

## § 801.401

Saturdays, Sundays, and legal holidays, for the purpose of receiving notices of appeal, petitions for review, other pleadings, motions, and other papers.

### REPRESENTATION

#### § 801.401 Representation before the Board.

On any issues requiring representation of the Secretary, the Director, Office of Workers' Compensation Programs, a deputy commissioner, or an administrative law judge before the Board, such representation shall be provided by attorneys designated by the Solicitor of Labor. Representation of all other persons before the Board shall be as provided by the rules of practice and procedure promulgated under § 801.302 (see part 802 of this chapter).

#### § 801.402 Representation of Board in court proceedings.

Except in proceedings in the Supreme Court of the United States, any representation of the Benefits Review Board in court proceedings shall be by attorneys designated by the Solicitor of Labor.

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AUTHORITY: 5 U.S.C. 301; 30 U.S.C. 901 *et seq.*; 33 U.S.C. 901 *et seq.*; Reorganization Plan

No. 6 of 1950, 15 FR 3174; Secretary of Labor's Order 03-2006, 71 FR 4219, January 25, 2006.

SOURCE: 52 FR 27292, July 20, 1987, unless otherwise noted.

## Subpart A—General Provisions

### INTRODUCTORY

#### § 802.101 Purpose and scope of this part.

(a) The purpose of part 802 is to establish the rules of practice and procedure governing the operation of the Benefits Review Board.

(b) Except as otherwise provided, the rules promulgated in this part apply to all appeals taken by any party from decisions or orders with respect to claims for compensation or benefits under the following Acts:

(1) The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*;

(2) The Defense Base Act (DBA), 42 U.S.C. 1651 *et seq.*;

(3) The District of Columbia Workmen's Compensation Act (DCWCA), 36 D.C. Code 501 *et seq.* (1973);

(4) The Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.*;

(5) The Nonappropriated Fund Instrumentalities Act (NFIA), 5 U.S.C. 8171 *et seq.*;

(6) Title IV, section 415 and part C of the Federal Mine Safety and Health Act of 1977, Public Law 95-164, 91 Stat. 1290 (formerly the FCMHSA of 1969), as amended by the Black Lung Benefits Reform Act of 1977, Public Law 95-239, 92 Stat. 95, the Black Lung Benefits Revenue Act of 1977, Public Law 95-229, 92 Stat. 11, and the Black Lung Benefits Amendments of 1981, Public Law 97-119, 95 Stat. 1643 (30 U.S.C. 901 *et seq.*).

#### § 802.102 Applicability of part 801 of this chapter.

Part 801 of this chapter VII sets forth rules of general applicability covering the composition, authority, and operation of the Benefits Review Board and definitions applicable to this chapter. The provisions of part 801 of this chapter are fully applicable to this part 802.

#### § 802.103 Powers of the Board.

(a) *Conduct of proceedings.* Pursuant to section 27(a) of the LHWCA, the Board shall have power to preserve and enforce order during any proceedings for determination or adjudication of entitlement to compensation or benefits or for liability for payment thereof, and to do all things in accordance with law which may be necessary to enable the Board to effectively discharge its duties.

(b) *Contumacy.* Pursuant to section 27(b) of the LHWCA, if any person in proceedings before the Board disobeys or resists any lawful order or process, or misbehaves during a hearing or so near the place thereof as to obstruct the same, the Board shall certify the facts to the Federal district court having jurisdiction in the place in which it is sitting (or to the U.S. District Court for the District of Columbia if it is sitting in the District) which shall thereupon in a summary manner hear the evidence as to the acts complained of, and if the evidence so warrants, punish such person in the same manner and to the same extent as for a contempt committed before the court, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process or in the presence of the court.

#### § 802.104 Consolidation; severance.

(a) Cases may, in the sole discretion of the Board, be consolidated for purposes of an appeal upon the motion of any party or upon the Board's own motion where there exist common parties, common questions of law or fact or both, or in such other circumstances as justice and the administration of the Acts require.

(b) Upon its own motion, or upon motion of any party, the Board may, for good cause, order any proceeding severed with respect to some or all issues or parties.

#### § 802.105 Stay of payment pending appeal.

(a) As provided in section 14(f) of the LHWCA and sections 415 and 422 of the Black Lung Benefits Act, the payment of the amounts required by an award of compensation or benefits shall not be stayed or in any way delayed beyond

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ten days after it becomes due pending final decision in any proceeding before the Board unless so ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer, coal mine operator or insurance carrier. Any order of the Board permitting any stay shall contain a specific finding, based upon evidence submitted to the Board and identified by reference thereto, that irreparable injury would result to such employer, operator or insurance carrier, and specify the nature and extent of the injury.

