

to skilled or semiskilled light work only if the light work is so similar to your previous work that you would need to make very little, if any, vocational adjustment in terms of tools, work processes, work settings, or the industry. \* \* \*

4. Amend part 404, subpart P, appendix 2, as follows:

a. In section 202.00, revise paragraph (f) to read as follows:

b. In section 203.00, revise the third sentence of paragraph (c) to read as follows:

#### Appendix 2 to Subpart P of Part 404— Medical-Vocational Guidelines

202.00 *Maximum sustained work capability limited to light work as a result of severe medically determinable impairment(s).*

(f) For a finding of transferability of skills to light work for individuals of advanced age who are closely approaching retirement age (age 60 or older), there must be very little, if any, vocational adjustment required in terms of tools, work processes, work settings, or the industry.

203.00 *Maximum sustained work capability limited to medium work as a result of severe medically determinable impairment(s).*

(c) \* \* \* Further, for individuals closely approaching retirement age (60 or older) with a work history of unskilled work and with marginal education or less, a finding of disabled is appropriate.

#### PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

##### Subpart I—[Amended]

5. The authority citation for subpart I of part 416 continues to read as follows:

**Authority:** Secs. 221(m), 702 (a)(5), 1611, 1614, 1619, 1631(a), (c), and (d)(1), and (p), and 1633 of the Social Security Act (42 U.S.C. 421(m), 902(a)(5), 1382, 1382c, 1382h, 1383(a), (c), and (d)(1), and (p), and 1383(b); secs. 4(c) and 5, 6(c)–(e), 14(a), and 15, Pub. L. 98–460, 98 Stat. 1794, 1801, 1802, and 1808 (42 U.S.C. 421 note, 423 note, and 1382h note).

6. Amend § 416.963 to revise paragraph (e) to read as follows:

#### § 416.963 Your age as a vocational factor.

(e) *Person of advanced age.* We consider that at advanced age (age 55 or older), age significantly affects a person's ability to adjust to other work. We have special rules for persons of advanced age and for persons in this

category who are closely approaching retirement age (age 60 or older). See § 416.968(d)(4).

7. Amend § 416.968 to revise the fifth sentence of paragraph (d)(4) to read as follows:

#### § 416.968 Skill requirements.

(d) *Skills that can be used in other work (transferability).* \* \* \*

(4) *Transferability of skills for individuals of advanced age.* \* \* \* If you are *closely approaching retirement age* (age 60 or older) and you have a severe impairment(s) that limits you to no more than *light work*, we will find that you have skills that are transferable to skilled or semiskilled light work only if the light work is so similar to your previous work that you would need to make very little, if any, vocational adjustment in terms of tools, work processes, work settings, or the industry. \* \* \*

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BILLING CODE 4191–02–P

## DEPARTMENT OF LABOR

### Employees Compensation Appeals Board

#### 20 CFR Part 501

RIN 1290–AA22

#### Rules of Procedure

**AGENCY:** Employees' Compensation Appeals Board, Department of Labor.

**ACTION:** Notice of Proposed Rulemaking (NPRM); Request for Comments.

**SUMMARY:** The Department of Labor (DOL or Department) is issuing this Notice of Proposed Rulemaking (NPRM) to update the regulations providing for appeals before the Employees' Compensation Appeals Board (Board). The Board has jurisdiction over appeals arising under the Federal Employees' Compensation Act (FECA). 5 U.S.C. 8149. Over the forty-six years since the last major revisions to the Board's procedural regulations, several aspects of the current rules have become outdated by case law precedent or technological advances. These proposed revisions will provide updated rules and guidance to all federal employees who seek to appeal from the decisions of the Office of Workers' Compensation Programs (OWCP) under FECA.

**DATES:** The Department invites interested persons to submit comments on this proposed rule. To ensure

consideration, comments must be in writing and must be received on or before August 19, 2008.

**ADDRESSES:** You may submit comments, identified by Regulatory Identification Number (RIN) 1290–AA22, by either one of the two following methods:

- *Federal e-Rulemaking Portal:* <http://www.regulations.gov>. Follow the Web site instructions for submitting comments.

- *Mail/Hand Delivery/Courier:* Written comments, disk and CD-Rom submissions may be mailed or delivered by hand delivery/courier to Alec J. Koromilas, Chairman and Chief Judge, Employees' Compensation Appeals Board, via the Office of the Clerk of the Appellate Boards, 200 Constitution Avenue, NW., Washington, DC 20210. The Office of the Clerk is open during business hours on all days except Saturdays, Sundays and Federal Holidays, from 8:30 a.m. to 5 p.m., Eastern Time.

Additional information on submitting and reviewing comments is found in Section IV.

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

**SUPPLEMENTARY INFORMATION:** This preamble is divided into four sections. Section I provides general background information on the development of the proposed revisions to 20 CFR part 501. Section II is a section-by-section analysis of the proposed regulatory text. Section III covers the administrative requirements for this proposed rulemaking. Section IV provides additional information and instructions to those wishing to comment on the rule.

