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FEDERAL WORKERS COMPENSATION PROGRAM: ARE INJURED FEDERAL WORKERS BEING TREATED FAIRLY?

HEARING

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, INFORMATION, AND TECHNOLOGY

OF THE

COMMITTEE ON GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

SEPTEMBER 21, 2000

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FEDERAL WORKERS COMPENSATION PROGRAM: ARE INJURED FEDERAL WORKERS BEING TREATED FAIRLY?

THURSDAY, SEPTEMBER 21, 2000

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON GOVERNMENT MANAGEMENT,
INFORMATION, AND TECHNOLOGY,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m. in room 2247, Rayburn House Office Building, Hon. Stephen Horn (chairman of the subcommittee) presiding.

Present: Representatives Horn and Turner.

Staff present: J. Russell George, staff director and chief counsel; Heather Bailey, professional staff member; Bonnie Heald, director of communications; Bryan Sisk, clerk; Elizabeth Seong, staff assistant; George Fraser, intern; Trey Henderson, minority counsel; and Jean Gosa, minority assistant clerk.

Mr. HORN. The Subcommittee on Government Management, Information, and Technology will come to order.

Today, the subcommittee is continuing its examination of the Office of Workers' Compensation Program administered by the Department of Labor. This program was established to handle workers' compensation claims in a non-adversarial manner for civilian Federal employees. In 1998, however, this subcommittee became concerned about the numerous complaints it was receiving from Federal injured workers about management practices and customer service at the Office of Workers' Compensation. These concerns include claims of long delays in the adjudication of disputed cases, lost case files and claims examiners who refuse to respond to inquiries on pending cases.

Unfortunately, Federal compensation claimants, case workers and attorneys are still contacting the subcommittee, saying that problems addressed at previous subcommittee hearings have not been fixed. Meanwhile, these injured employees go without compensation for months, sometimes years, as OWCP attempts to resolve their cases. Many of these workers say the delays have caused them financial or professional difficulties and often led to ruin.

In the next few weeks, the subcommittee will be asking the General Accounting Office to conduct a study to further examine the management customer service practices at the Office of Workers' Compensation. It is imperative that Federal workers injured on the

job be fairly compensated for legitimate claims. We will look closely at the General Accounting Office's findings and recommendations for improving, exiling, or reorganizing the program.

I encourage today's witnesses to present their thoughts on how to improve this vital program for Federal employees. I welcome each of you today and I look forward to your testimony. The ranking gentleman, Mr. Turner from Texas, is right on the spot. I yield to him for an opening statement.

[The prepared statement of Hon. Stephen Horn follows:]

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"Federal Workers' Compensation Program: Are Injured Federal Workers being Treated Fairly?"

OPENING STATEMENT
REPRESENTATIVE STEPHEN HORN (R-CA)
Chairman, Subcommittee on Government Management, Information, and Technology
September 21, 2000

A quorum being present, this hearing of the Subcommittee on Government Management, Information, and Technology will come to order.

Today, the subcommittee is continuing its examination of the Office of Workers' Compensation Program, administered by the Department of Labor. This program was established to handle compensation claims for injured federal employees in a non-adversarial manner.

In 1998, however, this subcommittee became concerned about the numerous complaints it was receiving regarding management practices and customer service at the Office of Workers' Compensation. The complaints involved lost case files, long delays, and claims examiners refusing to respond to telephone inquiries.

Unfortunately, injured workers and their caseworkers and attorneys are still contacting the subcommittee, saying that these problems have not been resolved. Case files are still being lost -- claims examiners still do not return telephone calls -- and the delays are as long as ever. Meanwhile, these federal workers go without compensation for months -- sometimes years.

Shortly, the subcommittee will be asking the General Accounting Office to conduct a study to examine the management practices and customer service at this important office. We will look closely at the GAO's findings, subcommittee investigations and testimony from this and previous hearings, looking for ways to improve the program.

I encourage today's witnesses to present their thoughts on this vital program. It is imperative that federal workers who have been injured on the job receive compensation in a timely manner. I welcome our witnesses, and look forward to their testimony.

Mr. TURNER. Mr. Chairman, due to my tardiness, I'll just file my statement for the record.

[The prepared statement of Hon. Jim Turner follows:]

Statement of the Honorable Jim Turner
GMIT HEARING: "Federal Workers' Compensation Program: Are Injured Federal Workers being Treated Fairly?"
September 21, 2000

Thank you, Mr. Chairman. This is the Subcommittee's third hearing on the Office of Workers' Compensation Programs (OWCP), which compensates injured federal workers for wage loss, medical care, rehabilitation, and other costs of workplace injury and illness pursuant to the Federal Employees' Compensation Act (FECA). Established in 1916, the FECA is one of the longest-standing workers' compensation programs in the nation and is designed to be a nonadversarial process where federal employees can receive compensation in a fair and equitable way. If a FECA claim is denied, the claimant can appeal the decision to the Employees' Compensation Appeals Board (ECAB), a quasi-judicial body which has been delegated exclusive jurisdiction in this matter by the Congress.

In the past, this Subcommittee has received complaints from a number of injured federal employees, alleging concerns with the customer service and responsiveness at the OWCP, particularly for cases in the appeals process. Since 1990 the number of appeals has risen dramatically at a time when ECAB personnel has been reduced. Since the Subcommittee's last hearing on this issue on May 18, 1999, I am pleased to learn that ECAB has been able to reduce its backlog on

the processing of appeals cases from two years to 16 months or less.

This hearing will provide us with an understanding of some of the most prevalent concerns regarding customer service, management practices, and the appeals process at the OWCP. My hope is that this hearing can help the agency focus on the areas that need the most improvement so that we can provide federal employees with the highest level of service and minimize the human, social, and financial costs of work-related injuries. Again, I commend the Chairman and welcome the witnesses here today.

Mr. HORN. No, take your time. It's a slow day, and everybody has a cough, I find. Are you OK?

We're going to swear in all witnesses here, as we have done before. So please stand and raise your right hands.

[Witnesses sworn.]

Mr. HORN. The clerk will note that all six witnesses and the backup have taken the oath.

So we start with Reginald Sydnor, a Federal Workers' Compensation claimant, formerly an attorney with the Equal Employment Opportunity Commission. Mr. Sydnor.

STATEMENT OF REGINALD L. SYDNOR, FEDERAL WORKERS COMPENSATION CLAIMANT

Mr. SYDNOR. Mr. Chairman and distinguished members of the subcommittee, I thank you for providing me the opportunity to present the barriers I have encountered in the process of filing a workers compensation claim with the Office of Workers' Compensation Programs with the intent to provide a synopsis of the Department of Labor Office of Workers' Compensation actions for analysis to improve effectiveness and efficiency.

Upon my graduation from high school, I attended college on an athletic scholarship and graduated with honors. In 1968, I was drafted into the military and honorably discharged in 1970. I received an academic scholarship to law school, from which I graduated in 1973. I was in private practice as township solicitor and administrator for the Law Enforcement Administration, Drug Enforcement Administration Task Force, before I became employed as a civil rights trial attorney with the Equal Employment Opportunity Commission in September 1978.

I litigated civil rights cases in numerous Federal district courts and traveled throughout New England, western Pennsylvania, New Jersey, West Virginia and Georgia. In April 1982, I was promoted to a supervisory trial attorney. I became responsible for the trial litigation of eight trial attorneys, traveled extensively throughout the Federal district courts in western Pennsylvania, West Virginia, New Jersey, Florida and Georgia.

On July 14, 1992, during the performance of my supervisory trial attorney duties, I lifted an unsuspecting heavy trial file box and suffered a freak low back injury. I suffered extensive pain from the injury, and despite painful efforts, found it difficult to perform the physical demands of travel in the performance of my supervisory trial attorney duties and responsibilities.

I worked until August 21, 1992, when my treating physician, a board certified orthopedist, directed that I cease working until the back injury could be effectively treated. The DOL OWCP agreed with my treating physician and placed me on Office of Workers' Compensation Program benefits, effective August 21, 1992. I never returned to work for the EEOC after August 21, 1992.

It must be noted, from the time I commenced my employment with the EEOC until August 21, 1992, my annual performance ratings always ranged from fully successful to outstanding performance. In fact, when I was the Acting Regional Attorney for the Philadelphia District Office legal unit in 1989, my legal unit re-

ceived an EEOC Chairman Thomas outstanding performance award.

It must also be noted that after August 21, 1992, I also commenced receiving Office of Workers' Compensation claim-related problems. Problem one, my employer's retaliation and the Office of Workers' Compensation Programs' inaction. Regarding EEOC employment, the Department of Labor approved my Office of Workers' Compensation claim filed with the Department of Labor for July 14, 1992 job accident, effective August 21, 1992.

Without any governmental business reason or logical explanation, the Philadelphia district office director personally decided not to cooperate with the Department of Labor in the processing of my Office of Workers' Compensation claim. At first, the Philadelphia district director insisted that the Department of Labor cancel my Office of Workers' Compensation claim. When the Department of Labor refused to do so, the EEOC office director refused to complete the standard Department of Labor Form CA–2, and the granting of my continuation of pay, despite repeated requests by the Department of Labor to do so.

The Philadelphia office director boldly refused to cooperate with the Department of Labor regarding my Office of Workers' Compensation claim. On December 18, 1992, the Philadelphia EEOC office continued disregarding my CA–2 form, ignored my continuation of pay and denied my request for leave without pay, placing me on AWOL.

Unexpectedly, on December 20, 1992, long after the rating period had closed, the Philadelphia EEOC office sent me an unacceptable performance rating for my yearly performance evaluation. This was the first time since I commenced my employment with the EEOC that I received a performance rating of less than highly effective. The Philadelphia EEOC office unsuccessfully tried to convince the Department of Labor Office of Workers' Compensation Program that this is the reason why my Office of Workers' Compensation claim should be canceled.

On August 13, 1993, the Philadelphia EEOC office terminated me from my supervisory trial attorney position for failure to perform his duties and responsibilities due to his disability. Despite the Department of Labor's standard request, no light duty or accommodation of my disability was ever offered to me by the EEOC prior to the Philadelphia EEOC district office terminating me due to my Office of Workers' Compensation disability.

In September 1993, I appealed all the EEOC continued administrative patterns of unexplainable adverse personnel actions against me to the Merit Systems Protection Board. Said appeal was based upon EEOC retaliation against me for filing a Department of Labor Office of Workers' Compensation claim.

In November 1993, prior to my Merit Systems Protection Board hearing, when all appealed EEOC adverse personnel actions and EEOC initiated settlement agreement with me to resolve all appealed matters. The EEOC convinced me to enter into an MSPB settlement agreement in return for my withdrawal of my MSPB appeal. The EEOC agreed to withdraw the Philadelphia district office 1992 unacceptable performance evaluation from my official personnel file.

Furthermore, the EEOC specifically agreed that neither the Philadelphia office director nor two named administrative staff members would be permitted to disclose to any future employers any employment information related to my employment with the Philadelphia district office.

The EEOC agreed to be held liable as an agency if either the Philadelphia district director or his two administrative staff members breached any condition of the MSPB settlement agreement. Also, as a further incentive for me to sign the MSPB agreement, on the MSPB record, the EEOC agreed to pay me my continuation of pay as repeatedly directed by the Office of Workers' Compensation program and intentionally denied by the EEOC. The EEOC required the Philadelphia district director to sign the MSPB agreement as a gesture of EEOC sincerity.

I later discovered that after he signed the MSPB agreement, the Philadelphia district officer director initiated an EEOC internal investigation against me for criminal misconduct. The EEOC dismissed all matters alleged by the district director as unsubstantiated.

Furthermore, as an effort to put pressure on the Department of Labor Office of Workers' Compensation program to cancel my claim, the EEOC continued to refuse to process Office of Workers' Compensation Program Form CA–2, which allowed me to get paid by Office of Workers' Compensation benefits on a periodic basis. Despite my repeated complaints to the Office of Workers' Compensation Program, months at a time went by without any Office of Workers' Compensation benefit payment.

From August 31, 1992 to September 22, 1994, when the Office of Workers' Compensation terminated my Office of Workers' Compensation payment benefits, I received a total of two Office of Workers' Compensation lump sum payments for over a 2-year period.

The second problem I encountered was the Office of Workers' Compensation apathetic second opinions and referee exam conclusions, as well as the Office of Workers' Compensation extraordinary time delay in making decisions. Medically, in addition to my July 14, 1992 low back injury, I also suffered from a sudden blood illness diagnosed in September 1992. The file contains a report dated July 13, 1993, sent to Toby Rubenstein of the Office of Workers' Compensation program by my doctor, Dr. Swensen, professor of medicine, section of infectious diseases at Temple University School of Medicine. Dr. Swensen related the etiology of my illness and concluded that the illness may well have been brought on or related to Feldene and muscle relaxants I was prescribed for my back.

I was given a CT scan dated September 9, 1992, as a result of the blood illness. The CT scan was prescribed by my infectious disease doctor to scan my abdominal and pelvic areas for liver damage. The results of the CT scan were normal.

The mentioning of my blood illness is relevant in my case for two reasons. First, it became part of the DOL Office of Workers' Compensation Program medical record. In this case, because the EEOC tried to use my blood illness as a reason for the Department of Labor to cancel my job related low back injury Office of Workers' Compensation Program claim. Second, and more importantly, both

the Office of Workers' Compensation Program's referees used the September 19, 1992 normal liver scan to support their medical report conclusions that there is no objective evidence of my low back injury.

Concerning my July 14, 1992 low back injury, after July 21, 1992, I continued treatment under my treating orthopedic physician. My treating physician referred me to a board certified physiatrist who conducted EMG and NCV studies on August 31, 1992, which showed abnormal findings. My treating physician also referred me to a board certified neurologist on November 10, 1992, who found neurological abnormalities consistent with my subjective complaints. A CT scan of the cervical and lumbar spine was conducted on January 23, 1993, which revealed evidence of abnormalities in the lumbar region, including generalized bulging of the disks at all levels from L–3 to S–1.

Compared to a pre-job injury February 9, 1991 MRI scan, no evidence of lumbar abnormalities existed before the July 14, 1992 Office of Workers' Compensation claim. In March 1993, my treating physician referred me to an anesthesiologist and pain management specialist, who confirmed all previous findings and suggested a course of treatment. In May 1993, my treating physician requested authorization from the Office of Workers' Compensation to conduct CT scans to be followed by a second one. The Office of Workers' Compensation rejected the recommendation of my treating physician and scheduled me for a second opinion.

From May 1993 until September 22, 1994, when my claim was rejected by the Office of Workers' Compensation Program, the Office of Workers' Compensation Program refused to authorize any further diagnostic testing. The Office of Workers' Compensation Program second opinion was rendered 9 months after my treating physician concluded, after a cursory examination, that the abnormal lumbar findings were congenial and conservative treatment of physical therapy should be favored over the discectomy. My treating physician disagreed with the Office of Workers' Compensation Program second opinion, and the Office of Workers' Compensation Program requested a referee exam regarding the issue of discogram.

Since May 1993, my treating physician expressed his frustration with the Office of Workers' Compensation Program in that a course of treatment he was recommending was being held up and he could not even undertake further diagnostic testing. In June 1994, my treating physician requested a new EMG, NCV and MRI studies be done. The Office of Workers' Compensation Program advised him they would not pay for these tests.

In July 1994, the Office of Workers' Compensation Program scheduled me for a referee exam to resolve the conflict of the medical opinion in August 1994. The Office of Workers' Compensation Program referee exam was a 5-minute physical examination. He issued a report concluding no need for surgery, my back injury was not job related, there is no objective evidence of a back injury based primarily on the September 9, 1992 liver CT scan. Finally, the report concluded I was not disabled and should return immediately to my EEOC supervisory trial attorney job, a job the EEOC terminated me from over a year prior, due to the disability.

Based upon the referee report conclusion, the Office of Workers' Compensation Program terminated all my Office of Workers' Compensation Program benefits effective September 22, 1994. The Office of Workers' Compensation Program claim representative affirmed the Office of Workers' Compensation Program decision, but modified the OWCP decision to allow medical treatment associated with the July 14, 1992 injury.

I appealed the OWCP decision to the Federal Employees Compensation Appeal Board. The ECAB rendered an opinion years later which basically confirmed the Office of Workers' Compensation Program decision, but remanded the case on the issue of cause of the injury and the question of disability.

In May 1999, the Office of Workers' Compensation again referred the case for a second referee exam. Although the referee admitted he did not examine me in August 1994, again, the referee concluded I was not disabled in August 1994, he concluded the injury was related to the July 14, 1992 accident based on the medical records. However, again, the referee's report cited the September 9, 1992 CT normal liver scan as a source for concluding no objective findings of the back injury.

The Office of Workers' Compensation Program adopted the referee's conclusion and this time concluded any medical treatment should also be terminated. The Office of Workers' Compensation Program claim representative confirmed the OWCP conclusion.

The case is again on appeal to the ECAB for review almost 6 years to date from the initial Office of Workers' Compensation Program termination of my Office of Workers' Compensation Program benefits.

In conclusion, I believe the underlying decision to terminate my Office of Workers' Compensation claim by the Department of Labor is because of the pressure put on the Department of Labor Office of Workers' Compensation to cancel the claim by the EEOC. It was a lot easier for the Department of Labor Office of Workers' Compensation Program to terminate the claim rather than deal with the lack of cooperation and defiance by the EEOC.

The Department of Labor Office of Workers' Compensation has sat by while the EEOC has destroyed my character and ruined my reputation for filing a legitimate Office of Workers' Compensation claim. Furthermore, my back injury continues to deteriorate, and I have developed severe depression from the results of filing an Office of Workers' Compensation claim 6 years ago, and the Office of Workers' Compensation Program's inaction and delay.

I would again like to personally thank you, Mr. Chairman, and distinguished members of the subcommittee, for allowing me to participate in this hearing with the intent to improve Government operations. Documentation to substantiate my statement is available upon request.

[The prepared statement of Mr. Sydnor follows:]

SUBCOMMITTEE ON GOVERNMENT MANAGEMENT

INFORMATION AND TECHNOLOGY

COMMITTEE ON GOVERNMENT REFORM

Testimony of

Reginald L. Sydnor

before the

House Subcommittee on Government Management, Information and Technology
Committee on Government Reform
September 21, 2000

on

"OVERSIGHT OF CUSTOMER SERVICE AT THE OFFICE OF WORKERS' COMPENSATION PROGRAMS"

Mr. Chairman and distinguished members of the subcommittee, thank you for providing me the opportunity to present the barriers I have encountered in the process of filing a worker's compensation claim with the Office of Workers' Compensation Programs with the intent to provide a synopsis of DOL-OWCP's action for analysis to improve "effectiveness and efficency".

BACKGROUND

Upon my graduation from High School, I attended College on an athletic scholarship and graduated with honors. In 1968, I was drafted into the military and honorably discharged in 1970. I received an academic scholarship to law school from which I graduated in 1973. I was in private practice, a Township Assistant Solicitor and an Administrator for a Law Enforcement Assistance Administration, Drug Enforcement Administration Task Force before I became employed as a Civil Rights Trial Attorney with the Equal Employment Opportunity Commission (EEOC), in September, 1978.

I litigated civil rights cases in numerous Federal District courts and traveled throughout New England, Western Pennsylvania, New Jersey, West Virginia and Georgia.

In April, 1982, I was promoted to a Supervisor Trial Attorney. I became responsible for the trial litigation of eight (8) trial attorneys and traveled extensively throughout the Federal District Courts in Western Pennsylvania, West Virginia, New Jersey, Florida and Georgia.

On July 14, 1992, during the performance of my supervisory trial attorney duties, I lifted an unsuspecting heavy trial file box and suffered a freak low back injury. I suffered extensive pain from the injury and despite painful efforts found it difficult to perform the physical demands of travel in the performance of my supervisory trial attorney duties and responsibilities.

I worked until August 21, 1992, when my treating physician, a Board Certified Orthopedist, directed that I cease working until the back injury can be effectively treated. The DOL-OWCP agreed with my treating physician and placed me on DOL-OWCP benefits, effective August 21, 1992. I never returned to work for the EEOC after August 21, 1992.

It must be noted that from the time I commenced my employment with the EEOC until August 21, 1992, my annual performance ratings always ranged from fully successful to outstanding performance. In fact, when I was the Acting Regional Attorney for the Philadelphia District Office Legal Unit in 1989, my Legal Unit received the EEOC Chairman Thomas Outstanding Performance Award.

It must also be noted that after August 21, 1992, I also commenced to receive DOL-OWCP claim related problems.

OWCP CLAIM

Problem One - Employer's (EEOC) Retaliation - DOL-OWCP Inaction

Regarding EEOC employment, the DOL approved my OWCP compensation claim filed with the DOL for the July 14, 1992 job accident effective August 21, 1992. Without any governmental business reason or logical explanation, the Philadelphia District Office Director personally decided not to cooperate with the DOL in the processing of my OWCP claim. At first, the Philadelphia District Office Director insisted that the DOL cancel my OWCP claim. When the DOL refused to do so, the EEOC Office Director refused to complete the standard DOL CA-2 forms and the granting of my continuation of pay (COP). Despite repeated requests by the DOL to do so, the Philadelphia Office Director boldly refused to cooperate with the DOL regarding my OWCP claim.

