IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

C C, Appellant, v. STATE OF ALASKA, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DIVISION OF PUBLIC ASSISTANCE, Appellee.	)	Case No. 3AN-15-00000CI

ORDER RE: MR. C'S ADMINISTRATIVE APPEAL

This is an administrative appeal by C C[1] from the Administrative Law Judge's ("ALJ") Decision and Order on Timeliness issued on June 23, 2014 affirming the Department of Health and Social Services' Division of Public Assistance's decision to deny Mr. C a hearing on the denial of his July 31, 103 Medicaid application.[2] The Court has jurisdiction over this appeal pursuant to Alaska Appellate Rule 602(a)(2).

The Court AFFIRMS the ALJ's decision that Mr. C's hearing request was untimely and order affirming the Division's denial of Mr. C's July 31, 2014 Medicaid application.

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[1] C C is a ward of the Office of Public Advocacy ("OPA"). This appeal was filed on his behalf by OPA.

[2] Fair Hearing Regulation 7 AAC 49.303(a) states that relaxation of time limits for requesting fair hearings is a decision reserved for the administrative law judge. Thus, this Decision and Order on Timeliness was issued without providing the parties an opportunity to file a proposal for action, and is instead directly appealable to the superior court within 30 days of the order.

Introduction

On July 31, 2014, Mandy Fowle, public guardian on behalf of Mr. C, filed an application for Medicaid benefits. The Division denied the application on September 30, 2014. The next day, October 1, Ms. Fowle submitted a new application. On November 4, 2014 Tom Fernette, the Public Guardian's benefit specialist, contacted the Division and learned that the July 2014 application had been denied and that notice of the denial had been mailed to the Office of the Public Advocate ("OPA") September 30, 2014. Mr. Fernette immediately faxed and mailed a request for a fair hearing November 4, 2014. The Division moved to dismiss the fair hearing on the basis that it was untimely.

A hearing was held on May 28, 2015 to address the limited issue of whether the November 2014 hearing request was timely. ALJ Pederson decided on June 23, 2015 that Mr. C's hearing request was untimely and thus affirmed the Division's decision to deny Mr. C's Medicaid application. This appeal followed.

Factual and Procedural History

I. July 2014 Medicaid Benefits Application

On July 31, 2014, Mandy Fowle, a public guardian with OPA, filed an application for Medicaid benefits on Mr. C's behalf.[3] On September 17, 2014, the Division mailed a notice to OPA that the application was deficient and that additional information needed to be provided by September 29, 2014, otherwise

[3] Tr. 13.

his application would be denied.[4] Ms. Fowle testified that OPA did in fact receive this notice.[5] On September 30, 2014, the Division mailed OPA a notice denying Mr. C's request for benefits due to a failure to provide the required documents and information requested in the September 17 notice.[6]

On September 30, 2014 (the same day the denial of benefits was mailed), N A, Mr. C's care coordinator, contacted the Division regarding the denial of his application and inquiring what could be done to assist Mr. C with his eligibility.[7] The Division replied that Ms. A needed to provide a release of information from his guardian before the Division could discuss the case with her.[8]

II. October 2014 Reapplication of Benefits

On October 2, 2014, the Division received a new application for benefits from Ms. Fowle on behalf of Mr. C.[9] This new application was approved for both future and retroactive benefits. [10] Thus the only benefits at issue in this appeal are the retroactive benefits associated with the July 2014 application. Those benefits would be for April, May and June 2014.

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[4] Exc. 34.

[5] Tr. 40-41.

[6] Exc. 44.

[7] Exc. 35. ("Received an email from N A requesting information regarding the denial of this case and requesting to know what can be done to assist the client.").

[8] Exc. 35; Tr. 29-30.

[9] Exc. 1-8, 45 (retroactive benefits for July, August and September 2014).

[10] Exc. 45.

