

party may request that he or she withdraw from the proceedings at any point before a final award is rendered on the ground that he or she is unable to render an award impartially. The request for withdrawal shall be served on all other parties and the arbitrator by hand or by certified or registered mail (or by any other method that includes verification or acknowledgment of receipt and meets (if applicable) the requirements of §4000.14 of this chapter) and shall include a statement of the circumstances that, in the requesting party's view, affect the arbitrator's impartiality and a statement that the requesting party has brought these circumstances to the attention of the arbitrator and the other parties at the earliest practicable point in the proceedings. If the arbitrator determines that the circumstances adduced are likely to affect his or her impartiality and have been presented in a timely fashion, he or she shall withdraw from the proceedings and notify the parties of the reasons for his or her withdrawal. The parties shall then select a new arbitrator in accordance with paragraph (d) of this section.

(d) *Filling vacancies.* If the designated arbitrator declines his or her appointment or, after accepting his or her appointment, is disqualified, resigns, dies, withdraws, or is unable to perform his or her duties at any time before a final award is rendered, the parties shall select another arbitrator to fill the vacancy. The selection shall be made, in accordance with the procedure used in the initial selection, within 20 days after the parties receive notice of the vacancy. The matter shall then be reheard by the newly chosen arbitrator, who may, in his or her discretion, rely on all or any portion of the record already established.

(e) *Failure to select arbitrator.* If the parties fail to select an arbitrator within the time prescribed by this section, either party or both may seek the designation and appointment of an arbitrator in a United States district court pursuant to the provisions of title 9 of the United States Code.

[61 FR 34109, July 1, 1996, as amended at 68 FR 61356, Oct. 28, 2003]

#### § 4221.5 Powers and duties of the arbitrator.

(a) *Arbitration hearing.* Except as otherwise provided in this part, the arbitrator shall conduct the arbitration hearing under §4221.6 in the same manner, and shall possess the same powers, as an arbitrator conducting a proceeding under title 9 of the United States Code.

(1) *Application of the law.* In reaching his or her decision, the arbitrator shall follow applicable law, as embodied in statutes, regulations, court decisions, interpretations of the agencies charged with the enforcement of ERISA, and other pertinent authorities.

(2) *Prehearing discovery.* The arbitrator may allow any party to conduct prehearing discovery by interrogatories, depositions, requests for the production of documents, or other means, upon a showing that the discovery sought is likely to lead to the production of relevant evidence and will not be disproportionately burdensome to the other parties. The arbitrator may impose appropriate sanctions if he or she determines that a party has failed to respond to discovery in good faith or has conducted discovery proceedings in bad faith or for the purpose of harassment. The arbitrator may, at the request of any party or on his or her own motion, require parties to give advance notice of expert or other witnesses that they intend to introduce.

(3) *Admissibility of evidence.* The arbitrator determines the relevance and materiality of the evidence offered during the course of the hearing and is the judge of the admissibility of evidence offered. Conformity to legal rules of evidence is not necessary. To the extent reasonably practicable, all evidence shall be taken in the presence of the arbitrator and the parties. The arbitrator may, however, consider affidavits, transcripts of depositions, and similar documents.

(4) *Production of documents or other evidence.* The arbitrator may subpoena witnesses or documents upon his or her own initiative or upon request by any party after determining that the evidence is likely to be relevant to the dispute.

(b) *Prehearing conference.* If it appears that a prehearing conference will expedite the proceedings, the arbitrator may, at any time before the commencement of the arbitration hearing under § 4221.6, direct the parties to appear at a conference to consider settlement of the case, clarification of issues and stipulation of facts not in dispute, admission of documents to avoid unnecessary proof, limitations on the number of expert or other witnesses, and any other matters that could expedite the disposition of the proceedings.

(c) *Proceeding without hearing.* The arbitrator may render an award without a hearing if the parties agree and file with the arbitrator such evidence as the arbitrator deems necessary to enable him or her to render an award under § 4221.8.

#### § 4221.6 Hearing.

(a) *Time and place of hearing established.* Unless the parties agree to proceed without a hearing as provided in § 4221.5(c), the parties and the arbitrator shall, no later than 15 days after the written acceptance by the arbitrator is mailed to the parties, establish a date and place for the hearing. If agreement is not reached within the 15-day period, the arbitrator shall, within 10 additional days, choose a location and set a hearing date. The date set for the hearing may be no later than 50 days after the mailing date of the arbitrator's written acceptance.

(b) *Notice.* After the time and place for the hearing have been established, the arbitrator shall serve a written notice of the hearing on the parties by hand, by certified or registered mail, or by any other method that includes verification or acknowledgment of receipt and meets (if applicable) the requirements of § 4000.14 of this chapter.

(c) *Appearances.* The parties may appear in person or by counsel or other representatives. Any party that, after being duly notified and without good cause shown, fails to appear in person or by representative at a hearing or conference, or fails to file documents in a timely manner, is deemed to have waived all rights with respect thereto and is subject to whatever orders or determinations the arbitrator may make.

(d) *Record and transcript of hearing.* Upon the request of either party, the arbitrator shall arrange for a record of the arbitration hearing to be made by stenographic means or by tape recording. The cost of making the record and the costs of transcription and copying are costs of the arbitration proceedings payable as provided in § 4221.10(b) except that, if only one party requests that a transcript of the record be made, that party shall pay the cost of the transcript.

(e) *Order of hearing.* The arbitrator shall conduct the hearing in accordance with the following rules:

(1) *Opening.* The arbitrator shall open the hearing and place in the record the notice of initiation of arbitration or the initiation agreement. The arbitrator may ask for statements clarifying the issues involved.

(2) *Presentation of claim and response.* The arbitrator shall establish the procedure for presentation of claim and response in such a manner as to afford full and equal opportunity to all parties for the presentation of their cases.

(3) *Witnesses.* All witnesses shall testify under oath or affirmation and are subject to cross-examination by opposing parties. If testimony of an expert witness is offered by a party without prior notice to the other party, the arbitrator shall grant the other party a reasonable time to prepare for cross-examination and to produce expert witnesses on its own behalf. The arbitrator may on his or her own initiative call expert witnesses on any issue raised in the arbitration. The cost of any expert called by the arbitrator is a cost of the proceedings payable as provided in § 4221.10(b).

(f) *Continuance of hearing.* The arbitrator may, for good cause shown, grant a continuance for a reasonable period. When granting a continuance, the arbitrator shall set a date for resumption of the hearing.

(g) *Filing of briefs.* Each party may file a written statement of facts and argument supporting the party's position. The parties' briefs are due no later than 30 days after the close of the hearing. Within 15 days thereafter,