On December 18, 1992, the Philadelphia EEOC Office continued disregarding my CA-2 forms, ignored my COP and denied my request for leave without pay (LWOP), placing me on absent without leave (AWOL). Unexpectedly on December 20, 1992, long after the rating period had closed, the Philadelphia EEOC Office sent me an "unacceptable" performance rating for my yearly performance evaluation. This was the first time since I commenced my employment with the EEOC had I received a performance rating of less than "highly effective". The Philadelphia EEOC Office unsuccessfully tried to convince the DOL-OWCP that this is the reason why my DOL-OWCP claim should be canceled.

On August 13, 1993, the Philadelphia EEOC Office terminated me from my supervisory trial attorney position for "failure to perform his duties and responsibilities, due to his disability". Despite the DOL standard request, no light duty or accommodation of my disability was ever offered to me by the EEOC prior to the Philadelphia EEOC District Office's termination of me, due to my OWCP disability.

In September, 1993, I appealed all the EEOC's continued administrative pattern of unexplainable adverse personnel actions against me to the Merit System Protection Board (MSPB). Said appeal was based upon the EEOC's retaliation against me for filing a DOL-OWCP claim.

In November, 1993 and prior to any MSPB hearing on all appealed EEOC adverse personnel actions, the EEOC initiated a settlement with me to resolve all appealed matters. The EEOC convinced me to enter into a MSPB settlement Agreement in return for my withdrawal of my MSPB appeal. The EEOC agreed to withdraw the Philadelphia District Office 1992 "unacceptable" performance evaluation from my Official Personnel file. Furthermore, the EEOC specifically agreed that neither the Philadelphia Office Director or two (2) named administrative staff members would be permitted to disclose to any future employers any employment information related to my employment with the District Office.

The EEOC agreed to be held liable, as an agency, if either the Philadelphia District Director or his two (2) administrative staff members breached any condition of the MSPB Settlement Agreement. Also, as a further incentive for me to sign the MSPB Settlement Agreement, on the MSPB record, the EEOC agreed to pay me my continuation of pay (COP) as repeatedly directed by the DOL-OWCP and intentionally denied by the EEOC. The EEOC required the Philadelphia District Director to sign the MSPB Settlement Agreement as a gesture of EEOC's sincerity.

I later discovered that after he signed the MSPB Settlement Agreement, the Philadelphia District Director initiated an EEOC internal investigation against me for criminal misconduct. The EEOC dismissed all the matters alleged by the District Director as unsubstantiated.

Furthermore, as an effort to put pressure on the DOL-OWCP to cancel my claim, the EEOC continued to refuse to process the OWCP CA-2 form which allowed me to get paid my OWCP benefits on a periodic basis. Despite my repeated complaints to the OWCP, months at a time went by without any OWCP benefit payment. From August 31, 1992 until September 22, 1994, when the DOL-OWCP terminated my OWCP payment benefit, I received a total of two OWCP lump sum payments for over a two year period.

Problem Two - OWCP's Apathetic Second Opinions and Referee Exam Conclusions As Well As OWCP's Extraordinary Time Delay In Making Decisions

Medically, in addition to my July 14, 1992, low back injury, I also suffered from a sudden blood illness diagnosed in September, 1992. The file contains a report dated July 13, 1993 sent to Toby Rubenstein, OWCP, by Dr. Swensen, Professor of Medicine, Section of Infectious

Diseases, at Temple University School of Medicine. Dr. Swensen related the etiology of my illness and concluded that the illness may well have been brought on or related to Feldene and muscle relaxants I was prescribed for my back. I was given a CT scan, dated September 9, 1992, as a result of the blood illness. This CT scan was prescribed by my infectious disease Dr. to scan my abdominal and pelvic areas for liver damage. The results of this CT scan was normal.

The mentioning of my blood illness is relevant in my case for two reasons. Firstly, it became part of the DOL medical record in this case because the EEOC tried to use my blood illness as a reason for the DOL to cancel my job related low back injury OWCP claim. Secondly, and more importantly, both OWCP's referee examiners used this September 9, 1992 normal liver scan to support their medical report conclusions that there is no objective evidence of my low back injury.

Concerning my July 14, 1992 low back injury, after August 21, 1992, I continued treatment under my treating orthopedic physician. My treating physician referred me to a Board Certified Physiatrist who conducted EMG and NCV studies on August 31, 1992 which showed abnormal findings. My treating physician also referred me to a Board Certified Neurologist on November 10, 1992 who found neurological abnormalities consistent with my subjective complaints. A CT scan of the cervical and lumbar spine was conducted on January 23, 1993 which revealed evidence of abnormalities in the lumbar region, including generalized bulging at the disc at all levels from L3 to S1. Compared to a pre-job injury February 9, 1991 MRI scan, no evidence of lumbar abnormalities existed before the July 14, 1992 DOL-OWCP claim.

In March, 1993, my treating physician referred me to an anesthesiologist and pain management specialist who confirmed all previous findings and suggested a course of treatment. In May, 1993, my treating physician requested authorization from the OWCP to conduct a CT scan to be followed by discectomy.

The OWCP rejected the recommendation of my treating physician and scheduled me for a second opinion. From May, 1993 until September 22, 1994, when my claim was rejected by the OWCP, the OWCP refused to authorize any further diagnostic testing.

The OWCP's second opinion, rendered nine months after my treating physician's request, concluded, after a cursory examination, that the abnormal lumbar findings were congenial and conservative treatment of physical therapy should be favored over the discectomy. My treating physician disagreed with the OWCP's second opinion and the OWCP requested a referee exam regarding the issue of discogram.

Since May, 1993, my treating physician expressed his frustration with OWCP in that a course of treatment he was recommending was being held up and he could not even undertake further diagnostic testing. In June, 1994, my treating physician requested new EMG, NCV and MRI studies be done. The OWCP advised him they would not pay for these tests.

In July, 1994, OWCP scheduled me for a referee exam to resolve the conflict of medical opinion in August, 1994. The OWCP referee exam was a five minute physical examination. He issued a report concluding no need for surgery, my back injury was not job related, there is no objective evidence of a back injury, based primarily upon the September 9, 1992 liver CT scan. Finally, the report concluded I was not disabled and should return immediately to my EEOC supervisory trial attorney job, a job the EEOC terminated me from over a year prior, due to the disability.

Based upon the referee report conclusion, the OWCP terminated all my OWCP benefits effective September 22, 1994. A OWCP claim representative affirmed the OWCP decision but modified the OWCP decision to allow medical treatment associated with the July 14, 1992 injury.

I appealed the OWCP decision to the Employees Compensation Appeals Board (ECAB). The ECAB rendered an opinion years later which basically confirmed the OWCP decision but remanded the case on the issue of cause of the injury and the question of disability.

In May, 1999, the OWCP again referred the case for a second referee exam. Although the referee admitted he did not examine me in August, 1994, again, the referee concluded I was not disabled back in August 1994. He concluded the injury was related to the July 14, 1992 accident based on the medical records. However, again the referee's report cited the September 9, 1992 CT normal liver scan as a source for concluding no objective findings of the back injury.

The OWCP adopted the referee's conclusion and this time concluded any medical treatment should also be terminated. A OWCP claim representative confirmed the OWCP conclusion.

The case is again on appeal to the ECAB for review almost six (6) years, to date, from the initial DOL-OWCP's termination of OWCP benefits.

In conclusion, I believe the underlying decision to terminate my OWCP claim by the DOL-OWCP is because of the pressure put on the DOL-OWCP to cancel the claim by the EEOC. It was a lot easier for the DOL-OWCP to terminate the claim rather than deal with the lack of cooperation and defiance by the EEOC. The DOL-OWCP has sat by while the EEOC has destroyed the character and reined my reputation for filing a legitimate OWCP claim.

Furthermore, my back injury continues to deteriorate and I have developed severe depression from the results of filing an OWCP claim six (6) years ago and the OWCP's inaction and delay.

I would again like to personally thank you, Mr. Chairman, and distinguished members of the Subcommittee for allowing me to participate in this hearing with the intent to improve governmental operations.

Documentation to substantiate my statement is available upon request.

Mr. HORN. Thank you very much for laying out that record.

Let me say to all the witnesses that your statements automatically go in the record, all of them. So what we'd like you to do is to summarize your statements. We have a vote coming on the floor at 11:30 a.m., and unless we need to take you all over into late in the afternoon, you're going to need to summarize your testimony and not read it.

So we have every one of these papers working in the hearing report that we will send to the full committee and the floor of the House of Representatives.

So let us now start with C.B. Weiser, the attorney at law from Marshall, TX. Mr. Weiser, we welcome you here today.

STATEMENT OF C.B. WEISER, ATTORNEY, WEISER LAW OFFICES, MARSHALL, TX

Mr. WEISER. Thank you, Mr. Chairman, distinguished members.

My name is Clete Weiser, I'm an attorney from Marshall, TX. I have represented clients before the OWCP since 1992.

I'd like to highlight perhaps two to three areas where I think there are problems. The first is the Employee Compensation Appeals Board [ECAB], the final appeal process. I've highlighted some cases, but I will address one. And that is a Mr. Dan Gregg, a former postmaster out of Iowa.

Mr. Gregg had his claims denied by the OWCP out of Chicago, IL. He appealed it finally to the Employee Compensation Appeals Board. They will take 24 months to render a decision. I can tell you, Mr. Chairman and distinguished members, that when I started in 1992, it was 18 months. By 1994, it was 20 months to get a decision. By 1996, 1997 and to the present, it's 24 months. If that's a timely decision, I'd like to know.

But in Mr. Gregg's case, they waited 23 months. On the 23rd month or thereabout, they remanded the case back to the district office in Chicago. And the reason given is the district office never provided them the OWCP file. It was remanded back, we were given no opportunity for input to the decision. I knew what the decision would be, it would be another denial, which it was.

It was then appealed back to ECAB and we got the standard response, you'll have another 24 months. This gentleman, Mr. Gregg, has been waiting, he will wait 2 years to get a decision, unconscionable in my view.

But more important, if the district office failed to give the file, in my view, that should have been determined in the first 30, 60, 90 days when the appeal went in, not wait 24 months and then remand it back. His is not one case, there are more.

The other area I'd like to talk about briefly is the area of the OWCP offices, especially Jacksonville, FL. I have here today Mr. Bobby Kunkel, former station manager, supervisor with the Postal Service. It took 18 months to get a decision in his favor.

What happened? We took the initial claim to OWCP in Jacksonville. It was supported by documentary evidence, it was supported by witness statements, clearly, clearly a case that should have been decided at the district office. What did the district office do? They not only denied the claim, saying there's no evidence to support it, but in addition, they added two alleged work factors that Mr.

Kunkel had never said occurred, work factors that you could never get approved, such as a disciplinary action, unless you show abuse or error. He never claimed that.

Yet they added those. Why? Because the agency gave it to them.

We took it on appeal to the Branch of Hearings and Review, and to be fair, to the process, the Branch of Hearings and Review did a fair hearing. They looked at the exact same evidence that we had presented to the OWCP office in Jacksonville. No new evidence, other than two witnesses who testified.

The Branch of Hearings and Review reversed. But it took Mr. Kunkel 18 months to get that decision. He suffered economic loss and he suffered additional depression, which is what he had. It is clearly a case that should never, never have gone outside the Jacksonville office.

The third case I'd like to at least address comes out of the Dallas office. It involves Mr. Bill Oates, a former employee of the Pine Bluff Arsenal, Department of Army. Mr. Oates suffered an on-the-job injury, he fell from a ladder. He suffered shoulder, neck, and head injuries. Yes, his claim was approved. However, within 6 or 7 years of that, it went to a referee examiner who saw him for 20 minutes. Did not examine him, according to Mr. Oates, found that he was completely, had no residuals, he was completely over the problem, it was denied. We took it all the way to the Branch of Hearings and Review. They denied.

But what they said was, you're making three or four claims with regard to additional injuries, which would be consequential injuries. These are injuries that would flow from the original injury that was accepted.

In November of last year, we filed a consequential claim injury. We never got a decision. We went through Congressman Dickey of Arkansas, who is the representative of Mr. Oates. He attempted to get one. We just got in last week an alleged letter that was sent to me by Mr. Martin Walker, the district director, unsigned, that said, this is the decision. We never got it.

Now we're going to have to take an appeal to ECAB, 24 months, and who knows where we come.

My time is up, I will be happy to take any questions the chairman or distinguished committee members may ask. Thank you.

[The prepared statement of Mr. Weiser follows:]

SUBCOMMITTEE ON GOVERNMENT MANAGEMENT INFORMATION AND TECHNOLOGY

COMMITTEE ON GOVERNMENT REFORM

Statement of C.B. Weiser, Attorney

Before the

Committee on Government Reform

Subcommittee on Government Management, Information and Technology

September 21, 2000

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to address the matter of Customer Service at the Office of Workers' Compensation Programs (OWCP) of the United States Department of Labor.

BACKGROUND

My name is Clete Weiser. I am an attorney representing claimants before the OWCP since 1992. My office is located in Marshall, Texas, I have undergraduate and post-graduate degrees from the University of Texas at Austin and obtained a Juris Doctor degree from the University of Memphis.

SPECIFIC PROBLEM AREAS

The Employees Compensation Appeals Board (ECAB)

The ECAB presently is the last avenue of appeal that a federal employee has with regard to his/her compensation claim. It presently takes approximately two (2) years for the ECAB to issue a decision.

Two of my clients, John Bright, from Mississippi, and Dan Gregg, from Iowa, have experienced undue delays concerning the processing of their claims by the ECAB. Both cases are still pending before the ECAB.

With regard to Mr. Bright's case, OWCP Case No. 060567857, Mr. Bright passed away while his case was pending before the OWCP District Office located in Jacksonville, Florida. Mr. Bright's case was appealed to the ECAB on August 9, 1998. Approximately 23 months after the appeal, the ECAB ordered Mr. Bright's widow to produce evidence that she was the executrix of her deceased husband's estate. Mrs. Bright forwarded to the OWCP a copy of a power of attorney executed by her husband prior to his death, and also provided the ECAB with a copy of her husband's last will

and testament which contained a clause naming his spouse as the executrix of his estate. To date, the ECAB has refused to accept those documents as proof that Mrs. Bright is the executrix of her deceased husband's estate.

Mrs. Bright has legitimately questioned why the ECAB waited approximately 23 months to require her to provide proof that she is the executrix of her husband's estate, and why this matter could not have been raised 23 months ago.

In the second case, Mr. Dan Gregg originally appealed his claim to the ECAB on May 30, 1998. After holding the case for approximately 23 months, the ECAB issued an order remanding the case to the OWCP District Office in Chicago, Illinois, to issue a decision on the basis that the OWCP District Office had not provided Mr. Gregg's file to the ECAB. Upon remand, the District Office reissued its decision denying Mr. Gregg's claim which was promptly appealed to the ECAB on May 22, 2000. The ECAB has advised that it will not issue a decision in Mr. Gregg's case for another 24 months.

Mr. Gregg has questioned why the ECAB could not require the District Office to forward the file within 30 to 45 days after his original appeal to the ECAB, and why the ECAB took approximately 23 months before it took any action concerning the District Office file. Mr. Gregg also questioned why the ECAB, on the second appeal, must make him wait another 24 months in order to receive a decision when the delay was caused by the OWCP.

Recommendation

Consideration should be given to disbanding the ECAB as the time period in which to receive a decision, two (2) years, is too long.

Consideration should be given to allowing a claimant to appeal a District Office decision to the United States Merit Systems Protection Board (Board) which presently has jurisdiction to hear federal employee claims concerning denial of restoration rights to duty after the OWCP has determined that the employee is either fully or partially recovered from his/her work-related injury.

The advantage of an appeal to the Board for a claimant is twofold: (1) The District Office of the Board has a policy of issuing initial decisions within 120 days of appeal, and the three member Board in Washington, D.C. has consistently issued final decision within five (5) to six (6) months of appeal of an initial decision; and (2) there is no cost to a claimant for making an appeal to the Board, unlike the federal courts, which require filing fees of $100 or more.

If the ECAB is not disbanded, then action should be taken to ensure that cases are reviewed and decisions issued within 90 to 120 days of appeal.

Additionally, the ECAB should be required to resolve all procedural issues within 30 to 45 days of docketing the appeal.

The Jacksonville, Florida, OWCP District Office

My clients have encountered numerous problems with the Jacksonville, Florida, OWCP District Office.

The Jacksonville, Florida, OWCP District Office will take approximately 11 to 15 months to issue an initial decision concerning an emotional condition claim, and invariably such claim will be denied. My clients who have had to wait approximately 11 to 15 months for a decision include Paula Johnson, of Alabama, OWCP Case No. 060719681, and Robert Kunkel, of Florida, OWCP Case No. 060700149. Another client, Kelsey Ellington, of Florida, OWCP Case No. 060740051, is still awaiting a decision after filing her appeal approximately 11 months ago.

The Jacksonville, Florida, OWCP District Office also denies claims in spite of the fact that there has been ample documentary and witness evidence to support the claim. A case on point is that of Robert Kunkel, of Florida. When he submitted his claim to the OWCP District Office, he included both documentary evidence and witness statements to support his claim. Not only was the claim denied, but the claims examiner also included as alleged work factors, two incidents that Mr. Kunkel had not claimed on his Form CA-2. Mr. Kunkel appealed the denial to the Branch of Hearings and Review, which approved his claim based on the same evidence that Mr. Kunkel had presented to the Jacksonville Office of the OWCP. Mr. Kunkel had to wait approximately 18 months for his claim to be approved, whereas, had the Jacksonville OWCP District Office properly reviewed the evidence Mr. Kunkel submitted, his claim would have been approved within a short period after submission of the claim to the Jacksonville OWCP District Office, and Mr. Kunkel would not have suffered severe economic losses.

In the case of Bernie Crawford, OWCP Case Nos. 060698129 and 06086865, the Branch of Hearings and Review remanded Mr. Crawford's claim finding that Mr. Crawford, who had suffered a heart attack, had incurred physical stress upon his return to duty because his federal employer required him to work outside his medical restrictions. Upon remand, Mr. Crawford's treating physician provided a medical statement relating the diagnosed physical stress to the work factor found compensable by the hearing officer of the Branch of Hearings and Review of the OWCP. The OWCP District Office denied the claim, stating that the medical evidence was insufficient. After Mr. Crawford's treating physician provided a second medical statement to meet the demands of the OWCP District Office, his claim was again denied. Mr. Crawford's treating physician was incensed, and to date has refused to provide any additional medical documentation to support the claim.

The Dallas, Texas, OWCP District Office

My clients also have experienced problems with the Dallas, Texas, OWCP District Office. In the case of Bill Oates, of Arkansas, OWCP Case No. A16-200626, the Dallas District Office has yet to issue a decision concerning a consequential injury claim submitted by Mr. Oates on November 16 1999.

Recommendation
Consideration should be given to require the OWCP District Offices to issue decisions within a definite period of time, such as 90 days after submission of the claim and supporting evidence.

Consideration should also be given to require the OWCP District Offices to recognize the "Attending Physician's Rule" rather than accepting *carte blanche* the findings of OWCP second opinion and referee examiners.

The Termination of Compensation If The Injured Employee Is Removed From Employment Under A Reduction-In-Force (RIF)
Under present OWCP regulations, the OWCP will not return to the periodic rolls a partially recovered injured employee who has been re-employed and then terminated from employment in a general RIF. See 20 CFR 10.5. I have represented two clients in Tennessee where this has occurred. The cases are John Sholl, OWCP Case No. A6431020, and Anthony Parham, OWCP Case No. 060286372.

None of these former employees were eligible for discontinued service annuity or optional retirement. All of these former employees cannot find any work in the private or federal sectors because their work-related conditions still exist and prospective employers will not hire injured employees. Consequently, these employees are without any means of livelihood.

Recommendation
The OWCP regulations should be modified so that partially recovered employees who still suffer from their work-related injuries can be returned to the periodic rolls of the OWCP after a RIF until such time as they have fully recovered from their work-related injury.

Mr. HORN. We will definitely have questions. So stay with us.

We now have Mr. Greg Fox, a representative from the American Federation of Government Employees for OWCP claimants. Go ahead, Mr. Fox.

STATEMENT OF GREGORY A. FOX, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES OFFICE OF WORKERS' COMPENSATION PROGRAM REPRESENTATIVE

Mr. FOX. Thank you, Mr. Chairman and distinguished members.

In the beginning, the Office of Workers' Compensation was originally designed to be a non-adversarial entity. Unfortunately, over the years, particularly since 1994, totally the opposite has occurred. It is very adversarial, as you have already heard.

The claimants, from the time of injury, the agencies label them as crooks, thieves, and too lazy to work. This is a very common practice at the agency level. Nothing, sir, could be farther from the truth. These are hard working, well tenured employees that simply want to come to work and do their job.

Why? Initially, it's because of over-zealous agency supervisors, compensation specialists, and human resources personnel. If the claimant has committed a crime, it is simply that they have hired on with the Federal Government.

Claimants go through, and as I represent them, I see these things, on a fairly regular basis, claimants go without pay, they have unpaid medical bills, and as a result, they have agencies chasing them to get these bills paid. Fairly difficult to do when you're not even getting paid.

