



## DEPARTMENT OF LABOR

### Employees' Compensation Appeals Board

#### 20 CFR Part 501

RIN 1290-AA37

#### Rules of Practice and Procedure

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

**ACTION:** Notice of proposed rulemaking; request for comments.

**SUMMARY:** The Department of Labor (DOL or Department) is issuing this Notice of Proposed Rulemaking (NPRM) to seek public comments on a proposal to require electronic filing (e-filing) and electronic service (e-service) for attorneys and lay representatives representing parties in proceedings before the Employees' Compensation Appeals Board (ECAB or the Board). These proposed regulations would establish e-filing and e-service rules of practice and procedure for the Board that would apply where a governing statute, regulation, or executive order does not establish contrary rules of practice or procedure. The rule would mandate e-filing, makes e-service automatic of documents for parties represented by attorneys and duly authorized lay representatives, and provides an option for pro se/self-represented parties to utilize these capabilities. It would also allow the Board, in its discretion, to hold oral arguments by videoconference.

**DATES:** The Department invites interested persons to submit comments on the proposed rules of practice and procedure. To ensure consideration, comments must be in writing and must be received by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**ADDRESSES:** You may send comments, identified by Regulatory Identification Number (RIN) 1290-AA37, only by the following method: Electronic Comments. Submit comments through the Federal eRulemaking Portal <http://www.regulations.gov>. To locate the proposed

rule, use docket number DOL-2020-0017 or key words such as “Administrative practice and procedure” or “Workers’ compensation.” Follow the instructions for submitting comments. All comments must be received by 11:59 p.m. on the date indicated for consideration in this rulemaking. **Instructions:** All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. All comments received will generally be posted without change to <https://www.regulations.gov>, including any personal information provided. If you need assistance to review the comments or the proposed rule, the Department will consider providing the comments and the proposed rule in other formats upon request. For assistance to review the comments or obtain the proposed rule in an alternate format, contact Mr. Thomas Shepherd, Clerk of the Appellate Boards, at (202) 693-6319.

Individuals with hearing or speech impairments may access the telephone number above by TTY by calling the toll-free Federal Information Relay Service at (800) 877-8339.

**FOR FURTHER INFORMATION CONTACT:** Thomas Shepherd, Clerk of the Appellate Boards, at 202–693–6319 or ECAB-Inquiries@dol.gov.

**SUPPLEMENTARY INFORMATION:** This preamble is divided into four sections: Section I explains the process of issuing a proposed rule concurrently with a companion direct final rule; Section II provides general background information on the development of the proposed rulemaking; Section III is a section-by-section summary and discussion of the proposed regulatory text; and Section IV covers the administrative requirements for this proposed rulemaking.

## **I. Proposed Rule Published Concurrently with Companion Direct Final Rule**

The Department is simultaneously publishing with this proposed rule an identical “direct final” rule elsewhere in this issue of the Federal Register. In direct final rulemaking, an agency publishes a final rule with a statement that the rule will go into effect unless the agency receives significant adverse comment within a specified period. If the agency receives no significant adverse comment in response to the direct final rule, the rule goes into effect. If the

agency receives significant adverse comment, the agency withdraws the direct final rule and treats such comment as submissions on the proposed rule. The proposed rule then provides the procedural framework to finalize the rule. An agency typically uses direct final rulemaking when it anticipates the rule will be non-controversial.

The Department has determined that this rule is suitable for direct final rulemaking. The proposed revisions to the Board's procedural regulations would require representatives to use the Board's electronic system for filing and serving documents unless exempted by the Board for good cause. Some represented parties are already filing documents through the Board's existing electronic system on a voluntary basis. Moreover, this system is similar to those used by courts and other administrative agency electronic systems and will thus be familiar to the representatives. The proposed rule would also give self-represented (pro se) appellants the option to file and serve documents through the electronic system or via conventional methods. It would also allow the Board to hear oral argument by videoconference under the same discretionary criteria outlined in its 2008 proposal. These changes to the Board's procedures and practices are not expected to be controversial and are consistent with its statements in its 2008 proposal. 73 FR 35103 ("[T]he Board has anticipated that technological advances may, in the future, allow the filing, notice, service and presentation of documents and argument by electronic means.").

