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20 CFR Parts 10 and 25

Claims for Compensation Under the Federal Employees' Compensation Act; Compensation for Disability and Death of Noncitizen Federal Employees Outside the United States; Final Rule

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

20 CFR Parts 10 and 25

RIN 1215–AB07

Claims for Compensation Under the Federal Employees' Compensation Act; Compensation for Disability and Death of Noncitizen Federal Employees Outside the United States

AGENCY: Office of Workers' Compensation Programs, Labor.

ACTION: Final rule.

SUMMARY: On December 23, 1997, the Department of Labor proposed revisions to the regulations governing the administration of the Federal Employees' Compensation Act (FECA) (62 FR 67120). The FECA provides benefits to all civilian Federal employees and certain other groups of employees and individuals who are injured or killed while performing their jobs.

The proposed changes were summarized in that publication. They contain a major revision of the medical fee schedule to include pharmacy and inpatient hospital bills. Other significant new provisions address suspension of benefits during incarceration and termination of benefits for conviction of fraud against the program; changes to the continuation of pay (COP) provisions; paying for an attendant as a medical expense; inclusion of OWCP nurse services in the definition of vocational rehabilitation services; clarifying the reconsideration process; restricting entitlement to postpone oral hearings; clarification of subpoena authority; streamlining the standards for review of representatives' fees; provision of more detailed guidance for claims involving the liability of a third party; and clarification of procedures for claims filed by non-Federal law enforcement officers.

Finally, in light of comments received, the proposal to remove all references to leave repurchase has been abandoned in favor of including a brief mention of this practice.

EFFECTIVE DATE: January 4, 1999.

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SUPPLEMENTARY INFORMATION: Proposed regulations were published in the **Federal Register** on December 23, 1997 (62 FR 67120). They allowed a 60-day period for comment, during which the Department of Labor received timely comments from 24 parties. Thirteen were submitted by Federal employing agencies, seven by labor organizations which represent Federal employees, two by attorneys, one by a physician, and one by a Department of Labor employee. Four untimely comments from Federal employing agencies were also received; many of the points they made were also made by other commenters.

The comments centered on time frames for use of continuation of pay (COP), time frames for submittal of forms by agencies, and postponement of hearing requests. None of the comments represented a profound challenge to the proposed rules.

This final rule applies to cases where the injury or death occurred before the effective date, but only when an initial decision on a particular issue is made on or after the effective date. This final rule does not apply, however, to issues decided for the first time in one of these cases before the effective date, even when such decision is being reviewed after a hearing before an OWCP representative, on reconsideration before OWCP, or on appeal to the Employees' Compensation Appeals Board (ECAB).

Several changes were made which did not result from the comments. One is the addition of nine new OMB clearance numbers to § 10.3 since publication of the Notice of Proposed Rulemaking. Another is that § 10.500 has been subdivided for clarity into four different subsections, and the contents have been rearranged slightly. Also, the title of subpart F has been changed to ''Continuing Benefits'', and the title of subpart G has been changed to ''Appeals Process'' for clarity. Several of the questions have been modified slightly for clarity, or so that they will be understandable on their own, without reference to the section where they appear.

Finally, after reviewing the decision of the United States District Court for the District of Massachusetts in *Jones-Booker* v. *United States* (C.A. No. 97cv10616–PBS, May 20, 1998), a provision is being added as new § 10.607(c). This provision will toll the running of the one-year time limitation for requesting reconsideration during any period for which the claimant can establish through the submission of probative medical evidence that he or she was unable to communicate in any way, and that his or her testimony was necessary to obtain modification of the prior decision. Any such period is not counted as part of the year in which a claimant has to timely request reconsideration. To establish eligibility for such tolling, the claimant will have the burden of proving both that he or she was unable to communicate in any way and that his or her testimony was necessary to establish factual matters that could not be established in any other way.

Overall, the parties who commented on the organization of the proposed regulations, the new question-and-answer format, and the ''plain English'' approach approved of these changes. However, one agency stated that the question-and-answer format might well be problematical, and that subject headings would be easier to follow.

The Department's analysis of the comments received is set forth below. Unless otherwise stated, section numbers refer to the revised regulations. No comments were received with respect to part 25.

Section 10.0

One labor organization asked that OWCP clarify the introduction to the regulations at § 10.0 by adding ''including an officer or employee of an instrumentality wholly owned by the United States'' to the first sentence. However, this same phrase already appears in the definition of ''Employee'' at § 10.5(h)(1), and it is not felt that repeating it in § 10.0 would provide any further clarification. Therefore, this change is not being made.

Section 10.5(a)

Two labor organizations noted OWCP's efforts to streamline its regulations and suggested dropping the term ''Compensation'' from the first line of § 10.5(a) since ''Compensation'' is defined at section 8101(12) of the FECA. While it is true that the FECA contains a general definition of ''Compensation,'' § 10.5(a) provides a more precise definition of this term (which is used interchangeably with ''Benefits'' throughout these regulations) that takes into account the construction given to this particular section since the FECA was first amended to include it in 1924. Therefore, dropping the term ''Compensation'' from § 10.5(a) would not be consistent with OWCP's streamlining effort, and the suggestion is not adopted.

Two labor organizations also argued that § 10.5(a) should not include ''medical treatment'' paid for out of the Employees'' Compensation Fund since beneficiaries are entitled to medical treatment for employment-related injuries and illnesses regardless of whether or not they sustain any

disability. However, this argument ignores the fact that, as one of the ''benefits paid for from the Employees'' Compensation Fund,'' medical treatment clearly falls within the statutory definition of ''Compensation'' set out at section 8101(12). Also, the regulatory definition of ''Benefits or Compensation'' in use since 1987 (20 CFR 10.5(a)(6)) includes ''medical treatment'' and, as there was no intent to change this aspect of the definition in these regulations, the suggestion is not accepted.

Section 10.5(f)

One commenter disagreed with the dual economic and medical nature of the definition of ''Disability'' in § 10.5(f) and argued that the definition of this word should focus solely on clinical findings. However, such a change would be contrary to settled precedent of the ECAB that has emphasized both the economic and medical aspects of disability for work under the FECA. Also, the regulatory definition of ''Disability'' in use since 1987 (20 CFR 10.5(a)(17)) was essentially identical to § 10.5(f), and as there was no intent to change this definition in these regulations, the suggestion is not adopted.

Section 10.5(g)

While one labor organization commended OWCP for providing further helpful explanation of the term ''Earnings from employment or self-employment'' in the definition at § 10.5(g), another labor organization asserted that ''reimbursed expenses'' are ''commonly not considered to be income'' and asked that they be deleted from the list of examples contained in § 10.5(g)(1) because they are not paid for ''services'' as that word is used in section 8114(e) of the FECA. There is nothing in the language referenced in section 8114(e) that would necessarily take precedence over the general requirement in section 8106(b) of the FECA that an employee must include any ''other advantages which are part of his earnings in employment or self-employment and which can be estimated in money'' in his reports to OWCP. The regulatory definition of ''Earnings from employment or self-employment'' in use since 1987 (20 CFR 10.125(c)) has included ''reimbursed expenses'', and as there was no intent to change this definition in these regulations, the request to delete this specific example from the list in § 10.5(g)(1) is not adopted.

Section 10.5(q)

One labor organization requested that the word ''by'' in the definition of ''Occupational disease or illness'' at § 10.5(q) be changed to ''in'' as it appeared in the prior regulatory definition in use since 1987. However, using the word ''in'' would not adequately convey the requirement in section 8101(5) of the FECA that occupational diseases or illnesses be ''proximately caused by the employment'' (emphasis added) rather than merely occurring during or ''in'' a period of employment in order to be compensable. Therefore, while there was no intent in these regulations to change the prior definition of ''Occupational disease or illness'' in any significant way, the requested change would not clarify § 10.5(q) in a manner consistent with the FECA, and it is therefore not adopted.

Section 10.5(x)

One Federal agency and two labor organizations expressed concern about the intended effect of the word ''material'' in the definition of ''Recurrence of disability'' and requested further clarification from OWCP. After considering the practical impact of the word ''material'' on the definition of this term, it does not appear that this particular word adds any further precision to § 10.5(x), and therefore it is deleted.

One labor organization suggested that confusion might result from the use of the term ''intervening injury'' in § 10.5(x) given the precise meaning of this term in the adjudication of claims for consequential injuries. However, since the context of § 10.5(x) makes it clear that the term ''intervening injury'' merely refers to a type of work stoppage that is not due to a ''spontaneous change in a medical condition,'' and there was no intent to limit this term to the meaning it has with respect to consequential injuries, modification of this particular term is not warranted.

The same labor organization also suggested that the reductions-in-force referred to § 10.5(x) as not resulting in recurrences of disability be limited to ''officially mandated'' actions. As the agency responsible for adjudicating FECA claims for the entire Federal workforce, OWCP must be able to rely upon employers (and claimants) to advise it of any relevant and pertinent personnel actions that might have some bearing on the outcome of a FECA claim. OWCP has neither the resources nor the expertise to ascertain whether reductions-in-force are ''officially mandated'' (presumably, this phrase is equivalent to ''duly authorized''), and must leave disputes about individual reductions-in-force to be resolved in the proper forum. Moreover, the words ''general'' or ''officially mandated'' add nothing to the sense of this section or its legal force. Under these circumstances, the requested modification of ''reductions-in-force'' would not be workable and is therefore not adopted.

Finally, two Federal agencies suggested that language be added to § 10.5(x) to highlight that a ''Recurrence of disability'' does not occur after an employee recuperates from surgery for an employment-related condition or injury if he or she has no entitlement to monetary benefits for refusing an offer of suitable work. Another commenter disagreed with the concept of recurrences altogether. This group of comments about the effect of changes in an employee's accepted medical condition indicates that it would be helpful to add another definition to answer the concerns raised. Therefore, § 10.5 is revised to add a new § 10.5(y), ''Recurrence of medical condition'', and subsequent paragraphs are renumbered accordingly.

Section 10.5(dd)

One labor organization suggested that a portion of the definition of ''Temporary aggravation'' in § 10.5(cc) (renumbered § 10.5(dd) in accordance with the revision noted above) be changed from ''caused that condition'' to ''caused that preexisting condition.'' This same organization also suggested that the second part of this section be changed from ''no greater impairment than existed prior to the employment injury'' to ''no greater impairment or disability than existed prior to the aggravation.'' The first wording change is redundant, given the context, and the second wording change would modify the sense of the definition in use since 1987 (20 CFR 10.5(a)(18)), which the program had no intent to change. For these reasons, the suggested changes are not adopted.

Section 10.5(ee)

One Federal agency assumed that the proposed definition of ''Traumatic injury'' in § 10.5(dd) (renumbered § 10.5(ee) in accordance with the revision noted above) differed from the prior regulatory definition of this term in that it now included the phrase ''external force,'' and requested further clarification regarding the meaning of this phrase. However, the definition of ''Traumatic injury'' has included the phrase ''external force'' since 1975 and no further definition of this phrase is required since it does not represent an

attempt to change the existing definition.

Section 10.6

One Federal agency felt that the statement that ''certain other benefits are payable'' in § 10.6(b) was not consistent with the language of section 8148(b)(3) of the FECA, which provides OWCP with discretionary authority in this area, and should be changed to ''certain other benefits may be payable * * *.'' We agree that the statute does give OWCP discretion in this matter, and § 10.6(b) is therefore revised consistent with the suggestion.

The same agency also felt that § 10.6(c) should refer only to persons who live in the beneficiary's household ''and are'' dependent on the beneficiary for support. Adoption of this idea would eliminate compensation payable for dependents living in another household through no fault of their own, e.g., minor children whose non-custodial parent is a beneficiary. In any event, this interpretation of the term ''dependent'' does not conform to the statutory test for dependency contained in section 8110(a) of the FECA, and the suggested revision is not adopted.

Finally, this agency suggested addition of a means test for dependents to this section and to § 10.405. The FECA contains no basis for such a measure.

Section 10.7

Three agencies commented on the use of Form CA–3, two stating that they would like to see continued use of the form, and one stating that there should be some way to report return to duty in its place. If the form is not to be required, one agency said that it should be removed from the list. On balance, OWCP does not believe that use of the form should be required, since agencies routinely notify the district offices when employees return to work. Form CA–3 is therefore being removed from the list. However, OWCP is looking into alternative means of collecting the information requested on this form.

One agency inquired about the purpose of Form CA–12, and another suggested that it simply be deleted from the list. A labor organization suggested that its purpose be clarified. OWCP uses this form to obtain reports of dependents in death cases. As the form is used exclusively by OWCP, and employers have no need to stock it, it is being removed from the list.

Two employee organizations suggested that this section include a statement that employers may not modify forms prescribed by OWCP, or use substitute forms. A statement to that effect is being added to paragraph (a).

Forms CA–7a and CA–7b have been added to the list (see the comments concerning leave buy-back at the end of this analysis).

Sections 10.10, 10.11, and 10.12

Two agencies commented on the statement that all records related to claims filed under the FECA are covered by the Government-wide system of records established by the Department of Labor. More specifically, they stated that an employer generates and maintains a variety of records systems in connection with claims filed under the FECA. The agencies suggested that § 10.10 be revised to provide that DOL/GOVT–1 covers only those records whose primary purpose is to generate, record or report data required by OWCP in its adjudication of claims. All other records an agency may generate as a result of a claim, such as those needed for personnel actions, payroll actions, safety records and investigative reports, should be subject only to the agency's Privacy Act regulations.

Similar comments were submitted to OWCP in connection with its proposal to amend former § 10.12 of the FECA regulations. In the final rule promulgated in the **Federal Register** on October 22, 1998, OWCP concluded that all records collected because a claim was filed seeking benefits under the FECA, including copies of records maintained by the employing agency, were official records of OWCP and, with one limited exception, covered by DOL/GOVT–1.

OWCP recognized, however, that a record may be created to satisfy two or more purposes, and therefore may be covered by other systems of records even though the subject matter of the document relates to an on-the-job injury sustained by a Federal employee. Thus, for example, records collected by an agency as part of a safety, personnel, or criminal investigation conducted pursuant to statutory or regulatory authority other than the FECA would not be covered by DOL/GOVT–1, unless they are submitted by the employee or the agency to OWCP for consideration in connection with the FEC claim. Readers are directed to the comments set forth at 63 FR 56752.

As noted above, the Department's proposed amendments to former § 10.12 have been adopted as a final rule. To ensure consistency, the provisions of that rule are being included in this publication.

With respect to § 10.12, a commenter alleged that he had experienced difficulty obtaining copies of case records from OWCP and recommended that this provision be revised to include a time limitation. The Department of Labor's regulations at 29 CFR part 71 contain the pertinent time limitations applicable to Privacy Act requests, and repeating them in these regulations would serve no useful purpose.

The same commenter also suggested that § 10.12 be revised to require OWCP to suspend the adjudication process until it complies with a request for copies under this section, and also to provide claimants with an opportunity to ''review and respond to the final decision after being provided with the requested documents.'' However, there is no reason given to support the recommendation that case adjudication should be interrupted until OWCP responds to a request under this provision, and the time periods within which claimants can exercise their appeal rights are set out in either the FECA itself or the ECAB's regulations and cannot be altered in these regulations. Accordingly, this second group of suggested revisions to § 10.12 have also not been made.

Section 10.16

One Federal agency requested the addition of a sentence at the end of § 10.16(a) to ''clarify'' that OWCP both cooperates with and supports the Department of Justice's efforts to enforce the criminal provisions that apply to claims under the FECA. However, OWCP already cooperates with and supports these efforts to vigorously enforce the criminal provisions referred to in § 10.16(a). Therefore, since the addition of an essentially hortatory sentence will not ''clarify'' OWCP's policy any further, the suggestion is not adopted.

One labor organization suggested deleting the phrase ''for making a false report'' from the question asked by § 10.16 to clarify that one of the criminal provisions referenced in this section, 18 U.S.C. 1922, applies to employer actions that wrongfully impede a claim. Since the question asked by proposed § 10.16 refers only to penalties that arise from filing a false report, it is revised consistent with the suggestion.

The same labor organization also suggested that a new subsection (c) be added to § 10.16 to further clarify that criminal penalties apply to actions by employers that wrongfully impede a claim. However, § 10.16(a) already lists 18 U.S.C. 1922 as one of the criminal provisions that can apply in connection with a claim under the FECA, so the addition of a new subsection to address this one provision is not seen as necessary. Instead, this subsection is

revised to clarify that criminal penalties also apply to actions of employers that wrongfully impede a claim.

Section 10.17

One Federal agency inquired whether the forfeiture of benefits provided for in § 10.17 applied to both Federal and State crimes and requested clarification if that was indeed the case. In light of the fact that section 8148(a) of the FECA refers to any ''Federal or State criminal statute,'' § 10.17 is revised consistent with the suggestion. The same agency also requested that a reporting requirement be added to this section so beneficiaries would have to inform OWCP of their convictions, and such a requirement will in fact be added to Form CA–1032.

Section 10.18

One Federal agency asked whether benefits inadvertently paid to an incarcerated beneficiary would be considered an overpayment of compensation, and also asked whether the forfeiture described in § 10.18(a) would apply to a period of time already served prior to conviction that is later included in the sentence of a convicted felon. As for the overpayment inquiry, an incarcerated felon is not entitled to compensation during the period of his or her incarceration, and therefore any compensation paid to such an individual would clearly constitute an overpayment of compensation under section 8129 and would be recoverable as such.

With respect to the possible retroactive application of any such forfeiture, section 8148(b)(1) specifies the potential range of these forfeitures by providing that ''no benefits * * * shall be paid or provided to any individual during any period'' of incarceration, not for any period of incarceration. This temporal limitation means that the forfeiture provided for by section 8148(b)(1) of the FECA will result only in a cessation of current payments that would otherwise have been made ''during'' a period of incarceration based on a felony conviction, and will not also result in a retroactive forfeiture for a period of time already served prior to conviction if subsequently included in the sentence.

Four Federal agencies objected to OWCP's blanket decision in § 10.18(b) to exercise the discretion granted it by section 8148(b)(3) of the FECA in such a way as to require the payment of benefits to eligible dependents of all incarcerated beneficiaries, since this is a ''benefit'' that was not available to family members of uninjured Federal employees incarcerated for felony convictions. One of these agencies wanted OWCP to restrict payments of this sort to dependents of felons who are incarcerated for periods of up to six months only, while two of the four agencies complained that there would be ''no reduction in compensation benefits'' in certain situations under § 10.18(b).

OWCP's policy is consistent with both the remedial aspect of the FECA and Congress's decision in section 8148(b)(3) to provide OWCP with the discretion necessary to make these types of payments. Also, these comments include no recognition that OWCP has exercised this discretion in such a way that these payments to dependents will never exceed 75% of the incarcerated felon's gross current entitlement (which is less than their monthly pay), and will therefore always result in a reduction of compensation benefits. To clarify matters, § 10.18(b) is revised to point out that dependents under this paragraph will not be paid the same amount of compensation as other dependents.

One of these four Federal agencies also requested that a reporting requirement be added to this section so incarcerated felons would have to inform OWCP when they were incarcerated, and such a requirement will be added to Form CA–1032.

Section 10.100

With respect to paragraph (b)(1), one agency requested some examples of verbal notifications of injury, asking specifically what would happen if an employee claimed to have told a supervisor that an injury occurred, but the supervisor died before the facts could be determined. In practice, verbal notification very seldom forms the basis for a claim. In problematic situations such as the one cited, OWCP would need to explore the surrounding circumstances and make a finding consistent with all of the evidence. Since such situations are so individual in nature, as well as quite rare in occurrence, OWCP does not believe that a fuller discussion of this matter in the regulations is warranted.

A commenter objected to the three-year time limit, which is set by law. A modification to it would require a change to the FECA itself.

Sections 10.101 Through 10.106

An employer stated that proposed § 10.103 is redundant, since it essentially repeats the contents of proposed § 10.101. This point is well taken. The positions of proposed § 10.102 and § 10.101 have been reversed, the title of proposed § 10.101 (now § 10.102) has been reworded, and proposed § 10.104 through § 10.106 have been renumbered § 10.103 through § 10.105. (The suggestion from a labor organization that the heading in § 10.103 be rephrased to include only compensable injuries therefore becomes moot). The following comments refer to the provisions as renumbered.

Sections 10.100(b)(3), 10.101(a), and 10.105(a)

Three labor organizations objected to the provision allowing for withdrawal of claims on the grounds that employers may pressure employees to drop claims. While the program continues to believe that there are valid reasons for retaining this provision, the text of § 10.117(b) has been modified to prohibit employers from compelling or inducing employees to withdraw claims.

Two agencies suggested that language be added to § 10.100(b)(3) to indicate that any COP granted to an employee after a claim is withdrawn must be charged to sick leave, annual leave or leave without pay as chosen by the employee. This suggestion has been adopted with respect to annual or sick leave, and the last part of the sentence has been reworded in accordance with § 10.223, which says that COP paid in error may be considered an overpayment of pay consistent with 5 U.S.C. 5584.

One agency asked about the implications of withdrawal of cases which were closed ''short form'', on the basis that OWCP does not formally ''determine eligibility for benefits'' in these cases. While no case-specific determination is made in these cases, eligibility has been established using pre-determined criteria, and the program does not believe that the proposed language compromises the ability to withdraw a case which is closed ''short form''. Should this happen, any monies paid for medical care would be declared an overpayment, which would be handled according to the usual procedures.

Section 10.101 (b) and (c)

A labor organization stated that, because latent conditions may result from traumatic injuries, the discussion of timeliness with respect to latent conditions should not appear solely in the paragraph dealing with occupational disease. The point is well taken, and the language of paragraph (c) is being added to § 10.100 as new paragraph (c). The organization also favors removing the word ''injurious'' from the first sentence of paragraph (b). As the concept of ''injury'' is integral to workers'

compensation claims, OWCP believes that the use of this word is appropriate.

Section 10.102

A labor organization suggested that the heading be rephrased to include only compensable injuries. When a Form CA–7 is filed, OWCP has not necessarily determined the compensability of the claim. The suggested change would therefore be unnecessarily restrictive and confusing.

Section 10.102(a)

One agency suggested that this section be amended to include a statement that Form CA–7 is not needed during the initial period of disability, which is covered by COP. The first sentence is being modified to clarify this point.

A labor organization states that the requirement to submit Form CA–7 no more than 14 days after pay stops suggests a legal time limit which a reader might confuse with the time limits specified by the FECA for making claim for compensation, which are described in § 10.100(b). Section 10.101(a) is exclusively concerned with the mechanics of filing a particular form, and makes no reference to time limitations under the FECA. OWCP does not believe that readers will be misled by the wording of this section when it is read in context.

Section 10.102(b)(3)

One agency asked for clarification as to whether the medical evidence should be submitted to the employer or to OWCP. As OWCP is the proper recipient, this paragraph has been changed to so state. The agency also stated that the employee should be required to provide the medical evidence to the employer. OWCP strenuously disagrees, as it is the adjudicator of claims for compensation and employers do not have a global need for medical reports supporting such payments. The agency may, however, obtain copies of such medical evidence directly from OWCP. Therefore, this change has not been made.

Section 10.103

One agency proposed that Form CA–7 always be required to file claims for schedule awards, as they are tracked for timely processing and letters are not, and a request for a schedule award conveyed in a letter might be overlooked. While this suggestion has merit, it does not take into account that schedule awards are initiated by claims personnel as well as by claimants, or that a schedule award may be claimed whether or not the employee is receiving compensation for disability. Given the variety of ways in which a claim for a schedule award may originate, OWCP does not think it is prudent to restrict the method of filing the claim to Form CA–7.

One employee organization noted that the phrase ''compensated according to the schedule'' is redundant. The phrase is being removed and the word ''such'' is being added before ''impairment'' to ensure that the meaning of the paragraph is clear.

Section 10.104

A commenter objected to the concept of recurrences. Removal of this concept would require a change to the FECA itself.

Section 10.104(a)

An agency desired clarification of whether an employee must both lose time from work and incur a wage loss for the submittal of a Form CA–2a to be necessary. This in fact is the case, and no change is made to this paragraph.

Another agency noted that this section addresses only recurrences of disability, and does not consider recurrences of medical conditions (although Form CA–2a is designed to claim both). This agency proposed adding a phrase to the end of the first sentence to address recurrences of medical conditions, and this change has been made.

Three agencies and a labor organization noted a contradiction between a statement in this section and a statement in § 10.207(a), with respect to whether a Form CA–2a, Notice of Recurrence, must be filed during the COP period. One agency noted that submittal of the form is a workload item both for the employer and for OWCP, while another agency noted OWCP's comment in the Preamble to the Proposed Rule that it is difficult for OWCP to intervene in cases when it does not know that time loss is occurring. The statement in § 10.207(a) is correct, and the second sentence of proposed § 10.105(a) (now § 10.104(a)) has been removed.

A labor organization suggested rewording the sentence addressing situations where a Form CA–2a need not be filed. From the suggested text it is clear that three situations (new traumatic injuries, new occupational diseases, and new events contributing to already-existing occupational diseases), rather than the two specified in the proposed rule, need to be addressed in this regard, and the paragraph has been reworded accordingly.

Section 10.104(b)

An agency asked whether the statement accompanying Form CA–2a is to be submitted as a separate narrative, since the information listed in this paragraph is also listed on Form CA–2a. The paragraph is being reworded so that it refers to the specific requirements stated on Form CA–2a, just as § 10.104(b)(2) refers to specific requirements stated on Form CA–2a with reference to the submittal of a medical report.

Section 10.105(a)

A labor organization suggested that this section be reworded to refer to the claimant as the ''survivor claimant'' throughout. As the referent changes from ''survivor'' to ''claimant'' in the middle of the paragraph, different wording would clearly be desirable. Therefore, ''claimant'' has been changed to ''survivor'' both in this paragraph and in paragraph (c). The point that SSNs are to be provided for all survivors on whose behalf benefits are being claimed has been clarified, though this issue was not raised by the labor organization.

Section 10.105(d)

A labor organization suggested that the first sentence of this paragraph, which parallels the language of section 8122(c), be expanded to include occupational diseases, and this change has been made. However, the meaning of the statutory text has not been expanded as suggested, by changing ''the same injury'' to ''the same compensable condition''.

The organization also proposed that this section address the entitlement of a survivor to the remainder of a schedule award after an employee dies. That is not the subject of this section, however, and its inclusion here would not be germane.

The organization also asked what provision of the FECA bars a claim for disability which is not filed while the employee is alive. In *Anna Palestro (Vincent Palestro),* 15 ECAB 241 (1964), the Employees' Compensation Appeals Board established that an individual must be alive to claim benefits for disability. The only provision for payments to carry over from a disability claim after death is found in section 8109.

Section 10.110 (a) and (b)

Nine employing agencies, one employee organization, and one other commenter objected to the reduction of time for submitting Forms CA–1 and CA–2 from 10 to five days. Many reasons were cited for this objection.

Practical concerns included observations that decentralized operations make it difficult to meet current time standards, much less tightened ones, and that delivery by the Postal Service can take five days. Also, injuries occurring on a night shift or weekend cannot always receive administrative attention until the next day, when the employee and/or witnesses may not be available; a five-day time frame may result in incomplete and/or inaccurate submittals of information; the quality of claims review by employers might suffer; and the proposed standards would be difficult to enforce.

With respect to traumatic injury cases, it was stated that a five-day period for submittal would be at variance with the 10-day period allowed employees to produce prima facie evidence of disability. It was further stated that, given that OWCP closes most traumatic injury cases ''short form'', and OWCP nurses are not assigned unless and until a Form CA–7 is submitted, the advantage of a five-day period over a 10-day period was not evident.

With respect to occupational disease cases, it was stated that 15 days should be allowed for submittal of Forms CA–2 for former employees, on the basis that it takes more than 10 days to compile even minimal information for these people. This longer time period would be consistent with the longer time frames OWCP allows for developing and adjudicating claims for occupational disease.

Concerns about the effect on employer morale included the observations that while a reduced time period is a worthy goal, less than half of claims submitted Government-wide meet the 10-day goal now; that employers trying to improve their performance in this area would be subject to criticism for inability to comply with this time limit; and that reducing the time limit would change employers' focus from the needs of injured employees to the need to meet the regulatory requirements.

As a related matter, an employer predicted with respect to § 10.117 that a five-day submittal requirement would result in more erroneous controversions, or more controversions after the initial submittal. This employer juxtaposed the five-day period to the 30-day period allowed for controversion, but this juxtaposition differs little from that presented by the current requirement to submit notices of injury within 10 days. Also, there is a difference between controverting the case, which can be done quickly, and providing supporting evidence, which may in fact take more time.

Finally, § 10.110(b) indicates that the employing agency will ''transmit'' the completed form to OWCP (as does § 10.113(c)). The word ''transmit'' is used specifically to allow for electronic transmission of forms. It was suggested that a five-day time frame would be more appropriate when electronic transmission is a reality. It is this argument which seemed most salient, and given the evolutionary nature of the program's electronic data processing efforts, the proposal to reduce the number of days allowed for submittal from 10 working days to five calendar days will be set aside until OWCP has the capacity to receive the notices in electronic format from all agencies. At that time OWCP will revisit this issue from the regulatory standpoint. The 10-day submittal period is very much within the norm by comparison with workers' compensation programs in the States and the District of Columbia. Nineteen states also set a 10-day submittal period, while 19 states set a shorter period and 13 states set a longer one.

A commenter stated that the employer cannot know if ''the need for more than two appointments'' as stated in § 10.110(b)(3) will develop, and suggests a more general rewording. The program has followed this practice for a number of years, and it has proven to be quite serviceable. Therefore, OWCP does not believe that a change is warranted.

Two labor organizations suggested that the employer be required to furnish the employee with a copy of both sides of Form CA–1 or CA–2 when the employer completes its portion of the form. A phrase to this effect is being added.

Section 10.111

Concerning paragraph (a), a labor organization suggested that language be added to explicitly require the employer to advise the employee of his or her rights under the FECA, as the current regulations provide at § 10.106(a). Employers are required at various places in these regulations to provide specific information and forms to injured workers, and inclusion of a general statement is superfluous.

Concerning paragraph (b), an agency suggested that the time frame for submitting Form CA–7 to OWCP remain as stated in current § 10.106(b), which allows for submittal by the tenth calendar day of wage loss rather than during the COP period. The proposed regulation represents long-standing policy in accordance with guidance first issued by FPM Letter 810–6 in May 1985. OWCP does not believe that this policy needs to be changed.

Concerning paragraph (c), three agencies objected to the five-day time frame for submitting Form CA–7. However, this time frame is the same as that found in the current regulations, and the program is striving to shorten the time frames for submittal of notices of injury and claims for compensation. Therefore, OWCP believes that it would be counterproductive to specify a period greater than the five days currently allowed for submittal of claim forms.

One employee organization suggested that the time frame be expressed as calendar days, rather than working days, to be consistent with § 10.110(a). As the latter section will be changed to read ''10 working days'' (see comments above), the wording in § 10.111(c) will remain ''working days'' as well.

Section 10.112

Two agencies objected to the five-day time frame for submitting Form CA–8. As noted in the comments about § 10.111(c) above, however, this time frame is the same as the one found in the current regulations, and the program is striving to shorten the time frames for submittal of claims for compensation. Here, too, the program believes that it would be counterproductive to specify a period greater than the five days currently allowed for submittal of claim forms.

As with § 10.111(c), one employee organization suggested that the time frame be expressed as calendar days, rather than working days, to be consistent with § 10.110(a). As the latter section will be changed to read ''10 working days'' (see comments above), the wording in § 10.112(b) will remain ''working days'' as well.

Section 10.115

Current § 10.104 requires the employee to submit medical evidence in all cases. One agency stated that this requirement is not clearly enunciated in the proposed regulations, in spite of specific references in proposed §§ 10.210, 10.101, and 10.105, and suggested a change to proposed § 10.115. The program concurs, and a sentence is being added to clarify this point.

A commenter recommended that Forms CA–1, CA–2, and CA–2c (perhaps CA–2a was intended) be combined, and that Forms CA–5 and CA–5b be combined, and that Forms CA–7, CA–8, and CA–12 be combined. Each of these forms serves a specific purpose and is accompanied by specific instructions. Any of the combinations suggested would result in much longer forms which would be more difficult to

use and understand, both for employees and employers.

A labor organization objected to the removal of the language found at current § 10.110(a) concerning the employee's burden of proof, and suggested that it be restored. Most of the material in the current rule is covered in proposed § 10.115, but the sentences pertaining to the belief of the claimant and emergence of a condition during a period of Federal employment with respect to causal relationship have been added to proposed § 10.115(e), and the latter part of that paragraph as proposed has been relettered (f). Also, a statement that the claimant must establish the five basic requirements of the claim to meet his or her burden of proof has been added to the introductory paragraph of this section.

Section 10.117

One agency read this section as applying only to occupational disease claims, as this is the subject of the section immediately preceding it, and proposed that § 10.117 be retitled to make clear that it applies to both traumatic injuries and occupational diseases. OWCP concurs, and this change has been made.

The same agency proposed a new paragraph providing that ''OWCP will promptly respond'' to an agency's objection to acceptance of a claim, and also that the agency and the claimant may review each other's responses to the agency's objections. Section 10.119 already addresses OWCP's responsibility to advise all of the parties to the claim when a claim is contested, and the remainder of this suggestion would add another layer of review by claimants and agencies. For these reasons OWCP has not adopted this suggestion.

One labor organization suggested that the last sentence of paragraph (b) be modified to include withdrawal of a claim. OWCP concurs with this suggestion and believes that it will address the issues raised with respect to §§ 10.100(b)(3), 10.101(a), and 10.105(a) (see the comments above with respect to these sections).

Section 10.118

One employee organization suggested that the language which appears in current § 10.140 with respect to the non-adversarial nature of proceedings under the FECA be added to this section. OWCP agrees that it should appear, but as this language applies to many aspects of claims processing, it is being added to § 10.0.

Section 10.119

An agency made two comments about delayed controversion which apparently flowed from the proposal to reduce the number of days allowed for filing notices of injury and occupational disease from 10 to five days. It asked whether OWCP would provide written explanation of an acceptance if the agency contested the claim within 30 days of receiving the notice from the claimant, even if the claim was not contested on the notice itself. OWCP will in fact provide such written explanation, and this section has been modified accordingly.

Section 10.121

Two employee organizations suggested that the phrase ''up to'' be removed, so that employees will always have 30 days to respond to a request for information. OWCP concurs, and the language of the current § 10.110(b) regulation is being retained in this regard.

Section 10.127

One employee organization suggested that the word ''should'' in the second sentence be changed to ''will'', both to ensure that the employee's representative is properly notified and to be consistent with the language in the last sentence. This change has been made.

Section 10.200

One agency requested amplification of when an agency can make preliminary determinations on an employee's entitlement to COP other than in the situations described in § 10.220 and § 10.221. Another agency suggested that the proposed language did not make it clear enough that the employing agency must pay COP, even while controverting it, except for certain delineated reasons. A labor organization also suggested clarifying language in this regard.

The policy behind the proposed rule was and remains that there are no circumstances under which an agency can refuse to pay COP, except for those listed in § 10.220 and § 10.221. The confusion and doubt expressed in the comments, however, pointed to a need for clarification. OWCP found language suggested by an employing agency to be helpful in this regard and changed § 10.200(b) accordingly.

Moreover, in paragraph (a), the phrase ''workers'' compensation benefits'' has been changed to ''wage loss benefits'' to make the meaning more clear. Finally, paragraph (e) lacks the words ''employing agency's'' before the word ''premises''. This oversight has been corrected.

Sections 10.205 and 10.207

These sections elicited the most comments with respect to COP (six and seven, respectively). These sections propose that, to use COP: Disability must either (1) begin within 30 days after the date of injury (§ 10.205(a)(3)); or (2) recur within 30 days after the first return to work (§ 10.207(c)).

One agency objected to shortening the time frame for commencing COP after suffering a recurrence of disability, and noted that since a Form CA–2a was required, OWCP would be put on notice of the recurrence. That agency also pointed out that neither the current nor the proposed rules address the situation where an employee returns to work but takes intermittent COP for medical appointments only, and it suggested that a new section be added to specifically allow for this. COP is appropriately used for medical appointments, and while OWCP does not believe a separate section is needed, a phrase to this effect has been added to § 10.205(a)(1).

Finally, that agency also suggested that employees should document these medical visits. Since bills will be submitted to OWCP for any medical treatment and the dates of treatment will be specified on these bills, no additional documentation will be required.

Six labor organizations addressed the reduction in the time period for commencing COP in both § 10.205 and § 10.207. One organization noted that disability may not begin right away because, for example, of difficulty in scheduling surgery, and that the restriction in both sections was contrary to the remedial purpose of COP. Another noted that complete healing following surgery may take longer than the 30-day time frame would allow, and suggested that a special extension to 180 days be allowed where COP is used for medical appointments only. A third organization challenged OWCP's stated rationale, noting that agencies do not uniformly submit claim forms in a timely manner. This organization stated further that early intervention is valuable in cases involving extensive disability, not where disability is infrequent, and suggested that the intention was really to save agencies COP payments.

A fourth organization felt that the change would deprive the employee of one of the Act's benefits and instead allow agencies to return employees to work before they were physically able to do so. A fifth organization expressed deep concern with the proposal, stating that it failed to recognize that some conditions result in delayed disability,

and while it applauded efforts to minimize lost time, it asked that other methods be used. The fifth organization suggested that the period be reduced to 60 rather than 30 days. A sixth organization also registered grave concerns with this change, stating that it ran counter to the remedial intent of COP and noting that medical treatment may be delayed beyond 30 days from the date of the injury.