III. OPA's Hearing Request on Denial of July 2014 Application

On November 4, 2014, Tom Fernette, OPA's benefits specialist, contacted the Division inquiring about the status of the July application.[11] Mr. Fernette was informed of the denial and emailed a copy of the September 30 notice.[12] In response to this information, Mr. Fernette faxed and emailed a request for fair hearing. The mailed request was received by the Division on November 6, 2014.[13]

The Division denied the November 4 hearing request as untimely because it was not made within thirty days of the date of the September 30 notice of denial.[14] Mr. C requested a hearing on the untimeliness denial, asserting that he had not received the September 30 notice.[15]

IV. The Administrative Hearing on Timeliness

An administrative hearing on the timeliness of Mr. C's November 4, 2014 hearing request was held on May 28, 2015 in front of ALJ Pederson. Mr. Miller, Ms. Dooley, and Ms. Nix testified on behalf of the Division.[16] Ms. Fowle and Mr. Fernette testified on Mr. C's behalf.[17]

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[11] Tr. 50.

[12] Tr. 51.

[13] Tr. 23.

[14] Exc. 23, 41.

[15] Exc. 41.

[16] Tr. 9-34.

[17] Tr. 34-52.

Mr. Miller and Ms. Dooley testified that the denial notice was entered on September 29, 2014 and automatically mailed on September 30, 2014.[18] Mr. Miller further testified that he subsequently performed a thorough search of any returned mail related to this case, and that the notice had not been returned to the Division.[19]

Ms. Fowle testified that she did not receive the denial notice, and that she did not know that Mr. C's application had been denied until Mr. Fernette's November 2014 communications with the Division.[20] She explained that she had been on vacation and returned to the office on October 1, 2014.[21] She stated that she chose to submit a new application out of an excess of caution because she had not received a decision on the first application.[22]

V. The ALJ's Decision

The ALJ issued his Decision and Order on Timeliness on June 23, 2015, addressing whether Mr. C's November 6, 2014 was timely requested. The ALJ held that the hearing request was untimely because Mr. C failed to rebut the legal presumption that he received the denial notice mailed September 30, 2014.[23]

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[18] Tr. 14-15, 28-29.

[19] Tr. 16.

[20] Tr. 42-44.

[21] Tr. 41.

[22] Tr. 41-42.

[23] ALJ's Decision, 3.

The ALJ cited the common-law doctrine known as the "mailbox rule" in his decision, finding that the evidence presented demonstrated that "it is more likely than not true that the Division mailed the denial notice to Mr. C's guardian on September 30, 2014 and that the Division's denial notice was not returned by the Postal Service."[24]

The ALJ then found that Mr. C failed to rebut the presumption that he had received the denial notice, primarily due to what he believed to be Ms. Fowle's lack of credibility.[25] Specifically, the ALJ found that rather than filing a new application, Ms. Fowle should have "simply contacted the Division" to check on the status of the original benefits application.[26]

The ALJ held that Mr. C's request was due on October 30, 2014, the statutorily required thirty days "after the date of the notice."[27] Because OPA submitted the hearing request on November 4, 2014 which was received two days later by the Division, the ALJ concluded that the request "was late and this action is time-barred."[28] Therefore, the ALJ decided and ordered that "[t]he Division's decision to deny Mr. C a hearing on the denial of his July 31, 2014 Medicaid application is affirmed."[29]

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[24] ALJ's Decision, 3.

[25] ALJ's Decision, 3.

[26] ALJ's Decision, 3.

[27] ALJ's Decision, 3.

[28] ALJ's Decision, 3-4. This would be true even if three days were added for mailing. *Cf.* ALASKA R. CIV. P. 6(c).

[29] ALJ's Decision, 4.

The Court held oral argument on April 19, 2016.

Standard of Review

Alaska courts apply one of four standards of review when deciding an administrative appeal:

> (1) the "substantial evidence" test applies to questions of fact; (2) the "reasonable basis" test applies to questions of law involving agency expertise; (3) the "substitution of judgment" test applies to questions of law where no expertise is involved; and (4) the "reasonable and not arbitrary" test applies to questions about agency regulations and the agency's interpretation of those regulations.[30]

Here, the Court is reviewing the application and interpretation of an Alaska statute.[31] The ALJ's findings of fact are reviewed under the substantial evidence test.[32] The ALJ's resolution of questions of law not involving agency expertise is subject to the independent judgment standard.[33] Therefore, the Court will apply independent substitution and substantial evidence standards as necessary.

Discussion

Mr. C is appealing the ALJ's decision finding Mr. C's hearing request untimely, and dismissing the underlying appeal under 7 AAC 49.100(5). Because the ALJ made a final determination of the timeliness under 7 AAC 49.030(a), the Court reviews the ALJ's decision.

