

GAO

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ENERGY EMPLOYEES COMPENSATION

GAO's Prior Work Has
Identified Needed
Improvements in Various
Aspects of the Program

Statement of Daniel Bertoni, Director,
Education, Workforce and Income Security Issues





Highlights of [GAO-07-233T](#), a testimony before the Subcommittee on Immigration, Border Security, and Claims, Committee on the Judiciary, House of Representatives

Why GAO Did This Study

The Energy Employees Occupational Illness Compensation Program Act (EEOICPA) was enacted in 2000 to compensate Department of Energy employees and contractors who developed work-related illnesses such as cancer and lung disease. Energy administered Subtitle D of the program. Subtitle B of the program is administered by the Department of Labor, which uses estimates of workers' likely radiation exposure to make compensation decisions. The estimates, known as dose reconstructions, are performed by the National Institute for Occupational Safety and Health (NIOSH) under the Department of Health and Human Services (HHS).

The act specified that the President establish an Advisory Board on Radiation and Worker Health to review the scientific validity of NIOSH's dose reconstructions and recommend whether workers should be part of special exposure cohorts whose claimants can be compensated without dose reconstructions. A recent memorandum from the Office of Management and Budget (OMB) to Labor has raised concern about potential efforts to unduly contain the cost of benefits paid to claimants. This testimony presents GAO's past work on program performance and the work of the advisory board. It also highlights GAO's ongoing work relevant to issues raised by the OMB memorandum. GAO interviewed key officials and reviewed contract and other agency documents.

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ENERGY EMPLOYEES COMPENSATION

GAO's Prior Work Has Identified Needed Improvements in Various Aspects of the Program

What GAO Found

GAO issued two reports in 2004 that focused on claims processing and program structure. The first report found that Energy got off to a slow start in processing Subtitle D claims and faced a backlog of cases. In addition, limitations in data systems made it difficult to assess Energy's performance. GAO recommended that Energy take actions to expedite claims processing, enhance communication with claimants, and improve case management data. The report also highlighted problems with program structure that could lead to inconsistent benefit outcomes and GAO presented various options for restructuring the program. Congress subsequently incorporated features of some of these options in enacting new legislation that dramatically restructured the program and transferred it from Energy to Labor. Labor has taken action to address the recommendations GAO made to Energy. The second report found that Labor and NIOSH faced a large backlog of claims awaiting dose reconstruction. To enhance program management and transparency, HHS implemented GAO's recommendation to establish time frames for completing profiles of Energy work sites, which are a critical element in efficiently processing claims that require dose reconstruction.

GAO's February 2006 report found that the roles of two key NIOSH officials involved with the work of the advisory board may not have been sufficiently independent because these officials also represented the dose reconstruction program under review. In response, NIOSH replaced them with a senior official not involved in the program. Since credibility is essential to the advisory board's work, GAO concluded that ongoing diligence by HHS is required to avoid actual or perceived conflicts of roles when new candidates are considered for these roles. GAO also found that the board's work presented a steep learning curve, prompting adjustments to the work done by the contractor assisting the board. GAO recommended actions to provide the board with more comprehensive data on contractor spending levels compared to work actually completed, assist the board in reexamining its long-term plan for reviewing NIOSH's work, and better track agency actions taken in response to board and contractor findings. HHS has implemented these recommendations.

One aspect of GAO's ongoing work especially relevant to the OMB memorandum is the extent to which Labor's concerns over potentially escalating benefit costs may have led the agency to be involved in activities tasked to NIOSH, the advisory board, or the contractor assisting the board. NIOSH agreed to provide Labor with draft versions of some of its evaluations of special exposure cohort petitions and other NIOSH technical documents before sending them for board review. Labor has commented on some of these draft documents. Labor officials told us that their reviews focus on changes needed to promote clarity and consistency in the adjudication of claims. As the review proceeds, GAO plans to obtain more information on key issues such as the timing, nature, and basis of Labor's activities in light of the program's design and assignment of responsibilities.

