

jurisdiction. This decision by the Board must be in writing and include the explanation of the extension request denial required under paragraph (d) of this section, in addition to 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 (as described in § 405.1840(c) of this subpart). 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 Board dismissal decision under paragraph (e)(1) 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.

(i) This 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 the period.

(ii) A Board decision under paragraph (e)(1) of this section that is otherwise final and binding may be reopened and revised by the Board in accordance with §§ 405.1885 through 405.1889 of this subpart.

(3) The Administrator may review a Board decision granting an extension request solely during the course of an Administrator review of one of the Board decisions specified as final, or deemed final by the Administrator, under § 405.1875(a)(2) of this subpart.

(4) A finding by the Board or the Administrator that the provider did or did not demonstrate good cause for extending the time for requesting a Board hearing is not subject to judicial review.

[73 FR 30250, May 23, 2008; 73 FR 49356, Aug. 21, 2008]

§ 405.1837 Group appeals.

(a) *Right to Board hearing as part of a group appeal; criteria.* A provider (but no other individual, entity, or party) has a right to a Board hearing, as part of a group appeal with other providers, for specific items claimed for a cost re-

porting period covered by an intermediary or Secretary determination for the period, only if—

(1) The provider satisfies individually the requirements for a Board hearing under § 405.1835(a), except for the \$10,000 amount in controversy requirement under § 405.1835(a)(2) of this subpart;

(2) The matter at issue in the group appeal involves a single question of fact or interpretation of law, regulations, or CMS Rulings that is common to each provider in the group; and

(3) The amount in controversy is, in the aggregate, \$50,000 or more, as determined in accordance with § 405.1839 of this subpart.

(b) *Usage and filing of group appeals—*

(1) *Mandatory use of group appeals.* (i) Two or more providers under common ownership or control that wish to appeal to the Board a specific matter at issue that involves a question of fact or interpretation of law, regulations, or CMS Rulings that is common to the providers, and that arises in cost reporting periods that end in the same calendar year, and for which the amount in controversy is \$50,000 or more in the aggregate, must bring the appeal as a group appeal.

(ii) One or more of the providers under common ownership or control may appeal more than one cost reporting period with respect to the issue that is the subject of the group appeal for purposes of meeting the \$50,000 amount in controversy requirement, and, subject to the Board's discretion, may appeal more than one cost reporting period with respect to the issue that is the subject of the group appeal for other purposes, such as convenience.

(iii) A group appeal involving two or more providers under common ownership or control must consist entirely of providers under common (to all) ownership or control.

(iv)(A) Example 1: A, B, C and D are commonly owned providers that wish to appeal issue X. This issue was adjusted on A, B and C's CY 2004 cost reports, and on D's CY 2005 cost report. The amount in controversy is more than \$50,000 in the aggregate for providers A, B and C, and more than \$10,000 for provider D. Providers A, B and C must appeal issue X as a group

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appeal. Provider D may pursue an individual appeal to the Board under the procedures set forth in § 405.1835 of this subpart, or if the Board agrees, Provider D may join the group appeal. (If Provider D joins the group appeal, the calendar years in the group appeal would then be 2004 and 2005, and any provider related to Providers A through D by common ownership or control would be required to appeal issue X for its cost reporting period ending in 2004 or 2005 through the group appeal.)

(B) Example 2: A, B and C are commonly owned providers that wish to appeal issue X. This issue was adjusted on A, B and C's CY 2004 cost reports. The amount in controversy is less than \$50,000 in the aggregate for providers A, B and C (\$10,000 for A, \$10,000 for B and \$7,000 for C). Providers A, B and C cannot appeal issue X as a group appeal. Provider A, if it wishes, and provider B, if it wishes, may pursue an individual appeal to the Board under the procedures set forth in § 405.1835 of this subpart. Provider C may not pursue an individual appeal to the Board, because the amount in controversy is less than \$10,000; however, it may pursue an appeal to the intermediary under the procedures set forth in § 405.1811 of this subpart.

(2) *Optional group appeals.* (i) Two or more providers not under common ownership or control may bring a group appeal before the Board under this section, if the providers wish to appeal to the Board a specific matter at issue that involves a question of fact or interpretation of law, regulations, or CMS Rulings that is common to the providers. Alternatively, any provider may appeal to the Board any issues in a single provider appeal brought under § 405.1835 of this subpart.

