

§ 405.1847

(3) A Board remand order is not subject to immediate Administrator review unless the Administrator determines that the remand order might otherwise evade his or her review (as described in § 405.1875(a)(2)(iv) of this subpart).

[39 FR 34515, Sept. 26, 1974, as amended at 41 FR 52051, Nov. 26, 1976. Redesignated at 42 FR 52826, Sept. 30, 1977, as amended at 73 FR 30256, May 23, 2008; 85 FR 59019, Sept. 18, 2020]

§ 405.1847 Disqualification of Board members.

No Board member shall join in the conduct of a hearing in a case in which he is prejudiced or partial with respect to any party or in which he has any interest in the matter pending for decision before him. Notice of any objection which a party may have with respect to a Board member shall be presented in writing to such Board member by the objecting party at its earliest opportunity. The Board member shall consider the objection and shall, in his discretion, either proceed to join in the conduct of the hearing or withdraw. If he does not withdraw, the objecting party may petition the Board, presenting its objection and reasons therefor, and be entitled to a ruling thereon before the hearing can proceed.

§ 405.1849 Establishment of time and place of hearing by the Board.

The Board shall fix the time and place for the hearing and shall send notice thereof to the parties' contact information on file, not less than 30 days prior to the scheduled time. Either on its own motion or for good cause shown by a party, the Board may, as appropriate, reschedule, adjourn, postpone, or reopen the hearing, provided that reasonable written notice is given to the parties.

[39 FR 34515, Sept. 26, 1974, as amended at 85 FR 59019, Sept. 18, 2020]

§ 405.1851 Conduct of Board hearing.

The Board hearing shall be open to the parties, to representatives of the Centers for Medicare & Medicaid Services, and to such other persons as the Board deems necessary and proper. The Board shall inquire fully into all of the matters at issue and shall receive into evidence the testimony of witnesses

42 CFR Ch. IV (10–1–23 Edition)

and any documents which are relevant and material to such matters. If the Board believes that there is relevant and material evidence available which has not been presented at the hearing, it may at any time prior to the issuing of the notice of the decision, reconvene the hearing for the receipt of such evidence. The order in which the evidence and the allegations shall be presented and the conduct of the hearing shall be at the discretion of the Board.

[39 FR 34515, Sept. 26, 1974, as amended at 85 FR 59019, Sept. 18, 2020]

§ 405.1853 Board proceedings prior to any hearing; discovery.

(a) *Preliminary narrowing of the issues.* Upon receiving notification that a request for a Board hearing is submitted, the contractor must—

(1) Promptly review both the materials submitted with the provider hearing request, and the information underlying each contractor or Secretary determination for each cost reporting period under appeal.

(2) Expeditiously attempt to join with the provider in resolving specific factual or legal issues and submitting to the Board written stipulations setting forth the specific issues that remain for Board resolution based on the review; and

(3) Ensure that the evidence it considered in making its determination, or, where applicable, the evidence the Secretary considered in making his or her determination, is included in the record.

(b) *Position papers.* (1) After any preliminary narrowing of the issues, the parties must file position papers in order to narrow the issues further. In each case, and as appropriate, the Board establishes the deadlines as to when the provider(s) and the contractor must submit position papers to the Board.

(2) The Board has the discretion to extend the deadline for submitting a position paper. Each position paper must set forth the relevant facts and arguments regarding the Board's jurisdiction over each remaining matter at issue in the appeal (as described in § 405.1840 of this subpart), and the merits of the provider's Medicare payment claims for each remaining issue.

(3) In the absence of a Board order or general instructions to the contrary, any supporting exhibits regarding Board jurisdiction must accompany the position paper. Exhibits regarding the merits of the provider's Medicare payment claims may be submitted in a timeframe to be decided by the Board through a schedule applicable to a specific case or through general instructions.

(c) *Initial status conference.* (1) Upon review of the parties' position papers, one or more members of the Board may conduct an initial status conference. An initial status conference may be conducted in person or telephone, at the discretion of the Board.

