UNITED STATES OF AMERICA
U.S. DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD
Complainant

vs.

CHAD F. EARLY

Respondent

Docket Number 2011-0362
Enforcement Activity No. 4023186

DEFAULT ORDER
Issued: February 14, 2012

By Administrative Law Judge:
Honorable George J. Jordan

Appearances:

Mr. Bruce L. Davies
Marine Safety Unit Port Arthur
For the Coast Guard

CHAD F. EARLY , Pro se
For the Respondent

ORDER GRANTING MOTION FOR DEFAULT

This is an administrative proceeding under the Administrative Procedure Act, 5 U.S.C. § 551 et seq., concerning the suspension or revocation of a merchant mariner's credential pursuant to 46 U.S.C. § 7701 et seq. and its underlying regulations found at 33 C.F.R. Part 20 and 46 C.F.R. Part 5. The United States Coast Guard (Coast Guard) initiated this proceeding by filing a Complaint seeking to revoke Respondent's Coast Guard-issued Credentials for a Use of a Dangeous Drug. This matter comes before me for review and approval of a motion for default under 33 C.F.R. § 20.310.

I. PROCEDURAL HISTORY

1. The Coast Guard initiated an administrative proceeding seeking revocation of Respondent's Merchant Mariner Credential (MMC) by filing a Complaint on June 30, 2011.
2. The Complaint alleged use of, or addiction to the use of, dangerous drugs and stated as its Jurisdictional Basis that Respondent is the Holder of a Merchant Mariner's License.
3. The Coast Guard alleged that -

> 1. On or about December 15, 2010, while working aboard Hercules Rig H120, Respondent took a DOT drug test. The test was initiated at or about 10:26 pm and completed at 1:30 am on December 16, 2010. That test was reviewed by Medical Review Officer (MRO) Philip Lopez, M.D. He determined that the drug test proved negative for the following substances: Marijuana, Cocaine, Opiates, Phencyclidine, and Amphetamines.
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> 2. On or about December 16, 2010, while working aboard Hercules Rig H120, and subsequent to the DOT drug test, Respondent was administered a Non-DOT drug test as required by his company's policy regarding "Search and Seizure, Drug, Alcohol, Chemicals, Substances, Firearms and Weapons in the Workplace."
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> 3. Respondent was aware of, understood, and acknowledged the drug testing policy of his company and had signed an acknowledgement to that effect on April 19, 2006.

> 4. Respondent provided urine specimen # 330006094 for analysis on or about December 16, 2010. That specimen was collected by Butch Dupuis of "Wayne Wicks and Associates" of LaPorte, Texas.
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> 5. Respondent signed a Non-DOT drug custody and control form number 330006094 on December 16, 2010.
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> 6. Urine specimen #330006094 provided by Respondent was analyzed by "One Source Toxicology," Pasadena, Texas 77504.
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> 7. Urine specimen #330006094, provided by Respondent on or about December 16, 2010, subsequently tested positive for propoxyphene as determined by Medical Review Officer, Philip Lopez, M.D.
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> 8. Propoxyphene is a class IV controlled substance as defined by U.S.C.A. section 802; 812 and is considered a dangerous drug under 46 USC 7704 and as defined by 46 C.F.R. 16.105.
>
> 9. Respondent did not possess a valid prescription for the drug as required by law.
>
> 10. Respondent is considered a user of a dangerous drug.

4. The Coast Guard filed a Return of Service for Complaint form indicating that (1) Respondent was served with a copy of the Complaint on July 27, 2011 by Certified Mail – Return Receipt, and (2) the Complaint was served signed for a person of suitable age and discretion.

5. The Coast Guard filed its Motion for Default with the Docketing Center on October 20, 2011 with a Certificate of Service indicating service by Certified Mail – Return Receipt.

6. The Motion for Default included the following information:

> This motion is made on the grounds that Respondent has failed to file an Answer to the Complaint in this proceeding and that the time allowed for filing an Answer has expired. The Respondent has not filed any Answer or requested an extension of time to file an Answer with the ALJ Docketing Center as of 10/20/2011.

