

court judgment is issued in a civil action brought by a provider against the Secretary as the real party in interest regarding a matter affecting Medicare payment, a court judgment is subject to the provisions of § 405.1803(d) of this subpart.

(2) The provisions of paragraph (h)(1) of this section do not apply to the extent they may be inconsistent with the court's final judgment or any other order of a court regarding the civil action.

[73 FR 30264, May 23, 2008]

§ 405.1881 Appointment of representative.

A provider or other party may be represented by legal counsel or any other person it appoints to act as its representative at the proceedings, conducted in accordance with §§ 405.1819 and 405.1851.

§ 405.1883 Authority of representative.

A representative appointed by a provider or other party may accept or give on behalf of the provider or other party any request or notice relative to any proceeding before a hearing officer or the Board. A representative shall be entitled to present evidence and allegations as to facts and law in any proceeding affecting the party he represents and to obtain information with respect to a request for an intermediary hearing or a Board hearing made in accordance with § 405.1811, § 405.1835, or § 405.1837 to the same extent as the party he represents. Notice to a provider or other party of any action, determination, or decision, or a request for the production of evidence by a hearing officer or the Board sent to the representative of the provider or other party shall have the same force and effect as if it had been sent to the provider or other party.

§ 405.1885 Reopening an intermediary determination or reviewing entity decision.

(a) *General.* (1) A Secretary determination, an intermediary determination, or a decision by a reviewing entity (as described in § 405.1801(a) of this subpart) may be reopened, for findings on matters at issue in a determination or decision, by CMS (with respect to

Secretary determinations), by the intermediary (with respect to intermediary determinations) or by the reviewing entity that made the decision (as described in § 405.1885(c) of this subpart).

(2) A determination or decision may be reopened either through own motion of CMS (for Secretary determinations), the intermediary or reviewing entity, by notifying the parties to the determination or decision (as specified in § 405.1887), or by granting the request of the provider affected by the determination or decision.

(3) An intermediary's discretion to reopen or not reopen a matter is subject to a contrary directive from CMS to reopen or not reopen that matter.

(4) If CMS directs an intermediary to reopen a matter, reopening is considered an own motion reopening by the intermediary. A reopening may result in a revision of any matter at issue in the determination or decision.

(5) If a matter is reopened and a revised determination or decision is made, a revised determination or decision is appealable to the extent provided in § 405.1889 of this subpart.

(6) A determination or decision to reopen or not to reopen a determination or decision is not a final determination or decision within the meaning of this subpart and is not subject to further administrative review or judicial review.

(b) *Time limits*—(1) *Own motion reopening of a determination not procured by fraud or similar fault.* An own motion reopening is timely only if the notice of intent to reopen (as described in § 405.1887 of this subpart) is mailed no later than 3 years after the date of the determination or decision that is the subject of the reopening. The date the notice is mailed is presumed to be the date indicated on the notice unless it is shown by a preponderance of the evidence that the notice was mailed on a later date.

(2) *Request for reopening of a determination not based on fraud or similar fault.* (i) A reopening made upon request is timely only if the request to reopen is received by CMS, the intermediary, or reviewing entity, as appropriate, no later than 3 years after the date of the determination or decision

that is the subject of the requested reopening. The date of receipt by CMS, the intermediary, or the reviewing entity of the request to reopen is conclusively presumed to be the date of delivery by a nationally-recognized next-day courier, or the date stamped “Received” by CMS, the intermediary or the reviewing entity (where a nationally-recognized next-day courier is not employed), unless it is shown by clear and convincing evidence that CMS, the intermediary, or the reviewing entity received the request on an earlier date.

(ii) A request to reopen does not toll the time in which to appeal an otherwise appealable determination or decision.

(iii) A request to reopen that is received within the 3-year period described in this paragraph is timely, notwithstanding that the notice of reopening required under § 405.1887 of this subpart is issued after such 3-year period.

(3) *Reopening of a determination procured by fraud or similar fault.* A Secretary or intermediary determination or decision by the reviewing entity may be reopened and revised at any time if it is established that the determination or decision was procured by fraud or similar fault of any party to the determination or decision.

(c) *Jurisdiction for reopening.* Jurisdiction for reopening an intermediary determination or intermediary hearing decision rests exclusively with the intermediary or intermediary hearing officer(s) that rendered the determination or decision (or, when applicable, with the successor intermediary), subject to a directive from CMS to reopen or not reopen the determination or decision. Jurisdiction for reopening a Secretary determination, CMS reviewing official decision, a Board decision, or an Administrator decision rests exclusively with CMS, the CMS reviewing official, Board or Administrator, respectively.

(1) *CMS-directed reopenings.* CMS may direct an intermediary or intermediary hearing officer(s) to reopen and revise any matter, subject to the time limits specified in paragraph (b) of this section, and subject to the limitation expressed in paragraph (c)(2) of this section, by providing explicit direction to

the intermediary or intermediary hearing officer(s) to reopen and revise.