They are forced to file bankruptcy and experience foreclosures of their homes. Utilities, water, gas, electricity, telephones are cutoff. The divorce rate for claimants is skyrocketing as a result of this. Chronic pain and depression has led to attempted suicides. And sadly, some of those attempts have been successful.

Imagine for a moment what the claimant's family is going through, as well as the claimant. The Department repeatedly sends claimants to physician after physician. This is a physician that the Department chooses, not the claimant, and it is not the claimant's primary care provider.

The Department knows that this will contradict the claimant's primary care provider's reports, better known as the wink-wink, nod-nod effect. This action is for the most part a result of the agency compensation specialist hounding the claims examiners to find a reason to deny any compensation. Generally if the claims examiner is resistant to the pressure of the agency, the compensation specialist will simply call the Department director, who will "fix" the problem. This results in the claims examiner being overruled.

Agency compensation specialists brag about claims examiners being repeatedly called and claiming that they are approving too many claims. At this point, we simply forget about the merits of the claim, it does not apply. Simply, they could care less about the claimant and the negative effect that it has on the claimant and their families. And believe me, there is a significant effect. I believe you're hearing testimony to that fact today from other people.

Imagine that you've been hurt. It doesn't stop there. You can't pick up your children. You can't mow your yard. You cannot par-

ticipate in activities you were able to do prior to the injury. There is no compensation for this.

As a clinician, I can tell you that it is nearly impossible for a back injury, upper extremity injury or a soft tissue injury to heal with this kind of unimaginable stress. We need to keep in mind that this process was supposed to be, in effect, to protect the employees. That is not the case, sir.

I suspect, from the claims examiners' perspective, certainly from talking with them and observing them over the years, that for the most part, they want to do a good job. However, the agencies do literally hound them. As a result, they have got to give in somewhere. They get pressure from the agencies, they get pressure from their own management.

In addition, the agencies do not respect the claims examiners. This is very clear.

When you couple this with the fact that the agencies are regularly hounding the Department, something's got to give. The only result under these circumstances, sir, is the claimant is harmed.

I suspect strongly as well that if these claims were adjudicated properly at the Department of Labor level that the hearings and review and the Employees Compensation Appeals Board would certainly have less workload. This would shorten the 2 to 3 year period waiting for ECAB decisions.

There are a great many other issues to be addressed. However, I can see that time is very short. So I will stop here, with the exception that all injured employees have the right to due process. This doesn't happen.

[The prepared statement of Mr. Fox follows:]

September 21 2000
Gregory A. Fox
A.F.G.E. O.W.C.P. Representative
11th District
Testimony before the
Congress of the United States
House of Representatives
Committee on Government Reform

In the beginning , the Office of Workers Compensation and Pension (O.W.C.P.) was designed to be a non-adversarial process in that the injured worker could receive wage loss compensation and the medical bills associated with the work related injury would be paid accordingly.

Unfortunately, since 1994 the mandated O.W.C.P. "charge back process" to the host agency has indeed become very adversarial.

As a result, this process has become incredibly stressful for the claimant, the claimant's family, the Claims Examiners, Hearings and Review Officers, as well as the Employees Compensation and Appeals Board.

These are some examples:
Claimants ,also known as injured employees, from the moment they are injured are labeled by the agency management as "crooks", "thieves", and simply to "lazy" to work.

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Nothing could be farther from the truth. The Claimants in the majority of cases are well tenured and dedicated employees. They would choose not have been injured and would prefer to do the job they were hired for. Unfortunately, injuries do occur and now the Claimant becomes a victim of the very system that has been put into place to protect them. Why? Initially because of over zealous agency supervisors' compensation specialists and Human Resources Personnel, if the Claimant has committed a crime, it is simply that they hired on with the federal government.

Claimants
As a consequence, Claimants go **without pay, have unpaid medical bills,** are forced to file for **bankruptcy,** and experience **foreclosures** of their homes. **Utilities, water, gas, electricity,** and **telephones** are cut off. **Automobiles are repossessed,** the **divorce** rate for **Claimants** is skyrocketing and diagnoses of **chronic pain, depression** has lead to **attempted suicides.** Sadly, some of those attempts have been **successful.** Imagine for a moment what the Claimants family is going through during this entire process.

The Department repeatedly sends claimants to Physician after Physician; this is a Physician that the Department has chosen, **not** the Claimants primary care provider. This is a

Physician that the Department knows will contradict the Claimants primary care provider.

This action is for the most part a result of the agency Compensation Specialist **hounding** the Claims Examiner to find a reason to deny **any** compensation. Generally if the Claims Examiner is resistant to the pressure of the agency the Compensation Specialist will simply call the Department Director who will in turn "fix the problem." This results in the Claims Examiner in being over ruled.

Agency Compensation Specialists frequently brag about harassing Claims Examiners by repeatedly calling and complaining that they are approving too many claims. Forget about the merits of the claim; it does not apply. They could care less about the Claimant and the negative impact this action will have not just on the Claimant, but the Claimants family as well.

Imagine you've been hurt at work, it does not stop there, now you can't pick-up your children, mow your yard, and many of the other activities you were able to do prior to the injury. There is no compensation for this.

It is nearly impossible for a back, upper extremity or soft tissue injury to heal when the Claimant is subjected to this unimaginable amount of stress.

Agencies are very well aware of this, so while they have the Claimant on the ropes they really pour it on. Why? So down the road the agency can simply say that the Claimant does not want to get better, or has been faking the injury all along in spite of what the diagnostics and the Primary Care Provider reveal in their reports.

Claims Examiners

There are good Claims Examiners and there are bad Claims Examiners. It is believed that most want to do a good job and that most try to help the Claimants; however, the Department has set unrealistic workload expectations. It is common belief that it is nearly impossible for the Claims Examiners to do the job that is expected of them with the resources that they have available. There is obviously not enough staff. A well known fact is that the Department is again proposing other changes that will only increase the workload further without increasing the staff ratio.

The agencies do not respect the Claims Examiners.

When you couple this with the fact that the agencies are regularly hounding them and the Department also subscribes to these tactics, in some cases peer pressure is a factor. This can only result in the Claimant being harmed.

This could also explain the turn over rate with

Claims Examiners. However we must remember there are also some bad, and some very bad Claims Examiners out there.

Hearings and Review

These officers appear to be somewhat aggravated by the tremendous workload and with the frequency that they are compelled to remand or turnover the Claims Examiners previous decisions. There are a high percentage of reversal rates here.

Employees Compensation Appeals Board

The reversal rate under E.C.A.B. is also high. Interestingly there appears to be a pattern here in reference to voting records. The waiting periods for the Board to act are excessive(generally 2-3 years). This excessive wait time is due to the number of appeals, which are a result of bad adjudication at the claims examiners level. This is also true at the hearings and review level.

There are great many other issues with the entire process and the authorities that administer them. Unfortunately, there is not enough time to cover all issues.

Respectfully Submitted,

Gregory A. Fox

Mr. HORN. Well, we appreciate that testimony, and we'll continue with all the three witnesses so far in a Q&A round, when we finish all of the presentations.

Next is Michael Walsh, chairman of the Employee Compensation Appeals Board, U.S. Department of Labor. Mr. Walsh.

STATEMENT OF MICHAEL J. WALSH, EMPLOYEES' COMPENSATION APPEALS BOARD, U.S. DEPARTMENT OF LABOR

Mr. WALSH. Thank you very much, Mr. Chairman.

The agency I represent is 54 years old this year. I've been with the agency for 15 years, both with Republican administrations and Democratic administrations. Our role is to give independent review of decisions of OWCP, to make sure that our best efforts ensure competent and fair decisionmaking. We try to provide the same level field a court would provide. We do that by having four specialists look at every case.

And the principles that we are bound by are the same principles that all adjudicatory agencies are bound by, and that is, no ex parte contacts with claimants or the OWCP. And I can say in my years that the Secretary of Labor has never tried to intervene in any case we've had, nor has any agency ever tried to influence our cases, except by filing briefs or by oral argument.

A quick background I think is necessary. In 1908, the first comp law came into effect. It didn't cover all Federal workers, only those in hazardous situations. In 1916, the first act came into being, covering all Federal employees. No review of decision.

In 1948, the Federal Security Agency was created by Congress and developed two entities: the Bureau of Employees Compensation, and our board, the Employees' Compensation Appeals Board. For the first time, there was review of decisions, appellate review of decisions of workers compensation.

In 1950, the Department of Labor was given the assignment of handling workers compensation for the Federal Government, divided into two entities, OWCP and the Employees' Compensation Appeals Board. OWCP is an agency separate from us. They're under the Employment Standards Administration. ECAB is under the Office of the Secretary.

OWCP does something different than we do. They administer a program involving 3,225,000 employees, including the 875,000 postal employees. Their job is to administrate for all those people, and their second job is to do initial adjudication. Our job is to do appellate review of adverse decisions received from the Office of Workers' Compensation.

ECAB's review is a de novo review. That is, we look at the case afresh as if we have the merits of the claim. We do not receive new evidence. Cases are decided on the record before us or on oral argument. If a majority of a panel assigned to the case finds that the Office is correct, it's affirmed. If not, it's reversed or remanded.

Jurisdiction in our case depends on this: if an appeal is filed in 1 year of a merit review by the Office, we have de novo jurisdiction. That is, we can look at both the law and the facts. If a decision is outside a year of the Office of Merit Review, we look at what we call abuse of discretion, and we're looking at three criteria: has there been an error on the part of the Office in the application or

interpretation of law; has the claimant advanced a point of law or a point not previously considered; is there new or relevant evidence.

In this case, we're not looking at the merits, we're simply looking to see whether any one of those criteria were abused. If they have been, we will send the case back for a merit review in the office.

We handle oral arguments, 120 are scheduled per year. We hear about 70 in panels of three. About 50 are reset or rescheduled. At those oral hearings, they're held in Washington, DC, at those oral hearings, the claimant is normally represented by an attorney, a union representative, or pro se, by themselves. The Office is represented by the Solicitor's office. Those arguments usually last about an hour.

Now, we have an non-adversarial system, as has been stated here. That is to be differentiated in the State system, where you have something similar to what we have, you have an administrative process, you have appeals boards, all administrative. And then the claimant can go into the courts, and he can go up to the lowest court in the State, up to the intermediate appellate court or up to the supreme court.

But the difference is this: the employers in State courts can fight the claim all the way up to the supreme court of any State. The other distinction is, many of the courts will just look at the law and not the facts. That can take a long time to go through court system.

Under the non-adversarial system, which was designed by Congress, the agencies are not a party to the action. The agency cannot appeal an OWCP decision, the agency cannot appeal to us. What the agency can do is controvert the claim, and they do that by investigation. But they're not a party to the action. That's why the courts, all of them, the appellate courts, the Supreme Court, have called this a model preclusion statute. And they've said that because Congress has been so clear in what can be reviewed. They say that our decisions cannot be reviewed except for a Constitutional violation.

I'll have to stop now, but I would like to add one other thing. And this is how we decide cases. A case is received from OWCP, it's assigned to an attorney advisor. A preliminary draft is made, and then the case is assigned to a panel of three board members. Each one of those board members independently examine the claim. After that has been done, there's a conference on each case that comes to us. If all members agree, the case goes out in that fashion. If there's a requirement for dissent, there is one, or a concurrence, and the case is recirculated, just like any other appellate agency. And thereafter, the case is sent out.

Now, approximately 25 percent of the cases that we see are sent back to OWCP on remand basis or reversal.

I'll stop there, I'll be pleased to answer any questions. I would like to point out one thing, though, Mr. Chairman, this. We start fiscal year 2001 with 3,600 cases. And that's down from a topload of 5,570 cases which we reached in May 1997.

Last year was our highest production rate, 3,332 cases, all written. This year, our goal is 3,450 cases, but it will turn out to be 3,700 cases. That's an 8 percent increase over our goal, and a 21 percent increase on the pending caseload. We have decreased the

caseload 900 cases this year. We are currently at about 16 to 18 months, and cases I'm now assigning are about 12 to 14 months. So I think we've had a dramatic downturn in our pending caseload.

I'll be pleased to answer any questions that the panel has.

[The prepared statement of Mr. Walsh follows:]

Statement of Chairman Michael J. Walsh
Employees' Compensation Appeals Board
United States Department of Labor
Before the Subcommittee on Government Management,
Information and Technology
Committee on Government Reform
House of Representatives
September 21, 2000

Mr. Chairman, and Members of the Subcommittee:

I am pleased to appear before the Subcommittee today to discuss the Federal Employees' Compensation program.

Mr. Chairman, I have served on the Employees' Compensation Appeals Board (ECAB) for fifteen years, under both Republican and Democratic Administrations. I think that if you review the work of ECAB over the past few years you will find a record of the Board providing for:

- independent review;
- fair and competent decisonmaking; and
- improvement in the timeliness of decisions

ECAB provides an independent review of workers' compensation cases for

Federal employees who believe that decisions by the Office of Workers' Compensation (OWCP) do not conform to existing law. In carrying out its responsibilities, ECAB provides for the same type of independence and level playing field as the courts.

Like the courts, ECAB members and staff are subject to the ethical standards which govern adjudicative bodies. For example, members and staff cannot engage in *ex parte* communications with OWCP, employing Federal agencies, or claimants. In addition, I think it is important to note that, during my fifteen years as a member of ECAB, no Secretary of Labor has ever asked me or the Board to rule one way or another on any case.

The historical background for the congressional creation of ECAB is important to understanding the function we perform: reviewing the law and facts that have been decided by OWCP.

Although Congress established a Federal workers' compensation program in 1908, the first appeals structure was not provided until 1946. In 1950, the responsibility for overseeing Federal workers' compensation was delegated to the Department of Labor. The Department set up two entities: the Office of Workers'

Compensation Programs and the Employees' Compensation Appeals Board. OWCP and ECAB operate independently of each other: OWCP is part of the Employment Standards Administration (ESA); ECAB is housed within the Office of the Secretary. OWCP and ECAB also perform different functions. OWCP administers the Federal workers' compensation program and has the dual function of initially adjudicating claims and conducting hearings to review the initial determinations.

ECAB's function is to receive appeals from the decisions of the OWCP and, when the appeal concerns the "merits" of the case, review the facts and law *de novo* – that is, as if the case were being determined for the first time. The Board's function is to make sure OWCP has determined the facts correctly and has applied the law correctly. ECAB does not take new evidence or conduct further evidentiary hearings. Its function is strictly appellate. Appeals are determined on the record made before the OWCP or after oral argument.

If a majority of the Board finds that OWCP has correctly decided the case, ECAB affirms OWCP's decision. If not, OWCP's decision is reversed, remanded, or affirmed and remanded, depending on the issues before the Board. The Board has jurisdiction to review the "merits" of the case only when the appeal is filed no

later than one year after the last OWCP "merit" decision. Cases appealed more than one year following an OWCP merit decision are decided on the basis of whether the OWCP abused its discretion in refusing to provide further merit review. In the latter case, the Board will look to see whether (1) there has been an error in application or interpretation of the law; (2) the claimant or his attorney has advanced a point of law or fact not previously presented; or (3) any new or relevant evidence has been presented. If any of those criteria are present, the Board will remand the case to the OWCP for a "merit" review.

While approximately 120 oral arguments are set for presentation before the Board each year in Washington, DC, usually there are about 70 hearings before panels of three Board members; the balance of the oral arguments are either cancelled or rescheduled at the request of the claimant. The Solicitor of Labor represents OWCP before the Board. The claimant is represented by private counsel, a union representative, or may appear *pro se*.

The Federal Employees' Compensation Act (FECA) is a non-adversarial system, unlike those created by state workers' compensation laws. Under state laws, the employer is a party to the action and can fight the employee's claim through, first, an administrative process and then through the courts to the highest

court in the state. This process can take years before a claim is ultimately decided. FECA does not allow the employer (the Federal government or the Postal Service) to fight the claim. A Federal agency cannot appeal OWCP's decision. The FECA statute has been determined by the courts to be a model preclusion statute. It is very clear that Congress intended only administrative review of claims.

The Board decides cases in the following manner. Once the case record is received from the OWCP, the case is assigned to an attorney-advisor, the case is thoroughly reviewed, and a preliminary draft is prepared. The case is then assigned to a panel of three Board members, each of whom reviews the file and makes an independent decision as to the outcome of the appeal. After their review, the panel members meet to discuss the case. If there is unanimity as to the outcome, the decision will be issued. If not, a dissent or concurring opinion is written and circulated. If no minds are changed by the circulated opinions, the decision is issued with the dissent or concurrence. As you can see, ECAB provides a rigorous review of the cases brought before it. We take very seriously our mandate to independently review each case. Of the cases that come to ECAB, about 25 percent are either reversed or remanded to OWCP for further review.

The Board, through its case law of decisions, sets out the legal principles to be followed by the OWCP. The principles have been set out in volumes of published precedential decisions since 1946. We are presently up to volume 51.

The Board understands the importance of timely decisions, is committed to reducing its pending caseload, and by October will have 3600 cases pending. In FY 1999, the Board issued 3232 dispositions -- more than in any prior year. In FY 2000, the Board had a goal of 3450 resolutions, but I am pleased to report to you that we will surpass that number by almost 8 per cent or 250 cases. During the past twelve months the Board has successfully reduced its backlog by approximately 21 per cent, and we expect to make further progress in the next fiscal year.

I have also attached to my testimony a more detailed overview of the Employees' Compensation Appeals Board that I believe will assist the Subcommittee in understanding the important role the Board plays in the Federal workers' compensation program.

Mr. Chairman, this concludes my remarks. I would be happy to respond to questions.

Attachment

UNITED STATES DEPARTMENT OF LABOR

EMPLOYEES' COMPENSATION APPEALS BOARD

I. BOARD COMPOSITION

The Employees' Compensation Appeals Board (Board) was created by Reorganization Plan No.2 of 1946 (60 Stat. 1095), effective July 16, 1946.[1] The Board is a three-member quasi-judicial body which has been delegated exclusive jurisdiction to hear and make final decisions on appeals from determinations of the Office of Workers' Compensation Programs (Office) in claims of federal employees arising under the Federal Employees' Compensation Act (FECA).[2] The Board's jurisdiction is strictly appellate in nature and extends to questions of fact and law. The Board is unique among federal executive branch agencies in that its decisions are not subject to review by any other administrative officer or the federal courts.[3] Its decisions are therefore binding upon the Office and must be accepted and acted upon by the Director.[4] All members and alternate members of the Board are attorneys and specialists in workers' compensation law or have many years experience in the private practice of law.[5]

II. BACKGROUND OF FECA LEGISLATION

The Federal Employees' Compensation Act (FECA) is a law conceived to provide

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[1] The Board was reorganized and transferred to the Department of Labor in 1950. *See* Reorganization Plan No. 19 of 1950, 64 Stat. 1272; 3 C.F.R. 1949-53 Comp., p. 1010. The regulations governing the Board and the Office, enabling the Board to weigh the evidence and to make final decisions on the merits of a claim, constitute a valid exercise by the promulgating officials of authority lawfully derived from Reorganization Plan No.2 of 1946 and Plan No.19 of 1950. *See Clinton K. Yingling, Jr.*, 4 ECAB 529 (1952).

[2] In Fiscal Year 1999, the Board issued 3,232 written decisions.

[3] *See infra* notes 13 through 19 and accompanying text.

[4] *Anthony Greco,* 3 ECAB 84(1949). The decisions of the Board are final upon the expiration of 3O days from the date of its decision or order, *See* 20 C.F.R. § 501.6(d); *Hugo A. Mentink, 9* ECAB 628 (1958). The subject matter of the appeal is *res judicata* and, in the absence of a claimant seeking further review by the Office, is not subject to further consideration by the Board. *Hugo A. Mentink, supra.*

[5] There are presently the Chairman, two members and four alternate members serving on the Board.

compensation for disability and death and full medical care for civilian federal employees who suffer injury in the performance of their job duties.[6] The Act, which has provided substantial relief for injured federal employees since its enactment September 7, 1916, has been modernized by periodic amendment to afford greatly liberalized benefits and increased coverage.[7] The Act is remedial legislation which was enacted by Congress to replace tort law and concepts of individual fault with a compensation system to cover federal civilian workers injured on the job.[8] The compensation system established by Congress under the Federal Employees' Compensation Act represents an attempt to ensure that the injured individual continues to receive a minimum income and medical care in order to keep the individual from destitution.[9]

Under the Federal Employees' Compensation Act, the only injuries compensated are those which produce disability for work, thereby affecting the employee's wage-earning power, or which produce impairment to a listed portion of the anatomy. The compensation system, unlike tort recovery, does not attempt to restore to the injured individual that which was lost.[10] Rather, Congress provided that the amount of compensation received depends upon the employee's earning level. Any loss of wages or wage-earning capacity due to disability from a

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[6] 5 U.S.C. §§ 8101 *et seq.*

[7] The Act of September 7, 1916 superseded the compensation act of May 30, 1908 and its amendments which had provided a system of coverage to employees of the United States engaged in manufacturing and construction work and in certain designated hazardous services. The Act of 1916 covers all civil employees of the United States regardless of the hazard of the employment and no distinction is made as to occupations. Subsequent congressional amendments to the Act have extended coverage under the Federal Employees' Compensation Act by creating new rights to compensation, as exemplified by schedule awards under S U.S.C. § 8107, and expanded the class of beneficiaries under the Act, as represented by sections 8140, 8141, 8142, 8143, 8143(a), 8144 and Subchapter III.

