

DEPARTMENT OF LABOR**Employees' Compensation Appeals Board****20 CFR Part 501**

RIN 1290-AA22

Rules of Procedure

AGENCY: Employees' Compensation Appeals Board, Labor.

ACTION: Final rule.

SUMMARY: The Department of Labor (DOL or Department) is publishing this final rule to update the regulations providing for appeals before the Employees' Compensation Appeals Board (Board). The Board has jurisdiction over appeals arising under the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8149. This final rule updates the rules and guidance to all federal employees who seek to appeal from the decisions of the Office of Workers' Compensation Programs (OWCP) under FECA.

DATES: These regulations are effective November 19, 2008. These regulations are applicable to all Board appeals filed from OWCP decisions issued on and after November 19, 2008.

FOR FURTHER INFORMATION CONTACT: Alec J. Koromilas, Chairman and Chief Judge, Employees' Compensation Appeals Board, 200 Constitution Avenue, NW., Room S-5220, Washington, DC 20210; e-mail contact-oas@dol.gov; Telephone (202) 693-6406 (voice) (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION:**I. Current Regulations and Rulemaking History**

This rule implements updates and revisions to the Rules of Procedure for practice before the Employees' Compensation Appeals Board (Board). The Board was created by the Reorganization Plan No. 2 of 1946 and transferred to the Department of Labor in 1950 by Reorganization Plan No. 19 of 1950. See 5 U.S.C. 8145 notes. Under the Federal Employees' Compensation Act (FECA), the Secretary of Labor must provide for an Employees' Compensation Appeals Board "* * * with the authority to hear and, subject to applicable law and the rules and regulations of the Secretary, make final decisions on appeals taken from determinations and awards with respect to claims of employees." 5 U.S.C. 8149.

On June 20, 2008, the Board published a Notice of Proposed Rulemaking (NPRM), 73 FR 35102, proposing the first major revisions to its rules of procedure in 46 years.

This final rule adopts, for the most part, the provisions that were proposed in the June 20, 2008 NPRM. A few provisions have been modified in response to public comments, and a few additional edits have been made to clarify text, correct typographical errors, or make style consistent. A total of ten timely comments were received, two of which were later withdrawn by the commenter. Additionally, one untimely comment was received one day past the comment deadline. The discussion below in Section II, Section-By-Section Analysis of Comments and Revisions, identifies the significant issues raised in non-withdrawn comments, provides the Board's responses to those comments, and explains any resulting changes to the proposed rule. Except as specifically addressed in the Section-by-Section Analysis, the final rule adopts the proposed provisions and reasoning explained in the June 20, 2008 NPRM.

II. Section-by-Section Analysis of Comments and Revisions*Section 501.1 Definitions*

This section defines selected terms in this rule. The NPRM proposed to replace the term "party" with the terms "Director," "Appellant" and "Representative" in paragraphs (f), (g), and (h). The NPRM also proposed to incorporate the definition of "counsel" into the definition of "Representative" in the proposed paragraph (h). One comment was received regarding section 501.1 the day after the comment period closed. This comment, however, has been considered. The commenter, who described himself as a tribal court judge who also represents claimants before the Board, expressed concern that the breadth of the definition of counsel and attorney in subsection (h) was too narrow to include all attorneys in good standing to provide representation to claimants, and in particular to include members of tribal bars or those admitted to practice before tribal courts. To clarify this definition, and to specifically include the tribal bar and tribal court members referenced by the comment, the Board has amended the definition of representative in section 501.1(h) to include any individual "who is admitted to practice and is in good standing with any court of competent jurisdiction." The language in section 501.9(a)(1) has been similarly revised for consistency in this rule.

No other comments were received regarding section 501.1, and in all other respects (except for grammatical corrections to subsections (h) and (j)), section 501.1 is adopted as proposed in the NPRM and for the reasons identified in the NPRM.

Section 501.2 Scope and Applicability of Rules; Compensation and Jurisdiction of the Board

The NPRM proposed clarifications and updates to this section. No comments were received concerning section 501.2. Accordingly, section 501.2 is adopted in the final rule as proposed for the reasons identified in the NPRM.

Section 501.3 Notice of Appeal

Section 501.3 clarifies the requirements for a Notice of Appeal. Four comments were received regarding this section.

