

## PART 500 [RESERVED]

### PART 501—RULES OF PROCEDURE

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AUTHORITY: Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.*

SOURCE: 73 FR 62193, Oct. 20, 2008, unless otherwise noted.

#### §501.1 Definitions.

(a) *FECA* means the Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq.* and any statutory extension or application thereof.

(b) *The Board* means the Employees' Compensation Appeals Board.

(c) *Chief Judge and Chairman of the Board* means the Chairman of the Employees' Compensation Appeals Board.

(d) *Judge or Alternate Judge* means a member designated and appointed by the Secretary of Labor with authority to hear and make final decisions on appeals taken from determinations and awards by the OWCP in claims arising under the FECA.

(e) *OWCP* means the Office of Workers' Compensation Programs, Employment Standards Administration, U.S. Department of Labor.

(f) *Director* means the Director of the Office of Workers' Compensation Programs or a person delegated authority to perform the functions of the Director. The Director of OWCP is represented before the Board by an attorney designated by the Solicitor of Labor.

(g) *Appellant* means any person adversely affected by a final decision or order of the OWCP who files an appeal to the Board.

(h) *Representative* means an individual properly authorized by an Appellant in writing to act for the Appellant in connection with an appeal before the Board. The Representative

may be any individual or an attorney who has been admitted to practice and who is in good standing with any court of competent jurisdiction.

(i) *Decision*, as prescribed by 5 U.S.C. 8149 of the FECA, means the final determinative action made by the Board on appeal of a claim.

(j) *Clerk or Office of the Clerk* means the Clerk of the Office of the Appellate Boards.

#### §501.2 Scope and applicability of rules; composition and jurisdiction of the Board.

(a) The regulations in this part establish the Rules of Practice and Procedure governing the operation of the Employees' Compensation Appeals Board.

(b) The Board consists of three permanent judges, one of whom is designated as Chief Judge and Chairman of the Board, and such alternate judges as are appointed by the Secretary of Labor. The Chief Judge is the administrative officer of the Board. The functions of the Board are quasi-judicial. For organizational purposes, the Board is placed in the Office of the Secretary of Labor and sits in Washington, DC.

(c) The Board has jurisdiction to consider and decide appeals from final decisions of OWCP in any case arising under the FECA. The Board may review all relevant questions of law, fact and exercises of discretion (or failure to exercise discretion) in such cases.

(1) The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.

(2) There will be no appeal with respect to any interlocutory matter decided (or not decided) by OWCP during the pendency of a case.

(3) The Board and OWCP may not exercise simultaneous jurisdiction over the same issue in a case on appeal. Following the docketing of an appeal before the Board, OWCP does not retain jurisdiction to render a further decision regarding the issue on appeal until after the Board relinquishes jurisdiction.

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### § 501.3 Notice of Appeal.

(a) *Who may file.* Any person adversely affected by a final decision of the Director, or his or her authorized Representative, may file for review of such decision by the Board.

(b) *Place of filing.* The notice of appeal shall be filed with the Clerk at 200 Constitution Avenue, NW., Washington, DC 20210.

(c) *Content of notice of appeal.* A notice of appeal shall contain the following information:

(1) Date of Appeal.

(2) Full name, address and telephone number of the Appellant and the full name of any deceased employee on whose behalf an appeal is taken. In addition, the Appellant must provide a signed authorization identifying the full name, address and telephone number of his or her Representative, if applicable.

(3) Employing establishment, and the date, description and place of injury.

(4) Date and Case File Number assigned by OWCP concerning the decision being appealed to the Board.

(5) A statement explaining Appellant's disagreement with OWCP's decision and stating the factual and/or legal argument in favor of the appeal.

(6) *Signature:* An Appellant must sign the notice of appeal.

(d) *Substitution of appellant:* Should the Appellant die after having filed an appeal with the Board, the appeal may proceed to decision provided there is the substitution of a proper Appellant who requests that the appeal proceed to decision by the Board.

(e) *Time limitations for filing.* Any notice of appeal must be filed within 180 days from the date of issuance of a decision of the OWCP. The Board maintains discretion to extend the time period for filing an appeal if an applicant demonstrates compelling circumstances. Compelling circumstances means circumstances beyond the Appellant's control that prevent the timely filing of an appeal and does not include any delay caused by the failure of an individual to exercise due diligence in submitting a notice of appeal.