The comment period for this proposed rule runs concurrently with the comment period for the direct final rule. Any comments received in response to this proposed rule will also be considered as comments regarding the direct final rule and vice versa. For purposes of this rulemaking, a significant adverse comment is one that explains (1) why the rule is inappropriate, including challenges to the rule's underlying premise or approach; or (2) why the direct final rule will be ineffective or unacceptable without a change. In determining whether a significant adverse comment necessitates withdrawal of this direct final rule, the Department will consider whether the comment raises an issue serious enough to warrant a substantive

response had it been submitted in a standard notice-and-comment process. A comment recommending an addition to the rule will not be considered significant and adverse unless the comment explains how this direct final rule would be ineffective without the addition.

The Department requests comments on all issues related to this rule, including economic or other regulatory impacts of this rule on the regulated community. All interested parties should comment at this time because the Department will not initiate an additional comment period on the proposed rule even if it withdraws the direct final rule.

This rule is not an E.O. 13771 regulatory action because this rule has been determined by the Office of Information and Regulatory Affairs as not significant under E.O. 12866.

Pursuant to the Congressional Review Act (F U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as not a ‘major rule,’ as defined by 5 U.S.C. 804(3).

## **II. Background of this rulemaking**

The Board is proposing a rule that would make e-filing and e-service mandatory for parties represented by attorneys and lay representatives. The Board’s long-term goal is to have entirely electronic case files (e-case files), which would significantly benefit both the Board and the participants in Board appeals. All parties and representatives, as well as appropriate Board employees, would have access to all of the Board’s case-related documents through the Board’s case management system at any time and place, as long as they have access to the Internet. In addition, digitally filed and served documents would allow the Board to leverage its case management system to more efficiently process incoming documents and reduce the time it takes to adjudicate appeals.

The Board’s case management system is a consolidated web-based case tracking system that was deployed in FY2011 to replace individual legacy applications and streamline business processes specific to each of the Department’s three Adjudicatory Boards: the Administrative Review Board (created in 1996) is the adjudicatory Board that issues final agency decisions for

the Secretary of Labor in cases arising under a variety of worker protection laws; the Benefits Review Board (created in 1972) reviews appeals of administrative law judges' decisions arising primarily under the Black Lung Benefits Act, the Longshore and Harbor Workers' Compensation Act and its extensions; and the Employees' Compensation Appeals Board (ECAB) (created in 1946) hears appeals taken from determinations and awards under the Federal Employees' Compensation Act by the Department's Office of Workers' Compensation Programs (OWCP) (whose predecessor agency was the Bureau of Federal Employees' Compensation as described in 20 CFR 1.6) with respect to claims of Federal employees injured in performance of duty.

The case management system has provided a broad range of capabilities to the staff of the Boards for inputting, processing, tracking, managing, and reporting specific details on thousands of cases since the initial implementation. In FY 2013, the system was enhanced to provide access to the general public. Specifically, users have the ability to check their case status, electronically file motions and briefs, and receive Board issuances electronically. Currently, more than 1,400 individuals are registered users of the system.

At present, there are two methods for placing the parties' pleadings into an electronic format for inclusion on the Board's case management system: pleadings can be filed in an electronic format; or pleadings can be digitally imaged after they have been filed in paper form. If e-filing and e-service remains optional, it is unlikely that the Board will achieve the goal of completely electronic case files. If, however, all pleadings submitted by attorneys and lay representatives are e-filed, imaging the remaining paper pleadings from self-represented parties (pro se parties) would be more manageable and allow greater efficiencies in the processing of appeals. In addition, utilization of e-filing and e-service will reduce case processing times by eliminating, in most cases, the timeframes required to allow for the delivery of traditional mailings. These time savings will allow the Board to more efficiently process appeals without

any sacrifice of the quality of work and will reduce mailing costs for the Board and private parties.

