Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: September 30, 2008
Social Security Administration, Office of the Inspector General,	
Petitioner,	Civil Remedies CR1795
	App. Div. Dkt. No. A-08-111
- v. -	
Steven Getchell,	
Respondent.	

RECOMMENDED DECISION

This case is before the Board on a notice of appeal filed by the Respondent, Steven Getchell. Respondent appealed a decision by Administrative Law Judge (ALJ) Carolyn Cozad Hughes dismissing as untimely his request for a hearing on a determination by the Inspector General of the Social Security Administration (SSA I.G.) to impose a civil money penalty and assessment (CMP) totalling $60,000 pursuant to section 1129 of the Social Security Act (Act).[1] Social Security Administration, Office of the Inspector General v. Steven Getchell, DAB CR1795 (2008) (ALJ Decision). SSA I.G. moved to dismiss as untimely Respondent's

[1] The current version of the Social Security Act can be found at www.ssa.gov/OP_Home/ssact/comp-ssa.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp Table.

request for a hearing on the imposition of the CMP. Respondent did not dispute that his hearing request was untimely but argued that good cause excused the late filing. The ALJ ruled that the Respondent had not established good cause for untimely filing and dismissed Respondent's hearing request pursuant to 20 C.F.R. § 498.202(f).

The Board's review is limited "to whether the ALJ's initial decision is supported by substantial evidence on the whole record or contained error of law." 20 C.F.R. § 498.221(i). As explained below, we conclude that the ALJ erred in determining that Respondent had not established good cause for untimely filing. Accordingly, we recommend reversing and remanding the ALJ Decision.

Applicable Statute and Regulations

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)(2) of the Act, a respondent is entitled to an ALJ hearing prior to any adverse determination under section 1129(a).

Section 498.202 of 20 C.F.R. provides in relevant part:

> (a) A party . . . may request a hearing before an ALJ.
>
> * * *
>
> (c) The request for a hearing must be:
>
> * * *
>
> (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 the ALJ.
>
> * * *
>
> (e) For purposes of this section, the date of receipt of the notice letter will be presumed to be five

> days after the date of such notice, unless there is a reasonable showing to the contrary.
>
> (f) The ALJ shall dismiss a hearing request where:
>
> (1) The respondent's hearing request is not filed in a timely manner and the respondent fails to demonstrate good cause for such failure. . . .

Section 498.212(a) provides that "[i]n computing any period of time under this part . . . , the time begins with the day following the act, . . . and includes the last day of the period unless it is a Saturday, Sunday or legal holiday . . . , in which event it includes the next business day."

Section 498.211(a)(4) provides that "[d]ocuments are considered filed when they are mailed."

Case Background

SSA I.G. determined to impose a civil money penalty and assessment totalling $60,000 on Respondent on the ground that Respondent made false statements and/or misrepresentations of material fact when he applied for Social Security disability insurance benefits. SSA I.G. sent Respondent a letter dated December 11, 2007 giving notice of imposition of the CMP by Federal Express Overnight Mail. SSA I.G. Ex. 2, at 1-7. The notice letter was received by Respondent on December 12, 2007. SSA I.G. Ex. 2, at 4, 7. The letter included a statement that any request for a hearing must be filed "within 60 days of the date of receipt of this letter," but also referred Respondent to section 498.202 (which includes the five-day presumption) and to 20 C.F.R. Part 498 as a whole, enclosing a copy. Id. at 4-5. Respondent sent his hearing request to the Civil Remedies Division of the Departmental Appeals Board via facsimile and Federal Express overnight delivery on February 13, 2008. SSA I.G. Ex. 3, at 1.

SSA I.G. moved to dismiss the hearing request on the ground that Respondent "did not file his request within the 60-day period prescribed by law, and the Respondent has neither asserted nor demonstrated good cause for failing to make his request within the required time period." SSA I.G. Motion to Dismiss. Citing sections 498.202(c)(2), 498.212(a), and 498.211(a)(4), SSA I.G. asserted that "in order for Respondent to have filed a timely request for hearing, he would have needed to file, i.e., mail,

his request by February 11, 2008, as day 60 fell on February 10, 2008, which was a Sunday." SSA I.G. Br. dated 4/2/08, at 6.

In response, Respondent identified the issue in the case as whether he "can establish good cause with regards to his request for hearing being untimely filed . . . ." Respondent Br. dated 4/21/08, at 1. Respondent asserted that the late filing occurred because Respondent's counsel failed to note that SSA I.G.'s December 11, 2007 notice letter was sent by Federal Express Overnight Mail and calendared the deadline for filing a hearing request by entering a starting date of December 11, 2007 into the office's case management software, which "added the five days mailing time that is given to SSA correspondence sent through the United States Postal Service" and therefore generated a "response date" of February 14, 2008, 65 days later. Id. at 3-4; Respondent Ex. 1 (Declaration of Jeanine M. Schweinberg), at 1. The response date calculation was also manually confirmed by Respondent's counsel's staff. Id. Respondent argued that good cause existed because the late filing resulted from an inadvertent mistake and did not prejudice SSA I.G. Respondent Br. dated 4/21/08, at 5.