Paragraph (e) to the NPRM proposed that 180 days would be provided for the filing of all appeals, regardless of where the Appellant lives. The 180 day filing window is a change from the current rule, which provides a filing window of 90 days for persons living in the United States or Canada, and 180 days for persons living outside the United States or Canada. Additionally, paragraph (e) proposed that should compelling circumstances prevent an Appellant from meeting this 180-day limitation, the Board would have retained discretion to extend this time period, but only on specific application to the Board and upon satisfactory demonstration of "compelling circumstances."

An administrative law representative who appears before the Board requested clarification regarding whether "the time limitation of an automatic one year for filing [an appeal before the Board] is to be discontinued." The current regulation at 20 CFR 501.3(d)(2) does not provide an "automatic" one-year time period to file an appeal with the Board. Rather, it provides that, "[f]or good cause shown," the Board in its discretion may waive a failure to appeal within the current 90 or 180 day window, "but for no longer than one year from the date of issuance of the final decision of the Director." The NPRM acknowledged that the "good cause" standard has not been enforced in practice, and stated that the proposed new standard was intended to provide an "objective standard" as a substitute. By defining compelling circumstances as those circumstances beyond the Appellant's control, by explicitly stating that compelling circumstances do not include "any delay caused by the failure

of an individual to exercise due diligence in submitting a notice of appeal," and by stating that appeals "must" be filed within 180 days, the NPRM proposed a new rule of procedure that would depart from and supersede any past practice in this area. To further address this comment, the Board has more fully articulated that compelling circumstances mean circumstances beyond the Appellant's control "that prevent the timely filing of an appeal," expanding the language of the final rule to demonstrate that "compelling circumstances" is meant to represent a more stringent standard than under the current rule. For example, "compelling circumstances" could include a medical condition that renders the Appellant incompetent or military service in a war zone that prevents the timely filing of an appeal. Therefore, any past practice of effectively providing one year for filing an appeal by not enforcing the regulatory requirement that Appellants show good cause for failure to file within 90 days is discontinued by this final rule.

Another individual commented that 90 days is ample time for the filing of an appeal worldwide and that to provide a 180-day appeal window further overburdens an already overburdened system. As just discussed, the Board's changes to this regulation discontinue the current practice of generally permitting one year for filing appeals. Thus adoption of a uniform 180-day timeframe will effectively reduce the time to appeal, which is the practical result sought by the commenter, while still giving claimants and their representatives adequate time to file an appeal. The Board believes that a 180-day time limit to appeal an OWCP decision strikes the appropriate balance between the 90-day and one-year periods provided by the combination of the current rules and current practice, creating a more efficient uniform time frame and still providing ample time for all claimants to exercise their appellate rights.

The commenter also recommended that the Board provide a clear statement that its decisions are final. We have considered this comment, but have not changed the rule in the manner requested, because 5 U.S.C. 8149 of the FECA clearly states that the decisions of the Board are final.

Section 501.3(f) proposed amending the date of filing requirements. The proposed language acknowledged that Appellants could file appeals using commercial delivery services or the U.S. Postal Service, but provided that the date of receipt by the Clerk would be

used to determine timeliness in all cases except where USPS mailing services were used. In that circumstance, the Board would continue to look to the date of mailing to establish timeliness if the date of receipt by the Clerk would make the appeal untimely. An administrative law representative questioned this differentiation in treatment between documents delivered by USPS and other commercial carriers, contending that tracking documentation can also be provided when commercial carriers are used. The Board has considered the points raised by this comment and has revised subsection (f)(1) in the final rule to provide that documentation from either the USPS or a commercial carrier can be used to determine whether the appeal is timely. A USPS postmark or "other carriers' date markings" will be considered only where an appeal is addressed and sent directly to the Board as set forth in these rules; this provision does not apply where Board appeals are mistakenly sent to an improper place (for example, OWCP, Congressional offices, and the employing agency). Where the Board has received appeals by any method other than USPS or commercial carrier, the Clerk's receipt will be used to determine timeliness.