COP is intended to prevent an interruption of income in traumatic injury cases during the time period it takes for an employee to submit a claim and for OWCP to adjudicate the claim. While the legislative history does not specify why a 45-day maximum was chosen, the history, supported by the plain language of the statute, makes it clear that Congress was concerned about interruption of an employee's salary while a claim was filed and adjudicated, but had no intention of providing an entitlement to the entire 45-day period if wage-loss benefits could be paid instead. Section 8118(b)(3) further provides that COP is to be paid ''under accounting procedures and such other regulations as the Secretary may require,'' giving the Secretary broad authority to establish the ground rules under which COP will be paid.

However, to mitigate any problems which a 30-day maximum time frame for beginning to use COP might cause, the time frame in the final rule has been changed to 45 days. Despite this change, OWCP believes that it will still be able to fulfill its goal of returning employees to work at the earliest possible time. As noted in the Preamble to the Proposed Rule, it is best if OWCP learns of lost-time cases as soon as possible so that early intervention can facilitate an early return to work. Continued disability-related absences, even intermittent absences, can prevent OWCP from intervening during this crucial time. OWCP recognizes that this need must be balanced against the need to ensure an income stream. The two are not mutually exclusive, however, and the efforts of the agencies and OWCP to shorten the time period required to process claims and pay benefits will prevent interruptions to the income stream.

One example put forth in favor of retaining the existing period for payment of COP when disability does not begin right after the date of injury is that of a claimant whose surgery cannot be scheduled within 30 days. If the claimant continues to work, lost time does not begin until the date of surgery, and if this date is more than 30 days past the date of injury, the individual will have no entitlement to COP and no income.

In this scenario, however, the income stream would not be interrupted. OWCP would note that surgery is pending, and the anticipated lost time would allow the agency and OWCP to process claim forms for wage-loss benefits so that the income stream would not be interrupted. Indeed, this is the very kind of scenario in which COP would not be appropriate, since such lost time is anticipated well in advance and the agency and OWCP have time to process the claim to provide the wage-loss benefits under the Act.

Finally, several commenters noted that employees in some cases lose time intermittently just to attend medical appointments, and cited this kind of time loss as a reason for not reducing the period for commenting use of COP. OWCP does not disagree with this argument, but after careful consideration, it concluded that administration of a provision with different time frames with respect to disability and medical care would be too complicated, both for employing agencies and for OWCP itself. Therefore, the time frame for beginning to use COP will be 45 days in all circumstances.

Three agencies and a labor organization noted a contradiction between a statement in this section and a statement in § 10.105(a), with respect to whether a Form CA–2a, Notice of Recurrence, must be filed during the COP period. As noted in the comments about § 10.105, the statement in § 10.207(a) is correct.

Section 10.205(a)(2)

An employing agency inquired as to what would constitute ''another form'' acceptable to OWCP, and whether a letter would suffice. This language is included so that the regulations reflect OWCP's position that a Form CA–2, CA–7 or CA–8 (all of which contain words of claim) fulfills the requirement that notice be given ''in writing'' under the appropriate circumstances. The word ''form'' does in fact denote an OWCP-approved claim form, and a letter would not serve the purpose described herein.

Section 10.206

One agency expressed concern with the retroactive election of COP in those cases OWCP terms ''short form closure'' cases, that is, cases where there is no wage loss claim and the medical bills do not exceed a certain dollar amount. In these cases, no formal acceptance is issued. The agency points out that in such cases, the wording in § 10.206(a) should be revised to reflect this by adding the parenthetical clause ''(if written approval is issued).'' This suggestion is accepted and the language has been changed accordingly.

Section 10.210

An employing agency argued that employees should submit medical reports to employing agencies as well as to OWCP. This issue is addressed in the comments about § 10.331(b). Several commenters pointed out a typographical error (''employer'' instead of ''employee''), which is corrected in the final rule.

A labor organization objected to changing the period within which medical evidence supporting disability must be submitted to the employer from 10 working days to 10 calendar days. This change was made because it is important to obtain this evidence as soon as possible. Using working days, which do not include Saturdays, Sundays and Federal government holidays, can easily result in a period of 15 or more calendar days elapsing before a medical report is received, a period during which the employee continues to be absent from work. OWCP has discussed the importance of early intervention, and the earlier the submittal, the better. This section is entitled ''Employee's Responsibilities'' to emphasize that return-to-work efforts are required by employees as well as employers and OWCP. Certainly the employee, who has chosen his or her physician, has the most leverage over the physician at this crucial time and can best ensure that such medical evidence is submitted. The new language requiring the report to contain a statement as to when the employee can return to work is consistent with and essential to this goal.

Section 10.211

One labor organization suggested wording changes to subsection (c) that would have the effect of eliminating the distinction between controverting a claim for COP and other objections an employer might raise to a claim under the FECA. Unlike a general objection that would have no immediate consequences for a claimant pending action by OWCP, controverting a claim for COP is a preliminary determination by an employer that stops a claimant's regular pay. Therefore, OWCP wants to retain the distinctive nature of this particular type of objection, and the suggested changes have not been adopted.

In subsection (d), several commenters asked what the phrase ''other forms approved by the Secretary'' meant. This phrase was added to ensure that the

regulations reflected OWCP's position that a Form CA–2, CA–7 or CA–8 (all of which contain words of claim) will fulfill the requirement that notice be given ''in writing'' under the appropriate circumstances. In addition, one labor organization suggested changing ''return'' to ''transmit'', and this change has been made. Finally, three agencies objected to the requirement that Form CA–1 be submitted to OWCP within five calendar days. For the reasons stated in the response to the comments received to § 10.110, OWCP has decided to keep the time frame of 10 working days, and the language of paragraph (d) has been changed accordingly.

Section 10.215

One agency noted with respect to paragraph (d) that there appeared to be a change in how COP days are calculated in this section as proposed. The section states that days off are counted toward COP if COP was used in the days immediately before and after the days off. The comment pointed to an inadvertent modification in how days are calculated and the final version has been changed to read that if COP is used on the day before or the day after days off and disability is supported by medical evidence, the days off are counted toward COP.

The same agency suggested language on calculating COP days for part-time or intermittent employees, and that language has been adopted. However, this agency's suggestion that OWCP add a new paragraph to § 10.215 to address the circumstances under which COP may be used for obtaining medical treatment would both limit the scope of paragraph (c) and unnecessarily restrict OWCP's ability to monitor the provision of medical treatment, and therefore the requested addition has not been made.

Sections 10.216 and 10.217

Two Federal agencies noted that the inclusion of differential and/or Sunday premium pay in the pay rate for COP was contrary to provisions in two appropriation bills passed by Congress, Pub. L. 104–208, section 630, 110 Stat. 3009, 3362 (1996) and Pub. L. 105–61, section 636, 111 Stat. 1272, 1316 (1997), which prohibited Federal agencies funded by those bills from paying differential and/or Sunday premium pay to their employees unless they actually performed work during the time period relevant to such pay. These agencies therefore suggested that both §§ 10.216(a)(1) and 10.217 be changed to reflect that these particular increments of pay are not to be included in the pay rate for COP.

Ever since Congress amended the FECA in 1974 to provide for COP, OWCP has directed agencies to include premium, night or shift differential, Sunday or holiday pay, and other extra pay in their calculations of the pay rate for COP. However, in several recent appropriation bills, Congress has included language similar to the prohibitions cited by the two Federal agencies, without actually amending the underlying statutory authority for such increments of pay or overturning court decisions construing such statutory authority.

Therefore, while it is clear in the absence of such appropriations language that it would still be proper for OWCP to require the inclusion of these two increments of pay in the pay rate for COP, it is also clear that the statutory authority for the payment of such increments is not derived from the FECA itself, nor are these increments currently being paid in a consistent manner throughout the entire Federal workforce due to the varied scope of agency legal authority to spend appropriated funds. In addition, the agencies funded by the appropriation bills in question would again be required to include these increments of pay in the pay rate for COP should the prohibition on their payment not be included in future appropriation bills.

From an administrative standpoint, there is little justification for OWCP involvement in payroll functions among the various agencies, only some of which are affected by the appropriation bills noted above, since COP constitutes a continuation of an employee's ''pay'' that is calculated and paid by his or her agency rather than a form of ''compensation'' that is calculated and paid by OWCP. Accordingly, §§ 10.216(a)(1) and 10.217 are revised to reflect these circumstances.

One of the same two Federal agencies also suggested adding language to § 10.216(a) to emphasize that ''weekly pay'' is based on an average of the employee's weekly pay over the prior 52 weeks. However, § 10.216(a) already explains this very point, and thus the suggested addition is not made. One labor organization urged that § 10.216 include a reference to paid leave in determining how COP is calculated, for fear that agencies would exclude it from their calculations. Certainly, paid leave must be included in the calculation of COP. While neither OWCP's regulations issued since 1975 nor the Federal (FECA) Procedure Manual make reference to paid leave, there is no indication that this absence has caused the feared exclusions to occur. Therefore, OWCP sees no need to add the requested reference.

Sections 10.220, 10.221 and 10.222

One labor organization recommended changes to § 10.221 regarding the requirement that an agency controvert a claim for COP before it stops an employee's pay. However, the suggested changes, which involve retention of language in current § 10.203(b), would not maintain the desired distinction between controverting and otherwise objecting to a claim, and they have therefore not been incorporated.

A number of labor organizations noted that the existing rules direct agencies to retroactively reinstate COP which it had stopped because medical evidence showing disability had not been received within 10 days, when that medical report is received. The language has been added to § 10.222(a)(1).

One agency asked about the type of medical evidence necessary to support the continued payment of COP and requested further guidance from OWCP. The evaluation of medical evidence by the employing agency is limited to a determination of whether, on its face, the medical report supports disability. Agencies do not properly consider medical rationale. Given this limited involvement, further guidance of the type requested is seen as unnecessary.

One labor organization objected to the provision in § 10.222(a)(1) that would allow an agency to stop paying COP if the claimant fails to submit the required medical evidence within 10 calendar days and requested that the time frame of 10 working days be retained. However, as noted previously in the response to this labor organization's objection to the equivalent language in § 10.210(b), the change to calendar days from working days was made because it is important to obtain this evidence as soon as possible. Therefore, for the same reasons that supported maintaining the equivalent change in § 10.210(b), the requested change in § 10.222(a)(1) has not been made.

Another labor organization objected to the change allowing the termination of COP when a personnel action—initiated before the injury and including a removal action—becomes final following the injury and during the COP period. No reason was offered for the objection, however, and the program believes that this clarification is necessary to ensure that employees who would otherwise not have received salary do not receive it merely because of the COP provisions. This change was supported by one agency.

Yet another labor organization, along with an agency, suggested that the

proposed rules clarify the employing agencies' authority to terminate COP. An agency noted that § 10.222(a)(3), regarding refusal of a written offer of suitable work, appears to change the current authority for an agency to stop COP. Such a change was not intended, and so new language has been added to this section which makes it clear that an agency can stop COP when an employee refuses a written offer of suitable work, but that OWCP has final authority to determine whether the termination was appropriate and can order retroactive restoration of COP benefits improperly terminated.

The labor organization noted that the language preventing an agency from terminating COP except under the circumstances listed in existing § 10.203 and § 10.204 does not appear in the proposed rules. The reasons for termination have remained essentially the same (except for termination for personnel actions initiated before the injury which become final after the injury). While the language in § 10.220 and § 10.222 is phrased to limit authority of the agency not to pay (§ 10.220) or to stop paying (§ 10.222) in those circumstances listed, the comments show that the program's intent was not clear. Therefore, additional language has been added to § 10.220 and § 10.222(c), clarifying that the agency cannot stop COP to which the employee is otherwise entitled except for the reasons set out in these two sections, or unless OWCP directs COP to stop, or unless the individual has returned to work.

Sections 10.223

Two agencies noted that this section failed to address disruptions by the employee's representative. That language has been added. A labor organization noted that the ''required medical examination'' is one required by OWCP and the regulations should so state, and this change has been made. The organization also suggested making clear that the suspension is subject to all appeal and review rights. This language is unnecessary, since all adverse decisions by OWCP are subject to the review and appeal processes set forth under the Act.

Section 10.300(b)

While agreeing with the proposed language that Form CA–16 need not be issued more than a week after the injury occurs, one agency suggested that this section be changed to state that the form need not be issued if the employee reports the injury more than one week after its occurrence. The current language covers this situation as well as the situation where an employee reports an injury right away but does not appear to need medical care for up to a week afterwards. Therefore, OWCP does not believe that the suggested change is necessary.

Another agency suggested that the time for issuing Form CA–16 be increased from four to 24 hours, citing distances among supervisors, injured employees, medical treatment facilities, and those authorized to sign Forms CA–16. The four-hour time frame is the same as currently provided, and as noted in the second sentence of this paragraph, verbal authorization may be given if necessary. In view of the excellent telephone and facsimile communications generally available in the United States, OWCP sees no reason to increase this time frame.

A commenter also objected to the time frame stated, claiming that reaching OWCP may take a week, that care cannot be authorized unless the specific procedures are known ahead of time, and that employees injured at night and on weekends are denied equal access to care. These arguments are not persuasive, especially as the proposed rule is unchanged from the existing rule, and the commenter's suggestion that the employer authorize one visit for medical care until OWCP can approve further care is impractical.

Three labor organizations argued that the proposed rule limiting issuance of Form CA–16 to one week following the injury is inconsistent with the statutory 30-day requirement for claiming COP. Still another labor organization stated that changing to a one-week limit from what it considered to be the current time frame of six months from the date of injury to be ''radical and inappropriate''. OWCP does not agree. The purpose of Form CA–16 is to authorize urgently-needed medical care in connection with a work-related traumatic injury, not to provide blanket medical coverage. An employee whose need for medical care develops so gradually that it is not apparent until a week after the injury occurred cannot accurately be said to require urgent medical care. The time requirements for claiming COP have no relation to those governing issuance of Form CA–16.

Section 10.300(d)

Three employee organizations suggested that the employer be specifically instructed to ''advise the employee of the right to initial choice of physician'', parallel to the language of proposed § 10.211(b) with respect to the employee's right to COP. This change has been made.

Another employee organization suggested that this paragraph allow for initial choice of medical facility as well as physician. Inasmuch as a report from a physician is needed to support a claim for compensation, the inclusion of the term ''medical facility'' is irrelevant at best, and might prove misleading as well.

A commenter stated that this section does not indicate how OWCP will notify physicians that they have been excluded. This information is provided in subpart I, which is referenced in this paragraph.

Section 10.303

Two agencies expressed their appreciation for the clear statement with respect to issuing Forms CA–16 for simple workplace exposures to hazardous substances when injuries have not occurred.

Section 10.310

Two agencies stated their support for the changes in this section with respect to appliances, supplies, and generic equivalents for prescribed medications, indicating their belief that these measures would assist in cost containment (and, in the view of one of them, sound fiscal management). Another agency stated its approval of the program's cost containment efforts in general. Another commenter, on the other hand, questioned how OWCP would apply the test of cost-effectiveness.

A commenter also questioned the statement that OWCP ''will not approve an elaborate appliance or service where a more basic one is suitable'', positing that OWCP will oppose use of higher-cost diagnostic tests (for instance MRIs, in comparison with x-rays) in a misguided attempt to cut costs. This conclusion is incorrect. The statement is intended to address requests for special equipment, such as exercise bicycles, and special services, such as health club memberships, when prescribed to treat the effects of an injury. OWCP will not pay for a top-of-the-line appliance or service where a less expensive equivalent exists. However, in matters of diagnosis and treatment, OWCP does not and will not attempt to second-guess physicians.

Section 10.310(b)

The last sentence in this paragraph gives OWCP the authority to require the use of generic equivalents where available. An agency suggested that OWCP require the use of generic equivalents where available for all prescribed medications, unless the employee shows good cause for not

doing so. Another commenter, on the other hand, stated that OWCP should not be allowed to require the use of generic equivalents if they do not represent the ''SOC'' (presumably ''standard of care''), since doing so ''sets MDs up for malpractice''.

As the purpose of adding this provision to the regulations is to provide OWCP with the flexibility to implement such a policy in the future, the first comment is not adopted. With respect to the second comment, use of generic equivalents is a commonly accepted practice in many health plans and medical benefit programs, and the program has no intent to subvert generally accepted standards of care. The statement will therefore remain unchanged.

Section 10.311

With respect to § 10.311(a), two agencies stated their disagreement with what they considered the expansion of chiropractic services and suggested that the first sentence be reworded to more closely follow the statutory language. However, the proposed change is virtually identical to the last sentence of section 8101(2), and as there is no intent to expand the meaning of the statute, and the costs involved are consistent with the statute and with OWCP's past practice, OWCP does not believe that the language of this section needs to be modified.

Another commenter objected to §§ 10.311(a) and (b) on the basis that chiropractors cannot treat subluxations. Such treatment is authorized at section 8101(2).

Section 10.313

An agency asked that this section more clearly define when preventive treatment may be authorized and when it may not, particularly in the context that a work-related injury must be present before treatment may be authorized. Paragraphs (b) and (d) already refer to specific injuries, and paragraph (a) addresses complications of agency-sponsored preventive measures, which are considered to be injuries. Paragraph (c) refers to conversion of tuberculin reaction after exposure to tuberculosis in the performance of duty. Since tuberculosis is transmitted invisibly, through the air, a specific injury is inferred from the conversion. For these reasons, OWCP does not believe that changes to this paragraph are necessary.

Section 10.314

Two employee organizations objected to the change in method of payment to attendants as represented by this section, given the language of section 8111(a). The Preamble to the Proposed Rule (62 FR 67123–67124) sets forth in detail OWCP's reasons for making this change, and OWCP continues to believe that this exercise of the Director's discretion will be beneficial in several ways. As noted in the Preamble, employees currently receiving an attendant's allowance under section 8111(a) will not be affected by this change.

Two agencies stated that they support the changes noted in this section, one indicating its belief that this provision will help OWCP to monitor and control medical costs in the future. The other suggested that this section address the desired billing method, either specifically or by cross-reference to subpart I. OWCP concurs, and a cross-reference to § 10.801 has been added.

The second agency also suggested that the new provision apply to all cases, and that attendants' allowances currently being paid under section 8111(a) be discontinued. In this agency's view, such a change would reduce workload and avoid any confusion which might result from having two methods of payment. Given the relatively small number of cases affected by this provision, OWCP does not believe that the benefits which would result from changing the method of payment to claimants now receiving augmented compensation for attendants would outweigh the disruption which might result.

Section 10.320

An agency questioned whether an employee's spouse may attend a second opinion examination, and if not, asked that this be stated in the regulation (and in the letters notifying claimants of appointments). The proposed paragraph states that ''the employee is not entitled to have anyone else present at the examination * * *.'' OWCP believes that the word ''anyone'' is inclusive enough to convey the intended meaning of this sentence, and that clarification is unnecessary.

A labor organization commented that it is unlikely that personal physicians will participate in second opinion examinations, due to other commitments, and that is unfair for an employee to be ''be denied an opportunity to have a second person present during the examination.'' Another organization expressed similar concerns and stated that the language of § 10.323 is sufficient to address any improper behavior.

Section 8123(a) provides that ''The employee may have a physician designated and paid by him present to participate in the examination.'' The FECA says nothing about other individuals participating in the examination. Of course, it is perfectly permissible for any individual to accompany the employee to the examination and remain nearby, in the waiting room, if the employee so desires.

On another subject covered by this section, an employee organization argued that the provision for sending a case file for second opinion evaluation without actual examination of the claimant is counter to the clear language of section 8123, and should therefore be removed. Evaluation of the case file without examination of the claimant can assist claims staff in resolving such issues as causal relationship in occupational disease cases, or making retroactive determination of whether surgery should be authorized. Furthermore, in *Melvina Jackson*, 38 ECAB 443 (1987), the ECAB authoritatively held that this section of the FECA is not limited to *physical examinations* of a claimant and specifically construed section 8123(a) as providing for evaluations of the evidence in a claimant's record without an actual physical examination. Therefore, the suggested deletion is not made.

Section 10.321

One agency asked that a statement be added to this section clarifying that not every difference in medical opinion results in a referee examination. The requested clarification is consistent with decisions of both the ECAB (Andrea Kay Roberts, Docket No. 95–1839 (October 22, 1997)) and federal courts that have addressed this point (*McDougal-Saddler* v. *Herman*, No. Civ.A. 97–1908 (E.D.Pa. December 24, 1997), and *Chaklos* v. *Reich*, et al., No. Civ.A. 95–1763 (W.D.Pa. August 25, 1997)). OWCP agrees that clarifying this section would be useful and therefore a new paragraph (a) has been added. Also, the current text has been relettered paragraph (b), and the title of this section has been slightly revised to more accurately reflect its subject matter.

One labor organization argued that the provision for sending a case file for referee evaluation without actual examination of the claimant is counter to the clear language of section 8123, and should therefore be removed. However, in *Melvina Jackson*, 38 ECAB 443 (1987), the ECAB noted that it had never held that an actual physical examination of a claimant was necessary to resolve disagreements using the medical referee provisions of

section 8123(a). Therefore, the suggested deletion is not made.

In paragraph (b), the reference to section 8123(a) has been replaced with a reference to § 10.502.

Section 10.322

An agency asked that a statement be added to this paragraph noting that the costs of second opinion and referee examinations are eventually charged back to employers. However, the costs associated with medical examinations are no different from other benefits under the FECA, as all expenses are charged back to employers. The mechanism for doing so is described in the FECA at section 8147. In line with OWCP's attempt to avoid repeating statutory provisions in the regulations wherever possible, the program does not believe that addition of language about chargeback of costs associated with medical examinations is necessary or desirable.

Section 10.323

An agency suggested that the title of this section be revised to include the word ''penalties'', and this change has been made.

Section 10.324

A labor organization argued for inclusion of language which would bar the results of medical examinations requested by the employer from being used to reduce or terminate OWCP benefits, unless those results were corroborated by medical examinations directed by OWCP. The program's procedures have stated for some time that such examinations will not be used in this way, and OWCP is not aware of any problems which have arisen with respect to this policy. Therefore, the program does not believe that it is necessary to address it by regulation.

Section 10.330

See the discussion above concerning § 10.115. This section is being modified to make clear that in all cases the employee is responsible for submitting medical evidence, or arranging for its submittal.

A commenter suggested that medical reports require the disclosure of previous claims for the same condition, pre-existing conditions of the same part of the body, and hobbies or other occupations which may contribute to the condition claimed. OWCP already has the capacity to identify previous Federal workers' compensation claims for injuries to the same part of the body. Where necessary, OWCP requests information about pre-existing conditions, hobbies and other jobs as part of evaluating claims for disability.

The same commenter stated that examining physicians should be required to state whether the condition found is causally related to employment. In fact, such a requirement already exists. The commenter also suggested that OWCP physicians review all claims to ensure that causal relationship is properly established. OWCP will shortly begin using automated decision tables, which will compare the condition claimed on the bill with the condition accepted in order to identify problematical acceptances.

Section 10.331(b)

An agency suggested that the employee or treating physician submit copies of medical reports to the employer, stating that while Form CA–17 is useful, physicians do not always complete it. The agency also suggested that OWCP should be required to submit to the employer a copy of any medical report showing that the employee can return to work in some capacity.

Another agency characterized the requirement that reports be sent directly to OWCP as ''directing employees and medical providers to circumvent the employing agencies'' and claimed that this represents a detrimental change, although current § 10.410(b) also requires submittal of reports to OWCP. This agency also stated that this policy will hinder agencies from helping claimants with requests for surgery and claims for wage loss and from becoming aware of new medical conditions which need to be considered in making offers of reemployment.

A third agency stated that it has difficulty managing cases without immediate access to medical reports, which it cannot always obtain right away from OWCP. Another commenter makes this argument as well.

This set of comments speaks to the need for careful information-gathering and for close coordination among employers, employees and OWCP. They also speak to the rights and responsibilities of all parties in the claims process. In its proposed regulations, OWCP has tried to strike a balance among these sometimes competing interests. Employers usually need copies of medical reports primarily to identify jobs to which their injured employees may return, and Form CA–17 is designed explicitly for this purpose. That medical providers do not always complete forms and reports as requested is an experience shared by OWCP, and the program does not believe that adding another requirement for information submittal will truly address this issue, particularly when the medical reports may not accurately describe work limitations.

With respect to managing claims and the need for up-to-date information when offering reemployment, one of the reasons that OWCP uses the services of registered nurses is to facilitate coordination and exchange of medical information among claimants, employers, and medical providers. When a claimant can return to work, whether to full or light duty, full or part time, it has been OWCP's experience that the nurses are able to provide information quickly and accurately so that reemployment can take place as soon as possible.

For all of these reasons the program does not believe that a change in this section is warranted. The agency may, however, obtain copies of such medical evidence directly from OWCP.

Another issue raised by several employing agencies is whether Form CA–17 may be used only for traumatic injuries. One agency notes that it might well be used to determine work limitations in certain kinds of occupational illness cases. OWCP concurs, and the word ''traumatic'' has been removed from this paragraph.

Section 10.333

One employee organization suggested that this section state that medical reports in support of claims for schedule awards must be based on the American Medical Administration's (actually, American Medical Association's) *Guides to the Evaluation of Permanent Impairment.* OWCP concurs, and this reference has been added to this section.

Section 10.336

A commenter stated that the time frames for submittal of bills are too long and suggested that OWCP require submittal within 30 days of the service date. However, the time frames set forth in the regulations are consistent with the practice of the insurance industry in general, and OWCP sees no reason to change them. The commenter also suggested that OWCP be required to process bills within 60 days of receipt. OWCP adheres to internal standards which require that 90 percent of medical payments be made within 28 days of receipt and that 95 percent be made within 60 days of receipt. For this reason, OWCP does not see the benefit of including specific time periods in the regulations. Requiring an ''attached medical report'', as is also suggested, is impractical in an automated bill processing environment.

Section 10.337

An employer and another commenter objected to the provision for reimbursement on the basis that it is unfair to both the agency, which will have to pay the chargeback bill, and to providers who adhere to the fee schedule. While OWCP does not consistently and/or routinely reimburse employees for these excess charges, paragraphs (b) and (c) have been revised so that the employee will be responsible for contacting the provider to obtain refund or credit. If the provider does not comply with this request, the claimant will need to submit documentation of the attempt to OWCP. OWCP may in its discretion make up the difference to the claimant, after reviewing the facts and circumstances of the case. Once such a payment is made, the employee would be aware of the monetary costs of continuing to seek treatment with such a provider, and OWCP might consider not reimbursing the employee for any subsequent excess charges, thereby minimizing the impact of § 10.337 on an agency's chargeback costs. (Section 10.802 has been modified consistent with these changes.)

Two labor organizations suggested that the language of § 10.813 be repeated for claimants in this section. Sections 10.337 and 10.813 are intended to be parallel in structure, and OWCP does not believe that repeating § 10.813 would serve any useful purpose.

Section 10.401

With respect to the period of disability which must elapse before the claimant may be compensated for the first three days of wage loss, an agency asked that the method of counting the days be clarified. The word ''calendar'' is being inserted to make the meaning clear. The agency also inquired as to whether the 14 days may be intermittent, and in fact they may.

One agency suggested a cross-reference to § 10.6. A specific reference to section 8110(a) would probably be more useful, and one is therefore being added.

Section 10.403(a)

One agency commented, apparently with respect to this section, that determinations of wage-earning capacity should be tied to the minimum wage rate. However, the FECA has no provision for establishing such a link.

Two labor organizations argued that, consistent with ECAB decisions in this area, any position selected as representing an employee's wage-earning capacity must be actually available to the employee within his or her commuting area. However, this is an incorrect interpretation of the ECAB's rulings, which have consistently held that OWCP only needs to find that a position is being performed in sufficient numbers in the area in which the employee lives so as to be considered reasonably available before it can determine that the job represents the employee's wage-earning capacity [*e.g., Kenneth H. Cummings, Sr.,* 28 ECAB 284 (1977); *James B. Stewart,* 32 ECAB 36 (1980)]. Accordingly, since there is no requirement that the selected position actually be available to the employee, the suggested change is not made.

Section 10.404

Two agencies objected to the inclusion of pre-existing impairments in payments made under the schedule award provisions of the FECA. These agencies argued that employees who are compensated for the full extent of their impairments actually receive benefits for non-occupational impairment.

It is a well-settled principle of workers' compensation law that each employee is hired ''as is''. The employee is a whole person, with various strengths and weaknesses, some of which pre-exist employment and some which develop concurrently with it. Apart from the practical difficulties which the commenting agencies admit would result from any attempt to differentiate work-related from non-work-related impairment to a schedule member, such an attempt would violate the remedial nature and spirit of the FECA.

One agency suggested re-writing this section to reflect a means test for dependency. The FECA contains no provision for such a test (see the comments about § 10.6).

A labor organization suggested restoring text concerning payment for schedule impairment which appears in current § 10.304(c). This material already appears in section 8107(a), and OWCP sees no reason to repeat it here.

Another commenter objected to the program's use of the AMA's *Guides to the Evaluation of Permanent Impairment* for determining schedule awards under the FECA, indicating that it focuses on the extent of the initial injury or illness, not the degree of recovery. This, however, is not true. The AMA states on page 1/1 of the fourth edition that ''The *Guides* defines 'permanent impairment' as one that has become static or stabilized during a period of time sufficient to allow optimal tissue repair, and one that is unlikely to change in spite of further medical or surgical therapy.'' OWCP does not agree with the commenter's suggestion that the program use another publication for determining schedule awards.

The commenter also questioned whether medical benefits are payable in cases where the claimant has reached maximum medical improvement. Such expenses are in fact payable as long as treatment is found to be necessary and reasonable.

Section 10.405

An agency suggested addition of a means test for dependents to this section and to § 10.6. The FECA contains no basis for such a measure.

Section 10.406

A commenter suggested use of different percentages than those provided by law for payment of compensation for disability. Such modifications would require a change to the FECA itself.

Section 10.410

One labor organization requested that OWCP restore the partial description of the compensation payable in death cases that was set out at § 10.306 of the 1987 regulations (the organization was apparently unaware that the FECA was amended in 1990 to change the age of remarriage noted in section 8133(b)(1) to 55). Since the proposed rule was published in the **Federal Register** on December 23, 1997, the ECAB issued a decision construing section 8133(a)(5) of the FECA for the first time. That decision is *Clyde Stevenson (Donna R. Stevenson),* Docket No. 95–3016 (issued February 4, 1998). In light of the authoritative construction of this section of the FECA provided by the ECAB in *Stevenson,* and to address the concerns of the labor organization, the heading and text of § 10.410 are revised consistent with the request.

Section 10.417

A commenter suggested that this section should state whether a handicapped child continues to be entitled to benefits if the employee dies. If this happens, payments end unless death benefits are awarded. No change is necessary as a result of this comment.

Section 10.420

In all four subsections, the statutory reference has been changed to section 8146a, not 8146(a).

Section 10.421

Two Federal agencies recommended that the election provision in § 10.421(a) be modified to make it either partially or fully irrevocable, citing the Office of

Personnel Management's (OPM's) rule that elections of benefits in death cases are irrevocable, while another commenter recommended that the provision be removed entirely. OPM and OWCP have adopted their respective policies for particular reasons, and neither agency is unaware of the other's position.

While it is understandable that agencies would desire that OPM and OWCP policy be the same, the changes proposed by these commenters would not be consistent with the settled construction given to section 8116 of the FECA by the ECAB in such leading cases as *Adeline N. Etzel (Bernard E. Etzel),* 21 ECAB 151 (1969); *Charles W. Akers,* 24 ECAB 316 (1973); *Louis Teplitsky,* 29 ECAB 826 (1978); and *Gary J. Bartolucci,* 34 ECAB 1569 (1983). Therefore, the suggested modifications are not adopted.

The latter commenter recommended that both subsections (a) and (d) of § 10.421 be modified to automatically end compensation payments at retirement age (except for permanently totally disabled individuals), at which time such beneficiaries would ''revert'' to their respective retirement systems. The commenter also recommended that the dual benefit restrictions set out in § 10.421(a) also apply to the military payments described in § 10.421(b). Absent an act of Congress amending section 8116, however, such changes cannot be made, and OWCP is therefore not adopting them.

Finally, the same commenter recommended that the first sentence of § 10.421(e) be modified to add the requirement that beneficiaries provide ''information on any other compensation or injury.'' However, such information would have no effect on a beneficiary's entitlement to compensation under the provisions of section 8116, and the requested modification is therefore considered unwarranted.

Section 10.430(a)

One labor organization suggested that the word ''clear'' be added before ''indication of the period * * *'', and OWCP is making this change. The organization also suggested that the section specify that periodic checks are to show any deductions or adjustments affecting the amount of the payment. OWCP is working on automated enhancements which will allow this information to be shown, but the capacity to do so is not yet available.

Sections 10.433, 10.436, and 10.437

Three agencies objected to being held financially accountable, through the chargeback process, for waivers of overpayments which resulted from errors made by OWCP. They suggested that when OWCP waives such an overpayment, the agency should receive a credit to its chargeback bill in the amount of the overpayment. For two reasons, OWCP does not concur with this suggestion.

First, the FECA is remedial in nature, and OWCP considers requests for waiver according to carefully defined procedures which are intended to protect the interests of both the claimant and the Government. The granting or withholding of a waiver is not intended to be a punishment or a reward, but rather the result of an administrative process as provided by law. Secondly, the FECA contains no provision for crediting the chargeback with monies reflecting either the commission of errors or the waiver of overpayments by OWCP.

Section 10.441

A commenter objected to inclusion of overpayment amounts in agencies' chargeback bills when the claimant is not at fault and the employer controverted the claim or detected the overpayment. The FECA contains no provision for crediting the chargeback because of such actions by the employer. In paragraph (b), the reference to the Debt Collection Act of 1982 has been replaced with the Federal Claims Collection Act of 1966 (as amended).

Section 10.500

As noted above, the proposed section has been subdivided into four new sections (§ 10.500 through 10.503) for clarity, and the contents have been slightly rearranged.

One agency objected to what it believed to be a new criterion for defining suitable work, namely that it be ''appropriate to the nature of the employee's usual employment''. This phrase represents a misreading of the actual text, which is taken from section 8115, as follows: ''appropriate to the nature of the injury; the degree of physical impairment; the employee's usual work; * * *'' The regulatory language contains nothing novel.

Four labor organizations argued that any position found to constitute suitable work should be available within the employee's commuting area. The availability of suitable work within the employee's ''commuting area'', a term which has been extensively addressed by the ECAB, is required. *See Arquelio Pacheco,* 40 ECAB 277 (1988); *Fred L. Nelly,* 46 ECAB 142 (1994). OWCP is modifying this section accordingly.

Section 10.501

One labor organization suggested rewording paragraph (a) to state that OWCP's requests for medical evidence in long-term disability cases will ordinarily occur not less than once a year. OWCP is making this change, as the suggested wording reflects long-term OWCP policy with respect to certain severely disabled employees.

One agency and another commenter noted that, while the Preamble to the Proposed Rule states that benefits may be suspended for failure to undergo non-invasive testing directed by OWCP, the text of paragraph (b) itself does not so state. A sentence is being added to this section to correct this oversight.

Section 10.505

One agency stated that this section combines two subsections of section 8151(b) in error, and a labor organization made the same point by suggesting that this section be rephrased. The word ''within'' is being replaced by the word ''after'' to correct this oversight.

The same agency noted that, because of the importance of making job offers in writing, § 10.505(c) is better placed in § 10.507, ''How should the employer make an offer of suitable work?'' OWCP concurs, and the language has been moved accordingly.

Section 10.505(a)

One labor organization suggested that this section require the employer to advise the employee in writing of the specific duties involved. This change has been made.

Section 10.506

An employer suggested that agencies not be limited to the use of Form CA–17 in gathering medical information from physicians. The form is usually adequate for this purpose, and this section has been revised to so state. Another agency wanted to remove the words ''in writing'' from this section, on the basis that return to work might be delayed or improper job placements might result from unclear descriptions of restrictions from physicians. The need for clarity in such descriptions is one of the two main reasons for requiring such offers to be made in writing, the other being the need for diligent attention to due process requirements. The suggested change has not been made.

A labor organization asked whether it is appropriate to use Form CA–17 for occupational diseases as well as traumatic injuries. OWCP has revised § 10.331(b) to allow its use in both kinds of situations.

This organization, along with one other, also suggested that employers be allowed to contact employees only in writing. Also, two labor organizations stated that employers should be explicitly prohibited from contacting physicians through phone calls or personal visits. OWCP concurs with both of these ideas, and the suggested changes have been added to this section.

Another labor organization objected to the provision allowing employers to contact employees at reasonable intervals to obtain medical evidence, due to a perceived possibility of harassment. While reasonable people may interpret the phrase ''at reasonable intervals'' differently, the phrase clearly does not provide license for harassment. OWCP does not believe that there is merit to the suggestion that this provision be removed.

Section 10.507

Two labor organizations stated that employers should be required to advise employees in writing of the information specified in paragraphs (a) and (b). This change has been made. (Also, ''should'' in (a) has been changed to ''shall'' for consistency with (b).)

Section 10.507(c)

An agency asked whether a job offer can be made verbally and followed up in writing. As discussed with respect to § 10.331(b), OWCP has tried to strike a balance among the sometimes competing interests of employers, employees, and OWCP itself.

In this case, the time gained by allowing verbal job offers must be balanced against the need to protect the employee's due process rights. The FECA provides a severe and permanent penalty for refusing an offered job, and the ECAB has remanded cases where OWCP has not scrupulously followed various procedural requirements. Job duties must be defined with great precision so that both employer and employee correctly understand them, and the potential for miscommunication is always higher in verbal than in written exchanges. However, as a practical matter, verbal job offers can expedite the process of reemployment, which benefits both the employer and the employee.

To both allow this flexibility and provide due process rights, this section has been modified to state that a job offer may be made verbally as long as the employing agency follows it up with a detailed written job offer within two business days of the verbal offer. This amount of time should be sufficient for the claimant to consider the job duties and assess whether he or she can perform them. The second half of this section has also been relettered ''(d)''.

