

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Social Security Administration,)	Date: February 18, 2009
)	
Petitioner,)	
)	
- v. -)	Docket No. C-08-710
)	Decision No. CR1902
Avajeau B. Manche,)	
)	
Respondent.)	

DECISION

This matter is before me on a motion to dismiss filed by Petitioner, the Social Security Administration (SSA). On September 19, 2008, Petitioner filed a motion to dismiss (P. Motion) seeking dismissal of Avajeau B. Manche's (Respondent) September 4, 2008 hearing request¹, which was accompanied by five attachments. To comply with the procedures of the Civil Remedies Division, the attachments have been renamed as exhibits and entered into the record as Petitioner's exhibits (P.Exs.) 1-5. Respondent filed a response (R. Response) to Petitioner's Motion for Dismissal, received October 15, 2008. Attached to the response, Respondent included unlabeled documents. The first document is entitled Financial Disclosure Form and has been marked as Respondent Exhibit (R. Ex.) 1. The second document is entitled Client Progress Note from the Horizons Mental Health Center and has been marked as R. Ex. 2. The last document is a June 24, 2008 letter from the SSA and has been marked as R. Ex. 3. I admit P. Exs. 1-5 and R. Exs. 1-3 into evidence. On November 20, 2008, Petitioner filed a reply. For the reasons discussed below, I dismiss Respondent's request for hearing as untimely.

¹ Respondent requested a hearing by an undated letter received on September 4, 2008. Hereafter, Respondent's hearing request will be referred to as the September 4, 2008 hearing request.

I. Background

On February 8, 2008, Petitioner notified Respondent that it was proposing imposition of a civil money penalty (CMP) of \$15,000 pursuant to section 1129 of the Social Security Act (Act) (42 U.S.C. § 1320a-8). P. Ex. 1. Petitioner's proposal of a CMP was based on the determination that Respondent was making false statements or representations to the SSA concerning her work activity and earnings in order to receive Title XVI Supplemental Security Income (SSI) benefits. *Id.* The February 8, 2008 notice letter also informed Respondent that a SSA investigation indicated that from 2001 through 2004 Respondent provided another individual with home health care, yard work, and other various services for which she received compensation, but failed to report it to the SSA. *Id.*

The SSA notice letter 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. *Id.* The notice letter 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 hand-delivered the notice on February 26, 2008. P. Ex. 2.

Respondent requested a hearing by letter received September 4, 2008 contending that she did not intentionally defraud or abuse the Social Security System. P. Ex. 3.

After consideration of the written arguments and documentary evidence submitted by the parties, I dismiss Respondent's hearing request. 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 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.

1. The SSA notice letter was received on February 26, 2008.

SSA sent Respondent the notice of proposed penalty and assessment (Notice) by hand-delivery to the Respondent's father, Terry Manche, on February 26, 2008. P. Ex. 2. Mr. Russell Plumley, Respondent's son, co-guardian and representative, admitted receipt of SSA's notice letter by Terry Manche on February 26, 2008. R. Response at 1. Terry Manche notified Russell Plumley about the SSA notice letter upon receipt of the notice letter. *Id.* This notice constituted agency action from which Respondent's right to appeal arose. 20 C.F.R. § 498.109(b).

On February 28, 2008, the Respondent's son, Russell Plumley, contacted Petitioner and advised that he and Karenjean Plumley were co-guardians for the Respondent. P. Motion, at 3. Mr. Plumley, acting on behalf of the respondent, notified the SSA that he would be providing documentation of Ms. Manche's physical and mental condition. *Id.* Mr. Plumley was reminded by the SSA that if a hearing is desired, a request for a hearing must be submitted within 60 days, as was specified in the letter. *Id.* On March 19, 2008, Mr. Plumley contacted Petitioner again to say he would be sending documentation of Ms. Manche's condition. *Id.*; R. Response at 2.

