

19.02 DUE PROCESS

I. Formal Hearings

Hearings must be conducted in accordance with Section 554 of the Administrative Procedure Act, 5 U.S.C. § 554.

A. Issues

1. All issues should be adjudicated in one proceeding to avoid piecemeal litigation and procedural delays. 20 C.F.R. § 702.338.
2. Formal hearing must address issues noted by the parties in pre-hearing statements (LS-18) prior to transfer from district director pursuant to 20 C.F.R. § 702.317.
 - (a) Hearing may be expanded to allow consideration of new issues if the evidence presented warrants their consideration. 20 C.F.R. § 702.336(a).
 - (b) § 702.366(b) provides that parties must be notified and given the opportunity to present argument and new evidence on a new issue which arises during the course of a hearing.
3. The ALJ may not raise new issue *sua sponte* in his Decision and Order.
 - (a) If the ALJ finds that case presents an issue which has not been raised by a party, he must give the parties notice that he is raising a new issue.
 - (b) The ALJ must hold the record open to provide parties an opportunity to respond before he issues his decision.
 - (c) The ALJ may not order a new hearing based on a new issue in a Decision and Order awarding benefits, since once a compensation order is issued, the record is closed, and the ALJ's authority to raise a new issue expires. 20 C.F.R. § 702.336(b).
 - (d) Persons entitled to notice of an administrative hearing shall be informed of issues of fact and law to be resolved.
4. Some issues, such as jurisdiction and Section 14(e) penalties can be raised at any time.

B. Stipulations

1. The ALJ is not obligated to accept all stipulations entered into by the parties.
 - (a) An ALJ may not reject stipulations without giving the parties prior notice that he will not automatically accept the stipulations.
 - (b) The parties must be given an opportunity to present evidence in support of the stipulations.

C. Evidence

1. Evidence must be formally admitted into the record.
 - (a) The ALJ must receive into evidence all relevant and material testimony and documents.
 - (b) The ALJ must fully inquire into matters that are fundamental to the disposition of the issues in a case.
2. The ALJ may take administrative judicial notice of facts if it is done in the proper manner.
 - (a) The ALJ must provide the parties with the opportunity to contradict the noticed facts with evidence to the contrary.
3. Hearsay evidence generally is admitted if considered reliable.
 - (a) The relaxed admissibility standard for hearsay evidence does not dispense with the right of cross-examination.
4. Benefits Review Board allows the administrative law judge to consider *ex parte* reports where
 - (a) the reports' authors are not biased and have no interest in the case;
 - (b) the opposing party has the opportunity to cross-examine or subpoena the witness; and
 - (c) the reports are not inconsistent on their face.

II. Decision and Order

A. Timing

1. If formal hearing is conducted, Section 19(c) requires administrative law judge to issue order within twenty days accepting/rejecting claim. See 20 C.F.R. § 702.349.
 - (a) Failure to comply requires **remand only where** aggrieved party shows that it was prejudiced by the delay.
2. If a Decision and Order is an award for compensation/payment, the employer/carrier has 10 days to make payment.
 - (a) No stay of payments by an administrative law judge is allowable.

B. Record

- _____ 1. Section 23(b) of the LHWCA provides for open hearings on the record and requires that hearings be stenographically reported.
2. The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitute the **exclusive record for decisions**, 5 U.S.C. § 556(e).
 - (a) Pursuant to 20 C.F.R. § 702.338, evidence must be **formally admitted** into the record.
 - (b) A decision issued based on evidence not formally admitted violates the APA.

C. Structure of Decision

- _____ 1. Findings of Fact and Conclusions of Law
 - (a) Section 552(a)(2)(B), 5 U.S.C. § 552(a)(2)(B), requires that a final order be in writing.
 - (b) Section 557(c)(3)(A), 5 U.S.C. § 557(c)(3)(A), requires that decisions rendered under the APA include a statement of "**findings and conclusions, and the reasons or basis**

therefor, on all material issues of fact, law or discretion presented on the record."

- (c) The ALJ's order must contain a sufficient rationale for the Board to discern the reasons for the ALJ's findings and thereby determine whether they are supported by substantial evidence and are in accordance with law.
- (d) The Board can remand cases for clarification where the administrative law judge makes conclusory findings of fact without comment on conflicting evidence or without explicit acceptance or rejection of parts thereof.

2. Medical Evidence

- _____ (a) The ALJ must adequately detail the rationale behind his decision, and specify which medical evidence was relied upon and why.
- (b) The ALJ must independently analyze and discuss the medical evidence. Failure to do so violates the APA's requirement for reasoned analysis.
- (c) The ALJ's incorporation of factual and legal assertions from a party's brief is impermissible to the extent it prevents this independent review of the evidence by the adjudicator.

