DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

20 CFR Parts 1 and 30

RIN 1215–AB51

Performance of Functions; Claims for Compensation Under the Energy Employees Occupational Illness Compensation Program Act of 2000, as Amended

AGENCY: Office of Workers' Compensation Programs, Employment Standards Administration, Labor.

ACTION: Final rule.

SUMMARY: On June 8, 2005, the Department of Labor (DOL) published interim final regulations that govern its responsibilities under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA or Act). Part B of the Act provides lump-sum payments of $150,000 and medical benefits to covered employees and, where applicable, to survivors of such employees, of the Department of Energy (DOE), its predecessor agencies and certain of its vendors, contractors and subcontractors. Part B also provides lump-sum payments of $50,000 and medical benefits to individuals found eligible by the Department of Justice (DOJ) for $100,000 under section 5 of the Radiation Exposure Compensation Act (RECA) and, where applicable, to their survivors. Part E of the Act provides variable lump-sum payments (based on a worker's permanent impairment and/or calendar years of qualifying wage-loss) and medical benefits for covered DOE contractor employees and, where applicable, provides variable lump-sum payments to survivors of such employees (based on a worker's death due to a covered illness and any calendar years of qualifying wage-loss). Part E also provides these same payments and benefits to uranium miners, millers and ore transporters covered by section 5 of RECA and, where applicable, to survivors of such employees.

At the same time the Department published the interim final regulations, it also invited written comments and advice from interested parties regarding possible changes to those regulations. This document amends the interim final regulations based on comments that the Department received.

DATES: *Effective Date:* This rule will be effective on February 27, 2007, and will apply to all claims filed on or after that date. This rule will also apply to any claims that are pending on February 27, 2007.

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SUPPLEMENTARY INFORMATION: The Department of Labor's interim final regulations implementing its responsibilities under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (42 U.S.C. 7384 *et seq.*), were published in the **Federal Register** on June 8, 2005 (70 FR 33590). They took effect immediately and included a 60-day period for comment. During the comment period, the Department received 533 timely comments: two joint comments from 39 congressional representatives; two from labor organizations; four from attorneys; four from advocacy groups; one from a lay representative; one from DOE; one from a DOE contractor; and 518 from individuals. The Department also received untimely comments from one physician, one attorney, one advocacy group, the Coconino County (Arizona) Board of Supervisors, one labor organization, the Navajo Nation and 23 individuals; all of the points they raised were also raised by the timely comments. Almost all of the timely comments (521) addressed the issue of eligibility for survivor benefits under Part E of EEOICPA; 494 of the comments addressed this issue alone. They also addressed a number of other issues, including the administrative claims process used to adjudicate claims under EEOICPA, entitlement qualifications, and the extent of coverage provided under Part E. The Department's section-by-section analysis of the timely comments it received is set forth below (see sections I and II).

Some minor changes have been made to the interim final regulations that did not result from any comments. One such change is the addition of new language to § 30.112(b) to recognize that pursuant to § 30.106, entities other than DOE may be verifying alleged periods of employment that claimants have reported to OWCP. A second change is the addition of language to § 30.301(c) clarifying that OWCP will also not issue a subpoena for the testimony of employees of the National Institute for Occupational Safety and Health (NIOSH) or contractors of either OWCP or NIOSH acting in their official capacities with respect to the EEOICPA claims adjudication process. In addition, the existing language of § 30.316(c) has been modified so that a recommended decision on a claim that is pending for more than one year after the date it was reopened for issuance of a new final decision will be considered a final decision on that claim as of that date, and § 30.400(a) has been modified to reflect the current practice of OWCP to pay for medically necessary treatment of a primary cancer in claims where the accepted occupational illness or covered illness is a secondary cancer.

When publishing a final rule following a comment period, it is customary to publish only the changes that have been made to the rule; however, in order to be more user-friendly, the Department is publishing the entire rule, including the parts that have not been changed. By doing so, only one document containing all of the regulations and commentary needs to be consulted rather than multiple documents.

I. Comments on the Interim Final Regulations

The section numbers used in the headings of the following analysis are those that were used in the interim final regulations. Unless otherwise stated, the section numbers in the text of the analysis refer to the numbering used for the final regulations. No comments were received with respect to part 1.

Section 30.5

One individual suggested that the definition for the statutory term ''Department of Energy facility'' be modified to more clearly identify the ''list of facilities established by the Department of Energy'' referred to in the interim final regulation. To eliminate any confusion with respect to this list, and as suggested by the comment, § 30.5(x) has been amended in this final rule to specify which list of facilities the Department has adopted. Another individual believed that the five-year latency period requirement for specified cancers listed in § 30.5(ff)(5) was ''in error'' and suggested that it be deleted. However, the latency period requirement is contained within section 7384l(17)(A) of the Act and cannot be modified in these regulations. Therefore, the suggested change was not made. A third individual suggested that § 30.5(gg) be modified to more clearly describe the requirements for eligibility of survivors under Part E. Section 30.5(gg) is only intended to inform readers that survivors must be alive to receive a payment. Because complete descriptions of the requirements for

eligibility of survivors under Part B and Part E of EEOICPA already appear at § 30.500, the suggested change is unnecessary and was not made.

Sections 30.100, 30.101, 30.102 and 30.103

One attorney pointed out that while employees and survivors can use Forms EE–1 and EE–2 to file their initial claims with OWCP, there was no form provided for filing a claim for an alleged consequential illness or injury. The absence of a specific form for claiming an alleged consequential illness or injury is intentional since in those situations, OWCP would already have all of the necessary factual information that could be requested by a form. Claimants need only submit written ''words of claim'' to OWCP, together with the type of supporting medical evidence described in §§ 30.207(d), 30.215, 30.222(b), 30.226 or 30.232(c), to file a claim for a consequential illness or injury. Therefore, no new form has been designed and the suggested changes to §§ 30.100 and 30.101 were not made.

Two individuals disputed the provision in § 30.101(c) that a survivor must be alive to receive a payment under the Act and noted that if all of the eligible survivors die before payment can be made, no payment can be made to any other individual as the heir of a deceased eligible survivor. However, this result is required under both Parts B and E of EEOICPA pursuant to sections 7384s(e)(1) and 7385s–3(c), which require that survivors under both Part B and Part E must be alive at the time of payment, and cannot be altered by regulation. Therefore, the requested change to § 30.101(c) was not made.

Three advocacy groups suggested that the provision in § 30.102 that OWCP will only adjudicate a claim for an increased impairment rating if it is filed at least two years from the date of the last award of impairment benefits is unreasonable and proposed that the waiting period to be reduced to either one year or six months. The claim development process that OWCP uses when it determines a covered Part E employee's minimum impairment rating is necessarily complex and usually takes a considerable amount of time to complete. For example, the medical evidence submitted in support of an alleged rating may not contain all of the information that OWCP will need to determine an impairment rating. OWCP would then have to seek that information from another source, or obtain an impairment evaluation by another physician before it would be able to determine the extent of the alleged permanent impairment based on the evidence in the case record. If claimants were permitted to apply for an increased impairment rating sooner than two years after their prior award for impairment benefits, the claims processing system would inevitably become less efficient and claimants who have not had their initial impairment claims adjudicated and who have not received benefits for their compensable permanent impairments would necessarily have to wait even longer to receive a decision from OWCP. Therefore, in order to maintain an efficient system of adjudication for all claimants and to best use its limited resources, OWCP concludes that the two-year waiting period should remain in place and none of the suggested changes to this section have been adopted.

One of these same advocacy groups also noted that while § 30.103 requires claimants to use approved forms when filing claims under Part E of EEOICPA, ''the present forms do not allow for claiming diseases other than cancer, berylliosis or silicosis.'' On June 20, 2005, the Office of Management and Budget approved new versions of Forms EE–1 and EE–2 that allow claimants to file for all illnesses potentially compensable under Part E. As noted in § 30.103(b), these forms are available on the Internet at *http://www.dol.gov/esa/regs/compliance/owcp/eeoicp/main.htm*. Therefore, the suggested change to § 30.103 is unnecessary and has not been made.

Section 30.106

One individual questioned whether DOE was in possession of sufficient employment data to enable it to verify alleged periods of employment for ''most'' claims. OWCP does not dispute that there are a number of facilities for which DOE does not have access to any employment data. However, OWCP has developed a number of alternative methods to be used for verifying alleged employment at those facilities. In acknowledgement of this situation, § 30.106 describes the various alternative methods by which OWCP may seek to verify alleged periods of employment at those facilities for which DOE has no employment data, and no change to this section was made in the final rule.

Sections 30.111, 30.113 and 30.114

One individual and two labor organizations questioned the description of the *general* burden of proof that all claimants must meet in order to establish their entitlement to any compensation under either Parts B or E of EEOICPA. Section 30.111(a) describes the general burden of proof that claimants must meet, ''[e]xcept where otherwise provided in the Act and these regulations,'' with respect to all of the required elements involved in a claim. As one of these labor organizations noted, there are differing burdens of proof between Parts B and E, as well as between different claimed illnesses within a single Part of the Act. This fact, however, does not mean that the description of the *general* burden of proof in § 30.111(a) is incorrect. OWCP is committed to helping claimants meet their burden of proof and is aware that some claimants may have difficulty proving both the presence of and their exposure to a toxic substance at a particular facility under Part E. In an effort to remedy this situation, OWCP is currently developing exposure matrices that will compile information provided by a variety of sources, including DOE, former worker medical survey programs, and epidemiological studies. For all of the DOE facilities, extensive documentation exists covering thousands of toxic materials. The matrices now being developed will be posted on our Web site and will be available to claimants and their representatives. While it is not possible to define precisely in a regulation how these complex matrices will be used in each case, OWCP's procedural guidance documents will provide additional clarity in this regard, and those documents will also be available to the public on our Web site. Nevertheless, it would not be appropriate to relieve claimants of their ultimate obligation to prove their claims, which is a standard requirement of all state and federal workers' compensation programs. Since Part E was intended to substitute for the state workers' compensation benefits that claimants could have sought DOE's assistance in obtaining under former Part D of EEOICPA, OWCP's application of standard workers' compensation principles is appropriate and no changes were made to § 30.111(a).

Another individual suggested that OWCP amend § 30.111(c) to state that an affidavit submitted by a claimant is not, in and of itself, sufficient to establish a period of alleged employment. Section 30.111(c) currently states that such affidavits ''may be relied on in determining whether a claim meets the requirements of the Act. * * *'' However, since § 30.112(b)(3) already makes clear that OWCP may reject a claim when the only evidence of covered employment is a ''self-serving affidavit,'' the suggested change is unnecessary and was not adopted in the

final rule. A third individual suggested that language be added to § 30.111 stating that when OWCP requests a second opinion from a medical specialist, it will only provide such specialist with copies of the ''medical'' evidence in the case file to review instead of all ''relevant'' evidence in the file. This suggestion ignores the fact that factual evidence from a case file may be highly relevant (*e.g.*, evidence of exposure levels, environmental assessments, etc.) to the probative value of the specialist's medical opinion and as a result, the requested change was not made.

A third individual requested that § 30.113(a) be changed to indicate that OWCP will accept various types of ''electronic'' submissions in support of claims for compensation under EEOICPA, while an advocacy group suggested that § 30.113(c) be changed due to its belief that all statements regarding the substance of lost or destroyed factual or medical evidence would be ''self-serving'' and therefore not acceptable. Both of these provisions have been in effect since the issuance of the first final rule on December 26, 2002, and have not proved problematic in practice. Therefore, the requested changes were not made in this final rule.

A fourth individual disagreed with the general requirement in § 30.114 that claims for compensation under EEOICPA be supported with medical evidence that establishes the existence of the alleged occupational illness under Part B or covered illness under Part E. However, these medical requirements are derived from the statutory requirements in the Act itself and cannot be altered through the rulemaking process. Therefore, the requested change to § 30.114 was not made.

Section 30.115

Two individuals asserted that application of the dose reconstruction process discussed in § 30.115 of the interim final regulations to Part E cancer claims would be neither just nor fair, and one advocacy group asked how OWCP planned to adjudicate the claims of employees with non-specified cancers (those not listed at § 30.5(ff)) at newly designated Special Exposure Cohort worksites. With respect to the first of these two concerns, the discussion of § 30.213 in the preamble to the interim final rule described the scientific and administrative reasons why OWCP decided to use the existing dose reconstruction process from Part B to adjudicate certain radiogenic cancer claims filed under Part E, and the two commenters have not presented any arguments challenging the underlying bases for that decision. As for the comment regarding OWCP's adjudication of non-specified cancer claims following an administrative addition of a class of employees to the Special Exposure Cohort, this question involves the manner in which the Department of Health and Human Services (HHS) defines the new class of employees and the unique factual basis for its addition to the Special Exposure Cohort. However, since neither of these matters are within the jurisdiction of OWCP, they cannot be addressed in the context of this rulemaking (see § 30.2(b)). For the above reasons, no changes were made to § 30.115 in the final rule based on these three comments.

Section 30.213

OWCP received 19 comments regarding the operation of § 30.213 with respect to the 50 percent compensable level of probability of causation (PoC) it will use to adjudicate claims for radiogenic cancer under Part E of EEOICPA (three comments were received from advocacy groups, 11 from individuals, two from congressional representatives, one from a lay representative, and two from a single labor organization). These comments requested that OWCP lower the compensability level below the 50 percent level that is used for Part B claims, but gave no scientific or other rationale for setting the compensability level at any particular point below 50 percent. Rather, the commenters base their arguments on the fact that the statutory causation standard for Part E uses language that differs from the language used for Part B. For the reasons set forth below, OWCP has determined that it is more consistent with congressional intent and current science to continue to use HHS's regulations in making the determination required by section 7385s–4(c)(1)(A) of the Act because those regulations provide the only reasonable factual basis upon which OWCP can determine if it is ''at least as likely as not'' that exposure to radiation at a DOE facility or RECA section 5 facility was a ''significant factor in aggravating, contributing to, or causing'' radiogenic cancer for which compensation is claimed under Part E.

It is clear from the scientific literature that it is not possible to definitively attribute any individual's cancer to any particular cause, and no commenter identified a method of attribution. As noted in Science Panel Report No. 6, *Use of Probability of Causation by the Veterans Administration in the Adjudication of Claims of Injury Due to Ionizing Radiation,* issued by the Committee on Interagency Radiation Research and Policy Coordination of the Office of Science and Technology Policy, Executive Office of the President (August 1988), ''[a]nalysis of medical findings cannot separate the 'radiogenic cases' from those unrelated to radiation exposure; no 'biological markers' have yet been identified that can unequivocally point to radiogenic cancers as distinct from non-radiogenic cancers. An excess incidence of cancer is identifiable in a statistical sense only.''

It is, thus, not surprising that Congress required the use of statistical probability in the determination whether to compensate an individual with a claimed cancer under Part B. Under Part B, an individual will be determined to have sustained ''cancer in the performance of duty for purposes of the compensation program if, and only if, the cancer [at issue] was at least as likely as not *related to* employment at the facility'' (emphasis added), determined pursuant to guidelines based upon radiation dose 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 well as a number of other factors. The technical documentation prepared by HHS to explain the computer program used to make this calculation similarly notes that ''it is not possible to determine, for a given individual, whether his or her cancer resulted from workplace exposure to ionizing radiation.'' (NIOSH—Interactive RadioEpidemiological Program (IREP) Technical Documentation, June 18, 2002). Part B, thus, requires that a claimed cancer be determined to be ''related to'' employment at a covered facility if the radiation dose and other factors combined indicate that there is a statistical probability that the cancer would not have occurred in the absence of work-related exposure to radiation. In other words, the PoC determination made for purposes of Part B is actually a determination that there is a 50 percent or better chance that radiation was a factor, however slight, ''in aggravating, contributing to, or causing'' a claimed cancer because, in the absence of work-related exposure to radiation, the cancer would not have occurred at all.

Because it is impossible to determine the extent to which any individual factor contributed to the development of cancer, OWCP has concluded that the only way to comply with the statutory

mandate in Part E is, in effect, to interpret ''a significant factor'' as including any factor. Accordingly, the determination made pursuant to HHS regulations issued under Part B whether there is a 50 percent probability that radiation was a factor in the development of cancer (*i.e.*, that in the absence of work-related exposure to radiation, the cancer would not have occurred at all) will be deemed sufficient to establish that radiation was not only a factor, but was also a significant factor ''in aggravating, contributing to, or causing'' the cancer in question.

The position taken by the commenters appears to be based on a misunderstanding of the test used by Congress in Part B of EEOICPA for determining coverage for cancer due to exposure to radiation. The standard used is whether a cancer suffered by a worker is ''related to'' his or her employment at a covered facility. The commenters suggest that Part B awards benefits only for cancers caused by exposure to radiation, while Part E was intended to award benefits where the cancer was either caused by or contributed to by exposure to radiation. This misunderstanding may well stem from use of the term ''probability of causation'' to describe the results of the statistical determination made by the radioepidemiological tables used in the process. By using the term ''related to'' in Part B, however, Congress encompassed all cancers for which there is a statistical probability that exposure to radiation was a factor in the development of the cancer. Despite the use of the word ''causation'' in the term ''probability of causation,'' the determination reached is not an individual determination of the mechanism of cause and effect leading to a particular cancer, which as explained above is not scientifically possible, but a statistical prediction of the probability that the cancer would not have occurred in the absence of exposure to radiation. Thus, the HHS technical documentation describes PoC as ''the likelihood that an existing cancer resulted from that [workplace radiation] exposure.'' (NIOSH–IREP Technical Documentation, June 18, 2002). Scientific analysis does not distinguish between cancers that are caused or contributed to by radiation. Since the actual mechanisms of cause (or contribution) for a given cancer are not known, only probabilistic assertions can be made, and they address only whether the cancer is more or less likely not to have occurred absent the exposure. The IREP approach identifies all conceivable cancers that might have resulted from the radiation exposure. This probabilistic approach is the only generally accepted scientific means of assigning responsibility for cancers in relation to radiation exposure. The Department of Veterans Affairs and the Defense Department also utilize essentially the same statistical probability test to adjudicate benefits for potentially radiogenic cancer cases incurred by veterans exposed to radiation.

Further, it should be noted that the epidemiological method utilized in this determination is actually far more favorable towards claimants than merely requiring a determination that radiation exposure was ''at least as likely as not'' a significant factor. The method specified by Congress for Part B and adopted by OWCP for Part E requires that OWCP use the upper 99 percent confidence interval to determine whether cancers of employees are to be compensable. In essence, a confidence interval indicates the likelihood that a statistical sample will reflect actual results and is often demonstrated in terms of a margin of error (*e.g.*, ±5 percentage points in a poll). The precise statistical definition of the 99 percent confidence interval is that if a study or poll were conducted 100 times, the results would be within the sample's margin of error 99 times and one time the results would be either higher or lower. For purposes of the calculations performed under Parts B and/or E of EEOICPA, an upper 99 percent confidence interval establishes a significant margin of error in favor of claimants for whether the exposures that appeared at least as likely as not to cause cancer actually did. That is, use of this confidence interval means that there is only a one percent chance that the exposure level has been underestimated and a 99 percent chance that it has been overestimated. Because of this extremely claimant-favorable margin of error, we believe that it is reasonable to conclude that the use of this method for adjudicating radiogenic cancer claims under Part E will provide compensation in any case in which it is at least as likely as not that an employee would not have suffered cancer absent his or her employment-related exposure to radiation.

This conclusion finds further support in the *Report of the NCI–CDC Working Group to Revise the 1985 NIH Radioepidemiological Tables* (September 2003), which found that the PoC model was a viable method to adjudicate claims for radiation-related instances of cancer that appropriately summarized ''the likelihood that prior radiation exposure might be causally related to cancer occurrence.'' The report described the Department of Veterans Affairs' use of PoC calculated at the 99 percent credibility limit (the term used in that report for confidence interval) as ''highly unlikely to exclude persons with meritorious claims. However it is likely to award many persons whose true [PoC's] are very much less than 50 percent.'' For example, as noted in that report, because of the substantial margin for error established by use of the 99 percent confidence level, a cancer that is actually nine percent likely to have been caused by the alleged exposure, but for which data is limited, could yield a PoC of 82 percent under the HHS PoC guidelines.

OWCP also believes that utilizing the 50 percent PoC process for Part E is more likely to result in a scientifically valid and consistent determination process than attempting to reach a determination based on medical opinions from physicians that inevitably contain a significant speculative component. Use of the PoC guidelines for claims under both Part B and Part E allows OWCP to adjudicate the entitlement of radiogenic cancers that are potentially compensable under both Part B and Part E in a uniform manner. Any process for determining coverage of claims for radiogenic cancers that would yield inconsistent results as to whether that cancer is compensable under Parts B and E is unlikely to be understood or accepted by claimants and other stakeholders.

The commenters' argument that eligibility for a radiogenic cancer under Part E should be based on a lower than 50 percent PoC level apparently is based on their interpretation of the language of section 7385s–4(c)(1)(A), which requires a determination that 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 claimed cancer. While Congress utilized different terminology to establish the test for compensation in Part E and Part B, the differences reflect the fact that Part B was intended to establish narrowly drawn tests for specific medical conditions, such as radiogenic cancer or chronic beryllium disease. Part E, on the other hand, sets forth a broad test that must be used to determine the compensability of a virtually unlimited array of illnesses potentially caused by exposure to the tens of thousands of toxic substances present at Department of Energy facilities. While there is no way to distinguish between causation and

contribution in regard to cancer related to exposure to radiation (because it is only possible to determine the statistical probability that, absent work-related exposure to radiation, the employee in question would not have incurred the cancer or cancers from which he or she suffered), Part E applies to other types of illnesses for which the concept of ''contribution'' may be highly relevant. Indeed, unlike the case of radiogenic cancer, it is possible to determine that toxic exposure contributed to a number of other illnesses or that other pre-existing illnesses were aggravated by toxic exposure. Therefore, the difference in the statutory language between the standard in Part B and the standard in Part E does not indicate that Part E was intended to establish a more lenient test, but can be explained by the fact that it was designed to cover a wide variety of situations and circumstances, as opposed to the more narrowly drawn Part B radiogenic cancer standard, where no difference existed between causation and contribution.

It should also be noted that the regulation specifies that the PoC model will be determinative under Part E only with respect to claims where the sole alleged condition is radiogenic cancer. When a claim for cancer under Part E cannot be accepted based on exposure to radiation alone because the PoC was determined to be less than 50 percent, the claimant is provided the opportunity to establish that the cancer was caused by a combination of exposure to radiation and exposure to one or more other toxic substances. OWCP will adjudicate those claims for cancer allegedly due to exposure to radiation combined with exposure to one or more other toxic substances using the eligibility criteria for other covered illnesses in §§ 30.230 through 30.232. As a result, no changes were made to § 30.213(c) in the final rule.

Sections 30.230, 30.231 and 30.232

One labor organization suggested that the statutory terms ''aggravated,'' ''contributed to'' and ''caused'' from one portion of the Part E causation standard appearing in section 7385s–4(c)(1)(A) of EEOICPA be defined in § 30.230 of the final rule so it will be ''possible to determine how DOL will adjudicate claims.'' However, these statutory terms have a long and settled history in workers' compensation law, and OWCP believes any attempt to further define those terms (which involve matters of administrative discretion and professional medical opinion) would only lead to increased confusion. As a result, § 30.230 has not been amended in the final rule.

Two comments from congressional representatives, three from advocacy groups and one from an individual asserted that it would be extremely difficult for claimants to satisfy their burden of proof under § 30.231 to establish both the presence of a toxic substance and the employee's exposure to the substance without the development of site exposure assessments of toxic substances. OWCP shares this concern and is committed to studying all of the available information pertaining to these sites and making publicly available a listing of the toxic substances present at such sites. The information compiled from these studies will be accepted as probative evidence in determining the eligibility of claimants, barring extraordinary and unusual circumstances, and § 30.231(b) has been modified to clarify OWCP's policies regarding this matter. However, the remainder of the suggested changes to the burden of proof described in § 30.231 have not been adopted.

One advocacy group objected to the requirement in § 30.232(a)(2) that each claimant under Part E provide a signed medical release authorizing the release of any diagnosis, medical opinion or medical records documenting the employee's alleged covered illness and that it resulted from exposure to a toxic substance. The advocacy group is concerned that in some cases such documents may no longer exist. OWCP is aware of this problem and has established procedures in § 30.113 by which a claimant can nevertheless meet this requirement through the submission of affidavits attesting to medical evidence that was contained in documents that no longer exist. However, a signed medical release is needed in all Part E claims so OWCP may thoroughly investigate the claim. Thus, the suggestion to drop this requirement was not adopted. The same advocacy group and another advocacy group suggested that the requirement contained in § 30.232(c) that a claimant establish that a covered Part E employee suffered an injury, illness, impairment or disease as a consequence of a covered illness be deleted. These commenters feel that OWCP claims examiners should have enough documentation and medical evidence in the case file to made these determinations without requiring the submission of additional medical evidence. However, the nature of these consequential conditions is that they only arise subsequent to the development of an underlying condition, thus necessitating the submission of more recent medical evidence establishing their causal relationship to an existing covered illness. Accordingly, the suggestion was not adopted in the final rule.

Section 30.300

Two comments from individuals, two from congressional representatives and one from an advocacy group suggested that OWCP use Physicians Panels to make determinations when there is a dispute with regard to issues of causation or the degree of impairment. After considering the use of Physicians Panels in the adjudication of Part E claims, OWCP decided in the interim final rule to base the formal adjudicatory and review structure for those claims on the same successful and streamlined structure that has been used for Part B claims since 2001. The use of Physicians Panels as deciding bodies for claims submitted to DOE under former Part D of EEOICPA proved to be both inefficient and extremely time-consuming. Nevertheless, OWCP will use a full range of qualified medical specialists to assist in the development of claims, especially the kind of complex cases these comments discuss. When a claim involves extreme complexity and multiple medical disciplines, OWCP may refer the claimant to a panel of physicians for a medical evaluation. Once a report is received, OWCP's adjudicatory staff will then consider it when they make a decision on the claim. OWCP continues to believe that this type of claims adjudication process provides for a more efficient and expeditious handling of medical disputes and the application of more uniform criteria to resolve such disputes. Thus, the suggested changes have not been adopted.

The same advocacy group suggested that OWCP state in the regulations the processes it will follow with respect to classified information that may be pertinent to a claim under EEOICPA, and urged that in situations where the claimant or his or her representative lacked the requisite security clearances, OWCP should ask the Ombudsman to provide a properly cleared lawyer or qualified technical expert to evaluate the factual evidence and advocate on behalf of the claimant during the claims adjudication process. OWCP is also concerned about the impact of using classified information to adjudicate claims under the Act. However, since it is not the classifying agency with respect to such information, it cannot allow greater access to the information than is currently permitted. As for the suggestion that OWCP should ask the Ombudsman to nominate or otherwise provide a person with the requisite security clearance to advocate for

claimants, the Ombudsman is not authorized to perform that function by either the statute or Secretary's Order 1–2005 (70 FR 33328), which established the Office of the Ombudsman within the Department. The Ombudsman does not have any role in the claims adjudication process administered by OWCP. Thus, the suggestions were not adopted in the final rule.

Another advocacy group suggested that the claims adjudication processes described in § 30.300 be altered to include a review by an ''independent entity'' like an administrative law judge. This same suggestion was made by several commenters with respect to this section as it appeared in the first interim final rule governing its administration of the Act that OWCP published on May 25, 2001 (66 FR 28948). As it noted when it subsequently published the first final rule governing its administration of EEOICPA on December 26, 2002 (67 FR 78874), OWCP believed that utilizing administrative law judges or another type of independent review body would unnecessarily complicate and delay the claims adjudication process to the detriment of claimants. The commenter did not present any new reason not previously considered by OWCP when it originally decided to retain the adjudicatory structure described in § 30.300, or any evidence of problems with it since its inception in 2001. Therefore, the suggested change to this section of the regulations was not adopted.

Sections 30.301 and 30.302

One advocacy group suggested that OWCP extend the ability to request issuance of a subpoena to include Part E claims as well as Part B claims, and that this ability should be extended to all stages of the claims adjudication process. Section 30.301 indicates that a claimant may request that a Final Adjudication Branch (FAB) reviewer issue a subpoena in connection with a claim under Part B of EEOICPA. The statutory authority underlying this section is derived from section 7384w, which only applies to claims filed under Part B; Part E does not contain a similar provision. Therefore, OWCP does not have authority to extend the ability to request a subpoena to claimants under Part E. Further, OWCP has found it to be more efficient to limit the use of subpoenas by claimants to the portion of the claims adjudication process that includes the right to request an oral hearing, *i.e.*, the portion before the FAB. OWCP claims examiners regularly assist claimants in obtaining relevant documents and information in the early development of claims under EEOICPA, and adding subpoena requests to this assistance would not appear to be either efficient or productive. Therefore, the suggested changes to § 30.301 have not been adopted.

One attorney suggested that § 30.302 be modified so that claimants will be relieved of their obligation to pay the costs associated with subpoenas they have requested when the subpoenaed witness submits evidence into the case record that is relevant to the claimant's case and where the witness failed before the hearing to provide written evidence after being requested to provide such evidence by the claimant. OWCP believes that the suggested modification erroneously presumes that there will likely be situations where a witness will refuse to provide requested evidence without issuance of a subpoena by a FAB reviewer. This has not been the experience of OWCP in other benefit programs it administers, and OWCP does not contemplate that it will occur in its future administration of Part B. Up to the present time, OWCP has not encountered significant difficulty obtaining the factual or medical evidence necessary for it to adjudicate these claims, and there is no reason to think that these sorts of difficulties will occur in the future. Therefore, the suggestion to modify § 30.302 was not adopted in the final rule.

Section 30.303

DOE commented that the 60-day period within which it was required to respond to a request from OWCP for information or documents relevant to a claim under Part E of the Act in § 30.303 was unreasonable, and noted that it would not be able to respond to such a request in a timely manner if the evidence needed to be reviewed for declassification purposes. As an alternative, DOE proposed that the standard for compliance with such a request be ''as soon as possible.'' While it does not dispute the validity of this concern, OWCP believes that the suggested proposal would effectively remove the time period for response from § 30.303. However, in order to accommodate DOE's belief that it requires additional time to comply with these necessary requests, OWCP has amended § 30.303(a) to provide DOE with 90 days within which to respond.

Sections 30.307 and 30.316

One attorney suggested that §§ 30.307(a) and 30.316(e) be amended to provide that a copy of the recommended decision and the final decision be sent to both the claimant and the claimant's representative. These sections currently provide that the recommended decision and final decision be sent to the claimant, unless he or she has a representative. In such a case, the recommended decision and final decision are to be sent only to the representative. OWCP believes that these suggestions have merit, and also notes that this has been the administrative practice of the program for some time. Thus, §§ 30.307(a) and 30.316(e) have been amended in the final rule to provide that OWCP will send a copy of the recommended decision and the final decision on a claim to both the claimant and the claimant's representative, if any.

Section 30.315

One attorney suggested that § 30.315 be amended to permit, at the discretion of the FAB reviewer, a postponement of a hearing if the claimant's representative provides reasonable notice that the representative has a medical reason that prevents his or her attendance at the claimant's hearing. The interim final rule permits such a postponement where the claimant is prevented from attending the hearing for medical reasons, and it is the current practice of OWCP to permit such postponements for representatives whose attendance is prevented for the same reasons. Thus, § 30.315(b) has been amended as suggested by the commenter.