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[30] *Lakloey, Inc. v. Univ. of Alaska*, 157 P.3d 1041, 1045 (Alaska 2007) (citing *Handley v. State*, 838 P.2d 1231, 1233 (Alaska 1992)).

[31] *See* 7 AAC 49.030.

[32] *Williams v. State, Dep't of Revenue*, 938 P.2d 1065, 1069 (Alaska 1997).

[33] *Id.*

The Fair Hearing regulation, 7 AAC 49.030(a), central to the dispute in this appeal states:

> Unless otherwise provided in federal law, a request for a hearing within the scope of 7 AAC 49.020 must be made to the department in writing by a recipient, or by a legal representative acting on the recipient's behalf, not later than 30 days after the date of the notice required under 7 AAC 49.060. A hearing request may be accepted after the time limit under this section only if the administrative law judge finds, based on the evidence submitted, that the request for a hearing could not be filed within the time limit.

The first issue on appeal is whether the ALJ based his decision on the substantial weight of the evidence. The second and third issues on appeal are whether the ALJ appropriately interpreted and applied the Fair Hearing regulation.[34] The last issue on appeal is whether the ALJ erred in his limitation of cross-examination testimony of the Division's witness.

Each issue requires a distinct standard of review. The Court applies the appropriate standard to each of these issues, as further elaborated below.

I. Substantial Evidence Supports the ALJ's Finding that Mr. C's Hearing Request Was Untimely Filed

The first issue on appeal is whether the ALJ based his decision on the substantial weight of the evidence. This is a question of fact. The Court must determine whether substantial evidence supports the ALJ's decision that Mr. C's hearing request was untimely filed. The Court reviews the ALJ's decision under

[34] 7 AAC 49.030.

the substantial evidence test.[35] "In applying this standard, [the Court] will not re-weigh evidence or re-evaluate the [ALJ]'s credibility determinations."[36]

The ALJ ultimately determined that OPA's fair hearing request was "late" and thus "time-barred."[37] Relying on the mailbox rule, the ALJ first found that a rebuttable presumption had been established that OPA received the September 30, 2014 denial notice, and second, that Mr. C failed to rebut the presumption.

The mailbox rule states that once mail is sent, it is presumed to be received.[38] "Evidence as to the proper mailing of a letter has been held to create a presumption the letter was received by the addressee."[39] Once the rebuttable presumption is established, the burden shifts to the opposing party to "prov[e] that the nonexistence of the presumed fact is more probable than its existence."[40] To overcome the presumption, the recipient must do something more than stating the document is not in the recipient's files or the recipient never saw the document.[41]

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[35] *Handley*, 838 P.2d at 1233.

[36] *Tesoro Corp. v. State Dep't of Revenue*, 312 P.3d 830, 837 (Alaska 2013).

[37] ALJ's Decision, 4.

[38] *Martens v. Metzgar*, 524 P.2d 666, 677 (Alaska 1974) *(*"Evidence as to the proper mailing of a letter has been held to create a presumption the letter was received by the addressee.").

[39] *Id.* Courts have also stated that the United States Postal Service's failure to return a piece of first class mail to the sender creates a rebuttable presumption that the mail was not received by the addressee. *See Clarke v. Nicholson*, 21 Vet. App. 130 (Vet. App. 2007).

[40] *Id.*

[41] *Mahon v. Credit Bureau of Placer County Inc.*, 171 F.3d 1197, 1201-02 (9th Cir. 1999).

A. A Rebuttable Presumption of Receipt Was Established

The first issue is whether there is substantial evidence for the ALJ to find a rebuttable presumption that the September 30, 2014 notice was delivered.

Based on the evidence, the ALJ determined that "it is more likely than not true that the Division mailed the denial notice to Mr. C's guardian on September 30, 2014 and that the Division's denial notice was not returned by the Postal Service to it."[42] Therefore, the ALJ held that a rebuttable presumption of mailing and receipt of the notice had been established.[43]

Mr. C argues that the ALJ's decision is not based on the substantial weight of the evidence.[44] He contends that "the notice was simply lost in the mail," not that the Division failed to send the notice.[45] However, Ms. Fowle herself testified that it is possible that the notice was received at OPA, but never made it to her.[46]

Once mail is sent and not returned, it is presumed to have been received by the recipient.[47] In support of the presumption, the Division testified that there is an automated system that automatically sends out notices via US mail the

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[42] ALJ's Decision, 3.

