

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

_____)	
In the Case of:)	
)	
Social Security Administration,)	Date: December 29, 2008
Office of the Inspector General,)	
)	
- v. -)	Docket No. C-09-31
)	Decision No. CR1876
Natkita Lester,)	
)	
Respondent.)	
_____)	

DECISION

The Office of the Inspector General for Social Security (SSA-OIG or I.G.) charges that Respondent, Natkita Lester, made false statements and/or misrepresentations of material fact when she requested to be selected as the representative payee for her minor child niece. For this reason the I.G. proposed to impose a civil money penalty (CMP) against Respondent Lester, and told her so in a notice letter which was personally served on her on May 19, 2008 by an SSA-OIG Special Agent. Respondent Lester appealed. The I.G. asks that her appeal be dismissed as untimely. For the reasons set forth below, I grant the I.G.'s motion and dismiss this case.

I. Background

On April 27, 2007, the Respondent received and signed for a certified initial letter from SSA-OIG, informing her that it was considering commencing a civil action against her under section 1129 of the Social Security Act (Act), 42 U.S.C. § 1320a-8. The letter stated that any action would be based on SSA-OIG's belief that Respondent, in her application to be named representative payee for child beneficiary Zikeya Lester, had made false statements and/or misrepresentations to SSA regarding the child's living arrangements, in order to receive Supplemental Security Insurance (SSI) benefits to which she was not entitled. The letter invited Respondent to respond with any relevant information, and it included a financial disclosure form for her to complete if she wished to do so. Finally, the letter served as an invitation to enter into settlement negotiations.

Respondent never sent any information or documents to SSA, and did not complete and return the financial disclosure form she was provided. Further, SSA is in possession of a photocopy of the SSI benefit check, which was endorsed and cashed by the Respondent.

Because SSA counsel was unsuccessful in contacting Respondent, she requested assistance from the SSA-OIG's Office of Investigations. On May 19, 2008, Special Agent Steven Blawski of SSA-OIG's Office of Investigations personally served a civil monetary penalty demand letter on Respondent Lester in Utica, New York. The letter informed Respondent that SSA-OIG was proposing a CMP against her under section 1129 of the Social Security Act, 42 U.S.C. § 1320a-8. The letter stated that any penalties would be based on SSA's determination that, when requesting to be selected as representative payee for a child beneficiary of SSI named Zikeya Lester in September 2006, Respondent made a material false statement to SSA regarding Zikeya's living arrangements. In addition, in October 2006, Ms. Lester, acting in her capacity as representative payee for Zikeya, received and cashed an SSI benefit check intended for the use and benefit of the child, to which the Respondent was not entitled. SSA further stated that Respondent knowingly and intentionally made these false statements to SSA in an effort to improperly receive SSI benefits. A Certificate of Service dated May 19, 2008, submitted by Special Agent Blawski and signed by the Respondent Lester demonstrates Respondent's receipt of this demand letter.

The demand letter served on Respondent Lester proposed penalties in accordance with 20 C.F.R. § 498.100 et seq. The letter served as notice of a proposed administrative action against Respondent Lester under section 1129, in the form of a CMP – including both a penalty and an assessment based on the overpayment -- in the amount of \$11,500.00. The letter clearly explained the reasons for the proposed penalty, discussed and outlined the required factors that went into the determination of the penalty amount, and notified Respondent of all applicable due process rights. Petitioner also attached for Respondent Lester's information a printed copy of the entire Part 498 of Title 20 of the U.S. Code of Federal Regulations, which includes the procedures for requesting a hearing. The demand/penalty letter also specifically stated:

If you wish to contest this proposed civil monetary penalty, you have the right to a hearing before an Administrative Law Judge in accordance with 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. Such a request must be accompanied by an answer to this letter that admits or denies your liability and states any defense upon which you intend to rely pursuant to 20 C.F.R. § 498.202.

The 60-day time period in which Respondent was required by law to request a hearing expired on July 18, 2008.