(b) When circumstances require, the Board, in its discretion, may issue a temporary order not to exceed 30 days granting a motion for stay of payment prior to the expiration of the ten-day period allowed for filing responses to motions pursuant to § 802.219(e). Following receipt of a response to the motion or expiration of the response time provided in § 802.219(e), the Board will issue a subsequent order ruling on the motion for stay of payment.

[52 FR 27292, July 20, 1987, as amended at 53 FR 16519, May 9, 1988]

### Subpart B—Prereview Procedures

#### COMMENCING APPEAL: PARTIES

#### § 802.201 Who may file an appeal.

(a) *A party.* (1) Any party or party-in-interest adversely affected or aggrieved by a decision or order issued pursuant to one of the Acts over which the Board has appellate jurisdiction may appeal a decision or order of an administrative law judge or deputy commissioner to the Board by filing a notice of appeal pursuant to this subpart. (See § 802.205(b) and (c) for exceptions to this general rule.) A party who files a notice of appeal shall be deemed the petitioner. The Director, OWCP, when acting as a representative of the Special Fund established under the Longshore and Harbor Workers' Compensation Act or the Black Lung Disability Trust Fund established by the Black Lung Benefits Act, or, when appealing a decision or order which affects the administration of one of the Acts, shall be considered a party adversely affected.

(2) When a decision or order is favorable to a party (*i.e.*, the prevailing

party), the prevailing party may file a cross-appeal pursuant to § 802.205(b) to challenge any adverse findings of fact or conclusions of law in the same proceeding.

(b) *Representative parties.* In the event that a party has not attained the age of 18, is not mentally competent, or is physically unable to file and pursue or defend an appeal, the Board may permit any legally appointed guardian, committee, or other appropriate representative to file and pursue or defend the appeal, or it may in its discretion appoint such representative for purposes of the appeal. The Board may require any legally appointed representative to submit evidence of that person's authority.

#### § 802.202 Appearances by attorneys and other authorized persons; denial or authority to appear.

(a) *Appearances.* Any party or intervenor or any representative duly authorized pursuant to § 802.201(b) may appear before and/or submit written argument to the Board by attorney or any other person, including any representative of an employee organization, duly authorized pursuant to paragraph (d)(2) of this section.

(b) Any individual petitioner or respondent or his duly authorized representative pursuant to § 802.201(b) or an officer of any corporate party or a member of any partnership or joint venture which is a party may participate in the appeal on his or her own behalf, or on behalf of such business entity.

(c) For each instance in which appearance before the Board is made by an attorney or duly authorized person other than the party or his legal guardian, committee, or representative, there shall be filed with the Board a notice of appearance. Any attorney or other duly authorized person of record who intends to withdraw from representation shall file prior written notice of intent to withdraw from representation of a party or of substitution of counsel or other representative.

(d) *Qualifications*—(1) *Attorneys.* An attorney at law who is admitted to practice before the Federal courts or before the highest court of any State,

the District of Columbia, or any territory or commonwealth of the United States, may practice before the Board unless he or she has been disqualified from representing claimants under the Act pursuant to 33 U.S.C. 931(b)(2)(C), or unless authority to appear has been denied pursuant to §802.202(e)(1) and (3). An attorney's own representation that he or she is in good standing before any of such courts shall be sufficient proof thereof, unless otherwise ordered by the Board.

(2) *Persons not attorneys.* Any person who is not an attorney at law may be admitted to appear in a representative capacity unless he or she has been disqualified from representing claimants under the Act pursuant to 33 U.S.C. 931(b)(2)(C). An application by a person not an attorney at law for admission to appear in a proceeding shall be submitted in writing to the Board at the time such person's appearance is entered. The application shall state such person's name, address, telephone number, general education, any special training or experience in claims representation, and such person's relationship, if any, to the party being represented. The Board may, at any time, make further inquiry as to the qualification or ability of such person to render assistance. In the event of a failure to make application for admission to appear, the Board shall issue an order to show cause why admission to appear should not be denied. Admission to appear in a particular case shall not be deemed a blanket authorization to appear in other cases.

(e) *Denial of authority to appear—(1) Attorneys.* The Board may deny the privilege of appearing to any attorney, within applicable statutory constraints, e.g., 5 U.S.C. 555, who has been disbarred or suspended from the practice of law; who has surrendered his or her license while under investigation or under threat of disciplinary action; or who, after notice of an opportunity for hearing in the matter is found by the Board to have engaged in any conduct which would result in the loss of his or her license. No provision hereof shall apply to any attorney who appears on his or her own behalf.

(2) *Persons not attorneys.* The Board may deny the privilege of appearing to

any person who, in the Board's judgment, lacks sufficient qualification or ability to render assistance. No provision hereof shall apply to any person who appears on his or her own behalf.

