Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Mahd Khalil Ismail Muhareb
Docket No. A-13-78
August 8, 2013

RECOMMENDED DECISION

Mahd Khalil Ismail Muhareb (Respondent) appeals a May 1, 2013 decision by an Administrative Law Judge (ALJ). *Mahd Khalil Ismail Muhareb*, DAB CR2772 (2013) (ALJ Decision). The ALJ dismissed Respondent's request for a hearing on the determination by the Office of the Inspector General (I.G.) of the Social Security Administration (SSA) to impose a civil monetary penalty (CMP) of $30,000 and an assessment in lieu of damages of $14,365.67 pursuant to section 1129 of the Social Security Act (Act).[1] The I.G. charged that Respondent made false statements or misrepresentations of material fact about his living arrangements while receiving Supplemental Security Income (SSI) benefits. The ALJ dismissed Respondent's hearing request, determining that it was untimely filed and good cause did not exist to extend the time for filing. In addition, the ALJ determined that the hearing request failed to raise any issue that could properly be addressed in a hearing. For the reasons explained below, we recommend upholding the ALJ Decision.

Legal Background

Section 1129(a) of the Act and the 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" SSI benefits or payments. 20 C.F.R. § 498.100(b)(1); *see also id.* § 498.102(a)(1). The I.G. may impose a CMP of "not more than $5,000 for each false statement or representation," in addition to an assessment 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. *Id.* §§ 498.103(a), 498.104.

[1] The current version of the Act can be found at http://www.socialsecurity.gov/ OP_Home/ssactlssact.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.

Under section 1129(b) of the Act and 20 C.F.R. § 498.202(c)(2), a respondent may appeal an I.G.'s 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. The regulation requires that the hearing request "shall contain" a statement about the specific "issues of findings of fact and conclusions of law in the notice letter with which the respondent disagrees" and the basis "for the respondent's contention that the specific issues or findings and conclusions were incorrect." 20 C.F.R. § 498.202(d). 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." *Id.* § 498.202(f)(1). An ALJ also must dismiss a hearing request if the request "fails to raise any issue which may properly be addressed in a hearing under this part." *Id.* § 498.202(f)(3).

Case Background[2]

By letter dated July 12, 2010, the I.G. notified Respondent that it intended to commence a CMP action against him pursuant to section 1129 of the Act. I.G. Ex. 1. The I.G. explained that it had received information indicating that Respondent may have made or caused to be made false statements or misrepresentations of material fact to the SSA that he knew or should have known were false or misleading. Specifically, the I.G. alleged that from approximately October 2008 to January 2010, Respondent was in Jordan for extended periods of time but continued to receive SSI benefits and failed to notify SSA that he had spent greater than 30 days outside the United States, as required by the Act. According to the I.G., Respondent's failure to report these changes in status had resulted in a potential overpayment to him of $14,365.67 in SSI benefits. The I.G. explained that, based on its investigation, it appeared Respondent might be subject to a CMP or an assessment in lieu of damages under section 1129. The I.G. enclosed with the July 12 letter a financial disclosure form that Respondent could complete if he wanted his ability to pay to be considered in determining the amount of any proposed penalty or assessment. Respondent signed the certified mail return receipt for the letter on July 16, 2010. I.G. Ex. 1, at 3. He signed the financial disclosure form on July 27, 2010. I.G. Ex. 2, at 5 (unnumbered page).

By letter dated April 1, 2011, the I.G. notified Respondent that it was proposing to impose a CMP of $30,000 and an assessment in lieu of damages of $14,365.67. I.G. Ex. 3. The letter explained that Respondent could contest the proposed CMP and assessment by filing a request for a hearing before an ALJ within 60 days of receipt of the letter. *Id.* at 2. The letter also explained how to request a hearing, stated the required contents of a

[2] Background information is drawn from the ALJ Decision and the record before the ALJ and is not intended to substitute for his findings.

hearing request, and enclosed a copy of the Part 498 regulations. If Respondent did not request a hearing within the 60-day period, the letter warned, the proposed CMP and assessment "will be imposed against you. **You will have no right to an administrative appeal after that time.**" *Id*. at 3 (emphasis in original). Respondent signed the certified mail return receipt for the letter on April 7, 2011. *Id.* at 5 (unnumbered page).

In a letter to Respondent dated July 8, 2011, the I.G. stated that its records showed Respondent had received the April 1, 2011 demand letter on April 7, 2011 and had not submitted a hearing request to challenge the proposed CMP and assessment, so Respondent owed SSA $44,365.67. I.G. Ex. 4, at 1. Respondent signed the certified mail return receipt for the letter on July 15, 2011. *Id*. at 3 (unnumbered page).

Approximately a year and a half later, on November 13, 2012, Respondent filed a request for hearing before an ALJ. Respondent acknowledged that his request was untimely, but argued that there was good cause to extend the filing deadline because he "was not aware" that he had to file an appeal within 60 days from the date that he received the I.G.'s letter dated April 1, 2011. Req. for Hr'g at 1 (unnumbered page). According to Respondent, he suffers from memory loss caused by a traumatic brain injury that he sustained in 1997, so he "misplaced" the letter and "do[es] not remember receiving" it. *Id.* In the request Respondent stated that he was seeking a hearing "to discuss the possibility of settlement terms that would permit smaller payments over time." *Id.* at 2 (unnumbered page).

The I.G. moved to dismiss the hearing request on the ground that it was untimely and Respondent had failed to demonstrate good cause for failing to file it in a timely manner. In the alternative, the I.G. argued that the request did not raise an issue that could properly be addressed in a hearing. In opposing the motion, Respondent submitted medical records that he asserted supported his claim that his traumatic brain injury prevented him from timely filing his request. He also sought leave to amend his request for hearing and proffered an amended request. The ALJ granted the I.G.'s motion to dismiss on both grounds.

