CMS Manual System	Department of Health & Human Services (DHHS)
Pub 100-20 One-Time Notification	Centers for Medicare & Medicaid Services (CMS)
Transmittal 2363	**Date: September 25, 2019**
	Change Request 10912

Transmittal 2268, dated March 8, 2019, is being rescinded and replaced by Transmittal 2363, dated, September 25, 2019 to include instruction on how to address jurisdictional challenges pending before the Provider Reimbursement Review Board that are no longer valid and that the MAC would prefer to pursue administrative resolution. All other information remains the same.

SUBJECT: Instructions Relating to the Self-Disallowance Requirement for Determining Jurisdiction over Appeals

I. SUMMARY OF CHANGES: This Change Request (CR) provides updated direction related to the evaluation of the self-disallowance requirement for determining Provider Reimbursement Review Board (PRRB) and Medicare Administrative Contractor (MAC) hearing officer jurisdiction over appeals of cost reports with a reporting period that ended on or after December 31, 2008 and began before January 1, 2016, when the appeals were pending or initiated on or after April 23, 2018.

EFFECTIVE DATE: March 8, 2019
**Unless otherwise specified, the effective date is the date of service.*
IMPLEMENTATION DATE: March 8, 2019

Disclaimer for manual changes only: The revision date and transmittal number apply only to red italicized material. Any other material was previously published and remains unchanged. However, if this revision contains a table of contents, you will receive the new/revised information only, and not the entire table of contents.

II. CHANGES IN MANUAL INSTRUCTIONS: (N/A if manual is not updated)
R=REVISED, N=NEW, D=DELETED-*Only One Per Row.*

R/N/D	CHAPTER / SECTION / SUBSECTION / TITLE
N/A	N/A

III. FUNDING:
For Medicare Administrative Contractors (MACs):
The Medicare Administrative Contractor is hereby advised that this constitutes technical direction as defined in your contract. CMS does not construe this as a change to the MAC Statement of Work. The contractor is not obligated to incur costs in excess of the amounts allotted in your contract unless and until specifically authorized by the Contracting Officer. If the contractor considers anything provided, as described above, to be outside the current scope of work, the contractor shall withhold performance on the part(s) in question and immediately notify the Contracting Officer, in writing or by e-mail, and request formal directions regarding continued performance requirements.

IV. ATTACHMENTS:

One Time Notification

Attachment - One-Time Notification

Pub. 100-20	Transmittal: 2363	Date: September 25, 2019	Change Request: 10912

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SUBJECT: Instructions Relating to the Self-Disallowance Requirement for Determining Jurisdiction over Appeals

EFFECTIVE DATE: March 8, 2019
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I. GENERAL INFORMATION

A. Background: This Change Request (CR) provides updated direction related to the evaluation of the self-disallowance requirements for determining the Provider Reimbursement Review Board (PRRB) and Medicare Administrative Contractor (MAC) hearing officer jurisdiction over appeals of cost reporting periods that ended on or after December 31, 2008 and began before January 1, 2016, when the appeals were pending or filed on or after April 23, 2018. This change request also implements the applicable provisions of CMS Ruling 1727-R.

The Dissatisfaction Requirement for Cost Report Appeals Jurisdiction

The PRRB and MAC Hearing Officers have jurisdiction over appeals for certain final determinations if the provider is "dissatisfied" with the final determination of the MAC or the Secretary. CMS originally required a provider to make a specific claim for an item on its cost report as a prerequisite to appeal. Under that policy, a provider that did not claim an item on its cost report did not meet the dissatisfaction requirement. A provider was not permitted to "self-disallow" a specific item, even if the MAC had no authority or discretion to make payment in the manner the provider sought. (In self-disallowing an item, the provider submits a cost report that complies with Medicare payment policy for the item and then appeals the item to the PRRB; the Notice of Program Reimbursement (NPR) would not include any disallowance for the item, and the provider would effectively self-disallow the item.) This policy was not reflected in a regulation. In the case of Bethesda Hospital Association v. Bowen, 485 U.S. 399 (1988), the Supreme Court held that providers' failure to claim reimbursement in the cost report for more payment than a regulation allowed did not mean they could not meet the dissatisfaction requirement for PRRB jurisdiction. The Court reasoned that it would be futile for a provider to seek payment that a MAC had no authority or discretion to make.