(3) Denial of authority to appear may be considered, after notice of and opportunity for a hearing, by the panel (constituted pursuant to §801.301) which is assigned to decide the appeal in which the attorney or other person has entered an appearance. If such proceeding reveals facts suggesting that one of the circumstances described in 33 U.S.C. 931(b)(2)(C) exists, the Board shall refer that information to the Director, OWCP, for further proceedings pursuant to 33 U.S.C. 931(b)(2)(C) and 907(j). An attorney or other person may appeal a panel's decision to deny authority to appear to the entire permanent Board sitting en banc.

[52 FR 27292, July 20, 1987, as amended at 53 FR 16519, May 9, 1988]

#### § 802.203 Fees for services.

(a) No fee for services rendered on behalf of a claimant in the successful pursuit or successful defense of an appeal shall be valid unless approved pursuant to 33 U.S.C. 928, as amended.

(b) All fees for services rendered in the successful pursuit or successful defense of an appeal on behalf of a claimant shall be subject to the provisions and prohibitions contained in 33 U.S.C. 928, as amended.

(c) Within 60 days of the issuance of a decision or non-interlocutory order by the Board, counsel or, where appropriate, representative for any claimant who has prevailed on appeal before the Board may file an application with the Board for a fee. Where the Board remands the case and the administrative law judge on remand issues an award, a fee petition may be filed within 60 days of the decision on remand. In the event that a claimant who was unsuccessful before the Board prevails on appeal to the court of appeals, his or her representative may within 60 days of issuance of the court's judgment file a fee application with the Board for services performed before the Board.

(d) A fee application shall include only time spent on services performed while the appeal was pending before the Board and shall be complete in all

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respects, containing all of the following specific information:

(1) A complete statement of the extent and character of the necessary work done;

(2) The professional status of each person for whom a fee is claimed who performed services on behalf of the claimant (if such professional status is other than attorney, a definition of the professional status of such individual must be included in the fee petition, including a statement of that individual's professional training, education and experience) and a statement that the attorney was a member in good standing of a state bar at the time the services were performed;

(3) The number of hours, in  $\frac{1}{4}$  hour increments, devoted by each person who performed services on behalf of the claimant and the dates on which such services were performed in each category of work;

(4) The normal billing rate for each person who performed services on behalf of the claimant. The rate awarded by the Board shall be based on what is reasonable and customary in the area where the services were rendered for a person of that particular professional status.

(e) Any fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, the amount of benefits awarded, and, when the fee is to be assessed against the claimant, shall also take into account the financial circumstances of the claimant. A fee shall not necessarily be computed by multiplying time devoted to work by an hourly rate.

(f) No contract pertaining to the amount of a fee shall be recognized.

(g) A fee application shall be served on all other parties and accompanied by a certificate of service. The Board will not take action on the fee application until such service is effected. Any party may respond to the application within 10 days of receipt of the application. The response shall be filed with the Board and served on all other parties.

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### NOTICE OF APPEAL

#### § 802.204 Place for filing notice of appeal and correspondence.

Any notice of appeal or other correspondence filed by mail shall be sent to the U.S. Department of Labor, Benefits Review Board, ATTN: Office of the Clerk of the Appellate Boards (OCAB), 200 Constitution Ave. NW, Washington, DC 20210-0001. Notices of appeal or other correspondence may be otherwise presented to the Clerk. A copy of the notice of appeal shall be served on the deputy commissioner who filed the decision or order being appealed and on all other parties by the party who files a notice of appeal. Proof of service of the notice of appeal on the deputy commissioner and other parties shall be included with the notice of appeal.

[83 FR 8173, Feb. 26, 2018]

#### § 802.205 Time for filing.

(a) A notice of appeal, other than a cross-appeal, must be filed within 30 days from the date upon which a decision or order has been filed in the Office of the Deputy Commissioner pursuant to section 19(e) of the LHWCA or in such other office as may be established in the future (see §§ 702.349 and 725.478 of this title).

(b) If a timely notice of appeal is filed by a party, any other party may initiate a cross-appeal by filing a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time prescribed by paragraph (a) of this section, whichever period last expires. In the event that such other party was not properly served with the first notice of appeal, such party may initiate a cross-appeal by filing a notice of appeal within 14 days of the date that service is effected.

(c) Failure to file within the period specified in paragraph (a) or (b) of this section (whichever is applicable) shall foreclose all rights to review by the Board with respect to the case or matter in question. Any untimely appeal will be summarily dismissed by the Board for lack of jurisdiction.

**§ 802.206 Effect of motion for reconsideration on time for appeal.**

(a) A timely motion for reconsideration of a decision or order of an administrative law judge or deputy commissioner shall suspend the running of the time for filing a notice of appeal.

(b)(1) In a case involving a claim filed under the Longshore and Harbor Workers' Compensation Act or its extensions (see § 802.101(b)(1)–(5)), a timely motion for reconsideration for purposes of paragraph (a) of this section is one which is filed not later than 10 days from the date the decision or order was filed in the Office of the Deputy Commissioner.

