

UNITED STATES DEPARTMENT OF LABOR

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ADVISORY BOARD ON TOXIC SUBSTANCES AND WORKER HEALTH

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SUMMARY MINUTES

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JUNE 29, 2022

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The Advisory Board met via teleconference, Steven Markowitz, Chair, presiding.

MEMBERS

SCIENTIFIC COMMUNITY

AARON BOWMAN
MARK CATLIN
KENNETH SILVER
MIKE VAN DYKE

MEDICAL COMMUNITY

GEORGE FRIEDMAN-JIMENEZ
STEVEN MARKOWITZ, Chair
MAREK MIKULSKI

CLAIMANT COMMUNITY

JIM KEY
DURONDA POPE
CALIN TEBAY

DESIGNATED FEDERAL OFFICIAL

RYAN JANSEN

Welcome/Introductions:

Mr. Jansen called the meeting to order at 1:04 p.m. and introduced himself as the Board's new Designated Federal Officer (DFO). The meeting was conducted via teleconference as a precaution against the COVID-19 pandemic. Mr. Jansen reminded Board members that some materials provided to them in their capacity as Special Government Employees should not be shared or discussed publicly. Chair Steven Markowitz welcomed Advisory Board members, Department of Labor (DOL) staff, and members of the public. After a round of introductions, Chair Markowitz reviewed the meeting's agenda.

Board Comments on EEOICP Quality Assurance Documents:

A working group of the Board met previously to discuss two documents provided by the program: one related to contract medical physician performance and the other related to quality assurance within the program. The working group compiled a list of comments and questions for the program, which was then circulated to the full Board for review. The Board voted unanimously to transmit these comments and questions to the Department.

Recommendation on Borderline BeLPT Tests:

The Board discussed draft language for a recommendation on borderline beryllium lymphocyte proliferation (BeLPT) tests. In its rationale, the Board proposed adding language to expand the current definition of beryllium sensitivity in the Energy Employees Occupational Illness Compensation Program Act (EEOICPA) to include three borderline BeLPT tests as evidence of beryllium sensitivity. Chair Markowitz noted that only a relatively small percentage of people have repeated borderline tests without ever having an abnormal BeLPT. Aaron Bowman voiced his support for the recommendation. Chair Markowitz reminded the Board that the Board raised this same issue in 2017 with a very similar recommendation, which was rejected by the Department. George Friedman-Jimenez suggested that they include an up-to-date reference from Newman and Maier, which recommends that two borderline tests be interpreted as a positive test. Chair Markowitz said that he would add the reference. The Board voted unanimously to approve the following language for the recommendation:

"The Board recommends that the Department of Labor communicate to Congress the need for a technical amendment in the Energy

Employees Occupational Illness Compensation Program Act that will recognize that covered individuals as defined in the Act and who have three borderline beryllium lymphocyte proliferation test results have beryllium sensitivity."

Industrial Hygiene Report Language re: Regulatory Standards:

When reviewing claims, Board members have noticed stereotypic language in many industrial hygienist (IH) reports related to regulatory standards. Numerous public commenters also raised this issue. Many IH reports continue to use language that frames the interpretation of exposure levels around the post-1995 period, even though this guidance was rescinded by the Department. Chair Markowitz summarized Board discussions on this topic at recent meetings, including discussion with Mr. Jeffrey Kotsch and Mr. John Vance from DOL at the last full Board meeting. He presented draft recommendation language and opened the floor for discussion.

Mike Van Dyke said that he supported the concept and suggested that it would be helpful to include examples of language that is unacceptable. Ken Silver said that he was not comfortable with the idea of comparison to past regulatory standards. The only comparison that makes sense for the purposes of the IH and contract medical consultant (CMC) rendering a causation determination is comparison to the latest American Conference of Governmental Industrial Hygienists' Threshold Limit Values (ACGIH TLVs). Chair Markowitz noted that, in their previous discussions, Mr. Kotsch said that the Department did use the most recent TLVs because those were most generous to the claimants. Dr. Silver said that they might want to include that fact in the rationale so that claims examiners understand that they are talking about the latest set of TLV standards that have evolved over time.

Chair Markowitz noted that ACGIH acknowledges that its standards are not absolutely protective. If the population of people exposed is large enough, a significant minority of people will still be affected by those exposures. Dr. Silver agreed and asked if it would be possible for the process to be expedited for claimants exposed above the latest ACGIH standards. Chair Markowitz said that he did not know the answer, but outside of the regulatory standards language, there is plenty of material in the IH report that can be used in claims evaluation. Dr. Silver noted that the TLV benchmarks give claimants a target presumption to refute on appeal.

