Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

The Inspector General of the Social Security Administration,

Petitioner,

v.

Aretha Harris,

Respondent.

Docket No. C-14-1659

ALJ Ruling No. 2015-14

Date: July 23, 2015

RULING

This Ruling summarizes procedural matters, the resolution of which has been delayed by the Inspector General (IG) of the Social Security Administration's (SSA) failure to comply with my orders. For the reasons below, I conclude that two witnesses called by Respondent may not be treated as adverse witnesses when questioned at hearing. However, Respondent may renew her request to ask leading questions of these witnesses at the hearing. Further, although the SSA IG failed to respond to an order to brief the question as to whether the witnesses referenced above ought to be considered adverse, and failed to timely respond to my Order to Show Cause, I will not impose a sanction on the SSA IG. However, I warn the SSA IG that future non-compliance with my orders may result in the imposition of sanctions.

I. Background

On March 18, 2015, I issued an order scheduling a prehearing conference in this case. I instructed the parties that they should be prepared to discuss the posture of certain witnesses whom Respondent sought to examine using leading questions, Dr. Hasan Assaf

and Dr. Michael Faust, even though Respondent was calling these witnesses. After the prehearing conference, I issued an order on April 13, 2015, in which I instructed the SSA IG to file written argument discussing whether the witnesses should be considered adverse witnesses.[1] My office provided an electronic courtesy copy of the order to counsel for the SSA IG. I gave the SSA IG 30 days to file its written argument and gave Respondent the opportunity to file a reply 15 days thereafter.

The SSA IG did not file any written argument, in contravention of my order. Therefore, I issued an Order to Show Cause on May 28, 2015. I gave the SSA IG 30 additional days to show cause why it should not be subject to sanction pursuant to section 1129(b)(4) of the Social Security Act (42 U.S.C. § 1320a-8(b)(4)) and 20 C.F.R. § 498.214 for its failure to comply with my April 13, 2015 order. My office again provided an electronic courtesy copy of the order to counsel for the SSA IG. The SSA IG did not respond to my Order to Show Cause.

II. Respondent's Motion to Dismiss and the SSA IG's Response

As a result of the SSA IG's failure to show cause, on July 7, 2015, Respondent submitted a motion to dismiss this case as a sanction for the SSA IG's silence. Respondent submitted her motion to dismiss by electronic mail to the attorney-advisor assisting me with the case. Also on July 7, 2015, counsel for the SSA IG submitted a response by electronic mail in which she professed to be unaware of my original order to submit briefing, unaware of my order to show cause, and suggested that another attorney from her office may have been handling the case on behalf of the SSA IG. Counsel went on to explain, seemingly in response to my original order to provide briefing, that the SSA IG did not believe the witnesses are hostile, but she did not address whether they were adverse, which was the issue I ordered the SSA IG to brief. On July 8, 2015, the attorney-advisor assisting me provided a second electronic copy of the Order to Show Cause to counsel for the SSA IG at her request and informed her that she is the only attorney from the Office of Counsel to the SSA IG who has filed a notice of appearance in this case.

In regard to the motion to dismiss and the response to the motion, both parties appear to have ignored the version of the Civil Remedies Division Procedures (CRDP) that I adopted in my August 19, 2014 Acknowledgment and Prehearing Order and provided to them by mail. The CRDP plainly states that parties are prohibited from filing documents

[1] As I related in the April 13, 2015 order, I was satisfied that the witnesses could not be deemed hostile at that time, but whether they should be considered adverse was a different matter entirely. Because the SSA IG had not stated a position on whether they should be deemed adverse (as opposed to hostile), I ordered briefing on this issue.

by e-mail.[2] CRDP § 5 ("Service by facsimile or e-mail is not acceptable unless authorized by the ALJ in advance. Written material is considered filed when placed in the U.S. mail or with an express delivery service . . . ."). While parties are always encouraged to provide electronic courtesy copies of documents that they properly file, providing an electronic courtesy copy does not constitute proper filing of the document.

Because Respondent has not properly filed her motion to dismiss, I will not rule on it. Even if I were to consider it, however, dismissal is not a sanction that "reasonably relate[s] to the severity and nature of the [SSA IG's] failure" to comply with my order to submit briefing and failure to show cause. 42 U.S.C. § 1320a-8(b)(4). Neither will I consider the SSA IG's response to the motion to dismiss which, in addition to being improperly filed, neither addressed the original issue I ordered addressed, nor sufficiently showed cause for the failure to file the briefing I ordered.

III. Witnesses Dr. Hasan Assaf and Dr. Michael Faust

I ordered the SSA IG to brief the issue of whether Drs. Assaf and Faust should be considered adverse to Respondent because their relationships with SSA were and are somewhat ambiguous. In the brief (SSA IG Br.) it filed as part is its prehearing exchange, the SSA IG stated that Drs. Assaf and Faust performed physical and psychological consultative examinations (CE) respectively of Respondent. SSA IG Br. at 8. While the SSA IG maintains that the doctors performed CE's of Respondent, it does not state the capacities in which the doctors did so. The SSA Program Operations Manual System (POMS) defines a "consultative examination" as "a physical or mental examination or test purchased from a medical source, at the [SSA's] request and expense, to provide evidence for a claimant's disability or blindness claim." POMS § DI 22510.001(A)(1); *see also* 20 C.F.R. § 404.1519 ("A consultative examination is a physical or mental examination or test purchased for you at our request and expense from a treating source or another medical source . . . ."). As such, some doctors who perform consultative examinations appear to be no more than vendors of SSA. There is, however, another class of individuals who can perform CE's called "medical consultants" who are Disability Determination Services (DDS) employees or contractors to whom SSA conflict of interest protocols apply. POMS § DI 39569.100(A)(1). Medical consultants can also perform CE's with "prior approval." POMS § DI 39569.100(B)(1). Therefore, I sought to determine whether Drs. Assaf and Faust were more akin to vendors whose services SSA purchased or employees or contractors of SSA by ordering the SSA IG to brief