7. On November 22, 2011, the Coast Guard filed a return of service form indicating that the Motion for Default had been delivered and signed for by Repsondent on November 8, 2011.
8. No further filings have been received at the Docketing Center, and on December 6, 2011, this matter was assigned to me for review and disposition.

II. STANDARD OF REVIEW

Because Respondent has not filed any responses either to the Complaint or the Motion for Default, I must first determine whether a default has in fact occurred. I must review the record and determine whether (1) there is been proper service of the Complaint; (2) the period for filing an Answer has expired; and (3) there has been proper service of the Motion for Default.

If I find that a default has occurred, that is not the end of the inquiry. If there was a default then the ALJ's role shifts to a review of the pleadings in the matter and a determination of: (1) whether the Agency has jurisdiction in this matter; (2) whether the Complaint is legally sufficient; and (3) if the sanction is consistent with agency regulation and policy.

Because this case arises from a Default action, the facts supporting the jurisdictional and factual allegations are found solely within the confines of the Coast Guard's Complaint and the record review is limited to the Docket Record. See Appeal Decision 2677 (WALKER) (2008).

III. DISCUSSION

The record reveals that the Coast Guard has filed evidence that the Complaint was properly served on Respondent on July 27, 2011.[1] Under the rules for computation of time at

[1] I note that the Motion for Default states the date of service as July 28, 2011. I am relying on the Notice of Return of Service and treating the date in the Motion for Default as a scrivener's error that does not impact this order.

33 C.F.R. § 20.306, Respondent had until August 17, 2011 to file an Answer to the Complaint. No such Answer was received.

The record establishes that the Coast Guard filed a Motion for Default with the Docketing Center and filed a certificate of service indicating that a service copy was sent by Certified Mail to Respondent's last known address in Coast Guard records. A respondent alleged to be in default is required to file a response to the motion 20 days or less from the service of the default motion. 33 C.F.R. § 20.310(b). To establish that time for response there must be successful service. Service of a default motion is complete when the document is "(i) Delivered to the person's residence and signed for by a person of suitable age and discretion residing at the individual's residence, or (ii) Delivered to the person's office during business hours and signed for by a person of suitable age and discretion." 33 C.F.R. § 20.304(g) (3). In order to establish whether service is complete or whether attempted service was refused or ignored, the record must be supplemented with a return of service form. The Coast Guard filed such a form on November 22, 2011.

The record indicates that the Complaint was properly served on Respondent by being delivered to Respondent's last known address and signed for by a person of suitable age and discretion. As to the Motion for Default, the record shows that the motion was received and signed for by Respondent. Accordingly, the Motion for Default was properly served and Respondent is found in default with respect to the Coast Guard's Complaint.

A. Jurisdiction

Although this case arises from a default action in which all alleged facts are considered admitted, the burden of establishing jurisdiction nonetheless remains. See 33 C.F.R. § 20.310(c); Appeal Decision 2677 (WALKER) (2008); see also Appeal Decision 2656 (JORDAN) (2006).

As in Walker, this case arises from a default action, and the facts supporting the jurisdictional allegation are found solely within the confines of the Coast Guard's Complaint. The Complaint alleges that Respondent holds a Coast Guard-issued credential. The Respondent was charged with use of, or addiction to the use of, dangerous drugs. Under 46 U.S.C. § 7704(c), being a holder of a Coast Guard-issued credential is an adequate basis for jurisdiction in cases involving the use of dangerous drugs. Accordingly, the record supports jurisdiction, and I find that jurisdiction is established.

B. Legal sufficiency of the Complaint

The Complaint alleged Use of, or Addiction to the Use of Dangerous Drugs. The Coast Guard alleged that on or about December 16, 2010, while working aboard Hercules Rig H120, and subsequent to a DOT drug test, Respondent was administered a Non-DOT drug test as required by company policy. It further alleged that his urine specimen was analyzed by a drug tersting laboratory and that a Medical Review Officer subsequently determined the urine specimen was positive for "propoxyphene."