#### I. Background

The Employees' Compensation Appeals Board was created by the Reorganization Plan No. 2 of 1946 and transferred to the Department of Labor in 1950 by Reorganization Plan No. 19 of 1950. See 5 U.S.C. 8145 notes. Under the Federal Employees' Compensation Act, the Secretary of Labor must provide for an Employees' Compensation Appeals Board “\* \* \* with the authority to hear and, subject to applicable law and the rules and

regulations of the Secretary, make final decisions on appeals taken from determinations and awards with respect to claims of employees." 5 U.S.C. 8149.

It has been forty-six years since the last major revisions to the Board's procedural regulations, and the Department has not revised the Part 501 rule at all since 1988. See 53 Fed. Reg. 49491 (December 7, 1988). Since these last amendments, administrative procedures have been updated by Board case law and practice. This proposed rule incorporates and codifies current Board operating procedures to provide more thorough and accurate rules and guidance to Appellants and the Representatives who come before the Board. In addition, the proposed rule includes three major revisions: amending the time provided for appeal, the procedures regarding requests for oral argument and attorney fees.

First, the proposed regulations provide all Appellants 180 days in which to file an appeal of a decision issued by OWCP. This is a change from the current regulations, which require an appeal to be filed within 90 days of the issuance of an OWCP decision for U.S. and Canadian residents, and 180 days for those residing outside the U.S. and Canada. Current regulations also permit the Board to waive the 90-day or 180-day requirement and allow an appeal to be filed within one year of the date of the OWCP decision, "for good cause shown," without defining or describing what constitutes "good cause." The proposed regulations establish a uniform appeal time, but give the Board discretion to increase the timeframe for any Appellant who demonstrates compelling circumstances. Given a claimant's ability to request reconsideration before the OWCP, and because the Board's review of the case is limited to the evidence before the OWCP at the time of the decision under review, the Board believes that allowing a uniform 180 days for the filing of an appeal (with the discretion to extend the 180 days for an Appellant who demonstrates compelling circumstances) provides sufficient time for an Appellant to achieve review of a decision by the Director.

Second, the proposed regulations provide for oral argument at the discretion of the Board on its own, or in response to a written request made within 60 days of the filing of the appeal that establishes the need for oral argument. This is a change from the current regulations that provide Appellants with a right to an oral argument before the Board. Although oral argument can be beneficial in the context of novel issues presented by the

appeal, or in other contexts such as resolving a perceived conflict between Board decisions on similar issues, there are other situations in which oral argument is unlikely to add to the record before the Board and therefore the Board is proposing to make the granting of oral argument a matter within the Board's discretion.

Finally, an explicit articulation of the requirement for requesting consideration and approval by the Board of any proposed fees for work before the Board is provided in this revision.

In drafting the proposed regulations, the Board has anticipated that technological advances may, in the future, allow the filing, notice, service and presentation of documents and argument by electronic means. These proposed regulations in no way limit the Board's discretion in utilizing technological advances.

## II. Summary and Discussion of Regulatory Provisions: Rules of Procedure

### Section 501.1 Definitions

In this subsection, the Board has amended and added certain defined terms. In paragraph (a), "FECA" replaces "Act" to more clearly reference the Federal Employees' Compensation Act. A definition of the Chief Judge and Chairman of the Board is provided for the first time in (c), as is the definition of other Board members and their roles in a new (d). In paragraph (e), "OWCP" has been substituted for "Office" to more clearly reference the Office of Workers' Compensation Programs. As proceedings before the Board are non-adversarial, references to "party" have been removed from section 501.1 and throughout the rule. In place of the term "party," this section contains new paragraphs (f), (g), and (h) for the terms "Director," "Appellant" and "Representative." The definition of "counsel" under the former paragraph (f) is incorporated into the definition of "Representative" in the new paragraph (h). These terms also are used throughout the proposed regulations.

The definition of "Director" in paragraph (f) deletes references to the Canal Zone and Panama Canal Company as those entities ceased to operate following the October 1, 1979 enactment of the Panama Canal Act of 1979. Workers hired after that date are covered under the social security system of the Republic of Panama. Workers hired before that date or who are U.S. citizens continue to be covered under FECA. See Exec. Order 12,652, 53 FR 36775 (Sept. 19, 1988). Paragraph (f)

recognizes that the Director may delegate his or her authority. Finally, paragraph (f) states that the Director is represented before the Board by an attorney designated by the Solicitor of Labor.

New subsection (i) defines the term "Decision." Paragraph (j) defines the term "Clerk or Office of the Clerk."

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

In paragraph (b), clarification is provided regarding the appointment of three permanent judges and other alternate judges by the Secretary of Labor. The Board has used alternate judges (formerly "members") since at least 1950; the Board's use of alternate judges was approved in *Norred v. Brock*, Civ. A. No. 86-887 SSH, 1987 WL 18742 (D.D.C., October 7, 1987). In addition, a sentence is added to reflect that the Board's functions are quasi-judicial in nature, because the Board inherited the quasi-judicial functions of the Employees' Compensation Commission when the Board was established in 1946. See *Clinton K. Yingling*, 4 ECAB 529, 533-537 (1952).

