

§ 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.

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(3) A copy of an initial decision and final decision under this paragraph shall be served on each party.

(b) *Hearings on issues of fact.* Where a genuine question of material fact is raised, the administrative law judge shall, and in any other case may, set the case for an evidentiary hearing in accordance with Subpart C of this part.

Subpart E—Effect of Initial Decision

§ 44.50 Effect of appeal on initial decision.

Except as provided in § 44.14(c), a proposed decision and order of an Administrator is not operative pending appeal to an administrative law judge, and a decision of an administrative law judge is not operative pending appeal to the Assistant Secretary.

[55 FR 53443, Dec. 28, 1990]

§ 44.51 Finality for purposes of judicial review.

Only a decision by the Assistant Secretary shall be deemed final agency action for purposes of judicial review. A decision by an Administrator or administrative law judge which becomes final for lack of appeal is not deemed final agency action for purposes of 5 U.S.C. 704.

§ 44.52 Revocation of modification.

(a) *Petition for revocation.* Any party to a proceeding under this part in which a petition for modification of a mandatory safety standard was granted by an Administrator, administrative law judge, or the Assistant Secretary may petition that the modification be revoked. Such petition shall be filed with the Chief Administrative Law Judge for disposition.

(b) *Revocation by the Administrator.* The appropriate Administrator may propose to revoke a modification previously granted by the Administrator, an administrative law judge, or the Assistant Secretary, by issuing a proposed decision and order revoking the modification. Such proposed revocation and a statement of reasons supporting the proposal must be served upon all parties to the proceeding, and shall become final on the 30th day after

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service thereof unless a hearing is requested in accordance with § 44.14.

(c) Revocation of a granted modification must be based upon a change in circumstances or because findings which originally supported the modification are no longer valid.

(d) Disposition of the revocation shall be subject to all procedures of subparts C through E of this part.

[55 FR 53443, Dec. 28, 1990]

§ 44.53 Amended modification.

(a) The Administrator may propose to revise the terms and conditions of a granted modification by issuing an amended proposed decision and order, along with a statement of reasons for the amended proposed decision and order, when one or both of the following occurs:

(1) A change in circumstances which originally supported the terms and conditions of the modification.

(2) The Administrator determines that findings which originally supported the terms and conditions of the modification are no longer valid.

(b) The Administrator's amended proposed decision and order shall be served upon all parties to the proceeding and shall become final upon the 30th day after service thereof, unless a request for hearing on the proposed amendments is filed under § 44.14. If a request for hearing is filed, the amended proposed decision and order shall be subject to all procedures of subparts C through E of this part as if it were a proposed decision and order of the Administrator issued in accordance with § 44.13. The original modification shall remain in effect until superseded by a final amended modification.

(c) In cases where the original decision and order was based upon an alternative method of achieving the result of the standard, the amended decision and order shall at all times provide to miners at the mine at least the same measure of protection afforded to the miners at the mine by such standard. In cases where the original decision and order was based upon a diminution of safety to the miners resulting from application of the standard at such time, the amended decision and order