Section 10.508

A labor organization stated that, since relocation expenses may be paid only to individuals who have been separated from the employer's rolls, the title of this section should be modified. However, the program believes that the question should continue to be phrased more generally, since it will arise with respect to employees still on the employer's rolls as well as to separated employees.

The same organization, and two others as well, proposed that the regulations require OWCP to notify employees that relocation expenses are payable when the job is offered. OWCP concurs that such notification should be provided in any case where a finding is made that the job is suitable, and text has been added to this effect.

Section 10.509

Three labor organizations suggested that the term ''reduction-in-force'' in § 10.509(a) be further modified by adding language that would limit its application to ''general'' or ''officially mandated'' actions. Using these modifiers, however, would not be consistent with ECAB decisions finding that employees do not sustain compensable recurrences of disability when they lose their light-duty positions pursuant to many different types of reductions-in-force.

Moreover, OWCP must be able to rely upon employers (and claimants) to advise it of any personnel actions that might affect the outcome of a FECA claim. OWCP has neither the resources nor the expertise to determine whether reductions-in-force are ''officially mandated'' (presumably, this phrase is equivalent to ''duly authorized''), and must leave disputes about individual reductions-in-force to be resolved in the proper forum. The suggested change would therefore not be workable, nor would it enhance either the sense of this section or its legal force.

Two of the same organizations suggested that OWCP simply assume that eliminated light-duty positions have been abolished because of employment-related disability. It is not OWCP's practice to make assumptions where the facts can be determined, and OWCP sees no merit in this idea.

Another labor organization objected to the underlying premise in § 10.509(a) that a reduction-in-force will not lead to a compensable recurrence of disability. However, as noted above, the ECAB has consistently ruled that employees who lose their light-duty positions in a reduction-in-force do not sustain compensable recurrences of disability.

A labor organization suggested that this section be modified so that employers would be prohibited from eliminating only light-duty positions. This is a personnel matter, and one which is outside the scope of these regulations.

One labor organization argued that a partially disabled employee who loses his or her Federal job will not be able to find another job in private industry and should therefore be entitled to receive compensation. Because this statement is hypothetical, OWCP cannot address it. An employee whose light-duty job is withdrawn, except in reduction-in-force situations, will in fact be entitled to claim compensation for a recurrence of disability.

An agency noted that employees may be performing light-duty work in classified positions while they are still receiving ''retained pay'' based on their date-of-injury positions and questioned whether OWCP should use their actual earnings in such circumstances to determine their wage-earning capacities consistent with the language found in § 10.509(a). However, using an employee's actual earnings while he or she is receiving ''retained pay'' has been approved by the ECAB in cases such as *Domenick Pezzetti,* 45 ECAB 787, *petition for recon. denied,* Docket No. 92–2037 (issued November 2, 1994), which held that the use of actual earnings under these circumstances to determine an employee's wage-earning capacity was consistent with section 8115(a) of the FECA.

The same agency also suggested that § 10.509(b) specifically note that an injured employee must ''encumber'' a classified light-duty position before OWCP will use the actual earnings in such a position to determine the wage-earning capacity under § 10.509(a). This suggestion reflects OWCP's existing policy in this area, and § 10.509(b) is revised accordingly.

A labor organization raised a concern that pursuant to § 10.509(b), OWCP might be tempted to use an ''odd-lot'' or ''sheltered'' position created specifically for a particular injured employee to determine that employee's wage-earning capacity. However, the ECAB has long rejected use of such a position, and nothing in this subsection is meant to thwart this legal prohibition, which is widely recognized in the field of workers' compensation law. If a job is withdrawn after OWCP has determined the employee's loss of wage-earning capacity, and the job was in fact an odd-lot or sheltered job, the employee may file a claim for a recurrence of disability.

Finally, one commenter disagreed with the use of the term ''light-duty'' in this section and argued that it should be replaced with a term such as ''modified'' or ''restricted duty'' that would be based solely on medical restrictions. However, the term ''light-duty'' has a very specific meaning in § 10.509(b) that is obviously based on a number of medical and factual circumstances, and for these reasons OWCP does not accept the argument that it be replaced with a purely medical term.

Section 10.515(a)

A labor organization suggested that the word ''total'' be replaced by ''his or her compensable'' disability. In fact, neither the original phrase nor the proposed revision adds value to this paragraph, and the phrase ''because total disability has ceased'' is therefore being removed.

Section 10.515(b)

An agency suggested that this section be reworded to require claimants to seek suitable employment, as well as to accept it. This change, which is consistent with section 8106(c), has been made.

A labor organization suggested that this paragraph be expanded to include the effects of an ''other acceptable medical condition'' as well as the effects of the work-related injury. The suggested wording both obscures the meaning of the paragraph and introduces extraneous concerns, and no change is being made to it.

Section 10.515(c) and (d)

An agency noted that employees do not always advise attending physicians that work may be available for them, and asks whether the agency can contact the physician when there is a written job offer or the employee's work limitations can be accommodated. Section 10.331(b) allows employers to contact physicians to obtain descriptions of work limitations on Form CA–17.

Section 10.516

Two agencies argued that the 30-day period provided by OWCP for an employee to accept or decline an offered position is too long. One suggested that this period be shortened to five days, while the other suggested that it be shortened to 15 days.

Where a job is to be accepted or declined, and termination of benefits may be at issue, OWCP does not consider a period of less than 30 days sufficient, across the board, for response from employees. For instance, if the employee objects to the position offered for medical reasons and thus needs to obtain a medical report, it is unreasonable to expect that the physician will conform to a five or even a 15-day deadline to prepare and submit a medical report.

Although the circumstances in a particular case may not in fact warrant a 30-day period for response, clear and consistent procedures are especially important in this area of the program's operations, given the need to provide due process at every step. For these reasons, OWCP does not believe a change to this paragraph is warranted.

Sections 10.518 and 10.519

While one Federal agency strongly supported the inclusion of nursing services as one of the many vocational rehabilitation services that OWCP may provide to injured employees, one labor organization noted that such inclusion would change nursing services from a voluntary choice to an obligatory course that OWCP could ''direct'' an employee to undergo, and argued that OWCP should not make this change. It stated that such an approach would be ''deeply unproductive'' without giving any reason for this belief. The organization also posited that the mandatory aspect was proposed so that the costs associated with OWCP nurses would be shifted to the employing agencies, but in fact, the costs are already charged back to the agencies.

In addition, the organization argued that since section 8104(a) of the FECA only allows OWCP to direct ''permanently disabled'' employees to undergo vocational rehabilitation, OWCP could not impose the sanctions described in § 10.519 (which are derived from section 8113(b) against employees who refuse to cooperate with OWCP nurses unless they were ''permanently disabled.''

Pursuant to section 8104(a), OWCP has the discretionary authority to ''direct a permanently disabled individual whose disability is compensable'' to undergo vocational rehabilitation. The ECAB has repeatedly held that a ''permanently disabled individual'' refers to an employee with a loss of wage-earning capacity, since the intent of Congress in enacting section 8104(a) was to provide disabled employees with the services necessary to overcome or lessen their disability. *See, e.g., Wayne E. Vincent, 6 ECAB 1024 (1954); Joseph C. Reuter,* 11 ECAB 296 (1960); *Gary L. Loser,* 38 ECAB 673 (1987).

Consistent with these rulings, OWCP's policy is to presume that an injured employee who has a loss of wage-earning capacity is ''permanently disabled,'' for purposes of § 10.519 only, unless and until the employee proves that the disability is not permanent, and to intervene in the early stages of disability cases to help employees return to some type of work as soon as possible. Since nursing services have been shown to be one of the most effective vocational rehabilitation services that can be provided to employees in the weeks immediately following their injuries, § 10.519 allows OWCP to impose sanctions against employees who refuse to cooperate with its nurses. However, in light of the apparent confusion regarding the scope of this regulation, § 10.519 is revised to better describe OWCP's policy.

Section 10.520

A labor organization asked that this section be reworded to state that positions must be available within the employee's commuting area. OWCP believes that this point is sufficiently addressed in the response to the comments to § 10.403 set out above.

Section 10.525(a)

Two agencies asked that this section include the authority for OWCP to request copies of employees' tax returns, though neither agency includes a reason for this request. The program occasionally finds it necessary to request tax returns, for instance to verify self-employment or to ensure that an employee has not earned income for a lengthy period for which retroactive compensation is claimed. When asked, employees have submitted the copies without protest. OWCP does not believe that an addition of regulatory authority is necessary.

Section 10.526

One agency asked OWCP to clarify the language of this section regarding the applicability and frequency of the intended reporting requirement, while another agency noted the similarity of this section to § 10.525 and suggested simply combining the two sections. To clarify § 10.526 consistent with the first suggestion, the text of this section has been modified to specifically state that this is a periodic reporting requirement which applies to both partially and totally disabled employees. However, the suggestion to combine §§ 10.525 and 10.526 is not adopted since the text of § 10.526 is intended to focus on volunteer activities, and keeping these sections separate will further highlight this intentional distinction.

The second agency also suggested that this section include OWCP's expectation that employees will report

any information which might reasonably affect their benefit levels. The program believes that this last point is better left to procedural guidance.

One labor organization argued that employees should not be required to report volunteer activities because such activities may help them cope with their disabilities. While agreeing that these activities may be beneficial to an employee's self-esteem, OWCP is of the opinion that they are also a useful indicator of an employee's ability to perform some form of work and therefore should be reported.

Section 10.527

One agency suggested strengthening the wording of this section by removing the words ''attempt to'' with respect to verifying employees earnings. Those two words have been removed. Another agency stated that this section should be reworded so as not to limit the kinds of computer matches which may be performed with records of State agencies. This suggestion is being adopted as well.

Section 10.540(b)

One labor organization suggested that the second sentence of § 10.540(b) be changed from ''a claim has been made for a specific period of time'' to ''a claim has been approved for a specific period of time * * *'' However, the recommended change would change the focus of this portion of § 10.540(b) from the reasonable expectation of the beneficiary to a determination of OWCP, and would therefore be inconsistent with the remainder of this subsection, which states that OWCP will not provide written notice before it terminates compensation ''when the beneficiary has no reasonable basis to expect that payment of compensation will continue.'' Therefore, the suggested change is not made. However, two minor wording changes have been made to clarify the meaning of two clauses in the third sentence.

Section 10.540(c)

A labor organization suggested wording changes that would, in essence, provide employees who refuse to accept or perform suitable work additional procedural safeguards that exceeded those described in § 10.516. However, the procedures in § 10.516 are based on the ECAB's decision in *Maggie L. Moore*, 42 ECAB 484 (1991), *reaffirmed on recon.*, 43 ECAB 818 (1992). OWCP sees no basis to add further procedures in this area.

One agency was under the impression that this section, which states (among other things) that OWCP will not provide written notice before it terminates compensation based on a ''failure or refusal to either continue performing suitable work or to accept an offer of suitable work,'' was inconsistent with the notice provided in these situations pursuant to § 10.516. However, the two regulations are not inconsistent since the notice provided under § 10.516 informs the employee of OWCP's determination that a particular position is suitable, whereas the notice contemplated by § 10.540 informs the employee of the impending cessation of his or her compensation rather than a finding on a preliminary issue such as suitability.

Therefore, for example, once an employee has received the notice required by § 10.516 and has refused an offer of suitable work, OWCP will issue a decision terminating the employee's monetary benefits without any prior written notice to that effect. The first sentence of § 10.540(c) is being amended to include the word ''terminated'' before ''suspended or forfeited'' to account for all of the possible ways in which OWCP may end compensation payments.

Section 10.541(b)

An agency suggested that the word ''Substantial'' be inserted before the word ''Evidence'' at the beginning of this section, which addresses the kinds of evidence which will affect OWCP's proposed action to reduce or terminate benefits. In practice, evaluations of evidence received when pre-termination notice has been issued always require judgment and discretion on the part of OWCP staff. This wording change would have no effect of any significance on the meaning of this subsection.

A labor organization suggested substituting ''finding and award under 5 U.S.C. 8124'' for ''decision'', but here again, such a wording change would have no apparent effect of any significance on the meaning of this subsection.

Section 10.600

One agency proposed giving agencies the right to seek review of decisions. Since proceedings under the FECA are non-adversarial, there is no statutory basis for providing the agencies with the right to seek review of benefit determinations.

Two employing agencies suggested that the phrase ''initial final decision'' in the first sentence is confusing. OWCP concurs, and the phrase has been changed to ''formal decision''.

Section 10.607

The existing rule, unchanged in the proposal, is that the claimant has a right to reconsideration of any decision if requested within one year of the date of the last merit decision. Three labor organizations noted that the proposal does not reflect OWCP's practice of including ECAB decisions among the ''merit decisions'' the date from which the one year begins to run.

Any suggestion that OWCP should review or reconsider an ECAB decision is inappropriate. OWCP and ECAB are separate and distinct entities. The ECAB is the highest appellate authority under the FECA and its decisions are binding on OWCP. Since OWCP has no authority to review decisions of the ECAB, OWCP has interpreted its limitation provision as liberally as possible, such that a merit decision of the ECAB will renew the one-year time period within which a claimant may request reconsideration before OWCP, with the date of the ECAB's merit decision serving as the new starting point from which the one-year period will run. OWCP will continue to do so, but because ECAB decisions cannot be reviewed by anyone, including OWCP, the language in this section has not been changed.

Section 10.609

One commenter suggested that the amount of time allowed for employers to comment on the application for reconsideration be expanded from 15 to 30 days, due to time constraints on the part of agency staff. While such a change would lengthen a process which is already time-consuming, OWCP recognizes that the 15-day period has been problematical. Therefore, the period for commenting on the application for reconsideration has been changed to 20 days in the final rule. This commenter also advocated allowing employers to ''question'' claims (presumably by requesting reconsideration). The FECA makes no provision for appeal rights for employers.

Section 10.610

One employing agency suggested that this section include appeal rights for employers. The FECA contains no provision for granting such rights.

Section 10.615

One agency objected to the proposal that a hearing representative may direct that the hearing be conducted by telephone or teleconference. A labor organization said that this should be a recommendation but not done at the hearing representative's option. Neither

the agency nor the labor organization gives a basis for its objection. OWCP believes that this option will allow it to better control an ever-increasing workload and to provide hearings at an earlier time than it otherwise could, without limiting claimants' rights in any way.

Sections 10.616 and 10.619

Several labor organizations objected to recognizing forms of date marking other than postmarks. Since requests are being submitted through carriers other than the Postal Service, and electronic transmission is likely to become routine in the future, the text has not been changed.

With respect to § 10.616, one commenter noted that the claimant could ask for a change to an oral hearing after the case was far along in the written review process, thus undercutting efficiency and allowing for purposeful delays. The point is well taken, and the time frame for such requests has been shortened to 30 days after the Branch of Hearings and Review acknowledges the request.

Sections 10.617 and 10.618

Several comments about time frames were received. One commenter noted that the time frames set forth in § 10.617(f) for submitting evidence were confusing and potentially never-ending, because they would allow new evidence to be submitted up to the date of the decision, which in turn would require comments by the agency or the employee, and so forth. The final rules have been changed to clarify that evidence in cases where oral hearings are held is to be submitted up to 30 days after the date on which the hearing is held (unless the hearing representative specifically grants an extension of time). Similarly, § 10.618(a) has been changed to provide that OWCP will designate a date by which evidence is to be submitted in reviews of the written record.

Another commenter noted that the service provisions in § 10.618(b) represent a change from the current practice of having the agency serve their comments directly on the claimant (or the claimant's representative, if any) and provide OWCP with a certification of service. That section has been slightly modified to reflect this practice.

With respect to the agencies' comments that 15 days is not enough time to adequately review and analyze the transcript (§ 10.617(e)), OWCP recognizes that this time frame has been problematical and has therefore extended the period for response to 20 days. For consistency, the time frame for claimants to respond to agency comments has also been changed to 20 days.

A labor organization suggested that the notice of hearing be mailed 60 days, rather than 30 days, before the date of the scheduled hearing. The argument offered is that seven to 10 days can elapse between the hearing representative's determination of the date of the hearing and the employee's receipt of the notice. However, any increase in the period of notice adds an increment of delay to a process which OWCP is attempting to streamline. The program does not believe that this change is necessary, and it has not been adopted.

Finally, one labor organization noted that language from the statute (section 8124(b)(2)) which appears in the current rules (at existing § 10.133) should be included in § 10.617. The phrase ''but may conduct the hearing in such a manner as to best ascertain the rights of the claimant'' has been added to § 10.617(c).

Section 10.621

One employing agency noted that the agency's role in teleconferenced hearings and the number of representatives an agency may send to the hearing needed to be clarified (another agency made the latter point as well). Section 10.621 has been changed to allow more than one representative, where appropriate. The comments also stated that the agency and the claimant should each be given copies of the other's comments, and both should have the same amount of time to review and respond to transcripts and comments. The current practice of sending agency comments to the claimant reflects the non-adversarial nature of the FECA claims process, and the fact that the agency is not a party to the claim. Because the agency is a source of information, however, it is allowed limited participation, but expansion of that role would not be appropriate.

Section 10.621(a)

One labor organization objected to the statement allowing hearing representatives to ask employing agency representatives to testify, on the basis that the employee cannot easily anticipate what issues the hearing representative will raise and that employing agency representatives, who are often compensation specialists, may confuse employees with sophisticated arguments. The organization also argues that active participation by the agency will compromise the non-adversarial nature of the hearing process and hinder the ability of claimants to present evidence. These arguments do not take into consideration the role of the hearing representative, which is to uphold the non-adversarial nature of the process and adjudicate the issues based on the evidence. OWCP does not find these arguments persuasive, and the language of this section has not been modified.

Section 10.622

The provision prohibiting cancellations of hearings drew considerable criticism from four labor organizations and three commenters, and support from one Federal agency. Most of the comments suggested that the blanket prohibition against postponements was too harsh and suggested that postponements be allowed under ''exceptional circumstances.''

OWCP is concerned about providing any opportunity to further delay the hearing process or to add yet another issue for potential review. Nevertheless, it is recognized that very narrow circumstances exist which are truly out of the control of the claimant and would justify a postponement. Accordingly, § 10.622(b) has been changed to allow a postponement for exceptional circumstances, defined in § 10.622(c) as medically documented non-elective hospitalization of the claimant, or death of the claimant's parent, spouse or child.

One labor organization commented on the period for rescheduling a hearing. However, nothing in this section of the regulations refers to time periods.

The first sentence in § 10.622(b) has been slightly reworded and divided into two sentences for clarity.

Section 10.701

A labor organization questioned whether representational activity undertaken in connection with a claim under the FECA is exempt from the prohibitions set forth at 18 U.S.C. 205. The organization asserted that ''the adjudication of a claim under the FECA is an administrative proceeding and thereby such representation meets the exceptions noted in the applicable law''. OWCP believes that the organization was referring to section 205(d), which permits a Federal employee to represent another employee in ''disciplinary, loyalty, or other personnel administration proceedings'' so long as the person acts without compensation. Based on OWCP's reading of Informal Advisory Letter 85 x 1, issued January 7, 1995, by the Office of Government Ethics (OGE) (representation of persons seeking to establish entitlement to benefits under laws administered by the

Veterans Administration is not covered by section 205(d)), the program is of the opinion that proceedings under the FECA do not come within the exception. For these reasons, no change will be made to § 10.701.

Section 10.701(b)

A labor organization noted that the phrase ''conflict with any other provision of law'' is redundant, given that it appears in the first paragraph of this section. Therefore, the phrase has been removed from paragraph (b).

Section 10.703

One commenter objected to assigning the task of approving fee petitions to the body before which the services for which fees are charged were performed. However, the office before which the work was performed is in the best position to evaluate the usefulness of services, the nature and complexity of the claim and the other criteria set out in this section. Thus, the text remains unchanged in this regard.

Section 10.705

One Federal agency asked whether claims examiners exercise any discretion in requiring an employee to prosecute an action against a third party in regard to minor injury claims, noting that § 10.709 references the procedures under which a FECA beneficiary who has been directed to pursue an action against a third party can be released from that obligation. Section 10.705(a) provides that an injured claimant ''can be required to take action'' against a third party responsible for an injury covered under the FECA. It does, however, allow OWCP to exercise discretion in determining whether to require a FECA beneficiary to take action against a third party.

Section 10.711

One Federal agency pointed out that ''Subtotal B'' in the example should be ''72,000'' and not ''-72,000'', and that ''Disbursement'' in line 4 of the example should be ''Disbursements.'' These observations are correct, and § 10.711 is revised accordingly.

Section 10.714

One commenter objected to the inclusion of costs for both second opinion medical examinations and referee medical examinations within the refundable disbursements used to calculate any required refund or any credit against future benefits. The objection is based upon the fact that the damages requested from a third party in any litigation are not based upon those expenditures. Inclusion of such costs within the refundable disbursements used to calculate both required refund and credit against future benefits is a longstanding practice based upon the fact that such costs are paid from the Employees' Compensation Fund and contribute to the ability of OWCP to ''furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation'' as set forth in section 8103(a) of the FECA.

Furthermore, the Supreme Court in *United States* v. *Lorrenzetti,* 467 U.S. 167 (1984), has specifically rejected any attempt to limit the calculation of either the refund required to be paid by FECA beneficiaries or any credit against future benefits based upon whether or not the expenditures at issue were within the elements of damages for which recovery was sought against a third party in the litigation that resulted in a recovery subject to section 8132. Accordingly, the requested change to this section is not made.

Section 10.717

One commenter disagreed with the statement that ''an injury caused by medical malpractice in treating an injury covered by the FECA is also an injury covered under the FECA,'' and argued that such coverage should not result from the medical malpractice of a private physician. However, since the statement in question is based on ECAB cases where coverage has been found under these circumstances, such as in *Bonnie D. Jefferson,* 34 ECAB 1426 (1983), the suggested modification of § 10.717 would be directly contrary to the ECAB's interpretation of the FECA, and it is therefore considered unwarranted.

Sections 10.730 and 10.731

An agency objected to the elimination of a number of redundant provisions that involved the Peace Corps and stated that without their inclusion in these regulations, it would not be able to effectively administer the workers' compensation claims of its personnel. However, the retention of the provisions in question would not be consistent with OWCP's efforts to streamline its regulations and would not provide any significant assistance with respect to this class of claims since the eliminated provisions merely repeat statutory language without adding anything. The suggested changes to this section are therefore not adopted.

Section 10.800

One agency recommended that OWCP expand the list of issues addressed by medical records to include ''disability.'' The recommended change would be consistent with § 10.330(j), which states that a medical report from an attending physician must address ''the extent of disability,'' and therefore § 10.800 is revised to reflect this suggestion.

Section 10.801

One agency supported the changes to OWCP's fee schedule, but asked how the requirement to use the specific billing forms listed in § 10.801 would be communicated to providers and employees. These regulations themselves are the primary vehicle for informing providers and employees of OWCP's billing requirements, which will also be communicated via the Internet (from which copies of the forms can be downloaded) and through routine contacts with OWCP claims staff and bill processing units in the various district offices across the country.

Section 10.802

One agency asked if there were any consequences for providers who consistently refused to reimburse employees for amounts charged in excess of the fee schedule. Since the inception of the fee schedule in 1986, OWCP has specified such consequences, and § 10.815(e) of these regulations states that providers may be excluded from participating in the FECA program if they knowingly fail to reimburse employees for amounts charged in excess of the fee schedule. Another agency thought that allowing OWCP to consider reimbursing an employee for the amount in excess of the fee schedule in § 10.802(g) contravened the fee schedule and would lead to an undesirable increase in agency chargeback costs. As noted above in response to similar comments regarding § 10.337, subsections (e), (f), and (g) of § 10.802 have been modified consistent with the changes to § 10.337.

Section 10.805

One agency asked if some providers might be exempt from the OWCP fee schedule. In § 10.805(b) and (c), OWCP notes that its fee schedule does not currently cover services provided in nursing homes, nor does it cover appliances, supplies, services or treatment furnished by medical facilities of the U.S. Public Health Service or the Departments of the Army, Navy, Air Force and Veterans Affairs.

Another agency disagreed with the fact that the fee schedule did not apply to Government medical facilities, since this meant that agencies would pay more if they encouraged their employees to seek treatment for employment-related injuries or illnesses at such facilities. However, this agency did not seem to be aware that pursuant to section 8103(a), employees have the right to make an initial selection of a physician to provide medical treatment, and would presumably not choose to be treated in a Government medical facility if other sources were available. Furthermore, there seems to be little rationale for applying OWCP's fee schedule to these facilities since they are, to a large extent, designed to provide specific types of medical services to rather limited groups of patients and are not currently operated under any recognizable billing system.

Finally, one commenter disagreed with the development and application of OWCP's fee schedule. Referencing a February 1994 article in the *Journal of Occupational Medicine*, this commenter alleged that using the schedule would cause providers to choose not to treat injured Federal employees, thus resulting in a diminished quality of care. OWCP's medical fee schedule has been in use since 1986 and is currently based on the relative value scale (RVS) used by the Health Care Financing Administration (HCFA), which includes geographic index factors. These data were developed by HCFA through studies and consultations with national physicians' groups and others. They are updated yearly through the regulatory process. While OWCP has incorporated the HCFA RVS in its medical fee schedule, the conversion factors that translate the RVS into maximum dollar amounts are based on OWCP program data, data from other Federal programs, reimbursements under State workers' compensation programs, and common billing data.

The article referenced by the commenter discusses the comparative cost savings of a corporate medical department versus outside services and therefore has no relevance to the program administered by OWCP given its national scope and the restrictions imposed by the physician selection provision of section 8103(a).

In the years since 1986, OWCP has not received any evidence that the fee schedule has jeopardized the quality of care provided injured employees, and the program only rarely receives a complaint about the maxima allowable that is not satisfactorily resolved. Therefore, no changes to § 10.805 will be made.

Section 10.809

One agency recommended that OWCP reimburse employees only for prescription drugs that they purchase for employment-related injuries and illnesses at the lower of either the fee schedule or the employee's individual health insurance plan charges. As already provided in § 10.809, OWCP will not reimburse an employee for an amount that exceeds the price he or she actually paid, nor will it reimburse an employee for an amount that exceeds the fee schedule. However, further limitations of the sort recommended would not be feasible due to the wide variation in health insurance plan charges and the fact that most plans do not cover prescription drugs needed for employment-related injuries and illnesses.

One labor organization noted that some small pharmacies lack the means to submit bills electronically to OWCP or to wait for the assignment of a claim number before submitting bills for payment by OWCP. However, there is no requirement that pharmacies bill OWCP electronically in these regulations, nor is there a likelihood that a problem involving claim numbers will occur since these numbers are currently being assigned in an expeditious manner.

The same labor organization asked that this section be amended to provide that pharmacies be notified of the requirement to refund any charges in excess of the fee schedule when employees are only partially reimbursed for prescription drugs. However, § 10.802(e) already provides for this notice to pharmacies and repeating this provision in § 10.809 is seen as unnecessary.

Another labor organization wanted OWCP to give employees notice of the fee schedule and an explanation of how it works, presumably in addition to the legal notice of these matters provided by the publication of the regulations in the **Federal Register**. However, additional notice of the sort requested would not be practical and is not seen as necessary, since current beneficiaries will be informed of these matters as part of the routine administration of their claims by OWCP. Therefore, the requested changes to § 10.809 will not be made.

Section 10.810

As with § 10.809, one labor organization wanted OWCP to notify employees of the fee schedule for inpatient medical services in § 10.810 and explain how it works, in addition to the legal notice of these matters provided by the publication of the regulations in the **Federal Register**. However, additional notice of the sort requested would not be practical and is not seen as necessary, since current beneficiaries will be informed of these matters as part of the routine administration of their claims by OWCP.

One commenter criticized the decision to use the HCFA Prospective Payment System (PPS) using Diagnostic Related Groups (DRGs) as the foundation of OWCP's own PPS in § 10.810. However, this decision was based on research that explored available options and a study of FECA inpatient bills which revealed that the HCFA PPS using DRGs is well-suited to OWCP's efforts to monitor and control its inpatient costs. Accordingly, the requested changes to § 10.810 have not been adopted.

Section 10.816

One commenter suggested that a new paragraph (c) be added to § 10.816 requiring that the ''partner or group'' of a physician automatically excluded from the FECA program under § 10.816(a) also be excluded from participating in the program. However, the situations that would lead OWCP to automatically exclude a physician under § 10.816(a) would be specific to that physician, and therefore they would not form a proper legal basis for automatically excluding that physician's ''partner or group'' under this regulation. Therefore, the suggested addition of a new subsection is not adopted.

Leave Buy-Back Provision

Two employing agencies and two labor organizations objected to the removal of the leave buy-back provision found at current § 10.310. Most important among the reasons for this removal, which are stated in the Preamble to the Proposed Rule, is that leave buy-back is neither authorized nor required by the FECA, nor is it controlled by OWCP.

The commenters argued that agencies would not have the authority to convert periods of leave to LWOP without the equivalent of the current § 10.310, and that in remaining silent about this issue, OWCP is abandoning its own procedures. It was also stated that compensation would have to be paid directly to employees, without reimbursement to agencies, and that employees would have to pay the entire cost of leave to agencies before leave restoration, instead of compensation due being paid to agencies. Finally, the two agencies stated that the current procedure, where OWCP pays the

agency directly, aids in debt collection, and that removal of the leave buy-back provision from OWCP's regulations would add work for agencies.

As an ancillary issue, several agencies asked that Forms CA–7a and CA–7b be added to the list in § 10.7(a).

The reasons for removal of the leave buy-back provision have not changed. However, since OWCP does in fact have a procedure for paying compensation when leave is restorable, a brief mention of this process in this rule is considered warranted, and it is being added as new § 10.425. For similar reasons, Forms CA–7a and CA–7b are being added to the list in § 10.7(a). Current practice is not altered.

Miscellaneous Comments

OWCP also received comments and suggestions which did not pertain directly to the proposed regulations. Many would require legislative amendments before they could be implemented, or concern procedural matters. Because they are not germane to this final rule, no further comments are appropriate.

One commenter addressed the section about Executive Order 12866, questioning whether compliance will be possible with existing personnel. To the extent that the comment refers to the staff needed by pharmacies to comply with the fee schedule, OWCP does not agree since similar fee schedules are already widely used. If the comment refers to federal personnel who administer the FECA, OWCP also disagrees but, in any event, the Executive Order does not concern the impact of regulations on federal agencies.

The commenter also stated that the proposed pharmacy fee schedule will adversely affect claimants since the most advanced drugs for musculoskeletal disorders are very expensive. However, the providers will be required to accept the amount offered under the fee schedule, and if they do not, the regulations contain a provision for reimbursement to the claimant of the difference between the amount charged and the amount allowed by the fee schedule (see the comments about § 10.337 above).

This commenter also addressed the section about the Unfunded Mandates Reform Act, referring to the above-noted proposal for establishing ''centers of excellence'' as well as to occupational health personnel matters. The first concern is misplaced (unfunded mandates apply to Federal requirements imposing a burden on States). The second concern is not germane to the regulations at hand.

Finally, with regard to the section about the Paperwork Reduction Act, this commenter made a general recommendation that existing forms be eliminated and consolidated. Since no specific forms are named or specific criticisms offered, OWCP is unable to address this comment.

Publication in Final Re Non-Substantive Changes

The Department of Labor has determined, pursuant to 5 U.S.C. 553(b)(B), that good cause exists for waiving the public comment on this rule with respect to the following changes:

(a) Typographical errors.

(b) Other minor wording changes and clarifications which do not affect the substance of the rules.

Executive Order 12866

This final rule constitutes a ''significant'' rule within the meaning of Executive Order 12866. The Department believes, however, that this rule will not have a significant economic impact on the economy, or any person or organization subject to the proposed changes. The changes will have little or no effect on the level of benefits paid (which in any case involve payments almost exclusively to Federal employees from funds appropriated by Congress); nor will there be a significant economic impact upon the hospitals and pharmacies which, for the first time, will be subject to the fee schedules established by these rules. The total dollar amount paid for inpatient hospital services in fiscal year 1996 was $81,955,562.00, and subjecting these charges to the DRG schedule is expected to result in a 20 percent decrease in the amount paid, or about $16.4 million. The total dollar amount paid for pharmacy costs in fiscal year 1996 was $31.9 million, and subjecting these charges to the fee schedule is expected to result in a 10 to 15 percent decrease in the amount paid, or about $3–4.5 million. Insofar as the new rules make it easier to seek benefits under the FECA and streamline the administration of the program, they would decrease administrative costs. These changes have been reviewed by the Office of Management and Budget for consistency with the President's priorities and the principles set forth in Executive Order 12866.

Unfunded Mandates Reform Act and Federalism Executive Order

For purposes of the Unfunded Mandates Reform Act of 1995, as well as E.O. 12875, this rule does not include any Federal mandate that may result in increased expenditures by State, local and tribal Governments, or increased expenditures by the private sector of more than $100 million.

Paperwork Reduction Act

The new collection of information contained in this rulemaking has been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995. No person is required to respond to a collection of information request unless the collection of information displays a valid OMB control number.

The new information collection requirements contained in this proposed rule are set forth in §§ 10.801 and 10.802, and they relate to information required to be submitted by pharmacies and hospitals covering certain inpatient bills. The Department has adopted a new form (Universal Pharmacy Billing Form) which will be used by pharmacies in submitting claims for payment. Another form (the claimant reimbursement form) will be used by claimants seeking reimbursement for medical expenses for which they have paid the providers directly. The public reporting burden for these collections of information is estimated to average as follows: Universal Pharmacy Billing Form—It will take five (5) minutes to complete the form, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed and completing and reviewing the collection of information; Claimant Reimbursement Form—It will take an average of ten (10) minutes to complete this form, including reviewing instructions, searching for existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Type of Review: New Collection.

Agency: Employment Standards Administration.

Title: Claimant Medical Reimbursement Form (CA–915).

OMB Number: 1215–0193.

Affected Public: Individuals or households, Federal Government.

Total Respondents: 40,500.

Frequency: On occasion.

Total Responses: 40,500.

Average Time per Response: 10 minutes.

Total Hours: 6,723.

Total Burden Cost (capital/startup): 0.

Total Burden Cost (operating/maintenance): 0.

Type of Review: New Collection.

Agency: Employment Standards Administration.

Title: NCPDP Universal Pharmacy Billing Form (79–1A) .

OMB Number: 1215–0194.
Affected Public: Businesses or other for-profit; Not-for-profit Institutions; Individuals or households; Federal Government; State, Local or Tribal Government.
Total Respondents: 406,198.
Frequency: On occasion.
Total Responses: 406,198.
Average Time per Response: 5 minutes.
Total Hours: 33,714.
Total Burden Cost (capital/startup): 0.
Total Burden Cost (operating/maintenance): 0.

Regulatory Flexibility Act

The Department believes that the rule will have ''no significant economic impact upon a substantial number of small entities'' within the meaning of section 3(a) of the Regulatory Flexibility Act Pub. L. 96–354, 91 Stat. 1164 (5 U.S.C. 605(b)). The provision of the final rules extending cost control measures to hospital inpatient services and pharmacies is the only provision of the regulations which may have a monetary effect on small businesses. That effect will not be significant for a substantial number of those businesses, however, for no one business bills a significant amount to OWCP for FECA-related services, and the effect on those bills which are submitted, while a worthwhile savings for the Government in the aggregate, will be not be significant for individual businesses affected.

The two new cost containment provisions are: (1) A set schedule for payment of pharmacy bills; and (2) a prospective payment system for hospital inpatient services. The two methodologies are fully explained in the text of the Preamble to the Proposed Rule, including the fact that the use of Diagnostic Related Groups (DRGs) for setting payment for inpatient hospital charges essentially is an adaptation of a system used by the Health Care Finance Agency (HCFA) in payment of Medicare bills. The use of Average Wholesale Prices (AWP) in setting the maximum reimbursable amount for pharmacy bills is also commonplace in the industry.

The method selected by OWCP is therefore one which contains efficiencies both for the Government and providers. The Government benefits because OWCP did not develop a new system, but rather minimized the use of resources by adopting existing and well-recognized systems already in place. The providers benefit because submitting a bill to OWCP and receiving payment will be almost the same process as submitting it to Medicare, a program with which hospitals are already familiar and have in place for billing, so they will not have to learn a new process and the FECA bills will not represent an unnecessary administrative cost because the FECA bill process will not be essentially distinguished from that for Medicare. Similarly, the pharmacies are used to billing through clearing houses and having charges subject to limits by private insurers. By adopting the uniform billing statement and a familiar cost control methodology, OWCP has kept close to the environment with which the pharmacies are already familiar. The methods chosen, therefore, represent a familiar environment to the providers.

The costs savings resulting from the implementation of these cost containment methods will have no significant effect on any individual business. First, the need for cost containment in the FECA program is self-evident and these methods are already used by Medicare, CHAMPUS and the Department of Veterans Affairs, among Government entities, and for the private insurance carriers which cover Federal employees as part of the Federal employees' health benefit insurance programs. The costs to providers whose charges may be reduced are relatively small, both in incremental and in actual terms.

Incrementally, FECA bills simply do not represent a large share of any one provider's total business. Since Federal employees are spread throughout the United States and this system covers only those Federal employees who are injured on the job and require either prescription drugs or inpatient hospital care (a tiny subset of all employees), the number of bills submitted by any one provider which may be subject to these provisions is likely to be very small.

Second, in actual terms, the amount by which these bills might be reduced will not have a significant impact on any business. In fiscal year (FY) 1998, the program paid $100.1 million dollars on about 13,150 bills received for inpatient hospital services (an average charge of $7,600.00 per stay). The total number of hospitals on the program's provider files is about 5,000, for an average patient load of slightly over three FECA-claimant patients per hospital. If we assume that no hospital had more than three patients, then the average annual billings subject to these rules for any hospital would be about $22,800 (3 X $7,600). As noted in the Preamble to the Proposed Rule, the DRG method will reduce the $100.1 million by about 20 percent, or $20.2 million. Thus, the average dollar amount of the reduction in bills submitted by any one hospital resulting from these rules would be about $4,560.00.

