Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Social Security Administration, Inspector General,
Petitioner,

v.

Michelle Valent,
Respondent.

Docket No. C-15-713 (On Remand)
Decision No. CR4089

Date: July 31, 2015

DECISION

There is no basis for the imposition of a civil money penalty (CMP) or an assessment in lieu of damages (assessment) under section 1129(a)(1) of the Social Security Act (the Act) (42 U.S.C. § 1320a-8(a)(1)), against Respondent, Michelle Valent.

I. Procedural History

The Counsel for the Inspector General (IG) of the Social Security Administration (SSA) notified Respondent, Michelle Valent, by letter dated June 3, 2013, that the SSA IG proposed imposition of a CMP of $100,000 and an assessment of $68,547 against Respondent, pursuant to section 1129 of the Social Security Act (Act) (42 U.S.C. § 1320a-8).[1] The SSA IG cited as the basis for the CMP and assessment that during the period September 2009 through January 2013, Respondent failed to report to SSA that she worked while she received Social Security Disability Insurance Benefits and she falsely reported during an April 2012 Continuing Disability Review (CDR) that she had not worked since 2004. SSA IG Exhibit (SSA Ex.) 4.

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[1] The current version of the Act is available at http://www.ssa.gov/OP_Home/ssact/ssact-toc.htm. The Code of Federal Regulations (C.F.R.), Federal Register (Fed. Reg.), and the United States (U.S.C.) cited in this decision are available at http://www.gpo.gov/fdsys/.

Respondent requested a hearing pursuant to 20 C.F.R. § 498.202,[2] by letter dated June 11, 2013. The case was assigned to me for hearing and decision.

On January 14, and 15, 2014, a hearing was convened by video teleconference (VTC). The SSA IG, represented by Penny Collender, Esq. and Erin Justice, Esq., appeared by VTC from New York City. Respondent appeared by VTC from Livonia, Michigan represented by Marianne McCauley. I participated by VTC from Kansas City with the court reporter. Witnesses testified by VTC from Livonia, Michigan, Baltimore, and San Diego. A transcript (Tr.) of the proceedings was prepared. The SSA IG offered SSA Exs. 1 through 18 and the exhibits were admitted as evidence. Tr. 37-38. Respondent offered Respondent's exhibits (R. Ex.) 1 through 6 and they were admitted as evidence. Tr. 38-39. The SSA IG called the following witnesses: Resident Agent in Charge (RAC) Adam Lowder; Special Agent (SA) Kathryn Krieg; Alan Watt, the confidential source; Respondent Michelle Valent; Mark McCauley, Respondent's brother; and B. Chad Bungard, Counsel to the SSA IG. Respondent called no witnesses.

The SSA IG filed a post-hearing brief (SSA Br.) on March 26, 2014. Respondent also filed her post-hearing brief (R. Br.) on March 26, 2014. Respondent filed a post-hearing reply brief (R. Reply) on April 10, 2014. The SSA IG filed a post-hearing reply brief (SSA Reply) on April 11, 2014.

On June 11, 2014, I issued a decision holding that there was no basis for imposing either a CMP or assessment under section 1129(a)(1) of the Act. *Michelle Valent*, DAB CR3261 (2014). The SSA IG requested review by the Departmental Appeals Board (the Board). An appellate panel of the Board issued a decision on November 24, 2014. *Michelle Valent*, DAB No. 2604 (2014). The Board reversed my legal conclusion that Respondent's work activity was not material as a matter of law under section 221(m)(1) of the Act. The Board remanded for me to make findings of fact and conclusions of law regarding whether Respondent is liable for a CMP and assessment under section 1129(a)(1) of the Act. If I conclude she is liable, the Board specified that I must determine if the SSA IG has established the months for which a CMP and assessment may be imposed; and the reasonable CMP and assessment to be imposed. *Valent*, DAB No. 2604 at 1-2, 13-15.

The record was returned to me on January 30, 2015. On February 26, 2015, I ordered that the parities submit new proposed findings of fact, conclusions of law, and briefing on the issues specified by the Board. On March 24, 2015, the SSA IG filed proposed

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[2] References are to the 2012 revision of the C.F.R. unless otherwise stated.

findings of fact and conclusions of law but no brief discussing the issues of fact and law. On May 1, 2015, Respondent filed proposed findings of fact, conclusions of law, argument (R. Remand Br.) and Respondent's exhibit (R. Ex. 1 on Remand). On June 1, 2015, the SSA IG filed a waiver of its right to reply to Respondent. The SSA IG did not object to my consideration of R. Ex. 1 on Remand and it is admitted as evidence.

