

Date: July 30, 2002
Claimant: [name, et al.]
File Number: 02-0004
OPM Contact: Deborah Y. McKissick

This is a claim from a group of 118 current and former wage rate supervisors (WS supervisors) who are or were employed at the Corpus Christi Army Depot, Department of the Army, as WS supervisors during the period September 1991 to February 1998. The claimants are requesting back pay for environmental differential pay (EDP) for exposure to asbestos during the claim period. The Office of Personnel Management (OPM) received the compensation claim on December 19, 2001, and the agency administrative report on June 19, 2002. For the reasons discussed herein, the claim is denied.

Some of the WS supervisors' documents include beginning dates (i.e., December 23, 1966) in their document submission that are outside of the claim period. The burden is on the claimant to prove that the claim was filed within the Barring Act's six-year limitation period and to prove the liability of the United States. 5 CFR 178.104(a), 178.105. The Barring Act does not merely establish administrative guidelines; it specifically prescribes the time within which a claim must be received in order for it to be considered on its merits. *Matter of Nguyen Thi Hao*, B-253096, (August 11, 1995).

The six-year limitation begins running from the date a claim first accrues. Accordingly, the WS supervisors' claims for EDP first accrued no later than October 21, 1995, which is the ending date of the claim period, and expired no later than six years thereafter on October 21, 2001. This determination is in accordance with the Barring Act, 31 U.S.C. 3702(b)(1), which states that every claim against the United States is barred unless such claim is received within six years after the date such claim first accrued. OPM does not have any authority to disregard the provisions of the Barring Act, make exceptions to its provisions, or waive the time limitation that it imposes. See *Matter of Nguyen Thi Hao, supra*; *Matter of Jackie A. Murphy*, B-251301 (April 23, 1993); *Matter of Alfred L. Lillie*, B-209955, May 31, 1983. In view of this, any claims submitted for periods prior to October 21, 1995, are barred under the Barring Act.

In support of their claim, the claimants referenced an arbitrator's decision, dated March 24, 2000, that established EDP for exposure to asbestos for the installation's wage employees covered by the bargaining units and the collective bargaining agreements (CBAs). The claimants' documentation included a memorandum, dated July 2, 2001, from the Commander of the claimants' installation that explains that the arbitration award included only the eligible employees covered by the bargaining units and covered by the CBAs. The Commander noted that the supervisors were not included in the arbitration award. Even though the claimants acknowledged that they were and are not covered by the bargaining

units and the CBAs and were not a party to the arbitration, they believe they are entitled to EDP for the claim period as a result of the arbitrator's decision. However, OPM cannot compare the claimants' positions to the wage employees covered by the bargaining units and the CBAs as a basis for deciding this claim.

The claimants believe the agency breached the law when the agency paid EDP for some wage employees but not for WS supervisors. The claimants state that the "past practice of the agency has been to pay EDP to the WS supervisors when the wage grade (WG) workers under their supervision were paid EDP." The claimants believe that, inasmuch as the WS supervisors work in the same shops as the wage employees receiving the EDP, the WS supervisors' environmental exposure to asbestos is identical to the wage employees, and they should also receive EDP.

In its Administrative Report to OPM, the agency explains that entitlement to EDP for asbestos exposure became effective on March 9, 1975. The agency states that a quantifiable standard must be exceeded in order to meet the definition of "unusually severe hazards." The agency also defines "practically eliminated" as when "the risk due to exposure has been reduced to the point where the probability of an adverse effect is extremely low." The agency believes that total elimination of a potential hazard is not required or expected.

The agency states that it has not exceeded the applicable Occupational Safety and Health Administration of the U.S. Department of Labor (OSHA) time-weighted average (TWA) permissible exposure limit (PEL) during the six years prior to October 31, 2001, the date that this claim was filed with the agency. The agency declares that the facility's comprehensive air monitoring has continually registered below the quantitative OSHA TWA PEL Standard of 0.1 f/cc. The agency states that this indicates that the WS supervisors' exposure would not adversely affect their health or entitle the WS supervisors to EDP payments.

