter (January to March) of 1954 and ending in the third quarter (July to September) of 1955. This is because the maximum taxable earnings were met for the year during that quarter.

The DOE was unable to confirm the reported employment. However, they provided a personnel clearance master card documenting that **[Employee]** was granted a security clearance with Blaw-Knox (Eichleay Corp.) and (Peter Kiewit Sons Co.) on January 8, 1954. No termination date is shown.

On April 8, 2004, the district office received a copy of an ante-nuptial agreement, signed by **[Employee]** and **[Employee's Spouse's previous name]** on June 9, 1968, which was recorded in the office of the County Clerk for Pike County, Kentucky, on June 10, 1986. In pertinent part, that document states that "each party hereby releases and discharges completely and forever, the other from. . .benefits or privileges accruing to either party by virtue of said marriage relationship, or otherwise, and whether the same are conferred by statutory law or the commonlaw of Kentucky, or any other state or of the United States. It is the understanding between the parties that this agreement, except as otherwise provided herein, forever and completely adjusts, settles, disposes of and completely terminates any and all rights, claims, privileges and benefits that each now has, or may have reason to believe each has against the other, arising out of said marriage relationship or otherwise, and whether the same are conferred by the laws of the Commonwealth of Kentucky, of any other state, or of the United States, and which are now, or which may hereafter be, in force or effect."

In a letter dated April 12, 2004, the district office advised **[Claimant #2]** that a review of the rules and regulations of this program found them to be silent with regard to a "pre-nuptial agreement." The letter further stated that adult children may be eligible for compensation as survivors if there is no surviving spouse of the employee.

On May 6, 2004, the Cleveland district office issued a recommended decision concluding that **[Employee]** is a DOE contractor employee as defined by 42 U.S.C. § 7384l(11)(B)(ii) and a member of the Special Exposure Cohort (SEC), as defined by 42 U.S.C. § 7384l(14), who was diagnosed with malignant lymphoma, which is a specified cancer under 42 U.S.C. § 7384l(17). For those reasons the district office concluded that **[Employee's Spouse]**, as his surviving spouse, is entitled to compensation in the amount of $150,000, pursuant to 42 U.S.C. § 7384s. The district office also concluded that **[Claimant #2]** is not entitled to compensation as a surviving child, because the employee is survived by a spouse. *See* 42 U.S.C. § 7384s(e)(1)(A). The district office also stated that Grinnell Corp. is a known subcontractor to Peter Kiewit Son's Co. at the Portsmouth facility in the 1950s.

On June 18, 2004, the Final Adjudication Branch (FAB) received a letter of objection from **[Claimant #2]**. **[Claimant #2]** stated that she believes that **[Employee's Spouse]** gave up any rights to any benefits based on the ante-nuptial agreement and that the benefits granted to **[Employee's Spouse]** by the May 6, 2004, recommended decision should be awarded to the surviving children.

On June 21, 2004, the FAB received a letter from the authorized representative of the three children/claimants objecting to the recommended decision of May 6, 2004, on behalf of each of them. On June 22, 2004, the FAB advised the representative that **[Claimant #4]** and **[Claimant #3]** had not filed claims for benefits and that only claimants who had been issued a recommended decision may object to such a decision. On July 2, 2004, the FAB received a letter from the authorized representative of **[Claimant #3]** and **[Claimant #4]** to the effect that they were claiming entitlement to benefits under the EEOICPA as surviving children of **[Employee]**. On July 6, 2004, the FAB received a copy of a death certificate which shows that **[Employee's first wife]** died on March 13, 1985, and identifies **[Employee]** as her surviving spouse. On July 23, 2004, the FAB issued a remand order which vacated the recommended decision and returned the case to the district office to adjudicate the new claims, to include any additional development which might be warranted, and to issue a new recommended decision to all claimants.

On August 16, 2004, **[Claimant #3]** and **[Claimant #4]** filed Forms EE-2 (Claim for Survivor Benefits under EEOICPA) claiming benefits as surviving children of **[Employee]**. Both claimants state that the employee had been diagnosed with leukemia, myeloma, and lymphoma.

On August 20, 2004, the Cleveland district office issued a recommended decision concluding that **[Employee]** is a DOE contractor employee as defined by 42 U.S.C. § 7384l(11)(B)(ii) and a member of the Special Exposure Cohort (SEC), as defined by 42 U.S.C. § 7384l(14), who was diagnosed with malignant lymphoma, which is a specified cancer under 42 U.S.C. § 7384l(17). For those reasons the district office concluded that **[Employee's Spouse]**, as his surviving spouse, is entitled to compensation in the amount of $150,000, pursuant to 42 U.S.C. § 7384s. The district office also concluded that **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #4]** are not entitled to compensation as surviving children, because the employee is survived by a spouse. *See* 42 U.S.C. § 7384s(e)(1)(A). The district office also finds that **[Employee]** was employed by Grinnell Corp. as a DOE subcontractor employee from September 1, 1954, to December 31, 1955.

On August 27, 2004, the FAB received written notification that **[Employee's Spouse]** waives any and all rights to file objections to the recommended decision. On September 17, 2004, the FAB received a letter from **[Claimant #4]** objecting to the award of benefits to **[Employee's Spouse]**. On October 19, 2004, the FAB received a letter from the authorized representative of the three children/claimants based on a "valid ante-nuptial agreement" between **[Employee's Spouse]** and **[Employee]** in which she expressly waived all rights to benefits which might arise from their marital relationship. It is argued that, although **[Employee's Spouse]** is a "surviving spouse" pursuant to 42 U.S.C. § 7384s(e)(3)(A), she waived any and all rights as the surviving spouse of **[Employee]** to receive benefits under the Act by entering into an ante-nuptial agreement by which she clearly waived the right to any federal benefits arising after the date of the agreement. It is argued that, in the absence of a clear mandate from the statute to ignore a valid ante-nuptial agreement, there is no reason that the Department should not follow the current state of the law and honor the ante-nuptial agreement. Finally, it is argued that, because **[Employee's Spouse]** has waived any and all rights to the benefits provided under the Act, the children/claimants are entitled to benefits pursuant to 42 U.S.C. § 7384s(e)(1)(B).

Pursuant to the authority granted by 20 C.F.R. § 30.317, the recommended decision was vacated and

the case was remanded to the district office on November 19, 2004, so that a determination could be made regarding the effect of the ante-nuptial agreement on the claimants' entitlement to compensation under the Act.

On March 18, 2005, the Cleveland district office issued a recommended decision in which they note that the issue of the effect of the ante-nuptial agreement was referred to the Branch of Policies, Regulations, & Procedures for review, and was subsequently forwarded to the Solicitor of Labor (SOL) for expert guidance. On January 4, 2005, the SOL opined that Congress intended, through 42 U.S.C. § 7385f(a), that persons with valid claims under the statute are not permitted to transfer or assign those claims. SOL determined that **[Employee's Spouse]** is entitled to any award payable under the EEOICPA even if she knowingly entered into an otherwise legally valid agreement in which she promised to forego that award. Since it has been determined that the deceased employee is a covered employee with cancer, by operation of 42 U.S.C. §§ 7384s(e)(1)(A) and 7385f(a), **[Employee's Spouse]** is entitled to receive the award payable in this claim. In conclusion, SOL opined, "an agreement to waive benefits to which one is entitled to under the EEOICPA, or to otherwise assign, or transfer the right to such payments, is legally prohibited, and has no effect on the party to whom an award is paid under the statute. The order of precedence established must be followed in this case and as a result, **[Employee's Spouse]** is entitled to payment."

Based on that opinion, the Cleveland district office found that **[Employee's Spouse's]** ante-nuptial agreement did not affect her entitlement to payment. The district office concluded that **[Employee]** is a covered employee under 42 U.S.C. § 7384l(1)(B), as he is a covered employee with cancer as that term is defined by 42 U.S.C. § 7384l(9)(A). **[Employee]** is a member of the Special Exposure Cohort, as defined by 42 U.S.C. § 7384l(14)(A)(ii), and was diagnosed with malignant lymphoma cancer, which is a specified cancer per 42 U.S.C. § 7384l(17)(A). The district office also concluded that as **[Employee]** is a covered employee and is now deceased, his eligible survivor is entitled to compensation of $150,000.00, per 42 U.S.C. § 7384s(a)(1). Lastly, the district office concluded that **[Employee's Spouse]** is the surviving spouse of **[Employee]**, per 42 U.S.C. § 7384s(e)(3)(A); and, as there is no evidence of a living minor child of **[Employee]**, the exception provided by 42 U.S.C. § 7384s(e)(1)(F) does not apply and, pursuant to 42 U.S.C. § 7384s(e)(1)(A), **[Employee's Spouse]** is thus entitled to the above mentioned compensation of $150,000.00, and that **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]** are not entitled to compensation pursuant to 42 U.S.C. § 7384s(e)(1)(A).

On March 28, 2005, the Final Adjudication Branch received written notification that **[Employee's Spouse]** waives any and all rights to file objections to the recommended decision. On April 15 and May 17, 2005, the Final Adjudication Branch received **[Claimant #2's]**, **[Claimant #3's]**, and **[Claimant #4's]** objections to the district office's March 18, 2005, recommended decision denying their claims, and a request for an oral hearing to present their objections. The hearing was held on August 23, 2005, in Bowling Green, KY.

In accordance with the implementing regulations, a claimant is allowed thirty days after the hearing is held to submit additional evidence or argument, and twenty days after a copy of the transcript is sent to them to submit any changes or corrections to that record. 20 C.F.R. § 30.314(e), and (f). By letter dated September 9, 2005, the transcript was forwarded to **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]**. By letter dated September 30, 2005, the transcript was forwarded to **[Employee's Spouse]**. **[Claimant #4]** provided her comments on the transcript. No other responses were received.

OBJECTIONS

The following objections were presented:

1. The claimants disagreed with the SOL January 4, 2005, opinion, and argued that the SOL improperly relied upon judicial interpretations of statutory provisions in other federal programs when it was concluded that an ante-nuptial agreement cannot override EEOICPA's statutory provision of survivor benefits to the spouse of a deceased covered employee.

2. It was requested that the FAB issue a finding regarding the legality of the prenuptial agreement that **[Employee]** and **[Employee's Spouse]** signed on June 9, 1986. Copies of the decisions in *Callahan v. Hutsell, Callahan & Buchino, P.S.C., Revised Profit Sharing Plan, et al.*, 813 F. Supp. 541 (W.D. Ky. 1992), *vacated and remanded*, 14 F.2d 600 (Table), 1993 WL 533557 (6th Cir. 1993), were submitted in support of the proposition that contractual rights in ante-nuptial agreements in Kentucky have been recognized by the Court of Appeals for the Sixth Circuit, and also as support for their contention that EEOICPA's prohibition against transfers or assignments is for the protection of covered employees only and not their survivors.

3. It was requested that the FAB change the "finding of fact" in the March 18, 2005, recommended decision that the Cleveland district office received the SOL legal opinion that **[Employee's Spouse's]** antenuptial agreement did not affect her entitlement to an award to a "conclusion of law."

The first objection is in regard to whether a prenuptial agreement can effect a waiver of a claim for survivor benefits under EEOICPA. A spouse's right to survivor benefits under EEOICPA is an entitlement or interest that is personal to the spouse and independent of any belonging to a covered employee. Section 7384s(e)(1)(A) of EEOICPA provides that if a covered Part B employee is deceased at the time of payment of compensation, "payment may be made only as follows: (A) If the covered employee is survived by a spouse who is living at the time of payment, such payment shall be made to the surviving spouse." The term "spouse" is defined in Part B as a "wife or husband of [the deceased covered Part B employee] who was married to that individual for at least one year immediately before the death of that individual. . . ." 42 U.S.C. § 7384s(e)(3)(A). As a result, it is clear that at the time **[Employee's Spouse]** signed the prenuptial agreement on June 9, 1986, she was not yet a "spouse" because she did not satisfy the above-noted definition for Part B of EEOICPA. Therefore, she had no entitlement to or interest in survivor benefits at that time that she could have attempted to waive.

Whether or not **[Employee's Spouse]** waived any rights under EEOICPA when she signed the prenuptial agreement, she is currently a "surviving spouse" as that term is defined in EEOICPA. Section 7384s(e) provides that payment shall be made to children of a covered employee *only* "[i]f there is no surviving spouse." Accordingly, even if **[Employee's Spouse]** has waived her right to survivor benefits, the covered Part B employee's children are precluded from receiving those benefits as long as **[Employee's Spouse]** is alive.

In *Duxbury v. Office of Personnel Management,* 232 F.3d 913 (Table), 2000 WL 380085 (Fed. Cir. 2000), the court denied a claim of a deceased employee's children from a prior marriage that they were entitled, as opposed to the deceased employee's widow, to any benefits attributable to their father's civil service retirement contributions based upon a prenuptial agreement signed by their father and his widow. In upholding the administrative denial of their claim, the court noted that it is the "widow" or "widower" of a federal employee covered by the Civil Service Retirement System who is entitled to a survivor annuity under 5 U.S.C. § 8341(d), and that "widow" is statutorily defined as "the surviving wife of an employee" who was married to him for at least nine months immediately before his death.

Noting that the prenuptial agreement governed property distribution and did not speak to the validity of the marriage, the court concluded that "because the petitioners cannot establish that [the widow] is ineligible for a survivor annuity under federal law, the Board did not err in affirming OPM's decision denying the [children's] claims." *Duxbury*, 2000 WL 38005 at **3.

Even if a claimant could waive his or her entitlement to survivor benefits by signing a prenuptial agreement, such a waiver would be barred by 42 U.S.C. § 7385f(a), which states that "[n]o claim cognizable under [EEOICPA] shall be assignable or transferable." Interpreting the anti-alienation provision within § 7385f(a) to prohibit the waiver of any interest in survivor benefits is consistent with the interpretation of other anti-alienation provisions by both the government and federal courts.

With regard to the second issue, under Part B of EEIOCPA, survivor benefits are paid to a "surviving spouse," defined as an individual who was married to the deceased covered Part B employee for at least 12 months prior to the employee's death. As in *Duxbury*, the prenuptial agreement signed by **[Employee's Spouse]** would be relevant to Division of the Energy Employees Occupational Illness Compensation's (DEEOIC) determination of her claim for survivor benefits only to the extent that it addresses the validity of **[Employee's Spouse's]** marriage to **[Employee]**. Since it does not, there is no reason for DEEOIC to consider the terms of the agreement, let alone make a finding on the legality of the agreement under Kentucky law, as requested by the claimants' authorized representative.

With regard to the third issue, the FAB finds that the referenced sentence is most properly a conclusion of law rather than a finding of fact, and it is so stated below.

FINDINGS OF FACT

1. **[Claimant #2]** filed a claim for survivor benefits on March 22, 2004. **[Employee's Spouse]** filed a claim for survivor benefits on March 22, 2004. **[Claimant #3]** and **[Claimant #4]** filed claims for survivor benefits on August 16, 2004.

2. **[Employee]** worked at the Portsmouth GDP, a covered DOE facility, from December 3, 1953 to December 21, 1955.

3. **[Employee]** worked for a number of work days aggregating at least 250 work days during the period of September 1954 to February 1, 1992.

4. **[Employee]** was diagnosed with malignant lymphoma cancer, a specified cancer, on January 29, 1997.

5. **[Employee's Spouse]** is the surviving spouse of **[Employee]** and was married to him for at least one year immediately prior to his death.

6. **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]** are the surviving children of **[Employee]**.

CONCLUSIONS OF LAW

A claimant who receives a recommended decision from the district office is entitled to file objections to the decision, pursuant to 20 C.F.R. § 30.310. In reviewing any objections submitted, the FAB will

review the written record, in the manner specified in 20 C.F.R. § 30.314, to include any additional evidence or argument submitted by the claimant, and conduct any additional investigation determined to be warranted in the case. I have reviewed the record in this case, as well as the objections raised and the evidence submitted before, during, or after the hearing, and must conclude that no further investigation is warranted.

Under the EEOICPA, for **[Employee]** to be considered a "member of the Special Exposure Cohort," he must have been a Department of Energy (DOE) employee, DOE contractor employee, or an atomic weapons employee who was so employed for a number of work days aggregating at least 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, and, during such employment worked in a job that was monitored through the use of dosimetry badges for exposure at the plant of the external parts of employee's body; or had exposures comparable to a job that is or was monitored through the use of dosimetry badges, as outlined in 42 U.S.C. § 7384l(14)(A).
The evidence of record establishes that **[Employee]** worked in covered employment at the Portsmouth GDP, in Piketon, Ohio from December 3, 1953 to December 21, 1955. For SEC purposes, only employment from September 1954 to before February 1992 may be considered. His employment at the Portsmouth GDP from September 1, 1954 to December 21, 1955 meets the requirement of working more than an aggregate 250 days at a covered facility. *See* 42 U.S.C. § 7384l(14)(A). The record does not show whether **[Employee]** wore a dosimetry badge. However, the Division of Energy Employees Occupational Illness Compensation (DEEOIC) has determined that employees who worked at the Portsmouth GDP between September 1954 and February 1, 1992, performed work that was comparable to a job that was monitored through the use of dosimetry badges. *See* Federal (EEOICPA) Procedure Manual, Chapter 2-500 (June 2002). On that basis, **[Employee]** meets the dosimetry badge requirement. The Portsmouth GDP is recognized as a covered DOE facility from 1952 to July 28, 1998; from July 29, 1998 to the present for remediation; and from May 2001 to the present in cold standby status. *See* DOE, Office of Worker Advocacy, Facility List. The evidence of record also establishes that **[Employee]** was diagnosed with malignant lymphoma, a specified cancer under 42 U.S.C. § 7384l(17)(A).
Based on the discussion above, **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]** have not presented objections or evidence showing that **[Employee's Spouse]** waived her eligibility to survivor benefits by signing the June 9, 1986 pre-nuptial agreement.

I have reviewed the record on this claim and the recommended decision issued by the district office. I find that the recommended decision is in accordance with the facts and the law in this case, and that **[Employee's Spouse]**, as the surviving spouse of the **[Employee]**, is entitled to compensation in the amount of $150,000.00, pursuant to 42 U.S.C. § 7384s. I also find that **[Claimant #2]**, **[Claimant #3]** and **[Claimant #4]** are not entitled to compensation pursuant to 42 U.S.C. § 7384s(e)(1)(A).

Cleveland, Ohio

Tracy Smart

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 62217-2005 (Dep't of Labor, January 13, 2005)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch concerning your claim for compensation under Part B of 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 for benefits under Part B of the Act is accepted. A copy of this decision will be provided to your Power of Attorney.

STATEMENT OF THE CASE

On September 30, 2004, you filed a Form EE-2, Claim for Survivor Benefits under the EEOICPA. Your claim was based, in part, on the assertion that the employee worked for a Department of Energy (DOE) contractor at a DOE facility. You stated on the Form EE-2 that you were filing for the employee's lung cancer. On the Form EE-3, Employment History, you stated the employee was employed at the gaseous diffusion plant (K-25) in Oak Ridge, Tennessee for the period of April 1, 1944 to April 1, 1952. Through the Oak Ridge Institute for Science and Education (ORISE) employment database, employment was verified from June 6, 1945 to October 23, 1951. An autopsy report established that the employee was diagnosed with lung cancer.

On December 14, 2004, the Jacksonville district office issued a decision recommending that you are entitled to compensation in the amount of $150,000 for the employee's lung cancer. On December 17, 2004, the Final Adjudication Branch received written notification that you waive any and all objections to the recommended decision.

In order for the employee to qualify as a member of the Special Exposure Cohort (SEC) under § 7384l(14)(A) of the Act, the following requirements must be satisfied:

The employee was so employed for a number of work days aggregating at least 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, and, during such employment - -

> (i) was monitored through the use of dosimetry badges for exposure at the plant of the external parts of employee's body to radiation; or
>
> (ii) worked on a job that had exposures comparable to a job that is or was monitored through the use of dosimetry badges.
>
> 42 U.S.C. § 7384l(14)(A).

Through the Oak Ridge Institute for Science and Education (ORISE) employment database, employment was verified at K-25 from June 6, 1945 to October 23, 1951, a period greater than 250 days. You indicated on the Form EE-3 that the employee wore a dosimetry badge. ORISE confirmed that he was assigned badges 01386, 00214, and 13992.

FINDINGS OF FACT

1. On September 30, 2004, you filed a Form EE-2, Claim for Survivor Benefits under the EEOICPA.

2. The medical evidence is sufficient to establish that the employee was diagnosed with lung cancer.

3. Lung cancer is a specified cancer under § 7384l(17)(A) of the Act and § 30.5(dd)(2) of the implementing regulations. 42 U.S.C. § 7384l(17)(A); 20 C.F.R. § 30.5(dd)(2).

4. The employee was employed at K-25 from June 6, 1945 to October 23, 1951. The employee is a covered employee as defined in § 7384l(1) of the Act. 42 U.S.C. § 7384l(1).

5. The employee is a member of the Special Exposure Cohort, as defined in § 7384l(14)(A) of the Act. 42 U.S.C. § 7384l(14)(A).

6. In proof of survivorship, although you were unable to submit your marriage certificate, you submitted a copy of the employee's death certificate, legal Oak Ridge Plant documents that establish your marriage to the employee, and one of your children's birth certificates which indicates that you and the employee were married on January 1, 1924. Therefore, you have established that you are a survivor as defined by § 30.5(ee) of the implementing regulations. 20 C.F.R. § 30.5(ee).

7. The district office issued the recommended decision on December 14, 2004.

8. On December 17, 2004, the Final Adjudication Branch received 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 December 14, 2004. I find that the employee is a member of the Special Exposure Cohort, as that term is defined in the Act; and that the employee's lung cancer is a specified cancer under the Act and implementing regulations. 42 U.S.C. §§ 7384l(14)(A), 7384l(17)(A); 20 C.F.R. § 30.5(dd)(2).

I find that the recommended decision is in accordance with the facts and the law in this case, and that you, as an eligible survivor of the employee as defined by the Act, are entitled to compensation in the amount of $150,000 pursuant to Part B of the Act on the basis of the employee's lung cancer. 42 U.S.C. §§ 7384s(e)(1)(A), 7384s(a).

Jacksonville, FL

Jeana F. LaRock

District Manager

EEOICPA Fin. Dec. No. 95118-2010 (Dep't of Labor, July 12, 2010)

NOTICE OF FINAL DECISION**AFTER REVIEW OF THE WRITTEN RECORD**

This is the decision of the Final Adjudication Branch (FAB) concerning two claims for survivor benefits under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claim of **[Claimant #1]** for survivor benefits based on the employee's conditions of bladder cancer, lung cancer

and bone cancer is approved for compensation in the amount of $150,000.00 under Part B of EEOICPA. Her claim for survivor benefits based on the employee's condition of metastatic liver cancer is denied under Part B. The claim of **[Claimant #2]** for survivor benefits based on the employee's condition of lung cancer is denied under Part B. The Estate of **[Employee]** is also entitled to reimbursement of medical expenses that were paid by the employee for treatment of bladder cancer and bone cancer beginning February 1, 2005 and ending February 3, 2007. A decision on the claims of **[Claimant #1]** and **[Claimant #2]** for survivor benefits under Part E of EEOICPA is deferred pending further development by the district office.

STATEMENT OF THE CASE

On February 1, 2005, **[Employee]** filed a claim for benefits (Form EE-1) under EEOICPA. He identified bone cancer, bladder cancer and kidney failure as the conditions resulting from his employment at a Department of Energy (DOE) facility. On , the district office received the death certificate of the employee which shows that he died on . The district office administratively closed the employee's claim on .

On April 25, 2008, **[Claimant #1]** filed a claim for survivor benefits (Form EE-2) as the surviving common-law wife of the employee. She identified bladder cancer, lung cancer and liver cancer as the conditions resulting from the employee's work at a DOE facility. On February 16, 2010, **[Claimant #2]** filed a claim for survivor benefits (Form EE-2) as a surviving child of the employee. He identified lung cancer as the employee's condition resulting from his employment at a DOE facility.

The employee completed an employment history form (Form EE-3) on . He stated he worked as an electrician and electrical superintendent for REECo at the Nevada Test Site in the 1970's and from 1981 until 1991.[1] DOE verified that the employee worked for REECo at the Nevada Test Site from August 11, 1982 until March 15, 1991, from August 18, 1981 until September 21, 1981, and from October 23, 1970 until September 22, 1972 as a wireman and operations superintendent and assistant superintendent.

The employee and both claimants submitted the following medical reports: a pathology report from Dr. Kokila S. Vasanawala, dated November 7, 2002, with a diagnosis of papillary transitional cell carcinoma of the bladder; a report on whole body bone scan from Dr. Mihai Iancu, dated January 17, 2003, with a diagnosis of metastatic bone cancer; a pathology report from Dr. Leena Shroff, dated November 7, 2005, with a diagnosis of adenocarcinoma of the right upper lung lobe; a consultation report from Dr. James A. Corwin, dated November 15, 2002, with the diagnosis of "widespread metastatic disease" including the bone; and a pathology report from Dr. Terry R. Burns, dated January 16, 2007, with a diagnosis of metastatic adenocarcinoma of the liver.

The employee's death certificate states that he died on , at the age of 74 years, and that there was no surviving spouse.

[Claimant #1] submitted evidence in support of her status as the common-law wife of the employee. She submitted a letter dated August 22, 2009, which enclosed a certified copy of a Final Decree of Divorce between **[Claimant #1]** and **[Claimant #1's ex-husband]** which changed her name to **[Claimant #1]** and a Marital Settlement Agreement between **[Employee]** and **[Employee's ex-wife]** issued by the Clark County, Nevada District Court on November 10, 1992. She also submitted a letter dated , in which she detailed her relationship with the employee beginning on , in the State of , when

she and the employee exchanged vows at her sister's home in , and continuing until the employee's death on . She describes in the letter that she and the employee lived together in for several years after exchanging vows until they went to other states to find work. She related that they returned to , in October 2000 and lived there together until the employee's death. She also submitted numerous documents showing she and the employee engaged in joint financial transactions, including applying for credit accounts and holding title real and personal property together. The Form EE-1 signed by the employee states she is his dependent and common-law wife. **[Claimant #2]** submitted a written statement on September 21, 2009, that he knew the employee and **[Claimant #1]** to have been together since 1983 and that he regarded them as married until she told him they were not. Numerous signed statements were submitted from third parties, including non-relatives, to the effect that the employee and **[Claimant #1]** were considered husband and wife. **[Claimant #2]** submitted his birth certificate which shows that he is a biological child of the employee born on October 25, 1966. His mother's name is shown as **[Employee's ex-wife]**.

On April 6, 2010, the district office issued a decision recommending that the claim of **[Claimant #1]** for survivor benefits based on the employee's conditions of bladder cancer, lung cancer and liver cancer be denied under Part B of EEOICPA. The basis for the recommendation was the district office's conclusion that the probability of causation (PoC) that the employee's bladder cancer and liver cancer were related to his exposure to radiation during his covered employment was less than the 50% threshold PoC required for compensation under Part B of EEOICPA. The district office also concluded that **[Claimant #1]** was the surviving spouse of the employee under Part B based on its determination that she was married to him as his common-law spouse under the laws of the State of Texas on the date of the employee's death and for at least one year prior to that date. The district office also recommended that the claim of **[Claimant #2]** for survivor benefits based on the employee's condition of lung cancer be denied under Part B. The basis for the decision was the conclusion that he did not qualify as an eligible survivor of the employee under Part B. The district office deferred making a decision on both of the claims for survivor benefits under Part E of EEOICPA. Accompanying the recommended decision was a letter explaining the claimants' rights and responsibilities with regard to findings of fact and conclusions of law contained in the recommended decision.

On April 28, 2010, FAB received an undated letter from **[Claimant #2]** objecting to the decision issued by the district office on April 6, 2010. On May 7, 2010, FAB sent a letter acknowledging receipt of **[Claimant #2]**'s letter of objection and advising him that if he had additional evidence for FAB to consider prior to issuance of a final decision, he should submit that evidence by June 7, 2010. The claim file does not show that he submitted any additional evidence in response. His letter of objection is part of the evidence of record. His objections were as follows:

He stated he is the son of the employee and the only living survivor of the employee. He is in prison, he was diagnosed with hepatitis C in October 2005, and he cannot work in the food or culinary arts industries in which he has been trained because of his medical condition. He stated he intended to file a claim for benefits under Part E only and not under Part B. He stated his authorized representative was supposed to get medical records in support of his claim that he was incapable of self-support at the time of his father's death, and that is the reason he asked the district office to grant a sixty-day extension of time to respond to its letter dated . He claimed **[Claimant #1]** forced his father to sign documents while he was sick acknowledging her as his common-law wife. He concluded that he believes he is the one entitled to receive any benefits available under EEOICPA on account of his father.

On July 9, 2010, FAB received a signed statement from **[Claimant #1]** that neither she nor anyone else

has filed for or received any settlement or award from a lawsuit related to the employee's exposure to toxic substances or filed for or received any payments, awards or benefits from a state workers' compensation claim based on the employee's lung cancer and that she has never pled guilty to or been convicted of fraud in connection with an application for or receipt of any federal or state workers' compensation benefits.

Based on an independent review of the evidence of record, the undersigned hereby makes the following:

FINDINGS OF FACT

1. On February 1, 2005, **[Employee]** filed a claim for benefits under EEOICPA for bone cancer, bladder cancer and kidney failure resulting from his employment at a DOE facility.
2. The employee worked for REECo, a DOE contractor, at the Nevada Test Site, a DOE facility, from August 11, 1982 until March 15, 1991, from August 18, 1981 until September 21, 1981, and from October 23, 1970 until September 22, 1972. The employee worked for an aggregate of at least 250 work days at the Nevada Test Site between January 1,1963 and December 31, 1992.
3. The employee was diagnosed with bladder cancer on November 7, 2002, metastatic bone cancer on January 17, 2003, lung cancer on November 7, 2005, and adenocarcinoma of the liver on January 16, 2007. These diagnoses were at least five years after the employee's first exposure during covered employment.
4. The employee died on February 3, 2007, at the age of 74 years.
5. **[Claimant #1]** and the employee exchanged vows before others and entered into a common-law marriage on July 5, 1993 in Texas which continued until the employee's death on February 3, 2007. During that period of time they lived together in and represented to others in that they were married to each other. **[Claimant #1]** was married to the employee on the date of his death and for at least one year prior to the employee's death.
6. **[Claimant #2]** was born on October 25, 1966. He is a biological child of the employee. He is 43 years of age. He is not the recognized natural child or adopted child of **[Claimant #1]**.
7. **[Claimant #1]** stated that neither she nor anyone else has filed for or received any settlement or award from a lawsuit related to the employee's exposure to toxic substances or filed for or received any payments, awards or benefits from a state workers' compensation claim based on the employee's lung cancer and that she has never pled guilty to or been convicted of fraud in connection with an application for or receipt of any federal or state workers' compensation benefits.
Based on these facts, the undersigned makes the following:

CONCLUSIONS OF LAW

This final decision, and the district office decision issued April 6, 2010, addresses **[Claimant #2]**'s claim for benefits under Part B of EEOICPA only. It does not address his claim for benefits under Part E. His objections related to his incapacity for self-support relate only to his eligibility as a surviving child under Part E and are not relevant to the determination whether he is an eligible child under Part B. The district office may have been unaware he did not want to pursue a claim under Part B. Regardless, it was proper for the district office to address whether he is an eligible survivor of the employee under Part B of EEOICPA.

In order for the employee's son to be eligible as a surviving child of the employee under Part B, he must be a minor on the date Part B benefits are paid and not the recognized natural child or adopted

child of **[Claimant #1]**. That is because FAB has determined that **[Claimant #1]** qualifies under Part B as a surviving spouse of the employee based on her common-law marriage to the employee. His allegation that **[Claimant #1]** forced the employee to sign documents is not supported by any evidence and is contradicted by his own statement submitted to the district office on September 21, 2009. It is also contradicted by the numerous documents and written statements from other individuals submitted by **[Claimant #1]**. His allegation is not credible and is insufficient to change the conclusion by FAB that **[Claimant #1]** and the employee were in a valid common-law marriage under the laws of Texas and she is the eligible surviving spouse of the employee.

Eligibility for EEOICPA compensation based on cancer may be established by demonstrating that the employee is a member of the Special Exposure Cohort (SEC) who contracted a specified cancer after beginning employment at a DOE facility (in the case of a DOE employee or DOE contractor employee). 42 U.S.C. §§ 7384l(9)(A), 7384l(14)(A).

On April 25, 2010, the Secretary of Health and Human Services designated a class of employees as an addition to the SEC under § 7384l(14)(C) of EEOICPA. This new class included all employees of DOE, its predecessor agencies, and its contractors and subcontractors who worked at the Nevada Test Site from January 1, 1963 through December 31, 1992, for a number of work days aggregating at least 250 work days, occurring either solely under this employment or in combination with work days within the parameters established for one or more other classes of the SEC. This designation became effective on . *See* EEOICPA Bulletin No. 10-13 (issued). This addition to the SEC was not in effect when the district office issued its decision recommending that the claims be denied under Part B.

The employee worked for an aggregate of at least 250 work days for a DOE contractor at the Nevada Test Site between and . The totality of evidence therefore demonstrates that the employee qualifies as a member of the SEC.

The employee was diagnosed with bladder cancer on November 7, 2002, metastatic bone cancer on , lung cancer on , and metastatic liver cancer on January 16, 2007 . Those diagnoses occurred more than five years after he began employment at a covered facility. Lung cancer and bone cancer are specified cancers when diagnosed after first exposure, as they were in his case. 20 C.F.R. § 30.5(ff)(2), (3). Bladder cancer is also a specified cancer when diagnosed more than five years after first exposure, as it was in his case. 20 C.F.R. § 30.5(ff)(5)(iii)(K). As a member of the SEC who was diagnosed with a specified cancer, the employee is a "covered employee with cancer." 42 U.S.C. § 7584l(9). The employee's liver cancer is not a specified cancer because it was diagnosed as a metastatic cancer. Liver cancer is a specified cancer only when it is a primary cancer. 20 C.F.R. § 30.5(iii)(O).

A covered employee, or the survivor of that employee, shall receive compensation for the disability or death of that employee from that employee's occupational illness in the amount of $150,000.00. The evidence of record establishes that the employee is deceased. Part B provides that where a covered employee is deceased at the time benefits are to be paid, payments are to be made to the employee's eligible surviving spouse if that person is living. 42 U.S.C. § 7384s(e)(1)(A). The eligible spouse of an employee is the husband or wife of the employee who was married to the employee for at least one year immediately before the death of the employee. 42 U.S.C. § 7384s(e)(3)(A). The Act does not define marriage, so the Division of Energy Employees Occupational Illness Compensation (DEEOIC) looks to the law of the most applicable state to determine whether a claimant was married to the employee. Federal (EEOICPA) Procedure Manual, Chapter 2-1200.5.b(2) (August 2009). If state law recognizes the existence of a marital relationship, that relationship must be recognized by DEEOIC in its adjudication of EEOICPA survivor claims. Common-law Marriage Handbook, p. 10 (April 2010).

