

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)
)
Social Security Administration, Office)
of the Inspector General,)
)
Petitioner,)
)
- v. -)
)
Lisa Marie Odle,)
)
Respondent.)

Date: July 14, 2008

Docket No. C-08-146

Decision No. CR1816

DECISION

This matter is before me on a motion to dismiss filed by the Social Security Administration, Office of the Inspector General (SSA-OIG or Petitioner). SSA-OIG filed a motion to dismiss (Motion) dated February 8, 2008, accompanied by five exhibits, seeking dismissal of Lisa Marie Odle's (Respondent) November 26, 2007 hearing request. Respondent filed a response (R. Response) to SSA-OIG's Motion on March 5, 2008, accompanied by no exhibits. By a motion received March 12, 2008, SSA-OIG requested leave to file a reply to Respondent's Response to SSA-OIG's motion to dismiss. On March 14, 2008, I granted Petitioner's motion. On March 20, 2008, SSA-OIG filed a reply to Respondent's response to the motion to dismiss, accompanied by one exhibit. On or about May 1, 2008, I notified Petitioner that the exhibits attached to its motion to dismiss must be labeled to conform with Civil Remedies Division Procedures. On May 8, 2008, SSA-OIG resubmitted its Motion to Dismiss and relabeled its five exhibits that were attached to its motion and one exhibit that was attached to its Reply as OIG Exhibits (Ex.) 1-6. I gave Respondent until May 15, 2008, to file leave to file a sur-reply and I closed the record on May 15, 2008, when no request for leave was submitted. OIG Exs. 1-6 are admitted. For the reasons discussed below, I grant SSA-OIG's Motion and dismiss Respondent's request for hearing.

I. Background

On September 21, 2007, the Social Security Administration Inspector General notified Respondent that it was proposing imposition of a civil money penalty (CMP) of \$50,000 and an assessment in lieu of damages of \$32,968 against Respondent pursuant to section 1129 of the Social Security Act (Act) (42 U.S.C. § 1320a-8). SSA-OIG's proposal of a CMP and assessment in lieu of damages was based on the determination that Respondent was not using SSA children's insurance benefits for two minors in her care solely for the children's present needs. The letter also informed Respondent that an SSA-OIG investigation indicated that although Respondent received \$16,484 of benefits on the minors' behalf from March 2004 to January 2005, the minors left Respondent's care in September 2003 and Respondent did not notify SSA of this fact. OIG Ex. 2, at 1.

SSA-OIG further informed Respondent that if she disagreed with this determination, she may request a hearing before an administrative law judge (ALJ) and that the procedures governing this process are set out in 20 C.F.R. §§ 498.109 and 498.202. OIG Ex. 2. SSA-OIG informed Respondent "[i]f you desire such a hearing, you must file a written request within 60 days of the date of receipt of this letter." *Id.* SSA-OIG sent the notice by Federal Express Overnight. *Id.*

Respondent requested a hearing by letter dated November 26, 2007, pursuant to 20 C.F.R. § 498.202 contending that she did not intentionally defraud or abuse the Social Security System and that she cared for the two minors as her own.

After consideration of the written arguments and documentary evidence submitted by SSA-OIG, I grant SSA-OIG's motion to dismiss. In doing so, I find that the hearing request was untimely filed and the time for filing a request for hearing cannot be extended, as Respondent has not shown good cause for her failure to file a timely hearing request.

II. Issues

- A. Whether Respondent filed a timely request for hearing; and if not
- B. Whether Respondent has shown good cause for extending the time to file a request for hearing.

III. Applicable Law and Regulations

In cases involving SSA, a party is entitled to a hearing only if that party files its request within the time limits established by 20 C.F.R. § 498.109, unless the period for filing is extended. In order to be entitled to a hearing, a party must file its request within 60 days from receipt of a notice of a determination by SSA-OIG to impose a remedy. An ALJ may extend the time within which a hearing request may be filed based on a showing of good cause to justify an extension of time. 20 C.F.R. § 498.202(c)(2). An ALJ must dismiss a request for hearing which is not timely filed. 20 C.F.R. § 498.202(f)(1).

IV. Findings and Discussion

I make findings of fact and conclusions of law (Findings) to support my decision to dismiss the request for hearing. Each finding is noted below in bold, italic face, followed by a discussion of each Finding.

A. SSA-OIG notified Respondent of its action on September 21, 2007.

SSA-OIG sent Respondent the notice of proposed penalty and assessment (Notice) by Federal Express Overnight on September 21, 2007. OIG Ex. 2. This notice constituted agency action from which Respondent's right to appeal arose. 20 C.F.R. § 498.109(b).