On June 1, 2015, Respondent filed a response to the SSA IG's proposed findings of fact and conclusions of law (R. Remand Reply). Respondent also filed the statements of: Kimberly Catenacci dated July 11, 2014; Brittney Brooks dated April 11, 2015; and Pauline Brooks dated April 13, 2015. The statements are not marked as Respondent's exhibits, but I treat them as if marked R. Ex. 2 on Remand, R. Ex. 3 on Remand, and R. Ex. 4 on Remand, respectively. The statements are recorded on SSA Form SSA-795 titled "Statement of Claimant" and the attestation for each form satisfies the requirements of 28 U.S.C. § 1746 for a declaration acceptable for filing in a federal court. The SSA IG has not objected to my consideration of R. Exs. 2, 3 and 4 on Remand or requested to cross-examine the declarants and the statements are admitted and considered as evidence. 20 C.F.R. §§ 498.213, 498.215(e)(2), 498.217(a), (g).

II. Discussion

A. Applicable Law

Pursuant to title II of the Act, an individual who has worked in jobs covered by Social Security for the required period of time, who has a medical condition that meets the definition of disability under the Act, and who is unable to work for a year or more because of the disability, may be entitled to monthly cash disability insurance benefits (DIB). 20 C.F.R. §§ 404.315-404.373. Pursuant to title XVI of the Act, certain eligible individuals are entitled to the payment of Supplemental Security Income (SSI) on a needs basis. To be eligible for SSI payments, a person must meet U.S. residency requirements and must be: (1) 65 years of age or older; (2) blind; or (3) disabled. Disability under both programs is determined based on the existence of one or more impairments that will result in death or that prevent an individual from doing his or her past work or other work that exists in substantial numbers in the economy for at least one year. 20 C.F.R. §§ 416.202, 416.905, 416.906. SSI is not at issue in this case as Respondent received no benefits under that program.

Section 1129(a)(1) of the Act authorizes the imposition of a CMP or an assessment against:

> (a)(1) Any person . . . who –
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> (A) makes, or causes to be made, a statement or representation of a material fact, for use in determining

> any initial or continuing right to or the amount of monthly insurance benefits under title II or benefits or payments under title VIII or XVI, that the person knows or should know is false or misleading,
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> (B) makes such a statement or representation for such use with knowing disregard for the truth, or
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> (C) omits from a statement or representation for such use, or otherwise withholds disclosure of, a fact which the person knows or should know is material to the determination of any initial or continuing right to or the amount of monthly insurance benefits under title II or benefits or payments under title VIII or XVI, if the person knows, or should know, that the statement or representation with such omission is false or misleading or that the withholding of such disclosure is misleading . . . .

The Commissioner of SSA (the Commissioner) delegated the authority of section 1129 of the Act to the IG. 20 C.F.R. § 498.102(a). A material fact is a fact that the Commissioner may consider in evaluating whether an applicant is entitled to benefits or payments under titles II, VIII, or XVI of the Act. Act § 1129(a)(2); 20 C.F.R. § 498.101. Individuals who violate section 1129 are subject to a CMP of not more than $5,000 for each false or misleading statement or representation of material fact or failure to disclose a material fact. Violators are also subject to an assessment in lieu of damages, of not more than twice the amount of the benefits or payments made as a result of the statements, representations, or omissions. Act § 1129(a)(1); 20 C.F.R. § 498.103(a).

In determining the amount of the CMP to impose, the SSA IG must consider: (1) the nature of the subject statements and representations and circumstances under which they occurred; (2) the degree of culpability of the person committing the offense; (3) the person's history of prior offenses; (4) the person's financial condition; and (5) such other matters as justice requires. Act § 1129(c); 20 C.F.R. §498.106(a).

