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Mr. Chairman and distinguished members of the Committee, thank you for the opportunity to testify about the Department of Energy's (DOE) refocused effort and progress made towards carrying out Part D of the Energy Employees Occupation Illness Compensation Program Act of 2000 (EEIOCPA).

Since my last appearance in front of this committee on November 21, 2003, the Department of Energy has made substantial improvements in processing Part D applications. In just the last six months, application development increased from 130 per month to 475 per month, more than a 350% improvement, and DOE has maintained an average development rate of more than 100 per week since November 2003; average final Physician Panel determinations increased from seven per month to almost 120 per month, more than a 1,700% improvement; the number of backlogged cases that were still awaiting initial processing has been slashed by more than 3,500 applications, a 25% reduction. I would also like to draw particular attention to OMB Director Bolten's letter of November 6<sup>th</sup>, 2003, where he stated that the Department had committed to developing to the Physicians Panels 25% of the then 15,000 application backlog within six months of receiving the full FY04 appropriations, including approval of DOE's appropriations transfer request. That equates to 3,750 applications developed for the Physicians Panel. To date, although we still have not received Congressional concurrence on the FY04 appropriations transfer request, we have developed over 1,800 applications for the Physicians Panel. Regardless of this short-term goal, we want to eliminate the entire backlog, through the Physicians Panels, by the end of 2006.

Even though we have made these improvements and are moving forward to entirely eliminate the backlog of applications, we know much more needs to be done. Mr. Chairman, we have shown we can improve our performance, and we have the plan to improve it even more. But we need your help.

Since my last appearance, the Department executed a top-to-bottom review of the Part D process, and developed a comprehensive plan to eliminate the backlog of applications by the end of 2006. To achieve that, we recently issued an Interim Final Rule revising our Physicians Panels processes that we believe will double the production of our determinations, reprioritized our application processing and determination order, and implemented scores of process improvements recommended by the Department of Labor, the National Institute of Occupational Safety and Health, the General Accounting Office, the Hays Group, the Workers Advocacy Advisory Committee, outside organizations, and Members of Congress. But we need legislation and more resources in order to fully execute this plan.

The Department's plan is aggressive, and is based upon the fastest possible hiring of physicians to review applications and render determinations. We believe that will be the biggest challenge in this plan, but also believe it is achievable with your help. As I stated earlier, it is a four part plan that includes legislative, regulatory, procedural and budgetary changes.

Legislative Changes: Yesterday the Secretary transmitted to Congress a legislative proposal to remove impediments to our ability to process applications. First, it would eliminate the statutory pay cap. The pay level set in EEOICPA Part D only allows the Department to pay Panel physicians \$69 per hour, when the average consulting rate for occupational medicine physicians is \$130 to \$150 per hour. Because of the pay cap, the 167 part-time physicians work an average of three hours per month, and are the equivalent of fewer than three full-time physicians. When we are able to establish temporary full-time panels, we are able to raise that FTE rate to almost 10, but maintaining those full-time panels is very difficult given the relatively low-pay. In fact, almost 20 physicians have refused to participate further in the process because it does not make financial sense for them to do so.

Second, the legislative proposal would expand the hiring authority for these Panel physicians. EEOICPA currently limits the Department to hiring Panel Physicians as intermittent or temporary experts, a status which limits them to six months of work in any year. Considering the heavy case-load ahead of us, we must have the authority to hire them as federal or contract employees, be able to pay them a market rate, and be able to utilize them for the next two-and-half years to eliminate the backlog.

Third, the legislative proposal would eliminate the requirement that DOE and a State enter in an agreement before a worker's application can be processed. We have no intention of terminating the agreements already in place, but because of changes in State governments and other considerations, approximately 6% of our applications are from workers in States that have not entered into an agreement with DOE. We hope to conclude agreements with those States, but in the meantime this requirement means that more than 1,200 workers have to wait for DOE-State agreements to be signed before their applications can proceed to a Physicians Panel for a determination, an impediment we believe should be removed.