(f) *Date of filing.* A notice of appeal complying with paragraph (c) of this section is considered to have been filed only if received by the Clerk by the

close of business within the period specified under paragraph (e) of this section, except as otherwise provided in this subsection:

(1) If the notice of appeal is sent by United States Mail or commercial carrier and use of the date of delivery as the date of filing would result in a loss of appeal rights, the appeal will be considered to have been filed as of the date of postmark or other carriers' date markings. The date appearing on the U.S. Postal Service postmark or other carriers' date markings (when available and legible) shall be prima facie evidence of the date of mailing. If there is no such postmark or date marking 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. If a notice of appeal is delivered or sent by means other than United States Mail or commercial carrier, including personal delivery or fax, the notice is deemed to be received when received by the Clerk.

(2) In computing the date of filing, the 180 day time period for filing an appeal begins to run on the day following the date of the OWCP decision. The last day of the period so computed shall be included, unless it is a Saturday, Sunday or Federal holiday, in which event the period runs to the close of the next business day.

(g) *Failure to timely file a notice of appeal.* The failure of an Appellant or Representative to file an appeal with the Board within the period specified under paragraph (e) of this section, including any extensions granted by the Board in its discretion based upon compelling circumstances, will foreclose all right to review. The Board will dismiss any untimely appeal for lack of jurisdiction.

(h) *Incomplete notice of appeal.* Any timely notice of appeal that does not contain the information specified in paragraph (c) of this section will be considered incomplete. On receipt by the Board, the Clerk will inform Appellant of the deficiencies in the notice of appeal and specify a reasonable time to submit the requisite information. Such appeal will be dismissed unless Appellant provides the requisite information in the time specified by the Clerk.

**§ 501.4 Case record; inspection; submission of pleadings and motions.**

(a) *Service on OWCP and transmission of OWCP case record.* The Board shall serve upon the Director a copy of each notice of appeal and accompanying documents. Within 60 days from the date of such service, the Director shall provide to the Board the record of the OWCP proceeding to which the notice refers. On application of the Director, the Board may, in its discretion, extend the time period for submittal of the OWCP case record.

(b) *Inspection of record.* The case record on appeal is an official record of the OWCP.

(1) Upon written application to the Clerk, an Appellant may request inspection of the OWCP case record. At the discretion of the Board, the OWCP case record may either be made available in the Office of the Clerk of the Appellate Boards for inspection by the Appellant, or the request may be forwarded to the Director so that OWCP may make a copy of the OWCP case record and forward this copy to the Appellant. Inspection of the papers and documents included in the OWCP case record of any appeal pending before the Board will be permitted or denied in accordance with 5 CFR 10.10 to 10.13. The Chief Judge (or his or her designee) shall serve as the disclosure officer for purposes of Appendix A to 29 CFR Parts 70 and 71.

(2) Copies of the documents generated in the course of the appeal before the Board will be provided to the Appellant and Appellant's Representative by the Clerk. If the Appellant needs additional copies of such documents while the appeal is pending, the Appellant may obtain this information by contacting the Clerk. Pleadings and motions filed during the appeal in proceedings before the Board will be made part of the official case record of the OWCP.

(c) *Pleadings.* The Appellant, the Appellant's Representative and the Director may file pleadings supporting their position and presenting information, including but not limited to briefs, memoranda of law, memoranda of justification, and optional form AB-1. All pleadings filed must contain the docket number and be filed with the Clerk.

The Clerk will issue directions specifying the time allowed for any responses and replies.

(1) The Clerk will distribute copies of any pleading received by the Clerk to ensure that the Appellant, his or her Representative and the Director receive all pleadings. Any pleading should be submitted within 60 days of the filing of an appeal. The Board may, in its discretion, extend the time period for the submittal of any pleading.

(2) Proceedings before the Board are informal and there is no requirement that any pleading be filed. Failure to submit a pleading or to timely submit a pleading does not prejudice the rights of either the Appellant or the Director.

(3) Upon receipt of a pleading, the Appellant and the Director will have the opportunity to submit a response to the Board.

(d) *Motions.* Motions are requests for the Board to take specific action in a pending appeal. Motions include, but are not limited to, motions to dismiss, affirm the decision below, remand, request a substitution, request an extension of time, or other such matter as may be brought before the Board. Motions may be filed by the Appellant, the Appellant's Representative and the Director. The motion must be in writing, contain the docket number, state the relief requested and the basis for the relief requested, and be filed with the Clerk. Any motion received will be sent by the Clerk to ensure that the Appellant, his or her Representative and the Director receive all motions. The Clerk will issue directions specifying the timing of any responses and replies. The Board also may act on its own to issue direction in pending appeals, stating the basis for its determination.

