

**DEPARTMENT OF ENERGY OFFICE OF GENERAL COUNSEL
INTERPRETATION REGARDING MEDICAL REMOVAL
PROTECTION BENEFITS PURSUANT TO 10 CFR PART 850,
CHRONIC BERYLLIUM DISEASE PREVENTION PROGRAM**

The Department of Energy (DOE) General Counsel has been asked to provide a legal interpretation of the regulations regarding medical removal protection benefits under 10 CFR Part 850, *Chronic Beryllium Disease Prevention Program*.¹ This interpretation addresses the questions below.

1. Who decides whether a worker should be removed temporarily or permanently from exposure to beryllium under 10 CFR Part 850?

The decision as to whether a worker should be temporarily or permanently removed from exposure to beryllium is made by the Site Occupational Medical Director (SOMD).² Title 10 CFR § 850.35(a) requires the responsible employer³ to:

[O]ffer a beryllium-associated worker⁴ medical removal from exposure to beryllium if the SOMD determines in a written medical opinion that it is

¹ With certain exceptions, 10 CFR Part 850 applies the chronic beryllium disease prevention program to:
“(1) DOE offices responsible for operations or activities that involve present or past exposure, or the potential for exposure, to beryllium at DOE facilities;
(2) DOE contractors with operations or activities that involve present or past exposure, or the potential for exposure, to beryllium at DOE facilities; and
(3) Any current DOE employee, DOE contractor employee, or other worker at a DOE facility who is or was exposed or potentially exposed to beryllium at a DOE facility.” 10 CFR § 850.2(a).

The following are excepted from the application of 10 CFR Part 850:
“(1) Beryllium articles [as defined in 10 CFR § 850.3(a)]; and
(2) DOE laboratory operations that meet the definition of laboratory use of hazardous chemicals in 29 CFR 1910.1450, Occupational Exposure to Hazardous Chemical in Laboratories.” 10 CFR § 850.2(b).

² The SOMD is the “physician responsible for the overall direction and operation of the site occupational medicine program.” 10 CFR § 850.3(a).

³ “Responsible employer” is defined in 10 CFR § 850.3(a) as:
“(1) For DOE contractor employees, the DOE contractor office that is directly responsible for the safety and health of DOE contractor employees while performing a beryllium activity or other activity at a DOE facility; or
(2) For DOE employees, the DOE office that is directly responsible for the safety and health of DOE Federal employees while performing a beryllium activity or other activity at a DOE facility; and
(3) Any person acting directly or indirectly for such office with respect to terms and conditions of employment of beryllium-associated workers.”

⁴ “Beryllium-associated worker” means “a current worker who is or was exposed or potentially exposed to airborne concentrations of beryllium at a DOE facility, including:

- (1) A beryllium worker;
- (2) A current worker whose work history shows that the worker may have been exposed to airborne concentrations of beryllium at a DOE facility;
- (3) A current worker who exhibits signs or symptoms of beryllium exposure; and
- (4) A current worker who is receiving medical removal protection benefits.”

10 CFR § 850.3(a). This section also defines “beryllium worker” as “a current worker who is regularly employed in a DOE beryllium activity.”

medically appropriate to remove the worker from such exposure. The SOMD's determination must be based on one or more positive [beryllium-induced lymphocyte proliferation test⁵] results, chronic beryllium disease diagnosis, an examining physician's recommendation, or any other signs or symptoms *that the SOMD deems medically sufficient* to remove a worker. [emphasis added]

Part 850 makes it clear that only the SOMD may make the decision as to whether a worker should be medically removed.

2. How long must a responsible employer provide medical removal protection benefits to a worker who is temporarily or permanently removed?

For temporary medical removal, the benefit period runs from the time the worker is temporarily removed until a final medical determination is made as to whether the worker should be permanently removed,⁶ but no longer than one year on each occasion that a worker is temporarily removed.⁷ For permanent medical removal, the benefit period is a maximum of two years.⁸ Periods of temporary medical removal cannot be included in the permanent medical removal benefits.

