

Sunshine Act Meetings

Federal Register

Vol. 52, No. 138

Monday, July 20, 1987

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

CONSUMER PRODUCT SAFETY COMMISSION

TIME AND DATE: 10:00 a.m., Thursday, July 23, 1987.

LOCATION: Room 556, Westwood Towers, 5401 Westbrad Avenue, Bethesda, MD.

STATUS: Open to the Public.

MATTERS TO BE CONSIDERED:

FY 89 Budget

The Commission will consider the proposed fiscal year 1987 budget.

FOR A RECORDED MESSAGE CONTAINING THE LATEST AGENDA INFORMATION, CALL: 301-492-5709.

CONTACT PERSON FOR ADDITIONAL INFORMATION: Sheldon D. Butts, Office of the Secretary, 5401 Westbrad Ave., Bethesda, Md. 20207 301-492-6800

Sheldon D. Butts,
Deputy Secretary,
July 16, 1987

[FR Doc. 87-16513 Filed 7-16-87; 12:53 pm]

BILLING CODE 6355-01-M

FEDERAL ENERGY REGULATORY COMMISSION

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: July 14, 1987, 52 FR 26396.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: July 15, 1987, 10:00 a.m.

CHANGE IN THE MEETING: The following docket number has been added to Item CAG-1.

Item No., Docket No. and Company

CAG-1

TA87-1-53-000, KN Energy, Inc.

Kenneth F. Plumb,

Secretary.

[FR Doc. 87-16553 Filed 7-16-87; 3:49 pm]

BILLING CODE 6717-02-M

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

July 14, 1987.

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: Sent of Federal Register on July 8, 1987.

PREVIOUSLY ANNOUNCED TIME AND DATE: 10:00 a.m., Thursday, July 16, 1987.

CHANGES IN THE MEETING: The "STATUS" of the meeting has been changed to "CLOSED" (Pursuant to 5 U.S.C. 552b(c)(10)).

It was determined by a unanimous vote of Commissioners that the items scheduled for the meeting be determined in closed session and no earlier announcement of the change was possible.

CONTACT PERSON FOR MORE

INFORMATION: Jean Ellen (202) 653-5629.

Jean H. Ellen,

Agenda Clerk.

[FR Doc. 87-16428 Filed 7-15-87; 4:49 pm]

BILLING CODE 6735-01-M

NATIONAL MEDIATION BOARD

TIME AND DATE: 2:00 p.m., Wednesday, August 5, 1987.

PLACE: Board Hearing Room 8th Floor, 1425 K Street, NW., Washington, DC.

STATUS: open.

MATTERS TO BE CONSIDERED:

1. Ratification of the Board actions taken by notation voting during the month of July, 1987.

2. Other priority matters which may come before the Board for which notice will be given at the earliest practicable time.

SUPPLEMENTARY INFORMATION: Copies of the monthly report of the Board's notation voting actions will be available from the Executive Director's office following the meeting.

CONTACT PERSON FOR MORE

INFORMATION: Mr. Charles R. Barnes, Executive Director, Tel: (202) 523-5920.

DATE OF NOTICE: July 14, 1987.

Charles R. Barnes,

Executive Director, National Mediation Board.

[FR Doc. 87-16473 Filed 7-16-87; 8:45 am]

BILLING CODE 7550-01-M

NUCLEAR REGULATORY COMMISSION.

DATE: Weeks of July 20, 27, August 3, and 10, 1987.

PLACE: Commissioners' Conference Room, 1717 H Street, NW., Washington, DC.

STATUS: Open and Closed.

MATTERS TO BE CONSIDERED:

Week of July 20

Tuesday, July 21

10:00 a.m.

Briefing on Final Plan for NUREC-0956 Uncertainty Areas (Source Term) (Public Meeting)

2:00 p.m.

Briefing on Research Plan in Response to the National Academy of Sciences Recommendations on Research (Public Meeting)

Thursday, July 23

10:00 a.m.

Briefing on Status of High Level Waste Management Program (Public Meeting)

2:00 p.m.

Briefing on the Status of TVA (Public Meeting)

3:30 p.m.