As a result of the Bethesda decision and subsequent litigation, CMS addressed the statutory dissatisfaction requirement in notice-and-comment rulemaking. The final rule, which was published in the May 23, 2008 Federal Register (73 FR 30194 through 30200 and 30249 and 30250), indicated that a provider must preserve its right to claim dissatisfaction by including one of two types of a cost report claim for the item under appeal. First, under 42 CFR 405.1835(a)(1)(i), a provider must claim reimbursement for the item in its cost report if it is seeking reimbursement that it believes is in accordance with Medicare policy. Second, under 42 CFR 405.1835(a)(1)(ii), if the provider is seeking reimbursement that it believes may not be allowed under Medicare policy (for example, where the MAC does not have the authority or discretion to make payment in the manner the provider seeks), then the provider must self-disallow the item by filing the applicable parts of its cost report under protest. However, providers should not self-disallow items if they do not have a good faith belief that the items may not be allowable under Medicare payment policy (see 73 FR 30196). At times, providers will file a cost report under protest out of concern that a cost report claim for reimbursement of a non-allowable item might raise program integrity concerns. Section 405.1835(a)(1)(ii)'s

self-disallowance requirement for PRRB jurisdiction over non-allowable items was effective for cost reporting periods ending on or after December 31, 2008. The May 2008 rule established a similar dissatisfaction requirement for MAC hearing officer jurisdiction at 42 CFR 405.1811(a)(1)(ii).

November 13, 2015 Final Rule: Changing the Requirement of an Appropriate Cost Report Claim from PRRB Jurisdiction Rule to a General Substantive Requirement for Payment

In a final rule published in the November 13, 2015 Federal Register (80 FR 70555 through 70565 and 70603 and 70604), CMS changed the requirement of an appropriate cost report claim from a jurisdiction rule to a general substantive requirement for payment, effective for cost reporting periods beginning on or after January 1, 2016. As a result, the cost report claim requirements of the PRRB and MAC hearing officer jurisdiction regulations at 42 CFR 405.1835(a)(1) and 405.1811(a)(1) that became effective in 2008 were eliminated and do not affect cost reporting periods beginning after December 31, 2015.

Decision in Banner Heart Hospital v. Burwell (D.D.C. August 19, 2016)

In Banner Heart Hospital v. Burwell, 201 F. Supp. 3d 131 (D.D.C. 2016) (Banner), the plaintiff hospitals claimed Medicare outlier payments in their fiscal year ending December 31, 2008 cost reports in accordance with applicable outlier payment rules and policies, but they did not claim or self-disallow any additional outlier payments as protested amounts in the cost reports. After the hospitals were paid in accordance with the outlier regulations, they appealed to the PRRB and requested Expedited Judicial Review (EJR) to challenge the validity of the outlier payment regulations. Applying the 2008 final rule, the PRRB denied the hospitals' EJR request, finding that it lacked jurisdiction over the providers' regulatory challenge because of the hospitals' failure to self-disallow the non-allowable outlier payments.

In the Banner decision, the district court held that, despite the hospitals' failure to comply with the self-disallowance regulation, the Supreme Court's decision in Bethesda Hospital establishes that the PRRB had jurisdiction over the hospitals' challenge to a payment regulation, as a cost report reimbursement claim for additional outlier payments would have been futile because the outlier regulations gave the MAC no authority or discretion to make payment in the manner the provider sought. More specifically, the Banner court concluded that, given the Supreme Court's interpretation of section 1878(a)(1)(A) of the Act (42 U.S.C. 1395oo(a)(1)(A)) in Bethesda Hospital, the 2008 self-disallowance regulation may not be applied to appeals raising a legal challenge to a payment regulation or other policy that the MAC cannot address. The court did not declare any other application of the self-disallowance regulation unlawful and did not address the 2015 final rule.

CMS continues to believe that the self-disallowance regulation, 42 CFR 405.1835(a)(1)(ii), is a reasonable interpretation of the dissatisfaction requirement for PRRB jurisdiction in section 1878(a)(1)(A) of the Act (42 U.S.C. 1395oo(a)(1)(A)). Nonetheless, CMS did not appeal the Banner decision, and any provider may file lawsuits in the U.S. District Court for the District of Columbia. Accordingly, CMS has decided to apply the holding of the district court's Banner decision to certain similar administrative appeals.