During both temporary and permanent benefit periods, a responsible employer must provide the following medical removal protection benefits: (1) the opportunity to transfer to a comparable job, if available, for which the worker is qualified or can be trained in a short period of time, and where beryllium exposures are as low as possible, but in no event at or above the action level;⁹ *or* (2) if the worker cannot be transferred to such a job, the removed worker's total normal earnings, seniority, and other worker rights and benefits must be maintained during the benefit period, as though the worker had not been removed.¹⁰

These benefits and the period of entitlement are reflected in the informed consent form that workers must sign and acknowledge before undergoing medical evaluations or tests:¹¹

⁵“*Beryllium-induced lymphocyte proliferation test* (Be-LPT) is an in vitro measure of the beryllium antigen-specific, cell-mediated immune response.” 10 CFR § 850.3. [emphasis original]

⁶ 10 CFR § 850.35(a)(1).

⁷ 10 CFR § 850.35(a)(1)(iv).

⁸ 10 CFR § 850.35(b)(1)(ii).

⁹ As “action level” is defined in 10 CFR § 850.23.

¹⁰ Title 10 CFR § 850.35(b)(1)(i) addresses transfer of the beryllium-associated worker to another position in the case of permanent removal, and 10 CFR § 850.35(b)(1)(ii) requires that such a position be comparable, or permanent medical removal protection benefits must be paid in accordance with 10 CFR § 850.35(b)(2). Title 10 CFR § 850.35(a)(1)(ii) requires the responsible employer to transfer the beryllium-associated worker to a comparable job in the case of temporary removal and 10 CFR § 850.35(a)(1)(iv) states that where no such job is available, the responsible employer must provide the benefits to which a permanently removed worker is entitled in 10 CFR § 850.35(b)(2) until a job becomes available or for one year, whichever comes first.

¹¹ See 10 CFR § 850.36(c).

If I agree to be removed, I understand that I may be transferred to another job for which I am qualified (or can be trained for in a short period) and where my beryllium exposures will be as low as possible, but in no case above the action level. I will maintain my total normal earnings, seniority, and other benefits *for up to two years* if I agree to be permanently removed.^[12]

The preamble to Part 850 (Preamble)¹³ notes that medical removal protection benefits are provided to beryllium-associated workers in order to assure workers that “if they fully participate in medical surveillance and if the results of medical surveillance require removal from their beryllium exposed jobs, their normal earnings and job status will be protected *for a pre-determined period.*”¹⁴

Since Part 850 was promulgated in 1999, some have argued that the respective one and two year time limits for removal benefits apply only when a worker cannot be transferred to a comparable position, with the implication that earnings and other benefits must be maintained indefinitely in the “comparable job.” This argument is contrary to the express language of the regulation and the premise that a worker who is transferred to a “comparable job” is already receiving earnings and other worker rights and benefits, commensurate with that “comparable job,” and continues to maintain his/her seniority. (See discussion of the circumstances under which a responsible employer must offer a removed worker a “comparable job,” below). Consequently, the regulation does not mandate that additional medical removal benefits be provided.¹⁵

The proposition that the entitlement to permanent medical removal benefits is limited to a specific duration is supported by discussions in the Preamble, in which DOE explained that it modeled the medical removal benefit provisions of Part 850 on the standards set by the Occupational Health and Safety Administration (OSHA) with respect to lead and cadmium. Whereas OSHA permits 18 months of removal benefits, DOE adopted a two-year benefit period for permanently removed workers in order to permit sufficient time for those workers to be retrained and gain alternate employment.¹⁶ As discussed in the Preamble:

DOE selected 2 years as the maximum period during which the responsible employer is required to pay [medical removal protection benefits] to a worker

¹² 10 CFR Part 850, Appendix A. [emphasis added]

¹³ Chronic Beryllium Disease Prevention Program, Final Rule, 10 CFR 850, 64 FR 68854- 68914 (December 8, 1999).

