

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Social Security Administration,)	
)	Date: May 22, 2007
Petitioner,)	
)	
- v. -)	Docket No. C-07-196
)	Decision No. CR1600
Karen Kay Parham,)	
)	
Respondent.)	

DECISION AND ORDER DISMISSING CASE

This matter is before me on the Office of the Inspector General, Social Security Administration's (I.G.'s) Motion to Dismiss the Request for Hearing filed January 11, 2007, by Respondent *pro se* Karen Kay Parham. The I.G.'s Motion asserts that the Request for Hearing is untimely filed, and the Motion is based on the terms of 20 C.F.R. §§ 498.202(c)(2) and 498.202(f)(1). As I explain below, I find that the Request for Hearing was not timely filed, and for that reason, I grant the I.G.'s Motion to Dismiss.

I. Procedural Background

Karen Kay Parham, Respondent *pro se*, was a recipient of Supplemental Security Income disability benefits under Title XVI of the Social Security Act (Act). The I.G. received information suggesting that she had given false statements in maintaining her eligibility for those benefits, and on May 10, 2006, wrote to Respondent announcing that the I.G. was considering the imposition of civil monetary penalties and assessments against her. The I.G.'s action was based on section 1129 of the Act, 42 U.S.C. § 1320a-8.

Respondent engaged counsel in late June 2006, and some discussions of a negotiated resolution of the matter began. Those discussions were unproductive, however, and on August 9, 2006, the I.G. sent Respondent notice that a civil monetary penalty of \$10,000.00 and an assessment in lieu of damages of \$7356.00 were to be imposed.

Respondent filed her Request for Hearing *pro se*, in a letter dated January 4, 2007. The letter was mailed January 11, 2007. I scheduled a telephonic prehearing conference for February 7, 2007, but before that conference could be convened, the I.G. filed a Motion to Dismiss on February 1, 2007. The I.G.'s Motion was based on the apparent untimeliness of Respondent's Request for Hearing, and contained both argument and authorities in support of the Motion.

The prehearing conference was held as scheduled, and its results are set out in the Order of February 8, 2007. The cycle of briefing established in that order has concluded, and the record in this case closed on April 16, 2007. The evidentiary record before me is made up of eight exhibits: the I.G. has proffered I.G. Exhibits 1-8 (I.G. Exs. 1-8), and in the absence of Respondent's objection, they are admitted. Respondent has proffered no exhibits of her own.

It will be noted that I have described Respondent as appearing here *pro se*. Her Request for Hearing was signed by her *in propria persona*, but all subsequent pleadings on her behalf have been signed by a male relative at Respondent's mailing address, one Peter E. Parham, who styles himself as "representing Karen Kay Parham." He has never filed an entry of appearance, but I have treated his participation as substantially compliant with 20 C.F.R. § 498.211(a)(3).

II. Issue

The issue before me is whether Respondent's Request for Hearing was timely filed, in compliance with 20 C.F.R. § 498.202(c)(2). If the Request was not filed in a timely manner, and if Respondent has not demonstrated good cause for filing her Request untimely, I am required by the mandatory language of 20 C.F.R. § 498.202(f)(1) to dismiss it.

This issue must be resolved against Respondent. Her Request for Hearing was filed untimely, almost three months later than the deadline established by regulation. She has failed here to demonstrate good cause for her untimeliness. In the absence of such a showing, her Request for Hearing must be dismissed.

III. Controlling Statutes and Regulations

Section 1129(a) of the Act, 42 U.S.C. § 1320a-8(a), provides in general terms that any person who makes or causes to be made false, misleading, or incomplete statements of material fact for use in determining initial or continuing eligibility for benefits under certain programs created by the Act shall be subject to civil monetary penalties and assessments in lieu of any damages sustained by the programs as a result of those statements. One of the programs included in section 1129(a)'s protection is Title XVI of the Act, the disability benefits program called Supplemental Security Income. The statutory language appears in substantially similar form at 20 C.F.R. §§ 498.102(a) and 498.103(a), and the specific steps by which the I.G. must proceed are set out at 20 C.F.R. § 498.109.

Section 1129(b) of the Act, 42 U.S.C. § 1320a-8(b), creates a right to appeal the imposition of civil monetary penalties and assessments. The procedures governing such appeals appear at 20 C.F.R. Part 498, and the 60-day deadline for filing a hearing request is established at 20 C.F.R. §§ 498.109(a)(5)(ii), 498.110, and 498.202(c)(2). 20 C.F.R. § 498.202(f) provides:

(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;

20 C.F.R. § 498.202(f)(1).

Documents filed in appeals governed by 20 C.F.R. Part 498 are considered filed when they are mailed. 20 C.F.R. § 498.211(a)(4).

IV. Findings and Conclusions

I find and conclude as follows:

1. By letter dated August 9, 2006, the I.G. notified Respondent that she was subject to a civil monetary penalty and assessment in the sum of \$17,356.00. The I.G. relied on the terms of section 1129 of the Social Security Act (Act), 42 U.S.C. § 1320a-8. I.G. Ex. 3, at 1-4.

2. Respondent received the I.G.'s notice letter on August 15, 2006. I.G. Ex. 3, at 5.
3. Respondent, through counsel, was aware that the last date on which Respondent's Request for Hearing would have been timely filed was October 16, 2006. I.G. Ex. 6.
4. Respondent filed her untimely Request for Hearing, dated January 4, 2007, by United States Postal Service, Certified Mail No. 7006 0810 0001 9405 2696, on or about January 11, 2007. Respondent's Request for Hearing; 20 C.F.R. § 498.211(a)(4).
5. Respondent has not shown good cause for her failure to file her Request for Hearing timely.
6. Because Respondent's Request for Hearing was not timely filed and because no good cause has been shown for her failure to file it timely, her Request for Hearing must be dismissed. 20 C.F.R. §§ 498.202(c)(2) and 498.202(f)(1).