In addition, we are working on an additional legislative proposal that will be forwarded independently that refines the definition of what is actually a Department of Energy facility under EEOICPA. Although the findings and Conference Report for the statute clearly state that the Part D program was established to compensate DOE and contractor employees who worked in Department of Energy facilities as part of the nuclear weapons production and testing process, the statute as currently drafted defines a DOE facility as almost any DOE facility, regardless of any nexus to nuclear weapons production or testing. Under such a definition, I would be eligible to apply for benefits under EEOICPA having worked in the Department of Energy's Forrestal headquarters building on Independence Avenue. This legislation will refine the definition of DOE facilities to limit it to those involved in nuclear weapons testing or production, and those in which employees were exposed to a significant radiological hazards, such as those

facilities in our current Federal Register list. We will specifically draft it so that no facility currently listed on the Facilities List will have to be taken off the list.

Regulatory Changes. On March 17<sup>th</sup>, 2004, I signed an Interim Final Rule allowing DOE to use Physician Panels with only one physician instead of three. The original rule, based upon the Fernald Physician Panel model, was based on a program with 200 applicants. With more than 23,000 applicants to date, the Department needs to utilize its Physician Panels more productively. Considering other federal compensation programs such as the Department of Veterans Affairs use single physicians to make their medical determinations, we determined that a single physician would be suitable here as well. This change will substantially speed up the Physicians Panel review process, delivering determinations to applicants weeks, if not months, sooner.

Under this Interim Final Rule, if the first physician makes a positive determination, that is sent forward as a positive determination. If, however, the physician makes a negative determination, the application is automatically sent to a second physician for review. If that second physician also makes a negative determination, then it is sent forward in the process as a negative determination. If that second physician makes a positive determination, it is sent to a third physician for review. The sum of the three physicians' determinations is used as the positive or negative determination sent forward in the process. No changes are made in this Interim Final Rule to the Secretary's review of determinations or to the applicant's appeal rights.

DOE's experience to date is that there have been very few split panel decisions. As a result, we believe this new process will speed up the processing of applications without prejudicing applicants. Moreover, this new procedure will reduce the average number of total physician hours expended on each determination by almost 60%, and the Department will save more than \$37 million in physician's pay between now and the end of 2006. Without this Rule revision, the Department would require almost 50% more physicians to process the same number of applications.

It is because of these productivity improvements that the applicants will also benefit. Given the previous Rule's requirement that three physicians coordinate their determinations in person, by phone, or other communications, we believe the new Rule will reduce to total time an application will spend in the Physician Panel process from weeks, even months, to days. This will mean the applicant gets their determination that much sooner. And just like under the original Rule, every negative determination requires the concurrence of two physicians.

This Interim Final Rule became effective on March 24<sup>th</sup>, 2004. It could have been issued as a Direct Final Rule, but given the interest in all aspects of this program, we decided to invite public comment through an Interim Final Rule process. If members of the Committee have additional ideas on how to best operate the Physicians Panel, I would invite them to comment.

Procedural Changes: When DOE started processing Part D applications, it adopted a first-in, first-worked prioritization. We now have moved to the front of our queue those applications where the per-panel deliberation time will be minimal and there is a strong relationship between activities performed and the associated ailments.

We've specifically done that with claims for exposure to beryllium, silica and asbestos, given the strong relationship between these substances, their associated ailments, and their specific use in nuclear weapons production. Similarly, given the higher standard of causation used in the Part B benefit determination process (given that Part B actually provides a direct cash benefit), we are moving those Part D applications where a positive Part B determination has already been made to the front of the queue as well. Additionally, given that medical benefits are available in most State workers compensation systems for living applicants; we are moving applications filed by living applicants ahead of those filed by survivors. Finally, given that the statute requires us to provide all available information, including dose reconstructions from relevant Part B applications, we are setting aside those Part D applications where Part B dose reconstructions are pending. All together, this reprioritization of the applications should maximize the number of determinations in the immediate timeframe, for the applicants most likely to directly benefit from a Physician Panels determination.

Finally, we are planning to competitively bid the additional application processing requirements eliminating the backlog will require. In doing so, the Department will be able to standardize procedures across the spectrum of operations, integrate the application development process with the Physician's Panels, and maximize the flexibility available to the Department in executing this program as quickly as possible. Given the corporate knowledge possessed by our current contractor, we anticipate their continuing operations at current production rates. Further, given the substantial improvements implemented in the Case Management System (CMS), we anticipate maintaining that system as well.