(2) In a case involving a claim filed under title IV of the Federal Mine Safety and Health Act, as amended (see § 802.101(b)(6)), a timely motion for reconsideration for purposes of paragraph (a) of this section is one which is filed not later than 30 days from the date the decision or order was served on all parties by the administrative law judge and considered filed in the Office of the Deputy Commissioner (see §§ 725.478 and 725.479(b), (c) of this title).

(c) If the motion for reconsideration is sent by mail and the fixing of the date of delivery as the date of filing would result in a loss or impairment of reconsideration rights, it will be considered to have been filed as of the date of mailing. The date appearing on the U.S. Postal Service postmark (when available and legible) shall be prima facie evidence of the date of mailing. If there is no such postmark or it is not legible, other evidence such as, but not limited to, certified mail receipts, certificates of service and affidavits may also be used to establish the mailing date.

(d) If a motion for reconsideration is granted, the full time for filing an appeal commences on the date the subsequent decision or order on reconsideration is filed as provided in § 802.205.

(e) If a motion for reconsideration is denied, the full time for filing an appeal commences on the date the order denying reconsideration is filed as provided in § 802.205.

(f) If a timely motion for reconsideration of a decision or order of an administrative law judge or deputy commissioner is filed, any appeal to the

Board, whether filed prior to or subsequent to the filing of the timely motion for reconsideration, shall be dismissed without prejudice as premature. Following decision by the administrative law judge or deputy commissioner pursuant to either paragraph (d) or (e) of this section, a new notice of appeal shall be filed with the Clerk of the Board by any party who wishes to appeal. During the pendency of an appeal to the Board, any party having knowledge that a motion for reconsideration of a decision or order of an administrative law judge or deputy commissioner has been filed shall notify the Board of such filing.

**§ 802.207 When a notice of appeal is considered to have been filed in the office of the Clerk of the Board.**

(a) *Date of receipt.* (1) Except as otherwise provided in this section, a notice of appeal is considered to have been filed only as of the date it is received in the office of the Clerk of the Board.

(2) Notices of appeal submitted to any other agency or subdivision of the Department of Labor or of the U.S. Government or any State government shall be promptly forwarded to the office of the Clerk of the Board. The notice shall be considered filed with the Clerk of the Board as of the date it was received by the other governmental unit if the Board finds that it is in the interest of justice to do so.

(b) *Date of mailing.* If the notice of appeal is sent by mail and the fixing of the date of delivery as the date of filing would result in a loss or impairment of appeal rights, it will be considered to have been filed as of the date of mailing. The date appearing on the U.S. Postal Service postmark (when available and legible) shall be prima facie evidence of the date of mailing. If there is no such postmark or it is not legible, other evidence, such as, but not limited to, certified mail receipts, certificate of service and affidavits, may be used to establish the mailing date.

**§ 802.208 Contents of notice of appeal.**

(a) A notice of appeal shall contain the following information:

(1) The full name and address of the petitioner;

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(2) The full name of the injured, disabled, or deceased employee;

(3) The full names and addresses of all other parties, including, among others, beneficiaries, employers, coal mine operators, and insurance carriers where appropriate;

(4) The case file number which appears on the decision or order of the administrative law judge;

(5) The claimant's OWCP file number;

(6) The date of filing of the decision or order being appealed;

(7) Whether a motion for reconsideration of the decision or order of the administrative law judge has been filed by any party, the date such motion was filed, and whether the administrative law judge has acted on such motion for reconsideration (see § 802.206);

(8) The name and address of the attorney or other person, if any, who is representing the petitioner.

(b) Paragraph (a) of this section notwithstanding, any written communication which reasonably permits identification of the decision from which an appeal is sought and the parties affected or aggrieved thereby, shall be sufficient notice for purposes of § 802.205.

(c) In the event that identification of the case is not possible from the information submitted, the Clerk of the Board shall so notify the petitioner and shall give the petitioner a reasonable time to produce sufficient information to permit identification of the case. For purposes of § 802.205, the notice shall be deemed to have been filed as of the date the insufficient information was received.

## **§ 802.209 Transmittal of record to the Board.**

Upon receipt of a copy of the notice of appeal or upon request of the Board, the deputy commissioner or other office having custody of such record shall immediately forward to the Clerk of the Board the official record of the case, which record includes the transcript or transcripts of all formal proceedings with exhibits, all decisions and orders rendered in the case.

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### **INITIAL PROCESSING**

## **§ 802.210 Acknowledgment of notice of appeal.**

Upon receipt by the Board of a notice of appeal, the Clerk of the Board shall as expeditiously as possible notify the petitioner and all other parties and the Solicitor of Labor, in writing, that a notice of appeal has been filed.