Affirmation/Discussion and Vote (Public Meeting)

a. Citizens Concerned About Nuclear Power—Motion to Reopen Record in the South Texas Licensing Proceeding (Tentative)

Week of July 27—Tentative

Wednesday, July 29

10:00 a.m.

Briefing on Medical Use of Radioisotopes and the Medical Misadministration Rule (Public Meeting)

2:00 p.m.

Discussion of Management-Organization and Internal Personnel Matters (Closed—Ex. 2 & 6)

3:30 p.m.

Affirmation/Discussion and Vote (Public Meeting) (if needed)

Friday, July 31

10:00 a.m.

Discussion of Pending Investigations (Closed—Ex. 5 & 7)

Week of August 3—Tentative

Monday, August 3

2:00 p.m.

Discussion of Standardization Policy Statement Development (Public Meeting)

Tuesday, August 4

9:30 a.m.

Briefing on the Management of "Greater Than Class C Low Level Wastes" and the LLW Program (Public Meeting)

2:00 p.m.

Briefing on Performance of New Plants (Public Meeting)

Wednesday, August 5

10:00 a.m.

Briefing on Staff Response to Recommendations of the Materials Safety Review Group (Public Meeting)

2:00 p.m.

Briefing on the Status of B&W Reassessment (Public Meeting)

Thursday, August 6

2:00 p.m.

Periodic Meeting with the Advisory
Committee on Reactor Safeguards
(ACRS) (Public Meeting)

3:30 p.m.

Affirmation/Discussion and Vote (Public
Meeting) (if needed)

Week of August 10—Tentative

Thursday, August 13

3:30 p.m.

Affirmation/Discussion and Vote (Public
Meeting) (if needed)

ADDITIONAL INFORMATION: Affirmation
of "Revision to the General Statement of
Policy and Procedures for Enforcement
Action" scheduled for July 15,
postponed.

**TO VERIFY THE STATUS OF MEETINGS
CALL (RECORDING) (202) 634-1498.**

**CONTACT PERSON FOR MORE
INFORMATION:** Robert McOsker (202)
634-1410.

July 16, 1987.

Andrew L. Bates,

Office of the Secretary.

[FR Doc. 87-16538 Filed 7-16-87; 8:45 am]

BILLING CODE 7590-01-M

Corrections

Federal Register

Vol. 52, No. 138

Monday, July 20, 1987

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents and volumes of the Code of Federal Regulations. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 9

Review of Exchange Disciplinary, Access Denial or Other Adverse Actions

Correction

In rule document 87-15299 beginning on page 25362 in the issue of Tuesday, July 7, 1987, make the following corrections:

1. On page 25363, in the third column, in the third line, "to" should read "of".
2. On page 25364, in the second column, in the second complete paragraph, in the 15th line, "procedure" should read "procedures".
3. On page 25366, in the second column, in the first complete paragraph, in the 18th line, "REA" should read "RFA".

§ 9.2 [Corrected]

4. On page 25367, in § 9.2(k), in the third column, in the first line, "or" should read "of".

§ 9.12 [Corrected]

5. On page 25370, in § 9.12(b), in the first column, in the seventh line, the word "be" should be removed.

§ 9.20 [Corrected]

6. On page 25370, in the second column, in § 9.20(b)(7), in the first line, insert "filing" before "fee".

§ 9.24 [Corrected]

7. On page 25371, in the first column, in § 9.24(b), in the third line from the bottom, "or" should read "of".

BILLING CODE 1505-01-D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 58

[COAR-FRL-3141-9(f)]

Ambient Air Quality Surveillance for Particulate Matter

Correction

In the rule document beginning on page 24736 in the issue of Wednesday, July 1, 1987, make the following corrections:

1. On page 24742, in the second column, in the sixth line, "M₁₀" should read "PM₁₀".
2. On page 24743, in Table 4, the first entry reading "1,000,000" should read "> 1,000,000".
3. On page 24744, in Table 5, in the first column, in the fifth entry reading "Regional" and under the heading "Scale Applicable for SLAMS" add check marks under the third and sixth column, delete the check mark from the fourth column and remove "G7z" from the fifth column.
4. On page 24744, in the first column following Table 5, in the third line "112" should read "11".
5. On the same page and in the same column, in the seventh line of item "17."

add to the end of the line the date "May 1987".