V. Discussion

In the months before the I.G.'s final actions to impose the civil monetary penalty and assessment, Respondent was represented by counsel, and that counsel actively sought to prevent or mitigate the I.G.'s proposed action. On May 10, 2006, the I.G. notified Respondent that her statements in support of her eligibility to receive Social Security disability benefits were being investigated, and that she might be liable to sanctions in the form of civil monetary penalties and assessments. I.G. Ex. 1, at 1-3. She was offered an opportunity to submit financial statements or other documents in response. *Id.* Respondent's counsel replied by letter of June 5, 2006: the attorney's letter denied the factual bases of the I.G.'s allegations, attached an affidavit dated June 6, 2006, supporting that denial, and included a financial disclosure statement signed by Respondent and dated June 5, 2006. I.G. Ex. 2. Three weeks later, Respondent's attorney submitted to the I.G. a Form SSA-1696-UA, the "Appointment of Representative" form by which claimants' representatives enter their appearances in Social Security Administration administrative litigation. I.G. Ex. 4.

Respondent's efforts to deflect the I.G.'s proposed action were unsuccessful. On August 9, 2006, the I.G. wrote to Respondent announcing the imposition of a civil monetary penalty and assessment totaling \$17,356.00 I.G. Ex. 1, at 1-3. On September 26, 2006, the I.G. reminded Respondent's attorney that the deadline for appeal of the I.G.'s action was October 16, 2006, although it appears that some negotiations were still open. I.G. Ex. 6.

There is no real debate about most of the chronology in this appeal. Respondent does not contest her receipt of the I.G.'s letter of August 9, 2006, although she does not directly admit here the date or approximate date of her receipt. Postal records confirm that she personally received it on August 15, 2006. I.G. Ex. 3, at 5.

The I.G.'s letter of August 9, 2006 could not have been clearer in informing Respondent about the steps required and the deadlines to be met in appealing the action: the last two paragraphs on the letter's third page explain those steps in detail, and include the warning: "If you do not request a hearing within the 60-day period, the proposed civil monetary penalty and assessment will be imposed upon you. **You will have no right to an administrative appeal after that time.**" I.G. Ex. 3, at 3 (emphasis in original). And although Respondent has never candidly conceded her awareness of the October 16, 2006 deadline for filing her Request for Hearing, as noted above, it is shown to have been brought to her attorney's attention explicitly on September 26, 2006. I.G. Ex. 6.

Nevertheless, the October 16, 2006 deadline for appeal came and went, and when Respondent mailed her Request for Hearing on January 11, 2007, it was untimely by nearly three months. Unless she could show good cause for her dilatory filing, Respondent's Request for Hearing was subject to mandatory dismissal: the regulation provides that "[t]he ALJ **shall dismiss** a hearing request . . ." when good cause is not shown for late filing. 20 C.F.R. § 498.202(f)(1) (emphasis added).

Respondent's position here is that the untimely filing is simply not her fault: she complains of her attorney's inaction, but cannot explain her own. She asserts, in increasingly florid language, that her attorney's conduct "demonstrated poor lawyer ethics" (Respondent's Response Brief at 1), that his actions amounted to "gross negligence" (Respondent's Answer Brief at 2), and that "[t]here are no lawyers in this county or the surrounding counties that want to proceed with this case." Res. Ans. Br. at 1. At an early point in this litigation she added this observation: "The argument of only proceeding with a late hearing request due to the fact of 'Good Cause' is ridiculous in this case." *Id.*

Now, the 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.

Was the alleged inaction of retained counsel a circumstance beyond Respondent's ability to control? The unadorned answer is "No." The facts asserted here by Respondent have been offered before as a showing of good cause, but they have been firmly rejected as inconsistent with orderly litigation. *Nelson Ramirez-Gonzalez*, DAB CR175 (1992); *accord, Bruce Franklin, R.Ph.*, DAB CR1198 (2004). A particularly cogent exposition of the rule appears in *Community Care Center of Seymour*, DAB CR758 (2001): "[T]he avoidable failure of counsel to discharge responsibilities on a [party's] behalf or the miscommunication between a [party] and its counsel have been found to constitute avoidable human error, rather than circumstances beyond the [party's] ability to control." *Sedgewick Health Care Center*, DAB CR596 (1998); *Jackson Manor Health Care, Inc.*, DAB CR545 (1998). On the plain terms of Respondent's claim to having good cause for filing late, I can find nothing to distinguish those cases and no reason to depart from the precedent thereby established. But I note two additional and perhaps telling points. First, Respondent's Request for Hearing was back-dated to fully a week before it was mailed, and I would find — if it were necessary to make such a finding — that her credibility on the subject of her intentions and actions during the last four months of 2006 is subject to a corresponding discount. Second, once the appeal period had run out and the sanctions had become final, the I.G. sent Respondent a letter pursuant to 20 C.F.R. § 498.110 confirming that finality. I.G. Ex. 7. The letter was dated October 30, 2006, and was received by Respondent on November 7, 2006. I.G. Ex 7, at 3. Yet Respondent took no action whatsoever toward requesting a hearing until January 11, 2007, an additional 65 days. Respondent has not shown good cause for her late filing, and the mandatory language of 20 C.F.R. § 498.202(f)(1) controls.

VI. Conclusion

For the reasons set forth above, I grant the I.G.'s Motion to Dismiss. The hearing request filed by Respondent Karen Kay Parham on or about January 11, 2007, must be, and it is, DISMISSED.

/s/

Richard J. Smith
Administrative Law Judge