[8] Under the 1908 Act, compensation was not payable in case of injury due to negligence on the part of the injured employee. The Act of 1916 only disqualifies an injured employee from compensation in cases of willful misconduct, intoxication or intent to commit injury to himself or another. *See* 5 U.S.C. § 8102(a). As noted by Arthur Larson in his treatise *Workmen's Compensation Law*, the ultimate social philosophy behind compensation liability is belief in the wisdom of providing financial and medical benefits for victims of work-connected injuries and by allocating the burden of these payments. Section 2.20. Workers' compensation acts are those laws which propose a scheme of compensation for injury or death arising out of employment and which attach to the contract of employment as an incident of it. They impose on industry the burden of care with respect to its disabled servants, or their dependents in the event of death, where an accident occurs chargeable to the employment in the statutory sense. 99 C.J.S. Workmen's Compensation § 1. Their primary purpose is to provide protection and economic aid without regard to fault or negligence. *Id.* at. § 5.

[9] *See* Larson, § 2.40. The purpose of the Federal Employees' Compensation Act is to provide a comprehensive compensation system for federal employees who sustain injuries in the performance of their duties. 99 C.J.S. Workmen's Compensation § 5. *See Weyerhaeuser S.S. Co. v. United States,* 372 U.S. 597 (1963) *recalled to assess costs* 374 U.S. 280 (1963). The right to workers' compensation is wholly statutory and the rights, remedies, and procedures provided thereunder are thereby exclusive and are not controlled by general rules of procedure in cases of law or equity. 99 C.J.S. Workmen's Compensation § 6. Workers' compensation acts are not designed to afford life, health, old age, or unemployment insurance. 99 C.J.S. Workmen's Compensation §9.

[10] *See* Larson, § 2.50.

work injury entitles the employee to monetary benefits at the statutory rate of 66 2/3 percent of salary if the employee has no dependents. This compensation rate is increased to 75 percent of wages if the injured employee has one or more dependents as defined in the Act.[11] The Act provides adequate compensation for the injured employee and represents the attempt by Congress to help sustain the injured employee with monetary benefits to compensate for any loss of wage-earning capacity. In addition to compensation for wage loss or permanent impairment, medical services are provided with no limit as to the amount except that of reasonableness.[12]

The Act of 1916 created the United States Employees' Compensation Commission which was charged with the administration of its provisions and administration of the earlier acts as to cases pending at the time of its organization. The actions of the Commission were final, so that an injured employee receiving an adverse decision had no legal recourse for obtaining review of his case. On July 16, 1946 the Act was amended by Congress to abolish the Commission and vest the administration of the Federal Employees' Compensation Act in the Bureau of Employees Compensation (predecessor to the Office of Workers' Compensation Programs) under the supervision of a Director. The 1946 amendments also created an appellate procedure under which the Director's actions could be reviewed and the Employees' Compensation Appeals Board was established to hear and decide appeals from the final decisions of the Director.[13] The Board was created as a separate entity in order to give Government employees the same administrative due process of law and right of appellate review which non-federal workers enjoy under the various state workers' compensation laws. The Federal Employees' Compensation Act, which provides for appellate review by the Board, represents the extent to which Congress has waived the constitutional sovereign immunity of the United States in federal workers' compensation matters.[14] In *Lindahl v. Office of Personnel Management,*[15] the United States Supreme Court singled out the Federal Employees' Compensation Act as a model preclusion of review statute, noting that Congress uses such "unambiguous and comprehensive" language

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[11] *See* 5 U.S.C. § 8110.

[12] Under the 1908 Act, no medical services were furnished.

[13] The Board was established by the Federal Security Administrator pursuant to Reorganization Plan No.2 of 1946, effective July 16, 1946. The Board's authority was more clearly defined by the subsequent Federal Security Agency Order No. 13 of January 15, 1947. Reorganization Plan No.19 of 1950, effective May 24, 1950, provided for the transfer of the Board, together with the functions thereof, to the Department of Labor.

[14] 5 U.S.C. § 8128(b) provides that the action of the Secretary or his designee in allowing or denying payment under the Act is (1) final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by any other official of the United States or by a court by mandamus or otherwise. *See Woodruff v. U.S. Dept. of Labor.* 954 F.2d 634,637 (11th Cir. 1992).

[15] 470 U.S. 768, 779-80 at n. 13, 105 S.Ct. 1620, 1627 at n. 13, 84 L.Ed. 2d 674 (1985).

[16] Federal courts maintain jurisdiction to consider constitutional claims, *see, e.g., Rodrigues V, Donovan,* 769 F.2d 1344, 1347-48 (9th Cir. 1985), or when a clear statutory mandate or prohibition is transgressed, *see e.g., Oestereich v. Selective Serv. Sys. Local Bd. No.* 11, 393 U.S. 233, 238-39 (1968). *Accord McCall v. United States,* 901 F.2d

"when [it] intends to bar judicial review altogether."[16] In *Weyerhaeuser S.S. Co. v. United States,*[17] the Supreme Court reviewed the legislative history of the Federal Employees' Compensation Act and stated: "The purpose of [§ 8128(b)] was to establish that, as between the Government on the one hand and its employees and their representatives or dependents on the other, the statutory remedy was to be exclusive."[18] For this reason, review by the Board constitutes the exercise of final authority by the Department of Labor and represents the highest level of review in federal workers' compensation claims.[19]

III. SCOPE OF FECA COVERAGE

Congress, in enacting the FECA, provided a statutory waiver of the sovereign immunity of the United States Government for injuries arising out of the performance of a federal employee's job activities.[20] In turn, the Board has been delegated the responsibility for interpretation of the statute in the resolution of matters raised on appeal. The FECA provides payment of disability compensation for wage loss or permanent physical impairment, medical care, and vocational rehabilitation for employment-related injuries sustained by Federal civilian employees. In the case of death, the FECA provides compensation for their dependents. Currently, there are approximately 3.2 million civilian federal employees and postal workers covered by the Act. Further, Congress has amended the statute to extend federal workers' compensation coverage to state and local law enforcement officers who are injured or killed while apprehending, or attempting to prevent or apprehend, individuals suspected of committing crimes against the United States. In addition, coverage under the Act includes noncitizen and nonresident employees who are employed abroad by agencies of the United States Government. The Board's jurisdiction extends to review of employees of sensitive agencies, such as the Federal Bureau of Investigation, the National Security Agency, and the Central Intelligence Agency. Handling of these cases requires the utmost security and discretion on the part of the Board members.

IV. RESPONSIBILITY FOR PRECEDENT

548 (6th Cir. 1990).

[17] *Supra* note 9.

[18] 372 U.S. at 601.

[19] On several occasions the Secretary of Labor has been asked by a claimant to review a decision of the Board; on each occasion the Secretary or his chief legal adviser, the Solicitor of Labor, has declined.

[20] As noted by Larson in his treatise *Workmen's Compensation Law,* the ultimate social philosophy behind compensation liability is to provide, in the most efficient and dignified manner, financial and medical benefits for victims of work-connected injuries. Section 2.20. Workers' compensation statutes are remedial legislation and should be liberally construed in favor of the employee. *Pearl Phillips Parker (George Tom Parker),* 9 ECAB 200 (1956).

In light of the vast coverage extended under the FECA, the Board has the responsibility to establish a sound body of case precedent in the interpretation of the statute, implementing regulations, and procedures adopted by the Office in order to provide guidance to the Office and practicing bar in the administration and processing of federal workers' compensation claims. The Board is also required, in particular circumstances, to interpret foreign laws and treaties of the United States relating to workers' compensation and the laws of the various states relating to such matters as marriage, divorce, and dependency. The final responsibility for interpreting the FECA and its amendments in the resolution of matters raised on appeal rests with the Board.

V. BOARD FUNCTIONS

The Board reviews all relevant questions of law and fact and questions involving the exercise of discretion. The decisions of the Board are based upon a full review of the case record upon which the Office rendered its decision to deny, award, or modify compensation benefits. In this regard, the Board conducts a *de novo* review of the case and is not limited to the terms of the Office order appealed from.[21] The Board makes its own independent judgment of the relevant facts in an effort to reach a fair disposition of the issues supportable on the record. As an appellate body, however, the Board is precluded from reviewing any evidence which was not before the Office at the time of its review of the claim.[22] The Board, through its written decisions, has the responsibility for definitively interpreting the FECA in the resolution of controversies raised on appeal and in such a manner as will fully protect the rights of all interested parties. The written decisions of the Board set forth the relevant facts of each claim, evaluate the facts in terms of applicable workers' compensation law, and may direct corrective action or discretionary relief depending on the merits of the case.[23] The Board holds in excess of 70 appellate oral arguments each year.

VI. THE BOARD AS COMPARED TO OTHER APPELLATE BODIES WHICH REVIEW WORKERS' COMPENSATION CASES

Review by the Board constitutes the exercise of final authority by the Department of Labor and represents the highest level of appellate review in federal workers' compensation

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21 *See Clara Anne Anderson*, 5 ECAB 42 (1952). In this regard, the work of the Board must be distinguished from other administrative appellate bodies which are bound by the factual determinations made by a lower reviewing authority.

22 *See* 20 C.F.R. § 501.2(c).

23 In addition to ensuring that the claimant for compensation has his case examined and judged correctly, the Board has the duty to insure that procedural due process rights have not been violated and that the final decision is just.

24 *See supra* notes 13 through 19 and accompanying text.

claims.[24] The Board stands in contrast to state workers' compensation appellate bodies whose decisions are appealable to the state court systems. Similarly, the finality of the Board's decisions stands in contrast with other executive department appellate bodies, such as the Department of Labor's own agencies such as the Benefits Review Board or the Office of Administrative Law Judges, whose decisions are subject to review by higher administrative and/or judicial appellate authorities.[25] The United States Supreme Court has acknowledged that the federal courts are precluded from reviewing the final judgments of the Board. In *Lindahl v. Office of Personnel Management*,[26] as noted above, the Supreme Court singled out the Federal Employees' Compensation Act as a model preclusion of review statute, noting that Congress uses such "unambiguous and comprehensive" language "when [it] intends to bar judicial review altogether." The finality granted to the Board's decisions under the Federal Employees' Compensation Act is extraordinary for a quasi-judicial (executive branch) body and is exclusive to the Board.[27] The Board is a court of last resort in federal workers' compensation appeals.

VII. SPECIFIC AREAS OF LAW[28]

The subject matter presented on appeals to the Board often involves novel legal and factual questions unique to the field of workers' compensation. In addition the information contained in the case records involve review of highly technical areas of science and medicine. The Board has seen a dramatic increase in the number of appeals involving controversial matters such as acquired immunodeficiency syndrome (AIDS); occupational exposure to potential carcinogenic chemicals or other agents, such as asbestos or low level radiation; emotional conditions; and repetitive motion injuries. The determination of the etiology of certain diseases

[24] *See supra* notes 13 through 19 and accompanying text.

[25] The Board serves as a court of last resort while the Benefits Review Board (BRB) serves as an intermediate appellate tribunal. The BRB is the last step in the administrative review process of claims under its jurisdiction. The initial decision is made by the Office of Workers' Compensation Programs which can be appealed to the Office of Administrative Law Judges (OALJ) whose decisions, in turn, can be appealed to the BRB. The decisions of the BRB are subject to further review on appeal to the United States Court of Appeals.

[26] *Supra* note 15.

[27] *See Staacke v. Secretary of Labor*, 841 F.2d 278 (9th Cir. 1988); *Paluca v. Secretary of Labor*, 813 F.2d 524 (1st Cir. 1987), *cert denied sub nom.*

[28] Among the subject areas of workers' compensation reviewed by the Board are issues concerning abandonment of hearings; abuse of discretion of the Office; attorney fee approval; back injuries; burden of proof; cancers or tumors; computation of pay; death benefit claims; dependency determinations; emotional conditions; exposure to asbestos, chemicals, radiation or other toxic materials; forfeitures of compensation; hearing loss; heart conditions; local law enforcement officer claims; overpayments of compensation; performance of duty; pulmonary and respiratory conditions; refusal to accept suitable work; schedule awards; statute of limitations; suicide; suspension of compensation benefits; termination of compensation benefits; vocational rehabilitation; and loss of wage-earning capacity determinations.

or medical conditions, *i.e.* the causal relationship of a federal worker's employment to the development or progression of his or her illness, is one of the most complex aspects of the Board's review of a claim. A substantial number of cases involve physical or emotional conditions whose origins are obscure and uncertain in the field of medicine and occupational health. Due to the vast numbers of civilian federal workers and the many capacities in which they are employed, *e.g.* from manual laborers, air traffic controllers, intelligence agents, scientific researchers, to law enforcement officers, the nature of injuries sustained are often vastly different from those generally faced by state workers' compensation agencies. For this reason, the Board's decisions often establish case precedent on the cutting edge of medical and scientific knowledge.

VIII. IMPACT OF BOARD DECISIONS

The Board's decisions establish case precedent and become part of the general corpus of Workers' Compensation Law.[29] The Board's decisions have been cited to in other court decisions and by generally recognized authorities such as Larson, *Workmen's Compensation Law* and Horovitz *On Workers' Compensation*. In cases involving dependency issues, the Board must also determine the relevancy of state laws involving marriage and divorce or family law as it pertains to adoption and custody.[30] In the cases of noncitizen employees of the United States, the Board must review the laws, regulations, and customs of foreign nations and United States treaties, which are applicable in determining benefits under the FECA.[31]

In addition to serving as precedent in the field of workers' compensation, the rulings of the Board are of national scope as compared to state decisions and have a widespread impact. The decisions of the Board, in broadening or restricting benefits to civil employees, affect millions of federal employees in the performance of their jobs and the industry practices maintained or developed by federal employing agencies. In turn, the decisions of the Board impact the expenditure of billions of dollars from the Federal Treasury. Costs of workers' compensation charged back to federal employing agencies for the period July 1, 1998 through June 30, 1999 alone totaled $1,908,256,156.[32] It is generally recognized that benefits under the FECA in amount, duration and scope are among the highest under any workers' compensation

[29] In construing similar provisions of the Federal Employees' Compensation Act, the Board will give considerable weight to the logical and reasonable conclusions reached by Federal and state courts, *see Viola Davidson (John 0. Lynch), 4* ECAB 260 (1951); however, the Board has noted that the decisions of other administrative agencies or courts are not binding on whether an individual is disabled under the FECA, *see Constance G. Mills,* 40 ECAB 317 (1988).

[30] *See, e.g., Mary Bee McCabe*, 35 ECAB 218 (1983); *Marolyn H. Videto* (*William R. Videto*), 23 ECAB 207 (1972); *Patrice Newkirk (Maurice D. Newkirk),* 18 ECAB 254 (1966); *Jo Ann Ensor (Mark Townsend Ensor),* 9 ECAB 260 (1957).

[31] *Mu-Yyang Ku*, 39 ECAB 217 (1987); *Artemio R. Aliplo*, 39 ECAB 570(1988) and 38 ECAB 438(1987).

[32] Workers' Compensation Costs Charged to Federal Employing Agencies, July 1,1998 through June 30, 1999, internal document assembled by the Office of Workers' Compensation Programs.

statute. For this reason, appeals before the Board are often vigorously contested, extensively briefed, appellant's represented by able private counsel or union representation, and oral arguments conducted in response to specific requests. For this reason, the Board's administrative office processes many requests from the private bar and labor unions for copies of Board decisions as they are issued. It should be recalled that due to budgetary cutbacks, the Board is not able to publish every written decision.[33] Therefore, great care is spent on selecting those decisions which represent important case precedent for inclusion in the Board's annual volume of published decisions. In addition, individual cases before the Board in overpayment and termination of benefit cases may involve the disposition of hundreds of thousands of dollars.

[33] There arc 50 volumes of Board decisions dating back to the establishment of the Board in 1946.

Mr. HORN. Thank you, Chairman Walsh. We will be getting back to you on the Q&A.

Shelby Hallmark is the Acting Director of the Office of Workers' Compensation Programs, U.S. Department of Labor. Mr. Hallmark.

STATEMENT OF SHELBY HALLMARK, ACTING DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEPARTMENT OF LABOR

Mr. HALLMARK. Thank you, Mr. Chairman and Ranking Member Turner. It's always a pleasure to appear to discuss the FECA program.

As you've heard today and in previous hearings, this is a very serious program and one that OWCP takes extremely seriously in our responsibility for assisting our fellow injured workers. And it's an honor for me to be here to represent the just over 900 men and women who do this work and work extremely hard every day trying to do the best they can.

OWCP, as I've described before, and as in my written testimony, has a very, I think, strong record of trying to improve its performance. We have an ambitious strategic plan which we are continuing to pursue very diligently. And we have made substantial strides. We have increased our ability to help people get back to work by tenfold over the last 10 years. We're now getting 7,500 people helped back to work every year by OWCP.

We are in the process, as I said, of implementing a very strong GPRA plan, and we're meeting those goals. We're now helping agencies increase their timeliness in submitting claims to us, so that we can get started on the process that you've heard about this morning. And we are working with OSHA to lead the Federal Worker 2000 initiative that was recently announced as a Government-wide safety and health goal.

Despite all of that, those accomplishments are made at the same time that we're addressing what is a very large, unrelenting and ever more complex work load. And some of the experiences that you've heard from the panel members today result from the fact that this is a very difficult job for our claims examiners on a day to day basis.

We're trying to help our examiners. We have some major computer improvement initiatives which we believe over the next 2 years will in fact help us tremendously in that regard. We're moving to an electronic imaging case processing system now. We're leading an agency effort to create an electronic data interchange process, so that claims can come to us electronically in the first place, and thereby speed them as well. And there are a whole raft of other improvements that we have been working on, and that are noted in my testimony.

We realize that all of those efforts are not complete, that the transformation we want to achieve to make this a service oriented, customer focused organization still has a way to go, and we are especially concerned that our ability to communicate with injured workers and to show them and explain to them what in fact is going on in their case is not what it should be. Nevertheless, our

staff work every day with the tools that they have to try to accomplish the goals of the program, and I think they do a good job.

I've noted in my testimony some issues that we specifically have addressed, following up on previous hearings, and I would point the committee members to that. I won't go into it now, but I will say that communications is a particularly serious concern of ours. We don't believe we have the resources that we need to accomplish what our customers rightfully should expect from us in the way of access, and our 2001 budget request addresses that, and we hope that may still be favorably received by Congress.

One of the major focuses today is on our adjudicatory process. We believe that while the FECA process is unique, it is well tailored to the system that Mr. Walsh just described, of a non-adversarial process. OWCP does take seriously its responsibility to be a neutral arbiter. We do not carry the water, if you will, of the agencies. Although we obviously have to work closely with them if we're going to accomplish this program. And we try to be fair to claimants and to provide benefits to those who are entitled, and in some cases we have to find that's not the case. But we believe that we do a quality job at the front end in making initial determinations. The vast majority of such cases are approved, as they always have been.

We have improved our timeliness in that regard so that people do not have to wait excessively, particularly in occupational disease cases, which are complicated. In the last 4 years, we've reduced the average time there from 97 days to receive a decision to 75 days.

There always are going to be outliers, where there are complex issues. But they are few and we monitor those. As I said, we approve roughly 90 percent of all incoming cases. And then there is, as Mr. Walsh started to explain, a complex and extensive appeals process which includes reconsideration at the district office, which includes all hearings at our Branch of Hearings and Review, which you heard something about this morning, and which includes the final review at ECAB, in addition to constitutional challenges in district court.

We think those processes work, we think the results that come out of them indicate that they are objective. And they parallel the kinds of outcomes that occur in State workers' compensation systems.

I'd like to just highlight if I can a couple of things that we've done to make improvements in that process. Branch of Hearings and Review, during the past 3 years, reduced the time it takes for us to remand cases where we find upon their receipt that a hearing is not in order, that it should have been resolved before. In 1998, that took 169 days. This year, it's going to take an average of 88 days. We're very proud of that.

We also found that issuing final decisions after oral hearings has needed to be improved because of the backlog, similar to the concerns that Mr. Walsh mentioned. We've reduced that timeframe from 361 days to 242 days on average this year. And we're still working to make improvements on that. And we are working with ECAB to address issues of coordination. We have shared some of our technology with ECAB to ensure that we hand cases off properly. Sometimes that doesn't work, and then there are problems

that we have, I think, addressed and improved substantially in that regard.

Finally, we're trying to ensure that our decisions are quality at the front end and that we do things right in the first place. We have an extensive and I think successful accountability review process that looks at how well we make those front end decisions. We have a quality index which is one of our GPRA goals, which is intended to measure how well we can move forward in improving those initial determinations and ensuring that the decision is right in the first place.

That goal has been one of our hardest to achieve. But we are showing success in 2000.

We're a dynamic organization. We are always glad to hear what people say about this issue, and we want to work with the committee and with everyone else to try to improve it. Thank you.