[Claimant #1] claimed to be the surviving spouse of the employee based on a common-law marriage entered into by her and the employee in Texas. The undersigned concludes the law of is the most applicable law to use in determining whether **[Claimant #1]** was married to the employee. recognizes common-law marriages contracted within its borders when three elements are satisfied concurrently. Those elements are: (1) the parties agreed to be married; (2) after the agreement, they lived together in as husband and wife; and (3) they held themselves out to others as husband and wife. Common-law Marriage Handbook, Appendix p. 9 (April 2010). The undersigned has considered the totality of the evidence including the 10-page letter submitted by **[Claimant #1]** describing her relationship with the employee, the numerous financial, legal and other documents she submitted, and the statements of numerous third parties. I find the totality of the evidence establishes that **[Claimant #1]** and the employee agreed to enter into a common-law marriage on July 5, 1993, that after entering into that agreement they lived together in Texas as husband and wife for two periods of time (from July 5, 1993 until approximately January 1, 1996 and from October 2000 until the employee's death on February 3, 2007), and that during those periods of time they held themselves out to others as husband and wife. I therefore find that **[Claimant #1]** is the eligible surviving spouse of the employee.

Under Part B of the Act, if there is an eligible surviving spouse of the employee, then payment shall be made to such surviving spouse unless there is also a child[2] of the employee who is not a recognized natural child or adopted child of the surviving spouse and who is a minor at the time of payment. 42 U.S.C. § 7384s(e)(1)(F). The evidence establishes that **[Claimant #2]** is a biological child of the employee and not a recognized natural child or adopted child of **[Claimant #1]**. Accordingly, because he is not also a minor, I find that he is not an eligible surviving child of the employee and his claim for survivor benefits based on the employee's condition of lung cancer under Part B of the Act is denied.

Therefore, **[Claimant #1]** is the only person to whom compensation may be paid under Part B of EEOICPA. Her claim for survivor benefits based on the employee's conditions of bladder cancer and lung cancer under Part B is approved for compensation in the amount of $150,000.00. As the maximum benefits provided for under Part B are being paid to her based on the employee's conditions of bladder cancer and bone cancer and there is no possible benefit to her in adjudicating her claim for the employee's condition of metastatic liver cancer, her claim for survivor benefits based on the employee's condition of metastatic liver cancer under Part B is denied.

The statute provides that medical benefits should be provided to a covered employee with an occupational illness for the treatment of that covered illness. These benefits are retroactive to the employee's application date. The evidence of record establishes that the employee is a covered employee with the occupational illnesses of bladder cancer and bone cancer under Part B. He filed a claim for benefits based on bladder cancer and bone cancer prior to his death. He is entitled to medical benefits for treatment of bladder cancer and bone cancer beginning February 1, 2005 and ending . Accordingly, the Estate of **[Employee]** is awarded medical benefits for the employee's condition of bladder cancer and bone cancer beginning February 1, 2005 and ending February 3, 2007.

A decision on the claims of **[Claimant #1]** and **[Claimant #2]** for survivor benefits under Part E of EEOICPA is deferred pending further development by the district office.

William B. Talty

Hearing Representative

Final Adjudication Branch

[1] The Nevada Test Site is a covered DOE facility beginning in 1951 to the present. Reynolds Electrical & Engineering Company (REECo) was a DOE contractor there from 1952 to 1995. *See* Department of Energy's weblisting at: http://www.hss.energy.gov/HealthSafety/FWSP/Advocacy/faclist/findfacility.cfm (verified by FAB on July 7, 2010).

[2] The statutory definition for the term "child" has been interpreted for the purposes of EEOICPA as meaning a biological child, adopted child or stepchild of an individual. *See* EEOICPA Circular No. 08-08 (issued September 23, 2008).

Stepchildren

EEOICPA Fin. Dec. No. 366-2002 (Dep't of Labor, June 3, 2003)
NOTICE OF FINAL DECISION REVIEW OF THE WRITTEN RECORD

This is the decision of the Final Adjudication Branch concerning your claim for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA or the Act). *See* 42 U.S.C. § 7384 *et seq*. The recommended decision was to deny your claim. You submitted objections to that recommended decision. The Final Adjudication Branch carefully considered the objections and completed a review of the written record. *See* 20 C.F.R. § 30.312. The Final Adjudication Branch concludes that the evidence is insufficient to allow compensation under the Act. Accordingly, your claim for benefits is denied.

STATEMENT OF THE CASE

On July 31, 2001, you filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA), stating that you were the daughter of **[Employee]**, who was diagnosed with cancer, chronic silicosis, and emphysema. You completed a Form EE-3, Employment History for Claim under the EEOICPA, indicating that from December 2, 1944 to May 30, 1975, **[Employee]** was employed as a heavy mobile and equipment mechanic, for Alaska District, Corps of Engineers, Anchorage, Alaska.

On August 20, 2001, a representative of the Department of Energy (or DOE) indicated that "none of the employment history listed on the EE-3 form was for an employer/facility which appears on the Department of Energy Covered Facilities List." Also, on August 29, 2001, a representative of the DOE stated in Form EE-5 that the employment history contains information that is not accurate. The information from the DOE lacked indication of covered employment under the EEOICPA.

The record in this case contains other employment evidence for **[Employee]**. With the claim for benefits, you submitted a "Request and Authorization for TDY Travel of DOD Personnel" Form DD-1610, initiated on November 10, 1971 and approved on November 11, 1971. **[Employee]** was approved for TDY travel for three days to perform work on Amchitka Island, Alaska, for the Department of Defense, Alaska District Corps of Engineers beginning on November 15, 1971. He was employed as a Mobile Equipment Mechanic WG-12, and the purpose of the TDY was noted "to examine equipment for potential use on Blair Lake Project." The security clearance was noted as "Secret." You also submitted numerous personnel documents from **[Employee]**'s employment with the Alaska District Corp of Engineers. Those documents include a "Notification of Personnel Action" Form SF-50 stating that **[Employee]**'s service compensation date was December 2, 1944, for his work as a Heavy Mobile Equipment Mechanic; and at a WG-12, Step 5, and that he voluntarily retired on May 30, 1975.

The medical documentation of record shows that **[Employee]** was diagnosed with emphysema, small cell carcinoma of the lung, and chronic silicosis. A copy of **[Employee]**'s Death Certificate shows that he died on October 9, 1990, and the cause of death was due to or as a consequence of bronchogenic cancer of the lung, small cell type.

On September 6 and November 5, 2001, the district office wrote to you stating that additional evidence was needed to show that **[Employee]** engaged in covered employment. You were requested to submit a Form EE-4, Employment History Affidavit, or other contemporaneous records to show proof of **[Employee]**'s employment at the Amchitka Island, Alaska site covered under the EEOICPA. You did not submit any additional evidence and by recommended decision dated December 12, 2001, the Seattle district office recommended denial of your claim. The district office concluded that you did not submit employment evidence as proof that **[Employee]** worked during a period of covered employment as required by § 30.110 of the EEOICPA regulations. *See* 20 C.F.R. § 30.110.

On January 15 and February 6, 2002, you submitted written objections to the recommended denial decision. The DOE also forwarded additional employment information. On March 20, 2002, a representative of the DOE provided a Form EE-5 stating that the employment history is accurate and complete. However, on March 25, 2002, a representative of the DOE submitted a "corrected copy" Form EE-5 that indicated that the employment history provided in support of the claim for benefits "contains information that is not accurate." An attachment to Form EE-5 indicated that **[Employee]** was employed by the Army Corps of Engineers for the period July 25, 1944 to August 11, 1952, at Fort Richardson, Alaska; and from August 11, 1952 to May 30, 1975 at Elmendorf Air Force Base, Alaska. Further, the attachment included clarifying information:

Our records show that the Corps of Engineers' was a prime AEC contractor at Amchitka. **[Employee]**'s Official Personnel Folder (OPF) indicates that he was at Forth Richardson and Elmendorf AFB, both in Alaska. The OPF provided no indication that **[Employee]** worked at Amchitka, Alaska. To the best of our knowledge, Blair Lake Project was not a DOE project.

Also, on April 3, 2002, a representative of the DOE submitted a Form EE-5 indicating that Bechtel Nevada had no information regarding **[Employee]**, but he had a film badge issued at the Amchitka Test Site, on November 15, 1971. The record includes a copy of Appendix A-7 of a "Manager's Completion Report" which indicates that the U. S. Army Corps of Engineers was a prime AEC (Atomic Energy Commission) Construction, Operations and Support Contractor, on Amchitka Island, Alaska.

On December 10, 2002, a hearing representative of the Final Adjudication Branch issued a Remand Order. Noting the above evidence, the hearing representative determined that the "only evidence in the record with regard to the Army Corps of Engineers status as a contractor on Amchitka Island is the DOE verification of its listing as a prime AEC contractor . . . and DOE's unexplained and unsupported verification [of **[Employee]**'s employment, which] are not sufficient to establish that a contractual relationship existed between the AEC, as predecessor to the DOE, and the Army Corps of Engineers." The Remand Order requested the district office to further develop the record to determine whether the Army Corps of Engineers had a contract with the Department of Energy for work on Amchitka Island, Alaska, and if the work **[Employee]** performed was in conjunction with that contract. Further the Remand Order directed the district office to obtain additional evidence to determine if **[Employee]** was survived by a spouse, and since it did not appear that you were a natural child of **[Employee]**, if you could establish that you were a stepchild who lived with **[Employee]** in a regular parent-child relationship. Thus, the Remand Order requested additional employment evidence and proof of eligibility under the Act.

On January 9, 2003, the district office wrote to you requesting that you provide proof that the U.S. Army Corps of Engineers had a contract with the AEC for work **[Employee]** performed on his TDY assignment to Amchitka Island, Alaska for the three days in November 1971. Further, the district office requested that you provide proof of your mother's death, as well as evidence to establish your relationship to **[Employee]** as a survivor.

You submitted a copy of your birth certificate that indicated that you were born **[Name of Claimant at Birth]** on October 4, 1929, to your natural mother and natural father **[Natural Mother]** and **[Natural Father]**. You also submitted a Divorce Decree filed in Boulder County Court, Colorado, Docket No. 10948, which showed that your biological parents were divorced on October 10, 1931, and your mother, **[Natural Mother]** was awarded sole custody of the minor child, **[Name of Claimant at Birth]**. In addition, you submitted a marriage certificate that indicated that **[Natural Mother]** married **[Employee]** in the State of Colorado on November 10, 1934. Further, you took the name **[Name of Claimant Assuming Employee's Last Name]** at the time of your mother's marriage in 1934, as indicated by the sworn statement of your mother on March 15, 1943. You provided a copy of a Marriage Certificate to show that on August 19, 1949, you married **[Husband]**. In addition, you submitted a copy of the Death Certificate for **[Name of Natural Mother Assuming Employee's Last Name]** stating that she died on May 2, 1990. The record includes a copy of **[Employee]**'s Death Certificate showing he died on October 9, 1990.

You also submitted the following additional documentation on January 20, 2003: (1) A copy of **[Employee's]** Last Will and Testament indicated that you, **[Claimant]**, were the adult daughter and named her as Personal Representative of the Estate; (2) Statements by Jeanne Findler McKinney and Jean M. Peterson acknowledged on January 17, 2003, indicated that you lived in a parent-child relationship with **[Employee]** since 1945; (3) A copy of an affidavit signed by **[Name of Natural Mother Assuming Employee's Last Name]** (duplicate) indicated that at the time of your mother's marriage to **[Employee]**, you took the name **[Name of Claimant Assuming Employee's Last Name]**.

You submitted additional employment documentation on January 27, 2003: (1) A copy of **[Employee]**'s TDY travel orders (duplicate); (2) A Memorandum of Appreciation dated February 11, 1972 from the Department of the Air Force commending **[Employee]** and other employees, for their support of the Blair Lake Project; (3) A letter of appreciation dated February 18, 1972 from the Department of the Army for **[Employee]**'s contribution to the Blair Lake Project; and (4) Magazine and newspaper articles containing photographs of **[Employee]**, which mention the work performed by the

U.S. Army Corps of Engineers in Anchorage, Alaska.

The record also includes correspondence, dated March 27, 2003, from a DOE representative. Based on a review of the documents you provided purporting that **[Employee]** was a Department of Energy contractor employee working for the U.S. Army Corps of Engineers on TDY in November, 1971, the DOE stated that the Blair Lake Project was not a DOE venture, observing that "[i]f Blair Lake Project had been our work, we would have found some reference to it."

On April 4, 2003, the Seattle district office recommended denial of your claim for benefits. The district office concluded that the evidence of record was insufficient to establish that **[Employee]** was a covered employee as defined under § 7384l(9)(A). *See* 42 U.S.C. § 7384l(9)(A). Further, **[Employee]** was not a member of the Special Exposure Cohort, as defined by § 7384l(14)(B). *See* 42 U.S. C. § 7384l(14)(B). Also, **[Employee]** was not a "covered employee with silicosis" as defined under §§ 7384r(b) and 7384r(c). *See* 42 U.S.C. §§ 7384r(b) and (c). Lastly, the recommended decision found that you are not entitled to compensation under § 7384s. *See* 42 U.S.C. § 7384s.

On April 21, 2003, the Final Adjudication Branch received your letter of objection to the recommended decision and attachments. First, you contended that the elements of the December 10, 2002 Remand Order were fulfilled because you submitted a copy of your mother's death certificate and further proof that **[Employee]** was your stepfather; and that the letter from the district office on April 4, 2003 "cleared that question on page three – quote 'Our records show that the Corps of Engineers was a prime AEC contractor at Amchitka.'"

Second, you stated that further clarification was needed as to the condition you were claiming. You submitted a death certificate for **[Employee]** showing that he died due to bronchogenic cancer of the lung, small cell type, and noted that that was the condition you alleged as the basis of your claim on your first Form, associated with your claim under the EEOICPA.

Third, you alleged that, in **[Employee]**'s capacity as a "Mobile Industrial Equipment Mechanic" for the Army Corps of Engineers, "he was required to work not only for the DOD (Blair Lake project) but also for DOE on the Amchitka program. For example: on March 5, 1968 he was sent to Seward, Alaska to 'Inspect equipment going to Amchitka.' He was sent from the Blair Lake project (DOD) to Seward for the specified purpose of inspecting equipment bound for Amchitka (DOE). Thus, the DOE benefited from my father's [Corp of Engineers] expertise/service while on 'loan' from the DOD. Since the closure of the Amchitka project (DOE), the island has been restored to its original condition. . . . Therefore, my dad's trip to Amchitka to inspect equipment which might have been used at the Blair Lake project benefited not only DOD but also DOE. In the common law, this is known as the 'shared Employee' doctrine, and it subjects both employers to liability for various employment related issues."

On May 21, 2003, the Final Adjudication Branch received your letter dated May 21, 2003, along with various attachments. You indicated that the U.S. Army Corps of Engineers was a contractor to the DOE for the Amchitka Project, based upon page 319 of an unclassified document you had previously submitted in March 2002. Further, you indicated that **[Employee]** had traveled to Seward, Alaska to inspect equipment used at on-site operations for use on Amchitka Island by the Corps of Engineers for the DOE project, and referred to the copy of the Corps of Engineers TDY for Seward travel you submitted to the Final Adjudication Branch with your letter of April 18, 2003. Also, you indicated that **[Employee]** traveled to Amchitka, Island in November 1972 to inspect the equipment referenced above, which had been shipped from Seward, Alaska. You indicated that **[Employee]** was a mobile industrial equipment mechanic, and that his job required him to travel. You attached the following documents in support of your contention that the equipment **[Employee]** inspected could have included equipment belonging to the Corps of Engineers: Job Description, Alaska District, Corps of Engineers (previously submitted), and an Employee Performance Appraisal.

In addition, you indicated **[Employee]** was required to travel to remote sites throughout Alaska in order to perform his job with the Corps of Engineers, and in support of this you referred to your electronic mail sent to the Seattle District Office on January 7, 2003. You indicated that, since **[Employee]** was required to travel to Amchitka as a part of his regular duties as a mobile industrial equipment mechanic, it was possible that the equipment he inspected on the November 15, 1971 trip to Amchitka included equipment owned by the Corps as well as inspection of equipment owned by private contractors. You attached a copy of a document entitled, "Affidavit," dated May 21, 2003, signed by Erwin L. Long. Mr. Long stated that he was head of the Foundations Material Branch for the Corps of Engineers at the time of his retirement, and that in 1971 he had been Head of the Rock Design Section. Mr. Long indicated that he did not spend any time on Amchitka Island, that he had known **[Employee]** since 1948, and that he "believe[d]" **[Employee]**'s travel to Amchitka for his job would have required him to track equipment belonging to the Corps of Engineers, and that **[Employee]** would also have "performed required maintenance on the equipment before preparing [it] for shipping off Amchitka Island." Mr. Long also stated that **[Employee]** would not talk about his work on Amchitka since it was classified. Finally, you attached a TDY dated March 4, 1968, as well as a travel voucher/subvoucher dated March 15, 1968, to support that **[Employee]**'s mission to Amchitka had been completed.

FINDINGS OF FACT

1. On July 31, 2001, **[Claimant]** filed a claim for survivor benefits under the EEOICPA as the daughter of **[Employee]**.

2. **[Employee]** was diagnosed with small cell bronchogenic carcinoma of the lung and chronic silicosis.

3. **[Employee]** was employed by the U.S. Army Corps of Engineers for the period from July 25, 1944

to August 11, 1952, at Fort Richardson, Alaska; and from August 11, 1952 to May 30, 1975 at Elmendorf Air Force Base, Alaska.

4. **[Employee]**'s employment for the U.S. Army Corps of Engineers on TDY assignment at the Amchitka Island, Alaska site in November 1971 was in conjunction with a Department of Defense venture, the Blair Lakes Project.

CONCLUSIONS OF LAW

The EEOCIPA implementing regulations provide that a claimant may object to any or all of the findings of fact or conclusions of law, in the recommended decision. 20 C.F.R. § 30.310. Further, the regulations provide that the Final Adjudication Branch will consider objections by means of a review of the written record. 20 C.F.R. § 30.312. The Final Adjudication Branch reviewer will review the record forwarded by the district office and any additional evidence and/or argument submitted by the claimant. 20 C.F.R. § 30.313. Consequently, the Final Adjudication Branch will consider the overall evidence of record in reviewing the written record.

In order to be awarded benefits under the Energy Employees Occupational Illness Compensation Program Act, the covered employee (or his/her eligible survivors), must first establish that the employee has been diagnosed with beryllium illness, cancer, or chronic silicosis. *See* 42 U.S.C. § 7384l(15), 20 C.F.R. § 30.110(a). The evidence to show proof of an occupational illness is not in dispute in this case. The medical evidence establishes that **[Employee]** was diagnosed with cancer (bronchogenic cancer of the lung, small cell type) and chronic silicosis. Consequently, **[Employee]** was diagnosed with two illnesses potentially covered under the Act.

Employees of a DOE contractor (or their eligible survivors) are entitled under the EEOICPA to seek compensation for a cancer as a member of the Special Exposure Cohort (SEC) or through a determination that they incurred cancer that was at least as likely as not related to employment at a DOE facility. 42 U.S.C. §§ 7384l(14), 7384l(9)(B)(ii)(II). To be included in the SEC, a DOE employee, DOE contractor employee, or atomic weapons employee must have been employed for an aggregate of 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee or employed before January 1, 1974, by the DOE or a DOE contractor or subcontractor on Amchitka Island, Alaska, and have been exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests. 42 U.S.C. § 7384l(14). To qualify as a covered employee with cancer, members of the SEC need only establish that they contracted a "specified cancer", designated in section 7384l(17) of the EEOICPA, after beginning employment at a DOE facility or atomic weapons employer facility.

While the EEOICPA does not contain a specific definition of a DOE contractor, it does contain a definition of a DOE contractor employee that, in effect, defines what a DOE contractor is. Section 7384l(11) of the EEOICPA defines a DOE contractor employee as:

(A) An individual who is or was in residence at a Department of Energy facility as a researcher for one or more periods aggregating at least 24 months.
(B) An individual who is or was employed at a Department of Energy facility by-
    (i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or

environmental remediation at the facility; or
(ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

The question presented in this case is whether **[Employee]**, an employee of the U.S. Army Corps of Engineers was, during the time he spent on Amchitka Island, providing management and operation, management and integration or environmental remediation services under a contract between the DOE and the Army Corps of Engineers.

The undersigned notes that the Atomic Energy Commission's Managers Completion Report refers to the U.S. Army Corp of Engineers, as a prime contractor for work on Milrow and Cannikin. The work to be performed under that contract consisted of "engineering, procurement, construction administration and inspection."

[Employee]'s "Request and Authorization for TDY Travel of DOD Personnel," initiated on November 10 and approved on November 11, 1971, was for the purpose of three days work on Amchitka Island, Alaska, for the Department of Defense, Alaska District Corps of Engineers. The purpose of the TDY was to "examine equipment for potential use on Blair Lake Project."

You submitted the following new documents along with your letter to the Final Adjudication Branch dated May 21, 2003: Employee Performance Appraisal for the period February 1, 1966 to January 31, 1967; Affidavit of Erwin L. Long dated May 21, 2003; Request and Authorization for Military Personnel TDY Travel and Civilian Personnel TDY and PCS Travel, dated March 4, 1968; and Travel Voucher or Subvoucher, dated March 15, 1968. None of the documents submitted establish that **[Employee]** was on Amchitka Island providing services pursuant to a contract with the DOE.

The preponderance of the evidence in this case supports the conclusion that **[Employee]** was on Amchitka Island in November 1971 for the sole purpose of inspecting equipment to be used by the Department of Defense on its Blair Lake Project. The documentation of record refers to the Blair Lake Project as a Department of Defense project, and the DOE noted in correspondence dated March 27, 2003, that research was not able to verify that Blair Lake was a DOE project.

While the DOE indicated that **[Employee]** was issued a dosimetry badge, such evidence may be used to establish that he was present on Amchitka Island, not to establish that he was a covered DOE employee. Therefore, **[Employee]**'s presence on Amchitka Island was to perform work for the Department of Defense, and not pursuant to a contract between the DOE and the U.S. Army Corps of Engineers.

The evidence is also insufficient to show covered employment under § 7384r(c) and (d) of the EEOICPA for chronic silicosis. To be a "covered employee with chronic silicosis" it must be established that the employee was:

A DOE employee or a DOE contractor employee, who was present for a number of workdays aggregating at least 250 work days during the mining of tunnels at a DOE facility located in Nevada or Alaska for test or experiments related to an atomic weapon.

See 42 U.S.C. § 7384r(c) and (d); 20 C.F.R. § 30.220(a). Consequently, even if the evidence showed DOE employment (which it does not since **[Employee]** worked for the DOD), he was present only three days on Amchitka, which is not sufficient for the 250 days required under the Act as a covered

employee with silicosis.

The undersigned notes that in your objection to the recommended decision, you referred to a "shared employee" doctrine which you believe should be applied to this claim. You contend that on March 5, 1968, **[Employee]** was sent to Seward, Alaska to "Inspect equipment going to Amchitka, which might have been used at the Blair Lake project [to benefit] not only DOD but also DOE." No provision in the Act refers to a "shared employee" doctrine. Given the facts of this case, coverage could only be established if **[Employee]** was on Amchitka Island providing services pursuant to a contract with the DOE, evidence of which is lacking in this case.

It is the claimant's responsibility to establish entitlement to benefits under the EEOICPA. The EEOICPA regulations at § 30.111(a) state that the claimant bears the burden of proving by a preponderance of the evidence, the existence of each and every criterion under any compensable claim category set forth in section 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the Act and regulations, the claimant also bears the burden of providing the Office of Workers' Compensation Programs all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in the regulations. *See* 20 C.F.R. § 30.111(a).

Although you submitted medical evidence to show covered illnesses due to cancer and chronic silicosis, the evidence of record is insufficient to establish that **[Employee]** engaged in covered employment. Therefore, your claim must be denied for lack of proof of covered employment under the EEOICPA.

Seattle, Washington

Rosanne M. Dummer

Seattle District Manager, Final Adjudication Branch

EEOICPA Fin. Dec. No. 32000-2002 (Dep't of Labor, September 13, 2004)
NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch (FAB) concerning the claims for compensation filed by the above claimants 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 stated below, these claims for compensation under the EEOICPA are approved.

STATEMENT OF THE CASE

On November 14, 2003, the Seattle district office issued a recommended decision finding that **[Employee]** was a member of the Special Exposure Cohort (SEC) based on both his confirmed employment on Amchitka Island, Alaska during the Cannikin and Milrow nuclear tests and his diagnosis of lung cancer, which is a "specified" cancer under the Act. As part of that decision, the district office found that **[Claimant 1]**, **[Claimant 2]**, and **[Claimant 3]** were step-children of the employee, based on their "regular parent-child relationship" with him. As such, the district office concluded that all 5 claimants were eligible beneficiaries under the EEOICPA as the surviving children

of the employee, and were entitled to share the compensation payment of $150,000 equally.

On January 9, 2004 and January 12, 2004, the FAB received objections and hearing requests from the employee's natural children, **[Claimant 4]** and **[Claimant 5]**. In the letters of objections, the natural children alleged that **[Claimant 1]**, **[Claimant 2]**, and **[Claimant 3]** had not lived with the employee in a parent-child relationship because they were adults at the time of their father's marriage to their mother and argued that they should not be awarded a share of any lump-sum payment of compensation. On March 25, 2004, a hearing was held in Las Vegas, NV to determine whether there was sufficient evidence to establish that the step-children are eligible beneficiaries pursuant to § 7384s(e)(3)(B) of the EEOICPA. At the hearing, two step-children testified that at any given time during their mother's marriage to the employee, each of the step-children had stayed in the residence of the employee; this testimony was not disputed by the two natural children at the hearing.

After considering the written record of the claim forwarded by the district office, the objections to the recommended decision, the arguments and evidence submitted in support of the objections, and after conducting a hearing, the FAB hereby makes the following:

FINDINGS OF FACT

1. On June 20, 2002, July 2, 2002 and July 24, 2003, **[Claimant 1]**, **[Claimant 2]**, **[Claimant 3]**, **[Claimant 4]**, and**[Claimant 5]**, respectively filed claims for compensation under the EEOICPA.

2. **[Employee]** was employed by a DOE contractor on Amchitka Island, Alaska before January 1, 1974, and was exposed to radiation in the performance of duty related to the Milrow and Cannikin nuclear tests.

3. **[Employee]** was diagnosed with a specified cancer, lung cancer,after beginning employment at a DOE facility.

4. **[Claimant 4]** and **[Claimant 5]** are the surviving natural children of the employee.

5. The evidence of record establishes that **[Claimant 1]**,**[Claimant 2]**, and **[Claimant 3]** are the step-children of the employee and that they lived in a regular parent-child relationship with the employee.

Based on the above-noted findings of fact in this claim, the FAB hereby also makes the following:

CONCLUSIONS OF LAW

Section 7384l(9) of the EEOICPA defines the different types of covered employees with cancer that can be eligible to receive compensation: these include "an individual with a specified cancer who is a member of the Special Exposure Cohort, if and only if that individual contracted that specified cancer after beginning employment at a DOE facility…." 42 U.S.C. § 7384l(9)(A). Section 7384l(14)(B) of the Act defines a member of the Special Exposure Cohort (SEC) as, among other things, an employee who "was so employed before January 1, 1974, by the Department of Energy or a DOE contractor or subcontractor on Amchitka Island, Alaska, and was exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests." There is no dispute that

[Employee] worked on-site during a covered period and was diagnosed with a specified cancer, lung cancer, after he began employment at Amchitka Island. Therefore, the evidence of record is sufficient to establish that **[Employee]** was a member of the SEC with a specified cancer.

However, since the employee is deceased and there is no surviving spouse, 42 U.S.C. § 7384s(e)(a)(B) of the EEOICPA provides that the payment that would otherwise be made to the covered employee "shall be made in equal shares to all children of the covered employee who are living at the time of payment." Section 7384s(e)(3)(B) of the EEOICPA goes on to define a "child" to include "a recognized natural child, a stepchild who lived with an individual in a regular parent-child relationship, and an adopted child." Chapter 2-200.9c(1) (October 2003) of the Federal (EEOICPA) Procedure Manual provides further guidance for adjudicating claims of stepchildren who were adults at the time of a covered employee's marriage. These procedures describe the types of evidence that may be used to support a finding that the stepchild lived in a regular parent-child relationship with the covered employee, and recognize that evidence such as copies of insurance policies, wills, photographs showing attendance at the stepchild's wedding as the father or mother or at other types of family gatherings, newspaper articles like obituaries, or any other documentation that refer to the stepchild and the decease employee in a familial way can be used to make this particular finding.

[Claimant 4] and **[Claimant 5]** qualify as children of the covered employee based on their birth and marriage certificates, and the employee's and **[Spouse]**'s death certificates; and are, therefore eligible surviving beneficiaries under the EEOICPA. **[Claimant 1]**, **[Claimant 2]**, and **[Claimant 3]** also qualify as children of the covered employee based on their presence in family photographs that were submitted into the record, their identification as surviving stepchildren in the covered employee's obituary, evidence in the record showing that the employee visited his stepchildren during the holidays, and that he and the stepchildren stayed at each other's homes. Therefore, **[Claimant 1]**, **[Claimant 2]**, and **[Claimant 3]** are also eligible surviving beneficiaries under the EEOICPA. Based on these conclusions of law, all five claims for compensation under the EEOICPA that were filed by the covered employee's children are approved. Each claimant is entitled to receive an equal share ($30,000) of the total lump-sum of $150,000 payable in this matter.

Washington, DC

Vawndalyn B. Feagins

Hearing Representative

Final Adjudication Branch

EEOICPA Fin. Dec. No. 32576-2004 (Dep't of Labor, November 19, 2004)
NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) 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 stated below, your claims for benefits are hereby accepted in part and denied in part.

STATEMENT OF THE CASE

On September 10, 2004**,** the district office issued a recommended decision concluding that **[Spouse]** had received an award as the widow of the **[Employee]** under section 5 of the Radiation Exposure Compensation Act. **[Employee]** and **[Spouse]** were married on June 9, 1955. The death certificate of record establishes that **[Employee]** died on March 18, 1990. Another death certificate of record establishes that **[Spouse]**, the employee's wife, died on October 15, 2001. Subsequently, nine survivors filed claims for benefits as follows:

On July 1, 2002**, [Claimant 1]** filed Form EE-2, Claim for Survivor Benefits under EEOICPA, as a surviving child. She provided a copy of her adoption papers from the Navajo Nation, verifying that the employee and his widow adopted her on July 15, 1969. **[Claimant 1]** also provided a copy of her marriage certificate to support her name change.

On July 12, 2002, **[Claimant 2]** filed Form EE-2, Claim for Survivor Benefits under EEOICPA as a surviving child. **[Claimant 2]** provided a copy of his birth certificate which listed the employee as his father.

On July 19, 2002, **[Claimant 3]** filed Form EE-2, Claim for Survivor Benefits under EEOICPA as a surviving child. **[Claimant 3]** provided a copy of her adoption papers from the Navajo Nation, verifying that the employee and his widow adopted her on July 15, 1969. She provided a copy of her marriage certificate to support her name change.

On January 21, 2003, **[Claimant 4]** filed Form EE-2, Claim for Survivor Benefits under EEOICPA as a surviving child. At the time **[Spouse]**, the widow, married the employee, **[Claimant 4]** was 30 years old. Based on documents in the file, **[Claimant 4]** is the daughter of **[Spouse]** and **[Claimant 4's Natural Father]**.

On January 22, 2003, **[Claimant 5]** filed Form EE-2, Claim for Survivor Benefits under EEOICPA as a surviving child. **[Claimant 5]** provided a copy of her birth certificate which listed **[Spouse]** as her mother and **[Claimant 5's Natural Father]** as her father. When **[Spouse]** married the employee, **[Claimant 5]** was a minor child and resided in the home of **[Spouse]** and **[Employee]**.

On January 23, 2003, **[Claimant 6]** filed Form EE-2, Claim for Survivor Benefits under EEOICPA as a surviving child. **[Claimant 6]** provided a copy of her birth certificate which listed **[Spouse]** as her mother and **[Claimant 6's Natural Father]** as her father. At the time **[Spouse]** married the employee **[Claimant 6]** was 28 years old.

On January 24, 2003, **[Claimant 7]** filed Form EE-2, Claim for Survivor Benefits under EEOICPA as a surviving child. **[Claimant 7]** provided a copy of her birth certificate which listed **[Employee]** as her mother and **[Claimant 7's Natural Father]** as her father. When **[Spouse]** married the employee, **[Claimant 7]** was a minor child and lived in the home of **[Spouse]** and **[Employee]**.

On January 31, 2003, **[Claimant 8]** filed Form EE-2, Claim for Survivor Benefits under EEOICPA as a surviving child. **[Claimant 8]** provided a copy of her marriage certificate which verified that she was married in August 1949, prior to her mother's marriage to the employee.

On February 24, 2004, **[Claimant 9]** filed form EE-2, Claim for Survivor Benefits under EEOICPA as a surviving child. **[Claimant 9]** provided a certified copy of a clinical record from Northern Navajo Medical Center Indian Health Services, Shiprock Service Unit, in Shiprock, New Mexico, certifying that her name was **[Claimant 9]** and that she had previously used **[Claimant 9's Former Name]** and **[Claimant 9's Former Name]**. The clinic record shows **[Employee]** as her father**, [Claimant 9's Step-father's Name]** as her step-father and that she was legally adopted by her uncle **[Claimant 9's Adoptive Father's Name]**.

On August 3, 2004, the district office requested that **[Claimant 9]** provide verification of either a final decree of adoption or a final judgment of adoption. The district office informed **[Claimant 9]** that the evidence submitted supports that she was legally adopted by **[Claimant 9's Adoptive Father's Name]**. Evidence to show that she was not legally adopted by **[Claimant 9's Adoptive Father's Name]** would need to be submitted, for her to be an eligible survivor on **[Employee]**'s record. She was

provided 30 days to submit this evidence. No evidence was submitted.
On September 10, 2004, the district office issued a recommended decision recommending that **[Claimant 1]**, **[Claimant 2]**, **[Claimant 3]**, **[Claimant 5]**, and **[Claimant 7]** were eligible surviving children of **[Employee]** and that **[Claimant 4]**, **[Claimant 6]**, **[Claimant 8]**, and **[Claimant 9]** did not establish that they were eligible surviving children of the employee.
[Claimant 1], **[Claimant 2]**, **[Claimant 3]**, **[Claimant 5]**, and **[Claimant 7]** have provided evidence to establish they are surviving children or have had step-children relationships with the employee, and therefore as his survivors, are entitled to additional compensation in the amount of $50,000.00, to be divided equally pursuant to 42 U.S.C. § 7384u(a). **[Claimant 1]**, **[Claimant 2]**, **[Claimant 3]**, **[Claimant 5]**, and **[Claimant 7]** are each entitled to $10,000. **[Claimant 4]**, **[Claimant 6]**, **[Claimant 8]**, and **[Claimant 9]** are not entitled to compensation because they have not established that they are an eligible survivor.
On the dates listed below, the Final Adjudication Branch received written notification that you waive any and all objections to the recommended decision:

[Claimant 1]	September 21, 2004
[Claimant 2]	September 22, 2004
[Claimant 3]	September 20, 2004
[Claimant 5]	September 21, 2004
[Claimant 7]	September 17, 2004

Pursuant to the regulations implementing the EEOICPA, a claimant has 60 days from the date of issuance of the recommended decision to raise objections to that decision to the Final Adjudication Branch. 20 C.F.R. § 30.310(a). If an objection is not raised during the 60-day period, the Final Adjudication Branch will consider any and all evidence submitted to the record and issue a final decision affirming the district office's recommended decision. 20 C.F.R. § 30.316(a). No objections were raised nor waivers received from **[Claimant 4]**, **[Claimant 6]**, **[Claimant 8]**, and **[Claimant 9]**.