Section 30.320

One attorney suggested that § 30.320(b) be amended to require the reopening of a final adverse decision on a claim if the claimant submits new evidence of a medical condition or discovers additional medical reports. The section currently requires the Director for Energy Employees Occupational Illness Compensation to a reopen a final decision on a claim if he concludes that the claimant has submitted new and material evidence with regard to either covered employment or exposure to a toxic substance, or identifies either a material change in the PoC guidelines, a material change in the dose reconstruction methods or a material addition of a class of employees to the Special Exposure Cohort. The experience of OWCP with respect to the processing and adjudicating of claims based on occupational or covered illnesses is that new medical evidence of a condition is easily obtained and, upon consideration, rarely sufficient to warrant the reversal of an earlier determination regarding a claimed condition. To permit an automatic reopening of a final decision based on such evidence would inevitably lead to

numerous frivolous reopenings and the attendant administrative inefficiencies would deprive claimants with meritorious claims of the opportunity to have those claims adjudicated in a timely manner. It should be noted, however, that claims may be reopened on the basis of new medical evidence by the Director under § 30.320(a), which permits the Director, at his discretion, to reopen a final decision at any time. For these reasons, the suggestion regarding § 30.320(b) has not been adopted.

Sections 30.400, 30.403, 30.404 and 30.405

OWCP received three comments from advocacy groups, one from an attorney and two from congressional representatives objecting to the wording in §§ 30.400, 30.403, 30.404 and 30.405 that suggested that there was no way for a claimant to administratively challenge a denial of a particular medical benefit. The wording in question was intended to describe the process that OWCP's medical billing contractor uses to inform claimants of decisions on medical bills that are submitted for payment. However, this wording incorrectly suggested that there was no administrative method by which a claimant could challenge an adverse medical billing determination by OWCP's contractor. To rectify this situation, and as suggested by the commenters, §§ 30.400, 30.403, 30.404 and 30.405 have been changed to indicate that a claimant may administratively challenge an adverse medical billing determination by utilizing the internal adjudicatory processes described in subpart D of the regulations.

Sections 30.410 and 30.411

One advocacy group asked that OWCP clarify the provisions in §§ 30.410(b) and 30.411(c) regarding disruptions of directed medical examinations. The provisions in question are intended to remind employees and their representatives that these medical examinations are under the control of medical professionals and are not, therefore, a proper forum for disputing aspects of individual claim adjudications. These physicians have been asked to conduct an examination at the request of OWCP in order to further clarify aspects of an employee's alleged medical condition, not to treat the employee, and therefore they do not have the type of ethical obligations regarding the employee that would otherwise naturally arise with a normal ''doctor-patient'' relationship. Since any attempt to interfere with a directed examination would disrupt the purpose of the examination, § 30.410(b) and § 30.411(c) set out the consequences of taking such actions, and have not been altered in the final rule.

This same advocacy group disagreed with § 30.411(b), which states that when OWCP finds that a conflict in the medical evidence exists, OWCP will select a third physician to conduct a referee examination that resolves such conflict. This process has been in place since the inception of OWCP's administration of Part B, and was not altered in any way with the promulgation of the interim final rule. Further, this same process has been used successfully in other benefit programs administered by OWCP. Accordingly, § 30.411(b) was not modified in the final rule.

The same advocacy group and another advocacy group criticized the absence of any ''conflict of interest'' provisions with respect to physicians in the interim final rule. These comments asserted that it was important that OWCP indicate that physicians involved in the claims adjudication process who submitted medical evidence upon which OWCP claims examiners would make determinations on claims would be subject to some sort of constraints regarding such matters as prior involvement with a claimant, former work for a claimant's employer, etc. OWCP agrees with the general thrust of these comments, and has added provisions to §§ 30.410 and 30.411 that indicate that physicians who perform directed medical examinations at the request of OWCP in connection with the claims adjudication process will be subject to ''conflict of interest'' standards devised by OWCP to ensure their compliance with ethical standards of professional conduct.

Sections 30.500 and 30.501

A total of 521 comments objecting to the definitions of ''covered'' child and ''surviving spouse'' for the purposes of Part E in § 30.500(a) were received from 502 individuals and one lay representative (several individual commenters submitted multiple comments on this issue). While the definition of a ''surviving spouse'' is the same one that applies to Part B claims, a ''covered'' child under Part E must meet the same definition of a ''child'' used in Part B and, as of the date of the covered Part E employee's death, be either under the age of 18, under the age of 23 and a full-time student who was continuously enrolled in one or more educational institutions since attaining the age of 18 years, or any age and incapable of self-support. These definitions merely follow, as they must, the definitions for these two terms that appear in section 7385s–3(d). Since these terms cannot be altered through the rulemaking process, the suggestions were not adopted and no changes were made to § 30.500(a).

The same lay representative and two of the same individuals also objected to the order of precedence for survivors under Part E that is set out in § 30.501(b) and argued that a surviving spouse should not be required to share an award with children of a deceased Part E employee under any circumstances. This section states that if there is a surviving spouse and at least one ''covered'' child of a deceased covered Part E employee who is living at the time of payment and who is not a recognized natural child or adopted child of such surviving spouse, half of the payment is made to the surviving spouse and the other half is shared equally among all ''covered'' children of the employee who are living at the time of payment. As was the case with the survivor definitions discussed in the preceding paragraph, the regulatory order of precedence for survivors under Part E of the Act merely tracks the statutory order of precedence contained in section 7385s–3(c)(3) of EEOICPA. Since the order of precedence for survivors under Part E cannot be modified by regulation, the suggestion was not adopted.

Section 30.505

Two advocacy groups suggested that the unified benefit payment processes for both Parts B and E described in § 30.505(a) be amended to require OWCP to issue a ''partial'' award of $12,500 to covered Part E employees at the time it determines that they have contracted a covered illness, and to determine the balance of any compensation due them within another six months. Unlike Part B of EEOICPA, which compensates individuals upon a finding that a covered Part B employee contracted an occupational illness, Part E monetary compensation can only be awarded if OWCP further determines that a covered Part E employee's wage-loss, impairment or death was due to his or her covered illness. Thus, this suggestion would result in the issuance of a monetary award to a claimant before OWCP has determined that the statutory entitlement criteria established by Part E have been met, and that a payment is due after any required offsets have been calculated. Shortening the monetary benefit payment processes for Part E as suggested by these two commenters would violate the explicit terms of EEOICPA, and therefore the

suggestions to change § 30.505(a) have not been adopted.

One labor organization suggested that § 30.505(d) be amended to permit a claimant to receive up to the $250,000 maximum aggregate compensation payable under Part E for both wage-loss and impairment, for each of his or her covered illnesses. As OWCP noted in the preamble discussion of this provision of the interim final rule, 42 U.S.C. 7385s–12 ''limits the aggregate compensation (other than medical benefits) that OWCP may pay under Part E to all claimants for each individual whose illness or death serves as a basis for compensation or benefits under Part E to a total of $250,000. This is the only reading of the statutory language that is consistent with the statutory requirement that the computation of both impairment benefits and wage-loss benefits under [section] 7385s–2 be based upon impairment or wage-loss that is 'the result of any covered illness.' This reading is also consistent with congressional intent, as reflected in the Conference Report for Public Law 108–375, which states that the 'maximum aggregate benefit available under [Part] E of EEOICPA is $250,000.' *See* H.R. Conf. Rep. No. 108–767, at 894 (2004).'' Thus, the suggested changes have not been adopted.

Section 30.509

Two advocacy groups asked why § 30.509(c) indicates that OWCP will only make an impairment determination for a deceased Part E employee if an eligible survivor makes an election to receive the compensation of the employee as permitted by section 7385s–1(2)(B) of EEOICPA, when the Conference Report states that survivors under Part E are to receive a minimum lump-sum payment of $125,000. These comments are based on a misunderstanding of the operation of § 30.509, which describes the very limited universe of survivors who are eligible to make the election described in section 7385s–1(2)(B), and the fact that the only survivors entitled to utilize this election provision would not be entitled to survivor benefits because the election is only available to survivors of a covered Part E employee who died ''from a cause other than the covered illness of the employee.'' Survivors who make this election will therefore not be eligible to receive any other compensation (such as the $125,000 lump-sum payment) under the terms of section 7385s–3. Accordingly, the provision discussed in § 30.509(c) is correct, and no changes were made to this section in the final rule.

Sections 30.513 Through 30.517

One lay representative suggested that in § 30.517, OWCP should more specifically describe the circumstances under which it would decide to waive its statutory right to recover an overpayment pursuant to section 7385j–2 of EEOICPA. While § 30.513 of the interim final regulations notes the general authority of OWCP to waive recovery of an overpayment of EEOICPA benefits, §§ 30.514 through 30.517 elaborate on that authority with a substantial amount of detail. In light of the variety of factual circumstances and fairness considerations that may apply in any specific case, it is not possible to identify particular circumstances rather than general principles concerning how this authority is to be exercised. Therefore, since §§ 30.513 through 30.517 in the interim final regulations adequately identify the standards that OWCP will use to make these determinations without depriving OWCP of sufficient flexibility to administer this aspect of the program, the suggested changes have not been adopted.

Section 30.600

One individual suggested that § 30.600(b) make it clearer that a claimant can grant a person a ''power of attorney'' to act on his or her behalf, and that such person can then designate a representative to pursue the claim under EEOICPA. OWCP believes there is merit in this suggestion. Thus, additional language was added to § 30.600(b) to clarify that a person who has been granted a power of attorney by a claimant under EEOICPA may designate a representative to pursue that claim before OWCP. Also, one attorney suggested that OWCP change § 30.600(c)(2) to allow an attorney or representative to complete, but not sign, a Form EN–20. OWCP believes that this suggestion has merit, and § 30.600(c)(2) has been amended as requested.

Section 30.603

One attorney suggested that the 10 percent limit for attorney fees for filing objections to a recommended decision should apply to the amount of the lump-sum awarded in the final decision. The interim final rule currently applies this limit to the amount by which the lump-sum award is *increased* as a result of the objections, and is consistent with the mandate in section 7385s–9 to limit such fees in Part E cases in the same manner as Part B cases. Since Part B claimants either receive a full lump-sum award or no award at all, successful objections to a recommended decision provide a claimant with an ''increased'' lump-sum award equal to the entire amount payable under Part B. Section 30.603(b)(2) in the interim final rule merely applies this same principle to Part E cases as required by the explicit terms of the Act. Since lump-sum awards to covered Part E employees may vary according to their level of impairment and the extent of their wage-loss, there may be instances where an objection to a recommended decision proposing to award benefits under Part E may result in a final decision awarding greater benefits. In such a case, the gain to the covered Part E employee from the filing of the objection will not be the entire lump-sum award; the gain will the difference between the lump-sum payment and the amount proposed in the recommended decision. To be consistent with Part B, as required by the statute, the attorney fees under Part E have to be limited to the difference in lump-sum amounts. Thus, the suggested change has not been adopted.

This attorney and two other attorneys also objected to the provision in § 30.603(b)(1) that does not permit a representative to charge a two percent fee unless he or she was retained prior to the initial filing of the claim. This provision, however, is based on the limitation contained in 42 U.S.C. 7385g(b)(1), which states that a representative may only charge a two percent fee ''for the filing of an initial claim for payment of lump-sum compensation. * * *'' OWCP believes that it would violate the statute to permit a representative to charge a fee of two percent of the lump-sum award if the representative was retained after the claim was filed. One of these two other attorneys also suggested that the term ''initial claim'' be defined to include the filing of amended claim forms, the submission of additional documents or data, or the reopening of the claim following the issuance of a final decision by the FAB; in the alternative, he also suggested that the limitations described in the interim final rule not apply to claims that were filed prior to the effective date of that rule, *i.e.*, June 8, 2005. OWCP believes that an expansive definition of the term ''initial claim'' would be inconsistent with the plain meaning of the statute, which has not changed in this regard since section 7385g was amended on December 28, 2001. For this same reason, OWCP also believes that there would be no justification for applying the fee limitations described in § 30.603 only to claims filed on or after June 8,

2005. Thus, none of these suggested changes were adopted in the final rule.

Section 30.609

Two advocacy groups disagreed with the requirement in § 30.609 that claimants must report (for offset purposes) any payments that they receive due to medical malpractice resulting from treatment of their occupational illness or covered illness. Such medical malpractice payments have as their genesis exposures for which compensation is payable under Part B or Part E of EEOICPA. Under section 7385 of EEOICPA, benefits payable under Part B or Part E must be offset to reflect these types of payments. Thus, OWCP must be informed of these types of payments so it can perform the statutorily mandated offset of EEOICPA benefits, and the suggestion to eliminate this section has not been adopted in the final rule.

Section 30.626

One lay representative and five individuals objected to § 30.626, which describes the required coordination of payments under Part E of EEOICPA with benefits from state workers' compensation programs for the same covered illness or illnesses. However, OWCP is required to coordinate Part E benefits in this manner by section 7385s–11 of the Act. Thus, the suggestion to eliminate this section has not been adopted.

Sections 30.801, 30.805, 30.806 and 30.815

One individual suggested that § 30.801 indicate that compensation will be provided to employees who have suffered occasional days of lost pay due to their covered illnesses. However, Part E is not a program that provides compensation for *any* wage-loss, regardless of amount, that a covered Part E employee may experience due to his or her covered illness. Instead, Part E only provides compensation under a specific formula in section 7385s–2(a)(2)(A) based on a qualifying amount of wage-loss sustained in a given calendar year, and this formula cannot be altered in this final rule. Thus, the suggestion has not been adopted.

One labor organization asserted that it is more difficult for employees who worked intermittently at DOE facilities to establish their average annual wage and their alleged calendar years of wage-loss through reliance on wage data received from the Social Security Administration, and that this will result in employees having to use the methods of § 30.806 to convince OWCP to determine a different average annual wage and/or the extent of compensable calendar years of wage-loss than it determined using § 30.805. However, the labor organization did not put forward any discernable proposal to address the purported problem it raised in its comment. While it is possible that some employees may incur difficulties in securing the type of records described as acceptable to OWCP in § 30.806, these difficulties alone should not relieve them of their burden to produce records that show a level of wage-loss sufficient to make them eligible for an award. OWCP claims examiners are instructed to accept tax returns, pay stubs, union records and pension records as evidence of earnings. In addition, claims examiners can request earning records from employers. Therefore, no change has been made to § 30.806 in the final rule. However, because of these concerns, § 30.805 has been amended in the final rule to more precisely define the term ''wages.'' Another labor organization asserted that some occupations are more likely to be affected by the business cycle than others, and asked that the wages of employees in these occupations be determined by looking to the average wages of their ''peer group'' rather than to their own individual wages. OWCP does not believe that adjustments for fluctuations in demand for labor in certain occupations can be made fairly or efficiently, nor does it believe that it has the authority to make this type of change to the statutory formulae for determining these matters by regulation. As a result, this suggested change has also not been adopted.

One individual suggested a stylistic change for the wording of § 30.815(b), which he felt was too confusing. Section 30.815(b) is merely intended to inform readers that in most situations, OWCP will determine the number of compensable years of wage-loss in accordance with the procedures described in §§ 30.800 through 30.811. The suggested change is not substantive in nature and would be, in OWCP's opinion, more confusing than the language that currently appears in § 30.815(b). Therefore, the suggested change to this section has not been adopted in the final rule.

Section 30.901

One labor organization questioned OWCP's ability to make the type of apportionment determinations described in § 30.901(a) of the interim final rule and asserted that there was no reasoned basis for allocating the cause of a permanent impairment of an organ or body function among both compensable and non-compensable exposures. This provision was based on the somewhat ambiguous language of section 7385s–2(a)(1)(A) of the Act, which can be read in such a way as to require the apportionment described in § 30.901(a) of the interim final rule. However, after carefully considering both the dearth of support for such apportionments in the medical literature and the practical difficulties that claims examiners would be faced with if they were required to make these particular types of determinations, OWCP agrees with the commenter and has decided to interpret the statutory provision in question as not requiring such an apportionment. Thus, OWCP has modified § 30.901(a) in the final rule to remove this requirement. Conforming changes have also been made to §§ 30.901(d), 30.902, and 30.908(b) and (c).

One lay representative, four individuals and the same labor organization also criticized the description of the criteria for physicians to perform impairment evaluations set out in § 30.901(b), and suggested that OWCP modify that description to make the criteria less restrictive so as to increase the potential pool of physicians who can perform impairment evaluations acceptable to OWCP. After considering several different potential criteria since the issuance of the interim final rule, OWCP believes that it has developed criteria that will satisfy the commenters' concern that there will be few physicians who meet the criteria in a given locality, or that claimants will not be able to use their local physicians to perform the testing and measurements upon which an impairment evaluation under Part E can be performed by a physician who meets the criteria. As changed, these criteria will now provide that a physician has to establish (to OWCP's satisfaction) that he or she possesses knowledge and experience in using the American Medical Association's *Guides to the Evaluation of Permanent* Impairment (AMA's *Guides*) and/or possesses the requisite professional background and work experience to conduct acceptable impairment evaluations. Further, while a claimant's local physician may not be able to satisfy all of the criteria described in § 30.901(b) and perform the impairment evaluation itself, the claimant can still elect to have such a physician perform the underlying objective testing and other procedures that another physician who does satisfy the criteria could rely upon in arriving at an evaluation of his or her impairment. Since OWCP has changed the policy to which the commenters

objected, no changes were made to § 30.901(b) in the final rule.

Sections 30.905 and 30.906

One individual objected to the provision in § 30.905(b)(1) that only impairment evaluations performed by physicians who meet the criteria identified by OWCP will be considered probative. The comment suggests that impairment evaluations performed by physicians of the Radiation Exposure Screening and Education Program (RESEP) that is administered by the Health Resources and Services Administration within HHS be considered probative under Part E of EEOICPA. OWCP has no objection to claimants submitting impairment evaluations performed by a RESEP physician, so long as that physician meets the qualifications set forth by OWCP. The same would be true for physicians who are affiliated with other government-sponsored health clinics. Not all physicians, however, have the necessary training to perform impairment evaluations (as noted above, claimants can utilize any physician to perform the testing and measurements upon which an impairment evaluation can be performed by a physician who meets OWCP's criteria). Thus, OWCP must put into place certain criteria to identify those physicians who are qualified to perform impairment evaluations upon which it can base its ratings. As a result, no changes to § 30.905(b)(1) were made in the final rule. Two other individuals objected to the requirement found in § 30.905(b)(2) that an impairment evaluation must have been performed within one year of its submission to OWCP for it to be considered probative in determining the permanent impairment of a covered Part E employee and suggested that this requirement be deleted. OWCP does not find any merit to this objection because the Act requires OWCP to determine the minimum impairment rating of the employee as of the time it is adjudicating the claim for the award. In light of this requirement, OWCP believes that it is reasonable to insist that the rating be based on an impairment evaluation that is no more than one year old. Two advocacy groups also suggested that this same requirement be deleted because covered Part E employees with previous temporary impairments from which they have recovered would not receive compensation. OWCP believes that the reasoning behind these latter comments ignores the mandate in the Act to compensate covered Part E employees for their permanent impairment rather than their temporary impairment. Thus, the suggestions to delete the requirement in § 30.905(b)(2) were not adopted.

Two attorneys suggested that § 30.906 be amended to provide that OWCP will pay for the cost of any additional impairment evaluation if such impairment evaluation increases the minimum impairment rating. In the interim final rule, this section states that OWCP will pay for one evaluation if it meets the criteria set forth in § 30.905(b), and that it will also pay for any additional impairment evaluations that it directs the employee to undergo (and reimburse the employee for reasonable expenses, as defined in the rule, that are associated with such an evaluation). OWCP is not persuaded that there is a reasonable basis for paying for additional impairment evaluations beyond those already described in § 30.906, and therefore the suggestion was not adopted in the final rule.

Sections 30.907 and 30.908

Two advocacy groups asserted that § 30.907(b) did not provide a process whereby a dispute regarding a covered Part E employee's impairment evaluation could be resolved. While § 30.907(b) in the interim final rule noted that the procedures for ''directed medical examinations'' set out in §§ 30.410 and 30.411 of the regulations applied to these types of disputes, OWCP acknowledges that it did not explicitly note that such procedures include the process by which OWCP resolves medical disputes in general. Therefore, in order to make this provision more clear, § 30.907(b) has been modified slightly in the final rule to explicitly note that OWCP will resolve medical disputes regarding impairment through the ''referee examination'' process set out in § 30.411.

One labor organization objected to the provisions in § 30.908 requiring that medical evidence of impairment submitted to the FAB in opposition to the impairment evaluation that was relied upon in a recommended decision conform to the requirements set out in § 30.905(b) in order to be afforded any probative value, and noted that claimants have the burden of proving that the new medical evidence has greater probative value than the impairment evaluation relied upon in the recommended decision. Requirements of this sort that set out minimum standards for new evidence and the assumption of the burden of proof when challenging a determination made below are standard features of any adjudicative system, and are necessary to conserve scarce administrative resources. OWCP does not agree that their use in this context is either unduly burdensome on claimants or inherently unfair in a system such as Part E. Therefore, no changes were made to § 30.908 as a result of the comment.

Section 30.910

Two comments from congressional representatives, four from advocacy groups and two from individuals objected to the provision in § 30.910(a) of the interim final rule that an impairment that cannot be assigned a numerical percentage using the AMA's *Guides* will not be included in a covered Part E employee's impairment rating, and noted that the Conference Report for Public Law 108–375 suggests that for those illnesses for which the AMA's *Guides* do not provide a method to assign a numerical percentage, the Department should devise another method to determine the amount of an impairment award to a covered Part E employee. *See* H.R. Conf. Rep. No. 108–767, at 893 (2004). However, as the Department pointed out when it promulgated § 30.910, the plain language of section 7385s–2(b) requires OWCP to determine the amount of an impairment award to a covered Part E employee in accordance with the AMA's *Guides* and does not contain the exception referred to in the Conference Report for ''an illness for which the [AMA's *Guides*] do not provide an impairment rating. * * *'' It should be noted that this suggestion appears to be based on the assumption that the AMA's *Guides* cannot be used to determine an impairment rating for an illness unless they explicitly provide a method to evaluate that particular illness. However, because the *Guides* evaluate the impairment of organs and body functions rather than illnesses *per se*, even a newly identified illness can be evaluated using the *Guides* so long as its effects on those organs and/or body functions are known and quantifiable.

As noted above, section 7385s–2(b) of EEOICPA requires that impairment ratings ''shall be determined in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*.'' The discussion of mental impairments that do not originate from documented physical dysfunctions of the nervous system in Chapter 14 (Mental and Behavioral Disorders) of the AMA's *Guides* states that ''there are no precise measures of impairment in mental disorders. The use of percentages implies a certainty that does not exist.'' Chapter 14 then explains that the authors of the current (fifth) edition of

the AMA's *Guides* are ''unaware of data that show the reliability'' of any percentages for these particular types of impairments and that ''the Committee on Disability and Rehabilitation of the American Psychiatric Association advised *Guides* contributors against the use of percentages in the chapter on mental and behavioral disorders of the fourth edition, and that remains the opinion of the authors of the present chapter.'' In support of their decision not to assign numerical percentages to mental impairments that do not originate from documented physical dysfunctions of the nervous system, the authors point out that ''[n]o available empirical evidence supports any method for assigning a percentage of impairment of the whole person'' to these disorders. Since the AMA's *Guides* clearly takes the position that there is no basis to calculate numerical percentages of mental impairment due to mental disorders, attempting to do so by devising a rating mechanism independent of the AMA's *Guides* would violate EEOICPA's requirement that impairment ratings be determined ''in accordance with'' the AMA's *Guides*. Thus, § 30.910(b) indicates that these types of mental impairments will not be included in an impairment rating; no change was made to this section in the final rule.

Section 30.911

Two comments from individuals, two from congressional representatives, two from advocacy groups and two from attorneys questioned the appropriateness of the provision in § 30.911(a) in light of the progressive nature of the covered illnesses that would be compensable under Part E of EEOICPA. OWCP's intent in the interim final rule was to apply the requirement that an individual reach ''maximum medical improvement'' in order for an impairment rating to be determined in a manner that is appropriate for the conditions covered by EEOICPA. OWCP recognizes that many of these covered illnesses are progressive, and that many employees may find themselves in a situation where their accepted condition is not likely to improve but can be expected to gradually deteriorate. The intent in the interim final rule was to allow for minimum impairment ratings to be calculated and compensated in such circumstances. However, since the wording of § 30.911(a) in the interim final rule did not convey this intent as clearly as it could have, this provision has been modified slightly in the final rule by changing the word ''change'' to ''improve'' in the final rule.

II. Miscellaneous Comments

Several of the 533 timely comments the Department received raised issues that either were not addressed in the interim final regulations or involved extraneous matters. The Department's analysis of these miscellaneous comments follows:

The Ombudsman

OWCP received one comment from an advocacy group pointing out that the interim final regulations did not address the role and functions of the Ombudsman provided for in section 7385s–15 of EEOICPA. However, this omission was intentional and required by the terms of section 7385s–15(d), which requires that the Ombudsman be independent ''from other officers and employees of the Department [of Labor] engaged in activities relating to the administration of the provisions of'' Part E of EEOICPA. Instead, the role and the functions of the Ombudsman are set out in Secretary's Order 1–2005. Therefore, the final rule also does not address either the role or the functions of the Ombudsman.

The Rulemaking Process

OWCP received one comment from an attorney on a specific aspect of the rulemaking process. Without identifying any particular provision of the regulations, the commenter opined that at least some of them would not be comprehensible to some members of the public and should be rewritten in ''plain English.'' OWCP acknowledges that some of the regulations for Part E involve complex medical matters or complicated arithmetic calculations. However, while these concepts can be difficult to comprehend, OWCP went to great lengths in an effort to ensure that the corresponding regulations in subparts I and J were written in a clear and understandable manner. Since the commenter neither identified a particularly incomprehensible provision of the regulations nor provided any suggested improvements, no additional changes were made to the regulations based on this comment.

Coverage

One DOE contractor and four individuals made suggestions about which workers or survivors should be covered by Part E of EEOICPA. However, the Act mandates the categories of workers and survivors covered under Part B and Part E and the regulations cannot be changed to either expand or restrict these categories unless the Act is amended. Therefore, the suggested changes have not been made in this final rule.

III. Publication in Final

The Department of Labor has determined, pursuant to 5 U.S.C. 553(b)(B), that good cause exists for waiving public comment on this final rule with respect to the following changes: (1) Corrections of typographical errors; and (2) minor wording changes and clarifications that do not affect the substance of the regulations. For these changes, publication of a proposed rule and solicitation of comments would be neither necessary nor fruitful.

IV. Statutory Authority

Section 7384d of EEOICPA provides general statutory authority, which E.O. 13179 allocates to the Secretary, to prescribe rules and regulations necessary for administration of Part B of the Act. Section 7385s–10(e) also provides the Secretary with the general statutory authority to prescribe regulations necessary for administration of Part E of the Act. Sections 7384t, 7384u and 7385s–8 provide the specific authority regarding medical treatment and care, including authority to determine the appropriateness of charges. The Federal Claims Collection Act of 1966, as amended (31 U.S.C. 3701 *et seq.*), authorizes imposition of interest charges and collection of debts by withholding funds due the debtor.

V. Paperwork Reduction Act

This final rule contains information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.* The requirements set out in §§ 30.401, 30.404, 30.420, 30.421, 30.512, 30.518, 30.700, 30.701 and 30.702 of this rule were both submitted to and approved by OMB under the PRA in OMB Control Nos. 1215–0054 (expires June 30, 2007), 1215–0055 (expires October 31, 2009), 1215–0137 (expires March 31, 2007), 1215–0144 (expires October 31, 2009), 1215–0176 (expires January 31, 2007), 1215–0193 (expires March 31, 2007) and 1215–0194 (expires March 31, 2007). The requirements in §§ 30.100, 30.101, 30.102, 30.103, 30.111, 30.112, 30.113, 30.114, 30.206, 30.207, 30.212, 30.213, 30.214, 30.215, 30.221, 30.222, 30.226, 30.231, 30.232, 30.415, 30.416, 30.417, 30.505, 30.620, 30.806, 30.905 and 30.907of this rule were also both submitted to and approved by OMB under the PRA in OMB Control No. 1215–0197 (expires August 31, 2007).

Following publication of this final rule, the Department plans to seek OMB approval of two new information collections under the PRA and will issue 60-day **Federal Register** notices

seeking public comment on (1) a collection that will annually request updated information relating to state workers' compensation benefits received by EEOICPA Part E beneficiaries; and (2) a collection annually requesting verifying information on state workers' compensation benefits from state authorities. These collections will implement the Department's responsibilities under section 7385s–11 of EEOICPA.

VI. Executive Order 12866

This rule is being treated as a ''significant regulatory action,'' within the meaning of E.O. 12866, because it is ''economically significant'' as defined by section 3(f)(1) of that Order. The payment of the benefits provided for by EEOICPA through the program administered pursuant to this regulatory action has an annual effect on the economy of $100 million or more. However, this rule does not adversely affect in a material way the economy, a sector of the economy, productivity, jobs, the environment, public health or safety, or State, local, or tribal governments or communities, as defined by section 3(f)(1) of E.O. 12866. This rule is also a ''significant regulatory action'' because it meets the criterion of section 3(f)(4) of that Order in that it raises novel or legal policy issues arising out of the legal mandate established by EEOICPA.

Based on the factors and assumptions set forth below, DOL's estimate of the aggregate cost of benefits and administrative expenses of this regulatory action implementing Part B and Part E of EEOICPA is, in millions of dollars:

	FY2007	FY2008	FY2009	FY2010	FY2011
Admin	$162	$163	$147	$127	$111
Benefits	1,123	861	752	656	579

The Department's estimate of the benefits to be paid pursuant to EEOICPA and of the administrative costs of providing those benefits is based on program experience to date, data collected from other federal agencies, assumptions about the incidence of cancer, covered beryllium disease, chronic silicosis and other covered illnesses in the claimant population, life expectancy tables, dose reconstruction acceptance rates, Physicians Panel acceptances under the former Part D of the Act, the anticipated distribution of benefit amounts, and its experience in estimating administrative and medical costs of workers' compensation programs. The Department's benefit estimates are not based on any projections regarding the number of future additions to the Special Exposure Cohort (SEC).

For Part B benefits, estimates for cancer claims are based on the actual number of claims received by OWCP, the anticipated number of future claims, and the historical approval rates for both SEC and non-SEC claims. Part B benefit estimates for beryllium exposure are based on the actual number of such claims received by OWCP, anticipated future claims, and the historical approval rate. Benefit estimates for chronic silicosis are based on similar factors. Benefit estimates for claims that require receipt of an award from DOJ under section 5 of RECA are based on historical claim receipts and include the amounts awarded by DOJ under RECA but paid from the compensation fund. Medical benefits for living employees eligible under Part B are computed using an average of $10,000 per year.

Part E benefit estimates for Part E cases are based on cases received by OWCP to date, future expected receipts, and the average Part B approval rate. The benefit amounts for Part E are calculated based on an estimated distribution of approved claims with varying degrees of compensable impairment and wage-loss, with an average benefit amount of $135,000 and average medical costs of $10,000 per year for each eligible living employee. Additional Part E benefits for individuals who are determined to be eligible RECA section 5 uranium workers are computed based upon the number of such claims received to date and the expected number of such claims in the future.