B. Policy: Updated Jurisdictional Review Rules

1. For an appeal of a cost reporting period that ends on or after December 31, 2008 and begins before January 1, 2016, where such appeal was pending or initiated on or after the April 23, 2018, the self-disallowance requirement for PRRB jurisdiction in 42 CFR 405.1835(a)(1)(ii) shall not be applied to a provider's appeal of a specific item if the provider had a good faith belief that claiming reimbursement for such item in the cost report would be futile because the item was subject to a regulation or other payment policy that bound the MAC and left the MAC with no authority or discretion to make payment in the manner sought by the provider. As of the effective date of this CR, the MAC shall not submit any jurisdictional challenges to the PRRB related to specific items falling within the exception of this paragraph.
2. For an appeal of a cost reporting period that ends on or after December 31, 2008 and begins before January 1, 2016, where such appeal was pending or initiated on or after the April 23, 2018, the self-

disallowance requirement for MAC hearing officer jurisdiction in 42 CFR 405.1811(a)(1)(ii) shall not be applied to a provider's appeal of a specific item if the provider had a good faith belief that claiming reimbursement for such item in the cost report would be futile because the item was subject to a regulation or other payment policy that bound the MAC and left it with no authority or discretion to make payment in the manner sought by the provider. As of the effective date of this CR, the MAC shall not submit any jurisdictional challenges to the MAC hearing officer related to specific items falling within the exception of this paragraph.

3. MACs and the reviewing entities may not reopen any final determination by a MAC or the Secretary or of any decision by the PRRB or other reviewing entity with respect to the question of whether application of the self-disallowance jurisdictional requirement in § 405.1835(a)(1)(ii) or § 405.1811(a)(1)(ii), as applicable, is foreclosed by the updated jurisdictional review rules in this CR.

Additional Guidance for Implementing the Updated Jurisdictional Review Rules

If the PRRB or other reviewing entity determines that the MAC actually had the authority or discretion to make payment for the specific item at issue in the manner sought by the provider on appeal, and if the provider's cost report claimed reimbursement for the allowable item in the manner sought by the provider on appeal, then the provider has met the dissatisfaction jurisdictional requirement in § 405.1811(a)(1)(i) or § 405.1835(a)(1)(i), as applicable. The reviewing entity should then apply all other applicable jurisdictional requirements (for example, the amount in controversy and timely filing requirements), and process the appeal in accordance with its usual appeal procedures. However, if the provider's cost report did not claim reimbursement for the allowable item in the manner sought by the provider on appeal, and the provider has not demonstrated a good faith belief that the item was not allowable, see (73 FR 30196), then the provider has not met the dissatisfaction jurisdictional requirement in § 405.1811(a)(1) or § 405.1835(a)(1), as applicable. The reviewing entity should then issue a jurisdictional dismissal decision under § 405.1814(c) or § 405.1840(c), as applicable.

If the provider's cost report did not claim reimbursement for the allowable item in the manner sought by the provider on appeal, but the provider has demonstrated a good faith belief that the item was not allowable, then the provider has met the dissatisfaction jurisdictional requirement. The reviewing entity should then apply all other applicable jurisdictional requirements (for example, the amount in controversy and timely filing requirements), and process the appeal in accordance with its usual appeal procedures. NOTE: a provider would rarely be able to demonstrate a good faith belief that an item is not allowable when that item is actually allowable under a Medicare payment regulation or other policy.

If the PRRB or other reviewing entity, as applicable, determines that the specific item under appeal was subject to a regulation or other payment policy that bound the MAC and left it with no authority or discretion to make payment in the manner sought by the provider on appeal, then the pertinent reviewing entity shall not apply the self-disallowance jurisdiction regulation (in § 405.1835(a)(1)(ii) or § 405.1811(a)(1)(ii), as applicable), to the specific non-allowable item under appeal; instead, the reviewing entity should apply all other applicable jurisdictional requirements (for example, the amount in controversy and timely filing requirements), and process the appeal in accordance with its usual appeal procedures.

Providers sometimes file a cost report under protest out of concern that a cost report claim for reimbursement of an item deemed non-allowable might raise program integrity questions. A provider still may elect to self-disallow a specific item deemed non-allowable by filing the pertinent parts of its cost report under protest in accordance with the procedures set forth in section 115 of the Provider Reimbursement Manual (PRM), Part 2. However, if the PRRB or other reviewing entity were to determine that, despite the provider's self-disallowance of the specific item under appeal, the MAC actually had the authority or discretion to make payment for the specific item at issue in the manner sought by the provider on appeal and the provider did not demonstrate a good faith belief that such item is not allowable, then then the provider has not met the dissatisfaction jurisdictional requirement in § 405.1811(a)(1) or § 405.1835(a)(1), as applicable. The reviewing entity should then issue a jurisdictional dismissal decision

under § 405.1814(c) or § 405.1840(c), as applicable.

II. BUSINESS REQUIREMENTS TABLE

"Shall" denotes a mandatory requirement, and "should" denotes an optional requirement.