The Coast Guard further alleged that propoxyphene is a class IV controlled substance and is considered a dangerous drug under 46 U.S.C. § 7704 and as defined by 46 C.F.R. § 16.105, and that Respondent did not possess a valid prescription for the drug as required by law.

My review of the factual allegations indicates that the pleadings set forth a valid basis for suspension or revocation. 46 U.S.C. § 7704(c) and 33 C.F.R. § 20.307.

The Complaint alleged Use of Dangerous Drug. Title 46, U.S. Code § 7704(c) states as follows:

> If it is shown that a holder has been a user of, or addicted to, a dangerous drug, the license, certificate of registry, or merchant mariner's document shall be revoked unless the holder provides satisfactory proof that the holder is cured.

The definition of dangerous drug orginally found in 46 U.S.C. § 7704(a) was moved to 46 U.S.C. § 2101(8a). It states:

> "'dangerous drug" means a narcotic drug, a controlled substance, or a controlled substance analog (as defined in section 102 of the Comprehensive Drug Abuse and Control Act of 1970 (21 U.S.C. 802)).

The Controlled Substances Act (CSA) states that the "term 'controlled substance' means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986." 21 U.S.C. § 802(6). Propoxyphene is controlled under Schedule IV of the CSA and is a dangerous drug for the purposes of 46 U.S.C. § 7704(c).

While cases brought under 46 U.S.C. § 7704(c) usually relate to DOT-mandated drug tests, the statute mandates revocation on evidence of use or addiction and does not specifically relate to drug testing. The current version of the statute was enacted in 1983[2] and the original version (46 U.S.C. § 239b) was enacted in 1954.[3] The Federal Transportation Workplace Drug Testing Programs began in 1988.

Drug testing is only one source of evidence for determining that the Respondent was a user. The Commandant has accepted other evidence to support findings of use. See, e.g., Appeal Decision 2424 (CAVANAUGH) (1986) (testimony by witness of use); Appeal Decision 2026 (CLARK) (1975) (admissions made by Respondent and symptoms of drug withdrawal).

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[2] Pub. L. 98-89, Aug. 26, 1983, 97 Stat. 546. This section was part of a major recodification of U.S. Shipping laws in Title 46 of the U.S. Code. However it also expanded the scope of this section to incorporate violations involving "controlled substances" which are not narcotic. This includes PCP and LSD. This section also provided that anyone who has been a user of or addicted to a dangerous drug since July 14, 1954 may be subjected to revocation procedures unless the individual provides satisfactory proof of being cured.

[3] Pub. L. 83-500, July 15, 1954, 68 Stat 484. This section states that the "Secretary may take action … based on a hearing before a Coast Guard [ALJ] under hearing procedures prescribed by the Administrative Procedure Act… to revoke the seaman's document of …any person who, unless he furnishes satisfactory evidence that he is cured, has been, subsequent to the effective date of this Act, a user of or addicted to the use of a narcotic drug.

Here the evidence of drug use is based solely on a urinalysis test result. The Commandant recently issued Appeal Decision 2697 (GREEN) (2011), which stated that to "establish *a prima facie* case of drug use based solely on a urinalysis test result, the Coast Guard **must** prove three elements: (1) That Respondent was tested for a dangerous drug, (2) that Respondent tested positive for a dangerous drug, and (3) that the test was conducted in accordance with 46 C.F.R. Part 16. Appeal Decisions 2631 (SENGEL), 2621 (PERIMAN), 2592 (MASON), and 2584 (SHAKESPEARE)." (Emphasis supplied). The Green decision seems to limit findings of drug use based on urinalysis test results to tests conducted under 46 C.F.R. Part 16 and tested using DOT standards.

However, such a narrow reading would be inconsistent with other Appeal Decisions and with 46 U.S.C. § 7704(c), which extends to any controlled substance and not just the DOT/SAMSHA five. The Commandant in Appeal Decision 2633 (MERRILL) (2002) vacated an ALJ decision that dismissed allegations of drug use because the reason for the drug test in question was not one of those enumerated under 46 C.F.R. Part 16. In Appeal Decision 2545 (JARDIN) (1992), it was held that revocation of a mariner's license or document can be predicated upon a voluntarily submitted urine sample that tests positive for the presence of a dangerous drug. See also Appeal Decision 2635 (SINCLAIR) (2002) (Coast Guard could rely on a voluntary test following a grounding that did not rise to the level of a serious marine incident for suspension and revocation proceedings). In Appeal Decision 2668 (MERRILL) (2007), the Commandant held that a prima facie case was found to be established in a voluntary (non-DOT mandated) drug test where the technical and physical testing of the specimen was conducted in accordance with the procedures set forth in 49 C.F.R. Part 40.