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss GAO's completed and ongoing work on the implementation of the Energy Employees Occupational Illness Compensation Program Act¹ (EEOICPA). For the last several decades, the Department of Energy and its predecessor agencies and contractors have employed thousands of individuals in secret and dangerous work in the atomic weapons industry. This legislation was enacted in 2000 to provide compensation to Energy employees and contractors who were exposed to radioactive and hazardous materials and who subsequently developed illnesses such as cancer and lung disease. Subtitle B of the program is administered by the Department of Labor (Labor) and provides for a one-time payment of \$150,000 to eligible workers or their survivors and coverage of future medical expenses associated with their illnesses. From the program's effective date in July 2001, through October 2006, Labor received 77,710 Subtitle B claims and has made payments for 21,376 of these claims exceeding \$1.7 billion.²

The compensation act also called for the President to establish the President's Advisory Board on Radiation and Worker Health—composed of scientists, physicians, and employee representatives—to advise the Secretary of Health and Human Services (HHS) on its activities under the act.³ The board is tasked with reviewing the scientific validity and quality of the National Institute for Occupational Safety and Health's (NIOSH) “dose reconstructions.” These are estimates of the likely radiation levels to which individual workers were exposed that Labor uses to determine whether claimants will receive compensation. The board is also tasked with making recommendations to the HHS Secretary on whether to approve petitions for “special exposure cohort” status. Because certain facilities are known to have exposed employees to radiation while keeping few records of individuals' exposure, their employees have been designated under the law as members of the special exposure cohort and their claims may be paid without individual dose reconstructions. The board is assisted in its oversight work by a contractor.

¹Title XXXVI of Pub. L. No. 106-398.

²Labor publishes program statistics at its Web site:
<http://www.dol.gov/esa/regs/compliance/owcp/eoicp/weeklstats.htm>.

³In December 2000 the President established the Advisory Board through Executive Order 13179.

Subtitle D of EEOICPA established a separate program that was administered by Energy. This program allowed Energy to help its contractors' employees file state workers' compensation claims for illnesses determined by a panel of physicians to be caused by exposure to toxic substances while employed at an Energy facility. In October 2004, Congress amended the act to restructure the program and to transfer responsibility from Energy to Labor under the newly created Subtitle E.⁴

Over the last several years, GAO has issued reports identifying needed improvements in various aspects of the EEOICPA program that can affect compensation provided to claimants. In 2004, we issued two reports that focused on claims processing and program structure.⁵ In February 2006, we reported to you on the status of the advisory board's review of the scientific validity and quality of NIOSH's dose reconstructions.⁶

Since the issuance of our February 2006 report, a memorandum from the Office of Management and Budget (OMB) to Labor has generated considerable congressional concern about the potential for inappropriate efforts to contain the cost of benefits paid to claimants. The memorandum notes that Labor has identified the potential for a large expansion of EEOICPA Part B benefits through the designation of special exposure cohorts. The memorandum further states that the Administration planned to convene a White House-led interagency workgroup to develop options to contain growth in the costs of benefits provided by the program. The memorandum specifically identifies five options, including more extensive review of NIOSH's special exposure cohort recommendations and

⁴Subtitle E of Title XXXI of Pub.L. No. 108-375.

⁵*Energy Employees Compensation: Even with Needed Improvements in Case Processing, Program Structure May Result in Inconsistent Benefit Outcomes*, [GAO-04-516](#) (Washington, D.C.: May 28, 2004) and *Energy Employees Compensation: Many Claims Have Been Processed, but Action is Needed to Expedite Processing of Claims Requiring Radiation Exposure Estimates*, [GAO-04-958](#) (Washington, D.C.: Sept. 10, 2004).

⁶*Energy Employees Compensation: Adjustments Made to Contracted Review Process, but Additional Oversight and Planning Would Aid the Advisory Board in Meeting Its Statutory Responsibilities*, [GAO-06-177](#) (Washington, D.C.: Feb. 10, 2006).

addressing any “imbalance” in advisory board membership.⁷ While it is reasonable for OMB to have a role in overseeing the costs of federal programs, some have raised concerns that certain options set forth in the memorandum, if implemented, could result in decisions unduly based on budgetary considerations rather than established scientific procedures for compensating workers under this program. This Subcommittee held several hearings in 2006 in response to such concerns.