According to the agency, air sampling for asbestos at the facility has been conducted since 1995. The agency stated that it conducts air sampling to assure compliance with the OSHA permissible exposure limit for asbestos and to determine whether or not employees are exposed to airborne asbestos "above ambient background levels." The agency submitted work histories and the National Institute for Occupational Safety and Health (NIOSH) air sampling results of the claimants' work centers.

Both the claimants and the agency provided a substantial amount of documentation concerning the issue of the claimants' exposure to asbestos. The documentation includes OSHA Standards Interpretation and Compliance Letter by Joseph A. Dear, Assistant Secretary of OSHA, dated October 6, 1995; 1995 – 2000 Distribution of Air Monitoring Data; 1998 Agency Air Monitoring Data; TEM Air Monitoring Summary; Distribution of PCM Air Monitoring Results; and PCM NIOSH 7400 and TEM NIOSH 7402 Results Summary Reports, Asbestos Sampling Data Sheets, Outside Ambient Air Sampling Reports, and Employees' Work Histories. Our review of the NIOSH reports and the claimants' work histories did not reveal any results exceeding the permissible exposure limits as described by OSHA.

The Civilian Personnel Law Manual states,

The entitlement to environmental differential pay is a decision vested primarily in the employing agency, and this Office will not substitute its judgment for that of agency officials unless that judgment was clearly wrong or was arbitrary and capricious. *Matter of AFGE Local 2413*, 67 Comp. Gen. 489 (1988). *See also Michael D. Harley, et al*, B-235461.2, January 16, 1991.

The WS supervisors' rights to EDP are based on statutes and regulations which exist independently from the collective bargaining agreement. *Matter of AFGE Local 2413*, 67 Comp. Gen. 489 (1988).

Section 5343 (c) (4) of title 5, United States Code, provides for EDP. OPM regulations at 5 CFR 535.511 authorize the employing agency to determine the situation that warrants EDP. However, section 532.511 limits payment of EDP to the situations described in Appendix A in 5 CFR part 532. *See William A. Lewis*, B-216575, March 26, 1985; *Joseph C. Schrage*, B-181843, November 19, 1974. The determination of whether a particular work situation warrants EDP is vested primarily in the employing agency whose officials are in a better position to investigate and resolve such matters. *Nicholas P. Davis*, B-246364, April 14, 1992; *Joseph C. Schrage, supra*. An agency's determination concerning an employee's entitlement to EDP will not be overturned unless there is clear and convincing evidence that the decision is arbitrary and capricious. *Id.*

OPM does not conduct adversary hearings, but settles claims on the basis of the evidence submitted by the claimant and the written record submitted by the government agency involved in the claim. 5 CFR 178.105; *Matter of John B. Tucker*, B-215346, March 29, 1985. Moreover, the burden of proof is on the claimant to prove the liability of the government and his or her right to payment. 5 CFR 178.105; *Matter of Jones and Short*, B-205282, June 15, 1982. Thus, where the written record presents an irreconcilable dispute of fact between a government agency and an individual claimant, the factual dispute is settled in favor of the agency, absent clear and convincing evidence to the contrary. 5 CFR 178.105; *Matter of Staff Sergeant Eugene K. Krampotich*, B-249027, November 5, 1992; *Matter of Elias S. Frey*, B-208911, March 6, 1984; *Matter of Charles F. Callis*, B-205118, March 8, 1982. Therefore, we must accept the agency's position that the NIOSH's health hazard evaluations do not support the claimants' position that occupational health limits are above established legal limits and that EDP is not warranted. The claim for EDP is denied.

This settlement is final. No further administrative review is available within OPM. Nothing in this settlement limits the claimant's right to bring an action in an appropriate United States Court.