The Green decision related to a pre-employment test. The cases it cites all relate to USCG/DOT tests. While the cases cited in Green[4] hold that the listed *prima facie* case elements were required in order for the Coast Guard to rely upon the regulatory presumption in 46 C.F.R. § 16.201(b), they do not hold that these elements are the only method to establish a *prima facie* case for use of a dangerous drug.

Title 46 C.F.R. § 16.201(b) states, "[i]f an individual fails a chemical test for dangerous drugs under this part, the individual will be presumed to be a user of dangerous drugs." Section 16.201 contains a series of restrictions that apply with that presumption. Such an individual must be either denied employment as a crewmember or must be removed from duties which directly affect the safe operation of the vessel. 46 C.F.R. § 16.201(c). Before such a mariner may return to work aboard a vessel, a medical review officer (MRO) must determine that the individual is drug-free and the risk of subsequent use of dangerous drugs by that person is sufficiently low to justify a return to work. Further the mariner must agree to be subject to increased unannounced testing.

The Green case correctly states the standard for cases that seek to invoke the regulatory presumption in 46 C.F.R. § 16.201(b). However, DOT tests are not the only drug testing mechanisms. From the very beginning of Transportation Workplace Drug Testing Programs,

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[4] Appeal Decisions 2631 (SENGEL), holding that the Coast Guard may establish a *prima facie* case for *use of a dangerous drug* by showing: (1) that the respondent was tested for a dangerous drug; (2) that the respondent tested positive for a dangerous drug; and, (3) that the test was conducted in accordance with 46 C.F.R. Part 16. (Case remanded for further proceedings to determine: 1) how the donor was identified when the urine sample was collected; and, 2) who signed a memorandum to rectify an incomplete DTCCF); 2621 (PERIMAN), stating, "In this type of case, a *prima facie* case is established by showing that Appellant: 1) was tested for a dangerous drug; 2) that he tested positive for a dangerous drug; and 3) that the test was conducted in accordance with 46 C.F.R. Part 16. If a *prima facie* case is established, the Coast Guard raises a presumption that the charge of use of a dangerous drug is proved." (Case remanded for consideration of newly discovered evidence); 2592 (MASON), stating, "The Coast Guard may establish a *prima facie* case by showing that the respondent was tested for a dangerous drug, that the respondent tested positive for a dangerous drug, and that the test was conducted in accordance with 46 C.F.R. Part 16. "(Respondent did not overcome the presumption and ALJ affirmed.); and 2584 (SHAKESPEARE), holding that the Coast Guard may establish a *prima facie* case by showing that the respondent was tested for a dangerous drug, that the respondent tested positive for a dangerous drug, and that the test was conducted in accordance with 46 C.F.R Part 16. (Respondent's testimony was not credible and was not supported by the record and, did not constitute persuasive rebuttal.)

DOT drug testing was only for five drug types. The DOT recognized that employers could test for other drugs. The preamble to the original rules states that "[i]f the employer wants to test, [for additional drugs], the employer must obtain a second sample from the employee. The obtaining of this second sample is not under the authority of the DOT regulation. The employer must base its request for the second sample on whatever other legal authority is available, since the employer cannot rely on the DOT regulation as the basis for the request." Interim final rule, Procedures for Transportation Workplace Drug Testing Programs. 53 Fed. Reg. 47002 **(**November 21, 1988).