[43] ALJ's Decision, 3.

[44] Appellant's Br., 3.

[45] Appellant's Br., 5.

[46] Tr. 44.

[47] *Martens*, 524 P.2d at 677 (*"*Evidence as to the proper mailing of a letter has been held to create a presumption the letter was received by the addressee.").

following day.[48] The Division explained that if there is a glitch in the system, it will involve a batch of notices, not just a single notice.[49] Mr. Miller testified that he reviewed Mr. C's entire file and saw no returned mail.[50]

Therefore, given the lack of batch of failures or returned mail, the Court finds that there is substantial evidence for the ALJ to have determined that Mr. C's denial notice was written on September 29, mailed on September 30, and subsequently received by OPA.

B. Mr. C Failed to Rebut the Presumption of Receipt

The second issue is whether there was substantial evidence for the ALJ to find that Mr. C "fail[ed] to rebut the presumption that he received the notice."[51]

Once the rebuttable presumption is established, the burden shifts to the opposing party to "prov[e] that the nonexistence of the presumed fact is more probable than its existence."[52] This requires more than stating the document is not in the recipient's files or the recipient never saw the document.[53]

Mr. C makes two main arguments to challenge the ALJ's finding that the presumption has not been rebutted: first, that the ALJ did not provide "specific, clear and convincing reasons" for his finding of Ms. Fowle's testimony not credible; and second, that the ALJ's timeline is incorrect. As the second involves

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48 Tr. 14-15.

49 Tr. 15.

50 Tr. 16.

51 ALJ's Decision, 3.

52 *Id.*

53 *Mahon*, 171 F.3d at 1201-02.

issues related to Mr. C's due process arguments, this argument is addressed *infra*.

The ALJ is the finder of fact. He determined that Ms. Fowle's explanation for her reasons for filing a new application (excess caution) rather than following up with the first application was not credible.[54] He found that if Ms. Fowle "was concerned about the lack of communication, she could have simply contacted the Division, or had one of her colleagues contact the Division and inquire about the status of the July application."[55] The ALJ then specifically noted that "Mr. Fernette's testimony that he contacted the Division on November 4, 2014 to inquire about the status of the July 2014 application demonstrates that a phone call to the Division was possible, and would have yielded a copy of the denial notice."[56]

There are several pieces of evidence that raise credibility issues regarding Ms. Fowle's testimony. First, Mr. Miller and Ms. Dooley testified that a new application is normally only submitted if the previous application had been denied, and that there was no reason why an application would reapply for the same benefits if not yet denied.[57] Second, Ms. A, Mr. C's care coordinator, contacted the Division requesting information regarding the *denial* of the case.[58] Ms. A did not have a release of information allowing the Division to inform her of

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[54] ALJ's Decision, 3.

[55] ALJ's Decision, 3.

[56] ALJ's Decision, 3 n. 13.

[57] Tr. 16-17, 31.

[58] Exc. 35.

the denial; the only notice of denial was sent to OPA.[59] Lastly, OPA admitted that it received the September 17, 2014 notice requesting further information and stating that the application would be denied and closed on September 29, 2014.[60]

The Court reviews the ALJ's decision under the substantial evidence test.[61] Thus, the Court will not re-weigh the testimony or documents in the record.[62] Furthermore, the Court will not re-evaluate the ALJ's credibility determination of the witnesses, including Ms. Fowle.[63]

Here, both sides presented evidence in support of their argument that the denial notice was sent or not sent. It was the job of the ALJ to determine which evidence was stronger. And it was the ALJ's responsibility to determine whether the presumption of the mailbox rule was rebutted. Appellant asks this Court to reweigh the evidence to find the presumption was rebutted, but this Court cannot reweigh the evidence. The presumption, if not rebutted, is substantial evidence.

Without reweighing the evidence, the Court finds that there is substantial evidence in the record to support the ALJ's findings that September 30 notice was mailed and received by OPA. Therefore, the Court AFFIRMS the ALJ's holding that Mr. C's hearing request was untimely filed.