[The prepared statement of Mr. Hallmark follows:]

Statement of Shelby Hallmark
Acting Director of the
Office of Workers' Compensation Programs
Employment Standards Administration
U.S. Department of Labor
before the
Subcommittee on Government Management, Information and Technology
of the House Government Reform Committee

September 21, 2000

Introduction and Overview

Thank you for the invitation to contribute to today's discussion of the administration of the Federal Employees' Compensation Act (FECA), to address some of the important issues and concerns people have about this program, and in particular its appellate process.

I would like first to provide background about this important program and how the Department of Labor's Office of Workers' Compensation Programs (OWCP) seeks to improve its functioning.

The FECA program covers nearly three million Federal employees in 72 different agencies, providing benefits to any of them who sustains an injury or illness in the performance of duty anywhere in the world. Because of the extreme importance of this protection to Federal workers, OWCP tries to provide those benefits when they are due as quickly as possible, and offers the full range of medical and rehabilitation services to return injured employees to productive work at the earliest date possible. For the 170,000 injury notices filed annually, we maintain high standards of decision timeliness, prompt payment of wage loss claims and medical bills, and are especially proud of the high number of workers successfully returned to work. At the same time we recognize our fiduciary responsibility to employers and taxpayers.

OWCP's record of timely adjudication, carefully managed caseloads, and timely payment has been consistent since the mid-eighties, when, after an intensive effort including ongoing automation initiatives, the program slowly gained control of a dramatically increased workload which overwhelmed our administrative resources in the late 1970's.

Beginning in 1992, and well before the Government Performance and Results Act (GPRA) made strategic planning a requirement, OWCP had already turned its attention to achieving improved outcomes for employers and employees. Union/management partnership teams in OWCP, building upon OWCP's long performance measurement

history, identified goals consistent with the OWCP mission, anchored in a set of basic principles guiding our vision of the future, and supportive of the needs and interests of our customers and stakeholders.

OWCP has thoroughly integrated GPRA into our overall management approach. A focus on measurable, real-world outcomes from the perspective of our customers has become the central theme running through all planning and evaluation activities, from long-range strategic vision, through operational planning and monitoring, to day-to-day project management. OWCP began multiple process reengineering, programmatic, and high technology initiatives in the early 1990's in support of the strategic goals.

Under GPRA, OWCP transformed itself from a gatekeeper, adjudicatory, and benefit payment program to a proactive, make-whole, service delivery agency. The make-whole orientation is most powerfully reflected in our establishing "Return to Work" as the first goal for the FECA program. We believe that in almost every case return to suitable employment is the best outcome for injured workers, their families, the employing agencies, and society as a whole. Our Quality Case Management (QCM) strategy employs new and creative methods to achieve this goal including the assignment of rehabilitation nurses to improve communications between the physician, the injured employee and the employer. This new approach helps injured workers better understand our system and effects early recovery and return to work.

In seeking ways to evaluate our progress, we determined that measuring average lost production days -- the length of time workers remain off the job due to a disability -- would provide an accurate insight into performance. The goal to reduce lost production days challenges the FECA program to address the entire experience of injured workers, from the day of the injury to their reintegration into the workplace.

Our analysis of the average lost days data demonstrated that external factors, such as the speed with which the employing agency submits the notice of injury and later the claim for wage-loss compensation, make a significant difference in the length of time a worker remains off the job, even when injuries and working conditions are similar. This led OWCP to launch a program to encourage Federal agencies to improve their submission timeliness.

With the announcement of the President's Federal Worker 2000 safety and health initiative, OWCP has expanded the measure of lost production days to incorporate all days lost from work through injury, including the continuation of pay period which is paid and administered by the employing agencies rather than OWCP. Facilitating return to work depends in large part on timely submission of claims from employing agencies. This year agencies have submitted 57% of claims within 14 days of injury, a substantial improvement over the 41% rate in 1997.

The second FECA strategic goal, "Injured workers are served by a fair, swift and people-oriented compensation system," embodies our strong concern for customer service to injured workers. We want to develop a more service-oriented, less

bureaucratic approach to the public, with an emphasis on making the program accessible and understandable to claimants and their representatives.

Although OWCP has made numerous improvements in the speed and quality of service over the years, we are keenly aware of critical areas where our performance needs to improve. We know that access to our offices and responsiveness to communications is not good enough, and we are working hard in a wide range of areas to address this difficult set of problems. I will address those efforts when I discuss the actions OWCP has taken to follow up on the issues raised in the two previous Committee hearings.

Our third goal, "fiscal integrity", includes two key cost savings objectives: the Periodic Roll Management (PRM) and medical cost savings initiatives. OWCP has been successful in both of these areas, each of which has been included in the overall Department of Labor GPRA plan. The PRM project reviews long-term disability cases for rehabilitation possibilities, and determines whether ongoing compensation is appropriate. Savings due to this initiative have exceeded our goals each year, topping $145 million over the past two years alone. Medical savings initiatives have also met our expectations, without reducing the quality of medical services received by injured workers. In 1999, OWCP established fee schedules for pharmacy and in-patient hospital bills, which, combined with the pre-existing schedule for physician services, reduced medical bills by 22% in FY 1999 and about 24% in FY 2000. (Providers are barred from seeking reimbursement from the claimant for these reductions.) We also implemented a Correct Coding Initiative which has saved over $4 million thus far in FY 2000. Nevertheless, total amounts billed for medical services have continued to rise, and OWCP is continuing to refine its strategies and measurements in this area to ensure that injured workers receive quality treatment at a reasonable price.

Underlying most FECA program improvements has been the sweeping enhancements to our already extensive computer systems. The OWCP Automated System for Imaging Services (OASIS) will increasingly allow electronic rather than paper communications, speeding transactions and improving our ability to track and control the information needed to process these cases. By the end of FY 2001, all new cases will be scanned and processed as electronic documents, and by FY 2002, we expect to be in a paperless environment.

We are completely redesigning the ADP support system that claims staff use to process cases. The new system – also targeted for completion in FY 2002 -- will greatly improve their ability to balance their complex workload and respond efficiently and effectively to the particular cases that need action on any given day.

Other ADP improvements are also supporting our customer services objectives. Electronic submission of prescription bills directly from pharmacies to OWCP began in early 1999 and has reduced the burden on injured workers by reducing their need to seek reimbursement for out-of-pocket expenses. That trend will become much more pronounced when our secure Internet system for pharmacy billing goes online, allowing instantaneous verification and billing while the injured worker is at the pharmacy

counter. We have already instituted a secure Internet system that provides employing agency staff, union representatives, and Congressional staffers with real-time access to virtually all the information they need to assist us in assuring the smooth operation of the system. We are supplying similar data in various electronic formats on a batch basis to those employing agencies who ask for it. We have recently begun accepting electronic submission of claim forms from VA and DOT, and DOD and other agencies are moving to join in that process. Interactive Voice Recognition (IVR) telephone systems allow automated access to FECA payment status data for claimants and medical providers. Although the priority we assigned to Year 2000 readiness postponed many of these projects, we are continuing to push hard to bring high technology to bear to improve the overall operation of the FECA program, and increase access to the information in our systems to those who need to use it.

Specific initiatives undertaken in response to the previous hearings.

I would like to turn now from our general plans and initiatives to a discussion of the specific steps we have taken since the last hearing to improve the program in three areas of concern.

I would like first to address changes in our methods of obtaining second opinion medical examinations. As we've previously discussed, OWCP first reviews medical evidence provided by the employee's attending physician; if necessary to adjudicate any issue in the case, OWCP arranges for a second medical opinion at its expense. If a second medical opinion is received which is in conflict with the previous evidence, OWCP will select an impartial medical examiner (or referee) to resolve the conflict. Neither the second opinion physician nor the referee specialist can have been connected with the case in any way, nor can either work for the employing agency. Because second opinion specialists and referee specialists can be critical to adjudicating and managing claims, OWCP follows specific procedures in selecting these physicians, and various safeguards apply to how the referrals are conducted.

During the two earlier hearings before this Committee, some witnesses raised concerns about the integrity of OWCP's process for choosing second opinion and referee specialists, and about the validity and fairness of the process as a whole. To address concerns of that kind, and assure that the process yields the unbiased, high quality evidence we truly seek, OWCP has taken a number of steps in the past two years.

First, we have enhanced our automated Physicians' Directory System (PDS), which allows OWCP staff to select physicians by rotation according to medical specialty and geographic area. We changed the structure of the PDS and developed new, more rigorous physician selection procedures. As part of the new procedures, OWCP charged district office managers with personal oversight of the medical referral operations in their respective offices. Claims staff are responsible for advising the district office managers about physicians' medical reports which are of poor quality or very untimely, as well as complaints about physicians received from injured workers. The revised procedures require that complaints and quality shortcomings be handled

systematically; substantiated problems are taken seriously, and can result in a physician being removed from the pool for future referrals. We believe these and other enhanced controls have increased both the reality and the appearance of fairness, accuracy and objectivity in medical examinations obtained by OWCP.

National Office staff provided training to district office managers in these new procedures, which are outlined in FECA Bulletin 00-01, published November 5, 1999, and the revised ADP system. At the same time that we modified the PDS system and released the new procedures, each district office's PDS database was updated with current information for all physicians now active in the specialties included. The update also contained listings of physicians in several new specialties and subspecialties.

As part of this effort, OWCP will be sending form letters to all physicians whose PDS records showed that they did not want to participate in the program and will ask them whether they are now willing to participate. The results will be used to further update the PDS databases.

Turning now to a second area of concern raised in previous hearings, we are well underway in developing the comprehensive "Communications Redesign" described in my testimony last year. This effort, which is aimed at achieving accuracy, courtesy, and timeliness in all of the program's communications and links very directly to our customer service goal, will help OWCP staff to be more responsive on the phone and in writing.

As a first step, we investigated the "best practices" of several organizations, public and private, to identify how we might restructure our overall communications system to make it far more effective. We are attempting to leverage the "real world" knowledge gained from SSA, insurance companies and other entities which face the same challenges in handling large volumes of telephone and written inquiries. Although these insights cover a wide range of strategies, tools and techniques, our previous interest in the idea of a centralized telephone inquiry system was reinforced. I will describe our significant FY 2001 request for funding of 800 number access to a national medical authorization call center in a moment.

Over the past 10 months, we have conducted workshops focusing on communications issues among staff at a variety of levels, and last month we established a national Union/Management Communications Steering Committee to examine in depth how we handle written and telephone communications and lead the change process. This group will be responsible for working with newly organized teams in each district office to identify ways to improve service to callers and to develop better measures of progress in this area.

We have engaged the services of The Center for Effective Performance, Inc. to develop a telephone training module for newly hired claims staff. This training, which will build skills and teach the need for accurate, courteous, and timely telephone service right from the start of the new hire's employment, will be incorporated into the basic training package given to all new claims examiners. At the same time, we are developing a

module for new hire claims staff which will focus on how to respond to common types of written inquiries. Like the telephone training, this module will stress the need for accurate, courteous, and timely service with respect to correspondence, areas which had not been specifically addressed in our new-hire training package before. We expect that the Steering Committee will consider building on these modules to address training needs for experienced examiners and support staff.

We have also convened a smaller group to examine the program's form letters, with a view to combining and streamlining them wherever possible, and to frame them in "plain language" to ensure they are understandable and clear. As I noted in my testimony last year, this effort will work in conjunction with the ADP redesign project to provide much fuller support to claims examiners, and better notification to claimants following case action. This work group will also study the information made available to employees at the time of injury to assess whether the program provides the right amount and kind of information, and if not, determine what changes should be made.

One very important compendium of information for the Steering Committee, and for the program as a whole, is the most recent Customer Satisfaction Survey of FECA claimants. This year's survey was modified in accordance with a number of suggestions made by the Office of the Inspector General. One result was that the overall response rate increased. Also, the samples in this year's survey were weighted to ensure that it was representative of the universe.

In addition, the General Accounting Office (GAO) last December began a study of FECA program communications. Although we do not yet have the results of the GAO study, it has already proven beneficial in reinforcing the need for constant monitoring of our automated systems to ensure that callers are not denied access to our offices due to technical problems. Also, partly in response to questions raised by the GAO auditors, we are evaluating ways to add standards to our accountability review manual which would measure the district offices' effectiveness in providing telephone service to callers and responding to correspondence.

We believe we have made a good deal of progress, and we anticipate that the newly established Steering Committee and district office teams will help us to further enhance our performance. But we still have a considerable way to go, and resources will be critical to elevating our service to the next level. As indicated, our survey of best practices led us to conclude that a national call center is a key missing element, and identified several other equipment and resource needs that cannot currently be addressed.

Accordingly, our 2001 budget proposal includes a request for $5.7 million to address a variety of communications needs. Regrettably, the Appropriations Committees have chosen not to fund these improvements. Among other things, the requested increase would provide:

--Centralization of medical authorizations via a national call center employing a

combination of Federal and contract staff who would use automated disability management guidelines;

--Installation of "800" telephone lines for medical authorizations;

--Communications specialists in each district office to refine the program's communications policy, monitor procedures and equipment, and adapt solutions based on best practices; and

--Telephone system hardware upgrades.

The third area identified for improvement involved cases appealed to the Branch of Hearings and Review. We have made considerable progress in both the fairness and the timeliness of the hearing process, and I will detail those developments as part of my remarks about the FECA appellate process, which I would like to address next.

FECA Non-adversarial structure and appellate process.

The focus of today's hearing is FECA's process for providing injured workers the opportunity to seek review of decisions on their cases. The FECA process is somewhat unique, and is therefore not always well understood by practitioners who are more familiar with other appellate arenas. We believe the FECA structure is well-tailored to the particular needs of this federal self-insurance arrangement, and that it provides an extensive, fair, and balanced approach to resolving injured workers' disputes. No appellate system is without flaws, and we have been particularly concerned about backlogs which have resulted in undue delay in the issuance of decisions. But progress is being made in that regard, and the system as a whole is sound.

FECA's appellate process can only be understood in the context of the overall structure of this 84 year old compensation scheme. Since sovereign immunity bars suits against the Government except when allowed by legislation, the extent of judicial review available under FECA is not within the control of the Department of Labor. The Federal Employees' Compensation Act was designed by Congress to be a non-adversarial claims process, with OWCP, an entity independent of the employing agencies, serving as a neutral fact-finder and adjudicator of claims, as well as a payer of benefits. This reflects the original workers' compensation concept, in which employers relinquished defenses against suit, and employees gave up the possibility for tort recovery in exchange for reliable compensation for injury.

Under the FECA, employing agencies may provide information, dispute the claim, or ask OWCP for an explanation of the decision, but have no right to appeal an award. OWCP assists claimants by eliciting the information needed to perfect their claims; and by educating employers concerning their responsibilities to submit timely claims, grant initial medical authorization, continue regular pay, and accommodate work restrictions.

OWCP has a long and consistent history of approving most FECA claims, with an

overall initial approval rate of about 89%. The percentage is higher, 93%, for traumatic injury claims, which are generally more straightforward than occupational disease claims. After the claim has been accepted, subsequent benefits, such as compensation for periods of wage loss and medical benefits, are awarded based on the individual need and the information provided. Once ongoing wage-loss benefits are awarded, OWCP provides notice and an opportunity to comment before implementing any decision to terminate those benefits.

If a case or a benefit is denied, the employee has three possible avenues of administrative appeal. The employee may request reconsideration by the district office that made the original decision, an oral hearing before the Branch of Hearings and Review, or a review by the Employees' Compensation Appeals Board (ECAB). Access to the courts is also available in that rare instance where a claimant raises a substantial constitutional challenge to actions by OWCP or the ECAB.

At each level, cases are evaluated objectively and according to established procedure, regulation, and law. As a result of newly presented evidence, a better presented case, or merely the fresh perspective of the reviewer, many of these reviews result in an overturning of the initial decision. Approximately 43% of the claims that are initially disallowed are accepted after district office reconsideration, the quickest form of appeal. Overall, 35% of the decisions that go to the Branch of Hearings and Review are remanded or reversed, while approximately 25% are remanded or reversed by the Employees' Compensation Appeals Board. The larger percentages of reversals at the reconsideration and oral hearing stages reflect the introduction of new evidence at those levels; ECAB review is limited to the record made in proceedings before OWCP. While no process is perfect, we believe the overwhelming majority of these decisions result in reasonable outcomes, and outcomes that are consistent with those in similar workers' compensation systems, although the benefits under FECA are, in many cases, more generous than those available under state systems.

Understandably, injured workers whose appeals fail frequently do not agree with the outcome in their case. Similarly, employing agencies -- which are not parties to the appellate process but are financially impacted by OWCP decisions to award benefits – will often disagree with a result favorable to the appellant. But the FECA structure provides numerous opportunities for an injured worker to seek review of decisions to ensure that a fair assessment of the evidence is achieved. Moreover, an injured worker may utilize each level of appeal numerous times depending on the posture of his or her case. Furthermore, no matter how long ago a decision was made, a negative decision can always be reopened if there is evidence of clear error.

The administrative process is structured such that a reasonable outcome, and multiple opportunities to obtain review of that outcome, can be achieved with a minimum of cost to the injured worker. The vast majority of workers do not obtain legal representation at the early stages of adjudication, and as noted, those stages are overwhelmingly positive for straightforward cases. Union or other lay representatives do provide valuable guidance in a significant portion of cases, and OWCP is committed to working

with employee representatives and assisting them in carrying out their important role in the overall FECA system.

At the oral hearing and before the Employees' Compensation Appeals Board, representation is more common - about one-third of the cases at hearing, and nearly two-thirds of the cases before the Board are represented by either attorneys or lay representatives. This appropriately reflects the increasingly formal and complex procedures at these higher stages. We believe the system works well, with a minimum of cost to the employee and a minimum of overall administrative and "friction" costs. Transactional costs are likely to be considerably lower than in the private sector because the employing agencies do not have standing as parties in the appellate process, and are neither obliged (nor able) to expend substantial resources to vigorously defend against a claim. Employees are correspondingly freed from excess expenditures to overcome such a defense.

Although we believe the system is sound, equitable and efficient, we are as concerned about achieving improvements in this arena as we are in the other critical aspects of the FECA program. In response to problems raised in the hearing two years ago, OWCP made changes in its Branch of Hearings and Review. Supervisory oversight of hearing representatives was increased, so that hearing decisions receive more comprehensive qualitative review within the Branch. Further, the initial screening of newly received hearing request cases has been substantially enhanced. The staff responsible for this task are now required to make an initial case posture assessment within thirty days of the case's arrival. This ensures much prompter remands for new decisions when pivotal evidence that was previously lacking in the case has been submitted, or where a clear error is discovered. The Branch has dramatically increased the timeliness of remanding this set of cases from an average of 169 days in FY 1998, to 107 days in FY 1999, to just 88 days so far this year.

For cases that go to hearing we have also made tremendous improvement in timeliness of issuing decisions. In FY 1998, the average time to issue a decision on the merits of an appeal following an oral hearing was 361 days. That time was reduced to 277 days in FY 1999, and it is presently down to 242 days.

The Employees' Compensation Appeals Board is under the jurisdiction of the office of the Secretary of Labor, and operates totally independently of OWCP in applying FECA law and regulations. ECAB's decisions are binding as precedent, and OWCP claims staff not only has automated access to volumes of all published decisions, but also receives regularly-issued summaries of those decisions. In reaching its decisions, the ECAB may draw upon longstanding FECA precedent, as well as consider decisions reached with respect to similar issues under state workers' compensation systems.

Timeliness at ECAB has been a concern. During the 1990's, an increased number of decisions in the OWCP district offices – generated in large part by the additional OWCP staff approved by Congress to carry out the Periodic Roll Management project -- resulted in more appeals going to the Board, producing a growing backlog. While

OWCP has no authority or responsibility for the Board's administration, we have supported their requests for additional resources, which have been successful in recent years. In addition, following the Board's relocation into the Frances Perkins Building, we have been able to assist them directly by sharing OWCP's increasingly powerful and sophisticated computer support systems with them. Sharing our technology has allowed the Board to track and manage its caseload more effectively and efficiently, and has improved the process by which OWCP and the ECAB communicate, transfer case files, and the like. With increased staff and more sophisticated automated support, the backlog of cases pending with the Board has been reduced by 26% over the last two years.

We believe further improvements can be made in OWCP's and the Board's coordination. For example, OWCP is currently converting its case-handling process from traditional paper files to an entirely electronic system. We look forward to working with the ECAB to share this powerful technology, which will greatly enhance the smooth transition of cases between the two organizations, accelerate OWCP's submission of case files on new appeals, speed the review and decision-making process within the Board, and allow OWCP to more effectively handle non-contested aspects of cases pending Board appeal.

Thank you again for the opportunity to address these important issues. I will be glad to answer any questions the Committee may have regarding OWCP's role in implementing the FECA program.

Mr. HORN. Thank you.

And now the last presenter is Patricia Dalton, Acting Inspector General, Office of the Inspector General, U.S. Department of Labor.

STATEMENT OF PATRICIA DALTON, ACTING INSPECTOR GENERAL, OFFICE OF THE INSPECTOR GENERAL, U.S. DEPARTMENT OF LABOR

Ms. DALTON. Thank you, Mr. Chairman and Representative Turner, for inviting the Office of Inspector General to testify on our work in the Federal Employees' Compensation Program.