GAO is currently conducting work requested by this Subcommittee to examine a broad range of issues concerning implementation of Subtitle B. A central focus of our ongoing work is on the reasons for increases in costs for the contractors assisting NIOSH in performing dose reconstructions and how effectively NIOSH has managed these contractors. Our ongoing work also addresses other issues, including the implementation of conflict of interest policies for NIOSH and its contractors, options for further strengthening the independence of the advisory board and the contractor assisting the board, and the extent, if any, to which Labor is involved in Subtitle B activities that have been tasked to NIOSH, the advisory board, or the contractor assisting the board, as specified by statute, regulation, or contract. As agreed with your Committee, we plan to issue a report on our ongoing work by the summer of 2007.

My testimony today will focus on three specific areas. First, I will discuss our 2004 reports on claims processing and program structure. Second, I will provide an overview of key findings from our February 2006 report on the work of the advisory board. Third, I will highlight an area of our ongoing work that is especially relevant to issues raised by the OMB memorandum to Labor. In performing this work, we interviewed key officials, examined pertinent contract-related documents such as monthly progress reports, and reviewed agency procedures and practices. Our work is being conducted in accordance with generally accepted government auditing standards.

⁷The OMB memorandum to Labor specifies the following five cost containment options: (1) require administration clearance of special exposure cohort determination; (2) address any imbalance in membership of the President’s Advisory Board on Radiation and Worker Health; (3) require an expedited review by outside experts of special exposure cohort recommendations by NIOSH; (4) require NIOSH to apply conflict of interest rules and constraints to the contractor assisting the Advisory Board; and (5) require that NIOSH demonstrate that its site profiles and other dose reconstruction guidance are balanced.

In summary, our May 2004 report indicated that Energy got off to a slow start in processing Subtitle D claims and faced a backlog of cases awaiting review by a physician panel. We concluded that in the absence of changes to expedite Energy's review, many claimants would likely wait years to receive the determination they needed from Energy to pursue a state workers' compensation claim, and in the interim their medical conditions might worsen or they might even die. We recommended that Energy take actions to expedite claims processing, enhance communications with claimants, and improve case management data. Our report also highlighted problems with the structure of the program that could lead to inconsistent benefit outcomes for claimants. We identified various options for restructuring the program and a framework of factors to consider in evaluating these options that informed congressional deliberations in enacting new legislation to dramatically restructure the program and transfer it from Energy to Labor. Labor told us it has taken actions to address each of the recommendations we made to the Secretary of Energy in our report. For example, Labor has compiled a data base of the toxic substances that may have been present at Energy facilities and linked them to medical conditions to help expedite the processing of claims. In addition, Labor rebuilt its case management system which tracks all Subtitle E claims transferred from Energy and enhanced the system's performance and reliability.

Our September 2004 report focused on the Subtitle B program and found that Labor and NIOSH faced a large backlog of claims awaiting dose reconstruction. NIOSH had learned from its initial implementation experience that completing site profiles—documents which describe the layout, materials used, radiation sources, and other characteristics of work sites—is a critical element for efficiently processing claims requiring dose reconstruction. To enhance program management and promote greater transparency with regard to the timeliness of completing dose reconstructions, we recommended that the Secretary of HHS direct agency officials to establish time frames for completing the remaining site profiles, which HHS has done.

Our February 2006 report found that the roles of certain key federal agency officials initially involved in the advisory board's review of dose reconstructions may not have been sufficiently independent, but that actions were taken to replace these officials. Since credibility is essential to the work of the advisory board, we concluded that continued diligence is required by HHS in avoiding actual or perceived conflicts of roles when new candidates are considered for the roles. We also found that the advisory board's review of site profiles and dose reconstructions

presented a steep learning curve and prompted the board to adjust the contractor's work to better meet the needs of the review. For example, the board revised task orders for the contractor to reduce the number of reviews to be completed or extend completion dates. Nonetheless, we concluded that further improvements could be made to the oversight and planning of the contracted review. We recommended that HHS provide the board with more comprehensive data on contractor spending levels compared to work actually completed, assist the board in reexamining its long-term plan for reviewing NIOSH's work, and improve tracking of agency actions taken in response to board and contractor findings. HHS has implemented these recommendations.