6. On pages 24747 and 24748 in Table 5 under the column heading "Distance from supporting structure, meters" in the second column, the heading "Horizontal^d" should read "Horizontal".

7. On page 24748, in Table 5, under the column heading "Other spacing criteria", in the 10th line, ">" should read "> 20".

8. On page 24750, the document number should read "87-14535".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

[BERC-399-NC]

Medicare Program; Schedules of Limits on Home Health Agency Costs per Visit for Cost Reporting Periods Beginning on or After July 1, 1986 but Before July 1, 1987 and Cost Reporting Periods Beginning on or After July 1, 1987

Correction

In notice document 87-15347 beginning on page 25562 in the issue of Tuesday, July 7, 1987, make the following correction:

- On page 25562, in the third column, in the last line, "1985" should read "1986".

BILLING CODE 1505-01-D

Estimote

Monday
July 20, 1987

Part II

Department of Labor

Benefits Review Board

20 CFR Parts 801 and 802

Organization of the Benefits Review Board and Rules of Practice and Procedure; Final Rule

DEPARTMENT OF LABOR

Benefits Review Board

20 CFR Parts 801 and 802

Organization of the Benefits Review Board and Rules of Practice and Procedure

AGENCY: Department of Labor.

ACTION: Final rule.

SUMMARY: These final rules revise the organization of the Benefits Review Board in accordance with the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. 98-426, 98 Stat. 1639. The Board's Rules of Practice and Procedure are also being revised to permit the Board to respond more efficiently to procedural issues which have arisen since the last time these regulations were revised.

EFFECTIVE DATE: These final regulations shall become effective August 19, 1987.

FOR FURTHER INFORMATION CONTACT:

Patricia T. Hagerty, Senior Board Attorney, Suite 757, 1111 20th Street NW., Washington, DC 20036, (202) 653-5060.

SUPPLEMENTARY INFORMATION: These amended regulations are issued pursuant to the Longshore and Harbor Workers' Compensation Act Amendments of 1984 and except where specifically stated to the contrary, are applicable to all appeals of decisions or orders with respect to claims under: (1) The Longshore and Harbor Workers' Compensation Act (33 U.S.C. 901 et seq.), (2) the Defense Base Act (42 U.S.C. 1651 et seq.), (3) the District of Columbia Workmen's Compensation Act (36 D.C. Code 501 et seq.) (1973 ed.), (4) The Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.), (5) the Nonappropriated Fund Instrumentalities Act (5 U.S.C. 8171 et seq.), and (6) Title IV, Section 415 and Part C of the Federal Mine Safety and Health Act of 1977 (Pub. L. 95-164, 91 Stat. 1290) (formerly the Federal Coal Mine Health and Safety Act, hereinafter, FCMHSA, of 1969) as amended by the Black Lung Benefits Reform Act of 1977 (92 Stat. 95), the Black Lung Benefits Revenue Act of 1977 (92 Stat. 11), and the Black Lung Benefits Amendments of 1981 (95 Stat. 1643) (30 U.S.C. 901 et seq.).

Changes in the organization of the Board and in the rules of practice and procedure have been made to implement statutory changes made by the amendments to the Longshore Act. The major changes concern the appointment of permanent Board members, the provision for appointment of temporary Board members, establishment of panels

within the Board, and provision for reconsideration en banc. Failure to issue procedural rules governing the consideration of appeals before the Board could result, for example, in confusion as to the correct procedures with regard to requests for en banc reconsideration.

Specifically, the changes in Part 801 and Part 802 are, among others, as follows:

1. Sections 802.105(b), 802.202 (d) and (e), and 802.301(c) are not included here. They are published elsewhere in this issue of the *Federal Register*. They are published separately because they are proposed regulations and public comment is invited on those provisions.

2. Section 801.201(b) is revised in accordance with the 1984 amendments, which provide that the Chairman of the Board has the authority, as delegated by the Secretary, to exercise all administrative functions necessary to operate the Board. The legislative history indicates that in this context administrative functions are housekeeping functions which do not relate to the adjudication of claims.