Administrative cost estimates were developed based upon OWCP's experience to date in administering Part B and the other workers' compensation programs that fall within its area of administrative responsibility, using calculations of the number of incoming claims and forecasting the necessary full-time equivalents and other resources that are necessary to efficiently administer the program.

No more extensive economic impact analysis of this rule is necessary because this regulatory action only addresses the transfer of funds from the federal government to individuals who qualify under EEOICPA and to providers of medical services in that program. This regulatory action has no affect on the functioning of the economy and private markets, on the health and safety of the general population, or on the natural environment. In addition, because this rule implements a statutory mandate, there are no feasible alternatives to this regulatory action. Finally, to the extent that policy choices have been made in interpreting statutory terms, those choices have no significant impact on the cost of this regulatory action. Such policy choices may affect who will be entitled to receive benefits (such as covered Part E employees with unratable impairments due to a covered illness), but will not have a significant impact on the number of eligible Part B or E beneficiaries or the level of benefits to which they are entitled.

OMB has reviewed the rule for consistency with the President's priorities and the principles set forth in E.O. 12866.

VII. Small Business Regulatory Enforcement Fairness Act

As required by Congress under the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), the Department will report to Congress promulgation of this final rule prior to its effective date. The report will state that the Department has concluded that this final rule is a ''major rule'' because it will likely result in an annual effect on the economy of $100 million or more.

VIII. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531 *et seq.*) directs agencies to assess the effects of federal regulatory actions on state, local, and tribal governments, and the private sector, ''other than to the extent that such regulations incorporate requirements specifically set forth in law.'' For purposes of the Unfunded Mandates Reform Act, this final rule does not include any federal mandate that may result in increased annual expenditures in excess of $100 million by state, local or tribal governments in the aggregate, or by the private sector.

IX. Regulatory Flexibility Act

The Department believes that this rule has ''no significant economic impact upon a substantial number of small entities'' within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The provisions of this rule that apply cost-control measures to payments for medical expenses are the only ones that could have a monetary effect on small businesses, and have been in effect since OWCP began administration of Part B of EEOICPA on July 31, 2001. The economic effect of these cost-control measures are not significant for a substantial number of those businesses who participate in the program under Parts B and E of EEOICPA, however, because no one business bills a significant amount to OWCP for EEOICPA-related services, and the monetary effect on bills that are submitted, while a worthwhile savings for the Government in the aggregate, are not significant for any individual business affected.

The cost-control provisions are: (1) A set schedule of maximum allowable fees for professional medical services; (2) a set schedule for payment of pharmacy bills; and (3) a prospective payment system for hospital inpatient services. The methodologies used for the first two of these provisions were explained in the text of the preamble to two earlier regulatory actions that implemented EEOICPA in 2001 (66 FR 28948) and 2002 (67 FR 78874), which essentially adopted payment systems that are prevalent in the industry. Their adoption for use in connection with OWCP's administration of Part E of the Act results in continued efficiencies for the Government and providers. The Government benefits because OWCP did not develop new cost containment measures for Part E claims, but rather adopted existing and well-recognized measures that were already in place. The providers benefit because submitting a bill and receiving a payment is almost the same as submitting it to Medicare, a program with which they are already familiar and have existing systems in place for billing—they do not have to incur unnecessary administrative costs to learn a new process because the EEOICPA bill process for Part E claims is identical to the bill process that applies to Part B claims, and is not readily distinguishable from the Medicare billing process. Similarly, pharmacies are familiar with billing through clearing houses and having their charges subject to limits by private insurance carriers. By adopting private sector uniform billing requirements and a familiar cost control methodology, OWCP has not altered the billing environment with which pharmacies are already familiar. The methods chosen, therefore, represent systems familiar to the providers. The third of these three provisions does not have an effect on a substantial number of ''small entities'' under Small Business Administration (SBA) standards, since most hospitals providing services for medical conditions covered by EEOICPA have annual receipts that exceed the set maximum.

The implementation of these cost-control methods does not have a significant effect on any single medical professional or pharmacy since they are already used by Medicare, CHAMPUS, and the Departments of Labor and Veterans Affairs, among Government entities, and by private insurance carriers. In actual terms, the amount by which these provider bills are reduced does not have a significant impact on any one small entity since these charges are currently being processed by other payers applying similar cost-control provisions. The costs to providers whose charges are reduced also are relatively small because EEOICPA bills simply do not represent a large share of any single provider's total business. Since the small universe of potential claimants is spread across the United States and this bill processing system covers only those employees who have sustained an occupational illness or a covered illness and require medical treatment on or after October 30, 2000, the number of bills submitted by any one small entity which may be subject to these provisions is likely to be very small. Therefore, the ''cost'' of this rule to any one pharmacy or medical professional is negligible. On the other hand, OWCP reaps substantial aggregate cost savings that benefit both OWCP (by strengthening the integrity of the program) and the taxpayers to whom the costs of the program are eventually charged.

The Assistant Secretary for Employment Standards has certified to the Chief Counsel for Advocacy of the SBA that this rule does not have a significant impact on a substantial number of small entities. The factual basis for this certification has been provided above. Accordingly, no regulatory impact analysis is required.

X. Executive Order 12988 (Civil Justice Reform)

This final rule has been drafted and reviewed in accordance with E.O. 12988 and will not unduly burden the federal court system. While Part B of EEOICPA does not provide any specific procedures that claimants under that Part must follow in order to seek review of decisions on their claims, Part E specifies that claimants under that Part have 60 days to file petitions for review of decisions on their claims in the United States district courts, and mandates the use of an ''arbitrary and capricious'' standard of review. It is reasonably likely that some EEOICPA claimants will seek review of adverse decisions in United States district courts pursuant to 28 U.S.C. 1331 (for claims under Part B of EEOICPA) or the EEOICPA itself (for claims under Part E). This rule should help minimize the burden placed on courts by litigation seeking to challenge decisions under EEOICPA by providing claimants with an opportunity to seek administrative review of adverse decisions prior to resorting to the court system, and by providing a clear legal standard for affected conduct. The rule has been reviewed carefully to eliminate drafting errors and ambiguities.

XI. Executive Order 13045 (Protection of Children From Environmental, Health Risks and Safety Risks)

In accordance with E.O. 13045, the Department has evaluated the environmental health and safety effects of this rule on children. The Department has determined that the final rule will have no effect on children.

XII. Executive Order 13132 (Federalism)

The Department has reviewed this final rule in accordance with E.O. 13132 and has determined that it does not have any ''federalism implications.'' The final rule does not ''have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

XIII. Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use)

In accordance with E.O. 13211, the Department has evaluated the effects of this final rule on energy supply, distribution or use, and has determined that this rule is not likely to have a significant adverse effect on them.

XIV. Submission to Congress and the General Accountability Office

In accordance with the Small Business Regulatory Enforcement Fairness Act of 1996, the Department will submit to each House of the Congress and to the Comptroller General

a report regarding the issuance of this final rule prior to the effective date set forth at the outset of this notice. The report will note that this rule constitutes a ''major rule'' as defined by 5 U.S.C. 804(2).

XV. Catalog of Federal Domestic Assistance Number

This program is listed in the Catalog of Federal Domestic Assistance as No. 17.310.

List of Subjects

20 CFR Part 1

Organization and functions (Government agencies).

20 CFR Part 30

Administrative practice and procedure, Cancer, Claims, Kidney diseases, Leukemia, Lung diseases, Miners, Radioactive materials, Tort claims, Underground mining, Uranium, Workers' compensation.

Text of the Rule

■ For the reasons set forth in the preamble, 20 CFR Chapter 1 is amended as follows:

Subchapter A—Organization and Procedures

■ 1. Part 1 is revised to read as follows:

PART 1—PERFORMANCE OF FUNCTIONS

Sec.

1.1 Under what authority was the Office of Workers' Compensation Programs established?
1.2 What functions are assigned to OWCP?
1.3 What rules are contained in this chapter?
1.4 Where are other rules concerning OWCP functions found?
1.5 When was the former Bureau of Employees' Compensation abolished?
1.6 How were many of OWCP's current functions administered in the past?

Authority: 5 U.S.C. 301, 8145 and 8149 (Reorganization Plan No. 6 of 1950, 15 FR 3174, 3 CFR, 1949–1953 Comp., p. 1004, 64 Stat. 1263); 42 U.S.C. 7384d and 7385s–10; Executive Order 13179, 65 FR 77487, 3 CFR, 2000 Comp., p. 321; Secretary of Labor's Order No. 13–71, 36 FR 8155; Employment Standards Order No. 2–74, 39 FR 34722.

§ 1.1 Under what authority was the Office of Workers' Compensation Programs established?

The Assistant Secretary of Labor for Employment Standards, by authority vested in him by the Secretary of Labor in Secretary's Order No. 13–71 (36 FR 8755), established in the Employment Standards Administration an Office of Workers' Compensation Programs (OWCP) by Employment Standards Order No. 2–74 (39 FR 34722). The Assistant Secretary subsequently designated as the head thereof a Director who, under the general supervision of the Assistant Secretary, administers the programs assigned to OWCP by the Assistant Secretary.

§ 1.2 What functions are assigned to OWCP?

The Assistant Secretary of Labor for Employment Standards has delegated authority and assigned responsibility to the Director of OWCP for the Department of Labor's programs under the following statutes:

(a) The Federal Employees' Compensation Act, as amended and extended (5 U.S.C. 8101 *et seq.*), except 5 U.S.C. 8149 as it pertains to the Employees' Compensation Appeals Board.

(b) The War Hazards Compensation Act (42 U.S.C. 1701 *et seq.*).

(c) The War Claims Act (50 U.S.C. App. 2003).

(d) The Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (42 U.S.C. 7384 *et seq.*), except activities, pursuant to Executive Order 13179 (''Providing Compensation to America's Nuclear Weapons Workers'') of December 7, 2000, assigned to the Secretary of Health and Human Services, the Secretary of Energy and the Attorney General.

(e) The Longshore and Harbor Workers' Compensation Act, as amended and extended (33 U.S.C. 901 *et seq.*), except: 33 U.S.C. 919(d) with respect to administrative law judges in the Office of Administrative Law Judges; 33 U.S.C. 921(b) as it pertains to the Benefits Review Board; and activities, pursuant to 33 U.S.C. 941, assigned to the Assistant Secretary of Labor for Occupational Safety and Health.

(f) The Black Lung Benefits Act, as amended (30 U.S.C. 901 *et seq.*).

§ 1.3 What rules are contained in this chapter?

The rules in this chapter are those governing the OWCP functions under the Federal Employees' Compensation Act, the War Hazards Compensation Act, the War Claims Act and the Energy Employees Occupational Illness Compensation Program Act of 2000.

§ 1.4 Where are other rules concerning OWCP functions found?

(a) The rules of the OWCP governing its functions under the Longshore and Harbor Workers' Compensation Act and its extensions are set forth in subchapter A of chapter VI of this title.

(b) The rules of the OWCP governing its functions under the Black Lung Benefits Act program are set forth in subchapter B of chapter VI of this title.

(c) The rules and regulations of the Employees' Compensation Appeals Board are set forth in chapter IV of this title.

(d) The rules and regulations of the Benefits Review Board are set forth in Chapter VII of this title.

§ 1.5 When was the former Bureau of Employees' Compensation abolished?

By Secretary of Labor's Order issued September 23, 1974 (39 FR 34723), issued concurrently with Employment Standards Order 2–74 (39 FR 34722), the Secretary revoked the prior Secretary's Order No. 18–67 (32 FR 12979), which had delegated authority and assigned responsibility for the various workers' compensation programs enumerated in § 1.2, except the Black Lung Benefits Program and the Energy Employees Occupational Illness Compensation Program not then in existence, to the Director of the former Bureau of Employees' Compensation.

§ 1.6 How were many of OWCP's current functions administered in the past?

(a) Administration of the Federal Employees' Compensation Act and the Longshore and Harbor Workers' Compensation Act was initially vested in an independent establishment known as the U.S. Employees' Compensation Commission. By Reorganization Plan No. 2 of 1946 (3 CFR, 1943–1949 Comp., p. 1064; 60 Stat. 1095, effective July 16, 1946), the Commission was abolished and its functions were transferred to the Federal Security Agency to be performed by a newly created Bureau of Employees' Compensation within such Agency. By Reorganization Plan No. 19 of 1950 (15 FR 3178, 3 CFR, 1949–1954 Comp., page 1010, 64 Stat. 1271), said Bureau was transferred to the Department of Labor (DOL), and the authority formerly vested in the Administrator, Federal Security Agency, was vested in the Secretary of Labor. By Reorganization Plan No. 6 of 1950 (15 FR 3174, 3 CFR, 1949–1953 Comp., page 1004, 64 Stat. 1263), the Secretary of Labor was authorized to make from time to time such provisions as he shall deem appropriate, authorizing the performance of any of his functions by any other officer, agency, or employee of the DOL.

(b) In 1972, two separate organizational units were established within the Bureau: an Office of Workmen's Compensation Programs (37 FR 20533) and an Office of Federal Employees' Compensation (37 FR 22979). In 1974, these two units were

abolished and one organizational unit, the Office of Workers' Compensation Programs, was established in lieu of the Bureau of Employees' Compensation (39 FR 34722).

■ 2. Subchapter C consisting of part 30 is revised to read as follows:

Subchapter C—Energy Employees Occupational Illness Compensation Program Act of 2000

PART 30—CLAIMS FOR COMPENSATION UNDER THE ENERGY EMPLOYEES OCCUPATIONAL ILLNESS COMPENSATION PROGRAM ACT OF 2000, AS AMENDED

Subpart A—General Provisions

Introduction

Sec.
30.0 What are the provisions of EEOICPA, in general?
30.1 What rules govern the administration of EEOICPA and this chapter?
30.2 In general, how have the tasks associated with the administration of the EEOICPA claims process been assigned?
30.3 What do these regulations contain?

Definitions

30.5 What are the definitions used in this part?

Information in Program Records

30.10 Are all OWCP records relating to claims filed under EEOICPA considered confidential?
30.11 Who maintains custody and control of claim records?
30.12 What process is used by a person who wants to obtain copies of or amend EEOICPA claim records?

Rights and Penalties

30.15 May EEOICPA benefits be assigned, transferred or garnished?
30.16 What penalties may be imposed in connection with a claim under the Act?
30.17 Is a beneficiary who defrauds the government in connection with a claim for EEOICPA benefits still entitled to those benefits?

Subpart B—Filing Claims; Evidence and Burden of Proof; Special Procedures for Certain Cancer Claims

Filing Claims for Benefits Under EEOICPA

30.100 In general, how does an employee file an initial claim for benefits?
30.101 In general, how is a survivor's claim filed?
30.102 In general, how does an employee file a claim for additional impairment or wage-loss under Part E of EEOICPA?
30.103 How does a claimant make sure that OWCP has the evidence necessary to process the claim?

Verification of Alleged Employment

30.105 What must DOE do after an employee or survivor files a claim?
30.106 Can OWCP request employment verification from other sources?

Evidence and Burden of Proof

30.110 Who is entitled to compensation under the Act?
30.111 What is the claimant's responsibility with respect to burden of proof, production of documents, presumptions, and affidavits?
30.112 What kind of evidence is needed to establish covered employment and how will that evidence be evaluated?
30.113 What are the requirements for written medical documentation, contemporaneous records, and other records or documents?
30.114 What kind of evidence is needed to establish a compensable medical condition and how will that evidence be evaluated?

Special Procedures for Certain Radiogenic Cancer Claims

30.115 For those radiogenic cancer claims that do not seek benefits under Part B of the Act pursuant to the Special Exposure Cohort provisions, what will OWCP do once it determines that an employee contracted cancer?

Subpart C—Eligibility Criteria

General Provisions

30.200 What is the scope of this subpart?

Eligibility Criteria for Claims Relating to Covered Beryllium Illness Under Part B of EEOICPA

30.205 What are the criteria for eligibility for benefits relating to beryllium illnesses covered under Part B?
30.206 How does a claimant prove that the employee was a ''covered beryllium employee'' exposed to beryllium dust, particles or vapor in the performance of duty?
30.207 How does a claimant prove a diagnosis of a beryllium disease covered under Part B?

Eligibility Criteria for Claims Relating to Radiogenic Cancer Under Parts B and E of EEOICPA

30.210 What are the criteria for eligibility for benefits relating to radiogenic cancer?
30.211 How does a claimant establish that the employee has or had contracted cancer?
30.212 How does a claimant establish that the employee contracted cancer after beginning employment at a DOE facility, an atomic weapons employer facility or a RECA section 5 facility?
30.213 How does a claimant establish that the radiogenic cancer was at least as likely as not related to employment at the DOE facility, the atomic weapons employer facility, or the RECA section 5 facility?
30.214 How does a claimant establish that the employee is a member of the Special Exposure Cohort?
30.215 How does a claimant establish that the employee has sustained an injury, illness, impairment or disease as a consequence of a diagnosed cancer?

Eligibility Criteria for Claims Relating to Chronic Silicosis Under Part B of EEOICPA

30.220 What are the criteria for eligibility for benefits relating to chronic silicosis?
30.221 How does a claimant prove exposure to silica in the performance of duty?
30.222 How does a claimant establish that the employee has been diagnosed with chronic silicosis or has sustained a consequential injury, illness, impairment or disease?

Eligibility Criteria for Certain Uranium Employees Under Part B of EEOICPA

30.225 What are the criteria for eligibility for benefits under Part B of EEOICPA for certain uranium employees?
30.226 How does a claimant establish that a covered uranium employee has sustained a consequential injury, illness, impairment or disease?

Eligibility Criteria for Other Claims Under Part E of EEOICPA

30.230 What are the criteria necessary to establish that an employee contracted a covered illness under Part E of EEOICPA?
30.231 How does a claimant prove employment-related exposure to a toxic substance at a DOE facility or a RECA section 5 facility?
30.232 How does a claimant establish that the employee has been diagnosed with a covered illness, or sustained an injury, illness, impairment or disease as a consequence of a covered illness?

Subpart D—Adjudicatory Process

30.300 What process will OWCP use to decide claims for entitlement and to provide for administrative review of those decisions?
30.301 May subpoenas be issued for witnesses and documents in connection with a claim under Part B of EEOICPA?
30.302 Who pays the costs associated with subpoenas?
30.303 What information may OWCP request in connection with a claim under Part E of EEOICPA?

Recommended Decisions on Claims

30.305 How does OWCP determine entitlement to EEOICPA compensation?
30.306 What does the recommended decision contain?
30.307 To whom is the recommended decision sent?

Hearings and Final Decisions on Claims

30.310 What must the claimant do if he or she objects to the recommended decision or wants to request a hearing?
30.311 What happens if the claimant does not object to the recommended decision or request a hearing within 60 days?
30.312 What will the FAB do if the claimant objects to the recommended decision but does not request a hearing?
30.313 How is a review of the written record conducted?
30.314 How is a hearing conducted?
30.315 May a claimant postpone a hearing?
30.316 How does the FAB issue a final decision on a claim?

30.317 Can the FAB request a further response from the claimant or return a claim to the district office?
30.318 Can the FAB consider objections to HHS's reconstruction of a radiation dose or to the guidelines OWCP uses to determine if a claimed cancer was at least as likely as not related to employment?
30.319 May a claimant request reconsideration of a final decision of the FAB?

Reopening Claims

30.320 Can a claim be reopened after the FAB has issued a final decision?

Subpart E—Medical and Related Benefits

Medical Treatment and Related Issues

30.400 What are the basic rules for obtaining medical treatment?
30.401 What are the special rules for the services of chiropractors?
30.402 What are the special rules for the services of clinical psychologists?
30.403 Will OWCP pay for the services of an attendant?
30.404 Will OWCP pay for transportation to obtain medical treatment?
30.405 After selecting a treating physician, may an employee choose to be treated by another physician instead?
30.406 Are there any exceptions to these procedures for obtaining medical care?

Directed Medical Examinations

30.410 Can OWCP require an employee to be examined by another physician?
30.411 What happens if the opinion of the physician selected by OWCP differs from the opinion of the physician selected by the employee?
30.412 Who pays for second opinion and referee examinations?

Medical Reports

30.415 What are the requirements for medical reports?
30.416 How and when should medical reports be submitted?
30.417 What additional medical information may OWCP require to support continuing payment of benefits?

Medical Bills

30.420 How should medical bills and reimbursement requests be submitted?
30.421 What are the time frames for submitting bills and reimbursement requests?
30.422 If an employee is only partially reimbursed for a medical expense, must the provider refund the balance of the amount paid to the employee?

Subpart F—Survivors; Payments and Offsets; Overpayments

Survivors

30.500 What special statutory definitions apply to survivors under EEOICPA?
30.501 What order of precedence will OWCP use to determine which survivors are entitled to receive compensation under EEOICPA?
30.502 When is entitlement for survivors determined for purposes of EEOICPA?

Payment of Claims and Offset for Certain Payments

30.505 What procedures will OWCP follow before it pays any compensation?
30.506 To whom and in what manner will OWCP pay compensation?
30.507 What compensation will be provided to covered Part B employees who only establish beryllium sensitivity under Part B of EEOICPA?
30.508 What is beryllium sensitivity monitoring?
30.509 Under what circumstances may a survivor claiming under Part E of the Act choose to receive the benefits that would otherwise be payable to a covered Part E employee who is deceased?

Overpayments

30.510 How does OWCP notify an individual of a payment made on a claim?
30.511 What is an ''overpayment'' for purposes of EEOICPA?
30.512 What does OWCP do when an overpayment is identified?
30.513 Under what circumstances may OWCP waive recovery of an overpayment?
30.514 If OWCP finds that the recipient of an overpayment was not at fault, what criteria are used to decide whether to waive recovery of it?
30.515 Is a recipient responsible for an overpayment that resulted from an error made by OWCP?
30.516 Under what circumstances would recovery of an overpayment defeat the purpose of the Act?
30.517 Under what circumstances would recovery of an overpayment be against equity and good conscience?
30.518 Can OWCP require the recipient of the overpayment to submit additional financial information?
30.519 How does OWCP communicate its final decision concerning recovery of an overpayment?
30.520 How are overpayments collected?

Subpart G—Special Provisions

Representation

30.600 May a claimant designate a representative?
30.601 Who may serve as a representative?
30.602 Who is responsible for paying the representative's fee?
30.603 Are there any limitations on what the representative may charge the claimant for his or her services?

Third Party Liability

30.605 What rights does the United States have upon payment of compensation under EEOICPA?
30.606 Under what circumstances must a recovery of money or other property in connection with an illness for which benefits are payable under EEOICPA be reported to OWCP?
30.607 How is a structured settlement (that is, a settlement providing for receipt of funds over a specified period of time) treated for purposes of reporting the recovery?
30.608 How does the United States calculate the amount to which it is subrogated?
30.609 Is a settlement or judgment received as a result of allegations of medical malpractice in treating an illness covered by EEOICPA a recovery that must be reported to OWCP?
30.610 Are payments to a covered Part B employee, a covered Part E employee or an eligible surviving beneficiary as a result of an insurance policy which the employee or eligible surviving beneficiary has purchased a recovery that must be reported to OWCP?
30.611 If a settlement or judgment is received for more than one medical condition, can the amount paid on a single EEOICPA claim be attributed to different conditions for purposes of calculating the amount to which the United States is subrogated?

Effect of Tort Suits Against Beryllium Vendors and Atomic Weapons Employers

30.615 What type of tort suits filed against beryllium vendors or atomic weapons employers may disqualify certain claimants from receiving benefits under Part B of EEOICPA?
30.616 What happens if this type of tort suit was filed prior to October 30, 2000?
30.617 What happens if this type of tort suit was filed during the period from October 30, 2000 through December 28, 2001?
30.618 What happens if this type of tort suit was filed after December 28, 2001?
30.619 Do all the parties to this type of tort suit have to take these actions?
30.620 How will OWCP ascertain whether a claimant filed this type of tort suit and if he or she has been disqualified from receiving any benefits under Part B of EEOICPA?

Coordination of Part E Benefits With State Workers' Compensation Benefits

30.625 What does ''coordination of benefits'' mean under Part E of EEOICPA?
30.626 How will OWCP coordinate compensation payable under Part E of EEOICPA with benefits from state workers' compensation programs?
30.627 Under what circumstances will OWCP waive the statutory requirement to coordinate these benefits?

Subpart H—Information for Medical Providers

Medical Records and Bills

30.700 What kind of medical records must providers keep?
30.701 How are medical bills to be submitted?
30.702 How should an employee prepare and submit requests for reimbursement for medical expenses, transportation costs, loss of wages, and incidental expenses?
30.703 What are the time limitations on OWCP's payment of bills?

Medical Fee Schedule

30.705 What services are covered by the OWCP fee schedule?

30.706 How are the maximum fees defined?
30.707 How are payments for particular services calculated?
30.708 Does the fee schedule apply to every kind of procedure?
30.709 How are payments for medicinal drugs determined?
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Authority: 5 U.S.C. 301; 31 U.S.C. 3716 and 3717; 42 U.S.C. 7384d, 7384t, 7384u and 7385s–10; Executive Order 13179, 65 FR 77487, 3 CFR, 2000 Comp., p. 321; Secretary of Labor's Order No. 4–2001, 66 FR 29656.

Subpart A—General Provisions

Introduction

§ 30.0 What are the provisions of EEOICPA, in general?

Part B of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA or Act), 42 U.S.C. 7384 *et seq.*, provides for the payment of compensation benefits to covered Part B employees and, where applicable, survivors of such employees, of the United States Department of Energy (DOE), its predecessor agencies and certain of its contractors and subcontractors. Part B also provides for the payment of supplemental compensation benefits to other covered Part B employees who have already been found eligible for benefits under section 5 of the Radiation Exposure Compensation Act, as amended (RECA), 42 U.S.C. 2210 note, and where applicable, survivors of such persons. Part E of the Act provides for the payment of compensation benefits to covered Part E employees and, where applicable, survivors of such employees. The regulations in this part describe the rules governing filing, processing, and paying claims for benefits under both Part B and Part E of EEOICPA.

(a) Part B of EEOICPA provides for the payment of either lump-sum monetary compensation for the disability of a covered Part B employee due to an occupational illness or for monitoring for beryllium sensitivity, as well as for medical and related benefits for such illness. Part B also provides for the payment of monetary compensation for the disability of a covered Part B employee to specified survivors if the employee is deceased at the time of payment.

(b) Part E of EEOICPA provides for the payment of monetary compensation for the established wage-loss and/or impairment of a covered Part E employee due to a covered illness, and for medical and related benefits for such covered illness. Part E also provides for the payment of monetary compensation for the death (and established wage-loss, where applicable) of a covered Part E employee to specified survivors if the covered Part E employee is deceased at the time of payment.

(c) All types of benefits and conditions of eligibility listed in this section are subject to the provisions of EEOICPA and this part.

§ 30.1 What rules govern the administration of EEOICPA and this chapter?

In accordance with EEOICPA, Executive Order 13179 and Secretary's Order No. 4–2001, the primary responsibility for administering the Act, except for those activities assigned to the Secretary of Health and Human Services (HHS), the Secretary of Energy and the Attorney General, has been delegated to the Assistant Secretary of Labor for Employment Standards. The Assistant Secretary, in turn, has delegated the responsibility for administering the Act to the Director of the Office of Workers' Compensation Programs (OWCP). Except as otherwise

provided by law, the Director of OWCP and his or her designees have the exclusive authority to administer, interpret and enforce the provisions of the Act.

§ 30.2 In general, how have the tasks associated with the administration of EEOICPA claims process been assigned?

(a) In E.O. 13179, the President assigned the tasks associated with administration of the EEOICPA claims process among the Secretaries of Labor, HHS and Energy, and the Attorney General. In light of the fact that the Secretary of Labor has been assigned primary responsibility for administering EEOICPA, almost the entire claims process is within the exclusive control of OWCP. This means that all claimants file their claims with OWCP, and OWCP is responsible for granting or denying compensation under the Act (see §§ 30.100 through 30.102). OWCP also provides assistance to claimants and potential claimants by providing information regarding eligibility and other program requirements, including information on completing claim forms and the types and availability of medical testing and diagnostic services related to occupational illnesses under Part B of the Act and covered illnesses under Part E of the Act. In addition, OWCP provides an administrative review process for claimants who disagree with its recommended and final adverse decisions on claims of entitlement (see §§ 30.300 through 30.320).

(b) However, HHS has exclusive control of the portion of the claims process under which it provides reconstructed doses for certain radiogenic cancer claims (see § 30.115). HHS also has exclusive control of the process for designating classes of employees to be added to the Special Exposure Cohort under Part B of the Act, and has promulgated regulations governing that process at 42 CFR part 83. Finally, 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 (see § 30.213). DOE and DOJ must, among other things, notify potential claimants and submit evidence that OWCP deems necessary for its adjudication of claims under EEOICPA (see §§ 30.105, 30.112, 30.206, 30.212 and 30.221).

§ 30.3 What do these regulations contain?

This part 30 sets forth the regulations governing administration of all claims that are filed with OWCP, except to the extent specified in certain provisions. Its provisions are intended to assist persons seeking benefits under EEOICPA, as well as personnel in the various federal agencies and DOL who process claims filed under EEOICPA or who perform administrative functions with respect to EEOICPA. The various subparts of this part contain the following:

(a) Subpart A: The general statutory and administrative framework for processing claims under both Parts B and E of EEOICPA. It contains a statement of purpose and scope, together with definitions of terms, information regarding the disclosure of OWCP records, and a description of rights and penalties involving EEOICPA claims, including convictions for fraud.

(b) Subpart B: The rules for filing claims for entitlement under EEOICPA. It also addresses general standards regarding necessary evidence and the burden of proof, descriptions of basic forms and special procedures for certain cancer claims.

(c) Subpart C: The eligibility criteria for occupational illnesses and covered illnesses compensable under Parts B and E of EEOICPA, respectively.

(d) Subpart D: The rules governing the adjudication process leading to recommended and final decisions on claims for entitlement filed under Parts B and E of EEOICPA. It also describes the hearing and reopening processes.

(e) Subpart E: The rules governing medical care, second opinion and referee medical examinations and impairment evaluations directed by OWCP as part of its adjudication of entitlement, and medical reports and records in general. It also addresses the kinds of medical treatment that may be authorized and how medical bills are paid.

(f) Subpart F: The rules relating to the payment of monetary compensation available under Parts B and E of EEOICPA. It includes provisions on medical monitoring for beryllium sensitivity, on the identification, processing and recovery of overpayments of compensation, and on the maximum aggregate amount of compensation payable under Part E.

(g) Subpart G: The rules concerning the representation of claimants in connection with the administrative adjudication of claims before OWCP, subrogation of the United States, the effect of tort suits against beryllium vendors and atomic weapons employers, and the coordination of benefits under Part E of EEOICPA with state workers' compensation benefits for the same covered illness.

(h) Subpart H: Information for medical providers. It includes rules for medical reports, medical bills, and the OWCP medical fee schedule, as well as the provisions for exclusion of medical providers.

(i) Subpart I: The rules relating to the adjudication of alleged periods of wage-loss of covered Part E employees. It also includes provisions on the use by OWCP of Social Security Administration earnings information and certain medical evidence to establish compensable wage-loss.

(j) Subpart J: The rules relating to the adjudication of alleged permanent impairment due to the exposure of covered Part E employees to toxic substances. It includes provisions relating to the medical evaluation of ratable impairments, the rating of progressive conditions, and qualifications of physicians.

Definitions

§ 30.5 What are the definitions used in this part?

