

I. INTERLOCUTORY APPEALS

OVERVIEW:

An interlocutory appeal is “[a]n appeal of a matter which is not determinable of the controversy, but which is necessary for a suitable adjudication of the merits.” Black’s Law Dictionary 815 (6th ed. 1990). Section [2423.31\(c\)](#) governs motions for an interlocutory appeal.

OBJECTIVE:

To provide guidance concerning what circumstances warrant seeking permission to file an interlocutory appeal.

1. PRACTICE AND PROCEDURE:

a. *Criteria for requesting permission to file:*

A request for special permission to appeal an ALJ’s ruling is grounded upon some showing that the moving party would be prejudiced by the attendant delays in awaiting the ALJ’s decision and then seeking review. Typical circumstances giving rise to such “extraordinary circumstances” might include an ALJ’s ruling to exclude certain evidence or witnesses. When this occurs, it is imperative to articulate the manner in which the evidence will be corrupted and/or the witness’s memory would likely fail if normal administrative delays accrue.

b. *Procedure to follow when contemplating the filing of an interlocutory appeal:*

- Coordinate with the RA/RD; and

- Always request a stay of proceedings or that the record remain open pending the outcome of the interlocutory appeal.
- c. *The ALJ grants the motion and certifies the contested ruling to the Authority if:*
- The ruling involves an important question of law or policy about which there is substantial ground for a difference of opinion; and
 - Immediate review will materially advance completion of the proceeding, or denial of review will cause undue harm to a party.
- d. *The ALJ denies the motion to file an interlocutory appeal:*

After issuance of a decision and recommended order, the Trial Attorney may file exceptions to the contested ruling pursuant to § [2423.40](#). § [2423.31](#)(c)(2).

2. CASE LAW:

Interlocutory appeals are granted only when extraordinary circumstances are present. See U.S. Department of Justice and Immigration and Naturalization Service, 46 FLRA No. 44, 46 FLRA 492 (1992) (extraordinary circumstances not present where ALJ rejected Respondent's motions and granted partial summary judgment).

See also Veterans Administration, VA Medical Center, San Francisco, California, 33 FLRA No. 27, 33 FLRA 242 (1988) (no extraordinary circumstances despite Respondent's assertion that production of a tape recording for inspection and copying prior to hearing is essential to ensure "judicial fairness and administrative due process"); and

Department of Transportation and Federal Aviation Administration, 32 FLRA No. 23, 32 FLRA 158 (1988) (no extraordinary circumstances despite Respondent's claim that the ALJ lacked subject matter jurisdiction)

over the compelling need issues in light of Supreme Court's decision in Aberdeen Proving Ground, 485 U.S. 409 (1988)).

FLRA v.

RESERVED