(e) *Number of copies.* All filings with the Board, including any notice of appeal, pleading, or motion shall include an original and two (2) legible copies.

**§ 501.5 Oral argument.**

(a) *Oral argument.* Oral argument may be held in the discretion of the Board, on its own determination or on application by Appellant or the Director.

(b) *Request.* A request for oral argument must be submitted in writing to

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the Clerk. The application must specify the issue(s) to be argued and provide a statement supporting the need for oral argument. The request must be made no later than 60 days after the filing of an appeal. Any appeal in which a request for oral argument is not granted by the Board will proceed to a decision based on the case record and any pleadings submitted.

(c) *Notice of argument.* If a request for oral argument is granted, the Clerk will notify the Appellant and the Director at least 30 days before the date set for argument. The notice of oral argument will state the issues that the Board has determined will be heard.

(d) *Time allowed.* Appellant and any Representative for the Director shall be allowed no more than 30 minutes to present oral argument. The Board may, in its discretion, extend the time allowed.

(e) *Appearances.* An Appellant may appear at oral argument before the Board or designate a Representative. Argument shall be presented by the Appellant or a Representative, not both. The Director may be represented by an attorney with the Solicitor of Labor. Argument is limited to the evidence of record on appeal.

(f) *Location.* Oral argument is heard before the Board only in Washington, DC. The Board does not reimburse costs associated with attending oral argument.

(g) *Continuance.* Once oral argument has been scheduled by the Board, a continuance will not be granted except on a showing of good cause. Good cause may include extreme hardship or where attendance by an Appellant or Representative is mandated at a previously scheduled judicial proceeding. Any request for continuance must be received by the Board at least 15 days before the date scheduled for oral argument and be served by the requester upon Appellant and the Director. No request for a second continuance will be entertained by the Board. In such case, the appeal will proceed to a decision based on the case record. The Board may reschedule or cancel oral argument on its own motion at any time.

(h) *Nonappearance.* The absence of an Appellant, his or her Representative, or the Director at the time and place

set for oral argument will not delay the Board's resolution of an appeal. In such event, the Board may, in its discretion, reschedule oral argument, or cancel oral argument and treat the case as submitted on the case record.

### § 501.6 Decisions and orders.

(a) *Decisions.* A decision of the Board will contain a written opinion setting forth the reasons for the action taken and an appropriate order. The decision is based on the case record, all pleadings and any oral argument. The decision may consist of an affirmation, reversal or remand for further development of the evidence, or other appropriate action.

(b) *Panels.* A decision of not less than two judges will be the decision of the Board.

(c) *Issuance.* The date of the Board's decision is the date of issuance or such date as determined by the Board. Issuance is not determined by the postmark on any letter containing the decision or the date of actual receipt by Appellant or the Director.

(d) *Finality.* The decisions and orders of the Board are final as to the subject matter appealed, and such decisions and orders are not subject to review, except by the Board. The decisions and orders of the Board will be final upon the expiration of 30 days from the date of issuance unless the Board has fixed a different period of time therein. Following the expiration of that time, the Board no longer retains jurisdiction over the appeal unless a timely petition for reconsideration is submitted and granted.

(e) *Dispositive orders.* The Board may dispose of an appeal on a procedural basis by issuing an appropriate order disposing of part or all of a case prior to reaching the merits of the appeal. The Board may proceed to an order on its own or on the written motion of Appellant or the Director.

(f) *Service.* The Board will send its decisions and orders to the Appellant, his or her Representative and the Director at the time of issuance.

### § 501.7 Petition for reconsideration.

(a) *Time for filing.* The Appellant or the Director may file a petition for reconsideration of a decision or order

issued by the Board within 30 days of the date of issuance, unless another time period is specified in the Board's order.

(b) *Where to File.* The petition must be filed with the Clerk. Copies will be sent by the Clerk to the Director, the Appellant and his or her Representative in the time period specified by the Board.

(c) *Content of petition.* The petition must be in writing. The petition must contain the docket number, specify the matters claimed to have been erroneously decided, provide a statement of the facts upon which the petitioner relies, and a discussion of applicable law. New evidence will not be considered by the Board in a petition for reconsideration.

(d) *Panel.* The panel of judges who heard and decided the appeal will rule on the petition for reconsideration. If any member of the original panel is unavailable, the Chief Judge may designate a new panel member. The decision or order of the Board will stand as final unless vacated or modified by the vote of at least two members of the reconsideration panel.

