

§ 44.35 Decision of the Assistant Secretary.

Appeals from a decision rendered pursuant to § 44.32 of this part shall be decided by the Assistant Secretary within 120 days after the time for filing responding statements under § 44.33 of this part. The Assistant Secretary's decision shall be based upon consideration of the entire record of the proceedings transmitted, together with the statements submitted by the parties. The decision may affirm, modify, or set aside, in whole or part, the findings, conclusions, and rule or order contained in the decision of the presiding administrative law judge and shall include a statement of reasons for the action taken. The Assistant Secretary may also remand the petition to the administrative law judge for additional legal or factual determinations. Any party may request that the time for the Assistant Secretary's decision be expedited. Such requests shall be granted in the discretion of the Assistant Secretary.

[55 FR 53442, Dec. 28, 1990]

Subpart D—Summary Decisions**§ 44.40 Motion for summary decision.**

(a) Any party may, at least 20 days before the date fixed for any hearing under Subpart C of this part, move with or without supporting affidavits for a summary decision on all or any part of the proceeding. Any other party may, within 10 days after service of the motion, serve opposing affidavits or countermove for summary decision. The administrative law judge may set the matter for argument and call for submission of briefs.

(b) Filing of any documents under paragraph (a) of this section shall be with the administrative law judge, and copies of such documents shall be served in accordance with § 44.6 of this part.

(c) Any affidavits submitted with the motion shall set forth such facts as would be admissible in evidence in a proceeding subject to 5 U.S.C. 556 and 557 and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary decision is made and

supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.

(d) The administrative law judge may grant the motion if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and a party is entitled to summary decision. The administrative law judge may deny the motion whenever the moving party denies access to information by means of discovery to a party opposing the motion.

(e) The denial of all or part of a motion for summary decision by the administrative law judge shall not be subject to interlocutory appeal to the Assistant Secretary unless the administrative law judge certifies in writing that (1) the ruling involves an important question of law or policy as to which there are substantial grounds for difference of opinion, and (2) an immediate appeal from the ruling may materially advance termination of the proceeding. The allowance of an interlocutory appeal shall not stay the proceedings before the administrative law judge unless ordered by the Assistant Secretary.

§ 44.41 Summary decision.

(a) *No genuine issue of material fact.* (1) Where no genuine issue of a material fact is found to have been raised, the administrative law judge may issue an initial decision to become final 30 days after service thereof, unless, within such time, any party has filed an appeal with the Assistant Secretary. Thereafter, the Assistant Secretary, after consideration of the entire record, may issue a final decision.

(2) An initial decision and a final decision made under this paragraph shall include a statement of—

(i) Findings and conclusions, and the reasons therefor, on all issues presented; and

(ii) Any terms and conditions of the rule or order.