2. Respondent's hearing request was received on September 4, 2008.

Respondent's hearing request was received by the Departmental Appeals Board (DAB), Civil Remedies Division on September 4, 2008. P. Motion, at 6. This submission was made 189 days after Respondent's receipt of the penalty letter. *Id.*

3. Respondent's hearing request was filed more than 60 days after receipt of the SSA'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 April 28, 2008.² Respondent's hearing request was received on September 4, 2008. P. Ex. 2. The filing of Respondent's request was clearly beyond the 60-day period stipulated in the regulations. Therefore, Respondent's hearing request was untimely.

4. Respondent has not shown good cause for her untimely hearing request.

The term "good cause" is not specifically defined by the regulations. The DAB 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. *Id.*

Respondent has made no such showing. Mr. Plumley, acting on behalf of the Respondent, admits that he received notice of the penalty on or around February 26, 2008. P. Ex. 3. He also acknowledges contacting the SSA attorney, Peter Johnson, and inquiring about the penalty on February 28, 2008. *Id.*; R. Response at 1. After contacting Mr. Johnson twice, neither Mr. Plumley, nor any individual representing Respondent in the matter, submitted the required hearing request within the 60-day period. P. Motion, at 3. Thus, the Respondent failed to appeal the decision within the 60-day period.

Mr. Plumley argues that he thought the SSA notice letter was fraudulent and an attempt to steal his mother's identity because the letter was accompanied by a Financial Disclosure Form. R. Response at 4. The SSA notice letter states:

I am affording you an opportunity to provide me with any and all information that could potentially mitigate your liability and the penalty amount. This information may relate to your financial condition and/or any other information that you may feel is relevant. To assist you in this regard, I am herein providing you with a financial disclosure form. Your completion of the financial disclosure form is voluntary. However, if you want me to consider your financial condition, I strongly recommend that you complete the form.

P. Ex. 1, at 2.

² The 60 day time period in which to respond expired on April 26, 2008, a Saturday. Therefore, Respondent had until April 28, 2008, the Monday afterward, to file a timely hearing request.

Further, Mr. Plumley claims that he talked to various individuals at his local SSA office who told him that the SSA “does not sue citizens” and/or that any action against the Respondent was going to be dropped. R. Response at 3. He even contacted his Congressman about this situation. The only evidence of Mr. Plumley’s actions are Client Progress Notes from the Horizons Mental Health Center from June 19, 2008 and July 21, 2008 about the Respondent’s case and a June 24, 2008 letter from the SSA to Congressman Jerry Moran’s office concerning this case. All of the Respondent’s evidence is well after the expiration of the hearing request period on April 28, 2008. Karenjean Plumley, Respondent’s daughter and co-guardian, contacted the SSA office in Kansas City in early March 2008. R. Response at 3. Mr. Plumley admits that the next week, after looking into the matter, the SSA office contacted Ms. Plumley. *Id.* Ms. Plumley was informed that her “mother was being sued due to giving false information to the SSA.” *Id.* At this point, still well within the 60-day time period to request a hearing, Mr. Plumley had independent verification that the SSA notice letter was not fraudulent. However, Mr. Plumley did not follow the clear instructions in the SSA notice letter in a timely manner and request a hearing.

Completion of the Financial Disclosure Form is plainly voluntary and independent of any request for hearing. Mr. Plumley was so advised in the SSA notice letter and on the telephone by the SSA attorney. P. Reply at 1. A hearing request would have required no financial disclosure whatsoever but, even so, Respondent failed to timely request a hearing

On a different page of the SSA notice letter, it states that:

If you wish to contest this proposed civil money penalty, you have a right to a hearing before an Administrative Law Judge. 20 C.F.R. §§ 498.109 and 498.202. If you desire such a hearing, you must file a written request within 60 days of the date of receipt of this letter. . . . If you do not request a hearing within the 60-day period, the proposed civil money penalty will be imposed on you. You will have no right to an administrative appeal after that time.

P. Ex. 1, at 3. The SSA letter clearly states that Respondent only has 60 days from the date of receipt to file a hearing request.

I find that neither Respondent, nor any individual acting on behalf of the Respondent in this matter, has demonstrated good cause for her untimely hearing request. Respondent has not shown circumstances beyond her control resulting in her failure to file her hearing request within the 60-day requirement. 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 an extension of time for filing a hearing request.

