

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:)	DATE: August 14, 2007
)	
Social Security Administration,)	
Office of the Inspector)	
General,)	
)	
Petitioner,)	Civil Remedies CR1600
)	App. Div. Dkt. No. A-07-109
- v. -)	
)	
Karen Kay Parham,)	
)	
Respondent.)	
)	

RECOMMENDED DECISION

This case is before the Board on a request for review filed by the Respondent, Karen Kay Parham. Respondent appealed a decision by Administrative Law Judge (ALJ) Richard J. Smith dismissing as untimely her request for a hearing on a determination by the Inspector General of the Social Security Administration (I.G.) to impose a civil monetary penalty (CMP) of \$10,000 and an assessment in lieu of damages of \$7,356 on Respondent pursuant to section 1129 of the Social Security Act (Act). Karen Kay Parham, DAB CR1600 (2007) (ALJ Decision). As the basis for the CMP and assessment, the I.G. charged that Respondent, a recipient of Social Security disability benefits, made false statements about her daily activities and work activities in reporting her disability and continuing right to receive benefits. For the reasons explained below, we recommend upholding the ALJ Decision.

Section 1129(a) of the Act and corresponding regulations at 20 C.F.R. Part 498 authorize the I.G. to impose a CMP and an assessment in lieu of damages against persons who "[m]ake or cause to be made false statements or representations or omissions or otherwise withhold disclosure of a material fact for use in determining any right to or amount of" Supplemental Security

Income (SSI) benefits or payments.* 20 C.F.R. § 498.100(b)(1); see also 20 C.F.R. § 498.102(a)(1). Under section 1129(b) of the Act and 20 C.F.R. § 498.202(c)(2), a respondent may appeal an I.G. determination proposing to impose a CMP and assessment by filing a request for an ALJ hearing within 60 days after receiving the I.G.'s notice. An ALJ must dismiss a hearing request if the request is not timely filed and "the respondent fails to demonstrate good cause for such failure." 20 C.F.R. § 498.202(f)(1).

It is undisputed in this case that Respondent's hearing request was not filed within the 60-day period provided in 20 C.F.R. § 498.202(c)(2). The notice in question here was dated August 9, 2006, and received by Respondent on August 15, 2006. I.G. Ex. 3. It specifically stated that the I.G. intended to impose a CMP and assessment totaling \$17,356 against Respondent based on section 1129 of the Act. The notice explained Respondent's right to appeal in plain terms. It emphasized that if she did not file a hearing request within 60 days of receiving the notice, the CMP and assessment would become final and she would have no further appeal rights. Accordingly, Respondent was required to file her hearing request by October 16, 2006. After that deadline expired, the I.G. notified Respondent by letter dated October 30, 2006, and received by Respondent November 7, 2006, that the CMP and assessment had become final since no hearing request had been filed. I.G. Ex. 7.

Nearly three months after the deadline for filing a hearing request had expired, Respondent filed a request for hearing pro se by letter dated January 4, 2007, and postmarked January 11, 2007, disputing the I.G.'s allegations. As noted in the ALJ Decision, Respondent's hearing request was signed by her, but all subsequent pleadings that she submitted to the ALJ were signed by Peter E. Parham, a male relative at Respondent's mailing address, who wrote that he was "representing Karen Kay Parham." The ALJ treated Mr. Parham as Respondent's representative for the purpose of accepting Respondent's filings under 20 C.F.R. § 498.211(a)(3). On February 1, 2007, the I.G. filed a motion to dismiss the appeal alleging that the request was untimely and

* The amount of the CMP may be "not more than \$5,000 for each false statement or representation." 20 C.F.R. § 498.103(a). A person subject to a CMP is also subject to an assessment in lieu of damages of "not more than twice the amount of benefits or payments paid as a result of the statement or representation which was the basis for the penalty." 20 C.F.R. § 498.104.

that Respondent had failed to show good cause for the delay. In response, Respondent did not deny that her request was untimely, but argued that it should be accepted anyway. She alleged: that her lawyer failed to represent her and in fact misled her to believe that he was actively pursuing the case; that she had attempted to contact the Social Security Administration but "had no response;" that she had attempted unsuccessfully to find other legal counsel to represent her; and that she was unable to "write a letter or respond" to the ALJ herself "due to her disability." Respondent Answer Brief at 1-2.