After considering the record of the claim forwarded by the district office, the Final Adjudication Branch makes the following:

FINDINGS OF FACT

1. On September 10, 2004**,** the district office issued a recommended decision concluding that **[Spouse]** had received an award as the widow of the **[Employee]** under section 5 of the Radiation Exposure Compensation Act**. [Employee**] and **[Spouse]** were married on June 9, 1955. The record establishes that **[Employee]** died on March 18, 1990. The record establishes that **[Spouse]**, the employee's wife, died on October 15, 2001. Subsequently, **[Claimant 1]**, **[Claimant 2]**, **[Claimant 3]**, **[Claimant 4]**, **[Claimant 5]**, **[Claimant 6]**, **[Claimant 7]**, **[Claimant 8]**, and **[Claimant 9]** filed claims for benefits

2. **[Claimant 1]**, **[Claimant 2]**, **[Claimant 3]**, **[Claimant 5]**, and **[Claimant 7]** have provided evidence to establish they are surviving children or have had step-children relationships with the employee.

3. **[Claimant 4]**, **[Claimant 6]**, **[Claimant 8]**, and **[Claimant 9]** are not entitled to compensation because they have not established that they are eligible survivors of the employee.

4. In cases involving a stepchild who was an adult at the time of marriage, supportive evidence may consist of documentation showing that the stepchild was the primary contact in medical dealings with the deceased employee, the stepchild provided financial support for the deceased employee, and/or had the deceased employee living with him/her, etc. In addition, evidence consisting of medical reports, letters from the physician, receipts showing that the stepchild purchased medical equipment, supplies or medicine for the employee may be helpful. Also, evidence such as copies of insurance policies, wills, photographs *(i.e.*, attendance in the stepchild's wedding as the father or mother), and newspaper articles *(i.e.*, obituary) may be considered. No evidence has been submitted to support this type of relationship with **[Claimant 4]**, **[Claimant 6]**, or **[Claimant 8]** and the employee.

Based on the above noted findings of fact in this claim, the Final Adjudication Branch hereby also makes the following:

CONCLUSIONS OF LAW

Per Chapter 2-200 (September 2004) of the Federal (EEOICPA) Procedure Manual, a stepchild is considered a child if he or she lived with the employee in a regular parent-child relationship. **[Claimant 1]**, **[Claimant 2]**, **[Claimant 3]**, **[Claimant 5]**, and **[Claimant 7]** have established they lived with the employee in a regular child/step-child relationship with **[Employee]** pursuant to 42 U.S.C. § 7384u(e)(1)(B) of the EEOICPA and are entitled to compensation in the amount of $10,000.00 each.

[Claimant 9] has established that she was adopted by **[Claimant 9's Adoptive Father's Name]** and pursuant to 25 U.S.C. § 1911 of the Indian Child Welfare Laws, Indian tribes have exclusive jurisdiction over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where jurisdiction is otherwise vested in the State by existing Federal law. Pursuant to the Navajo Nation Code, 9 NNC § 611 (1960), the natural parents of the adoptive child, except a natural parent who is also an adoptive parent or the spouse of an adoptive parent, shall be relieved of all parental responsibilities for such child or to his property by descent or distribution or otherwise.

Accordingly, an adopted Navajo child may claim EEOICPA benefits only as a survivor of her adopted father, not her natural father. Please note that in order to terminate parental rights under Navajo law there must be a "final decree of adoption" – not just a "final judgment of adoption." Therefore **[Claimant 9]** is not an eligible surviving child of the employee.

[Claimant 4], **[Claimant 6]**, and **[Claimant 8]** are not considered eligible surviving children of **[Employee]**, because they did not establish a relationship pursuant to Chapter 2-200 (September 2004) of the Federal (EEOICPA) Procedure Manual and 42 U.S.C. § 7384s(e)(3)(B) and are not entitled to compensation.

The undersigned has reviewed the record and the recommended decision issued by the district office on September 10, 2004, and finds that your claims are in accordance with the facts and the law in this case. It is the decision of the Final Adjudication Branch that your claims are accepted in part and

denied in part.

DENVER, CO

Joyce L. Terry

District Manager

EEOICPA Fin. Dec. No. 54583-2004 (Dep't of Labor, November 2, 2006)
NOTICE OF FINAL DECISION FOLLOWING A HEARING

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

STATEMENT OF THE CASE

In 2004, **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]**, **[Claimant #9]**, **[Claimant #10]**, **[Claimant #11]**, **[Claimant #12]** and **[Claimant #13]** each filed a claim for survivor benefits under the Act. You stated on the forms that you were filing for the multiple myeloma of your late father, **[Employee]**, hereinafter referred to as "the employee." A pathology report establishes that the employee was diagnosed with multiple myeloma on May 8, 1991. The death certificate shows the causes of death on May 21, 1991 were shock, gastric bleeding due to stress ulcers and sepsis, with a significant contributing factor of multiple myeloma.

On the Form EE-2, you indicated the employee was a member of the Special Exposure Cohort (SEC). The Form EE-3 stated the employee was employed as a roofer by Hannin Roofing at the Gaseous Diffusion Plant (GDP) in Paducah, Kentucky, for the period of January 1, 1970 to December 31, 1982. The district office verified that the employee worked for Hannin Roofing at the Paducah GDP for the period April 1, 1977 to September 30, 1978.

In support of your claims for survivorship, you submitted the death certificate of the employee which showed he was divorced at the time of his death. In addition, you submitted evidence that **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]**, **[Claimant #9]**, **[Claimant #10]**, **[Claimant #11]**, **[Claimant #12]** and **[Claimant #13]** are the natural children of the employee and that at the time of the employee's death, you were each over the age of 23, except for **[Claimant #12]**, who was 22 years old. There was no evidence that **[Claimant #12]** was in school full-time or that any of you were incapable of self-support at the time of the employee's death.

On July 14, 2004, the FAB issued a final decision, finding that **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]**, **[Claimant #9]**, **[Claimant #10]**, **[Claimant #11]**, **[Claimant #12]** and **[Claimant #13]** were each entitled to compensation under Part B of the Act in the amount of $11,538.46. **[Claimant #14]**, **[Claimant #15]**, and **[Claimant #16]** then filed claim forms in 2005 as the stepchildren of the employee. A letter of objection requesting reopening was submitted, protesting the inclusion of

[Claimant #2] as an eligible survivor, since her marriage certificate showed a different father and mother than the employee and his spouse. On July 11, 2005, the Director of DEEOIC issued a Director's Order, vacating the final decision of July 14, 2004 and requiring the district office to develop survivorship eligibility and issue a new recommended decision.

On May 8, 2006, the Jacksonville district office issued a recommended decision, concluding that all the claimants are entitled to survivor compensation of $9,375.00 each under Part B of the Act, and that **[Claimant #15]** is entitled to survivor compensation of $125,000.00 under Part E of the Act. The district office recommended denial of all the other survivor claims under Part E of the Act.

Attached to the recommended decision was a notice of claimant rights, which stated that you had 60 days in which to file an objection to the recommended decision and/or request a hearing. This period expired on July 7, 2006. The FAB received written notification that **[Claimant #16]**, **[Claimant #14]**, and **[Claimant #15]** each waived any and all objections to the recommended decision. The FAB received letters of objection from **[Claimant #7]** and **[Claimant #5]**, and letters of objection and request for a hearing from **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #6]**, **[Claimant #9]**, and **[Claimant #12]**. The hearing was held on September 15, 2006, in Paducah, Kentucky.

A claimant is allowed thirty days after the hearing is held to submit additional evidence or argument, and twenty days after a copy of the transcript is sent to them to submit any changes or corrections to that record. By letter dated October 4, 2006, the transcript was forwarded to the hearing attendees (**[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #9]**, **[Claimant #12]**, **[Claimant #14]**, **[Claimant #15]**, and **[Claimant #16]**). No response was received.

OBJECTIONS

The objections from each of the claimants stated that **[Claimant #14]**, **[Claimant #15]**, and **[Claimant #16]** are the stepchildren of the employee, not his children, and should not be entitled to receive any compensation.

During the hearing, the marital history of the employee and his spouse, the mother of the survivors, was discussed. It was clarified that the employee and your mother (**[Employee's spouse]**) married originally in the 1950s, had thirteen children, divorced in the early 1970s, remarried in 1981, and divorced again in 1985. During the first period of divorce,

[Employee's spouse] married **[Employee's spouse's second husband]**, and gave birth to **[Claimant #14]**, **[Claimant #15]**, and **[Claimant #16]**. The hearing discussion verified that

[Claimant #14], **[Claimant #15]** and **[Claimant #16]** lived with the employee in his home during the period of his remarriage to your mother.

After considering the recommended decision and all the evidence in the case file, the FAB hereby makes the following:

FINDINGS OF FACT

1. You each filed a claim for survivor benefits under the Act.

2. The employee was diagnosed with multiple myeloma on May 8, 1991 and died on May 21, 1991.
3. The employee was employed at the Paducah GDP from April 1, 1977 to September 30, 1978.
4. **[Claimant #1]**, **[Claimant #2]**, **[Claimant#3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant #6]**, **[Claimant#7]**, **[Claimant #8]**, **[Claimant #9]**, **[Claimant #10]**, **[Claimant#11]**, **[Claimant #12]** and **[Claimant #13]** are the employee's natural children. The employee was divorced at the time of his death. Each of you was over the age of 23 at the time of the employee's death, except for **[Claimant #12]** (born **[Date of birth]**). However, **[Claimant #12]** did not provide evidence of being in school full-time or being incapable of self-support at the time of the employee's death.
5. **[Claimant #14]**, **[Claimant #15]**, and **[Claimant #16]** are the employee's stepchildren. **[Claimant #15]** was born on **[Date of birth]** and was 17 years old at the time of the employee's death. **[Claimant #14]** and **[Claimant #16]** were between the ages of 18 and 23, but did not provide evidence of being in school full-time or incapable of self-support at the time of the employee's death.
6. The employee's multiple myeloma caused or contributed to his death.

Based on the above-noted findings of fact in this claim, the FAB hereby makes the following:

CONCLUSIONS OF LAW

The undersigned has reviewed the record, the recommended decision issued by the Jacksonville district office on May 8, 2006 and the subsequently submitted objections. I find that the decision of the Jacksonville district office is supported by the evidence and the law and cannot be changed.

To qualify as a member of the SEC under the Act, the following requirements must be satisfied:

The employee was so employed for a number of work days aggregating at least 250 work days before February 1, 1992, at a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee.

42 U.S.C. § 7384l(14)(A). The evidence must also show the employee was monitored for radiation through the use of dosimetry badges or worked in a job that had exposures comparable to a job that was monitored through the use of dosimetry badges.

The evidence shows that the employee worked at the Paducah GDP from April 1, 1977 to September 30, 1978, which equals more than 250 days prior to February 1, 1992. In addition, he worked in a job that had exposures comparable to a job that was monitored through the use of dosimetry badges. Therefore, the employee qualifies as a member of the SEC.

The employee's multiple myeloma is a specified cancer as defined by the Act and implementing regulations. 42 U.S.C. § 7384l(17); 20 C.F.R. § 30.5(ff) (2005).

Part B of the Act defines a "child" as including a recognized natural child, a stepchild who lived with an individual in a regular parent-child relationship, and an adopted child. 42 U.S.C. § 7384s(e)(3)(B). There is no minimum or maximum time requirement for a stepchild to have lived in the same household as the employee.[1] **[Claimant #2]** is determined to be a survivor of the employee, since his name is listed as the father on your birth certificate and there is no evidence you were formally adopted

by **[Family relative]**. **[Claimant #14]**, **[Claimant #15]** and **[Claimant #16]** are determined to be stepchildren of the employee, since the evidence indicates you lived with the employee for at least three years and are listed as children in his obituary. Therefore, all of the claimants meet the definition of a survivor under Part B of the Act. 42 U.S.C. § 7384s(e)(3)(A). Therefore, I conclude that you are entitled to $150,000.00, or $9,375.00 each for the employee's multiple myeloma, pursuant to the Act. 42 U.S.C. § 7384s(a). Since **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]**, **[Claimant #9]**, **[Claimant #10]**, **[Claimant #11]**, **[Claimant #12]** and **[Claimant #13]** have already received compensation under this section of the Act, no additional funds are payable to you at this time.

The employee was an employee of a DOE contractor at a DOE facility. 42 U.S.C. §§ 7384l(11), 7384l(12). A determination under Part B of the Act that a DOE contractor employee is entitled to compensation under that Part for an occupational illness is treated as a determination that the employee contracted that illness through exposure at a DOE facility. 42 U.S.C. § 7385s-4(a). Therefore, the employee is a covered DOE contractor employee with a covered illness. 42 U.S.C. §§ 7385s(1), 7385s(2). The employee died as a consequence of multiple myeloma.

The term "covered child" means a child of the employee who, at the time of the employee's death, was under the age of 18 years, or under the age of 23 years and a full-time student who was continuously enrolled in an educational institution since attaining the age of 18 years, or incapable of self-support. 42 U.S.C. § 73845s-3(d)(2).

The evidence of record shows that **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]**, **[Claimant #9]**, **[Claimant #10]**, **[Claimant #11]** and **[Claimant #13]** were each over 23 years old at the time of the employee's death, with no evidence of being incapable of self-support. **[Claimant #12]**, **[Claimant #14]**, and **[Claimant #16]** were between the ages of 18 and 23 with no evidence of full-time attendance at school or being incapable of self-support.

Therefore, the claims of **[Claimant #1]**, **[Claimant #2]**, **[Claimant #3]**, **[Claimant #4]**, **[Claimant #5]**, **[Claimant #6]**, **[Claimant #7]**, **[Claimant #8]**, **[Claimant #9]**, **[Claimant #10]**, **[Claimant #11]**, **[Claimant #13], [Claimant #12]**, **[Claimant #14]** and **[Claimant #16]** under Part E of the Act must be denied because the evidence does not establish that you meet the criteria of "covered" child as defined by the Act. 42 U.S.C. § 73845s-3(d)(2).

[Claimant #15] meets the definition of a survivor under Part E of the Act. 42 U.S.C. § 7385s-3(d). Therefore, **[Claimant #15]** is entitled to benefits in the amount of $125,000.00 for the employee's death due to multiple myeloma. 42 U.S.C. § 7385s-3.

Jacksonville, Florida

Sidne M. Valdivieso, Hearing Representative

Final Adjudication Branch

[1] Federal (EEOICPA) Procedure Manual, Chapter 2-200.5c(5).

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch concerning your claims for compensation under 42 U.S.C. § 7384 of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA or the Act). Upon a careful review of the facts and an independent review of the record, the Final Adjudication Branch concludes that the evidence of record is sufficient to allow compensation under 42 U.S.C. § 7384 of the Act for your claims based on **[Employee's]** condition of lung cancer.

STATEMENT OF THE CASE

On July 31, 2001, **[Employee's Spouse]** filed a Form EE-2 (Claim for Survivor Benefits under the EEOICPA) for compensation as the surviving spouse of **[Employee]**, a uranium worker. On August 17, 2001, the Department of Labor received verification from the Department of Justice that **[Employee's Spouse]** filed for an award under section 5 of the Radiation Exposure Compensation Act (RECA) for the condition of lung cancer as the surviving beneficiary of **[Employee]**, for the medical condition of lung cancer, which was approved for an award of $100,000 under section 5 of the RECA, on January 15, 1999. Based on the award under section 5 of the RECA, on August 30, 2001, the Denver district office recommended acceptance of **[Employee's Spouse]** claim. On December 13, 2001, the Final Adjudication Branch issued a Final Decision to accept **[Employee's Spouse's]** claim; however, she had passed away on September 10, 2001, and her claim was administratively closed. By Modification Order dated September 13, 2002, the Director vacated the December 13, 2002 Final Decision and remanded the claim to the Denver district office for the development and determination of survivor entitlement(s).

On March 23, 2004, you (**[Claimant #1]**) submitted a Form EE-2, seeking benefits in the amount of $50,000 as a surviving child of a uranium worker who had lung cancer. You provided a copy of your birth certificate which indicated you are a child of the employee.

[Employee Spouse] had two living children from a previous marriage, **[Claimant #3]** and **[Claimant # 2]**. **[Employee's Spouse's]** third child, **[Employee's Spouse's third child]**, passed away at age twenty (a newspaper article regarding his accident was provided). The Denver district office sent letters and claim forms to **[Claimant #3]** and **[Claimant #2]**. On March 26, 2004, **[Claimant #3]** submitted a letter indicating he did not believe that he would qualify as a surviving stepchild as he was a married adult at the time his mother and stepfather were married. **[Claimant #3]** and **[Claimant #2]** did not apply for benefits at that time.

On May 12, 2004, the Denver district office issued a recommended acceptance of **[Claimant #1's]** claim for compensation. By Remand Order dated June 16, 2004, the Final Adjudication Branch vacated the May 12, 2004 recommended decision and remanded the case to the Denver district office as further development of survivorship issues was needed.

On June 14 (**[Claimant #2]**) and June 15, 2004, (**[Claimant #3]**), you submitted Forms EE-2, seeking benefits in the amount of $50,000 as surviving stepchildren of a uranium worker who had lung cancer. You provided copies of your birth certificates which indicate you are the children of **[Employee's Spouse]**.

The record includes statements by **[Claimant #3]**, **[Claimant #2]** and **[Claimant #2's spouse]**

(**[Claimant #2's spouse]**), family photographs, a genealogical record, and the obituary of **[Employee]** as evidence that **[Claimant #3]** and **[Claimant #2]** lived in a parent-child relationship with **[Employee]**.

On November 5, 2004, the Denver district office recommended approval of your claims as eligible survivors of a covered uranium worker entitled to compensation totaling $50,000 pursuant to §§ 7384u(a), 7384u(e)(1)(B) and 7384u(e)(3)(B) of the Act. *See* 42 U.S.C. § 7384u(a), (e)(1)(B) and (e)(3)(B). The compensation was recommended to be distributed as follows: **[Claimant #1]** in the amount of $16,666.67; **[Claimant #3]** in the amount of $16,666.67; and **[Claimant #2]** in the amount of $16,666.66.

On November 17 (**[Claimant #3]**) and November 22, 2004 (**[Claimant #2]**), the Final Adjudication Branch received written notice that you waived your right to file objections to the November 5, 2004 recommended decision.

OBJECTIONS

On November 22, 2004, the Final Adjudication Branch received your (**[Claimant #1]**) letter (dated November 15, 2004) of objection to the recommended decision with your request for oral hearing.

After due notice, the Final Adjudication Branch held a hearing in Salt Lake City, Utah on January 11, 2005. **[Claimant #1]** and **[Claimant #3]** testified in person and **[Claimant #2]**, with **[Claimant #2's spouse]**, witness, testified via a telephone conference call. The following exhibits were submitted by **[Claimant #1]** on the date of the hearing:

Exhibit 1: A January 11, 2005 letter by **[Claimant #1]**, which was read onto the record at the hearing.

Exhibit 2: A November 24, 2004 letter by **[Claimant #1]**, addressed to President George W. Bush.

The main issues you (**[Claimant #1]**) brought forth in your objection letter and at the hearing are summarized as follows:

1. You contend that you should be awarded $50,000.00, as the surviving child of the employee (Letter of objection; Transcript (Tr.) 8-13).

2. You disagree with the use of family photographs and obituaries in establishing the relationship between your father and his stepchildren (Letter of objections; Tr. 14-16).

3. You disagree with Findings of Fact number five in the November 5, 2004 recommended decision, indicating **[Claimant #2]** lived with the employee in a parent-child relationship (Letter of objection; Tr. 14-15).

4. You disagree with Findings of Fact number six in the November 5, 2004 recommended decision, indicating **[Claimant #3]** lived with the employee in a parent-child relationship (Letter of objection; Tr. 14-15).

5. You are dissatisfied with the handling of your claim (Letter of objection; Tr. 8-14, 17-19, 34-35).

6. A copy of the transcript of the administrative hearing was sent to each participant at the hearing as an opportunity to provide corrections/and or comments.

The second, third, and fourth issues all relate to issue number one, your (**[Claimant #1]**) contention that you should be awarded compensation in the amount of $50,0000, and that the stepchildren of the employee (**[Claimant #3]** and **[Claimant #2]**) should not be awarded survivor benefits in this case.

The fact that compensation is payable and the amount ($50,000 total) is not in dispute in this case. The regulations provide that if there is no surviving spouse, the compensation shall be paid in equal shares to all children of the deceased covered Part B employee. *See* 20 C.F.R. § 30.501(a)(2). The regulations define a "child" or "children" to include a recognized child, a stepchild who lived with that individual in a regular parent-child relationship, and an adopted child of that individual. *See* 20 C.F.R. § 30.500(a)(2).

You (**[Claimant #1]**) established that you are a child of the employee by providing a copy of your birth certificate, showing the employee as your biological father.

[Claimant #3] (born **[Claimant #3's date of birth]**) and **[Claimant #2]** (born **[Claimant #2's date of birth]**) were both adults at the time their mother (**[Employee's Spouse]**) married the employee on July 18, 1955. **[Employee's Spouse]** had a third child, **[Employee's Spouse's third child]** (born **[Employee's Spouse's third child's date of birth]**), who passed away at age twenty. In cases involving a stepchild who was an adult at the time of marriage, supportive evidence of a parent-child relationship may consist of documentation showing that the stepchild was the primary contact in medical dealings with the deceased employee, provided financial support for the deceased employee, or had the employee living with him/her. Other evidence, including medical reports, letters from a physician, receipts showing the stepchild purchased medical equipment, supplies or medicine for the employee, insurance policies, wills, photographs, and newspaper articles (*i.e.*, obituary) may also be considered. *See* Federal (EEOICPA) Procedure Manual, Chapter 2-0200.5(3) (September 2004). In addition, there is no minimum time requirement for the stepchild to have lived in the same household as the covered employee to fulfill the requirement to have "lived with the employee in a parent-child relationship." Visits during holidays, a stepchild caring for an employee, and/or stays at one another's home at any given time may fulfill this requirement. *See* Federal (EEOICPA) Procedure Manual, Chapter 2-0200.5(5) (September 2004).

The record includes a June 13, 2004 letter by **[Claimant #3]** in which he indicated he and his family stayed with **[Employee]** and **[Employee's Spouse]** during his visits from Spanish Fork to Moab, Utah. A photograph was provided identifying **[Employee]** and **[Employee's Spouse]**, as well as **[Claimant #3]** and his family at Christmas dinner. In addition, a photograph of a family gathered around a Christmas tree with opened gifts was provided, and **[Claimant #3]**, two of his small children, **[Employee]** and **[Employee's Spouse]** were identified in the photograph. **[Claimant #3]** indicated this picture was taken at his home in Spanish Fork, Utah.

The record also includes a May 28, 2004 letter by **[Claimant #2]**, in which he indicated he lived with **[Employee]** and **[Employee's Spouse]** for six months in 1957, and that he visited the employee in the hospital in Grand Junction, Colorado. Photographs of a family hunting outing were provided in which

[Employee], **[Claimant #1]** and **[Claimant #2]** were identified, as well as **[Claimant #2's]** son and **[Claimant #3's]** son. A genealogical record of the **[Employee's family name's]** family was provided and indicated that **[Claimant #2]** named his son "**[Claimant #2's son's name]**," apparently after **[Employee]**. **[Claimant #1]** testified that both names are pronounced the same even though the spelling is different. **[Claimant #1]** testified also that the employee helped **[Claimant #2]** get a job around 1956, he lived with the employee for four months at that time (Tr. 25), and **[Claimant #2]** and his family lived with the employee for approximately six months while his family was searching for a home (Tr. 26). Further, the record includes the obituary for **[Employee]**. The obituary shows the employee's daughter as **[Claimant #1's married name]** and his stepsons as **[Claimant #3]** and **[Claimant #2]**.

The preponderance of the evidence of record indicates that the claimants **[Claimant #3]** and **[Claimant #2]** lived in a parent-child relationship with the employee,**[Employee]**.

Your fifth issue indicates you are dissatisfied with the handling of your claim because it involved remand, and the opportunity for other survivors to file a claim. Pursuant to the authority granted by § 30.317 of the EEOICPA regulations, at any time before the issuance of its final decision, the Final Adjudication Branch may return a claim to the district office for further development and/or issuance of a new recommended decision without issuing a final decision, whether or not requested to do so by the claimant. *See* 20 C.F.R. § 30.317. Under this authority, the Final Adjudication Branch issued a Remand Order on June 16, 2004, vacating the May 12, 2004 recommended decision. The Final Adjudication Branch directed the Denver district office to do further survivorship development and to issue a new recommended decision based on that development. The Denver district office completed its survivorship development and issued a new recommended decision based on that development on November 5, 2004. Thus, your claim was handled in accordance with the regulations that govern the Act.

FINDINGS OF FACT

1. On July 31, 2001, **[Employee's Spouse]** filed a claim as a surviving spouse of a uranium worker. **[Employee's Spouse]** passed away on September 10, 2001, and her claim was administratively closed.

2. On August 17, 2001, the Department of Justice verified that **[Employee's Spouse]** had filed as the eligible surviving RECA beneficiary of the employee and had been approved for an award of $100,000 under section 5 of the Radiation Exposure Compensation Act on January 15, 1999 for the medical condition of lung cancer.

3. The employee died on March 26, 1973 as a result of squamous cell carcinoma of the lung and he worked in the mining business.

4. **[Claimant #1]** filed a claim as a surviving child of a uranium worker on March 23, 2004. **[Claimant #1]** established that she is a surviving child of a uranium worker.

5. On June 14, 2004, **[Claimant #2]** filed a claim as a surviving stepchild of a uranium worker. **[Claimant #2]** provided evidence establishing that he lived with the employee in a parent-child relationship. **[Claimant #2]** is a surviving stepchild of a uranium worker.

6. On June 15, 2004, **[Claimant #3]** filed a claim as a surviving stepchild of a uranium worker. **[Claimant #3]** provided evidence establishing that he lived with the employee in a parent-child relationship. **[Claimant #3]** is a surviving stepchild of a uranium worker.

CONCLUSIONS OF LAW

I have carefully reviewed the evidence of record, including your letters, your testimony at the administrative hearing, and additional documentation you provided.

The EEOICPA provides that an individual who receives, or has received, $100,000 under section 5 of the Radiation Exposure Compensation Act (42 U.S.C. § 2210 note) for a claim made under that Act, or the survivor of that covered uranium employee if the employee is deceased, shall receive compensation under this section in the amount of $50,000. *See* 42 U.S.C. § 7384u(a).

The undersigned notes your (**[Claimant #1]**) objections to the recommended decision; however, they do not change the outcome of the case. The Final Adjudication Branch is bound by the provisions of the Energy Employees Occupational Illness Compensation Program Act and has no authority to depart from the Act and implementing regulations.

You (**[Claimant #1]**, **[Claimant #3]** and **[Claimant #2]**) have demonstrated that you are the surviving children (daughter and stepsons) and eligible beneficiaries of a uranium worker. Therefore, **[Claimant #1]** is entitled to compensation in the amount of $16, 666.67; **[Claimant #3]** is entitled to compensation in the amount of $16, 666.67; and **[Claimant #2]** is entitled to compensation in the amount of 16, 666.66; totaling $50,000, pursuant to 42 U.S.C. § 7384u(a), 7384u(e)(1)(B), and 7384u(e)(3)(B) of the EEOICPA.

For the above reasons, the Final Adjudication Branch concludes that the evidence of record is sufficient to allow compensation under 42 U.S.C. § 7384 of the Act for your claims based on **[Employee's]** condition of lung cancer. Accordingly, your claim for compensation is accepted.

Seattle, Washington

Rosanne M. Dummer, District Manager

Final Adjudication Branch Seattle

EEOICPA Fin. Dec. No. 68949-2005 (Dep't of Labor, September 21, 2005)
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, the Final Adjudication Branch accepts your claims for compensation under 42 U.S.C. § 7384.

STATEMENT OF THE CASE

On May 31, 2005, you filed Forms EE-2 (Claim for Survivor Benefits under EEOICPA) claiming

benefits as the surviving children of **[Employee]**. You identified the diagnosed condition being claimed as small cell carcinoma of the lung. The medical documentation of record includes a pathology report based on an endobronchial biopsy performed on March 1, 1995, which shows a diagnosis of small cell carcinoma of the right upper lung lobe. A report of a consultation examination conducted on March 2, 1995, and signed by Dr. Blessilda Liu, confirms that diagnosis.

You submitted a copy of your father's death certificate showing that he died on April 18, 1996, and identifying **[Employee's Spouse]** as his surviving spouse. A copy of their marriage certificate shows that they were wed on August 31, 1953. A copy of a death certificate shows that **[Employee's Spouse]** died on December 26, 2004, and names her father as **[Employee's Spouse's Father]**.

With the exception of **[Claimant #3]**, you each provided a copy of a birth certificate naming **[Employee]** as your father. **[Claimant #5]** provided marriage certificates and a divorce decree establishing the change in her last name to **[Claimant #5's married name]**.

[Claimant #3's] birth certificate shows that she was named **[Claimant #3's given name]** and that she was born on July 8, 1953, approximately two months prior to the marriage of **[Employee]** and **[Employee's Spouse]**. The certificate was filed with the Pennsylvania Department of Health on July 22, 1953. The birth certificate names **[Claimant #3's biological father]** as her father and **[Employee's Spouse]** as her mother. She provided a statement indicating that she resided with her mother and **[Employee]** from infancy until 1974, when she was married. She reports that, after leaving home, she maintained a relationship with **[Employee]** and cared for him during his illness due to cancer. She further reports that **[Employee]** and her mother had told her that she was adopted, but that she cannot find any supporting documentation. Finally, she states that she never knew any other father. She provided a copy of a permanent record card for the senior high school in McKeesport, PA, which names **[Employee]** as her father and **[Employee's Spouse]**as her mother. A copy of **[Employee's]** last will and testament names **[Claimant #3]**, along with the other claimants, as his children. **[Claimant #5]** provided a letter in which she states that she has no doubt that **[Claimant #3]** is her sister and that all five children were raised in the same household. **[Claimant #3]** also provided marriage certificates and a divorce decree establishing the change in her last name to **[Claimant #3's married name]**.

You also provided a Form EE-3 (Employment History) in which you stated that your father worked at the U.S. Steel Co., National Tube Division, from 1953 to 1985. U.S. Steel verified that he worked at the U.S. Steel Co., National Tube Division, from August 15, 1953, to July 30, 1985. The U.S. Steel Co., National Tube Division, in McKeesport, PA, is recognized as a covered atomic weapons employer (AWE) facility from 1959 to 1960. *See* Department of Energy, Office of Worker Advocacy, Facility List.

To determine the probability of whether your father sustained cancer in the performance of duty, the Cleveland district office referred your claims to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction. On July 20, 22, 24, and 27, 2005, you signed Forms OCAS-1, indicating that you had reviewed the NIOSH Draft Report of Dose Reconstruction and agreeing that it identified all of the relevant information provided to NIOSH. On August 3, 2005, the district office received the final NIOSH Report of Dose Reconstruction. Using the information provided in this report, the district office used the Interactive RadioEpidemiological Program to determine the probability of causation of your father's cancer and reported in its recommended decision that there was at least a 50% probability that lung cancer was caused by radiation exposure at the U.S. Steel Co., National Tube Division.

On August 11, 2005, the Cleveland district office issued a recommended decision concluding that your father is a covered employee with cancer as defined in 42 U.S.C. § 7384l(9)(B), whose cancer was at least as likely as not related to his employment at the U.S. Steel Co., National Tube Division, and thus sustained in the performance of duty. For that reason, the district office recommended that you, as his surviving children, are each entitled to compensation in the amount of $30,000 pursuant to 42 U.S.C. § 7384s.

On August 17 and 22, 2005, the Final Adjudication Branch received written notification that you waive any and all objections to the recommended decision.

FINDINGS OF FACT

1. You filed claims for benefits on May 31, 2005.

2. Your father worked at the U.S. Steel Co., National Tube Division, a covered AWE facility, from August 15, 1953, to July 30, 1985.

3. Your father was diagnosed with small cell carcinoma of the right upper lung lobe on March 1, 1995.

4. The NIOSH Interactive RadioEpidemiological Program determined a 95.91% probability that your father's lung cancer was caused by radiation exposure at the U.S. Steel Co., National Tube Division.

5. Your father's cancer was at least as likely as not related to his employment at an AWE facility.

6. You are the surviving children of **[Employee]**.

CONCLUSIONS OF LAW

I have reviewed the evidence of record and the recommended decision issued by the district office on August 11, 2005.

To determine the probability of whether your father sustained cancer in the performance of duty, the district office referred your claims to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction, in accordance with 20 C.F.R. § 30.115. The information and methods utilized to produce the dose reconstruction are summarized and explained in the NIOSH Report of Dose Reconstruction, dated April 13, 2005. NIOSH determined that the internal dose due to inhalation during your father's first year of employment was of sufficient magnitude to produce a probability of causation of 50% or greater. *See* 42 C.F.R. §§ 82.25, 82.26.

Using the information provided in the Report of Dose Reconstruction for small cell carcinoma of the right upper lung lobe, the district office utilized the NIOSH Interactive RadioEpidemiological Program to determine a 95.91% probability that your father's cancer was caused by radiation exposure while employed at the U.S. Steel Co., National Tube Division. The Final Adjudication Branch (FAB) also analyzed the information in the NIOSH report, confirming the 95.91% probability.

The FAB has also reviewed the evidence regarding **[Claimant #3's]** status as a stepchild and has determined that she is a stepchild of **[Employee]** who lived with him in a regular parent-child relationship. For that reason, she meets the definition of "child" in 42 U.S.C. § 7384s(e)(3)(B).

Based on your father's covered employment at the U.S. Steel Co., National Tube Division, the medical documentation showing a diagnosis of small cell carcinoma of the right upper lung lobe, and the determination that your father's cancer is at least as likely as not related to his employment at the U.S. Steel Co., National Tube Division, and thus sustained in the performance of duty, he is a "covered employee with cancer". *See* 42 U.S.C. §§ 7384l(1)(B), (9)(B).

For those reasons, I find that you are each entitled to $30,000 based on your father's lung cancer, as provided by 42 U.S.C. § 7384s.

Cleveland, OH

Debra A. Benedict

District Manager

Final Adjudication Branch

Toxic Substances

Acceptance under former Part D

EEOICPA Fin. Dec. No. 2029-2002 (Dep't of Labor, January 10, 2005)
NOTICE OF FINAL DECISION

This decision of the Final Adjudication Branch (FAB) concerns 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). Your claim under Part E of the Act is hereby accepted as compensable.

The Jacksonville district office issued a recommended decision finding that **[Employee]** was employed at a Department of Energy (DOE) facility by a DOE contractor in accordance with Part E, 42 U.S.C. § 7385s(1); that you are the eligible survivor in accordance with Part E, 42 U.S.C. § 7385s-3(c)(1); and that you are entitled to $125,000 in accordance with Part E, 42 U.S.C. § 7385s-3(a)(1). Consequently, the district office concluded your survivor claim is accepted in accordance with Part E, 42 U.S.C. § 7385s-4(b). On December 28, 2004, the Final Adjudication Branch received your written notification that you waive any and all objections to the recommended decision.