3. Section 801.201 is revised pursuant to the 1984 amendments, which increase the number of permanent Board members from three to five and provide for the appointment of up to four temporary Board members at any one time. The amendments are construed as not restricting temporary Board members to a single term.

4. Section 801.202(a) sets forth amended procedures for the designation of an Acting Chairman in the event that the Chairman is temporarily disabled or unavailable to perform his or her duties. Paragraph (b) is amended to differentiate between permanent and temporary Board members with respect to interim appointments to the Board. Because a temporary member's term shall be for no more than one year, there is no need to provide for interim replacements for temporary members. If a temporary member becomes unable to serve, the Secretary may appoint a new temporary member.

5. Section 801.301 has been amended pursuant to the 1984 amendments. Paragraph (a), dealing with quorum and votes, applies only to the situation where the newly enlarged permanent Board votes en banc. New paragraph (b) provides for the delegation of powers to panels of three Board members pursuant to the 1984 amendments. New paragraph (c) clarifies that the decision of a panel shall be considered a Board decision unless vacated or modified by the concurring vote of at least three permanent members. In situations in which there are insufficient permanent

Board members to constitute a quorum or insufficient concurring votes of permanent members to constitute official action of the permanent Board, this provision shall apply. New paragraph (d), provides pursuant to *Keener v. Washington Metropolitan Area Transit Authority*, 800 F.2d 1173 (D.C. Cir 1986), that the provisions of these regulations providing for en banc action of the Board do not apply to cases arising under the District of Columbia Workmen's Compensation Act.

6. Section 801.304 is amended to change the office hours of the Clerk of the Board to 8:30 a.m.-5:00 p.m. The intent is for the Board's hours to coincide with the usual office hours of attorneys in the Washington, DC, area.

7. The language of § 802.104(a) is amplified to provide that the Board has sole discretion to consolidate cases; this change has been made in response to the administrative burden which frequently results from the consolidation of large numbers of cases.

8. Note that the Benefits Review Board has held that certain criteria required by § 802.105(a) do not have to be stated in their stay orders. *Riviere v. Raymond Fabricator Inc.*, 18 BRBS 6 (1985). The correctness of this ruling is being challenged and should be resolved by the courts.

9. Revisions to § 802.201(a) are intended to clarify both the standing of the Director, OWCP, in appeals to the Board and the basis for filing a cross-appeal.

10. Section 802.202, dealing with appearances by attorneys and other authorized persons, has been substantially revised. New paragraph (c) retains the requirement (previously contained in paragraph (a)) that a notice of appearance be filed, but eliminates the needless requirement that such notice be signed by the party. An additional requirement that prior notices of intent to withdraw from representation and notices of substitution of counsel be filed with the Board is intended for both administrative convenience and fairness to the parties.

11. Section 802.203, dealing with attorney's fees, has been substantially revised and the subsections redesignated. Paragraphs (a) and (b) remain unchanged. New paragraph (c) requires that any application for an attorney's fee be filed within 60 days of the issuance of a final Board decision. This requirement is imposed in order to facilitate Board record-keeping and to ensure that the reasonableness of the fee requested is evaluated as soon as

possible following a decision in the case. The language of redesignated paragraph (d) (formerly paragraph (c)) has been amplified to clarify that a fee application shall include only services performed while the appeal was pending before the Board. Additionally, paragraph (d)(2) requires a definition of any professional status other than attorney and further requires that the attorney affirmatively state that he or she was a member in good standing of a state bar at the time the services were rendered. These new provisions ensure that the Board does not approve fees for services performed by clerical employees or by attorneys who have been disbarred or suspended from the practice of law. Paragraph (d)(3), providing for a system of time-keeping in ¼ hour increments, will facilitate the fee approval process. In this context, the Board notes its disapproval of the association of co-counsel. Compelling reasons for such association in any particular case must be shown before the Board will consider awarding a fee to multiple counsel for work performed on behalf of a single claimant.