The ALJ dismissed Respondent's request for hearing. He concluded that Respondent was aware that the last date on which her request for hearing would have been timely filed was October 16, 2006 and that the request for hearing, dated January 4, 2007, was filed "on or about January 11, 2007." ALJ Decision at 4. The ALJ also concluded that Respondent did not show good cause for her failure to file her appeal timely. Id. Specifically, he determined that the failure of Respondent's attorney to discharge his responsibilities and any failure in communications between Respondent and her attorney constituted "avoidable human error," and were not beyond Respondent's ability to control. Id. at 6. Further, the ALJ wrote that while Respondent "complain[ed] of her attorney's inactions, she [could] not explain her own." Id. at 5. The ALJ noted that because Respondent's hearing request "was back-dated to fully a week before it was mailed," he would discount her credibility "on the subject of her intentions and actions during the last four months of 2006" were he required to make such a finding. Id. at 6. He also observed that even after Respondent received the I.G.'s final notice imposing the CMP and assessment, she took an additional 65 days to file her hearing request. Id.

On appeal to the Board, Respondent repeats her general claims that her attorney failed to represent her and falsely led her to believe that he was pursuing the case. She also writes that she did not commit fraud and that she was treated unfairly by the Social Security investigator. In addition, Respondent included with her request for review a copy of 20 C.F.R. § 416.1411, the Social Security regulation which sets forth the standards for determining what constitutes "good cause" for missing deadlines to appeal determinations generally involving an individual's eligibility or continuing eligibility to receive SSI benefits. Citing the regulation, Respondent writes in her appeal that her case should be heard because of her "mental illness and educational understanding and unethical lawyer." Respondent Request for Review.

The regulations governing appeals to the Board in proceedings to enforce section 1129(a) of the Act specify the Board's standard of review. 20 C.F.R. § 498.221(i). Section 498.221(i) states that the Board "will limit its review to whether the ALJ's initial decision is supported by substantial evidence on the whole record or contained an error of law." Substantial evidence exists to support a factual finding "if a reasonable mind reviewing the evidence in the record as a whole could accept it as adequate to support his conclusion." Consolidated Edison v. NLRB, 305 U.S. 197, 229 (1938); see also Richardson v. Perales, 402 U.S. 389, 401 (1971). Accordingly, the issue before us is whether the ALJ's findings and conclusions relating to his dismissal of the case are supported by substantial evidence and are in accordance with applicable legal authorities. Respondent's general contentions concerning the underlying merits of the case -- that she did not commit fraud and was not fairly treated by the Social Security investigator -- are beyond the scope of our limited review of the ALJ's decision on timeliness.

The regulations governing this appeal do not specifically define the term "good cause." While Respondent referred to the standards set forth at section 416.1411 of the Social Security regulations to support her contention that there was good cause for her untimely filing, her reliance on that regulation is misplaced. As noted above, 20 C.F.R. § 416.1411 applies to appeals of determinations generally involving an individual's eligibility or continuing eligibility to receive SSI benefits, not to appeals involving I.G. determinations under section 1129 of the Act. Further, the ALJ Decision states:

[T]he concept of "good cause" has not been extensively debated in the context of 20 C.F.R. Part 498. *See Peoples Benefit Services, Inc.*, DAB CR1525(2006). Nevertheless, the concept has never been defined in this forum or before the Board - no matter what the jurisdictional context - as anything other than circumstances beyond the ability of the party-litigant to control. *Hillcrest Healthcare, L.L.C.*, DAB No. 1879 (2003); *Glen Rose Medical Center Nursing Home*, DAB No. 1852 (2002); *Hospicio San Martin*, DAB No. 1554 (1996); *The Heritage Center*, DAB CR1219 (2004); *Hillcrest Healthcare, LLC*, DAB CR976 (2002). I apply that definition here.

ALJ Decision at 5. In Hospicio San Martin, DAB No. 1554 (1996), the Board did affirm the ALJ's finding that the petitioner had not shown "good cause" for missing the 60-day filing deadline in 42 C.F.R. Part 498 by concluding, as had the ALJ, that the petitioner's failure to meet the deadline was not due to

circumstances beyond its control. However, the Board noted that the petitioner had not challenged this definition of good cause on appeal. More recently, the Board has stated that it "has never attempted to provide an authoritative or complete definition of the term 'good cause' in section 498.40(c)." Hillcrest Healthcare, L.L.C., DAB No. 1879, at 5 (2003). However, the Board concluded in Hillcrest that it was not necessary to decide whether the definition applied by the ALJ in that case (either a circumstance beyond the petitioner's control or an action by CMS misleading petitioner into not filing its hearing request timely) was appropriate because the ALJ reasonably concluded, based on his findings of fact, that the petitioner had not shown good cause under any reasonable definition of that term. Id. Similarly, we need not decide the exact scope of the term under 20 C.F.R. Part 498 since under any reasonable definition, the ALJ's determination that Respondent did not show "good cause" for her failure to file a timely hearing request is supported by substantial evidence in the record as a whole.