Paragraph (c) provides that the Board's jurisdiction on appeal extends only to the record considered by OWCP. During the pendency of an appeal, Appellants often submit new evidence to the Board that cannot be considered, or Appellants simultaneously seek an appeal and a request for reconsideration before OWCP with the submission of new evidence. The Board clarifies its procedure in subsection (c). Subsection (c)(i) articulates that any evidence not previously considered by OWCP will not be considered by the Board on appeal; (c)(ii) states that there is no appeal with respect to any interlocutory matter decided (or not decided) by OWCP during the pendency of a case (an example of an interlocutory matter is a remand by an OWCP Hearing Representative to the district office for further development); and (c)(iii) codifies Board practice that once an appeal is docketed by the Board, OWCP cannot retain jurisdiction to consider a simultaneous request for reconsideration or hearing on the same issue until after the Board relinquishes jurisdiction.

### Section 501.3 Notice of Appeal

In this section, the Board clarifies the elements of a Notice of Appeal. Paragraphs (a) and (b) contain essentially the same language as the current regulation regarding who may file an appeal and where an appeal is to be filed. Subsections (c)(i)-(v) expand

upon the elements that must be contained in an Appeal Notice. Additional requirements of providing the date of the appeal, the phone numbers of the Appellant and any duly appointed Representative, a signed authorization for that Representative, and the Appellant's signature on the notice of appeal have been added. These items are intended to increase the Clerk's ability to timely contact Appellant or his or her Representative during the pendency of the appeal, and to verify the Representative named in the appeal. The addition of this data achieves consistency with the information requested through the optional use of the Form AB-1, which may be used but is not required.

Paragraph (d) incorporates case law for the circumstances that allow substitution for a deceased Appellant. When an employee properly files an appeal before the Board but then dies prior to the Board's disposition of the appeal, the appeal may proceed to adjudication only if there is a substitution of a proper appellant. The request must be made by motion, providing documentation of the death and requesting a determination as to whether a substitution of an appropriate party in interest has been proposed. *See John J. Cremo*, 38 ECAB 153, 155-156 (1986).

The proposed paragraph (e) provides 180 days for the filing of all appeals, regardless of where the Appellant lives. Currently, the rule provides 90 days for persons living in the United States or Canada and 180 days for persons living outside the United States or Canada. As discussed above, the Board believes 180 days is a sufficient amount of time for a claimant to appeal an adverse decision, given a claimant's ability to request reconsideration before the OWCP, and because the Board's review of the case is limited to the evidence before the OWCP at the time of the decision under review.

Additionally, paragraph (e) states that should compelling circumstances prevent an Appellant from meeting this 180-day limitation, the Board has retained discretion to extend this time period, but only on specific application to the Board. As paragraph (e) states, "compelling circumstances" are "circumstances beyond the Appellant's control" and do not include "delay caused by failure of an individual to exercise due diligence in submitting a notice of appeal." The Board has adopted a new term, "compelling circumstances," in place of "good cause," for the standard describing its discretion in accepting an appeal filed after the 180 days. The phrase

"compelling circumstances" has been substituted in the proposed rule to insure that an objective standard for accepting an appeal after 180 days is being uniformly followed. The standard of "good cause" which appears in the current regulations concerning time limits for appeals was not being enforced in practice. For example, "compelling circumstances" could include a medical condition that renders the Appellant incompetent or military service in a war zone. The Board will, in its discretion, consider any such request on a case-by-case basis.

Date of filing requirements have been moved from Section 501.3(d)(3) to paragraph (f) and include more extensive discussion of these requirements to assist Appellants. The new language in (f)(i) replaces language currently found in 501.10(c) by acknowledging that commercial delivery services may be used by Appellants in place of the U.S. Mail Service, but only the date of receipt by the Clerk will then be used to determine timeliness. If, however, the U.S. Mail Service is used, the Board will continue to look to the date of mailing to establish timeliness if the date of receipt by the Clerk would make the appeal untimely. Subsection (f)(ii) contains provisions in current section 501.10(d)(1) and also incorporates case law and current Board practice that the determination of timeliness of the appeal starts the day after the date of the OWCP decision. *See Angel M. Labron, Jr.*, 51 ECAB 488 (2000), *citing to John B. Montoya*, 43 ECAB 1148 (1992), *citing to Marguerite J. Dvorak*, 33 ECAB 1682 (1982). While section 501.3(f)(ii) only addresses timelines with respect to filing dates, the Board will consistently apply this section's method of computing time for all actions in the unlikely event that time computation becomes an issue for another action under this Part.

The provisions for the filing of pleadings currently found in section 501.3(e) are moved in the proposed regulation to section 501.4(c) and (d). The term "pleadings" is broadly construed to include all written communications from an Appellant or Representative to the Board, including briefs, statements of law, memoranda in justification, motions, and the optional form AB-1.

