

§ 405.1843-.1871. Within 60 days, a PRRB decision is subject to review by the CMS¹ Administrator; if the Administrator takes no action or declines to review the decision, PRRB's decision stands as the final agency action. 42 U.S.C. § 1395oo(f)(1); 42 C.F.R. §§ 405.1875(a)(2), .1877(a)(2), (3).

Instead of making a finding on the merits, PRRB may determine that it lacks authority to decide the underlying question of law and expedited judicial review ("EJR") is appropriate. 42 U.S.C. § 1395oo(f)(1); 42 C.F.R. §§ 405.1842(a). An EJR determination is a final decision not subject to review by the Secretary, but instead judicial review is available. 42 U.S.C. § 1395oo(f)(1); 42 C.F.R. §§ 405.1842(a).

Here, Plaintiffs are Medicare-participating hospitals who filed a challenge to payment rates with PRRB and sought EJR. On December 9, 2010, PRRB determined that it lacked jurisdiction over Plaintiffs' appeals. Def.'s Mot. to Dismiss and Remand [Dkt. # 8] ("Def.'s Mot."), Ex. A ("PRRB Decision") at 3. Anticipating that its jurisdictional decision would be reversed, PRRB ruled in the alternative that if it did have jurisdiction, it lacked authority to decide the underlying legal question and EJR was appropriate. *Id.*, PRRB Decision at 7-8.

PRRB predicted that its jurisdictional decision would be reversed because, at least since 2008, the Secretary has maintained that PRRB's interpretation of 42 C.F.R. § 405.1804 as precluding jurisdiction is in error. *See Cape Cod Hosp. v. Leavitt*, 565 F. Supp. 2d 137, 139 (D.D.C. 2008) (granting Secretary's motion to dismiss and remand; Secretary declined to defend

¹ "CMS" is the Centers for Medicare & Medicaid Services, an operating component of the Department of Health and Human Services.

PRRB's decision regarding jurisdiction). After *Cape Cod*, the Administrator has repeatedly reversed jurisdictional dismissals by PRRB. See Compl. [Dkt. #1] ¶ 110, *Armstrong Cty. Mem'l Hosp. v. Sebelius*, Civ. No. 11-565 (RCL) (filed Mar. 18, 2011); Compl. [Dkt. #1] ¶ 108, *Banner Baywood Heart Hosp. v. Sebelius*, Civ. No. 10-1799 (RCL) (D.D.C.) (filed Oct. 25, 2010); Am. Compl. [Dkt. #6] ¶ 109, *Highland Hosp. v. Sebelius*, Civ. No. 10-1064 (RCL) (D.D.C.) (filed Aug. 10, 2010).

In this case, PRRB's decision stands as the final decision of the agency because the CMS Administrator did not take any action on the decision within 60 days. The Secretary now indicates that "the PRRB's jurisdictional decision is in error and [the Secretary] does not wish to defend that decision in this case." Def.'s Mot. at 6. Plaintiff Hospitals agree that PRRB erred in finding it lacked jurisdiction. The Secretary seeks dismissal and remand to permit the Secretary (via the CMS Administrator) to reverse PRRB's decision that it lacked jurisdiction. The Secretary already had the opportunity to reverse PRRB's decision, but failed to do so within the 60-day time period. The process that the Secretary suggests is unnecessary, time-consuming, and inefficient. It would merely serve to delay the resolution of this case on the merits. PRRB's decision constitutes final agency action, and it is properly before this Court.

The Secretary contends that this case is analogous to *Cape Cod* and should similarly be subject to dismissal and remand. In *Cape Cod*, the district court reviewed a PRRB decision that it lacked jurisdiction to consider Medicare providers' administrative appeals. The Administrator failed to take action within the 60-day window for review. After the 60-day period had expired, the Secretary determined that PRRB's jurisdictional determination was incorrect. 565 F. Supp. 2d at 140. The Secretary moved for dismissal and remand, and the district court

