

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

The Inspector General of the Social Security Administration,

v.

Anita Kennedy,

Respondent.

Docket No. C-15-83

ALJ Ruling No. 2015-10

Date: March 3, 2015

DISMISSAL

I dismiss the hearing request of Respondent, Anita Kennedy, because it is untimely and Respondent did not establish that there is good cause to extend the filing deadline.

I. Background and Procedural History

In a November 18, 2013 letter, the Inspector General (IG) of the Social Security Administration (SSA) notified Respondent that a civil action might be commenced against her under section 1129 of the Social Security Act (42 U.S. C. § 1320a-8), as implemented by regulations at 20 C.F.R. §§ 498.100-498.224. The letter stated that the SSA IG had information that Respondent may have made, or caused to be made, false statements, misrepresentations, and/or material omissions with regard to her receipt of Supplemental Security Income (SSI) benefits. Specifically, the SSA IG asserted that while receiving SSI benefits, Respondent concealed the material facts that her husband was living with her and that her husband was employed and providing household income. The SSA IG asserted that Respondent was obligated to “truthfully report” these material facts to SSA because these facts could have affected her entitlement to SSI benefits and, as a result of this failure, Respondent received \$42,548 in SSI benefits to which she was not entitled. The SSA IG listed factors it would consider in determining the amount of

any civil monetary penalty (CMP) or assessment it might propose, including factors such as Respondent's culpability, history of prior offenses, and financial condition. The SSA IG noted that it had the authority to settle the matter prior to issuance of a formal demand letter. The SSA IG enclosed a financial disclosure form for Respondent to fill out so that the SSA IG could consider Respondent's ability to pay a CMP. The SSA IG also gave Respondent the opportunity to submit a statement or additional information. Petitioner Exhibit (P. Ex.) 1.¹

The SSA IG mailed the November 18, 2013 letter to Respondent by certified mail and requested a return receipt. Respondent signed the return receipt card on November 23, 2013. P. Ex. 2.

In a November 24, 2013 letter, Respondent acknowledged that she was living in the same house with her husband, but stated that they had been separated for some time prior to that. Respondent asserted that she paid rent and the cost of her utilities while living in the house. She further averred that she had informed "SSI" about these arrangements and had not done anything wrong. She also appeared to disagree with the length of time that she and her husband had been living together. P. Ex. 3.

On December 13, 2013, an SSA IG special agent personally served Respondent's husband, at Respondent's address, with a notice that the SSA IG proposed to impose a total CMP against her of \$129,548.28, consisting of an \$87,000 penalty and a \$42,548.28 assessment in lieu of damages. P. Exs. 4, 5. The letter stated that the SSA IG's proposal was based on an investigation which showed that Respondent failed to truthfully report that her husband was living with her and thus failed to report her "true household income" despite being aware of her obligation to report her living arrangements, financial income and resources (i.e., information that was material to determining her eligibility for SSI). The letter explained how the SSA IG determined the CMP amount and how Respondent could request an administrative law judge (ALJ) hearing to contest the proposed CMP. The SSA IG explained:

If you wish to contest this proposed civil monetary penalty, you have the right to request a hearing before an Administrative Law Judge. 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 your receipt of this

¹ The SSA IG marked SSA IG exhibits as P. Exs. 1-7. However, when marking exhibits in cases filed with the Civil Remedies Division, "the designation 'P' for Petitioner or 'R' for Respondent is generally used for non-federal parties . . . and 'SSA' is used for the Social Security Administration as a party." Civil Remedies Division Procedures § 9 (effective July 6, 2009). In the future, the SSA IG should conform to this convention for marking proposed exhibits.

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. 20 C.F.R. § 498.202. The request should also state any reasons that you contend should result in a reduction or modification of the proposed civil monetary penalty.