Chair Markowitz said that the Board heard from Mr. Kotsch that when exposure data are available from DOE or a DOE contractor, it is generally related to acute incidents. While these data can be important, many of the occupational diseases in the claims stem from chronic exposures. He asked whether that aspect of the IH data should be specified in the Board recommendation. Dr. Van Dyke said that if they wanted to focus on avoiding prejudicial blanket statements, they might not want to go down a rabbit hole of exposure information.

Dr. Friedman-Jimenez said that in many claims there is no evidence available about whether or not the exposures exceeded or did not exceed the regulatory standard; when this is the case, it should be stated clearly to avoid prejudice. Dr. Van Dyke suggested that when exposures are compared to regulatory standards, IH reports should specify the amount of available IH data and the specific regulatory limit referenced. Dr. Friedman-Jimenez acknowledged that this creates more work for the IH, but noted that, compared to a more extensive process of auditing IH data, this process was fairly efficient. Chair Markowitz commented that the industrial hygienists are already supposed to track down existing IH data during the claims review process.

Dr. Silver noted that because there are so few IH data available prior to the mid-1990s, limiting comparisons to regulatory standards to cases where sufficient relevant IH data exist means that those comparisons will not happen in many older claims, which is a good thing. Dr. Bowman suggested that they specify a preference for the most current regulatory standards when there is a comparison. Dr. Friedman-Jimenez recommended that they specify that the IH data need to be from the time when the claimant would have been exposed, rather than the most current IH data. Dr. Bowman said that that point seemed to be captured in wording earlier on in the recommendation, and Dr. Friedman-Jimenez agreed.

After further wordsmithing, the Board voted unanimously to approve the following draft Board recommendation:

"The Board recommends that the Energy Employees Occupational Illness Compensation Program advise its staff and industrial hygiene contractor that claim-related industrial hygiene reports and opinions restrict comparisons of claimants' exposures to toxic substances at Department of Energy facilities to regulatory workplace exposure standards only to cases where sufficient industrial hygiene data exist that are relevant to the claim and that support the comparisons. Comparisons of

exposures to regulatory standards must describe the available industrial hygiene data and the specific regulatory limit referenced, with preference for the most current standards. Comparisons of claimants' workplace exposures to regulatory standards, in the absence of specific industrial hygiene evidence, lack objective support and may be prejudicial to the appropriate resolution of the claim."

Follow-up on Asbestos Presumptions Re: Engineers:

Chair Markowitz summarized the Board's work on the current asbestos presumption issue: determining whether the list of job titles in the Procedure Manual (PM) that are presumed to have significant exposure to asbestos should be expanded to include certain types of engineers. The Board conducted research to determine what was known about the regularity and predictability of asbestos exposure for engineers in previous eras. Chair Markowitz and former Board member John Dement looked at the National Occupational Mortality Survey (NOMS) and searched for job titles showing excess mesothelioma as an indicator of asbestos risk. They found a sizeable number of job titles which are included in the PM, Exhibit 15-4, as well as several types of engineers that are not included in the PM. A report from Paragon Technical Services (PTS) on asbestos presumptions notes that the Site Exposure Matrices (SEM) includes information about bystander exposure. It also states that the disease experience of the mechanical, chemical, and industrial safety engineers reflected in NOMS is not sufficiently similar to the engineers at the DOE complex to presume that DOE engineers also had asbestos exposure.

Chair Markowitz added that when he conducted his own search he found the SEM to be quite variable as to which sites listed asbestos as a potential exposure for engineers. For example, Hanford did list asbestos, while Y-12, Savannah River, and Portsmouth did not. Dr. Bowman said that he did not fully understand PTS' rationale, and part of the difficulty was that they did not fully explain how the differences in tasks related to differences in potential exposure to asbestos. Chair Markowitz noted that the Board's term will end on July 15th and suggested that they add this topic to the list of issues for the next Board to look at. Dr. Van Dyke suggested examining denied mesothelioma claims to see if this issue was affecting claims adjudication. Chair Markowitz added that it could be helpful to look at the experiences of these types of engineers in their asbestos disease claims.

Board comments on Claims Review:

Chair Markowitz led a discussion on the Board's claims review to identify areas that should be looked at more closely. He reminded the Board that their charter instructed them to evaluate the consistency, quality, and objectivity of IH and CMC reports. Chair Markowitz said that he would like to know about the consistency of IHs' assessment of the level of exposure by job title. Dr. Van Dyke said that that might be difficult given the limitations on sorting claims by job title or exposure. He added that he would like to see improved guidance on frequency, intensity, and duration of exposure in IH evaluations, and that this might help to improve consistency. Chair Markowitz said that he would also be interested to know how frequently the industrial hygienists were correct in their judgments.

