

§ 702.318 The record; what constitutes; nontransferability of the administrative file.

For the purpose of any further proceedings under the Act, the formal record of proceedings shall consist of the hearing record made before the administrative law judge (see § 702.344). When transferring the case for hearing pursuant to § 702.317, the district director shall not transfer the administrative file under any circumstances.

§ 702.319 Obtaining documents from the administrative file for reintroduction at formal hearings.

Whenever any party considers any document in the administrative file essential to any further proceedings under the Act, it is the responsibility of such party to obtain such document from the district director and reintroduce it for the record before the administrative law judge. The type of document that may be obtained shall be limited to documents previously submitted to the district director, including documents or forms with respect to notices, claims, controversions, contests, progress reports, medical services or supplies, etc. The work products of the district director or his staff shall not be subject to retrieval. The procedure for obtaining documents shall be for the requesting party to inform the district director in writing of the documents he wishes to obtain, specifying them with particularity. Upon receipt, the district director shall cause copies of the requested documents to be made and then:

- (a) Place the copies in the file together with the letter of request, and
- (b) promptly forward the originals to the requesting party. The handling of multiple requests for the same document shall be within the discretion of the district director and with the cooperation of the requesting parties.

SPECIAL FUND

§ 702.321 Procedures for determining applicability of section 8(f) of the Act.

- (a) *Application: filing, service, contents.*
- (1) An employer or insurance carrier which seeks to invoke the provisions of section 8(f) of the Act must request

limitation of its liability and file, in duplicate, with the district director a fully documented application. A fully documented application shall contain the following information: (i) A specific description of the pre-existing condition relied upon as constituting an existing permanent partial disability; (ii) the reasons for believing that the claimant's permanent disability after the injury would be less were it not for the pre-existing permanent partial disability or that the death would not have ensued but for that disability. These reasons must be supported by medical evidence as specified in paragraph (a)(1)(iv) of this section; (iii) the basis for the assertion that the pre-existing condition relied upon was manifest in the employer; and (iv) documentary medical evidence relied upon in support of the request for section 8(f) relief. This medical evidence shall include, but not be limited to, a current medical report establishing the extent of all impairments and the date of maximum medical improvement. If the claimant has already reached maximum medical improvement, a report prepared at that time will satisfy the requirement for a current medical report. If the current disability is total, the medical report must explain why the disability is not due solely to the second injury. If the current disability is partial, the medical report must explain why the disability is not due solely to the second injury and why the resulting disability is materially and substantially greater than that which would have resulted from the subsequent injury alone. If the injury is loss of hearing, the pre-existing hearing loss must be documented by an audiogram which complies with the requirements of § 702.441. If the claim is for survivor's benefits, the medical report must establish that the death was not due solely to the second injury. Any other evidence considered necessary for consideration of the request for section 8(f) relief must be submitted when requested by the district director or Director.

- (2) If claim is being paid by the special fund and the claimant dies, an employer need not reapply for section 8(f) relief. However, survivor benefits will

not be paid until it has been established that the death was due to the accepted injury and the eligible survivors have been identified. The district director will issue a compensation order after a claim has been filed and entitlement of the survivors has been verified. Since the employer remains a party in interest to the claim, a compensation order will not be issued without the agreement of the employer.

(b) *Application: Time for filing.* (1) A request for section 8(f) relief should be made as soon as the permanency of the claimant's condition becomes known or is an issue in dispute. This could be when benefits are first paid for permanent disability, or at an informal conference held to discuss the permanency of the claimant's condition. Where the claim is for death benefits, the request should be made as soon as possible after the date of death. Along with the request for section 8(f) relief, the applicant must also submit all the supporting documentation required by this section, described in paragraph (a), of this section. Where possible, this documentation should accompany the request, but may be submitted separately, in which case the district director shall, at the time of the request, fix a date for submission of the fully documented application. The date shall be fixed as follows:

(i) Where notice is given to all parties that permanency shall be an issue at an informal conference, the fully documented application must be submitted at or before the conference. For these purposes, notice shall mean when the issues of permanency is noted on the form LS-141, Notice of Informal Conference. All parties are required to list issue reasonably anticipated to be discussed at the conference when the initial request for a conference is made and to notify all parties of additional issues which arise during the period before the conference is actually held.

(ii) Where the issue of permanency is first raised at the informal conference and could not have reasonably been anticipated by the parties prior to the conference, the district director shall adjourn the conference and establish the date by which the fully documented application must be submitted and so notify the employer/carrier. The

date shall be set by the district director after reviewing the circumstances of the case.

