



September 29, 2026

MEMORANDUM FOR: KEITH E. SONDERLING
Acting Secretary of Labor

A handwritten signature in blue ink that reads "Laura B. Nicolosi".

FROM: LAURA B. NICOLOSI
Assistant Inspector General
for Audit

SUBJECT: **Alert Memorandum:** Immediate Need to Address the
Benefits Review Board's Shortage of Permanent
Judges to Protect Workers' Compensation Rights,
Report Number: 02-26-003-98-100

The purpose of this memorandum is to alert the Office of the Secretary to a pressing concern regarding the impact of the ongoing shortage of judges on the Benefits Review Board (BRB or Board) that needs immediate attention.

The Board was created by Congress to review appeals of administrative law judges' decisions arising from certain workers' compensation claims.¹ Judges for the BRB are appointed by the Secretary of Labor, and the Board is statutorily required to operate with five permanent judges.² Since November 2023, the Board has had fewer than five judges—operating with either three or, as of this memorandum's issuance, four judges (see Figure 1).³ The current composition of the BRB goes against congressional intent for the planned five-member Board. It also presents operational challenges and jeopardizes the BRB's ability to

¹ 20 C.F.R. § 801.102 specifies review authority for the BRB as covering decisions or orders with respect to claims for compensation or benefits arising under programs including the Longshore and Harbor Workers' Compensation Act, the Defense Base Act, and the Black Lung Benefits Act

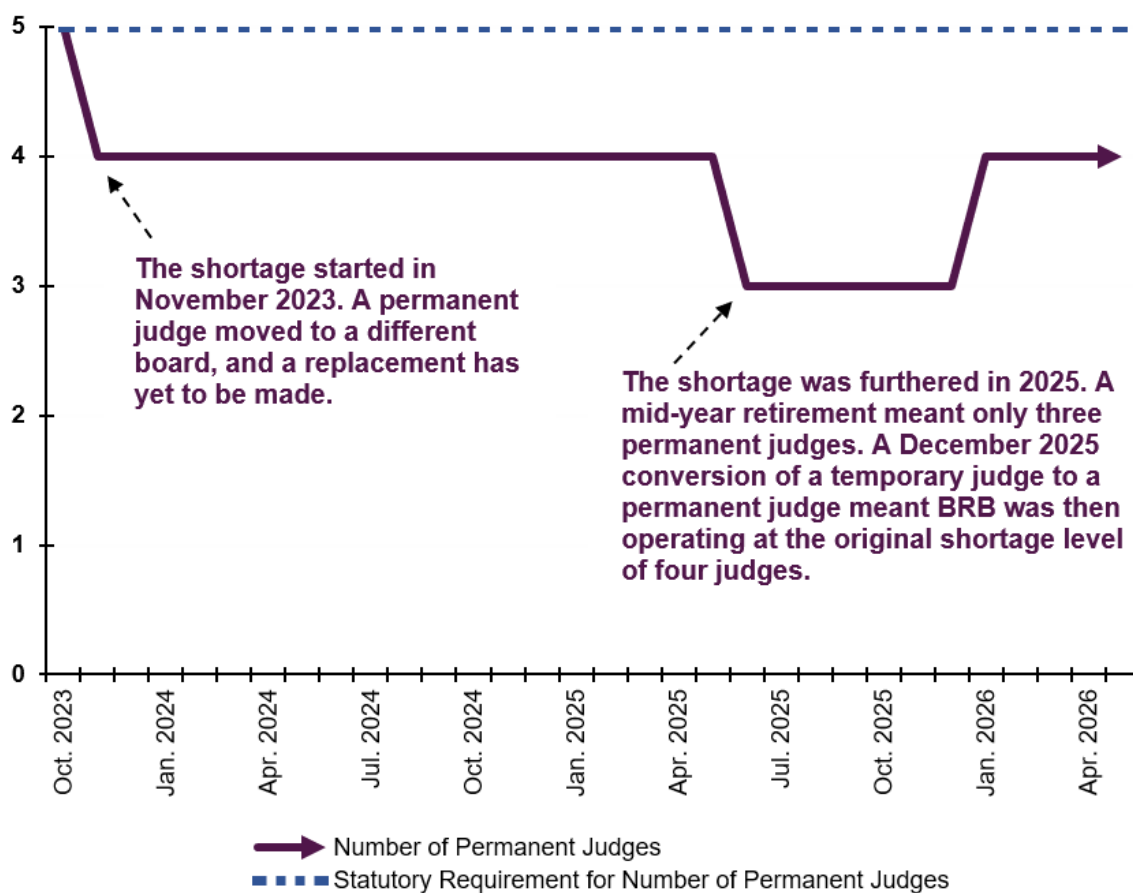
² 20 C.F.R. § 801.201 specifies the BRB is to be composed of five permanent members, including a chairman and four associate members. It also specifies the Secretary may designate up to four administrative law judges as temporary members for up to 1 year.