Dr. Silver said that, in the absence of hard IH monitoring data, claimants and IHs are hindered when other kinds of information in claim files are not incorporated into the SEM. Chair Markowitz said that it would be helpful to know how often IHs use the occupational health questionnaire information and affidavits. He would also be interested to find out how often CMCs are wrong in their opinions, and how often claims examiners fail to include important information on exposure or disease. Dr. Silver mentioned Case 7716, a mechanic at a uranium mill whose pneumoconiosis claim was paid for under RECA by the Justice Department. When his claim was sent to DOL, the claims examiner determined that it did not qualify under Part E relative to pulmonary fibrosis and denied the claim in December of 2020. Dr. Friedman-Jimenez said that the Board had addressed the issue of the lack of synonymy of pulmonary fibrosis and pneumoconiosis in the SEM. He read language from the current Procedure Manual concerning synonymous fibrotic lung conditions and said that Case 7716 most likely pre-dated the change in the PM.

Chair Markowitz asked Mr. Vance why claims examiners limit the number of targeted toxic substances to six when looking through exposures. Mr. Vance said that the suggested limit is seven, and that this is part of an administrative process to prioritize toxins that will produce a positive outcome in the case. Claims examiners can look at more than seven substances if there is a basis to do so. Dr. Friedman-Jimenez asked how effectively claimants who have reasonable evidence for causation but do not meet the criteria for presumed exposure or causation are referred to the CMC and IH for individual-level analyses. Mr. Vance said that the process is designed so that claims examiners

try to fit claimants into presumptions. In the absence of an exposure or causation presumption, the claimant is advised that they will need evidence from a physician of their choosing or from a CMC to establish a causal relationship.

Review of Public Comments:

Chair Markowitz noted that several written comments from the last Board meeting were relevant to the Board's charter. He proposed adding the question of how the Board should deal with public comments to the next Board's agenda. The Board has not developed a systematic way of following up on relevant comments, and Chair Markowitz asked whether there were opportunities to look at issues arising in the public comments that the Board is not currently following up on. He posited the idea of a standing working group to review public comments between meetings and bring them forward to the Board as issues for exploration. Dr. Friedman-Jimenez asked if any commenters had expressed satisfaction or dissatisfaction with the Board's current method of receiving comments. Dr. Silver said that if the Board resumes in-person meetings at DOE sites, another strategy could be to construct agenda items based on comments received from the public at those particular sites. Duronda Pope stated that it is important for the commenters to feel heard.

Agenda Suggestions for New Board:

Chair Markowitz presented a list of agenda items for the new Board:

- Follow up on outstanding recommendations.
- Track progress on previous accepted Board recommendations.
- Complete the contracting process so that the Board can have a contractor to evaluate claims and scientific and technical issues to improve the program.
- Identify scientific and technical issues to contribute to improvement of the program. These issues can come from the PM, public comments, and the program itself. Some examples include Parkinson's disease, group 2A carcinogens, and health effects of certain radiologic materials.
- Once the contractor is in place, design and conduct an evaluation of a sizeable number of claims to look at objectivity, consistency, and quality of the work of IHs and claims examiners.
- Follow up on public comments and find a structural way to review comments.

Chair Markowitz added that, several Board terms ago, the Department gave the Board data on the top ten conditions, both overall and by disease type or organ site. It would be useful to update that data to get a sense of where the program is on issues of substance. Several Board members agreed that they should submit a data request so that the next Board could have that information and be up to speed when the next term starts. Hearing no objection, Chair Markowitz confirmed that he would submit an information request to the Department for an update on the top ten tables.

In response to Dr. Friedman-Jimenez's earlier question, Amanda Fallon from the Ombudsman's Office said that her office had occasionally received some requests for assistance that overlap with comments provided to the Board, and they did their best to help those individuals when they could. Chair Markowitz cautioned that it is not part of the Board's charge to assist individuals.

Close of Meeting:

Chair Markowitz thanked the Board members, DOL staff, and members of the public who have participated in the Board's work during the current term. He noted that it is not easy to comprehend and assist a complicated system with very few resources, but the Board tries its best to understand the program and to provide advice to improve it. Dr. Ken Silver will not be returning to the Board next term, and Chair Markowitz thanked him for his service. Ms. Pope thanked Dr. Silver for his assistance to the claimant community.

Mr. Jansen adjourned the meeting at 3:25 p.m.

I hereby certify that, to the best of my knowledge, the foregoing minutes are an accurate summary of the meeting.
Submitted by:



Steven Markowitz, MD, DrPh
Chair, Advisory Board on Toxic Substances and Worker Health
Date: 8/9/2022