

(2) The necessity of amendments to pleadings;

(3) The possibility of obtaining stipulations of facts and of the authenticity, accuracy, and admissibility of documents, which will avoid unnecessary proof;

(4) The limitations on the number of expert or other witnesses;

(5) Negotiation, compromise, or settlement of issues;

(6) The exchange of copies of proposed exhibits;

(7) The identification of documents or matters of which official notice may be required;

(8) A schedule to be followed by the parties for completion of the actions decided at the conference; and

(9) Such other matters, including the disposition of pending motions and resolution of issues regarding the admissibility of evidence, as may expedite and aid in the disposition of the proceeding.

(b) *Reporting.* A verbatim record of the conference shall not be kept unless directed by the Judge.

(c) *Order.* Actions taken as a result of a prehearing conference shall be reduced to a written order unless the Judge concludes that a stenographic report shall suffice or, if the conference takes place within seven (7) days of the beginning of a hearing, and the Judge elects to make a statement on the record at the hearing summarizing the actions taken.

§ 76.20 Consent Order or settlement prior to hearing.

(a) *Generally.* At any time after the commencement of a proceeding, the parties jointly may move to defer the hearing for a reasonable time to permit negotiation of a settlement or an agreement containing findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof shall be at the discretion of the Judge, after consideration of such factors as the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of reaching an agreement which will result in a just disposition of the issue involved. The Judge may require the parties to sub-

mit progress reports on a regular basis as to the status of negotiations.

(b) *Consent orders.* Any agreement containing consent findings and an order disposing of a proceeding or any part thereof shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the complaint or notice of administrative determination (or amended notice, if one is filed), as appropriate, and the agreement;

(3) A waiver of any further procedural steps before the Judge; and

(4) A waiver of any right to challenge or contest the validity of the order entered into in accordance with the agreement.

(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their counsel may:

(1) Submit the proposed agreement containing consent findings and an order for consideration by the Judge; or

(2) Notify the Judge that the parties have reached a full settlement and have agreed to dismissal of the action; or

(3) Inform the Judge that agreement cannot be reached.

(d) *Disposition.* In the event that an agreement containing consent findings and an order is submitted, the Judge, within thirty (30) days or as soon as practicable thereafter may, if satisfied with its timeliness, form, and substance, accept such agreement by issuing a decision based upon the agreed findings. The Judge has the discretionary authority to conduct a hearing to determine the fairness of the agreement, consent findings, and proposed order.

§ 76.21 Discovery.

(a) *Scope.* Discovery under this part covers any matter not otherwise privileged or protected by law, which is directly relevant to the issues involved in the case, including the existence, description, nature, custody, condition, and location of documents or other tangible things, and the identity and location of persons having knowledge

§76.21

28 CFR Ch. I (7-1-03 Edition)

of relevant facts. To the extent not inconsistent with this part, the Federal Rules of Civil Procedure may be used as a general guide for discovery practices in proceedings before the Judge. However, unless otherwise stated in this part, the Federal Rules shall be deemed to be instructive rather than controlling.

(b) *Methods.* Discovery may be obtained by one or more of the methods provided under the Federal Rules of Civil Procedure, including: written interrogatories, depositions, requests for production of documents or things for inspection or copying, and requests for admission addressed to parties.

(c) *Procedures governing discovery—(1) Discovery from a party.* A party seeking discovery from another party shall initiate the process by serving a request for discovery on the other party. The request for discovery shall:

(i) State the time limit for responding, as prescribed in 28 CFR 76.21(c)(4);

(ii) In the case of a request for a deposition of a party or an employee of a party shall

(A) Specify the time and place of the taking of the deposition, and

(B) Be served on the person to be deposed.

(2) *Discovery from a nonparty.* Whenever possible, a party seeking a deposition and/or production of documents from a nonparty shall attempt to obtain the nonparty's voluntary cooperation. A party seeking such discovery from a nonparty may initiate such discovery by serving a request for discovery on the nonparty directly and by serving the other party. Upon failure to obtain voluntary cooperation, discovery from a nonparty may be sought by a written motion directed to the Judge in accordance with paragraph (c)(3) of this section.

(3) *Discovery motions.* (i) A party shall answer a discovery request within the time provided by 28 CFR 76.21(c)(4), either by furnishing to the requesting party the information or testimony requested, agreeing to make deponents available to testify within a reasonable time, or by stating an objection to the particular request and the reasons for objection. Upon the failure of a party to respond in full to a discovery request, the requesting party may file

with the Judge a motion to compel. A copy of the motion shall be served on the other party. The motion shall be accompanied by:

(A) A copy of the original request and a statement showing the relevance and materiality of the information sought; and

(B) A copy of the objections to discovery or, where appropriate, a statement with accompanying affidavit that no response has been received.