One aspect of our ongoing work on Subtitle B is especially relevant to issues raised by the OMB memorandum to Labor. We are examining whether Labor is involved in activities tasked to NIOSH, the advisory board, or the contractor assisting the board, and if so, whether these activities reflect an effort to constrain the cost of benefits. For example, in some cases NIOSH has shared drafts of its special exposure cohort petition evaluations as well as drafts of other NIOSH technical documents with Labor before sending final versions to the advisory board, which is tasked to review them. Labor has provided comments on some of these draft documents. Labor officials told us that the basis of their involvement is Labor's designation as primary administrator of the program. Labor officials added that their reviews of these documents focus on changes needed to promote clarity and consistency in the adjudication of claims. We are currently examining the extent, nature, and outcome of Labor's comments on various NIOSH documents. As our work proceeds, we plan to obtain additional information on key issues such as the timing, nature, and basis of Labor's activities in light of the program's design and assignment of responsibilities.

Background

Several different federal agencies are involved with the implementation of the Subtitle B program, including Labor, HHS, and Energy. However, Labor has primary responsibility for administering the program. Labor receives the claims, determines whether the claimant meets the eligibility requirements, and adjudicates the claim. When considering the compensability of certain claims, Labor relies on dose reconstructions developed by NIOSH, under HHS. To avoid gathering similar information for each claim associated with a particular facility, NIOSH compiles facility-specific information in "site profiles," which assist NIOSH in completing the dose reconstructions. NIOSH contracted with Oak Ridge Associated Universities and the Battelle Corporation to develop site

profiles and draft dose reconstructions. Energy is responsible for providing Labor and NIOSH with employment verification, estimated radiation dose, and facility-wide monitoring data.

Labor does not refer all claims to NIOSH for dose reconstruction. For example, reconstructions are not needed for workers in the special exposure cohort. For special exposure cohort claimants, Labor verifies the employment and illness, and develops a recommended compensability decision that is issued to the claimant. The act specified that classes of workers from four designated locations would constitute the special exposure cohort⁸ and authorized the Secretary of HHS to add additional classes of employees. Classes of workers may petition HHS to be added to the cohort. A class of employees is generally defined by the facility at which they worked, the specific years they worked, and the type of work they did.⁹ NIOSH collects and evaluates the petitions and gives the results of its evaluations to the advisory board for review. The board, in turn, submits a recommendation to the Secretary of HHS to accept or deny the petition. To date, 13 classes of workers have been approved at 10 sites, and petitions from 9 additional sites have been qualified for evaluation. A petition from one site has been evaluated and denied.

GAO's Prior Work Identified Problems with Case Processing and Program Structure

Our May 2004 report identified various problems with Energy's processing of Subtitle D cases. Energy got off to a slow start in processing cases but had taken some steps to reduce the backlog of cases waiting for review by a physician panel. For example, Energy took steps to expand the number of physicians who would qualify to serve on the panels and recruit more physicians. Nonetheless, a shortage of qualified physicians continued to constrain the agency's capacity to decide cases more quickly. Further, insufficient strategic planning and systems limitations made it difficult to assess Energy's achievement of goals relative to case processing and program objectives, such as the quality of the assistance provided to claimants in filing for state workers' compensation. We concluded that in

⁸These four locations include three gaseous diffusion plants in Oak Ridge, Tennessee; Paducah, Kentucky; Portsmouth, Ohio; and an underground nuclear test site on Amchitka Island, Alaska.

⁹For example, a member of the Amchitka Island Nuclear Explosion site special exposure cohort is defined in the statute as an employee who was "employed before January 1, 1974, by the Department of Energy or a Department of Energy contractor or subcontractor on Amchitka Island, Alaska and was exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests."

the absence of changes that would expedite Energy's review, many claimants would likely wait years to receive the determination they needed from Energy to pursue a state workers' compensation claim, and in the interim their medical conditions might worsen or they might even die. We made several recommendations to Energy to help improve its effectiveness in assisting Subtitle D claimants in obtaining compensation. Specifically, we recommended that Energy take additional steps to expedite the processing of claims through its physician panels, enhance the quality of its communications with claimants, and develop cost-effective methods for improving the quality of case management data and its capabilities to aggregate these data to address program issues. Energy generally agreed with these recommendations.