Number	Requirement	Responsibility								
		A/B MAC			DME MAC	Shared-System Maintainers				Other
		A	B	HHH		FISS	MCS	VMS	CWF	
10912.1	As of the effective date of this CR, the MACs shall not submit any jurisdictional challenges to the PRRB related to specific items falling within this exception: For an appeal of a cost reporting period that ends on or after December 31, 2008 and begins before January 1, 2016, where such appeal was pending or initiated on or after April 23, 2018, the self-disallowance requirement for PRRB jurisdiction in 42 CFR 405.1835(a)(1)(ii) shall not be applied to a provider's appeal of a specific item if the provider had a good faith belief that claiming reimbursement for such item in the cost report would be futile because the item was subject to a regulation or other payment policy that bound the MAC and left the MAC with no authority or discretion to make payment in the manner sought by the provider.	X								
10912.1.1	The MACs shall take no action for jurisdictional challenges that were forwarded to the Appeals Support Contractor prior to the effective date of this CR for items that fall within the exception noted in BR 10912.1 unless the MAC determines that the appeal can be resolved through Administrative Resolution or reopening.	X								
10912.1.2	The MAC shall send an email to the Board Adviser assigned to the PRRB case or the PRRB mailbox, PRRB@cms.hhs.gov, with the Appeals Support Contractor copied at prrb@fssappeals.com for appeals that the MAC determines that an Administrative Resolution or reopening is appropriate for issues that fall within the exception noted in BR 10912.1, and that a jurisdictional challenge is pending before the Provider Reimbursement Review Board (PRRB).	X								
10912.1.2.1	The MAC shall reference the specific PRRB case # and issue for which the jurisdictional challenge is no longer valid, and that the MAC will complete the appeal as an Administrative Resolution or reopening	X								

Number	Requirement	Responsibility								
		A/B MAC			DME MAC	Shared-System Maintainers				Other
		A	B	HHH		FISS	MCS	VMS	CWF	
	in the email to the Board Adviser, or PRRB mailbox.									
10912.2	As of the effective date of this CR, the MACs shall not submit any jurisdictional challenges to the MACs' hearing officer related to specific items falling within this exception: For an appeal of a cost reporting period that ends on or after December 31, 2008 and begins before January 1, 2016, where such appeal was pending or initiated on or after April 23, 2018, the self-disallowance requirement for MAC hearing officer jurisdiction in 42 CFR 405.1811(a)(1)(ii) shall not be applied to a provider's appeal of a specific item if the provider had a good faith belief that claiming reimbursement for such item in the cost report would be futile because the item was subject to a regulation or other payment policy that bound the MAC and left it with no authority or discretion to make payment in the manner sought by the provider.	X								
10912.3	MACs and the reviewing entities shall not reopen any final determination by a MAC or the Secretary or of any decision by the PRRB or other reviewing entity with respect to the question of whether application of the self-disallowance jurisdictional requirement in § 405.1835(a)(1)(ii) or § 405.1811(a)(1)(ii), as applicable, is foreclosed by the updated jurisdictional review rules in this CR.	X								
10912.4	Any questions relating to this CR shall be submitted to the DPAO Questions mailbox at DPAOQuestions@cms.hhs.gov.	X								

III. PROVIDER EDUCATION TABLE

Number	Requirement	Responsibility				
		A/B MAC			DME MAC	CEDI
		A	B	HHH		
	None					

IV. SUPPORTING INFORMATION

Section A: Recommendations and supporting information associated with listed requirements: N/A

"Should" denotes a recommendation.

X-Ref Requirement Number	Recommendations or other supporting information:

Section B: All other recommendations and supporting information: N/A

V. CONTACTS

Pre-Implementation Contact(s): Barbara Shadle, 410-786-6475 or barbara.shadle@cms.hhs.gov

Post-Implementation Contact(s): Contact your Contracting Officer's Representative (COR).

VI. FUNDING

Section A: For Medicare Administrative Contractors (MACs):
The Medicare Administrative Contractor is hereby advised that this constitutes technical direction as defined in your contract. CMS does not construe this as a change to the MAC Statement of Work. The contractor is not obligated to incur costs in excess of the amounts allotted in your contract unless and until specifically authorized by the Contracting Officer. If the contractor considers anything provided, as described above, to be outside the current scope of work, the contractor shall withhold performance on the part(s) in question and immediately notify the Contracting Officer, in writing or by e-mail, and request formal directions regarding continued performance requirements.

ATTACHMENTS: 0