(a) *Act* or *EEOICPA* means the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (42 U.S.C. 7384 *et seq.*).

(b) *Atomic weapon* means any device utilizing atomic energy, exclusive of the means for transporting or propelling the device (where such means is a separable and divisible part of the device), the principle purpose of which is for use as, or for development of, a weapon, a weapon prototype, or a weapon test device.

(c) *Atomic weapons employee* means:

(1) 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; or

(2)(i) An individual employed at a facility that the National Institute for Occupational Safety and Health (NIOSH) reported had a potential for significant residual contamination outside of the period described in paragraph (c)(1) of this section;

(ii) By the atomic weapons employer that owned the facility referred to in paragraph (c)(2)(i) of this section, or a subsequent owner or operator of such facility; and

(iii) During a period reported by NIOSH, 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, to have a potential for significant residual radioactive contamination.

(d) *Atomic weapons employer* means any entity, other than the United States, that:

(1) 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

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

(e) *Atomic weapons employer facility* means any facility, owned by an atomic weapons employer, that:

(1) 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; and

(2) Is designated as such in the list periodically published in the **Federal Register** by DOE.

(f) *Attorney General* means the Attorney General of the United States or the United States Department of Justice (DOJ).

(g) *Benefit* or *Compensation* means the money the Department pays to or on behalf of either a covered Part B employee under Part B, or a covered Part E employee under Part E, from the Energy Employees Occupational Illness Compensation Fund. However, the term ''compensation'' used in section 7385f(b) of EEOICPA (restricting entitlement to only one payment of compensation under Part B) means only the payments specified in section 7384s(a)(1) and in section 7384u(a). Except as used in section 7385f(b), these two terms also include any other amounts paid out of the Fund for such things as medical treatment, monitoring, examinations, services, appliances and supplies as well as for transportation and expenses incident to the securing of such medical treatment, monitoring, examinations, services, appliances, and supplies.

(h) *Beryllium sensitization or sensitivity* means that the individual has an abnormal beryllium lymphocyte proliferation test (LPT) performed on either blood or lung lavage cells.

(i) *Beryllium vendor* means the specific corporations and named predecessor corporations listed in section 7384l(6) of the Act and any of the facilities designated as such in the list periodically published in the **Federal Register** by DOE.

(j) *Chronic silicosis* means a non-malignant lung disease if:

(1) The initial occupational exposure to silica dust preceded the onset of silicosis by at least 10 years; and

(2) A written diagnosis of silicosis is made by a medical doctor and is accompanied by:

(i) A chest radiograph, interpreted by an individual certified by NIOSH as a B reader, classifying the existence of pneumoconioses of category 1/0 or higher; or

(ii) Results from a computer assisted tomograph or other imaging technique that are consistent with silicosis; or

(iii) Lung biopsy findings consistent with silicosis.

(k) *Claim* means a written assertion to OWCP of an individual's entitlement to benefits under EEOICPA, submitted in a manner authorized by this part.

(l) *Claimant* means the individual who is alleged to satisfy the criteria for compensation under the Act.

(m) *Compensation fund* or *fund* means the fund established on the books of the Treasury for payment of benefits and compensation under the Act.

(n) *Contemporaneous record* means any document created at or around the time of the event that is recorded in the document.

(o) *Covered beryllium illness* means any of the following:

(1) Beryllium sensitivity as established by an abnormal LPT performed on either blood or lung lavage cells.

(2) Established chronic beryllium disease (see § 30.207(c)).

(3) Any injury, illness, impairment, or disability sustained as a consequence of a covered beryllium illness referred to in paragraphs (o)(1) or (2) of this section.

(p) *Covered Part E employee* means, under Part E of the Act, a Department of Energy contractor employee or a RECA section 5 uranium worker who has been determined by OWCP to have contracted a covered illness (see paragraph (r) of this section) through exposure at a Department of Energy facility or a RECA section 5 facility, as appropriate.

(q) *Covered Part B employee* means, under Part B of the Act, a covered beryllium employee (see § 30.205), a covered employee with cancer (see § 30.210(a)), a covered employee with chronic silicosis (see § 30.220), or a covered uranium employee (see paragraph (s) of this section).

(r) *Covered illness* means, under Part E of the Act relating to exposures at a DOE facility or a RECA section 5 facility, an illness or death resulting from exposure to a toxic substance.

(s) *Covered uranium employee* means, under Part B of the Act, an individual who has been determined by DOJ to be entitled to an award under section 5 of RECA, whether or not the individual was the employee or the deceased employee's survivor.

(t) *Current or former employee as defined in 5 U.S.C. 8101(1)* as used in § 30.205(a)(1) means an individual who fits within one of the following listed groups:

(1) A civil officer or employee in any branch of the Government of the United States, including an officer or employee of an instrumentality wholly owned by the United States;

(2) An individual rendering personal service to the United States similar to the service of a civil officer or employee of the United States, without pay or for nominal pay, when a statute authorizes the acceptance or use of the service, or authorizes payment of travel or other expenses of the individual;

(3) An individual, other than an independent contractor or individual employed by an independent contractor, employed on the Menominee Indian Reservation in Wisconsin in operations conducted under a statute relating to tribal timber and logging operations on that reservation;

(4) An individual appointed to a position on the office staff of a former President; or

(5) An individual selected and serving as a Federal petit or grand juror.

(u) *Department* means the United States Department of Labor (DOL).

(v) *Department of Energy* or *DOE* includes the predecessor agencies of the DOE, including the Manhattan Engineering District.

(w) *Department of Energy contractor employee* means any of the following:

(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.

(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.

(x)(1) *Department of Energy facility* means, as determined by the Director of OWCP, any building, structure, or premise, including the grounds upon which such building, structure, or premise is located:

(i) In which operations are, or have been, conducted by, or on behalf of, the DOE (except for buildings, structures, premises, grounds, or operations covered by E.O. 12344, dated February 1, 1982, pertaining to the Naval Nuclear Propulsion Program); and

(ii) With regard to which the DOE has or had:

(A) A proprietary interest; or

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

(2) DOL has adopted the determinations of the Department of Energy regarding Department of Energy facilities that were contained in the list of facilities published in the **Federal Register** on August 23, 2004 (69 FR 51825). DOL will periodically update this list as it deems appropriate in its sole discretion by publishing a revised list of Department of Energy facilities in the **Federal Register**.

(y) *Disability* means, for purposes of determining entitlement to payment of Part B benefits under section 7384s(a)(1) of the Act, having been determined by OWCP to have or have had established chronic beryllium disease, cancer, or chronic silicosis.

(z) *Eligible surviving beneficiary* means any individual who is entitled under sections 7384s(e), 7384u(e), or 7385s–3(c) and (d) of the Act to receive a payment on behalf of a deceased covered Part B employee or a deceased covered Part E employee.

(aa) *Employee* means either a current or former employee.

(bb) *Occupational illness* means, under Part B of the Act, a covered beryllium illness, cancer sustained in the performance of duty as defined in § 30.210(a), specified cancer, chronic silicosis, or an illness for which DOJ has awarded compensation under section 5 of RECA.

(cc) *OWCP* means the Office of Workers' Compensation Programs, United States Department of Labor. One of the four divisions of OWCP is the Division of Energy Employees Occupational Illness Compensation.

(dd) *Physician* includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law. The term ''physician'' includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.

(ee) *Qualified physician* means any physician who has not been excluded under the provisions of subpart H of this part. Except as otherwise provided by regulation, a qualified physician shall be deemed to be designated or approved by OWCP.

(ff) *Specified cancer* (as defined in section 4(b)(2) of RECA and in EEOICPA) means:

(1) Leukemia (other than chronic lymphocytic leukemia) provided that the onset of the disease was at least 2 years after first exposure;

(2) Lung cancer (other than in situ lung cancer that is discovered during or after a post-mortem exam);

(3) Bone cancer;

(4) Renal cancers; or

(5) The following diseases, provided onset was at least 5 years after first exposure:

(i) Multiple myeloma;

(ii) Lymphomas (other than Hodgkin's disease); and

(iii) Primary cancer of the:

(A) Thyroid;

(B) Male or female breast;

(C) Esophagus;

(D) Stomach;

(E) Pharynx;

(F) Small intestine;

(G) Pancreas;

(H) Bile ducts;

(I) Gall bladder;

(J) Salivary gland;

(K) Urinary bladder;

(L) Brain;

(M) Colon;

(N) Ovary; or

(O) Liver (except if cirrhosis or hepatitis B is indicated).

(6) The specified diseases designated in this section mean the physiological condition or conditions that are recognized by the National Cancer Institute under those names or nomenclature, or under any previously accepted or commonly used names or nomenclature.

(gg) *Survivor* means:

(1) For claims under Part B of the Act, and subject to paragraph (gg)(3) of this section, a surviving spouse, child, parent, grandchild and grandparent of a deceased covered Part B employee.

(2) For claims under Part E of the Act, and subject to paragraph (gg)(3) of this section, a surviving spouse and child of a deceased covered Part E employee.

(3) Those individuals listed in paragraphs (gg)(1) and (gg)(2) of this section do not include any individuals not living as of the time OWCP makes a lump-sum payment or payments to an eligible surviving beneficiary or beneficiaries.

(hh) *Time of injury* means:

(1) In regard to a claim arising out of exposure to beryllium or silica, the last date on which a covered Part B employee was exposed to such substance in the performance of duty in accordance with sections 7384n(a) or 7384r(c) of the Act; or

(2) In regard to a claim arising out of exposure to radiation under Part B, the last date on which a covered Part B employee was exposed to radiation in the performance of duty in accordance with section 7384n(b) of the Act or, in the case of a member of the Special Exposure Cohort, the last date on which the member of the Special Exposure Cohort was employed at the Department of Energy facility or the atomic weapons employer facility at which the member was exposed to radiation; or

(3) In regard to a claim arising out of exposure to a toxic substance, the last date on which a covered Part E employee was employed at the Department of Energy facility or RECA section 5 facility, as appropriate, at which the exposure took place.

(ii) *Toxic substance* means any material that has the potential to cause illness or death because of its radioactive, chemical, or biological nature.

(jj) *Workday* means a single workshift whether or not it occurred on more than one calendar day.

Information in Program Records

§ 30.10 Are all OWCP records relating to claims filed under EEOICPA considered confidential?

All OWCP records relating to claims for benefits under EEOICPA are considered confidential and may not be released, inspected, copied or otherwise disclosed except as provided in the Freedom of Information Act and the Privacy Act of 1974.

§ 30.11 Who maintains custody and control of claim records?

All OWCP records relating to claims for benefits filed under the Act are covered by the Privacy Act system of records entitled DOL/ESA–49 (Office of Workers' Compensation Programs, Energy Employees Occupational Illness Compensation Program Act File). This system of records is maintained by and under the control of OWCP, and, as such, all records covered by DOL/ESA–49 are official records of OWCP. The protection, release, inspection and copying of records covered by DOL/ESA–49 shall be accomplished in accordance with the rules, guidelines and provisions of this part, as well as those contained in 29 CFR parts 70 and 71, and with the notice of the system of records and routine uses published in the **Federal Register**. All questions relating to access, disclosure, and/or amendment of claims records maintained by OWCP are to be resolved in accordance with this section.

§ 30.12 What process is used by a person who wants to obtain copies of or amend EEOICPA claim records?

(a) A claimant seeking copies of his or her official EEOICPA file should address a request to the District Director of the OWCP district office having custody of the file.

(b) Any request to amend a record covered by DOL/ESA–49 should be directed to the district office having custody of the official file.

(c) Any administrative appeal taken from a denial issued by OWCP under this section shall be filed with the Solicitor of Labor in accordance with 29 CFR 71.7 and 71.9.

Rights and Penalties

§ 30.15 May EEOICPA benefits be assigned, transferred or garnished?

(a) Pursuant to section 7385f(a) of the Act, no claim for EEOICPA benefits may be assigned or transferred.

(b) Provisions of the Social Security Act (42 U.S.C. 659) and regulations issued by the Office of Personnel Management at 5 CFR part 581 permit the garnishment of payments of EEOICPA monetary benefits to collect overdue alimony and child support. A request to garnish a payment for either of these purposes should be submitted to the district office that is handling the EEOICPA claim, and must be accompanied by a copy of the pertinent state agency or court order.

§ 30.16 What penalties may be imposed in connection with a claim under the Act?

(a) Other statutory provisions make it a crime to file a false or fraudulent claim or statement with the federal government in connection with a claim under the Act. Included among these provisions is 18 U.S.C. 1001. Enforcement of criminal provisions that may apply to claims under the Act is within the jurisdiction of the Department of Justice.

(b) In addition, administrative proceedings may be initiated under the Program Fraud Civil Remedies Act of 1986 (PFCRA), 31 U.S.C. 3801 *et seq.*, to impose civil penalties and assessments against persons or entities who make, submit or present, or cause to be made, submitted or presented, false, fictitious or fraudulent claims or written statements to OWCP in connection with a claim under EEOICPA. The Department's regulations implementing PFCRA are found at 29 CFR part 22.

§ 30.17 Is a beneficiary who defrauds the government in connection with a claim for EEOICPA benefits still entitled to those benefits?

When a beneficiary either pleads guilty to or is found guilty on either federal or state criminal charges of defrauding the federal or a state government in connection with a claim for benefits under the Act or any other federal or state workers' compensation law, the beneficiary forfeits (effective the date either the guilty plea is accepted or a verdict of guilty is returned after trial) any entitlement to any further benefits for any injury, illness or death covered by this part for which the time of injury was on or before the date of such guilty plea or verdict. Any subsequent change in or recurrence of the beneficiary's medical condition does not affect termination of entitlement under this section.

Subpart B—Filing Claims; Evidence and Burden of Proof; Special Procedures for Certain Cancer Claims

Filing Claims for Benefits Under EEOICPA

§ 30.100 In general, how does an employee file an initial claim for benefits?

(a) To claim benefits under EEOICPA, an employee must file a claim in writing. Form EE–1 should be used for this purpose, but any written communication that requests benefits under EEOICPA will be considered a claim. It will, however, be necessary for an employee to submit a Form EE–1 for OWCP to fully develop the claim. Copies of Form EE–1 may be obtained from OWCP or on the Internet at *http://www.dol.gov/esa/regs/compliance/owcp/eeoicp/main.htm.* The employee's claim must be filed with OWCP, but another person may do so on the employee's behalf.

(b) The employee may choose, at his or her own option, to file for benefits for only certain conditions that are potentially compensable under the Act (*e.g.*, the employee may not want to claim for an occupational illness or a covered illness for which a payment has been received that would necessitate an offset of EEOICPA benefits under the provisions of § 30.505(b) of these regulations). The employee may withdraw his or her claim by so requesting in writing to OWCP at any time before OWCP determines his or her eligibility for benefits.

(c) Except as provided in paragraph (d) of this section, a claim is considered to be ''filed'' on the date that the employee mails his or her claim to OWCP, as determined by postmark, or on the date that the claim is received by OWCP, whichever is the earliest determinable date. However, in no event will a claim under Part B of EEOICPA be considered to be ''filed'' earlier than July 31, 2001, nor will a claim under Part E of EEOICPA be considered to be ''filed'' earlier than October 30, 2000.

(1) The employee, or the person filing the claim on behalf of the employee, shall affirm that the information provided on the Form EE–1 is true, and must inform OWCP of any subsequent changes to that information.

(2) Except for a covered uranium employee filing a claim under Part B of the Act, the employee is responsible for submitting with his or her claim, or arranging for the submission of, medical evidence to OWCP that establishes that he or she sustained an occupational illness and/or a covered illness. This required medical evidence is described in § 30.114 and does not refer to mere recitations of symptoms the employee experienced that the employee believes indicate that he or she sustained an occupational illness or a covered illness.

(d) For those claims under Part E of EEOICPA that were originally filed with DOE as claims for assistance under former section 7385o of EEOICPA (which was repealed on October 28, 2004), a claim is considered to be ''filed'' on the date that the employee mailed his or her claim to DOE, as determined by postmark, or on the date that the claim was received by DOE, whichever is the earliest determinable date. However, in no event will a claim referred to in this paragraph be considered to be ''filed'' earlier than October 30, 2000.

§ 30.101 In general, how is a survivor's claim filed?

(a) A survivor of an employee who sustained an occupational illness or a covered illness must file a claim for compensation in writing. Form EE–2 should be used for this purpose, but any written communication that requests survivor benefits under the Act will be considered a claim. It will, however, be necessary for a survivor to submit a Form EE–2 for OWCP to fully develop the claim. Copies of Form EE–2 may be obtained from OWCP or on the Internet at *http://www.dol.gov/esa/regs/compliance/owcp/eeoicp/main.htm.* The survivor's claim must be filed with OWCP, but another person may do so on the survivor's behalf. Although only one survivor needs to file a claim under this section to initiate the development process, OWCP will distribute any monetary benefits payable on the claim among all eligible surviving beneficiaries who have filed claims with OWCP.

(b) A survivor may choose, at his or her own option, to file for benefits for only certain conditions that are potentially compensable under the Act (*e.g.*, the survivor may not want to claim

for an occupational illness or a covered illness for which a payment has been received that would necessitate an offset of EEOICPA benefits under the provisions of § 30.505(b) of these regulations). The survivor may withdraw his or her claim by so requesting in writing to OWCP at any time before OWCP determines his or her eligibility for benefits.

(c) A survivor must be alive to receive any payment under EEOICPA; there is no vested right to such payment.

(d) Except as provided in paragraph (e) of this section, a survivor's claim is considered to be ''filed'' on the date that the survivor mails his or her claim to OWCP, as determined by postmark, or the date that the claim is received by OWCP, whichever is the earliest determinable date. However, in no event will a survivor's claim under Part B of the Act be considered to be ''filed'' earlier than July 31, 2001, nor will a survivor's claim under Part E of the Act be considered to be ''filed'' earlier than October 30, 2000.

(1) The survivor, or the person filing the claim on behalf of the survivor, shall affirm that the information provided on the Form EE–2 is true, and must inform OWCP of any subsequent changes to that information.

(2) Except for the survivor of a covered uranium employee claiming under Part B of the Act, the survivor is responsible for submitting, or arranging for the submission of, evidence to OWCP that establishes that the employee upon whom the survivor's claim is based was eligible for such benefits, including medical evidence that establishes that the employee sustained an occupational illness or a covered illness. This required medical evidence is described in § 30.114 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.

(e) For those claims under Part E of EEOICPA that were originally filed with DOE as claims for assistance under former section 7385o of EEOICPA (which was repealed on October 28, 2004), a claim is considered to be ''filed'' on the date that the survivor mailed his or her claim to DOE, as determined by postmark, or on the date that the claim was received by DOE, whichever is the earliest determinable date. However, in no event will a claim referred to in this paragraph be considered to be ''filed'' earlier than October 30, 2000.

(f) A spouse or a child of a deceased DOE contractor employee or RECA section 5 uranium worker, who is not a covered spouse or covered child under Part E, may submit a written request to OWCP for a determination of whether that deceased DOE contractor employee or RECA section 5 uranium worker contracted a covered illness under section 7385s–4(d) of EEOICPA.

(1) Any such request submitted pursuant to paragraph (f) of this section will not be considered a survivor's claim for benefits under Part E of the Act.

(2) As part of its consideration of any request submitted pursuant to paragraph (f) of this section, OWCP will apply the eligibility criteria in subpart C of this part. However, the adjudicatory procedures contained in subpart D of this part will not apply to OWCP's consideration of such a request, and OWCP's response to the request will not constitute a final agency decision on entitlement to any benefits under EEOICPA.

§ 30.102 In general, how does an employee file a claim for additional impairment or wage-loss under Part E of EEOICPA?

(a) An employee previously awarded impairment benefits by OWCP may file a claim for additional impairment benefits. Such claim must be based on an increase in the employee's minimum impairment rating attributable to the covered illness or illnesses from the impairment rating that formed the basis for the last award of such benefits by OWCP. OWCP will only adjudicate claims for such an increased rating that are filed at least two years from the date of the last award of impairment benefits. However, OWCP will not wait two years before it will adjudicate a claim for additional impairment that is based on an allegation that the employee sustained a new covered illness.

(b) An employee previously awarded wage-loss benefits by OWCP may be eligible for additional wage-loss benefits for periods of wage-loss that were not addressed in a prior claim only if the employee had not reached his or her Social Security retirement age at the time of the prior award. OWCP will adjudicate claims filed on a yearly basis in connection with each succeeding calendar year for which qualifying wage-loss under Part E is alleged, as well as claims that aggregate calendar years for which qualifying wage-loss is alleged.

(c) Employees should use Form EE–10 to claim for additional impairment or wage-loss benefits under Part E of EEOICPA.

(1) The employee, or the person filing the claim on behalf of the employee, shall affirm that the information provided on Form EE–10 is true, and must inform OWCP of any subsequent changes to that information.

(2) The employee is responsible for submitting with any claim filed under this section, or arranging for the submission of, factual and medical evidence establishing that he or she experienced another calendar year of qualifying wage-loss, and/or medical evidence establishing that he or she has an increased minimum impairment rating, as appropriate.

§ 30.103 How does a claimant make sure that OWCP has the evidence necessary to process the claim?

(a) Claims and certain required submissions should be made on forms prescribed by OWCP. Persons submitting forms shall not modify these forms or use substitute forms.

Form No.	Title
(1) EE–1	Claim for Benefits Under the Energy Employees Occupational Illness Compensation Program Act.
(2) EE–2	Claim for Survivor Benefits Under the Energy Employees Occupational Illness Compensation Program Act.
(3) EE–3	Employment History for a Claim Under the Energy Employees Occupational Illness Compensation Program Act.
(4) EE–4	Employment History Affidavit for a Claim Under the Energy Employees Occupational Illness Compensation Program Act.

(b) Copies of the forms listed in this section are available for public inspection at the Office of Workers' Compensation Programs, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210. They may also be obtained from OWCP district offices and on the Internet at *http://www.dol.gov/esa/regs/compliance/owcp/eeoicp/main.htm.*

Verification of Alleged Employment

§ 30.105 What must DOE do after an employee or survivor files a claim?

(a) After it receives a claim for benefits described in §§ 30.100 or 30.101, OWCP may request that DOE verify the employment history provided by the claimant. Upon receipt of such a request, DOE will complete Form EE–5 as soon as possible and transmit the completed form to OWCP. On this form, DOE will certify either that it concurs with the employment history provided by the claimant, that it disagrees with such history, or that it can neither concur nor disagree after making a reasonable search of its records and also making a reasonable effort to locate

pertinent records not already in its possession.

(b) Claims for additional impairment or wage-loss benefits under Part E of the Act described in § 30.102 will not require any verification of employment by DOE, since OWCP will have made any required findings on this particular issue when it adjudicated the employee's initial claim for benefits.

§ 30.106 Can OWCP request employment verification from other sources?

(a) For most claims filed under EEOICPA, DOE has access to sufficient factual information to enable it to fulfill its obligations described in § 30.105(a). However, in instances where it lacks such information, DOE may arrange for other entities to provide OWCP with the information necessary to verify an employment history submitted as part of a claim. These other entities may consist of either current or former DOE contractors and subcontractors, atomic weapons employers, beryllium vendors, or other entities with access to relevant employment information.

(b) On its own initiative, OWCP may also arrange for entities other than DOE to perform the employment verification duties described in § 30.105(a).

Evidence and Burden of Proof

§ 30.110 Who is entitled to compensation under the Act?

(a) Under Part B of EEOICPA, compensation is payable to the following covered Part B employees, or their survivors:

(1) A ''covered beryllium employee'' (as described in § 30.205(a)) with a covered beryllium illness (as defined in § 30.5(o)) who was exposed to beryllium in the performance of duty (in accordance with § 30.206).

(2) A ''covered Part B employee with cancer'' (as described in § 30.210(a)).

(3) A ''covered Part B employee with chronic silicosis'' (as described in § 30.220).

(4) A ''covered uranium employee'' (as defined in § 30.5(s)).

(b) Under Part E of EEOICPA, compensation is payable to a ''covered Part E employee'' (as defined in § 30.5(p)), or his or her survivors.

(c) Any claim that does not meet all of the criteria for at least one of these categories, as set forth in the regulations in this part, must be denied.

(d) All claims for benefits under the Act must comply with the claims procedures and requirements set forth in subpart B of this part before any payment can be made from the Fund.

§ 30.111 What is the claimant's responsibility with respect to burden of proof, production of documents, presumptions, and affidavits?

(a) 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 the regulations in this part, 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.

(b) In the event that the claim lacks required information or supporting documentation, OWCP will notify the claimant of the deficiencies and provide him or her an opportunity for correction of the deficiencies.

(c) Written affidavits or declarations, subject to penalty for perjury, by the employee, survivor or any other person, will be accepted as evidence of employment history and survivor relationship for purposes of establishing eligibility and may be relied on in determining whether a claim meets the requirements of the Act for benefits if, and only if, such person attests that due diligence was used to obtain records in support of the claim, but that no records exist.

(d) A claimant will not be entitled to any presumption otherwise provided for in these regulations if substantial evidence exists that rebuts the existence of the fact that is the subject of the presumption. Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. When such evidence exists, the claimant shall be notified and afforded the opportunity to submit additional written medical documentation or records.

§ 30.112 What kind of evidence is needed to establish covered employment and how will that evidence be evaluated?

(a) Evidence of covered employment may include: employment records; pay stubs; tax returns; Social Security records; and written affidavits or declarations, subject to penalty of perjury, by the employee, survivor or any other person. However, no one document is required to establish covered employment and a claimant is not required to submit all of the evidence listed above. A claimant may submit other evidence not listed above to establish covered employment. To be acceptable as evidence, all documents and records must be legible. OWCP will accept photocopies, certified copies, and original documents and records.

(b) Pursuant to §§ 30.105 and/or 30.106, DOE or another entity verifying alleged employment shall certify that it concurs with the employment information provided by the claimant, that it disagrees with the information provided by the claimant, or, after a reasonable search of its records and a reasonable effort to locate pertinent records not already in its possession, it can neither concur nor disagree with the information provided by the claimant.

(1) If DOE or another entity certifies that it concurs with the employment information provided by the claimant, then the criterion for covered employment will be established.

(2) If DOE or another entity certifies that it disagrees with the information provided by the claimant or that after a reasonable search of its records and a reasonable effort to locate pertinent records not already in its possession it can neither concur nor disagree with the information provided by the claimant, OWCP will evaluate the evidence submitted by the claimant to determine whether the claimant has established covered employment by a preponderance of the evidence. OWCP may request additional evidence from the claimant to demonstrate that the claimant has met the criterion for covered employment. Nothing in this section shall be construed to limit OWCP's ability to require additional documentation.

(3) If the only evidence of covered employment is a self-serving affidavit and DOE or another entity either disagrees with the assertion of covered employment or cannot concur or disagree with the assertion of covered employment, then OWCP may reject the claim based upon a lack of evidence of covered employment.

§ 30.113 What are the requirements for written medical documentation, contemporaneous records, and other records or documents?

(a) All written medical documentation, contemporaneous records, and other records or documents submitted by an employee or his or her survivor to prove any criteria provided for in these regulations must be legible. OWCP will accept photocopies, certified copies, and original documents and records.

(b) To establish eligibility, the employee or his or her survivor may be required to provide, where appropriate, additional contemporaneous records to the extent they exist or an authorization to release additional contemporaneous records or a statement by the custodian(s) of the record(s) certifying that the requested record(s) no longer exist. Nothing in this section shall be construed to limit OWCP's ability to require additional documentation.

(c) If a claimant submits a certified statement, by a person with knowledge of the facts, that the medical records containing a diagnosis and date of diagnosis of a covered medical condition no longer exist, then OWCP may consider other evidence to establish a diagnosis and date of diagnosis of a covered medical condition. However, if the certified statement is a self-serving document, OWCP may reject the claim based upon a lack of evidence of a covered medical condition.

§ 30.114 What kind of evidence is needed to establish a compensable medical condition and how will that evidence be evaluated?

(a) Evidence of a compensable medical condition may include: a physician's report, laboratory reports, hospital records, death certificates, x-rays, magnetic resonance images or reports, computer axial tomography or other imaging reports, lymphocyte proliferation testings, beryllium patch tests, pulmonary function or exercise testing results, pathology reports including biopsy results and other medical records. A claimant is not required to submit all of the evidence listed in this paragraph. A claimant may submit other evidence that is not listed in this paragraph to establish a compensable medical condition. Nothing in this section shall be construed to limit OWCP's ability to require additional documentation.

(b) The medical evidence submitted will be used to establish the diagnosis and the date of diagnosis of the compensable medical condition.

(1) For covered beryllium illnesses, additional medical evidence, as set forth in § 30.207, is required to establish a beryllium illness.

(2) For chronic silicosis, additional medical evidence, as set forth in § 30.222, is required to establish chronic silicosis.

(3) For consequential injuries, illnesses, impairments or diseases, the claimant must also submit a physician's fully rationalized medical report showing a causal relationship between the resulting injury, illness, impairment or disease and the compensable medical condition.

(c) OWCP will evaluate the medical evidence in accordance with recognized and accepted diagnostic criteria used by physicians to determine whether the claimant has established the medical condition for which compensation is sought in accordance with the requirements of the Act.

Special Procedures for Certain Radiogenic Cancer Claims

§ 30.115 For those radiogenic cancer claims that do not seek benefits under Part B of the Act pursuant to the Special Exposure Cohort provisions, what will OWCP do once it determines that an employee contracted cancer?

(a) Other than claims for a non-radiogenic cancer listed by HHS at 42 CFR 81.30, or claims seeking benefits under Part E of the Act that have previously been accepted under section 7384u of the Act, or claims previously accepted under Part B pursuant to the Special Exposure Cohort provisions, OWCP will forward the claim package (including, but not limited to, Forms EE–1, EE–2, EE–3, EE–4 and EE–5, as appropriate) to HHS for dose reconstruction. At that point in time, development of the claim by OWCP may be suspended.

(1) This package will include OWCP's initial findings in regard to the diagnosis and date of diagnosis of the employee, as well as any employment history compiled by OWCP (including information such as dates and locations worked, and job titles). The package, however, will not constitute either a recommended or final decision by OWCP on the claim.

(2) HHS will then reconstruct the radiation dose of the employee, after such further development of the employment history as it may deem necessary, and provide OWCP, DOE and the claimant with the final dose reconstruction report. The final dose reconstruction record will be delivered to OWCP with the final dose reconstruction report and to the claimant upon request.

(b) Following its receipt of the reconstructed dose from HHS, OWCP will resume its adjudication of the cancer claim and consider whether the claimant has met the eligibility criteria set forth in subpart C of this part. However, during the period before it receives a reconstructed dose from HHS, OWCP may continue to develop other aspects of a claim, to the extent that it deems such development to be appropriate.

Subpart C—Eligibility Criteria

General Provisions

§ 30.200 What is the scope of this subpart?

The regulations in this subpart describe the criteria for eligibility for benefits for claims under Part B of EEOICPA relating to covered beryllium illness under sections 7384l, 7384n, 7384s and 7384t of the Act; for cancer under sections 7384l, 7384n, 7384q and 7384t of the Act; for chronic silicosis under sections 7384l, 7384r, 7384s and 7384t of the Act; and for claims relating to covered uranium employees under sections 7384t and 7384u of the Act. These regulations also describe the criteria for eligibility for benefits for claims under Part E of EEOICPA relating to covered illnesses under sections 7385s–4 and 7385s–5 of the Act. This subpart describes the type and extent of evidence that will be necessary to establish the criteria for eligibility for compensation for these illnesses.