³ The Board's vice chair moved to a different board in November 2023. From November 2023 through mid-June 2025, the BRB operated with four permanent judges. Subsequently, due to a retirement in mid-June 2025, the BRB operated with three permanent judges for a few weeks until a temporary judge was appointed in July 2025. From July to near the end of December, the BRB operated with three permanent judges and one temporary judge. In December 2025, the temporary judge was converted to a permanent judge. The Board has been operating with four permanent judges since December 2025.

accomplish its statutory mission and timely address benefit needs of the Nation's workforce.

A panel of three BRB judges hears cases on a rotational basis. However, judges or the party-in-interest⁴ have the right to request “en banc” decisions, a process by which all five Board members weigh in and review the original three-member panel decisions.⁵ The shortage of judges poses risks to the BRB’s intended functions and workers’ rights (compensation or benefits) in terms of both timely case processing and the sufficiency of en banc decisions.

Figure 1: Shortage of BRB Judges from November 2023 to Present



Source: The OIG’s visual representation of BRB data

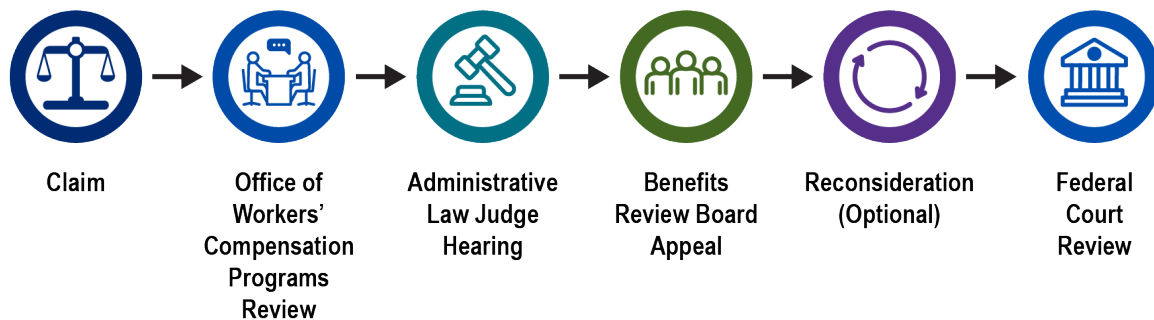
⁴ According to 33 U.S.C. § 921, “[a]ny party aggrieved by a decision of a panel of the Board may, within thirty days after the date of entry of the decision, petition the entire permanent Board for review of the panel’s decision.”

⁵ 20 C.F.R. § 801.301 establishes a quorum and voting procedures for the BRB and provides the basis for both panel decisions and en banc consideration of appeals within the Board. Official en banc action requires a quorum of and concurrence of at least three permanent members sitting en banc, a term meaning “on the bench.”

The BRB's Purpose and Composition

In 1972, Congress established the BRB, a quasi-judicial body, to review appeals of workers' compensation decisions issued by administrative law judges to ensure those decisions are supported by substantial evidence and in accordance with the law. These appeals primarily arise under the Black Lung Benefits Act (Black Lung)⁶ and the Longshore and Harbor Workers' Compensation Act (Longshore) provisions. The Board is required to issue written decisions as expeditiously as possible after review proceedings are completed. Decisions of the BRB may be appealed to the U.S. Courts of Appeals and ultimately to the U.S. Supreme Court (see Figure 2).