3. Miscellaneous

- _____ (a) Post-hearing decisions shall be made by the same administrative law judge who received the evidence and presided at the hearing, unless that administrative law judge is unavailable.
- (b) If the credibility of the witness is at issue, and the presiding judge is unavailable to issue a decision, the parties have the right to a *de novo* proceeding before a new administrative law judge. This right may be waived.

D. Enforcement

1. Any beneficiary of an award, or the district director, may apply for enforcement to the **Federal District Court** for the judicial district in which the injury occurred, **not** to the Office of Administrative Law Judges.

E. Motions for Reconsideration

1. Any party may file a motion for reconsideration within 10 days of the filing of the Decision and Order. **(Must be postmarked by the tenth day and received within 15 days.)**
2. Upon filing a motion of reconsideration, the appeal time is tolled.
3. Motion must be issue specific and documented. Should not be a generic, one paragraph request.
4. Although the regulations do not address whether new evidence may be submitted with a Motion for Reconsideration, 20 C.F.R. §702.338 states that the ALJ may reopen the record at any time prior to the filing of a compensation order for the receipt of additional relevant evidence.

F. Motions for Modification

1. Section 22 allows for modification of a compensation order on the ground of a change in physical or economic conditions because of a mistake in a determination of fact. 33 U.S.C. §922.
2. Must be filed with the district director within one year of denial or last payment.
 - (a) If the case is on appeal to the Board, party can file a Motion for Modification with the Office of Administrative Law Judges.

III. Attorney Fee Applications

A. Approval Authority

1. Both the district director and the ALJ have the authority to approve an attorney fee application submitted by the claimant's attorney in a successful claim for the elements of the attorney fee petition which transpired while the claim was at their respective levels. (There is no authority to award an attorney fee to an employer or carrier.)

B. Parties Should Respond

1. Parties should respond to the Order setting up time tables to file attorney fee petitions and responses.

C. Appealing the Award

1. Parties that appeal the ALJ's decision should notify the OALJ as to the appeal
 - (a) Appeal does not automatically absolve a party of conforming to the above noted timetables. (The ALJ has the discretion to continue and resolve the attorney fee matter, though an award of attorney fees is not enforceable while the case is on Appeal. Alternatively, the ALJ can issue an order holding in abeyance any attorney fee pending the outcome of the appeal.)

D. Order to Discuss/Resolve Objections

1. The ALJ **may** order one party to initiate a verbal discussion with the opposing side in an effort to amicably resolve any objections to the Application for Fees and Costs.

IV. Settlements

A. Timing

1. Parties may settle at any time, including after a final order.

B. Approval Authority

1. Both the district director and the ALJ have authority to approve a settlement that is proper in form and has not been procured by duress, fraud or lack of mental capacity, and is an adequate settlement of the compensation and/or medical and/or attorney fee claim. But see 20 C.F.R. § 702.241(c) (when a case is pending at OALJ and is set for trial).

C. Settlements for psychological claims

1. A settlement for a psychological claim should contain evidence showing that the Claimant has a personal representative, unless Claimant who suffers a psychological impairment is fully capable of understanding the settlement

agreement **and** capable of properly controlling/administering the settlement fund.

- (a) Legal representation/Legal counsel does not constitute personal representation.
- (b) Capable Claimant suffering from a psychological impairment should submit psychiatric/psychological evidence proving his/her capability

D. Future Claims

- 1. Do not attempt to settle “all future claims.” But injury not specifically mentioned in a settlement package is NOT barred from a subsequent claim.

E. Jurisdiction

- 1. Parties may wish to specifically state that the Claimant is covered by the LHWCA.

V. Action to Withhold Benefits

A private insurer’s decision to withhold benefits does not amount to governmental action, and the due process clause is, therefore, not applicable. Kreschollek v. Southern Stevedoring Co., 223 F.3d 202 (3rd Cir. 2000)(A claimant has no protectable property right in the continued receipt of benefits in light of the lack of a prior finding of entitlement.). In Kreschollek, the **Third Circuit** followed American Mfr. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999), which dealt with a similar state worker’s compensation claim. In Sullivan, the Court held that “an insurer’s decision to withhold payment and seek utilization review of the reasonableness and necessity of particular medical treatment is not fairly attributable to the State.” Sullivan at 58. The Court further noted that, employees do not have a property interest in workers compensation benefits when they have not demonstrated that they are entitled to them and a state statute requires that they prove “that an employer is liable for a work-related injury, and ... that the particular medical treatment at issue is reasonable and necessary.” Sullivan at 61.