(2) The Board may use the status conference to discuss any of the following:

- (i) Simplification of the issues.
- (ii) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement.
- (iii) Stipulations and admissions of fact or as to the content and authenticity of documents.
- (iv) Whether the parties can agree to submission of the case on a stipulated record.
- (v) Whether a party may waive appearance at an oral hearing and submit only documentary evidence (the admissibility of which is subject to objection from other parties) and written argument.
- (vi) Limitation of the number of witnesses.
- (vii) Scheduling dates for the exchange of witness lists and of proposed exhibits.
- (viii) Discovery as permitted under this section.
- (ix) The time and place for the hearing.
- (x) Potential settlement of some or all of the issues.
- (xi) Other matters that the Board deems necessary and appropriate. The Board may issue any orders at the conference found necessary and appropriate to narrow the issues further and expedite further proceedings in the appeal.

(3) After the status conference, the Board may—

(i) Issue in writing a report and order specifying what transpired and formalizing any orders issued at the conference; and

(ii) Require the parties to submit (jointly or otherwise) a proposed report and order, in order to facilitate issuance of a final report and order.

(d) *Further status conferences.* Upon a party's request, or on its own motion, the Board may conduct further status conferences where it finds the proceedings necessary and appropriate.

(e) *Discovery*—(1) *General rules.* (i) Discovery is limited in Board proceedings.

(ii) The Board may permit discovery of a matter that is relevant to the specific subject matter of the Board hearing, provided the matter is not privileged or otherwise protected from disclosure and the discovery request is not unreasonable, unduly burdensome or expensive, or otherwise inappropriate.

(iii) Any discovery initiated by a party must comply with all requirements and limitations of this section, and with any further requirements or limitations ordered by the Board.

(iv) The applicable provisions of the Federal Rules of Civil Procedure and Rules 401 and 501 of the Federal Rules of Evidence serve as guidance for any discovery that is permitted under this section or by Board order.

(2) *Limitations on discovery.* Any discovery before the Board is limited as follows:

(i) A party may request of another party, or of a nonparty other than CMS, the Secretary or any Federal agency, the reasonable production of documents for inspection and copying.

(ii) A party may also request another party to respond to a reasonable number of written interrogatories.

(iii)(A) A party may not take the deposition, upon oral or written examination, of another party or a nonparty, unless the proposed deponent agrees to the deposition or the Board finds that the proposed deposition is necessary and appropriate under the criteria set forth in Federal Rules of Civil Procedure 26 and 32(a)(3) in order to secure the deponent's testimony for a Board hearing.

(B) 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 an employee or officer of CMS or HHS will appear for a deposition.

(iv) A party may not request admissions or take any other form of discovery not authorized under this section.

(3) *Time limits.* (i) A party's discovery request is timely if the date the request is served on another party or nonparty, as applicable, is no later than 120 days before the initially scheduled starting date of the Board hearing, unless the Board extends the time for the request.

(ii)(A) *Depositions.* (1) In the absence of an order or instruction by the Board setting a schedule for the holding of a deposition, a party desiring to take a deposition must give reasonable notice in writing to the deponent of a scheduled deposition.

(2) A deposition may not be held any later than 45 days before the initially scheduled starting of the Board hearing, unless the Board orders otherwise.

(B) *Responses.* (1) In the absence of a Board order or general instructions of the Board setting a schedule for responses, responses to interrogatories and requests for production of documents are due according to the schedule agreed upon by the party serving discovery and the party to which the discovery is directed, or within the time allotted by the Federal Rules of Civil Procedure.

(2) Responses by a party to interrogatories, and responses by a party or nonparty to requests for production of documents, must be served no later than 45 days before the initially scheduled starting date of the Board hearing, unless the Board orders otherwise.

(iii) Before ruling on a request to extend the time for requesting discovery or for conducting or responding to discovery, the Board must give the other parties to the appeal, and any nonparty subject to a discovery request, a reasonable period to respond to the extension request.

(iv) The Board has the discretion to extend the time in which to request

discovery or conduct or respond to discovery.

(v) If the Board grants the extension request, it sets a new discovery deadline and has the discretion to reschedule the hearing date.

(4) *Rights of nonparties.* If a discovery request is made of a nonparty to the Board appeal, the nonparty has the rights any party has in responding to a discovery request. The rights of the nonparty include, but are not limited to, the right to select and use any attorney or other representative, and to submit discovery responses, objections, or motions to the Board.

(5) *Motions to compel or for protective order.* (i) Each party is required to make a good faith effort to resolve or narrow any discovery dispute, regardless of whether the dispute is with another party or a nonparty.