The current DOT rules for Drug Testing are found in 49 CFR Part 40. The current rules also do not preclude non-DOT tests. Rather, the DOT created a firewall between DOT mandated tests and non-DOT tests. 49 C.F.R. § 40.13. Under the DOT rules, a laboratory would test only for five types of drugs[5] while non-DOT testing allows for broader testing. However, DOT does allow the same laboratory to analyze both samples as long as the DOT sample is not used for non-DOT testing. 49 C.F.R. § 40.13.

Likewise, Coast Guard rules limit the types of drugs tested under Part 16. See 46 C.F.R. § 16.113(b). "As part of a reasonable cause drug testing program established pursuant to this part, employers may test for drugs in addition to those specified in this part only with approval granted by the Coast Guard under 49 CFR part 40 and for substances for which the Department of Health and Human Services has established an approved testing protocol and positive

[5] The DOT rules state in pertinent part as follows:

> § 40.85 What drugs do laboratories test for?
> As a laboratory, you must test for the following five drugs or classes of drugs in a DOT drug test. You must not test "DOT specimens" for any other drugs.
> (a) Marijuana metabolites.
> (b) Cocaine metabolites.
> (c) Amphetamines.
> (d) Opiate metabolites.
> (e) Phencyclidine (PCP).

threshold." 46 C.F.R. § 16.101(c). No new tests have yet been authorized. Any tests for other drugs are not part of the Part 16 testing regime.

The Coast Guard has also provided recent guidance to employers concerning drug testing in the Marine Employers Drug Testing Guidebook - September 2009. That guidance clearly allows for non-DOT testing. "A marine employer may conduct other types of tests, but the DOT 5-panel test, using a Federal CCF, is the only test that will be accepted for showing compliance with the regulations. If a marine employer conducts testing for more drugs than is permitted by Coast Guard regulations, that testing shall be separate from any Coast Guard mandated program, including specimen collection." Guidebook at 5. "If a marine employer elects to do testing in the event of an accident that does not rise to the level of a Coast Guard mandated SMI or marine casualty, the marine employer is not eligible to use a Federal CCF for the drug test, but can do a non-DOT drug test." Guidebook at 29. "Many marine employers expand the definition of a reasonable cause drug test to include a number of situations. Examples include, "being reasonably suspected of possessing drugs or alcohol aboard a company vessel," "being reasonably suspected of dealing drugs aboard a company vessel," "being suspected of having been involved in an accident on company time" and many others." Guidebook at 32.

Given that non-DOT testing is clearly allowed and that Coast Guard precedent allows non-DOT testing as admissible, the holding in Green can be distinguished on the facts from the present case, which involved a company-ordered test for a drug not tested for in a DOT 5-panel test. Accordingly, Green does not preclude me from finding that a scientifically valid company-ordered urinalysis test result could provide substantial probative evidence that a mariner used a prohibited dangerous drug in violation of 46 U.S.C. § 7704(c).

The complaint in this matter clearly states that this non-DOT test was conducted under a company policy regarding "Search and Seizure, Drug, Alcohol, Chemicals, Substances, Firearms and Weapons in the Workplace" and that it was conducted separately from a DOT test. The

discovered drug was Propoxyphen which is not a type of drug tested for under USCG rules (46 C.F.R. § 16.113(b)) or DOT rules (49 C.F.R. § 40.85).

The presumption in 46 C.F.R. § 16.201(b) applies only if an individual fails a chemical test for dangerous drugs conducted pursuant to Part 16. Accordingly, it does not apply to this matter. Likewise, the consequences that flow from failing a required drug test do not apply. However, propoxyphene is a controlled substance under the definition in 46 U.S.C. § 2101(8a) and the schedules of the CSA. Drug test evidence that Respondent used propoxyphene coupled with the allegation that Respondent did not have a prescription for p can provide evidence of drug use in violation of 46 U.S.C. § 7704 and 46 C.F.R. § 5.35.

"In Coast Guard Suspension and Revocation proceedings, 'If it is shown that a holder has been a user of, or addicted to, a dangerous drug, the license, certificate of registry, or merchant mariner's document shall be revoked unless the holder provides satisfactory proof that the holder is cured.' 46 U.S.C. § 7704. By being in default, Respondent is deemed to have admitted all facts alleged in the Complaint. 33 C.F.R. § 20.310(c)." Appeal Decision 2696 (CORSE) (2011). Thus, by defaulting, Respondent has admitted that he provided a urine sample in a non-DOT test that tested positive for the presence of propoxyphene, a controlled substance under the definition in 46 U.S.C. § 2101(8a), and that Respondent did not have a prescription for propoxyphene.