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[59] Exc. 35; Tr. 29-30.

[60] Tr. 40; Exc. 34.

[61] *Handley*, 838 P.2d at 1233.

[62] *See Tesoro Corp. v. State Dep't of Revenue*, 312 P.3d 830, 837 (Alaska 2013).

[63] *See id*.

II. The ALJ's Correctly Applied and Interpreted 7 AAC 49.030

The second issue on appeal is whether the ALJ correctly interpreted and applied 7 AAC 49.030, the Fair Hearing regulation. The ALJ's resolution of questions of law does not involving agency expertise and is therefore subject to the independent judgment standard.[64]

7 AAC 49.030(a) states that a request for a hearing must be made to the Division "not later than 30 days after the date of the notice" and that "[a] hearing request may be accepted after the time limit…only if the **administrative law judge finds, based on the evidence submitted, that the request for a hearing could not be filed within the time limit**."[65]

Here, there is no dispute between the parties that the Division did not receive a request for a hearing for the September 30, 2014 denial of benefits until November 4, 2014, more than 30 days after the date of the denial. Instead, Mr. C is arguing that his due process was violated because (1) the ALJ's interpretation of the statute is "far too strict," and (2) the ALJ did not engage in "reasoned decision making" when he determined that an appeal of the denial could have been filed within the 30 day statutory limit.[66] The Court does not find either argument persuasive.

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[64] *Williams*, 938 P.2d at 1069.

[65] 7 AAC 49.030(a) (emphasis added).

[66] Appellant Br., 7-8.

A. Mr. C's Due Process Was Not Violated

Mr. C's due process violation argument relies on one tangentially related case and the ALJ's alleged miscalculation of days. Mr. C cites *Baker*, a case about the initiation of benefits, for his claim that "a shout from a mountain top is not notice, a letter sent into a void is not notice."[67] Also, Mr. C argues that the ALJ's calculation of the 30th day to make an appeal request is incorrect. However, both these arguments are unconvincing.

First, the ALJ found that the denial notice was sent and delivered to OPA at the correct address. Therefore, due process was satisfied under *Baker* because the ALJ determined that the notice detailing the denial of benefits was sent and that OPA had the requisite 30 days to respond. As discussed *supra*, the fact that Ms. Fowle and Mr. Fernette may not have personally seen the notice during those 30 days due to being out of town or disorganization in the office does not mean that due process was not afforded to Mr. C.[68]

Second, the regulation states that a request for fair hearing must be made "not later than 30 days after *the date* of the notice."[69] Mr. C argues that counting 30 days from the date the notice was mailed is interpreting the statute "far too strict[ly]" and that such calculation "violates a recipient's due process rights to start the clock for requesting an appeal prior to any actual (or even presumed)

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[67] Appellant's Br., 6; *see Baker v. State, Dep't of Health and Social Servs.*, 191 P.3d 1005, 1009 (Alaska 2008) (quoting *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

[68] Ms. Fowle testified that she was out of the office until October 1, 2014, and that it was possible that the co-worker covering for her could have misplaced the denial notice. Tr. 40-41, 44.

[69] 7 AAC 49.030(a) (emphasis added).

receipt of the denial notice."[70] However, Mr. C cites no case law to support this argument. The current regulation includes no language specifying that the notice must be seen or received by the recipient.[71] To require this element would be an overbroad reading of the statute, potentially leading to verification of when notices are read or received by the recipient. Instead, the statute has a built-in safety valve allowing for the ALJ to determine on the evidence submitted whether more time should be given. As explained *supra*, the ALJ made specific findings after weighing the evidence from both parties that additional time was not merited in this case because the evidence did not show that "a hearing could not be filed within the time limit."[72]

Therefore, under the independent judgment standard, this Court does not find that the ALJ's decision violated Mr. C's due process rights.

B. The ALJ Did Not Err in Interpretation and Application of 7 AAC 43.090(a)

Mr. C argues that the ALJ erred in his interpretation and application of 7 AAC 43.090(a) because he failed to engage in reasoned decision-making when determining the hearing request was untimely and thus time-barred.[73] This is

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[70] Appellant's Br., 7.