The procedures for requesting a hearing are set forth in 20 C.F.R. part 498, a copy of which is enclosed. **If you do not request a hearing within the 60-day period, the proposed civil monetary penalty will be imposed upon you. You will have no right to administrative appeal after that time.**

A request for hearing should be made in writing to:

U.S. Department of Health and Human Services
Departmental Appeals Board, MS 6132
Civil Remedies Division
Attn: Karen Robinson, Division Director
330 Independence Avenue, S.W.
Cohen Building, Room G-644
Washington, D.C. 20201

P. Ex. 5, at 3 (emphasis in original). The SSA IG CMP notice informed Respondent that if she requested a hearing, she was to send a copy of the hearing request to the SSA IG's office. The SSA IG also told Respondent that it had the authority to settle the matter without going to court and to negotiate payment terms over time. The SSA IG provided Respondent the name of the individual to contact for such negotiations, who is also the attorney representing the SSA IG in the current proceedings (SSA IG counsel). P. Ex. 5, at 4.

SSA IG counsel states that Respondent contacted him by telephone on December 16, 2013, that they discussed settlement terms, and that Respondent indicated that she would complete the financial disclosure form. SSA IG counsel states that the SSA IG received this form on January 10, 2014, that the form contains "personal information," and that SSA IG counsel would only submit it at Respondent's request and with her approval. SSA IG Brief (P. Br.) at 5. SSA IG counsel also states that he tried to contact Respondent by telephone three times in January and February 2014 but was unable to do so or to leave her a message. P. Br. at 6.² Respondent does not deny SSA IG counsel's

² SSA IG counsel detailed his interactions with Respondent following service of the CMP notice in his brief. Counsel did not make these statements in the form of an affidavit or declaration. Therefore, these statements are of limited use.

statements or request that the SSA IG submit the financial disclosure form she sent to him. *See* Respondent's response to the SSA IG's motion to dismiss (R. Br.).

On April 11, 2014, the SSA IG notified Respondent by letter that, because Respondent had not requested a hearing, the SSA IG was imposing the \$129,548.28 CMP referenced in the SSA IG's December 13, 2013 letter. The SSA IG mailed the April 11, 2014 letter to Respondent by certified mail and requested a return receipt. Respondent signed the return receipt card on April 16, 2014. P. Exs. 6, 7.

By letter dated October 5, 2014, Respondent requested a hearing. I held a telephonic prehearing conference in the case on November 19, 2014, the substance of which I summarized in a November 20, 2014 Order. During the conference, SSA IG counsel stated that he intended to file a motion to dismiss Respondent's hearing request for untimely filing. Respondent stated that she received several letters from SSA in 2013 and 2014 to which she responded, including requesting a hearing. She asserted that she had not kept copies of the letters she sent. SSA IG counsel stated that he did not construe the information he received from Respondent in December 2013 to be a hearing request. As noted above, Respondent has not asked that SSA IG counsel provide me with this information (which I take to be Respondent's financial disclosure information).

In my November 20, 2014 Order, I set due dates for the parties to brief the SSA IG's motion to dismiss. The SSA IG filed a formal written motion to dismiss and brief in support of the motion on December 15, 2014 (P. Br.). The brief was accompanied by seven exhibits (P. Exs. 1 – 7). Respondent filed her response on February 9, 2015 (R. Br.), unaccompanied by exhibits.³

II. Issues

1. Whether Respondent filed an untimely hearing request; and, if so,
2. Whether Respondent established good cause for untimely filing.

³ Respondent did not file her response by January 16, 2015 as established in my November 20, 2014 Order. On January 26, 2015, I issued an Order to Show Cause, telling Respondent that if she failed to respond to the SSA IG's motion to dismiss I might construe her failure to file as abandonment of her hearing request, and may dismiss her case. I gave Respondent until February 12, 2015 to file her response, which I received on February 9, 2015.

III. Analysis

A. Respondent filed an untimely hearing request.

The regulations required Respondent to file a request for a hearing, in writing and signed, within 60 days after receipt of the SSA IG's notice of the proposal to impose a CMP. 20 C.F.R. § 498.202(c). The SSA IG's notice proposing the CMP was personally served at Respondent's residence on December 13, 2013. P. Exs. 4, 5. Respondent does not dispute receiving the letter on that date, but asserts she submitted a timely request for hearing in response to it. However, Respondent simply has not provided any support for her assertion that she timely filed the request for hearing. She has not submitted any mailing receipt or even a copy of the request itself. According to the SSA IG notice, Respondent was supposed to send her hearing request to both the Civil Remedies Division and SSA IG counsel. Neither the Civil Remedies Division nor SSA IG counsel received it. The only hearing request from Respondent was filed on October 5, 2014, almost eight months after the 60-day period for filing closed. The October 5, 2014 hearing request is clearly untimely.