Eligibility Criteria for Claims Relating to Covered Beryllium Illness Under Part B of EEOICPA

§ 30.205 What are the criteria for eligibility for benefits relating to beryllium illnesses covered under Part B of EEOICPA?

To establish eligibility for benefits under this section, the claimant must establish the criteria set forth in both paragraphs (a) and (b) of this section:

(a) The employee is a covered beryllium employee only if the criteria in paragraphs (a)(1) and (a)(3) of this section, or (a)(2) and (a)(3) of this section, are established:

(1) The employee is a ''current or former employee as defined in 5 U.S.C. 8101(1)'' (see § 30.5(t) of this part) who may have been exposed to beryllium at a DOE facility or at a facility owned, operated, or occupied by a beryllium vendor; or

(2) The employee is a current or former civilian employee of:

(i) Any entity that contracted with the DOE to provide management and operation, management and integration, or environmental remediation of a DOE facility; or

(ii) Any contractor or subcontractor that provided services, including construction and maintenance, at such a facility; or

(iii) 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 DOE, including periods during which environmental remediation of a

vendor's facility was undertaken pursuant to a contract between the vendor and DOE; and

(3) The civilian employee was exposed to beryllium in the performance of duty by establishing that he or she was, during a period when beryllium dust, particles, or vapor may have been present at such a facility:

(i) Employed at a DOE facility (as defined in § 30.5(x) of this part); or

(ii) Present at a DOE facility, or at a facility owned, operated, or occupied by a beryllium vendor, because of his or her employment by the United States, a beryllium vendor, a contractor or subcontractor of a beryllium vendor, or a contractor or subcontractor of the DOE. Under this paragraph, exposure to beryllium in the performance of duty can be established whether or not the beryllium that may have been present at such facility was produced or processed for sale to, or use by, DOE.

(b) The employee has one of the following:

(1) Beryllium sensitivity as established by an abnormal beryllium LPT performed on either blood or lung lavage cells.

(2) Established chronic beryllium disease.

(3) Any injury, illness, impairment, or disability sustained as a consequence of the conditions specified in paragraphs (b)(1) and (2) of this section.

§ 30.206 How does a claimant prove that the employee was a ''covered beryllium employee'' exposed to beryllium dust, particles or vapor in the performance of duty?

(a) Proof of employment at or physical presence at a DOE facility, or a facility owned, operated, or occupied by a beryllium vendor, because of employment by the United States, a beryllium vendor, or a contractor or subcontractor of a beryllium vendor during a period when beryllium dust, particles, or vapor may have been present at such a facility, may be made by the submission of any trustworthy records that, on their face or in conjunction with other such records, establish that the employee was employed or present at a covered facility and the time period of such employment or presence.

(b) If the evidence shows that exposure occurred while the employee was employed or present at a facility during a time frame that is outside the relevant time frame indicated for that facility, OWCP may request that DOE provide additional information on the facility. OWCP will determine whether the evidence of record supports enlarging the relevant time frame for that facility.

(c) If the evidence shows that exposure occurred while the employee was employed or present at a facility that would have to be designated by DOE as a beryllium vendor under section 7384m of the Act to be a covered facility, and that the facility has not been so designated, OWCP will deny the claim on the ground that the facility is not a covered facility.

(d) Records from the following sources may be considered as evidence for purposes of establishing employment or presence at a covered facility:

(1) Records or documents created by any federal government agency (including verified information submitted for security clearance), any tribal government, or any state, county, city or local government office, agency, department, board or other entity, or other public agency or office.

(2) Records or documents created by any vendor, processor, or producer of beryllium or related products designated as a beryllium vendor by the DOE in accordance with section 7384m of the Act.

(3) Records or documents created as a by product of any regularly conducted business activity or by an entity that acted as a contractor or subcontractor to the DOE.

§ 30.207 How does a claimant prove a diagnosis of a beryllium disease covered under Part B?

(a) Written medical documentation is required in all cases to prove that the employee developed a covered beryllium illness. Proof that the employee developed a covered beryllium illness must be made by using the procedures outlined in paragraphs (b), (c), or (d) of this section.

(b) Beryllium sensitivity or sensitization is established with an abnormal LPT performed on either blood or lung lavage cells.

(c) Chronic beryllium disease is established in the following manner:

(1) For diagnoses on or after January 1, 1993, beryllium sensitivity (as established in accordance with paragraph (b) of this section), together with lung pathology consistent with chronic beryllium disease, including 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.

(2) For diagnoses before January 1, 1993, the presence of the following:

(i) Occupational or environmental history, or epidemiologic evidence of beryllium exposure; and

(ii) Any three of the following criteria:

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

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

(C) Lung pathology consistent with chronic beryllium disease.

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

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

(d) 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.

Eligibility Criteria for Claims Relating to Radiogenic Cancer Under Parts B and E of EEOICPA

§ 30.210 What are the criteria for eligibility for benefits relating to radiogenic cancer?

(a) To establish eligibility for benefits for radiogenic cancer under Part B of EEOICPA, an employee or his or her survivor must show that:

(1) The employee has been diagnosed with one of the forms of cancer specified in § 30.5(ff) of this part; and

(i) Is a member of the Special Exposure Cohort (as described in § 30.214(a) of this subpart) who, as a civilian DOE employee or civilian DOE contractor employee, contracted the specified cancer after beginning employment at a DOE facility; or

(ii) Is a member of the Special Exposure Cohort (as described in § 30.214(a) of this subpart) who, as a civilian atomic weapons employee, contracted the specified cancer after beginning employment at an atomic weapons employer facility (as defined in § 30.5(e)); or

(2) The employee has been diagnosed with cancer; and

(i)(A) Is/was a civilian DOE employee who contracted that cancer after beginning employment at a DOE facility; or

(B) Is/was a civilian DOE contractor employee who contracted that cancer after beginning employment at a DOE facility; or

(C) Is/was a civilian atomic weapons employee who contracted that cancer after beginning employment at an atomic weapons employer facility; and

(ii) The cancer was at least as likely as not related to the employment at the DOE facility or atomic weapons employer facility; or

(3) The employee has been diagnosed with an injury, illness, impairment or disease that arose as a consequence of the accepted cancer.

(b)(1) To establish eligibility for benefits for radiogenic cancer under Part E of EEOICPA, an employee or his or her survivor must show that:

(i) The employee has been diagnosed with cancer; and

(A) Is/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

(B) The cancer was at least as likely as not related to exposure to a toxic substance of a radioactive nature at a DOE facility or a RECA section 5 facility; and

(C) It is at least as likely as not that the exposure to such toxic substance(s) was related to employment at a DOE facility or a RECA section 5 facility; or

(ii) The employee has been diagnosed with an injury, illness, impairment or disease that arose as a consequence of the accepted cancer.

(2) Eligibility for benefits for radiogenic cancer under Part E in a claim that has previously been accepted under Part B pursuant to the Special Exposure Cohort provisions is described in § 30.230(a) of these regulations.

§ 30.211 How does a claimant establish that the employee has or had contracted cancer?

A claimant establishes that the employee has or had contracted a specified cancer (as defined in § 30.5(ff)) or other cancer with medical evidence that sets forth an explicit diagnosis of cancer and the date on which that diagnosis was first made.

§ 30.212 How does a claimant establish that the employee contracted cancer after beginning employment at a DOE facility, an atomic weapons employer facility or a RECA section 5 facility?

(a) Proof of employment by the DOE or a DOE contractor at a DOE facility, or by an atomic weapons employer at an atomic weapons employer facility, or at a RECA section 5 facility, may be made by the submission of any trustworthy records that, on their face or in conjunction with other such records, establish that the employee was so employed and the time period(s) of such employment.

(b)(1) Except as provided in paragraph (b)(2) of this section, if the evidence shows that exposure occurred while the employee was employed at a facility during a time frame that is outside the relevant period indicated for that facility, OWCP may request that DOE provide additional information on the facility. OWCP will determine whether the evidence of record supports enlarging the relevant period for that facility.

(2) OWCP may choose not to request that DOE provide additional information on an atomic weapons employer facility that NIOSH reported had a potential for significant residual radiation contamination 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, if the evidence referred to in paragraph (a) of this section establishes that the employee was employed at that facility during a period when NIOSH reported that it had a potential for significant residual radiation contamination.

(c) If the evidence shows that exposure occurred while the employee was employed by an employer that would have to be designated by DOE as an atomic weapons employer under section 7384l(4) of the Act to be a covered employer, and that the employer has not been so designated, OWCP will deny the claim on the ground that the employer is not a covered atomic weapons employer.

(d) Records from the following sources may be considered as evidence for purposes of establishing employment or presence at a covered facility:

(1) Records or documents created by any federal government agency (including verified information submitted for security clearance), any tribal government, or any state, county, city or local government office, agency, department, board or other entity, or other public agency or office.

(2) Records or documents created as a byproduct of any regularly conducted business activity or by an entity that acted as a contractor or subcontractor to the DOE.

§ 30.213 How does a claimant establish that the radiogenic cancer was at least as likely as not related to employment at the DOE facility, the atomic weapons employer facility, or the RECA section 5 facility?

(a) HHS, with the advice of the Advisory Board on Radiation and Worker Health, has issued regulatory guidelines at 42 CFR part 81 that OWCP uses to determine whether radiogenic cancers claimed under Parts B and E were at least as likely as not related to employment at a DOE facility, an atomic weapons employer facility, or a RECA section 5 facility, as appropriate. Persons should consult HHS's regulations for information regarding the factual evidence that will be considered by OWCP, in addition to the employee's radiation dose reconstruction that will be provided to OWCP by HHS, in making this particular factual determination.

(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).

(c) OWCP also uses HHS's regulations when it makes the determination required by section 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. For cancer claims under Part E, if the PoC is less than 50% and the claimant alleges that the employee was exposed to additional toxic substances, OWCP will determine if the claim is otherwise compensable pursuant to § 30.230(d) of this part.

§ 30.214 How does a claimant establish that the employee is a member of the Special Exposure Cohort?

(a) For purposes of establishing eligibility as a member of the Special Exposure Cohort (SEC) under § 30.210(a)(1), the employee must have been a DOE employee, a DOE contractor employee, or an atomic weapons employee who meets any of the following requirements:

(1) The employee was so employed for a number of workdays aggregating at

least 250 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; or

(ii) Worked in a job that had exposures comparable to a job that is or was monitored through the use of dosimetry badges.

(2) The employee 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.

(3) The employee is a member of a group or class of employees subsequently designated as additional members of the SEC by HHS.

(b) For purposes of satisfying the 250 workday requirement of paragraph (a)(1) of this section, the claimant may aggregate the days of service at more than one gaseous diffusion plant.

(c) Proof of employment by the DOE or a DOE contractor, or an atomic weapons employer, for the requisite time periods set forth in paragraph (a) of this section, may be made by the submission of any trustworthy records that, on their face or in conjunction with other such records, establish that the employee was so employed and the time period(s) of such employment. If the evidence shows that exposure occurred while the employee was employed by an employer that would have to be designated by DOE as an atomic weapons employer under section 7384l(4) of the Act to be a covered employer, and that the employer has not been so designated, OWCP will deny the claim on the ground that the employer is not a covered atomic weapons employer.

(d) Records from the following sources may be considered as evidence for purposes of establishing employment or presence at a covered facility:

(1) Records or documents created by any federal government agency (including verified information submitted for security clearance), any tribal government, or any state, county, city or local government office, agency, department, board or other entity, or other public agency or office.

(2) Records or documents created as a byproduct of any regularly conducted business activity or by an entity that acted as a contractor or subcontractor to the DOE.

§ 30.215 How does a claimant establish that the employee has sustained an injury, illness, impairment or disease as a consequence of a diagnosed cancer?

An injury, illness, impairment or disease sustained as a consequence of a diagnosed cancer covered by the provisions of § 30.210 must be established with a fully rationalized medical report by a physician that shows the relationship between the injury, illness, impairment or disease and the cancer. Neither the fact that the injury, illness, impairment or disease manifests itself after a diagnosis of a cancer, nor the belief of the claimant that the injury, illness, impairment or disease was caused by the cancer, is sufficient in itself to prove a causal relationship.

Eligibility Criteria for Claims Relating to Chronic Silicosis Under Part B of EEOICPA

§ 30.220 What are the criteria for eligibility for benefits relating to chronic silicosis?

To establish eligibility for benefits for chronic silicosis under Part B of EEOICPA, an employee or his or her survivor must show that:

(a) The employee is a civilian DOE employee, or a civilian DOE contractor employee, who was present for a number of workdays aggregating at least 250 workdays during the mining of tunnels at a DOE facility (as defined in § 30.5(x)) located in Nevada or Alaska for tests or experiments related to an atomic weapon, and has been diagnosed with chronic silicosis (as defined in § 30.5(j)); or

(b) The employee has been diagnosed with an injury, illness, impairment or disease that arose as a consequence of the accepted chronic silicosis.

§ 30.221 How does a claimant prove exposure to silica in the performance of duty?

(a) Proof of the employee's employment and presence for the requisite days during the mining of tunnels at a DOE facility located in Nevada or Alaska for tests or experiments related to an atomic weapon may be made by the submission of any trustworthy records that, on their face or in conjunction with other such records, establish that the employee was so employed and present at these sites and the time period(s) of such employment and presence.

(b) If the evidence shows that exposure occurred while the employee was employed and present at a facility during a time frame that is outside the relevant time frame indicated for that facility, OWCP may request that DOE provide additional information on the facility. OWCP will determine whether the evidence of record supports enlarging the relevant time frame for that facility.

(c) Records from the following sources may be considered as evidence for purposes of establishing proof of employment or presence at a covered facility:

(1) Records or documents created by any federal government agency (including verified information submitted for security clearance), any tribal government, or any state, county, city or local government office, agency, department, board or other entity, or other public agency or office.

(2) Records or documents created as a byproduct of any regularly conducted business activity or by an entity that acted as a contractor or subcontractor to the DOE.

(d) For purposes of satisfying the 250 workday requirement of § 30.220(a), the claimant may aggregate the days of service at more than one qualifying site.

§ 30.222 How does a claimant establish that the employee has been diagnosed with chronic silicosis or has sustained a consequential injury, illness, impairment or disease?

(a) A written diagnosis of the employee's chronic silicosis (as defined in § 30.5(j)) shall be made by a medical doctor and accompanied by one of the following:

(1) A chest radiograph, interpreted by an individual certified by NIOSH as a B reader, classifying the existence of pneumoconioses of category 1/0 or higher; or

(2) Results from a computer assisted tomograph or other imaging technique that are consistent with silicosis; or

(3) Lung biopsy findings consistent with silicosis.

(b) An injury, illness, impairment or disease sustained as a consequence of accepted chronic silicosis covered by the provisions of § 30.220(a) must be established with a fully rationalized medical report by a physician that shows the relationship between the injury, illness, impairment or disease and the accepted chronic silicosis. Neither the fact that the injury, illness, impairment or disease manifests itself after a diagnosis of accepted chronic silicosis, nor the belief of the claimant that the injury, illness, impairment or disease was caused by the accepted chronic silicosis, is sufficient in itself to prove a causal relationship.

Eligibility Criteria for Certain Uranium Employees Under Part B of EEOICPA

§ 30.225 What are the criteria for eligibility for benefits under Part B of EEOICPA for certain uranium employees?

In order to be eligible for benefits under this section, the claimant must establish the criteria set forth in either paragraph (a) or paragraph (b) of this section:

(a) The Attorney General has determined that the claimant is a covered uranium employee who is entitled to payment of $100,000 as compensation due under section 5 of RECA for a claim made under that statute (there is, however, no requirement that the claimant or surviving eligible beneficiary has actually received payment pursuant to RECA). If a deceased employee's survivor(s) has been determined to be entitled to such an award, his or her survivor(s), if any, will only be entitled to EEOICPA compensation in accordance with section 7384u(e) of the Act.

(b) The covered uranium employee has been diagnosed with an injury, illness, impairment or disease that arose as a consequence of the medical condition for which he or she was determined to be entitled to payment of $100,000 as compensation due under section 5 of RECA.

§ 30.226 How does a claimant establish that a covered uranium employee has sustained a consequential injury, illness, impairment or disease?

An injury, illness, impairment or disease sustained as a consequence of a medical condition covered by the provisions of § 30.225(a) must be established with a fully rationalized medical report by a physician that shows the relationship between the injury, illness, impairment or disease and the accepted medical condition. Neither the fact that the injury, illness, impairment or disease manifests itself after a diagnosis of a medical condition covered by the provisions of § 30.225(a), nor the belief of the claimant that the injury, illness, impairment or disease was caused by such a condition, is sufficient in itself to prove a causal relationship.

Eligibility Criteria for Other Claims Under Part E of EEOICPA

§ 30.230 What are the criteria necessary to establish that an employee contracted a covered illness under Part E of EEOICPA?

To establish that an employee contracted a covered illness under Part E of the Act, the employee, or his or her survivor, must show one of the following:

(a) That OWCP has determined under Part B of EEOICPA that the employee is a Department of Energy contractor employee as defined in § 30.5(w), and that he or she has been awarded compensation under that Part of the Act for an occupational illness;

(b) That the Attorney General has determined that the employee is entitled to payment of $100,000 as compensation due under section 5 of RECA for a claim made under that statute (however, if a deceased employee's survivor has been determined to be entitled to such an award, his or her survivor(s), if any, will only be entitled to benefits under Part E of EEOICPA in accordance with section 7385s–3 of the Act);

(c) That the Secretary of Energy has accepted a positive determination of a Physicians Panel that the employee sustained an illness or died due to exposure to a toxic substance at a DOE facility under former section 7385o of EEOICPA, or that the Secretary of Energy has found significant evidence contrary to a negative determination of a Physicians Panel; or

(d)(1) That the employee is a civilian Department of Energy contractor employee as defined in § 30.5(w), or a civilian who was employed in a uranium mine or mill located in Colorado, New Mexico, Arizona, Wyoming, South Dakota, Washington, Utah, Idaho, North Dakota, Oregon or Texas at any time during the period from January 1, 1942 through December 31, 1971, or was employed in the transport of uranium ore or vanadium-uranium ore from such a mine or mill during that same period, and that he or she:

(i) Has been diagnosed with an illness; and

(ii) That it is at least as likely as not that exposure to a toxic substance at a Department of Energy facility or at a RECA section 5 facility, as appropriate, was a significant factor in aggravating, contributing to, or causing the illness; and

(iii) That 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 or a RECA section 5 facility, as appropriate.

(2) In making the determination under paragraph (d)(1)(ii) of this section, OWCP will consider:

(i) The nature, frequency and duration of exposure of the covered employee to the substance alleged to be toxic;

(ii) Evidence of the carcinogenic or pathogenic properties of the alleged toxic substance to which the employee was exposed;

(iii) An opinion of a qualified physician with expertise in treating, diagnosing or researching the illness claimed to be caused or aggravated by the alleged exposure; and

(iv) Any other evidence that OWCP determines to have demonstrated relevance to the relation between a particular toxic substance and the claimed illness.

§ 30.231 How does a claimant prove employment-related exposure to a toxic substance at a DOE facility or a RECA section 5 facility?

To establish employment-related exposure to a toxic substance at a Department of Energy facility or RECA section 5 facility as required by § 30.230(d), an employee, or his or her survivor(s), must prove that the employee was employed at such facility and that he or she was exposed to a toxic substance in the course of that employment.

(a) Proof of employment may be established by any trustworthy records that, on their face or in conjunction with other such records, establish that the employee was so employed and the time period(s) of such employment.

(b) Proof of exposure to a toxic substance may be established by the submission of any appropriate document or information that is evidence that such substance was present at the facility in which the employee was employed and that the employee came into contact with such substance. OWCP site exposure matrices may be used to provide probative factual evidence that a particular substance was present at either a DOE facility or a RECA section 5 facility.

§ 30.232 How does a claimant establish that the employee has been diagnosed with a covered illness, or sustained an injury, illness, impairment or disease as a consequence of a covered illness?

(a) To establish that the employee has been diagnosed with a covered illness as required by § 30.230(d), the employee, or his or her survivor(s), must provide the following:

(1) The name and address of any licensed physician who is the source of a diagnosis based upon documented medical information that the employee has or had an illness and that the illness may have resulted from exposure to a toxic substance while the employee was employed at a DOE facility or a RECA section 5 facility, as appropriate, and, to the extent practicable, a copy of the diagnosis and a summary of the information upon which the diagnosis is based; and

(2) A signed medical release, authorizing the release of any diagnosis,

medical opinion and medical records documenting the diagnosis or opinion that the employee has or had an illness and that the illness may have resulted from exposure to a toxic substance while the employee was employed at a DOE facility or RECA section 5 facility, as appropriate; and

(3) To the extent practicable and appropriate, an occupational history obtained by a physician, an occupational health professional, or a DOE-sponsored Former Worker Program (if such an occupational history is not reasonably available or is inadequate, and such history is deemed by OWCP to be needed for the fair adjudication of the claim, then OWCP may assist the claimant in developing this history); and

(4) Any other information or materials deemed by OWCP to be necessary to provide reasonable evidence that the employee has or had an illness that may have arisen from exposure to a toxic substance while employed at a DOE facility or RECA section 5 facility, as appropriate.

(b) The employee, or his or her survivor(s), may also submit to OWCP other evidence not described in paragraph (a) of this section showing that the employee has or had an illness that resulted from an exposure to a toxic substance during the course of employment at either a DOE facility or a RECA section 5 facility, as appropriate.

(c) An injury, illness, impairment or disease sustained as a consequence of a covered illness (as defined in § 30.5(r)) must be established with a fully rationalized medical report by a physician that shows the relationship between the injury, illness, impairment or disease and the covered illness. Neither the fact that the injury, illness, impairment or disease manifests itself after a diagnosis of a covered illness, nor the belief of the claimant that the injury, illness, impairment or disease was caused by the covered illness, is sufficient in itself to prove a causal relationship.

Subpart D—Adjudicatory Process

§ 30.300 What process will OWCP use to decide claims for entitlement and to provide for administrative review of those decisions?

OWCP district offices will issue recommended decisions with respect to claims for entitlement under Part B and/or Part E of EEOICPA that are filed pursuant to the regulations set forth in subpart B of this part. In circumstances where a claim is made for more than one benefit available under Part B and/or Part E of the Act, OWCP may issue a recommended decision on only part of that particular claim in order to adjudicate that portion of the claim as quickly as possible. Should this occur, OWCP will issue one or more recommended decisions on the deferred portions of the claim when the adjudication of those portions is completed. All recommended decisions granting and/or denying benefits under Part B and/or Part E of the Act will be forwarded to the Final Adjudication Branch (FAB). Claimants will be given an opportunity to object to all or part of the recommended decision before the FAB. The FAB will consider objections filed by a claimant and conduct a hearing, if requested to do so by the claimant, before issuing a final decision on the claim for entitlement.

§ 30.301 May subpoenas be issued for witnesses and documents in connection with a claim under Part B of EEOICPA?

(a) In connection with the adjudication of a claim under Part B of EEOICPA, an OWCP district office and/or a FAB reviewer may, at their own initiative, issue subpoenas for the attendance and testimony of witnesses, and for the production of books, electronic records, correspondence, papers or other relevant documents. Subpoenas will only be issued for documents if they are relevant and cannot be obtained by other means, and for witnesses only where oral testimony is the best way to ascertain the facts.

(b) A claimant may also request a subpoena in connection with his or her claim under Part B of the Act, but such request may only be made to a FAB reviewer. No subpoenas will be issued at the request of the claimant under any other portion of the claims process. The decision to grant or deny such request is within the discretion of the FAB reviewer. To request a subpoena under this section, the requestor must:

(1) Submit the request in writing and send it to the FAB reviewer as early as possible, but no later than 30 days (as evidenced by postmark, electronic marker or other objective date mark) after the date of the original hearing request;

(2) Explain why the testimony or evidence is directly relevant and material to the issues in the case; and

(3) Establish that a subpoena is the best method or opportunity to obtain such evidence because there are no other means by which the documents or testimony could have been obtained.

(c) No subpoena will be issued for attendance of employees or contractors of OWCP or NIOSH acting in their official capacities as decision-makers or policy administrators. For hearings taking the form of a review of the written record, no subpoena for the appearance of witnesses will be considered.

(d) The FAB reviewer will issue the subpoena under his or her own name. It may be served in person or by certified mail, return receipt requested, addressed to the person to be served at his or her last known principal place of business or residence. A decision to deny a subpoena requested by a claimant can only be challenged as part of a request for reconsideration of any adverse decision of the FAB which results from the hearing.

§ 30.302 Who pays the costs associated with subpoenas?

(a) Witnesses who are not employees or former employees of the federal government shall be paid the same fees and mileage as paid for like services in the District Court of the United States where the subpoena is returnable, except that expert witnesses shall be paid a fee not to exceed the local customary fee for such services.

(b) Where OWCP asked that the witness submit evidence into the case record or asked that the witness attend, OWCP shall pay the fees and mileage. Where the claimant asked for the subpoena, and where the witness submitted evidence into the record at the request of the claimant, the claimant shall pay the fees and mileage.

§ 30.303 What information may OWCP request in connection with a claim under Part E of EEOICPA?

At any time during the course of development of a claim for benefits under Part E, OWCP may determine that it needs relevant information to adjudicate the claim. When this occurs, and at the request of OWCP, DOE and/or any contractor who employed a Department of Energy contractor employee must provide to OWCP information or documents in response to the request in connection with a claim under Part E of EEOICPA.

(a) The party to whom the request is made must respond to OWCP within 90 days of the request with either:

(1) The requested information or documents; or

(2) A sworn statement that a good faith search for the requested information or documents was conducted, and that the information or documents could not be located.

(b) DOE and/or the DOE contractor who employed a Department of Energy contractor employee must query third parties under its control to acquire the requested information or documents.

(c) In providing the requested information or documents, DOE and/or the DOE contractor who employed a DOE contractor employee must preserve the current organization of the requested information or documents, and must provide such description and indexing of the requested information or documents as OWCP considers appropriate to facilitate their use by OWCP.

(d) Information or document requests may include, but are not limited to, requests for records, files and other data, whether paper, electronic, imaged or otherwise, developed, acquired or maintained by DOE or the DOE contractor who employed a DOE contractor employee. Such information or documents may include records, files and data on facility industrial hygiene, employment of individuals or groups, exposure and medical records, and claims applications.

Recommended Decisions on Claims

§ 30.305 How does OWCP determine entitlement to EEOICPA compensation?

(a) In reaching a recommended decision with respect to EEOICPA compensation, OWCP considers the claim presented by the claimant, the factual and medical evidence of record, the dose reconstruction report calculated by HHS (if any), any report submitted by DOE and the results of such investigation as OWCP may deem necessary.

(b) The OWCP claims staff applies the law, the regulations and its procedures when it evaluates the medical evidence and the facts as reported or obtained upon investigation.

§ 30.306 What does the recommended decision contain?

The recommended decision shall contain findings of fact and conclusions of law. The recommended decision may accept or reject the claim in its entirety, or it may accept or reject a portion of the claim presented. It is accompanied by a notice of the claimant's right to file objections with, and request a hearing before, the FAB.

§ 30.307 To whom is the recommended decision sent?

(a) A copy of the recommended decision will be mailed to the claimant's last known address and to the claimant's designated representative before OWCP, if any. Notification to either the claimant or the representative will be considered notification to both parties.

(b) At the same time it issues a recommended decision on a claim, the OWCP district office will forward the record of such claim to the FAB. Any new evidence submitted to the district office following the issuance of the recommended decision will also be forwarded to the FAB for consideration.

Hearings and Final Decisions on Claims

§ 30.310 What must the claimant do if he or she objects to the recommended decision or wants to request a hearing?

(a) 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. This written statement should be filed with the FAB at the address indicated in the notice accompanying the recommended decision.

(b) For purposes of determining whether the written statement referred to in paragraph (a) of this section has been timely filed with the FAB, the statement will be considered to be ''filed'' on the date that the claimant mails it to the FAB, as determined by postmark, or on the date that such written statement is actually received by the FAB, whichever is the earliest determinable date.

§ 30.311 What happens if the claimant does not object to the recommended decision or request a hearing within 60 days?

(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 in § 30.310, the FAB may issue a final decision accepting the recommendation of the district office as provided in § 30.316.

(b) If the recommended decision accepts all or part of a claim for compensation, the FAB may issue a final decision at any time after receiving written notice from the claimant that he or she waives any objection to all or part of the recommended decision.

§ 30.312 What will the FAB do if the claimant objects to the recommended decision but does not request a hearing?

If 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. If the claimant only objects to part of the recommended decision, the FAB may issue a final decision accepting the remaining part of the recommendation of the district office without first reviewing the written record (see § 30.316).

§ 30.313 How is a review of the written record conducted?

(a) The FAB reviewer will consider the written record forwarded by the district office and any additional evidence and/or argument submitted by the claimant. The reviewer may also conduct whatever investigation is deemed necessary.

(b) The claimant should submit, with his or her written statement that objects to the recommended decision, all evidence or argument that he or she wants to present to the reviewer. However, evidence or argument may be submitted at any time up to the date specified by the reviewer for the submission of such evidence or argument.

(c) Any objection that is not presented to the FAB reviewer, including any objection to HHS's reconstruction of the radiation dose to which the employee was exposed (if any), whether or not the pertinent issue was previously presented to the district office, is deemed waived for all purposes.

§ 30.314 How is a hearing conducted?

(a) The FAB reviewer retains complete discretion to set the time and place of the hearing, including the amount of time allotted for the hearing, considering the issues to be resolved. At the discretion of the reviewer, the hearing may be conducted by telephone or teleconference. As part of the hearing process, the FAB reviewer will consider the written record forwarded by the district office and any additional evidence and/or argument submitted by the claimant. The reviewer may also conduct whatever investigation is deemed necessary.

(1) The FAB reviewer will try to set the hearing at a place that is within commuting distance of the claimant's residence, but will not be able to do so in all cases. Therefore, for reasons of economy, the claimant may be required to travel a roundtrip distance of up to 200 miles to attend the hearing.

(2) In unusual circumstances, the FAB reviewer may set a place for the hearing that is more than 200 miles roundtrip from the claimant's residence. However, in that situation, OWCP will reimburse the claimant for reasonable and necessary travel expenses incurred to attend the hearing if he or she submits a written reimbursement request that documents such expenses.

(b) Unless otherwise directed in writing by the claimant, the FAB

reviewer will mail a notice of the time and place of the hearing to the claimant and any representative at least 30 days before the scheduled hearing date. If the claimant only objects to part of the recommended decision, the FAB reviewer may issue a final decision accepting the remaining part of the recommendation of the district office without first holding a hearing (see § 30.316). Any objection that is not presented to the FAB reviewer, including any objection to HHS's reconstruction of the radiation dose to which the employee was exposed (if any), whether or not the pertinent issue was previously presented to the district office, is deemed waived for all purposes.

(c) The hearing is an informal process, and the reviewer is not bound by common law or statutory rules of evidence, or by technical or formal rules of procedure. The reviewer may conduct the hearing in such manner as to best ascertain the rights of the claimant. During the hearing process, the claimant may state his or her arguments and present new written evidence and/or testimony in support of the claim.

(d) Testimony at hearings is recorded, then transcribed and placed in the record. Oral testimony shall be made under oath.