B. Respondent received SSA-OIG's notice letter by September 24, 2007.

There is a regulatory presumption that the affected party has received the notice of penalty and assessment five days after it is mailed unless there is a "reasonable showing to the contrary." 20 C.F.R. § 498.202(e). Respondent signed that she received notice from SSA-OIG on September 24, 2007. OIG Ex. 3. Respondent did not address in her hearing request any delay in receiving the Notice. Also, Respondent did not address in her Response any delay in receiving the Notice. Respondent did assert during the January 8, 2008 prehearing conference that the SSA-OIG notice letter sat undiscovered for two weeks in a doorway of her house which she did not regularly use. However, the fact that Respondent signed for the Federal Express package on September 24, 2007 counters her assertion. The signature is very similar to the signature on Respondent's hearing request. OIG Ex. 4. Therefore, I find that Respondent received SSA-OIG's notice of penalty and assessment by September 24, 2007.

C. Respondent's hearing request was filed on November 29, 2007.

Respondent's hearing request is dated November 26, 2007, and was received by the Civil Remedies Division on November 30, 2007. SSA-OIG has provided documentation that shows that despite the hearing request being dated November 26, 2007, it was not mailed until November 29, 2007. OIG Ex. 5. Pursuant to 20 C.F.R. § 498.211(4), documents are considered filed when they are mailed. Thus, I find that Respondent's hearing request was filed on November 29, 2007.

D. Respondent's hearing request was filed more than 60 days after receipt of SSA-OIG's notice letter, and was therefore untimely.

Section 498.202(c) of 20 C.F.R. expressly provides that:

The request for a hearing must be:

- (1) In writing and signed by the respondent or by the respondent's attorney; and
- (2) Filed within 60 days after the notice, provided in accordance with § 498.109, is received by the respondent or upon a showing of good cause, the time permitted by an ALJ.

The latest date by which Respondent could have filed a timely hearing request consistent with 20 C.F.R. § 498.202(c)(2) was November 23, 2007, 60 days after September 24, 2007. Respondent's hearing request was submitted on November 29, 2007. The filing of Respondent's request was clearly beyond the 60 days stipulated in the regulations. Therefore, Respondent's hearing request was untimely.

E. Respondent has not shown good cause for its untimely hearing request.

The term "good cause" is not specifically defined by the regulations. The Departmental Appeals Board (DAB or Board), has not found it necessary to decide the exact scope of the term "good cause" under 20 C.F.R. Part 498. *See SSA v. Parham*, DAB CR1600 (2007). Good cause has been interpreted by the Board in other types of cases as circumstances beyond the ability of the party litigant to control. *SSA v. Parham*, DAB CR1600 (2007); *Hillcrest Healthcare, L.L.C.*, DAB No. 1879 (2003); *Hospicio San Martin*, DAB No. 1554 (1996). In *Parham*, the Board agreed with the ALJ that an attorney's failure to effectively represent a party litigant cannot be considered as good cause. *Parham* at 4.

At the January 8, 2008, telephone prehearing conference, Respondent asserted that there was a delay in receiving the SSA-OIG notice letter. As discussed above, the facts prove otherwise. Respondent signed that she received the package containing SSA-OIG's notice letter on September 24, 2007. Respondent also maintains in her Response that she had difficulty securing counsel to represent her in this matter. R. Response at 1. Respondent argues that numerous calls in an effort to retain an attorney were not returned and that when she did find an attorney, James Rinck, he ultimately decided that he could not represent her. R. Response at 1. Respondent contends that her problems in finding counsel contributed to her untimely filing.

I find that Respondent has not demonstrated good cause for her untimely hearing request. Respondent has not shown that she filed the hearing request after the 60-day requirement due to circumstances beyond her control. Representation by an attorney is not required to appeal penalties and assessments imposed by the SSA. Respondent admitted that she eventually submitted a written hearing request and that she was never represented by Mr. Rinck, or any other attorney. R. Response at 1. The ability to appeal has always been in the control of the Respondent. The procedures for requesting a hearing are clearly given in the notice letter and the assistance of an attorney is not required to understand these procedures. Furthermore, Respondent never requested to extend the time for filing a hearing request. Therefore, I have nothing before me that could be interpreted as an explanation of good cause for failure to submit a timely hearing request.

V. Conclusion

Based on the applicable law and undisputed facts, I conclude that Respondent's hearing request was untimely filed, and good cause does not exist to extend the time for filing. SSA-OIG's motion to dismiss is granted.

/s/

José A. Anglada
Administrative Law Judge