

§ 26.38

PREHEARING PROCEDURES

§ 26.38 Commencement of action.

Proceedings under subpart B of this part shall commence with the Government's filing of a complaint, as that term is defined in §26.29, with the Docket Clerk. The respondent's response to the complaint shall be timely filed with the Docket Clerk and served upon the Government in accordance with the procedures set forth in the complaint. If the respondent fails to submit a response to the Docket Clerk, then the Government may file a motion for a default judgment in accordance with §26.41.

§ 26.39 Prehearing conferences.

(a) The ALJ may schedule prehearing conferences as appropriate.

(b) Upon the motion of any party or *sua sponte*, the ALJ may schedule a prehearing conference at a reasonable time in advance of the hearing.

(c) The ALJ may consider the following at a prehearing conference:

(1) Simplification of the issues;

(2) Stipulations of fact and of the authenticity, accuracy, and admissibility of documents;

(3) Submission of the case on briefs in lieu of an oral hearing;

(4) Limitation of the number of witnesses;

(5) The exchange of witness lists and of proposed exhibits;

(6) Discovery;

(7) The time and place for the hearing; and

(8) Such other matters as may tend to expedite the fair and just disposition of the proceedings.

§ 26.40 Motions.

(a) *General.* All motions shall state the specific relief requested and the basis therefore and, except during a conference or the hearing, shall be in writing. Written motions shall be filed and served in accordance with §26.30. Either party may submit a proposed order with any motion.

(b) *Response to motions.* Unless otherwise ordered by the ALJ, a response to a written motion may be filed within 10 days after service of the motion. A party failing to respond timely to a motion may be deemed to have waived

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any objection to the granting of the motion.

(c) *Motions for extensions.* Either party may file a motion for extension. At the discretion of the ALJ, a motion for an extension of time may be granted for good cause at any time, notwithstanding an objection or any reply to the motion, consistent with §26.32(f). The ALJ may waive the requirements of this section as to motions for extensions of time or any page limits.

(d) *Right to reply.* The moving party shall have no right to reply, except as permitted by the ALJ.

(e) *Oral Argument.* Either party may request oral argument on any motion, but such argument shall be available at the sole discretion of the ALJ.

(f) *Motions for summary judgment.* (1) A party claiming relief or a party against whom relief is sought may timely move, with or without supporting affidavits, for summary judgment on all or part of the claim.

(2) Objections in the consideration of summary judgment motions or answers thereto based upon a failure to strictly comply with the provisions of Rule 56 of the Federal Rules of Civil Procedure may, at the discretion of the ALJ, be overruled.

(g) *Motions for dismissal.* When a motion to dismiss the proceeding is granted, the ALJ shall make and file a determination and order in accordance with the provisions of §26.50.

§ 26.41 Default.

(a) *General.* The respondent may be found in default, upon motion, for failure to file a timely response to the Government's complaint. The motion shall include a copy of the complaint and a proposed default order, and shall be served upon all parties. The respondent shall have 10 days from such service to respond to the motion.

(b) *Default order.* The ALJ shall issue a decision on the motion within 15 days after the expiration of the time for filing a response to the default motion. If a default order is issued, it shall constitute the final agency action.

(c) *Effect of default.* A default shall constitute an admission of all facts alleged in the Government's complaint and a waiver of respondent's right to a