(e) The FAB reviewer will furnish a transcript of the hearing to the claimant, who has 20 days from the date it is sent to submit any comments to the reviewer.

(f) The claimant will have 30 days after the hearing is held to submit additional evidence or argument, unless the reviewer, in his or her sole discretion, grants an extension. Only one such extension may be granted.

(g) The reviewer determines the conduct of the hearing and may terminate the hearing at any time he or she determines that all relevant evidence has been obtained, or because of misbehavior on the part of the claimant and/or representative at or near the place of the oral presentation.

§ 30.315 May a claimant postpone a hearing?

(a) The FAB will entertain any reasonable request for scheduling the time and place of the hearing, but such requests should be made at the time that the hearing is requested. Scheduling is at the discretion of the FAB, and is not reviewable. In most instances, once the hearing has been scheduled and appropriate written notice has been mailed, it cannot be postponed at the claimant's request for any reason except those stated in paragraph (b) of this section, unless the FAB reviewer can reschedule the hearing on the same docket (that is, during the same hearing trip). If a request to postpone a scheduled hearing does not meet one of the tests of paragraph (b) of this section and cannot be accommodated on the same docket, no further opportunity for a hearing will be provided. Instead, the FAB will consider the claimant's objections by means of a review of the written record. In the alternative, a teleconference may be substituted for the hearing at the discretion of the reviewer.

(b) Where the claimant or the representative appointed by the claimant in accordance with § 30.600 of this part has a medical reason that prevents attendance at the hearing, or where the death or illness of the claimant's parent , spouse, or child prevents the claimant from attending the hearing as scheduled, a postponement may be granted in the discretion of the FAB if the claimant or the representative provides at least 24 hours notice and a reasonable explanation supporting his or her inability to attend the scheduled hearing.

(c) At any time after requesting a hearing, the claimant can request a change to a review of the written record by making a written request to the FAB. Once such a change is made, no further opportunity for a hearing will be provided.

§ 30.316 How does the FAB issue a final decision on a claim?

(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 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 (see §§ 30.311, 30.312 and 30.314(b)).

(b) 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.

(c) Any recommended decision (or part thereof) that is pending either a hearing or a review of the written record for more than one year from the date the FAB received the written statement described in § 30.310(a), or the date the Director reopened the claim for issuance of a new final decision pursuant to § 30.320(a), shall be considered a final decision of the FAB on the one-year anniversary of such date. Any recommended decision described in § 30.311 that is pending at the FAB for more than one year from the date that the period of time described in § 30.310 expired shall be considered a final decision of the FAB on the one-year anniversary of such date.

(d) The decision of the FAB, whether issued pursuant to paragraph (a), (b) or (c) of this section, shall be final upon the date of issuance of such decision, unless a timely request for reconsideration under § 30.319 has been filed.

(e) A copy of the final decision of the FAB will be mailed to the claimant's last known address and to the claimant's designated representative before OWCP, if any. Notification to either the claimant or the representative will be considered notification to both parties.

§ 30.317 Can the FAB request a further response from the claimant or return a claim to the district office?

At any time before the issuance of its final decision, the FAB may request that the claimant submit additional evidence or argument, or return the claim to the district office for further development and/or issuance of a newly recommended decision without issuing a final decision, whether or not requested to do so by the claimant.

§ 30.318 Can the FAB consider objections to HHS's reconstruction of a radiation dose or to the guidelines OWCP uses to determine if a claimed cancer was at least as likely as not related to employment?

(a) If the claimant objects to HHS's reconstruction of the radiation dose to which the employee was exposed, the FAB will evaluate the factual findings upon which HHS based its dose reconstruction. If these factual findings do not appear to be supported by substantial evidence, the claim will be returned to the district office for referral to HHS for further consideration.

(b) The methodology used by HHS in arriving at reasonable estimates of the radiation doses received by an employee, established by regulations issued by HHS at 42 CFR part 82, is binding on the FAB. The FAB reviewer may determine, however, that objections concerning the application of that methodology should be considered by HHS and may return the case to the district office for referral to HHS for such consideration.

(c) The methodology that OWCP uses to determine if a claimed cancer was at least as likely as not related to employment at a DOE facility, an atomic weapons employer facility, or a RECA section 5 facility, established by

regulations issued by HHS at 42 CFR part 81, is also binding on the FAB (see § 30.213). However, since OWCP applies this methodology when it makes these determinations, the FAB reviewer may consider objections to the manner in which OWCP applied HHS's regulatory guidelines.

§ 30.319 May a claimant request reconsideration of a final decision of the FAB?

(a) A claimant may request reconsideration of a final decision of the FAB by filing a written request with the FAB within 30 days from the date of issuance of such decision. If a timely request for reconsideration is made, the decision in question will no longer be considered ''final'' under § 30.316(d).

(b) For purposes of determining whether the written request referred to in paragraph (a) of this section has been timely filed with the FAB, the request will be considered to be ''filed'' on the date that the claimant mails it to the FAB, as determined by postmark, or on the date that such written request is actually received by the FAB, whichever is the earliest determinable date.

(c) A hearing is not available as part of the reconsideration process. If the FAB grants the request for reconsideration, it will consider the written record of the claim again and issue a new final decision on the claim. A new final decision that is issued after the FAB grants a request for reconsideration will be ''final'' upon the date of issuance of such new decision.

(1) Instead of issuing a new final decision after granting a request for reconsideration, the FAB may return the claim to the district office for further development as provided in § 30.317.

(2) If the FAB denies the request for reconsideration, the FAB decision that formed the basis for the request will be considered ''final'' upon the date the request is denied, and no further requests for reconsideration of that particular final decision of the FAB will be entertained.

(d) A claimant may not seek judicial review of a decision on his or her claim under EEOICPA until OWCP's decision on the claim is final pursuant to either § 30.316(d) (for claims in which no request for reconsideration was filed with the FAB) or paragraph (c) of this section (for claims in which a request for reconsideration was filed with the FAB).

Reopening Claims

§ 30.320 Can a claim be reopened after the FAB has issued a final decision?

(a) At any time after the FAB has issued a final decision pursuant to § 30.316, and without regard to whether new evidence or information is presented or obtained, the Director for Energy Employees Occupational Illness Compensation may reopen a claim and return it to the FAB for issuance of a new final decision, or to the district office for such further development as may be necessary, to be followed by a new recommended decision. The Director may also vacate any other type of decision issued by the FAB.

(b) At any time after the FAB has issued a final decision pursuant to § 30.316, a claimant may file a written request that the Director for Energy Employees Occupational Illness Compensation reopen his or her claim, provided that the claimant also submits new evidence of either covered employment or exposure to a toxic substance, or identifies either a change in the PoC guidelines, a change in the dose reconstruction methods or an addition of a class of employees to the Special Exposure Cohort.

(1) If the Director concludes that the evidence submitted or matter identified in support of the claimant's request is material to the claim, the Director will reopen the claim and return it to the district office for such further development as may be necessary, to be followed by a new recommended decision.

(2) New evidence of a medical condition described in subpart C of these regulations is not sufficient to support a written request to reopen a claim for such a condition under paragraph (b) of this section.

(c) The decision whether or not to reopen a claim under this section is solely within the discretion of the Director for Energy Employees Occupational Illness Compensation and is not reviewable. If the Director reopens a claim pursuant to paragraphs (a) or (b) of this section and returns it to the district office, the resulting new recommended decision will be subject to the adjudicatory process described in this subpart. However, neither the district office nor the FAB can consider any objection concerning the Director's decision to reopen a claim under this section.

Subpart E—Medical and Related Benefits

Medical Treatment and Related Issues

§ 30.400 What are the basic rules for obtaining medical treatment?

(a) A covered Part B employee or a covered Part E employee who fits into at least one of the compensable claim categories described in subpart C of this part 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 or covered illness, retroactive to the date the claim for benefits for that occupational illness or covered illness under Part B or Part E of EEOICPA was filed. In situations where the occupational illness or covered illness is a secondary cancer, such treatment may include treatment of the underlying primary cancer when it is medically necessary or related to treatment of the secondary cancer; however, payment for medical treatment of the underlying primary cancer under these circumstances does not constitute a determination by OWCP that the primary cancer is a covered illness under Part E of EEOICPA. The employee need not be disabled to receive such treatment. When a survivor receives payment, OWCP will pay for such treatment if the employee died before the claim was paid. If there is any doubt as to whether a specific service, appliance or supply is necessary to treat the occupational illness or covered illness, the employee should consult OWCP prior to obtaining it.

(b) If a claimant disagrees with the decision of OWCP that medical benefits provided under paragraph (a) of this section are not necessary to treat an occupational illness or covered illness, he or she may choose to utilize the adjudicatory process described in subpart D of this part.

(c) Any qualified physician or qualified hospital may provide medical services, appliances and supplies to the covered Part B employee or the covered Part E employee. A qualified provider of medical support services may also furnish appropriate services, appliances, and supplies. OWCP may apply a test of cost-effectiveness when it decides if appliances and supplies are necessary to treat an occupational illness or covered illness. With respect to prescribed medications, OWCP may require the use of generic equivalents where they are available.

§ 30.401 What are the special rules for the services of chiropractors?

(a) The services of chiropractors that may be reimbursed by OWCP are limited to treatment to correct a spinal subluxation. The costs of physical and related laboratory tests performed by or required by a chiropractor to diagnose such a subluxation are also payable.

(b) A diagnosis of spinal subluxation as demonstrated by x-ray to exist must appear in the chiropractor's report before OWCP can consider payment of a chiropractor's bill.

(c) A chiropractor may interpret his or her x-rays to the same extent as any other physician. To be given any weight, the medical report must state that x-rays support the finding of spinal subluxation. OWCP will not necessarily require submission of the x-ray, or a report of the x-ray, but the report must be available for submission on request.

(d) A chiropractor may also provide services in the nature of physical therapy under the direction of a qualified physician.

§ 30.402 What are the special rules for the services of clinical psychologists?

A clinical psychologist may serve as a physician within the scope of his or her practice as defined by state law. Therefore, a clinical psychologist may not serve as a physician for conditions that include a physical component unless the applicable state law allows clinical psychologists to treat physical conditions. A clinical psychologist may also perform testing, evaluation, and other services under the direction of a qualified physician.

§ 30.403 Will OWCP pay for the services of an attendant?

OWCP will authorize payment for personal care services under section 7384t of the Act, whether or not such care includes medical services, so long as the personal care services have been determined to be medically necessary and are provided by a home health aide, licensed practical nurse, or similarly trained individual. If a claimant disagrees with the decision of OWCP that personal care services are not medically necessary, he or she may utilize the adjudicatory process described in subpart D of this part.

§ 30.404 Will OWCP pay for transportation to obtain medical treatment?

(a) The employee is entitled to reimbursement for reasonable and necessary expenses, including transportation, incident to obtaining authorized medical services, appliances or supplies. To determine what is a reasonable distance to travel, OWCP will consider the availability of services, the employee's condition, and the means of transportation. Generally, a roundtrip distance of up to 200 miles is considered a reasonable distance to travel.

(b) If travel of more than 200 miles is contemplated, or air transportation or overnight accommodations will be needed, the employee must submit a written request to OWCP for prior authorization with information describing the circumstances and necessity for such travel expenses. OWCP will approve the request if it determines that the travel expenses are reasonable and necessary, and are incident to obtaining authorized medical services, appliances or supplies. Requests for travel expenses that are often approved include those resulting from referrals to a specialist for further medical treatment, and those involving air transportation of an employee who lives in a remote geographical area with limited local medical services.

(c) If a claimant disagrees with the decision of OWCP that requested travel expenses are either not reasonable or necessary, or are not incident to obtaining authorized medical services, appliances or supplies, he or she may utilize the adjudicatory process described in subpart D of this part.

(d) The standard form designated for medical travel refund requests is Form OWCP–957 and must be used to seek reimbursement under this section. This form can be obtained from OWCP.

§ 30.405 After selecting a treating physician, may an employee choose to be treated by another physician instead?

(a) OWCP will provide the employee with an opportunity to designate a treating physician when it accepts the claim. When the physician originally selected to provide treatment for an occupational illness or a covered illness refers the employee to a specialist for further medical care, the employee need not consult OWCP for approval. In all other instances, however, the employee must submit a written request to OWCP with his or her reasons for desiring a change of physician.

(b) OWCP will approve the request if it determines that the reasons submitted are sufficient. Requests that are often approved include those for transfer of care from a general practitioner to a physician who specializes in treating the occupational illnesses or covered illnesses covered by EEOICPA, or the need for a new physician when an employee has moved.

(c) If a claimant disagrees with the decision of OWCP that insufficient reasons for a change of physician have been submitted, he or she may utilize the adjudicatory process described in subpart D of this part.

§ 30.406 Are there any exceptions to these procedures for obtaining medical care?

In cases involving emergencies or unusual circumstances, OWCP may authorize treatment in a manner other than as stated in this subpart.

Directed Medical Examinations

§ 30.410 Can OWCP require an employee to be examined by another physician?

(a) OWCP sometimes needs a second opinion from a medical specialist. The employee must submit to examination by a qualified physician who conforms to the standards regarding conflicts of interest adopted by OWCP as often and at such times and places as OWCP considers reasonably necessary. Also, OWCP may send a case file for second opinion review to a qualified physician who conforms to the standards regarding conflicts of interest adopted by OWCP where an actual examination is not needed, or where the employee is deceased.

(b) If the initial examination is disrupted by someone accompanying the employee, OWCP will schedule another examination with a different qualified physician who conforms to the standards regarding conflicts of interest adopted by OWCP. The employee will not be entitled to have anyone else present at the subsequent examination unless OWCP decides that exceptional circumstances exist. For example, where a hearing-impaired employee needs an interpreter, the presence of an interpreter would be allowed.

§ 30.411 What happens if the opinion of the physician selected by OWCP differs from the opinion of the physician selected by the employee?

(a) If one medical opinion holds more probative value than the other, OWCP will base its determination of coverage on the medical opinion with the greatest probative value. A difference in medical opinion sufficient to be considered a conflict only occurs when two reports of virtually equal weight and rationale reach opposing conclusions.

(b) If a conflict exists between the medical opinion of the employee's physician and the medical opinion of a second opinion physician, an OWCP medical adviser or consultant, or a physician submitting an impairment evaluation that meets the criteria set out in § 30.905 of this part, OWCP shall appoint a third physician who conforms to the standards regarding conflicts of interest adopted by OWCP to make an examination or an impairment evaluation. This is called a referee examination or a referee impairment evaluation. OWCP will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case. Also, a case file may be sent to a physician who conforms to the standards regarding conflicts of interest adopted by OWCP for a referee medical review

where there is no need for an actual examination, or where the employee is deceased.

(c) If the initial referee examination or referee impairment evaluation is disrupted by someone accompanying the employee, OWCP will schedule another examination or impairment evaluation with a different qualified physician who conforms to the standards regarding conflicts of interest adopted by OWCP. The employee will not be entitled to have anyone else present at the subsequent referee examination or referee impairment evaluation unless OWCP decides that exceptional circumstances exist. For example, where a hearing-impaired employee needs an interpreter, the presence of an interpreter would be allowed.

§ 30.412 Who pays for second opinion and referee examinations?

OWCP will pay second opinion and referee medical specialists directly. OWCP will also reimburse the employee for all necessary and reasonable expenses incident to such an examination, including transportation costs and actual wages the employee lost for the time needed to submit to an examination required by OWCP.

Medical Reports

§ 30.415 What are the requirements for medical reports?

In general, medical reports from the employee's attending physician should include the following:

(a) Dates of examination and treatment;

(b) History given by the employee;

(c) Physical findings;

(d) Results of diagnostic tests;

(e) Diagnosis;

(f) Course of treatment;

(g) A description of any other conditions found due to the claimed occupational illness or covered illness;

(h) The treatment given or recommended for the claimed occupational illness or covered illness; and

(i) All other material findings.

§ 30.416 How and when should medical reports be submitted?

(a) The initial medical report (and any subsequent reports) should be made in narrative form on the physician's letterhead stationery. The physician should use the Form EE–7 as a guide for the preparation of his or her initial medical report in support of a claim under Part B and/or Part E of EEOICPA. The report should bear the physician's signature or signature stamp. OWCP may require an original signature on the report.

(b) The report shall be submitted directly to OWCP as soon as possible after medical examination or treatment is received, either by the employee or the physician.

§ 30.417 What additional medical information may OWCP require to support continuing payment of benefits?

In all cases requiring hospital treatment or prolonged care, OWCP will request detailed narrative reports from the attending physician at periodic intervals. The physician will be asked to describe continuing medical treatment for the occupational illness or covered illness accepted by OWCP, a prognosis, and the physician's opinion as to the continuing causal relationship between the need for additional treatment and the occupational illness or covered illness.

Medical Bills

§ 30.420 How should medical bills and reimbursement requests be submitted?

Usually, medical providers submit their bills directly for processing. The rules for submitting and processing provider bills and reimbursement requests are stated in subpart H of this part. An employee requesting reimbursement for out-of-pocket medical expenses must submit a Form OWCP–915 and meet the requirements described in § 30.702.

§ 30.421 What are the time frames for submitting bills and reimbursement requests?

To be considered for payment, bills and reimbursement requests must be submitted by the end of the calendar year after the year when the expense was incurred, or by the end of the calendar year after the year when OWCP first accepted the claim as compensable under subpart D of this part, whichever is later.

§ 30.422 If an employee is only partially reimbursed for a medical expense, must the provider refund the balance of the amount paid to the employee?

(a) The OWCP fee schedule sets maximum limits on the amounts payable for many services. The employee may be only partially reimbursed for out-of-pocket medical expenses because the amount he or she paid to the medical provider for a service exceeds the maximum allowable charge set by the OWCP fee schedule.

(b) If this happens, the employee will be advised of the maximum allowable charge for the service in question and of his or her responsibility to ask the provider to refund to the employee, or credit to the employee's account, the amount he or she paid that exceeds the maximum allowable charge. The provider that the employee paid, but not the employee, may request reconsideration of the fee determination as set forth in § 30.712.

(c) If the provider does not refund to the employee or credit to his or her account the amount of money paid in excess of the charge that OWCP allows, the employee should submit documentation of the attempt to obtain such refund or credit to OWCP. OWCP may authorize reasonable reimbursement to the employee after reviewing the facts and circumstances of the case.

Subpart F—Survivors; Payments and Offsets; Overpayments

Survivors

§ 30.500 What special statutory definitions apply to survivors under EEOICPA?

(a) For the purposes of paying compensation to survivors under both Parts B and E of EEOICPA, OWCP will use the following definitions:

(1) *Surviving spouse* means the wife or husband of a deceased covered Part B employee or deceased covered Part E employee who was married to that individual for the 365 consecutive days immediately prior to the death of that individual.

(2) *Child* or *children* includes a recognized natural child of a deceased covered Part B employee or deceased covered Part E employee, a stepchild who lived with that individual in a regular parent-child relationship, and an adopted child of that individual. However, to be a ''covered'' child under Part E only, such child must have been, as of the date of the deceased covered Part E employee's death, either under the age of 18 years, or under the age of 23 years and a full-time student who was continuously enrolled in one or more educational institutions since attaining the age of 18 years, or any age and incapable of self-support.

(b) For the purposes of paying compensation to survivors only under Part B of EEOICPA, OWCP will use the following additional definitions:

(1) *Parent* includes fathers and mothers of a deceased covered Part B employee through adoption.

(2) *Grandchild* means a child of a child of a deceased covered Part B employee.

(3) *Grandparent* means a parent of a parent of a deceased covered Part B employee.

§ 30.501 What order of precedence will OWCP use to determine which survivors are entitled to receive compensation under EEOICPA?

(a) Under Part B of the Act, if OWCP determines that a survivor or survivors are entitled to receive compensation under EEOICPA because a covered Part B employee who would otherwise have been entitled to benefits is deceased, that compensation will be disbursed as follows, subject to the qualifications set forth in § 30.5(gg)(3) of these regulations:

(1) If there is a surviving spouse, the compensation shall be paid to that individual.

(2) If there is no surviving spouse, the compensation shall be paid in equal shares to all children of the deceased covered Part B employee.

(3) If there is no surviving spouse and no children, the compensation shall be paid in equal shares to the parents of the deceased covered Part B employee.

(4) If there is no surviving spouse, no children and no parents, the compensation shall be paid in equal shares to all grandchildren of the deceased covered Part B employee.

(5) If there is no surviving spouse, no children, no parents and no grandchildren, the compensation shall be paid in equal shares to the grandparents of the deceased covered Part B employee.

(6) Notwithstanding paragraphs (a)(1) through (a)(5) of this section, if there is a surviving spouse and at least one child of the deceased covered Part B employee who is a minor at the time of payment and who is not a recognized natural child or adopted child of such surviving spouse, half of the compensation shall be paid to the surviving spouse, and the other half of the compensation shall be paid in equal shares to each child of the deceased covered Part B employee who is a minor at the time of payment.

(b) Under Part E of the Act, if OWCP determines that a survivor or survivors are entitled to receive compensation under EEOICPA because a covered Part E employee who would otherwise have been entitled to benefits is deceased, that compensation will be disbursed as follows, subject to the qualifications set forth in § 30.5(gg)(3) of these regulations:

(1) If there is a surviving spouse, the compensation shall be paid to that individual.

(2) If there is no surviving spouse, the compensation shall be paid in equal shares to all ''covered'' children of the deceased covered Part E employee.

(3) Notwithstanding paragraphs (b)(1) and (b)(2) of this section, if there is a surviving spouse and at least one ''covered'' child of the deceased covered Part E employee who is living 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 ''covered'' child of the employee who is living at the time of payment.

§ 30.502 When is entitlement for survivors determined for purposes of EEOICPA?

Entitlement to any lump-sum payment for survivors under EEOICPA, other than for ''covered'' children under Part E, will be determined as of the time OWCP makes such a payment. As noted in § 30.500(a)(2) of these regulations, a child of a deceased Part E employee will only qualify as a ''covered'' child of that individual if he or she satisfied one of the additional statutory criteria for a ''covered'' child as of the date of the deceased Part E employee's death.

Payment of Claims and Offset for Certain Payments

§ 30.505 What procedures will OWCP follow before it pays any compensation?

(a) In cases involving the approval of a claim, whether in whole or in part, OWCP shall take all necessary steps to determine the amount of any offset or coordination of EEOICPA benefits before paying any benefits, and to verify the identity of the covered Part B employee, the covered Part E employee, or the eligible surviving beneficiary or beneficiaries. To perform these tasks, OWCP may conduct any investigation, require any claimant to provide or execute any affidavit, record or document, or authorize the release of any information as OWCP deems necessary to ensure that the compensation payment is made in the correct amount and to the correct person or persons. OWCP shall also require every claimant under Part B of the Act to execute and provide any necessary affidavit described in § 30.620 of these regulations. Should a claimant fail or refuse to execute an affidavit or release of information, or fail or refuse to provide a requested document or record or to provide access to information, such failure or refusal may be deemed to be a rejection of the payment, unless the claimant does not have and cannot obtain the legal authority to provide, release, or authorize access to the required information, records, or documents.

(b) To determine the amount of any offset, OWCP shall require the covered Part B employee, covered Part E employee or each eligible surviving beneficiary filing a claim under this part to execute and provide an affidavit (or declaration made under oath on Form EE–1 or EE–2) reporting the amount of any payment made pursuant to a final judgment or settlement in litigation seeking damages. Even if someone other than the covered Part B employee or the covered Part E employee receives a payment pursuant to a final judgment or settlement in litigation seeking damages (*e.g.*, the surviving spouse of a deceased covered Part B employee or a deceased covered Part E employee), the receipt of any such payment must be reported.

(1) For the purposes of this paragraph (b) only, ''litigation seeking damages'' refers to any request or demand for money (other than for workers' compensation) by the covered Part B employee or the covered Part E employee, or by another individual if the covered Part B employee or the covered Part E employee is deceased, made or sought in a civil action or in anticipation of the filing of a civil action, for injuries incurred on account of an exposure for which compensation is payable under EEOICPA. This term does not also include any request or demand for money made or sought pursuant to a life insurance or health insurance contract, or any request or demand for money made or sought by an individual other than the covered Part B employee or the covered Part E employee in that individual's own right (*e.g.*, a spouse's claim for loss of consortium), or any request or demand for money made or sought by the covered Part B employee or the covered Part E employee (or the estate of a deceased covered Part B employee or deceased covered Part E employee) not for injuries incurred on account of an exposure for which compensation is payable under the EEOICPA (*e.g.*, a covered Part B employee's or a covered Part E employee's claim for damage to real or personal property).

(2) If a payment has been made pursuant to a final judgment or settlement in litigation seeking damages, OWCP shall subtract a portion of the dollar amount of such payment from the benefit payments to be made under EEOICPA. OWCP will calculate the amount to be subtracted from the benefit payments in the following manner:

(i) OWCP will first determine the value of the payment made pursuant to either a final judgment or settlement in litigation seeking damages by adding the dollar amount of any monetary damages (excluding contingent awards) and any medical expenses for treatment provided on or after the date the covered Part B employee or the covered

Part E employee filed a claim for EEOICPA benefits that were paid for under the final judgment or settlement. In the event that these payments include a ''structured'' settlement (where a party makes an initial cash payment and also arranges, usually through the purchase of an annuity, for payments in the future), OWCP will usually accept the cost of the annuity to the purchaser as the dollar amount of the right to receive the future payments.

(ii) OWCP will then make certain deductions from the above dollar amount to arrive at the dollar amount to be subtracted from any unpaid EEOICPA benefits. Allowable deductions consist of attorney's fees OWCP deems reasonable, and itemized costs of suit (out-of-pocket expenditures not part of the normal overhead of a law firm's operation like filing fees, travel expenses, witness fees, and court reporter costs for transcripts) provided that adequate supporting documentation is submitted to OWCP.

(iii) The EEOICPA benefits that will be reduced will consist of any unpaid lump-sum payments payable in the future and medical benefits payable in the future. In those cases where it has not yet paid EEOICPA benefits, OWCP will reduce such benefits on a dollar-for-dollar basis, beginning with the lump-sum payments first. If the amount to be subtracted exceeds the lump-sum payments, OWCP 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 B employee or the covered Part E employee for any ongoing EEOICPA medical treatment to the remaining surplus until it is absorbed. In addition to this reduction of ongoing EEOICPA medical benefits, OWCP will not be the first payer for any medical expenses that are the responsibility of another party (who will instead be the first payer) as part of a final judgment or settlement in litigation seeking damages.

(3) The above reduction of EEOICPA benefits will not occur if an EEOICPA claimant had his or her award under section 5 of RECA reduced by the full amount of the payment made pursuant to a final judgment or settlement in litigation seeking damages. It will also not occur if an EEOICPA claimant's prior payment of EEOICPA benefits, or his or her workers' compensation benefits, were offset to reflect the full amount of the payment made pursuant to a final judgment or settlement in litigation seeking damages. However, if the prior reduction or offset of the above benefits did not reflect the full amount of the payment made pursuant to a final judgment or settlement in litigation seeking damages, OWCP will reduce currently payable EEOICPA benefits by the amount of any surplus final judgment or settlement payment that remains.

(c) Except as provided in § 30.506(b) of these regulations, when OWCP has verified the identity of every claimant who is entitled to the compensation payment, or to a share of the compensation payment, and has determined the correct amount of the payment or the share of the payment, OWCP shall notify every claimant, every duly appointed guardian or conservator of a claimant, or every person with power of attorney for a claimant, and require such person or persons to complete a Form EN–20 providing payment information. Such form shall be signed and returned to OWCP within sixty days of the date of the form or within such greater period as may be allowed by OWCP. Failure to sign and return the form within the required time may be deemed to be a rejection of the payment. If the claimant dies before the payment is received, the person who receives the payment shall return it to OWCP for redetermination 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.

(d) The total amount of compensation (other than medical benefits) under Part E that can be paid to all claimants as a result of the exposure of a covered Part E employee shall not be more than $250,000 in any circumstances.

§ 30.506 To whom and in what manner will OWCP pay compensation?

(a) Except with respect to claims under Part B of the Act for beryllium sensitivity, payment shall be made to the covered Part B employee or the covered Part E employee, to the duly appointed guardian or conservator of that individual, or to the person with power of attorney for that individual, unless the covered Part B employee or covered Part E employee is deceased at the time of the payment. In all cases involving a deceased covered Part B employee or deceased covered Part E employee, payment shall be made to the eligible surviving beneficiary or beneficiaries, to the duly appointed guardian or conservator of the eligible surviving beneficiary or beneficiaries, or to every person with power of attorney for an eligible surviving beneficiary, in accordance with the terms and conditions specified in sections 7384s(e), 7384u(e), and 7385s–3(c) and (d) of EEOICPA.

(b) Under Part B of the Act, compensation for any consequential injury, illness, impairment or disease is limited to payment of medical benefits for that injury, illness, impairment or disease. Under Part E of the Act, compensation for any consequential injury, illness, impairment or disease consists of medical benefits for that injury, illness, impairment or disease, as well as any additional monetary benefits that are consistent with the terms of § 30.505(d).

(c) Rejected compensation payments, or shares of compensation payments, shall not be distributed to other eligible surviving beneficiaries, but shall be returned to the Fund.

(d) No covered Part B employee may receive more than one lump-sum payment under Part B of EEOICPA for any occupational illnesses he or she contracted. However, any individual, including a covered Part B employee who has received a lump-sum payment for his or her own occupational illness or illnesses, may receive one lump-sum payment for each deceased covered Part B employee for whom he or she qualifies as an eligible surviving beneficiary under Part B of the Act.

§ 30.507 What compensation will be provided to covered Part B employees who only establish beryllium sensitivity under Part B of EEOICPA?

The establishment of beryllium sensitivity does not entitle a covered Part B employee, or the eligible surviving beneficiary or beneficiaries of a deceased covered Part B employee, to any lump-sum payment provided for under Part B. Instead, a covered Part B employee whose sole accepted occupational illness is beryllium sensitivity shall receive beryllium sensitivity monitoring, as well as medical benefits for the treatment of this occupational illness in accordance with § 30.400 of these regulations.

§ 30.508 What is beryllium sensitivity monitoring?

Beryllium sensitivity monitoring shall consist of medical examinations to confirm and monitor the extent and nature of a covered Part B employee's beryllium sensitivity. Monitoring shall also include regular medical examinations, with diagnostic testing, to determine if the covered Part B employee has established chronic beryllium disease.

§ 30.509 Under what circumstances may a survivor claiming under Part E of the Act choose to receive the benefits that would otherwise be payable to a covered Part E employee who is deceased?

(a) If a covered Part E employee dies after filing a claim but before monetary benefits are paid under Part E of the Act, and his or her death is from a cause other than a covered illness, his or her survivor can choose to receive either the survivor benefits payable on account of the death of that covered Part E employee, or the monetary benefits that would otherwise have been payable to the covered Part E employee.

(b) For the purposes of this section only, a death ''from a cause other than a covered illness'' refers only to a death that was *solely* caused by a non-covered illness or illnesses. Therefore, the choice referred to in paragraph (a) of this section will not be available if a covered illness contributed to the death of the covered Part E employee in any manner. In those instances, survivor benefits will still be payable to the claimant, but he or she cannot choose to receive the monetary benefits that would have otherwise been payable to the deceased covered Part E employee in lieu of survivor benefits.