Proposed paragraph (g) clarifies that if an appeal is filed more than 180 days from the date of the OWCP decision without a successful request to extend time due to compelling circumstances, the appeal will be dismissed and there

will be no further review of the OWCP decision.

Proposed paragraph (h) discusses the procedures used by the Clerk upon receipt of an incomplete appeal, currently found at the end of section 501.3(c). The proposed paragraph (h) specifies that it is the Clerk who will specify a reasonable time for Appellant to submit all required information missing from the appeal. Additionally, paragraph (h) states that if the needed information is not received in the time specified, the appeal will be dismissed.

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

The current regulations regarding service of an appeal on OWCP and transmission of the OWCP record to ECAB, now at 501.4(a) and (b), are essentially restated in the proposed 501.4(a), except for the reference to the Solicitor of Labor acting as a conduit for transmission of the OWCP records from OWCP to the Board. The Office of the Solicitor's role as Representative of OWCP is now referenced in section 501.1(f)'s definition of the Director.

Paragraph (b) describes the different options available to an Appellant who wishes to inspect, or receive a copy of, the OWCP record that is on appeal to the Board. This paragraph incorporates many of the provisions regarding inspection of the ECAB docket and record that are currently found in Section 501.8(b). However, the proposed paragraph no longer states that the docket of the Board is open to public inspection. This change acknowledges that the docket is maintained in a Privacy Act system of records, DOL/ECAB-1, Employees' Compensation Appeals Board Docket Records, 67 Fed. Reg. 16867 (April 8, 2002). Consequently, release of information from the docket is no longer automatic; any release of information from the docket must be in conformity with the requirements of the Privacy Act, 5 U.S.C. 552a, and the Department of Labor's implementing regulations found at 29 CFR part 71.

Paragraphs (c) and (d) expand current Section 501.3(e), which allows applications for review to be accompanied by a brief or supporting statement, by providing for the filing of pleadings (including supporting statements, briefs, and memoranda of law), and motions. Consistent with current Board practice, pleadings generally provide any type of information to the Board, whereas motions request Board action. Motions may include a request that the Board dismiss the appeal, affirm the OWCP decision or remand for further

consideration, approve a substitution on appeal, or other such matter. The Board on its own may also take action regarding a pending appeal. In addition, the Clerk is solely responsible for the service of a copy of all pleadings and motions filed with the Board on the Appellant, his or her Representative and the Director. This change to the original provision in subsection 501.10(b), which has been deleted, is intended to ensure that all documents filed with the Board are provided to Appellants, their Representatives and the Director. In addition, provisions originally contained in 501.10(d)(3) regarding motions for extension of time to file a paper other than a notice of appeal or petition for reconsideration are now contained in section 501.4(d).

Paragraph (e) requires the filing of an original and two copies of all papers with the Clerk, replacing Section 501.10(a). This is an increase from one to two copies to facilitate the processing efficiency of the Clerk.

#### *Section 501.5 Oral Argument*

This proposed section revises and expands upon the current regulation's provisions regarding oral argument, also found at section 501.5. Proposed paragraph (a) provides that the granting of oral argument is within the discretion of the Board and not automatically scheduled upon the request of an Appellant or the Director. This is a change in the availability of oral argument. As previously discussed, while oral argument can provide the Board valuable assistance in addressing and evaluating the issues presented on appeal, the Board has concluded that automatic availability of oral argument on request of an Appellant or the Director is not necessary. The Board still retains the ability to grant oral argument in an appropriate case. The Board may grant oral argument, for example, when the case presents an issue not previously considered by the Board, when oral argument will assist the Board in carrying out the intent of FECA, in the interests of justice, or when oral argument will resolve a conflict in Board decisions on a substantial question of law.

Proposed paragraph (b) provides that a request for oral argument must specify the issue(s) to be addressed, provide a statement supporting the need for oral argument, and be submitted in writing no later than 60 days from the date of the appeal. If not granted, the Board will proceed to a decision on the record.

Revised paragraph (c) provides that the Clerk will notify the Appellant and Director at least 30 days before the date set for the argument, and the notice of

oral argument will state the issues to be heard. The increase from 10 to 30 days is designed to give Appellants more time to prepare for oral argument and to arrange travel to Washington, DC. Paragraphs (d) and (e) specify that thirty minutes will be provided for the argument by either the Appellant or his or her Representative, not both. This changes the current regulations statement that "generally not more than 1 hour shall be allowed for oral argument." However, the proposed regulation retains the Board's discretion to extend the new 30 minute time limit. In new paragraph (f), the Board emphasizes that costs associated with travel to oral argument, held in Washington, DC, are borne by the Appellant. This is consistent with current practice.

Proposed paragraph (g) codifies the current practice that a continuance may only be granted for good cause shown and only if the request is received by the Board at least 15 days prior to the date scheduled for oral argument. Paragraph (h) continues the Board's discretion, now found at current section 501.5(c), to determine that non-appearance by either Appellant or the Director will not delay the Board's resolution of an appeal and the Board may treat the appeal as submitted on the record.