B. Respondent did not establish good cause for failing to file her hearing request timely.

If a respondent fails to file a timely request for hearing, then the penalty and assessment proposed by the SSA IG becomes final unless the respondent demonstrates to an ALJ that there is good cause for failing to timely file the hearing request. 20 C.F.R. § 498.109(c). The regulations do not define good cause.

In her October 5, 2014 request for hearing, Respondent asserted that she requested a hearing in "late May early June" of 2013. The letter notifying her of her hearing rights, however, was not served on Respondent until December 2013, months later.⁴ She also asserts that she had a heart attack in June 2013 and needed more heart surgery. Respondent did not explain, however, why her heart attack in June 2013 precluded her from timely requesting a hearing in December 2013, and she has submitted no evidence to show how her medical condition precluded her from filing a hearing request from December 2013 through February 2014.

⁴ Even if Respondent meant May or June of 2014, any putative hearing request would still have been untimely by several months.

In her response to the SSA IG's motion to dismiss, Respondent asserts that she "did respond to all letters sent to [her]"⁵ and that she "attempted to resolve this matter without appeal." She asserts that the SSA IG "has refused to work with [her] to resolve this matter . . . [and] has all ready labeled [her] as non credible." She asserts that she has "many illness issues and did [her] best to get things done in a time limit allowed." She asserts that her "civil rights have been denied." She asserts that she has "been sent . . . at least 4 [packs] of letters or more from . . . SSA in which it was at least 40 pages – [and she] only understood the first 10 [pages]." She asserts that when she asked questions about the "paper" she was told that the SSA IG could not give her "advice or answers." She asserts that she cannot get an attorney to assist her. R. Br.

Under any reasonable definition of the term, Respondent has not shown good cause for her failure to file a timely hearing request. The SSA IG CMP notice clearly stated where Respondent was to send a hearing request and how much time she had to send the request. Respondent has not shown that she was incapable of understanding the information sent to her by the SSA IG. Respondent submitted a lengthy response to the SSA IG's letter in November 2013 (P. Ex. 2). She submitted financial information in response to the SSA IG CMP notice.

Further, even though Respondent eventually submitted a hearing request in October 2014, this was almost six months after the SSA IG served notice on her that she had failed to file a hearing request and had defaulted. P. Ex. 6. Respondent received this notice on April 16, 2014. P. Ex. 7. Respondent provides no explanation why she did not file her hearing request shortly after learning that neither the SSA IG nor the Civil Remedies Division received a hearing request from her.

Finally, Respondent has provided no evidence (physician statements, medical or other records) to show that she has a physical, mental, educational or linguistic limitation which prevented her from timely filing a hearing request, asserting only that her illnesses may have made it harder to comply but that she "did [her] best." This is not a circumstance, however, that shows good cause to extend her time for filing.

C. I must dismiss Respondent's hearing request because Respondent did not file it timely or otherwise show good cause for filing it late.

I am required to dismiss an untimely hearing request unless a respondent shows good cause for untimely filing. 20 C.F.R. § 498.202(f)(1). As already discussed above, Respondent did not file a timely hearing request and has not shown good cause for the late filing. Therefore, I must dismiss Respondent's hearing request.

⁵ During the prehearing conference Respondent stated that she had received numerous letters from SSA. I questioned her as to whether or not some of the letters might have come from SSA offices other than from the SSA IG.

IV. Conclusion

Respondent filed an untimely request for hearing and did not show that there is good cause for extending the filing deadline. Therefore, I grant the SSA IG's motion to dismiss Respondent's hearing request.

/s/

Scott Anderson
Administrative Law Judge