(ii) One or more of the providers bringing a group appeal under this paragraph may appeal more than one cost reporting period with respect to the issue that is the subject of the group appeal for purposes of meeting the \$50,000 amount in controversy requirement, and, subject to the Board's discretion, may appeal more than one cost reporting period with respect to the issue that is the subject of the

group appeal for other purposes, such as convenience.

(3) *Initiating a group appeal.* With respect to group appeals brought under paragraph (b)(1) of this section, one or more commonly owned or operated providers must make a written request for a Board hearing as a group appeal in accordance with paragraph (c) of this section. Any group appeal filed by a single provider must be joined by related providers on common issues in accordance with paragraphs (b)(1) and (e) of this section. With respect to group appeals brought under paragraph (b)(2) of this section, two or more providers may submit—

(i) A written request for a Board hearing as a group appeal in accordance with paragraph (c) of this section; or

(ii) A request to the Board in accordance with paragraph (e)(4) of this section that a specific matter at issue in a single provider appeal, filed previously under § 405.1835 of this subpart, be transferred from the single appeal to a group appeal.

(c) *Contents of request for a group appeal.* The request for a Board hearing as a group appeal must be submitted in writing to the Board, and the request must include all of the following:

(1) A demonstration that the request satisfies the requirements for a Board hearing as a group appeal, as specified in paragraph (a) of this section.

(2) An explanation (for each specific item at issue; see § 405.1835(a)(1)) of each provider's dissatisfaction with its intermediary or Secretary determination under appeal, including an account of—

(i) Why the provider believes Medicare payment is incorrect for each disputed item;

(ii) How and why the provider believes Medicare payment must be determined differently for each disputed item; and

(iii) If the provider self-disallows a specific item, a description of the nature and amount of each self-disallowed item and the reimbursement sought for each item.

(3) A copy of each intermediary or Secretary determination under appeal, and any other documentary evidence

the providers consider necessary to satisfy the hearing request requirements of paragraphs (c)(1) and (c)(2) of this section, and a precise description of the one question of fact or interpretation of law, regulations, or CMS Rulings that is common to the particular matters at issue in the group appeal; and

(4) A statement that—

(i) The providers believe they have satisfied all of the requirements for a group appeal hearing request under paragraph (a) of this section and requesting the Board to proceed to make jurisdictional findings in accordance with § 405.1840; or

(ii) The Board is requested to defer making jurisdictional findings until the providers request the findings in accordance with paragraph (e)(2) of this section.

(d) *Board's preliminary response to group appeal hearing requests.* (1) Upon receipt of a group appeal hearing request, the Board must take any necessary ministerial steps.

(2) The steps, include, for example—

(i) Acknowledging the request;

(ii) Assigning a case number to the appeal; or

(iii) If applicable, transferring a specific matter at issue from a single provider appeal filed under § 405.1835 of this subpart to a group appeal filed under this section.

(e) *Group appeal procedures pending full formation of the group and issuance of a Board decision.* (1) A provider (or providers) may file a group appeal hearing request with the Board under this section before each provider member of the group identifies or complies with paragraphs (a)(1) and (a)(2) of this section, or before the group satisfies the \$50,000 amount in controversy requirement under paragraph (a)(3) of this section. Proceedings before the Board in any partially formed group appeal are subject to the provisions of paragraphs (e)(2), (e)(3), and (e)(4) of this section. The Board will determine that a group appeal brought under paragraph (b)(1) of this section is fully formed upon a notice in writing from the group that it is fully formed. Absent such a notice from the group, the Board may issue an order, requiring the group to demonstrate (within a period of not less than 15 days) that at

least one commonly owned or controlled provider has preserved the issue for appeal by claiming the relevant item on its cost report or by self-disallowing the item, but has not yet received its final determination with respect to the item for a cost year that is within the same calendar year as that covered by the group appeal (or that it has received its final determination with respect to the item for that period, and is still within the time to request a hearing on the issue). The Board determines that a group appeal brought under paragraph (b)(2) of this section is fully formed upon a notice in writing from the group that it is fully formed, or following an order from the Board that in its judgment, that the group is fully formed, or through general instructions that set forth a schedule for the closing of group appeals brought under paragraph (b)(2) of this section. When the Board has determined that a group appeal brought under paragraph (b)(1) of this section is fully formed, absent an order from the Board modifying its determination, no other provider under common ownership or control may appeal to the Board the issue that is the subject of the group appeal with respect to a cost reporting period that falls within the calendar year(s) covered by the group appeal.