I'm here today in my capacity as Acting Inspector General to present the views of the Office of Inspector General, which may not necessarily represent those of the Department of Labor.

Over the last few decades, the OIG has made it a priority to effect positive changes and reduce vulnerabilities in the FECA program. The OIG's audits, evaluations and investigations have disclosed weaknesses that can lead to inefficiencies, ineffectiveness, or loss of Federal funds.

Some of our efforts related to customer service, program integrity, and due process issues, which I detail in my full statement, include: a cross-match between FECA and Social Security wage information that revealed potential claim and fraud and overpayments; a review of 13 Inspector Generals which we coordinated that found employing Federal agencies generally needed to improve the management of their workers' compensation program; a review of OWCP's customer service survey, which has led to changes in the way OWCP handles the survey process; an analysis of timeliness of claimant reimbursement of out of pocket medical expenses and the authorization of surgical requests; an audit of OWCP's financial statements, which noted that FECA does not have policies and procedures in place to ensure the documents are requested and received on a timely basis; and an audit analyzing improper medical provider billings, which revealed that millions of dollars are being lost annually because of improper or abusive medical provider billing.

I should note that OWCP has generally been very responsive to any recommendations that my office made.

The subcommittee has also asked that we provide our views regarding Federal Employee Compensation Act appeals process, and ECAB specifically. Mr. Chairman, we believe that central to the success of any compensation program is the need to ensure that the appropriate amount of benefits be given to the appropriate people for the appropriate timeframe. Complementary to this is the need to ensure an effective, timely mechanism to protect the due-process rights of individuals while protecting the integrity of the program at the same time.

While our work has predominantly focused on customer service and program integrity issues, we did briefly look at this issue in 1995. The OIG issued a report which examined a sample of 50 claims that had been appealed to ECAB. In that report, the OIG recommended that ECAB and OWCP reevaluate the current FECA claims and appeal adjudication processes to develop an action plan, including legislative proposals, where necessary, to better capture

performance of cost information and reduce the costs and adjudication times for these claims.

ECAB recently indicated that it had reduced its backlog and the average time it takes to adjudicate a case had been reduced from 24 to 16 months. However, we have not audited that information at this time.

Mr. Chairman, even though OWCP is implementing measures to increase the efficiency and effectiveness of the program, there are still issues that need to be addressed. While some of these are administrative in nature and can be resolved by OWCP, there are other solutions that are legislative and budgetary in nature. Among the legislative recommendations that we have made over the years include changes in the continuation of pay period, establishing a retirement age for beneficiaries, adding a wage reporting requirement for totally disabled recipients, and verifying employment information by the use of other data bases, such as Social Security information.

In conclusion, Mr. Chairman, our work in FECA and ECAB has served, I believe, to help the programs to be more effective and to work more efficiently. As demonstrated by our findings and recommendations, our efforts have focused on helping to improve services provided to FECA claimants and in ensuring the integrity of the program.

This concludes my oral statement. I would be happy to answer any questions.

[The prepared statement of Ms. Dalton follows:]

Statement of Patricia A. Dalton
Acting Inspector General
U.S. Department of Labor
Before the House Committee on Government Reform
Subcommittee on Government Management, Information, and Technology
U.S. House of Representatives

Good morning Mr. Chairman and members of the Subcommittee. Thank you for inviting the Office of Inspector General (OIG) to testify on our work in the Federal Employees' Compensation Act (FECA) program. Specifically you requested our views on customer service provided by the Office of Workers' Compensation Programs (OWCP), the agency responsible for administering FECA, and on the appeals process administered by the Employees' Compensation Appeals Board (ECAB). I am here in my capacity as Acting Inspector General to present the views of the OIG, which may not necessarily be representative of those of the Department of Labor.

Background – Federal Employees' Compensation Act

The U.S. Department of Labor administers several programs and statutes designed to provide and protect the benefits of workers. FECA is a comprehensive workers' compensation law covering some 3 million Federal and postal employees. It is designed to provide medical benefits, income replacement, and certain supportive services to employees with work-related injuries or, in the case of deaths, survivor benefits to family members. OWCP is responsible for making eligibility determinations and for the initial reconsideration if a claim is denied. Benefits are paid from the Employees' Compensation Fund which is principally funded through chargebacks to the Federal agencies that employ the injured worker. Therefore, the FECA program affects the budgets of all Federal agencies. In its FY 2001 budget justification, OWCP stated that in FY 2000, they will receive approximately 165,000 new cases in addition to over 40,000 cases on their periodic rolls. This year, FECA expenditures are expected to total about $2 billion.

Background – Employees' Compensation Appeals Board

The Employees' Compensation Appeals Board (ECAB) is a three member, independent, quasi-judicial body that has been delegated exclusive jurisdiction by Congress to hear and make final decisions on FECA determinations appeals. ECAB is independent of OWCP, and its jurisdiction is strictly appellate and extends to questions of fact and law. ECAB renders decisions that are binding upon OWCP and must be accepted and acted upon by OWCP.

It is important to note that after an adverse decision has been appealed and affirmed by OWCP and ECAB, the claimant may repeatedly petition OWCP for reconsideration of the same issue, if the claimant has additional documentation. According to its FY 2001 budget justification, ECAB will receive approximately 2,800 appeals in FY 2000. Moreover, the budget justification states that a total of 4,546 FECA appeals were pending before ECAB at the beginning of FY 2000, and that approximately 3,450 appeals are projected to have some action taken during FY 2000.

OIG Activities Relating to FECA

Over the last two decades, the OIG has made it a priority to effect positive changes and reduce vulnerabilities within the FECA program through our audits, investigations, and evaluations. The OIG's work has disclosed weaknesses that can lead to inefficiencies, ineffectiveness, or loss of Federal funds. I would like to note that OWCP has been very responsive to our recommendations. The work that the OIG has performed has led to many substantial and positive changes within OWCP. I will now discuss some of our most significant reviews to illustrate our efforts related to customer service, program integrity, and due process issues.

FECA Customer Service and Program Integrity

Mr. Chairman, our reviews have identified and made recommendations to improve a number of customer service and program integrity issues in the FECA program. In turn, OWCP has recognized the need to implement changes in response to our concerns. In fact, in its Strategic Plan, OWCP states its recognition that injured workers should be served by a fair, swift, and people-oriented compensation system. One of OWCP's performance goals is to "increase customer satisfaction with FECA services by 10%, as measured by a customer satisfaction survey."

Draft Audit on Crossmatches between FECA and Social Security Wage Information

Our most recent audit to improve overall program effectiveness looked at whether FECA claimants earned wages while receiving long-term total disability compensation; whether automated crossmatches with Federal or state wage records could assist OWCP in identifying potential claimant fraud or overpayments; and whether internal controls ensured that claimant wages were detected and benefit amounts were adjusted. Our audit involved 27,050 FECA claimants who had received total disability compensation for the entire Calendar Year 1996. Of those claimants, we found that 905 of them had total earnings of $2.9 million. The OIG concluded that automated crossmatches with SSA would result in program savings including reduced compensation, medical, and administrative costs. The DOL-OIG also recommended that OWCP crossmatch Social Security wage data with their records for work status monitoring. OWCP, however, cannot institute this recommendation without a change in the law. This audit is currently in draft.

President's Council on Integrity and Efficiency FECA Review

Mr. Chairman, part of effective customer service is the need for all Federal agencies to provide supportive services to help employees return to work when appropriate. In 1996, under the leadership of the DOL-OIG, the President's Council on Integrity and Efficiency (PCIE) issued a Consolidated Report on FECA. This report summarized the results of audits conducted by 13 participating Inspectors General regarding agencies' effectiveness in managing their workers' compensation program. Each participating

Inspector General was responsible for follow-up on specific recommendations they made to agency officials. The report disclosed that:

- Employing Federal agencies generally needed to improve the management of the workers' compensation programs;
- Nine of 10 employing agencies did not have effective return-to-work programs and the PCIE concluded that employing agencies were not effectively monitoring the work status of injured employees;
- Seven out of 10 OIG's reported that agency workers' compensation files were out of date or missing altogether. Moreover, there was a perception in many agencies that claimants receiving compensation from OWCP were no longer the agencies' concern;
- Twelve of the 13 employing agencies were not adequately verifying their FECA chargeback cost reports, which reconcile chargebacks between OWCP and employing agencies. Most agencies had concluded that it was not cost effective to verify the chargeback reports, therefore, many employing agencies were paying more in FECA costs than was necessary; and
- Five of the IG's reviewed FECA claim forms processing and all five found that their agencies were not processing the forms in a timely manner. As a result, many injured employees had no income while waiting for their FECA benefits to begin.

While the DOL-OIG has not conducted a follow-up audit, we are aware of several new initiatives that agencies are implementing that relate to some of the PCIE recommendations. For example, several Departments have instituted electronic filing to submit claims directly to OWCP. In addition, OWCP also has initiated the Early Nurse Prevention Program to help claimants return to work as soon as appropriate, thereby reducing costs in the program.

Customer Service Evaluation

In addition to the PCIE Report, we reviewed OWCP's 1995–1998 FECA customer service surveys. We analyzed the surveys' methodology in order to determine its accuracy and usefulness in providing sound information about customer service. Although OWCP has made efforts to improve the surveys each year, our analysis revealed the existence of methodological flaws in several areas, including survey design, measurement of customer service, sampling, response rate, and survey operations. As a result, we made a number of recommendations to enhance the accuracy of the data by improving the survey methodology and thus help OWCP judge and improve the quality of customer service provided. The agency agreed with most of our recommendations and incorporated them in its subsequent survey.

Medical Reimbursements and Authorization of Surgical Requests

Another customer service issue that we have reviewed is that of medical reimbursements and authorization of surgical requests. In 1999, the OIG issued an evaluation of the timeliness of claimant reimbursement for out-of-pocket medical expenses and requests for surgical authorizations in OWCP. Our review found that OWCP surpasses its "95 percent" 60-day performance standard by paying 96.9 claimant-submitted bills withing 60 days, although it falls short of the "90 percent" standard in 28 days by paying 82.1 percent of claimant-submitted bills within 28 days. OWCP stated that it implemented an automated bill review system to increase the percentage of claimant-submitted bills paid. In this review, we also examined OWCP's

handling of requests for non-emergency surgery. We found that OWCP had not set a performance standard in this area and recommended that the agency do so. In its response to the evaluation, OWCP stated that this was not feasible at the time the evaluation was issued. They indicated that response times vary greatly, depending on the type of request, and it would be difficult for them to track the information required under their current information system. However, OWCP stated that it is analyzing the issue and, by FY 2001, will determine whether it needs a new standard.

Financial Statement Audits

In addition, Mr. Chairman, each year, the OIG is required to audit DOL's financial statements. In the most recent report, we continued to note weaknesses related to several areas of the FECA program. For example, we identified the need for improvements in verifying the continuing eligibility of claimants. The audit disclosed that FECA does not have policies and procedures in place to ensure that documents are requested and received on a timely basis. This is necessary to confirm a claimant's continuing eligibility or, in the case of an investigation, to determine a claimant's intent to defraud the program.

Improper Medical Provider Billings

Mr. Chairman, we have also focused significant attention to identifying program integrity weaknesses that can have a bearing on customer service because resources are diverted away from serving legitimate claimants. In 1997, we issued a report which

revealed that millions of dollars are being lost annually because of improper or abusive medical provider billings. In that report, we recommended that OWCP procure a commercial system to screen medical billings for code manipulation and pursue collection actions, if warranted. These screenings are critical to quickly identify inappropriate claims. In its FY 2001 budget justification, OWCP indicated that it has implemented a commercial software system to screen incoming medical bills for duplicate charges and/or abusive billing practices.

The Appeals Process

The Subcommittee has also asked that we provide our views regarding the FECA appeals process. Mr. Chairman, we believe that central to the success of any compensation program is the need to ensure that the appropriate amount of benefits be given to the appropriate people for the appropriate time frame. Complimentary to this is the need to ensure an effective, timely mechanism to protect the due process rights of individuals, while protecting the integrity of the program. While our work has predominately focused on customer service and program integrity issues, we have briefly looked at this area.

Employees' Compensation Appeals Board

In 1995, the OIG issued a report that examined a sample of FECA claims that had been appealed to ECAB. As I mentioned earlier, ECAB is the Appeals Board for FECA

claimants. Our survey of 100 FECA claims noted that each claim had an average of 5 decisions per claim, meaning that, on average, each recipient had appealed their case 5 times. Of the 528 decisions on the 100 sample claims, the Board agreed with 89 percent of OWCP's prior decisions. Based on this, and the fact that claimants can repeatedly appeal adverse decisions, the OIG recommended that ECAB and OWCP reevaluate the current FECA claims and appeal adjudication processes and develop an action plan, including legislative proposals, where necessary, to better capture performance and cost information, and to reduce the costs and adjudication times for these claims.

ECAB recently indicated that it had reduced its backlog and that the average time it takes to adjudicate a case had been reduced from 24 to 16 months. However, the OIG has not audited this latest information.

Recommendations to Improve the FECA Program

Mr. Chairman, as I have stated previously, OWCP has consistently worked with us to improve the efficiency of the FECA program and decrease the level of fraud and abuse. Even though the OIG has made great strides to increase the efficiency and effectiveness of the FECA program, there are still issues that need to be addressed. In the past, the OIG has made recommendations to strengthen the program. Some of these are administrative in nature and can be resolved by OWCP, but there are other solutions that are legislative or budgetary in nature. These include changing the

continuation of pay period, establishing a retirement age for beneficiaries, adding a wage reporting requirement for total disability recipients, and verifying employment information by using the new hire or Social Security databases.

Conclusion

In conclusion Mr. Chairman, our work involving FECA has served to help the program to be more effective and to work more efficiently. As demonstrated by our findings and recommendations our efforts have focused on helping to improve service provided to FECA claimants while ensuring the integrity of the program. This concludes my written statement and I would be pleased to answer any questions you or the other members of the Subcommittee may have.

Mr. HORN. Well, thank you very much.

Let me just ask a general question first. We've got the administration and representatives, even the Inspector General, looking at the whole department. We've got the people that are saying, hey, there's a problem here, what are you going to do about it. I mean, do you gentlemen recognize, for example, Mr. Walsh, Mr. Hallmark, that there is a problem?

We have 300 cases that have come to my office. And before I send them to my subcommittee staff, I've looked at every single one of them. Ms. Bailey, the professional staff member working on this problem, then gets it. And believe me, she's read at least 300 cases also.

So, do we admit in the executive branch that there are problems here? And if so, is it an attitude problem? Now, some usually say, "oh, it's a resource problem, we don't have enough people." You've got a lot of people. The question is, what's their attitude? How do they function? What sort of hierarchy do you have here within your program? What do you think, Mr. Walsh?

Mr. WALSH. Well, I think timeliness, Mr. Chairman, is a real consideration. And as I pointed out, you asked us a question in 1998, you wanted to know about what was going on, why we had the backlog in the first place. May I read you my answer?

Mr. HORN. Yes, it was in your testimony, but go right ahead.

Mr. WALSH. I said from 1985 to the end of 1991, the pending case load grew approximately 60 cases per year, which was certainly manageable. In 1991, we had a pending caseload of about 1,000 cases.

In contrast, between 1992 and 1996, the pending caseload increased an average of 791 cases per year, more than we could handle. And ECAB work force remained steady.

Now, what's happened is, we've got more resources, we've got about 51 people now. But we had about 34 then. So from our viewpoint, the most serious question is getting out timely decisions. As far as the decisions themselves, I feel very good about the decisions. Our attorneys are very industrious, they have high output and they're working very hard. And their whole goal, and our goal, is to reduce this time period to what I think is a manageable time period, about 10 months.

Mr. HORN. It looks like you've made a change and that you've processed more cases. But when you hear in the rest of this organization, they lose files, don't answer calls, etc? Does that worry you, as an administrative law judge?

Mr. WALSH. Well, yes, certainly, that would worry me. But I'm of course concerned and responsible for my own agency. And I said not too long ago, down in Florida, that in our view, the claimant is our customer, is our constituent. And it's our duty to see that they get a fair hearing. And that's what we're pursuing. And our attorneys are pursuing that to the best of their ability.

Yes, we are, as a board. So I would simply say to you that what's most important is that we give a fair decision in the rationale for the decision.

Mr. HORN. I understand you're saying it's below your level, in a nutshell. You feel you've done your best with your appellate actions.

Mr. WALSH. I can't comment on another agency. But I think we're doing, I'm satisfied we're doing very good work.

Mr. HORN. OK, I'll take that for the record. Mr. Hallmark, what are you doing to straighten it out? Do you admit there's a problem?

Mr. HALLMARK. I believe my testimony suggests that we understand there are issues that we need to improve. There's no question that there are cases where problems arise. Any system that has 170,000 cases per year is going to have some cases where there are surely going to be disputes and where there are errors made. We have, as I said, a number of strategic goals to address improvements in a wide range of activities.

One of them has to do with the whole issue of how we communicate and whether or not we are accessible and whether people can get a phone call back. That is an area that we do believe is a resource intensive area, because we get 2 million phone calls a year. Our staff tell us they are pressed to do the basic adjudication and claims processing work, and adding to that, answering more and more telephone calls, is a difficulty for them. We have a proposal on the table right now.

Mr. HORN. Excuse us for a minute. We obviously have two votes on the floor. We were told it would be at 11:30, and they've pushed it up a little. So I'm going to finish my 10 minutes and when we come back, Mr. Turner will have 10 minutes. And so it will go until we find out where we're headed here.

I would ask the Inspector General, when you've got a troubled operation like this one what's been the investigation procedure, and what have you done about this one?

Ms. DALTON. Mr. Chairman, we are continually in the Office of Workers' Compensation, as with all the other Department's programs, looking at them from an oversight capacity as well as from an investigative capacity for specific problem areas.

Mr. HORN. Well, do you think there's a problem with the program? First, I've got to find out if anybody thinks there's a problem, or are we the only ones in town that think that way?

Ms. DALTON. Certainly our reports have indicated that there are problems there. The last time I testifited before this subcommittee, we mentioned our review of OWCP's customer satisfaction survey, which I believe was a valid attempt to find out how OWCP was being received, and how it was satisfying its customers.

We indicated that a number of improvements needed to be made in the survey, as well as recommended using other tools, such as focus groups, to gain information on how OWCP was serving its customers. Certainly there are indications that other improvements are needed. I know certainly from my own experience in dealing with people that have called in complaining to us that there are some very legitimate concerns.

One thing that I think hasn't been mentioned here, but I believe is in Mr. Hallmark's testimony, is a need to communicate more clearly with claimants. I think there's a lot of confusion, because we speak in Government jargon as opposed to plain English. I think that relates to some of OWCPs problems, I also think the Department needs to do a better job of explaining where we are in a process, what's going on, what people can expect, and what do they need to do.

Mr. HORN. Well, I think that's well put. And I might say, Mr. Hallmark, what bothers me is way down at the bottom entry. Now, part of that problem is the employing agency. The Post Office, for example, had a number of cases where they refused to even give claimants a form. And apparently, middle management types in the Post Office, think they can keep their salary if they show that nobody's injured down there.

Well, that's nonsense. They ought to give injured employees the form, and if they don't, you should be punishing them for not complying with the law.

Now, how do you solve that?

Mr. HALLMARK. Well, it's clearly the case, and Ms. Dalton's comments regarding our plans and efforts to improve communication go to this point. Oftentimes, injured workers don't know exactly who it is, where the problem is, and sometimes the problem is some kind of a block at the agency level, or some kind of failure to communicate between the agencies and OWCP.

That's one of the reasons why we have worked much more diligently in the last several years to try to improve our coordination with the agencies, and to ensure that where problems like the ones you've suggested, and they do occasionally happen, although it's against the law, that we have ways of identifying that it's happened, and then going to higher level management to ensure that it stops.

The agencies are, including the Postal Service, are increasing the level of their coordination with us and their support of our programs. But frankly, it is the case that they have troubles as well as we do.

I think, however, I would take issue with the notion that we are a program in crisis. I think we are a program that always is going to have some difficult disputed cases, and that we're a program that has not been able to communicate as well as we should with our customers.

But I think we are fundamentally moving in the right direction, and I really believe that as the next few years unfold, the projects and the initiatives that we have in place will start to address a lot of the problem. You mentioned lost cases. Our imaging process is specifically addressed at having an electronic control, so that we don't have, as we do now, hundreds of thousands of paper files that in fact do on occasion get lost in the shuffle, as they move around in offices. We are addressing those kinds of issues.

Mr. HORN. Do you have that kind of system in place now?

Mr. HALLMARK. It's in place in five of our district offices and will be completed this year.

Mr. HORN. Have you seen a difference in——

Mr. HALLMARK. Absolutely.

Mr. HORN [continuing]. The five offices versus the others?

Mr. HALLMARK. Well, it started just this past winter, in its early days. But we see already that problems like a doctor calling in to say, I need your authorization for a medical treatment, whereas before that call had to be put on hold while somebody went and found a paper file, now the person on the telephone bank can simply pull up that case on their screen and say, yes, I see the report you submitted, but you need to give me this additional piece of information

regarding its relationship to this injury. They can then fax that piece of information to us and get a decision on the spot. We've seen that kind of improvement already.

