Testimony of Malcolm D. Nelson

Before the Senate Health, Education, Labor, and Pensions Committee

On

EEOICPA: Is the Program Claimant Friendly For Our Cold War Heroes?

October 23, 2007

Good morning. I am Malcolm D. Nelson, the Ombudsman for the Energy Employees Occupational Illness Compensation Act, Part E, and I would like to thank the Committee on Health, Education, Labor, and Pensions for inviting me to testify today.

The 2004 amendments to the Energy Employees Occupational Illness Compensation Program Act (EEOICPA) repealed Part D of the program which had been administered by the Department of Energy, and enacted Part E, effectively transferring responsibility for administration of contractor employee compensation from the Department of Energy to the Department of Labor. These amendments also created the Office of the Ombudsman and directed that it be an independent office located within the Department of Labor. The statute outlines three duties for the Office of the Ombudsman:

1. To provide information on the benefits available under this part and on the requirements and procedures applicable to the provision of such benefits;

2. To make recommendations to the Secretary regarding the location of resource centers for the acceptance and development of claims for benefits; and

3. To submit to Congress by February 15th of each year, a report outlining the number and types of complaints, grievances, and requests for assistance received by the Office during the preceding year, and an assessment of the most common difficulties encountered by claimants and potential claimants.

Since our establishment in 2004, outreach has been an important aspect of the Office of the Ombudsman, and our office strives to reach out to as many claimants and potential claimants as possible. As a result of our outreach efforts, as well as the efforts of others, we are contacted on a daily basis by claimants and potential claimants regarding their grievances, complaints and

requests for assistance. Our most recent annual report was submitted to Congress on February 15, 2007, and since that time, we have heard from hundreds of new claimants. We look forward to reporting on their concerns, grievances and requests for assistance in our report for 2007.

The essential characteristics of any Ombudsman's office are:

- independence
- impartiality, and
- confidentiality

Consistent with these characteristics, and with the statutory responsibilities outlined above, the Office of the Ombudsman provides assistance and guidance to those who request it. We do not possess investigatory authority and we cannot advocate on behalf of individual claimants as a private attorney might. Rather, we direct claimants to the appropriate resources, we answer their questions (to the extent that we are able), and in some instances, we simply record their concerns. Based upon a review of our records, and relying upon my personal interactions with claimants either at town hall meetings or in one-on-one conversations, I am confident in stating that a

large percentage of the claimants and potential claimants with whom we have spoken do not believe that this program is, or has been, claimant friendly. There are many reasons for this and it would take too long to discuss every concern and grievance that we have received. However, let me take a few minutes to discuss a few of the more common complaints that this office hears.

Before I begin, however, I should note that in light of the mission given to the Office of the Ombudsman, we generally only hear from those who have complaints, grievances, and/or requests for assistance. This in no way detracts from the validity of their concerns; rather I simply want to note that we tend to only hear of the problems.

Delays

The fact that it often takes years to adjudicate a claim is a concern that many claimants express to us. We continue to hear from claimants who initially filed a Part B or Part D claim, meaning that they filed their claim prior to October 2004, and yet they are still awaiting a final resolution. In many other instances, while the claim may not have been pending since 2004, there still has been a lengthy wait. Even where there is an explanation for

the delay, many claimants nevertheless assert that the wait is too long, especially since you are referring to a program that is intended to be claimant friendly. Many of the people with whom we speak are elderly, and quite a lot of them are sick, often suffering from malignant and debilitating illnesses. Claimants have been quite blunt in telling us that they fear that if they are made to wait too long, they will not be around to receive benefits.

In addition, generally under Part E, if the worker dies prior to the awarding of benefits, only surviving spouses or certain surviving children are eligible for benefits. In light of this, many claimants voice a concern that if benefits are not awarded during their lifetime, their family will not receive anything from this program – regardless of the severity of their illness. Moreover, there are claimants who simply need the money – sometimes to help pay for their health costs, and other times, for any number of reasons. I recently spoke to a woman who is anxious to receive her benefits so that she can pay for the installation of a new heater.

Burden of Proof

Under Part E, the claimant has the burden to establish entitlement to benefits. In general, in order to establish entitlement to benefits under Part E, a living worker claimant must establish:

- employment at a covered DOE facility;
- an illness;
- that the illness is related to exposure to a toxic substance;
- that the exposure to the toxic substance is the result of employment at the covered DOE facility; and
- impairment and/or wage loss (if the claimant wishes to be compensated for impairment and/or wage loss) due to the illness.

We hear a large number of complaints from claimants who believe that the burden on them is virtually impossible to meet. For instance, a number of claimants have indicated that in developing evidence of their employment at a covered facility or of their exposure to toxic substances, they were stymied because relevant records had been either lost or destroyed. Where such claims are ultimately denied on the ground that the claimant failed to present sufficient evidence of covered employment or of toxic exposure, the

claimants often turn to us with the same questions, “if the government cannot find these records, how can I be expected to find them?” and “why should I lose because this evidence has been lost or destroyed?” Although, the Program Office, as well as this Office, will sometimes suggest other means of developing necessary evidence, following through on these suggestions is often beyond the capabilities of the claimant.

