

(2) Certain matters affecting payments to hospitals under the prospective payment system, as provided in section 1886(d)(7) of the Act and § 405.1804 of this subpart.

(c) *Board's jurisdictional findings and jurisdictional dismissal decisions.* (1) In issuing an EJR decision under § 405.1842 of this subpart or a hearing decision under § 405.1871 of this subpart, as applicable, the Board must make a separate determination of whether it has jurisdiction for each specific matter at issue in each contractor or Secretary determination under appeal. A decision by the Board must include specific findings of fact and conclusions of law as to whether the Board has jurisdiction to grant a hearing on each matter at issue in the appeal.

(2) Except as provided in §§ 405.1836(e)(1) and 405.1842(f)(2)(i), where the Board determines it lacks jurisdiction to grant a hearing for every specific matter at issue in an appeal, it must issue a dismissal decision dismissing the appeal for lack of Board jurisdiction. The decision by the Board must include specific findings of fact and conclusions of law explaining the Board's determination that it lacks jurisdiction to grant a hearing on each matter at issue in the appeal. A copy of the Board's decision must be sent promptly to each party to the appeal (as described in § 405.1843).

(3) A dismissal decision by the Board under paragraph (c)(2) of this section is final and binding on the parties unless the decision is reversed, affirmed, modified or remanded by the Administrator under § 405.1875(a)(2)(ii) and § 405.1875(e) or § 405.1875(f) of this subpart, no later than 60 days after the date of receipt by the provider of the Board's decision. The Board decision is inoperative during the 60-day period for review of the decision by the Administrator, or in the event the Administrator reverses, affirms, modifies or remands that decision within that period. A final Board decision under paragraphs (c)(2) and (c)(3) of this section may be reopened and revised by the Board in accordance with §§ 405.1885 through 405.1889 of this subpart.

(d) *Administrator and judicial review.* Any finding by the Board as to whether it has jurisdiction to grant a hearing

on a specific matter at issue in an appeal is not subject to further administrative and judicial review, except as provided in this paragraph. The Board's jurisdictional findings as to specific matters at issue in an appeal may be reviewed solely during the course of Administrator review of one of the Board decisions specified as final, or deemed to be final by the Administrator, under § 405.1875(a)(2) of this subpart, or during the course of judicial review of a final agency decision as described in § 405.1877(a) of this subpart, as applicable.

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§ 405.1842 Expedited judicial review.

(a) *Basis and scope.* (1) This section implements provisions in section 1878(f)(1) of the Act that give a provider the right to seek EJR of a legal question relevant to a specific matter at issue in a Board appeal if there is Board jurisdiction to conduct a hearing on the matter (as described in § 405.1840 of this subpart), and the Board determines it lacks the authority to decide the legal question (as described in § 405.1867 of this subpart, which explains the scope of the Board's legal authority).

(2) A provider may request a Board decision that the provider is entitled to seek EJR or the Board may consider issuing a decision on its own motion. Each EJR decision by the Board must include a specific jurisdictional finding on the matter(s) at issue, and, where the Board determines that it does have jurisdiction on the matter(s) at issue, a separate determination of the Board's authority to decide the legal question(s).

(3) The Administrator may review the Board's jurisdictional finding, but not the Board's authority determination.

(4) The provider has a right to seek EJR of the legal question under section 1878(f)(1) of the Act only if—

(i) The final EJR decision of the Board or the Administrator, as applicable, includes a finding of Board jurisdiction over the specific matter at issue and a determination by the Board

that it has no authority to decide the relevant legal question; or

(ii) The Board fails to make a determination of its authority to decide the legal question no later than 30 days after finding jurisdiction over the matter at issue and notifying the provider that the provider's EJR request is complete.

(b) *General*—(1) *Prerequisite of Board jurisdiction*. The Board (or the Administrator) must find that the Board has jurisdiction over the specific matter at issue before the Board may determine its authority to decide the legal question.