Mr. HORN. Mr. Weiser, have any of your customers or clients been with one of these five offices where imagery is used to get their files? Or are you just running into the ones that don't have this technology?

Mr. WEISER. I don't know what the five offices are, Mr. Chairman.

Mr. HORN. Well, I take it Jacksonville isn't one of them.

Mr. WEISER. Well, if it's in Jacksonville, FL——

Mr. HALLMARK. Jacksonville was our first office. I have to tell you that this is being implemented with regard to new claims. So the claim that was filed in 1999, for example, in Jacksonville, would not currently be imaged. That's our plan, to move to that later. Right now, all new claims are being turned into this image system.

So if a claim was filed in February or March 2000 in Jacksonville, it's now being handled in that fashion. Also Dallas, San Francisco, New York and Cleveland.

Mr. HORN. Any comments by you, Mr. Sydnor? Have you seen any change?

Mr. SYDNOR. No, sir, I haven't.

Mr. HORN. Because you've had a rather long experience there.

Mr. SYDNOR. Any change right now would be too little, too late, as far as I'm concerned.

Mr. HORN. Mr. Fox, have you seen change?

Mr. FOX. No, sir, I haven't.

Mr. HORN. And your representatives in the field back you up on that?

Mr. FOX. I believe so.

Mr. HORN. Well, unfortunately, we have to go and vote. So we're in recess then, and Mr. Turner, when he comes back, he will have 10 or 15 minutes to ask questions, because that's what I took. So we're in recess.

[Recess.]

Mr. HORN. Recess is over, I now recognize the gentleman from Texas for questioning.

Mr. TURNER. Thank you, Mr. Chairman.

Mr. Hallmark, you heard Mr. Weiser talk about a gentleman named Mr. Gregg, his case where they took 23 months before there was any action on the case. Was that at the initial claim level, Mr. Weiser?

Mr. WEISER. No, Congressman.

Mr. TURNER. That's on appeal?

Mr. WEISER. It was at ECAB.

Mr. TURNER. All right, so I need to ask Mr. Walsh. That was 23 months before it was discovered that the file wasn't complete, which Mr. Weiser pointed out should have been discovered within at least 30, 60 or 90 days and been corrected. Instead, it caused the case to go all the way back, get the trial materials, and then I guess you had to wait another 20 or so months.

Mr. WALSH. I'm not sure, Congressman, if he's talking about a case that was remanded, is that what you're talking about, Mr. Weiser?

Mr. WEISER. Yes, it was remanded this year.

Mr. TURNER. But the reason for its remand was the fact that the file wasn't complete, which seems to me to be a ministerial matter, it should have been determined within at least 30 to 60 days and corrected.

Mr. WALSH. Yes, if I may——

Mr. TURNER. I guess what I'm getting at here, what kind of a system do we have? It sounds like every time you appeal, the file gets a number and it sits over there until somebody 20 months later decides to look at it and make a decision, have oral argument or whatever.

What kind of initial screening do you have in place to see if the basics are there to prevent that kind of problem from occurring?

Mr. WALSH. What happened, it sounds like, in that case, I can't speak specifically to it, except it was remanded to OWCP, we initially request when a notice of appeal is filed, we request the case from OWCP. And they have an amount of time to get that to us.

If in fact they can't get it to us, then the only thing that we have available to us is what we call kind of an order to show cause, we say, get the case to us in 30 days, or we'll have to remand it for reconstruction.

Now, we don't have to do that in too many cases, because OWCP does the very best they can to get the cases to us. But because of our backlog, we hate to send the case back, remand it back, even though we don't have it. Because once it goes back, OWCP has to issue another decision. And then it has to be appealed back up to us.

And so we work with the OWCP to try and get that file. Now, it could have been lost, a lot of things could have happened. But of course, we can't decide the appeal without the file.

So I don't know exactly what happened in that particular case. But if there was an order remand, it was an order back to the office to get the file together, reconstruct it. And your question is, well, why did it take 23 months? I can't answer that right off. It doesn't happen very often.

But we do give OWCP as much time to get the case to us, because we are reluctant to send it back, Congressman, because it's going to have to start back up again. So we make every effort we can to cooperate with them to get that case.

Now, if it's lost, there's nothing we can do about that.

Mr. TURNER. Mr. Weiser, what do you think about that response?

Mr. WEISER. Frankly, Congressman, I don't find it acceptable. It was not a matter of reconstructing the file. The remand order was, we don't have the file. Get a new decision and then we had to appeal it back.

And it's not the first case. I had a case called Linda Joray, out of Oklahoma City, within a month of that. The same thing was being done. I filed a motion at that point objecting to the remand. And suddenly, they got the file and a decision was rendered.

Now, I find it hard to believe that you cannot determine within the first 30, 60 or 90 days of receiving an appeal, you cannot deter-

mine that you either have or do not have a file from the OWCP district office. In at least the cases I've had, action is not being done, and these are cases done this year, this is the year 2000, that action is not being taken as far as remands, or the case, the John Bright case I mentioned, on the executrix issue, not being done until the 23rd month. And that's unconscionable, in my view, for an administrative office to do that.

Mr. TURNER. How many claimants have benefit of legal counsel in filing these claims and pursing these appeals?

Mr. WEISER. I cannot tell you, Congressman. I don't think there are a lot. Because I know a number of attorneys that I've dealt with that do not want to take the claims. The adjudication process is too long. And as far as the attorney fees, unlike Social Security or VA, the client has to pay them from whatever they get. And it has to be approved by OWCP, you have to send your fees in for approval. You may not get fees in advance. You can get expenses in advance, but not fees. That's under the law.

And I don't have a problem with that. But I don't think there are a lot of attorneys representing. Because it is just not an area that they see quick results from or really a fair process.

Mr. TURNER. What percentage of your practice is involved in these Federal worker comp claims?

Mr. WEISER. I would say about 30 to 40 percent, maybe, Your Honor, I do basically Federal employment law, or Congressman, I do Merit Systems Protection Board, OPM disability, Social Security and OWCP. So it's about 30 to 40 percent.

Mr. TURNER. Mr. Hallmark, what percentage of cases have an attorney representing the claimant?

Mr. HALLMARK. I was just looking through my statement. I believe there's a reference in here somewhere.

My rough understanding is that roughly a third of the cases are represented at our hearings level and nearly a half at the ECAB level. Since the process is more streamlined, typically at the district office level, the claimants are represented generally either by a union representative or not represented at all at the first initial audience.

Mr. TURNER. Mr. Weiser, I think Mr. Walsh or Mr. Hallmark described this Federal system as a non-adversarial system. Do you agree with that characterization?

Mr. WEISER. I do not, Congressman. I think that too often it's the claims examiner working with the agency to deny the claim. I really believe that they are looking for ways to deny claims. And Mr. Kunkel's case is a prime example. They added two work factors that would never pass muster, because you'd have to show abuse or error. That would be a disciplinary action. That's one, I can't recall the other.

But Mr. Kunkel never alleged that as creating his emotional condition. The agency brought it up. The other was the death of his sister. That was brought forth by the agency. But in the statement of accepted facts by the district office, those two appear as work factors. Unclaimed by Mr. Kunkel.

Now, if a district office is to be fair to the claimant, if they are not adversarial, why are they adding as work factors that which

the claimant does not claim, but the agency claims? And work factors that you cannot prevail on? That is my question.

And it's not just Mr. Kunkel's case. There are others like that.

I think it's adversarial. I think, too, the forms, I've given up trying to get the forms from OWCP or even from an agency. I go on the Web site and pull them down and send them to my clients. I'm waiting for the day when they say, those aren't our official forms, that you've got to do it on a certain form. That hasn't happened yet.

But I had a case in Oklahoma, Mr. Bieger. He was on OPM disability retirement. He had his claim approved. We asked the OWCP to send us a CA–7. He was a former postal employee. They said, go to his employer. I said, the postal service isn't his employer, he's on disability retirement, he's making an election to take OWCP. Why can't you send the form?

Never got a response back. So I sent Mr. Bieger the form off the Internet.

But this is the kind of responses I have seen. And I'll grant you, I'm not one that handles every case in the country. But in the cases I have handled, there have been problems.

Yes, we have prevailed in cases. But in many cases, we were fighting all the way through. And we're fighting our own OWCP, we're fighting an agency because they work, in my view, hand in hand. They simply do.

Mr. TURNER. Mr. Hallmark, what do you have in place to prevent undue influence by the agencies over the decisions made by the people in your office?

Mr. HALLMARK. We have a substantial training program for new claims examiners. And we have a procedural manual that lays out in fairly explicit detail how decisions are to be made. I think it's very well understood by our claims examiners around the country that we are an independent body, that we have a responsibility to be objective, that we obtain communications from the agencies, because they in fact are the ones who know what the circumstances are, they have information about pay rates and so on which would be appropriate for filing of wage laws claims.

But we are not guided by agency activity, and we do as best we can to shield our claims examiners from being hounded, if you will, as has been suggested here. I don't believe that our claims examiners in the district offices feel that they must reach a particular result. And I'm not aware of agencies attempting to pressure, or they certainly don't attempt to pressure me to come up with a result of one kind or another on a case. Although clearly, the agencies have an interest, they have a fiduciary responsibility, and they work to try to constrain cost.

But that does not yield, in my view, inappropriate discussions of that kind. Where we are aware that they happen, we address that as inappropriate.

Mr. TURNER. I see my time's expired.

Mr. HORN. Go ahead.

Mr. TURNER. One followup question. Do you have a situation where these claims are actually handled by a representative in your office in a way that they end up handling the same agency claims? Do they end up specializing, I don't mean specializing, do

they end up handling a disproportionate share of claims from one agency because of perhaps the location of the district office?

In other words, would we have a situation where someone in your office would end up having their caseload being 60 percent from one agency, simply because of the location of that district office and its relationship geographically to some Federal agency?

Mr. HALLMARK. I understand your question. We have several different methods of assigning work to claims examiners. The predominant method is that cases are assigned on a random basis, based on the last three digits of the case number. So it is not, that's a process which spreads the cases across the office. In some cases, we do have specialization, with respect to certain types of cases or certain stages. But even within those specializations, in other words, initial adjudication, post-adjudication, return to work efforts, the assignment is on a random basis.

And I think in fact there is no tendency to create that kind of an overly tight relationship with a given installation.

Mr. TURNER. Did I heard you say earlier that 90 percent of claims are approved and 10 percent denied?

Mr. HALLMARK. More than 90 percent of what we call traumatic cases, which are injuries that occur on one work shift, are approved, something like 93 percent. That's an outcome that has been fairly consistent over a number of years.

Occupational disease cases, which are more complex, and some of the cases that Mr. Weiser has been discussing today, where there are a whole series of different factors which have to be considered as to whether the condition is caused by the work or by other activities, are less likely to be approved. I think the number in that case is in the high 60, low 70 percent, and the average between those is around 89 or 90 percent.

Mr. TURNER. Mr. Walsh, from your perspective, you said that when the case reaches your appellate level that there is no ex parte communication with the agency at that level.

Mr. WALSH. Yes, we have nothing to do with the agency. We've never been approached by, not in my time, the agency to affect a case in one way or the other. As I say, it's non-adversarial. The agency is not a party. They cannot produce briefs, they cannot present oral argument. They're out of it.

Mr. TURNER. But the Solicitor General?

Mr. WALSH. The Solicitor represents the Office of Workers' Compensation before us, in oral arguments, for example. They are in effect a party to the case.

But the agencies are not. They are of course self-insured, because of the chargeback, and they have a vital interest in it, because they pay the money. But they do not appear before us, nor do they have any influence upon us.

Mr. TURNER. Well, am I incorrect in stating that the Solicitor General is in effect standing in for the decision that was made at the lower level?

Mr. WALSH. Yes.

Mr. TURNER. He is advocating denial of the claim?

Mr. WALSH. Yes, I think that's right, he does represent the Office of Workers' Compensation. But in my remarks, I said we distinguish between the adversarial system and the non-adversarial sys-

tem, in that the employer in the adversarial system can fight the claim all the way through administrative process and into the courts. Whereas in the FECA system, the non-adversarial system, they cannot. The employer cannot fight the claim.

What they do initially is they can investigate it, and furnish facts to OWCP upon which then OWCP will make a judgment. But they are not a party to the claim. That's the difference between the two systems.

Mr. TURNER. Mr. Weiser, that to me sounds like a distinction without a difference. The Solicitor General is there to be sure that the decision to deny the claim is upheld. Does that sound like an adversarial system to you?

Mr. WEISER. Yes, that would be my view. My major concern with ECAB has been the length of time it takes. And then the procedural way that it's handled, which I think is highly improper. You shouldn't have to wait 23 months to find out that, gee, you don't have the case file. And then the case is remanded, and when it goes back up, now you have another 24 months.

I heard them say that there had been 10 months and 16 months. I haven't seen it. And I'm talking this year, 2000. I have not seen it, with the cases that are pending at ECAB that I have. We are getting the decisions back in a 23 to 24 month period.

Mr. WALSH. Congressman Turner, if I can just add, if Mr. Weiser's through, add to my remarks about the Solicitor. In the majority of the cases, probably 95 to 96 percent of the cases that come before us, they simply say, we're not making any comment, we're not filing any brief. Where we see the briefs and what you might call adversary position is in the oral arguments, where they file a brief, state the case, defending the decision of the OWCP. But I wanted to make it clear that in most cases the Office does not say anything or file anything, they just say, we're not going to file a brief in the case.

Mr. TURNER. Well, it sounds to me like our major problem is time here. I know you have a request in through the President's budget for additional funds for additional staff. I know I agree with the chairman, a lot of times I think we are told the problem is money, and yet maybe there are other problems that could be solved. It sounded like some greater initial review of these files as they come in would be helpful.

Mr. Hallmark, when your people look at these claims, is there any difference between the processing time, the time from initial filing of the claim to a decision for those that end up being granted, that 89 or 90 percent, versus what may appear to be the tougher cases that you end up denying? Is there some way in the early stage to make a distinction where you get on a different path, if you have a relatively clean claim?

Mr. HALLMARK. Well, clearly, the purpose of workers' compensation is to try to reach prompt decisions on those cases which are straightforward. So the vast majority of your straightforward slip and fall events that occur, which is the bulk of the 170,000 claims, are dealt with very, very rapidly. And medical benefits ensue, and that's usually the end of the story.

Where a case has to be developed, or in other words, there are questions, either the agency has raised a question about the work-

relatedness of the condition, or there is a medical issue about whether there is in fact a disability as such, those events take longer. And yes, occupational disease cases, which are more complex, we set a different standard than we do for traumatic injuries, which we typically, 97 percent of the time, we complete within 45 days.

Occupational cases, we complete simple ones, which are a category we recently created, we do within 90 days. More extended ones, such as stress cases, we try and accomplish within 180 days. So there are different gradations. And there always are cases where the complexity of the development, the evidence is such that it takes longer than what our standard is. That's why our goals are not expressed as 100 percent. We will have a goal of in some cases 90 percent or 80 percent within a certain timeframe. Because we know that there are always some cases that deserve and should have more careful review than a particular timeframe.

Mr. TURNER. Do you have statistics that you could share with the committee that would show us that, specifically for example, if it's 50 percent of your claims are disposed of within 90 days, and 10 percent take 2 years, that would be interesting information for us to see. Do you have it broken down in that fashion?

Mr. HALLMARK. We have lots of different data. I don't know if it's in exactly that fashion. But we certainly can tell you at any given moment how many cases were adjudicated within our timeframes, the goals that we set, which is 45 days for traumatic, 90 days for simple occupational disease, 184 extended occupational disease.

And we also can tell you at any given time how many have gone beyond, say, 1 year. And I think as of June 30th, that number was 50, or thereabouts. We keep track of those cases that are outliers, because we know by experience, as you look at this kind of process, it's easy for a case to fall off the screen, if you will, and become—take too long. So we have reports that tell us, this many cases are over 1 year in district office X, Mr. district director, will you ensure that a letter goes out to that claimant every month explaining where the status of that case is.

That's part of our process, and part of what we do to ensure that even though a case may take longer for reasons that are legitimate, that it doesn't cease to be a concern for managers and claims examiners.

Mr. TURNER. How many district offices do you have around the country?

Mr. HALLMARK. We have 12 offices.

Mr. TURNER. And do you develop statistics that show that the workload is fairly evenly distributed between those 12 offices, or do we have some offices that have greater workload than others?

Mr. HALLMARK. The offices range rather greatly in size. But we have the process whereby we allocate staff as based on incoming caseload. So it is proportionate insofar as we possibly can make it to the workload that exists in each office.

Mr. TURNER. Have you monitored the length of time that it takes to process and dispose of claims by district office to see if they're——

Mr. HALLMARK. Absolutely. We do that on a quarterly basis to ensure that problems don't arise. We look at it, and where there

are problems, where an office starts to have difficulty, we have remedial discussions about how to fix it. And that's something that's been done in this program for 20 years, and necessarily so, because this kind of workload cannot be allowed to be left for a general process, routine process. You must stay on top of it.

Mr. TURNER. And I assume you do the same for the individuals who review the claims, to be sure that their performance is at least up to some acceptable standard?

Mr. HALLMARK. At our appellate level, the hearings and review level, the data that I mentioned in my statement this morning are a part of the way we measure those kinds of things. We also look at standards that each hearing representative has for issuing their decisions.

And by the way, the timeliness statistics I talked about at the district office level are also measured at the individual claims examiner levels, so that we can identify problems and fix them right down at the immediate source.

Mr. TURNER. Well, in conclusion, Mr. Chairman, I think I can see some evidence of progress here. But it seems like we do have a long way to go in terms of timely processing. And I think we need to all recommit ourselves to trying to be sure we solve these problems. It's not the way we should treat our Federal employees when they have an injury on the job. And anything we can do to improve that, I think both the chairman and I would be very supportive.

Thank you, Mr. Chairman.

Mr. HORN. Well, thank you.

Let me followup on a few things. When you have a case, Mr. Hallmark, that has been turned down by Mr. Walsh's operation and remanded back to OWCP for more information, do you go through that or have your staff go through it and straighten out where the errors were made by the various offices? Mr. Walsh, how many cases do you reject, because of something that's been done within the administrative process?

Mr. WALSH. Mr. Chairman, it varies from month to month. But it averages about 25 percent of the cases are remanded for various reasons. Either there's been an error or law or further development needs to be taken. And the office usually follows those, what we have in our decision.

Mr. HORN. Well, Mr. Hallmark, does this give you a chance to straighten out a casefile, or other administrative problems?

Mr. HALLMARK. Mr. Chairman, we do two things with respect to the cases decided at ECAB. They set precedent for us, and so we review the decisions that the board makes to ensure that we are in synch with the view of the law that they establish. And obviously law is, as I'm sure you're aware, evolves over time and it's important for us to make sure that our claims examiners learn that interpretations have shifted.

So we send out, on a roughly monthly basis, a listing of the most significant decisions of that kind, where either there has been a slight shift in the interpretation, or where a systemic kind of interpretation is identified that we need to fix. In other words, the board has said, we're seeing this kind of error more frequently. And we pick up on that and use it as a training device.

The second thing we do is that, as each individual case comes back to us, obviously we have to then correct whatever the issue has been, we have been directed to do by the board, which may mean either just simply reversing the decision or proceeding with further development. Those cases are also reviewed by district managers to ensure that we understand why the error occurred in the first place. And again, used as a training device for the specific staff, so that we don't repeat them.

Mr. HORN. Mr. Walsh, when you see a case that's been sitting around for 2 years in the system somewhere, do you ever expedite their hearing date? How do you decide whose case comes first? Is it simply first come, first serve?

Mr. WALSH. Yes, at the outset, to be fair to all appellates.

Mr. HORN. How about the person sitting there for 2 years waiting for their case to come back to ECAB as Attorney Weiser explains? Seems to me you ought to give them a speedy appeal, if the bureaucracy is not doing anything for them.

Mr. WALSH. Yes, Mr. Chairman, just to address your first point, to be fair to all litigants, we take them in the order in which they were appealed. But we do expedite cases. And what we've been doing, since OWCP has gone over their periodic roles, they hired 100 people to do that, which brought a tremendous amount of appeals to us, we've been expediting those cases, because we consider those to be the most important cases.

We also expedite cases that attorneys have requested and given specific reasons why they should be expedited. We keep track of every case in the house. And we have a tracking system now that has been devised where we have an inventory, we know where all our cases are, we can print out the chronological listing of what's happened. And we're keeping track of what we would call old cases.

When I addressed you 2 years ago, we had something like 725 cases over 2 years old. I'm pleased to report that now we're down to about 75, and that's quite a large gap for us to pick up.

So we have a way of expediting cases, and we do.

Mr. HORN. So you can, and you do, you're saying.

Mr. WALSH. Yes, we do.

Mr. HORN. OK. How many cases do you have who have not seen a decision in 2 years, or left and never get into the system? I mean, are there some cases you just reject or what?

Mr. WALSH. There are some appeals we reject, is that your question?

Mr. HORN. Yes.

Mr. WALSH. Yes. Of course, we will reject cases for jurisdiction. We don't have jurisdiction to take the case.