The evidence of record establishes that your application meets the statutory criteria for compensability as defined in Part E of the EEOICPA. In this instance the evidence confirms that your spouse had covered employment with the gaseous diffusion plant in Paducah, Kentucky, for the period of March 24, 1952 to January 15, 1982, and supports a causal connection between your spouse's death and his exposure to a toxic substance at a DOE facility. Specifically, the evidence of record establishes that a Physicians Panel review under former Part D of the EEOICPA has been completed, and that the Secretary of Energy accepted the Panel's affirmative determination of **[Employee]**'s pulmonary

fibrosis due to exposure to a toxic substance at a DOE facility. The file contains **[Employee]**'s death certificate listing the causes of death as cardiogenic shock and pneumonia, the medical opinion of Dr. Kalindi Narayan concluding that pulmonary fibrosis contributed to the employee's death, and a copy of your marriage certificate. This evidence establishes your entitlement to basic survivor benefits under Part E of the EEOICPA.

The Final Adjudication Branch hereby finds that **[Employee]** was a DOE contractor employee with pulmonary fibrosis due to exposure to a toxic substance at a DOE facility; and that you are the eligible survivor of **[Employee]**. Therefore, the Final Adjudication Branch hereby concludes that you are entitled to compensation in the amount of $125,000 under Part E of the EEOICPA. Adjudication of your potential entitlement to additional compensation is deferred until after the effective date of the Interim Final Regulations.

Sidne M. Valdivieso

Hearing Representative

Claim for cancer under Part E

EEOICPA Fin. Dec. No. 10009704-2007 (Dep't of Labor, February 22, 2010)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning the above-captioned claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claim for benefits based on lymphoma is denied under Part E of EEOICPA.

STATEMENT OF THE CASE

On March 19, 2002, the employee filed a claim for benefits under Part B of EEOICPA and alleged that he had contracted pulmonary fibrosis and lymphoma due to his employment as a uranium miner. On May 11, 2004, he also filed a Request for Review by Physicians Panel with the Department of Energy (DOE) under former Part D of EEOICPA for pulmonary fibrosis and lymphoma. With the repeal of Part D and the enactment of Part E, the employee's Part D claim was treated as a claim for benefits under Part E.

On August 16, 2002, FAB issued a final decision accepting the claim under Part B for pulmonary fibrosis and awarded the employee $50,000.00 in lump-sum compensation. In that decision, FAB noted that the Department of Justice (DOJ) confirmed that the employee was an award recipient under section 5 of the Radiation Exposure Compensation Act (RECA), 42 U.S.C. 2210 note, for the condition of pulmonary fibrosis. On May 21, 2007, FAB issued another final decision that accepted the claim for pulmonary fibrosis, this time under Part E, and awarded the employee medical benefits under Part E for that covered illness. On November 3, 2008, FAB also issued a final decision that awarded the employee impairment benefits under Part E based on his accepted pulmonary fibrosis; the award of $142,500.00 was for his 57% whole body impairment.

In support of his Part E claim for lymphoma, the employee submitted an employment history on Form

EE-3, showing that he had worked as a miner for Kerr-McGee at the KerMac 24 Mine in Grants, New Mexico, from approximately September 1, 1959 to March 1, 1960, and for Phillips Petroleum/Sandstone at the Ambrosia Lake Mine, from approximately March 1, 1960 to November 30, 1960. DOJ submitted employment evidence it had collected in connection with his RECA claim, including an Itemized Statement of Earnings from the Social Security Administration and a Uranium Miner's study, both of which verified that the employee worked as a uranium miner for Kerr-McGee in Section 24 from January 1, 1959 to September 30, 1960, and for Phillips Petroleum at Sandstone from October 1, 1960 to December 31, 1960. The employee also submitted a pathology report, dated November 10, 1998, in which Dr. Glenn H. Segal diagnosed B-cell non-Hodgkin's lymphoma involving bone marrow. He also submitted a November 18, 1998 report in which Dr. Jo-Ann Andriko confirmed the diagnosis of malignant lymphoma.

The district office reviewed source documents used to compile the U. S. Department of Labor's Site Exposure Matrices (SEM)[1]to determine whether it was possible that, given the employee's labor category and the work processes in which he was engaged, he was exposed to a toxic substance in the course of his employment that has a causal link with his claimed lymphoma. The district office determined that SEM did not have such a link and by letters dated August 14, 2009, and September 14, 2009, it advised the employee that there was insufficient evidence to establish that exposure to a toxic substance at a DOE facility or section 5 mine was a significant factor in aggravating, contributing to or causing his lymphoma. The district office requested that he provide further evidence of the link necessary to support his claim and afforded him 30 days to provide the requested evidence. In response, on October 13, 2009, he submitted a letter in which he stated that his lymphoma was the result of his employment as a uranium miner. The letter was accompanied by the following documents:

1. An article entitled "Radon Exposure and Mortality Among White and American Indian Uranium Miners: An Update of the Colorado Plateau Cohort."

2. An article entitled "Radiation Exposure Tied to Lymphoma Risk in Men."

3. An article entitled "Occupational Exposures and Non-Hodgkin's Lymphoma: Canadian Case-Control Study."

4. An article on non-Hodgkin's lymphoma.

5. An abstract from the update of mortality from all causes among white uranium miners from the Colorado plateau study group.

6. A section from the Federal Register Notice regarding changes to the dose reconstruction target organ selection for lymphoma under EEOICPA.

7. A letter dated August 17, 2001 in which Dr. Thomas P. Hyde opined that it was highly likely that the employee's lymphoma was caused by his exposure to radiation during his employment as a uranium miner.

To determine the probability of whether the employee contracted cancer in the performance of duty under Part E due to radiation, the district office referred his claim to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction. On November 10, 2009,

the district office received the final NIOSH Report of Dose Reconstruction and used the information provided in that report to determine the probability of causation (PoC). The district office calculated that there was a 17.10% probability that the employee's lymphoma was caused by radiation exposure at the uranium mines in which he worked.

On December 10, 2009, the district office issued a recommended decision to deny the employee's Part E claim for lymphoma on the ground that it was not "at least as likely as not" (a 50% or greater probability) that his lymphoma was caused by his employment at the uranium mines where he worked. The district office further concluded that there was no evidence meeting the "at least as likely as not" causation standard that exposure to a toxic substance other than radiation at either a DOE facility or a section 5 mine was a significant factor in aggravating, contributing to or causing the claimed illness of lymphoma.

Following issuance of the recommended decision, FAB independently analyzed the information in the NIOSH report and confirmed the district office's PoC calculation of 17.10%. Based on a thorough review of the case file, FAB hereby makes the following:

FINDINGS OF FACT

1. The employee worked as a uranium miner for Kerr-McGee in Section 24 from January 1, 1959 to September 30, 1960, and for Phillips Petroleum at Sandstone from October 1, 1960 to December 31, 1960.

2. He was diagnosed with lymphoma on November 10, 1998.

3. Based on the dose reconstruction performed by NIOSH, the PoC (the likelihood that the cancer was caused by radiation exposure incurred while working at a covered facility) for the employee's lymphoma was 17.10%, which is less than 50%.

4. There is insufficient evidence in the file to establish that it is "at least as likely as not" that exposure to toxic substances other than radiation at a covered DOE facility or section 5 mine was a significant factor in aggravating, contributing to or causing the employee's lymphoma.

Based on a review of the aforementioned facts, FAB also hereby makes the following:

CONCLUSIONS OF LAW

Part E of EEOICPA provides compensation to covered DOE contractor employees who have contracted a "covered illness" through exposure at a DOE facility in accordance with § 7385s-2. Section 7385s(2) defines a "covered DOE contractor employee" as any DOE contractor employee determined under § 7385s-4 to have contracted a covered illness through exposure at a DOE facility, and § 7385s(2) defines a "covered illness" as an illness or death resulting from exposure to a toxic substance. Pursuant to 42 U.S.C. § 7385s-5(2), a section 5 uranium worker determined under § 7385s-4(c) to have contracted a covered illness through exposure to a toxic substance at a section 5 mine or mill will be eligible for Part E benefits to the same extent as a DOE contractor employee determined under § 7385s-4 to have contracted a covered illness through exposure to a toxic substance at a DOE facility.

To establish eligibility for benefits for radiogenic cancer under Part E of EEOICPA, an employee must

show that he or she has been diagnosed with cancer; was a civilian DOE contractor employee or a civilian RECA section 5 uranium worker who contracted that cancer after beginning employment at a DOE facility or a RECA section 5 facility; and that the cancer was at least as likely as not related to exposure to radiation at a DOE facility or a RECA section 5 facility. Section 30.213 of the implementing regulations (20 C.F.R. § 30.213(c) (2009)) states that:

The Office of Workers' Compensation Programs (OWCP) also uses the Department of Health and Human Services (HHS) regulations when it makes the determination required by § 7385s-4(c)(1)(A) of the Act, since those regulations provide the factual basis for OWCP to determine if "it is at least as likely as not" that exposure to radiation at a DOE facility or RECA section 5 facility, as appropriate, was a significant factor in aggravating, contributing to or causing the employee's radiogenic cancer claimed under Part E of the Act. For cancer claims under Part E of the Act, if the PoC is less than 50% and the employee alleges that he was exposed to additional toxic substances, OWCP will determine if the claim is otherwise compensable pursuant to § 30.230(d) of this part.

FAB notes that the PoC calculations in this case were performed in accordance with 20 C.F.R. § 30.213. FAB independently analyzed the information in the NIOSH report, confirming the district office's PoC calculation of 17.10%.

Section 30.111(a) of the regulations states that "Except where otherwise provided in the Act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true." 20 C.F.R. § 30.111(a). As found above, the case file does not contain sufficient evidence to enable the employee to meet his burden of proof to establish that it is "at least as likely as not" that exposure to toxic substances other than radiation at a covered DOE facility or section 5 mine was a significant factor in aggravating, contributing to or causing his lymphoma.

In the absence of evidence to support that it is at least as likely as not that exposure to a toxic or radiological substance at a DOE facility or a RECA section 5 facility was a significant factor in aggravating, contributing to, or causing his lymphoma, FAB concludes that the employee has failed to establish that he contracted the "covered illness" of lymphoma, and his claim under Part E of EEOICPA is denied.

Kathleen M. Graber

Hearing Representative

Final Adjudication Branch

[1] SEM is a database of occupational categories, the locations where those occupational categories would have been performed, a list of process activities at the facility and the locations where those processes occurred, a list of toxic substances and the locations where those toxic substances were located, and a list of medical conditions and the toxic substances associated with those conditions.

Definition of

EEOICPA Fin. Dec. No. 10086042-2010 (Dep't of Labor, June 22, 2010)
NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) on the above-noted claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claim for medical benefits due to choroid melanoma of the left eye, based on exposure to non-ionizing radiation, is accepted under Part E of EEOICPA. The claim for choroid melanoma of the left eye under Part B is deferred pending completion of a radiation dose reconstruction.

STATEMENT OF THE CASE

On September 9, 2009, the employee filed a Form EE-1 claiming benefits under EEOICPA for choroid melanoma. On a Form EE-3, Employment History, he indicated he was employed as a welder by Union Carbide at the Oak Ridge Gaseous Diffusion Plant (K-25) from September 1967 to July 1974. The Oak Ridge Institute for Science and Education (ORISE) database verified his contractor employment as a welder at K-25 from September 18, 1967 to July 5, 1974. K-25 is a covered Department of Energy (DOE) facility.[1]

DOE provided the employee's available personnel and medical records. A November 3, 1969 medical report noted conjunctivitis (flash burns) to his eyes after performing his regular welding duties and noted he had suffered previous flash burns. An incident report, dated December 18, 1969, diagnosed flash burns to his eyes after welding at K-25 and again noted he had previous burns to his eyes. A September 1, 2009 letter, signed by the employee's physician, listed a diagnosis of choroidal melanoma of the left eye.

On October 5, 2009, the employee completed an Occupational History Questionnaire in which he identified areas in which he worked (K-1401, K-1410, K-1420), his job title (welder), and some of the toxic substances to which he may have been exposed in the course of his employment (including beryllium, cadmium, chromium, lead, manganese, etc.).

To determine his exposure to ionizing radiation, the district office referred the employee's application package to the National Institute for Occupational Safety and Health (NIOSH) for a radiation dose reconstruction. The reconstruction is still being completed.

The district office reviewed source documents used to compile the U. S. Department of Labor's Site Exposure Matrices (SEM) to determine whether or not it is possible that, given the employee's labor category and the work processes engaged in, he was exposed to a toxic substance in the course of employment that corresponds to the claimed medical condition. The SEM search failed to establish a known causal link between melanoma and exposure to any toxic substance.

The district office sent the employee's records to a district medical consultant (DMC) for review. In an April 26, 2010 report, the DMC concluded that it was "at least as likely as not" that exposure to toxic substances at the covered facility was a significant factor in causing, contributing to, or aggravating the employee's choroidal melanoma of the left eye. The DMC noted that a recognized risk factor for ocular melanoma is ultraviolet light exposure and there is growing scientific literature which includes case-control epidemiologic studies and meta-analysis that supports that work as a welder increases risk for ocular melanoma, particularly if multiple burns of the eyes occur. The DMC noted that high energy welding processes can generate intense ultraviolet light and the welding-related burns, which can occur in the eyes or skin, are sometimes called flash burns. The DMC noted that the time between his documented flash burns to the eyes to diagnosis of the eye melanoma is a sufficient latency period for the cancer to occur from worksite exposures.

On May 20, 2010, the Jacksonville district office issued a recommended decision recommending acceptance of the claim for medical benefits under Part E for choroid melanoma of the left eye. The recommended decision informed the employee that he had 60 days to file any objections. On May 27,

2010, FAB received written notification that the employee waived any and all objections to the recommended decision. On June 18, 2010, FAB received the employee's signed statement verifying that he had not received any settlement or award from a lawsuit related to toxic exposure at the covered facility or workers' compensation claim in connection with choroid melanoma of the left eye, and that he had neither pled guilty to nor been convicted of workers' compensation fraud.

In light of the above, the undersigned hereby makes the following:

FINDINGS OF FACT

1. On September 9, 2009, the employee filed a claim for benefits under EEOICPA based on choroid melanoma.

2. The employee was initially diagnosed with choroid melanoma of the left eye on September 1, 2009.

3. The employee was a DOE contractor employee at K-25 from September 18, 1967 to July 5, 1974.

4. There is a causal relationship between toxic exposure at K-25 and the employee's choroid melanoma of the left eye.

Based on the above findings of fact, the undersigned hereby makes the following:

CONCLUSIONS OF LAW

Section 30.316(a) of the EEOICPA regulations provides that, if the claimant waives any objections to all or part of the recommended decision, FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part. 20 C.F.R. § 30.316(a) (2010).

Under Part E, a "covered illness" means an illness or death resulting from exposure to a toxic substance. A "toxic substance" means any material that has the potential to cause illness or death because of its radioactive, chemical, or biological nature. 20 C.F.R. § 30.5(ii). Non-ionizing radiation in the form of radio-frequency radiation, microwaves, visible light, and infrared or ultraviolet light radiation is a toxic substance under Part E.[2]

Under Part B, radiation is defined only as ionizing radiation in the form of alpha particles, beta particles, neutrons, gamma rays, X-rays, or accelerated ions or subatomic particles from accelerator machines. 42 U.S.C. § 7384l(16). A NIOSH radiation dose reconstruction is required to determine the probability that ionizing radiation exposure during the performance of duty caused an employee's cancer. However, EEOICPA does not require a dose reconstruction to determine if *non*-ionizing radiation exposure caused an employee's cancer under Part E. 20 C.F.R. § 30.213(c).

The evidence establishes that it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing the employee's choroid melanoma of the left eye. The employee was a DOE contractor employee with choroid melanoma of the left eye due to exposure to a toxic substance at a DOE facility. Therefore, I hereby conclude that the employee is entitled to medical benefits for choroid melanoma of the left eye, effective September

9, 2009, under Part E of EEOICPA.

Jacksonville, FL

Jeana F. LaRock

Hearing Representative

Final Adjudication Branch

[1] See DOE's facility list on the agency website at:
http://www.hss.energy.gov/healthsafety/FWSP/advocacy/faclist/showfacility.cfm (Retrieved June 21, 2010).

[2] Federal (EEOICPA) Procedure Manual, Chapter 0-0500.2(ss) (November 2008).

Exposure to

EEOICPA Fin. Dec. No. 20858-2006 (Dep't of Labor, June 30, 2006)
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 in part and denied in part.

STATEMENT OF THE CASE

You each filed a Form EE-2, Claim for Survivor Benefits. A claim was also filed by **[Claimant #8]**, but he died on April 21, 2005 before adjudication was complete. You stated on the Forms EE-2 that you were filing for the lung and throat cancer of your late father, **[Employee]**, hereinafter referred to as "the employee." The death certificate and affidavits establish that the employee was diagnosed with lung cancer in approximately June 1959. The employee's death certificate shows lung cancer as the cause of death on June 13, 1961. There is no medical evidence supporting a diagnosis of throat cancer. On the Form EE-3, Employment History, you stated the employee was employed sometime in the 1940s as a machinist with the Manhattan Project in Oak Ridge, Tennessee. The district office verified that the employee worked for Tennessee Eastman Corporation (TEC) at the Y-12 plant[1] for the period of December 27, 1943 to August 29, 1946.

On July 16, 2002, the district office referred your application package to the National Institute for Occupational Safety and Health (NIOSH) for radiation dose reconstruction. On September 26, 2005, NIOSH returned your case to the district office. Effective September 24, 2005, the Department of Health and Human Services designated certain employees of the Y-12 plant who were employed for a number of work days aggregating at least 250 work days, either solely under this employment or in combination with work days of employment occurring within the parameters established for classes of employees included in the SEC, as members of the Special Exposure Cohort (SEC) based on work performed in uranium enrichment or other radiological activities at the Y-12 plant, for the period from March 1943 through December 1947.

In support of your claims for survivorship, you submitted the death certificate of the employee, and a

copy of the death certificate of the employee's spouse. In addition, you submitted evidence that you are the children of the employee, along with documentation of legal name changes.

On March 20, 2006, the Seattle district office issued a recommended decision, concluding that you are entitled to lump-sum compensation as eligible survivors under Part B of the Act, that **[Claimant #1]**, **[Claimant #4]**, **[Claimant #5]**, and **[Claimant #6]** are eligible survivors under Part E, and **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #7]** are not eligible survivors under Part E of the Act. The district office also recommended that the claim for throat cancer be denied. On May 27, 2006, the Final Adjudication Branch issued a final decision, denying compensation to **[Claimant #2]**, **[Claimant #3]**, and **[Claimant #7]** under Part E of the Act.

You each verified that neither you nor the employee filed a lawsuit or a state workers' compensation claim or received a settlement, award, or benefit for the claimed conditio

The Final Adjudication Branch received written notification that you each waived any and all objections to the recommended decision.

FINDINGS OF FACT

1. You each filed a Form EE-2, Claim for Survivor Benefits.

2. The employee was diagnosed with lung cancer in approximately June 1959.

3. The employee was employed at the Y-12 plant in Oak Ridge, Tennessee, from December 27, 1943 to Au gust 29, 1946.

4. You are each the employee's child. **[Claimant #1]**'s birth date is **[Date of Birth]**; **[Claimant #4]**'s birth date is **[Date of Birth]**; **[Claimant #5]**'s birth date is **[Date of Birth]**; and **[Claimant #6]**'s birth date is **[Date of Birth]**. The employee's spouse is no longer living. **[Claimant #4]** and **[Claimant #6]** were enrolled in college full-time and continuously from the age of 18 through the date of the employee's death on June 13, 1961.

5. The employee's lung cancer caused his death.

6. The employee was 50 years old at the time of his death and died 15 years before his normal retirement age of 65 years.

CONCLUSIONS OF LAW

I have reviewed of the evidence of record and the recommended decision.

On June 5, 2006, the Director of the Division of Energy Employees Occupational Illness Compensation (DEEOIC) issued a bulletin establishing supplemental guidance for processing claims for the SEC class at the Y-12 Plant from March 1943 to December 1947.[2] This directive supplements the guidance provided for making a determination that the employee performed work in uranium enrichment operations or other radiological activities for more than 250 days at the Y-12 plant.[3] Attachment 1 of the bulletin lists occupational titles for Y-12 employees involved in Uranium Enrichment Processes. The employment evidence of record, specifically the report from the Oak Ridge Institute for Science

and Education (ORISE) database and Department of Energy (DOE) records, indicates that the employee was classified as a "maintenance mechanic" from December 27, 1943 to April 1, 1944; as a "millwright" from April 2, 1944 to December 8, 1945; as a "vacuum service mechanic" from December 9, 1945 to January 12, 1946; and as a "millwright" from January 13, 1946 to August 29, 1946. However, the employee's job titles are not on the list.[4]

The DEEOIC notes that the Y-12 facility had building locations where uranium enrichment operations or other processes relating to radiological material were conducted. Employees performing non-uranium enrichment duties that were routinely present within the buildings or areas where uranium enrichment operations occurred are also considered part of the SEC class. Department of Energy (DOE) records include a clinical record for the employee listing each time he went to the employee health unit for treatment while employed by the Tennessee Eastman Corporation. Several treatments list a building number (9204-4). Building 9204-4 is acknowledged to be a Beta building where the calutron was located and uranium enrichment occurred. The Final Adjudication Branch performed a search of the U. S. Department of Labor Site Exposure Matrices (SEM). Source documents used to compile the SEM establish that the labor category of "millwright" at Y-12 could potentially be exposed to the toxic substance of uranium tetrafluoride. The SEM contains a list of processes performed by this labor category, which includes uranium recovery, purification, and recycle operations.

The evidence shows that the employee worked at the Y-12 plant in Oak Ridge, Tennessee from December 27, 1943 to August 29, 1946, and as a millwright from April 2, 1944 to December 8, 1945 and from January 13, 1946 to August 29, 1946, which equals more than 250 days during the SEC class period, and that he was involved in uranium enrichment operations and other radiological activities. Therefore, the employee qualifies as a member of the SEC.

The employee was diagnosed with lung cancer which is a "specified cancer" pursuant to 42 U.S.C. § 7384l(17)(A) and 20 C.F.R. § 30.5(ff)(2). You meet the definition of survivors under Part B of the Act. 42 U.S.C. § 7384s(e)(B). Therefore, you are entitled to compensation of $150,000 for the employee's lung cancer, to be divided equally. 42 U.S.C. § 7384s(a). The exact payment amounts may vary by one penny, as the total compensation may not exceed $150,000.

The employee was an employee of a DOE contractor at a DOE facility. 42 U.S.C. §§ 7384l(11), 7384l(12). A determination under Part B of the Act that a DOE contractor employee is entitled to compensation under that part for an occupational illness is treated as a determination that the employee contracted that illness through exposure at a DOE facility. 42 U.S.C. § 7385s-4(a). Therefore, the employee is a covered DOE contractor employee with a covered illness. 42 U.S.C. §§ 7385s(1), 7385s(2).

[Claimant #1] was 14 at the time of the employee's death. **[Claimant #4]** was 19 at the time of the employee's death and enrolled full-time in school. **[Claimant #5]** was 11 at the time of the employee's death. **[Claimant #6]** was 21 at the time of the employee's death and enrolled full-time in school. Therefore, **[Claimant #1]**, **[Claimant #4]**, **[Claimant #5]**, and **[Claimant #6]** each meet the definition of a covered child under Part E of the Act. 42 U.S.C. § 7385s-3(d)(2). Therefore, **[Claimant #1]**, **[Claimant #4]**, **[Claimant #5]**, and **[Claimant #6]** are also entitled to benefits in the amount of $125,000 for the employee's death related to lung cancer, to be divided equally. 42 U.S.C. § 7385s-3(a)(1).

The employee experienced presumed wage-loss for each calendar year subsequent to the calendar year

of his death through and including the calendar year in which he would have reached normal retirement age. 20 C.F.R. § 30.815 (2005). This equals 14 years of wage-loss. Therefore, **[Claimant #1]**, **[Claimant #4]**, **[Claimant #5]**, and **[Claimant #6]** are also entitled to share an additional $25,000 for the employee's wage-loss, for a total award of $150,000. 42 U.S.C. § 7385s-3(a)(2).

I also conclude that there was no medical evidence submitted to establish that the employee was diagnosed with the claimed condition of throat cancer, and the claims for that condition must be denied. 20 C.F.R. §§ 30.211, 30.215.

Jacksonville, Florida

Sidne M. Valdivieso

Hearing Representative

[1] According to the Department of Energy's (DOE) Office of Worker Advocacy on the DOE website at: http://www.eh.doe.gov/advocacy/faclist/showfacility.cfm., the Y-12 plant is a covered DOE facility from 1942 to the present. Tennessee Eastman Corporation (TEC) was a DOE contractor at this facility from 1943 to 1947. (Retrieved June 30, 2006).

[2] EEOICPA Bulletin No. 06-11 (issued June 5, 2006).

[3] EEOICPA Bulletin No. 06-04 (issued November 21, 2005).

[4] EEOICPA Bulletin No. 06-11 (issued June 5, 2006).

EEOICPA Fin. Dec. No. 10016501-2007 (Dep't of Labor, May 7, 2007)
NOTICE OF FINAL DECISION

This is the final decision of the Final Adjudication Branch (FAB) concerning the above claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the FAB reverses the recommended decision of the district office and accepts the claim under Part E of EEOICPA for medical benefits based on the covered illness of brain tumor (meningioma).

STATEMENT OF CASE

On December 18, 2002, **[Employee]** filed a claim for benefits under Part B and the former Part D of EEOICPA claiming he developed a brain tumor, diagnosed in February of 1993, as the result of his work at a Department of Energy (DOE) facility. On October 28, 2004, Part E of EEOICPA was enacted when Congress repealed Part D. **[Employee]** alleged on his Form EE-3 that he was employed as a Hazard Reduction Technician (HRT) from April 14, 1984 to the date of his signature (December 18, 2002) at the Rocky Flats Plant.[1] DOE confirmed his employment at the Rocky Flats Plant from April 16, 1984 to January 15, 2003.

[Employee] submitted medical records in support of his claim. Included in these medical records were several surgical pathology reports, MRI reports and medical narratives, which document he was diagnosed with meningioma (a non-cancerous brain tumor) in February 1993 at the age of 31. Then, he developed several recurrences of the initial meningioma as well as new lesions in other parts of his

brain. Notably, his tumors were always referred to in these records as being "atypical, aggressive, and skull-based" and have resulted in his loss of hearing and other neurological deficits.

On May 14, 2003, FAB issued a final decision denying **[Employee]**'s claim under Part B of EEOICPA, because non-cancerous tumors of the brain are not compensable "occupational" illnesses under that Part.

In September 2006, the district office initiated development of **[Employee]**'s claim under Part E. Under that Part, once the medical evidence substantiates a diagnosis of a claimed condition, the district office proceeds with a causation analysis to make a determination as to whether there is a causal connection between that condition and exposure to a toxic substance or substances at a DOE facility. The standard by which causation between an illness and employment is established is explained in Federal (EEOICPA) Procedure Manual Chapter E-500.3b:

Causation Test for Toxic Exposure. Evidence must establish that there is a relationship between exposure to a toxic substance and an employee's illness or death. The evidence must show that it is "at least as likely as not" that such exposure at a covered DOE facility during a covered time period was a **significant factor** in aggravating, contributing to, or causing the employee's illness or death, **and** that it is "at least as likely as not" that exposure to a toxic substance(s) was related to employment at a DOE facility.

To assist employees in meeting this standard, the Division of Energy Employees Occupational Illness Compensation (DEEOIC) undertakes a variety of steps to collect necessary information to show that a claimed illness is linked to a toxic exposure. Principally, DEEOIC has undertaken extensive data collection efforts with regard to the various types of toxic substances present at particular DOE facilities and the health effects these substances have on workers. This data has been organized into the Site Exposure Matrices (SEM). SEM allows DEEOIC claims staff to identify illnesses linked to particular toxic substances, site locations where toxic materials were used, exposures based on different job processes or job titles, and other pertinent facility data.

In addition to the SEM data, DEEOIC works directly with DOE to collect individual employee exposure and medical records. Contact is also made in certain situations to obtain information from Former Worker Screening Programs or trade groups that may have relevant exposure or medical information. Relevant specialists in the areas of industrial hygiene and toxicology are also utilized in certain situations to evaluate and render opinions on claims made by employees. DEEOIC also works directly with treating physicians or other medical specialists in an effort to obtain the necessary medical evidence to satisfy the causation standard delineated under EEOICPA.

On September 20, 2006, the district office notified **[Employee]** that after conducting extensive research, they had been unable to establish a causal connection between the development of his meningioma and exposure to a toxic substance or substances at the Rocky Flats Plant. He was afforded a period of 30 days to provide factual or medical evidence that established such a link.

On October 17, 2006, the district office received a letter from **[Employee]**'s authorized representative, in which he indicated that he believed that **[Employee]**'s exposure to plutonium and his work in the glove boxes where he was exposed to radiation contributed to the development of his brain tumor. He requested a copy of the file, which was provided by the district office on November 14, 2006.

On December 4, 2006, a letter was received from **[Employee]**'s representative, in which he detailed several instances, based on his review of **[Employee]**'s exposure records, when he had experienced plutonium contamination.

Subsequently, on January 31, 2007, the district office issued a recommended decision to deny the claim under Part E of EEOICPA, finding that the evidence of record was not sufficient to establish a causal relationship between the development of **[Employee]**'s meningioma and his exposure to toxic substances at the Rocky Flats Plant. The recommended decision was then forwarded to FAB for review.

[Employee]'s representative requested an oral hearing on February 12, 2007, and reiterated his contention that **[Employee]**'s exposure to radiation had contributed to the development of his meningioma. By letter dated February 27, 2007, the representative provided results of his research into the relationship between the development of meningioma and exposure to radiation. He referenced fourteen medical articles that suggested such a relationship existed.

Upon review of the record, FAB determined that based on the contamination records in the file; **[Employee]**'s age at the time of diagnosis; his length of exposure to radiation at the time of diagnosis; the location of his meningiomas, the description of his meningiomas as being atypical, aggressive and skull-based; and the fact that the medical literature appears to support a relationship between exposure to radiation and the development of these types of tumor, that **[Employee]**'s record should be referred to a DEEOIC toxicologist.

On April 11, 2007, a statement of accepted facts detailing **[Employee]**'s employment dates, labor categories, the work processes he had been engaged in, the buildings that he worked in, his exposure history, the number of positive contamination events he had experienced with resulting acute intakes of plutonium, as well as his medical and case history was referred to a toxicologist. The toxicologist was asked to provide an opinion as to whether there was current scientific and/or medical evidence supporting a causal link between exposure to radiation and the development of meningioma and, if so, whether based on the specifics of **[Employee]**'s case, it is as likely as not that his exposure to radiation at the Rocky Flats Plant was a significant factor in causing, contributing to, or aggravating his meningioma.

On April 26, 2007, the toxicologist stated that the scientific and medical literature does support a "causal" relationship between ionizing radiation and meningiomas at levels below 1 siever (SV). Further, she opined with a reasonable degree of scientific certainty "[t]hat it is as likely as not that exposure to a toxic substance at a DOE facility during a covered time period was a significant factor in aggravating, contributing to, or causing the employee's illness, and that it is 'at least as likely as not' that exposure to a toxic substance was related to employment at a DOE facility."

On May 7, 2007, **[Employee]** affirmed he had never filed for or received any benefits for meningioma associated with a tort suit or state workers' compensation claim. Additionally, he stated that he had never pled guilty to or been convicted of any charges of fraud in connection with a state or federal workers' compensation claim.

After a careful review of the case file, FAB hereby makes the following:

FINDINGS OF FACT

1. On December 18, 2002, **[Employee]** filed a claim under Part E of EEOICPA for a brain tumor.

2. **[Employee]** was employed by DOE contractors from April 16, 1984 to January 15, 2003 at the Rocky Flats Plant, a covered DOE facility.

3. During **[Employee]**'s employment he was exposed to ionizing radiation.

4. **[Employee]** was diagnosed with meningioma, a non-cancerous tumor of the brain, after he began his employment at the Rocky Flats Plant.

5. The evidence of record supports a causal relationship between the development of **[Employee]**'s meningioma and exposure to ionizing radiation at the Rocky Flat Plant.

6. Ionizing radiation is as least as likely as not a significant factor in causing, contributing to, or aggravating **[Employee]**'s meningioma.

Based on the above-noted findings of fact in this claim, FAB hereby also makes the following:

CONCLUSIONS OF LAW

Pursuant to the regulations implementing EEOICPA, a claimant has 60 days from the date of issuance of the recommended decision to raise objections to that decision to FAB. 20 C.F.R § 30.310(a). If an objection is not raised during the 60-day period, FAB will consider any and all objections to the recommended decision waived and issue a final decision affirming the district office's recommended decision. 20 C.F.R. § 30.316(a).

FAB received the letter of objection and request for an oral hearing. A hearing was scheduled, but upon review of the evidence in the case file, FAB determined the claim was not in posture for a final decision and required a review by a toxicologist. Based on this review, the recommended decision is hereby reversed and **[Employee]'s** claim for meningioma is accepted. On May 7, 2007, he submitted a written statement affirming that he agreed with the final decision to reverse the recommended decision and to accept his claim for meningioma.

FAB concludes that **[Employee]** is a covered DOE contractor employee with a covered illness who contracted that illness through exposure to a toxic substance at a DOE facility pursuant to 42 U.S.C. § 7385s-4(c). Therefore, **[Employee]**'s claim under Part E is accepted and he is awarded medical benefits for the treatment of meningioma pursuant to 42 U.S.C. § 7385s-8.

Denver, CO

Paula Breitling

Hearing Representative

Final Adjudication Branch

[1] According to DOE's website at: http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/showfacility.cfm, the Rocky Flats Plant in Golden, Colorado is a covered DOE facility from 1951 to the present.

EEOICPA Fin. Dec. No. 10036412-2006 (Dep't of Labor, June 13, 2007)

NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) concerning the above claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claim for compensation filed by **[Claimant]** is accepted under Part E and she is awarded $125,000.00 plus an additional $25,000.00 in survivor benefits.

STATEMENT OF THE CASE

On July 1, 2005, **[Claimant]** filed a claim for survivor benefits under Part E of EEOICPA as the spouse of the employee. She identified heart bypass surgery and diabetes, Type II, as the conditions resulting from the employee's work at a Department of Energy (DOE) facility. A representative from DOE verified the employee's work as a physicist for the University of California at the Lawrence Livermore National Laboratory (LLNL) from September 1, 1955 to July 25, 1988, and that he was also present at the Nevada Test Site, the Salmon Site, the Gasbuggy Site and Amchitka Island.[1]

The evidence of record includes a June 20, 1985 electrocardiogram report in which Dr. Calder Burton diagnosed an anteroseptal myocardial infarction. It also includes a January 20, 1986 consultation report in which Dr. Rory O'Connor related a history of diabetes mellitus, LLNL medical records with a diagnosis of diabetes mellitus as early as November 4, 1976, and a June 18, 1985 hospital record noting the **[Employee]** was admitted on June 18, 1985 for diabetes mellitus, angina pectoris and coronary artery disease.

A copy of the employee's death certificate showed that he died on July 29, 1988 at the age of 54, and that **[Claimant]** was the employee's spouse at the time of his death. A copy of a marriage certificate indicates that **[Claimant]** and the employee were married on September 1, 1956. The death certificate, signed by Dr. M.T. McEneny, identified the immediate cause of the employee's death as myocardial infarction and coronary artery disease. Based on the employee's date of birth of March 22, 1934, his normal retirement age under the Social Security Act would have been 65.