Our May 2004 report also identified structural problems that could lead to inconsistent benefit outcomes for claimants whose illness was determined by a physician panel to be caused by exposure to toxic substances while employed at an Energy facility. Our analysis of cases associated with Energy facilities in nine states¹⁰ indicated that a few thousand cases would lack a "willing payer" of workers' compensation benefits; that is, they would lack an insurer that—by order from, or agreement with, Energy—would not contest these claims. As a result, in some instances, these cases may have been less likely to receive compensation than cases for which there was a willing payer. We identified various options for restructuring the program to improve payment outcomes and presented a framework of issues to consider in evaluating these options. Congress subsequently enacted legislation that dramatically restructured the program, transferred it from Energy to Labor, and incorporated features of some of the options we identified. Labor told us it has taken actions to address each of the recommendations we made to the Secretary of Energy in our report. For example, Labor has compiled a data base of the toxic substances that may have been present at Energy facilities and linked them to medical conditions to help expedite the processing of claims. In addition, Labor has rebuilt its case management system which tracks all Subtitle E claims transferred from Energy and enhanced the system's performance and reliability.

Our September 2004 report on the Subtitle B program found that in the first 2½ years of the program, Labor and NIOSH had fully processed only

¹⁰The total number of cases in the nine states accounted for more than three-quarters of all Subtitle D claims that had been filed.

9 percent of the more than 21,000 claims that were referred to NIOSH for dose reconstruction. NIOSH officials reported that the backlog of dose reconstruction claims arose because of several factors, including the time needed to get the necessary staff and procedures in place for performing dose reconstructions and to develop site profiles. NIOSH learned from its initial implementation experience that completing site profiles is a critical element for efficiently processing claims requiring dose reconstructions. To enhance program management and promote greater transparency with regard to timeliness, we recommended that the Secretary of HHS direct agency officials to establish time frames for completing the remaining site profiles, which HHS has done.

GAO's Prior Work Also Highlighted Issues of Advisory Board Independence and Oversight of the Contractor Supporting the Board

Our February 2006 report discussed the roles of certain federal agency officials involved in the advisory board's review of NIOSH's dose reconstructions and site profiles that raised concerns about the independence of this review. The project officer who was initially assigned responsibility for reviewing the monthly progress reports and monitoring the technical performance of the contractor reviewing NIOSH's dose reconstruction activities for the advisory board was also a manager of the NIOSH dose reconstruction program. In addition, the person assigned to be the designated federal officer for the advisory board, who is responsible for scheduling and attending board meetings, was also the director of the dose reconstruction program being reviewed. In response to concerns about the appearance of conflicting roles, the director of NIOSH replaced both of these officials in December 2004 with a senior NIOSH official not involved in the program. The contractor and members of the board told us that implementation of the contract improved after these officials were replaced. Since credibility is essential to the work of the advisory board and the contractor assisting the board, we concluded that continued diligence by HHS is required to prevent such problems from recurring when new candidates are considered for these roles. With regard to structural independence, we found it appropriate that the contracting officers managing the contract on behalf of the advisory board were officials from the Centers for Disease Control and Prevention, NIOSH's parent agency, who do not have responsibilities for the NIOSH program under review and are not accountable to its managers. In addition, advisory board members helped facilitate the independence of the contractor's work by playing the leading role in developing and approving the initial statement of work for the contractor and the independent government cost estimate for the contract.

Our February 2006 report identified further improvements that could be made to the oversight and planning of the advisory board's contracted

review of NIOSH's dose reconstructions and site profiles. We found that this review presented a steep learning curve for the various parties involved. In the first 2 years, the contractor assisting the board had spent almost 90 percent of the \$3 million that had been allocated to the contract for a 5-year undertaking. In addition, the contractor's expenditure levels were not adequately monitored by the agency in the initial months and the contractor's monthly progress reports did not provide sufficient details on the level of work completed compared to funds expended. The advisory board had made mid-course adjustments to the contractor's task orders and review procedures, such as by revising task orders to reduce the number of reviews to be completed or extend completion dates. However, the board had not comprehensively reexamined its long-term plan for the overall project to determine whether the plan needed to be modified in light of knowledge gained over the past few years. Finally, without a system to track the actions taken by NIOSH in response to the findings and recommendations of the advisory board and contractor, there was no assurance that needed improvements were being made.