(2) *Initiating EJR procedures*. A provider or group of providers may request the Board to grant EJR of a specific matter or matters under appeal, or the Board on its own motion may consider whether to grant EJR of a specific matter or matters under appeal. Under paragraph (c) of this section, the Board may initiate own motion consideration of its authority to decide a legal question only if the Board makes a preliminary finding that it has jurisdiction over the specific matter at issue to which the legal question is relevant. Under paragraphs (d) and (e) of this section, a provider may request a determination of the Board's authority to decide a legal question, but the 30-day period for the Board to make a determination under section 1878(f)(1) of the Act does not begin to run until the Board finds jurisdiction to conduct a hearing on the specific matter at issue in the EJR request and notifies the provider that the provider's request is complete.

(c) *Board's own motion consideration*.

(1) If the Board makes a finding that it has jurisdiction to conduct a hearing on a specific matter at issue in accordance with § 405.1840(a) of this part, it may then consider on its own motion whether it lacks the authority to decide a legal question relevant to the matter at issue.

(2) The Board must initiate its own motion consideration by issuing a written notice to each of the parties to the appeal (as described in § 405.1843 of this subpart). The notice must—

(i) Identify each specific matter at issue for which the Board has made a finding that it has jurisdiction under

§ 405.1840(a) of this part, and for each specific matter, identify each relevant statutory provision, regulation, or CMS Ruling; and

(ii) Specify a reasonable period of time for the parties to respond in writing.

(3) After considering any written responses made by the parties to its notice of own motion consideration, the Board must determine whether it has sufficient information to issue an EJR decision for each specific matter and legal question included in the notice. If necessary, the Board may request additional information regarding its jurisdiction or authority from a party (or parties), and the Board must give any other party a reasonable opportunity to comment on any additional submission. Once the Board determines it needs no further information from the parties (or that any information has not been rendered timely), it must issue an EJR decision in accordance with paragraph (f) of this section.

(d) *Provider requests*. A provider (or, in the case of a group appeal, a group of providers) may request a determination by the Board that it lacks the authority to decide a legal question relevant to a specific matter at issue in an appeal. A provider must submit a request in writing to the Board and to each party to the appeal (as described in § 405.1843 of this subpart), and the request must include—

(1) For each specific matter and question included in the request, an explanation of why the provider believes the Board has jurisdiction under § 405.1840 of this subpart over each matter at issue and no authority to decide each relevant legal question; and

(2) Any documentary evidence the provider believes supports the request.

(e) *Board action on provider requests*.

(1) If the Board makes a finding that it has jurisdiction to conduct a hearing on a specific matter at issue in accordance with § 405.1840(a) of this part, then (and only then) it must consider whether it lacks the authority to decide a legal question relevant to the matter at issue. The Board is required to make a determination of its authority to decide the legal question raised in a review request under paragraph (d)(1) of this section by issuing an EJR

decision no later than 30 days after receiving a complete provider request as defined in paragraph (e)(2) of this section.

(2) *Requirements of a complete provider request.* A complete provider request for EJR consists of the following:

(i) A request for an EJR decision by the provider(s).

(ii) All of the information and documents found necessary by the Board for issuing a decision in accordance with paragraph (f) of this section.

(3) *Board's response to provider requests.* After receiving a provider request for an EJR decision, the Board must review the request, along with any responses to the request submitted by other parties to the appeal (as described in §405.1843 of this subpart). The Board must respond to the provider(s) as follows:

(i) Upon receiving a complete provider request, issue an EJR decision in accordance with paragraph (f) of this section no later than 30 days after receipt of the complete provider request. If the Board does not issue a decision within that 30-day period, the provider has a right to file a complaint in Federal district court in order to obtain EJR over the specific matter(s) at issue.

(ii) If the provider has not submitted a complete request, issue no later than 30 days after receipt of the incomplete request a written notice to the provider describing in detail the further information that the provider must submit in order to complete the request.

(f) *Board's decision on EJR: Criteria for granting EJR.* Subject to paragraph (h)(3) of this section, the Board is required to issue an EJR decision following either the completion of the Board's own motion consideration under paragraph (c) of this section, or a notice issued by the Board in accordance with paragraph (e)(3)(i) of this section.

(1) The Board's decision must grant EJR for a legal question relevant to a specific matter at issue in a Board appeal if the Board determines the following conditions are satisfied:

(i) The Board has jurisdiction to conduct a hearing on the specific matter

at issue in accordance with §405.1840 of this subpart.