## **§ 802.211 Petition for review.**

(a) Within 30 days after the receipt of an acknowledgment of a notice of appeal issued pursuant to § 802.210, the petitioner shall submit a petition for review to the Board which petition lists the specific issues to be considered on appeal.

(b) Each petition for review shall be accompanied by a supporting brief, memorandum of law or other statement which: Specifically states the issues to be considered by the Board; presents, with appropriate headings, an argument with respect to each issue presented with references to transcripts, pieces of evidence and other parts of the record to which the petitioner wishes the Board to refer; a short conclusion stating the precise result the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result. The Longshore Desk Book and Black Lung Desk Book are not intended as final legal authorities and should not be cited or relied upon as such.

(c) Copies of the petition for review and accompanying documents must be served upon all parties and the Solicitor of Labor.

(d) Failure to submit a petition for review and brief within the 30-day period or to comply with any part of this section may, in the discretion of the Board, cause the appeal to be deemed abandoned (see § 802.402).

(e) When a party appears pro se the Board may, in its discretion, waive formal compliance with the requirements of this section and may, depending upon the particular circumstances, prescribe an alternate method of furnishing such information as may be necessary for the Board to decide the merits of any such appeal.

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### **§ 802.212 Response to petition for review.**

(a) Within 30 days after the receipt of a petition for review, each party upon whom it was served may submit to the Board a brief, memorandum, or other statement in response to it.

(b) Arguments in response briefs shall be limited to those which respond to arguments raised in petitioner's brief and to those in support of the decision below. Other arguments will not be considered by the Board (see § 802.205(b)).

### **§ 802.213 Reply briefs.**

(a) Within 20 days after the receipt of a brief, memorandum, or statement submitted in response to the petition for review pursuant to § 802.212, any party upon whom it was served may file a brief, memorandum, or other statement in reply to it.

(b) Arguments in reply briefs shall be limited to those which reply to arguments made in the response brief. Any other arguments in a reply brief will not be considered by the Board.

### **§ 802.214 Intervention.**

(a) If a person or legal entity shows in a written petition to intervene that his, her, or its rights are affected by any proceeding before the Board, the Board may permit that person or legal entity to intervene in the proceeding and to participate within limits prescribed by the Board.

(b) The petition to intervene shall state precisely:

- (1) The rights affected, and
- (2) The nature of any argument the person or legal entity intends to make.

### **§ 802.215 Additional briefs.**

Additional briefs may be filed or ordered in the discretion of the Board and shall be submitted within time limits specified by the Board.

### **§ 802.216 Service and form of papers.**

(a) All papers filed with the Board, including notices of appeal, petitions for review, briefs and motions, shall be secured at the top and shall have a caption, title, signature of the party (or his attorney or other representative),

date of signature, and certificate of service.

(b) For each paper filed with the Board, the original and two legible copies shall be submitted.

(c) A copy of any paper filed with the Board shall be served on each party and the Solicitor of Labor, by the party submitting the paper.

(d) Any paper required to be given or served to or by the Board or any party shall be served by mail or otherwise presented. All such papers served shall be accompanied by a certificate of service.

(e) All papers (exclusive of documentary evidence) submitted to the Benefits Review Board shall conform to standard letter dimensions (8.5 × 11 inches).

### **§ 802.217 Waiver of time limitations for filing.**

(a) The time periods specified for submitting papers described in this part, except that for submitting a notice of appeal, may be enlarged for a reasonable period when in the judgment of the Board an enlargement is warranted.

(b) Any request for an enlargement of time pursuant to this section shall be directed to the Clerk of the Board and must be received by the Clerk on or prior to the date on which the paper is due.

(c) Any request for an enlargement of time pursuant to this section shall be submitted in writing in the form of a motion, shall specify the reasons for the request, and shall specify the date to which an enlargement of time is requested.

(d) Absent exceptional circumstances, no more than one enlargement of time shall be granted to each party.

(e) Absent a timely request for an enlargement of time pursuant to this section and the Board's granting that request, any paper submitted to the Board outside the applicable time period specified in this part shall be accompanied by a separate motion stating the reasons therefor and requesting that the Board accept the paper although filed out of time.



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(f) When a paper filed out of time is accepted by the Board, the time for filing a response shall begin to run from the date of a party's receipt of the Board's order disposing of the motion referred to in paragraph (e) of this section.

### § 802.218 Failure to file papers; order to show cause.

(a) Failure to file any paper when due pursuant to this part, may, in the discretion of the Board, constitute a waiver of the right to further participation in the proceedings.

(b) When a petition for review and brief has not been submitted to the Board within the time limitation prescribed by § 802.211, or within an enlarged time limitation granted pursuant to § 802.217, the petitioner shall be ordered to show cause to the Board why his or her appeal should not be dismissed pursuant to § 802.402.