The ALJ found that Respondent's "good cause claim fails." ALJ Decision at 3. In particular, the ALJ stated:

> The regulations do not define "good cause" but leave that determination to the discretion of the ALJ. Looking to regulations governing certain Social Security benefit appeals – 20 C.F.R. § 404.911; 20 C.F.R. § 404.933(c) – for guidance, many ALJs have ruled that "good cause" means circumstances beyond a party's ability to control. *See, e.g., Hillcrest Healthcare, L.L.C.*, DAB CR976 (2002), *aff'd* DAB No. 1879 (2003); *see also*, *SSA v. Parham*, DAB CR1600 (2007) and cases cited therein. Under those regulations, to determine whether good cause exists, the ALJ considers 1) the circumstances that kept Respondent from making the request on time; 2) whether any SSA action misled him; 3) whether Respondent understood the requirements for filing; and 4) whether Respondent had any physical, mental, educational, or linguistic limitation that prevented him from filing a timely request, or from understanding or knowing about the need to file a timely request for review. 20 C.F.R. § 404.911.
>
> Under this standard, Respondent Getchell's good cause claim fails. He has not claimed that meeting the filing deadline was beyond his control; he was perfectly

> capable of filing timely. He does not claim that he misunderstood the filing deadline. Indeed, SSA's notice to him left no room for misunderstanding. It said that he *must* file within 60 days of "the *date of receipt* of this letter," and warned that he would lose his hearing right if he failed to file the request within the 60 day period. I.G. Ex. 2, at 4-5. Respondent's disregard of that unambiguous warning does not constitute good cause.

Id. (emphasis in original).

Analysis

On appeal, Respondent argues that the ALJ abused her discretion by not finding good cause for the untimely filing of Respondent's hearing request. Respondent asserts that the deadline to file a hearing request –

> generated by the case management/calendar software program used by the law office automatically added the five days mailing time that is given to SSA correspondence sent through the United States Postal Service; as a result, the computer generated a response date of February 14, 2008 (December 11, 2007 + 65 days); and when the response date was cross-checked by Ms. Schweinberg's supervisor, . . . she also calculated 65 days and arrived at February 14, 2008.

Notice of appeal at 2-3, citing Schweinberg declaration. Respondent challenges the ALJ's view that good cause exists only when there are circumstances beyond the ability of the party-litigant to control. According to Respondent, "[i]n evaluating whether good cause exists, the ALJ should assess the risk of prejudice to the non-moving party, the length of delay, the potential effect of the delay on the proceedings, the reason for the delay and the moving party's good faith." Id. at 4-5. Respondent contends that it met all of these criteria here.

Although the ALJ indicated that some ALJs have ruled that good cause for late filing exists only if the respondent was prevented from filing timely by circumstances beyond his control, she recognized that this is not the only basis for finding good cause. In stating that good cause did not exist since Respondent "does not claim that he misunderstood the filing deadline" and SSA's notice letter "left no room for misunderstanding," the ALJ concluded in effect that good cause may exist if the respondent reasonably misunderstood the filing deadline. See ALJ Decision at 3. For the reasons discussed below, we find that Respondent

did in fact claim that he misunderstood the filing deadline, and we conclude that he had a reasonable basis for his understanding. Accordingly, we conclude that the ALJ erred in dismissing Respondent's hearing request on the ground that Respondent had not shown good cause for not filing timely.

As noted above, Respondent's explanation for the late filing was that counsel used software programmed to automatically add a five-day mailing time for correspondence from SSA and therefore to generate a response date 65 days from the date of the correspondence. Counsel filed Respondent's hearing request within this 65-day period after cross-checking the date. Section 498.202(e) provides for a presumption that a respondent received SSA I.G.'s notice letter five days after the date of the notice letter. Applying this presumption here would mean that Respondent indeed had 65 days from the date of SSA I.G.'s notice letter to file his hearing request, the same period identified by the software used by Respondent's counsel.

Section 498.202(e) also permits "a reasonable showing to the contrary," however. The regulation is silent as to who may rebut the five-day presumption by making this showing. There is no question that the regulation permits a respondent to rebut the regulatory presumption by showing that it did not receive SSA I.G.'s notice letter until more than five days after the date of the notice letter, thus extending the deadline for filing a hearing request beyond 65 days from the date of the notice letter. In moving to dismiss Respondent's request as untimely, however, SSA I.G. read the regulation as also permitting SSA I.G. to rebut the five-day presumption by showing an earlier date of actual receipt, thus reducing the period for appeal to less than 65 days. If the regulation is read as permitting only a respondent and not SSA I.G. to rebut the presumption, then Respondent's hearing request would have been timely filed. Thus, although Respondent did not specifically allege that its late filing was based on its reading of the regulatory filing deadline, we conclude that this understanding was inherent in his counsel's software and office system for handling SSA I.G. correspondence.

We also conclude that the ALJ erred in concluding that SSA I.G.'s notice letter provided clear notice to Respondent that his hearing request was required to be filed within 60 days of his actual receipt of the notice letter. Although the notice letter instructed Respondent to file within 60 days of the date of receipt of the notice letter, the notice letter also instructed Respondent to follow the procedures in the enclosed regulations. Those procedures included the five-day mailing presumption. We

consider that the ambiguity we have identified in that regulatory provision undercuts the ALJ's conclusion that the wording of the notice was clear on its face.