(ii) The Board lacks the authority to decide a specific legal question relevant to the specific matter at issue because the legal question is a challenge either to the constitutionality of a provision of a statute, or to the substantive or procedural validity of a regulation or CMS Ruling.

(2) The Board's decision must deny EJR for a legal question relevant to a specific matter at issue in a Board appeal if any of the following conditions are satisfied:

(i) The Board determines that it does not have jurisdiction to conduct a hearing on the specific matter at issue in accordance with §405.1840 of this subpart.

(ii) The Board determines it has the authority to decide a specific legal question relevant to the specific matter at issue because the legal question is neither a challenge to the constitutionality of a provision of a statute, nor a challenge to the substantive or procedural validity of a regulation or CMS Ruling.

(iii) The Board does not have sufficient information to determine whether the criteria specified in paragraph (f)(1)(i) or (f)(1)(ii) of this section are met.

(3) A copy of the Board's decision must be sent promptly to—

(i) Each party to the Board appeal (as described in §405.1843 of this subpart) and

(ii) The Office of the Attorney Advisor.

(g) *Further review after the Board issues an EJR decision—(1) General rules.*

(i) Under §405.1875(a)(2)(iii) of this subpart, the Administrator may review, on his or her own motion, or at the request of a party, the jurisdictional component only of the Board's EJR decision.

(ii) Any review by the Administrator is limited to the question of whether there is Board jurisdiction over the specific matter at issue; the Administrator may not review the Board's determination of its authority to decide the legal question.

(iii) An EJR decision by the Board becomes final and binding on the parties unless the decision is reversed, affirmed, modified, or remanded by the Administrator under §§ 405.1875(a)(2)(iii), 405.1875(e), and 405.1875(f) of this subpart no later than 60 days after the date of receipt by the provider of the Board's decision.

(iv) A Board decision is inoperative during the 60-day period for review by the Administrator, or in the event the Administrator reverses, affirms, modifies, or remands that decision within that period.

(v) Any right of the provider to obtain EJR from a Federal district court is specified at paragraphs (g)(2) and (g)(3) of this section (when the Board issues a timely EJR decision) and paragraph (g)(4) of this section (in the absence of a timely Board decision).

(vi) A final Board decision under paragraph (f) of this section, and a final Administrator decision made upon review of a final Board decision (as described in § 405.1875(a)(2) and (e) of this subpart) may be reopened and revised in accordance with §§ 405.1885 through 405.1889 of this subpart.

(2) *Board grants EJR.* If the Board grants EJR, the provider may file a complaint in a Federal district court in order to obtain EJR of the legal question. If the Administrator renders, no later than 60 days after the date of receipt by the provider of the Board's decision granting EJR, a decision finding that the Board has no jurisdiction over the matter at issue, the Board's decision is nonfinal and the provider has no right to obtain judicial review based on the Board's decision (as described in § 405.1877(a)(3) and (b)(3) of this subpart).

(3) *Board denies EJR.* If the Board's decision denies EJR because the Board finds that it has the authority to decide the legal question relevant to the matter at issue, the Administrator may not review the Board's authority determination, and the provider has no right to obtain EJR. If the Board denies EJR based on a finding that it lacks jurisdiction over the specific matter, the provider has no right to obtain EJR unless—

(i) The Administrator renders timely a final decision reversing the Board,

finding the Board has jurisdiction over the matter at issue, and remanding to the Board; or

(ii) A court reverses the Board's or Administrator's decision as to jurisdiction, the Administrator remands to the Board, and the Board subsequently issues on remand from the Administrator an EJR decision granting EJR on the basis that it lacks the authority to decide the legal question.

(4) *No timely EJR decision.* The Board must issue an EJR decision no later than 30 days after the date of a written notice under paragraph (e)(3)(i) of this section, when the provider submits a complete request for EJR. If the Board does not issue an EJR decision within a 30-day period, the provider(s) has a right to seek EJR under section 1878(f)(1) of the Act.

(h) *Effect of final EJR decisions and lawsuits on further Board proceedings—*

(1) *Final decisions granting EJR.* If the final decision of the Board or the Administrator, as applicable (as described in §§ 405.1842(g)(1) and 405.1875(e)(4) of this subpart), grants EJR, the Board may not conduct any further proceedings on the legal question. The Board must dismiss—

(i) The specific matter at issue from the appeal.