### § 802.219 Motions to the Board; orders.

(a) An application to the Board for an order shall be by motion in writing. A motion shall state with particularity the grounds therefor and shall set forth the relief or order sought.

(b) A motion shall be a separate document and shall not be incorporated in the text of any other paper filed with the Board, except for a statement in support of the motion. If this paragraph is not complied with, the Board will not consider and dispose of the motion.

(c) If there is no objection to a motion in whole or in part by another party to the case, the absence of an objection shall be stated on the motion.

(d) The rules applicable to service and form of papers, § 802.216, shall apply to all motions.

(e) Within 10 days of the receipt of a copy of a motion, a party may file a written response with the Board.

(f) As expeditiously as possible following receipt of a response to a motion or expiration of the response time provided in paragraph (e) of this section, the Board shall issue a dispositive order.

(g) *Orders granted by Clerk.* The Clerk of the Board may enter orders on behalf of the Board in procedural matters, including but not limited to:

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(1) First motions for extensions of time for filing briefs and any papers other than notices of appeal or cross-appeal;

(2) Motions for voluntary dismissals of appeals;

(3) Orders to show cause why appeals should not be dismissed for failure to timely file a petition for review and brief (see § 802.218(b)); and

(4) Unopposed motions which are ordinarily granted as of course, except that the Clerk may, in his or her discretion, refer such motions for disposition to a motions panel as provided by paragraph (h) of this section.

(h) *All other motions.* All other motions will be referred for disposition to a panel of three members constituted pursuant to § 801.301. Any member may request that any motion be considered by the entire permanent Board en banc except as provided in § 801.301(d).

(i) *Reconsideration of orders.* Any party adversely effected by any interlocutory order issued under paragraph (g) or (h) may file a motion to reconsider, vacate or modify the order within 10 days from its filing, stating the grounds for such request. Any motion for reconsideration, vacation or modification of an interlocutory order shall be referred to a three-member panel that may include any member who previously acted on the matter. Suggestions for en banc reconsideration of interlocutory orders shall not be accepted. Reconsideration of all other orders will be treated under § 802.407 of this part.

### § 802.220 Party not represented by an attorney; informal procedure.

A party to an appeal who is not represented by an attorney shall comply with the procedural requirements contained in this part, except as otherwise specifically provided in § 802.211(e). In its discretion, the Board may prescribe additional informal procedures to be followed by such party.

### § 802.221 Computation of time.

(a) In computing any period of time prescribed or allowed by these rules, by direction of the Board, or by any applicable statute which does not provide otherwise, the day from which the designated period of time begins to run

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shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.

(b) Whenever a paper is served on the Board or on any party by mail, paragraph (a) of this section will be deemed complied with if the envelope containing the paper is postmarked by the U.S. Postal Service within the time period allowed, computed as in paragraph (a) of this section. If there is no such postmark, or it is not legible, other evidence, such as, but not limited to, certified mail receipts, certificate of service and affidavits, may be used to establish the mailing date.

(c) A waiver of the time limitations for filing a paper, other than a notice of appeal, may be requested by proper motion filed in accordance with §§ 802.217 and 802.219.

### Subpart C—Procedure for Review

#### ACTION BY THE BOARD

#### § 802.301 Scope of review.

(a) The Benefits Review Board is not empowered to engage in a *de novo* proceeding or unrestricted review of a case brought before it. The Board is authorized to review the findings of fact and conclusions of law on which the decision or order appealed from was based. Such findings of fact and conclusions of law may be set aside only if they are not, in the judgment of the Board, supported by substantial evidence in the record considered as a whole or in accordance with law.

(b) Parties shall not submit new evidence to the Board. Any evidence submitted by a party which is not part of the record developed at the hearing before the administrative law judge will be returned without being considered by the Board.

(c) Any party who considers new evidence necessary to the adjudication of the claim may apply for modification pursuant to section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 922. A party who files a petition for modification shall promptly notify the Board of such filing. Upon

receipt of such notification, the Board shall dismiss the case without prejudice. Should the petition for modification be declined, the petitioner may file a request for reinstatement of his or her appeal with the Board within 30 days of the date the petition is declined. Should the petition for modification be accepted, any party adversely affected by the decision or order granting or denying modification may file a new appeal with the Board within 30 days of the date the decision or order on modification is filed.

[52 FR 27292, July 20, 1987, as amended at 53 FR 16519, May 9, 1988]

#### § 802.302 Docketing of appeals.

(a) *Maintenance of dockets.* A docket of all proceedings shall be maintained by the Board. Each proceeding shall be assigned a number in chronological order upon the date on which a notice of appeal is received. Correspondence or further applications in connection with any pending case shall refer to the docket number of that case.

(b) *Inspection of docket; publication of decision.* The docket of the Board shall be open to public inspection. The Board shall publish its decisions in a form which is readily available for inspection, and shall allow the public to inspect its decisions at the permanent location of the Board.