Figure 2: Flow Chart for Workers' Compensation Appeals Process



Source: Prepared by the OIG based on the BRB's description of claims processing

By statute, the BRB is composed of five permanent administrative appeals judges appointed by the Secretary of Labor, including a chairman and four associate members. In addition to its permanent members, the Secretary may designate up to four administrative law judges to serve as temporary Board members for terms not to exceed a year. The Secretary can also appoint a qualified individual to serve as interim judge for permanent members who become temporarily unable to serve. The Secretary appointed an interim judge from within the BRB instead of a judge from the Office of Administrative Law Judges to cover the 6-month period from July 1, 2025, to December 28, 2025, when the Board had only three permanent members.

The BRB may delegate its powers to panels of three members, which can include both permanent and temporary judges. However, en banc decisions require the participation of at least three permanent judges. Temporary judges do not replace the statutory requirement for five permanent judges.

⁶ The Black Lung Program was created with the enactment of Title IV of the Federal Coal Mine Health and Safety Act of 1969. This act was amended in 1972 by the Black Lung Benefits Act.

Ongoing Shortage of BRB Judges Poses Risk to Workers' Compensation Rights

The Board has operated with fewer than its statutorily required five permanent judges since November 2023 and currently operates with four permanent members. The judges continue to carry increased caseload demands, placing an ongoing strain on the BRB's limited capacity. This increases not only the risk of delays in the decision for adjudication of workers' compensation appeals, but also the risk of disruption if a judge takes leave or departs permanently.

Also, the shortage means the Board, while it does have the three required permanent members to complete en banc decision-making, may face split decisions (2-2) given its current four-member composition, impeding the effectiveness of the en banc process. We note that, although the U.S. Department of Labor has put forth efforts to address the staffing shortages—including coordination with the Office of the Secretary and posting a job announcement in December 2023, which closed in January 2024—the permanent appointment of a fifth judge has not been made.

Shortage Poses Risk to Timely Case Processing

The reduction in the number of permanent judges has significantly increased the workload assigned to each judge, as three judges must rule on each appeal. According to the Chief Judge, when the BRB operates with five judges, each judge is involved in ruling on approximately 60 percent of the cases. However, with only four judges, this increases to approximately 75 percent involvement per judge, a 25 percent increase in workload. See the Table for an overview of the recent number of appeals and the processing time⁷ for Black Lung and Longshore appeals, respectively, from October 2020 through September 2025.

⁷ The appeals processing time is based on closed appeals.

**Table: Number of Black Lung and Longshore Appeals
Cases Processed and Average Processing Time,
from October 2020 through September 2025**

Program Specifics	FY 2021	FY 2022	FY 2023	FY 2024	FY 2025
Black Lung Appeals, Number of Cases	622	657	489	340	360
Black Lung Appeals, Average Processing Time	11.17 months	13.59 months	16.54 months	12.22 months	12.34 months
Longshore Appeals, Number of Cases	61	100	130	196	207
Longshore Appeals, Average Processing Time	6.83 months	9.76 months	11.93 months	12.81 months	13.98 months

Source: OIG analysis from the Department's Appeals electronic case management database

Available workload data further showed pressure on the BRB's adjudication timelines, particularly for Longshore appeals. For Black Lung appeals, we found:

- Open appeals declined overall from 622 in September 2021 to 360 in September 2025, after peaking at 657 in September 2022.
- Over the same period, average processing times fluctuated with an overall rise. The average processing time rose from more than 11 months in September 2021 to a peak of more than 16 months in September 2023. The processing time then decreased to more than 12 months in September 2024 and remained relatively stable at more than 12 months as of September 2025.

For Longshore appeals, we found:

- Open appeals rose substantially from 61 in September 2021 to 207 in September 2025, more than tripling over the about 5-year period with steady year-to-year increases.
- At the same time, average processing times increased consistently from more than 6 months in September 2021 to more than 13 months in September 2025—more than doubling over the period.