SSA maintains that it subsequently sent a certified letter to the Respondent on August 1, 2008, in which Petitioner informed Respondent that pursuant to the requirement articulated in 20 C.F.R. § 498.110, SSA was imposing against her the CMP referenced in the demand/penalty letter, noting that no timely request for hearing had been filed. Specifically, the letter explained that OIG's records and the records of the Department of Health and Human Services, Departmental Appeals Board (DAB) showed that no written request for a hearing to contest the CMP was filed within 60 days of the date of receipt of the demand/penalty notification letter.

On October 4, 2008, approximately two and one-half months (78 days) after the 60-day time period had expired on July 18, 2008 – and 138 days after Respondent's initial receipt of the penalty letter on May 19, 2008 – the Civil Remedies Division of the DAB received a request for hearing on this matter from the Respondent.

I conducted a prehearing conference with the parties by telephone on October 31, 2008. I explained that Respondent Lester could be represented by counsel. Ms. Lester indicated that she would represent herself in this matter. I issued an Order summarizing the results of that conference. Counsel for SSA indicated that he would be filing a motion to dismiss because the hearing request was not timely filed. I therefore set a briefing schedule and indicated to the parties that I would consider the briefs and any supporting document in making my decision. I also indicated to Respondent that under the applicable regulations I am required to dismiss an hearing request if it is not timely filed and if the respondent fails to demonstrate good cause for the failure to file timely. I indicated as well that if I determined that dismissal was warranted that I would dismiss the case.

SSA submitted its motion together with its brief in support with four attachments which I will refer to as I.G. Exhibits (Exs.) 1 through 4; Respondent submitted a one-page response; SSA submitted a reply. Respondent had the opportunity to submit a sur-reply but did not do so.

II. Finding of Fact and Conclusion of Law

Respondent Lester has not established good cause for untimely filing, and her hearing request must therefore be dismissed.

In its demand/penalty letter, the I.G. advised Respondent Lester that, pursuant to section 1129 of the Act, the I.G. proposed imposing against her a CMP of \$11,500.00 because she knowingly made false or misleading statements in documents related to her request to be representative payee for her minor child niece. I.G. Ex. 3. The letter advised Respondent of her right to request a hearing before an Administrative Law Judge (ALJ), and said that such a request had to be filed within 60 days of her receiving the letter. That

letter was personally served on Respondent and the I.G. has included the Certificate of Service signed by the SSA-OIG Special Agent and by Respondent on May 19, 2008. I.G. Ex. 4. The letter included a copy of the regulations governing these proceedings, and emphasized:

If no hearing is requested within the 60-day period, the proposed civil money penalty will be imposed upon you and you will have no right to an administrative appeal after that time.

I.G. Ex. 3, at 3 (Emphasis added).

To be timely, Respondent Lester's hearing request should have been filed on or before July 18, 2008. No appeal was filed within that time. Respondent Lester requested a hearing by letter dated October 4, 2008.

Respondent Lester does not dispute the untimeliness of her appeal, nor does she indicate any reason for her failure to timely file her hearing request.

The regulations mandate that a hearing request be filed within 60 days after notice is received by the respondent "or upon a showing of good cause," within the time permitted by the ALJ. 20 C.F.R. § 498.202(c)(2). The date of receipt is presumed to be five days after the date of the notice, "*unless there is a reasonable showing to the contrary.*" 20 C.F.R. § 498.202(e). The ALJ must dismiss an untimely hearing request when the respondent fails to demonstrate good cause. 20 C.F.R. § 498.202(f)(1).

Here, the demand/penalty letter was personally served on Respondent Lester. Thus, the 60 days began to run beginning the day after personal service was made. Therefore, the hearing request was required to be postmarked no later than July 18, 2008. Moreover, Respondent Lester did not even attempt to make a showing of good cause as to why her hearing request was filed so long after the 60-day filing period.

While the regulations do not define "good cause" but leave that determination to the discretion of the ALJ, there must be at least some showing made by the Respondent as to why her filing was late. 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;