¹⁴ Preamble, 68894. [emphasis added]

¹⁵ We note, however, that 10 CFR § 850.10(d) requires that the responsible employer provide any labor organization representing its employees or employees it supervises with notice of the development and implementation of or updates to the Chronic Beryllium Disease Prevention Program, which includes provisions relating to medical removal benefits; and upon timely request, opportunity to bargain over implementation of Part 850, consistent with Federal labor laws. In addition, 10 CFR § 850.12(d) states that “[n]othing in this part [Part 850] precludes a responsible employer from taking any additional protective action that it determines to be necessary to protect the health and safety of workers.” As a result, a particular employer may agree to provide its employees with medical removal benefits beyond those prescribed by 10 CFR Part 850.

¹⁶ Preamble, 68895.

who accepts removal The objective of DOE's 24 month period . . . is to allow beryllium-associated workers who accept permanent medical removal sufficient time to be retrained and placed in [a] different job.¹⁷

The Preamble also makes clear that a comparable job is an alternative to the remaining medical removal protection benefits, and that permanent removal benefits terminate after two years. As stated in the Preamble:

Medical removal protection benefits are employment rights established in section 850.35 for beryllium-associated workers temporarily or permanently subject to medical removal from working in regulated areas following medical evaluations. These provisions give contractors an incentive to make reasonable efforts to find and offer alternate employment to workers who have suffered negative health effects due to exposure to beryllium. The definition of medical removal protection benefits and the requirements in section 850.35 ensure that such workers would suffer no reductions in total earnings, seniority, or other worker rights and benefits for two years after permanent medical removal. The two-year period for medical removal protection benefits after permanent removal will allow the contractor to make a reasonable effort to find alternate employment for a removed worker or, through job retraining and out-placement programs operated by many sites, to locate alternate outside employment for the worker.¹⁸

In the event a worker accepts a transfer to another job for which the salary and benefits would normally be lower than the position he held prior to being medically removed, the responsible employer must maintain the removed worker's higher salary and benefits during the benefit period (i.e., up to one year for temporary removal, or two years for permanent removal). This satisfies Part 850's requirement that the salary and benefits of the removed worker be maintained during the benefit period, as though he had not been removed.

3. Under what circumstances must a responsible employer offer a worker who is temporarily or permanently removed a "comparable job"?

If a worker has been medically removed under Part 850, a responsible employer must offer the removed employee a comparable job during the benefit period if the proposed job meets all of the following conditions: (1) the job is available or becomes available during the benefit period; (2) the job is one for which the beryllium-associated worker is qualified (or for which the worker can be trained in a short period); (3) the job is one in which the worker's beryllium exposure is as low as possible, but in no event at or above the action level; and (4) the job allows the worker to maintain his total normal earnings, seniority, and other worker rights and benefits, as though the worker had not been removed.¹⁹

¹⁷ *Id.* Bracketed language not in original.

¹⁸ Preamble, 68867.

¹⁹ See 10 CFR § 850.35(a)(1), (b)(1), (2).

If a comparable job is unavailable when the worker is initially removed, but becomes available during the benefit period, the responsible employer must provide the worker with the opportunity to transfer to such comparable job. In the event that a comparable job is available when the worker is initially removed, but terminates prior to the end of the benefit period, the responsible employer must maintain the worker's total normal earnings, seniority, and other worker rights and benefits during the remainder of the benefit period, and must continue to make reasonable efforts to provide the worker with the opportunity to transfer to a comparable job during the benefit period.

4. Is a beryllium-associated worker who has filed for workers' compensation benefits entitled to medical removal benefits?

Title 10 CFR § 850.35(b)(3) provides that “[i]f a *removed* beryllium-associated worker files a claim for workers' compensation payments for a beryllium-related disability, then the responsible employer must continue to provide medical removal protection benefits pending disposition of the claim.”²⁰ This provision only applies to removed workers, not to workers who have filed for workers' compensation benefits but have not yet been removed pursuant to a written medical opinion by the SOMD.

If the workers' compensation claim is decided in favor of the removed worker, 10 CFR § 850.35(b)(4) provides that:

The responsible employer's obligation to provide medical removal protection benefits to a removed beryllium-associated worker is reduced to the extent that the worker receives compensation for earnings lost during the period of removal either from a publicly- or employer-funded compensation program, or from employment with another employer made possible by virtue of the worker's removal.