A similarly small actual dollar reduction applies to pharmacy charges. OWCP paid about $32,000,000 for pharmacy charges, although the program cannot identify exactly what portion of this amount was paid to institutions, since much of this dollar figure represents reimbursements directly to claimants. OWCP cannot identify with certainty the number of pharmacies who provided supplies, for the same reason, but there are about 4,000 pharmacies in the program's provider files. Similarly, OWCP cannot determine the exact number of bills paid, since the program captures only those submitted by a provider for direct payment and not those submitted by a claimant for reimbursement. Assuming for purposes of this analysis that the reimbursements were evenly divided among pharmacies already part of our provider files, we divide 4,000 providers into the total number of dollars paid to get an average annual aggregate of charges paid to a provider of about $8,000. It is estimated that the schedule would result in an average reduction of five percent in pharmacy charges; based on these figures, the average pharmacy would see a reduction in the total amount received of about $400.

These figures illustrate that the ''cost'' of these rules to any one provider is negligible. On the other hand, OWCP will see substantial aggregate cost savings as a result (estimated at $18,000,000). These savings benefit OWCP (by strengthening the integrity of the program), the employing agencies (which ultimately foot the bill for FECA through the chargeback system), and taxpayer and rate payers to whom the ultimate costs of the program are eventually charged through appropriations.

The Assistant Secretary for Employment Standards has certified to the Chief Counsel for Advocacy of the Small Business Administration that these rules will not have a significant impact on a substantial number of small entities. The factual basis for this certification has been provided above. Accordingly, no regulatory impact analysis is required.

Executive Order 13045 Protection of Children From Environmental, Health Risks and Safety Risks

In accordance with Executive Order 13045, OWCP has evaluated the environmental health and safety effects of the rule on children. The agency has determined that the final rule will have no effect on children.

Submission to Congress and the General Accounting Office

In accordance with the Small Business Regulatory Enforcement Fairness Act, the Department will submit to each House of the Congress and to the Comptroller General a report regarding the issuance of today's final rule prior to the effective date set forth at the outset of this notice. The report will note that this rule does not constitute a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 20 CFR Parts 10 and 25

Administrative practices and procedures, Claims, Government employees, Labor, Workers' compensation.

For reasons set forth in the preamble, 20 Chapter I is amended to read as follows:

1. Part 10 is revised to read as follows:

PART 10—CLAIMS FOR COMPENSATION UNDER THE FEDERAL EMPLOYEES' COMPENSATION ACT, AS AMENDED

Subpart A—General Provisions

Sec.

Subpart B—Filing Notices and Claims; Submitting Evidence

Subpart C—Continuation of Pay

Subpart D—Medical and Related Benefits

Authority: 5 U.S.C. 301, 8103, 8145 and 8149; 31 U.S.C. 3716 and 3717; Reorganization Plan No. 6 of 1950, 15 FR 3174, 64 Stat. 1263; Secretary's Order 5–96, 62 FR 107.

Subpart A—General Provisions

Introduction

§ 10.0 What are the provisions of the FECA, in general?

The Federal Employees' Compensation Act (FECA) as amended (5 U.S.C. 8101 et seq.) provides for the payment of workers' compensation benefits to civilian officers and employees of all branches of the Government of the United States. The regulations in this part describe the rules for filing, processing, and paying claims for benefits under the FECA. Proceedings under the FECA are non-adversarial in nature.

(a) The FECA has been amended and extended a number of times to provide workers' compensation benefits to volunteers in the Civil Air Patrol (5 U.S.C. 8141), members of the Reserve Officers' Training Corps (5 U.S.C. 8140), Peace Corps Volunteers (5 U.S.C. 8142), Job Corps enrollees and Volunteers in Service to America (5 U.S.C. 8143), members of the National Teachers Corps (5 U.S.C. 8143a), certain student employees (5 U.S.C. 5351 and 8144), certain law enforcement officers not employed by the United States (5 U.S.C. 8191–8193), and various other classes of persons who provide or have provided services to the Government of the United States.

(b) The FECA provides for payment of several types of benefits, including compensation for wage loss, schedule awards, medical and related benefits, and vocational rehabilitation services for conditions resulting from injuries sustained in performance of duty while in service to the United States.

(c) The FECA also provides for payment of monetary compensation to specified survivors of an employee whose death resulted from a work-related injury and for payment of certain burial expenses subject to the provisions of 5 U.S.C. 8134.

(d) All types of benefits and conditions of eligibility listed in this section are subject to the provisions of the FECA and of this part. This section shall not be construed to modify or enlarge upon the provisions of the FECA.

§ 10.1 What rules govern the administration of the FECA and this chapter?

In accordance with 5 U.S.C. 8145 and Secretary's Order 5–96, the responsibility for administering the FECA, except for 5 U.S.C. 8149 as it pertains to the Employees' Compensation Appeals Board, has been delegated to the Assistant Secretary for Employment Standards. The Assistant Secretary, in turn, has delegated the authority and responsibility for administering the FECA to the Director of the Office of Workers' Compensation Programs (OWCP). Except as otherwise provided by law, the Director, OWCP and his or her designees have the exclusive authority to administer, interpret and enforce the provisions of the Act.

§ 10.2 What do these regulations contain?

This part 10 sets forth the regulations governing administration of all claims filed under the FECA, except to the extent specified in certain particular provisions. Its provisions are intended to assist persons seeking compensation benefits under the FECA, as well as personnel in the various Federal agencies and the Department of Labor who process claims filed under the FECA or who perform administrative functions with respect to the FECA. This part 10 applies to part 25 of this chapter except as modified by part 25. The various subparts of this part contain the following:

(a) Subpart A: The general statutory and administrative framework for processing claims under the FECA. It contains a statement of purpose and scope, together with definitions of terms, descriptions of basic forms, information about the disclosure of OWCP records, and a description of rights and penalties under the FECA, including convictions for fraud.

(b) Subpart B: The rules for filing notices of injury and claims for benefits under the FECA. It also addresses evidence and burden of proof, as well as the process of making decisions concerning eligibility for benefits.

(c) Subpart C: The rules governing claims for and payment of continuation of pay.

(d) Subpart D: The rules governing emergency and routine medical care, second opinion and referee medical examinations directed by OWCP, and medical reports and records in general. It also addresses the kinds of treatment which may be authorized and how medical bills are paid.

(e) Subpart E: The rules relating to the payment of monetary compensation benefits for disability, impairment and death. It includes the provisions for identifying and processing overpayments of compensation.

(f) Subpart F: The rules governing the payment of continuing compensation benefits. It includes provisions concerning the employee's and the employer's responsibilities in returning the employee to work. It also contains provisions governing reports of earnings and dependents, recurrences, and reduction and termination of compensation benefits.

(g) Subpart G: The rules governing the appeals of decisions under the FECA. It includes provisions relating to hearings, reconsiderations, and appeals before the Employees' Compensation Appeals Board.

(h) Subpart H: The rules concerning legal representation and for adjustment and recovery from a third party. It also contains provisions relevant to three groups of employees whose status requires special application of the provisions of the FECA: Federal grand and petit jurors, Peace Corps volunteers, and non-Federal law enforcement officers.

(i) Subpart I: Information for medical providers. It includes rules for medical reports, medical bills, and the OWCP medical fee schedule, as well as the provisions for exclusion of medical providers.

§ 10.3 Have the collection of information requirements of this part been approved by the Office of Management and Budget (OMB)?

The collection of information requirements in this part have been approved by OMB and assigned OMB control numbers 1215–0055, 1215–0067, 1215–0078, 1215–0103, 1215–0105, 1215–0115, 1215–0116, 1215–0144, 1215–0151, 1215–0154, 1215–0155, 1215–0161, 1215–0167, 1215–0176, 1215–0178, 1215–0182, 1215–0193 and 1215–0194.

Definitions and Forms

§ 10.5 What definitions apply to these regulations?

Certain words and phrases found in this part are defined in this section or in the FECA. Some other words and phrases that are used only in limited situations are defined in the later subparts of these regulations.

(a) *Benefits* or *Compensation* means the money OWCP pays to or on behalf of a beneficiary from the Employees' Compensation Fund for lost wages, a loss of wage-earning capacity or a permanent physical impairment, as well as the money paid to beneficiaries for an employee's death. These two terms also include any other amounts paid out of the Employees' Compensation Fund for such things as medical treatment, medical examinations conducted at the request of OWCP as part of the claims adjudication process, vocational rehabilitation services, services of an attendant and funeral expenses, but does not include continuation of pay.

(b) *Beneficiary* means an individual who is entitled to a benefit under the FECA and this part.

(c) *Claim* means a written assertion of an individual's entitlement to benefits under the FECA, submitted in a manner authorized by this part.

(d) *Claimant* means an individual whose claim has been filed.

(e) *Director* means the Director of OWCP or a person designated to carry out his or her functions.

(f) *Disability* means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.

(g) *Earnings from employment or self-employment* means:

(1) Gross earnings or wages before any deductions and includes the value of subsistence, quarters, reimbursed expenses and any other goods or services received in kind as remuneration; or

(2) A reasonable estimate of the cost to have someone else perform the duties of an individual who accepts no remuneration. Neither lack of profits, nor the characterization of the duties as a hobby, removes an unremunerated individual's responsibility to report the estimated cost to have someone else perform his or her duties.

(h) *Employee means,* but is not limited to, an individual who fits within one of the following listed groups:

(1) A civil officer or employee in any branch of the Government of the United States, including an officer or employee of an instrumentality wholly owned by the United States;

(2) An individual rendering personal service to the United States similar to the service of a civil officer or employee of the United States, without pay or for nominal pay, when a statute authorizes the acceptance or use of the service, or authorizes payment of travel or other expenses of the individual;

(3) An individual, other than an independent contractor or an individual employed by an independent contractor, employed on the Menominee Indian Reservation in Wisconsin in operations conducted under a statute relating to tribal timber and logging operations on that reservation;

(4) An individual appointed to a position on the office staff of a former President; or

(5) An individual selected and serving as a Federal petit or grand juror.

(i) *Employer or Agency* means any civil agency or instrumentality of the United States Government, or any other organization, group or institution employing an individual defined as an ''employee'' by this section. These terms also refer to officers and employees of an employer having responsibility for the supervision, direction or control of employees of that employer as an ''immediate superior,'' and to other employees designated by the employer to carry out the functions vested in the employer under the FECA and this part, including officers or employees delegated responsibility by an employer for authorizing medical treatment for injured employees.

(j) *Entitlement* means entitlement to benefits as determined by OWCP under the FECA and the procedures described in this part.

(k) *FECA* means the Federal Employees' Compensation Act, as amended.

(l) *Hospital services* means services and supplies provided by hospitals within the scope of their practice as defined by State law.

(m) *Impairment* means any anatomic or functional abnormality or loss. A permanent impairment is any such abnormality or loss after maximum medical improvement has been achieved.

(n) *Knowingly* means with knowledge, consciously, willfully or intentionally.

(o) *Medical services* means services and supplies provided by or under the supervision of a physician. Reimbursable chiropractic services are limited to physical examinations (and related laboratory tests), x-rays performed to diagnose a subluxation of the spine and treatment consisting of manual manipulation of the spine to correct a subluxation.

(p) *Medical support services* means services, drugs, supplies and appliances provided by a person other than a physician or hospital.

(q) *Occupational disease* or *Illness* means a condition produced by the work environment over a period longer than a single workday or shift.

(r) *OWCP* means the Office of Workers' Compensation Programs.

(s) *Pay rate for compensation purposes* means the employee's pay, as determined under 5 U.S.C. 8114, at the time of injury, the time disability begins or the time compensable disability recurs if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater, except as otherwise determined under 5 U.S.C. 8113 with respect to any period.

(t) *Physician* means an individual defined as such in 5 U.S.C. 8101(2), except during the period for which his or her license to practice medicine has been suspended or revoked by a State licensing or regulatory authority.

(u) *Qualified hospital* means any hospital licensed as such under State law which has not been excluded under the provisions of subpart I of this part. Except as otherwise provided by regulation, a qualified hospital shall be deemed to be designated or approved by OWCP.

(v) *Qualified physician* means any physician who has not been excluded under the provisions of subpart I of this part. Except as otherwise provided by regulation, a qualified physician shall be deemed to be designated or approved by OWCP.

(w) *Qualified provider of medical support services or supplies* means any person, other than a physician or a hospital, who provides services, drugs, supplies and appliances for which OWCP makes payment, who possesses any applicable licenses required under State law, and who has not been excluded under the provisions of subpart I of this part.

(x) *Recurrence of disability* means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, non-performance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.

(y) *Recurrence of medical condition* means a documented need for further medical treatment after release from treatment for the accepted condition or injury when there is no accompanying work stoppage. Continuous treatment for the original condition or injury is not considered a ''need for further medical treatment after release from treatment,'' nor is an examination without treatment.

(z) *Representative* means an individual properly authorized by a claimant in writing to act for the claimant in connection with a claim or proceeding under the FECA or this part.

(aa) *Student* means an individual defined at 5 U.S.C. 8101(17). Two terms used in that particular definition are further defined as follows:

(1) *Additional type of educational or training institution* means a technical, trade, vocational, business or professional school accredited or licensed by the United States Government or a State Government or any political subdivision thereof providing courses of not less than three months duration, that prepares the individual for a livelihood in a trade, industry, vocation or profession.

(2) *Year beyond the high school level* means:

(i) The 12-month period beginning the month after the individual graduates from high school, provided he or she had indicated an intention to continue schooling within four months of high school graduation, and each successive 12-month period in which there is school attendance or the payment of

compensation based on such attendance; or

(ii) If the individual has indicated that he or she will not continue schooling within four months of high school graduation, the 12-month period beginning with the month that the individual enters school to continue his or her education, and each successive 12-month period in which there is school attendance or the payment of compensation based on such attendance.

(bb) *Subluxation* means an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrable on any x-ray film to an individual trained in the reading of x-rays.

(cc) *Surviving spouse* means the husband or wife living with or dependent for support upon a deceased employee at the time of his or her death, or living apart for reasonable cause or because of the deceased employee's desertion.

(dd) *Temporary aggravation* of a pre-existing condition means that factors of employment have directly caused that condition to be more severe for a limited period of time and have left no greater impairment than existed prior to the employment injury.

(ee) *Traumatic injury* means a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected.

§ 10.6 What special statutory definitions apply to dependents and survivors?

(a) 5 U.S.C. 8133 provides that certain benefits are payable to certain enumerated survivors of employees who have died from an injury sustained in the performance of duty.

(b) 5 U.S.C. 8148 also provides that certain other benefits may be payable to certain family members of employees who have been incarcerated due to a felony conviction.

(c) 5 U.S.C. 8110(b) further provides that any employee who is found to be eligible for a basic benefit shall be entitled to have such basic benefit augmented at a specified rate for certain persons who live in the beneficiary's household or who are dependent upon the beneficiary for support.

(d) 5 U.S.C. 8101, 8110, 8133 and 8148, which define the nature of such survivorship or dependency necessary to qualify a beneficiary for a survivor's benefit or an augmented benefit, apply to the provisions of this part.

§ 10.7 What forms are needed to process claims under the FECA?

(a) Notice of injury, claims and certain specified reports shall be made on forms prescribed by OWCP. Employers shall not modify these forms or use substitute forms. Employers are expected to maintain an adequate supply of the basic forms needed for the proper recording and reporting of injuries.

Form No.	Title
(1) CA–1	Federal Employee's Notice of Traumatic Injury and Claim for Continuation of Pay/ Compensation.
(2) CA–2	Notice of Occupational Disease and Claim for Compensation.
(3) CA–2a	Notice of Employee's Recurrence of Disability and Claim for Pay/ Compensation.
(4) CA–5	Claim for Compensation by Widow, Widower and/or Children.
(5) CA–5b	Claim for Compensation by Parents, Brothers, Sisters, Grandparents, or Grandchildren.
(6) CA–6	Official Superior's Report of Employee's Death.
(7) CA–7	Claim for Compensation Due to Traumatic Injury or Occupational Disease.
(8) CA–7a	Time Analysis Form.
(9) CA–7b	Leave Buy Back (LBB) Worksheet/Certification and Election.
(10) CA–8	Claim for Continuing Compensation on Account of Disability.
(11) CA–16	Authorization of Examination and/or Treatment.
(12) CA–17	Duty Status Report.
(13) CA–20	Attending Physician's Report.
(14) CA–20a ..	Attending Physician's Supplemental Report.

(b) Copies of the forms listed in this paragraph are available for public inspection at the Office of Workers' Compensation Programs, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210. They may also be obtained from district offices, employers (i.e., safety and health offices, supervisors), and the Internet, at www.dol.gov./dol/esa/owcp.htm.

Information in Program Records

§ 10.10 Are all documents relating to claims filed under the FECA considered confidential?

All records relating to claims for benefits, including copies of such records maintained by an employer, are considered confidential and may not be released, inspected, copied or otherwise disclosed except as provided in the Freedom of Information Act and the Privacy Act of 1974.

§ 10.11 Who maintains custody and control of FECA records?

All records relating to claims for benefits filed under the FECA, including any copies of such records maintained by an employing agency, are covered by the government-wide Privacy Act system of records entitled DOL/GOVT–1 (Office of Workers' Compensation Programs, Federal Employees' Compensation Act File). This system of records is maintained by and under the control of OWCP, and, as such, all records covered by DOL/GOVT–1 are official records of OWCP. The protection, release, inspection and copying of records covered by DOL/GOVT–1 shall be accomplished in accordance with the rules, guidelines and provisions of this part, as well as those contained in 29 CFR parts 70 and 71, and with the notice of the system of records and routine uses published in the **Federal Register**. All questions relating to access/disclosure, and/or amendment of FECA records maintained by OWCP or the employing agency, are to be resolved in accordance with this section.

§ 10.12 How may a FECA claimant or beneficiary obtain copies of protected records?

(a) A claimant seeking copies of his or her official FECA file should address a request to the District Director of the OWCP office having custody of the file. A claimant seeking copies of FECA-related documents in the custody of the employer should follow the procedures established by that agency.

(b) (1) While an employing agency may establish procedures that an injured employee or beneficiary should follow in requesting access to documents it maintains, any decision issued in response to such a request must comply with the rules and regulations of the Department of Labor which govern all other aspects of safeguarding these records.

(2) No employing agency has the authority to issue determinations with respect to requests for the correction or amendment of records contained in or covered by DOL/GOVT–1. That authority is within the exclusive control of OWCP. Thus, any request for correction or amendment received by an employing agency must be referred to OWCP for review and decision.

(3) Any administrative appeal taken from a denial issued by the employing agency or OWCP shall be filed with the

Solicitor of Labor in accordance with 29 CFR 71.7 and 71.9.

§ 10.13 What process is used by a person who wants to correct FECA-related documents?

Any request to amend a record covered by DOL/GOVT–1 should be directed to the district office having custody of the official file. No employer has the authority to issue determinations with regard to requests for the correction of records contained in or covered by DOL/GOVT–1. Any request for correction received by an employer must be referred to OWCP for review and decision.

Rights and Penalties

§ 10.15 May compensation rights be waived?

No employer or other person may require an employee or other claimant to enter into any agreement, either before or after an injury or death, to waive his or her right to claim compensation under the FECA. No waiver of compensation rights shall be valid.

§ 10.16 What criminal penalties may be imposed in connection with a claim under the FECA?

(a) A number of statutory provisions make it a crime to file a false or fraudulent claim or statement with the Government in connection with a claim under the FECA, or to wrongfully impede a FECA claim. Included among these provisions are sections 287, 1001, 1920, and 1922 of title 18, United States Code. Enforcement of these and other criminal provisions that may apply to claims under the FECA are within the jurisdiction of the Department of Justice.

(b) In addition, administrative proceedings may be initiated under the Program Fraud Civil Remedies Act of 1986 (PFCRA), 31 U.S.C. 3801–12, to impose civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted or presented, false, fictitious or fraudulent claims or written statements to OWCP in connection with a claim under the FECA. The Department of Labor's regulations implementing the PFRCA are found at 29 CFR part 22.

§ 10.17 Is a beneficiary who defrauds the Government in connection with a claim for benefits still entitled to those benefits?

When a beneficiary either pleads guilty to or is found guilty on either Federal or State criminal charges of defrauding the Federal Government in connection with a claim for benefits, the beneficiary's entitlement to any further compensation benefits will terminate effective the date either the guilty plea is accepted or a verdict of guilty is returned after trial, for any injury occurring on or before the date of such guilty plea or verdict. Termination of entitlement under this section is not affected by any subsequent change in or recurrence of the beneficiary's medical condition.

§ 10.18 Can a beneficiary who is incarcerated based on a felony conviction still receive benefits?

(a) Whenever a beneficiary is incarcerated in a State or Federal jail, prison, penal institution or other correctional facility due to a State or Federal felony conviction, he or she forfeits all rights to compensation benefits during the period of incarceration. A beneficiary's right to compensation benefits for the period of his or her incarceration is not restored after such incarceration ends, even though payment of compensation benefits may resume.

(b) If the beneficiary has eligible dependents, OWCP will pay compensation to such dependents at a reduced rate during the period of his or her incarceration, by applying the percentages of 5 U.S.C. 8133(a)(1) through (5) to the beneficiary's gross current entitlement rather than to the beneficiary's monthly pay.

(c) If OWCP's decision on entitlement is pending when the period of incarceration begins, and compensation is due for a period of time prior to such incarceration, payment for that period will only be made to the beneficiary following his or her release.

Subpart B—Filing Notices and Claims; Submitting Evidence

Notices and Claims for Injury, Disease, and Death—Employee or Survivor's Actions

§ 10.100 How and when is a notice of traumatic injury filed?

(a) To claim benefits under the FECA, an employee who sustains a work-related traumatic injury must give notice of the injury in writing on Form CA–1, which may be obtained from the employer or from the Internet at www.dol.gov./dol/esa/owcp.htm. The employee must forward this notice to the employer. Another person, including the employer, may give notice of injury on the employee's behalf. The person submitting a notice shall include the Social Security Number (SSN) of the injured employee.

(b) For injuries sustained on or after September 7, 1974, a notice of injury must be filed within three years of the injury. (The form contains the necessary words of claim.) The requirements for filing notice are further described in 5 U.S.C. 8119. Also see § 10.205 concerning time requirements for filing claims for continuation of pay.

(1) If the claim is not filed within three years, compensation may still be allowed if notice of injury was given within 30 days or the employer had actual knowledge of the injury or death within 30 days after occurrence. This knowledge may consist of written records or verbal notification. An entry into an employee's medical record may also satisfy this requirement if it is sufficient to place the employer on notice of a possible work-related injury or disease.

(2) OWCP may excuse failure to comply with the three-year time requirement because of truly exceptional circumstances (for example, being held prisoner of war).

(3) The claimant may withdraw his or her claim (but not the notice of injury) by so requesting in writing to OWCP at any time before OWCP determines eligibility for benefits. Any continuation of pay (COP) granted to an employee after a claim is withdrawn must be charged to sick or annual leave, or considered an overpayment of pay consistent with 5 U.S.C. 5584, at the employee's option.

(c) However, in cases of latent disability, the time for filing claim does not begin to run until the employee has a compensable disability and is aware, or reasonably should have been aware, of the causal relationship between the disability and the employment (see 5 U.S.C. 8122(b)).

§ 10.101 How and when is a notice of occupational disease filed?

(a) To claim benefits under the FECA, an employee who has a disease which he or she believes to be work-related must give notice of the condition in writing on Form CA–2, which may be obtained from the employer or from the Internet at www.dol.gov./dol/esa/owcp.htm. The employee must forward this notice to the employer. Another person, including the employer, may do so on the employee's behalf. The person submitting a notice shall include the Social Security Number (SSN) of the injured employee. The claimant may withdraw his or her claim (but not the notice of occupational disease) by so requesting in writing to OWCP at any time before OWCP determines eligibility for benefits.

(b) For occupational diseases sustained as a result of exposure to injurious work factors that occurs on or after September 7, 1974, a notice of occupational disease must be filed within three years of the onset of the

condition. (The form contains the necessary words of claim.) The requirements for timely filing are described in § 10.100(b)(1) through (3).

(c) However, in cases of latent disability, the time for filing claim does not begin to run until the employee has a compensable disability and is aware, or reasonably should have been aware, of the causal relationship between the disability and the employment (see 5 U.S.C. 8122(b)).

§ 10.102 How and when is a claim for wage loss compensation filed?

(a) Form CA–7 is used to claim compensation for periods of disability not covered by COP.

(1) An employee who is disabled with loss of pay for more than three calendar days due to an injury, or someone acting on his or her behalf, must file Form CA–7 before compensation can be paid.

(2) The employee shall complete the front of Form CA–7 and submit the form to the employer for completion and transmission to OWCP. The form should be completed as soon as possible, but no more than 14 calendar days after the date pay stops due to the injury or disease.

(3) The requirements for filing claims are further described in 5 U.S.C. 8121.

(b) Form CA–8 is used to claim compensation for additional periods of disability after Form CA–7 is submitted to OWCP.

(1) It is the employee's responsibility to submit Form CA–8. Without receipt of such claim, OWCP has no knowledge of continuing wage loss. Therefore, while disability continues, the employee should submit a claim on Form CA–8 each two weeks until otherwise instructed by OWCP.

(2) The employee shall complete the front of Form CA–8 and submit the form to the employer for completion and transmission to OWCP.

(3) The employee is responsible for submitting, or arranging for the submittal of, medical evidence to OWCP which establishes both that disability continues and that the disability is due to the work-related injury. Form CA–20a is attached to Form CA–8 for this purpose.

§ 10.103 How and when is a claim for permanent impairment filed?

Form CA–7 is used to claim compensation for impairment to a body part covered under the schedule established by 5 U.S.C. 8107. If Form CA–7 has already been filed to claim disability compensation, an employee may file a claim for such impairment by sending a letter to OWCP which specifies the nature of the benefit claimed.

§ 10.104 How and when is a claim for recurrence filed?

(a) A recurrence should be reported on Form CA–2a if it causes the employee to lose time from work and incur a wage loss, or if the employee experiences a renewed need for treatment after previously being released from care. However, a notice of recurrence should not be filed when a new injury, new occupational disease, or new event contributing to an already-existing occupational disease has occurred. In these instances, the employee should file Form CA–1 or CA–2.

(b) The employee has the burden of establishing by the weight of reliable, probative and substantial evidence that the recurrence of disability is causally related to the original injury.

(1) The employee must include a detailed factual statement as described on Form CA–2a. The employer may submit comments concerning the employee's statement.

(2) The employee should arrange for the submittal of a detailed medical report from the attending physician as described on Form CA–2a. The employee should also submit, or arrange for the submittal of, similar medical reports for any examination and/or treatment received after returning to work following the original injury.

§ 10.105 How and when is a notice of death and claim for benefits filed?

(a) If an employee dies from a work-related traumatic injury or an occupational disease, any survivor may file a claim for death benefits using Form CA–5 or CA–5b, which may be obtained from the employer or from the Internet at www.dol.gov./dol/esa/owcp.htm. The survivor must provide this notice in writing and forward it to the employer. Another person, including the employer, may do so on the survivor's behalf. The survivor may also submit the completed Form CA–5 or CA–5b directly to OWCP. The survivor shall disclose the SSNs of all survivors on whose behalf claim for benefits is made in addition to the SSN of the deceased employee. The survivor may withdraw his or her claim (but not the notice of death) by so requesting in writing to OWCP at any time before OWCP determines eligibility for benefits.

(b) For deaths that occur on or after September 7, 1974, a notice of death must be filed within three years of the death. The form contains the necessary words of claim. The requirements for timely filing are described in § 10.100(b)(1) through (3).

(c) However, in cases of death due to latent disability, the time for filing the claim does not begin to run until the survivor is aware, or reasonably should have been aware, of the causal relationship between the death and the employment (see 5 U.S.C. 8122(b)).

(d) The filing of a notice of injury or occupational disease will satisfy the time requirements for a death claim based on the same injury or occupational disease. If an injured employee or someone acting on the employee's behalf does not file a claim before the employee's death, the right to claim compensation for disability other than medical expenses ceases and does not survive.

(e) A survivor must be alive to receive any payment; there is no vested right to such payment. A report as described in § 10.414 of this part must be filed once each year to support continuing payments of compensation.

Notices and Claims for Injury, Disease, and Death—Employer's Actions

§ 10.110 What should the employer do when an employee files a notice of traumatic injury or occupational disease?

(a) The employer shall complete the agency portion of Form CA–1 (for traumatic injury) or CA–2 (for occupational disease) no more than 10 working days after receipt of notice from the employee. The employer shall also complete the Receipt of Notice and give it to the employee, along with copies of both sides of Form CA–1 or Form CA–2.

(b) The employer must complete and transmit the form to OWCP within 10 working days after receipt of notice from the employee if the injury or disease will likely result in:

(1) A medical charge against OWCP;

(2) Disability for work beyond the day or shift of injury;

(3) The need for more than two appointments for medical examination and/or treatment on separate days, leading to time loss from work;

(4) Future disability;

(5) Permanent impairment; or

(6) Continuation of pay pursuant to 5 U.S.C. 8118.

(c) The employer should not wait for submittal of supporting evidence before sending the form to OWCP.

(d) If none of the conditions in paragraph (b) of this section applies, the Form CA–1 or CA–2 shall be retained as a permanent record in the Employee Medical Folder in accordance with the guidelines established by the Office of Personnel Management.

§ 10.111 What should the employer do when an employee files an initial claim for compensation due to disability or permanent impairment?

(a) When an employee is disabled by a work-related injury and loses pay for more than three calendar days, or has a permanent impairment or serious disfigurement as described in 5 U.S.C. 8107, the employer shall furnish the employee with Form CA–7 for the purpose of claiming compensation.

(b) If the employee is receiving continuation of pay (COP), the employer should give Form CA–7 to the employee by the 30th day of the COP period and submit the form to OWCP by the 40th day of the COP period. If the employee has not returned the form to the employer by the 40th day of the COP period, the employer should ask him or her to submit it as soon as possible.

(c) Upon receipt of Form CA–7 from the employee, or someone acting on his or her behalf, the employer shall complete the appropriate portions of the form. As soon as possible, but no more than five working days after receipt from the employee, the employer shall forward the completed Form CA–7 and any accompanying medical report to OWCP.

§ 10.112 What should the employer do when an employee files a claim for continuing compensation due to disability?

(a) If the employee continues in a leave-without-pay status due to a work-related injury after the period of compensation initially claimed on Form CA–7, the employer shall furnish the employee with Form CA–8 for the purpose of claiming continuing compensation.

(b) Upon receipt of Form CA–8 from the employee, or someone acting on his or her behalf, the employer shall complete the appropriate portions of the form. As soon as possible, but no more than five working days after receipt from the employee, the employer shall forward the completed Form CA–8 and any accompanying medical report to OWCP.

§ 10.113 What should the employer do when an employee dies from a work-related injury or disease?

(a) The employer shall immediately report a death due to a work-related traumatic injury or occupational disease to OWCP by telephone, telegram, or facsimile (fax). No more than 10 working days after notification of the death, the employer shall complete and send Form CA–6 to OWCP.

(b) When possible, the employer shall furnish a Form CA–5 or CA–5b to all persons likely to be entitled to compensation for death of an employee. The employer should also supply information about completing and filing the form.

(c) The employer shall promptly transmit Form CA–5 or CA–5b to OWCP. The employer shall also promptly transmit to OWCP any other claim or paper submitted which appears to claim compensation on account of death.

Evidence and Burden of Proof

§ 10.115 What evidence is needed to establish a claim?

Forms CA–1, CA–2, CA–5 and CA–5b describe the basic evidence required. OWCP may send any request for additional evidence to the claimant and to his or her representative, if any. Evidence should be submitted in writing. The evidence submitted must be reliable, probative and substantial. Each claim for compensation must meet five requirements before OWCP can accept it. These requirements, which the employee must establish to meet his or her burden of proof, are as follows:

(a) The claim was filed within the time limits specified by the FECA;

(b) The injured person was, at the time of injury, an employee of the United States as defined in 5 U.S.C. 8101(1) and § 10.5(h) of this part;

(c) The fact that an injury, disease or death occurred;

(d) The injury, disease or death occurred while the employee was in the performance of duty; and

(e) The medical condition for which compensation or medical benefits is claimed is causally related to the claimed injury, disease or death. Neither the fact that the condition manifests itself during a period of Federal employment, nor the belief of the claimant that factors of employment caused or aggravated the condition, is sufficient in itself to establish causal relationship.

(f) In all claims, the claimant is responsible for submitting, or arranging for submittal of, a medical report from the attending physician. For wage loss benefits, the claimant must also submit medical evidence showing that the condition claimed is disabling. The rules for submitting medical reports are found in §§ 10.330 through 10.333.

§ 10.116 What additional evidence is needed in cases based on occupational disease?

(a) The employee must submit the specific detailed information described on Form CA–2 and on any checklist (Form CA–35, A–H) provided by the employer. OWCP has developed these checklists to address particular occupational diseases. The medical report should also include the information specified on the checklist for the particular disease claimed.

(b) The employer should submit the specific detailed information described on Form CA–2 and on any checklist pertaining to the claimed disease.

§ 10.117 What happens if, in any claim, the employer contests any of the facts as stated by the claimant?

(a) An employer who has reason to disagree with any aspect of the claimant's report shall submit a statement to OWCP that specifically describes the factual allegation or argument with which it disagrees and provide evidence or argument to support its position. The employer may include supporting documents such as witness statements, medical reports or records, or any other relevant information.

(b) Any such statement shall be submitted to OWCP with the notice of traumatic injury or death, or within 30 calendar days from the date notice of occupational disease or death is received from the claimant. If the employer does not submit a written explanation to support the disagreement, OWCP may accept the claimant's report of injury as established. The employer may not use a disagreement with an aspect of the claimant's report to delay forwarding the claim to OWCP or to compel or induce the claimant to change or withdraw the claim.

§ 10.118 Does the employer participate in the claims process in any other way?

(a) The employer is responsible for submitting to OWCP all relevant and probative factual and medical evidence in its possession, or which it may acquire through investigation or other means. Such evidence may be submitted at any time.

(b) The employer may ascertain the events surrounding an injury and the extent of disability where it appears that an employee who alleges total disability may be performing other work, or may be engaging in activities which would indicate less than total disability. This authority is in addition to that given in § 10.118(a). However, the provisions of the Privacy Act apply to any endeavor by the employer to ascertain the facts of the case (see §§ 10.10 and 10.11).

(c) The employer does not have the right, except as provided in subpart C of this part, to actively participate in the claims adjudication process.

§ 10.119 What action will OWCP take with respect to information submitted by the employer?

OWCP will consider all evidence submitted appropriately, and OWCP will inform the employee, the employee's representative, if any, and the employer of any action taken. Where an employer contests a claim within 30 days of the initial submittal and the claim is later approved, OWCP will notify the employer of the rationale for approving the claim.

§ 10.120 May a claimant submit additional evidence?

A claimant or a person acting on his or her behalf may submit to OWCP at any time any other evidence relevant to the claim.

§ 10.121 What happens if OWCP needs more evidence from the claimant?

If the claimant submits factual evidence, medical evidence, or both, but OWCP determines that this evidence is not sufficient to meet the burden of proof, OWCP will inform the claimant of the additional evidence needed. The claimant will be allowed at least 30 days to submit the evidence required. OWCP is not required to notify the claimant a second time if the evidence submitted in response to its first request is not sufficient to meet the burden of proof.

Decisions on Entitlement to Benefits

§ 10.125 How does OWCP determine entitlement to benefits?

(a) In reaching any decision with respect to FECA coverage or entitlement, OWCP considers the claim presented by the claimant, the report by the employer, and the results of such investigation as OWCP may deem necessary.

(b) OWCP claims staff apply the law, the regulations, and its procedures to the facts as reported or obtained upon investigation. They also apply decisions of the Employees' Compensation Appeals Board and administrative decisions of OWCP as set forth in FECA Program Memoranda.

§ 10.126 What does the decision contain?

The decision shall contain findings of fact and a statement of reasons. It is accompanied by information about the claimant's appeal rights, which may include the right to a hearing, a reconsideration, and/or a review by the Employees' Compensation Appeals Board. (See subpart G of this part.)

§ 10.127 To whom is the decision sent?

A copy of the decision shall be mailed to the employee's last known address. If the employee has a designated representative before OWCP, a copy of the decision will also be mailed to the representative. Notification to either the employee or the representative will be considered notification to both. A copy of the decision will also be sent to the employer.

Subpart C—Continuation of Pay

§ 10.200 What is continuation of pay?

(a) For most employees who sustain a traumatic injury, the FECA provides that the employer must continue the employee's regular pay during any periods of resulting disability, up to a maximum of 45 calendar days. This is called continuation of pay, or COP. The employer, not OWCP, pays COP. Unlike wage loss benefits, COP is subject to taxes and all other payroll deductions that are made from regular income.

(b) The employer must continue the pay of an employee who is eligible for COP, and may not require the employee to use his or her own sick or annual leave, unless the provisions of §§ 10.200(c), 10.220, or § 10.222 apply. However, while continuing the employee's pay, the employer may controvert the employee's COP entitlement pending a final determination by OWCP. OWCP has the exclusive authority to determine questions of entitlement and all other issues relating to COP.

(c) The FECA excludes certain persons from eligibility for COP. COP cannot be authorized for members of these excluded groups, which include but are not limited to: persons rendering personal service to the United States similar to the service of a civil officer or employee of the United States, without pay or for nominal pay; volunteers (for instance, in the Civil Air Patrol and Peace Corps); Job Corps and Youth Conservation Corps enrollees; individuals in work-study programs, and grand or petit jurors (unless otherwise Federal employees).