#### *Section 501.6 Decisions and Orders*

The Board is revising this section to provide more information regarding the Board's practice in the issuance of decisions and orders. Paragraph (a) states that the Board's decision will be in writing and the types of decisions that the Board may make. Paragraph (b) states the number of judges on a panel and the number needed to make a decision. Paragraph (c) provides new language, consistent with Board practice, regarding how the date of issuance is determined. Proposed paragraph (d) combines the provisions found in current paragraphs (c) and (d), stating that the Board's decision will become final 30 days from the date of issuance and that at that point the Board will no longer retain jurisdiction over the appeal unless a petition for reconsideration is submitted and granted or unless the Board fixes another date for finality. See Section 501.7. Paragraph (e) explains dispositive orders. Paragraph (f) states that the Board will send a copy of its opinion to the Appellant as well as the Director and notes that, where Appellant has authorized a Representative on appeal, service of the Board's opinion will be made to both the Appellant and to the Representative.

#### *Section 501.7 Petition for Reconsideration*

The proposed revisions to this section expand upon the information in the current section 501.7 regarding the Board's practice and procedures regarding requests for reconsideration. Paragraph (a) maintains a 30 day time period for filing a petition for reconsideration, with time measured from the date of the issuance of a decision or order, unless the Board sets another time period.

Paragraph (b) changes the instructions on where to file the petition, and newly stipulates that the Clerk will ensure that Appellants, their Representatives and the Director are served with copies of the petition for reconsideration. Paragraph (c) states what information must be in the petition. Paragraph (d) describes the panel of judges who will review the petition, noting that it is the Board's practice to assign the same panel to hear a petition for reconsideration if at all possible. This codification of agency practice provides continuity and efficiency in the consideration of reconsideration requests. Paragraph (e) allows, but does not require, an answer to be filed. Paragraph (f) notes that, at the Board's discretion, an oral argument may be allowed prior to the Board's decision on the petition for reconsideration.

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

Section 501.8 is revised to provide more information regarding the Clerk's office, the docket and record maintained by the Board. Paragraph (a) gives the address and business hours for the Clerk. Business hours of the Clerk are provided by the Board to clarify "close of business" for purposes of section 501.3(f). Paragraph (b) states that the Clerk will maintain the docket in the chronological order in which notices of appeal are received, but that the Board retains discretion regarding the order in which it will hear appeals. Provisions and proposed amendments to current regulation section 501.8(b), including the elimination of the provision providing public inspection of the ECAB docket, and clarifications regarding the public availability of the OWCP record, have been moved to proposed section 501.4(b).

Paragraph (c) continues to state that final decisions of the Board will be published in a form readily available for inspection by the general public. This proposed regulation will not change current Board practices in publication of final decisions. The phrase "readily

available” means the Board will provide copies of its decisions in a form that complies with section 508 of the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*

The Board, through its written decisions, has the responsibility for interpreting the FECA and resolving matters raised on appeal. The written decisions of the Board set forth the relevant facts of each claim, evaluate the facts in terms of applicable workers’ compensation law, and affirm OWCP’s decision or direct corrective action or discretionary relief, or order such action as may be appropriate depending on the case. The Board has the responsibility to establish a sound body of case precedent in the interpretation of the FECA, its implementing regulations, and procedures in order to provide guidance in the administration of Federal workers’ compensation claims. The Board’s decisions are cited in OWCP motions and decisions as well as by courts and legal authorities. Due to budgetary considerations, however, the Board is not able to include every written decision in its annual paper bound volume of published decisions, *Digest and Decisions of the Employees’ Compensation Appeals Board*, but takes great care selecting those decisions that represent important case precedent. The annual volume does not include routine cases or procedural orders. *The Digest and Decisions of the ECAB* is available at various law libraries throughout the country. A complete collection of Board final decisions is posted on the DOL Web site and Board final decisions also are available in print form from the Clerk’s office upon request and through various commercial vendors providing research services. The Board notes that copies of its final decisions are included in the Board docket, which is maintained in a system of records (DOL/ECAB-1) covered by the Privacy Act. Release of ECAB decisions are permitted in accordance with the DOL/ECAB-1’s routine use provisions. *See* 67 Fed. Reg. 16867 (April 8, 2002).

#### *Section 501.9 Representation; Appearances and Fees*

Section 501.9 incorporates and expands upon information currently contained in section 501.11. This proposed section defines representation in paragraph (a) and notes that a Representative may be either an attorney or non-attorney, but that representation by former DOL employees and judges is governed by the Department’s ethics regulations. Paragraph (b) states that an Appellant must file a written authorization with the Board for any Representative.

Paragraph (c) requires that changes of address be reported to the Clerk. Proposed paragraph (d) continues the current section 501.11(c) regarding rules of Representative debarment and debarment appeals.