[71] Previous versions of the regulation allowed "30 days after *receipt*" of the notice by the division. 7 AAC 49.040 (effective Mar. 23, 1978, amended June 26, 1999, repealed Apr. 4, 2013) (emphasis added). The ALJ pointed out this change in the regulation to Appellant's counsel at the start of the administrative hearing, specifically stating that the regulation used to require receipt "a number of years ago, but that's not the way it reads now." Tr.10.

[72] *See* 7 AAC 49.030(a).

[73] Mr. C cites *Interior Alaska Airboat Association* for the assertion that the ALJ must "genuinely engage…in reasoned decision making." *Interior Alaska Airboat Ass'n, Inc. v. State, Bd. Of Game*, 18 P.3d 686, 693 (Alaska 2001).

both a question of law and a question of fact. The Court will analyze the ALJ's interpretation of the regulation under the independent judgment standard[74] and the ALJ's application of the regulation under the substantial judgment standard.[75]

7 AAC 49.030(a) states: "[a] hearing request *may* be accepted after the time limit under this section only if the administrative law judge finds, based on the evidence submitted, that the request for a hearing could not be filed within the time limit."[76]

The Court does not find Mr. C's argument persuasive for two reasons. First, the ALJ did not err in his interpretation of the regulation because granting a party excess time is not required; rather it is under the ALJ's discretion. That discretion is not absolute but requires a factual finding by the ALJ that the request for a hearing could not be filed within the time limit. Thus, the Court finds that under the independent judgment standard it was within the ALJ's purview to determine based on the evidence whether or not OPA could have filed a hearing request within 30 days of the September 30 denial notice.[77]

Second, the ALJ did engage in "reasoned decision making" when he determined that an appeal of the denial could have been filed within the 30 day statutory limit. As discussed *supra*, the ALJ's factual decision that the hearing

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[74] *Williams*, 983 P.2d at 1069.

[75] *Handley*, 838 P.2d at 1233.

[76] 7 AAC 49,030(a) (emphasis added); Appellant's Br., 7.

[77] As discussed *supra* in footnote 71, the current regulation starts the counting of days upon delivery of the denial notice, not the receipt of the hearing request. *See* 7 AAC 49.030(a) (2013) *compared to* 7 AAC 49.040 (1999).

request could not have been filed within the regulatory time limit, thus time-barring the action, is supported by substantial evidence.

Therefore, under the independent judgment standard and the substantial evidence standard, respectively, the ALJ did not err in his interpretation and application of 7 AAC 43.090.

III. The ALJ's Limitation of Cross-Examination was Not Improper or Prejudicial

The final issue on appeal is whether the ALJ erred in limiting cross-examination of the Division's witness, Mr. Miller, regarding the notice mailing process.

Mr. C argues that the ALJ cut off his representative's line of questioning "regarding the Division's mailing process," thus "inhibit[ing] Mr. C's ability to create a greater record to rebut the presumption that notices are properly sent and delivered."[78]

The line of questioning at issue here began with Mr. C's representative, Ms. Russo, asking Mr. Miller: "And is the U.S. Postal Service always 100 percent speedy and…"[79] The ALJ then interjected, noting that Mr. Miller was not an expert on the postal system, and that upon agreement by both attorneys, he (the ALJ) was going to take judicial notice that "occasionally systems mess up, including the U.S. Postal Service."[80]

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[78] Appellant's Br., 8; Tr. 22.

[79] Tr. 21.

[80] Tr. 22.

Given this agreement and without further explanation from Mr. C, it does not appear that Mr. C was prejudiced by the ALJ's action. Therefore, the ALJ's limitation of this line of questioning was not improper or prejudicial.

Conclusion

The rule in this case is a harsh one. But the ALJ properly followed the dictates of the law as it is written. Although this Court might have reached a different result were it the factfinder in the case, it cannot reweigh the evidence as the ALJ's factual findings are supported by substantial evidence. Based on the above reasoning, the Court AFFIRMS the ALJ's decision that Mr. C's hearing request was untimely, thus resulting in the dismissal of the underlying case.

DATED at Anchorage, Alaska, this 20th day of April 2016.

Signed
MARK RINDNER
Superior Court Judge

[This document has been modified to conform to the technical standards for publication.]