Eligibility for COP

§ 10.205 What conditions must be met to receive COP?

(a) To be eligible for COP, a person must:

(1) Have a ''traumatic injury'' as defined at § 10.5(ee) which is job-related and the cause of the disability, and/or the cause of lost time due to the need for medical examination and treatment;

(2) File Form CA–1 within 30 days of the date of the injury (but if that form is not available, using another form would not alone preclude receipt); and

(3) Begin losing time from work due to the traumatic injury within 45 days of the injury.

(b) OWCP may find that the employee is not entitled to COP for other reasons consistent with the statute (see § 10.220).

§ 10.206 May an employee who uses leave after an injury later decide to use COP instead?

On Form CA–1, an employee may elect to use accumulated sick or annual leave, or leave advanced by the agency, instead of electing COP. The employee can change the election between leave and COP for prospective periods at any point while eligibility for COP remains. The employee may also change the election for past periods and request COP in lieu of leave already taken for the same period. In either situation, the following provisions apply:

(a) The request must be made to the employer within one year of the date the leave was used or the date of the written approval of the claim by OWCP (if written approval is issued), whichever is later.

(b) Where the employee is otherwise eligible, the agency shall restore leave taken in lieu of any of the 45 COP days. Where any of the 45 COP days remain unused, the agency shall continue pay prospectively.

(c) The use of leave may not be used to delay or extend the 45-day COP period or to otherwise affect the time limitation as provided by 5 U.S.C. 8117. Therefore, any leave used during the period of eligibility counts towards the 45-day maximum entitlement to COP.

§ 10.207 May an employee who returns to work, then stops work again due to the effects of the injury, receive COP?

If the employee recovers from disability and returns to work, then becomes disabled again and stops work, the employer shall pay any of the 45 days of entitlement to COP not used during the initial period of disability where:

(a) The employee completes Form CA–2a and elects to receive regular pay;

(b) OWCP did not deny the original claim for disability;

(c) The disability recurs and the employee stops work within 45 days of the time the employee first returned to work following the initial period of disability; and

(d) Pay has not been continued for the entire 45 days.

Responsibilities

§ 10.210 What are the employee's responsibilities in COP cases?

An employee who sustains a traumatic injury which he or she considers disabling, or someone authorized to act on his or her behalf,

must take the following actions to ensure continuing eligibility for COP. The employee must:

(a) Complete and submit Form CA–1 to the employing agency as soon as possible, but no later than 30 days from the date the traumatic injury occurred.

(b) Ensure that medical evidence supporting disability resulting from the claimed traumatic injury, including a statement as to when the employee can return to his or her date of injury job, is provided to the employer within 10 calendar days after filing the claim for COP.

(c) Ensure that relevant medical evidence is submitted to OWCP, and cooperate with OWCP in developing the claim.

(d) Ensure that the treating physician specifies work limitations and provides them to the employer and/or representatives of OWCP.

(e) Provide to the treating physician a description of any specific alternative positions offered the employee, and ensure that the treating physician responds promptly to the employer and/or OWCP, with an opinion as to whether and how soon the employee could perform that or any other specific position.

§ 10.211 What are the employer's responsibilities in COP cases?

Once the employer learns of a traumatic injury sustained by an employee, it shall:

(a) Provide a Form CA–1 and Form CA–16 to authorize medical care in accordance with § 10.300. Failure to do so may mean that OWCP will not uphold any termination of COP by the employer.

(b) Advise the employee of the right to receive COP, and the need to elect among COP, annual or sick leave or leave without pay, for any period of disability.

(c) Inform the employee of any decision to controvert COP and/or terminate pay, and the basis for doing so.

(d) Complete Form CA–1 and transmit it, along with all other available pertinent information, (including the basis for any controversion), to OWCP within 10 working days after receiving the completed form from the employee.

Calculation of COP

§ 10.215 How does OWCP compute the number of days of COP used?

COP is payable for a maximum of 45 calendar days, and every day used is counted toward this maximum. The following rules apply:

(a) Time lost on the day or shift of the injury does not count toward COP. (Instead, the agency must keep the employee in a pay status for that period);

(b) The first COP day is the first day disability begins following the date of injury (providing it is within the 30 days following the date of injury), except where the injury occurs before the beginning of the work day or shift, in which case the date of injury is charged to COP;

(c) Any part of a day or shift (except for the day of the injury) counts as a full day toward the 45 calendar day total;

(d) Regular days off are included if COP has been used on the regular work days immediately preceding or following the regular day(s) off, and medical evidence supports disability; and

(e) Leave used during a period when COP is otherwise payable is counted toward the 45-day COP maximum as if the employee had been in a COP status.

(f) For employees with part-time or intermittent schedules, all calendar days on which medical evidence indicates disability are counted as COP days, regardless of whether the employee was or would have been scheduled to work on those days. The rate at which COP is paid for these employees is calculated according to § 10.216(b).

§ 10.216 How is the pay rate for COP calculated?

The employer shall calculate COP using the period of time and the weekly pay rate.

(a) The pay rate for COP purposes is equal to the employee's regular ''weekly'' pay (the average of the weekly pay over the preceding 52 weeks).

(1) The pay rate excludes overtime pay, but includes other applicable extra pay except to the extent prohibited by law.

(2) Changes in pay or salary (for example, promotion, demotion, within-grade increases, termination of a temporary detail, etc.) which would have otherwise occurred during the 45-day period are to be reflected in the weekly pay determination.

(b) The weekly pay for COP purposes is determined according to the following formulas:

(1) For full or part-time workers (permanent or temporary) who work the same number of hours each week of the year (or of the appointment), the weekly pay rate is the hourly pay rate (A) in effect on the date of injury multiplied by (×) the number of hours worked each week (B): $A \times B$ = Weekly Pay Rate.

(2) For part-time workers (permanent or temporary) who do not work the same number of hours each week, but who do work each week of the year (or period of appointment), the weekly pay rate is an average of the weekly earnings, established by dividing (÷) the total earnings (excluding overtime) from the year immediately preceding the injury (A) by the number of weeks (or partial weeks) worked in that year (B): $A \div B$ = Weekly Pay Rate.

(3) For intermittent, seasonal and on-call workers, whether permanent or temporary, who do not work either the same number of hours or every week of the year (or period of appointment), the weekly pay rate is the average weekly earnings established by dividing (÷) the total earnings during the full 12-month period immediately preceding the date of injury (excluding overtime) (A), by the number of weeks (or partial weeks) worked during that year (B) (that is, $A \div B$); or 150 times the average daily wage earned in the employment during the days employed within the full year immediately preceding the date of injury divided by 52 weeks, whichever is greater.

§ 10.217 Is COP charged if the employee continues to work, but in a different job that pays less?

If the employee cannot perform the duties of his or her regular position, but instead works in another job with different duties with no loss in pay, then COP is not chargeable. COP must be paid and the days counted against the 45 days authorized by law whenever an actual reduction of pay results from the injury, including a reduction of pay for the employee's normal administrative workweek that results from a change or diminution in his or her duties following an injury. However, this does not include a reduction of pay that is due solely to an employer being prohibited by law from paying extra pay to an employee for work he or she does not actually perform.

Controversion and Termination of COP

§ 10.220 When is an employer not required to pay COP?

An employer shall continue the regular pay of an eligible employee without a break in time for up to 45 calendar days, except when, and only when:

(a) The disability was not caused by a traumatic injury;

(b) The employee is not a citizen of the United States or Canada;

(c) No written claim was filed within 30 days from the date of injury;

(d) The injury was not reported until after employment has been terminated;

(e) The injury occurred off the employing agency's premises and was otherwise not within the performance of official duties;

(f) The injury was caused by the employee's willful misconduct, intent to injure or kill himself or herself or another person, or was proximately caused by intoxication by alcohol or illegal drugs; or

(g) Work did not stop until more than 30 days following the injury.

§ 10.221 How is a claim for COP controverted?

When the employer stops an employee's pay for one of the reasons cited in § 10.220, the employer must controvert the claim for COP on Form CA–1, explaining in detail the basis for the refusal. The final determination on entitlement to COP always rests with OWCP.

§ 10.222 When may an employer terminate COP which has already begun?

(a) Where the employer has continued the pay of the employee, it may be stopped only when at least one of the following circumstances is present:

(1) Medical evidence which on its face supports disability due to a work-related injury is not received within 10 calendar days after the claim is submitted (unless the employer's own investigation shows disability to exist). Where the medical evidence is later provided, however, COP shall be reinstated retroactive to the date of termination;

(2) The medical evidence from the treating physician shows that the employee is not disabled from his or her regular position;

(3) Medical evidence from the treating physician shows that the employee is not totally disabled, and the employee refuses a written offer of a suitable alternative position which is approved by the attending physician. If OWCP later determines that the position was not suitable, OWCP will direct the employer to grant the employee COP retroactive to the termination date.

(4) The employee returns to work with no loss of pay;

(5) The employee's period of employment expires or employment is otherwise terminated (as established prior to the date of injury);

(6) OWCP directs the employer to stop COP; and/or

(7) COP has been paid for 45 calendar days.

(b) An employer may not interrupt or stop COP to which the employee is otherwise entitled because of a disciplinary action, unless a preliminary notice was issued to the employee before the date of injury and the action becomes final or otherwise takes effect during the COP period.

(c) An employer cannot otherwise stop COP unless it does so for one of the reasons found in this section or § 10.220. Where an employer stops COP, it must file a controversion with OWCP, setting forth the basis on which it terminated COP, no later than the effective date of the termination.

§ 10.223 Are there other circumstances under which OWCP will not authorize payment of COP?

When OWCP finds that an employee or his or her representative refuses or obstructs a medical examination required by OWCP, the right to COP is suspended until the refusal or obstruction ceases. COP already paid or payable for the period of suspension is forfeited. If already paid, the COP may be charged to annual or sick leave or considered an overpayment of pay consistent with 5 U.S.C. 5584.

§ 10.224 What happens if OWCP finds that the employee is not entitled to COP after it has been paid?

Where OWCP finds that the employee is not entitled to COP after it has been paid, the employee may chose to have the time charged to annual or sick leave, or considered an overpayment of pay under 5 U.S.C. 5584. The employer must correct any deficiencies in COP as directed by OWCP.

Subpart D—Medical and Related Benefits

Emergency Medical Care

§ 10.300 What are the basic rules for authorizing emergency medical care?

(a) When an employee sustains a work-related traumatic injury that requires medical examination, medical treatment, or both, the employer shall authorize such examination and/or treatment by issuing a Form CA–16. This form may be used for occupational disease or illness only if the employer has obtained prior permission from OWCP.

(b) The employer shall issue Form CA–16 within four hours of the claimed injury. If the employer gives verbal authorization for such care, he or she should issue a Form CA–16 within 48 hours. The employer is not required to issue a Form CA–16 more than one week after the occurrence of the claimed injury. The employer may not authorize examination or medical or other treatment in any case that OWCP has disallowed.

(c) Form CA–16 must contain the full name and address of the qualified physician or qualified medical facility authorized to provide service. The authorizing official must sign and date the form and must state his or her title. Form CA–16 authorizes treatment for 60 days from the date of issuance, unless OWCP terminates the authorization sooner.

(d) The employer should advise the employee of the right to his or her initial choice of physician. The employer shall allow the employee to select a qualified physician, after advising him or her of those physicians excluded under subpart I of this part. The physician may be in private practice, including a health maintenance organization (HMO), or employed by a Federal agency such as the Department of the Army, Navy, Air Force, or Veterans Affairs. Any qualified physician may provide initial treatment of a work-related injury in an emergency. See also § 10.825(b).

§ 10.301 May the physician designated on Form CA–16 refer the employee to another medical specialist or medical facility?

The physician designated on Form CA–16 may refer the employee for further examination, testing, or medical care. OWCP will pay this physician or facility's bill on the authority of Form CA–16. The employer should not issue a second Form CA–16.

§ 10.302 Should the employer authorize medical care if he or she doubts that the injury occurred, or that it is work-related?

If the employer doubts that the injury occurred, or that it is work-related, he or she should authorize medical care by completing Form CA–16 and checking block 6B of the form. If the medical and factual evidence sent to OWCP shows that the condition treated is not work-related, OWCP will notify the employee, the employer, and the physician or hospital that OWCP will not authorize payment for any further treatment.

§ 10.303 Should the employer use a Form CA–16 to authorize medical testing when an employee is exposed to a workplace hazard just once?

(a) Simple exposure to a workplace hazard, such as an infectious agent, does not constitute a work-related injury entitling an employee to medical treatment under the FECA. The employer therefore should not use a Form CA–16 to authorize medical testing for an employee who has merely been exposed to a workplace hazard, unless the employee has sustained an identifiable injury or medical condition as a result of that exposure. OWCP will authorize preventive treatment only under certain well-defined circumstances (see § 10.313).

(b) Employers may be required under other statutes or regulations to provide their employees with medical testing and/or other services in situations described in paragraph (a) of this section. For example, regulations issued

by the Occupational Safety and Health Administration at 29 CFR chapter XVII require employers to provide their employees with medical consultations and/or examinations when they either exhibit symptoms consistent with exposure to a workplace hazard, or when an identifiable event such as a spill, leak or explosion occurs and results in the likelihood of exposure to a workplace hazard. In addition, 5 U.S.C. 7901 authorizes employers to establish health programs whose staff can perform tests for workplace hazards, counsel employees for exposure or feared exposure to such hazards, and provide health care screening and other associated services.

§ 10.304 Are there any exceptions to these procedures for obtaining medical care?

In cases involving emergencies or unusual circumstances, OWCP may authorize treatment in a manner other than as stated in this subpart.

Medical Treatment and Related Issues

§ 10.310 What are the basic rules for obtaining medical care?

(a) The employee is entitled to receive all medical services, appliances or supplies which a qualified physician prescribes or recommends and which OWCP considers necessary to treat the work-related injury. The employee need not be disabled to receive such treatment. If there is any doubt as to whether a specific service, appliance or supply is necessary to treat the work-related injury, the employee should consult OWCP prior to obtaining it.

(b) Any qualified physician or qualified hospital may provide such services, appliances and supplies. A qualified provider of medical support services may also furnish appropriate services, appliances, and supplies. OWCP may apply a test of cost-effectiveness to appliances and supplies. With respect to prescribed medications, OWCP may require the use of generic equivalents where they are available.

§ 10.311 What are the special rules for the services of chiropractors?

(a) The services of chiropractors that may be reimbursed are limited by the FECA to treatment to correct a spinal subluxation. The costs of physical and related laboratory tests performed by or required by a chiropractor to diagnose such a subluxation are also payable.

(b) In accordance with 5 U.S.C. 8101(3), a diagnosis of spinal ''subluxation as demonstrated by X-ray to exist'' must appear in the chiropractor's report before OWCP can consider payment of a chiropractor's bill.

(c) A chiropractor may interpret his or her x-rays to the same extent as any other physician. To be given any weight, the medical report must state that x-rays support the finding of spinal subluxation. OWCP will not necessarily require submittal of the x-ray, or a report of the x-ray, but the report must be available for submittal on request.

(d) A chiropractor may also provide services in the nature of physical therapy under the direction of a qualified physician.

§ 10.312 What are the special rules for the services of clinical psychologists?

A clinical psychologist may serve as a physician only within the scope of his or her practice as defined by State law. Therefore, a clinical psychologist may not serve as a physician for conditions that include a physical component unless the applicable State law allows clinical psychologists to treat physical conditions. A clinical psychologist may also perform testing, evaluation and other services under the direction of a qualified physician.

§ 10.313 Will OWCP pay for preventive treatment?

The FECA does not authorize payment for preventive measures such as vaccines and inoculations, and in general, preventive treatment may be a responsibility of the employing agency under the provisions of 5 U.S.C. 7901 (see § 10.303). However, OWCP can authorize treatment for the following conditions, even though such treatment is designed, in part, to prevent further injury:

(a) Complications of preventive measures which are provided or sponsored by the agency, such as an adverse reaction to prophylactic immunization.

(b) Actual or probable exposure to a known contaminant due to an injury, thereby requiring disease-specific measures against infection. Examples include the provision of tetanus antitoxin or booster toxoid injections for puncture wounds; administration of rabies vaccine for a bite from a rabid or potentially rabid animal; or appropriate measures where exposure to human immunodeficiency virus (HIV) has occurred.

(c) Conversion of tuberculin reaction from negative to positive following exposure to tuberculosis in the performance of duty. In this situation, the appropriate therapy may be authorized.

(d) Where injury to one eye has resulted in loss of vision, periodic examination of the uninjured eye to detect possible sympathetic involvement of the uninjured eye at an early stage.

§ 10.314 Will OWCP pay for the services of an attendant?

Yes, OWCP will pay for the services of an attendant up to a maximum of $1,500 per month, where the need for such services has been medically documented. In the exercise of the discretion afforded by 5 U.S.C. 8111(a), the Director has determined that, except where payments were being made prior to January 4, 1999, direct payments to the claimant to cover such services will no longer be made. Rather, the cost of providing attendant services will be paid under section 8103 of the Act, and medical bills for these services will be considered under § 10.801. This decision is based on the following factors:

(a) The additional payments authorized under section 8111(a) should not be necessary since OWCP will authorize payment for personal care services under 5 U.S.C. 8103, whether or not such care includes medical services, so long as the personal care services have been determined to be medically necessary and are provided by a home health aide, licensed practical nurse, or similarly trained individual.

(b) A home health aide, licensed practical nurse, or similarly trained individual is better able to provide quality personal care services, including assistance in feeding, bathing, and using the toilet. In the past, provision of supplemental compensation directly to injured employees may have encouraged family members to take on these responsibilities even though they may not have been trained to provide such services. By paying for the services under section 8103, OWCP can better determine whether the services provided are necessary and/or adequate to meet the needs of the injured employee. In addition, a system requiring the personal care provider to submit a bill to OWCP, where the amount billed will be subject to OWCP's fee schedule, will result in greater fiscal accountability.

§ 10.315 Will OWCP pay for transportation to obtain medical treatment?

The employee is entitled to reimbursement of reasonable and necessary expenses, including transportation needed to obtain authorized medical services, appliances or supplies. To determine what is a reasonable distance to travel, OWCP will consider the availability of services,

the employee's condition, and the means of transportation. Generally, 25 miles from the place of injury, the work site, or the employee's home, is considered a reasonable distance to travel. The standard form designated for Federal employees to claim travel expenses should be used to seek reimbursement under this section.

§ 10.316 After selecting a treating physician, may an employee choose to be treated by another physician instead?

(a) When the physician originally selected to provide treatment for a work-related injury refers the employee to a specialist for further medical care, the employee need not consult OWCP for approval. In all other instances, however, the employee must submit a written request to OWCP with his or her reasons for desiring a change of physician.

(b) OWCP will approve the request if it determines that the reasons submitted are sufficient. Requests that are often approved include those for transfer of care from a general practitioner to a physician who specializes in treating conditions like the work-related one, or the need for a new physician when an employee has moved. The employer may not authorize a change of physicians.

Directed Medical Examinations

§ 10.320 Can OWCP require an employee to be examined by another physician?

OWCP sometimes needs a second opinion from a medical specialist. The employee must submit to examination by a qualified physician as often and at such times and places as OWCP considers reasonably necessary. The employee may have a qualified physician, paid by him or her, present at such examination. However, the employee is not entitled to have anyone else present at the examination unless OWCP decides that exceptional circumstances exist. For example, where a hearing-impaired employee needs an interpreter, the presence of an interpreter would be allowed. Also, OWCP may send a case file for second opinion review where actual examination is not needed, or where the employee is deceased.

§ 10.321 What happens if the opinion of the physician selected by OWCP differs from the opinion of the physician selected by the employee?

(a) If one medical opinion holds more probative value, OWCP will base its determination of entitlement on that medical conclusion (see § 10.502). A difference in medical opinion sufficient to be considered a conflict occurs when two reports of virtually equal weight and rationale reach opposing conclusions (*see James P. Roberts, 31 ECAB 1010 (1980)*).

(b) If a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser or consultant, OWCP shall appoint a third physician to make an examination (see § 10.502). This is called a referee examination. OWCP will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case. The employee is not entitled to have anyone present at the examination unless OWCP decides that exceptional circumstances exist. For example, where a hearing-impaired employee needs an interpreter, the presence of an interpreter would be allowed. Also, a case file may be sent for referee medical review where there is no need for an actual examination, or where the employee is deceased.

§ 10.322 Who pays for second opinion and referee examinations?

OWCP will pay second opinion and referee medical specialists directly. OWCP will reimburse the employee all necessary and reasonable expenses incident to such an examination, including transportation costs and actual wages lost for the time needed to submit to an examination required by OWCP.

§ 10.323 What are the penalties for failing to report for or obstructing a second opinion or referee examination?

If an employee refuses to submit to or in any way obstructs an examination required by OWCP, his or her right to compensation under the FECA is suspended until such refusal or obstruction stops. The action of the employee's representative is considered to be the action of the employee for purposes of this section. The employee will forfeit compensation otherwise paid or payable under the FECA for the period of the refusal or obstruction, and any compensation already paid for that period will be declared an overpayment and will be subject to recovery pursuant to 5 U.S.C. 8129.

§ 10.324 May an employer require an employee to undergo a physical examination in connection with a work-related injury?

The employer may have authority independent of the FECA to require the employee to undergo a medical examination to determine whether he or she meets the medical requirements of the position held or can perform the duties of that position. Nothing in the FECA or in this part affects such authority. However, no agency-required examination or related activity shall interfere with the employee's initial choice of physician or the provision of any authorized examination or treatment, including the issuance of Form CA–16.

Medical Reports

§ 10.330 What are the requirements for medical reports?

In all cases reported to OWCP, a medical report from the attending physician is required. This report should include:

(a) Dates of examination and treatment;

(b) History given by the employee;

(c) Physical findings;

(d) Results of diagnostic tests;

(e) Diagnosis;

(f) Course of treatment;

(g) A description of any other conditions found but not due to the claimed injury;

(h) The treatment given or recommended for the claimed injury;

(i) The physician's opinion, with medical reasons, as to causal relationship between the diagnosed condition(s) and the factors or conditions of the employment;

(j) The extent of disability affecting the employee's ability to work due to the injury;

(k) The prognosis for recovery; and

(l) All other material findings.

§ 10.331 How and when should the medical report be submitted?

(a) Form CA–16 may be used for the initial medical report; Form CA–20 may be used for the initial report and for subsequent reports; and Form CA–20a may be used where continued compensation is claimed. Use of medical report forms is not required, however. The report may also be made in narrative form on the physician's letterhead stationery. The report should bear the physician's signature or signature stamp. OWCP may require an original signature on the report.

(b) The report shall be submitted directly to OWCP as soon as possible after medical examination or treatment is received, either by the employee or the physician. (See also § 10.210.) The employer may request a copy of the report from OWCP. The employer should use Form CA–17 to obtain interim reports concerning the duty status of an employee with a disabling injury.

§ 10.332 What additional medical information will OWCP require to support continuing payment of benefits?

In all cases of serious injury or disease, especially those requiring hospital treatment or prolonged care, OWCP will request detailed narrative reports from the attending physician at periodic intervals. The physician will be asked to describe continuing medical treatment for the condition accepted by OWCP, a prognosis, a description of work limitations, if any, and the physician's opinion as to the continuing causal relationship between the employee's condition and factors of his or her Federal employment.

§ 10.333 What additional medical information will OWCP require to support a claim for a schedule award?

To support a claim for a schedule award, a medical report must contain accurate measurements of the function of the organ or member, in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment.* These measurements may include: The actual degree of loss of active or passive motion or deformity; the amount of atrophy; the decrease, if any, in strength; the disturbance of sensation; and pain due to nerve impairment.

Medical Bills

§ 10.335 How are medical bills submitted?

Usually, medical providers submit bills directly to OWCP. The rules for submitting and paying bills are stated in subpart I of this part. An employee claiming reimbursement of medical expenses should submit an itemized bill as described in § 10.802.

§ 10.336 What are the time frames for submitting bills?

To be considered for payment, bills must be submitted by the end of the calendar year after the year when the expense was incurred, or by the end of the calendar year after the year when OWCP first accepted the claim as compensable, whichever is later.

§ 10.337 If OWCP reimburses an employee only partially for a medical expense, must the provider refund the balance of the amount paid to the employee?

(a) The OWCP fee schedule sets maximum limits on the amounts payable for many services (see § 10.805). The employee may be only partially reimbursed for medical expenses because the amount he or she paid to the medical provider for a service exceeds the maximum allowable charge set by the OWCP fee schedule.

(b) If this happens, OWCP shall advise the employee of the maximum allowable charge for the service in question and of his or her responsibility to ask the provider to refund to the employee, or credit to the employee's account, the amount he or she paid which exceeds the maximum allowable charge. The provider may request reconsideration of the fee determination as set forth in § 10.812.

(c) If the provider does not refund to the employee or credit to his or her account the amount of money paid in excess of the charge which OWCP allows, the employee should submit documentation of the attempt to obtain such refund or credit to OWCP. OWCP may make reasonable reimbursement to the employee after reviewing the facts and circumstances of the case.

Subpart E—Compensation and Related Benefits

Compensation for Disability and Impairment

§ 10.400 What is total disability?

(a) Permanent total disability is presumed to result from the loss of use of both hands, both arms, both feet, or both legs, or the loss of sight of both eyes. However, the presumption of permanent total disability as a result of such loss may be rebutted by evidence to the contrary, such as evidence of continued ability to work and to earn wages despite the loss.

(b) Temporary total disability is defined as the inability to return to the position held at the time of injury or earn equivalent wages, or to perform other gainful employment, due to the work-related injury. Except as presumed under paragraph (a) of this section, an employee's disability status is always considered temporary pending return to work.

§ 10.401 When and how is compensation for total disability paid?

(a) Compensation is payable when the employee starts to lose pay if the injury causes permanent disability or if pay loss continues for more than 14 calendar days. Otherwise, compensation is payable on the fourth day after pay stops. Compensation may not be paid while an injured employee is in a continuation of pay status or receives pay for leave.

(b) Compensation for total disability is payable at the rate of 66⅔ percent of the pay rate if the employee has no dependents, or 75 percent of the pay rate if the employee has at least one dependent. (''Dependents'' are defined at 5 U.S.C. 8110(a).)

§ 10.402 What is partial disability?

An injured employee who cannot return to the position held at the time of injury (or earn equivalent wages) due to the work-related injury, but who is not totally disabled for all gainful employment, is considered to be partially disabled.

§ 10.403 When and how is compensation for partial disability paid?

(a) 5 U.S.C. 8115 outlines how compensation for partial disability is determined. If the employee has actual earnings which fairly and reasonably represent his or her wage-earning capacity, those earnings may form the basis for payment of compensation for partial disability. (See §§ 10.500 through 10.520 concerning return to work.) If the employee's actual earnings do not fairly and reasonably represent his or her wage-earning capacity, or if the employee has no actual earnings, OWCP uses the factors stated in 5 U.S.C. 8115 to select a position which represents his or her wage-earning capacity. However, OWCP will not secure employment for the employee in the position selected for establishing a wage-earning capacity.

(b) Compensation for partial disability is payable as a percentage of the difference between the employee's pay rate for compensation purposes and the employee's wage-earning capacity. The percentage is 66⅔ percent of this difference if the employee has no dependents, or 75 percent of this difference if the employee has at least one dependent.

(c) The formula which OWCP uses to compute the compensation payable for partial disability employs the following terms: Pay rate for compensation purposes, which is defined in § 10.5(s) of this part; current pay rate, which means the salary or wages for the job held at the time of injury at the time of the determination; and earnings, which means the employee's actual earnings, or the salary or pay rate of the position selected by OWCP as representing the employee's wage-earning capacity.

(d) The employee's wage-earning capacity in terms of percentage is computed by dividing the employee's earnings by the current pay rate. The comparison of earnings and ''current'' pay rate for the job held at the time of injury need not be made as of the beginning of partial disability. OWCP may use any convenient date for making the comparison as long as both wage rates are in effect on the date used for comparison.

(e) The employee's wage-earning capacity in terms of dollars is computed by first multiplying the pay rate for compensation purposes by the

percentage of wage-earning capacity. The resulting dollar amount is then subtracted from the pay rate for compensation purposes to obtain the employee's loss of wage-earning capacity.

§ 10.404 When and how is compensation for a schedule impairment paid?

Compensation is provided for specified periods of time for the permanent loss or loss of use of certain members, organs and functions of the body. Such loss or loss of use is known as permanent impairment. Compensation for proportionate periods of time is payable for partial loss or loss of use of each member, organ or function. OWCP evaluates the degree of impairment to schedule members, organs and functions as defined in 5 U.S.C. 8107 according to the standards set forth in the specified (by OWCP) edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment.*

(a) 5 U.S.C. 8107(c) provides a list of schedule members. Pursuant to the authority provided by 5 U.S.C. 8107(c)(22), the Secretary has added the following organs to the compensation schedule for injuries that were sustained on or after September 7, 1974:

Member	Weeks
Breast (one)	52
Kidney (one)	156
Larynx	160
Lung (one)	156
Penis	205
Testicle (one)	52
Tongue	160
Ovary (one)	52
Uterus/cervix and vulva/vagina	205

(b) Compensation for schedule awards is payable at 66⅔ percent of the employee's pay, or 75 percent of the pay when the employee has at least one dependent.

(c) The period of compensation payable under 5 U.S.C. 8107(c) shall be reduced by the period of compensation paid or payable under the schedule for an earlier injury if:

(1) Compensation in both cases is for impairment of the same member or function or different parts of the same member or function, or for disfigurement; and

(2) OWCP finds that compensation payable for the later impairment in whole or in part would duplicate the compensation payable for the pre-existing impairment.

(d) Compensation not to exceed $3,500 may be paid for serious disfigurement of the face, head or neck which is likely to handicap a person in securing or maintaining employment.

§ 10.405 Who is considered a dependent in a claim based on disability or impairment?

(a) Dependents include a wife or husband; an unmarried child under 18 years of age; an unmarried child over 18 who is incapable of self-support; a student, until he or she reaches 23 years of age or completes four years of school beyond the high school level; or a wholly dependent parent.

(b) Augmented compensation payable for an unmarried child, which would otherwise terminate when the child reached the age of 18, may be continued while the child is a student as defined in 5 U.S.C. 8101(17).

§ 10.406 What are the maximum and minimum rates of compensation in disability cases?

(a) Compensation for total or partial disability may not exceed 75 percent of the basic monthly pay of the highest step of grade 15 of the General Schedule. (Basic monthly pay does not include locality adjustments.) However, this limit does not apply to disability sustained in the performance of duty which was due to an assault which occurred during an attempted assassination of a Federal official described under 10 U.S.C. 351(a) or 1751(a).

(b) Compensation for total disability may not be less than 75 percent of the basic monthly pay of the first step of grade 2 of the General Schedule or actual pay, whichever is less. (Basic monthly pay does not include locality adjustments.)

Compensation for Death

§ 10.410 Who is entitled to compensation in case of death, and what are the rates of compensation payable in death cases?

(a) If there is no child entitled to compensation, the employee's surviving spouse will receive compensation equal to 50 percent of the employee's monthly pay until death or remarriage before reaching age 55. Upon remarriage, the surviving spouse will be paid a lump sum equal to 24 times the monthly compensation payment (excluding compensation payable on account of another individual) to which the surviving spouse was entitled immediately before the remarriage. If remarriage occurs at age 55 or older, the lump-sum payment will not be paid and compensation will continue until death.

(b) If there is a child entitled to compensation, the compensation for the surviving spouse will equal 45 percent of the employee's monthly pay plus 15 percent for each child, but the total percentage may not exceed 75 percent.

(c) If there is a child entitled to compensation and no surviving spouse, compensation for one child will equal 40 percent of the employee's monthly pay. Fifteen percent will be awarded for each additional child, not to exceed 75 percent, the total amount to be shared equally among all children.

(d) If there is no child or surviving spouse entitled to compensation, the parents will receive compensation equal to 25 percent of the employee's monthly pay if one parent was wholly dependent on the employee at the time of death and the other was not dependent to any extent, or 20 percent each if both were wholly dependent on the employee, or a proportionate amount in the discretion of the Director if one or both were partially dependent on the employee. If there is a child or surviving spouse entitled to compensation, the parents will receive so much of the compensation described in the preceding sentence as, when added to the total percentages payable to the surviving spouse and children, will not exceed a total of 75 percent of the employee's monthly pay.

(e) If there is no child, surviving spouse or dependent parent entitled to compensation, the brothers, sisters, grandparents and grandchildren will receive compensation equal to 20 percent of the employee's monthly pay to such dependent if one was wholly dependent on the employee at the time of death; or 30 percent if more than one was wholly dependent, divided among such dependents equally; or 10 percent if no one was wholly dependent but one or more was partly dependent, divided among such dependents equally. If there is a child, surviving spouse or dependent parent entitled to compensation, the brothers, sisters, grandparents and grandchildren will receive so much of the compensation described in the preceding sentence as, when added to the total percentages payable to the children, surviving spouse and dependent parents, will not exceed a total of 75 percent of the employee's monthly pay.

(f) A child, brother, sister or grandchild may be entitled to receive death benefits until death, marriage, or reaching age 18. Regarding entitlement after reaching age 18, refer to § 10.417 of these regulations.

§ 10.411 What are the maximum and minimum rates of compensation in death cases?

(a) Compensation for death may not exceed the employee's pay or 75 percent of the basic monthly pay of the highest

step of grade 15 of the General Schedule, except that compensation may exceed the employee's basic monthly pay if such excess is created by authorized cost-of-living increases. (Basic monthly pay does not include locality adjustments.) However, the maximum limit does not apply when the death occurred during an assassination of a Federal official described under 18 U.S.C. 351(a) or 18 U.S.C. 1751(a).

(b) Compensation for death is computed on a minimum pay rate equal to the basic monthly pay of an employee at the first step of grade 2 of the General Schedule. (Basic monthly pay does not include locality adjustments.)

§ 10.412 Will OWCP pay the costs of burial and transportation of the remains?

In a case accepted for death benefits, OWCP will pay up to $800 for funeral and burial expenses. When an employee's home is within the United States and the employee dies outside the United States, or away from home or the official duty station, an additional amount may be paid for transporting the remains to the employee's home. An additional amount of $200 is paid to the personal representative of the decedent for reimbursement of the costs of terminating the decedent's status as an employee of the United States.

§ 10.413 If a person dies while receiving a schedule award, to whom is the balance of the schedule award payable?

The circumstances under which the balance of a schedule award may be paid to an employee's survivors are described in 5 U.S.C. 8109. Therefore, if there is no surviving spouse or child, OWCP will pay benefits as follows:

(a) To the parent, or parents, wholly dependent for support on the decedent in equal shares with any wholly dependent brother, sister, grandparent or grandchild;

(b) To the parent, or parents, partially dependent for support on the decedent in equal shares when there are no wholly dependent brothers, sisters, grandparents or grandchildren (or other wholly dependent parent); and

(c) To the parent, or parents, partially dependent upon the decedent, 25 percent of the amount payable, shared equally, and the remaining 75 percent to any wholly dependent brother, sister, grandparent or grandchild (or wholly dependent parent), shared equally.

§ 10.414 What reports of dependents are needed in death cases?

If a beneficiary is receiving compensation benefits on account of an employee's death, OWCP will ask him or her to complete a report once each year on Form CA–12. The report requires the beneficiary to note changes in marital status and dependents. If the beneficiary fails to submit the form (or an equivalent written statement) within 30 days of the date of request, OWCP shall suspend compensation until the requested form or equivalent written statement is received. The suspension will include compensation payable for or on behalf of another person (for example, compensation payable to a widow on behalf of a child). When the form or statement is received, compensation will be reinstated at the appropriate rate retroactive to the date of suspension, provided the beneficiary is entitled to such compensation.

§ 10.415 What must a beneficiary do if the number of beneficiaries decreases?

The circumstances under which compensation on account of death shall be terminated are described in 5 U.S.C. 8133(b). A beneficiary in a claim for death benefits should promptly notify OWCP of any event which would affect his or her entitlement to continued compensation. The terms ''marriage'' and ''remarriage'' include common-law marriage as recognized and defined by State law in the State where the beneficiary resides. If a beneficiary, or someone acting on his or her behalf, receives a check which includes payment of compensation for any period after the date when entitlement ended, he or she must promptly return the check to OWCP.

§ 10.416 How does a change in the number of beneficiaries affect the amount of compensation paid to the other beneficiaries?

If compensation to a beneficiary is terminated, the amount of compensation payable to one or more of the remaining beneficiaries may be reapportioned. Similarly, the birth of a posthumous child may result in a reapportionment of the amount of compensation payable to other beneficiaries. The parent, or someone acting on the child's behalf, shall promptly notify OWCP of the birth and submit a copy of the birth certificate.

§ 10.417 What reports are needed when compensation payments continue for children over age 18?

(a) Compensation payable on behalf of a child, brother, sister, or grandchild, which would otherwise end when the person reaches 18 years of age, shall be continued if and for so long as he or she is not married and is either a student as defined in 5 U.S.C. 8101(17), or physically or mentally incapable of self-support.

(b) At least twice each year, OWCP will ask a beneficiary receiving compensation based on the student status of a dependent to provide proof of continuing entitlement to such compensation, including certification of school enrollment.

(c) Likewise, at least twice each year, OWCP will ask a beneficiary or legal guardian receiving compensation based on a dependent's physical or mental inability to support himself or herself to submit a medical report verifying that the dependent's medical condition persists and that it continues to preclude self-support.

Adjustments to Compensation

§ 10.420 How are cost-of-living adjustments applied?

(a) In cases of disability, a beneficiary is eligible for cost-of-living adjustments under 5 U.S.C. 8146a where injury-related disability began more than one year prior to the date the cost-of-living adjustment took effect. The employee's use of continuation of pay as provided by 5 U.S.C. 8118, or of sick or annual leave, during any part of the period of disability does not affect the computation of the one-year period.