On July 26, 2006, FAB issued a final decision and remand order, denying the claim filed by **[Employee's Daughter]** on the ground that she was an ineligible survivor and vacating and remanding the decision denying **[Claimant]**'s claim under Part E. FAB directed the district office to further develop the likelihood of the employee's exposure to carbon disulfide, and further explore the link between his heart conditions and his LLNL employment.

Source documents in the U.S. Department of Labor's Site Exposure Matrices (SEM) show that carbon disulfide and lead were present at LLNL. The SEM is a database of occupational categories, the locations where those occupational categories would have performed their duties, a list of process activities at the facility and the locations where those processes occurred, a list of toxic substances and the locations where those toxic substances were located, and a list of medical conditions and the toxic substances associated with those conditions. SEM did not show a connection between the toxic substances of carbon disulfide and lead and the employee's heart conditions.

On August 15, 2006, the district office referred the file to a District Medical Consultant (DMC) to determine if the employee's work history and potential exposure to toxic substances at a DOE facility

show that it is "at least as likely as not" that the toxic substances were a significant factor in causing, contributing to, or aggravating his coronary artery disease, myocardial infarction or diabetes mellitus. In a September 2, 2006 report, the DMC concluded that, pending further information on the employee's exposure to carbon disulfide, the medical evidence of record did not establish that it was "at least as likely as not" that exposure to toxic substances was a significant factor in causing, contributing to, or aggravating the employee's coronary artery disease, myocardial infarction or diabetes mellitus.

On October 1, 2006, the district office forwarded a synopsis of the claim to an Industrial Hygienist for an opinion on the parameters of the employee's exposure to carbon disulfide and lead while he was employed as a physicist at LLNL or while he was present on site at the Nevada Test Site, Salmon Site, Gasbuggy Site and Amchitka Island. On December 7, 2006, the district office followed up by referring the entire file to the Industrial Hygienist for this purpose.

On November 6, 2006, the district office sent **[Claimant]** a letter requesting factual or medical evidence which would establish that the employee's coronary artery disease, myocardial infarction or diabetes mellitus have a known link to exposure to toxic substances. On December 6, 2006, the district office received her submission of medical studies indicating that exposure to carbon disulfide contributes to atherosclerotic disease. **[Claimant]**'s authorized representative stated that the employee's job duties as a physicist at LLNL in the 1970s required him to work in the area of a shale oil retort, a process that results in the release of carbon disulfide in excess of the threshold level for exposure.

On February 28, 2007, the district office received a report in which the Industrial Hygienist concluded that the employee's duties as a physicist did not involve work that would have exposed him to lead. The Industrial Hygenist noted that LLNL was tasked with researching and developing methods for the extraction (or "retorting") of oil shale in the 1970s, and that LLNL focused in particular on underground methods of production and extraction. The Industrial Hygenist determined that the employee's expertise in the physics of chimney formation, underground chamber formation and stability made it likely that he would have been involved in the gas production research and the shale oil research, both on site and off. The employee's exposure to carbon disulfide and other sulfur-containing chemicals would have been low to moderately high during the time he spent operating shale oil retort facilities, and would not have been during major periods of each year. The primary route for exposure was through inhalation.

On April 4, 2007, the district office forwarded the Industrial Hygenist's report to the DMC. On April 12, 2007, the DMC determined that, given the employee's work history and exposure to carbon disulfides, it was "at least as likely as not" that the exposures were a significant factor in causing, contributing to, or aggravating the employee's claimed conditions of coronary artery disease and myocardial infarction. The DMC also determined that there is no known toxic exposure that would be a significant factor in causing, contributing to, or aggravating the employee's claimed condition of diabetes mellitus.

On April 27, 2007, the Jacksonville district office issued a recommended decision finding that the employee was employed at a DOE facility by DOE contractors; that the employee's death was caused by coronary artery disease and myocardial infarction; that the employee's normal retirement age would have been 65, and that it was "at least as likely as not" that the employee contracted his conditions of coronary artery disease and myocardial infarction through work-related exposure to a toxic substance at a DOE facility under Part E. The district office also recommended that **[Claimant]** be awarded $125,000.00 plus an additional $25,000.00 in survivor benefits under Part E of EEOICPA.

On May 14, 2006, FAB received **[Claimant]**'s signed waiver of her right to object to any of the findings of fact or conclusions of law contained in the recommended decision. On the same date, the district office received her signed statement advising that neither she nor the employee had filed any lawsuits or received any settlements or awards in connection with the conditions claimed under EEOICPA, and that neither she nor the employee had ever filed for or received an award of state workers' compensation for the claimed conditions.

Following a review of the evidence of record, the undersigned hereby makes the following:

FINDINGS OF FACT

1. On July 1, 2005, **[Claimant]** filed a claim for survivor benefits under Part E of EEOICPA as the spouse of the employee.

2. **[Claimant]** identified heart bypass surgery and diabetes, Type II, as the conditions resulting from the employee's work at a DOE facility.

3. The employee worked as a physicist for the University of California at LLNL from September 1, 1955 to July 25, 1988, and he was also present at the Nevada Test Site, the Salmon Site, the Gasbuggy Site and Amchitka Island.

4. On June 18 and 20, 1985, the employee was diagnosed with coronary artery disease and a myocardial infarction. On November 4, 1976, the employee was diagnosed with diabetes mellitus. These dates are after he began work at a covered DOE facility.

5. The employee died on July 29, 1988 at the age of 54 and the immediate cause of the employee's death was coronary artery disease and myocardial infarction.

6. **[Claimant]** was married to the employee on September 1, 1956, and she was the employee's spouse at the time of his death.

7. On April 12, 2007, a DMC concluded that it was "at least as likely as not" that the employee's exposures to toxic substances at DOE facilities were a significant factor in causing, contributing to, or aggravating the employee's claimed conditions of coronary artery disease and myocardial infarction.

8. The DMC also determined that there is no known toxic exposure that would be a significant factor in causing, contributing to, or aggravating the employee's claimed condition of diabetes mellitus.

9. The employee's normal retirement age would have been 65, based on his birth date of March 22, 1934. As he died at age 54, the employee died more than ten years but less than 20 years before his normal retirement age.

10. Neither **[Claimant]** nor the employee have ever filed a lawsuit or received a payment from a lawsuit, or ever filed for or received any state workers' compensation benefits for the conditions claimed under EEOICPA.

Based on these facts, the undersigned makes the following:

CONCLUSIONS OF LAW

Section 30.316(a) of the EEOICPA regulations provides that if the claimant waives any objections to all or part of the recommended decision, FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part. 20 C.F.R. § 30.316(a). **[Claimant]** has waived her rights to file objections to the findings of fact and conclusions of law in the recommended decision.

Part E of EEOICPA provides compensation and medical benefits to DOE contractor employees determined to have contracted a covered illness through exposure to toxic substances at a DOE facility. The term "covered illness" means an illness or death resulting from exposure to a toxic substance. 42 U.S.C. § 7385s(2). The employee's work for the University of California at LLNL from September 1, 1955 to July 25, 1988 establishes that the employee was a DOE contractor employee, as defined by 42 U.S.C. § 7384l(11).

In order to be entitled to benefits under Part E of EEOICPA, **[Claimant]** must provide medical evidence that establishes a specific diagnosis and the date of that diagnosis. She must also submit evidence that establishes a reasonable likelihood of **[Employee]**'s occupational exposure to a toxic substance at a DOE facility prior to the diagnosis of the claimed condition. Finally, she must establish that there is a relationship between his exposure to a toxic substance and the claimed medical condition such that it can be concluded that exposure to a toxic substance during employment by a DOE contractor at a DOE facility was "at least as likely as not" a significant factor in aggravating, contributing to, or causing the claimed medical condition. *See* 42 U.S.C. § 7385s-4(c), 20 C.F.R. §§ 30.230 to 30.232.

The survivor of a DOE contractor employee will receive $125,000.00 if the employee would have been entitled to compensation under § 7385s-4 for a covered illness, and it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing the death of such employee. 42 U.S.C. § 7385s-3(a)(1).

As noted above, the file was submitted to a DMC who gave his opinion that, based on information received from an Industrial Hygenist about the employee's exposure to carbon disulfide in the course of his employment at a DOE facility, it was "at least as likely as not" that the exposures were a significant factor in causing, contributing to, or aggravating the employee's claimed conditions of coronary artery disease and myocardial infarction. The DMC also concluded that there is no known toxic exposure that would be a significant factor in causing, contributing to, or aggravating the employee's claimed condition of diabetes mellitus.

Based upon the totality of evidence including the employee's employment history, his medical evidence of record, and the DMC's report, FAB concludes that the evidence of record establishes that it is "at least as likely as not" that the employee's occupational exposure to a toxic substance during covered employment was a significant factor in aggravating, contributing to, or causing the employee's myocardial infarction and coronary artery disease. The evidence of record is not sufficient to establish that it is "at least as likely as not" that the employee's work exposure to a toxic substance during covered employment was a significant factor in aggravating, contributing to, or causing the employee's diabetes mellitus. *See* 42 U.S.C. § 7385s-4(c)(1).

The evidence of record therefore establishes that the employee was a DOE contractor employee, and that he was diagnosed with coronary artery disease and myocardial infarction, which are both "covered illnesses" as defined by 42 U.S.C. § 7385s(2). The employee contracted the covered illnesses through exposure to a toxic substance at a DOE facility. Therefore, he would have been entitled to benefits under § 7385s-4 for a covered illness. The employee died on January 13, 1993 and the immediate cause of the employee's death was listed as coronary artery disease and myocardial infarction. This is sufficient to establish that it is "at least as likely as not" that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing the employee's death.

Eligibility for survivor benefits under Part E is delineated at 42 U.S.C. § 7385s-3(c)(1), which provides that such benefits shall be paid to the "covered spouse," if alive at the time of payment. Part E defines a "covered spouse" as a "spouse of the employee who was married to the employee for at least one year immediately before the employee's death." 42 U.S.C. § 7385s-3(d)(1). **[Claimant]** was married to the employee for at least one year immediately before his death and she is therefore his "covered spouse." Therefore, she is entitled to $125,000.00 in basic survivor benefits for the employee's death due to the covered illnesses of coronary artery disease and myocardial infarction.

Under Part E of EEOICPA, the survivor of a covered employee is eligible to receive additional survivor benefits of $25,000.00 if there was an aggregate period of not less than 10 years before the employee attained his or her normal retirement age, during which as the result of any covered illness contracted by that employee through exposure to a toxic substance at a DOE facility the employee's annual wage did not exceed 50% of the employee's average annual wage. The employee in this case died at age 54. Under the Social Security Act, the normal retirement age for an employee born on March 22, 1934 is 65. *See* Federal (EEOICPA) Procedure Manual, Chapter E-800(3)(d)(September 2005). Therefore, **[Claimant]** is entitled to additional survivor benefits of $25,000.00.

Accordingly, **[Claimant]**'s claim based on the employee's death due to coronary artery disease and myocardial infarction is accepted, and she is awarded $125,000.00 in basic survivor benefits and an additional $25,000.00, for a total award of $150,000.00. **[Claimant]**'s claim based on the employee's death due to diabetes mellitus is denied under Part E.

Washington, DC

Carrie A. Rhoads

Hearing Representative

Final Adjudication Branch

[1] LLNL was a covered DOE facility beginning in 1950 to the present. DOE and the University of California jointly operate the site. The Nevada Test Site in Mercury, Nevada is a covered DOE facility from 1951 to the present. The Salmon Site was a covered DOE facility from 1964 to 1972. The Gasbuggy Site was a covered DOE facility from 1967 to 1973, 1978, and 1998 to the present (remediation). Amchitka Island was a covered DOE facility beginning in 1951 to the present. *See* DOE's facility listings at http://www.hss.energy.gov/healthsafety/FWSP/advocacy/faclist/findfacility.cfm (visited June 12, 2007).

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

STATEMENT OF THE CASE

On November 9, 2006, the employee filed Form EE-1 claiming for benefits under Parts B and E of EEOICPA for both skin cancer and hearing loss. On Form EE-3, he claimed he was employed as a machinist, production foreman, general foreman, production shift manager, and machining manager at the Rocky Flats Plant[1] from January 7, 1957 to December 31, 1987. The Department of Energy (DOE) verified the employee's employment at the Rocky Flats Plant from January 7, 1957 until December 31, 1987.

In support of his claim, the employee submitted an October 24, 2006 audiology report that diagnosed him with a moderate/severe sensorineural hearing loss bilaterally. He did not submit any evidence of skin cancer. On February 19, 2007, the employee stated in a letter that he was withdrawing his claim for skin cancer and that he had concerns about beryllium disease. However, on August 2, 2007, the employee submitted another letter stating that he did not wish to file a claim for beryllium disease.

On February 22, 2007, the Denver district office of the Division of Energy Employees Occupational Illness Compensation issued a recommended decision to deny the employee's claim under Part B because he did not establish that he had developed a compensable occupational illness. In that same recommended decision, the district office also recommended that the employee's claim under Part E be denied because the evidence did not establish that his hearing loss was caused by exposure to any toxic substances at a DOE facility. The case then was forwarded to FAB for the issuance of a final decision.

After reviewing the medical evidence, FAB determined that the employee was not diagnosed with conductive hearing loss but rather sensorineural hearing loss, which can be caused by toxic exposure. The employee's claim was then referred to a District Medical Consultant (DMC) on August 2, 2007 to determine which toxins could have caused his sensorineural hearing loss. The DMC determined that carbon tetrachloride and thorium could have caused the employee's sensorineural hearing loss, and noted that his exposure records at the Rocky Flats Plant showed 20 years of exposure to carbon tetrachloride and 6 years of exposure to thorium.

Based on the DMC's opinion regarding exposure to toxic substances and the employee's hearing loss, FAB issued a final decision and remand order on August 8, 2007. In that decision, FAB denied his claim under Part B for sensorineural hearing loss on the ground that it was not a compensable occupational illness, and remanded his claim under Part E for that same condition to the district offrice for a determination as to whether it was at least as likely as not that the employee's exposure to carbon tetrachloride and thorium as a machinist was a significant factor in aggravating, contributing to, or causing his hearing loss.

On October 1, 2007, a copy of the employee's medical records, employment history including occupational titles, toxic exposure information, and other relevant material was sent to a DMC. The DMC was also provided with a list of toxic substances to which the employee was exposed in his job as a machinist at the Rocky Flats Plant, including the following organic solvent mixtures: petroleum

solvents, sulfonic acid, chlorinated polyolefins, ethoxylated alcohols, ethylene glycol, substituted indole, hydrocarbons, dimethyl polysiloxane, and carbon tetrachloride. On October 4, 2007, the DMC opined that the medical evidence suggests that the employee developed his sensorineural hearing loss as a result of exposure to mixed organic solvents. Specifically, the DMC opined that it is at least as likely as not that his exposure to organic solvent mixtures at the Rocky Flats Plant was a significant factor in causing, contributing to, or aggravating the claimed condition of sensorineural hearing loss.

The employee submitted a current statement affirming that he had not filed any state workers' compensation claims, lawsuits, tort suits or received any awards or settlements for the claimed condition and that he had never pled guilty to or been convicted of any charges of having committed fraud in connection with an application for or receipt of benefits under EEOICPA or any other federal or state workers' compensation law.

On November 6, 2007, the Denver district office issued a recommended decision to accept the employee's claim for sensorineural hearing loss under Part E of EEOICPA, after which the case was forwarded to FAB for the issuance of a final decision. After considering the record of the claim forwarded by the district office, FAB hereby makes the following:

FINDINGS OF FACT

1. On November 9, 2006, the employee filed for benefits under Parts B and E of EEOICPA.=
2. He was employed by DOE contractors from January 7, 1957 until December 31, 1987 at the Rocky Flats Plant, a covered DOE facility.
3. He was diagnosed with sensorineural hearing loss after he began his employment at the Rocky Flats Plant.
4. On August 8, 2007, FAB issued a final decision denying the employee's claim under Part B for the condition of sensorineural hearing loss.
5. His employment records show that he was exposed to multiple organic solvent mixtures at the Rocky Flats Plant, specifically carbon tetrachloride.
6. The DMC opined that it is at least as likely as not that the employee's exposure to organic solvent mixtures at the Rocky Flats Plant was a significant factor in causing, contributing to, or aggravating the claimed condition of sensorineural hearing loss.
7. The employee submitted a current statement affirming that he had not filed any state workers' compensation claims, lawsuits, tort suits or received any awards or settlements for the claimed condition and that he had never pled guilty to or been convicted of any charges of having committed fraud in connection with an application for or receipt of benefits under EEOICPA or any other federal or state workers' compensation law.

Based on the above noted findings of fact in this claim, the FAB hereby also makes the following:

CONCLUSIONS OF LAW

Pursuant to the regulations implementing the EEOICPA, a claimant has 60 days from the date of issuance of the recommended decision to raise objections to that decision to FAB. 20 C.F.R. § 30.310(a). If an objection is not raised during the 60-day period, FAB will consider any and all objections to the recommended decision waived and issue a final decision affirming the district office's recommended decision. 20 C.F.R. § 30.316(a). On November 13, 2007, FAB received written notification from the employee waiving any and all objections to the recommended decision.

In order for an employee to be afforded coverage under Part E of EEOICPA, he must establish that he is a "covered DOE contractor employee" who has contracted a covered illness through exposure at a DOE facility. The term "covered illness" means an illness or death resulting from exposure to a toxic substance. *See* 42 U.S.C. § 7385s(1) and (2). FAB concludes that the employee is a covered DOE contractor employee with a covered illness who contracted that illness through exposure to toxic substances at a DOE facility pursuant to 42 U.S.C. § 7385s-4(c), and awards medical benefits for sensorineural hearing loss pursuant to § 7385s-8, retroactive to November 9, 2006.

It is the decision of FAB that the employee's claim under Part E of EEOICPA is accepted for medical benefits for the covered illness of sensorineural hearing loss.

Denver, CO

Paula Breitling

Hearing Representative

Final Adjudication Branch

[1] According to DOE's website at http://www.hss.energy.gov/healthsafety/fwsp/advocacy/faclist/showfacility.cfm, the Rocky Flats Plant in Golden, Colorado is a covered DOE facility from 1951 to present.

EEOICPA Fin. Dec. No. 10086042-2010 (Dep't of Labor, June 22, 2010)
NOTICE OF FINAL DECISION

This is the decision of the Final Adjudication Branch (FAB) on the above-noted claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the claim for medical benefits due to choroid melanoma of the left eye, based on exposure to non-ionizing radiation, is accepted under Part E of EEOICPA. The claim for choroid melanoma of the left eye under Part B is deferred pending completion of a radiation dose reconstruction.

STATEMENT OF THE CASE

On September 9, 2009, the employee filed a Form EE-1 claiming benefits under EEOICPA for choroid melanoma. On a Form EE-3, Employment History, he indicated he was employed as a welder by Union Carbide at the Oak Ridge Gaseous Diffusion Plant (K-25) from September 1967 to July 1974. The Oak Ridge Institute for Science and Education (ORISE) database verified his contractor employment as a welder at K-25 from September 18, 1967 to July 5, 1974. K-25 is a covered Department of Energy (DOE) facility.[1]
DOE provided the employee's available personnel and medical records. A November 3, 1969 medical report noted conjunctivitis (flash burns) to his eyes after performing his regular welding duties and noted he had suffered previous flash burns. An incident report, dated December 18, 1969, diagnosed flash burns to his eyes after welding at K-25 and again noted he had previous burns to his eyes. A September 1, 2009 letter, signed by the employee's physician, listed a diagnosis of choroidal melanoma of the left eye.
On October 5, 2009, the employee completed an Occupational History Questionnaire in which he identified areas in which he worked (K-1401, K-1410, K-1420), his job title (welder), and some of the toxic substances to which he may have been exposed in the course of his employment (including

beryllium, cadmium, chromium, lead, manganese, etc.).
To determine his exposure to ionizing radiation, the district office referred the employee's application package to the National Institute for Occupational Safety and Health (NIOSH) for a radiation dose reconstruction. The reconstruction is still being completed.
The district office reviewed source documents used to compile the U. S. Department of Labor's Site Exposure Matrices (SEM) to determine whether or not it is possible that, given the employee's labor category and the work processes engaged in, he was exposed to a toxic substance in the course of employment that corresponds to the claimed medical condition. The SEM search failed to establish a known causal link between melanoma and exposure to any toxic substance.

The district office sent the employee's records to a district medical consultant (DMC) for review. In an April 26, 2010 report, the DMC concluded that it was "at least as likely as not" that exposure to toxic substances at the covered facility was a significant factor in causing, contributing to, or aggravating the employee's choroidal melanoma of the left eye. The DMC noted that a recognized risk factor for ocular melanoma is ultraviolet light exposure and there is growing scientific literature which includes case-control epidemiologic studies and meta-analysis that supports that work as a welder increases risk for ocular melanoma, particularly if multiple burns of the eyes occur. The DMC noted that high energy welding processes can generate intense ultraviolet light and the welding-related burns, which can occur in the eyes or skin, are sometimes called flash burns. The DMC noted that the time between his documented flash burns to the eyes to diagnosis of the eye melanoma is a sufficient latency period for the cancer to occur from worksite exposures.

On May 20, 2010, the Jacksonville district office issued a recommended decision recommending acceptance of the claim for medical benefits under Part E for choroid melanoma of the left eye. The recommended decision informed the employee that he had 60 days to file any objections. On May 27, 2010, FAB received written notification that the employee waived any and all objections to the recommended decision. On June 18, 2010, FAB received the employee's signed statement verifying that he had not received any settlement or award from a lawsuit related to toxic exposure at the covered facility or workers' compensation claim in connection with choroid melanoma of the left eye, and that he had neither pled guilty to nor been convicted of workers' compensation fraud.

In light of the above, the undersigned hereby makes the following:

FINDINGS OF FACT

1. On September 9, 2009, the employee filed a claim for benefits under EEOICPA based on choroid melanoma.

2. The employee was initially diagnosed with choroid melanoma of the left eye on September 1, 2009.

3. The employee was a DOE contractor employee at K-25 from September 18, 1967 to July 5, 1974.

4. There is a causal relationship between toxic exposure at K-25 and the employee's choroid melanoma of the left eye.

Based on the above findings of fact, the undersigned hereby makes the following:

CONCLUSIONS OF LAW

Section 30.316(a) of the EEOICPA regulations provides that, if the claimant waives any objections to all or part of the recommended decision, FAB may issue a final decision accepting the recommendation of the district office, either in whole or in part. 20 C.F.R. § 30.316(a) (2010).

Under Part E, a "covered illness" means an illness or death resulting from exposure to a toxic substance. A "toxic substance" means any material that has the potential to cause illness or death because of its radioactive, chemical, or biological nature. 20 C.F.R. § 30.5(ii). Non-ionizing radiation in the form of radio-frequency radiation, microwaves, visible light, and infrared or ultraviolet light radiation is a toxic substance under Part E.[2]

Under Part B, radiation is defined only as ionizing radiation in the form of alpha particles, beta particles, neutrons, gamma rays, X-rays, or accelerated ions or subatomic particles from accelerator machines. 42 U.S.C. § 7384l(16). A NIOSH radiation dose reconstruction is required to determine the probability that ionizing radiation exposure during the performance of duty caused an employee's cancer. However, EEOICPA does not require a dose reconstruction to determine if *non*-ionizing radiation exposure caused an employee's cancer under Part E. 20 C.F.R. § 30.213(c).

The evidence establishes that it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing the employee's choroid melanoma of the left eye. The employee was a DOE contractor employee with choroid melanoma of the left eye due to exposure to a toxic substance at a DOE facility. Therefore, I hereby conclude that the employee is entitled to medical benefits for choroid melanoma of the left eye, effective September 9, 2009, under Part E of EEOICPA.

Jacksonville, FL

Jeana F. LaRock

Hearing Representative

Final Adjudication Branch

[1] See DOE's facility list on the agency website at: http://www.hss.energy.gov/healthsafety/FWSP/advocacy/faclist/showfacility.cfm (Retrieved June 21, 2010).

[2] Federal (EEOICPA) Procedure Manual, Chapter 0-0500.2(ss) (November 2008).

Presumption of Causation

EEOICPA Fin. Dec. No. 10039710-2007 (Dep't of Labor, November 30, 2007)
ORDER GRANTING REQUEST FOR RECONSIDERATION AND FINAL DECISION

This is the final decision of the Final Adjudication Branch (FAB) concerning the employee's claim under Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons stated below, the employee's claim under Part E for the covered illness of asbestosis is accepted for the payment of medical benefits. However, a surplus in the amount of $132,065.71 must be absorbed before any Part E benefits may actually be paid to or on behalf of the employee. A determination as to whether the employee is entitled to any compensation for potential wage-loss and/or impairment benefits under Part E due to

asbestosis is deferred at this time.

STATEMENT OF THE CASE

On , the employee filed a claim for benefits under Part E of EEOICPA and alleged that he had developed "asbestos lung disease" as the result of his employment in , from 1976 to 2001. On his claim form, the employee indicated that he had both filed a law suit and had received a settlement for the claimed condition of "asbestos lung disease." He also alleged that he had worked for three different Department of Energy (DOE) contractors at the Y-12 and K-25 Plants, and DOE subsequently verified that he was employed at the Y-12 and K-25 Plants from through .

In support of the claim, the employee's representative submitted an report in which Dr. Scutero reviewed the employee's medical records and x-rays and diagnosed asbestosis due to asbestos exposure, and a report in which Dr. Chirrona related an impression of probable asbestos-related lung disease and mild chronic obstructive pulmonary disease (COPD). In a July 3, 2006 response to a request for additional medical evidence from the Jacksonville district office of the Division of Energy Employees Occupational Illness Compensation (DEEOIC), the representative submitted October 21 and 31, 2005 reports in which Dr. Cherry diagnosed asbestosis due to asbestos exposure as confirmed by evidence of pleural plaques and pulmonary function testing, and COPD due to cigarette smoking, as well as the pulmonary function testing and computerized tomography findings upon which Dr. Cherry had based his opinions.

In a submission that was received by the district office on October 19, 2006, the employee's representative submitted copies of the "short-form" complaint alleging work-related asbestos exposure at the Oak Ridge Reservation that the employee filed in the Circuit Court for Knox County, Tennessee on August 14, 1992[1], and a "settlement detail" from the employee's attorneys in that tort action. The latter document listed 14 defendants and the dollar amounts of settlement payments received from 13 of them (the complaint listed 17 defendants) totaling $18,532.43. Entries for 10 of the 13 defendants indicated that attorney fees were deducted from the settlement payments received, and entries for nine of the 13 defendants also indicated that expenses ranging from $0 to $640 were deducted. The employee's representative also submitted copies of the "worker's compensation complaint" that the employee filed in the Circuit Court for Anderson County, Tennessee on November 15, 2005[2], an "Order Approving Compromised Settlement of Workers' Compensation Claim" dated September 15, 2006, and a list of itemized expenses related to that claim. The complaint alleged that the employee contracted "asbestosis or asbestos-related lung disease, due to, or as a consequence of his exposure to asbestos" at work, but did not also allege that the employee had contracted COPD due to his employment. In Sections II, III and V of the September 15, 2006 Order, the judge in that matter found that the employee had contracted one work-related illness, "asbestos-related lung disease," dismissed his claim against two of the three defendants, and decreed that upon payment of the settlement of $150,869.60 and its agreement to pay medical benefits, the third defendant would be relieved of all further liability to the employee for "the claimed occupational asbestos-related lung disease and any non-malignant respiratory injury."

On , the district office issued a recommended decision to accept the employee's Part E claim and found that the medical evidence established that the employee had contracted the covered illness of asbestosis due to his work-related exposure to asbestos. In that same recommended decision, the district office found that the employee had received a state workers' compensation settlement of $150,869.60 for his covered illness, and calculated that $119,392.18 of that settlement had to be coordinated with the

employee's Part E benefits. Since the employee was not being awarded any monetary benefits at that time, the district office found that the entire $119,392.18 constituted a "surplus" that would have to be recovered from his future Part E benefits, including the medical benefits that it was recommending for acceptance. However, the district office made no findings of fact regarding the employee's tort recoveries.

In a letter, the employee's representative objected to the recommendation that the employee's Part E award for asbestosis be coordinated with his state workers' compensation settlement. In support of this objection, the representative asserted that the employee had both claimed for and received the settlement for both "any non-malignant respiratory injury" and either "asbestosis" or "asbestos lung disease," and argued that because the district office found that the employee had contracted only one covered illness—asbestosis—no coordination was required under DEEOIC's procedures.

On February 7, 2007, FAB issued a final decision accepting the employee's Part E claim. In its decision, FAB considered the representative's objection to the coordination of the employee's Part E benefits and rejected it because there was "no evidence that the employee was diagnosed with a non-malignant illness other than from asbestos exposure and that is not considered an asbestos-related pulmonary condition." Based on this finding, FAB accepted the district office's recommendation that payment for any medical treatment of the employee's asbestosis be suspended until the $119,392.18 "surplus" was fully absorbed. FAB also made no findings regarding the employee's tort recoveries.

On March 22, 2007, the employee filed a petition in the United States District Court for the Eastern District of Tennessee seeking review of the final decision on his Part E claim.[3] Shortly thereafter, on April 30, 2007 the Director of DEEOIC issued an order that vacated the February 7, 2007 final decision and reopened the employee's claim for both further development and the issuance of new recommended and final decisions. The order noted that neither the recommended nor the final decisions in this matter had discussed the recoveries that the employee had received from his tort action, and that the coordination of his Part E benefits with his state workers' compensation settlement was not correctly calculated using the proper worksheet.

Following the issuance of the April 30, 2007 order, the national office of DEEOIC sent the employee a July 5, 2007 letter in which it requested additional information regarding his tort recoveries. On July 12, 2007, the employee's representative responded to the July 5, 2007 development letter by submitting an updated "Settlement Detail" showing the receipt of another $3,000 payment from a defendant, a list of itemized expenses related to the employee's tort suit amounting to $1,703.96, and a cover letter in which he noted that attorney fees of $7,177.40 had been paid out of the recovery total of $21,532.43.

On August 15, 2007, the national office issued a recommended decision: (1) to accept the employee's Part E claim for the payment of medical benefits for the covered illness of asbestosis; (2) to offset the employee's Part E benefits with the $12,673.53 "surplus" recovery from his tort action for asbestos exposure; and (3) to coordinate the employee's Part E benefits with the $119,392.18 "surplus" of the state workers' compensation benefits he received for the same covered illness. The case was transferred to FAB on the same date; since no objections to the recommended decision were received within the 60-day period provided for under 20 C.F.R. § 30.310(a) (2007), FAB issued a decision on the employee's claim on October 25, 2007.

Thereafter, by letter dated November 2, 2007, the employee's representative made a timely request for reconsideration of the October 25, 2007 decision and submitted copies of an August 29, 2007 letter

objecting to the August 15, 2007 recommended decision and an April 20, 2007 affidavit of Dr. Cherry that he alleged had been sent to FAB in a timely manner in support of his reconsideration request. Although there is no evidence that the August 29, 2007 objections or the April 20, 2007 affidavit were ever received by FAB, they appear to have been properly sent to the correct mailing address. Therefore, FAB hereby grants the request to reconsider the employee's claim to consider the following objections to the recommended decision:

OBJECTIONS

In his August 29, 2007 submission, the employee's representative argued that the recommended coordination of the employee's Part E benefits with the $119,392.18 "surplus" of the state workers' compensation benefits he had received was improper under 20 C.F.R. § 30.626(c)(3), and alleged that the state workers' compensation benefits at issue were for both asbestos-related lung disease (a covered illness) and COPD (a non-covered illness). In support of his argument, the representative asserted that Dr. Cherry's affidavit established that the employee's COPD was a "non-malignant lung injury." In his affidavit, Dr. Cherry indicated that he had examined the employee on , that he had diagnosed COPD based on his findings, and that COPD "is a non-malignant respiratory injury."

After considering the recommended decision, the objections to the recommended decision and all of the evidence in the case file, FAB hereby makes the following:

FINDINGS OF FACT

1. The employee filed a claim for benefits under Part E of EEOICPA on , and alleged that he had contracted "asbestos lung disease" due to his employment.

2. The employee was employed as a DOE contractor employee at two DOE facilities, the K-25 and Y-12 Plants in , , from through . This is more than 250 days of covered employment, during which the potential for asbestos exposure existed.

3. The medical evidence of record establishes that the employee was first definitively diagnosed with asbestosis due to exposure to asbestos by Dr. Scutero on October 7, 1997, more than ten years after he was first exposed to asbestos at a DOE facility, and that he was later diagnosed with nonwork-related COPD due to cigarette smoking by Dr. Cherry in reports dated October 21 and 31, 2005.

4. It is at least as likely as not that the employee's exposure to asbestos at two DOE facilities, the K-25 and Y-12 Plants, was a significant factor in aggravating, contributing to, or causing his asbestosis.

5. It is at least as likely as not that the employee's exposure to asbestos was related to his employment by a DOE contractor at the K-25 and Y-12 Plants.

6. The employee filed a tort suit in the Circuit Court for , on August 14, 1992 against 17 defendants, alleging that he had been exposed to asbestos at work at the K-25 and Y-12 Plants. As of July 12, 2007, the employee had received recoveries from the defendants of $21,532.43 and had paid out allowable attorney fees of $7,199.86 and allowable costs of suit of $1,681.50.

7. The employee also filed a "worker's compensation complaint" in the Circuit Court for Anderson County, Tennessee on November 15, 2005 seeking workers' compensation benefits for "asbestosis or

asbestos-related lung disease." The employee did not seek state workers' compensation benefits for COPD in that action. In an "Order Approving Compromised Settlement of Workers' Compensation Claim" dated September 15, 2006, the judge in that matter found that the employee had contracted a single illness, "asbestos-related lung disease," and decreed that payment of the settlement of $150,869.60 would relieve the defendant of all future liability to the employee for "the claimed occupational asbestos-related lung disease and any non-malignant respiratory injury." Out of this settlement, the employee paid allowable attorney fees of $30,173.92 and allowable costs of suit of $1,303.50.

Based on the above-noted findings of fact, FAB hereby makes the following:

CONCLUSIONS OF LAW

The first issue in this case is whether the employee qualifies as a "covered Part E employee" under 20 C.F.R. § 30.5(p). For this case, the relevant portion of the definition of a "covered Part E employee" is "a Department of Energy contractor employee. . .who has been determined by OWCP to have contracted a covered illness. . .through exposure at a Department of Energy facility," and the claimed "covered illness" is "asbestos lung disease" or asbestosis.

DEEOIC has established criteria to allow for a presumption of causation in claims filed under Part E for asbestosis. If the evidence in the claim file is sufficient to establish that the employee was diagnosed with asbestosis, that he or she worked at least 250 aggregate days at a facility where the presence of asbestos has been confirmed, and that there was a latency period of at least 10 years between the employee's first exposure and the first diagnosis of asbestosis, DEEOIC can accept that it was at least as likely as not that the employee's exposure to asbestos at a DOE facility was a significant factor in aggravating, contributing to or causing his or her asbestosis.[4] *See* Federal (EEOICPA) Procedure Manual, Chapter E-500.17 (June 2006).