Paragraph (h) in the NPRM proposed to amend the procedures used by the Clerk upon receipt of an incomplete appeal and clarify that it is the Clerk who will specify a reasonable time for an Appellant to submit all required information missing from an appeal. A comment by the administrative law representative expressed concern that "reasonable time" is not adequately defined, and sought a more specific definition to insure there would be no abuse of discretion. While the Board considered this comment, the Board determined that the procedures proposed in the NPRM are reasonable and adequate. The Board did not set a fixed time for submission of missing information because the scope and volume of missing information varies, and the Board intends to allow the Clerk flexibility to work with Appellants to perfect their appeals, or clarify the status of their appeal requests.

After reviewing all the comments regarding section 501.3, the Board has revised §§ 501.3(e) and (f)(1) as noted above, and included minor language changes to this section to create consistency in style or clarify the text. In all other respects, section 501.3 is adopted as proposed and justified in the NPRM.

Section 501.4 Case Record; Inspection; Submission of Pleadings and Motions

Section 501.4 contains clarifications regarding inspection of the Board's docket and the procedures for submitting pleadings and motions for consideration by the Board during the pendency of an appeal. No comments were received regarding this section. Accordingly, section 501.4 is adopted in the final rule as proposed.

Section 501.5 Oral Argument

Section 501.5, in its current and proposed form, contains the procedures for requesting and conducting oral arguments. The NPRM in paragraph (a) provided that the granting of oral argument is within the discretion of the Board and not automatically scheduled upon the request of an Appellant or the Director. A Federal employee objected to this change in the availability of oral argument, contending that this would be a "serious diminishment in a basic tenant [sic] in our adversarial system" for federal employees who bring their appeals before the Board. Contrary to the view expressed in this comment, proceedings under the FECA are not adversarial in nature. See, e.g., *Owens v. Brock*, 860 F.2d 1363, 1367 (6th Cir. 1988); *William B. Webb*, 56 ECAB 156, 159 (2004); *Norman M. Perras*, 49 ECAB 191, 193(1997); see also 20 CFR 10.11(b). While the Board acknowledges that oral argument in some instances can provide the Board valuable assistance in addressing and evaluating the issues presented on appeal, the Board has concluded that the automatic availability of oral argument on request of an Appellant or the Director is not always necessary. To best use Board resources, this final rule provides the opportunity for Appellants to request oral argument should their case present, for example, an issue not previously considered by the Board, or a perceived conflict between Board decisions on similar issues. Appellants seeking oral argument must follow the procedure in § 501.5(b) to identify the need for oral argument.

After reviewing the above comment, the Board has determined that no changes are necessary to the language proposed for this section. Accordingly, section 501.5 is adopted in the final rule as proposed in the NPRM.

Section 501.6 Decisions and Orders

This section contains the Board's practice in the issuance of decisions and orders. No comments were received regarding this section. Accordingly, section 501.6 is adopted in the final rule as proposed.

Section 501.7 *Petition for Reconsideration*

Section 501.7 provides the Board's practice and procedures regarding requests for reconsideration. No comments were received regarding this section. Accordingly, section 501.7 is adopted in the final rule as proposed.

Section 501.8 *Clerk of the Office of the Appellate Boards; Docket of Proceedings; Records*

Section 501.8 provides information regarding the Clerk's office, the docket and record maintained by the Board. No comments were received regarding this section. Accordingly, section 501.8 is adopted in the final rule as proposed.

Section 501.9 *Representation; Appearances and Fees*

Section 501.9 incorporates and expands upon who may represent a claimant before the Board, and what fees they may charge. In the NPRM, subsection (a)(1) defined counsel as "an attorney who has been admitted to practice before the Supreme Court of the United States or the highest court of any state, the District of Columbia, or a United States territory and who is in good standing with that bar." The commenter, who described himself as a tribal court judge who also acts as a claimant's representative, expressed concern that the definition of "counsel" was too narrow. For the reasons discussed in relation to 501.1, the Board has amended the definition of representative in section 501.9(a)(1) to include any individual "who is admitted to practice and is in good standing with any court of competent jurisdiction." The NPRM and this final rule allow an Appellant to be represented in a proceeding before the Board not only by an attorney, but alternatively by a lay representative.

A commenter who represented Appellants before the Board urged the Board to expand the definition of counsel under subsection (a) to include "law firms instead of limiting representation purely to individual attorneys." The commenter noted that an expanded definition of representative will make it easier for law firms to continue representation when a designated attorney is ill, on vacation, or otherwise unavailable. The Board considered this comment but does not believe that a change in the language of the rule is necessary. The Board recognizes that if the representative of record is a member of a law firm, the representative may look to another member of his or her firm to provide services, particularly if the

representative is temporarily unavailable. Nothing in this rule prevents this practice.