Drug test evidence that Respondent, a holder of a Coast Guard credential, used a controlled substance coupled with the deemed-admitted allegation that Respondent did not have a prescription for that controlled substance provides adequate evidence that Respondent was a user of a dangerous drug in violation of 46 U.S.C. § 7704(c) and 46 C.F.R. § 5.35. Accordingly, the specifications are legally sufficient and the facts deemed admitted are sufficient to find the allegations **PROVED.**

C. Appropriate Order

Having found Respondent in default, the regulations require that I "issue a decision against" Respondent. 33 C.F.R. § 20.310(d). In issuing a decision, the ALJ must include the disposition of the case, including any appropriate order. 33 C.F.R. § 20.902(a) (2). Here, the Coast Guard has proposed an order of revocation. Respondent failed to respond to the Complaint so the underlying facts are proven and there is no evidence of "cure" or any other remedial actions or mitigation by Respondent in the record. Unless satisfactory proof of cure is provided, the pertinent statute requires that the holder's credentials shall be revoked. See 46 U.S.C. § 7704. Likewise, 46 C.F.R. § 5.59 requires revocation in this matter. Accordingly, I find that Revocation is mandated in this matter.

ORDER

WHEREFORE:

IT IS HEREBY ORDERED that the Coast Guard's Motion for a Default Order is **GRANTED**; and

IT IS HEREBY FURTHER ORDERED that the Allegations in the Complaint are found **PROVED**; and

IT IS HEREBY FURTHER ORDERED that Respondent's Mariner's credential is **REVOKED. IT IS SO ORDERED.**

The parties have a right to appeal, as set forth in 33 C.F.R. Subpart J, Section 20.1001 (Attachment A) An Administrative Law Judge may set aside this finding of Default under the provisions of 33 C.F.R. § 20.310(e) for good cause shown. You may file a motion to set aside the findings with the ALJ Docketing Center, Baltimore.

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George J. Jordan
US Coast Guard Administrative Law Judge

Date: February 14, 2012

ATTACHMENT A
33 CFR PART 20- APPEALS
SUBPART J

§ 20.1001 - General

(a) Any party may appeal the ALJ's decision by filing a notice of Appeal. The party shall file the notice with the U.S. Coast Guard Administrative Law Judge Docketing Center, Attention: Hearing Docket Clerk, Room 412, 40 S. Gay Street, Baltimore, MD 21201-4022. The party shall file the notice thirty (30) days or less after issuance of the decision and shall serve a copy of it on the other party and each interested person.

(b) No party may appeal except on the following issues: (1) Whether each finding of fact is supported by substantial evidence. (2) Whether such conclusion of law accords with applicable law, precedent, and public policy. (3) Whether the ALJ abused his or her discretion. (4) The ALJ's denial of a motion for disqualification.

(c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.

(d) The appeal must follow the procedural requirements of this subpart.

§ 20.1002 - Records on Appeal

(a) The record of appeal of the proceeding constitutes the record for decision on appeal.

(b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, - (1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but, (2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

§ 20.1003 - Procedures for Appeal

(a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center, Attention: Hearing Docket Clerk, Room 412, 40 S. Gay Street, Baltimore, MD 21201-4022 and shall serve a copy of the brief on every other party. (1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the - (i) Basis for the appeal;

(ii) Reasons supporting the appeal; and (iii) Relief requested in the appeal.

(2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record. (3) The appellate brief must reach the Docketing Center sixty (60) days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.

(b) Any party may file a reply brief with the Docketing Center thirty-five (35) days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.

(c) No party mail file more than one appellate brief or reply brief, unless - (1) The party has petitioned the Commandant in writing; and (2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.

(d) The Commandant may accept an *amicus curiae* brief from any person in an appeal of an ALJ's decision.