(c) OWCP only makes impairment determinations based on rationalized medical evidence in the case file that is sufficiently detailed and meets the various requirements for the many different types of impairment determinations possible under the AMA's *Guides*. Therefore, OWCP will only make an impairment determination for a deceased covered Part E employee pursuant to this section if the medical evidence of record is sufficient to satisfy the pertinent requirements in the AMA's *Guides* and subpart J of this part.

Overpayments

§ 30.510 How does OWCP notify an individual of a payment made on a claim?

(a) In addition to providing narrative descriptions to recipients of benefits paid or payable, OWCP includes on each check a clear indication of the reason the payment is being made. For payments sent by electronic funds transfer, a notification of the date and amount of payment appears on the statement from the recipient's financial institution.

(b) By these means, OWCP puts the recipient on notice that a payment was made and the amount of the payment. If the amount received differs from the amount indicated on the written notice or bank statement, the recipient is responsible for notifying OWCP of the difference. Absent affirmative evidence to the contrary, the recipient will be presumed to have received the notice of payment, whether mailed or transmitted electronically.

§ 30.511 What is an ''overpayment'' for purposes of EEOICPA?

An ''overpayment'' is any amount of compensation paid under sections 7384s, 7384t, 7384u, 7385s–2 or 7385s–3 of the EEOICPA to a recipient that constitutes, as of the time OWCP makes such payment:

(a) Payment where no amount is payable under this part; or

(b) Payment in excess of the correct amount determined by OWCP.

§ 30.512 What does OWCP do when an overpayment is identified?

Before seeking to recover an overpayment or adjust benefits, OWCP will advise the recipient of the overpayment in writing that:

(a) The overpayment exists, and the amount of overpayment;

(b) A preliminary finding shows either that the recipient was or was not at fault in the creation of the overpayment;

(c) He or she has the right to inspect and copy OWCP records relating to the overpayment; and

(d) He or she has the right to present written evidence which challenges the fact or amount of the overpayment, and/or challenges the preliminary finding that he or she was at fault in the creation of the overpayment. He or she may also request that recovery of the overpayment be waived. Any submission of evidence or request that recovery of the overpayment be waived must be presented to OWCP within 30 days of the date of the written notice of overpayment.

§ 30.513 Under what circumstances may OWCP waive recovery of an overpayment?

(a) OWCP may consider waiving recovery of an overpayment only if the recipient was not at fault in accepting or creating the overpayment. Recipients of benefits paid under EEOICPA are responsible for taking all reasonable measures to ensure that payments received from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

(2) Failed to provide information which he or she knew or should have known to be material; or

(3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual.)

(b) Whether or not OWCP determines that a recipient was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the recipient's capacity to realize that he or she is being overpaid.

§ 30.514 If OWCP finds that the recipient of an overpayment was not at fault, what criteria are used to decide whether to waive recovery of it?

If OWCP finds that the recipient of an overpayment was not at fault, repayment will still be required unless:

(a) Adjustment or recovery of the overpayment would defeat the purpose of the Act (see § 30.516); or

(b) Adjustment or recovery of the overpayment would be against equity and good conscience (see § 30.517).

§ 30.515 Is a recipient responsible for an overpayment that resulted from an error made by OWCP?

(a) The fact that OWCP may have erred in making the overpayment does not by itself relieve the recipient of the overpayment from liability for repayment if the recipient also was at fault in accepting the overpayment.

(b) However, OWCP may find that the recipient was not at fault if failure to report an event affecting compensation benefits, or acceptance of an incorrect payment, occurred because:

(1) The recipient relied on misinformation given in writing by OWCP regarding the interpretation of a pertinent provision or EEOICPA of this part; or

(2) OWCP erred in calculating either the percentage of impairment or wage-loss under Part E of EEOICPA.

§ 30.516 Under what circumstances would recovery of an overpayment defeat the purpose of the Act?

Recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to the recipient because:

(a) The recipient from whom OWCP seeks recovery needs substantially all of his or her current income to meet current ordinary and necessary living expenses; and

(b) The recipient's assets do not exceed two months' expenditures as determined by OWCP using the Bureau of Labor Statistics Consumer Expenditure Survey tables.

§ 30.517 Under what circumstances would recovery of an overpayment be against equity and good conscience?

(a) Recovery of an overpayment is considered to be against equity and good conscience when the recipient would experience severe financial hardship in attempting to repay the debt.

(b) Recovery of an overpayment is also considered to be against equity and good conscience when the recipient, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse. In making such a decision, OWCP does not consider the recipient's current ability to repay the overpayment.

(1) To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained, and that the action was based chiefly or solely in reliance on the payments or on the notice of payment. Gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.

(2) To establish that a recipient's position has changed for the worse, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits, and that this decision resulted in a loss.

§ 30.518 Can OWCP require the recipient of the overpayment to submit additional financial information?

(a) The recipient of the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act, or would be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.

(b) Failure to submit this requested information within 30 days of the request shall result in denial of waiver, and no further request for waiver shall be considered until the requested information is furnished.

§ 30.519 How does OWCP communicate its final decision concerning recovery of an overpayment?

(a) After considering any written documentation or argument submitted to OWCP within the 30-day period set out in § 30.512(d), OWCP will issue a final decision on the overpayment. OWCP will send a copy of the final decision to the individual from whom recovery is sought and his or her representative, if any.

(b) The provisions of subpart D of this part do not apply to any decision regarding the recovery of an overpayment.

§ 30.520 How are overpayments collected?

(a) When an overpayment has been made to a recipient who is entitled to further payments, the recipient shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, OWCP shall recover the overpayment by reducing any further lump-sum payments due currently or in the future, taking into account the financial circumstances of the recipient, and any other relevant factors, so as to minimize any hardship. Should the recipient die before collection has been completed, further collection shall be made by decreasing later payments, if any, payable under EEOICPA with respect to the underlying occupational illness or covered illness.

(b) When an overpayment has been made to a recipient and OWCP is unable to recover the overpayment by reducing compensation due currently, the recipient shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. The overpayment is subject to the provisions of the Federal Claims Collection Act of 1966, as amended (31 U.S.C. 3701 *et seq.*), and may be reported to the Internal Revenue Service as income. If the recipient fails to make such refund, OWCP may recover the overpayment through any available means, including offset of salary, annuity benefits, or other Federal payments, including tax refunds as authorized by the Tax Refund Offset Program, or referral of the debt to a collection agency or to the Department of Justice.

Subpart G—Special Provisions

Representation

§ 30.600 May a claimant designate a representative?

(a) The claims process under this part is informal, and OWCP acts as an impartial evaluator of the evidence. A claimant need not be represented to file a claim or receive a payment. Nevertheless, a claimant may appoint one individual to represent his or her interests, but the appointment must be in writing.

(b) There can be only one representative at any one time, so after one representative has been properly appointed, OWCP will not recognize another individual as a representative until the claimant withdraws the authorization of the first individual. In addition, OWCP will recognize only certain types of individuals (see § 30.601). For the purposes of paragraph (b) of this section, a ''representative'' does not include a person who only has a power of attorney to act on behalf of a claimant.

(c) A properly appointed representative who is recognized by OWCP may make a request or give direction to OWCP regarding the claims process, including a hearing. This authority includes presenting or eliciting evidence, making arguments on facts or the law, and obtaining information from the case file, to the same extent as the claimant.

(1) Any notice requirement contained in this part or EEOICPA is fully satisfied if served on the representative, and has the same force and effect as if sent to the claimant.

(2) A representative does not have authority to sign the Form EN–20, described in § 30.505(c) of these regulations, which collects information necessary for issuance of a compensation payment.

§ 30.601 Who may serve as a representative?

A claimant may authorize any individual to represent him or her in regard to a claim under EEOICPA, unless that individual's service as a representative would violate any applicable provision of law (such as 18 U.S.C. 205 and 208). A federal employee may act as a representative only:

(a) On behalf of immediate family members, defined as a spouse, children, parents, and siblings of the representative, provided no fee or gratuity is charged; or

(b) While acting as a union representative, defined as any officially sanctioned union official, and no fee or gratuity is charged.

§ 30.602 Who is responsible for paying the representative's fee?

A representative may charge the claimant a fee for services and for costs associated with the representation before OWCP. The claimant is solely responsible for paying the fee and other costs. OWCP will not reimburse the claimant, nor is it in any way liable for the amount of the fee and costs.

§ 30.603 Are there any limitations on what the representative may charge the claimant for his or her services?

(a) Notwithstanding any contract, the representative may not receive, for services rendered in connection with a claim pending before OWCP, more than the percentages of the lump-sum

payment made to the claimant set out in paragraph (b) of this section.

(b) The percentages referred to in paragraph (a) of this section are:

(1) 2 percent for the filing of an initial claim with OWCP, provided that the representative was retained prior to the filing of the initial claim; plus

(2) 10 percent of the difference between the lump-sum payment made to the claimant and the amount proposed in the recommended decision with respect to objections to a recommended decision.

(c)(1) Any representative who violates this section shall be fined not more than $5,000.

(2) The authority to prosecute violations of this limitation lies with the Department of Justice.

(d) The fee limitations described in this section shall not apply with respect to representative services that are rendered in connection with a petition filed with a U.S. District Court seeking review of an OWCP decision that is final pursuant to § 30.316(d), or with respect to any subsequent appeal in such a proceeding.

Third Party Liability

§ 30.605 What rights does the United States have upon payment of compensation under EEOICPA?

If an occupational illness or covered illness for which compensation is payable under EEOICPA is caused, wholly or partially, by someone other than a federal employee acting within the scope of his or her employment, a DOE contractor or subcontractor, a beryllium vendor, an atomic weapons employer or a RECA section 5 mine or mill, the United States is subrogated for the full amount of any payment of compensation under EEOICPA to any right or claim that the individual to whom the payment was made may have against any person or entity on account of such occupational illness or covered illness.

§ 30.606 Under what circumstances must a recovery of money or other property in connection with an illness for which benefits are payable under EEOICPA be reported to OWCP?

Any person who has filed an EEOICPA claim that has been accepted by OWCP (whether or not compensation has been paid), or who has received EEOICPA benefits in connection with a claim filed by another, is required to notify OWCP of the receipt of money or other property as a result of a settlement or judgment in connection with the circumstances of that claim.

§ 30.607 How is a structured settlement (that is, a settlement providing for receipt of funds over a specified period of time) treated for purposes of reporting the recovery?

In this situation, the recovery to be reported is the present value of the right to receive all of the payments included in the structured settlement, allocated in the case of multiple recipients in the same manner as single payment recoveries.

§ 30.608 How does the United States calculate the amount to which it is subrogated?

The subrogated amount of a specific claim consists of the total money paid by OWCP from the Energy Employees Occupational Illness Compensation Fund with respect to that claim to or on behalf of a covered Part B employee, a covered Part E employee or an eligible surviving beneficiary, less charges for any medical file review (*i.e.*, the physician did not examine the employee) done at the request of OWCP. Charges for medical examinations also may be subtracted if the covered Part B employee, covered Part E employee or an eligible surviving beneficiary establishes that the examinations were required to be made available to the covered Part B employee or covered Part E employee under a statute other than EEOICPA.

§ 30.609 Is a settlement or judgment received as a result of allegations of medical malpractice in treating an illness covered by EEOICPA a recovery that must be reported to OWCP?

Since an injury caused by medical malpractice in treating an occupational illness or covered illness compensable under EEOICPA is also covered under EEOICPA, any recovery in a suit alleging such an injury is treated as a recovery that must be reported to OWCP.

§ 30.610 Are payments to a covered Part B employee, a covered Part E employee or an eligible surviving beneficiary as a result of an insurance policy which the employee or eligible surviving beneficiary has purchased a recovery that must be reported to OWCP?

Since payments received by a covered Part B employee, a covered Part E employee or an eligible surviving beneficiary pursuant to an insurance policy purchased by someone other than a liable third party are not payments in satisfaction of liability for causing an occupational illness or covered illness compensable under the Act, they are not considered a recovery that must be reported to OWCP.

§ 30.611 If a settlement or judgment is received for more than one medical condition, can the amount paid on a single EEOICPA claim be attributed to different conditions for purposes of calculating the amount to which the United States is subrogated?

(a) All medical conditions accepted by OWCP in connection with a single claim are treated as the same illness for the purpose of computing the amount which the United States is entitled to offset in connection with the receipt of a recovery from a third party, except that an injury caused by medical malpractice in treating an illness covered under EEOICPA will be treated as a separate injury.

(b) If an illness covered under EEOICPA is caused under circumstances creating a legal liability in more than one person, other than the United States, a DOE contractor or subcontractor, a beryllium vendor or an atomic weapons employer, to pay damages, OWCP will determine whether recoveries received from one or more third parties should be attributed to separate conditions for which compensation is payable in connection with a single EEOICPA claim. If such an attribution is both practicable and equitable, as determined by OWCP, in its discretion, the conditions will be treated as separate injuries for purposes of calculating the amount to which the United States is subrogated.

Effect of Tort Suits Against Beryllium Vendors and Atomic Weapons Employers

§ 30.615 What type of tort suits filed against beryllium vendors or atomic weapons employers may disqualify certain claimants from receiving benefits under Part B of EEOICPA?

(a) A tort suit (other than an administrative or judicial proceeding for workers' compensation) that includes a claim arising out of a covered Part B employee's employment-related exposure to beryllium or radiation, filed against a beryllium vendor or an atomic weapons employer, by a covered Part B employee or an eligible surviving beneficiary or beneficiaries of a deceased covered Part B employee, will disqualify that otherwise eligible individual or individuals from receiving benefits under Part B of EEOICPA unless such claim is terminated in accordance with the requirements of §§ 30.616 through 30.619 of these regulations.

(b) The term ''claim arising out of a covered Part B employee's employment-related exposure to beryllium or radiation'' used in paragraph (a) of this section includes a claim that is

derivative of a covered Part B employee's employment-related exposure to beryllium or radiation, such as a claim for loss of consortium raised by a covered Part B employee's spouse.

(c) If all claims arising out of a covered Part B employee's employment-related exposure to beryllium or radiation are terminated in accordance with the requirements of §§ 30.616 through 30.619 of these regulations, proceeding with the remaining portion of the tort suit filed against a beryllium vendor or an atomic weapons employer will not disqualify an otherwise eligible individual or individuals from receiving benefits under Part B of EEOICPA.

§ 30.616 What happens if this type of tort suit was filed prior to October 30, 2000?

(a) If a tort suit described in § 30.615 was filed prior to October 30, 2000, the claimant or claimants will not be disqualified from receiving any EEOICPA benefits to which they may be found entitled if the tort suit was terminated in any manner prior to December 28, 2001.

(b) If a tort suit described in § 30.615 was filed prior to October 30, 2000 and was pending as of December 28, 2001, the claimant or claimants will be disqualified from receiving any benefits under Part B of EEOICPA unless they dismissed all claims arising out of a covered Part B employee's employment-related exposure to beryllium or radiation that were included in the tort suit prior to December 31, 2003.

§ 30.617 What happens if this type of tort suit was filed during the period from October 30, 2000 through December 28, 2001?

(a) If a tort suit described in § 30.615 was filed during the period from October 30, 2000 through December 28, 2001, the claimant or claimants will be disqualified from receiving any benefits under Part B of EEOICPA unless they dismiss all claims arising out of a covered Part B employee's employment-related exposure to beryllium or radiation that are included in the tort suit on or before the last permissible date described in paragraph (b) of this section.

(b) The last permissible date is the later of:

(1) April 30, 2003; or

(2) The date that is 30 months after the date the claimant or claimants first became aware that an illness of the covered Part B employee may be connected to his or her exposure to beryllium or radiation covered by EEOICPA. For purposes of determining when this 30-month period begins, ''the date the claimant or claimants first became aware'' will be deemed to be the date they received either a reconstructed dose from HHS, or a diagnosis of a covered beryllium illness, as applicable.

§ 30.618 What happens if this type of tort suit was filed after December 28, 2001?

(a) If a tort suit described in § 30.615 was filed after December 28, 2001, the claimant or claimants will be disqualified from receiving any benefits under Part B of EEOICPA if a judgment is entered against them.

(b) If a tort suit described in § 30.615 was filed after December 28, 2001 and a judgment has not yet been entered against the claimant or claimants, they will also be disqualified from receiving any benefits under Part B of EEOICPA unless, prior to entry of any judgment, they dismiss all claims arising out of a covered Part B employee's employment-related exposure to beryllium or radiation that are included in the tort suit on or before the last permissible date described in paragraph (c) of this section.

(c) The last permissible date is the later of:

(1) April 30, 2003; or

(2) The date that is 30 months after the date the claimant or claimants first became aware that an illness of the covered Part B employee may be connected to his or her exposure to beryllium or radiation covered by EEOICPA. For purposes of determining when this 30-month period begins, ''the date the claimant or claimants first became aware'' will be deemed to be the date they received either a reconstructed dose from HHS, or a diagnosis of a covered beryllium illness, as applicable.

§ 30.619 Do all the parties to this type of tort suit have to take these actions?

The type of tort suits described in § 30.615 may be filed by more than one individual, each with a different cause of action. For example, a tort suit may be filed against a beryllium vendor by both a covered Part B employee and his or her spouse, with the covered Part B employee claiming for chronic beryllium disease and the spouse claiming for loss of consortium due to the covered Part B employee's exposure to beryllium. However, since the spouse of a living covered Part B employee could not be an eligible surviving beneficiary under Part B of EEOICPA, the spouse would not have to comply with the termination requirements of §§ 30.616 through 30.618. A similar result would occur if a tort suit were filed by both the spouse of a deceased covered Part B employee and other family members (such as children of the deceased covered part B employee). In this case, the spouse would be the only eligible surviving beneficiary of the deceased covered Part B employee under Part B of the EEOICPA because the other family members could not be eligible for benefits while he or she was alive. As a result, the spouse would be the only party to the tort suit who would have to comply with the termination requirements of §§ 30.616 through 30.618.

§ 30.620 How will OWCP ascertain whether a claimant filed this type of tort suit and if he or she has been disqualified from receiving any benefits under Part B of EEOICPA?

Prior to authorizing payment on a claim under Part B of EEOICPA, OWCP will require each claimant to execute and provide an affidavit stating if he or she filed a tort suit (other than an administrative or judicial proceeding for workers' compensation) against either a beryllium vendor or an atomic weapons employer that included a claim arising out of a covered Part B employee's employment-related exposure to beryllium or radiation, and if so, the current status of such tort suit. OWCP may also require the submission of any supporting evidence necessary to confirm the particulars of any affidavit provided under this section.

Coordination of Part E Benefits With State Workers' Compensation Benefits

§ 30.625 What does ''coordination of benefits'' mean under Part E of EEOICPA?

In general, ''coordination of benefits'' under Part E of the Act occurs when compensation to be received under Part E is reduced by OWCP, pursuant to section 7385s–11 of EEOICPA, to reflect certain benefits the beneficiary receives under a state workers' compensation program for the same covered illness.

§ 30.626 How will OWCP coordinate compensation payable under Part E of EEOICPA with benefits from state workers' compensation programs?

(a) 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, after deducting the reasonable costs to the claimant of obtaining those benefits.

(b) To determine the amount of any reduction of EEOICPA compensation, OWCP shall require the covered Part E employee or each eligible surviving beneficiary filing a claim under Part E to execute and provide affidavits reporting the amount of any benefit received pursuant to a claim filed in a state workers' compensation program for the same covered illness.

(c) 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, OWCP shall reduce a portion of the dollar amount of such state workers' benefit from the compensation payable under Part E. OWCP will calculate the net amount of the state workers' compensation benefit amount to be subtracted from the compensation payment under Part E in the following manner:

(1) OWCP will first determine the dollar value of the benefits received by that individual 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.

(2) OWCP will then make certain deductions from the above dollar benefit received under a state workers' compensation program to arrive at the dollar amount that will be subtracted from any compensation payable under Part E of EEOICPA.

(i) Allowable deductions consist of reasonable costs in obtaining state workers' compensation benefits incurred by that individual, including but not limited to attorney's fees OWCP deems reasonable and itemized costs of suit (out-of-pocket expenditures not part of the normal overhead of a law firm's operation like filing, travel expenses, witness fees, and court reporter costs for transcripts), provided that adequate supporting documentation is submitted to OWCP for its consideration.

(ii) The EEOICPA benefits that will be reduced will 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 EEOICPA benefits under Part E, OWCP 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, OWCP 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 EEOICPA medical treatment to the remaining surplus until it is absorbed (or until further monetary benefits become payable that are sufficient to absorb the surplus).

(3) The above coordination of benefits will not occur if the beneficiary under a state workers' compensation program receives state workers' compensation benefits for both a covered and a non-covered illness arising out of and in the course of the same work-related incident.

§ 30.627 Under what circumstances will OWCP waive the statutory requirement to coordinate these benefits?

A waiver to the requirement to coordinate Part E benefits with benefits paid under a state workers' compensation program may be granted if OWCP determines that the administrative costs and burdens of coordinating benefits in a particular case or class of cases justifies the waiver. This decision is exclusively within the discretion of OWCP.

Subpart H—Information for Medical Providers

Medical Records and Bills

§ 30.700 What kinds of medical records must providers keep?

Federal Government medical officers, private physicians and hospitals are required to keep records of all cases treated by them under EEOICPA so they can supply OWCP with a history of the claimed occupational illness or covered illness, a description of the nature and extent of the claimed occupational illness or covered illness, the results of any diagnostic studies performed, and the nature of the treatment rendered. This requirement terminates after a provider has supplied OWCP with the above-noted information, and otherwise terminates ten years after the record was created.

§ 30.701 How are medical bills to be submitted?

(a) All charges for medical and surgical treatment, appliances or supplies furnished to employees, except for treatment and supplies provided by nursing homes, shall be supported by medical evidence as provided in § 30.700. The physician or provider shall itemize the charges on Form OWCP–1500 or CMS–1500 (for professional charges), Form OWCP–04 or UB–04 (for hospitals), an electronic or paper-based bill that includes required data elements (for pharmacies), or other form as warranted, and submit the form or bill promptly for processing.

(b) The provider shall identify each service performed using the Physician's Current Procedural Terminology (CPT) code, the Healthcare Common Procedure Coding System (HCPCS) code, the National Drug Code (NDC) number, or the Revenue Center Code (RCC), with a brief narrative description. Where no code is applicable, a detailed description of services performed should be provided.

(c) For professional charges billed on Form OWCP–1500 or CMS–1500, the provider shall also state each diagnosed condition and furnish the corresponding diagnostic code using the ''International Classification of Disease, 9th Edition, Clinical Modification'' (ICD–9–CM), or as revised. A separate bill shall be submitted when the employee is discharged from treatment or monthly, if treatment for the occupational illness is necessary for more than 30 days.

(1)(i) Hospitals shall submit charges for medical and surgical treatment or supplies promptly on Form OWCP–04 or UB–04. The provider shall identify each outpatient radiology service, outpatient pathology service and physical therapy service performed, using HCPCS/CPT codes with a brief narrative description. The charge for each individual service, or the total charge for all identical services, should also appear on the form.

(ii) Other outpatient hospital services for which HCPCS/CPT codes exist shall also be coded individually using the coding scheme noted in this section. Services for which there are no HCPCS/CPT codes available can be presented using the RCCs described in the ''National Uniform Billing Data Elements Specifications,'' current edition. The provider shall also furnish the diagnostic code using the ICD–9–CM. If the outpatient hospital services include surgical and/or invasive procedures, the provider shall code each procedure using the proper HCPCS/CPT codes and furnishing the corresponding diagnostic codes using the ICD–9–CM.

(2) Pharmacies shall itemize charges for prescription medications, appliances, or supplies on electronic or paper-based bills and submit them promptly for processing. Bills for prescription medications must include all required data elements, including the NDC number assigned to the product, the generic or trade name of the drug provided, the prescription number, the quantity provided, and the date the prescription was filled.

(3) Nursing homes shall itemize charges for appliances, supplies or services on the provider's billhead stationery and submit them promptly for processing.

(d) By submitting a bill and/or accepting payment, the provider signifies that the service for which payment is sought was performed as described and was necessary. In addition, the provider thereby agrees to comply with all regulations set forth in this subpart concerning the rendering of treatment and/or the process for seeking

payment for medical services, including the limitation imposed on the amount to be paid for such services.

(e) In summary, bills submitted by providers must: Be itemized on Form OWCP–1500 or CMS–1500 (for physicians), Form OWCP–04 or UB–04 (for hospitals), or an electronic or paper-based bill that includes required data elements (for pharmacies); contain the signature or signature stamp of the provider; and identify the procedures using HCPCS/CPT codes, RCCs, or NDC numbers. Otherwise, the bill may be returned to the provider for correction and resubmission. The decision of OWCP whether to pay a provider's bill is final when issued and is not subject to the adjudicatory process described in subpart D of this part.

§ 30.702 How should an employee prepare and submit requests for reimbursement for medical expenses, transportation costs, loss of wages, and incidental expenses?

(a) If an employee has paid bills for medical, surgical or other services, supplies or appliances provided by a professional due to an occupational illness or a covered illness, he or she must submit a request for reimbursement on Form OWCP–915, together with an itemized bill on Form OWCP–1500 or CMS–1500 prepared by the provider and a medical report as provided in § 30.700, for consideration.

(1) The provider of such service shall state each diagnosed condition and furnish the applicable ICD–9–CM code and identify each service performed using the applicable HCPCS/CPT code, with a brief narrative description of the service performed, or, where no code is applicable, a detailed description of that service.

(2) The reimbursement request must be accompanied by evidence that the provider received payment for the service from the employee and a statement of the amount paid. Acceptable evidence that payment was received includes, but is not limited to, a signed statement by the provider, a mechanical stamp or other device showing receipt of payment, a copy of the employee's canceled check (both front and back) or a copy of the employee's credit card receipt.

(b) If a hospital, pharmacy or nursing home provided services for which the employee paid, the employee must also use Form OWCP–915 to request reimbursement and should submit the request in accordance with the provisions of § 30.701(a). Any such request for reimbursement must be accompanied by evidence, as described in paragraph (a)(2) of this section, that the provider received payment for the service from the employee and a statement of the amount paid.

(c) The requirements of paragraphs (a) and (b) of this section may be waived if extensive delays in the filing or the adjudication of a claim make it unusually difficult for the employee to obtain the required information.

(d) Copies of bills submitted for reimbursement will not be accepted unless they bear the original signature of the provider and evidence of payment. Payment for medical and surgical treatment, appliances or supplies shall in general be no greater than the maximum allowable charge for such service determined by OWCP, as set forth in § 30.705. The decision of OWCP whether to reimburse an employee for out-of-pocket medical expenses, and the amount of any reimbursement, is final when issued and is not subject to the adjudicatory process described in subpart D of this part.

(e) An employee will be only partially reimbursed for a medical expense if the amount he or she paid to a provider for the service exceeds the maximum allowable charge set by OWCP's schedule. If this happens, the employee will be advised of the maximum allowable charge for the service in question and of his or her responsibility to ask the provider to refund to the employee, or credit to the employee's account, the amount he or she paid which exceeds the maximum allowable charge. The provider that the employee paid, but not the employee, may request reconsideration of the fee determination as set forth in § 30.712.

(f) If the provider fails to make appropriate refund to the employee, or to credit the employee's account, within 60 days after the employee requests a refund of any excess amount, or the date of a subsequent reconsideration decision which continues to disallow all or a portion of the disputed amount, OWCP will initiate exclusion procedures as provided by § 30.715.

(g) If the provider does not refund to the employee or credit to his or her account the amount of money paid in excess of the allowed charge, the employee should submit documentation of the attempt to obtain such refund or credit to OWCP. OWCP may authorize reasonable reimbursement to the employee after reviewing the facts and circumstances of the case.

§ 30.703 What are the time limitations on OWCP's payment of bills?

OWCP will pay providers and reimburse employees promptly for all bills received on an approved form and in a timely manner. However, no bill will be paid for expenses incurred if the bill is submitted more than one year beyond the end of the calendar year in which the expense was incurred or the service or supply was provided, or more than one year beyond the end of the calendar year in which the claim was first accepted as compensable by OWCP, whichever is later.

Medical Fee Schedule

§ 30.705 What services are covered by the OWCP fee schedule?

(a) Payment for medical and other health services furnished by physicians, hospitals and other providers for occupational illnesses or covered illnesses shall not exceed a maximum allowable charge for such service as determined by OWCP, except as provided in this section.

(b) The schedule of maximum allowable charges does not apply to charges for services provided in nursing homes, but it does apply to charges for treatment furnished in a nursing home by a physician or other medical professional.

(c) The schedule of maximum allowable charges also does not apply to charges for appliances, supplies, services or treatment furnished by medical facilities of the U.S. Public Health Service or the Departments of the Army, Navy, Air Force and Veterans Affairs.

§ 30.706 How are the maximum fees defined?

For professional medical services, OWCP shall maintain a schedule of maximum allowable fees for procedures performed in a given locality. The schedule shall consist of: An assignment of a value to procedures identified by HCPCS/CPT code which represents the relative skill, effort, risk and time required to perform the procedure, as compared to other procedures of the same general class; an index based on a relative value scale that considers skill, labor, overhead, malpractice insurance and other related costs; and a monetary value assignment (conversion factor) for one unit of value in each of the categories of service.

§ 30.707 How are payments for particular services calculated?

Payment for a procedure identified by a HCPCS/CPT code shall not exceed the amount derived by multiplying the relative values for that procedure by the geographic indices for services in that area and by the dollar amount assigned to one unit in that category of service.

(a) The ''locality'' which serves as a basis for the determination of average cost is defined by the Bureau of Census Metropolitan Statistical Areas. OWCP

shall base the determination of the relative per capita cost of medical care in a locality using information about enrollment and medical cost per county, provided by the Centers for Medicare and Medicaid Services (CMS).

(b) OWCP shall assign the relative value units (RVUs) published by CMS to all services for which CMS has made assignments, using the most recent revision. Where there are no RVUs assigned to a procedure, OWCP may develop and assign any RVUs considered appropriate. The geographic adjustment factor shall be that designated by Geographic Practice Cost Indices for Metropolitan Statistical Areas as devised for CMS and as updated or revised by CMS from time to time. OWCP will devise conversion factors for each category of service, and in doing so may adapt CMS conversion factors as appropriate using OWCP's processing experience and internal data.

(c) For example, if the unit values for a particular surgical procedure are 2.48 for physician's work (W), 3.63 for practice expense (PE), and 0.48 for malpractice insurance (M), and the dollar value assigned to one unit in that category of service (surgery) is $61.20, then the maximum allowable charge for one performance of that procedure is the product of the three RVUs times the corresponding geographical indices for the locality times the conversion factor. If the geographic indices for the locality are 0.988(W), 0.948 (PE), and 1.174 (M), then the maximum payment calculation is:

$$[(2.48)(0.988) + (3.63)(0.948) + (0.48)(1.174)] \times \$61.20$$
$$[2.45 + 3.44 + .56] \times \$61.20$$
$$6.45 \times \$61.20 = \$394.74$$

§ 30.708 Does the fee schedule apply to every kind of procedure?

Where the time, effort and skill required to perform a particular procedure vary widely from one occasion to the next, OWCP may choose not to assign a relative value to that procedure. In this case the allowable charge for the procedure will be set individually based on consideration of a detailed medical report and other evidence. At its discretion, OWCP may set fees without regard to schedule limits for specially authorized consultant examinations, for directed medical examinations, and for other specially authorized services.

§ 30.709 How are payments for medicinal drugs determined?

Payment for medicinal drugs prescribed by physicians shall not exceed the amount derived by multiplying the average wholesale price of the medication by the quantity or amount provided, plus a dispensing fee.