Another comment received from an administrative law representative questioned whether the statement in subsection (a)(2) that a lay representative "may be an accredited Representative of an employee organization" was intended to exclude all others from the role of "Law Representatives" authorized by the rule. It was not. The referenced language merely provides an example of one type of lay representative that may appear before the Board. The first sentence in subsection (a)(2)—"A non-attorney Representative may represent an Appellant before the Board"—is all inclusive and does not restrict an Appellant from representation by anyone of his or her choosing.

Proposed § 501.9(e) clarified the requirements regarding review of all fee applications to ensure that Appellants are aware of and understand the mandatory requirement for Board consideration and approval of any Representative or attorney fee. A representative who practices before the Board contended that the language "in connection with a proceeding before the Board" is misleading. Arguing that all proceedings following an appeal to the Board have a "connection" with the Board, this commenter questioned whether the Board intended to review all fee requests, even for work before the OWCP following disposition of an appeal. The Board does not. Approval of fee requests for representative services before OWCP must be submitted directly to OWCP for consideration under OWCP's own regulations (see 20 CFR Part 10) and are not the subject of this rule. To ensure that this intent is clearly articulated in this subsection, the Board has revised the language in the final rule to read "performed on appeal before the Board."

Paragraph (e) also expands the list of factors that the Board will evaluate when reviewing fee requests. One commenter questioned the meaning of "de minimis" in regard to the Board's consideration of fees charged, contending that the term is vague and undefined. Determinations regarding what fees constitute "de minimis" charges will be made on a case-by-case basis with the understanding that the term "de minimis" connotes a minimal or nominal fee. See, e.g., *Black's Law Dictionary*, 464 (8th ed. 2004). For example, if an attorney charged a nominal flat-rate fee for all of his or her services before the Board, the fee request would not be denied by the Board solely because it lacked an hourly

breakdown. Appeals brought before the Board vary widely in complexity as well as the extent of representation provided to Appellants. Customary charges also vary by locality and the expertise the representative provides. The final rule therefore provides for this process and specifies that all fees proposed by any representative with respect to an appeal must be filed with the Board for consideration and approval.

The commenter also advocated that the Board utilize the provisions of 38 U.S.C. 5904, which recognizes a 20% contingency fee as reasonable in veterans' cases before the Department of Veterans Affairs (VA). The commenter further contended that the requirement to submit fee requests for the Board's approval is "discriminatory" in that it sets a different fee review policy than utilized by the VA. Review and approval by the Secretary of Labor of fee requests are specifically required by FECA. The provisions of 5 U.S.C. 8127 are controlling in consideration of representative fees in appeals brought before the Board under FECA. That provision specifies that "(a) A claimant may authorize an individual to represent him in any proceeding under this subchapter before the Secretary of Labor. (b) A claim for legal or other services furnished in respect to a case, claim, or award for compensation under this subchapter is valid only if approved by the Secretary." The Board has found that the use of contingency fees by attorneys handling FECA claims before OWCP is not in keeping with section 8127. In *Angela M. Sanden*, Docket No. 04-1632 (issued September 20, 2004), the representative's contingency fee arrangement was held to be illegal, and the representative directed to calculate the money owed for services rendered on an hourly basis. Furthermore, the provisions of FECA are controlling for fees resulting from Board proceedings, not those governing another Federal agency whose decisions are not binding on the Board. *Hazelee K. Anderson*, 37 ECAB 277 (1986). Thus, no changes to the final rule have been made as a result of the Board's consideration of this comment.

Another claimant's representative who appears before the Board commented that section 501.9 should be expanded to allow for law firms to bill for the services of paralegals and other experts, to supplement and support the work of the individual identified as the Appellant's Representative of record. These charges, as well as related services, are among those envisioned in FECA as "other services furnished in respect to a case, claim or award" under 5 U.S.C. 8127(b), as they are specifically

performed and billed for work on the individual case for which a fee approval is requested by an attorney or a lay representative. The Board will consider such fee requests for work performed on appeal under subsection (e)(5), which allows consideration of "customary local charges."