12. Paragraph (b) of § 802.205 is revised to rectify problems which have arisen when a petitioner fails to make timely service of the notice of appeal upon the respondent, thereby depriving respondent of the opportunity to file a cross-appeal. In such a case, the revised regulation permits the respondent to file a cross-appeal within 14 days of the date that service is effected. Former paragraph (b)(2), concerning the basis for filing a cross-appeal, has been deleted; the subject is now addressed in revised § 802.201(a).

13. A new paragraph (c) of § 802.206 specifies that the Board will consider a motion for reconsideration of an administrative law judge decision timely if it was postmarked by the U.S. Postal Service within the appropriate time prescribed in paragraph (b) and consequently will dismiss a notice of appeal, without prejudice, as premature pursuant to paragraph (e) in such a case even if the administrative law judge considered the motion for reconsideration untimely. Redesignated paragraph (f) contains a new requirement that any party having knowledge of the filing of a motion for reconsideration notify the Board of such filing; this addition is intended to improve administrative efficiency.

14. Paragraph (b) of § 802.207 is amended to provide that the date appearing on the U.S. Postal Service postmark shall be prima facie evidence of the date of mailing. This change is intended to resolve problems which

have arisen when the dates on the U.S. Postal Service postmark and the in-house postage meter differ. The same amendment also is made in §§ 802.206(c) and 802.221(b).

15. The language of § 802.208(a)(7) has been amplified for reasons of administrative efficiency to require that a notice of appeal indicate the date of filing of any motion for reconsideration and whether the administrative law judge has acted on such motion.

16. Section 802.211(b) has been amplified to specify the format and content required of a brief in support of a petition for review. The Board expects that adherence to these new requirements will result in a significant reduction in the time involved in deciding appeals. New paragraph (e) provides that, based on the circumstances of any particular case involving a party appearing pro se, the Board may prescribe for that party an alternate method of preparing the arguments on appeal. (See revised § 802.220.)

17. Sections 802.212 and 802.213 are revised to clarify the limitations on the kinds of argument which may be made in response and reply briefs.

18. Revised § 802.216(b) requires the submission of the original and only two copies of papers filed with the Board. New paragraph (e) conforms with General Services Administration Bulletin FPMR 8-120 (June 12, 1982) and the decision of the Judicial Conference of the United States to eliminate legal-size documents; this paragraph codifies the notice in the *Federal Register* effective January 1, 1983.

19. New paragraphs (g)-(i) have been added to § 802.219 dealing with motions and orders. Paragraph (g) merely codifies the Board's practice of having the Clerk issue orders on routine procedural matters. Paragraph (h) provides that in all matters not disposed of by the Clerk, a three-member panel shall act (see explanation of revised § 801.301(b)). Provision also is made for a member to request consideration by the entire permanent Board. Paragraph (i) clarifies that parties may request reconsideration of the Board's orders. The Board, however, will not entertain parties' suggestions for en banc reconsideration of interlocutory orders. En banc reconsideration of interlocutory orders, therefore, may be had only at the request of a Board member pursuant to the provisions of paragraph (h). Reconsideration of non-interlocutory orders is treated in the same manner as reconsideration of the Board's decisions in accordance with § 802.407. Pursuant to *Keener v. Washington Metropolitan*

Area Transit Authority, 800 F.2d 1173 (D.C. Cir. 1986), the provisions of this regulation providing for en banc reconsideration do not apply to cases arising under the District of Columbia Workmen's Compensation Act. (See § 801.301(d).)

20. Section 802.220 has been amended to modify procedures relating to parties who are not represented by attorneys (see explanation of revised § 802.211(e)).

21. Paragraph (b) has been added to § 802.301 to reaffirm that the Board will not accept or consider new evidence submitted by the parties.

22. Sections 802.308 and 802.309 have been revised to provide for the senior judge of the panel to preside at oral argument in the absence of the Chairman.

23. Section 802.405(a), dealing with remand by the Board, has been simplified to provide that action shall be taken on remand as directed by the Board or, as appropriate, by a court.