As found above, the employee is a DOE contractor employee who was employed at two DOE facilities in Oak Ridge by DOE contractors and who contracted a "covered illness," as that term is defined in § 7385s(2) of EEOICPA. The "covered illness" that the employee contracted is asbestosis due to work-related exposure to asbestos, and this is the only "covered illness" that is supported by the medical evidence in the case file (the employee's COPD is not due to the same work-related exposure that resulted in his asbestosis and is instead due to nonwork-related cigarette smoking). The employee also had more than one year of covered employment with exposure to asbestos and was diagnosed with asbestosis more than ten years following his initial exposure to asbestos at a covered DOE facility. Therefore, he qualifies as a "covered Part E employee" under § 30.5(p) of the regulations for the condition of asbestosis, and the employee's claim for asbestosis is accepted pursuant to § 7385s-4(c) of EEOICPA. Since he is a "covered Part E employee," the employee is entitled to medical benefits for the "covered illness" of asbestosis pursuant to § 7385s-8 of EEOICPA, retroactive to the date he filed his claim for benefits on .

The second issue in this case is whether the employee's Part E benefits must be offset. Under § 7385 of EEOICPA and 20 C.F.R. § 30.505(b), Part E benefits must be offset to reflect payments made pursuant to a final judgment or a settlement received in litigation for the same exposure that EEOICPA benefits are payable. As found above, the employee filed a tort suit in the Circuit Court for , on against 17 defendants, alleging that he had been exposed to asbestos at work. Through , the employee has received total recoveries from the defendants of $21,532.43, and had paid out allowable attorney fees

of $7,199.86 and allowable costs of suit of $1,681.50. Using the "EEOICPA Part B/E Benefits Offset Worksheet," the employee has a "surplus" recovery from his tort action of $12,673.53; this "surplus" must be absorbed from medical benefits and any lump-sum monetary benefits payable in the future before any Part E benefits can actually be paid to or on behalf of the employee.

The third issue in this case is whether the employee's Part E benefits also must be coordinated. Under § 7385s-11 of EEOICPA and 20 C.F.R. § 30.626, Part E benefits must be coordinated with any state workers' compensation benefits (other than medical or vocational rehabilitation benefits) that the claimant has received for the same covered illness. As found above, on November 15, 2005 the employee filed a "worker's compensation complaint" in the Circuit Court for Anderson County, Tennessee seeking state workers' compensation benefits solely for "asbestosis or asbestos-related lung disease." In an "Order Approving Compromised Settlement of Workers' Compensation Claim" dated September 15, 2006, the judge specifically found that the employee had contracted one illness, "asbestos-related lung disease," and decreed that the payment of the settlement of $150,869.60 would relieve the defendant of all future liability to the employee for "the claimed occupational asbestos-related lung disease and any non-malignant respiratory injury."

This does not mean, however, that the settlement was for anything other than the employee's "covered illness" of asbestosis, which is the only *work-related* lung disease that is established by the medical evidence of record. This conclusion is consistent with the medical evidence in the case file, the "worker's compensation complaint" that the employee filed, and the remainder of the Order itself, which explicitly states in Sections II, III and V that the employee contracted a single work-related illness of "asbestos-related lung disease," not that illness *and* a work-related non-malignant respiratory injury.[5] In his objection to the recommended decision, the employee's representative argued for the first time that Dr. Cherry's affidavit established that the employee's COPD is a non-malignant respiratory injury, and the medical evidence of record supports that particular conclusion. However, the record also establishes that the employee's COPD is due to his nonwork-related cigarette smoking rather than to his exposure to asbestos while employed at a DOE facility. Therefore, because the record does not establish that the employee received state workers' compensation benefits "for both a covered illness and a non-covered illness arising out of and in the course of the same work-related incident," coordination of the employee's Part E benefits for the "covered illness" of asbestosis with his $150,869.60 settlement is required. *See* 20 C.F.R. 30.626(c)(3). Out of this settlement, the employee paid allowable attorney fees of $30,173.92 and allowable costs of suit of $1,303.50. Using the "EEOICPA/SWC Coordination of Benefits Worksheet," the employee has received "surplus" state workers' compensation benefits totaling $119,392.18 after deducting allowable attorney fees and costs of suit from his gross settlement. This second "surplus" must also be absorbed from the employee's medical benefits and any lump-sum monetary benefits payable in the future before any Part E benefits can actually be paid to or on behalf of the employee.

Accordingly, the employee is entitled to medical benefits for his asbestosis, retroactive to the date he filed his EEOICPA claim on . However, a total "surplus" in the amount of $132,065.71 must be absorbed pursuant to §§ 7385 and 7385s-11(a) of EEOICPA before any Part E benefits are actually payable.

Washington,

Tom Daugherty

Hearing Representative

Final Adjudication Branch

[1] No. 1-553-92.

[2] No. A5LA0597.

[3] No. 3:07-cv-103 (E.D. Tenn. Knoxville).

[4] The actual latency period for the development of asbestosis is a function of the duration and intensity of exposure to asbestos. Thus, if an employee's occupation was one that is not typically exposed to asbestos, or the potential for extreme exposure existed and the employee worked less than 250 aggregate work days, or there is a latency period of less than 10 years existing between the covered DOE or RECA section 5 employment and the onset of the illness, DEEOIC will evaluate all of the evidence in the file to determine whether a causal relationship exists in those instances.

[5] This interpretation of the September 15, 2006 Order is consistent with the way a similar order settling a Tennessee workers' compensation case was interpreted by the Tennessee Supreme Court in *Wilson v. National Healthcare Corp*., 2004 WL 1964909 *3 (Tenn. Workers' Comp. Panel Sept. 7, 2004).

EEOICPA Fin. Dec. No. 10068242-2008 (Dep't of Labor, July 25, 2008)

ORDER GRANTING REQUEST FOR RECONSIDERATION
AND FINAL DECISION

The Final Adjudication Branch (FAB) hereby grants the employee's timely request for reconsideration of its June 6, 2008 final decision, pursuant to 20 C.F.R. § 30.319(c) (2008), and issues this new final decision concerning the employee's claim under Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons stated below, the employee's claim under Part E for the covered illness of asbestosis is accepted for the payment of medical benefits. However, a "surplus" in the amount of $74,416.46 must be absorbed before any Part E benefits may actually be paid to or on behalf of the employee. A determination as to whether the employee is entitled to any compensation for potential wage-loss and/or impairment benefits under Part E due to his covered illness of asbestosis is deferred at this time.

STATEMENT OF THE CASE

On August 13, 2007, the employee filed a Form EE-1 claiming benefits under Part E of EEOICPA and alleged that he had contracted "asbestos related lung disease" due to his employment as an electrician at the Y-12 Plant and K-25 Plant in Oak Ridge, Tennessee from 1977 to 1995. The employee also alleged that he was exposed to asbestos, radiation and toxic chemicals while working at those two facilities. Using the Oak Ridge Institute for Science and Education database, the Savannah River Resource Center verified that the employee had worked at the K-25 Plant from October 31, 1977 to August 28, 1981, and at the Y-12 Plant from August 22, 1983 to March 4, 1991. On his Form EE-1, the employee further indicated that he had filed a tort suit and a state workers' compensation claim related to his claimed illness, and that he had received settlements or other awards.

In support of his claim, the employee submitted pulmonary function and x-ray studies and a July 27,

2005 report from Dr. Ronald R. Cherry, a Board-certified pulmonary specialist. In that report, Dr. Cherry related the employee's belief that he had mild asthma, noted that he had smoked about one quarter pack of cigarettes a day for 10 years before he quit at age 35, and diagnosed "asbestosis" based on the results of his laboratory studies. In a follow-up note dated August 3, 2005, Dr. Cherry repeated his diagnosis of "asbestosis," causally related that one illness to the employee's work-related exposure to asbestos dust, and opined that the employee had a 17% permanent impairment of the whole person using the Fifth Edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*.

In a signed statement dated September 18, 2007, the employee confirmed that he and his wife had filed a tort suit for damages due to his alleged asbestos exposure in the Circuit Court for Knox County, Tennessee; he also noted that the suit was still pending and that they had received joint settlement payments as of that date amounting to $6,339.50, less attorneys fees of $2,113.14 and court costs of $708.62.[1] The employee also confirmed that he had received a settlement of his claim for state workers' compensation benefits[2] in the amount of $91,104.02, less attorney fees of $18,220.80 and $1,281.50 of expenses, and asserted that this payment was for "the claimed condition of asbestos related lung disease and any non-malignant respiratory injury (asthma)."

Accompanying the employee's statement was a copy of the short-form complaint against 14 defendants that he and his wife had filed in the tort suit, a settlement sheet showing that their law firm had received seven separate payments as of September 11, 2007, and an itemized list of court costs from that litigation. Also accompanying the above-noted statement was a certified copy of the March 10, 2006 "Order Approving Compromised Settlement of Workers' Compensation Claim," signed by Judge Donald R. Elledge of the Circuit Court for Anderson County, Tennessee, that settled the employee's state workers' compensation claim against his employer, and a list of expenses from that proceeding. In his March 10, 2006 Order, the Judge found that the employee had contracted "asbestos-related lung disease as a result of occupational exposure to asbestos," and decreed that payment of $91,104.02 would exonerate the employer "from any and all further liability with regard to [state workers' compensation] benefits which may be claimed by the [employee] or growing out of any injuries that have resulted, or may hereafter result, to [the employee] in reference to the claimed asbestos-related lung disease and any non-malignant respiratory injury. . . ."

On December 12, 2007, the Jacksonville district office issued a recommended decision to accept the employee's Part E claim for asbestosis and to pay him medical benefits, once a combined surplus due to his receipt of payments from his tort suit and his state workers' compensation claim in the amount of $74,416.46 was absorbed.[3] By letter postmarked on January 29, 2008, the employee's representative filed an objection to the recommended decision and requested a review of the written record of the claim. In her submission, the employee's representative objected to the coordination of the employee's Part E benefits with the proceeds of the settlement of his state workers' compensation claim, which had accounted for $71,601.72 of the $74,416.46 "surplus" found by the district office. She alleged that the employee's settlement was "for the claimed conditions of both asbestos lung disease and any non-malignant respiratory injury" (emphasis in original) based on the "Order Approving Compromised Settlement of Workers' Compensation Claim," and further alleged that the employee had been diagnosed with "asthma, a non-malignant lung injury. . . ." Given these allegations, the representative argued that the recommendation to coordinate was improper because the employee "received his state workers' compensation for a covered and non-covered illness. . . ."

As noted above, FAB issued a June 6, 2008 final decision in which it confirmed the district office's recommendations to accept the employee's claim for the covered illness of "asbestosis" and awarded

the employee medical benefits for his accepted illness, after the combined surplus of $74,416.46 was absorbed. However, on June 30, FAB received a timely request that it reconsider its June 6, 2008 decision from the employee's representative.[4] In her request, the representative alleged that the employee had received state workers' compensation benefits for both his covered illness of "asbestos related lung disease and any non-malignant respiratory injury (asthma and COPD). . . ." In support of her most recent allegation, the representative submitted office notes and accompanying consultation reports dated February 26, 2004, June 30, 2004, October 29, 2004, February 28, 2005, August 22, 2005, May 1, 2006 and April 28, 2008 by Dr. Richard M. Gaddis, the employee's attending osteopath. In his office notes, Dr. Gaddis diagnosed flare-ups of both asthma and COPD due to either burning wood in a wood stove and paint fumes; however, Dr. Gaddis did not causally relate either of these two medical conditions to the employee's work-related exposure to asbestos at the K-25 and Y-12 Plants.

After considering the recommended decision, the timely objections to the recommended decision, the evidence submitted in support of the timely request for reconsideration and all of the evidence in the case file, FAB hereby makes the following:

FINDINGS OF FACT

1. The employee filed a claim for benefits under Part E of EEOICPA on August 13, 2007, and alleged that he had contracted "asbestos related lung disease" due to his employment.

2. The employee was employed as a DOE contractor employee at two DOE facilities, the K-25 and Y-12 Plants in Oak Ridge, Tennessee, from October 31, 1977 through August 28, 1981, and from August 22, 1983 through March 4, 1991, respectively. This is more than 250 days of covered employment, during which the potential for asbestos exposure existed.

3. The medical evidence of record establishes that the employee was first diagnosed with asbestosis due to work-related asbestos exposure by Dr. Cherry in his August 3, 2005 report, more than ten years after he was first exposed to asbestos at a DOE facility.

4. The medical evidence of record also establishes that the employee was diagnosed with asthma and COPD by Dr. Gaddis. However, Dr. Gaddis did not causally relate either the employee's asthma or his COPD to the same work-related asbestos exposure that led to the employee's asbestosis.

5. It is at least as likely as not that the employee's exposure to asbestos at two DOE facilities, the K-25 and Y-12 Plants in Oak Ridge, Tennessee was a significant factor in aggravating, contributing to, or causing his asbestosis.

6. It is at least as likely as not that the employee's exposure to asbestos was related to his employment by a DOE contractor at two DOE facilities, the K-25 and Y-12 Plants in Oak Ridge, Tennessee.

7. The employee and his wife filed a tort suit in the Circuit Court for Knox County, Tennessee, alleging that he had been exposed to asbestos while at work. As of September 11, 2007, the employee and his wife have received total recoveries from seven of the defendants of $6,339.50, and have paid out allowable attorney fees of $2,113.14 and allowable costs of suit of $708.62.

8. The employee also filed a workers' compensation complaint in the Circuit Court for Anderson County, Tennessee seeking state workers' compensation benefits for asbestos-related lung disease. In

an "Order Approving Compromised Settlement of Workers' Compensation Claim" dated March 10, 2006, the judge in that matter found that the employee had contracted a single illness, "asbestos-related lung disease as a result of occupational exposure to asbestos," and decreed that payment of the settlement of $91,104.02 would relieve the employer of all future liability to the employee for "the claimed asbestos-related lung disease and any non-malignant respiratory injury." Out of this settlement, the employee paid allowable attorney fees of $18,220.80 and allowable costs of suit of $1,281.50.

Based on the above-noted findings of fact in the employee's Part E claim, FAB hereby makes the following:

CONCLUSIONS OF LAW

The first issue in this case is whether the employee qualifies as a "covered Part E employee" under 20 C.F.R. § 30.5(p). For this case, the relevant portion of the definition of a "covered Part E employee" is "a Department of Energy contractor employee. . .who has been determined by OWCP to have contracted a covered illness. . .through exposure at a Department of Energy facility," and the claimed "covered illness" is "asbestos-related lung disease" or asbestosis.

DEEOIC has established criteria to allow for a presumption of causation in claims filed under Part E for asbestosis. If the evidence in the claim file is sufficient to establish that the employee was diagnosed with asbestosis, that he or she worked at least 250 aggregate days at a facility where the presence of asbestos has been confirmed, and that there was a latency period of at least 10 years between the employee's first exposure and the first diagnosis of asbestosis, DEEOIC can accept that it was at least as likely as not that the employee's exposure to asbestos at a DOE facility was a significant factor in aggravating, contributing to or causing his or her asbestosis.[5] *See* Federal (EEOICPA) Procedure Manual, Chapter E-500.17 (June 2006).

As found above, the employee is a DOE contractor employee who was employed at two DOE facilities in Oak Ridge by DOE contractors and who contracted a "covered illness," as that term is defined in § 7385s(2) of EEOICPA. The "covered illness" that the employee contracted is asbestosis due to work-related exposure to asbestos, and this is the only "covered illness" that is supported by the medical evidence in the case file. While there is medical evidence in the file that establishes that the employee has been diagnosed with both asthma and COPD, that same medical evidence does not establish that either of these two other illnesses were contracted through the same work-related exposure of the employee to asbestos (or any other toxic substance) at a DOE facility. The employee also had more than one year of covered employment with exposure to asbestos and was first diagnosed with asbestosis more than ten years following his initial exposure to asbestos at a covered DOE facility. Therefore, he qualifies as a "covered Part E employee" under § 30.5(p) of the regulations for the condition of asbestosis, and the employee's claim for asbestosis is accepted pursuant to § 7385s-4(c) of EEOICPA. Since he is a "covered Part E employee," the employee is entitled to medical benefits for the "covered illness" of asbestosis pursuant to § 7385s-8 of EEOICPA, retroactive to the date he filed his claim for benefits on August 13, 2007.

The second issue in this case is whether the employee's Part E benefits must be offset. Under § 7385 of EEOICPA and 20 C.F.R. § 30.505(b), Part E benefits must be offset to reflect payments made pursuant to a final judgment or a settlement received in litigation for the same exposure for which EEOICPA benefits are payable. As found above, the employee and his wife filed a tort suit in the

Circuit Court for Knox County, Tennessee, alleging that he had been exposed to asbestos at work. Through September 11, 2007, the employee and his wife have received total joint recoveries from seven of the defendants of $6,339.50, and have paid out allowable attorney fees of $2,113.14 and allowable costs of suit of $708.62. Using the "EEOICPA Part B/E Benefits Offset Worksheet," the employee has a "surplus" recovery from his tort action of $2,814.74; this "surplus" must be absorbed from medical benefits and any lump-sum monetary benefits payable in the future before any Part E benefits can actually be paid to or on behalf of the employee.

The third issue in this case is whether the employee's Part E benefits also must be coordinated. Under § 7385s-11 of EEOICPA and 20 C.F.R. § 30.626, Part E benefits must be coordinated with any state workers' compensation benefits (other than medical or vocational rehabilitation benefits) that the claimant has received for the same covered illness. As found above, the employee filed a state workers' compensation complaint in the Circuit Court for Anderson County, Tennessee seeking workers' compensation benefits for asbestos-related lung disease. In an "Order Approving Compromised Settlement of Workers' Compensation Claim" dated March 10, 2006, the judge in that matter found that the employee had contracted a single illness, "asbestos-related lung disease as a result of occupational exposure to asbestos," and decreed that payment of the settlement of $91,104.02 would relieve the employer of all liability to the employee for "the claimed asbestos-related lung disease and any non-malignant respiratory injury."

This does not mean, however, that the above settlement was for anything other than the employee's "covered illness" of asbestosis. The scope of the settlement is important because pursuant to 20 C.F.R. § 30.626(c)(3), DEEOIC will not coordinate a claimant's Part E benefits with his or her state workers' compensation benefits for the same covered illness if the state workers' compensation benefits were received "for both a covered illness and a non-covered illness *arising out of and in the course of the same work-related incident*." (emphasis added) A close reading of Sections II, III, IV and V of the March 10, 2006 Order, however, reveals that the only lung disease specifically identified by the judge as resulting from work-related asbestos exposure was the same as the employee's covered illness—asbestosis or "asbestos-related lung disease." This conclusion is also consistent with the medical evidence in the case file, which does not establish that the employee's asthma and COPD are causally related to the same work-related exposure to asbestos that led to the development of his asbestosis. The mere fact that the judge in the employee's state workers' compensation proceeding wrote that payment of $91,104.02 would exonerate the employer "from any and all further liability with regard to [state workers' compensation] benefits which may be claimed by the [employee] or growing out of any injuries that have resulted, or may hereafter result, to [the employee] in reference to the claimed asbestos-related lung disease and any non-malignant respiratory injury" in his March 10, 2006 Order does not mean that that the employee actually contracted both "asbestos-related lung disease as a result of occupational exposure to asbestos" and some other unidentified "non-malignant respiratory injury."[6] Therefore, coordination of the employee's Part E benefits for the "covered illness" of asbestosis with his $91,104.02 settlement is required. Out of this settlement, the employee paid allowable attorney fees of $18,220.80 and allowable costs of suit of $1,281.50. Using the "EEOICPA/SWC Coordination of Benefits Worksheet," the employee has received "surplus" state workers' compensation benefits totaling $71,601.72 after deducting allowable attorney fees and costs of suit from his gross settlement. This second "surplus" must also be absorbed from the employee's medical benefits and any lump-sum monetary benefits payable in the future before any Part E benefits can actually be paid to or on behalf of the employee.

Accordingly, the employee is entitled to medical benefits for his asbestosis, retroactive to the date he filed his EEOICPA claim on August 13, 2007. However, a total "surplus" in the amount of $74,416.46

must be absorbed pursuant to §§ 7385 and 7385s-11(a) of EEOICPA before any Part E benefits are actually payable.

Washington, DC

Kathleen M. Graber

Hearing Representative

Final Adjudication Branch

[1] No. 2-472-05 (filed August 31, 2005).

[2] No. A5LA0307.

[3] On February 25, 2008, FAB issued a final decision confirming the district office's recommendations to accept the employee's claim for the covered illness of asbestosis and to award the employee medical benefits for his accepted illness, after the combined surplus of $74,416.46 was absorbed. On April 9, 2008, the employee filed a petition with the United States District Court for the Eastern District of Tennessee, seeking review of the February 25, 2008 decision (No. 3:08-cv-125). Also on April 9, 2008, FAB received an April 7, 2008 submission in which the employee's authorized representative noted that she had submitted objections to the recommended decision, which FAB had not considered prior to issuing the February 25, 2008 decision. Because of this, the Director of the Division of Energy Employees Occupational Illness Compensation (DEEOIC) issued a May 20, 2008 order vacating the February 25, 2008 decision, reopening the employee's Part E claim and returning it to FAB for the issuance of an appropriate new final decision that considered the representative's timely objections to the December 12, 2007 recommended decision.

[4] By doing so, the representative revoked the finality of the June 6, 2008 decision. *See* 20 C.F.R. § 30.316(d).

[5] The actual latency period for the development of asbestosis is a function of the duration and intensity of exposure to asbestos. Thus, if an employee's occupation was one that is not typically exposed to asbestos, or the potential for extreme exposure existed and the employee worked less than 250 aggregate work days, or there is a latency period of less than 10 years existing between the covered DOE or RECA section 5 employment and the onset of the illness, DEEOIC will evaluate all of the evidence in the file to determine whether a causal relationship exists in those instances.

[6] This interpretation of the September 15, 2006 Order is consistent with the way a similar order settling a Tennessee workers' compensation case was interpreted by the Tennessee Supreme Court in *Wilson v. National Healthcare Corp*., 2004 WL 1964909 *3 (Tenn. Workers' Comp. Panel Sept. 7, 2004).

Wage-Loss Benefits

Calculation of average annual wage

EEOICPA Fin. Dec. No. 10057883-2008 (Dep't of Labor, October 20, 2010)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch (FAB) concerning the above claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons stated below, the claim for wage-loss benefits is accepted under Part E for calendar years 2005, 2006, 2007 and 2008.

STATEMENT OF THE CASE

On September 27, 2006, the employee filed a Form EE-1 claiming benefits under EEOICPA for non-Hodgkin's lymphoma and skin cancer. On April 25, 2008, FAB issued a final decision accepting the claim under Part E based on six primary skin cancers (squamous cell carcinoma or SCC) *in situ* of the right eyelid, basal cell carcinoma (BCC) of the shoulder, BCC of the chest, SCC of the right lower eyelid, and SCC of the cheek. In that final decision, FAB determined that he was a covered Department of Energy (DOE) contractor employee at the Mound Plant, a DOE facility, from November 23, 1966 to September 1, 1967.

On July 9, 2008, the employee filed a claim for wage-loss benefits under Part E, stating that he began to lose wages as a result of his covered illness in the first quarter of 2005. He also submitted medical reports from Dr. Nicholas T. Ilif dated August 18, 2008 and November 18, 2008, who stated that as a result of his cancers and consequential conditions, he began incurring wage-loss in February 2005 and took early retirement in November 2007.

On November 7, 2008, the employee filed another claim and identified additional skin cancers. On April 16, 2009, FAB issued a final decision accepting his claim under Part E based on these additional skin cancers (SCC of the left lower eyelid, SCC of the tip of the nose, SCC of the right preauricular). On July 30, 2009, the district office accepted that the employee had consequential conditions of blindness of the right eye, photophobia and right eye pain.

On August 7, 2009, the district office issued a recommended decision to deny the claim under Part B for multiple skin cancers and large B-cell lymphoma, and under Part E for lymphoma. The district office further recommended that the claim for impairment benefits based on the employee's skin cancers be approved under Part E, based on a whole-person impairment rating of 24%.

With respect to the employee's wage-loss claim, the district office recommended that it be accepted for the period 2005 through 2008. The district office determined that he had an average annual wage (AAW) of $66,801.21 in the 36 months prior to February 2005. This figure was based on his earnings as reported in annual tax returns. Specifically, the district office combined the employee's total "dividend" income reported annually on Line 1 of IRS Schedule K-1 (Shareholder's Share of Income, Credits, Deductions, etc.), which lists "Ordinary income from trade or business activities" as 100% Shareholder of **[Employee's company]**, with the amount listed in Box 1 (wages, tips, other compensation) of Form W-2 (Wage and Tax Statement), which is the salary he paid himself as an employee of **[Employee's company]**. The district office included his dividend income because he explained that these were "pass through" earnings he paid to himself as the owner of 100% of the shares of **[Employee's company]**, which is classified as a "subchapter S" corporation for purposes of the Internal Revenue Code. The district office's AAW calculation made no deduction for the health insurance premiums the employee paid out of his S corporation dividend income. Using this method, the district office determined that his inflation-adjusted earnings for the period 2005 through 2008 were as follows: for 2005, $37,989.00 (57% of his AAW); for 2006, $21,124.33 (32%); for 2007, $17,249.19 (26%); and for 2008, $0 (0%). Based on these figures, the district office recommended that the employee receive $10,000.00 in wage-loss benefits for calendar year 2005, and $15,000.00 for calendar years 2006, 2007 and 2008. The total compensation recommended was $55,000.00.

On November 16, 2009, FAB issued a final decision denying the claim for multiple skin cancers and lymphoma under Part B, and for lymphoma under Part E. The final decision accepted the claim for

impairment benefits based on a 24% impairment rating, and awarded the employee compensation of $60,000.00. With respect to his wage-loss claim, FAB determined that the district office's calculation of his entitlement to wage-loss benefits was incorrect. Specifically, FAB determined that the district office should not have included dividend income in the employee's AAW for the 36 months prior to February of 2005, or in his earnings during and after calendar year 2005. The case was therefore remanded to the district office for recalculation of the employee's entitlement to wage-loss benefits for the period 2005-2008.

On January 29, 2010, the district office issued a recommended decision in which it determined that the employee's AAW for the 36 months prior to February 2005 was $25,714.21. This was based solely on his wages as reported in Box 1 of his Form W-2 for the years 2002, 2003 and 2004. Using the information reported in Box 1 of his W-2s for 2005 through 2008, the district office determined that the employee's inflation-adjusted earnings were as follows: $15,780.00 in 2005 (61% of his AAW); $20,376.00 in 2006 (77%); $9,744.00 in 2007 (38%); and $0 in 2008 (0% of AAW). The district office further concluded that the employee's health insurance costs should not be considered in determining his AAW or calculating his calendar years of qualifying wage-loss during and after 2005.

On March 16, 2010, the employee filed objections to the recommended decision and requested a hearing. However, the objections were not addressed and no hearing was scheduled. On April 13, 2010, FAB issued a final decision accepting the claim for wage-loss benefits for the calendar years 2005 through 2008, concluding that the employee's AAW for the 36 months prior to February 2005 was $25,714.21. FAB further concluded that his inflation-adjusted earnings were $15,780.00 in 2005 (61% of AAW); $20,376.00 in 2006 (77%); $9,744.00 in 2007 (38%); and $0 in 2008 (0%). Accordingly, FAB concluded that the employee was entitled to wage-loss benefits of $10,000.00 for 2005, $15,000.00 for 2007 and $15,000.00 for 2008. FAB further concluded that the employee had no entitlement to wage-loss benefits for 2006, since his inflation-adjusted wages during that year were greater than 75% of his AAW.

On June 4, 2010, FAB issued an order granting reconsideration of the employee's wage-loss claim, because the April 13, 2010 final decision did not address his objections. The case was subsequently referred for a hearing.

OBJECTIONS

In his written objections and at a hearing held on August 5, 2010, the employee raised two arguments against the wage-loss calculation in the January 29, 2010 recommended decision. These are summarized below:

1. He argued that all of his income from **[Employee's company]** constituted payments received from employment or services. He reiterated that he was the sole proprietor of **[Employee's company]**, explaining that this was a small company that distributed packaged food products to convenience stores. For tax purposes, he organized the business as a subchapter S corporation, which allowed the company's earnings to be passed through to him, the owner, as ordinary income. He stated that each year he paid himself a small salary (known as a "draw"). Any profits over and above that salary were reported to the IRS as dividends.

Therefore, the employee argued that such income met the definition of "wages" under the EEOICPA regulations, and should be included in both the AAW calculation and in determining his

inflation-adjusted earnings for subsequent years. He also submitted copies of his Form 1040 Schedule E for the years in question, which lists his S corporation income from **[Employee's company]** for the years 2002 to 2007. For purposes of his tax returns, his S Corporation income is listed under "nonpassive" income according to Schedule K-1.

2. The employee further argued that his health insurance premiums should be deducted from his income for purposes of calculating his AAW and his inflation-adjusted earnings in subsequent years. He stated that such premiums should be excluded from the wage-loss calculation, since they are tax-deductable.

After reviewing the evidence in the case file, and considering the objections and the testimony at the oral hearing, FAB hereby makes the following:

FINDINGS OF FACT

1. By final decisions dated April 25, 2008 and April 16, 2009, FAB determined that the employee is a covered DOE contractor employee who contracted the covered illness of multiple skin cancers through exposure to a toxic substance at a DOE facility.

2. On July 30, 2009, the district office determined that he sustained the consequential conditions of blindness of the right eye, photophobia and right eye pain.

3. The employee filed a claim for wage-loss benefits for the period beginning February 2005. His date of birth is September 24, 1944, and he will reach normal retirement age for unreduced Social Security retirement benefits at age 66 on September 29, 2010.

4. His AAW for the 36-month period prior to February 2005 is $66,801.21. His adjusted earnings in 2005 were $37,989.00 (57% of his AAW); for 2006, $21,124.33 (32% of AAW); for 2007, $17,249.19 (26% of AAW); and for 2008, $0 (0% of AAW).

Based on the above findings of fact, FAB hereby also makes the following:

CONCLUSIONS OF LAW

Part E provides for payment of compensation to covered DOE contractor employees who experience wage-loss as a result of a covered illness, and defines wage-loss as any year in which the employee's wages did not exceed 75% of his average annual wage in the 36-month period prior to the month compensable wage-loss began. Compensable wage-loss may include any year occurring up to and including the calendar year that a covered Part E employee reaches normal retirement age under the Social Security Act. To establish eligibility for wage-loss benefits, the evidence must show that the period of wage-loss at issue is causally related to the employee's covered illness. 42 U.S.C. § 7385s-2(a)(2).

The implementing regulations provide that in determining an employee's AAW and any subsequent adjusted earnings, DEEOIC "will consider all monetary payments that the covered Part E employee received in a quarter from employment or services, except for monetary payments that were not taxable as income during that quarter under the Internal Revenue Code, to be 'wages.'" 20 C.F.R. § 30.805(a) (2009). Under EEOICPA procedures, wages are defined to include salaries, overtime compensation,

sick leave, vacation leave, tips and bonuses received for employment services. Income specifically excluded from the definition of wages includes capital gains, IRA distributions, pensions, annuities, unemployment compensation, state workers' compensation benefits, medical retirement benefits and Social Security benefits. Federal (EEOICPA) Procedure Manual, Chapter 2-1400.8 (2009). The regulations and the procedures do not specifically exclude dividends from the definition of "wages."

In this case, the recommended decision issued on January 19, 2010 is based on a calculation of AAW that excludes the employee's dividend earnings as the 100% shareholder of **[Employee's company]**. He has objected to this calculation, arguing that his dividend earnings qualify as wages under the definition cited above. The issue, therefore, is whether those dividends are "monetary payments. . .from employment or services" under § 30.805 of the regulations, and if so, whether they are taxable as income under the Internal Revenue Code.

The employee's tax records show that his income from **[Employee's company]** is classified as "non-passive" income according to Schedule K-1. Under IRS rules, passive income is defined as earnings derived from a business in which a person "does not materially participate."[1] Since the employee's hearing testimony and tax records make clear that he materially participated in the operation of **[Employee's company]** as the sole proprietor and 100% shareholder, I conclude that these earnings constitute monetary payments from employment or services. His tax records further show that these earnings were taxable as income under the Internal Revenue Code. Accordingly, I conclude that the employee's dividend income as 100% shareholder of **[Employee's company]**, a subchapter S corporation, are "wages."

In response to the second objection, I have reviewed the tax records submitted in support of the employee's claim, which includes Form 1040 Schedule E, Schedule K-1 and his W-2 statements covering the period 2001 through 2008. I have also reviewed IRS Publication 15-B, *Employer's Tax Guide to Fringe Benefits* (2010), which is part of the record and was cited by the district office in its recommended decision, as well as other IRS guidance concerning subchapter S corporations.

IRS Publication 15-B states that although the value of S corporation employees' health benefits are generally excluded from the employees' wages, this exclusion does not apply to shareholders owning 2% or more of the corporation ("2% shareholders"). According to the IRS, for 2% shareholders who are also employees, the value of the health benefits premiums *must be included in the employee's wages subject to federal income tax withholding*. IRS Publication 15-B, p. 6 (2010). A review of the employee's Form 1040 shows that the value of his health benefits is included in his S corporation earnings (line 17), and is therefore an element of his total income (line 22). If he were an employee and less than a 2% shareholder, the value of his health benefits would be excluded entirely from his taxable wages. As a 2% shareholder, he qualifies for a self-employed health benefits insurance deduction (line 29), which is deducted from his total income to derive his adjusted gross income. In other words, the value of the employee's health benefits is included in calculating his taxable income, but is not included in his adjusted gross income. The health benefits deduction is therefore no different than the other deductions available to taxpayers listed on Form 1040, such as student loan interest expenses, educator expenses, or IRA contributions, which are not taken into account when calculating an employee's AAW.

Accordingly, the evidence establishes that the employee experienced wage-loss as a result of his covered illness during calendar years 2005 through 2008. I further conclude that his AAW for the 36 months prior to February 2005 is $66,801.21; that his adjusted earnings for calendar year 2005 were between 50 and 75% of his AAW; and that his adjusted earnings for calendar years 2006, 2007 and

2008 were less than 50% of his AAW. Therefore, in accordance with 42 U.S.C. § 7385s-2(a)(2), the employee is entitled to wage-loss benefits of $10,000.00 for 2005, and $15,000.00 per year for 2006 through 2008, totaling $55,000.00.

Cleveland, OH

Greg Knapp

Hearing Representative

Final Adjudication Branch

[1] *See* http://www.irs.gov/businesses/small/article/0,,id=146833,00.html (retrieved October 18, 2010).

Causation not proven

EEOICPA Fin. Dec. No. 10002977-2006 (Dep't of Labor, February 12, 2009)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch (FAB) on the employee's claim for benefits under Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the employee's claim for wage-loss benefits based on his covered illness of chronic obstructive pulmonary disease (COPD) is denied.

STATEMENT OF THE CASE

On December 8, 2004, the employee filed a claim under Part E of EEOICPA in which he alleged that he had contracted "COPD-Bronchitis, Hearing Loss, Hemorrhoids, Back Disorder, Bursitis, Hernia Multiple, Shoulder Disease, Rotator Cuff, Joint Disease, Knee, Tremors, Essential" due to his work-related exposure to toxic substances at the K-25 and Y-12 Plants in Oak Ridge, Tennessee.[1] Later on August 28, 2006, the employee submitted a written request for both impairment benefits and wage-loss benefits and alleged he had experienced wage-loss from January 1997 through the date of his request.

