

that is common to each provider (as described in §405.1837(a)(2) of this subpart).

(B) The single issue that is common to each provider may exist over different cost reporting periods.

(ii) For purposes of satisfying the amount in controversy requirement, a provider may appeal multiple cost reporting periods and different providers in the group may appeal different cost reporting periods.

(c) *Limitations on change in Medicare reimbursement.* (1) In order to satisfy the applicable amount in controversy requirement for a single provider appeal or a group appeal, an appeal favorable to the provider(s) on all specific matters at issue in the appeal increases program reimbursement for the provider(s) in the cost reporting period(s) at issue by an amount that equals or exceeds the applicable amount in controversy threshold.

(2) The applicable amount in controversy requirement is not satisfied if the result of a favorable appeal decreases program reimbursement for the provider(s) in the cost reporting year(s) at issue in the appeal.

(3) Any effects that a favorable appeal might have on program reimbursement for the provider(s) in cost reporting period(s) not at issue in the appeal have no bearing on whether the amount in controversy requirement is satisfied for the cost year(s) at issue in the appeal.

(4) When a provider (or group of providers) has requested a hearing before an intermediary under §405.1811 of this subpart, and the amount in controversy is subsequently determined to be at least \$10,000 (for example, due to a reassessment of the amount in controversy by the intermediary hearing office or due to adding an issue), the appeal is transferred to the Board. The Board is not bound by any jurisdictional finding of the intermediary hearing officer(s).

(5) When a provider or group of providers has requested a hearing before the Board under §405.1835 or §405.1837 of this subpart, and the amount in controversy changes to an amount less than the minimum for a Board appeal due to—

(A) The settlement or partial settlement of an issue, transfer of an issue to a group appeal, or the abandonment of an issue in an individual appeal, the change in the amount in controversy does not deprive the Board of jurisdiction.

(B) A more accurate assessment of the amount in controversy, the Board does not retain jurisdiction.

[73 FR 30252, May 23, 2008; 73 FR 49356, Aug. 21, 2008]

#### § 405.1840 Board jurisdiction.

(a) *General rules.* (1) After a request for a Board hearing is filed under §405.1835 or §405.1837 of this part, the Board must determine in accordance with paragraph (b) of this section, whether or not it has jurisdiction to grant a hearing on each of the specific matters at issue in the hearing request.

(2) The Board must make a preliminary determination of the scope of its jurisdiction (that is, whether the request for hearing was timely, and whether the amount in controversy requirement has been met), if any, over the matters at issue in the appeal before conducting any of the following proceedings:

(i) Determining its authority to decide a legal question relevant to a matter at issue (as described in §405.1842 of this subpart).

(ii) Permitting discovery (as described in §405.1853 of this subpart).

(iii) Issuing a subpoena (as described in §405.1857 of this subpart).

(iv) Conducting a hearing (as described in §405.1845 of this subpart).

(3) The Board may revise a preliminary determination of jurisdiction at any subsequent stage of the proceedings in a Board appeal, and must promptly notify the parties of any revised determination. Under paragraph (c)(1) of this section, each expedited judicial review (EJR) decision (as described in §405.1842 of this subpart) and hearing decision (as described in §405.1871 of this subpart) by the Board must include a jurisdictional finding for each specific matter at issue in the appeal.

(4) If the Board finally determines it lacks jurisdiction over every specific matter at issue in the appeal, the

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Board must issue a dismissal decision under paragraph (c)(2) of this section.

(5) Final jurisdictional findings and dismissal decisions by the Board under paragraphs (c)(1) and (c)(2) of this section are subject to Administrator and judicial review in accordance with paragraph (d) of this section.

(b) *Criteria.* Except with respect to the amount in controversy requirement, the jurisdiction of the Board to grant a hearing must be determined separately for each specific matter at issue in each intermediary or Secretary determination for each cost reporting period under appeal. The Board has jurisdiction to grant a hearing over a specific matter at issue in an appeal only if the provider has a right to a Board hearing as a single provider appeal under § 405.1835 of this subpart or as part of a group appeal under § 405.1837 of this subpart, as applicable. Certain matters at issue are removed from jurisdiction of the Board. These matters include, but are not necessarily limited to, the following:

(1) A finding in an intermediary determination that expenses incurred for certain items or services furnished by a provider to an individual are not payable under title XVIII of the Act because those items or services are excluded from coverage under section 1862 of the Act and part 411 of the regulations. Review of these findings is limited to the applicable provisions of sections 1155, 1869, and 1879(d) of the Act and of subpart I of part 405 and subpart B of part 478 of the regulations, as applicable.

(2) Certain matters affecting payments to hospitals under the prospective payment system, as provided in section 1886(d)(7) of the Act and § 405.1804 of this subpart.

(3) Any self-disallowed cost, except as permitted in §§ 405.1835(a)(1)(ii) and 405.1837(a)(1) of this subpart.

