

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 an intermediary 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 intermediary's actions and requesting that CMS take appropriate action, such as review of the intermediary'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 intermediary's or Secretary's determination for the cost reporting period under appeal, or ruling against the intermediary 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 mailed 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—

§ 405.1869

- (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]

§ 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 intermediary's findings on each specific matter at issue in the intermediary determination for the cost reporting period under appeal, and to make additional revisions on specific matters regardless of whether the intermediary considered the matters in issuing the intermediary 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

42 CFR Ch. IV (10–1–10 Edition)

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 intermediary's or Secretary's findings on each specific matter at issue in the intermediary or Secretary determination under appeal.

- (ii) Make additional revisions on each specific matter at issue regardless of whether the intermediary considered these revisions in issuing the intermediary determination under appeal, provided the Board does not consider or decide a specific matter for which it lacks jurisdiction (as described in § 405.1840(b) of this subpart) or that was not timely raised in the provider's hearing request.

(2) The Board's authority under this section to make the additional revisions is limited to those revisions necessary to resolve a specific matter at issue.

[73 FR 30261, May 23, 2008]

§ 405.1871 Board hearing decision.

(a)(1) If the Board finds jurisdiction over a specific matter at issue and conducts a hearing on the matter (as described in §§ 405.1840(a) and 405.1845(e) of this subpart), the Board must issue a hearing decision deciding the merits of the specific matter at issue.

(2) A Board hearing decision must be in writing and based on the admissible evidence from the Board hearing and other admissible evidence and written argument or comments as may be included in the record and accepted by the Board (as described in §§ 405.1845(g) and 405.1865 of this subpart).

(3) The decision must include findings of fact and conclusions of law regarding the Board's jurisdiction over each specific matter at issue (see § 405.1840(c)(1)), and whether the provider carried its burden of production of evidence and burden of proof by establishing, by a preponderance of the