Proposed section 501.9(e) amends the attorney and other fee provisions now found in section 501.11(d). Board experience has demonstrated that the statutory requirement that attorney and other fee requests must be approved by the Board for work before it, *see* 5 U.S.C. 8127, is often not followed. Therefore, in paragraph (e) the Board has clarified the requirements regarding review of all fee applications to ensure that Appellants are aware of and understand the mandatory requirement for Board consideration and approval of any fee application by a Representative or Counsel. Paragraph (e) also expands the list of factors that the Board will evaluate when reviewing fee requests. This section also provides information to those practicing before ECAB about the federal criminal law provision relating to Representatives in the FECA process, as failure to receive an approval from ECAB for collecting a fee may constitute a violation of federal law under 18 U.S.C. 292.

#### *Section 501.10 Number of Copies*

This section has been deleted and its requirements incorporated into section 501.4.

#### *Section 501.11 Appearances*

This section has been deleted and its requirements incorporated into section 501.9.

#### *Section 501.12 Intervention*

This section has been deleted in its entirety. The intervention process, used only occasionally by OWCP prior to the 1989 transfer of Panama Canal Commission cases to the OWCP, has not been utilized in recent years and is deleted as unnecessary.

#### *Section 501.13 Place of Proceedings*

This section has been deleted and its requirements incorporated into section 501.3.

### **III. Administrative Requirements for the Proposed Rulemaking**

#### *Executive Order 12866*

The Office of Management and Budget has not reviewed this proposed rule because it is not economically significant. This proposed rule will not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs; nor will it have an annual effect on the economy of \$100 million or more; nor will it adversely affect the

economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities in any material way. Furthermore, it does not raise a novel legal or policy issue arising out of legal mandates, the President’s priorities or the principles set forth in the Executive Order.

#### *Regulatory Flexibility Act of 1980*

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

#### *Paperwork Reduction Act (PRA)*

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

#### *The National Environmental Policy Act of 1969*

The Department certifies that this proposed rule has been assessed in accordance with the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* (NEPA). The Department concludes that NEPA requirements do not apply to this rulemaking because this proposed rule includes no provisions impacting the maintenance, preservation or enhancement of a healthful environment.

#### *Federal Regulations and Policies on Families*

The Department has reviewed this proposed rule in accordance with the requirements of section 654 of the Treasury and General Government Appropriations Act of 1999, 5 U.S.C. 601 note. These proposed regulations were not found to have a potential negative affect on family well-being as it is defined thereunder.

*Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks*

The Department certifies that this proposed rule has been assessed regarding environmental health risks and safety risks that may disproportionately affect children. These proposed regulations were not found to have a potential negative affect on the health or safety of children.

*Unfunded Mandates Reform Act of 1995 and Executive Order 13132*

The Department has reviewed this proposed rule in accordance with the requirements of Exec. Order No. 13132, 64 Fed. Reg. 43,225 (Aug. 10, 1999) and the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 *et seq.*, and has found no potential or substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. As there is no Federal mandate contained herein that could result in increased expenditures by State, local or tribal governments or by the private sector, the Department has not prepared a budgetary impact statement.

*Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

The Department has reviewed this proposed rule in accordance with Exec. Order 13,175, 65 FR 67,249 (Nov. 9, 2000), and has determined that it does not have "tribal implications." The proposed rule does not "have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes."

*Executive Order 12630: Governmental Actions and Interference With Constitutionally Protected Property Rights*

The Department has reviewed this proposed rule in accordance with Exec. Order 12630, 53 FR 8859 (Mar. 15, 1988) and has determined that it does not contain any "policies that have takings implications" in regard to the "licensing, permitting, or other condition requirements or limitations on private property use, or that require dedications or exactions from owners of private property."

*Executive Order 13211: Energy Supply, Distribution, or Use*

The Department has reviewed this proposed regulation and has determined

that the provisions of Exec. Order 13211, 66 FR 28355 (May 18, 2001) are not applicable as this is not a significant regulatory action and there are no direct or implied effects on energy supply, distribution, or use.

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

The Department has reviewed these proposed rules under the Privacy Act, 5 U.S.C. 552a, and has determined that this proposed rule will not require that any new information be processed, filed or collected during an appeal before the Board. Case files will continue to be released or not released consistent with the provisions of the Privacy Act and current published systems of record notices. Therefore, the Department has determined this proposed rule would not require revision of the current Privacy Act System of Records, DOL/GOVT-1, Office of Workers' Compensation Programs, Federal Employees' Compensation Act File, 67 Fed. Reg. 16826 (April 8, 2002) and DOL/ECAB-1, Employees' Compensation Appeals Board Docket Records, 67 Fed. Reg. 16867 (April 8, 2002).

*Clarity of This Regulation*

Executive Order 12866, 58 FR 51735 (September 30, 1993), and the President's memorandum of June 1, 1998, require each agency to write all rules in plain language. The Department invites comments on how to make this proposed rule easier to understand.

**List of Subjects in 20 CFR Part 501**

Rules of Procedure for practice before the Employees' Compensation Appeals Board, including definitions; scope and applicability of rules; composition and jurisdiction; notice of appeal; case record, inspection and submission of pleadings and motions; oral argument; decisions and orders; petitions for reconsideration; clerk, docket and records; and representation, appearances and fees.