#### ORAL ARGUMENT BEFORE THE BOARD

#### § 802.303 Decision; no oral argument.

(a) In the event that no oral argument is ordered pursuant to § 802.306, the Board shall proceed to review the record of the case as expeditiously as possible after all briefs, supporting statements, and other pertinent documents have been received.

(b) Each case shall be considered in the order in which it becomes ready for decision, regardless of docket number, although for good cause shown, upon the filing of a motion to expedite by a party, the Board may advance the order in which a particular case is to be considered.

(c) The Board may advance an appeal on the docket on its own motion if the interests of justice would be served by so doing.

**§ 802.304 Purpose of oral argument.**

Oral argument may be held by the Board in any case:

- (a) When there is a novel issue not previously considered by the Board; or
- (b) When in the interests of justice oral argument will serve to assist the Board in carrying out the intent of any of the Acts; or
- (c) To resolve conflicting decisions by administrative law judges on a substantial question of law.

**§ 802.305 Request for oral argument.**

- (a) During the pendency of an appeal, but not later than the expiration of 20 days from the date of receipt of the response brief provided by § 802.212, any party may request oral argument. The Board on its own motion may order oral argument at any time.
- (b) A request for oral argument shall be submitted in the form of a motion, specifying the issues to be argued and justifying the need for oral argument (see § 802.219).
- (c) The party requesting oral argument shall set forth in the motion suggested dates and alternate cities convenient to the parties when and where they would be available for oral argument.

**§ 802.306 Action on request for oral argument.**

As expeditiously as possible after the date upon which a request for oral argument is received, the Board shall determine whether the request shall be granted or denied.

**§ 802.307 Notice of oral argument.**

- (a) In cases where a request for oral argument has been approved or where oral argument has been ordered, the Board shall give all parties a minimum of 30 days' notice, in writing, by mail, of the scope of argument and of the time when, and place where, oral argument will be held.
- (b) Once oral argument has been scheduled by the Board, continuances shall not be granted except for good cause shown by a party, such as in cases of extreme hardship or where attendance of a party or his or her representative is mandated at a previously scheduled judicial proceeding. Unless the ground for the request arises there-

after, requests for continuances must be received by the Board at least 15 days before the scheduled date of oral argument, must be served upon the other parties and must specify good cause why the requesting party cannot be available for oral argument.

- (c) The Board may cancel or reschedule oral argument on its own motion at any time.

**§ 802.308 Conduct of oral argument.**

- (a) Oral argument shall be held in Washington, DC, unless the Board orders otherwise, and shall be conducted at a time reasonably convenient to the parties. For good cause shown, the presiding judge of the panel may, in his or her discretion, postpone an oral argument to a more convenient time.
- (b) The proceedings shall be conducted under the supervision of the Chairman or, if the Chairman is not on the panel, the senior judge, who shall regulate all procedural matters arising during the course of the argument.
- (c) Within the discretion of the Board, oral argument shall be open to the public and may be presented by any party, representative, or duly authorized attorney. Presentation of oral argument may be denied by the Board to a party who has not significantly participated in the appeal prior to oral argument.
- (d) The Board shall determine the scope of any oral argument presented and shall so inform the parties in its notice scheduling oral argument pursuant to § 802.307.
- (e) The Board in its discretion shall determine the amount of time allotted to each party for argument and rebuttal.

**§ 802.309 Absence of parties.**

The unexcused absence of a party or his or her authorized representative at the time and place set for argument shall not be the occasion for delay of the proceeding. In such event, argument on behalf of other parties may be heard and the case shall be regarded as submitted on the record by the absent party. The presiding judge may, with the consent of the parties present, cancel the oral argument and treat the appeal as submitted on the written record.

### Subpart D—Completion of Board Review

#### DISMISSALS

##### § 802.401 Dismissal by application of party.

(a) At any time prior to the issuance of a decision by the Board, the petitioner may move that the appeal be dismissed. If granted, such motion for dismissal shall be granted with prejudice to the petitioner.

(b) At any time prior to the issuance of a decision by the Board, any party or representative may move that the appeal be dismissed.

##### § 802.402 Dismissal by abandonment.

(a) Upon motion by any party or representative or upon the Board's own motion, an appeal may be dismissed upon its abandonment by the party or parties who filed the appeal. Within the discretion of the Board, a party may be deemed to have abandoned an appeal if neither the party nor his representative participates significantly in the review proceedings.

(b) An appeal may be dismissed on the death of a party only if the record affirmatively shows that there is no person who wishes to continue the action and whose rights may be prejudiced by dismissal.