(ii) A party may submit to the Board a motion to compel discovery that is permitted under this section or any Board order, and a party or nonparty may submit a motion for a protective order regarding any discovery request to the Board.

(iii) Any motion to compel or for protective order must include a self-sworn declaration describing the movant's efforts to resolve or narrow the discovery dispute.

(iv) A self-sworn declaration describing the movant's efforts to resolve or narrow the discovery dispute must be included with any response to a motion to compel or for protective order.

(v) The Board must decide any motion in accordance with this section and any prior discovery ruling.

(vi)(A) The Board must issue and send to each party and any affected nonparty a discovery ruling that grants or denies, in whole or in part, the motion to compel or the motion for a protective order, if applicable.

(B) The discovery ruling must—

(1) Specifically identify any part of the disputed discovery request upheld and any part rejected, and

(2) Impose any limits on discovery the Board finds necessary and appropriate.

(vii) Nothing in this section authorizes the Board to compel any action from the Secretary or CMS.

(6) *Reviewability of discovery and disclosure rulings*—(i) *General rule.* A Board discovery ruling, or a Board disclosure ruling, such as one issued at a hearing, is not subject to immediate review by the Administrator (as described in § 405.1875(a)(3) of this subpart). The ruling 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 of judicial review of a final agency decision as described in § 405.1877(a) and (c)(3) of this subpart, as applicable.

(ii) *Exception.* To the extent a ruling authorizes discovery or disclosure of a matter for which an objection based on privilege, or other protection from disclosure such as case preparation, confidentiality, or undue burden, was made before the Board, that portion of the discovery or disclosure ruling may be reviewed immediately by the Administrator in accordance with § 405.1875(a)(3)(i) of this subpart. Upon notice to the Board that a party or nonparty, as applicable, intends to seek Administrator review of the ruling,—

(A)(1) The Board must stay all proceedings affected by the ruling.

(2) The Board determines the length of the stay under the circumstances of a given case, but in no event may the length of the stay be less than 15 days after the day on which the Board received notice of the party or nonparty's intent to seek Administrator review.

(B) If the Administrator—

(1) Grants a request for review, or takes own motion review, of a ruling, the ruling is stayed until the time the Administrator issues a written decision that affirms, reverses, modifies, or remands the Board's ruling.

(2) Does not grant a request or take own motion review within the time allotted for the stay, the stay is lifted and the ruling is not subject to immediate review.

[73 FR 30257, May 23, 2008; 73 FR 49356, Aug. 21, 2008; 85 FR 59019, Sept. 18, 2020]

§ 405.1855 Evidence at Board hearing.

Evidence may be received at the Board hearing even though inadmis-

sible under the rules of evidence applicable to court procedure. The Board shall give the parties opportunity for submission and consideration of facts and arguments and during the course of the hearing should, in ruling upon admissibility of evidence, exclude irrelevant, immaterial, or unduly repetitious evidence. The Board shall render a final ruling on the admissibility of evidence.

§ 405.1857 Subpoenas.

(a) *Time limits.* (1) The Board may issue a subpoena—

(i) To a party to a Board appeal or to a nonparty other than CMS or the Secretary or any Federal agency, requiring the attendance and testimony of witnesses or the production of documents for inspection and copying, provided the Board makes a preliminary finding of its jurisdiction over the matters at issue in accordance with § 405.1840(a) of this subpart.

(ii) At the request of a party for purposes of discovery (as described in § 405.1853 of this subpart) or an oral hearing (as described in § 405.1845 of this subpart); and

(iii) On its own motion solely for purposes of a hearing.

(2) The date of receipt by the Board of a party's subpoena request may not be any later than for subpoenas requested for purposes of—

(i) Discovery, 120 days before the initially scheduled starting date of the Board hearing; and

(ii) An oral hearing, 45 days before the scheduled starting date of the Board hearing.

(3) Subject to paragraph (4) of this section, the Board may not issue a subpoena any later than for purposes of—

(i) Discovery, 90 days before the initially scheduled starting date of the Board hearing; and

(ii) An oral hearing, whether issued at a party's request or on the Board's own motion, 30 days before the scheduled starting date of the Board hearing.

(4) The Board may extend the deadlines specified in paragraphs (a)(2) and (a)(3) of this section provided the Board gives each party to the appeal and any nonparty subject to the subpoena request or subpoena a reasonable period