**IV. Instructions for Providing Comments**

*APA Requirements for Notice and Comment*

The majority of changes proposed here consist of amendments to rules of agency organization, procedure and practice, and consequently are exempt from the notice and public comment requirements of the Administrative Procedures Act, *see* 5 U.S.C. 553(b)(3)(A). However, the Board and the Department wish to provide the public with an opportunity to submit

comments on any aspect of the entire proposed rule.

*Methods of Filing Comments*

Please submit only one copy of your comments via any of the methods noted in the addresses section. All submissions received must include the agency name, as well as RIN 1290-AA22. Also, please note that due to security concerns, postal mail delivery in Washington, DC may be delayed. Therefore, in order to ensure that comments are received on time, the Department encourages the public to submit comments via the Internet as indicated above.

*Publication of Comments Submitted Electronically*

Please be advised that the Department will post all comments received on <http://www.regulations.gov> without making any change to the comments, including any personal information provided. The <http://www.regulations.gov> Web site is the Federal e-rulemaking portal and all comments posted there are available and accessible to the public. Therefore, the Department recommends that commenters safeguard their personal information by not including Social Security Numbers, personal addresses, telephone numbers, and e-mail addresses in comments. It is the responsibility of the commenter to safeguard his or her information.

*Rulemaking Docket*

In addition to the electronic comments available on <http://www.regulations.gov>, the Department will make all the comments it receives available for public inspection during normal business hours at the above address. If you need assistance to review the comments, the Department will provide you with appropriate aids such as readers or print magnifiers. The Department will make copies of the proposed rule available, upon request, in large print or electronic file on computer disc. The Department will consider providing the proposed rule in other formats upon request. To schedule an appointment to review the comments and/or obtain the proposed rule in an alternate format, contact the office of Alec J. Koromilas, Chairman and Chief Judge, Employees' Compensation Appeals Board at (202) 693-6406 (VOICE)(this is not a toll-free number) or (877) 889-5627 (TTY/TDD). You may also contact Chairman Koromilas' office at the address listed above.

Signed at Washington, DC, on June 16, 2008.

**Howard M. Radzely,**

*Deputy Secretary, U.S. Department of Labor.*

For the reasons stated in the preamble, the Department of Labor proposes to revise 20 CFR part 501 to read as follows:

**PART 20—THE EMPLOYEES' COMPENSATION APPEALS BOARD—RULES OF PROCEDURE**

Sec.

501.1 Definitions

501.2 Scope and Applicability of Rules; Composition and Jurisdiction of the Board

501.3 Notice of Appeal

501.4 Case Record; Inspection; Submission of Pleadings and Motions

501.5 Oral Argument

501.6 Decisions and Orders

501.7 Petition for Reconsideration

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

501.9 Representation; Appearances and Fees

**Authority:** 5 U.S.C. 8101 *et seq.*

**§ 501.1 Definitions.**

(a) *FECA* means the Federal Employees' Compensation Act, 5 U.S.C. 8145, and any statutory extension or application thereof.

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

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

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

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

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

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

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

who is a member in good standing of the bar of the Supreme Court of the United States or the highest court of any State, territory or the District of Columbia.

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

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

**§ 501.2 Scope and applicability of rules, composition and jurisdiction of the Board.**

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

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

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

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

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

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

**§ 501.3 Notice of appeal.**

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

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

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

(1) Date of Appeal.

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

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

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

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

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

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

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

(f) *Date of Filing.* A notice of appeal complying with paragraph (c) is considered to have been filed only if received by the Clerk by the close of business within the period specified under paragraph (e).

(1) *Date of Mailing.* If the notice of appeal is sent by United States Mail and use of the date of delivery as the date of filing would result in a loss of appeal rights, the appeal will be considered to have been filed as of the date of 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. If a notice of appeal is delivered or sent by means other than United States Mail, including commercial delivery, personal delivery or fax, the notice is deemed to be received when received by the Clerk.

(2) In computing the date of filing, the 180 day time period for filing an appeal

begins to run on the day following the date of the OWCP decision. The last day of the period so computed shall be included, unless it is a Saturday, Sunday or Federal holiday, in which event the period runs to the close of the next business day.

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

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

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

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

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

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

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

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

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

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

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

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

(e) *Number of Copies.* All filings with the Board, including any notice of appeal, pleading, or motion shall

include an original and two (2) legible copies.

**§ 501.5 Oral argument.**

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

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

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

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

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

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

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

(h) *Nonappearance.* The absence of an Appellant, his or her Representative, or



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

#### **§ 501.6 Decisions and orders.**

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

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

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

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

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

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

#### **§ 501.7 Petition for reconsideration.**

(a) *Time for filing.* The Appellant or the Director may file a petition for reconsideration of a decision or order issued by the Board within 30 days of the date of issuance, unless another time period is specified in the Board's order.

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

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

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

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

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

#### **§ 501.8 Clerk of the office of the appellate boards, docket of proceedings, records.**

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

(b) *Docket.* The Clerk will maintain a docket containing a record of all proceedings before the Board. Each docketed appeal will be assigned a number in chronological order based upon the date on which the notice of appeal is received. While the Board generally hears appeals in the order docketed, the Board retains discretion to change the order in which a particular appeal will be considered. The Clerk will prepare a calendar of cases submitted or awaiting oral argument and such other records as may be required by the Board.