24. Section 802.406 has been revised, as suggested by a recent decision of the Seventh Circuit, to clarify that when a motion for reconsideration has been timely filed with the Board the 60-day time period for filing a petition for review with the court of appeals will run from the issuance of the Board's decision on reconsideration. See *Arch Mineral Corp. v. Office of Workers' Compensation*, 798 F.2d 215 (7th Cir. 1986).

25. Section 802.407 has been revised to implement the provision under section 15(4) of the 1984 amendments for reconsideration en banc. See 33 U.S.C. 921(b)(5). The period for filing a request for reconsideration in all cases has been lengthened to 30 days to coincide with the statutory period for filing petitions for reconsideration en banc. A request for reconsideration en banc must be accompanied by a motion for reconsideration directed to the panel which rendered the decision. Section 802.407(a) also provides for the appointment of new panel members if the original judges are not available to consider a request for reconsideration. Pursuant to *Keener v. Washington Metropolitan Area Transit Authority*, 800 F.2d 1173 (D.C. Cir. 1986), the provisions of this regulation providing for en banc reconsideration do not apply to cases arising under the District of Columbia Workmen's Compensation Act. (See § 801.301(d).)

A few additional revisions contained herein reflect technical and clarifying changes felt necessary by the Department.

Publication in Final

Inasmuch as the revised regulations contained herein consist of rules of practice and procedure, the relevant provisions of the Administrative Procedure Act (15 U.S.C. 553) requiring notice of proposed rulemaking and opportunity for public comment are inapplicable.

Classification—Executive Order 12291

The Department has determined that these revisions are procedural in character and, therefore, that this rule is not a major rule under Executive Order 12291, because it is not likely to result in (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation or on ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. No regulatory impact analysis is therefore required.

Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act of 1980, 5 U.S.C. 601 *et seq.*, do not apply to these rules because they are, as discussed above, not subject to the notice and comment procedures of the Administrative Procedure Act. See 5 U.S.C. 603(a).

List of Subjects in 20 CFR Parts 801 and 802

Workers' Compensation,
Administrative Practice and Procedure.

Accordingly, Part 801 and Part 802 of title 20 of the Code of Federal Regulations, as amended to date, are hereby revised and read as set forth below.

PART 801—ESTABLISHMENT AND OPERATION OF THE BOARD**Introductory****Sec.**

- 801.1 Purpose and scope of this part.
- 801.2 Definitions and use of terms.
- 801.3 Applicability of this part to 20 CFR Part 802.

Establishment and Authority of the Board

- 801.101 Establishment.
- 801.102 Review authority.
- 801.103 Organizational placement.
- 801.104 Operational rules.

Members of the Board

- 801.201 Composition of the Board.
- 801.202 Interim appointments.

Sec.

- 801.203 Disqualification of Board members.

Action by the Board

- 801.301 Quorum and votes of the permanent Board; panels within the Board.
- 801.302 Procedural rules.
- 801.303 Location of Board's proceedings.
- 801.304 Business hours.

Representation

- 801.401 Representation before the Board.
- 801.402 Representation of Board in court proceedings.

Authority: 5 U.S.C. 301, Reorganization Plan No. 6 of 1950, 15 FR 3174, 33 U.S.C. 901 *et seq.*, 30 U.S.C. 901 *et seq.*

Introductory**§ 801.1 Purpose and scope of this part.**

This Part 801 describes the establishment and the organizational structure of the Benefits Review Board of the Department of Labor, sets forth the general rules applicable to operation of the Board, and defines terms used in this chapter.

§ 801.2 Definitions and use of terms.

(a) For purposes of this chapter, except where the content clearly indicates otherwise, the following definitions apply:

(1) "Acts" means the several Acts listed in §§ 801.102 and 802.101 of this chapter, as amended and extended, unless otherwise specified.

(2) "Board" means the Benefits Review Board established by section 21 of the LHWCA (33 U.S.C. 921) as described in § 801.101, and as provided in this part and Secretary of Labor's Order No. 38-72 (33 FR 90). Mention in these regulations of the "permanent Board" refers to the five permanent Board members only.

(3) "Chairman" or "Chairman of the Board" means Chairman of the Benefits Review Board. The Chairman of the Board is officially entitled Chief Administrative Appeals Judge.