Section 1129(b)(2) of the Act specifies that the Commissioner shall not decide to impose a CMP or assessment against a person until that person is given written notice and an opportunity for the determination to be made on the record after a hearing at which the person is allowed to participate. The Commissioner has provided by regulations at 20 C.F.R. pt. 498 that a person against whom a CMP is proposed by the SSA IG may request a hearing before an administrative law judge (ALJ). The ALJ has jurisdiction to determine whether the person should be found liable for a CMP and/or an assessment and the amount of each. 20 C.F.R. §§ 498.215(a), 498.220(b). The person requesting the

hearing, the Respondent, has the burden of going forward and the burden of persuasion with respect to any affirmative defenses and any mitigating circumstances. 20 C.F.R. § 498.215(b)(1). The SSA IG has the burden of going forward as well as the burden of persuasion with respect to all other issues. 20 C.F.R. § 498.215(b)(2). The burdens of persuasion are to be judged by a preponderance of the evidence. 20 C.F.R. § 498.215(c).

B. Issues

> Whether there is a basis for the imposition of a CMP pursuant to section 1129(a)(1) of the Act and 20 C.F.R. § 498.102(a).
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> Whether there is a basis for the imposition of an assessment pursuant to section 1129(a)(1) of the Act and 20 C.F.R. § 498.102(a).
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> Whether a CMP and assessment should be imposed and, if so, in what amount considering the factors specified by section 1129(c) of the Act and 20 C.F.R. § 498.106(a).

Issues specified by the Board on remand:

> Whether Respondent is liable for a CMP and assessment under section 1129(a)(1) of the Act;
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> Whether, if Respondent is liable, the SSA IG has established the months for which a CMP and assessment may be imposed; and
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> Whether the proposed CMP and assessment are reasonable.

Valent, DAB No. 2604 at 1-2, 13-15.

Whether or not Respondent may be liable for an overpayment of Social Security benefits and whether or not she continued to meet the requirements for payment of Social Security benefits are not issues before me.

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold followed by the statement of pertinent facts and my analysis. I have carefully considered all the evidence and the arguments of both parties, although not all may be specifically discussed in this decision. I have also

carefully considered the Board's opinion in support of its decision to remand this case and the issues specified therein. I discuss the credible evidence given the greatest weight in my decision-making.[3] I also discuss any evidence that I find is not credible or worthy of weight. The fact that evidence is not specifically discussed should not be considered sufficient to rebut the presumption that I considered all the evidence and assigned such weight or probative value to the credible evidence that I determined appropriate within my discretion as an ALJ. There is no requirement for me to discuss the weight given every piece of evidence considered in this case, nor would it be consistent with notions of judicial economy to do so. Charles H. Koch, Jr., *Admin. L. and Prac.* § 5:64 (3d ed. 2013).

Following are my conclusions of law from my first decision in this case. *Valent*, DAB CR3261 at 6-7.

> **1. Respondent was entitled to receive DIB under section 223 of the Act for at least 24 months.**
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> **2. Pursuant to section 221(m)(1)(B) of the Act, the Commissioner is prohibited from considering any work activity of Respondent as evidence that Respondent was no longer disabled and no longer entitled to DIB.**
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> **3. Respondent's work activity after she received DIB for at least 24 months is not a fact that the Commissioner was permitted to evaluate to determine if Respondent was entitled to continuing receipt of DIB, and therefore, not a material fact within the meaning of section 1129(a)(2) of the Act or 20 C.F.R. § 498.101.**
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> **4. Although Respondent failed to report work activity in violation of the regulation, the fact she engaged in work activity was not a material fact and the failure to report is not a basis for the imposition of a CMP or an assessment under section 1129 of the Act.**
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> **5. The SSA IG failed to show by a preponderance of the evidence that Respondent knew or should have known that her work activity was a**

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[3] "Credible evidence" is evidence that is worthy of belief. *Black's Law Dictionary* 596 (18th ed. 2004). The "weight of evidence" is the persuasiveness of some evidence compared to other evidence. *Id*. at 1625.

