

NEW EVIDENCE

EXHIBIT L

FEDERAL REGISTER / VOL. 69, NO. 104 / FRIDAY, MAY 28, 2004 / RULES AND REGULATIONS - PAGE 30764 - D. STATUTORY REQUIREMENTS FOR DESIGNATING CLASSES OF EMPLOYEES AS MEMBERS OF THE COHORT

This states in part: "This section also mandates two broad criteria to govern HHS Decisions, which are made after receiving the advice of the Board. Members of a class of employees at a DOE facility or AWE facility may be treated as members of the Cohort for purposes of the compensation program if HHS "determines that: (1) It is not feasible to estimate with sufficient accuracy the radiation dose that the class received; and there is a reasonable likelihood that such radiation dose may have endangered the health of members of the class." Also on Page 30765 – II. A. Feasibility of Dose Reconstructions: Timeliness, Cost, and Availability of Records "As discussed above, EEOICPA requires HHS to find that it is "not feasible to estimate with sufficient accuracy the radiation dose that the class received" as a condition for adding the class to the Cohort. The NPRM proposed the criterion that this condition would be met if NIOSH were not able to establish "that it has access to sufficient information to estimate the maximum radiation dose that could have been incurred in plausible circumstances by any member of the class" (68 FR 11308). On page 30766 the statement is made, "NIOSH and its contractor for dose reconstructions are now employing more than 300 staff (including more than 100 health physicists) and are working to complete tasks necessary to eliminate the backlog. These tasks include the completion of "site profiles", which summarize site-specific exposure conditions, dosimetry, and other relevant information." Also on page 30766, "In addition, HHS has added a provision to section 83.13(c)(1)(i) of the rule, as part of the feasibility determination by NIOSH under this section, to require that NIOSH determine whether it has information regarding monitoring, source, source term, or process information from the site where the employees worked to serve as the basis for a dose reconstruction. EEOICPA requires that determinations of probability of causation for claimants under EEOICPA be based on the radiation dose received by the employee (or a group of employees performing similar work) at the facility where the employee(s) worked. 42 U.S.C. 7384n(c)(3)(A). Consequently, for NIOSH to determine that dose construction is feasible, dose reconstruction must, as a starting point, be based on some information from the site where the employee worked. This basis requirement does not limit NIOSH to using only or primarily information from the site where the employee worked, but it requires the use of some information from the site. HHS has also added a new 83.13(b) which authorizes the Director of the Office of Compensation Analysis and Support (OCAS) within NIOSH to determine that records and/or information requested from DOE, and AWE, or another source to evaluate a petition is not, or will not be, available on a timely basis. Such a determination will be treated, for the purposes of the petition evaluation, as equivalent to a finding that the records and/or information

requested are not available.” Also on page 30766, “The ability to estimate the maximum radiation dose received by members of a class is technically a critical distinction between circumstances in which it is feasible to estimate radiation doses through dose reconstruction and those in which it is not feasible to do so.” Also on page 30767, “Furthermore, HHS has revised section 83.13 (c) (1) of the rule to state explicitly that NIOSH will make determinations of feasibility based on whether or not NIOSH is able to reconstruct doses for every type of cancer for which radiation doses are reconstructed.”

Regarding the above paragraph, I see no statement in the Dose Reconstruction Report in my claim where NIOSH states that information from the site where my husband worked was used. The “Dose Reconstruction Overview” on Page 4 of 18 of the Dose Reconstruction Report completed 3/13/2004, states “No dosimetry or bioassay records for _____ related to Mathieson Chemical’s work for the Atomic Energy Commission (AEC, one of the predecessor agencies of the present Department of Energy) could be found.” Under “Information Used”, also on page 4 of 18, I quote “The primary data source utilized for this dose reconstruction was the “Technical Information Bulletin: Technical Basis for Estimating the Maximum Plausible Dose to Workers at Atomic Weapons Employer Facilities” prepared for the EEOICPA project. It presents the evaluation of information regarding the uranium processing work performed by various atomic weapons employer (AWE) facilities for the AEC. Conservative air concentrations and inhalation times were assumed to estimate doses to these workers⁴. The types of cancer and the dates of diagnosis were obtained from the medical records and/or death certificate submitted by the claimant.” Under “Dose Estimate – Radiation Type, Energy, and Exposure Conditions” the statement is made “From the records, it was not possible to state whether he was in a position to be exposed to radioactive material or not.” No information for the period of 1951 – 1953 was furnished from the Mathieson Chemical worksite. No records were kept.

Attachment:

(1) Federal Register / Vol. 69, No. 104 / Friday, May 28, 2004 / Rules and Regulations – Page 30764 – D. s

DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Part 83

RIN 0920-AA07

Procedures for Designating Classes of Employees as Members of the Special Exposure Cohort Under the Energy Employees Occupational Illness Compensation Program Act of 2000; Final Rule

AGENCY: Department of Health and Human Services.

ACTION: Final rule.