Respondent timely appealed the ALJ Decision to the Board. On appeal, Respondent contends that he demonstrated good cause for failing to meet the filing deadline and that his hearing requests raise issues that may properly be addressed before an ALJ.

Standard of Review

The regulations governing section 1129 appeals provide 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." 20 C.F.R. § 498.221(i). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable

mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971), quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Under the substantial evidence standard, the reviewer must examine the record as a whole and take into account whatever in the record fairly detracts from the weight of the evidence relied on in the decision below. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

Analysis

1. The ALJ's conclusion that Respondent did not demonstrate good cause for failing to meet the filing deadline is supported by substantial evidence in the record and free of legal error.

The regulations at 20 C.F.R. Part 498 do not specifically define the term "good cause," nor has the Board definitively decided the exact scope of that term. *Karen Kay Parham*, Board Docket No. A-07-109, at 4-5 (Aug. 14, 2007). Here too we need not decide the exact scope of the term since under any reasonable definition, the ALJ's determination that Respondent did not show good cause for his failure to file a timely hearing request is supported by substantial evidence in the record and free of legal error.

Respondent contended that the memory loss he claims to experience as a result of his traumatic brain injury provided good cause to excuse the untimeliness of his hearing request. Although Respondent admitted that he signed the return receipts for the I.G.'s letters and returned the financial disclosure form to the I.G. (though he said one of his family members completed the form), Respondent argued that he did not remember receiving the letters or where he put them, so he was unaware of the 60-day filing deadline. This argument is without merit.

The ALJ reasonably concluded that Respondent did not offer any "significant proof beyond his own assertions" that he suffers from "such severe memory loss" that it was impossible for him to timely file a hearing request. ALJ Decision at 3. As the ALJ observed, the hospital discharge summary dated March 12, 1997 from when Respondent sustained the traumatic brain injury does not mention severe memory loss as a resulting symptom. *Id.*; *see also* Respondent Ex. A. Although the medical records Respondent submitted suggest that he suffers from seizure disorder, chronic headaches, and chronic stomach and joint pain, the only reference to memory loss comes from an office visit that he made to a nurse practitioner on April 10, 2012. *See* Respondent Ex. B. As the ALJ noted, this visit – and the other visits for which Respondent submitted records – occurred "well after the time limit for filing a hearing request passed in June 2011." ALJ Decision at 3. Moreover, the ALJ found that the nurse practitioner's notes from the visit do not establish that Respondent was suffering from ongoing, severe memory loss at that time. *Id*. Instead, the notes indicate that Respondent reported having a seizure and suffering memory loss as a result and that the nurse practitioner determined Respondent should

resume taking an anti-seizure medication. Respondent Ex. B at 15 (page labeled 15 of 16 on medical record). We agree with the ALJ that even if this visit had occurred closer to the relevant time period, the notes do "not sufficiently show the extent of any memory loss that Respondent was suffering." ALJ Decision at 3.

Thus, the ALJ's determination that Respondent did not demonstrate good cause for the untimeliness of his request is supported by substantial evidence in record and is free from legal error.

2. The ALJ's determination that Respondent's request for hearing failed to raise any issue that could properly be addressed in a hearing is supported by substantial evidence in the record and free of legal error.

In his request for hearing filed on November 13, 2012, Respondent only offered reasons why the request was late and stated that he sought a hearing "to discuss the possibility of settlement terms that would permit smaller payments over time." Req. for Hr'g at 2nd p. The amended hearing request Respondent proffered with his answer to the I.G.'s motion to dismiss similarly focused only on whether there was a basis for excusing Respondent's untimely filing. *See* Respondent Ex. C. In both submissions, Respondent failed to state the specific "issues of findings of fact and conclusions of law in the notice letter with which" he disagreed and the basis for his "contention that the specific issues or findings and conclusions were incorrect," as required by section 498.202(d). Indeed, Respondent neither denied the facts underlying the I.G.'s determination to impose a CMP and assessment against him nor challenged the reasonableness of the proposed amounts of the CMP and assessment.

The regulations specifically provide that an ALJ is not authorized to "[c]ompel settlement negotiations." 20 C.F.R. § 498.205(c)(3). The I.G. has "exclusive authority to settle any issues or case, without the consent" of the ALJ or the Commissioner of SSA "prior to a final determination." *Id.* § 498.126. "Thereafter, the Commissioner or his or her designee has such exclusive authority." *Id.* Thus, because Respondent sought a hearing before the ALJ solely to discuss settlement, the ALJ correctly determined that Respondent's request failed to raise an issue that could properly be addressed in a hearing.

Respondent now says for the first time on appeal to the Board that he "disagrees that he made false statements and/or misrepresentations of material facts to [SSA] which he knew or should have known were false or misleading" and alleges that he "was not aware that he could not be out of the country for more than 30 days." RR at 6-7. He also contends that the "interests of justice were not taken into consideration when determining the amount" of the CMP and assessment. *Id.* at 7. However, the Board will not consider any issue that could have been, but was not, raised before the ALJ, so Respondent's

belated attempt to raise issues that might properly be addressed in a hearing comes too late. *See* 20 C.F.R. § 498.221(f). Accordingly, the ALJ's determination that Respondent did not raise any issue that could properly be addressed in a hearing is supported by substantial evidence in record and is free from legal error.

Conclusion

For the reasons explained above, we recommend upholding the ALJ's dismissal of Respondent's hearing request.

/s/
Sheila Ann Hegy

/s/
Constance B. Tobias

/s/
Stephen M. Godek
Presiding Board Member