> **material fact that she failed to report because, pursuant to section 221(m) of the Act, her work activity is not material as a matter of law.**

The Board, in its remand decision, rejected my legal interpretation and application of section 221(m) of the Act to bar the imposition of a CMP and assessment against Respondent in this case. *Valent*, DAB No. 2604 at 9-12. I attribute the Board's rejection of my interpretation of section 221(m) to a lack of clarity in my prior analysis. Accordingly, I conclude it is both necessary and appropriate to explain my analysis with more clarity to permit the Board to reconsider its legal ruling to ensure that the Act is applied consistent with the manifest intent of Congress and to avoid injustice. If the Board does not change its interpretation of section 221(m) of the Act as it applies to the facts of this case, I encourage the Commissioner of Social Security to consider the legal issue as the agency head responsible for implementing section 221(m) of the Act.

The following is a clarification of my original legal analysis for why section 221(m)(1) of the Act prevents the SSA IG from citing a failure to report "work activity" as a basis for imposing a CMP or an assessment.

Counsel to the Inspector General, B. Chad Bungard, notified Respondent by letter dated June 3, 2013, that he proposed to impose against Respondent a CMP of $100,000 and an assessment in the amount of $68,547, pursuant to section 1129 of the Act and 20 C.F.R. §§ 498.100-.224. The letter advised that the proposed CMP and assessment were based on Mr. Bungard's determination that Respondent:

> [W]ithheld material information from SSA, which [she] knew or should have known, was false or misleading. **During the period from September 2009 through January 2013, [Respondent] failed to report to SSA that [she] worked at the War Era Veterans Alliance, which is owned by [her] brother, Mark McCauley.** In addition, during an April 2012 Continuing Disability Review (CDR), [she] falsely states that [she] had not worked since 2004. [Respondent] failed to report [her] work activity to facilitate the improper receipt of Title II Disability Insurance Benefits (DIB).

SSA Ex. 4 (emphasis added). Mr. Bungard testified at hearing that the only basis for the CMP and assessment was the 41 months from September 2009 through January 2013, during which Respondent failed to report that she worked at War Era Veterans Alliance. Tr. 361-63.

Section 1129(a)(1)(C) of the Act authorizes the Commissioner to impose a CMP and assessment against one who fails to disclose a material fact. Pursuant to section

1129(a)(1)(C) the Commissioner may impose a CMP and assessment against any person who:

> (C) omits from a statement or representation for such use, or otherwise withholds disclosure of, **a fact which the person knows or should know is material to the determination of any initial or continuing right to or the amount of monthly insurance benefits** under title II or benefits or payments under title VIII or XVI, if the person knows, or should know, that the statement or representation with such omission is false or misleading or that the withholding of such disclosure is misleading . . . .

Act § 1129(a)(1)(C) (emphasis added). The Act defines a "material fact" as a fact "which the Commissioner of Social Security may consider in evaluating whether an applicant is entitled to benefits under title II or title VIII, or eligible for benefits or payments under title XVI." Act § 1129(a)(2).

The Commissioner delegated the authority of section 1129 of the Act to the IG. The regulatory delegation applicable in this case provides:

> (a) The Office of the Inspector General may impose a penalty and assessment, as applicable, against any person who it determines in accordance with this part—
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> * * * *
>
> (3) Omitted from a statement or representation, or otherwise withheld disclosure of, **a material fact for use in determining any initial or continuing right to or amount of benefits or payments**, which the person knew or should have known was material for such use and that such omission or withholding was false or misleading.

20 C.F.R. § 498.102(a)(3) (emphasis added). The regulation defines a "material fact" as a fact that the Commissioner may consider in evaluating whether an applicant is entitled to benefits or payments under titles II, VIII, or XVI of the Act. 20 C.F.R. § 498.101. The phrase "otherwise withheld disclosure" is defined as:

> the failure to come forward to notify the SSA of a material fact when such person knew or should have known that the withheld fact was material and that such withholding was misleading for purposes of determining eligibility or Social Security benefit amount for that person or another person.

20 C.F.R. § 498.101.

According to the June 3, 2013 IG notice to Respondent, as clarified by Mr. Bungard in testimony, the CMP and assessment in this case are based on Respondent's failure to report that she "worked" at War Era Veterans Alliance and that she failed to report the work for 41 months from September 2009 through January 2013. SSA Ex. 4; Tr. 361-63. The June 3, 2013 IG notice did not charge Respondent with failure to report earnings or failure to report substantial gainful activity. SSA Ex. 4. Mr. Bungard did not testify that he determined that Respondent failed to report earnings or substantial gainful activity. Tr. 361-63.