SUMMARY: This document describes how the Department of Health and Human Services ("HHS") will consider designating classes of employees to be added to the Special Exposure Cohort under the Energy Employees Occupational Illness Compensation Program Act of 2000 ("EEOICPA"). Under EEOICPA, and Executive Order 13179, the Secretary of HHS is authorized to make such designations, which take effect 180 days after Congress is notified unless Congress provides otherwise. An individual member (or the eligible survivors of a member) of a class of employees added to the Special Exposure Cohort would be entitled to compensation if the Department of Labor ("DOL") finds that employee incurred a specified cancer and the claim meets other requirements established under EEOICPA.

DATES: *Effective Date:* This final rule is effective May 28, 2004.

Compliance Date: Affected parties are required to comply with the information collection requirements in § 82.9 effective May 28, 2004.

FOR FURTHER INFORMATION CONTACT: Larry Elliott, Director, Office of Compensation Analysis and Support, National Institute for Occupational Safety and Health, 4676 Columbia Parkway, MS-C-46, Cincinnati, OH 45226, Telephone 513-533-6800 (this is not a toll-free number). Information requests can also be submitted by e-mail to OCAS@CDC.GOV.

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory Authority

The Energy Employees Occupational Illness Compensation Program Act (EEOICPA), 42 U.S.C. 7384-7385, established a compensation program to provide a lump sum payment of \$150,000 and prospective medical benefits as compensation to covered employees suffering from designated illnesses incurred as a result of their

exposure to radiation, beryllium, or silica while in the performance of duty for the Department of Energy ("DOE") and certain of its vendors, contractors and subcontractors. This legislation also provided for lump sum payments for certain survivors of these covered employees.

EEOICPA instructed the President to designate one or more Federal Agencies to carry out the compensation program. Pursuant to this statutory provision, on December 7, 2000, the President issued Executive Order 13179 ("Providing Compensation to America's Nuclear Weapons Workers"), which assigned primary responsibility for administering the compensation program to the Department of Labor ("DOL"). 65 FR 77487 (December 11, 2000). DOL published a final rule governing DOL's administration of EEOICPA on December 26, 2002 (67 FR 78874).

Executive Order 13179 directed HHS to perform several technical and policymaking roles in support of the DOL program:

(1) HHS was to develop procedures for considering petitions by classes of employees at DOE and Atomic Weapons Employer ("AWE") facilities to be added to the Special Exposure Cohort established under EEOICPA. These procedures are the subject of this rule. HHS is also to apply these procedures in response to such petitions. Covered employees included in the Special Exposure Cohort who have a specified cancer, and eligible survivors of these employees, qualify for compensation under EEOICPA.

(2) HHS was to develop guidelines, by regulation, to be used by DOL to assess the likelihood that an employee with cancer developed that cancer as a result of exposure to radiation in performing his or her duty at a DOE facility or AWE facility. HHS published a final rule establishing these "Probability of Causation" guidelines on May 2, 2002 (67 FR 22296) under 42 CFR Part 81.

(3) HHS was also to develop methods, by regulation, to estimate radiation doses ("dose reconstruction") for certain individuals with cancer applying for benefits under the DOL program. HHS published a final rule promulgating these methods under 42 CFR Part 82 on May 2, 2002 (67 FR 22314). HHS is applying these methods to conduct the program of dose reconstruction required by EEOICPA.

(4) Finally, HHS is to provide the Advisory Board on Radiation and Worker Health ("the Board") with administrative and other necessary support services. The Board, a federal advisory committee whose members are appointed by the President, is advising

HHS in implementing its roles under EEOICPA described here.

42 U.S.C. 7384p requires HHS to implement its responsibilities with the assistance of the National Institute for Occupational Safety and Health (NIOSH), an Institute of the Centers for Disease Control and Prevention. HHS.

B. What Is the Special Exposure Cohort?

The Special Exposure Cohort ("the Cohort") is a category of employees defined under 42 U.S.C. 7384l(14). In this definition, Congress specified classes of employees to comprise the Cohort initially, including DOE employees, DOE contractor or subcontractor employees, who were (1) employed an aggregate of at least 250 work days before February 1, 1992 at a gaseous diffusion plant in Paducah, Kentucky, Portsmouth, Ohio, or Oak Ridge, Tennessee, and who were monitored using dosimetry badges or worked in a job that had exposures comparable to a job that is or was monitored using dosimetry badges; or (2) employees of DOE or DOE contractors or subcontractors employed before January 1, 1974 on Amchitka Island, Alaska and exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests. As provided in 42 U.S.C. 7384l(9)(A), employees included in the Cohort who incur a specified cancer¹ qualify for compensation (see DOL regulations 20 CFR part 30 for details). Cancer claims submitted by these employees or their survivors do not require DOL to evaluate the probability that the cancer was caused by radiation doses incurred during the performance of duty for nuclear weapons programs of DOE, as is required for other cancer claims covered by EEOICPA.

C. Purpose of the Rule

EEOICPA authorized the President to designate additional classes of employees to be included in the Cohort, while providing Congress with the opportunity to review these decisions and expedite or reverse them. As noted previously, the President has delegated his authority in this matter to the Secretary of HHS. The purpose of this rule is to establish procedures by which the Secretary of HHS will determine whether to add to the Cohort new classes of employees from DOE and AWE facilities. The procedures are

¹ Specified cancers are a limited group of cancers that EEOICPA specifies are compensable under provisions governing compensation for members of the Cohort. Although the list of specified cancers is determined by statute, the list can also be found in this rule under § 83.5.