In addition to the revisions discussed above to section 501.9, the text of subsection (d) was clarified to address an internal inconsistency in the NPRM. In all other respects, the final rule is identical to the rule proposed in the NPRM.

III. Regulatory Procedures

Executive Order 12866

The Department is issuing this final rule in conformance with Executive Order 12866. The Department has determined that this rule does not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs; nor will it have an annual effect on the economy of \$100 million or more; nor will it adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities in any material way. Furthermore, it does not raise a novel legal or policy issue arising out of legal mandates, the President's priorities or the principles set forth in the Executive Order. This rulemaking is therefore not significant under Executive Order 12866.

Regulatory Flexibility Act of 1980

This final rule has been thoroughly reviewed in accordance with the Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601–612. The Department has determined that the final rule does not involve any regulatory and informational requirements regarding businesses, organizations, and governmental jurisdictions subject to regulation.

Paperwork Reduction Act (PRA)

The Department has determined that this rule is not subject to the requirements of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, as this rulemaking involves administrative actions to which the Federal government is a party and that occur after an administrative case file has been opened regarding a particular individual. See 5 CFR 1320.4(a)(2), (c).

Unfunded Mandates Reform

Unfunded Mandates Reform Act of 1995—This rule does not include any

Federal mandate that may result in increased expenditures by State, local, and tribal governments, in the aggregate, of \$100 million or more, or increased expenditures by the private sector of \$100 million or more.

Executive Order 12875—This rule does not create an unfunded Federal mandate upon any State, local or tribal governments.

The Privacy Act of 1974, 5 U.S.C. 552a, as Amended

The Department has determined this rule does not require that any new information be processed, filed or collected during an appeal before the Board under the Privacy Act, 5 U.S.C. 552a. Therefore, this rule does not require revision of the current Privacy Act System of Records, DOL/GOVT–1, Office of Workers' Compensation Programs, Federal Employees' Compensation Act File, 67 FR 16826 (April 8, 2002) and DOL/ECAB–1, Employees' Compensation Appeals Board Docket Records, 67 FR 16867 (April 8, 2002).

List of Subjects in 20 CFR Part 501

Administrative practice and procedure, Workers' compensation.

Signed at Washington, DC, on October 6, 2008.

Howard M. Radzely,

Deputy Secretary, U.S. Department of Labor.

■ For the reasons set forth in the preamble, 20 CFR Part 501 is hereby revised to read as follows:

PART 501—RULES OF PROCEDURE

Sec.

- 501.1 Definitions.
- 501.2 Scope and applicability of rules; composition and jurisdiction of the Board.
- 501.3 Notice of appeal.
- 501.4 Case record; inspection; submission of pleadings and motions.
- 501.5 Oral argument.
- 501.6 Decisions and orders.
- 501.7 Petition for reconsideration.
- 501.8 Clerk of the Office of the Appellate Boards; docket of proceedings; records.
- 501.9 Representation; appearances and fees.

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

§ 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.

§ 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 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 docketed 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 Fee.

(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 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 person 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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DEPARTMENT OF STATE

22 CFR Parts 7 and 50

[Public Notice: 6398]

Board of Appellate Review; Review of Loss of Nationality

AGENCY: State Department.

ACTION: Final rule.

SUMMARY: This rule eliminates the Department's Board of Appellate Review (L/BAR), which had been authorized to review certain Department determinations, in particular those related to loss of citizenship and passport denials. Because L/BAR's jurisdiction has been superseded or made obsolete, and in large part replaced by review of loss of citizenship and passport matters by the Bureau of Consular Affairs, this rule eliminates L/BAR and authorizes on a discretionary basis an alternative, less cumbersome review of loss of nationality determinations by the Bureau of Consular Affairs.

DATES: This rule is effective October 20, 2008.

FOR FURTHER INFORMATION CONTACT: Monica A. Gaw, Office of Policy Review and InterAgency Liaison, Overseas Citizens Services, who may be reached at (202) 736-9110, e-mail GAWMA@state.gov.

SUPPLEMENTARY INFORMATION: The Department published an interim final rule, Public Notice 6298 at 73 FR 41256 (July 18, 2008), with 60 days for post-promulgation comment, amending 22 CFR by removing the regulations in Part