(2) At the request of the employer or insurance carrier, and for good cause, the district director, at his/her discretion, may grant an extension of the date for submission of the fully documented application. In fixing the date for submission of the application under circumstances other than described above or in considering any request for an extension of the date for submitting the application, the district director shall consider all the circumstances of the case, including but not limited to: Whether the claimant is being paid compensation and the hardship to the claimant of delaying referral of the case to the Office of Administrative Law Judges (OALJ); the complexity of the issues and the availability of medical and other evidence to the employer; the length of time the employer was or should have been aware that permanency is an issue; and, the reasons listed in support of the request. If the employer/carrier requested a specific date, the reasons for selection of that date will also be considered. Neither the date selected for submission of the fully documented application nor any extension therefrom can go beyond the date the case is referred to the OALJ for formal hearing.

(3) Where the claimant's condition has not reached maximum medical improvement and no claim for permanency is raised by the date the case is referred to the OALJ, an application need not be submitted to the district director to preserve the employer's right to later seek relief under section 8(f) of the Act. In all other cases, failure to submit a fully documented application by the date established by the district director shall be an absolute defense to the liability of the special fund. This defense is an affirmative defense which must be raised and pleaded by the Director. The absolute defense will not be raised where permanency was not an issue before the district director. In all other cases, where permanency has been raised, the failure of an employer to submit a timely and fully documented application for section 8(f)

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relief shall not prevent the district director, at his/her discretion, from considering the claim for compensation and transmitting the case for formal hearing. The failure of an employer to present a timely and fully documented application for section 8(f) relief may be excused only where the employer could not have reasonably anticipated the liability of the special fund prior to the consideration of the claim by the district director. Relief under section 8(f) is not available to an employer who fails to comply with section 32(a) of the Act, 33 U.S.C. 932(a).

(c) *Application: Approval, disapproval.* If all the evidence required by paragraph (a) was submitted with the application for section 8(f) relief and the facts warrant relief under this section, the district director shall award such relief after concurrence by the Associate Director, DLHWC, or his or her designee. If the district director or the Associate Director or his or her designee finds that the facts do not warrant relief under section 8(f) the district director shall advise the employer of the grounds for the denial. The application for section 8(f) relief may then be considered by an administrative law judge. When a case is transmitted to the Office of Administrative Law Judges the district director shall also attach a copy of the application for section 8(f) relief submitted by the employer, and notwithstanding § 702.317(c), the district director's denial of the application.

(Approved by the Office of Management and Budget under control number 1215-0160)

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FORMAL HEARINGS

§ 702.331 Formal hearings; procedure initiating.

Formal hearings are initiated by transmitting to the Office of the Chief Administrative Law Judge the pre-hearing statement forms, the available evidence which the parties intend to submit at the formal hearing, and the letter of transmittal from the district director as provided in § 702.316 and § 702.317.

[42 FR 42552, Aug. 23, 1977]

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§ 702.332 Formal hearings; how conducted.

Formal hearings shall be conducted by the administrative law judge assigned the case by the Office of the Chief Administrative Law Judge in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. 554 *et seq.* All hearings shall be transcribed.

§ 702.333 Formal hearings; parties.

(a) The necessary parties for a formal hearing are the claimant and the employer or insurance carrier, and the administrative law judge assigned the case.

(b) The Solicitor of Labor or his designee may appear and participate in any formal hearing held pursuant to these regulations on behalf of the Director as an interested party.

§ 702.334 Formal hearings; representatives of parties.

The claimant and the employer or carrier may be represented by persons of their choice.

§ 702.335 Formal hearings; notice.

On a form prescribed for this purpose, the Office of the Chief Administrative Law Judge shall notify the parties (See § 702.333) of the place and time of the formal hearing not less than 30 days in advance thereof.

[42 FR 42552, Aug. 23, 1977]

§ 702.336 Formal hearings; new issues.

(a) If, during the course of the formal hearing, the evidence presented warrants consideration of an issue or issues not previously considered, the hearing may be expanded to include the new issue. If in the opinion of the administrative law judge the new issue requires additional time for preparation, the parties shall be given a reasonable time within which to prepare for it. If the new issue arises from evidence that has not been considered by the district director, and such evidence is likely to resolve the case without the need for a formal hearing, the administrative law judge may remand the case to the district director for his or her evaluation and recommendation pursuant to, § 702.316.