Budgetary Changes: On January 30<sup>th</sup>, 2004, the Secretary requested Congressional approval to transfer \$33.3 million of FY04 appropriations to the EEOICPA program. If approved, these funds will allow the Department to capitalize on the legislative, regulatory, and procedural changes I've just detailed, as well as to provide the Department the resources necessary to hire the additional field data collection workers, application processors, and Panel physicians necessary to eliminate the backlog by the end of 2006. However, unless these funds are received by the end of April 2004, the Department will not be able to meet that end of 2006 goal. In addition, the President requested \$43 million in the Administration's FY05 budget to continue this backlog elimination plan.

I know some of you have raised concerns with these budget requests and the apparent lack of production to date, and the lack of Part D applicants receiving State workers compensation benefits. But as I discussed in my last appearance before this Committee, significantly more Part D applications have been filed than originally anticipated and significant effort and investment has been required to cope with that larger volume. As a result, the program development costs, akin to initial capital investment costs, were also substantially greater than DOE originally thought.

As for the operating expenses necessary to execute Part D, and DOE's plan to eliminate the backlog of applications by the end of 2006, the major variable is the National Institute of Occupational Safety and Health's (NIOSH) ability to recruit sufficient physicians in time to meet the determination case load required in this plan. We have been working closely with NIOSH and professional medical organizations such as the American College of Occupational and Environmental Medicine (ACOEM) to develop a plan that provides for a credible physician hiring rate, and as stated in the letter from ACOEM, the number of physicians we are seeking is credible, especially at a more competitive pay rate we have proposed.

But assuming our original physician supply assumptions hold true, we believe it is wise to take advantage of our ability to significantly ramp up the processing of applications to the Physicians Panel, even if those Panels cannot immediately accept them. It makes little sense to not complete this work while we have the opportunity. It would be unfortunate to have physicians sitting idle because of a lack of applications ready for review – a situation for which the Department was roundly criticized at last November's hearing.

But now we need Congress' help. We need Congress' concurrence to the appropriations transfer soon. Every month's delay in receiving that concurrence is a month's delay in achieving our goal of totally eliminating the application backlog. And if we don't receive that concurrence by this summer, we will have to stop our field data collection programs, with layoffs required at the participating DOE sites. If we don't receive that concurrence in April, we may have to stop processing Part B employment verification and NIOSH dose reconstruction data requests in order to devote our remaining resources to Part D application development. These funds are needed regardless of any changes Congress may make to the Part D program.

At this point I have discussed our plan to minimize the remaining time for each applicant to receive a physician's panel determination and to maximize the willing payers for those that receive a positive determination. Additionally, we have reexamined our ability to support applicants in filing the state workers compensation claim and have increased our assistance in supporting them completing the claim submittal. These items together will maximize the benefits of the state workers compensation process that Part D was intended to address. We are gratified that the first state benefit has now been paid and we expect to see an increasing number of payments as the applicant pipeline into the state programs fills up.

However, it needs to be clear that it appears that no causality will be found by the physician's panels for many of the applicants and an as yet undetermined percentage of the applicants may end up without a willing payer or other solution in the State program. Further, for those with a willing payer, the causality determination by the State program and the level of benefit are still not certain.

To provide information on the scope of these issues, DOE has proposed a study by the National Academies that would commence when sufficient cases have been

through the state program to provide meaningful data regarding the finding of willing payers, the causality determinations and the benefit received. Given the probable several month time period required for a state program determination from the date of application submittal, we anticipate that it will be the end of the year before sufficient data are available for this study. While we are aware that many workers want and deserve answers now, we believe that there is simply not enough information available at this time to underpin sound policy decisions.

Many of you have stated your desire a more robust benefit for Part D applicants. However, regardless of what benefit is provided, or which agency executes the process, more medical determinations need to be made, and more data needs to be collected. Regardless of the process used, more money and legislative relief are needed.

The Department of Energy has accelerated application processing considerably since I last appeared before this Committee. We have conducted a top-to-bottom review of the program and the numerous recommendations provided, implemented what we can immediately, taken what steps we can in the short term to further accelerate the process, developed a plan to implement additional improvements as the resources become available, proposed legislation to eliminate impediments to that plan, and requested the resources to fund it. Although there will invariably be additional improvements we can and will make, we believe we have a credible plan in place that can accelerate the process now, and allow for us to accelerate it further in future. But there's only so much the Department can do independently. Ultimately, we will need additional resources and statutory changes to the statute to achieve our goal of eliminating the entire backlog by the end of 2006. And that additional help can only come from Congress.

I am available to answer the Committee's questions.