In support of his claim, the employee filed a work history listing his employment by the Department of Energy (DOE) contractors Union Carbide at the K-25 Plant from 1975 to 1981, and by Lockheed Martin Energy Systems and other DOE contractors at the Y-12 Plant from 1981 to 1997. The Oak Ridge Institute for Science and Education verified that the employee worked for DOE contractors as a Component Assembler, Inspector and Senior Inspector at the K-25 Plant from March 10, 1975 to February 15, 1981, and as a Machinist, Engineering Assistant and Technical Associate at the Y-12 Plant from February 16, 1981 to January 31, 1997.

In support of his claim, the employee submitted an October 24, 2001 report of a medical screening examination in which Dr. Steven Markowitz noted that while the employee's chest x-ray "showed no evidence of lung disease," his ten-year history of symptoms was "consistent with chronic bronchitis." The employee also submitted an August 28, 2002 report in which Dr. R. Hal Hughes related

"approximately a ten year history of chronic bronchitis symptoms on average of two to three episodes a year." The file also contains several medical reports from Dr. Gregory P. LeMense, the employee's treating physician. The earliest of those reports note a chest CT scan and a medical examination performed by Dr. LeMense in late February 2004. In a February 26, 2004 medical report, Dr. LeMense stated "it is my impression that **[Employee]** has mild obstructive lung disease due to chronic obstructive bronchitis."

On October 6, 2006, FAB issued a final decision in which it found that the evidence was sufficient to establish a diagnosis of COPD and a causal link between the COPD and the employee's work-related exposure to toxic substances at the K-25 and Y-12 Plants. Based on those findings, FAB accepted the employee's Part E claim for the "covered illness" of COPD and awarded him medical benefits for that particular illness[2]; in that same decision, FAB explicitly deferred a decision on the employee's August 28, 2006 request for both impairment and wage-loss benefits "since Jan. 1997."[3]

By letter dated November 29, 2006, the Jacksonville district office asked the employee to submit evidence in support of his allegation that he had experienced wage-loss as a result of his COPD. The district office specifically asked for earnings information to support his claimed period of wage-loss and medical evidence to support the causal link of that wage-loss to his covered illness of COPD. In his December 11, 2006 response to the district office's request, he stated:

I first experience[d] wage loss in Jan. 1, 1997 due [to] my COPD because I was laid off at that time with no pay and 21 years company service. I feel I was laid off because of this problem.
I did not know I had COPD until Jan. 1, 2002.

On December 13, 2006, the district office received a wage report from the Social Security Administration in response to its request for the employee's reported wages for the years 1993 through 2005. It showed that the employee earned $28,225.80 in 1993, $28,437.56 in 1994, $28,819.96 in 1995, $29,853.88 in 1996, and $19,133.59 in 1997, and stated that "There are no other earnings recorded under this Social Security Number for the period(s) requested." On April 3, 2007, the district office sent the employee another letter asking for evidence of his alleged wage-loss, and stated the following:

Our records indicate [you] were diagnosed with COPD on February 20, 2004. Please state what illness you are claiming that caused your wage loss beginning in 1997 through present.

This letter reminded the employee that he had the burden of providing medical evidence establishing a causal relationship between his accepted covered illness (COPD) and his alleged wage-loss. In his response to this second letter, the employee submitted a copy of a November 22, 1996 termination notice that Lockheed Martin Energy Systems had given him. The notice stated the following, in pertinent part:

Subject: Reduction-In-Force Notification
I regret to inform you that the number of employees at Lockheed Martin Energy Systems, Inc., P.O. Box 2009, Oak Ridge, Tennessee 37831, will be reduced as a result of declining Department of Energy budgets and changing program emphasis for FY 1997. The layoff, which is expected to be permanent, will commence January 31, 1997.
Your position as Technical Associate II will be terminated on January 31, 1997.

* * *

I acknowledge receipt of the Reduction-In-Force Notification.
[Employee] /s/ 11/22/96

Signature Date

On August 11, 2007, the district office referred the employee's case file to a District Medical Consultant (DMC) and requested an opinion on whether, for any of the years between 1997 and 2007, "there is sufficient rationalized medical evidence that the employee was unable to work due to the covered illness of chronic obstructive pulmonary disease." In her September 11, 2007 report, Dr. Jeanne M. McGregor, the DMC that the district office selected to provide the opinion, reviewed the medical evidence in the case file and noted that it showed that the employee had "good control of his moderate chronic obstructive lung disease with current medications" and that "[h]is only medication for his lungs is Advair 500/50." She also noted that there was nothing in the file to support the employee's allegation that he was laid off due to his COPD, and concluded as follows:

> Unfortunately, the evidence in **[Employee]**'s file does not support that he was unable to work due to his COPD in any of the years 1997 to present. It appears that the only reason that **[Employee]** stopped working in 1997 was because he was laid off in November of 1996.
>
> * * *
>
> Upon consideration of all the above, it is my medical opinion within a reasonable degree of medical certainty that there is not sufficient rationalized medical evidence in the file to establish that **[Employee]** was unable to work due to his covered illness of COPD for any of the years from 1997 to present.

On October 23, 2007, the Jacksonville district office issued a recommended decision to deny the employee's request for wage-loss benefits because "the medical evidence is insufficient to support a causal relationship between the employee's accepted condition of COPD and wage-loss during the claimed period from 1997 to present." On November 5, 2007, the employee's representative filed a timely written objection to the recommended decision and requested a hearing, which was held on April 30, 2008 in Oak Ridge, Tennessee.[4]

OBJECTION

In his November 5, 2007 objection letter, the employee's representative did not disagree with any specific factual finding included in the district office's recommended decision; rather, he expressed the employee's disagreement with the recommended conclusion that there was no causal relationship between his COPD and any wage-loss during the claimed period of January 1997 to August 2006. The letter was not accompanied by any evidence in support of the disagreement expressed therein. At the April 30, 2008 oral hearing, the representative raised no additional objections; instead, he submitted a written report from Dr. Marty G. Wallace, together with copies of previously submitted documents, and argued that the medical evidence of causation in the case file was sufficient to award the wage-loss benefits at issue.

After reviewing the evidence in the case file and the employee's objection, FAB hereby makes the following:

FINDINGS OF FACT

1. The employee filed a claim for benefits under Part E of EEOICPA, including wage-loss benefits for the period from January 1997 to August 2006 due to his covered illness of COPD.

2. The employee was a DOE contractor employee who worked at the K-25 Plant from March 10, 1975 to February 15, 1981, and at the Y-12 Plant from February 16, 1981 to January 31, 1997.

3. Effective January 31, 1997, Lockheed Martin Energy Systems terminated the employee's

position at the Y-12 Plant as part of a Reduction-In-Force.

4. Prior to the termination of his position, the employee earned wages of $28,225.80 in 1993, $28,437.56 in 1994, $28,819.96 in 1995, $29,853.88 in 1996 and $19,133.59 in 1997. Following the termination of his position, he was not employed for the balance of 1997, nor was he employed during the years 1998 through the date of his April 30, 2008 hearing.

5. The employee was first diagnosed with COPD by Dr. LeMense in a February 26, 2004 report.

6. In a September 11, 2007 report requested by the district office, Dr. McGregor concluded that "it is my medical opinion within a reasonable degree of medical certainty that there is not sufficient rationalized medical evidence in the file to establish that **[Employee]** was unable to work due to his covered illness of COPD for any of the years from 1997 to present."

Based on the above findings of fact, FAB hereby also makes the following:

CONCLUSIONS OF LAW

Part E of EEOICPA provides several different types of benefits to eligible DOE contractor employees or their survivors. Among those benefits are compensation for permanent impairment, compensation for qualifying calendar years of wage-loss, a lump-sum survivor benefit, and medical benefits. *See* 42 U.S.C. §§ 7385s-2(a)(1), 7385s-2(a)(2), 7385s-3, 7385s-8. In order to prove eligibility for any of these benefits, the evidence must establish that the employee forming the basis for the Part E claim is/was a "covered DOE contractor employee" and that he/she contracted a "covered illness" through exposure to a toxic substance at a DOE facility. In this particular Part E claim, FAB has already determined that the employee is a "covered DOE contractor employee," as that term is defined in 42 U.S.C. § 7385s(1), and that his COPD is a "covered illness" pursuant to § 7385s(2).

In addition to satisfying the general eligibility requirements applicable to all Part E claims, an employee seeking benefits for calendar years of qualifying wage-loss must also satisfy the specific requirements of 42 U.S.C. § 7385s-2(a)(2). 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).

The employee alleges that he first experienced wage-loss in January 1997, and that this wage-loss has continued at least through the date of his April 30, 2008 oral hearing in his EEOICPA claim. The factual evidence establishes that the employee held a job at the Y-12 Plant at which he was earning

wages, and that he began to lose wages when his job was terminated as part of a Reduction-In-Force, effective January 31, 1997. The evidence also establishes that the employee has not worked since this job was terminated. Therefore, FAB concludes that the employee has proven the first two elements of his wage-loss claim: (1) that he held a job at which he was earning wages; and (2) that he experienced a loss in those wages in a particular month—January 1997.

However, FAB also concludes that the employee has failed to prove that his wage-loss in January 1997 was caused by his covered illness, *i.e.* that he would have continued to earn wages in January 1997 from his job at the Y-12 Plant had he not contracted COPD in January 1997. It is axiomatic that an employee cannot lose wages in a particular month because of a covered illness if he/she has not yet contracted that illness. Although the employee here has submitted medical evidence from Dr. Wallace in support of his argument that he should have been restricted from working at the Y-12 Plant when his job was terminated as part of a Reduction-In-Force in January 1997, the Reduction-In-Force Notification he submitted clearly indicates that the layoff was caused by "declining Department of Energy budgets and changing program emphasis for FY 1997" rather than by any medical condition of the employee. A review of the medical evidence of record reveals that there is no mention of a diagnosis of COPD prior to treating physician, Dr. LeMense's February 26, 2004 report.[5] None of the physicians who have submitted medical reports in this matter have even suggested that the employee had COPD before that date, and COPD is the only covered illness that has been accepted as compensable in this claim. Thus, the employee has not offered any evidence to establish a diagnosis of COPD in 1997 or at any time prior to February 2004 that could have lead to any wage-loss.

Furthermore, even if the employee had shown that his diagnosed covered illness arose in January 1997 at the time of his wage-loss, the employee's argument concerning Dr. Wallace's report ignores the fact that the after-the-fact suggestion of restrictions that might have resulted in wage-loss if put in effect simply have no relevance to why the employee ceased earning wages seven years prior to when his illness was first diagnosed. EEOICPA does not provide wage-loss benefits for employees *who should have been* placed under restrictions and *might have lost wages* had those restrictions been in place, even if those restrictions were caused by a covered illness. Rather, it only provides wage-loss benefits for employees who, consistent with the terms of 42 U.S.C. § 7385s-2(a)(2)(A)(i), experience wage-loss *caused by a covered illness*.[6]

Unfortunately, the employee's February 26, 2004 diagnosis is insufficient to establish his entitlement to wage-loss benefits commencing in 2004 because there is no factual evidence in the case file that the employee experienced a *loss* of wages in that month (or in any month thereafter). It is also axiomatic that an employee cannot experience a loss of wages during a particular month if he/she is not earning any wages in that month. Therefore, even if the employee's covered illness of COPD made it impossible for him to work from February 2004 forward, it would still be insufficient to establish any compensable wage-loss because the employee had no job and no wages at that time.

The regulations provide that the claimant bears the burden of providing all documentation necessary to establish eligibility for benefits and of proving "by a preponderance of the evidence the existence of each and every criterion" required for eligibility; "[p]roof by a preponderance of the evidence means it is more likely than not that a given proposition is true." *See* 20 C.F.R. § 30.111(a). Thus, FAB concludes that the evidence in the case file is insufficient to establish, by a preponderance of the evidence, that the employee experienced any compensable calendar years of qualifying wage-loss as the result of his COPD, and hereby denies the employee's wage-loss claim.

Washington, DC

Amanda M. Fallon

Hearing Representative

Final Adjudication Branch

[1] On the same date, the employee also filed a claim under Part B of EEOICPA in which he alleged that he had contracted "COPD-bronchitis" as a result of working at the K-25 and Y-12 Plants.

[2] In that decision, FAB denied the employee's Part B claim because his alleged condition was not an "occupational illness" compensable under that Part. FAB also denied his Part E claim for hearing loss, a back disorder, hemorrhoids, bursitis, joint disease, multiple hernias, knee tremors, and rotator cuff disease because the evidence was insufficient to establish that those illnesses were contracted through exposure to a toxic substance at a DOE facility.

[3] On May 7, 2007, FAB issued another final decision awarding the employee $115,000.00 for impairment due to his covered illness of COPD, based on the February 24, 2007 impairment evaluation of Dr. Harvey Popovich.

[4] Following that hearing, FAB issued a July 14, 2008 final decision denying the employee's claim for wage-loss benefits. However, the Director of the Division of Energy Employees Occupational Illness Compensation thereafter issued a September 18, 2008 order vacating FAB's July 14, 2008 decision because it did not "properly determine whether the employee's exposure at K-25 and Y-12 resulted in any compensable loss of wages," and referring the case back to FAB "for issuance of a new final decision that gives appropriate consideration to the evidence in the case file that is relevant to the employee's Part E claim."

[5] FAB notes that, notwithstanding the employee's reported history of breathing difficulties, even as of October 24, 2001, the report of Dr. Steven Markowitz' medical screening examination noted that the employee's chest x-ray "showed no evidence of lung disease."

[6] Alternatively, the employee's entitlement to wage-loss benefits is also foreclosed because he was unemployed for the 36-month period prior to his initial 2004 diagnosis. His average annual earnings (AAW) for that 36-month period would therefore be zero. Under the wage-loss formula in the statute, a benefit payment for a particular calendar year is predicated on a finding that the employee has earned at least 25 percent less than his AAW during that calendar year. 42 U.S.C. § 7385s-2(a)(2). Since the employee earned no wages in the three years prior to his initial diagnosis, he cannot demonstrate the requisite 25 percentage loss of earnings for any calendar year after his initial diagnosis of a covered medical condition.

Elements to be proven

EEOICPA Fin. Dec. No. 10002977-2006 (Dep't of Labor, February 12, 2009)

[same as one up]

EEOICPA Fin. Dec. No. 10057883-2008 (Dep't of Labor, October 20, 2010)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch (FAB) concerning the above claim for compensation under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons stated below, the claim for wage-loss benefits is accepted under Part E for calendar years 2005, 2006, 2007 and 2008.

STATEMENT OF THE CASE

On September 27, 2006, the employee filed a Form EE-1 claiming benefits under EEOICPA for non-Hodgkin's lymphoma and skin cancer. On April 25, 2008, FAB issued a final decision accepting the claim under Part E based on six primary skin cancers (squamous cell carcinoma or SCC) *in situ* of the right eyelid, basal cell carcinoma (BCC) of the shoulder, BCC of the chest, SCC of the right lower eyelid, and SCC of the cheek. In that final decision, FAB determined that he was a covered Department of Energy (DOE) contractor employee at the Mound Plant, a DOE facility, from November 23, 1966 to September 1, 1967.

On July 9, 2008, the employee filed a claim for wage-loss benefits under Part E, stating that he began to lose wages as a result of his covered illness in the first quarter of 2005. He also submitted medical reports from Dr. Nicholas T. Ilif dated August 18, 2008 and November 18, 2008, who stated that as a result of his cancers and consequential conditions, he began incurring wage-loss in February 2005 and took early retirement in November 2007.

On November 7, 2008, the employee filed another claim and identified additional skin cancers. On April 16, 2009, FAB issued a final decision accepting his claim under Part E based on these additional skin cancers (SCC of the left lower eyelid, SCC of the tip of the nose, SCC of the right preauricular). On July 30, 2009, the district office accepted that the employee had consequential conditions of blindness of the right eye, photophobia and right eye pain.

On August 7, 2009, the district office issued a recommended decision to deny the claim under Part B for multiple skin cancers and large B-cell lymphoma, and under Part E for lymphoma. The district office further recommended that the claim for impairment benefits based on the employee's skin cancers be approved under Part E, based on a whole-person impairment rating of 24%.

With respect to the employee's wage-loss claim, the district office recommended that it be accepted for the period 2005 through 2008. The district office determined that he had an average annual wage (AAW) of $66,801.21 in the 36 months prior to February 2005. This figure was based on his earnings as reported in annual tax returns. Specifically, the district office combined the employee's total "dividend" income reported annually on Line 1 of IRS Schedule K-1 (Shareholder's Share of Income, Credits, Deductions, etc.), which lists "Ordinary income from trade or business activities" as 100% Shareholder of **[Employee's company]**, with the amount listed in Box 1 (wages, tips, other compensation) of Form W-2 (Wage and Tax Statement), which is the salary he paid himself as an employee of **[Employee's company]**. The district office included his dividend income because he explained that these were "pass through" earnings he paid to himself as the owner of 100% of the shares of **[Employee's company]**, which is classified as a "subchapter S" corporation for purposes of the Internal Revenue Code. The district office's AAW calculation made no deduction for the health insurance premiums the employee paid out of his S corporation dividend income. Using this method, the district office determined that his inflation-adjusted earnings for the period 2005 through 2008 were as follows: for 2005, $37,989.00 (57% of his AAW); for 2006, $21,124.33 (32%); for 2007, $17,249.19 (26%); and for 2008, $0 (0%). Based on these figures, the district office recommended that the employee receive $10,000.00 in wage-loss benefits for calendar year 2005, and $15,000.00 for calendar years 2006, 2007 and 2008. The total compensation recommended was $55,000.00.

On November 16, 2009, FAB issued a final decision denying the claim for multiple skin cancers and lymphoma under Part B, and for lymphoma under Part E. The final decision accepted the claim for impairment benefits based on a 24% impairment rating, and awarded the employee compensation of $60,000.00. With respect to his wage-loss claim, FAB determined that the district office's calculation of his entitlement to wage-loss benefits was incorrect. Specifically, FAB determined that the district

office should not have included dividend income in the employee's AAW for the 36 months prior to February of 2005, or in his earnings during and after calendar year 2005. The case was therefore remanded to the district office for recalculation of the employee's entitlement to wage-loss benefits for the period 2005-2008.

On January 29, 2010, the district office issued a recommended decision in which it determined that the employee's AAW for the 36 months prior to February 2005 was $25,714.21. This was based solely on his wages as reported in Box 1 of his Form W-2 for the years 2002, 2003 and 2004. Using the information reported in Box 1 of his W-2s for 2005 through 2008, the district office determined that the employee's inflation-adjusted earnings were as follows: $15,780.00 in 2005 (61% of his AAW); $20,376.00 in 2006 (77%); $9,744.00 in 2007 (38%); and $0 in 2008 (0% of AAW). The district office further concluded that the employee's health insurance costs should not be considered in determining his AAW or calculating his calendar years of qualifying wage-loss during and after 2005.

On March 16, 2010, the employee filed objections to the recommended decision and requested a hearing. However, the objections were not addressed and no hearing was scheduled. On April 13, 2010, FAB issued a final decision accepting the claim for wage-loss benefits for the calendar years 2005 through 2008, concluding that the employee's AAW for the 36 months prior to February 2005 was $25,714.21. FAB further concluded that his inflation-adjusted earnings were $15,780.00 in 2005 (61% of AAW); $20,376.00 in 2006 (77%); $9,744.00 in 2007 (38%); and $0 in 2008 (0%). Accordingly, FAB concluded that the employee was entitled to wage-loss benefits of $10,000.00 for 2005, $15,000.00 for 2007 and $15,000.00 for 2008. FAB further concluded that the employee had no entitlement to wage-loss benefits for 2006, since his inflation-adjusted wages during that year were greater than 75% of his AAW.

On June 4, 2010, FAB issued an order granting reconsideration of the employee's wage-loss claim, because the April 13, 2010 final decision did not address his objections. The case was subsequently referred for a hearing.

OBJECTIONS

In his written objections and at a hearing held on August 5, 2010, the employee raised two arguments against the wage-loss calculation in the January 29, 2010 recommended decision. These are summarized below:

1. He argued that all of his income from **[Employee's company]** constituted payments received from employment or services. He reiterated that he was the sole proprietor of **[Employee's company]**, explaining that this was a small company that distributed packaged food products to convenience stores. For tax purposes, he organized the business as a subchapter S corporation, which allowed the company's earnings to be passed through to him, the owner, as ordinary income. He stated that each year he paid himself a small salary (known as a "draw"). Any profits over and above that salary were reported to the IRS as dividends.

Therefore, the employee argued that such income met the definition of "wages" under the EEOICPA regulations, and should be included in both the AAW calculation and in determining his inflation-adjusted earnings for subsequent years. He also submitted copies of his Form 1040 Schedule E for the years in question, which lists his S corporation income from **[Employee's company]** for the years 2002 to 2007. For purposes of his tax returns, his S Corporation income is listed under

"nonpassive" income according to Schedule K-1.

2. The employee further argued that his health insurance premiums should be deducted from his income for purposes of calculating his AAW and his inflation-adjusted earnings in subsequent years. He stated that such premiums should be excluded from the wage-loss calculation, since they are tax-deductable.

After reviewing the evidence in the case file, and considering the objections and the testimony at the oral hearing, FAB hereby makes the following:

FINDINGS OF FACT

1. By final decisions dated April 25, 2008 and April 16, 2009, FAB determined that the employee is a covered DOE contractor employee who contracted the covered illness of multiple skin cancers through exposure to a toxic substance at a DOE facility.

2. On July 30, 2009, the district office determined that he sustained the consequential conditions of blindness of the right eye, photophobia and right eye pain.

3. The employee filed a claim for wage-loss benefits for the period beginning February 2005. His date of birth is September 24, 1944, and he will reach normal retirement age for unreduced Social Security retirement benefits at age 66 on September 29, 2010.

4. His AAW for the 36-month period prior to February 2005 is $66,801.21. His adjusted earnings in 2005 were $37,989.00 (57% of his AAW); for 2006, $21,124.33 (32% of AAW); for 2007, $17,249.19 (26% of AAW); and for 2008, $0 (0% of AAW).

Based on the above findings of fact, FAB hereby also makes the following:

CONCLUSIONS OF LAW

Part E provides for payment of compensation to covered DOE contractor employees who experience wage-loss as a result of a covered illness, and defines wage-loss as any year in which the employee's wages did not exceed 75% of his average annual wage in the 36-month period prior to the month compensable wage-loss began. Compensable wage-loss may include any year occurring up to and including the calendar year that a covered Part E employee reaches normal retirement age under the Social Security Act. To establish eligibility for wage-loss benefits, the evidence must show that the period of wage-loss at issue is causally related to the employee's covered illness. 42 U.S.C. § 7385s-2(a)(2).

The implementing regulations provide that in determining an employee's AAW and any subsequent adjusted earnings, DEEOIC "will consider all monetary payments that the covered Part E employee received in a quarter from employment or services, except for monetary payments that were not taxable as income during that quarter under the Internal Revenue Code, to be 'wages.'" 20 C.F.R. § 30.805(a) (2009). Under EEOICPA procedures, wages are defined to include salaries, overtime compensation, sick leave, vacation leave, tips and bonuses received for employment services. Income specifically excluded from the definition of wages includes capital gains, IRA distributions, pensions, annuities, unemployment compensation, state workers' compensation benefits, medical retirement benefits and

Social Security benefits. Federal (EEOICPA) Procedure Manual, Chapter 2-1400.8 (2009). The regulations and the procedures do not specifically exclude dividends from the definition of "wages."

In this case, the recommended decision issued on January 19, 2010 is based on a calculation of AAW that excludes the employee's dividend earnings as the 100% shareholder of **[Employee's company]**. He has objected to this calculation, arguing that his dividend earnings qualify as wages under the definition cited above. The issue, therefore, is whether those dividends are "monetary payments. . .from employment or services" under § 30.805 of the regulations, and if so, whether they are taxable as income under the Internal Revenue Code.

The employee's tax records show that his income from **[Employee's company]** is classified as "non-passive" income according to Schedule K-1. Under IRS rules, passive income is defined as earnings derived from a business in which a person "does not materially participate."[1] Since the employee's hearing testimony and tax records make clear that he materially participated in the operation of **[Employee's company]** as the sole proprietor and 100% shareholder, I conclude that these earnings constitute monetary payments from employment or services. His tax records further show that these earnings were taxable as income under the Internal Revenue Code. Accordingly, I conclude that the employee's dividend income as 100% shareholder of **[Employee's company]**, a subchapter S corporation, are "wages."

In response to the second objection, I have reviewed the tax records submitted in support of the employee's claim, which includes Form 1040 Schedule E, Schedule K-1 and his W-2 statements covering the period 2001 through 2008. I have also reviewed IRS Publication 15-B, *Employer's Tax Guide to Fringe Benefits* (2010), which is part of the record and was cited by the district office in its recommended decision, as well as other IRS guidance concerning subchapter S corporations.

IRS Publication 15-B states that although the value of S corporation employees' health benefits are generally excluded from the employees' wages, this exclusion does not apply to shareholders owning 2% or more of the corporation ("2% shareholders"). According to the IRS, for 2% shareholders who are also employees, the value of the health benefits premiums *must be included in the employee's wages subject to federal income tax withholding*. IRS Publication 15-B, p. 6 (2010). A review of the employee's Form 1040 shows that the value of his health benefits is included in his S corporation earnings (line 17), and is therefore an element of his total income (line 22). If he were an employee and less than a 2% shareholder, the value of his health benefits would be excluded entirely from his taxable wages. As a 2% shareholder, he qualifies for a self-employed health benefits insurance deduction (line 29), which is deducted from his total income to derive his adjusted gross income. In other words, the value of the employee's health benefits is included in calculating his taxable income, but is not included in his adjusted gross income. The health benefits deduction is therefore no different than the other deductions available to taxpayers listed on Form 1040, such as student loan interest expenses, educator expenses, or IRA contributions, which are not taken into account when calculating an employee's AAW.

Accordingly, the evidence establishes that the employee experienced wage-loss as a result of his covered illness during calendar years 2005 through 2008. I further conclude that his AAW for the 36 months prior to February 2005 is $66,801.21; that his adjusted earnings for calendar year 2005 were between 50 and 75% of his AAW; and that his adjusted earnings for calendar years 2006, 2007 and 2008 were less than 50% of his AAW. Therefore, in accordance with 42 U.S.C. § 7385s-2(a)(2), the employee is entitled to wage-loss benefits of $10,000.00 for 2005, and $15,000.00 per year for 2006 through 2008, totaling $55,000.00.

Cleveland, OH

Greg Knapp

Hearing Representative

Final Adjudication Branch

[1] *See* http://www.irs.gov/businesses/small/article/0,,id=146833,00.html (retrieved October 18, 2010).

Evidence required

EEOICPA Fin. Dec. No. 10002977-2006 (Dep't of Labor, February 12, 2009)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch (FAB) on the employee's claim for benefits under Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the employee's claim for wage-loss benefits based on his covered illness of chronic obstructive pulmonary disease (COPD) is denied.

STATEMENT OF THE CASE

On December 8, 2004, the employee filed a claim under Part E of EEOICPA in which he alleged that he had contracted "COPD-Bronchitis, Hearing Loss, Hemorrhoids, Back Disorder, Bursitis, Hernia Multiple, Shoulder Disease, Rotator Cuff, Joint Disease, Knee, Tremors, Essential" due to his work-related exposure to toxic substances at the K-25 and Y-12 Plants in Oak Ridge, Tennessee.[1] Later on August 28, 2006, the employee submitted a written request for both impairment benefits and wage-loss benefits and alleged he had experienced wage-loss from January 1997 through the date of his request.

In support of his claim, the employee filed a work history listing his employment by the Department of Energy (DOE) contractors Union Carbide at the K-25 Plant from 1975 to 1981, and by Lockheed Martin Energy Systems and other DOE contractors at the Y-12 Plant from 1981 to 1997. The Oak Ridge Institute for Science and Education verified that the employee worked for DOE contractors as a Component Assembler, Inspector and Senior Inspector at the K-25 Plant from March 10, 1975 to February 15, 1981, and as a Machinist, Engineering Assistant and Technical Associate at the Y-12 Plant from February 16, 1981 to January 31, 1997.

In support of his claim, the employee submitted an October 24, 2001 report of a medical screening examination in which Dr. Steven Markowitz noted that while the employee's chest x-ray "showed no evidence of lung disease," his ten-year history of symptoms was "consistent with chronic bronchitis." The employee also submitted an August 28, 2002 report in which Dr. R. Hal Hughes related "approximately a ten year history of chronic bronchitis symptoms on average of two to three episodes a year." The file also contains several medical reports from Dr. Gregory P. LeMense, the employee's treating physician. The earliest of those reports note a chest CT scan and a medical examination performed by Dr. LeMense in late February 2004. In a February 26, 2004 medical report, Dr. LeMense

stated “it is my impression that **[Employee]** has mild obstructive lung disease due to chronic obstructive bronchitis.”

On October 6, 2006, FAB issued a final decision in which it found that the evidence was sufficient to establish a diagnosis of COPD and a causal link between the COPD and the employee’s work-related exposure to toxic substances at the K-25 and Y-12 Plants. Based on those findings, FAB accepted the employee’s Part E claim for the “covered illness” of COPD and awarded him medical benefits for that particular illness[2]; in that same decision, FAB explicitly deferred a decision on the employee’s August 28, 2006 request for both impairment and wage-loss benefits “since Jan. 1997.”[3]

By letter dated November 29, 2006, the Jacksonville district office asked the employee to submit evidence in support of his allegation that he had experienced wage-loss as a result of his COPD. The district office specifically asked for earnings information to support his claimed period of wage-loss and medical evidence to support the causal link of that wage-loss to his covered illness of COPD. In his December 11, 2006 response to the district office’s request, he stated:

I first experience[d] wage loss in Jan. 1, 1997 due [to] my COPD because I was laid off at that time with no pay and 21 years company service. I feel I was laid off because of this problem. I did not know I had COPD until Jan. 1, 2002.

On December 13, 2006, the district office received a wage report from the Social Security Administration in response to its request for the employee’s reported wages for the years 1993 through 2005. It showed that the employee earned $28,225.80 in 1993, $28,437.56 in 1994, $28,819.96 in 1995, $29,853.88 in 1996, and $19,133.59 in 1997, and stated that “There are no other earnings recorded under this Social Security Number for the period(s) requested.” On April 3, 2007, the district office sent the employee another letter asking for evidence of his alleged wage-loss, and stated the following:

Our records indicate [you] were diagnosed with COPD on February 20, 2004. Please state what illness you are claiming that caused your wage loss beginning in 1997 through present.

This letter reminded the employee that he had the burden of providing medical evidence establishing a causal relationship between his accepted covered illness (COPD) and his alleged wage-loss. In his response to this second letter, the employee submitted a copy of a November 22, 1996 termination notice that Lockheed Martin Energy Systems had given him. The notice stated the following, in pertinent part:

Subject: Reduction-In-Force Notification

I regret to inform you that the number of employees at Lockheed Martin Energy Systems, Inc., P.O. Box 2009, Oak Ridge, Tennessee 37831, will be reduced as a result of declining Department of Energy budgets and changing program emphasis for FY 1997. The layoff, which is expected to be permanent, will commence January 31, 1997.

Your position as Technical Associate II will be terminated on January 31, 1997.

* * *

I acknowledge receipt of the Reduction-In-Force Notification.

[Employee] /s/ 11/22/96

Signature Date

On August 11, 2007, the district office referred the employee’s case file to a District Medical Consultant (DMC) and requested an opinion on whether, for any of the years between 1997 and 2007, “there is sufficient rationalized medical evidence that the employee was unable to work due to the

covered illness of chronic obstructive pulmonary disease." In her September 11, 2007 report, Dr. Jeanne M. McGregor, the DMC that the district office selected to provide the opinion, reviewed the medical evidence in the case file and noted that it showed that the employee had "good control of his moderate chronic obstructive lung disease with current medications" and that "[h]is only medication for his lungs is Advair 500/50." She also noted that there was nothing in the file to support the employee's allegation that he was laid off due to his COPD, and concluded as follows:

Unfortunately, the evidence in **[Employee]**'s file does not support that he was unable to work due to his COPD in any of the years 1997 to present. It appears that the only reason that **[Employee]** stopped working in 1997 was because he was laid off in November of 1996.

* * *

Upon consideration of all the above, it is my medical opinion within a reasonable degree of medical certainty that there is not sufficient rationalized medical evidence in the file to establish that **[Employee]** was unable to work due to his covered illness of COPD for any of the years from 1997 to present

On October 23, 2007, the Jacksonville district office issued a recommended decision to deny the employee's request for wage-loss benefits because "the medical evidence is insufficient to support a causal relationship between the employee's accepted condition of COPD and wage-loss during the claimed period from 1997 to present." On November 5, 2007, the employee's representative filed a timely written objection to the recommended decision and requested a hearing, which was held on April 30, 2008 in Oak Ridge, Tennessee.[4]

OBJECTION

In his November 5, 2007 objection letter, the employee's representative did not disagree with any specific factual finding included in the district office's recommended decision; rather, he expressed the employee's disagreement with the recommended conclusion that there was no causal relationship between his COPD and any wage-loss during the claimed period of January 1997 to August 2006. The letter was not accompanied by any evidence in support of the disagreement expressed therein. At the April 30, 2008 oral hearing, the representative raised no additional objections; instead, he submitted a written report from Dr. Marty G. Wallace, together with copies of previously submitted documents, and argued that the medical evidence of causation in the case file was sufficient to award the wage-loss benefits at issue.

After reviewing the evidence in the case file and the employee's objection, FAB hereby makes the following:

FINDINGS OF FACT

1. The employee filed a claim for benefits under Part E of EEOICPA, including wage-loss benefits for the period from January 1997 to August 2006 due to his covered illness of COPD.

2. The employee was a DOE contractor employee who worked at the K-25 Plant from March 10, 1975 to February 15, 1981, and at the Y-12 Plant from February 16, 1981 to January 31, 1997.

3. Effective January 31, 1997, Lockheed Martin Energy Systems terminated the employee's position at the Y-12 Plant as part of a Reduction-In-Force.

4. Prior to the termination of his position, the employee earned wages of $28,225.80 in 1993, $28,437.56 in 1994, $28,819.96 in 1995, $29,853.88 in 1996 and $19,133.59 in 1997.

Following the termination of his position, he was not employed for the balance of 1997, nor was he employed during the years 1998 through the date of his April 30, 2008 hearing.

5. The employee was first diagnosed with COPD by Dr. LeMense in a February 26, 2004 report.

6. In a September 11, 2007 report requested by the district office, Dr. McGregor concluded that "it is my medical opinion within a reasonable degree of medical certainty that there is not sufficient rationalized medical evidence in the file to establish that **[Employee]** was unable to work due to his covered illness of COPD for any of the years from 1997 to present."

Based on the above findings of fact, FAB hereby also makes the following:

CONCLUSIONS OF LAW

Part E of EEOICPA provides several different types of benefits to eligible DOE contractor employees or their survivors. Among those benefits are compensation for permanent impairment, compensation for qualifying calendar years of wage-loss, a lump-sum survivor benefit, and medical benefits. *See* 42 U.S.C. §§ 7385s-2(a)(1), 7385s-2(a)(2), 7385s-3, 7385s-8. In order to prove eligibility for any of these benefits, the evidence must establish that the employee forming the basis for the Part E claim is/was a "covered DOE contractor employee" and that he/she contracted a "covered illness" through exposure to a toxic substance at a DOE facility. In this particular Part E claim, FAB has already determined that the employee is a "covered DOE contractor employee," as that term is defined in 42 U.S.C. § 7385s(1), and that his COPD is a "covered illness" pursuant to § 7385s(2).