Since Respondent filed her hearing request nearly five months after receiving the I.G.'s notice proposing to impose the CMP and assessment, Respondent needed to show the specific circumstances that caused the extensive delay. As discussed in the ALJ Decision, Respondent primarily cited the inaction of her attorney as the reason for her failure to meet the filing deadline. Relying on other ALJ decisions, the ALJ reasonably determined that Respondent's attorney's failure to effectively represent her was "avoidable human error," and did not constitute "good cause." ALJ Decision at 6 (citing Nelson Ramirez-Gonzalez, DAB CR175 (1992); Bruce Franklin, R.Ph., DAB CR1198 (2004); Community Care Center of Seymour, DAB CR758 (2001); Sedgewick Health Care Center, DAB CR596 (1998); Jackson Manor Health Care, Inc., DAB CR545 (1998)).

Further, Respondent acknowledged that she received "evidence that [her attorney was] not helping her anymore and . . . had missed several deadlines." Respondent Answer Brief at 2. Yet she did not explain why, after her receipt on November 7, 2006 of the I.G.'s final notice, it took her an additional 65 days to submit her hearing request. Respondent did not identify any specific conditions or circumstances that kept her from either understanding her appeal rights or acting upon the plain instructions in the I.G.'s notice sooner. While Respondent makes generalized statements that her "mental illness" and "educational understanding" should provide a basis for finding good cause for the extensive delay, she never explains how either of those factors impeded either her understanding of her appeal rights or

her ability to submit a timely, written request for hearing. Rather, the evidence in the record supports the ALJ's determination that Respondent understood the nature and gravity of the proceedings and that she was capable of following the clear instructions in the I.G. notice to preserve her appeal rights. That Respondent, according to her own submissions, extensively searched for another lawyer to represent her and asked Mr. Parham to assist her in this matter after she received the I.G.'s final notice shows that she understood the I.G.'s notices and belies her assertions that she was incapable of acting on the instructions in them. Finally, the ALJ reasonably determined, under the circumstances here, that the gap between the date on her hearing request and the date of mailing called into question her credibility.

Accordingly, we recommend upholding the ALJ's dismissal of Respondent's hearing request.

Appeal Rights

This recommended decision becomes the final decision of the Commissioner of the Social Security Administration 60 days after the date on which it is served on the parties and the Commissioner, unless the Commissioner reverses or modifies the recommended decision within that 60-day period. 20 C.F.R. § 498.222(a). If the Commissioner reverses or modifies the Board's recommended decision, the Commissioner's decision is the final decision and binding on the parties. Id. In either event, a copy of the final decision will be served on Respondent. Id.

The regulation at 20 C.F.R. § 498.221(j) provides that the Board will issue to each party, along with its recommended decision, "a statement describing the right of any respondent who is found liable to seek judicial review upon a final decision." Under section 1129(d)(1) of the Act, "[a]ny person adversely affected by a determination of the Commissioner [under section 1129] may obtain a review of such determination," by filing a petition for judicial review in the United States Court of Appeals for the circuit in which the respondent resides, or in which the statement or representation found to violate section 1129 was made, within 60 days after the person is served with a copy of the determination. 42 U.S.C. § 1320a-8(d)(1); see also 20 C.F.R. § 498.222(c) (stating the 60-day time limit and other procedural requirements); 20 C.F.R. § 498.127 (providing that section 1129 of the Act authorizes judicial review of any penalty and assessment that has become final). If a petition for judicial review is filed, a copy of the filed petition must be sent by

certified mail, return receipt requested, to SSA's General Counsel at the following address:

Social Security Administration
Office of General Counsel
Altmeyer Building
6401 Security Boulevard, Room 635
Baltimore, MD 21235.

20 C.F.R. § 498.222(c)(2).

/s/
Sheila Ann Hegy

/s/
Leslie A. Sussan

/s/
Judith A. Ballard
Presiding Board Member