(b) Where an injury does not result in disability but compensation is payable for permanent impairment of a covered member, organ or function of the body, a beneficiary is eligible for cost-of-living adjustments under 5 U.S.C. 8146a where the award for such impairment began more than one year prior to the date the cost-of-living adjustment took effect.

(c) In cases of recurrence of disability, where the pay rate for compensation purposes is the pay rate at the time disability recurs, a beneficiary is eligible for cost-of-living adjustments under 5 U.S.C. 8146a where the effective date of that pay rate began more than one year prior to the date the cost-of living adjustment took effect.

(d) In cases of death, entitlement to cost-of-living adjustments under 5 U.S.C. 8146a begins with the first such adjustment occurring more than one year after the date of death. However, if the death was preceded by a period of injury-related disability, compensation payable to the survivors will be increased by the same percentages as the cost-of-living adjustments paid or payable to the deceased employee for the period of disability, as well as by subsequent cost-of-living adjustments to which the survivors would otherwise be entitled.

§ 10.421 May a beneficiary receive other kinds of payments from the Federal Government concurrently with compensation?

(a) 5 U.S.C. 8116(a) provides that a beneficiary may not receive wage-loss compensation concurrently with a Federal retirement or survivor annuity. The beneficiary must elect the benefit that he or she wishes to receive, and the election, once made, is revocable.

(b) An employee may receive compensation concurrently with military retired pay, retirement pay, retainer pay or equivalent pay for service in the Armed Forces or other uniformed services, subject to the reduction of such pay in accordance with 5 U.S.C. 5532(b).

(c) An employee may not receive compensation for total disability concurrently with severance pay or separation pay. However, an employee may concurrently receive compensation for partial disability or permanent impairment to a schedule member, organ or function with severance pay or separation pay.

(d) Pursuant to 5 U.S.C. 8116(d), a beneficiary may receive compensation under the FECA for either the death or disability of an employee concurrently with benefits under title II of the Social Security Act on account of the age or death of such employee. However, this provision of the FECA also requires OWCP to reduce the amount of any such compensation by the amount of any Social Security Act benefits that are attributable to the Federal service of the employee.

(e) To determine the employee's entitlement to compensation, OWCP may require an employee to submit an affidavit or statement as to the receipt of any Federally funded or Federally assisted benefits. If an employee fails to submit such affidavit or statement within 30 days of the date of the request, his or her right to compensation shall be suspended until such time as the requested affidavit or statement is received. At that time compensation will be reinstated retroactive to the date of suspension provided the employee is entitled to such compensation.

§ 10.422 May compensation payments be issued in a lump sum?

(a) In exercise of the discretion afforded under 5 U.S.C. 8135(a), OWCP has determined that lump-sum payments will not be made to persons entitled to wage-loss benefits (that is, those payable under 5 U.S.C. 8105 and 8106). Therefore, when OWCP receives requests for lump-sum payments for wage-loss benefits, OWCP will not exercise further discretion in the matter. This determination is based on several factors, including:

(1) The purpose of the FECA, which is to replace lost wages;

(2) The prudence of providing wage-loss benefits on a regular, recurring basis; and

(3) The high cost of the long-term borrowing that is needed to pay out large lump sums.

(b) However, a lump-sum payment may be made to an employee entitled to a schedule award under 5 U.S.C. 8107 where OWCP determines that such a payment is in the employee's best interest. Lump-sum payments of schedule awards generally will be considered in the employee's best interest only where the employee does not rely upon compensation payments as a substitute for lost wages (that is, the employee is working or is receiving annuity payments). An employee possesses no absolute right to a lump-sum payment of benefits payable under 5 U.S.C. 8107.

(c) Lump-sum payments to surviving spouses are addressed in 5 U.S.C. 8135(b).

§ 10.423 May compensation payments be assigned to, or attached by, creditors?

(a) As a general rule, compensation and claims for compensation are exempt from the claims of private creditors. This rule does not apply to claims submitted by Federal agencies. Further, any attempt by a FECA beneficiary to assign his or her claim is null and void. However, pursuant to provisions of the Social Security Act, 42 U.S.C. 659, and regulations issued by the Office of Personnel Management (OPM) at 5 CFR part 581, FECA benefits, including survivor's benefits, may be garnished to collect overdue alimony and child support payments.

(b) Garnishment for child support and alimony may be requested by providing a copy of the State agency or court order to the district office handling the FECA claim.

§ 10.424 May someone other than the beneficiary be designated to receive compensation payments?

A beneficiary may be incapable of managing or directing the management of his or her benefits because of a mental or physical disability, or because of legal incompetence, or because he or she is under 18 years of age. In this situation, absent the appointment of a guardian or other party to manage the financial affairs of the claimant by a court or administrative body authorized to do so, OWCP in its sole discretion may approve a person to serve as the representative payee for funds due the beneficiary.

§ 10.425 May compensation be claimed for periods of restorable leave?

The employee may claim compensation for periods of annual and sick leave which are restorable in accordance with the rules of the employing agency. Forms CA–7a and CA–7b are used for this purpose.

Overpayments

§ 10.430 How does OWCP notify an individual of a payment made?

(a) In addition to providing narrative descriptions to recipients of benefits paid or payable, OWCP includes on each periodic check a clear indication of the period for which payment is being made. A form is sent to the recipient with each supplemental check which states the date and amount of the payment and the period for which payment is being made. For payments sent by electronic funds transfer (EFT), a notification of the date and amount of payment appears on the statement from the recipient's financial institution.

(b) By these means, OWCP puts the recipient on notice that a payment was made and the amount of the payment. If the amount received differs from the amount indicated on the written notice or bank statement, the recipient is responsible for notifying OWCP of the difference. Absent affirmative evidence to the contrary, the beneficiary will be presumed to have received the notice of payment, whether mailed or transmitted electronically.

§ 10.431 What does OWCP do when an overpayment is identified?

Before seeking to recover an overpayment or adjust benefits, OWCP will advise the beneficiary in writing that:

(a) The overpayment exists, and the amount of overpayment;

(b) A preliminary finding shows either that the individual was or was not at fault in the creation of the overpayment;

(c) He or she has the right to inspect and copy Government records relating to the overpayment; and

(d) He or she has the right to present evidence which challenges the fact or amount of the overpayment, and/or challenges the preliminary finding that he or she was at fault in the creation of the overpayment. He or she may also request that recovery of the overpayment be waived.

§ 10.432 How can an individual present evidence to OWCP in response to a preliminary notice of an overpayment?

The individual may present this evidence to OWCP in writing or at a pre-recoupment hearing. The evidence must

be presented or the hearing requested within 30 days of the date of the written notice of overpayment. Failure to request the hearing within this 30-day time period shall constitute a waiver of that right.

§ 10.433 Under what circumstances can OWCP waive recovery of an overpayment?

(a) OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

(2) Failed to provide information which he or she knew or should have known to be material; or

(3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual.)

(b) Whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.

§ 10.434 If OWCP finds that the recipient of an overpayment was not at fault, what criteria are used to decide whether to waive recovery of it?

If OWCP finds that the recipient of an overpayment was not at fault, repayment will still be required unless:

(a) Adjustment or recovery of the overpayment would defeat the purpose of the FECA (see § 10.436), or

(b) Adjustment or recovery of the overpayment would be against equity and good conscience (see § 10.437).

§ 10.435 Is an individual responsible for an overpayment that resulted from an error made by OWCP or another Government agency?

(a) The fact that OWCP may have erred in making the overpayment, or that the overpayment may have resulted from an error by another Government agency, does not by itself relieve the individual who received the overpayment from liability for repayment if the individual also was at fault in accepting the overpayment.

(b) However, OWCP may find that the individual was not at fault if failure to report an event affecting compensation benefits, or acceptance of an incorrect payment, occurred because:

(1) The individual relied on misinformation given in writing by OWCP (or by another Government agency which he or she had reason to believe was connected with the administration of benefits) as to the interpretation of a pertinent provision of the FECA or its regulations; or

(2) OWCP erred in calculating cost-of-living increases, schedule award length and/or percentage of impairment, or loss of wage-earning capacity.

§ 10.436 Under what circumstances would recovery of an overpayment defeat the purpose of the FECA?

Recovery of an overpayment will defeat the purpose of the FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because:

(a) The beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and

(b) The beneficiary's assets do not exceed a specified amount as determined by OWCP from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents.

§ 10.437 Under what circumstances would recovery of an overpayment be against equity and good conscience?

(a) Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.

(b) Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse. In making such a decision, OWCP does not consider the individual's current ability to repay the overpayment.

(1) To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained, and that the action was based chiefly or solely in reliance on the payments or on the notice of payment. Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.

(2) To establish that an individual's position has changed for the worse, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits, and that this decision resulted in a loss.

§ 10.438 Can OWCP require the individual who received the overpayment to submit additional financial information?

(a) The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the FECA, or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.

(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver, and no further request for waiver shall be considered until the requested information is furnished.

§ 10.439 What is addressed at a pre-recoupment hearing?

At a pre-recoupment hearing, the OWCP representative will consider all issues in the claim on which a formal decision has been issued. Such a hearing will thus fulfill OWCP's obligation to provide pre-recoupment rights and a hearing under 5 U.S.C. 8124(b). Pre-recoupment hearings shall be conducted in exactly the same manner as provided in § 10.615 through § 10.622.

§ 10.440 How does OWCP communicate its final decision concerning recovery of an overpayment, and what appeal right accompanies it?

(a) OWCP will send a copy of the final decision to the individual from whom recovery is sought; his or her representative, if any; and the employing agency.

(b) The only review of a final decision concerning an overpayment is to the Employees' Compensation Appeals Board. The provisions of 5 U.S.C. 8124(b) (concerning hearings) and 5 U.S.C. 8128(a) (concerning reconsiderations) do not apply to such a decision.

§ 10.441 How are overpayments collected?

(a) When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the

overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship. Should the individual die before collection has been completed, collection shall be made by decreasing later payments, if any, payable under the FECA with respect to the individual's death.

(b) When an overpayment has been made to an individual who is not entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. The overpayment is subject to the provisions of the Federal Claims Collection Act of 1966 (as amended) and may be reported to the Internal Revenue Service as income. If the individual fails to make such refund, OWCP may recover the same through any available means, including offset of salary, annuity benefits, or other Federal payments, including tax refunds as authorized by the Tax Refund Offset Program, or referral of the debt to a collection agency or to the Department of Justice.

Subpart F—Continuing Benefits

Rules and Evidence

§ 10.500 What are the basic rules governing continuing receipt of compensation benefits and return to work?

(a) Benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury. Payment of medical benefits is available for all treatment necessary due to a work-related medical condition.

(b) Each disabled employee is obligated to perform such work as he or she can, and OWCP's goal is to return each disabled employee to suitable work as soon as he or she is medically able. In determining what constitutes ''suitable work'' for a particular disabled employee, OWCP considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work, and other relevant factors. (See § 10.508 with respect to the payment of relocation expenses.)

§ 10.501 What medical evidence is necessary to support continuing receipt of compensation benefits?

(a) The employee is responsible for providing sufficient medical evidence to justify payment of any compensation sought.

(1) To support payment of continuing compensation, narrative medical evidence must be submitted whenever OWCP requests it but ordinarily not less than once a year. It must contain a physician's rationalized opinion as to whether the specific period of alleged disability is causally related to the employee's accepted injury or illness.

(2) The physician's opinion must be based on the facts of the case and the complete medical background of the employee, must be one of reasonable medical certainty and must include objective findings in support of its conclusions. Subjective complaints of pain are not sufficient, in and of themselves, to support payment of continuing compensation. Likewise, medical limitations based solely on the fear of a possible future injury are also not sufficient to support payment of continuing compensation. See § 10.330 for a fuller discussion of medical evidence.

(b) OWCP may require any kind of non-invasive testing to determine the employee's functional capacity. Failure to undergo such testing will result in a suspension of benefits. In addition, OWCP may direct the employee to undergo a second opinion or referee examination in any case it deems appropriate (see §§ 10.320 and 10.321).

§ 10.502 How does OWCP evaluate evidence in support of continuing receipt of compensation benefits?

In considering the medical and factual evidence, OWCP will weigh the probative value of the attending physician's report, any second opinion physician's report, any other medical reports, or any other evidence in the file. If OWCP determines that the medical evidence supporting one conclusion is more consistent, logical, and well-reasoned than evidence supporting a contrary conclusion, OWCP will use the conclusion that is supported by the weight of the medical evidence as the basis for awarding or denying further benefits. If medical reports that are equally well-reasoned support inconsistent determinations of an issue under consideration, OWCP will direct the employee to undergo a referee examination to resolve the issue. The results of the referee examination will be given special weight in determining the issue.

§ 10.503 Under what circumstances may OWCP reduce or terminate compensation benefits?

Once OWCP has advised the employee that it has accepted a claim and has either approved continuation of pay or paid medical benefits or compensation, benefits will not be terminated or reduced unless the weight of the evidence establishes that:

(a) The disability for which compensation was paid has ceased;

(b) The disabling condition is no longer causally related to the employment;

(c) The employee is only partially disabled;

(d) The employee has returned to work;

(e) The beneficiary was convicted of fraud in connection with a claim under the FECA, or the beneficiary was incarcerated based on any felony conviction; or

(f) OWCP's initial decision was in error.

Return to Work—Employer's Responsibilities

§ 10.505 What actions must the employer take?

Upon authorizing medical care, the employer should advise the employee in writing as soon as possible of his or her obligation to return to work under § 10.210 and as defined in this subpart. The term ''return to work'' as used in this subpart is not limited to returning to work at the employee's normal worksite or usual position, but may include returning to work at other locations and in other positions. In general, the employer should make all reasonable efforts to place the employee in his or her former or an equivalent position, in accordance with 5 U.S.C. 8151(b)(2), if the employee has fully recovered after one year. The Office of Personnel Management (not OWCP) administers this provision.

(a) Where the employer has specific alternative positions available for partially disabled employees, the employer should advise the employee in writing of the specific duties and physical requirements of those positions.

(b) Where the employer has no specific alternative positions available for an employee who can perform restricted or limited duties, the employer should advise the employee of any accommodations the agency can make to accommodate the employee's limitations due to the injury.

§ 10.506 May the employer monitor the employee's medical care?

The employer may monitor the employee's medical progress and duty status by obtaining periodic medical reports. Form CA–17 is usually adequate for this purpose. To aid in returning an injured employee to suitable employment, the employer may also contact the employee's physician in writing concerning the work limitations imposed by the effects of the injury and possible job assignments. (However, the employer shall not contact the physician by telephone or through personal visit.) When such contact is made, the employer shall send a copy of any such correspondence to OWCP and the employee, as well as a copy of the physician's response when received. The employer may also contact the employee at reasonable intervals to request periodic medical reports addressing his or her ability to return to work.

§ 10.507 How should the employer make an offer of suitable work?

Where the attending physician or OWCP notifies the employer in writing that the employee is partially disabled (that is, the employee can perform some work but not return to the position held at date of injury), the employer should act as follows:

(a) If the employee can perform in a specific alternative position available in the agency, and the employer has advised the employee in writing of the specific duties and physical requirements, the employer shall notify the employee in writing immediately of the date of availability.

(b) If the employee can perform restricted or limited duties, the employer should determine whether such duties are available or whether an existing job can be modified. If so, the employer shall advise the employee in writing of the duties, their physical requirements and availability.

(c) The employer must make any job offer in writing. However, the employer may make a job offer verbally as long as it provides the job offer to the employee in writing within two business days of the verbal job offer.

(d) The offer must include a description of the duties of the position, the physical requirements of those duties, and the date by which the employee is either to return to work or notify the employer of his or her decision to accept or refuse the job offer. The employer must send a complete copy of any job offer to OWCP when it is sent to the employee.

§ 10.508 May relocation expenses be paid for an employee who would need to move to accept an offer of reemployment?

If possible, the employer should offer suitable reemployment in the location where the employee currently resides. If this is not practical, the employer may offer suitable reemployment at the employee's former duty station or other location. Where the distance between the location of the offered job and the location where the employee currently resides is at least 50 miles, OWCP may pay such relocation expenses as are considered reasonable and necessary if the employee has been terminated from the agency's employment rolls and would incur relocation expenses by accepting the offered reemployment. OWCP may also pay such relocation expenses when the new employer is other than a Federal employer. OWCP will notify the employee that relocation expenses are payable if it makes a finding that the job is suitable. To determine whether a relocation expense is reasonable and necessary, OWCP shall use as a guide the Federal travel regulations for permanent changes of duty station.

§ 10.509 If an employee's light-duty job is eliminated due to downsizing, what is the effect on compensation?

(a) In general, an employee will not be considered to have experienced a compensable recurrence of disability as defined in § 10.5(x) merely because his or her employer has eliminated the employee's light-duty position in a reduction-in-force or some other form of downsizing. When this occurs, OWCP will determine the employee's wage-earning capacity based on his or her actual earnings in such light-duty position if this determination is appropriate on the basis that such earnings fairly and reasonably represent the employee's wage-earning capacity and such a determination has not already been made.

(b) For the purposes of this section only, a *light-duty position* means a classified position to which the injured employee has been formally reassigned that conforms to the established physical limitations of the injured employee and for which the employer has already prepared a written position description such that the position constitutes ''regular'' Federal employment. In the absence of a ''light-duty position'' as described in this paragraph, OWCP will assume that the employee was instead engaged in non-competitive employment which does not represent the employee's wage-earning capacity, i.e., work of the type provided to injured employees who cannot otherwise be employed by the Federal Government or in any well-known branch of the general labor market.

Return to Work—Employee's Responsibilities

§ 10.515 What actions must the employee take with respect to returning to work?

(a) If an employee can resume regular Federal employment, he or she must do so. No further compensation for wage loss is payable once the employee has recovered from the work-related injury to the extent that he or she can perform the duties of the position held at the time of injury, or earn equivalent wages.

(b) If an employee cannot return to the job held at the time of injury due to partial disability from the effects of the work-related injury, but has recovered enough to perform some type of work, he or she must seek work. In the alternative, the employee must accept suitable work offered to him or her. (See § 10.500 for a definition of ''suitable work''.) This work may be with the original employer or through job placement efforts made by or on behalf of OWCP.

(c) If the employer has advised an employee in writing that specific alternative positions exist within the agency, the employee shall provide the description and physical requirements of such alternate positions to the attending physician and ask whether and when he or she will be able to perform such duties.

(d) If the employer has advised an employee that it is willing to accommodate his or her work limitations, the employee shall so advise the attending physician and ask him or her to specify the limitations imposed by the injury. The employee is responsible for advising the employer immediately of these limitations.

(e) From time to time, OWCP may require the employee to report his or her efforts to obtain suitable employment, whether with the Federal Government, State and local Governments, or in the private sector.

§ 10.516 How will an employee know if OWCP considers a job to be suitable?

OWCP shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter OWCP's finding of suitability. If the employee presents such reasons, and OWCP determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in

time, OWCP's notification need not state the reasons for finding that the employee's reasons are not acceptable.

§ 10.517 What are the penalties for refusing to accept a suitable job offer?

(a) 5 U.S.C. 8106(c) provides that a partially disabled employee who refuses to seek suitable work, or refuses to or neglects to work after suitable work is offered to or arranged for him or her, is not entitled to compensation. An employee who refuses or neglects to work after suitable work has been offered or secured for him or her has the burden to show that this refusal or failure to work was reasonable or justified.

(b) After providing the two notices described in § 10.516, OWCP will terminate the employee's entitlement to further compensation under 5 U.S.C. 8105, 8106, and 8107, as provided by 5 U.S.C. 8106(c)(2). However, the employee remains entitled to medical benefits as provided by 5 U.S.C. 8103.

§ 10.518 Does OWCP provide services to help employees return to work?

(a) OWCP may, in its discretion, provide vocational rehabilitation services as authorized by 5 U.S.C. 8104. These services include assistance from registered nurses working under the direction of OWCP. Among other things, these nurses visit the worksite, ensure that the duties of the position do not exceed the medical limitations as represented by the weight of medical evidence established by OWCP, and address any problems the employee may have in adjusting to the work setting. The nurses do not evaluate medical evidence; OWCP claims staff perform this function.

(b) Vocational rehabilitation services may also include vocational evaluation, testing, training, and placement services with either the original employer or a new employer, when the injured employee cannot return to the job held at the time of injury. These services also include functional capacity evaluations, which help to tailor individual rehabilitation programs to employees' physical reconditioning and behavioral modification needs, and help employees to meet the demands of current or potential jobs.

§ 10.519 What action will OWCP take if an employee refuses to undergo vocational rehabilitation?

Under 5 U.S.C. 8104(a), OWCP may direct a permanently disabled employee to undergo vocational rehabilitation. To ensure that vocational rehabilitation services are available to all who might be entitled to benefit from them, an injured employee who has a loss of wage-earning capacity shall be presumed to be ''permanently disabled,'' for purposes of this section only, unless and until the employee proves that the disability is not permanent. If an employee without good cause fails or refuses to apply for, undergo, participate in, or continue to participate in a vocational rehabilitation effort when so directed, OWCP will act as follows:

(a) Where a suitable job has been identified, OWCP will reduce the employee's future monetary compensation based on the amount which would likely have been his or her wage-earning capacity had he or she undergone vocational rehabilitation. OWCP will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meetings with the OWCP nurse and the employer. The reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP.

(b) Where a suitable job has not been identified, because the failure or refusal occurred in the early but necessary stages of a vocational rehabilitation effort (that is, meetings with the OWCP nurse, interviews, testing, counseling, functional capacity evaluations, and work evaluations), OWCP cannot determine what would have been the employee's wage-earning capacity.

(c) Under the circumstances identified in paragraph (b) of this section, in the absence of evidence to the contrary, OWCP will assume that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity, and OWCP will reduce the employee's monetary compensation accordingly (that is, to zero). This reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP.

§ 10.520 How does OWCP determine compensation after an employee completes a vocational rehabilitation program?

After completion of a vocational rehabilitation program, OWCP may adjust compensation to reflect the injured worker's wage-earning capacity. Actual earnings will be used if they fairly and reasonably reflect the earning capacity. The position determined to be the goal of a training plan is assumed to represent the employee's earning capacity if it is suitable and performed in sufficient numbers so as to be reasonably available, whether or not the employee is placed in such a position.

Reports of Earnings From Employment and Self-Employment

§ 10.525 What information must the employee report?

(a) An employee who is receiving compensation for partial or total disability must advise OWCP immediately of any return to work, either part-time or full-time. In addition, an employee who is receiving compensation for partial or total disability will periodically be required to submit a report of earnings from employment or self-employment, either part-time or full-time. (See § 10.5(g) for a definition of ''earnings''.)

(b) The employee must report even those earnings which do not seem likely to affect his or her level of benefits. Many kinds of income, though not all, will result in reduction of compensation benefits. While earning income will not necessarily result in a reduction of compensation, failure to report income may result in forfeiture of all benefits paid during the reporting period.

§ 10.526 Must the employee report volunteer activities?

An employee who is receiving compensation for partial or total disability is periodically required to report volunteer activity or any other kind of activity which shows that the employee is no longer totally disabled for work.

§ 10.527 Does OWCP verify reports of earnings?

To make proper determinations of an employee's entitlement to benefits, OWCP may verify the earnings reported by the employee through a variety of means, including but not limited to computer matches with the Office of Personnel Management and inquiries to the Social Security Administration. Also, OWCP may perform computer matches with records of State agencies, including but not limited to workers' compensation administrations, to determine whether private employers are paying workers' compensation insurance premiums for recipients of benefits under the FECA.

§ 10.528 What action will OWCP take if the employee fails to file a report of activity indicating an ability to work?

OWCP periodically requires each employee who is receiving compensation benefits to complete an affidavit as to any work, or activity indicating an ability to work, which the employee has performed for the prior 15 months. If an employee who is required to file such a report fails to do so within 30 days of the date of the request, his or her right to compensation for wage

loss under 5 U.S.C. 8105 or 8106 is suspended until OWCP receives the requested report. At that time, OWCP will reinstate compensation retroactive to the date of suspension if the employee remains entitled to compensation.

§ 10.529 What action will OWCP take if the employee files an incomplete report?

(a) If an employee knowingly omits or understates any earnings or work activity in making a report, he or she shall forfeit the right to compensation with respect to any period for which the report was required. A false or evasive statement, omission, concealment, or misrepresentation with respect to employment activity or earnings in a report may also subject an employee to criminal prosecution.

(b) Where the right to compensation is forfeited, OWCP shall recover any compensation already paid for the period of forfeiture pursuant to 5 U.S.C. 8129 and other relevant statutes.

Reports of Dependents

§ 10.535 How are dependents defined, and what information must the employee report?

(a) Dependents in disability cases are defined in § 10.405. While the employee has one or more dependents, the employee's basic compensation for wage loss or for permanent impairment shall be augmented as provided in 5 U.S.C. 8110. (The rules for death claims are found in § 10.414.)

(b) An employee who is receiving augmented compensation on account of dependents must advise OWCP immediately of any change in the number or status of dependents. The employee should also promptly refund to OWCP any amounts received on account of augmented compensation after the right to receive augmented compensation has ceased. Any difference between actual entitlement and the amount already paid beyond the date entitlement ended is an overpayment of compensation and may be recovered pursuant to 5 U.S.C. 8129 and other relevant statutes.

(c) An employee who is receiving augmented compensation shall be periodically required to submit a statement as to any dependents, or to submit supporting documents such as birth or marriage certificates or court orders, to determine if he or she is still entitled to augmented compensation.

§ 10.536 What is the penalty for failing to submit a report of dependents?

If an employee fails to submit a requested statement or supporting document within 30 days of the date of the request, OWCP will suspend his or her right to augmented compensation until OWCP receives the requested statement or supporting document. At that time, OWCP will reinstate augmented compensation retroactive to the date of suspension, provided that the employee is entitled to receive augmented compensation.

§ 10.537 What reports are needed when compensation payments continue for children over age 18?

(a) Compensation payable on behalf of a child that would otherwise end when the child reaches 18 years of age will continue if and for so long as he or she is not married and is either a student as defined in 5 U.S.C. 8101(17), or physically or mentally incapable of self-support.

(b) At least twice each year, OWCP will ask an employee who receives compensation based on the student status of a child to provide proof of continuing entitlement to such compensation, including certification of school enrollment.

(c) Likewise, at least twice each year, OWCP will ask an employee who receives compensation based on a child's physical or mental inability to support himself or herself to submit a medical report verifying that the child's medical condition persists and that it continues to preclude self-support.

(d) If an employee fails to submit proof within 30 days of the date of the request, OWCP will suspend the employee's right to compensation until the requested information is received. At that time OWCP will reinstate compensation retroactive to the date of suspension, provided the employee is entitled to such compensation.

Reduction and Termination of Compensation

§ 10.540 When and how is compensation reduced or terminated?

(a) Except as provided in paragraphs (b) and (c) of this section, where the evidence establishes that compensation should be either reduced or terminated, OWCP will provide the beneficiary with written notice of the proposed action and give him or her 30 days to submit relevant evidence or argument to support entitlement to continued payment of compensation. This notice will include a description of the reasons for the proposed action and a copy of the specific evidence upon which OWCP is basing its determination. Payment of compensation will continue until any evidence or argument submitted has been reviewed and an appropriate decision has been issued, or until 30 days have elapsed if no additional evidence or argument is submitted.

(b) OWCP will not provide such written notice when the beneficiary has no reasonable basis to expect that payment of compensation will continue. For example, when a claim has been made for a specific period of time and that specific period expires, no written notice will be given. Written notice will also not be given when a beneficiary dies, when OWCP either reduces or terminates compensation upon an employee's return to work, when OWCP terminates only medical benefits after a physician indicates that further medical treatment is not necessary or has ended, or when OWCP denies payment for a particular medical expense.

(c) OWCP will also not provide such written notice when compensation is terminated, suspended or forfeited due to one of the following: A beneficiary's conviction for fraud in connection with a claim under the FECA; a beneficiary's incarceration based on any felony conviction; an employee's failure to report earnings from employment or self-employment; an employee's failure or refusal to either continue performing suitable work or to accept an offer of suitable work; or an employee's refusal to undergo or obstruction of a directed medical examination or treatment for substance abuse.

§ 10.541 What action will OWCP take after issuing written notice of its intention to reduce or terminate compensation?

(a) If the beneficiary submits evidence or argument prior to the issuance of the decision, OWCP will evaluate it in light of the proposed action and undertake such further development as it may deem appropriate, if any. Evidence or argument which is repetitious, cumulative, or irrelevant will not require any further development. If the beneficiary does not respond within 30 days of the written notice, OWCP will issue a decision consistent with its prior notice. OWCP will not grant any request for an extension of this 30-day period.

(b) Evidence or argument which refutes the evidence upon which the proposed action was based will result in the continued payment of compensation. If the beneficiary submits evidence or argument which fails to refute the evidence upon which the proposed action was based but which requires further development, OWCP will not provide the beneficiary with another notice of its proposed action upon completion of such development. Once any further development of the evidence is completed, OWCP will either continue payment or issue a decision consistent with its prior notice.

Subpart G—Appeals Process

§ 10.600 How can final decisions of OWCP be reviewed?

There are three methods for reviewing a formal decision of the OWCP (§§ 10.125–10.127 discuss how decisions are made). These methods are: reconsideration by the district office; a hearing before an OWCP hearing representative; and appeal to the Employees' Compensation Appeals Board (ECAB). For each method there are time limitations and other restrictions which may apply, and not all options are available for all decisions, so the employee should consult the requirements set forth below. Further rules governing appeals to the ECAB are found at part 501 of this title.

Reconsiderations and Reviews by the Director

§ 10.605 What is reconsideration?

The FECA provides that the Director may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the ''application for reconsideration.''

§ 10.606 How does a claimant request reconsideration?

(a) An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by OWCP in the final decision.

(b) The application for reconsideration, including all supporting documents, must:

(1) Be submitted in writing;

(2) Set forth arguments and contain evidence that either:

(i) Shows that OWCP erroneously applied or interpreted a specific point of law;

(ii) Advances a relevant legal argument not previously considered by OWCP; or

(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP.

§ 10.607 What is the time limit for requesting reconsideration?

(a) An application for reconsideration must be sent within one year of the date of the OWCP decision for which review is sought. If submitted by mail, the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. If there is no such postmark, or it is not legible, other evidence such as (but not limited to) certified mail receipts, certificate of service, and affidavits, may be used to establish the mailing date.

(b) OWCP will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.

(c) The year in which a claimant has to timely request reconsideration shall not include any period subsequent to an OWCP decision for which the claimant can establish through probative medical evidence that he or she is unable to communicate in any way and that his or her testimony is necessary in order to obtain modification of the decision.

§ 10.608 How does OWCP decide whether to grant or deny the request for reconsideration?

(a) A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meets at least one of the standards described in § 10.606(b)(2). If reconsideration is granted, the case is reopened and the case is reviewed on its merits (see § 10.609).

(b) Where the request is timely but fails to meet at least one of the standards described in § 10.606(b)(2), or where the request is untimely and fails to present any clear evidence of error, OWCP will deny the application for reconsideration without reopening the case for a review on the merits. A decision denying an application for reconsideration cannot be the subject of another application for reconsideration. The only review for this type of non-merit decision is an appeal to the ECAB (see § 10.625), and OWCP will not entertain a request for reconsideration or a hearing on this decision denying reconsideration.

§ 10.609 How does OWCP decide whether new evidence requires modification of the prior decision?

When application for reconsideration is granted, OWCP will review the decision for which reconsideration is sought on the merits and determine whether the new evidence or argument requires modification of the prior decision.

(a) After OWCP decides to grant reconsideration, but before undertaking the review, OWCP will send a copy of the reconsideration application to the employer, which will have 20 days from the date sent to comment or submit relevant documents. OWCP will provide any such comments to the employee, who will have 20 days from the date the comments are sent to him or her within which to comment. If no comments are received from the employer, OWCP will proceed with the merit review of the case.

(b) A claims examiner who did not participate in making the contested decision will conduct the merit review of the claim. When all evidence has been reviewed, OWCP will issue a new merit decision, based on all the evidence in the record. A copy of the decision will be provided to the agency.

(c) An employee dissatisfied with this new merit decision may again request reconsideration under this subpart or appeal to the ECAB. An employee may not request a hearing on this decision.

§ 10.610 What is a review by the Director?

The FECA specifies that an award for or against payment of compensation may be reviewed at any time on the Director's own motion. Such review may be made without regard to whether there is new evidence or information. If the Director determines that a review of the award is warranted (including, but not limited to circumstances indicating a mistake of fact or law or changed conditions), the Director (at any time and on the basis of existing evidence) may modify, rescind, decrease or increase compensation previously awarded, or award compensation previously denied. A review on the Director's own motion is not subject to a request or petition and none shall be entertained.

(a) The decision whether or not to review an award under this section is solely within the discretion of the Director. The Director's exercise of this discretion is not subject to review by the ECAB, nor can it be the subject of a reconsideration or hearing request.

(b) Where the Director reviews an award on his or her own motion, any resulting decision is subject as appropriate to reconsideration, a hearing and/or appeal to the ECAB. Jurisdiction on review or on appeal to ECAB is limited to a review of the merits of the resulting decision. The Director's determination to review the award is not reviewable.

Hearings

§ 10.615 What is a hearing?

A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record. At the discretion of the hearing representative, an oral hearing may be conducted by telephone or teleconference. In addition to the evidence of record, the employee

may submit new evidence to the hearing representative.

§ 10.616 How does a claimant obtain a hearing?

(a) A claimant, injured on or after July 4, 1966, who has received a final adverse decision by the district office may obtain a hearing by writing to the address specified in the decision. The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought. The claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.

(b) The claimant may specify the type of hearing desired when making the original hearing request. If the request does not specify a format, OWCP will schedule an oral hearing. The claimant can request a change in the format of the hearing by making a written request to the Branch of Hearings and Review. OWCP will grant a request received by the Branch of Hearings and Review within 30 days of: The date OWCP acknowledges the initial hearing request, or the date OWCP issues a notice setting a date for an oral hearing, in cases where the initial request was for, or was treated as a request for, an oral hearing. A request received after those dates will be subject to OWCP's discretion. The decision to grant or deny a change of format is not reviewable.

§ 10.617 How is an oral hearing conducted?

(a) The hearing representative retains complete discretion to set the time and place of the hearing, including the amount of time allotted for the hearing, considering the issues to be resolved.

(b) Unless otherwise directed in writing by the claimant, the hearing representative will mail a notice of the time and place of the oral hearing to the claimant and any representative at least 30 days before the scheduled date. The employer will also be mailed a notice at least 30 days before the scheduled date.

(c) The hearing is an informal process, and the hearing representative is not bound by common law or statutory rules of evidence, by technical or formal rules of procedure or by section 5 of the Administrative Procedure Act, but the hearing representative may conduct the hearing in such manner as to best ascertain the rights of the claimant. During the hearing process, the claimant may state his or her arguments and present new written evidence in support of the claim.

(d) Testimony at oral hearings is recorded, then transcribed and placed in the record. Oral testimony shall be made under oath.

(e) OWCP will furnish a transcript of the oral hearing to the claimant and the employer, who have 20 days from the date it is sent to comment. Any comments received from the employer shall be sent to the claimant, who will be given an additional 20 days to comment from the date OWCP sends any agency comments.

(f) The hearing remains open for the submittal of additional evidence until 30 days after the hearing is held, unless the hearing representative, in his or her sole discretion, grants an extension. Only one such extension may be granted. A copy of the decision will be mailed to the claimant's last known address, to any representative, and to the employer.

(g) The hearing representative determines the conduct of the oral hearing and may terminate the hearing at any time he or she determines that all relevant evidence has been obtained, or because of misbehavior on the part of the claimant and/or representative at or near the place of the oral presentation.

§ 10.618 How is a review of the written record conducted?

(a) The hearing representative will review the official record and any additional evidence submitted by the claimant and by the agency. The hearing representative may also conduct whatever investigation is deemed necessary. New evidence and arguments are to be submitted at any time up to the time specified by OWCP, but they should be submitted as soon as possible to avoid delaying the hearing process.

(b) The claimant should submit, with his or her application for review, all evidence or argument that he or she wants to present to the hearing representative. A copy of all pertinent material will be sent to the employer, which will have 20 days from the date it is sent to comment. (Medical evidence is not considered ''pertinent'' for review and comment by the agency, and it will therefore not be furnished to the agency. OWCP has sole responsibility for evaluating medical evidence.) The employer shall send any comments to the claimant, who will have 20 more days from the date of the agency's certificate of service to comment.

§ 10.619 May subpoenas be issued for witnesses and documents?

A claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative. The hearing representative may issue subpoenas for the attendance and testimony of witnesses, and for the production of books, records, correspondence, papers or other relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means, and for witnesses only where oral testimony is the best way to ascertain the facts.

(a) A claimant may request a subpoena only as part of the hearings process, and no subpoena will be issued under any other part of the claims process. To request a subpoena, the requestor must:

(1) Submit the request in writing and send it to the hearing representative as early as possible but no later than 60 days (as evidenced by postmark, electronic marker or other objective date mark) after the date of the original hearing request.

(2) Explain why the testimony or evidence is directly relevant to the issues at hand, and a subpoena is the best method or opportunity to obtain such evidence because there are no other means by which the documents or testimony could have been obtained.

(b) No subpoena will be issued for attendance of employees of OWCP acting in their official capacities as decision-makers or policy administrators. For hearings taking the form of a review of the written record, no subpoena for the appearance of witnesses will be considered.

(c) The hearing representative issues the subpoena under his or her own name. It may be served in person or by certified mail, return receipt requested, addressed to the person to be served at his or her last known principal place of business or residence. A decision to deny a subpoena can only be appealed as part of an appeal of any adverse decision which results from the hearing.