In addition to satisfying the general eligibility requirements applicable to all Part E claims, an employee seeking benefits for calendar years of qualifying wage-loss must also satisfy the specific requirements of 42 U.S.C. § 7385s-2(a)(2). 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).

The employee alleges that he first experienced wage-loss in January 1997, and that this wage-loss has continued at least through the date of his April 30, 2008 oral hearing in his EEOICPA claim. The factual evidence establishes that the employee held a job at the Y-12 Plant at which he was earning wages, and that he began to lose wages when his job was terminated as part of a Reduction-In-Force, effective January 31, 1997. The evidence also establishes that the employee has not worked since this job was terminated. Therefore, FAB concludes that the employee has proven the first two elements of his wage-loss claim: (1) that he held a job at which he was earning wages; and (2) that he experienced

a loss in those wages in a particular month—January 1997.

However, FAB also concludes that the employee has failed to prove that his wage-loss in January 1997 was caused by his covered illness, *i.e.* that he would have continued to earn wages in January 1997 from his job at the Y-12 Plant had he not contracted COPD in January 1997. It is axiomatic that an employee cannot lose wages in a particular month because of a covered illness if he/she has not yet contracted that illness. Although the employee here has submitted medical evidence from Dr. Wallace in support of his argument that he should have been restricted from working at the Y-12 Plant when his job was terminated as part of a Reduction-In-Force in January 1997, the Reduction-In-Force Notification he submitted clearly indicates that the layoff was caused by "declining Department of Energy budgets and changing program emphasis for FY 1997" rather than by any medical condition of the employee. A review of the medical evidence of record reveals that there is no mention of a diagnosis of COPD prior to treating physician, Dr. LeMense's February 26, 2004 report.[5] None of the physicians who have submitted medical reports in this matter have even suggested that the employee had COPD before that date, and COPD is the only covered illness that has been accepted as compensable in this claim. Thus, the employee has not offered any evidence to establish a diagnosis of COPD in 1997 or at any time prior to February 2004 that could have lead to any wage-loss.

Furthermore, even if the employee had shown that his diagnosed covered illness arose in January 1997 at the time of his wage-loss, the employee's argument concerning Dr. Wallace's report ignores the fact that the after-the-fact suggestion of restrictions that might have resulted in wage-loss if put in effect simply have no relevance to why the employee ceased earning wages seven years prior to when his illness was first diagnosed. EEOICPA does not provide wage-loss benefits for employees *who should have been* placed under restrictions and *might have lost wages* had those restrictions been in place, even if those restrictions were caused by a covered illness. Rather, it only provides wage-loss benefits for employees who, consistent with the terms of 42 U.S.C. § 7385s-2(a)(2)(A)(i), experience wage-loss *caused by a covered illness*.[6]

Unfortunately, the employee's February 26, 2004 diagnosis is insufficient to establish his entitlement to wage-loss benefits commencing in 2004 because there is no factual evidence in the case file that the employee experienced a *loss* of wages in that month (or in any month thereafter). It is also axiomatic that an employee cannot experience a loss of wages during a particular month if he/she is not earning any wages in that month. Therefore, even if the employee's covered illness of COPD made it impossible for him to work from February 2004 forward, it would still be insufficient to establish any compensable wage-loss because the employee had no job and no wages at that time.

The regulations provide that the claimant bears the burden of providing all documentation necessary to establish eligibility for benefits and of proving "by a preponderance of the evidence the existence of each and every criterion" required for eligibility; "[p]roof by a preponderance of the evidence means it is more likely than not that a given proposition is true." *See* 20 C.F.R. § 30.111(a). Thus, FAB concludes that the evidence in the case file is insufficient to establish, by a preponderance of the evidence, that the employee experienced any compensable calendar years of qualifying wage-loss as the result of his COPD, and hereby denies the employee's wage-loss claim.

Washington, DC

Amanda M. Fallon

Hearing Representative

Final Adjudication Branch

[1] On the same date, the employee also filed a claim under Part B of EEOICPA in which he alleged that he had contracted "COPD-bronchitis" as a result of working at the K-25 and Y-12 Plants.

[2] In that decision, FAB denied the employee's Part B claim because his alleged condition was not an "occupational illness" compensable under that Part. FAB also denied his Part E claim for hearing loss, a back disorder, hemorrhoids, bursitis, joint disease, multiple hernias, knee tremors, and rotator cuff disease because the evidence was insufficient to establish that those illnesses were contracted through exposure to a toxic substance at a DOE facility.

[3] On May 7, 2007, FAB issued another final decision awarding the employee $115,000.00 for impairment due to his covered illness of COPD, based on the February 24, 2007 impairment evaluation of Dr. Harvey Popovich.

[4] Following that hearing, FAB issued a July 14, 2008 final decision denying the employee's claim for wage-loss benefits. However, the Director of the Division of Energy Employees Occupational Illness Compensation thereafter issued a September 18, 2008 order vacating FAB's July 14, 2008 decision because it did not "properly determine whether the employee's exposure at K-25 and Y-12 resulted in any compensable loss of wages," and referring the case back to FAB "for issuance of a new final decision that gives appropriate consideration to the evidence in the case file that is relevant to the employee's Part E claim."

[5] FAB notes that, notwithstanding the employee's reported history of breathing difficulties, even as of October 24, 2001, the report of Dr. Steven Markowitz' medical screening examination noted that the employee's chest x-ray "showed no evidence of lung disease."

[6] Alternatively, the employee's entitlement to wage-loss benefits is also foreclosed because he was unemployed for the 36-month period prior to his initial 2004 diagnosis. His average annual earnings (AAW) for that 36-month period would therefore be zero. Under the wage-loss formula in the statute, a benefit payment for a particular calendar year is predicated on a finding that the employee has earned at least 25 percent less than his AAW during that calendar year. 42 U.S.C. § 7385s-2(a)(2). Since the employee earned no wages in the three years prior to his initial diagnosis, he cannot demonstrate the requisite 25 percentage loss of earnings for any calendar year after his initial diagnosis of a covered medical condition.

EEOICPA Fin. Dec. No. 10004605-2006 (Dep't of Labor, September 30, 2010)

NOTICE OF FINAL DECISION FOLLOWING A HEARING

This is the decision of the Final Adjudication Branch (FAB) on the employee's claim for wage-loss benefits under Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. For the reasons set forth below, the employee's claim for wage-loss benefits based on his covered illness of chronic atrophic gastritis is denied. The employee's pending claims for nephritis and beryllium sensitivity are deferred at this time.

STATEMENT OF THE CASE

On August 16, 2001, the employee filed a request for assistance with the Department of Energy (DOE) under Part D of EEOICPA in connection with a state workers' compensation claim for chronic atrophic gastritis (and a number of other claimed illnesses). DOE verified that he was a DOE contractor employee who had worked as a machinist at the Rocky Flats Plant in Golden, Colorado, from March 1, 1982 to July 5, 1989. In early 2005, the employee's Part D claim was transferred to the Division of Energy Employees Occupational Illness Compensation (DEEOIC) at the Department of Labor for

adjudication under the newly enacted Part E.[1]

On December 2, 2005, DEEOIC sent the employee a letter asking if he wanted to request wage-loss benefits under Part E for his chronic atrophic gastritis. The letter indicated that if he wanted to submit such a request, he should notify DEEOIC of that fact and provide "the period of time and amount of wage loss that was caused by the accepted condition of chronic atrophic gastritis." The letter also asked for evidence of any claimed wage-loss. In response, the employee's authorized representative indicated that the employee was claiming for wage-loss benefits from the date he was diagnosed with chronic atrophic gastritis "to today March 22, 2006."[2] In support of this claim, the employee submitted an Operative Record of the in , , dated March 22, 1995, which reported a postoperative diagnosis of gastritis. The employee also submitted a medical report of an examination performed on January 25, 1997 by Dr. Deborah Brown. In that six-page report, Dr. Brown stated that the employee's atrophic gastritis was "not well controlled with Pepcid and Propulsid," but concluded in her "Functional Assessment" that the gastritis was not so serious that it would cause the employee to miss work. Specifically, Dr. Brown opined that the employee's atrophic gastritis "should not limit the claimant in any areas of employment." The file also contains a medical report dated July 18, 2002, in which Dr. Lee S. Newman reviewed the employee's medical records and described the March 22, 1995 diagnosis of chronic atrophic gastritis as follows: "The diagnosis was chronic atrophic gastritis which was inactive." Further, an impairment evaluation report signed by Dr. Annyce Mayer on November 12, 2006 also opined that the contemporary medical reports of the employee's March 1995 diagnosis showed that his gastritis was inactive as of the diagnosis date. The employee also submitted an October 5, 2005 report in which Dr. Thomas N. Told stated that the employee's chronic atrophic gastritis "appears to be inactive at this point but [he] has had periods of chronicity with recurrent pain." In that same report, Dr. Told asserted that "[s]o far, [the employee] has been unable to carry out any extended employment."

After considering his October 5, 2005 report, the district office wrote to Dr. Told on April 6, 2006 and asked him to clarify the statements in that report and supply additional evidence regarding whether the employee's covered illness caused him to lose wages. Specifically, the district office asked Dr. Told how he came to the conclusion that the covered illness caused the employee to lose wages and "[s]ince you state that the gastritis is inactive, what periods of time did the gastritis keep **[Employee]** from working?" In response, Dr. Told sent an April 24, 2006 letter that reads, in its entirety, as follows:

In response to your letter regarding **[Employee]**, I did indeed do endoscopy and observed firsthand the chronicity of his gastritis. Biopsies did confirm a chronic gastritis of the atrophic type. **[Employee]** has also been symptomatic throughout this period. I have observed his response to the medication and stressful situations and have concluded that he will not improve in spite of medicine. He does need to have avoidance therapy for situations that cause hyperacidity. I know of no surgeries that will correct this, since hemigastrectomy is an archaic operation. Therefore, it is my conclusion that he would require stress avoidance as the only effective means of controlling chronic gastritis and I feel he will never be able to work again.

On May 2, 2006, the district office issued a recommended decision to deny the employee's claim for wage-loss benefits for his accepted chronic atrophic gastritis. The employee objected to the recommended decision and requested a hearing before FAB, which was held on September 26, 2006. On May 2, 2007, FAB issued a final decision denying the employee's claim for wage-loss benefits due to the lack of probative evidence of a causal relationship between the employee's covered illness and any period of wage-loss. The employee sought timely review of FAB's decision in the United States District Court for the District of Colorado and on January 29, 2009, Judge Lewis T. Babcock issued an

order vacating FAB's denial of the employee's wage-loss claim based on his chronic atrophic gastritis and remanding the case back to DEEOIC on that point.[3] Judge Babcock held that FAB's decision on the employee's wage-loss claim for chronic atrophic gastritis was arbitrary and capricious because it found that Dr. Told's April 24, 2006 opinion regarding causation as of that date was contradicted by other evidence. In his remand order, Judge Babcock disagreed with that particular finding and provided this direction for DEEOIC's further development of the claim:

Accordingly, Dr. Told's statement that [the employee] "will never be able to work again"—at least as of April 24, 2006, the date of Dr. Told's letter to that effect—was in fact uncontradicted by the relevant medical record.

* * *

Accordingly, to the extent the May 2, 2007 Final Decision denied [the employee's] application for wage-loss benefits for his gastritis, it is reversed and remanded for further proceedings. On remand, OWCP may not disregard Dr. Told's uncontradicted medical opinion without articulating a *relevant* factual basis. Further, if OWCP accepts Dr. Told's uncontradicted opinion, it must make an additional factual inquiry to determine the relevant dates of wage-loss.

On remand, DEEOIC accepted Dr. Told's uncontradicted opinion that the employee could no longer work as of April 24, 2006 due to his chronic atrophic gastritis and followed Judge Babcock's directive to make additional factual inquiries regarding the employee's dates of wage-loss. In a November 18, 2009 development letter, DEEOIC set out the relevant evidence already in the case file and asked the employee to submit additional evidence to determine any dates of compensable wage-loss, as follows:

You have claimed that you suffered wage-loss as a result of your chronic atrophic gastritis from May 1995 to the present day. In accord with Judge Babcock's Memorandum Opinion and Order, we accept that Dr. Told's April 24, 2006 letter constitutes an uncontradicted medical opinion that your covered illness of chronic atrophic gastritis prevented you from working on and after April 24, 2006. However, we do not yet have sufficient evidence that you experienced wage-loss that is compensable under Part E of EEOICPA and we ask that you submit any evidence that you have that might support your claim. Specifically, we do not have sufficient probative evidence that your chronic atrophic gastritis caused you to experience wage-loss for any particular period of time between March 22, 1995 and April 24, 2006. The evidence shows that your gastritis was inactive on the date of its initial diagnosis and that it was inactive when you were examined by Dr. Told on October 5, 2005. Dr. Told's October 5, 2005 letter indicates that you experienced "periods of chronicity with recurrent pain," but there is no evidence in the case file of the frequency, duration, or severity of those flare-ups and there is insufficient evidence in the case file to establish that these flare-ups ever caused you to experience quantifiable wage-loss for any identifiable period of time. Additionally, although the evidence supports a finding that your covered illness of chronic atrophic gastritis prevented you from working on and after April 24, 2006, there is no evidence in the case file that you earned wages at any time during the 36-month period immediately preceding that date.

The wage-loss provisions in the Act and regulations require that you submit evidence of an identifiable period of wage-loss and that you submit rationalized medical evidence to establish that the period of wage-loss is causally related to the covered illness. Additionally, to be eligible for wage-loss benefits under the Act, you must have earned wages in the 36-month period immediately preceding your first period of wage-loss. Thus, if your wage-loss due to your covered illness began in April 2006, you need

to submit evidence establishing earned income during the 36-month period immediately preceding that month.

Please submit any additional evidence that you have not yet submitted that will assist us in determining the relevant dates of wage-loss caused by your chronic atrophic gastritis. Please provide evidence of the frequency, duration, and severity of the active flare-ups of chronic atrophic gastritis that you have experienced and provide evidence of dates during which those flare-ups caused you to experience wage-loss. If any of your evidence is in the form of a sworn written statement, please provide documentation to corroborate any factual assertions that you make in your written statement. Employment and earnings evidence showing actual dates of wage-loss, as well as medical evidence that shows a causal relationship between specific periods of wage-loss and your chronic atrophic gastritis, is vitally important to the eligibility determination in your case.

In response to the above request, the employee's representative submitted a letter and several enclosures on December 30, 2009: (1) a copy of the employee's December 18, 1995 state workers' compensation claim for an injury to "multiple body parts" on July 5, 1989; (2) a portion of a December 20, 1995 letter to the Traveler's Insurance Company that purports to show the employee's medical expenses related to chronic atrophic gastritis up to that date; (3) a January 27, 1996 letter from the employee to the Colorado Division of Workers' Compensation in which the employee states that he was diagnosed with chronic atrophic gastritis in 1995, and in which the employee describes a contamination accident that is alleged to have occurred around October of 1982; (4) a November 2, 1995 letter from the employee to a Mr. Jerman, notifying him of the employee's workers' compensation claim; (5) pharmacy receipts from 1996 for Pepcid tablets and Propulcid; (6) a Diagnostic Imaging Report of an October 20, 1998 examination of the employee's abdomen and pelvis, in which Dr. Mark J. Sulek concluded "NO ABNORMALITY IDENTIFIED"; and (7) a typed page which purports to show the employee's earnings for each calendar year from 1970 through 1997.

Item 7 above was signed by the employee and shows earnings figures for 1991 to the present as follows: $3,768.48 in 1991; $13,423.25 in 1992; $5,650.89 in 1993; $2,494.35 in 1994; $0 in 1995 and 1996; and $1,658.32 in 1997. These earnings figures are consistent with those shown by Social Security Administration (SSA) documents that were already in the case file. The other SSA documents in the file also indicate that the employee had no earned wages reported for any year from 1998 through 2008. Despite being asked to do so, the employee did not provide any statement or documented evidence of the frequency, duration, and severity of the active flare-ups of chronic atrophic gastritis that he experienced from 1995 to the present, nor did he provide the requested evidence of dates during which those flare-ups caused him to experience wage-loss.

On January 26, 2010, the district office issued a recommended decision to deny the employee's claim for wage-loss benefits based on his accepted chronic atrophic gastritis. The district office's recommendation was based on two separate conclusions of law regarding the period prior to April 24, 2006 and the period on and after that date. After their analysis of the evidence of the pre-April 24, 2006 time period, the district office stated:

Based on the totality of the evidence in the case file, we conclude that the rationalized medical evidence in this case is not sufficient to establish a causal relationship between the employee's covered illness and any loss of wages prior to April 24, 2006. Thus, as the evidence is insufficient to establish that the covered illness caused any wage-loss prior to April 24, 2006, there can be no qualifying wage-loss for the calendar years prior to that date. *See* 42 U.S.C. § 7385s-2(a)(2)(A)(i); 20 C.F.R. § 30.805.

Regarding the period beginning on April 24, 2006, the district office concluded—consistent with Judge Babcock's Order—that "the rationalized medical evidence of causation is sufficient to establish that the employee's illness would keep him from working from April 24, 2006 forward." However, the district office also concluded that since the evidence established that the employee earned no wages during the relevant 36-month period prior to April 24, 2006, the employee could not have any qualifying calendar years of wage-loss after that date because, by application of the formula supplied by the statute, he had no wages to lose.

OBJECTIONS

By letter dated March 15, 2010, the employee's representative objected to the recommended decision and requested a hearing before FAB. The letter of objection did not identify any finding of fact or conclusion of law with which the employee disagreed; rather, it was simply a general objection to the recommended denial of benefits.

Per the employee's request, a telephone hearing was conducted on May 25, 2010, at which the employee and his representative both testified. The employee testified that he made several hospital visits when he experienced flare-ups of gastritis, but he stated he had no documentation to corroborate that allegation. He also testified that he sometimes simply did not go to work because of stomach pain that may have been due to his gastritis, but he provided no dates and made no assertions of amounts of income that were lost due to such sick days. The employee's representative argued that the burden of proof as "impossible" to satisfy and asserted that DEEOIC had "ignored" Dr. Told's letters and given them too little weight. She asserted that the evidence already submitted was sufficient to prove the employee's wage-loss claim. Also, the employee confirmed that he stopped working in 1998, with the exception of some occasional work scooping snow from friends' driveways—which he described as "just a fly-by-night, you know, friend type thing here and there, that type of situation"—but he provided no time frame or income amounts relating to this work. The representative testified that the employee "didn't make enough [through this occasional work] to report it on Federal income tax."

On June 17, 2010, the representative submitted a copy of a one-page April 29, 1996 report by Dr. Lawrence Stelmach. In this report, which was written for use in the employee's state workers' compensation claim, Dr. Stelmach noted that the employee had been a patient of his for less than a year, reviewed his past medical records and provided his current findings. Dr. Stelmach stated that "biopsy done in the spring of 1995 did show some gastric atrophy of non-specific character and his symptoms have been unremitting since that time." Dr. Stelmach concluded by observing that "[a]t this point it appears as though this patient is chronically debilitated."

After reviewing the evidence in the case file, FAB hereby makes the following:

FINDINGS OF FACT

1. On August 16, 2001, the employee filed a claim under EEOICPA for his illness of chronic atrophic gastritis.

2. The employee was a DOE contractor employee at the Rocky Flats Plant from March 1, 1982 to July 5, 1989.

3. The employee was diagnosed with chronic atrophic gastritis on March 22, 1995, and his

gastritis was inactive at that time.

4. On January 12, 2006, FAB issued a final decision accepting the employee's claim for chronic atrophic gastritis and awarding him medical benefits under Part E for that covered illness.

5. On December 14, 2005 and March 22, 2006, the employee claimed for wage-loss benefits under Part E based on his chronic atrophic gastritis and alleged that he had lost wages due to that illness from the March 22, 1995 date of his diagnosis to the present.

6. Starting in 1991, the employee earned reported wages as follows: 1991 $3,768.48; 1992 $13,423.25; 1993 $5,650.89; 1994 $2,494.35; 1995 and 1996 $0; 1997 $1,658.32. The employee earned no reported wages from 1998 up to the May 25, 2010 date of his latest hearing.

7. On January 25, 1997, the employee was examined by Dr. Brown, who wrote a detailed medical report that included a "Functional Assessment" in which she opined that the employee's atrophic gastritis "should not limit the claimant in any areas of employment." This medical opinion is the only opinion in the file that addresses wage-loss due to chronic atrophic gastritis between March 1995 and October 2005.

8. On April 24, 2006, Dr. Told opined that the employee "will never be able to work again" due to his chronic atrophic gastritis.

Based on the above-noted findings of fact and the totality of the evidence, FAB hereby makes the following:

CONCLUSIONS OF LAW

Part E of EEOICPA provides several different types of benefits to eligible DOE contractor employees. Among those benefits are medical benefits, compensation for permanent impairment, and compensation for qualifying calendar years of wage-loss. In order to prove eligibility for any of these benefits, the evidence must establish that the employee is or was a "covered DOE contractor employee" and that he or she contracted a "covered illness" through exposure to a toxic substance at a DOE facility.

In this particular Part E claim, FAB has already determined that the employee is a "covered DOE contractor employee," as that term is defined in 42 U.S.C. § 7385s(1), and that his chronic atrophic gastritis is a "covered illness" pursuant to § 7385s(2). Additionally, he has already been awarded both medical benefits and impairment benefits under Part E for that covered illness. However, FAB concludes that the employee did not experience qualifying calendar years of wage-loss as the result of his covered illness of chronic atrophic gastritis and that, therefore, he is not entitled to wage-loss benefits for that illness under Part E of EEOICPA. *See* 42 U.S.C. § 7385s-2(a)(2).

The employee claims entitlement to wage-loss benefits from March 1995 to the present. In order to establish qualifying calendar years of wage-loss under Part E, the statute requires evidence that the employee experienced wage-loss beginning in a specific month, as well as rationalized medical evidence that the wage-loss in that "trigger month" was caused by his covered illness. *See* 42 U.S.C. § 7385s-2(a)(2); 20 C.F.R. §§ 30.800-805. Both the loss of wages and the causal relationship with the

covered illness must be proven. If the evidence does not sufficiently prove the statutory element of causation, the employee cannot have qualifying calendar years of wage-loss because the covered illness did not cause his wage-loss. Likewise, if the evidence does not show that the employee earned wages during the 36-month period immediately preceding the trigger month, the employee cannot have qualifying calendar years of wage-loss because he had no wages to lose. These elements of causation and lost earnings must co-exist, and must be tied to the same trigger month, in order for a wage-loss claim to satisfy the statutory requirements. *See* 42 U.S.C. § 7385s-2(a)(2); 20 C.F.R. §§ 30.800-811. *See also Trego v. Dep't of Labor*, 681 F.Supp.2d 894 (E.D. Tenn. 2009).

A review of the medical evidence of record establishes that the employee was first diagnosed with chronic atrophic gastritis on March 22, 1995. Two separate doctors, Dr. Newman and Dr. Mayer, opined that the employee's gastritis was inactive as of the date of its diagnosis. In chronological order, the next piece of medical evidence is the April 29, 1996 report of Dr. Stelmach. In that report, Dr. Stelmach reviewed the employee's gastrointestinal issues up to that point in time, and concluded that "[a]t this point it appears as though this patient is chronically debilitated." In her June 17, 2010 letter to FAB, the employee's representative urged that Dr. Stelmach's observation be accepted as a firm, rationalized medical opinion that the employee could no longer earn wages as of the April 29, 1996 date of the letter. As the letter does not constitute such evidence, FAB declines to reach such a conclusion.

However, Dr. Stelmach's observation is to be accorded an appropriate level of weight as evidence that it appeared to Dr. Stelmach on that day that the employee was chronically weak. Such an observation is some evidence that the employee was in a generally weakened condition at that point in time due to his many gastrointestinal ailments, including his gastritis. However, Dr. Stelmach's reserved observation does not, either standing alone or coupled with other available evidence, constitute the type of "rationalized medical evidence of sufficient probative value" that the regulations require be supplied to establish a causal link between the employee's covered illness and a specific period of wage-loss. *See* 20 C.F.R. § 30.805(b). As described above, Dr. Stelmach's letter is brief, unrationalized and conclusory in nature, and his initial characterization of the employee's gastritis symptoms as "unremitting" is inconsistent with both the employee's own hearing testimony and his treating physician's (Dr. Told) later description of those symptoms as periodic. The letter is not proof that the employee could not work or that he lost wages over any identifiable term due to his covered illness. Again, the letter is of some, albeit limited, value on the specific issue at issue in this claim.

Next chronologically, Dr. Brown examined the employee and obtained historical information directly from both the employee and his wife on January 25, 1997. Dr. Brown prepared a detailed 6-page report, which included a "Functional Assessment" section. In this section, Dr. Brown opined that the employee's chronic atrophic gastritis "should not limit the claimant in any areas of employment." This opinion is supported by her findings in the body of the report that the employee suffered "crampy belly pain" only periodically ("a couple of times a week") and that such pain was limited by the employee through avoiding stress, taking Pepcid tablets, and avoiding certain foods. The report addressed a plethora of illnesses and conditions experienced by the employee from 1988 through January 1997 and discussed the impact of the employee's health condition on his daily living.

As the district office found, Dr. Brown's detailed assessment and her resulting medical opinion constitute objective, rationalized medical evidence on the determinative issue, *i.e.*, whether there is a causal link between the employee's covered illness and a loss of wages. Dr. Brown's opinion is supported by her description of her examination of the employee and was explicitly informed by the history provided by both the employee and his wife. Importantly, the opinion directly addresses the

statutory wage-loss element of causation, and it is the most contemporary medical opinion (*i.e.*, the closest in time to the March 1995 time at which the employee claims his wage-loss began) to do so. Although he claims to have visited the hospital multiple times due to his gastritis, the employee did not provide any medical records from the 1990s that directly addressed this causation issue, *except for Dr. Brown's report*. For these reasons, the district office found that Dr. Brown's 1997 opinion is to be accorded significant probative weight on the issue of whether the employee's gastritis caused him to experience wage-loss in the years following his initial diagnosis. FAB agrees with that assessment.

The next medical opinion, chronologically speaking, comes almost nine years later. On October 5, 2005, Dr. Told stated in a letter to the district office that the employee's gastritis had caused him "periods of chronicity with recurrent pain [and so] far, he has been unable to carry out any extended employment." Consistent with the district office's impression, FAB concludes that that letter is of limited probative value for several reasons. Dr. Told did not, in that letter, identify the timing, duration, or severity of the reported "periods of chronicity," nor did he explain what he meant by "extended employment." Also, the "so far" statement at the end of that letter does not identify a time-frame for the claimed period of the employee's inability to "carry out. . .extended employment." FAB thus concludes that Dr. Told did not, in that letter, identify any specific periods of time during which the employee's gastritis caused him to lose wages, nor did he provide a rationalized explanation for his "so far" statement. FAB also concludes that Dr. Told's October 5, 2005 letter does not, standing alone or in concert with other evidence, constitute rationalized medical evidence of sufficient probative value to establish that the employee experienced wage-loss in March 1995—or during any other identifiable time frame—as a result of his covered illness.

Because Dr. Told's October 5, 2005 letter was vague in its time frame and was lacking in rationalization, the district office asked for clarification. Specifically, the district office asked Dr. Told how he came to the conclusion that the covered illness caused the employee to lose wages and, they asked him, "[s]ince you state that the gastritis is inactive, what periods of time did the gastritis keep **[Employee]** from working?" In his April 24, 2006 response, Dr. Told stated that "**[Employee]** has. . .been symptomatic throughout *this period*." (emphasis added) Since Dr. Told did not further define or explain what he meant by "this period," that portion of his April 24, 2006 letter provides little, if any, clarification of his letter of October 5, 2005. The final sentence of his April 24, 2006 letter, however, provides the requested clarification. In that sentence, Dr. Told summed up his opinion: "Therefore, it is my conclusion that he would require stress avoidance as the only effective means of controlling chronic gastritis and I feel he will never be able to work again." In this sentence, Dr. Told, for the first time, provides a medical opinion of the causal effect of the employee's covered illness on his wages and a time-frame as to when the gastritis will cause the employee to lose wages; *i.e.*, from the April 24, 2006 date of the letter onward. Dr. Told's clarification letter did not identify any month prior to April 2006 during which the employee experienced wage-loss as the result of the covered illness, but the letter does constitute medical evidence that the employee's illness would keep him from working from April 24, 2006 forward.[4]

The EEOICPA wage-loss provisions and governing regulations require "rationalized medical evidence" of sufficient probative value to establish by a preponderance of the evidence that the period of wage-loss at issue is causally related to the employee's covered illness. *See* 42 U.S.C. § 7385s-2(a)(2)(A)(i); 20 C.F.R. §§ 30.111(a), 30.805(b). *See also Trego*, 681 F.Supp.2d at 897. Based on the totality of the evidence in the case file, FAB concludes that the rationalized medical evidence in this case is not sufficient to establish a causal relationship between the employee's covered illness and any loss of wages prior to April 24, 2006. Thus, as the evidence is insufficient to establish that the covered illness caused any wage-loss prior to April 24, 2006, there can be no qualifying wage-loss for the calendar

years prior to that date. *See* 42 U.S.C. § 7385s-2(a)(2)(A)(i); 20 C.F.R. § 30.805.

However, the medical evidence *is* sufficient to establish that the employee's illness would keep him from working from April 24, 2006 forward. Thus, as the element of causation under clause (i) of § 7385s-2(a)(2)(A) is established as of April 2006, clause (ii) requires calculation of the employee's average annual wage (AAW) relevant to that trigger month. *See* 42 U.S.C. § 7385s-2(a)(2)(A); 20 C.F.R. §§ 30.800-811. *See also Trego*, 681 F.Supp.2d at 897-898. The AAW that is relevant for purposes of the wage-loss provisions of EEOICPA is "the average annual wage of the employee for the 36-month period immediately preceding the calendar month referred to in clause (i)." *See* 42 U.S.C. §§ 7385s-2(a)(2)(A)(ii); 20 C.F.R. § 30.801. Because the month referred to in clause (i) is April 2006, FAB must look to the 36-month period immediately preceding the second quarter of 2006. *See* 20 C.F.R. § 30.810; Federal (EEOICPA) Procedure Manual, Chapter 2-1400.9 (July 2009).

The evidence establishes that the employee earned no wages during the relevant 36-month period in 2003-2006. Several SSA documents in the case file, including documents submitted by the employee since the District Court's remand, show that the employee earned no wages in 2003 through 2006. During the latest hearing, the employee confirmed that he had earned no reported wages since 1998, and that the only money he did earn since that time was of a negligible amount from "occasionally" plowing snow from his friends' driveways (for which he provided no evidence of dates or amounts earned). Therefore, his AAW for the relevant 2003 to 2006 time frame, calculated in accordance with the governing regulations, is zero. *See* 20 C.F.R. § 30.810. Since the employee had no wages during the relevant 36-month period preceding the trigger month, he cannot have any subsequent qualifying calendar years of wage-loss under clause (iii) of § 7385s-2(a)(2)(A). *See* 42 U.S.C. § 7385s-2(a)(2)(A)(iii); 20 C.F.R. §§ 30.800-811.

The regulations provide that "Except where otherwise provided in the Act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion" required for eligibility. *See* 20 C.F.R. § 30.111(a). In light of the above, FAB concludes that the evidence in the case file is insufficient to establish, by a preponderance of the evidence, that the employee experienced any qualifying calendar years of wage-loss as the result of his chronic atrophic gastritis. Therefore, FAB concludes that the employee is not entitled to wage-loss benefits for his covered illness of chronic atrophic gastritis and hereby denies his claim for such benefits under Part E of EEOICPA.

Denver,

Anna Navarro

Hearing Representative

Final Adjudication Branch

[1] This transfer was required by 42 U.S.C. § 7385s-10(g).

[2] Consistent with the district office's interpretation of this response, FAB has analyzed the employee's request with the understanding that he is seeking wage-loss benefits for the entire period from March 22, 1995 (the date of diagnosis) to the present.

[3] 597 F.Supp.2d 1235 (D. 2009).

[4] At this point in time, the case file consists of over 4,000 pages of documents, including dozens if not hundreds of pages of medical records extending back into the early 1980's. A review of those records shows that the employee has been periodically placed under work restrictions at various times for various ailments, but none of those documented work restrictions refers to the employee's covered illness of chronic atrophic gastritis, until Dr. Told's letter of April 24, 2006.

EEOICPA Order No. 10076066-2009 (Dep't of Labor, March 5, 2010)

REMAND ORDER

This Remand Order of the Final Adjudication Branch (FAB) concerns the above claim for wage-loss under Part E of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA), 42 U.S.C. § 7384 *et seq*. Pursuant to the authority granted by the EEOICPA regulations, and for the reasons set forth below, the claim is remanded to the Seattle district office for further development and the issuance of a new recommended decision. 20 C.F.R. § 30.317 (2010).

On June 20, 2008, the employee filed a Form EE-1 claiming benefits under EEOICPA for the alleged conditions of asthma, idiopathic thrombocytopenia purpura (ITP) and bipolar depression. On May 8, 2009, FAB issued a final decision accepting the claim for asthma under Part E, based on the determination that the employee was a covered Department of Energy (DOE) contractor employee who was diagnosed with a covered illness (asthma), and that it was at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing that asthma. FAB therefore awarded the employee medical benefits for the treatment of her asthma, retroactive to June 20, 2008.

On October 21, 2009, FAB issued a second final decision accepting the employee's Part E claim for impairment due to her asthma and awarded her compensation in the amount of $62,500.00. On November 23, 2009, the employee requested wage-loss benefits due to her accepted asthma, for the period May of 1990 to December 31, 2008.

As part of the development of the employee's request for wage-loss benefits, the Seattle district office referred her claim to a District Medical Consultant (DMC). On February 3, 2010, the district office received the report of the DMC, who concluded that the employee's records supported approximately five to eight weeks of wage-loss causally related to her asthma or the treatment thereof, during 2004 and 2005.

On February 24, 2010, the Seattle district office issued a recommended decision to accept the claim for wage-loss due to asthma in the amount of $30,000.00. On March 4, 2010, FAB received her written statement, waiving her right to object to any of the findings of fact or conclusions of law found in the recommended decision of February 24, 2010.

In order to support a request for wage-loss benefits under Part E, rationalized medical evidence of sufficient probative value to establish that the period of wage-loss at issue is causally related to a covered illness must be submitted. 20 C.F.R. § 30.805(b). Specifically, the employee must prove that if not for her accepted condition of asthma, she would have continued to earn wages from her existing employment in January of 2004, the first month indicated by the DMC as a potential period of wage-loss.

The evidence of record, including an itemized statement of earnings from the Social Security Administration, indicates that the employee was not employed during the years 2003 or 2004. Since

she was not employed in January of 2004, the first month in which the DMC indicated that her asthma could have prevented her from working, the employee could not experience wage-loss at the time that was causally related to her accepted condition of asthma.

The regulations provide that at any time before the issuance of its decision, FAB may remand the claim to the district office for further development without issuing a decision. In light of the evidence of record showing that the employee did not actually lose any wages during January of 2004, her claim is being remanded to the Seattle district office. On remand, the district office should take such further development as they deem necessary, and issue a new recommended decision.

Seattle, Washington

Keiran Gorny

Hearing Representative

Final Adjudication Branch

In general

EEOICPA Fin. Dec. No. 10002977-2006 (Dep't of Labor, February 12, 2009)

[same as three up]