Although the law requires Federal agencies to provide information and services via the Internet, it also mandates that agencies consider the impact on persons without access to the Internet and, to the extent practicable, ensure that the availability of government services has not been diminished for such persons. 44 U.S.C. 3501. Accordingly, the Board will make e-filing and e-service optional for self-represented parties. There is no known legal restriction to a requirement that attorneys and lay representatives use e-filing and make e-service automatic, nor are there undue costs or difficulties imposed, particularly because a party may obtain an exemption for good cause shown. The Board notes that in this regard, e-filing is generally mandatory for attorneys in the Federal court system. *See* 76 FR 56107 (Sept. 12, 2011) (Social Security Administration final rule announcing that it will require claimant representatives to use SSA's electronic services as they become available on matters for which the representatives request direct fee payment); 76 FR 63537 (Oct. 13, 2011) (U.S. Merit Systems Protection Board pilot program requiring agencies and attorneys representing appellants to file pleadings electronically for appeals in the Washington Regional Office and Denver Field Office); 84 FR 14554 (Apr. 10, 2019) (Occupational Safety and Health Review Commission final rule adopting mandatory electronic filing and service); 84 FR 37081 (July 31, 2019) (U.S. Patent and Trademark Office final rule amending its Rules of Practice in Trademark Cases and Rules of Practice in Filings to mandate electronic filing of trademark applications and submissions associated with trademark applications and registrations). Individuals who are e-filing appeals to the Board need access to a computer with internet connectivity and an e-mail account.

### **III. Section-by Section Analysis of Proposed Rule**

Title 20

Part 501 RULES OF PROCEDURE

*Section 501.3 Notice of appeal.*

Current § 501.3(a) defines who may “file for review” from a final decision of the Director. Proposed § 501.3(a) would change the phrase “file for review” to “file an appeal” to reflect the terminology contained in this section.

Current § 501.3(b) defines the “place of filing” as with the Clerk of the Appellate Boards at a specific mailing address. Proposed § 501.3(b) would define “how to file” appeals and all post-appeal pleadings and motions, requiring e-filing by attorneys and lay representatives beginning 45 days after the effective date of the rule and allowing for e-filing by self-represented appellants. This requirement applies only to those documents filed 45 days after the effective date or later. This time period between the effective date, when litigants can be certain that the direct final rule will not be withdrawn, and the applicability date, on which e-filing becomes mandatory, allows those who were previously filing and serving documents by mail to adjust to electronic filing.

Current § 501.3(c)(2) contains requirements for the content of an appeal to the Board regarding the name and contact information for an appellant or a deceased employee who is the subject of an appeal. In addition it requires a signed authorization identifying the name and contact information of his or her representative, if applicable. Proposed § 501.3(c)(2) would require the identifying contact information to include an e-mail address.

Current § 501.3(c)(6) requires an appellant to sign the notice of appeal. Proposed § 501.3(c)(6) would allow for the use of an electronic signature when an appeal is electronically filed by a registered user.

Current § 501.3(f) sets forth how the date of filing an appeal is determined by the Board for purposes of timeliness of an appeal. Proposed § 501.3(f) would change the word “Clerk” to “Clerk of the Appellate Boards” to reflect the terminology contained in this section.

Current § 501.3(f)(1) sets forth how timeliness of an appeal is determined and provides that a notice of appeal is deemed to be “received when received by the Clerk.” Proposed § 501.3(f)(1) would include a provision for the timeliness of an appeal when e-filed. It also

contains technical amendments to change the terminology “United States Mail” to “United States Postal Service”; “Clerk” to “Clerk of the Appellate Boards”; and “received when received” to “filed when received.” Paragraph (f)(2) would be renumbered to (f)(3), and proposed new paragraph (f)(2) would clarify that e-filed documents are deemed filed as of the date and time the Board’s electronic case management system records its receipt and must be filed by 11:59:59 pm Eastern Time on the due date.

Current § 501.3(h) describes when a notice of appeal will be considered incomplete. Proposed § 501.3(h) would change the terminology from “Clerk” to “Clerk of the Appellate Boards.”

*Section 501.4 Case record; inspection; submission of pleadings and motions.*

Current § 501.4(e) requires all filings with the Board to include an original and two copies. This proposal would remove that paragraph because paper copies are not necessary when e-filing, and the Board no longer needs multiple paper copies from self-represented parties or those who are granted an exemption from e-filing.

*Section 501.5 Oral argument.*

Current § 501.5 provides that oral argument is held only in Washington, DC. The proposal would allow the Board, in its discretion, to hold oral argument by videoconference. It also provides that the notice to the parties will specify whether the oral argument is to be held in person or by videoconference. This would provide the Board with greater flexibility and efficiency. Oral arguments (including those conducted by videoconference) will not be recorded because ECAB decisions are not subject to further review by OWCP or the courts.

