

otherwise) must be, to the extent practicable, clearly identified and segregated in an appendix to the record for purposes of any further review (as described in §§ 405.1875 and 405.1877 of this subpart).

(c) To the extent applicable, the administrative record also includes all documents (including written submissions) and any other tangible materials submitted to the Administrator by the parties to the appeal or by any nonparty (as described in §§ 405.1853(e)(4) and 405.1857(c)(3) of this subpart), in addition to all correspondence from the Administrator or the Office of the Attorney Advisor, and all rulings, orders, and decisions by the Administrator. The provisions of paragraph (b) of this section also pertain to any proceedings before the Administrator, to the extent the Administrator finds evidence inadmissible or declines to consider a specific matter (whether as untimely or otherwise).

[73 FR 30260, May 23, 2008; 73 FR 49356, Aug. 21, 2008]

§ 405.1867 Scope of Board's legal authority.

In exercising its authority to conduct proceedings under this subpart, the Board must comply with all the provisions of Title XVIII of the Act and regulations issued thereunder, as well as CMS Rulings issued under the authority of the Administrator as described in § 401.108 of this subchapter. The Board shall afford great weight to interpretive rules, general statements of policy, and rules of agency organization, procedure, or practice established by CMS.

[48 FR 22925, May 23, 1983, as amended at 73 FR 30260, May 23, 2008; 73 FR 49356, Aug. 21, 2008]

§ 405.1868 Board actions in response to failure to follow Board rules.

(a) The Board has full power and authority to make rules and establish procedures, not inconsistent with the law, regulations, and CMS Rulings, that are necessary or appropriate to carry out the provisions of section 1878 of the Act and of the regulations in this subpart. The Board's powers include the authority to take appropriate actions in response to the failure of a

party to a Board appeal to comply with Board rules and orders or for inappropriate conduct during proceedings in the appeal.

(b) If a provider fails to meet a filing deadline or other requirement established by the Board in a rule or order, the Board may—

- (1) Dismiss the appeal with prejudice;
- (2) Issue an order requiring the provider to show cause why the Board should not dismiss the appeal; or
- (3) Take any other remedial action it considers appropriate.

(c) If a contractor fails to meet a filing deadline or other requirement established by the Board, the Board may—

(1) Take other actions that it considers appropriate, such as—

(i) Issuing a decision based on the written record submitted to that point; or

(ii) Issuing a written notice to CMS describing the contractor's actions and requesting that CMS take appropriate action, such as review of the contractor's compliance with the contractual requirements of §§ 421.120, 421.122, and 421.124 of this chapter; and

(2) Not use its authority to take an action such as, a sanction, reversing or modifying the contractor's or Secretary's determination for the cost reporting period under appeal, or ruling against the contractor on a disputed issue of law or fact in the appeal.

(d)(1) If the Board dismisses the appeal with prejudice under this section, it must issue a dismissal decision dismissing the appeal. The decision by the Board must be in writing and include an explanation of the reason for the dismissal. A copy of the Board's dismissal decision must be sent promptly to each party to the appeal (as described in § 405.1843 of this subpart).

(2) A dismissal decision by the Board 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 part, no later than 60 days after the date of receipt by the provider of the Board's decision.

(i) The 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 the decision within the period.

(ii) The Board may reopen and revise a final Board decision in accordance with §§ 405.1885 through 405.1889 of this subpart.

(e)(1) Any action taken by the Board under this section other than dismissal of the appeal is not subject to immediate Administrator review (as described in § 405.1875(a)(3) of this subpart) or judicial review (as described in § 405.1877(a)(3) of this subpart).

(2) A Board action other than dismissal of the 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 of judicial review of a final agency decision as described in § 405.1877(a) of this subpart, as applicable.

(f) *Ex parte* communications with Board staff concerning procedural matters are not prohibited.

(g) Upon receipt of a credible allegation that a party's representative has divulged to that party, or to the Board, information that was obtained during the course of the representative's relationship (such as legal counsel or employee) with an opposing party and that was intended by that party to be kept confidential, the Board—

(1) Investigates the allegation; and

(2) May take remedial action when it determines that it is appropriate to do so, against the party or the representative (such as prohibiting the representative from appearing before it, excluding such information from the record, or if the overall fairness of the hearing has been compromised, dismissing the case).

[73 FR 30260, May 23, 2008; 73 FR 49356, Aug. 21, 2008; 85 FR 59019, Sept. 18, 2020]

§ 405.1869 Scope of Board's authority in a hearing decision.

(a) If the Board has jurisdiction to conduct a hearing on a specific matter at issue under section 1878(a) or (b) of the Act and § 405.1840 of this subpart, and the legal authority to fully resolve the matter in a hearing decision (as described in §§ 405.1842(f), 405.1867, and 405.1871 of this subpart), section 1878 of

the Act, and paragraph (a) of this section give the Board the power to affirm, modify, or reverse the contractor's findings on each specific matter at issue in the contractor determination for the cost reporting period under appeal, and to make additional revisions on specific matters regardless of whether the contractor considered the matters in issuing the contractor determination. The Board's power to make additional revisions in a hearing decision does not authorize the Board to consider or decide a specific matter at issue for which it lacks jurisdiction (as described in § 405.1840(b) of this subpart) or which was not timely raised in the provider's hearing request. The Board's power under section 1878(d) of the Act and paragraph (a) of this section to make additional revisions is limited to those revisions necessary to resolve fully a specific matter at issue if—

(1) The Board has jurisdiction to grant a hearing on the specific matter at issue under section 1878(a) or (b) of the Act and § 405.1840 of this subpart; and

(2) The specific matter at issue was timely raised in an initial request for a Board hearing filed in accordance with § 405.1835 or § 405.1837 of this subpart, as applicable, or in a timely request to add issues to a single provider appeal submitted in accordance with § 405.1835(c) of this subpart.

(b)(1) If the Board has jurisdiction to conduct a hearing on a specific matter at issue solely under §§ 405.1840 and 405.1835 or § 405.1837 of this subpart, as applicable, and the legal authority to fully resolve the matter in a hearing decision (as described in §§ 405.1842(f), 405.1867, and 405.1871 of this subpart), the Board is authorized to do the following:

(i) Affirm, modify, or reverse the contractor's or Secretary's findings on each specific matter at issue in the contractor or Secretary determination under appeal.

(ii) Make additional revisions on each specific matter at issue regardless of whether the contractor considered these revisions in issuing the contractor determination under appeal, provided the Board does not consider or decide a specific matter for which it