

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 rel-

evant 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.

[73 FR 30254, May 23, 2008; 73 FR 49356, Aug. 21, 2008]

§ 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]

§ 405.1845 Composition of Board; hearings, decisions, and remands.

(a) The Board will consist of five members appointed by the Secretary. All shall be knowledgeable in the field of cost reimbursement. At least one shall be a certified public accountant. Two Board members shall be representative of providers of services.

(b) The term of office for Board members shall be 3 years, except that initial appointments may be for such shorter terms as the Secretary may designate to permit staggered terms of office. No member shall serve more than two consecutive 3-year terms of office. The Secretary shall have the authority to terminate a Board member's term of office for good cause.

(c) *Composition of the Board.* The Secretary designates one member of the Board as Chairperson. The Chairperson coordinates and directs the administra-

tive activities of the Board and the conduct of proceedings before the Board. CMS provides administrative support for the Board. Under the direction of the Chairperson, the Board is solely responsible for the content of its decisions.

(d) *Quorum.* (1) The Board must have a quorum in order to issue one of the decisions specified as final, or deemed final by the Administrator, under § 405.1875(a)(2)(i), (a)(2)(iii), and (a)(2)(iv), but a quorum is not required for other Board actions.

(2) Three Board members, at least one of whom is representative of providers, are required in order to constitute a quorum.

(3) The opinion of the majority of those Board members issuing a decision specified as final, or deemed as final by the Administrator, under § 405.1875(a)(2), constitutes the Board's decision.

(e) *Hearings.* The Board may conduct a hearing and issue a hearing decision (as described in § 405.1871 of this subpart) on a specific matter at issue in an appeal, provided it finds jurisdiction over the matter at issue in accordance with § 405.1840 of this part and determines it has the legal authority to fully resolve the issue (as described in § 405.1867 of this subpart).

(f) *Oral hearings.* (1) In accordance with paragraph (d) of this section, the Board does not need a quorum in order to hold an oral hearing (as described in § 405.1851 of this subpart). The Chairperson of the Board may designate one or more Board members to conduct an oral hearing (where less than a quorum conducts the hearing). Because the presence of all Board members is not required at an oral hearing, the Board, at its discretion, may hold more than one oral hearing at a time.

(2) *Waiver of oral hearings.* With the contractor's agreement and the Board's approval, the provider (or, in the case of group appeals, the group of providers) and any related organizations (as described in § 405.1843(a) of this subpart) may waive any right to an oral hearing and stipulate that the Board may issue a hearing decision on the written record. An on-the-written-