§ 10.620 Who pays the costs associated with subpoenas?

(a) Witnesses who are not employees or former employees of the Federal Government shall be paid the same fees and mileage as paid for like services in the District Court of the United States where the subpoena is returnable, except that expert witnesses shall be paid a fee not to exceed the local customary fee for such services.

(b) Where OWCP asked that the witness submit evidence into the case record or asked that the witness attend, OWCP shall pay the fees and mileage. Where the claimant requested the subpoena, and where the witness submitted evidence into the record at the request of the claimant, the claimant shall pay the fees and mileage.

§ 10.621 What is the employer's role when an oral hearing has been requested?

(a) The employer may send one (or more, where appropriate) representative(s) to observe the proceeding, but the agency representative cannot give testimony or argument or otherwise participate in the hearing, except where the claimant or the hearing representative specifically asks the agency representative to testify.

(b) The hearing representative may deny a request by the claimant that the agency representative testify where the claimant cannot show that the testimony would be relevant or where the agency representative does not have the appropriate level of knowledge to provide such evidence at the hearing. The employer may also comment on the hearing transcript, as described in § 10.617(e).

§ 10.622 May a claimant withdraw a request for or postpone a hearing?

(a) The claimant and/or representative may withdraw the hearing request at any time up to and including the day the hearing is held, or the decision issued. Withdrawing the hearing request means the record is returned to the jurisdiction of the district office and no further requests for a hearing on the underlying decision will be considered.

(b) OWCP will entertain any reasonable request for scheduling the oral hearing, but such requests should be made at the time of the original application for hearing. Scheduling is at the sole discretion of the hearing representative, and is not reviewable. Once the oral hearing is scheduled and OWCP has mailed appropriate written notice to the claimant, the oral hearing cannot be postponed at the claimant's request for any reason except those stated in paragraph (c) of this section, unless the hearing representative can reschedule the hearing on the same docket (that is, during the same hearing trip). When the request to postpone a scheduled hearing does not meet the test of paragraph (c) of this section and cannot be accommodated on the docket, no further opportunity for an oral hearing will be provided. Instead, the hearing will take the form of a review of the written record and a decision issued accordingly. In the alternative, a teleconference may be substituted for the oral hearing at the discretion of the hearing representative.

(c) Where the claimant is hospitalized for a reason which is not elective, or where the death of the claimant's parent, spouse, or child prevents attendance at the hearing, a postponement may be granted upon proper documentation.

Review by the Employees' Compensation Appeals Board (ECAB)

§ 10.625 What kinds of decisions may be appealed?

Only final decisions of OWCP may be appealed to the ECAB. However, certain types of final decisions, described in this part as not subject to further review, cannot be appealed to the ECAB. Decisions that are not appealable to the ECAB include: Decisions concerning the amounts payable for medical services, decisions concerning exclusion and reinstatement of medical providers, decisions by the Director to review an award on his or her own motion, and denials of subpoenas independent of the appeal of the underlying decision. In appeals before the ECAB, attorneys from the Office of the Solicitor of Labor shall represent OWCP.

§ 10.626 Who has jurisdiction of cases on appeal to the ECAB?

While a case is on appeal to the ECAB, OWCP has no jurisdiction over the claim with respect to issues which directly relate to the issue or issues on appeal. The OWCP continues to administer the claim and retains jurisdiction over issues unrelated to the issue or issues on appeal and issues which arise after the appeal as a result of ongoing administration of the case. Such issues would include, for example, the ability to terminate benefits where an individual returns to work while an appeal is pending at the ECAB.

Subpart H—Special Provisions

Representation

§ 10.700 May a claimant designate a representative?

(a) The claims process under the FECA is informal. Unlike many workers' compensation laws, the employer is not a party to the claim, and OWCP acts as an impartial evaluator of the evidence. Nevertheless, a claimant may appoint one individual to represent his or her interests, but the appointment must be in writing.

(b) There can be only one representative at any one time, so after one representative has been properly appointed, OWCP will not recognize another individual as representative until the claimant withdraws the authorization of the first individual. In addition, OWCP will recognize only certain types of individuals (see § 10.701).

(c) A properly appointed representative who is recognized by OWCP may make a request or give direction to OWCP regarding the claims process, including a hearing. This authority includes presenting or eliciting evidence, making arguments on facts or the law, and obtaining information from the case file, to the same extent as the claimant. Any notice requirement contained in this part or the FECA is fully satisfied if served on the representative, and has the same force and effect as if sent to the claimant.

§ 10.701 Who may serve as a representative?

A claimant may authorize any individual to represent him or her in regard to a claim under the FECA, unless that individual's service as a representative would violate any applicable provision of law (such as 18 U.S.C. 205 and 208). A Federal employee may act as a representative only:

(a) On behalf of immediate family members, defined as a spouse, children, parents, and siblings of the representative, provided no fee or gratuity is charged; or

(b) While acting as a union representative, defined as any officially sanctioned union official, and no fee or gratuity is charged.

§ 10.702 How are fees for services paid?

A representative may charge the claimant a fee and other costs associated with the representation before OWCP. The claimant is solely responsible for paying the fee and other charges. The claimant will not be reimbursed by OWCP, nor is OWCP in any way liable for the amount of the fee.

Administrative costs (mailing, copying, messenger services, travel and the like, but not including secretarial services, paralegal and other activities) need not be approved before the representative collects them. Before any fee for services can be collected, however, the fee must be approved by the Secretary. (Collecting a fee without this approval may constitute a misdemeanor under 18 U.S.C. 292.)

§ 10.703 How are fee applications approved?

(a) *Fee Application.* (1) The representative must submit the fee application to the district office and/or the Branch of Hearings and Review, according to where the work for which the fee is charged was performed. The application shall contain the following:

(i) An itemized statement showing the representative's hourly rate, the number of hours worked and specifically identifying the work performed and a total amount charged for the representation (excluding administrative costs).

(ii) A statement of agreement or disagreement with the amount charged, signed by the claimant. The statement must also acknowledge that the claimant is aware that he or she must pay the fees and that OWCP is not responsible for paying the fee or other costs.

(2) An incomplete application will be returned with no further comment.

(b) *Approval where there is no dispute.* Where a fee application is accompanied by a signed statement indicating the claimant's agreement with the fee as described in paragraph (a)(1)(ii) of this section, the application is deemed approved.

(c) *Disputed requests.* (1) Where the claimant disagrees with the amount of the fee, as indicated in the statement accompanying the submittal, OWCP will evaluate the objection and decide whether or not to approve the request. OWCP will provide a copy of the request to the claimant and ask him or her to submit any further information in support of the objection within 15 days from the date the request is forwarded. After that period has passed, OWCP will evaluate the information received to determine whether the amount of the fee is substantially in excess of the value of services received by looking at the following factors:

(i) Usefulness of the representative's services;

(ii) The nature and complexity of the claim;

(iii) The actual time spent on development and presentation of the claim; and

(iv) Customary local charges for similar services.

(2) Where the claimant disputes the representative's request and files an objection with OWCP, an appealable decision will be issued.

Third Party Liability

§ 10.705 When must an employee or other FECA beneficiary take action against a third party?

(a) If an injury or death for which benefits are payable under the FECA is caused, wholly or partially, by someone other than a Federal employee acting within the scope of his or her employment, the claimant can be required to take action against that third party.

(b) The Office of the Solicitor of Labor (SOL) is hereby delegated authority to administer the subrogation aspects of certain FECA claims for OWCP. Either OWCP or SOL can require a FECA beneficiary to assign his or her claim for damages to the United States or to prosecute the claim in his or her own name.

§ 10.706 How will a beneficiary know if OWCP or SOL has determined that action against a third party is required?

When OWCP determines that an employee or other FECA beneficiary must take action against a third party, it will notify the employee or beneficiary in writing. If the case is transferred to SOL, a second notification may be issued.

§ 10.707 What must a FECA beneficiary who is required to take action against a third party do to satisfy the requirement that the claim be ''prosecuted''?

At a minimum, a FECA beneficiary must do the following:

(a) Seek damages for the injury or death from the third party, either through an attorney or on his or her own behalf;

(b) Either initiate a lawsuit within the appropriate statute of limitations period or obtain a written release of this obligation from OWCP or SOL unless recovery is possible through a negotiated settlement prior to filing suit;

(c) Refuse to settle or dismiss the case for any amount less than the amount necessary to repay OWCP's refundable disbursements, as defined in § 10.714, without receiving permission from OWCP or SOL;

(d) Provide periodic status updates and other relevant information in response to requests from OWCP or SOL;

(e) Submit detailed information about the amount recovered and the costs of the suit on a ''Statement of Recovery'' form approved by OWCP; and

(f) Pay any required refund.

§ 10.708 Can a FECA beneficiary who refuses to comply with a request to assign a claim to the United States or to prosecute the claim in his or her own name be penalized?

When a FECA beneficiary refuses a request to either assign a claim or prosecute a claim in his or her own name, OWCP may determine that he or she has forfeited his or her right to all past or future compensation for the injury with respect to which the request is made. Alternatively, OWCP may also suspend the FECA beneficiary's compensation payments until he or she complies with the request.

§ 10.709 What happens if a beneficiary directed by OWCP or SOL to take action against a third party does not believe that a claim can be successfully prosecuted at a reasonable cost?

If a beneficiary consults an attorney and is informed that a suit for damages against a third party for the injury or death for which benefits are payable is unlikely to prevail or that the costs of such a suit are not justified by the potential recovery, he or she should request that OWCP or SOL release him or her from the obligation to proceed. This request should be in writing and provide evidence of the attorney's opinion. If OWCP or SOL agrees, the beneficiary will not be required to take further action against the third party.

§ 10.710 Under what circumstances must a recovery of money or other property in connection with an injury or death for which benefits are payable under the FECA be reported to OWCP or SOL?

Any person who has filed a FECA claim that has been accepted by OWCP (whether or not compensation has been paid), or who has received FECA benefits in connection with a claim filed by another, is required to notify OWCP or SOL of the receipt of money or other property as a result of a settlement or judgment in connection with the circumstances of that claim. This includes an injured employee, and in the case of a claim involving the death of an employee, a spouse, children or other dependents entitled to receive survivor's benefits. OWCP or SOL should be notified in writing within 30 days of the receipt of such money or other property or the acceptance of the FECA claim, whichever occurs later.

§ 10.711 How much of any settlement or judgment must be paid to the United States?

The statute permits a FECA beneficiary to retain, as a minimum, one-fifth of the net amount of money or property remaining after a reasonable attorney's fee and the costs of litigation have been deducted from the third-party recovery. The United States shares in the litigation expense by allowing the beneficiary to retain, at the time of distribution, an amount equivalent to a reasonable attorney's fee proportionate to the refund due the United States. After the refund owed to the United States is calculated, the FECA beneficiary retains any surplus remaining, and this amount is credited, dollar for dollar, against future compensation for the same injury, as defined in § 10.719. OWCP will resume the payment of compensation only after the FECA beneficiary has been awarded compensation which exceeds the amount of the surplus.

(a) The refund to the United States is calculated as follows, using the Statement of Recovery form approved by OWCP:

(1) Determine the gross recovery as set forth in § 10.712;

(2) Subtract the amount of attorney's fees actually paid, but not more than the maximum amount of attorney's fees

considered by OWCP or SOL to be reasonable, from the gross recovery (Subtotal A);

(3) Subtract the costs of litigation, as allowed by OWCP or SOL (Subtotal B);

(4) Subtract one fifth of Subtotal B from Subtotal B (Subtotal C);

(5) Compare Subtotal C and the refundable disbursements as defined in § 10.714. Subtotal D is the lower of the two amounts.

(6) Multiply Subtotal D by a percentage that is determined by dividing the gross recovery into the amount of attorney's fees actually paid, but not more than the maximum amount of attorney's fees considered by OWCP or SOL to be reasonable, to determine the Government's allowance for attorney's fees, and subtract this amount from Subtotal D.

(b) The credit against future benefits (also referred to as the surplus) is calculated as follows:

(1) If Subtotal C, as calculated according to paragraph (a)(4) of this section, is less than the refundable disbursements, as defined in § 10.714, there is no credit to be applied against future benefits;

(2) If Subtotal C is greater than the refundable disbursements, the credit against future benefits (or surplus) amount is determined by subtracting the refundable disbursements from Subtotal C.

(c) An example of how these calculations are made follows. In this example, a Federal employee sues another party for causing injuries for which the employee has received $22,000 in benefits under the FECA, subject to refund. The suit is settled and the injured employee receives $100,000, all of which was for his injury. The injured worker paid attorney's fees of $25,000 and costs for the litigation of $3,000.

(1) Gross recovery	$100,000
Attorney's fees	−25,000
(2) Subtotal A	75,000
(3) Costs of suit	−3,000
Subtotal B	72,000
One-fifth of Subtotal B	−14,400
(4) Subtotal C	57,600
Refundable Disbursements	22,000
(5) Subtotal D (lower of Subtotal C or refundable disbursements)	22,000
(6) Government's allowance for attorney's fees [25,000/100,000) × 22,000] (attorney's fees divided by gross recovery then multiplied by Subtotal D)	−5,500
Refund to the United States	16,500
(7) Credit against future benefits [57,600–22,000] (Subtotal C minus refundable disbursements)	35,600

§ 10.712 What amounts are included in the gross recovery?

(a) When a settlement or judgment is paid to, or for, one individual, the entire amount, except for the portion representing damage to real or personal property, is reported as the gross recovery. If a settlement or judgment is paid to or for more than one individual or in more than one capacity, such as a joint payment to a husband and wife for personal injury and loss of consortium or a payment to a spouse representing both loss of consortium and wrongful death, the gross recovery to be reported is the amount allocated to the injured employee. If a judge or jury specifies the percentage of a contested verdict attributable to each of several plaintiffs, OWCP or SOL will accept that division.

(b) In any other case, where a judgment or settlement is paid to or on behalf of more than one individual, OWCP or SOL will determine the appropriate amount of the FECA beneficiary's gross recovery and advise the beneficiary of its determination. FECA beneficiaries may accept OWCP's or SOL's determination or demonstrate good cause for a different allocation. Whether to accept a specific allocation is at the discretion of SOL or OWCP.

§ 10.713 How is a structured settlement (that is, a settlement providing for receipt of funds over a specified period of time) treated for purposes of reporting the gross recovery?

In this situation, the gross recovery to be reported is the present value of the right to receive all of the payments included in the structured settlement, allocated in the case of multiple recipients in the same manner as single payment recoveries.

§ 10.714 What amounts are included in the refundable disbursements?

The refundable disbursements of a specific claim consist of the total money paid by OWCP from the Employees' Compensation Fund with respect to that claim to or on behalf of a FECA beneficiary, less charges for any medical file review (i.e., the physician does not examine the employee) done at the request of OWCP. Charges for medical examinations also may be subtracted if the FECA beneficiary establishes that the examinations were required to be made available to the employee under a statute other than the FECA by the employing agency or at the employing agency's cost.

§ 10.715 Is a beneficiary required to pay interest on the amount of the refund due to the United States?

If the refund due to the United States is not submitted within 30 days of receiving a request for payment from SOL or OWCP, interest shall accrue on the refund due to the United States from the date of the request. The rate of interest assessed shall be the rate of the current value of funds to the United States Treasury as published in the **Federal Register** (as of the date the request for payment is sent). Waiver of the collection of interest shall be in accordance with the provisions of the Department of Labor regulations on Federal Claims Collection governing waiver of interest, 29 CFR 20.61.

§ 10.716 If the required refund is not paid within 30 days of the request for repayment, can it be collected from payments due under the FECA?

If the required refund is not paid within 30 days of the request for payment, OWCP can, in its discretion, collect the refund by withholding all or part of any payments currently payable to the beneficiary under the FECA with respect to any injury. The waiver provisions of §§ 10.432 through 10.440 do not apply to such determinations.

§ 10.717 Is a settlement or judgment received as a result of allegations of medical malpractice in treating an injury covered by the FECA a gross recovery that must be reported to OWCP or SOL?

Since an injury caused by medical malpractice in treating an injury covered by the FECA is also an injury covered under the FECA, any recovery in a suit alleging such an injury is treated as a gross recovery that must be reported to OWCP or SOL.

§ 10.718 Are payments to a beneficiary as a result of an insurance policy which the beneficiary has purchased a gross recovery that must be reported to OWCP or SOL?

Since payments received by a FECA beneficiary pursuant to an insurance policy purchased by someone other than a liable third party are not payments in satisfaction of liability for causing an injury covered by the FECA, they are not considered a gross recovery covered by section 8132 that requires filing a Statement of Recovery and paying any required refund.

§ 10.719 If a settlement or judgment is received for more than one wound or medical condition, can the refundable disbursements paid on a single FECA claim be attributed to different conditions for purposes of calculating the refund or credit owed to the United States?

(a) All wounds, diseases or other medical conditions accepted by OWCP in connection with a single claim are treated as the same injury for the purpose of computing any required refund and any credit against future benefits in connection with the receipt of a recovery from a third party, except that an injury caused by medical malpractice in treating an injury covered under the FECA will be treated as a separate injury for purposes of section 8132.

(b) If an injury covered under the FECA is caused under circumstances creating a legal liability in more than one person, other than the United States, to pay damages, OWCP or SOL will determine whether recoveries received from one or more third parties should be attributed to separate conditions for which compensation is payable in connection with a single FECA claim. If such an attribution is both practicable and equitable, as determined by OWCP or SOL, in its discretion, the conditions will be treated as separate injuries for purposes of calculating the refund and credit owed to the United States under section 8132.

Federal Grand and Petit Jurors

§ 10.725 When is a Federal grand or petit juror covered under the FECA?

(a) Federal grand and petit jurors are covered under the FECA when they are in performance of duty as a juror, which includes that time when a juror is:

(1) In attendance at court pursuant to a summons;

(2) In deliberation;

(3) Sequestered by order of a judge; or

(4) At a site, by order of the court, for the taking of a view.

(b) A juror is not considered to be in the performance of duty while traveling to or from home in connection with the activities enumerated in paragraphs (a)(1) through (4) of this section.

§ 10.726 When does a juror's entitlement to disability compensation begin?

Pursuant to 28 U.S.C. 1877, entitlement to disability compensation does not commence until the day after the date of termination of service as a juror.

§ 10.727 What is the pay rate of jurors for compensation purposes?

For the purpose of computing compensation payable for disability or death, a juror is deemed to receive pay at the minimum rate for Grade GS–2 of the General Schedule unless his or her actual pay as an ''employee'' of the United States while serving on court leave is higher, in which case the pay rate for compensation purposes is determined in accordance with 5 U.S.C. 8114.

Peace Corps Volunteers

§ 10.730 What are the conditions of coverage for Peace Corps volunteers and volunteer leaders injured while serving outside the United States?

(a) Any injury sustained by a volunteer or volunteer leader while he or she is located abroad shall be presumed to have been sustained in the performance of duty, and any illness contracted during such time shall be presumed to be proximately caused by the employment. However, this presumption will be rebutted by evidence that:

(1) The injury or illness was caused by the claimant's willful misconduct, intent to bring about the injury or death of self or another, or was proximately caused by the intoxication by alcohol or illegal drugs of the injured claimant; or

(2) The illness is shown to have pre-existed the period of service abroad; or

(3) The injury or illness claimed is a manifestation of symptoms of, or consequent to, a pre-existing congenital defect or abnormality.

(b) If the presumption that an injury or illness was sustained in the performance of duty is rebutted as provided by paragraph (a) of this section, the claimant has the burden of proving by the submittal of substantial and probative evidence that such injury or illness was sustained in the performance of duty with the Peace Corps.

(c) If an injury or illness, or episode thereof, comes within one of the exceptions described in paragraph (a)(2) or (3) of this section, the claimant may nonetheless be entitled to compensation. This will be so provided he or she meets the burden of proving by the submittal of substantial, probative and rationalized medical evidence that the illness or injury was proximately caused by factors or conditions of Peace Corps service, or that it was materially aggravated, accelerated or precipitated by factors of Peace Corps service.

§ 10.731 What is the pay rate of Peace Corps volunteers and volunteer leaders for compensation purposes?

The pay rate for these claimants is defined as the pay rate in effect on the date following separation, provided that the rate equals or exceeds the pay rate on the date of injury. It is defined in accordance with 5 U.S.C. 8142(a), not 8101(4).

Non-Federal Law Enforcement Officers

§ 10.735 When is a non-Federal law enforcement officer (LEO) covered under the FECA?

(a) A law enforcement officer (officer) includes an employee of a State or local Government, the Governments of U.S. possessions and territories, or an employee of the United States pensioned or pensionable under sections 521–535 of Title 4, D.C. Code, whose functions include the activities listed in 5 U.S.C. 8191.

(b) Benefits are available to officers who are not ''employees'' under 5 U.S.C. 8101, and who are determined in the discretion of OWCP to have been engaged in the activities listed in 5 U.S.C. 8191 with respect to the enforcement of crimes against the United States. Individuals who only perform administrative functions in support of officers are not considered officers.

(c) Except as provided by 5 U.S.C. 8191 and 8192 and elsewhere in this part, the provisions of the FECA and of subparts A, B, and D through I of this part apply to officers.

§ 10.736 What are the time limits for filing a LEO claim?

OWCP must receive a claim for benefits under 5 U.S.C. 8191 within five years after the injury or death. This five-year limitation is not subject to waiver. The tolling provisions of 5 U.S.C. 8122(d) do not apply to these claims.

§ 10.737 How is a LEO claim filed, and who can file a LEO claim?

A claim for injury or occupational disease should be filed on Form CA–721; a death claim should be filed on Form CA–722. All claims should be submitted to the officer's employer for completion and forwarding to OWCP. A claim may be filed by the officer, the officer's survivor, or any person or association authorized to act on behalf of an officer or an officer's survivors.

§ 10.738 Under what circumstances are benefits payable in LEO claims?

(a) Benefits are payable when an officer is injured while apprehending, or attempting to apprehend, an individual for the commission of a Federal crime. However, either an actual Federal crime must be in progress or have been committed, or objective evidence (of which the officer is aware at the time of injury) must exist that a potential Federal crime was in progress or had already been committed. The actual or potential Federal crime must be an integral part of the criminal activity toward which the officer's actions are directed. The fact that an injury to an officer is related in some way to the commission of a Federal crime does not necessarily bring the injury within the coverage of the FECA. The FECA is not intended to cover officers who are merely enforcing local laws.

(b) For benefits to be payable when an officer is injured preventing, or attempting to prevent, a Federal crime, there must be objective evidence that a Federal crime is about to be committed. An officer's belief, unsupported by objective evidence, that he or she is acting to prevent the commission of a Federal crime will not result in coverage. Moreover, the officer's subjective intent, as measured by all available evidence (including the officer's own statements and testimony, if available), must have been directed toward the prevention of a Federal crime. In this context, an officer's own statements and testimony are relevant to, but do not control, the determination of coverage.

§ 10.739 What kind of objective evidence of a potential Federal crime must exist for coverage to be extended?

Based on the facts available at the time of the event, the officer must have an awareness of sufficient information which would lead a reasonable officer, under the circumstances, to conclude that a Federal crime was in progress, or was about to occur. This awareness need not extend to the precise particulars of the crime (the section of Title 18, United States Code, for example), but there must be sufficient evidence that the officer was in fact engaged in actual or attempted apprehension of a Federal criminal or prevention of a Federal crime.

§ 10.740 In what situations will OWCP automatically presume that a law enforcement officer is covered by the FECA?

(a) Where an officer is detailed by a competent State or local authority to assist a Federal law enforcement authority in the protection of the President of the United States, or any other person actually provided or entitled to U.S. Secret Service protection, coverage will be extended.

(b) Coverage for officers of the U.S. Park Police and those officers of the Uniformed Division of the U.S. Secret Service who participate in the District of Columbia Retirement System is adjudicated under the principles set forth in paragraph (a) of this section, and does not extend to numerous tangential activities of law enforcement (for example, reporting to work, changing clothes). However, officers of the Non-Uniformed Division of the U.S. Secret Service who participate in the District of Columbia Retirement System are covered under the FECA during the performance of all official duties.

§ 10.741 How are benefits calculated in LEO claims?

(a) Except for continuation of pay, eligible officers and survivors are entitled to the same benefits as if the officer had been an employee under 5 U.S.C. 8101. However, such benefits may be reduced or adjusted as OWCP in its discretion may deem appropriate to reflect comparable benefits which the officer or survivor received or would have been entitled to receive by virtue of the officer's employment.

(b) For the purpose of this section, a comparable benefit includes any benefit that the officer or survivor is entitled to receive because of the officer's employment, including pension and disability funds, State workers' compensation payments, Public Safety Officers' Benefits Act payments, and State and local lump-sum payments. Health benefits coverage and proceeds of life insurance policies purchased by the employer are not considered to be comparable benefits.

(c) The FECA provides that, where an officer receives comparable benefits, compensation benefits are to be reduced proportionally in a manner that reflects the relative percentage contribution of the officer and the officer's employer to the fund which is the source of the comparable benefit. Where the source of the comparable benefit is a retirement or other system which is not fully funded, the calculation of the amount of the reduction will be based on a per capita comparison between the contribution by the employer and the contribution by all covered officers during the year prior to the officer's injury or death.

(d) The non-receipt of compensation during a period where a dual benefit (such as a lump-sum payment on the death of an officer) is being offset against compensation entitlement does not result in an adjustment of the respective benefit percentages of remaining beneficiaries because of a cessation of compensation under 5 U.S.C. 8133(c).

Subpart I—Information for Medical Providers

Medical Records and Bills

§ 10.800 What kind of medical records must providers keep?

Agency medical officers, private physicians and hospitals are required to keep records of all cases treated by them under the FECA so they can supply OWCP with a history of the injury, a description of the nature and extent of injury, the results of any diagnostic studies performed, the nature of the treatment rendered and the degree of any impairment and/or disability arising from the injury.

§ 10.801 How are medical bills to be submitted?

(a) All charges for medical and surgical treatment, appliances or supplies furnished to injured employees, except for treatment and supplies provided by nursing homes, shall be supported by medical evidence as provided in § 10.800. The physician or provider shall itemize the charges on the standard Health Insurance Claim Form, HCFA 1500 or OWCP 1500, (for professional charges), the UB–92 (for hospitals), the Universal Claim Form (for pharmacies), or other form as warranted, and submit the form promptly to OWCP.

(b) The provider shall identify each service performed using the Physician's Current Procedural Terminology (CPT) code, the Health Care Financing Administration Common Procedure Coding System (HCPCS) code, the National Drug Code (NDC), or the

Revenue Center Code (RCC), with a brief narrative description. Where no code is applicable, a detailed description of services performed should be provided.

(c) The provider shall also state each diagnosed condition and furnish the corresponding diagnostic code using the ''International Classification of Disease, 9th Edition, Clinical Modification'' (ICD–9-CM), or as revised. A separate bill shall be submitted when the employee is discharged from treatment or monthly, if treatment for the work-related condition is necessary for more than 30 days.

(1) (i) Hospitals shall submit charges for medical and surgical treatment or supplies promptly to OWCP on the Uniform Bill (UB–92). The provider shall identify each outpatient radiology service, outpatient pathology service and physical therapy service performed, using HCPCS/CPT codes with a brief narrative description. The charge for each individual service, or the total charge for all identical services, should also appear in the UB–92.

(ii) Other outpatient hospital services for which HCPCS/CPT codes exist shall also be coded individually using the coding scheme noted in this paragraph. Services for which there are no HCPCS/CPT codes available can be presented using the RCCs described in the ''National Uniform Billing Data Elements Specifications'', current edition. The provider shall also furnish the diagnostic code using the ICD–9–CM. If the outpatient hospital services include surgical and/or invasive procedures, the provider shall code each procedure using the proper CPT/HCPCS codes and furnishing the corresponding diagnostic codes using the ICD–9–CM.

(2) Pharmacies shall itemize charges for prescription medications, appliances, or supplies on the Universal Claim Form and submit them promptly to OWCP. Bills for prescription medications must include the NDC assigned to the product, the generic or trade name of the drug provided, the prescription number, the quantity provided, and the date the prescription was filled.

(3) Nursing homes shall itemize charges for appliances, supplies or services on the provider's billhead stationery and submit them promptly to OWCP.

(d) By submitting a bill and/or accepting payment, the provider signifies that the service for which reimbursement is sought was performed as described and was necessary. In addition, the provider thereby agrees to comply with all regulations set forth in this subpart concerning the rendering of treatment and/or the process for seeking reimbursement for medical services, including the limitation imposed on the amount to be paid for such services.

(e) In summary, bills submitted by providers must: be itemized on the Health Insurance Claim Form (for physicians), the UB–92 (for hospitals), or the Universal Claim Form (for pharmacies); contain the signature or signature stamp of the provider; and identify the procedures using HCPCS/CPT codes, RCCs, or NDCs. Otherwise, OWCP may return the bill to the provider for correction and resubmission.

§ 10.802 How should an employee prepare and submit requests for reimbursement for medical expenses, transportation costs, loss of wages, and incidental expenses?

(a) If an employee has paid bills for medical, surgical or dental services, supplies or appliances due to an injury sustained in the performance of duty, he or she may submit an itemized bill on the Health Insurance Claim Form, HCFA 1500 or OWCP 1500, together with a medical report as provided in § 10.800, to OWCP for consideration.

(1) The provider of such service shall state each diagnosed condition and furnish the applicable ICD–9–CM code and identify each service performed using the applicable HCPCS/CPT code, with a brief narrative description of the service performed, or, where no code is applicable, a detailed description of that service.

(2) The bill must be accompanied by evidence that the provider received payment for the service from the employee and a statement of the amount paid. Acceptable evidence that payment was received includes, but is not limited to, a signed statement by the provider, a mechanical stamp or other device showing receipt of payment, a copy of the employee's canceled check (both front and back) or a copy of the employee's credit card receipt.

(b) If services were provided by a hospital, pharmacy or nursing home, the employee should submit the bill in accordance with the provisions of § 10.801(a). Any request for reimbursement must be accompanied by evidence, as described in paragraph (a) of this section, that the provider received payment for the service from the employee and a statement of the amount paid.

(c) OWCP may waive the requirements of paragraphs (a) and (b) of this section if extensive delays in the filing or the adjudication of a claim make it unusually difficult for the employee to obtain the required information.

(d) OWCP will not accept copies of bills for reimbursement unless they bear the original signature of the provider, with evidence of payment. Payment for medical and surgical treatment, appliances or supplies shall in general be no greater than the maximum allowable charge for such service determined by the Director, as set forth in § 10.805.

(e) An employee will be only partially reimbursed for a medical expense if the amount he or she paid to a provider for the service exceeds the maximum allowable charge set by the Director's schedule. If this happens, OWCP shall advise the employee of the maximum allowable charge for the service in question and of his or her responsibility to ask the provider to refund to the employee, or credit to the employee's account, the amount he or she paid which exceeds the maximum allowable charge. The provider may request reconsideration of the fee determination as set forth in § 10.812.

(f) If the provider fails to make appropriate refund to the employee, or to credit the employee's account, within 60 days after the employee requests a refund of any excess amount, or the date of a subsequent reconsideration decision which continues to disallow all or a portion of the appealed amount, OWCP shall initiate exclusion procedures as provided by § 10.815.

(g) If the provider does not refund to the employee or credit to his or her account the amount of money paid in excess of the charge which OWCP allows, the employee should submit documentation of the attempt to obtain such refund or credit to OWCP. OWCP may make reasonable reimbursement to the employee after reviewing the facts and circumstances of the case.

§ 10.803 What are the time limitations on OWCP's payment of bills?

OWCP will pay providers and reimburse employees promptly for all bills received on an approved form and in a timely manner. However, no bill will be paid for expenses incurred if the bill is submitted more than one year beyond the end of the calendar year in which the expense was incurred or the service or supply was provided, or more than one year beyond the end of the calendar year in which the claim was first accepted as compensable by OWCP, whichever is later.

Medical Fee Schedule

§ 10.805 What services are covered by the OWCP fee schedule?

(a) Payment for medical and other health services furnished by physicians, hospitals and other providers for work-

related injuries shall not exceed a maximum allowable charge for such service as determined by the Director, except as provided in this section.

(b) The schedule of maximum allowable charges does not apply to charges for services provided in nursing homes, but it does apply to charges for treatment furnished in a nursing home by a physician or other medical professional.

(c) The schedule of maximum allowable charges also does not apply to charges for appliances, supplies, services or treatment furnished by medical facilities of the U.S. Public Health Service or the Departments of the Army, Navy, Air Force and Veterans Affairs.

§ 10.806 How are the maximum fees defined?

For professional medical services, the Director shall maintain a schedule of maximum allowable fees for procedures performed in a given locality. The schedule shall consist of: An assignment of a value to procedures identified by Health Care Financing Administration Common Procedure Coding System/ Current Procedural Terminology (HCPCS/CPT) code which represents the relative skill, effort, risk and time required to perform the procedure, as compared to other procedures of the same general class; an index based on a relative value scale that considers skill, labor, overhead, malpractice insurance and other related costs; and a monetary value assignment (conversion factor) for one unit of value in each of the categories of service.

§ 10.807 How are payments for particular services calculated?

Payment for a procedure identified by a HCPCS/CPT code shall not exceed the amount derived by multiplying the relative values for that procedure by the geographic indices for services in that area and by the dollar amount assigned to one unit in that category of service.

(a) The ''locality'' which serves as a basis for the determination of average cost is defined by the Bureau of Census Metropolitan Statistical Areas. The Director shall base the determination of the relative per capita cost of medical care in a locality using information about enrollment and medical cost per county, provided by the Health Care Financing Administration (HCFA).

(b) The Director shall assign the relative value units (RVUs) published by HCFA to all services for which HCFA has made assignments, using the most recent revision. Where there are no RVUs assigned to a procedure, the Director may develop and assign any RVUs that he or she considers appropriate. The geographic adjustment factor shall be that designated by Geographic Practice Cost Indices for Metropolitan Statistical Areas as devised for HCFA and as updated or revised by HCFA from time to time. The Director will devise conversion factors for each category of service, and in doing so may adapt HCFA conversion factors as appropriate using OWCP's processing experience and internal data.

(c) For example, if the unit values for a particular surgical procedure are 2.48 for physician's work (W), 3.63 for practice expense (PE), and 0.48 for malpractice insurance (M), and the dollar value assigned to one unit in that category of service (surgery) is $61.20, then the maximum allowable charge for one performance of that procedure is the product of the three RVUs times the corresponding geographical indices for the locality times the conversion factor. If the geographic indices for the locality are 0.988(W), 0.948 (PE), and 1.174 (M), then the maximum payment calculation is:

$$[(2.48)(0.988) + (3.63)(0.948) + (0.48)(1.174)] \times \$61.20$$
$$[2.45 + 3.44 + .56] \times \$61.20$$
$$6.45 \times \$61.20 = \$394.74$$

§ 10.808 Does the fee schedule apply to every kind of procedure?

Where the time, effort and skill required to perform a particular procedure vary widely from one occasion to the next, the Director may choose not to assign a relative value to that procedure. In this case the allowable charge for the procedure will be set individually based on consideration of a detailed medical report and other evidence. At its discretion, OWCP may set fees without regard to schedule limits for specially authorized consultant examinations, for examinations performed under 5 U.S.C. 8123, and for other specially authorized services.

§ 10.809 How are payments for medicinal drugs determined?

Payment for medicinal drugs prescribed by physicians shall not exceed the amount derived by multiplying the average wholesale price of the medication by the quantity or amount provided, plus a dispensing fee.

(a) All prescription medications identified by National Drug Code (NDC) will be assigned an average wholesale price representing the product's nationally recognized wholesale price as determined by surveys of manufacturers and wholesalers. The Director will establish the dispensing fee.

(b) The NDCs, the average wholesale prices, and the dispensing fee shall be reviewed from time to time and updated as necessary.

§ 10.810 How are payments for inpatient medical services determined?

(a) OWCP will pay for inpatient medical services according to pre-determined, condition-specific rates based on the Prospective Payment System (PPS) devised by HCFA (42 CFR parts 412, 413, 424, 485, and 489). Using this system, payment is derived by multiplying the diagnosis-related group (DRG) weight assigned to the hospital discharge by the provider-specific factors.

(1) All hospital discharges will be classified according to the DRGs prescribed by the HCFA in the form of the DRG Grouper software program. On this list, each DRG represents the average resources necessary to provide care in a case in that DRG relative to the national average of resources consumed per case.

(2) The provider-specific factors will be provided by HCFA in the form of their PPS Pricer software program. The software takes into consideration the type of facility, census division, actual geographic location (MSA) of the hospital, case mix cost per discharge, number of hospital beds, intern/beds ratio, operating cost to charge ratio, and other factors used by HCFA to determine the specific rate for a hospital discharge under their PPS. The Director may devise price adjustment factors as appropriate using OWCP's processing experience and internal data.

(3) OWCP will base payments to facilities excluded from HCFA's PPS on consideration of detailed medical reports and other evidence.

(4) The Director shall review the pre-determined hospital rates at least once a year, and may adjust any or all components when he or she deems it necessary or appropriate.

(b) The Director shall review the schedule of fees at least once a year, and may adjust the schedule or any of its components when he or she deems it necessary or appropriate.

§ 10.811 When and how are fees reduced?

(a) OWCP shall accept a provider's designation of the code to identify a billed procedure or service if the code is consistent with medical reports and other evidence. Where no code is supplied, OWCP may determine the code based on the narrative description of the procedure on the billing form and in associated medical reports. OWCP will pay no more than the maximum allowable fee for that procedure.

(b) If the charge submitted for a service supplied to an injured employee exceeds the maximum amount determined to be reasonable according to the schedule, OWCP shall pay the amount allowed by the schedule for that service and shall notify the provider in writing that payment was reduced for that service in accordance with the schedule. OWCP shall also notify the provider of the method for requesting reconsideration of the balance of the charge.