We further conclude that Respondent's understanding of the regulation was reasonable. SSA I.G. does not point to any evidence that its interpretation has in fact been adopted as the official agency interpretation.[2] Nor (as discussed above) is there any evidence that Respondent had actual and timely notice of SSA I.G.'s interpretation.

These SSA regulations were "modeled on the HHS's hearing regulations which govern CMP cases for which the DAB also conducts hearings and appeals on behalf of the Secretary of the HHS." 61 Fed. Reg. 65,467 (Dec. 13, 1996). The HHS I.G., in adopting its CMP appeals procedures at 42 C.F.R. Part 1005, rejected a suggestion always to use certified mail, and then deem notice received on the return receipt date, rather than using "a presumed date of 5 days after the date on the notice." 57 Fed. Reg. 3298, 3319 (Jan. 29, 1992). HHS explained it would not be "administratively feasible for the OIG to await the return of certified mail receipt forms before proceeding to impose exclusions" and therefore concluded "that a presumption that notices are received within 5 days after the date on the notice is both reasonable and legally sound." 57 Fed. Reg. 3298, 3320. This discussion could be read to suggest that the provision in the SSA regulations was similarly intended to ensure that the parties could rely on "a date certain" – 65 days after the date on the notice (five "extra days") – for determining when a hearing request was due, and that the "reasonable showing" exception was intended to protect a respondent's due process rights if, in fact, no receipt took place until a later date, while imposing the burden on such a respondent to make a reasonable showing in support of the claim of late receipt.[3]

---

[2] A position asserted by an attorney in litigation does not necessarily reflect an official interpretation by the agency. See, e.g., Hawaii Dept. of Human Services, et al., Docket No. A-05-100, Ruling No. 2006-1 (February 22, 2006); New York State Office of Children and Family Services, DAB No. 1831, at 16-17 (2002), quoting Auer v. Robbins, 519 U.S. 452, at 462 (1997) (An agency interpretation taken in litigation may be worthy of deference so long as it reflects the agency's "fair and considered judgment" on the matter in question.).

[3] We note that, although the Board has been hearing appeals

(continued...)

In addition, we note that SSA itself has interpreted other regulations using analogous language, as providing the addressee, but not SSA, an opportunity for rebuttal. For example, the original language in SSA's hearing procedures was identical to the provision at issue here. SSA revised the regulation to use plain English (with no change in substance). The plain English version defines "date of receipt" as "Date you receive notice means 5 days after the date of the notice, unless you show us that you did not receive it within the 5-day period." 20 C.F.R. § 404.901. This restatement can reasonably be read to suggest that the original language also meant that the party with the opportunity to make a reasonable showing is the party with the right to request a hearing and that the presumption of receipt five days after the date of the notice otherwise controls.

We also observe that the understanding upon which the Respondent acted in filing more than 60 days after actual receipt could reasonably arise from the placement of the language at issue in the context of a section which sets out what a respondent must do in order to perfect its appeal. This context raises a reasonable expectation that the reasonable showing of a different receipt date would be made by a respondent. The use of a reasonable showing standard may be read to reinforce this expectation, since SSA I.G.'s burden on the other issues in a CMP proceeding is to support its position by a "preponderance of the evidence." 20 C.F.R. § 498.215. Finally, the contrast between the general rule for computation of time in section 498.212(c) and the specific exception for requests for review could be read to reinforce this expectation. Generally, the regulations conclusively presume receipt in five days, but section 498.202 instead provides for a rebuttable presumption of receipt in five days. A reasonable explanation for the difference may lie in concern that hearing rights not be cut off where actual receipt did not take place in time to provide the party with its full time period to appeal.

Based on the foregoing, we conclude that, while the interpretation propounded by SSA I.G. in this litigation is not impermissible, the alternative interpretation that underlay

---

[3](...continued)
under Part 1005 for over 15 years, we are aware of no instance in which the HHS I.G. took the position before us that SSA I.G. took in its Motion to Dismiss here. A review of ALJ decisions under those regulations also does not disclose a case in which the "reasonable showing" was undertaken by the HHS I.G. rather than the party appealing. See, e.g., Mark K. Mileski, DAB No. CR1174 (2004), and prior ALJ cases discussed therein.

Respondent's timing in filing his hearing request was, at a minimum, a reasonable interpretation. Accordingly, we conclude that, contrary to what the ALJ found, Respondent showed good cause for not filing his hearing request timely.[4]

Conclusion

We recommend that the Commissioner reverse the ALJ Decision based on the analysis set out above and remand to the ALJ for further proceedings as appropriate.

/s/
Stephen M. Godek

/s/
Constance B. Tobias

/s/
Leslie A. Sussan
Presiding Board Member

[4] Should the Commissioner conclude that the five-day presumption in fact applied here, then of course the Respondent's hearing request would be considered timely. We do not, however, reach that issue here since Respondent's appeal to us was based on the claim of good cause.