(4) "Secretary" means the Secretary of Labor.

(5) "Department" means the Department of Labor.

(6) "Judge" means an administrative law judge appointed as provided in 5 U.S.C. 3105 and Subpart B of 5 CFR Part 930, who is qualified to preside at hearings under 5 U.S.C. 557 and is empowered by the Secretary to conduct formal hearings whenever necessary in respect of any claim for benefits or compensation arising under the Acts.

(7) "Chief Administrative Law Judge" means the Chief Administrative Law Judge of the Department of Labor.

(8) "Director" means the Director of the Office of Workers' Compensation

Programs of the Department of Labor (hereinafter OWCP).

(9) "Deputy commissioner" means a person appointed as provided in sections 39 and 40 of the LHWCA or his designee, authorized by the Director to make decisions and orders in respect to claims arising under the Acts.

(10) "Party" or "Party in Interest" means the Secretary or his designee and any person or business entity directly affected by the decision or order from which an appeal to the Board is taken.

(11) "Day" means calendar day.

(12) "Member" means a member of the Benefits Review Board. Unless specifically stated otherwise, the word "member" shall apply to permanent, temporary and interim members. Permanent Board members are officially entitled Administrative Appeals Judges. Temporary and interim Board members are designated as Acting Administrative Appeals Judges.

(b) The definitions contained in this part shall not be considered to derogate from the definitions of terms in the respective Acts.

(c) The definitions pertaining to the Acts contained in the several parts of chapter VI of this title 20 shall be applicable to this chapter as is appropriate.

§ 801.3 Applicability of this part to 20 CFR Part 802.

Part 802 of title 20, Code of Federal Regulations, contains the rules of practice and procedure of the Board. This Part 801, including the definitions and usages contained in § 801.2, is applicable to Part 802 of this chapter as appropriate.

Establishment and Authority of the Board**§ 801.101 Establishment.**

By Pub. L. 92-576, 82 Stat. 1251, in an amendment made to section 21 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 921), there was established effective November 26, 1972, a Benefits Review Board, which is composed of members appointed by the Secretary of Labor.

§ 801.102 Review authority.

The Board is authorized, as provided in 33 U.S.C. 921(b), as amended, to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions or orders with respect to claims for compensation or benefits arising under the following Acts, as amended and extended:

(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, Pub. L. 95-164, 91 Stat. 1290 (formerly the Federal Coal Mine Health and Safety Act, hereinafter, FCMHSA, of 1969) as amended by the Black Lung Benefits Reform Act of 1977, Pub. L. 92-239, 92 Stat. 95, the Black Lung Benefits Revenue Act of 1977, Pub. L. 95-227, 92 Stat. 11, and the Black Lung Benefits Amendments of 1981, Pub. L. 97-119, 95 Stat. 1643 (30 U.S.C. 901 et seq.).

§ 801.103 Organizational placement.

As prescribed by the statute, the functions of the Benefits Review Board are quasi-judicial in nature and involve review of decisions made in the course of the administration of the above statutes by the Employment Standards Administration in the Department of Labor. It is accordingly found appropriate for organizational purposes to place the Board in the Office of the Deputy Secretary and it is hereby established in that Office, which shall be responsible for providing necessary funds, personnel, supplies, equipment, and records services for the Board.

§ 801.104 Operational rules.

The Deputy Secretary of Labor may promulgate such rules and regulations as may be necessary or appropriate for effective operation of the Benefits Review Board as an independent quasi-judicial body in accordance with the provisions of the statute.

Members of the Board

§ 801.201 Composition of the Board.

(a) The Board shall be composed of five permanent members appointed by the Secretary from among individuals who are especially qualified to serve thereon. Each permanent member shall serve an indefinite term subject to the discretion of the Secretary.

(b) The member designated by the Secretary as Chairman of the Board shall serve as chief administrative officer of the Board and shall have the authority, as delegated by the Secretary, to exercise all administrative functions necessary to operate the Board.

(c) The four remaining members shall be the associate members of the Board.