§ 10.812 If OWCP reduces a fee, may a provider request reconsideration of the reduction?

(a) A physician or other provider whose charge for service is only partially paid because it exceeds a maximum allowable amount set by the Director may, within 30 days, request reconsideration of the fee determination.

(1) The provider should make such a request to the OWCP district office with jurisdiction over the employee's claim. The request must be accompanied by documentary evidence that the procedure performed was incorrectly identified by the original code, that the presence of a severe or concomitant medical condition made treatment especially difficult, or that the provider possessed unusual qualifications. In itself, board-certification in a specialty is not sufficient evidence of unusual qualifications to justify an exception. These are the only three circumstances which will justify reevaluation of the paid amount.

(2) A list of OWCP district offices and their respective areas of jurisdiction is available upon request from the U.S. Department of Labor, Office of Workers' Compensation Programs, Washington, DC 20210, or from the Internet at www.dol.gov./dol/esa/owcp.htm. Within 30 days of receiving the request for reconsideration, the OWCP district office shall respond in writing stating whether or not an additional amount will be allowed as reasonable, considering the evidence submitted.

(b) If the OWCP district office issues a decision which continues to disallow a contested amount, the provider may apply to the Regional Director of the region with jurisdiction over the OWCP district office. The application must be filed within 30 days of the date of such decision, and it may be accompanied by additional evidence. Within 60 days of receipt of such application, the Regional Director shall issue a decision in writing stating whether or not an additional amount will be allowed as reasonable, considering the evidence submitted. This decision shall be final, and shall not be subject to further review.

§ 10.813 If OWCP reduces a fee, may a provider bill the claimant for the balance?

A provider whose fee for service is partially paid by OWCP as a result of the application of its fee schedule or other tests for reasonableness in accordance with this part shall not request reimbursement from the employee for additional amounts.

(a) Where a provider's fee for a particular service or procedure is lower to the general public than as provided by the schedule of maximum allowable charges, the provider shall bill at the lower rate. A fee for a particular service or procedure which is higher than the provider's fee to the general public for that same service or procedure will be considered a charge ''substantially in excess of such provider's customary charges'' for the purposes of § 10.815(d).

(b) A provider whose fee for service is partially paid by OWCP as the result of the application of the schedule of maximum allowable charges and who collects or attempts to collect from the employee, either directly or through a collection agent, any amount in excess of the charge allowed by OWCP, and who does not cease such action or make appropriate refund to the employee within 60 days of the date of the decision of OWCP, shall be subject to the exclusion procedures provided by § 10.815(h).

Exclusion of Providers

§ 10.815 What are the grounds for excluding a provider from payment under the FECA?

A physician, hospital, or provider of medical services or supplies shall be excluded from payment under the FECA if such physician, hospital or provider has:

(a) Been convicted under any criminal statute of fraudulent activities in connection with any Federal or State program for which payments are made to providers for similar medical, surgical or hospital services, appliances or supplies;

(b) Been excluded or suspended, or has resigned in lieu of exclusion or suspension, from participation in any Federal or State program referred to in paragraph (a) of this section;

(c) Knowingly made, or caused to be made, any false statement or misrepresentation of a material fact in connection with a determination of the right to reimbursement under the FECA, or in connection with a request for payment;

(d) Submitted, or caused to be submitted, three or more bills or requests for payment within a twelve-month period under this subpart containing charges which the Director finds to be substantially in excess of such provider's customary charges, unless the Director finds there is good cause for the bills or requests containing such charges;

(e) Knowingly failed to timely reimburse employees for treatment, services or supplies furnished under this subpart and paid for by OWCP;

(f) Failed, neglected or refused on three or more occasions during a 12-month period to submit full and accurate medical reports, or to respond to requests by OWCP for additional reports or information, as required by the FECA and § 10.800;

(g) Knowingly furnished treatment, services or supplies which are substantially in excess of the employee's needs, or of a quality which fails to meet professionally recognized standards; or

(h) Collected or attempted to collect from the employee, either directly or through a collection agent, an amount in excess of the charge allowed by OWCP for the procedure performed, and has failed or refused to make appropriate refund to the employee, or to cease such collection attempts, within 60 days of the date of the decision of OWCP.

§ 10.816 What will cause OWCP to automatically exclude a physician or other provider of medical services and supplies?

(a) OWCP shall automatically exclude a physician, hospital, or provider of medical services or supplies who has been convicted of a crime described in § 10.815(a), or has been excluded or suspended, or has resigned in lieu of exclusion or suspension, from participation in any program as described in § 10.815(b).

(b) The exclusion applies to participating in the program and to seeking payment under the FECA for services performed after the date of the entry of the judgment of conviction or order of exclusion, suspension or resignation, as the case may be, by the court or agency concerned. Proof of the conviction, exclusion, suspension or resignation may consist of a copy thereof authenticated by the seal of the court or agency concerned.

§ 10.817 When are OWCP's exclusion procedures initiated?

Upon receipt of information indicating that a physician, hospital or provider of medical services or supplies (hereinafter the provider) has engaged in activities enumerated in paragraphs (c) through (h) of § 10.815, the Regional Director, after completion of inquiries he or she deems appropriate, may

initiate procedures to exclude the provider from participation in the FECA program. For the purposes of this section, ''Regional Director'' may include any officer designated to act on his or her behalf.

§ 10.818 How is a provider notified of OWCP's intent to exclude him or her?

The Regional Director shall initiate the exclusion process by sending the provider a letter, by certified mail and with return receipt requested, which shall contain the following:

(a) A concise statement of the grounds upon which exclusion shall be based;

(b) A summary of the information, with supporting documentation, upon which the Regional Director has relied in reaching an initial decision that exclusion proceedings should begin;

(c) An invitation to the provider to:

(1) Resign voluntarily from participation in the FECA program without admitting or denying the allegations presented in the letter; or

(2) Request that the decision on exclusion be based upon the existing record and any additional documentary information the provider may wish to furnish;

(d) A notice of the provider's right, in the event of an adverse ruling by the Regional Director, to request a formal hearing before an administrative law judge;

(e) A notice that should the provider fail to answer (as described in § 10.819) the letter of intent within 30 calendar days of receipt, the Regional Director may deem the allegations made therein to be true and may order exclusion of the provider without conducting any further proceedings; and

(f) The name and address of the OWCP representative who shall be responsible for receiving the answer from the provider.

§ 10.819 What requirements must the provider's reply and OWCP's decision meet?

(a) The provider's answer shall be in writing and shall include an answer to OWCP's invitation to resign voluntarily. If the provider does not offer to resign, he or she shall request that a determination be made upon the existing record and any additional information provided.

(b) Should the provider fail to answer the letter of intent within 30 calendar days of receipt, the Regional Director may deem the allegations made therein to be true and may order exclusion of the provider.

(c) By arrangement with the official representative, the provider may inspect or request copies of information in the record at any time prior to the Regional Director's decision.

(d) The Regional Director shall issue his or her decision in writing, and shall send a copy of the decision to the provider by certified mail, return receipt requested. The decision shall advise the provider of his or her right to request, within 30 days of the date of the adverse decision, a formal hearing before an administrative law judge under the procedures set forth in § 10.820. The filing of a request for a hearing within the time specified shall stay the effectiveness of the decision to exclude.

§ 10.820 How can an excluded provider request a hearing?

A request for a hearing shall be sent to the official representative named under § 10.818(f) and shall contain:

(a) A concise notice of the issues on which the provider desires to give evidence at the hearing;

(b) Any request for a more definite statement by OWCP;

(c) Any request for the presentation of oral argument or evidence; and

(d) Any request for a certification of questions concerning professional medical standards, medical ethics or medical regulation for an advisory opinion from a competent recognized professional organization or Federal, State or local regulatory body.

§ 10.821 How are hearings assigned and scheduled?

(a) If the designated OWCP representative receives a timely request for hearing, the OWCP representative shall refer the matter to the Chief Administrative Law Judge of the Department of Labor, who shall assign it for an expedited hearing. The administrative law judge assigned to the matter shall consider the request for hearing, act on all requests therein, and issue a Notice of Hearing and Hearing Schedule for the conduct of the hearing. A copy of the hearing notice shall be served on the provider by certified mail, return receipt requested. The Notice of Hearing and Hearing Schedule shall include:

(1) A ruling on each item raised in the request for hearing;

(2) A schedule for the prompt disposition of all preliminary matters, including requests for more definite statements and for the certification of questions to advisory bodies; and

(3) A scheduled hearing date not less than 30 days after the date the schedule is issued, and not less than 15 days after the scheduled conclusion of preliminary matters, provided that the specific time and place of the hearing may be set on 10 days' notice.

(b) The purpose of the designation of issues is to provide for an effective hearing process. The provider is entitled to be heard on any matter placed in issue by his or her response to the Notice of Intent to Exclude, and may designate ''all issues'' for purposes of hearing. However, a specific designation of issues is required if the provider wishes to interpose affirmative defenses, or request the issuance of subpoenas or the certification of questions for an advisory opinion.

§ 10.822 How are subpoenas or advisory opinions obtained?

(a) The provider may apply to the administrative law judge for the issuance of subpoenas upon a showing of good cause therefor.

(b) A certification of a request for an advisory opinion concerning professional medical standards, medical ethics or medical regulation to a competent recognized or professional organization or Federal, State or local regulatory agency may be made:

(1) As to an issue properly designated by the provider, in the sound discretion of the administrative law judge, provided that the request will not unduly delay the proceedings;

(2) By OWCP on its own motion either before or after the institution of proceedings, and the results thereof shall be made available to the provider at the time that proceedings are instituted or, if after the proceedings are instituted, within a reasonable time after receipt. The opinion, if rendered by the organization or agency, is advisory only and not binding on the administrative law judge.

§ 10.823 How will the administrative law judge conduct the hearing and issue the recommended decision?

(a) To the extent appropriate, proceedings before the administrative law judge shall be governed by 29 CFR part 18.

(b) The administrative law judge shall receive such relevant evidence as may be adduced at the hearing. Evidence shall be presented under oath, orally or in the form of written statements. The administrative law judge shall consider the Notice and Response, including all pertinent documents accompanying them, and may also consider any evidence which refers to the provider or to any claim with respect to which the provider has provided medical services, hospital services, or medical services and supplies, and such other evidence as the administrative law judge may determine to be necessary or useful in evaluating the matter.

(c) All hearings shall be recorded and the original of the complete transcript

shall become a permanent part of the official record of the proceedings.

(d) Pursuant to 5 U.S.C. 8126, the administrative law judge may:

(1) Issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles;

(2) Administer oaths;

(3) Examine witnesses; and

(4) Require the production of books, papers, documents, and other evidence with respect to the proceedings.

(e) At the conclusion of the hearing, the administrative law judge shall issue a written decision and cause it to be served on all parties to the proceeding, their representatives and the Director.

§ 10.824 How can a party request review by the Director of the administrative law judge's recommended decision?

(a) Any party adversely affected or aggrieved by the decision of the administrative law judge may file a petition for discretionary review with the Director within 30 days after issuance of such decision. The administrative law judge's decision, however, shall be effective on the date issued and shall not be stayed except upon order of the Director.

(b) Review by the Director shall not be a matter of right but of the sound discretion of the Director.

(c) Petitions for discretionary review shall be filed only upon one or more of the following grounds:

(1) A finding or conclusion of material fact is not supported by substantial evidence;

(2) A necessary legal conclusion is erroneous;

(3) The decision is contrary to law or to the duly promulgated rules or decisions of the Director;

(4) A substantial question of law, policy, or discretion is involved; or

(5) A prejudicial error of procedure was committed.

(d) Each issue shall be separately numbered and plainly and concisely stated, and shall be supported by detailed citations to the record when assignments of error are based on the record, and by statutes, regulations or principal authorities relied upon. Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass.

(e) A statement in opposition to the petition for discretionary review may be filed, but such filing shall in no way delay action on the petition.

(f) If a petition is granted, review shall be limited to the questions raised by the petition.

(g) A petition not granted within 20 days after receipt of the petition is deemed denied.

(h) The decision of the Director shall be final with respect to the provider's participation in the program, and shall not be subject to further review by any court or agency.

§ 10.825 What are the effects of exclusion?

(a) OWCP shall give notice of the exclusion of a physician, hospital or provider of medical services or supplies to:

(1) All OWCP district offices;

(2) All Federal employers;

(3) The HCFA;

(4) The State or local authority responsible for licensing or certifying the excluded party; and

(5) All employees who are known to have had treatment, services or supplies from the excluded provider within the six-month period immediately preceding the order of exclusion.

(b) Notwithstanding any exclusion of a physician, hospital, or provider of medical services or supplies under this subpart, OWCP shall not refuse an employee reimbursement for any otherwise reimbursable medical treatment, service or supply if:

(1) Such treatment, service or supply was rendered in an emergency by an excluded physician; or

(2) The employee could not reasonably have been expected to have known of such exclusion.

(c) An employee who is notified that his or her attending physician has been excluded shall have a new right to select a qualified physician.

§ 10.826 How can an excluded provider be reinstated?

(a) If a physician, hospital, or provider of medical services or supplies has been automatically excluded pursuant to § 10.816, the provider excluded will automatically be reinstated upon notice to OWCP that the conviction or exclusion which formed the basis of the automatic exclusion has been reversed or withdrawn. However, an automatic reinstatement shall not preclude OWCP from instituting exclusion proceedings based upon the underlying facts of the matter.

(b) A physician, hospital, or provider of medical services or supplies excluded from participation as a result of an order issued pursuant to this subpart may apply for reinstatement one year after the entry of the order of exclusion, unless the order expressly provides for a shorter period. An application for reinstatement shall be addressed to the Director for Federal Employees' Compensation, and shall contain a concise statement of the basis for the application. The application should be accompanied by supporting documents and affidavits.

(c) A request for reinstatement may be accompanied by a request for oral argument. Oral argument will be allowed only in unusual circumstances where it will materially aid the decision process.

(d) The Director for Federal Employees' Compensation shall order reinstatement only in instances where such reinstatement is clearly consistent with the goal of this subpart to protect the FECA program against fraud and abuse. To satisfy this requirement the provider must provide reasonable assurances that the basis for the exclusion will not be repeated.

2. Part 25 is revised to read as follows:

Part 25—Compensation for Disability and Death of Noncitizen Federal Employees Outside the United States

Subpart A—General Provisions

Sec.

Subpart B—The Special Schedule of Compensation

Subpart C—Extensions of the Special Schedule of Compensation

Authority: 5 U.S.C. 301, 8137, 8145 and 8149; 1946 Reorganization Plan No. 2, sec. 3, 3 CFR 1943–1948 Comp., p. 1064; 60 Stat. 1095; Reorganization Plan No. 19 of 1950, sec. 1, 3 CFR 1943–1953 Comp., p. 1010; 64 Stat. 1271; Secretary's Order 5–96, 62 FR 107.

Subpart A—General Provisions

§ 25.1 How are claims of Federal employees who are neither citizens nor residents adjudicated?

This part describes how OWCP pays compensation under the FECA to employees of the United States who are neither citizens nor residents of the United States, any territory or Canada, as well as to any dependents of such employees. It has been determined that the compensation provided under the FECA is substantially disproportionate to the compensation for disability or death which is payable in similar cases under local law, regulation, custom or otherwise, in areas outside the United States, any territory or Canada. Therefore, with respect to the claims of such employees whose injury (or injury resulting in death) has occurred subsequent to December 7, 1941, or may occur, the regulations in this part shall apply.

§ 25.2 In general, what is the Director's policy regarding such claims?

(a) Pursuant to 5 U.S.C. 8137, the benefit features of local workers' compensation laws, or provisions in the nature of workers' compensation, in effect in areas outside the United States, any territory or Canada shall, effective as of December 7, 1941 and as recognized by the Director, be adopted and apply in the cases of employees of the United States who are neither citizens nor residents of the United States, any territory or Canada, unless a special schedule of compensation for injury or death has been established under this part for the particular locality, or for a class of employees in the particular locality.

(b) The benefit provisions adopted under paragraph (a) of this section are those dealing with money payments for injury and death (including medical benefits), as well as those dealing with services and purposes forming an integral part of the local plan, provided they are of a kind or character similar to services and purposes authorized by the FECA.

(1) Procedural provisions, designations of classes of beneficiaries in death cases, limitations (except those affecting amounts of benefit payments), and any other provisions not directly affecting the amounts of the benefit payments, in such local plans, shall not apply, but in lieu thereof the pertinent provisions of the FECA shall apply, unless modified in this section.

(2) However, the Director may at any time modify, limit or redesignate the class or classes of beneficiaries entitled to death benefits, including the designation of persons, representatives or groups entitled to payment under local statute or custom whether or not included in the classes of beneficiaries otherwise specified by this subchapter.

(c) Compensation in all cases of such employees paid and closed prior to January 4, 1999 shall be deemed compromised and paid under 5 U.S.C. 8137. In all other cases, compensation may be adjusted to conform with the regulations in this part, or the beneficiary may by compromise or agreement with the Director have compensation continued on the basis of a previous adjustment of the claim.

(d) Persons employed in a country or area having no well-defined workers' compensation benefits structure shall be accorded the benefits provided—either by local law or special schedule—in a nearby country as determined by the Director. In selecting the benefit structure to be applied, equity and administrative ease will be given consideration, as well as local custom.

(e) Compensation for disability and death of non-citizens outside the United States under this part, whether paid under local law or special schedule, shall in no event exceed that generally payable under the FECA.

§ 25.3 What is the authority to settle and pay such claims?

In addition to the authority to receive, process and pay claims, when delegated such representative or agency receiving delegation of authority shall, in respect to cases adjudicated under this part, and when so authorized by the Director, have authority to make lump-sum awards (in the manner prescribed by 5 U.S.C. 8135) whenever such authorized representative shall deem such settlement to be for the best interest of the United States, and to compromise and pay claims for any benefits provided for under this part, including claims in which there is a dispute as to questions of fact or law. The Director shall, in instructions to the particular representative concerned, establish such procedures in respect to action under this section as he or she may deem necessary, and may specify the scope of any administrative review of such action.

§ 25.4 What type of evidence is required to establish a claim under this part?

Claims of employees of the United States who are neither citizens nor residents of the United States, any territory or Canada, if otherwise compensable, shall be approved only upon evidence of the following nature without regard to the date of injury or death for which claim is made:

(a) Appropriate certification by the Federal employing establishment; or

(b) An armed service's casualty or medical record; or

(c) Verification of the employment and casualty by military personnel; or

(d) Recommendation of an armed service's ''Claim Service'' based on investigations conducted by it.

§ 25.5 What special rules does OWCP apply to claims of third and fourth country nationals?

(a) *Definitions.* A ''third country national'' is a person who is neither a citizen nor resident of the United States who is hired by the United States in the person's country of citizenship or residence for employment in another foreign country, or in a possession or territory of the United States. A ''fourth country national'' is a person who is neither a citizen nor resident of either the country of hire or the place of employment, but who otherwise meets the definition of third country national. ''Benefits applicable to local hires'' are the benefits provided in this part by local law or special schedule, as determined by the Director. With respect to a United States territory or possession, ''local law'' means only the law of the particular territory or possession.

(b) *Benefits payable.* Third and fourth country nationals shall be paid the benefits applicable to local hires in the country of hire or the place of employment, whichever benefits are greater, provided that all benefits payable on account of one injury must be paid under the same benefit structure.

(1) Where no well-defined workers' compensation benefits structure is provided in either the country of hire or the place of employment, the provisions of § 25.2(d) shall apply.

(2) Where equitable considerations as determined by the Director so warrant, a fourth country national may be awarded benefits applicable to local hires in his or her home country.

§ 25.6 How does OWCP adjudicate claims of non-citizen residents of possessions?

An employee who is a *bona fide* permanent resident of any United States possession, territory, commonwealth or trust territory will receive the full benefits of the FECA, as amended, except that the application of the minimum benefit provisions provided therein shall be governed by the restrictions set forth in 5 U.S.C. 8138.

Subpart B—The Special Schedule of Compensation

§ 25.100 How is compensation for disability paid?

Compensation for disability shall be paid to the employee as follows:

(a) *Permanent total disability.* In cases of permanent total disability, 66⅔ percent of the monthly pay during the period of such disability.

(b) *Temporary total disability.* In cases of temporary total disability, 66⅔ percent of the monthly pay during the period of such disability.

(c) *Permanent partial disability.* In cases of permanent partial disability, 66⅔ percent of the monthly pay, for the following losses and periods:

(1) Arm lost: 280 weeks' compensation.

(2) Leg lost: 248 weeks' compensation.

(3) Hand lost: 212 weeks' compensation.

(4) Foot lost: 173 weeks' compensation.

(5) Eye lost: 140 weeks' compensation.

(6) Thumb lost: 51 weeks' compensation.

(7) First finger lost: 28 weeks' compensation.

(8) Great toe lost: 26 weeks' compensation.

(9) Second finger lost: 18 weeks' compensation.

(10) Third finger lost: 17 weeks' compensation.

(11) Toe, other than great toe, lost: 8 weeks' compensation.

(12) Fourth finger lost: 7 weeks' compensation.

(13) Loss of hearing: One ear, 52 weeks' compensation; both ears, 200 weeks' compensation.

(14) Phalanges: Compensation for loss of more than one phalanx of a digit shall be the same as for the loss of the entire digit. Compensation for loss of the first phalanx shall be one-half of the compensation for the loss of the entire digit.

(15) Amputated arm or leg: Compensation for an arm or a leg, if amputated at or above the elbow or the knee, shall be the same as for the loss of the arm or leg; but, if amputated between the elbow and the wrist, or between the knee and the ankle, the compensation shall be the same as for the loss of the hand or the foot.

(16) Binocular vision or percent of vision: Compensation for loss of binocular vision, or for 80 percent or more of the vision of an eye shall be the same as for the loss of the eye.

(17) Two or more digits: Compensation for loss of two or more digits, one or more phalanges of two or more digits of a hand or foot may be proportioned to the loss of use of the hand or foot occasioned thereby, but shall not exceed the compensation for the loss of a hand or a foot.

(18) Total loss of use: Compensation for a permanent total loss of use of a member shall be the same as for loss of the member.

(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss of use of the member.

(20) Consecutive awards: In any case in which there shall be a loss or loss of use of more than one member or parts of more than one member set forth in paragraphs (c)(1) through (19) of this section, but not amounting to permanent total disability, the award of compensation shall be for the loss or loss of use of each such member or part thereof, which awards shall run consecutively, except that where the injury affects only two or more digits of the same hand or foot, paragraph (c)(17) of this section shall apply.

(21) Other cases: In all other cases within this class of disability the compensation during the continuance of disability shall be that proportion of compensation for permanent total disability, as determined under paragraph (a) of this section, which is equal in percentage to the degree or percentage of physical impairment caused by the disability.

(22) Compensation under paragraphs (c)(1) through (21) of this section for permanent partial disability shall be in addition to any compensation for temporary total or temporary partial disability under this section, and awards for temporary total, temporary partial, and permanent partial disability shall run consecutively.

(d) *Temporary partial disability.* In cases of temporary partial disability, during the period of disability, that proportion of compensation for temporary total disability, as determined under paragraph (b) of this section, which is equal in percentage to the degree or percentage of physical impairment caused by the disability.

§ 25.101 How is compensation for death paid?

If the disability causes death, the compensation shall be payable in the amount and to or for the benefit of the following persons:

(a) To the undertaker or person entitled to reimbursement, reasonable funeral expenses not exceeding $200.

(b) To the surviving spouse, if there is no child, 35 percent of the monthly pay until his or her death or remarriage.

(c) To the surviving spouse, if there is a child, the compensation payable under paragraph (b) of this section, and in addition thereto 10 percent of the monthly wage for each child, not to exceed a total of 66⅔ percent for such surviving spouse and children. If a child has a guardian other than the surviving spouse, the compensation payable on account of such child shall be paid to such guardian. The compensation of any child shall cease when he or she dies, marries or reaches the age of 18 years, or if over such age and incapable of self-support, becomes capable of self-support.

(d) To the children, if there is no surviving spouse, 25 percent of the monthly pay for one child and 10 percent thereof for each additional child, not to exceed a total of 66⅔ percent thereof, divided among such children share and share alike. The compensation of each child shall be paid until he or she dies, marries or reaches the age of 18, or if over such age and incapable of self-support, becomes capable of self-support. The compensation of a child under legal age shall be paid to its guardian, if there is one, otherwise to the person having the custody or care of such child, for such child, as the Director in his or her discretion shall determine.

(e) To the parents, if one is wholly dependent for support upon the deceased employee at the time of his or her death and the other is not dependent to any extent, 25 percent of the monthly pay; if both are wholly dependent, 20 percent thereof to each; if one is or both are partly dependent, a proportionate amount in the discretion of the Director. The compensation to a parent or parents in the percentages specified shall be paid if there is no surviving spouse or child, but if there is a surviving spouse or child, there shall be paid so much of such percentages for a parent or parents as, when added to the total of the percentages of the surviving spouse and children, will not exceed a total of 66⅔ percent of the monthly pay.

(f) To the brothers, sisters, grandparents and grandchildren, if one is wholly dependent upon the deceased employee for support at the time of his or her death, 20 percent of the monthly pay to such dependent; if more than one are wholly dependent, 30 percent of such pay, divided among such dependents share and share alike; if there is no one of them wholly dependent, but one or more are partly dependent, 10 percent of such pay divided among such dependents share and share alike. The compensation to such beneficiaries shall be paid if there

is no surviving spouse, child or dependent parent. If there is a surviving spouse, child or dependent parent, there shall be paid so much of the above percentages as, when added to the total of the percentages payable to the surviving spouse, children and dependent parents, will not exceed a total of 66⅔ percent of such pay.

(g) The compensation of each beneficiary under paragraphs (e) and (f) of this section shall be paid until he or she, if a parent or grandparent, dies, marries or ceases to be dependent, or, if a brother, sister or grandchild, dies, marries or reaches the age of 18 years, or if over such age and incapable of self-support, becomes capable of self-support. The compensation of a brother, sister or grandchild under legal age shall be paid to his or her guardian, if there is one, otherwise to the person having the custody or care of such person, for such person, as the Director in his or her discretion shall determine.

(h) Upon the cessation of any person's compensation for death under this subpart, the compensation of any remaining person entitled to continuing compensation in the same case shall be adjusted, so that the continuing compensation shall be at the same rate such person would have received had no award been made to the person whose compensation ceased.

(i) In cases where there are two or more classes of persons entitled to compensation for death under this subpart, and the apportionment of such compensation as provided in this section would result in injustice, the Director may in his or her discretion modify the apportionments to meet the requirements of the case.

§ 25.102 What general provisions does OWCP apply to the Special Schedule?

(a) The definitions of terms in the FECA, as amended, shall apply to terms used in this subpart.

(b) The provisions of the FECA, unless modified by this subpart or otherwise inapplicable, shall be applied whenever possible in the application of this subpart.

(c) The provisions of the regulations for the administration of the FECA, as amended or supplemented from time to time by instructions applicable to this subpart, shall apply in the administration of compensation under this subpart, whenever they can reasonably be applied.

Subpart C—Extensions of the Special Schedule of Compensation

§ 25.200 How is the Special Schedule applied for employees in the Republic of the Philippines?

(a) *Modified special schedule of compensation.* Except for injury or death of direct-hire employees of the U.S. Military Forces covered by the Philippine Medical Care Program and the Employees' Compensation Program pursuant to the agreement signed by the United States and the Republic of the Philippines on March 10, 1982 who are also members of the Philippine Social Security System, the special schedule of compensation established in subpart B of this part shall apply, with the modifications or additions specified in paragraphs (b) through (k) of this section, in the Republic of the Philippines, to injury or death occurring on or after July 1, 1968, with the following limitations:

(1) *Temporary disability.* Benefits for payments accruing on and after July 1, 1969, for injuries causing temporary disability and which occurred on and after July 1, 1968, shall be payable at the rates in the special schedule as modified in this section.

(2) *Permanent disability and death.* Benefits for injuries occurring on and after July 1, 1968, which cause permanent disability or death, shall be payable at the rates specified in the special schedule as modified in this section for all awards not paid in full before July 1, 1969, and any award paid in full prior to July 1, 1969: Provided, that application for adjustment is made, and the adjustment will result in additional benefits of at least $10. In the case of injuries or death occurring on or after December 8, 1941 and prior to July 1, 1968, the special schedule as modified in this section may be applied to prospective awards for permanent disability or death, provided that the monthly and aggregate maximum provisions in effect at the time of injury or death shall prevail. These maxima are $50 and $4,000, respectively.

(b) *Death benefits.* 400 weeks' compensation at two-thirds of the weekly wage rate, shared equally by the eligible survivors in the same class.

(c) *Death beneficiaries.* Benefits are payable to the survivors in the following order of priority (all beneficiaries in the highest applicable classes are entitled to share equally):

(1) Surviving spouse and unmarried children under 18, or over 18 and totally incapable of self-support.

(2) Dependent parents.

(3) Dependent grandparents.

(4) Dependent grandchildren, brothers and sisters who are unmarried and under 18, or over 18 and totally incapable of self-support.

(d) *Burial allowance.* 14 weeks' wages or $400, whichever is less, payable to the eligible survivor(s), regardless of the actual expense. If there is no eligible survivor, actual burial expenses may be paid or reimbursed, in an amount not to exceed what would be paid to an eligible survivor.

(e) *Permanent total disability.* 400 weeks' compensation at two-thirds of the weekly wage rate.

(f) *Permanent partial disability.* Where applicable, the compensation provided in paragraphs (c)(1) through (19) of § 25.100, subject to an aggregate limitation of 400 weeks' compensation. In all other cases, provided for permanent total disability that proportion of the compensation (paragraph (e) of this section) which is equivalent to the degree or percentage of physical impairment caused by the disability.

(g) *Temporary partial disability.* Two-thirds of the weekly loss of wage-earning capacity.

(h) *Compensation period for temporary disability.* Compensation for temporary disability is payable for a maximum period of 80 weeks.

(i) *Maximum compensation.* The total aggregate compensation payable in any case, for injury or death or both, shall not exceed $8,000, exclusive of medical costs and burial allowance. The weekly rate of compensation for disability or death shall not exceed $35.

(j) *Method of payment.* Only compensation for temporary disability shall be payable periodically. Compensation for permanent disability and death shall be payable in full at the time the extent of entitlement is established.

(k) *Exceptions.* The Director in his or her discretion may make exceptions to the regulations in this section by:

(1) Reapportioning death benefits, for the sake of equity.

(2) Excluding from consideration potential death beneficiaries who are not available to receive payment.

(3) Paying compensation for permanent disability or death on a periodic basis, where this method of payment is considered to be in the best interest of the beneficiary.

§ 25.201 How is the Special Schedule applied for employees in Australia?

(a) The special schedule of compensation established by subpart B of this part shall apply in Australia with the modifications or additions specified in paragraph (b) of this section, as of

December 8, 1941, in all cases of injury (or death from injury) which occurred between December 8, 1941 and December 31, 1961, inclusive, and shall be applied retrospectively in all such cases of injury (or death from injury). Compensation in all such cases pending as of July 15, 1946, shall be readjusted accordingly, with credit taken in the amount of compensation paid prior to such date. Refund of compensation shall not be required if the amount of compensation paid in any such case, otherwise than through fraud, misrepresentation or mistake, and prior to July 15, 1946, exceeds the amount provided for under this paragraph, and such case shall be deemed compromised and paid under 5 U.S.C. 8137.

(b) The total aggregate compensation payable in any case under paragraph (a) of this section, for injury or death or both, shall not exceed the sum of $4,000, exclusive of medical costs. The maximum monthly rate of compensation in any such case shall not exceed the sum of $50.

(c) The benefit amounts payable under the provisions of the Commonwealth Employees' Compensation Act of 1930–1964, Australia, shall apply as of January 1, 1962, in Australia, as the exclusive measure of compensation in cases of injury (or death from injury) according on and after January 1, 1962, and shall be applied retrospectively in all such cases, occurring on and after such date: Provided, that the compensation payable under the provisions of this paragraph shall in no event exceed that payable under the FECA.

§ 25.202 How is the Special Schedule applied for Japanese seamen?

(a) The special schedule of compensation established by subpart B of this part shall apply as of November 1, 1971, with the modifications or additions specified in paragraphs (b) through (i) of this section, to injuries sustained outside the continental United States or Canada by direct-hire Japanese seamen who are neither citizens nor residents of the United States or Canada and who are employed by the Military Sealift Command in Japan.

(b) Temporary total disability. Weekly compensation shall be paid at 75 percent of the weekly wage rate.

(c) Temporary partial disability. Weekly compensation shall be paid at 75 percent of the weekly loss of wage-earning capacity.

(d) Permanent total disability. Compensation shall be paid in a lump sum equivalent to 360 weeks' wages.

(e) Permanent partial disability.

(1) The provisions of § 25.100 shall apply to the types of permanent partial disability listed in paragraphs (c)(1) through (19) of that section: Provided that weekly compensation shall be paid at 75 percent of the weekly wage rate and that the number of weeks allowed for specified losses shall be changed as follows:

(i) Arm lost: 312 weeks.
(ii) Leg lost: 288 weeks.
(iii) Hand lost: 244 weeks.
(iv) Foot lost: 205 weeks.
(v) Eye lost: 160 weeks.
(vi) Thumb lost: 75 weeks.
(vii) First finger lost: 46 weeks.
(viii) Second finger lost: 30 weeks.
(ix) Third finger lost: 25 weeks.
(x) Fourth finger lost: 15 weeks.
(xi) Great toe lost: 38 weeks.
(xii) Toe, other than great toe lost: 16 weeks.

(2) In all other cases, that proportion of the compensation provided for permanent total disability in paragraph (d) of this section which is equivalent to the degree or percentage of physical impairment caused by the injury.

(f) Death. If there are two or more eligible survivors, compensation equivalent to 360 weeks' wages shall be paid to the survivors, share and share alike. If there is only one eligible survivor, compensation equivalent to 300 weeks' wages shall be paid. The following survivors are eligible for death benefits:

(1) Spouse who lived with or was dependent upon the employee.

(2) Unmarried children under 21 who lived with or were dependent upon the employee.

(3) Adult children who were dependent upon the employee by reason of physical or mental disability.

(4) Dependent parents, grandparents and grandchildren.

(g) Burial allowance. $1,000 payable to the eligible survivor(s), regardless of actual expenses. If there are no eligible survivors, actual expenses may be paid or reimbursed, up to $1,000.

(h) Method of payment. Only compensation for temporary disability shall be payable periodically, as entitlement accrues. Compensation for permanent disability and death shall be payable in a lump sum.

(i) Maxima. In all cases, the maximum weekly benefit shall be $130. Also, except in cases of permanent total disability and death, the aggregate maximum compensation payable for any injury shall be $40,000.

(j) Prior injury. In cases where injury or death occurred prior to November 1, 1971, benefits will be paid in accordance with regulations promulgated, contained in 20 CFR parts 1–399, edition revised as of January 1, 1971.

§ 25.203 How is the Special Schedule applied to non-resident aliens in the Territory of Guam?

(a) The special schedule of compensation established by subpart B of this part shall apply, with the modifications or additions specified in paragraphs (b) through (k) of this section, to injury or death occurring on or after July 1, 1971 in the Territory of Guam to non-resident alien employees recruited in foreign countries for employment by the military departments in the Territory of Guam. However, the Director may, in his or her discretion, adopt the benefit features and provisions of local workers' compensation law as provided in subpart A of this part, or substitute the special schedule in subpart B of this part or other modifications of the special schedule in this subpart C, if such adoption or substitution would be to the advantage of the employee or his or her beneficiary. This schedule shall not apply to any employee who becomes a permanent resident in the Territory of Guam prior to the date of his or her injury or death.

(b) Death benefits. 400 weeks' compensation at two-thirds of the weekly wage rate, shared equally by the eligible survivors in the same class.

(c) Death beneficiaries. Beneficiaries of death benefits shall be determined in accordance with the laws or customs of the country of recruitment.

(d) Burial allowance. 14 weeks' wages or $400, whichever is less, payable to the eligible survivor(s), regardless of the actual expense. If there is no eligible survivor, actual burial expenses may be paid or reimbursed, in an amount not to exceed what would be paid to an eligible survivor.

(e) Permanent total disability. 400 weeks' compensation at two-thirds of the weekly wage rate.

(f) Permanent partial disability. Where applicable, the compensation provided in paragraphs (c)(1) through (19) of § 25.100, subject to an aggregate limitation of 400 weeks' compensation. In all other cases, that proportion of the compensation provided for permanent total disability (paragraph (e) of this section) which is equivalent to the degree or percentage of physical impairment caused by the disability.

(g) Temporary partial disability. Two-thirds of the weekly loss of wage-earning capacity.

(h) Compensation period for temporary disability. Compensation for temporary disability is payable for a maximum period of 80 weeks.

(i) Maximum compensation. The total aggregate compensation payable in any case, for injury or death or both, shall not exceed $24,000, exclusive of medical costs and burial allowance. The weekly rate of compensation for disability or death shall not exceed $70.

(j) Method of payment. Compensation for temporary disability shall be payable periodically. Compensation for permanent disability and death shall be payable in full at the time the extent of entitlement is established.

(k) Exceptions. The Director may in his or her discretion make exception to the regulations in this section by:

(1) Reapportioning death benefits for the sake of equity.

(2) Excluding from consideration potential beneficiaries of a deceased employee who are not available to receive payment.

(3) Paying compensation for permanent disability or death on a periodic basis, where this method of payment is considered to be in the best interest of the employee or his or her beneficiary(ies).

Signed at Washington, D.C., this 17th day of November, 1998.

Alexis M. Herman,

Secretary of Labor.

Bernard E. Anderson,

Assistant Secretary for Employment Standards Administration.

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