(2) The Board may make jurisdictional findings under § 405.1840 at any time, including, but not limited to, following a request by the providers for the jurisdictional findings. The providers may request jurisdictional findings by notifying the Board in writing that the group appeal is fully formed, or that the providers believe they have satisfied all of the requirements for a group appeal hearing request, and the Board may proceed to make jurisdictional findings. The providers must include with the notice any additional information or documentary evidence that is required for group appeal hearing requests. The Board does not dismiss a group appeal hearing request for failure to meet the \$50,000 amount in controversy requirement until the Board has determined, in accordance with paragraph (e)(1) of this section, that the group is fully formed.

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(3) If the Board makes a preliminary determination of jurisdiction to conduct a hearing as a group appeal under this section, the Board then takes any further actions in the appeal it finds to be appropriate under this subpart (as described in § 405.1840(a) of this subpart). The Board may take further actions, even though the providers in the appeal may wish to add other providers to the group in accordance with paragraph (e)(4) of this section. The Board must make separate jurisdictional findings for each cost reporting period added subsequently to the group appeal (as described in §§ 405.1837(a) and 405.1839(b) of this subpart).

(4) A provider may submit a request to the Board to join a group appeal anytime before the Board issues one of the decisions specified in § 405.1875(a)(2). By submitting a request, the provider agrees that, if the request is granted, the provider is bound by the Board's actions and decision in the appeal. If the Board denies a request, the Board's action is without prejudice to any separate appeal the provider may bring in accordance with § 405.1811 of this subpart, § 405.1835 of this subpart, or this section. For purposes of determining timeliness for the filing of any separate appeal and for the adding of issues to such appeal, the date of receipt of the provider's request to form or join the group appeal is considered the date of receipt for purposes of meeting the applicable 180-day period prescribed in § 405.1835(a)(3) of this subpart.

(5)(i) Except as specified in paragraph (ii) of this paragraph, when a provider has appealed an issue through electing to form, or joining, a group appeal under the procedures set forth in this section, it may not subsequently request that the Board transfer that issue to a single provider appeal brought in accordance with § 405.1811 or § 405.1835 of this subpart.

(ii) *Exception.* When the Board determines that the requirements for a group appeal are not met (that is, when there has been a failure to meet the amount in controversy or the common issue requirement), it transfers the issue that was the subject of the group appeal to a single provider appeal (or appeals) for the provider (or providers)

that meets (or meet) the requirements for a single provider appeal.

(f) *Limitations on group appeals.* (1) After the date of receipt by the Board of a group appeal hearing request under paragraph (c) of this section, a provider may not add other questions of fact or law to the appeal, regardless of whether the question is common to other members of the appeal (as described in § 405.1837(a)(2) and (g) of this subpart).

(2) The Board may not consider, in one group appeal, more than one question of fact, interpretation of law, regulations, or CMS Rulings that is common to each provider in the appeal. If the Board finds jurisdiction over a group appeal hearing request under § 405.1840 of this subpart—

(i) The Board must determine whether the appeal involves specific matters at issue that raise more than one factual or legal question common to each provider; and

(ii) When the appeal is found to involve more than one factual or legal question common to each provider, the Board must assign a separate case number to the appeal of each common factual or legal question and conduct further proceedings in the various appeals separately for each case.

(g) *Issues not common to the group appeal.* A provider involved in a group appeal that also wishes to appeal a specific matter that does not raise a factual or legal question common to each of the other providers in the group must file a separate request for a single provider hearing in accordance with § 405.1811 or § 405.1835 of this subpart, or file a separate request for a hearing as part of a different group appeal under this section, as applicable.

[73 FR 30250, May 23, 2008]

§ 405.1839 Amount in controversy.

(a) *Single provider appeals.* (1) In order to satisfy the amount in controversy requirement under § 405.1811(a)(2) of this subpart for an intermediary hearing or the amount in controversy requirement under § 405.1835(a)(2) of this subpart for a Board hearing for a single provider, the provider must demonstrate that if its appeal were successful, the provider's total program reimbursement for each cost reporting period under appeal would increase by