(d) Upon application of the Chairman of the Board, the Secretary may designate up to four Department of Labor administrative law judges to serve as temporary Board members in addition to the five permanent Board members. Up to four such temporary members may serve at any one time. The term of any temporary Board member shall not exceed 1 year from date of appointment.

§ 801.202 Interim appointments.

(a) *Acting Chairman.* In the event that the Chairman of the Board is temporarily disabled or unavailable to perform his or her duties as prescribed in this chapter VII, he or she shall designate a permanent member to serve as Acting Chairman until such time as the Secretary designates an Acting Chairman. In the event that the Chairman is physically unable to make such designation, the next senior permanent member shall serve as Acting Chairman until such time as the Secretary of Labor designates an Acting Chairman.

(b) *Interim members.* In the event that a permanent member of the Board is temporarily unable to carry out his or her responsibilities because of disqualification, illness, or for any other reason, the Secretary of Labor may, in his or her discretion, appoint a qualified individual to serve in the place of such permanent member for the duration of that permanent member's inability to serve.

§ 801.203 Disqualification of Board Members.

(a) During the period in which the Chairman or the other members serve on the Board, they shall be subject to the Department's regulations governing ethics and conduct set forth at 20 CFR Part 0.

(b) Notice of any objection which a party may have to any Board member who will participate in the proceeding shall be made by such party at the earliest opportunity. The Board member shall consider such objection and shall, in his or her discretion, either proceed with the case or withdraw.

Action by the Board

§ 801.301 Quorum and Votes of the permanent Board; panels within the Board.

(a) For the purpose of carrying out its functions under the Acts, whenever action is taken by the entire permanent Board sitting en banc, three permanent members of the Board shall constitute a quorum, and official action of the permanent Board can be taken only on

the concurring vote of at least three permanent members.

(b) The Board may delegate any or all of its powers except en banc review to panels of three members. Each panel shall consist of at least two permanent members. Two members of the panel shall constitute a quorum and official panel action can be taken only on the concurring vote of two members of the panel.

(c) A panel decision shall stand unless vacated or modified by the concurring vote of at least three permanent members sitting en banc.

(d) En banc action is not available in cases arising under the District of Columbia Workmen's Compensation Act.

§ 801.302 Procedural rules.

Procedural rules for performance by the Board of its review functions and for insuring an adequate record for any judicial review of its orders, and such amendments to the rules as may be necessary from time to time, shall be promulgated by the Deputy Secretary. Such rules shall incorporate and implement the procedural requirements of section 21(b) of the Longshore and Harbor Workers' Compensation Act.

§ 801.303 Location of Board's proceedings.

The Board shall hold its proceedings in Washington, DC, unless for good cause the Board orders that proceedings in a particular matter be held in another location.

§ 801.304 Business hours.

The office of the Clerk of the Board at Washington, DC shall be open from 8:30 a.m.—5:00 p.m. on all days, except 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.

PART 802—RULES OF PRACTICE AND PROCEDURE

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Authority: 5 U.S.C. 301, Reorganization Plan No. 6 of 1950, 15 FR 3174, 33 U.S.C. 901 et seq., 30 U.S.C. 901 et seq.

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, Pub. L. 95-164, 91 Stat. 1290 (formerly the FCMHSA of 1969), as amended by the Black Lung Benefits Reform Act of 1977, Pub. L. 95-239, 92 Stat. 95, the Black Lung Benefits Revenue Act of 1977, Pub. L. 95-229, 92 Stat. 11, and the Black Lung Benefits Amendments of 1981, Pub. L. 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 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) [Reserved]

Subpart B—Prereview Procedures

Commencing Appeal: Parties

§ 802.201 Who may file an appeal.

(a) *A party.* (1) Any party or party-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.

(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.

§ 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 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 ¼ 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.

Notice of Appeal

§ 802.204 Place for filing notice of appeal.

Any notice of appeal shall be sent by mail or otherwise presented to the Clerk of the Board in Washington, DC. A copy 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.

§ 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;

(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.

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.

§ 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 (8.5x11 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.

(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:

(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 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.

§ 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 thereafter, 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 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.

§ 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.

Signed in Washington, DC, this 9th day of July, 1987.

William E. Brock,

Secretary of Labor.

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