(e) *Answer.* Upon the filing of a petition for reconsideration, Appellant or the Director may file an answer to the petition within such time as fixed by the Board.

(f) *Oral argument and decision on reconsideration.* An oral argument may be allowed at the discretion of the Board upon application of the Appellant or Director or the Board may proceed to address the matter upon the papers filed. The Board shall grant or deny the petition for reconsideration and issue such orders as it deems appropriate.

**§ 501.8 Clerk of the Office of the Appellate Boards; docket of proceedings; records.**

(a) *Location and business hours.* The Office of the Clerk of the Appellate Boards is located at 200 Constitution Avenue, NW., Washington, DC 20210. The Office of the Clerk is open during business hours on all days except Saturdays, Sundays and Federal holidays, from 8:30 a.m. to 5 p.m.

(b) *Docket.* The Clerk will maintain a docket containing a record of all proceedings before the Board. Each dock-

eted appeal will be assigned a number in chronological order based upon the date on which the notice of appeal is received. While the Board generally hears appeals in the order docketed, the Board retains discretion to change the order in which a particular appeal will be considered. The Clerk will prepare a calendar of cases submitted or awaiting oral argument and such other records as may be required by the Board.

(c) *Publication of decisions.* Final decisions of the Board will be published in such form as to be readily available for inspection by the general public.

**§ 501.9 Representation; appearances and fees.**

(a) *Representation.* In any proceeding before the Board, an Appellant may appear in person or by appointing a duly authorized individual as his or her Representative.

(1) *Counsel.* The designated Representative may be an attorney who has been admitted to practice and who is in good standing with any court of competent jurisdiction.

(2) *Lay representative.* A non-attorney Representative may represent an Appellant before the Board. He or she may be an accredited Representative of an employee organization.

(3) *Former members of the Board and other employees of the Department of Labor.* A former judge of the Board is not allowed to participate as counsel or other Representative before the Board in any proceeding until two years from the termination of his or her status as a judge of the Board. The practice of a former judge or other former employee of the Department of Labor is governed by 29 CFR Part 0, Subpart B.

(b) *Appearance.* No individual may appear as a Representative in a proceeding before the Board without first filing with the Clerk a written authorization signed by the Appellant to be represented. When accepted by the Board, such Representative will continue to be recognized unless the Representative withdraws or abandons such capacity or the Appellant directs otherwise.

(c) *Change of address.* Each Appellant and Representative authorized to appear before the Board must give the

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Clerk written notice of any change to the address or telephone number of the Appellant or Representative. Such notice must identify the docket number and name of each pending appeal for that Appellant, or, in the case of a Representative, in which he or she is a Representative before the Board. Absent such notice, the mailing of documents to the address most recently provided to the Board will be fully effective.

(d) *Debarment of Counsel or Representative.* In any proceeding, whenever the Board finds that a person acting as counsel or other Representative for the Appellant or the Director, is guilty of unethical or unprofessional conduct, the Board may order that such person be excluded from further acting as counsel or Representative in such proceeding. Such order may be appealed to the Secretary of Labor or his or her designee, but proceedings before the Board will not be delayed or suspended pending disposition of such appeal. However, the Board may suspend the proceeding of an appeal for a reasonable time for the purpose of enabling Appellant or the Director to obtain different counsel or other Representative. Whenever the Board has issued an order precluding a person from further acting as counsel or Representative in a proceeding, the Board will, within a reasonable time, submit to the Secretary of Labor or his or her designee a report of the facts and circumstances surrounding the issuance of such order. The Board will recommend what action the Secretary of Labor should take in regard to the appearance of such per-

son as counsel or Representative in other proceedings before the Board. Before any action is taken debarring a person as counsel or Representative from other proceedings, he or she will be furnished notice and the opportunity to be heard on the matter.

(e) *Fees for attorney, Representative, or other services.* No claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. Under 18 U.S.C. 292, collecting a fee without the approval of the Board may constitute a misdemeanor, subject to fine or imprisonment for up to a year or both. No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. No fee for service will be approved except upon written application to the Clerk, supported by a statement of the extent and nature of the necessary work performed before the Board on behalf of the Appellant. The fee application will be served by the Clerk on the Appellant and a time set in which a response may be filed. Except where such fee is *de minimis*, the fee request will be evaluated with consideration of the following factors:

- (1) Usefulness of the Representative's services;
- (2) The nature and complexity of the appeal;
- (3) The capacity in which the Representative has appeared;
- (4) The actual time spent in connection with the Board appeal; and
- (5) Customary local charges for similar services.

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