#### DECISION OF THE BOARD

##### § 802.403 Issuance of decisions; service.

(a) The Board shall issue written decisions as expeditiously as possible after the completion of review proceedings before the Board. The transmittal of the decision of the Board shall indicate the availability of judicial review of the decision under section 21(c) of the LHWCA when appropriate.

(b) The original of the decision shall be filed with the Clerk of the Board. A copy of the Board's decision shall be sent by certified mail or otherwise presented to all parties to the appeal and the Director. The record on appeal, together with a transcript of any oral proceedings, any briefs or other papers filed with the Board, and a copy of the

decision shall be returned to the appropriate deputy commissioner for filing.

(c) Proof of service of Board decisions shall be certified by the Clerk of the Board or by another employee in the office of the Clerk of the Board who is authorized to certify proof of service.

##### § 802.404 Scope and content of Board decisions.

(a) In its decision the Board shall affirm, modify, vacate or reverse the decision or order appealed from, and may remand the case for action or proceedings consistent with the decision of the Board. The consent of the parties shall not be a prerequisite to a remand ordered by the Board.

(b) In appropriate cases, such as where the issues raised on appeal have been thoroughly discussed and disposed of in prior cases by the Board or the courts, or where the findings of fact and conclusions of law are both correct and adequately discussed, the Board in its discretion may issue a brief, summary decision in writing, disposing of the appeal.

(c) In cases which cannot be disposed of as in paragraph (b) of this section, a full, written decision discussing the issues and applicable law shall be issued.

##### § 802.405 Remand.

(a) *By the Board.* Where a case is remanded, such additional proceedings shall be initiated and such other action shall be taken as is directed by the Board.

(b) *By a court.* Where a case has been remanded by a court, the Board may proceed in accordance with the court's mandate to issue a decision or it may in turn remand the case to an administrative law judge or deputy commissioner with instructions to take such action as is ordered by the court and any additional necessary action.

##### § 802.406 Finality of Board decisions.

A decision rendered by the Board pursuant to this subpart shall become final 60 days after the issuance of such decision unless a written petition for review praying that the order be modified or set aside, pursuant to section 21(c) of the LHWCA, is filed in the appropriate U.S. court of appeals prior to

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the expiration of the 60-day period herein described, or unless a timely request for reconsideration by the Board has been filed as provided in § 802.407. If a timely request for reconsideration has been filed, the 60-day period for filing such petition for review will run from the issuance of the Board's decision on reconsideration.

### **RECONSIDERATION**

## **§ 802.407 Reconsideration of Board decisions.**

(a) Any party-in-interest may, within 30 days from the filing of a decision or non-interlocutory order by a panel or the Board pursuant to § 802.403(b), request reconsideration of such decision by those members who rendered the decision. The panel of members who heard and decided the appeal will rule on the motion for reconsideration. If any member of the original panel is unavailable, the Chairman shall designate a new panel member.

(b) Except as provided in § 801.301(d), a party may, within 30 days from the filing of a decision or non-interlocutory order by a panel of the Board pursuant to § 802.403(b), suggest the appropriateness of reconsideration by the permanent members sitting en banc. Such suggestion, however, must accompany a motion for reconsideration directed to the panel which rendered the decision. The suggestion for reconsideration en banc must be clearly marked as such.

(c) Except as provided in § 801.301(d), even where no party has suggested reconsideration en banc, any permanent member may petition the permanent Board for reconsideration en banc of a panel decision.

(d) Reconsideration en banc shall be granted upon the affirmative vote of the majority of permanent members of the Board. A panel decision shall stand unless vacated or modified by the concurring vote of at least three permanent members.

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## **§ 802.408 Notice of request for reconsideration.**

(a) In the event that a party requests reconsideration of a decision or order, he or she shall do so in writing, in the form of a motion, stating the supporting rationale for the request, and include any material pertinent to the request.

(b) The request shall be sent by mail, or otherwise presented, to the Clerk of the Board. Copies shall be served on all other parties.

## **§ 802.409 Grant or denial of request.**

All requests for reconsideration shall be reviewed by the Board and shall be granted or denied in the discretion of the Board.

### **JUDICIAL REVIEW**

## **§ 802.410 Judicial review of Board decisions.**

(a) Within 60 days after a decision by the Board has been filed pursuant to § 802.403(b), any party adversely affected or aggrieved by such decision may file a petition for review with the appropriate U.S. Court of Appeals pursuant to section 21(c) of the LHWCA.

(b) The Director, OWCP, as designee of the Secretary of Labor responsible for the administration and enforcement of the statutes listed in § 802.101, shall be deemed to be the proper party on behalf of the Secretary of Labor in all review proceedings conducted pursuant to section 21(c) of the LHWCA.

## **§ 802.411 Certification of record for judicial review.**

The record of a case including the record of proceedings before the Board shall be transmitted to the appropriate court pursuant to the rules of such court.

## **PARTS 803-899 [RESERVED]**