#### **IV. Administrative Requirements of the Proposed Rulemaking**

*Regulatory Flexibility Act of 1980*

Because no notice of proposed rulemaking is required for this rule under section 553(b) of the Administrative Procedure Act, the regulatory flexibility requirements of the Regulatory Flexibility Act, 5 U.S.C. § 601, do not apply to this rule. *See* 5 U.S.C. § 601(2).

*Paperwork Reduction Act (PRA)*

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

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

The Department has reviewed this proposed rule in accordance with the requirements of Executive Order 13132 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, and 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 Executive Order 13175 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 13211, Energy Supply, Distribution, or Use*

The Department has reviewed this proposed rule and has determined that the provisions of Executive Order 13211 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.

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

Administrative practice and procedure; Claims; Government employees; Worker’s compensation.

For the reasons set forth in the preamble, the Department of Labor proposes to amend 20 CFR part 501 as follows:

**PART 501 [AMENDED]**

1. The authority citation for Part 501 continues to read as follows:

Authority: Federal Employees’ Compensation Act, 5 U.S.C. 8101, et seq.

2. Amend § 501.3 by revising paragraphs (a), (b), (c)(2) and (6), (f), and (h) to read as follows:

**§ 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 an appeal of such decision to the Board.

(b) *How to file.* (1) Beginning on [DATE 45 DAYS AFTER EFFECTIVE DATE OF FINAL RULE], attorneys and lay representatives must file appeals with the Board electronically through the Board's case management system, along with all post-appeal pleadings and motions as set forth in paragraphs (d) and (h) of this section and §§ 501.4(b) through (d), 501.5(b) and (g); 501.7 (a), (e), and (f), and 501.9(b), (c), and (e).

(2) Attorneys and lay representatives may request an exemption (pursuant to § 501.4(d)) for good cause shown. Such a request must include a detailed explanation why e-filing or acceptance of e-service should not be required.

(3) Self-represented parties may either file appeals electronically through the Board's case management system or file appeals by mail or other method of delivery to the Clerk of the Appellate Boards at 200 Constitution Avenue, N.W., Washington, DC 20210.

(c) \* \* \*

(2) Full name, address, e-mail 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, e-mail address, and telephone number of his or her representative, if applicable.

\* \* \* \* \*

(6) Signature: An Appellant must sign the notice of appeal. A filing made electronically through the Board's case management system by a registered user containing the Appellant's name in an appropriate signature block constitutes the Appellant's signature.

\* \* \* \* \*

(f) *Date of filing.* A notice of appeal complying with this paragraph (c) is considered to have been filed only if received by the Clerk of the Appellate Boards within the period

specified under paragraph (e) of this section, except as otherwise provided in this subsection:

(1) If the notice of appeal is sent via the U.S. Postal Service or commercial carrier and use of the date of delivery as the date of filing would result in a loss of appeal rights, the appeal will be considered to have been filed as of the date of the postmark or other carriers' date markings. The date appearing on the U.S. Postal Service postmark or other carriers' date markings (when available and legible) shall be *prima facie* evidence of the date of mailing. If there is no such postmark or date marking, or it is illegible, then other evidence including, 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 the U.S. Postal Service or commercial carrier, including e-filing, personal delivery, or fax, the notice is deemed to be filed when received by the Clerk of the Appellate Boards.

(2) For electronic filings made through the Board's case management system, a document is deemed filed as of the date and time the Board's electronic case management system records its receipt, even if transmitted after the close of business. To be considered timely, an e-filed document or pleading must be filed by 11:59:59 pm Eastern Time on the due date.

(3) 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.

\* \* \* \* \*

(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 of the Appellate Boards 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 specified time.

#### **§ 501.4 [Amended]**

3. Amend § 501.4 by removing paragraph (e).

4. Amend § 501.5 by revising paragraphs (c) and (f) to read as follows:

#### **§ 501.5 Oral argument.**

\* \* \* \* \*

(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 prior to the date set for argument. The notice of oral argument will state the issues that the Board has determined will be heard and whether the oral argument will take place in person in Washington, DC or by videoconference.

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(f) *Location.* Oral argument in person is heard before the Board only in Washington, DC. The Board may, in its discretion, hear oral argument by videoconference. The Board does not reimburse costs associated with an oral argument.

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Signed on this 14th day of December, 2020, in Washington, D.C.

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EUGENE SCALIA  
Secretary of Labor