(ii) The entire appeal if there are no other matters at issue that are within the Board's jurisdiction and can be fully decided by the Board.

(2) *Final decisions denying EJR.* If the final decision:

(i) Of the Board denies EJR solely on the basis that the Board determines it has the authority to decide the legal question relevant to the specific matter at issue, the Board must conduct further proceedings on the legal question and issue a decision on the matter at issue in accordance with this subpart.

Exception: If the provider(s) file(s) a lawsuit pertaining to the legal question, and for a period that is covered by the Board's decision denying EJR, the Board may not conduct any further proceedings under this subpart on the legal question or the matter at issue before the lawsuit is finally resolved.

(ii) Of the Board (or the Administrator) denies EJR on the basis that the Board lacks jurisdiction over the

specific matter at issue, the Board (or the Administrator) must, as applicable, dismiss the specific matter at issue from the appeal, or dismiss the appeal entirely if there are no other matters at issue that are within the Board's jurisdiction and can be fully decided by the Board. If only the specific matter(s) is dismissed from the appeal, judicial review may be had only after a final decision on the appeal is made by the Board or Administrator, as applicable (as described in §§ 405.1840(d) and 405.1877(a) of this subpart). If the Board or the Administrator, as applicable, dismisses the appeal entirely, the decision is subject to judicial review under § 405.1877(a) of this subpart.

(3) *Provider lawsuits.* (i) If the provider files a lawsuit seeking judicial review (whether on the basis of the EJR provisions of section 1878(f)(1) of the Act or on some other basis) pertaining to a legal question that is allegedly relevant to a specific matter at issue in a Board appeal to which the provider is a party and that is allegedly not within the Board's authority to decide, the Office of the Attorney Advisor must promptly provide the Board with written notice of the lawsuit and a copy of the complaint.

(ii) If the lawsuit is filed after a final EJR decision by the Board or the Administrator, as applicable (as described in §§ 405.1842(g)(1) and 405.1875(e)(4) of this subpart), on the legal question, the Board must carry out the applicable provisions of paragraphs (h)(1) and (h)(2) of this section in any pending Board appeal on the specific matter at issue.

(iii) If the lawsuit is filed before a final EJR decision is issued on the legal question, the Board may not conduct any further proceedings on the legal question or the matter at issue until the lawsuit is resolved.

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§ 405.1843 Parties to proceedings in a Board appeal.

(a)(1) When a provider files a request for a hearing before the Board in accordance with § 405.1835 or § 405.1837, the parties to all proceedings in the Board appeal include the provider, a contractor, and, where applicable, any

other entity found by the Board to be a related organization of the provider under the principles enunciated in § 413.17 of this chapter.

(2) All parties to a Board appeal are to familiarize themselves with the instructions for handling a Provider Reimbursement Review Board (PRRB) appeal, including any and all requirements related to the electronic/online filing of documents.

(b) Neither the Secretary nor CMS may be made a party to proceedings in a Board appeal.

(1) The Board may call as a witness any employee or officer of the Department of Health and Human Services or CMS having personal knowledge of the facts and the issues in controversy in an appeal.

(2) The regulations at 45 CFR Part 2 (Testimony by employees and production of documents in proceedings where the United States is not a party) apply as to whether such employee or officer will appear.

(c) A contractor may designate a representative from the Secretary or CMS, who may be an attorney, to represent the contractor in proceedings before the Board.

(d) Although CMS is not a party to proceedings in a Board appeal, there may be instances where CMS determines that the administrative policy implications of a case are substantial enough to warrant comment from CMS (as described in § 405.1863 of this subpart). CMS—

(1) May file *amicus curiae* (friend of the court) briefing papers with the Board in accordance with a schedule to be determined by the Board.

(2) Must promptly send copies of any documents filed with the Board to each party to the appeal.

(e) A nonparty other than CMS may seek leave from the Board to file *amicus curiae* briefing papers with the Board.

(f) The Board may exclude from the record all or part of an *amicus curiae* briefing paper. When the Board excludes from the record all or part of an *amicus curiae* briefing paper submitted by CMS, it states for the record its reason(s) in writing.

[73 FR 30256, May 23, 2008, as amended at 85 FR 59019, Sept. 18, 2020]