Moreover, even where the records are available, many claimants question the accuracy of these records. A common complaint that we hear is that employment records fail to recognize that during the day the employee was routinely “ordered” to go to other sites around the facility. Transportation workers and security guards often tell us that they were not required to wear dosimetry badges, yet their duties often required them to travel throughout the facility and to have contact with a broad spectrum of the workforce. Furthermore, we encounter claimants who strongly believe that their employers manipulated or destroyed exposure data. The most common assertion that we hear is that employees were sometimes “ordered” to take off their dosimetry badges.

We also hear complaints relating to the burden of establishing that one's illness was caused by exposure to toxic substances at work (causation). Many claimants tell us that they simply cannot find a doctor who will assist them. Moreover, even when claimants are able to retain a doctor, many become frustrated when their doctors' reports are ultimately deemed insufficient to satisfy their burden.

EEOICPA Bulletin 06-10 is a source of many complaints. Bulletin 06-10 informs claims examiners that DEEOIC "has identified certain illnesses with no known causal link to toxic substances." Where a covered worker is determined to have one of these conditions, Bulletin 06-10 instructs the claims examiner to send a letter to the claimant stating this finding and telling the claimant that "it is necessary to submit factual or medical documentation to show a relationship between the claimed medical condition(s) and exposure to a toxic substance." In response to this bulletin, some claimants assure us that they are aware of (or have) medical/scientific evidence drawing a link between their illness and a toxic substance, and thus question the evidentiary basis for the conclusions in Bulletin 06-10. (Bulletin 6-10 states that "DEEOIC specialists researched authoritative scientific publications, medical literature, and occupational exposure

records," but does not specifically identify the publications, literature or records consulted.) There are also claimants who believe that Bulletin 06-10 imposes an even higher burden on what is supposed to be a claimant friendly program. In addition, we encounter many claimants who assert that they have no appreciation of the quantum or quality of evidence necessary to overcome Bulletin 06-10.

Lack of clarity/explanation

Similarly, many claimants who contact our office contend that the decisions denying benefits do not adequately explain why their evidence was not sufficient to support an award of benefits. According to many claimants, an explanation as to why their previous evidence was insufficient, as well as clear guidance concerning the quantum and quality of evidence needed to meet one's burden, would assist them tremendously in their efforts to develop evidence.

Many claimants also find it a challenge to understand the letters and other documents that they receive. These documents often discuss legal and medical matters which simply are beyond the grasp of some claimants. For instance, many claimants are potentially eligible under Part B, as well as

Part E, yet it is not unusual to talk to a claimant who, in spite of receiving correspondence from DEEOIC, still cannot confidently state whether the application that they filed has become a Part B or Part E claim, or both.

Lack of legal representation/expert medical assistance

The inability to obtain an attorney or other representative to assist them often exacerbates the problems that claimants encounter as they attempt to establish entitlement to benefits. Also, finding medical evidence to support one's claim often requires diligence and perseverance. We, however, encounter claimants who do not have the physical stamina to engage in this level of activity. In addition, assuming that evidence can be located, much of it will be extremely technical in nature. Many claimants simply are unable to fully comprehend such technical information. The fact that some claimants do not have access to a computer or are not computer-savvy adds to these problems.

For example, I recently spoke to a woman who has been denied benefits on the ground that there is no evidence linking her husband's death to any of the toxins at his worksite. If this woman wishes to continue to pursue her claim, she will need to find a link between her husband's death and one of

the toxins now identified on the Site Exposure Matrices – a tool developed by DEEOIC to catalogue, to date, which particular toxic substances were present at a Department of Energy facility during a particular claimant's employment. Consequently, this woman needs to review medical literature to try to find this link. Unfortunately, this woman is elderly, she does not live near a library, she does not drive, she does not have access to the internet, and she does not have anybody who is actively assisting her. At this point it is impossible to say whether this woman will prevail; however, it is safe to say that this woman will need assistance if she wishes to continue to pursue this matter.

Miscellaneous

As I indicated at the beginning, I am not going to try to discuss all of the complaints and grievances that claimants have reported to our office. However, I do want to note that many claimants tell us that they believe that it is unfair that under Part B adult children can receive benefits if the eligible parent dies, yet under Part E, adult children generally are not eligible. It should be noted that some of these Part E adult children were not eligible to receive benefits under Part B because their parent did not have one of the illnesses covered by Part B. We also continue to hear complaints concerning

the courteousness and professionalism of some of the staff involved with this program. Moreover, even when benefits are awarded, we hear from claimants who do not understand or disagree with the methodology used to determine if a coordination of benefits is needed for a previous non-EEOICPA award of benefits or compensation.

Conclusion

Many of the claimants who attend our town hall meetings or who call our office come to us with a sense of frustration. It does not matter where the claimant lives, or whether the claimant is the worker or a survivor of a worker, we continue to hear many of the same complaints and grievances. Unfortunately, in response to many of these complaints and grievances, we often must remind claimants that this Office cannot change the result, we cannot award benefits and we cannot rewrite the statute. However, we then inform these claimants that the Office of the Ombudsman can and will take their concerns and express them to the program agency and to Congress. I realize that I cannot adequately describe the depths of their frustration, but in order for me to live up to the promise that I have made to these claimants and potential claimants, I want to conclude by again stating that a large percentage of the claimants and potential claimants who contact our Office

very strongly and unequivocally believe that this program is not living up to its promise of being claimant friendly.

Thank you very much for your time and attention.