(i) *Examples.* An intermediary determination or intermediary hearing decision must be reopened and revised if CMS provides explicit notice to the intermediary that the intermediary determination or the intermediary hearing decision is inconsistent with the applicable law, regulations, CMS ruling, or other interpretive rules, general statements of policy, and rules of agency organization, procedure, or practice established by CMS in effect, and as CMS understood those legal provisions, at the time the determination or decision was rendered by the intermediary. CMS may also direct the intermediary to reopen a particular intermediary determination or decision in order to implement a final agency decision (as described in §§ 405.1833, 405.1871(b) and 405.1875 of this subpart), a final, non-appealable court judgment § 405.1877, or an agreement to settle an administrative appeal or a lawsuit, regarding the same determination or decision.

(ii) [Reserved]

(2) *Prohibited reopenings.* A change of legal interpretation or policy by CMS in a regulation, CMS ruling, or other interpretive rules, general statements of policy, and rules of agency organization, procedure, or practice established by CMS, whether made in response to judicial precedent or otherwise, is not a basis for reopening a CMS or intermediary determination, an intermediary hearing decision, a CMS reviewing official decision, a Board decision, or an Administrator decision, under this section.

(3) *Reopening by CMS or intermediary of determination currently on appeal to the Board or Administrator.* CMS or an intermediary may reopen, on its own motion or on request of the provider(s), a Secretary or intermediary determination that is currently pending on appeal before the Board or Administrator.

(i) The scope of the reopening may include any matter covered by the determination, including those specific matters that are appealed to the Board or the Administrator.

(ii) The intermediary must send a copy of the notice required under

§ 405.1887(a) to the Board or to the Administrator, through the Office of the Attorney Advisor, specifically informing that the matter(s) to be addressed by the reopening is currently under appeal to the Board or to the Administrator or is covered by the same determination that is under appeal.

(4) *Reopening of determination within the time for appealing that determination to the Board.* CMS or an intermediary may reopen, on its own motion or on request of the provider(s), a Secretary or intermediary determination for which no appeal was taken to the Board, but for which the time to appeal to the Board has not yet expired, by sending the notice specified in § 405.1887(a) of this subpart.

[73 FR 30265, May 23, 2008]

§ 405.1887 Notice of reopening; effect of reopening.

(a) In exercising its reopening authority under § 405.1885, CMS (for Secretary determinations), the intermediary or the reviewing entity, as applicable, must provide written notice to all parties to the determination or decision that is the subject of the reopening. Notices of—

(1) Reopening by a CMS reviewing official or the Board must be sent promptly to the Administrator.

(2) Intermediary reopenings of determinations that are currently pending before the Board or the Administrator must meet the requirements specified in § 405.1885(c)(3) and (c)(4) of this subpart.

(b) Upon receipt of the notice required under § 405.1887(a) of this subpart, the parties to the prior Secretary or intermediary determination or decision by a reviewing entity, as applicable, must be allowed a reasonable period of time in which to present any additional evidence or argument in support of their positions.

(c) Upon concluding its reopening, CMS, the intermediary or the reviewing entity, as applicable, must provide written notice promptly to all parties to the determination or decision that is the subject of the reopening, informing the parties as to what matter(s), if any, is revised, with a complete explanation of the basis for any revision.

(d) A reopening by itself does not extend appeal rights. Any matter that is reconsidered during the course of a reopening, but is not revised, is not within the proper scope of an appeal of a revised determination or decision (as described in § 405.1889 of this subpart).

[73 FR 30266, May 23, 2008]

§ 405.1889 Effect of a revision; issue-specific nature of appeals of revised determinations and decisions.

(a) If a revision is made in a Secretary or intermediary determination or a decision by a reviewing entity after the determination or decision is reopened as provided in § 405.1885 of this subpart, the revision must be considered a separate and distinct determination or decision to which the provisions of §§ 405.1811, 405.1834, 405.1835, 405.1837, 405.1875, 405.1877 and 405.1885 of this subpart are applicable.

(b)(1) Only those matters that are specifically revised in a revised determination or decision are within the scope of any appeal of the revised determination or decision.

(2) Any matter that is not specifically revised (including any matter that was reopened but not revised) may not be considered in any appeal of the revised determination or decision.

[73 FR 30266, May 23, 2008]

Subparts S–T [Reserved]

Subpart U—Conditions for Coverage of Suppliers of End-Stage Renal Disease (ESRD) Services

AUTHORITY: Secs. 1102, 1861, 1862(a), 1871, 1874, and 1881 of the Social Security Act (42 U.S.C. 1302, 1320b–8, 1395x, 1395y(a), 1395hh, 1395kk, and 1395rr), unless otherwise noted.

SOURCE: 41 FR 22511, June 3, 1976, unless otherwise noted. Redesignated at 42 FR 52826, Sept. 30, 1977.

§§ 405.2100—405.2101 [Reserved]

§ 405.2102 Definitions.

As used in this subpart, the following definitions apply:

Agreement. A written document executed between an ESRD facility and