We also have numerous cases where after the appeal has been filed, the attorney or the litigant will ask that the case be dismissed or withdrawn, because they want to proceed back before OWCP because they have new evidence. So we have a lot of those.

So of the say, this year we'll have 3,700 disposals, there may be 200 or 300 that are rejected because we don't have jurisdiction of the case.

Mr. HORN. In what sense would you not have jurisdiction?

Mr. WALSH. Well, if the case is appealed to us over a year from the last merit decision, we can't take jurisdiction of it. Actually, the

regulations provide that if the appeal is not made to us within 90 days of the last decision by OWCP, we don't have jurisdiction. But over the years, we've extended that for good reason. We'll let them appeal up to a year. If it exceeds that, we don't have jurisdiction of the case. They have to present whatever they have before OWCP.

Mr. HORN. Well, what happens to them there? Does the process just stop there?

Mr. WALSH. The claimant is free to go back to OWCP with whatever evidence they have. But for example——

Mr. HORN. Well, this sounds like a catch 22. They go up, they go back and nothing happens.

Mr. WALSH. Let me explain. If in 1997 they had a merit decision from OWCP, and they appealed to us in 1999, we could not take jurisdiction of that case, because it's over 1 year. That's all I'm saying.

Mr. HORN. Well, does that make sense?

Mr. WALSH. Well, that's the regulations. We have to——

Mr. HORN. Is that the law?

Mr. WALSH. That's the law.

Mr. HORN. Or is that some bureaucrat's dream?

Mr. WALSH. No, no, that's the law that we have to follow. If someone wants to amend that——

Mr. HORN. A law made by Congress, or an agency regulation?

Mr. WALSH. Well, the regulations are promulgated by the Department of Labor and the Secretary of Labor. We are of course bound to follow those regulations. Now, if they were changed, you could extend the appeal out as long as you wanted, for a year or two or three. People could appeal after 5 years after the decision, presumably, if the regs were changed. But it's 1 year now, and has been since 1974, when Congress made some amendments.

Mr. HORN. Well, whose fault is it that cases haven't been processed, because they've missed it by a day or something like that?

Mr. WALSH. Well, the burden is upon the attorney or the claimant to file the appeal. And they have to do that within a certain period. That would be true of any administrative body or any court. Appeals have to be filed within a certain time. The burden would not be on the agency.

Mr. HORN. Mr. Weiser, you ever have any cases like that, where you've missed it for a client because of the 1-year rule?

Mr. WEISER. I've not had that, we've appealed it untimely. I've had it where people have come to me, Mr. Chairman, and they are over the 1-year mark. Yes, you can take that back to the district office, but your review will be under clear evidence of error, under the present regulations. Very difficult standard. You may bring in medical documentation, for example, that shows you had a valid claim. OWCP will reject it and so will ECAB, under clear evidence of error. I've seen very, very few cases that have succeeded under that standard.

Mr. HORN. Part of the complaints I see that have popped up when I look through these cases have to do with the availability of doctors one way or the other. Now, the agency has primary care doctors, and to some degree, the individual that is injured has doctors. Or do they have to go through the agency doctor all the time?

Mr. WEISER. Well, as far as, if you look at initial injury, for example, take a traumatic injury. At a Federal agency like the Postal Service. That employee, if they do not know their rights, may very well be directed by that Federal agency to their doctor. I've seen that. They will tell them, we have a doctor, go to this doctor.

They will then get the result they want from that doctor, the agency will. If the injured employee then goes to their own doctor, for example, then many times I've seen OWCP will take the agency doctor position.

Now, if you can ever get a claim approved, then they will send, the OWCP will be sending you to their second opinion doctors and then ultimately to a referee examiner. And the problem I see in that arena is, they will always take what their doctors say.

In the Bill Oates case, he was seen for 20 minutes by a referee examiner, not examined, nothing. His claim was denied because the referee examiner said there are no residuals.

Why wasn't his doctor, who sees him on a weekly, monthly basis, given more credence, credibility than the referee examiner? I think it should be.

But that is what's happening, that I have seen, Mr. Chairman.

Mr. HORN. Well, somehow we've got to get a system that protects the public interest and protects the individual interest.

Mr. WEISER. I don't disagree.

Mr. HORN. In California, we had a real mess in workers' compensation, where there were lots of lawyers and doctors that were just saying yes to everything, and they were wrong. Because they were just milking the system.

So the question is, what kind of a board operation can you put together and what kind of an agency operation can you put together where you have people of integrity that can give you the medical data you need to act in a reasonable way? That's what I'm curious about, how do you handle that? Are we short on doctors? Or do we rotate them, or if they go against the agency, do they never get a case again? Or this kind of thing.

Mr. WEISER. Let me give an example, if I may, Mr. Chairman. And this is on emotional condition claims, and they are out of three clients I have in Memphis, TN.

They were sent for second opinion to a psychiatrist in Corinth, MS. Now, that's approximately 80 miles from Memphis, TN. All three of them were sent there.

Mr. HORN. You mean they don't have any psychiatrists in Tennessee?

Mr. WEISER. Well, that was my question.

Mr. HORN. I've got some clients for them. [Laughter.]

Mr. WEISER. It amazes me that Memphis doesn't have psychiatrists for second opinions. I wrote the claims examiners, after the third person. Because it didn't sound right. You're supposed to rotate.

All I got back was a telephone call, that said, don't call us back, but you're opening a can of worms. And then for the third person, they suddenly sent them to a psychiatrist in Memphis for a second opinion.

But what was happening, the Corinth, MS, psychiatrist, on the two cases prior to the third one, ruled for the OWCP every time.

Again, the inference I have to draw, it's a setup. The person is being sent, being funneled to where they want them to go, knowing the decision they'll get.

And in California, you have a doctor called Elliott Ness that they do that all the time, OWCP does, for second opinion or referee. That's all I can answer, is my experience, Mr. Chairman.

Mr. HORN. Mr. Fox, what's your experience with second opinion physicians? Do you agree with Mr. Weiser, and do you think the board is handling claimants the right way in terms unbiased or time? What are your people saying to you?

Mr. FOX. Same thing. I do have to agree with Mr. Weiser. When one of my clients goes into a doctor's office, assigned to them by the Department, and they're out in 10 minutes and they've got a back injury, and they're not physically touched during the examination, or when they would attempt to make comment on what's going on, how it's affecting their lives, they're told it's not necessary. And they're out in 10 minutes.

Mr. HORN. Well, do you tell the Federal program what is going on with these doctors? Is this guy milking people and OWCP by bringing clients through their doctor's office? Is this set up to deny people benefits?

Mr. FOX. I certainly believe that that's going on. You've been to a doctor, Mr. Horn, usually there are people waiting in the waiting room.

Mr. HORN. Yes.

Mr. FOX. Not with these doctors. That tells me as a clinician a lot about their practice and where they're getting their boat payments.

Mr. HORN. What about that, Mr. Hallmark?

Mr. HALLMARK. The rotation process that we have in place is a very strict one with respect to referee examinations. The referee examination is spelled out in law. It is the final resolution of dispute. And we do everything we can to ensure that there is a rotation that is fair, given the availability of doctors in an area.

Second opinions are not necessarily rotated in that fashion. Many of our second opinions are obtained through private sector contracts that provide us with that kind of access. There may be, in the example that Mr. Weiser notes in Tennessee, maybe that the contractor who's providing those second opinion referrals wasn't able to find somebody to operate in their system in Memphis.

We are aware of those kinds of issues and we take response when we have complaints that are cited of the kind that Mr. Weiser just mentioned. I've addressed in my written comments, and I would point you to those, some of the changes that we've made with respect to our doctor rotation processes and second opinion procurement, since the hearing in Long Beach in 1998. We are anxious to ensure that this is a quality process and that claimant violation, that claimant complaints about the quality of a review or the way they are treated by a second opinion, or a referee doctor, are treated seriously and addressed.

Now, it has to be understood, though, that these kinds of evaluations oftentimes are brief because the primary involvement of the second opinion or referee doctor is in reviewing a very voluminous pre-existing medical record. So the evaluation in person may seem

to the injured worker to be cursory, when in fact, that's from the point of view of his specialist, that which is needed.

And again, if we have evidence that an individual is not providing the kinds of services that we believe are needed, and are of the quality that we need, we will remove them from our list.

Mr. HORN. Let me just go through a few questions, then I'd like to submit them on behalf of Mr. Turner and myself to all the witnesses, and it's going to take a little time. So I think your staff will want to work with you on that.

Mr. Walsh, the subcommittee received information from OWCP officials that they discuss cases with board members. Under what circumstances would officials contact board members to discuss cases, and would those discussions be considered ex parte communications?

Mr. WALSH. Well, they would be considered ex parte, but I'm not aware of any such conversations, context.

Mr. HORN. So you're saying none really happened?

Mr. WALSH. None that I'm aware of, Mr. Chairman.

Mr. HORN. That you're aware of?

Mr. WALSH. Yes.

Mr. HORN. OK. Now, with all of you, what are you doing to reduce the number of pre-hearing remands? Is that due just to incomplete records or what?

Mr. WALSH. I'm not sure what you mean by pre-hearing remand. If a case is remanded, it's remanded after full consideration by the panel of a case, and they've decided to remand that case, and it comes out in a written decision with rationale, and it directs the office to do something. So I'm not certain what——

Mr. HORN. Well, I assume you found something that you wanted as data to make a rational judgment, so you kick it back to OWCP. Is that it?

Mr. WALSH. Yes. That's our role. Our role is to review whether they've correctly looked at the facts and correctly looked at the law. If we disagree on either of those issues, and we find they haven't, that would be a basis for sending it back.

For example, we might feel that a case has to be developed, that they have to send it out for medical, that they've only looked at one side. So we think there's enough evidence, what we call prima facie, go back, office and develop the claim, which they will do.

Mr. HALLMARK. Mr. Chairman, you may be referring more specifically to the process at the hearings and review level. We do have a pre-hearing review process, which again goes to some issues that were raised in one of the earlier hearings. And this is in my statement. We have substantially improved that review process to ensure that if, for example, an appeal was filed from one of our district office decisions, it reaches Washington, but at the same time, new medical evidence which is pivotal to the decision is received from the injured worker. We then would quickly remand that case without making it wait for the scheduling of a hearing. That's the data that I mentioned in my oral remarks, that we have reduced the time for those pre-hearing remands from, I believe it was 160 odd days, to roughly 88 this year.

So we've taken that consideration as something that we really need to work on and improve to ensure that these cases don't lin-

ger and have to go through the entire process of waiting for scheduling of an oral hearing.

Mr. HORN. Ms. Dalton, in one of our earlier hearings, you testified that the customer service surveys were vague, stating that the agency was unable to fully discern whether Federal injured workers were being adequately served by the process intended to help them. And the Inspector General recommended that the agency enhance the accuracy of the data collected in the customer service surveys by improving survey methodology so OWCP can better utilize the information.

Now, since the agency praises its customer service, why wouldn't it conduct customer service surveys?

Mr. HALLMARK. We have done so, Mr. Chairman. We did not complete a review in 1999 because of the issues that have been raised by the IG with respect to the technical sampling processing some of the questions in the nature of the survey. We've completed one just recently in 2000, which incorporated many of the recommendations from the IG report.

We don't have the final report on that, but we certainly intend to continue with that process, and to implement some of the other comments, which were to go a broader series of measures to try to get more precise information about the real impact and the real views of our customers.

Mr. HORN. Let me ask you, Mr. Hallmark, does the agency measure the rate of recurrence of disabilities that sometimes occur with former claimaints? If a recurrence of disability does occur, does the agency begin calculating a new period of lost production days, or are the recurrent lost production days added to the previous period?

Mr. HALLMARK. We do keep track of recurrences as a separate category of case. The particular issue you're raising with regard to our measure of lost production days has been handled in the fashion that a particular period of disability is begun when the initial claim loss claim is filed, when a new recurrence occurs later, after the person has gone back to work, we treat that as a separate case.

Mr. HORN. My staff, in reviewing this, felt what steps do they really feel need to be taken to ensure injured workers are cared for in a timely manner, which is what we've seen from some of our witnesses this morning, both within the Branch of Hearings and Review as well as your board, Mr. Walsh. In other words, judicial review, more oversight by the subcommittee and congressional intervention and all that, I understand. But I'd really like to see it done by the agencies affected.

So what can you say on that in terms of taking those steps to assist injured workers and work in a timely manner?

Mr. HALLMARK. I believe I've already provided some statistics that show, I think, fairly dramatic improvement in our timeliness at the hearings and review level, and that we're also working to improve quality at that level, and at the first instance, so that cases don't need to go to hearing.

Mr. WALSH. Well, Mr. Chairman, as I indicated in my remarks at one point in time, at around 1996, we were at a level of 5,500 cases. We dropped that to 3,600. By next year, we will be under

3,000, probably around 2,600, we've programmed for. So as we bring down our caseload, our timeliness is going to improve.

Again, we'll expedite cases that we think should be expedited, and certainly, that's the termination cases. But other than that, we think it's fair to take them in the order in which they're appealed.

Mr. HORN. Well, let me ask the gentlemen on the other side of the aisle here, do you believe the remand rate is high within the Employee Compensation Appeals Board and the Branch of Hearings and Review? And I would ask, you gentlemen, what's the appropriate remand rate?

Mr. WALSH. I'll respond to that. I think the normal affirmance rate, if I can phrase it that way, amongst appellate bodies, and this is courts included, would be about 90 to 92 or 93 percent. The reason ours would be 75 percent, essentially, is because we do both the law and the facts, we do de novo. Whereas most courts and most appellate bodies are only looking at the law. They'll only look, they'll look at the administrative law judge's opinion if there's any evidence to substantiate it, they don't bother with it, they simply look at the law.

So our remand rate would be a little higher than the typical appellate body, because we review both the law and the facts.

Mr. HORN. I'm interested in the board's use of attorneys. Does the Solicitor of Labor assign an attorney to the board?

Mr. WALSH. No, Mr. Chairman. We have 26 staff attorneys right now. We're a little short, because we have to hire some. But we have 3 paralegals, and we have 7 board members, a total of 36 attorneys in the agency. They're within our agency. They have nothing to do with OWCP. They're part of our agency. And the cases are assigned within our agency.

Mr. HORN. Well, what is the Solicitor's attorney doing?

Mr. WALSH. Well, the only thing the Solicitor does is, after the case is decided by the OWCP, they apparently review the cases. As I indicated earlier, in about 95 percent of the cases, they say nothing. They just say, we're submitting the case, we have no comments on it.

But, if after the case is submitted, the claimant or the appellant asks for oral argument, then the Solicitor will prepare a brief. Normally the other side does, too. That's when they become really into the case. But other than the oral arguments, they really don't make any appearance.

Mr. HORN. Well, you've got your own staff attorneys that go through the case, I take it, and brief it for the members of the board.

Mr. WALSH. Right. That is true.

Mr. HORN. So why do you need somebody from the Solicitor of Labor?

Mr. WALSH. We don't. They're not part of our organization at all. They are, on oral argument, they're defending the Office of Workers' Compensation decision. They're not part of our operation. They have nothing to do with us. Except to argue before us occasionally. I want to make that clear. Because our attorneys do our decisions. And our board members do our decisions.

Mr. HORN. Are they worried in some cases that it would lead to going into the Federal court system, to get a final decision?

Mr. WALSH. Let me explain, just quickly if I may. The first week I was chairman I was served with a complaint that contended that the decision of the board was arbitrary and capricious, etc., and there was collusion between OWCP and ECAB, etc. About 3 weeks later I was served with a complaint that the board was issuing decisions with two members, and that their decisions were unlawful.

Now, both those cases went up to Federal court. Summary judgment in both cases, and affirmed on appeal.

Since that time, in 1985, I've been served about 25, 30 times as the board has, in OWCP, with similar complaints. That is, the board's biased, the board's arbitrary, etc., and Constitutional provisions. And all those cases have been reviewed by the courts, they've gone out on summary judgment.

So yes, the claimant can go into Federal court if they're dissatisfied with our judgment. But the courts have limited it to the basis of Constitutional violation.

If that answers your question, it can go into the Federal court.

Mr. HORN. Mr. Hallmark, what about the agency? How many lawyers does OWCP have to look at these cases as they go through the review process?

Mr. HALLMARK. The Solicitor's office is an independent body which is not part of OWCP either. It reports directly to the Secretary. They represent the director of OWCP in selected cases. And I think there's a legitimate reason for that, in the sense that, as I indicated earlier, ECAB decisions establish case law, and result in the evolving nature of how these cases are addressed. And the director has an interest in ensuring that straightforward and interpretable kinds of outcomes are reached. And so the Solicitor's office in effect is looking at how the case law has evolved and defending, in effect, the interpretations presented by the director.

Mr. WALSH. May I followup on that, Mr. Chairman?

Mr. HORN. Sure.

Mr. WALSH. I had in my extended remarks that we have had 51 volumes of law published since the beginning of the ECAB. And of course, we try to strive for stare decisis when we have thousands of cases coming through. Those volumes, they make up the law. That's what the law is for OWCP, for the Solicitor's office and everybody else. We're the court of last resort. Those volumes are sent to law libraries around the country and to public libraries and they're produced for the Government Printing Office. And that is the case law that's built up over these 54 years now.

Mr. HORN. It was started when?

Mr. WALSH. The board came into being in 1946 through an act of Congress, of course.

Mr. HORN. So that's the case law, starting in 1946?

Mr. WALSH. Yes, that is true. And I might point out that these volumes contain about 150 to 175 cases that we pick out ourselves, that we think are the most important issues in a given year. And they become the lead cases that OWCP follows and everybody else follows, practitioners, lawyers, etc.

Mr. HORN. I want to ask Mr. Weiser, but I want to get a statistic on the record, as my head slowly thought about all those lawyers there, I remember that when I was assistant to the Secretary of Labor under President Eisenhower, Betsy Margolin, the Solicitor's

office had a 93 percent appellate win record. She rarely, if ever, had been defeated.

Do any of those cases go into the Federal courts?

Mr. WALSH. Well, yes, as I just indicated.

Mr. HORN. You do the work for them, I'm assuming?

Mr. WALSH. No, let me clarify. There are claimants that go into the Federal court. And they, in my experience, about 35, 40 cases that I'm aware of. The board has normally made defendant, and the OWCP is made defendant, the Secretary is made defendant.

To my knowledge, all of those cases have been dismissed on the basis of summary judgment after review of the case and affirmed on appeal. And what the courts have said is that we will not look at an ECAB decision, we will not overturn it, we will not put ourselves in their shoes, unless there's a constitutional violation. And that's what they call a preclusionary statute. They say Congress is very clear what they wanted. They wanted an administrative agency to conduct reviews in these cases.

Mr. HORN. Mr. Weiser, you face all those attorneys and board members in court, and are knocking on doors in Jacksonville or other areas you practice. What do you think about the review process?

Mr. WEISER. Let me address the court process, Your Honor. There is 5 U.S.C. 8128, I believe, (a). The decisions of the Secretary of Labor in the area of injury compensation cannot be reviewed by a court, even by a writ of mandamus. That is by law.

So yes, they will get summary judgment in court, if a person takes it there. I do not take cases there for that reason. Because I think 5 U.S.C. 8128 will bar you.

As far as the remand rate, I would say the remand rate from ECAB and the cases I've handled is perhaps 1 to 2 percent. It is not up to 25 percent, as I think I've heard overall. But that's been my experience.

As far as the Branch of Hearings and Review, I do believe that after your oversight committee looked at the branch, in my experience, I have seen many more fair hearings and decisions. They have at least on the pre-hearing side, remanded cases back where the district has been absolutely wrong. And I think we are getting fair hearings.

My main concern is with the district offices, especially in Jacksonville and Dallas. Because I think they are non-responsive to claimants, completely non-responsive. And I would add, I've heard that the emotional claims are 6 months to get a decision. Not in the cases I've had. We are running 11 months or greater. And that is to initial decision.

And when you inquire why, you can inquire 11 months, 12 months later, say why are we not getting a decision, the answer is, we're still developing the case. If you can't develop a case within 6 months, I question. And these are not complicated emotional condition cases that I'm representing. But every one of them that I have had, Mr. Chairman, is running a minimum of 11 months for an initial decision from a district office.

Mr. HORN. Well, I want to thank you all. In about 2 minutes, well, even 1 now, under the rules of the House, subcommittees can-

not meet when the full committee is meeting. And they're downstairs in what would normally be our hearing room.

I want to thank all of you for coming, and we'll send you some questions I'd like to see an answer to in the next couple of weeks. Don't rush it, but if you could do it within the month, we'd appreciate it. And I know your staff might well answer some of these questions.

I want to thank Russell George, our staff director and chief counsel; Heather Bailey is the professional staff member that is working with this issue. She's to my left, your right; Bonnie Heald, director of communications, over there against the wall; Brian Sisk, our clerk; Elizabeth Seong, staff assistant; George Fraser, intern; and Trevor Pedigo, intern. And Mr. Turner's staff, Trey Henderson, counsel; Jean Gosa, minority clerk; and our court reporter, Shari Acosta.

Thank you very much for coming. We're adjourned.

[Whereupon, at 12:29 p.m., the subcommittee was adjourned, to reconvene at the call of the Chair.]

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