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

#### **§ 501.9 Representation, appearances and fees.**

(a) *Representation.* In any proceeding before the Board, an Appellant may

appear in person or by appointing a duly authorized individual as his or her Representative.

(1) *Counsel.* The designated Representative may be an attorney who has been admitted to practice before the Supreme Court of the United States or the highest court of any state, the District of Columbia, or a United States territory and who is in good standing with that bar.

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

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

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

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

(d) *Debarment of Counsel or Representative.* In any proceeding, whenever the Board finds that a person acting as counsel or other Representative or the Director is guilty of unethical or unprofessional conduct, the Board may order that such person be excluded from further acting as counsel or Representative of an Appellant in such proceeding. Such order may be appealed to the Secretary of Labor or his or her designee, but proceedings before the Board will not be delayed or suspended pending disposition of such appeal. However, the Board may suspend the proceeding of an appeal for

a reasonable time for the purpose of enabling Appellant or the Director to obtain different counsel or other Representative. Whenever the Board has issued an order precluding a person from further acting as counsel or Representative in a proceeding, the Board will, within a reasonable time, submit to the Secretary of Labor or his or her designee a report of the facts and circumstances surrounding the issuance of such order. The Board will recommend what action the Secretary of Labor should take in regard to the appearance of such person as counsel or Representative in other proceedings before the Board. Before any action is taken debarring a person as counsel or Representative from other proceedings, he or she will be furnished notice and the opportunity to be heard on the matter.

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

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

[FR Doc. E8-13910 Filed 6-19-08; 8:45 am]

BILLING CODE 4510-23-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R07-OAR-2008-0392; FRL-8582-1]

#### Approval and Promulgation of Implementation Plans; State of Missouri

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA proposes to approve a request to amend the Missouri State Implementation Plan (SIP) to include revisions to the Kansas City Solvent Metal Cleaning rule. The revisions to this rule include consolidating exemptions in the applicability section, adding new exemptions, adding definitions of new and previously undefined terms, and clarifying rule language regarding operating procedure requirements for spray gun cleaners and air-tight and airless cleaning systems. This revision will ensure consistency between the state and the federally-approved rules.

**DATES:** Comments on this proposed action must be received in writing by July 21, 2008.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R07-OAR-2008-0392 by mail to Amy Algoe-Eakin, Environmental Protection Agency, Air Planning and Development Branch, 901 North 5th Street, Kansas City, Kansas 66101. Comments may also be submitted electronically or through hand delivery by following the detailed instructions in the **ADDRESSES** section of the direct final rule located in the rules section of this **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Amy Algoe-Eakin at (913) 551-7942, or by e-mail at [algoe-eakin.amy@epa.gov](mailto:algoe-eakin.amy@epa.gov).

**SUPPLEMENTARY INFORMATION:** In the final rules section of the **Federal Register**, EPA is approving the state's SIP revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial revision amendment and anticipates no relevant adverse comments to this action. A detailed rationale for the approval is set forth in the direct final rule. If no relevant adverse comments are received in response to this action, no further activity is contemplated in relation to this action. If EPA receives relevant adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed action. EPA will not institute a second comment period

on this action. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on part of this rule and if that part can be severed from the remainder of the rule, EPA may adopt as final those parts of the rule that are not the subject of an adverse comment. For additional information, see the direct final rule which is located in the rules section of this **Federal Register**.

Dated: June 9, 2008.

**John B. Askew,**

*Regional Administrator, Region 7.*

[FR Doc. E8-13756 Filed 6-19-08; 8:45 am]

BILLING CODE 6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R07-OAR-2008-0342; FRL-8581-8]

#### Approval and Promulgation of Implementation Plans; State of Missouri

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA proposes to approve a State Implementation Plan (SIP) to revise the sulfur dioxide (SO<sub>2</sub>) emissions rates and averaging times for Kansas City Power & Light's Hawthorn Plant and Montrose Station in Missouri rule, Restriction of Emission of Sulfur Compounds. Previous changes to this rule were disapproved in 2006 because EPA was concerned that the averaging times for the rates at these units had been dramatically increased from a 3-hour average to an annual average and that the revised averaging times were not demonstrated by the state to be protective of the short-term (3- and 24-hour) sulfur dioxide (SO<sub>2</sub>) National Ambient Air Quality Standard (NAAQS). EPA believes that the recent changes, which EPA is now proposing to approve, have been shown by Missouri to be protective of the short-term SO<sub>2</sub> NAAQS. This revision will ensure consistency between the state and the federally-approved rules.

**DATES:** Comments on this proposed action must be received in writing by July 21, 2008.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R07-OAR-2008-0342, by mail to Amy Algoe-Eakin, Environmental Protection Agency, Air Planning and Development Branch, 901 North 5th Street, Kansas City, Kansas 66101. Comments may also