Understanding the meaning of the terms "work," "earnings," and "substantial gainful activity" are important to a proper interpretation of the provisions of the Act and regulations at issue in this case. "Work," "earnings," and "substantial gainful activity" are not synonymous. The SSA IG in its briefing to the Board and the Board in its decision appear to use the terms as if they have the same meaning or refer to the same thing, which clearly they do not. As a threshold matter, it is important to understand that whether or not one is disabled for purpose of receiving DIB benefits is not based on whether or not one can do "work." Disability for purposes of entitlement to DIB payments is the "inability to engage in **substantial gainful activity** by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." Act § 223(d)(1)(A) (emphasis added). However, an individual may only be determined to be under a disability if his or her physical or mental impairment or impairments prevent **previous work**, and considering the individual's age, education, and work experience, **any other substantial gainful work** that exists in significant numbers in the national economy. Act § 223(d)(2)(A).

The Board recognized that the term "work" is not defined in the Act or regulations. *Valent*, DAB No. 2604 at 3. Earnings as used in the regulations for purposed of determining DIB coverage (insured status), include wages, compensation, self-employment income, and deemed military wage credits creditable to an individual for Social Security purposes. 20 C.F.R. § 404.221(b). "Substantial gainful activity" is work that involves "significant and productive physical or mental duties" and is "done (or intended) for pay or profit." 20 C.F.R. §§ 404.1510, 404.1572. Generally, work, whether or not legal, is a fact that may be considered to determine whether an individual can work

at the level of substantial gainful activity. If one can work at the level of substantial gainful activity, he or she is not disabled for purposes of receiving DIB payments even if the individual meets the medical requirements for DIB. The regulation provides that even work done that was not substantial gainful activity may be considered to decide whether or not an individual should be able to perform substantial gainful activity. 20 C.F.R. § 404.1571. Self-care, household tasks, hobbies, therapy, school attendance, club activities, or social programs are generally not considered to be substantial gainful activity. 42 C.F.R. § 404.1572. The nature of work activity, how well the work was performed, whether work is done under special conditions (accommodated), whether work was performed by one self-employed, and time spent in work, are all factors considered to determine whether work is "substantial gainful activity." 20 C.F.R. § 404.1573. Based on the definitions provided by the regulations, work or work activity may or may not be substantial gainful activity; substantial gainful activity is defined as work at a certain intensity and quality with or without earnings; and earnings are derived from work and may be evidence that work is at the level of substantial gainful activity. As a general rule, all these facts related to work are facts that the Commissioner may consider in determining whether an applicant is engaging in substantial gainful activity and is initially entitled to benefits or continuing benefits under title II of the Act (DIB) and, therefore, they are material facts under section 1129(a)(2) of the Act and 20 C.F.R. § 498.101. Furthermore, the facts listed related to work are the type of material facts which may be the basis for the imposition of a CMP or assessment by the SSA IG because they are facts "**for use in determining any initial or continuing right to or amount of benefits or payments**." Act § 1129(a)(1)(C) (emphasis added); 20 C.F.R. § 498.102(a)(3) (emphasis added). Therefore, as I stated in my prior decision, because a DIB beneficiary has a regulatory duty to report work activity under 42 C.F.R. § 404.1588(a) and work activity is material to a determination of continuing entitlement,[4] I would generally find a DIB beneficiary who failed to report work activity, no matter how minimal the activity, is subject to a CMP or an assessment under section 1129(a)(1) of the Act. *Valent*, DAB No. CR3261 at 15.

In my initial decision in this case I concluded that Congress acted to prohibit the Commissioner from considering work activity in certain cases and, thereby, removed "work activity" from status as a material fact for purposes of the SSA IG imposing a CMP or assessment. My conclusion was based on the plain language of the Act.

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[4] Unlike retirement benefits and SSI, the amount of DIB payments is generally not affected by earnings. 42 C.F.R. §§ 404.317, 404.401, 404.415(a), 404.417, 416.420. However, DIB payments may be suspended or terminated as provided by the regulations. 20 C.F.R. §§ 404.401a, 404.467, 404.1592, 404.1592a, 404.1596, 404.1597.