(a) All prescription medications identified by NDC number will be assigned an average wholesale price representing the product's nationally recognized wholesale price as determined by surveys of manufacturers and wholesalers. OWCP will establish the dispensing fee.

(b) The NDC numbers, the average wholesale prices, and the dispensing fee shall be reviewed from time to time and updated as necessary.

§ 30.710 How are payments for inpatient medical services determined?

(a) OWCP will pay for inpatient medical services according to pre-determined, condition-specific rates based on the Prospective Payment System (PPS) devised by CMS (42 CFR parts 412, 413, 424, 485, and 489). Using this system, payment is derived by multiplying the diagnosis-related group (DRG) weight assigned to the hospital discharge by the provider-specific factors.

(1) All hospital discharges will be classified according to the DRGs prescribed by CMS in the form of the DRG Grouper software program. On this list, each DRG represents the average resources necessary to provide care in a case in that DRG relative to the national average of resources consumed per case.

(2) The provider-specific factors will be provided by CMS in the form of their PPS Pricer software program. The software takes into consideration the type of facility, census division, actual geographic location of the hospital, case mix cost per discharge, number of hospital beds, intern/beds ratio, operating cost to charge ratio, and other factors used by CMS to determine the specific rate for a hospital discharge under their PPS. OWCP may devise price adjustment factors as appropriate using OWCP's processing experience and internal data.

(3) OWCP will base payments to facilities excluded from CMS's PPS on consideration of detailed medical reports and other evidence.

(4) OWCP shall review the pre-determined hospital rates at least once a year, and may adjust any or all components when OWCP deems it necessary or appropriate.

(b) OWCP shall review the schedule of fees at least once a year, and may adjust the schedule or any of its components when OWCP deems it necessary or appropriate.

§ 30.711 When and how are fees reduced?

(a) OWCP shall accept a provider's designation of the code to identify a billed procedure or service if the code is consistent with medical reports and other evidence. Where no code is supplied, OWCP may determine the code based on the narrative description of the procedure on the billing form and in associated medical reports. OWCP will pay no more than the maximum allowable fee for that procedure.

(b) If the charge submitted for a service supplied to an employee exceeds the maximum amount determined to be reasonable according to the schedule, OWCP shall pay the amount allowed by the schedule for that service and shall notify the provider in writing that payment was reduced for that service in accordance with the schedule. OWCP shall also notify the provider of the method for requesting reconsideration of the balance of the charge. The decision of OWCP to pay less than the charged amount is final when issued and is not subject to the adjudicatory process described in subpart D of this part.

§ 30.712 If OWCP reduces a fee, may a provider request reconsideration of the reduction?

(a) A physician or other provider whose charge for service is only partially paid because it exceeds a maximum allowable amount set by OWCP may, within 30 days, request reconsideration of the fee determination.

(1) Any such request will be considered by the district office with jurisdiction over the employee's claim. The request must be accompanied by documentary evidence that the procedure performed was either incorrectly identified by the original code, that the presence of a severe or concomitant medical condition made treatment especially difficult, or that the provider possessed unusual qualifications. In itself, board certification in a specialty is not sufficient evidence of unusual qualifications to justify a charge in excess of the maximum allowable amount set by OWCP. These are the only three circumstances that will justify reevaluation of the paid amount.

(2) A list of district offices and their respective areas of jurisdiction is available upon request from the U.S. Department of Labor, Office of Workers' Compensation Programs, Washington, DC 20210, or on the Internet at *http://www.dol.gov/esa/regs/compliance/owcp/eeoicp/main.htm*. Within 30 days of receiving the request for reconsideration, the district office shall respond in writing stating whether or not an additional amount will be

allowed as reasonable, considering the evidence submitted.

(b) If the district office issues a decision that continues to disallow a contested amount, the provider may apply to the Regional Director of the region with jurisdiction over the district office. The application must be filed within 30 days of the date of such decision, and it may be accompanied by additional evidence. Within 60 days of receipt of such application, the Regional Director shall issue a decision in writing stating whether or not an additional amount will be allowed as reasonable, considering the evidence submitted.

§ 30.713 If OWCP reduces a fee, may a provider bill the employee for the balance?

A provider whose fee for service is partially paid by OWCP as a result of the application of its fee schedule or other tests for reasonableness in accordance with this part shall not request payment from the employee for the unpaid amount of the provider's bill.

(a) Where a provider's fee for a particular service or procedure is lower to the general public than as provided by the schedule of maximum allowable charges, the provider shall bill at the lower rate. A fee for a particular service or procedure which is higher than the provider's fee to the general public for that same service or procedure will be considered a charge ''substantially in excess of such provider's customary charges'' for the purposes of § 30.715(d).

(b) A provider whose fee for service is partially paid by OWCP as the result of the application of the schedule of maximum allowable charges and who collects or attempts to collect from the employee, either directly or through a collection agent, any amount in excess of the charge allowed by OWCP, and who does not cease such action or make appropriate refund to the employee within 60 days of the date of the decision of OWCP, shall be subject to the exclusion procedures provided by § 30.715(h).

Exclusion of Providers

§ 30.715 What are the grounds for excluding a provider from payment under this part?

A physician, hospital, or provider of medical services or supplies shall be excluded from payment under this part if such physician, hospital or provider has:

(a) Been convicted under any criminal statute of fraudulent activities in connection with any federal or state program for which payments are made to providers for similar medical, surgical or hospital services, appliances or supplies;

(b) Been excluded or suspended, or has resigned in lieu of exclusion or suspension, from participation in any federal or state program referred to in paragraph (a) of this section;

(c) Knowingly made, or caused to be made, any false statement or misrepresentation of a material fact in connection with a determination of the right to reimbursement under this part, or in connection with a request for payment;

(d) Submitted, or caused to be submitted, three or more bills or requests for payment within a 12-month period under this subpart containing charges which OWCP finds to be substantially in excess of such provider's customary charges, unless OWCP finds there is good cause for the bills or requests containing such charges;

(e) Knowingly failed to timely reimburse employees for treatment, services or supplies furnished under this subpart and paid for by OWCP;

(f) Failed, neglected or refused on three or more occasions during a 12-month period to submit full and accurate medical reports, or to respond to requests by OWCP for additional reports or information, as required by § 30.700 of this part;

(g) Knowingly furnished treatment, services or supplies which are substantially in excess of the employee's needs, or of a quality which fails to meet professionally recognized standards; or

(h) Collected or attempted to collect from the employee, either directly or through a collection agent, an amount in excess of the charge allowed by OWCP for the procedure performed, and has failed or refused to make appropriate refund to the employee, or to cease such collection attempts, within 60 days of the date of the decision of OWCP.

§ 30.716 What will cause OWCP to automatically exclude a physician or other provider of medical services and supplies?

(a) OWCP shall automatically exclude a physician, hospital, or provider of medical services or supplies who:

(1) Has been convicted of a crime described in § 30.715(a); or

(2) Has been excluded or suspended, or has resigned in lieu of exclusion or suspension, from participation in any federal or state program for which payments are made to providers for similar medical, surgical or hospital services, appliances or supplies.

(b) The exclusion applies to participating in the program and to seeking payment under this part for services performed after the date of the entry of the judgment of conviction or order of exclusion, suspension or resignation, as the case may be, by the court or agency concerned. Proof of the conviction, exclusion, suspension or resignation may consist of a copy thereof authenticated by the seal of the court or agency concerned.

§ 30.717 When are OWCP's exclusion procedures initiated?

Upon receipt of information indicating that a physician, hospital or provider of medical services or supplies (hereinafter the provider) has engaged in activities enumerated in paragraphs (c) through (h) of § 30.715, the Regional Director, after completion of inquiries he or she deems appropriate, may initiate procedures to exclude the provider from participation in the EEOICPA program. For the purposes of these procedures, ''Regional Director'' may include any officer designated to act on his or her behalf.

§ 30.718 How is a provider notified of OWCP's intent to exclude him or her?

The Regional Director shall initiate the exclusion process by sending the provider a letter, by certified mail and with return receipt requested, which shall contain the following:

(a) A concise statement of the grounds upon which exclusion shall be based;

(b) A summary of the information, with supporting documentation, upon which the Regional Director has relied in reaching an initial decision that exclusion proceedings should begin;

(c) An invitation to the provider to:

(1) Resign voluntarily from participation in the EEOICPA program without admitting or denying the allegations presented in the letter; or

(2) Request that the decision on exclusion be based upon the existing record and any additional documentary information the provider may wish to furnish;

(d) A notice of the provider's right, in the event of an adverse ruling by the Regional Director, to request a formal hearing before an administrative law judge;

(e) A notice that should the provider fail to answer (as described in § 30.719) the letter of intent within 30 calendar days of receipt, the Regional Director may deem the allegations made therein to be true and may order exclusion of the provider without conducting any further proceedings; and

(f) The name and address of the OWCP representative who shall be responsible for receiving the answer from the provider.

§ 30.719 What requirements must the provider's reply and OWCP's decision meet?

(a) The provider's answer shall be in writing and shall include an answer to OWCP's invitation to resign voluntarily. If the provider does not offer to resign, he or she shall request that a determination be made upon the existing record and any additional information provided.

(b) Should the provider fail to answer the letter of intent within 30 calendar days of receipt, the Regional Director may deem the allegations made therein to be true and may order exclusion of the provider.

(c) By arrangement with the OWCP representative, the provider may inspect or request copies of information in the record at any time prior to the Regional Director's decision.

(d) The Regional Director shall issue his or her decision in writing, and shall send a copy of the decision to the provider by certified mail, return receipt requested. The decision shall advise the provider of his or her right to request, within 30 days of the date of the adverse decision, a formal hearing before an administrative law judge under the procedures set forth in § 30.720. The filing of a request for a hearing within the time specified shall stay the effectiveness of the decision to exclude.

§ 30.720 How can an excluded provider request a hearing?

A request for a hearing shall be sent to the OWCP representative named pursuant to § 30.718(f) and shall contain:

(a) A concise notice of the issues on which the provider desires to give evidence at the hearing;

(b) Any request for a more definite statement by OWCP;

(c) Any request for the presentation of oral argument or evidence; and

(d) Any request for a certification of questions concerning professional medical standards, medical ethics or medical regulation for an advisory opinion from a competent recognized professional organization or federal, state or local regulatory body.

§ 30.721 How are hearings assigned and scheduled?

(a) If the designated OWCP representative receives a timely request for hearing, the OWCP representative shall refer the matter to the Chief Administrative Law Judge of the Department of Labor, who shall assign it for an expedited hearing. The administrative law judge assigned to the matter shall consider the request for hearing, act on all requests therein, and issue a Notice of Hearing and Hearing Schedule for the conduct of the hearing. A copy of the hearing notice shall be served on the provider by certified mail, return receipt requested. The Notice of Hearing and Hearing Schedule shall include:

(1) A ruling on each item raised in the request for hearing;

(2) A schedule for the prompt disposition of all preliminary matters, including requests for more definite statements and for the certification of questions to advisory bodies; and

(3) A scheduled hearing date not less than 30 days after the date the schedule is issued, and not less than 15 days after the scheduled conclusion of preliminary matters, provided that the specific time and place of the hearing may be set on 10 days' notice.

(b) The purpose of the designation of issues is to provide for an effective hearing process. The provider is entitled to be heard on any matter placed in issue by his or her response to the Notice of Intent to Exclude, and may designate ''all issues'' for purposes of hearing. However, a specific designation of issues is required if the provider wishes to interpose affirmative defenses or request the certification of questions for an advisory opinion.

§ 30.722 How are subpoenas or advisory opinions obtained?

(a) In exclusion proceedings involving medical services provided under Part B of the Act only, the provider may apply to the administrative law judge for the issuance of subpoenas upon a showing of good cause therefore.

(b) A certification of a request for an advisory opinion concerning professional medical standards, medical ethics or medical regulation to a competent recognized or professional organization or federal, state or local regulatory agency may be made:

(1) As to an issue properly designated by the provider, in the sound discretion of the administrative law judge, provided that the request will not unduly delay the proceedings;

(2) By OWCP on its own motion either before or after the institution of proceedings, and the results thereof shall be made available to the provider at the time that proceedings are instituted or, if after the proceedings are instituted, within a reasonable time after receipt. The opinion, if rendered by the organization or agency, is advisory only and not binding on the administrative law judge.

§ 30.723 How will the administrative law judge conduct the hearing and issue the recommended decision?

(a) To the extent appropriate, proceedings before the administrative law judge shall be governed by 29 CFR part 18.

(b) The administrative law judge shall receive such relevant evidence as may be adduced at the hearing. Evidence shall be presented under oath, orally or in the form of written statements. The administrative law judge shall consider the Notice and Response, including all pertinent documents accompanying them, and may also consider any evidence which refers to the provider or to any claim with respect to which the provider has provided medical services, hospital services, or medical services and supplies, and such other evidence as the administrative law judge may determine to be necessary or useful in evaluating the matter.

(c) All hearings shall be recorded and the original of the complete transcript shall become a permanent part of the official record of the proceedings.

(d) In conjunction with the hearing, the administrative law judge may:

(1) Administer oaths; and

(2) Examine witnesses.

(e) At the conclusion of the hearing, the administrative law judge shall issue a written decision and cause it to be served on all parties to the proceeding, their representatives and OWCP.

§ 30.724 How can a party request review by OWCP of the administrative law judge's recommended decision?

(a) Any party adversely affected or aggrieved by the decision of the administrative law judge may file a petition for discretionary review with the Director for Energy Employees Occupational Illness Compensation within 30 days after issuance of such decision. The administrative law judge's decision, however, shall be effective on the date issued and shall not be stayed except upon order of the Director.

(b) Review by the Director for Energy Employees Occupational Illness Compensation shall not be a matter of right but of the sound discretion of the Director.

(c) Petitions for discretionary review shall be filed only upon one or more of the following grounds:

(1) A finding or conclusion of material fact is not supported by substantial evidence;

(2) A necessary legal conclusion is erroneous;

(3) The decision is contrary to law or to the duly promulgated rules or decisions of OWCP;

(4) A substantial question of law, policy, or discretion is involved; or

(5) A prejudicial error of procedure was committed.

(d) Each issue shall be separately numbered and plainly and concisely stated, and shall be supported by detailed citations to the record when assignments of error are based on the record, and by statutes, regulations or principal authorities relied upon. Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass.

(e) A statement in opposition to the petition for discretionary review may be filed, but such filing shall in no way delay action on the petition.

(f) If a petition is granted, review shall be limited to the questions raised by the petition.

(g) A petition not granted within 20 days after receipt of the petition is deemed denied.

§ 30.725 What are the effects of non-automatic exclusion?

(a) OWCP shall give notice of the exclusion of a physician, hospital or provider of medical services or supplies to:

(1) All OWCP district offices;

(2) CMS; and

(3) All employees who are known to have had treatment, services or supplies from the excluded provider within the six-month period immediately preceding the order of exclusion.

(b) Notwithstanding any exclusion of a physician, hospital, or provider of medical services or supplies under this subpart, OWCP shall not refuse an employee reimbursement for any otherwise reimbursable medical treatment, service or supply if:

(1) Such treatment, service or supply was rendered in an emergency by an excluded physician; or

(2) The employee could not reasonably have been expected to know of such exclusion.

(c) An employee who is notified that his or her attending physician has been excluded shall have a new right to select a qualified physician.

§ 30.726 How can an excluded provider be reinstated?

(a) If a physician, hospital, or provider of medical services or supplies has been automatically excluded pursuant to § 30.716, the provider excluded will automatically be reinstated upon notice to OWCP that the conviction or exclusion which formed the basis of the automatic exclusion has been reversed or withdrawn. However, an automatic reinstatement shall not preclude OWCP from instituting exclusion proceedings based upon the underlying facts of the matter.

(b) A physician, hospital, or provider of medical services or supplies excluded from participation as a result of an order issued pursuant to this subpart may apply for reinstatement one year after the entry of the order of exclusion, unless the order expressly provides for a shorter period. An application for reinstatement shall be addressed to the Director for Energy Employees Occupational Illness Compensation, and shall contain a concise statement of the basis for the application. The application should be accompanied by supporting documents and affidavits.

(c) A request for reinstatement may be accompanied by a request for oral argument. Oral argument will be allowed only in unusual circumstances where it will materially aid the decision process.

(d) The Director for Energy Employees Occupational Illness Compensation shall order reinstatement only in instances where such reinstatement is clearly consistent with the goal of this subpart to protect the EEOICPA program against fraud and abuse. To satisfy this requirement the provider must provide reasonable assurances that the basis for the exclusion will not be repeated.

Subpart I—Wage-Loss Determinations Under Part E of EEOICPA

General Provisions

§ 30.800 What types of wage-loss are compensable under Part E of EEOICPA?

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 Department of Energy facility or a RECA section 5 facility, as appropriate, may be compensable under Part E of the Act. Whether years of wage-loss are compensable depends on determinations with respect to:

(a) The average annual wage of the employee as determined by OWCP in accordance with § 30.810;

(b) The percentage of his or her average annual wage that the employee was able to earn during the calendar year(s) in question as determined by OWCP in accordance with § 30.811; and

(c) Whether the employee's inability to earn at least as much as his or her average annual wage was due to a covered illness as defined in § 30.5(r).

§ 30.801 What special definitions does OWCP use in connection with Part E wage-loss determinations?

For the purposes of paying compensation based on wage-loss under Part E of the Act, OWCP will apply the following definitions:

(a) *Average annual wage* means four times the average quarterly wages of a covered Part E employee for the 12 quarters preceding the quarter during which he or she first experienced wage-loss due to exposure to a toxic substance at a DOE facility or RECA section 5 facility, excluding any quarters during which the employee was unemployed. Because being ''retired'' is not equivalent to being ''unemployed,'' quarters during which an employee had no wages because he or she was retired will not be excluded from this calculation.

(b) *Normal retirement age* means the age at which a covered Part E employee first became eligible for unreduced retirement benefits under the Old-Age, Survivors and Disability Insurance (OASDI) provisions of the Social Security Act. In general, persons born during or before 1937 are eligible for unreduced OASDI retirement benefits at age 65, and that age increases in monthly increments until it reaches 67, which is the age at which persons born during or after 1960 become eligible for unreduced OASDI retirement benefits.

(c) *Quarter* means the three-month period January through March, April through June, July through September, or October through December.

(d) *Quarter during which the employee was unemployed* means any quarter during which the covered Part E employee had $700 (in constant 2005 dollars) or less in wages unless the quarter is one during which the employee was retired.

(e) *Year of wage-loss* means a calendar year during which the covered Part E employee's earnings were less than his or her average annual wage, after such earnings have been adjusted using the Consumer Price Index for All Urban Consumers (CPI–U), as produced by the Bureau of Labor Statistics, to reflect their value in the year during which the employee first experienced wage-loss due to exposure to a toxic substance at a DOE facility or RECA section 5 facility.

Evidence of Wage-Loss

§ 30.805 What evidence does OWCP use to determine a covered Part E employee's average annual wage and whether he or she experienced compensable wage-loss under Part E of EEOICPA?

(a) OWCP may rely on quarterly wages information reported to the Social

Security Administration to establish a covered Part E employee's presumed average annual wage (see § 30.810) and the duration and extent of any years of wage-loss that are compensable under Part E of the Act (see § 30.811). OWCP may also rely on other probative evidence of a covered Part E employee's wages, and may ask the claimant for additional evidence necessary to make this determination, if necessary. For the purposes of making these two types of determinations, OWCP 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.''

(b) OWCP also requires the submission of rationalized medical evidence of sufficient probative value to establish that the period of wage-loss at issue is causally related to the covered Part E employee's covered illness.

§ 30.806 May a claimant submit factual evidence in support of a different determination of average annual wage and/or wage-loss than that found by OWCP?

A claimant who disagrees with the evidence OWCP has obtained under § 30.805(a) and alleges a different average annual wage for the covered Part E employee, or that there was a greater duration or extent of wage-loss, may submit records that were produced in the ordinary course of business due to the employee's employment to rebut that evidence, to the extent that such records are determined to be authentic by OWCP by a preponderance of the evidence. The average annual wage and/or wage-loss of the covered Part E employee will then be determined by OWCP in the exercise of its discretion.

Determinations of Average Annual Wage and Percentages of Loss

§ 30.810 How will OWCP calculate the average annual wage of a covered Part E employee?

To calculate the average annual wage of a covered Part E employee as defined in § 30.801(a), OWCP will:

(a) Aggregate the wages for the twelve quarters that preceded the quarter during which the covered Part E employee first experienced wage-loss due to exposure to a toxic substance at a DOE facility or a RECA section 5 facility, excluding any quarter during which the employee was unemployed;

(b) Add any additional wages earned by the employee during those same quarters as evidenced by records described in §§ 30.805(a) and 30.806;

(c) Divide the sum of paragraphs (a) and (b) of this section by 12 less the number of quarters during which the employee was unemployed; and

(d) Multiply this figure by four to calculate the covered Part E employee's average annual wage.

§ 30.811 How will OWCP calculate the duration and extent of a covered Part E employee's initial period of compensable wage-loss?

(a) To determine the initial calendar years of wage-loss, OWCP will use the evidence it receives under §§ 30.805 and 30.806 to determine the quarter in which a covered Part E employee first sustained wage-loss due to exposure to a toxic substance while engaged in employment at a DOE facility or a RECA section 5 facility, as appropriate.

(b) OWCP will then compare the calendar-year wages for that employee, as adjusted, with the average annual wage determined under § 30.810 for each calendar year beginning with the calendar year that includes the quarter in which the wage-loss commenced, and concluding with the last calendar year of wage-loss prior to the submission of the claim or the calendar year in which the employee reached normal retirement age (as defined in § 30.801(b)), whichever occurred first.

(c) OWCP will then aggregate separately the number of calendar years of wage-loss in which the employee's wages, as adjusted, did not exceed 50 percent of the average annual wage determined under § 30.810, and the number of calendar years of wage-loss in which the employee's wages, as adjusted, exceeded 50 percent of such average annual wage, but did not exceed 75 percent of such average annual wage.

(d) For each calendar year of wage-loss determined under paragraph (c) of this section during which the employee's wages did not exceed 50 percent of his or her average annual wage, OWCP will pay the employee $15,000 as compensation for wage-loss. For each calendar year of wage-loss determined under paragraph (c) of this section during which the employee's calendar-year wages exceeded 50 percent of his or her average annual wage but did not exceed 75 percent of such average annual wage, OWCP will pay the employee $10,000 as compensation for wage-loss.

§ 30.812 May a covered Part E employee claim for subsequent periods of compensable wage-loss?

A covered Part E employee previously awarded compensation for wage-loss under § 30.811 may file for additional compensation for wage-loss suffered by the employee during periods subsequent to a period for which a wage-loss claim for the employee has already been adjudicated by OWCP. However, no compensation for wage-loss shall be awarded for any period following the year during which the covered Part E employee attained normal retirement age for purposes of the Social Security Act as described in § 30.801(b).

Special Rules for Certain Survivor Claims Under Part E of EEOICPA

§ 30.815 Are there special rules that OWCP will use to determine the extent of a deceased covered Part E employee's compensable wage-loss?

(a) For purposes of adjudicating a claim of a survivor of a deceased covered Part E employee only, OWCP will presume that such employee experienced wage-loss for each calendar year subsequent to the calendar year of his or her death through and including the calendar year in which the employee would have reached normal retirement age under the Social Security Act. During these particular calendar years, OWCP will also presume that the deceased covered Part E employee's subsequent calendar-year wages did not exceed 50 percent of his or her average annual wage as determined under § 30.810.

(b) Except as provided in paragraph (a) of this section, OWCP will calculate the wage-loss of a deceased covered Part E employee in conformance with the provisions of §§ 30.800 through 30.811.

(c) If OWCP determines that a deceased covered Part E employee had an aggregate of not less than ten calendar years of adjusted earnings that did not exceed 50 percent of his or her average annual earnings, it will pay the eligible surviving beneficiary(s) additional compensation (the basic survivor award payable under section 7385s–3(a)(1) is $125,000) in the amount of $25,000 pursuant to section 7385s–3(a)(2) of the Act. In the alternative, if OWCP determines that the aggregate number of such years is not less than 20 years, it will pay the eligible surviving beneficiary(s) additional compensation in the amount of $50,000 pursuant to section 7385s–3(a)(3).

Subpart J—Impairment Benefits Under Part E of EEOICPA

General Provisions

§ 30.900 Who can receive impairment benefits under Part E?

In order to receive impairment benefits under Part E, the employee must show that:

(a) He or she is a covered Part E employee who has been determined to

have contracted a covered illness through exposure to a toxic substance at a DOE facility or a RECA section 5 facility, as appropriate, pursuant to either §§ 30.210 through 30.215 or §§ 30.230 through 30.232 of these regulations; and

(b) He or she has been determined to have an impairment, pursuant to the regulations set out in this subpart, that is the result of the covered illness referred to in paragraph (a) of this section.

§ 30.901 How does OWCP determine the extent of an employee's impairment that is due to a covered illness contracted through exposure to a toxic substance at a DOE facility or a RECA section 5 facility, as appropriate?

(a) OWCP will determine the amount of impairment benefits to which an employee is entitled based on one or more impairment evaluations submitted by physicians. An impairment evaluation shall contain the physician's opinion on the extent of whole person impairment of all organs and body functions of the employee that are compromised or otherwise affected by the employee's covered illness or illnesses, which shall be referred to as a ''minimum impairment rating.''

(b) The minimum impairment rating shall be determined in accordance with the current edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA's *Guides*). In making impairment benefit determinations, OWCP will only consider medical reports from physicians who are certified by the relevant medical board and who satisfy any additional criteria determined by OWCP to be necessary to qualify to perform impairment evaluations under Part E, including any specific training in use of the AMA's *Guides*, specific training and experience related to particular conditions and other objective factors.

(c) OWCP will establish criteria based upon objective factors such as training and certification that must be met by physicians preparing impairment evaluations in order for an impairment evaluation to be considered in determining an impairment award. Such criteria shall be made available to claimants and the public by OWCP.

§ 30.902 How will OWCP calculate the amount of the award of impairment benefits that is payable under Part E?

OWCP will multiply the percentage points of the minimum impairment rating by $2,500 to calculate the amount of the award.

Medical Evidence of Impairment

§ 30.905 How may an impairment evaluation be obtained?

(a) Except as provided in paragraph (b) of this section, OWCP may request that an employee undergo an evaluation of his or her permanent impairment that specifies the percentage points that are the result of the employee's covered illness or illnesses. To be of any probative value, such evaluation must be performed by a physician who meets the criteria OWCP has identified for physicians performing impairment evaluations for the pertinent covered illness or illnesses in accordance with the AMA's *Guides*.

(b) In lieu of submitting an evaluation requested by OWCP under paragraph (a) of this section, an employee may obtain an impairment evaluation at his own initiative and submit it to OWCP for consideration. Such an evaluation will be deemed to have sufficient probative value to be considered in the adjudication of impairment benefits by OWCP only if:

(1) The evaluation was performed by a physician who meets the criteria identified by OWCP for the covered illness or illnesses in question;

(2) The evaluation was performed no more than one year before the date that it was received by OWCP; and

(3) The evaluation conforms to all applicable requirements set out in this part.

§ 30.906 Who will pay for an impairment evaluation?

(a) OWCP will pay for one impairment evaluation obtained by an employee if it meets the criteria set out in § 30.905(b), unless it was performed by a physician prior to the date that the claim for Part E benefits is filed, or obtained for a claim in which OWCP finds that the employee did not contract a covered illness. At its discretion, OWCP may direct that the employee undergo additional evaluations. OWCP will pay for any such additional evaluations and will reimburse the employee for any reasonable and necessary costs incident to the evaluations, as described in §§ 30.404 and 30.412 of this part.

(b) Except for one impairment evaluation obtained pursuant to § 30.905(b) and meeting the criteria set out in § 30.905(b)(1), (2) and (3), the employee must pay for any impairment evaluations not directed by OWCP.

§ 30.907 Can an impairment evaluation obtained by OWCP be challenged prior to issuance of the recommended decision?

(a) An employee may submit arguments challenging an impairment evaluation, and/or additional medical evidence of impairment, before the district office issues a recommended decision on his or her claim. However, the district office will not consider an additional impairment evaluation, even if it differs from the impairment evaluation obtained under §§ 30.905 or 30.906, if it does not meet the criteria listed in § 30.905(b)(1), (2) and (3).

(b) If the district office obtains an additional impairment evaluation that differs from the impairment evaluation obtained under §§ 30.905 or 30.906, the district office will base its recommended determinations regarding impairment upon the evidence it considers to have the greatest probative value, after evaluating all relevant evidence of impairment in the record, including evidence from directed impairment evaluations and referee impairment evaluations, if any, that it deems necessary pursuant to §§ 30.410 and 30.411 of this part.

§ 30.908 How will the FAB evaluate new medical evidence submitted to challenge the impairment determination in the recommended decision?

(a) If an employee submits an additional impairment evaluation that differs from the impairment evaluation relied upon by the district office, the FAB will not consider the additional impairment evaluation if it does not meet the criteria listed in § 30.905(b)(1), (2) and (3).

(b) The employee shall bear the burden of proving that the additional impairment evaluation submitted is more probative than the evaluation relied upon by the district office to determine the employee's recommended minimum impairment rating.

(c) 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.

Ratable Impairments

§ 30.910 Will an impairment that cannot be assigned a numerical percentage using the AMA's Guides be included in the impairment rating?

(a) An impairment of an organ or body function that cannot be assigned a numerical impairment percentage using the AMA's *Guides* will not be included in the employee's impairment rating.

(b) A mental impairment that does not originate from a documented physical dysfunction of the nervous system, and cannot be assigned a numerical percentage using the AMA's *Guides*, will not be included in the impairment rating for the employee. Mental impairments that are due to documented physical dysfunctions of the nervous system can be assigned numerical percentages using the AMA's *Guides* and will be included in the rating.

§ 30.911 Does maximum medical improvement always have to be reached for an impairment to be included in the impairment rating?

(a) An impairment that is the result of a covered illness will be included in the employee's impairment rating determined by OWCP under § 30.901 only if OWCP concludes that the impairment has reached maximum medical improvement, which means that it is well-stabilized and unlikely to improve substantially with or without medical treatment.

(b) Notwithstanding paragraph (a) of this section, if OWCP finds that an employee's covered illness is in the terminal stages, based upon probative medical evidence, an impairment that results from such covered illness will be included in the impairment rating for the employee even if it has not reached maximum medical improvement.

§ 30.912 Can a covered Part E employee receive benefits for additional impairment following an award of such benefits by OWCP?

A covered Part E employee previously awarded impairment benefits by OWCP may file a claim for additional impairment benefits. Such claim must be based on an increase in the impairment rating that is the result of the covered illness or illnesses from the impairment rating that formed the basis for the last award of such benefits by OWCP. OWCP will only adjudicate claims for such an increased rating that are filed at least two years from the date of the last award of impairment benefits. However, OWCP will not wait two years before it will adjudicate a claim for additional impairment that is based on an allegation that the employee sustained a new covered illness.

Signed at Washington, DC, this 15th day of December, 2006.

Victoria A. Lipnic,

Assistant Secretary of Labor for Employment Standards.

Signed at Washington, DC, this 15th day of December, 2006.

Shelby Hallmark,

Director, Office of Workers' Compensation Programs, Employment Standards Administration.

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