(c) *Board's jurisdictional findings and jurisdictional dismissal decisions.* (1) In issuing an EJR decision under § 405.1842 of this subpart or a hearing decision under § 405.1871 of this subpart, as applicable, the Board must make a separate determination of whether it has jurisdiction for each specific matter at issue in each intermediary or Secretary determination under appeal. A

decision by the Board must include specific findings of fact and conclusions of law as to whether the Board has jurisdiction to grant a hearing on each matter at issue in the appeal.

(2) Except as provided in §§ 405.1836(e)(1) and 405.1842(f)(2)(i) of this subpart, where the Board determines it lacks jurisdiction to grant a hearing for every specific matter at issue in an appeal, it must issue a dismissal decision dismissing the appeal for lack of Board jurisdiction. The decision by the Board must include specific findings of fact and conclusions of law explaining the Board's determination that it lacks jurisdiction to grant a hearing on each matter at issue in the appeal. A copy of the Board's decision must be mailed promptly to each party to the appeal (as described in § 405.1843 of this subpart).

(3) A dismissal decision by the Board under paragraph (c)(2) of this section 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 subpart, no later than 60 days after the date of receipt by the provider of the Board's decision. The Board decision is inoperative during the 60-day period for review of the decision by the Administrator, or in the event the Administrator reverses, affirms, modifies or remands that decision within that period. A final Board decision under paragraphs (c)(2) and (c)(3) of this section may be reopened and revised by the Board in accordance with §§ 405.1885 through 405.1889 of this subpart.

(d) *Administrator and judicial review.* Any finding by the Board as to whether it has jurisdiction to grant a hearing on a specific matter at issue in an appeal is not subject to further administrative and judicial review, except as provided in this paragraph. The Board's jurisdictional findings as to specific matters at issue in an 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 during the course of judicial

review of a final agency decision as described in § 405.1877(a) of this subpart, as applicable.

[73 FR 30253, May 23, 2008]

**§ 405.1842 Expedited judicial review.**

(a) *Basis and scope.* (1) This section implements provisions in section 1878(f)(1) of the Act that give a provider the right to seek EJR of a legal question relevant to a specific matter at issue in a Board appeal if there is Board jurisdiction to conduct a hearing on the matter (as described in § 405.1840 of this subpart), and the Board determines it lacks the authority to decide the legal question (as described in § 405.1867 of this subpart, which explains the scope of the Board's legal authority).

(2) A provider may request a Board decision that the provider is entitled to seek EJR or the Board may consider issuing a decision on its own motion. Each EJR decision by the Board must include a specific jurisdictional finding on the matter(s) at issue, and, where the Board determines that it does have jurisdiction on the matter(s) at issue, a separate determination of the Board's authority to decide the legal question(s).

(3) The Administrator may review the Board's jurisdictional finding, but not the Board's authority determination.

(4) The provider has a right to seek EJR of the legal question under section 1878(f)(1) of the Act only if—

(i) The final EJR decision of the Board or the Administrator, as applicable, includes a finding of Board jurisdiction over the specific matter at issue and a determination by the Board that it has no authority to decide the relevant legal question; or

(ii) The Board fails to make a determination of its authority to decide the legal question no later than 30 days after finding jurisdiction over the matter at issue and notifying the provider that the provider's EJR request is complete.

(b) *General*—(1) *Prerequisite of Board jurisdiction.* The Board (or the Administrator) must find that the Board has jurisdiction over the specific matter at issue before the Board may determine

its authority to decide the legal question.

(2) *Initiating EJR procedures.* A provider or group of providers may request the Board to grant EJR of a specific matter or matters under appeal, or the Board on its own motion may consider whether to grant EJR of a specific matter or matters under appeal. Under paragraph (c) of this section, the Board may initiate own motion consideration of its authority to decide a legal question only if the Board makes a preliminary finding that it has jurisdiction over the specific matter at issue to which the legal question is relevant. Under paragraphs (d) and (e) of this section, a provider may request a determination of the Board's authority to decide a legal question, but the 30-day period for the Board to make a determination under section 1878(f)(1) of the Act does not begin to run until the Board finds jurisdiction to conduct a hearing on the specific matter at issue in the EJR request and notifies the provider that the provider's request is complete.

(c) *Board's own motion consideration.* (1) If the Board makes a finding that it has jurisdiction to conduct a hearing on a specific matter at issue in accordance with § 405.1840(a) of this part, it may then consider on its own motion whether it lacks the authority to decide a legal question relevant to the matter at issue.

(2) The Board must initiate its own motion consideration by issuing a written notice to each of the parties to the appeal (as described in § 405.1843 of this subpart). The notice must—

(i) Identify each specific matter at issue for which the Board has made a finding that it has jurisdiction under § 405.1840(a) of this part, and for each specific matter, identify each relevant statutory provision, regulation, or CMS Ruling; and

(ii) Specify a reasonable period of time for the parties to respond in writing.

(3) After considering any written responses made by the parties to its notice of own motion consideration, the Board must determine whether it has sufficient information to issue an EJR decision for each specific matter and legal question included in the notice. If