As explained in the Preamble, “[t]his provision is necessary to ensure that [medical removal protection benefits] does [sic] not result in a ‘windfall’ to the worker who collects other compensation, including salary from another job, while the worker is on medical removal from exposure to beryllium.”²¹

5. Is temporary medical removal available prior to, or without, a SOMD determination if a beryllium-associated worker has already been restricted from working with beryllium?

The SOMD must determine in a written medical opinion that it is appropriate to remove a beryllium-associated worker from exposure to beryllium. Temporary medical removal is not available prior to or without such a written determination by the SOMD.²²

²⁰ 10 CFR § 835(b)(3). [emphasis added]

²¹ Preamble, 68895.

²² If a worker has not been medically removed based on the recommendation of the SOMD pursuant to the provisions of 10 CFR § 850.35, the worker is not entitled to temporary or permanent medical removal

Temporary medical removal is available in the limited circumstances in which a final medical determination *is pending* to resolve whether the worker should be removed permanently from exposure to beryllium.²³ “Final medical determination” is defined in 10 CFR § 850.35(a)(1)(i) as “the outcome of the multiple physician review process or the alternate medical determination process provided for in paragraphs (c) and (d) of § 850.34.” As stated above, the duration of this period is no longer than one year. Upon a “final medical determination” that a worker should be permanently removed, the continuation of temporary removal benefits becomes inappropriate.

We note that the purpose of temporary medical removal is to remove the worker from exposure to beryllium pending a final medical determination of whether the employee should be removed permanently. In a case where the SOMD has made a final medical determination that a worker should be permanently removed from beryllium exposure, the responsible employer *must* offer the worker permanent medical removal from exposure to beryllium²⁴ and provide the removed worker with the medical removal protection benefits specified in 10 CFR § 850.35(b).²⁵

6. Are workers who are or become too ill to work entitled to medical removal benefits?

Title 10 CFR § 850.35(b)(3) and (4) make it clear that a removed worker is entitled to receive medical removal protection benefits during the benefit period, even if he is unable to work due to illness. In no case, however, do the regulations require the benefit period to run beyond one year for temporary removal on each occasion that a worker is removed, or two years for permanent removal.

If, after the SOMD has issued the requisite medical opinion resulting in the temporary or permanent removal of a beryllium-associated worker, the removed worker is unable to work during the removal benefit period, the removed worker is entitled to medical removal protection benefits. This conclusion is supported by 10 CFR § 850.35(b)(3) and (4), which provide that, in the event a removed worker files a workers’ compensation claim during the removal benefit period, the responsible employer must “continue to provide medical removal protection benefits pending disposition of the

protection benefits. See 10 CFR § 850.3(a): “*Medical removal protection benefits* means the employment rights established by section 850.35 of this part for beryllium-associated workers who voluntarily accept temporary or permanent medical removal from beryllium areas following a recommendation by the Site Occupational Medicine Director.” [emphasis original]

²³ Title 10 CFR § 850.35(a)(1) states that “[t]he responsible employer must offer a beryllium-associated worker temporary medical removal from exposure to beryllium on each occasion that the SOMD determines in a written medical opinion that the worker should be temporarily removed from such exposure pending a final medical determination of whether the worker should be removed permanently.”

²⁴ Title 10 CFR § 850.35(a)(2)(i) states: “The responsible employer *must* offer a beryllium-associated worker permanent medical removal from exposure to beryllium if the SOMD determines in a written medical opinion that the worker should be permanently removed from exposure to beryllium.” [emphasis added]

²⁵ However, 10 CFR § 850.35(b)(6) provides that the responsible employer may condition the provision of medical removal protection benefits upon the beryllium-associated worker’s participation in medical surveillance provided in accordance with 10 CFR § 850.34.

claim,”²⁶ although benefits are reduced to the extent that the worker receives compensation for earnings lost.²⁷

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²⁶ 10 CFR § 850.35(b)(3).

²⁷ 10 CFR § 850.35(b)(4).