

such as an informal conference, oral argument, additional written submissions or, as to issues other than substantial justification (such as the applicant's eligibility or substantiation of fees and expenses), pertinent discovery or an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application and shall be conducted as promptly as possible.

(c) If the proceeding for which fees and expenses are sought was conceded by the Secretary on the merits, withdrawn by the Secretary, or otherwise settled before any of the merits were heard, the applicant and the Secretary may supplement the administrative record with affidavits or other documentary evidence.

(d) A request that the judge order further proceedings under this section shall specifically identify the information sought on the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

[54 FR 6286, Feb. 9, 1989]

§ 2704.307 Decision of administrative law judge.

The administrative law judge shall issue an initial decision on the application within 75 days after completion of proceedings on the application. In all decisions on applications, the administrative law judge shall include written findings and conclusions on the applicant's eligibility, and an explanation of the reasons for any difference between the amount requested and the amount awarded. As to applications filed pursuant to § 2704.105(a), the administrative law judge shall also include findings on the applicant's status as a prevailing party and whether the position of the Secretary was substantially justified; if at issue, the judge shall also make findings on whether the applicant unduly protracted or delayed the underlying proceeding or whether special circumstances make the award unjust. As to applications filed pursuant to § 2704.105(b), the administrative law judge shall include findings on whether the Secretary made a demand that is substantially in excess of the decision of the Commission and unreasonable

when compared with that decision; if at issue, the judge shall also make findings on whether the applicant has committed a willful violation of the law or otherwise acted in bad faith or whether special circumstances make the award unjust. Under either paragraph, the decision shall include, if at issue, detailed findings and conclusions on whether an increase in the cost of living or any other special factor justifies a higher fee than the \$125 per hour fee set forth in the statute. The initial decision by the administrative law judge shall become final 40 days after its issuance unless review by the Commission is ordered under § 2704.308 of this part.

[63 FR 63177, Nov. 12, 1998]

§ 2704.308 Commission review.

(a) Either the applicant or the Secretary of Labor may seek review by the Commission of the initial decision by the administrative law judge, but review shall be discretionary with the Commission.

(b) The party seeking review shall file a petition for discretionary review so as to be received by the Commission at 601 New Jersey Avenue, NW., Suite 9500, Washington, DC 20001 within 30 days of the issuance of the initial decision by the administrative law judge. Each issue in dispute shall be plainly and concisely stated, with supporting reasons set forth. Except for good cause shown, no issue not raised before the administrative law judge shall be set forth in the petition for discretionary review. Review by the Commission shall be granted only by affirmative vote of two of the Commissioners within 40 days of the issuance of the initial opinion, except that within 30 days after the issuance of the initial decision by the administrative law judge, two or more Commissioners may in their discretion order the case for review without the filing of a petition. The latter procedure shall be reserved for novel questions of law or policy, however.

(c) If review of the initial decision of the administrative law judge is granted by the Commission, the Commission shall, after allowing opportunity for presentation of views by opposing parties, review the case and issue its own