We made three recommendations to HHS to address these shortcomings. First, we recommended that HHS provide the board with more integrated and comprehensive data on contractor spending levels compared with work actually completed, which HHS has done. Second, we recommended that HHS consider the need for providing HHS staff to collect and analyze pertinent information to help the advisory board comprehensively reexamine its long-term plan for assessing the NIOSH site profiles and dose reconstructions. HHS is considering the need for such action. Third, we recommended that the Director of NIOSH establish a system to track actions taken by the agency in response to the board and contractor's findings and recommendations. NIOSH now tracks agency actions to resolve the board and contractor's comments.

GAO's Ongoing Work Includes Focus on Labor's Involvement in Certain Subtitle B Program Activities

As part of our ongoing work, we are examining to what extent, if any, Labor is involved in certain Subtitle B activities. While the director of Labor's Office of Workers' Compensation Programs stated that Labor has not taken any actions to implement the options outlined in the OMB memorandum, Labor's internal correspondence reflects major concerns about the potential for rapidly expanding costs in Subtitle B benefits resulting from adding new classes of workers to the special exposure cohort. One aspect of our ongoing work is determining whether Labor is involved in activities that have been tasked to NIOSH, the advisory board, or the contractor assisting the board, and if so, whether these activities reflect an effort to constrain the costs of benefits. Our work in this area is

still ongoing and we have not drawn any conclusions. Nonetheless, we would like to briefly highlight the types of issues we will be analyzing as our work proceeds.

NIOSH has, in some cases, shared draft versions of key documents with Labor before finalizing and sending them to the advisory board for review. For example, NIOSH has shared draft special exposure cohort petition evaluations with Labor. Similarly, NIOSH has agreed to allow Labor to review and comment on drafts of various technical documents such as site profiles, technical basis documents, or technical information bulletins,¹¹ all of which are used to help perform dose reconstructions. Labor has provided comments on some of these draft documents. Labor officials told us that the basis of their involvement is Labor's designation as lead agency with primary responsibility for administering the program. Labor officials added that their reviews of these documents focus on changes needed to promote clarity and consistency in the adjudication of claims. In addition, Labor has reviewed individual dose reconstructions completed by NIOSH. Labor officials told us that they review all NIOSH dose reconstructions and return them for rework if, for example, they find errors in factual information or in the way the dose reconstruction methodology was applied. We are currently examining the extent, nature, and outcome of Labor's comments on these various documents. As our review proceeds, we plan to obtain more information on key issues such as the timing, nature, and basis of Labor's activities in light of the program's design and assignment of responsibilities.

Mr. Chairman, this concludes my prepared remarks. I will be pleased to answer any questions you or other Members of the Subcommittee may have.

¹¹Site profiles are documents that describe a specific work site, including physical appearance and layout of the site, the work processes used there, the types of materials used, potential sources of radiation, and other details important at that work site. Site profiles may be used to assist NIOSH in the completion of the dose reconstruction. Technical basis documents are the individual documents that form a site profile. Technical information bulletins contain information on specific technical issues or procedures for estimating radiation exposure for specific or multiple work sites. They are used to add to or supplement site profiles and technical basis documents.

GAO Contact and Staff Acknowledgments

For further information regarding this testimony, please contact me at (202) 512-7215. Key contributors to this testimony were Claudia Becker, Meeta Engle, Robert Sampson, Andrew Sherrill, and Charles Willson.

Related GAO Products

Department of Energy, Office of Worker Advocacy: Deficient Controls Led to Millions of Dollars in Improper and Questionable Payments to Contractors. [GAO-06-547](#). Washington, D.C.: May 31, 2006.

Energy Employees Compensation: Adjustments Made to Contracted Review Process, but Additional Oversight and Planning Would Aid the Advisory Board in Meeting Its Statutory Responsibilities. [GAO-06-177](#). Washington, D.C.: Feb. 10, 2006.

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