[2] The Civil Remedies Division of the Departmental Appeals Board has subsequently updated its Procedures, effective January 1, 2015. Because the newest version of the CRDP differs substantively with respect to filing documents, I have quoted the prior version, which are applicable to this case.

whether I should consider the doctors adverse to Respondent. In her Witness List and Exhibit List, Respondent described the doctors as "agents" of SSA without any support for that characterization.

In light of the absence of any evidence to conclude that Drs. Assaf and Faust are employees or contractors of SSA, I have decided that, at this time, Drs. Assaf and Faust should not be considered adverse to Respondent. As I indicated in my April 13, 2015 order, the Federal Rules of Evidence provide non-binding guidance in SSA civil monetary penalty cases. 20 C.F.R. § 498.217(b). Looking to Federal Rule of Evidence 611 for guidance, I note that Rule 611 states generally that I have discretion related to the examination of witnesses. Rule 611(c) is directly applicable to the question of how Respondent may question Drs. Assaf and Faust. Rule 611(c) states that I should not generally permit a party to ask leading questions on direct examination, but should permit leading questions "when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party." Fed. R. Evid. 611(c)(2).

The question before me is whether Drs. Assaf and Faust are either adverse parties or "witnesses identified with an adverse party." For instance, Rule 611(c) "assumes that witnesses who are adverse parties or identified with one may be presumed predisposed against the direct examiner without requiring a demonstration of that fact. 28 Wright & Miller, *Federal Practice and Procedure* § 6168, *1 (2d ed. 1993); *see also U.S. v. Bryant*, 461 F.2d 912, 918-19 (6th Cir. 1972) (observing that the risk from asking leading questions does not exist when a party opposed to the government is permitted to ask leading questions during direct examination of a government agent or witness closely identified with the interest of the government). Because the SSA IG relies on the truth of the reports Drs. Assaf and Faust filed, Respondent has presumably called the doctors to undermine their previous reports. It seems fair to believe that Drs. Assaf and Faust would be predisposed to defend the veracity of their reports and, thereby, to resist Respondent's likely questioning. Conversely, courts have typically limited their application of Rule 611(c)(2) to employees, former employees, and close relations of an opposing party. *See, e.g.*, *Ellis v. City of Chicago*, 667 F.2d 606 (7th Cir. 1981); *Stahl v. Sun Microsystems, Inc.*, 775 F.Supp. 1397 (D. Colo. 1991); *Vanemmerik v. The Ground Round, Inc.*, 1998 WL 474106, *1 (E.D. Pa. 1998) (collecting cases).

While this is a difficult issue that further briefing would have helped clarify, I do not believe that I can deem Drs. Assaf and Faust "adverse" to Respondent or "witnesses identified with an adverse party" at this time. I will, however, reserve the right to deem Drs. Assaf and Faust at the hearing based on their responses to Respondent's direct examination. Respondent will begin her questioning of Drs. Assaf and Faust without using leading questions and may move to treat them as adverse or hostile based on her ability to obtain answers during direct examination. Further, Respondent may first voir dire the doctors to determine their exact relationship to SSA and, if appropriate, renew her motion to treat the doctors as adverse witnesses.

IV. The SSA IG's Failure to Comply with Orders

As discussed, the SSA IG has missed two deadlines in this case. I have the authority to "[r]egulate . . . the conduct of representatives [and] parties" in this case. 20 C.F.R. § 498.204(b)(8). I have the statutory authority to sanction a party or attorney where that party or attorney does not comply with my orders or when the party's misconduct interferes with the "speedy, orderly, or fair conduct of the hearing." 42 U.S.C. § 1320a-8(b)(4). In this case, the SSA IG's conduct qualifies on both counts. By neglecting to provide the briefing I ordered, the SSA IG has delayed my decision regarding whether Drs. Assaf and Faust are adverse to Respondent and wasted valuable time. Moreover, counsel's position that she was unaware that I had issued an Order to Show Cause is troubling because my office sent counsel a courtesy copy of the Order to Show Cause by email to the same address from which counsel responded to Respondent's motion to dismiss. Counsel indicated that she was on detail, and if this impacted her ability to receive my orders,[3] then the SSA IG ought to have substituted counsel in this case.

Despite the SSA IG's conduct in the present case, I will not formally impose a sanction on the SSA IG. However, future failures by the SSA IG to comply with my orders may subject the SSA IG or counsel to sanctions. It is my hope that the issue of sanctions will never again arise.[4]

/s/
Scott Anderson
Administrative Law Judge

[3] Counsel's contention that she was unaware of this case's status because she did not have access to the Departmental Appeals Board's electronic filing system while on detail is confusing, since neither party is filing documents electronically in this case.

[4] This warning is not made lightly. However, it is necessary because this is not the first case in which the SSA IG has not complied with my orders. Such conduct impedes my ability to adjudicate the cases on my docket.