While Black Lung appeals have experienced fluctuations and recent stabilization in processing times, Longshore appeals continued to rise in both open appeals and processing time. The continued increase, combined with rising adjudication times, may increase pressure on the BRB's ability to manage its caseloads.

Shortage Poses Risk to En Banc Decision-Making

Under federal regulation, the BRB may grant en banc reconsideration of a decision when a party petitions the full Board. This can happen after a panel decision is appealed to the full Board or when the BRB itself decides to rehear a case for reasons such as a significant legal question, a need to clarify or correct a prior decision, or a case of exceptional importance to the Board's jurisdiction. When the BRB grants an en banc review, all active permanent judges participate in the hearing and decision-making process. Notably, an en banc decision requires concurrence of at least three permanent members. A panel decision also remains in effect unless modified or vacated by a majority vote of the Board sitting en banc. We note that, while en banc decisions are rare, a Board of only four judges carries a risk of split en banc decisions (2-2) that could affect workers' compensation rights.

BRB officials indicated that claimants may be dissuaded to request en banc decisions from a four-member permanent Board. When the Board splits two in favor and two opposed, the existing decision determines the outcome of the en banc request. The last en banc decision of the BRB was issued on December 29, 2022, by the five permanent Board members at the time. Prior to this, the BRB issued an en banc decision in February 2020.

The BRB's en banc decisions are meant to review, not solely affirm, underlying panel decisions. Further, such decisions set a precedent moving forward. Because en banc action requires a quorum of at least three permanent members and the Board is currently operating with only four judges, any further reductions in available members could not only limit the standard panel reviews but could also limit the Board's ability to conduct en banc reviews altogether.

Conclusion

Since November 2023, the shortage of permanent judges for the BRB has increased individual workloads and reduced the Board's capacity to manage its caseload efficiently. The situation poses a risk to both case processing times and to en banc decision-making, thereby risking the BRB's mission and workers' compensation rights.

Sustained pressure on processing timelines, particularly for Longshore appeals, driven in part by a shortage of judges, has contributed to increases in pending cases and overall resolution time. Also, the shortage of permanent judges poses a risk of split en banc decisions, and further reductions in available members could limit the Board's ability to conduct en banc reviews altogether.

The current composition and resource constraints do not align with the statute's purpose or intent. Overall, the sustained shortage of judges at the BRB may

impair the timely resolution of workers' compensation appeals, delay access to benefits for claimants, and impinge on workers' rights.

Recommendation

We recommend the Secretary of Labor:

1. Take prompt action to appoint a fifth permanent administrative appeals judge to the Benefits Review Board to restore full capacity, strengthen consistency in en banc decision-making, reduce workload pressures, and improve the timely resolution of appeals.

Analysis of Department Comments

In response to a draft of this alert memorandum, the Office of the Secretary agreed with our recommendation to appoint a fifth permanent administrative appeals judge to the Benefits Review Board. The Department's response to the draft memorandum is included in its entirety in the Attachment.

Attachment: Department's Response to the Alert Memorandum

The Department's response to our draft alert memorandum follows.



9/16/2026

MEMORANDUM FOR THE ASSISTANT INSPECTOR GENERAL FOR AUDIT

FROM: COURTNEY WALTER
Chief of Staff

SUBJECT: Management Response to Management Alert Memorandum
02-26-003-01-001

In response to the Management Alert Memorandum dated August 21, 2026, Number 02-26-003-01-001, titled, "Immediate Need to Address the Benefits Review Board's Shortage of Permanent Judges to Protect Workers' Compensation Rights," the Office of the Secretary of Labor (OSEC) will resolve the recommendations as follows:

Recommendations 1: OSEC, in coordination with the Office of the Assistant Secretary for Administration and Management (OASAM), will take prompt action to appoint a fifth permanent administrative appeals judge to the Benefit Review Board to restore full capacity, strengthen consistency in en banc decision-making, reduce workload pressures, and improve the timely resolution of appeals.

Actions are planned to be completed by December 31, 2026.

Any questions can be directed to me at Walter.Courtney.E@dol.gov.