(ii) If a nonparty will not voluntarily respond to a discovery request in full, the requesting party may file with the Judge a written motion seeking a subpoena. A copy of the motion shall be served on the other party in accordance with 28 CFR 76.23. The motion shall be accompanied by:

(A) A copy of the original request and a statement showing the relevance, materiality and reasonable scope of the information sought;

(B) A copy of the objections to discovery or, where appropriate, a statement with accompanying affidavit that no response has been received; and

(C) In the case of a deposition, the date, time, and place of the proposed deposition.

(iii) The other party may respond to a motion to compel discovery or for issuance of a subpoena requiring a deposition or production of documents under this section by filing an opposition and/or a motion for a protective order in accordance with 28 CFR 76.24 within the time limits set forth in paragraph (c)(4)(iv) of this section.

(4) *Time limits.* (i) Discovery may be initiated after the filing of a complaint and shall be completed within the time designated by the Judge, but no later than seventy-five (75) days after the filing of the answer, unless a different time limit is set by the Judge after due consideration of the particular situation, including the dates set for hearing.

(ii) A party or nonparty shall file and serve a response to a discovery request promptly, but not later than twenty (20) days after the date of service of the request or order of the Judge.

(iii) A motion seeking a subpoena for the deposition testimony of a nonparty or for the production of documents by a nonparty, or a motion for an order

compelling discovery from a party, shall be filed with the Judge and served upon the other party within ten (10) days of the date of service of objections, or within ten (10) days of the expiration of the time limit for response when no response is received, unless otherwise ordered by the Judge.

(iv) An opposition to a motion to compel, an opposition to a motion for an order to depose a nonparty or for the production of documents by a nonparty, or a motion for a protective order must be filed with the Judge and served upon the other party within ten (10) days of the date of service of the motion to which such motion relates.

(5) *Orders for discovery.* (i) Any order issued compelling discovery shall include, as appropriate:

(A) Provision for notice to the person to be deposed as to the time and place of such deposition;

(B) Such conditions or limitations concerning the conduct or scope of the discovery or the subject matter of the discovery as may be necessary to prevent undue delay or to protect a party or other individual or entity from undue expense, embarrassment or oppression;

(C) Limitations upon the time for conducting depositions, answering written interrogatories, or producing documentary evidence; and

(D) Other restrictions upon the discovery process as determined by the Judge.

(ii) The order will be served on the parties by the Judge, together with a subpoena, if approved in the case of discovery sought from nonparties, directed to the individual or entity from which discovery is sought, specifying the manner and time limit for compliance. It shall be the responsibility of the party seeking discovery from a nonparty to serve or arrange for service of an approved discovery request and subpoena on the nonparty from whom discovery is sought and on the other party.

(iii) Failure to comply with an order compelling discovery may subject the noncomplying party to sanctions under 28 CFR 76.26.

(6) *Costs.* Each party shall bear its own costs of discovery unless otherwise agreed by the parties or ordered by the

Judge. The party seeking the deposition shall provide for a verbatim transcript of the description, which shall be available to all parties for inspection and copying.

§ 76.22 Exchange of witness lists, statements and exhibits.

(a) At least twenty-one (21) days before the hearing or at such other time as may be ordered by the Judge, the parties shall exchange witness lists, copies of prior statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements that the respondent intends to offer in lieu of live testimony in accordance with 28 CFR 76.29. At the time these documents are exchanged, any party that intends to rely on the transcript of deposition testimony in lieu of live testimony at the hearing, if permitted by the Judge, shall provide each party with a copy of the specific pages of the transcript it intends to introduce into evidence.

(b) If a party objects to admission, the Judge may not admit into evidence the testimony of any witness whose name does not appear on the witness list or any exhibit not provided to the opposing party as provided above unless the Judge finds good cause for the failure and that there is no prejudice to the objecting party.

(c) Unless a party objects within the times set by the Judge, documents exchanged in accordance with paragraph (a) of this section shall be deemed to be authentic for the purpose of admissibility at the hearing.

§ 76.23 Subpoenas.

(a) Requests for the issuance of subpoenas requiring the attendance and testimony of witnesses or the production of documents or other evidence under 21 U.S.C. 875 and 876 shall be filed with the Judge. Subpoenas are not ordinarily required to obtain the attendance of federal employees as witnesses, but such testimony shall be sought first by filing a request with the United States Attorney.

(b) Requests for subpoenas shall be filed with the Judge in writing and shall specify with particularity the books, papers, or testimony desired,