> (1) In any case where an individual entitled to disability insurance benefits under section 223 or to monthly insurance benefits under section 202 based on such individual's disability (as defined in section 223(d)) has received such benefits for at least 24 months—
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> > **(A) no continuing disability review conducted by the Commissioner may be scheduled for the individual solely as a result of the individual's work activity;**
> >
> > **(B) no work activity engaged in by the individual may be used as evidence that the individual is no longer disabled;** and
> >
> > (**C) no cessation of work activity** by the individual may give rise to a presumption that the individual is unable to engage in work.
>
> (2) An individual to which paragraph (1) applies shall continue to be subject to—
>
> > (A) continuing disability reviews on a regularly scheduled basis that is **not triggered by work**; and
> >
> > (B) **termination of benefits under this title in the event that the individual has earnings that exceed the level of earnings established by the Commissioner to represent substantial gainful activity.**

Act § 221(m) (emphasis added). The Board criticizes my analysis stating that I failed to consider the entire statutory provision. *Valent*, DAB No. 2604 at 9. However, I set forth in my decision the entirety of subsection 221(m) of the Act to show that I did, in fact, consider that entire subsection. The language of subsection 221(m) is clear and requires no interpretation as to its meaning. Subsection 221(m)(1) states that it applies to DIB beneficiaries such as Respondent, who have been receiving DIB benefits for at least 24 months (24-month DIB beneficiaries). Subsection 221(m)(1) has no application to those initially filing for DIB benefits, those who have been DIB beneficiaries for less than 24 months, or to individuals receiving SSI benefits. Subsection 221(m)(1) (A), (B), and (C) specifically prohibit the Commissioner from considering work activity of a 24-month DIB beneficiary as: (1) the basis for scheduling a continuing disability review, that is, a review to determine if the DIB beneficiary is no longer disabled and entitled to benefits;

(2) evidence that the DIB beneficiary is no longer disabled; or (3) triggering a presumption that the cessation of work activity indicates the individual is unable to engage in work. Subsection 221(m)(2) does not permit consideration of work activity prohibited by subsection 221(m)(1). Rather, subsection 221(m)(2)(A) provides that the 24-month DIB beneficiary remains subject to continuing disability reviews that are regularly scheduled as required under the Act and regulations and not triggered by work activity. Subsection 221(m)(2)(B) provides that a 24-month DIB beneficiary is subject to termination of benefits when he or she has **earnings** that exceed the level of **substantial gainful activity**. Subsection 221(m)(2)(B) refers to "earnings" as the factual basis for determining whether a 24-month DIB beneficiary is exceeding the level of substantial gainful activity. Subsection 221(m)(2)(B) does not state that the Commissioner can consider work activity of the 24-month DIB beneficiary to determine whether or not the work activity rises to the level of substantial gainful activity, which would be contrary to the prohibition on considering work activity of the 24-month beneficiary either as a basis for triggering a continuing disability review or as a basis for terminating entitlement established by subsection 221(m)(1). My interpretation gives effect to all provisions of section 221(m) of the Act. The SSA IG's interpretation advanced to the Board does not. The legislative history of section 221(m) cited by the Board actually supports my interpretation of the provision, rather than the Board's:

> The history explains that section 221(m) "is intended to encourage long-term [DIB] beneficiaries to return to work by ensuring that work activity would not trigger an unscheduled **medical review of their eligibility**" but that "like all beneficiaries, long-term beneficiaries **would have benefits suspended if earnings exceeded the substantial gainful activity level**, and would be subject to periodic continuing disability reviews." H.R. Rep. 106-393(1), at 45 (1999) (emphasis added).

Valent, DAB No. 2604 at 11. This history simply states that for a 24-month DIB beneficiary no continuing disability review may be triggered by work activity (with or without earnings) but earnings may be the basis for finding substantial gainful activity, which would be a basis for suspending benefit payments. The legislative history does not indicate that Congress intended that the Commissioner is permitted to consider the 24-month DIB beneficiaries work activity. To the contrary the legislative history is clear that Congress intended to encourage long-term DIB beneficiaries to attempt to return to work without fear that the work activity would cause a suspension of their benefits or termination of their entitlement. This is clearer from a reading the complete section of the cited legislative history in context:

> Present law
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> Eligibility for Social Security disability insurance [DIB] cash benefits requires an applicant to meet certain criteria, including the presence of a disability that renders the individual unable to engage in substantial gainful activity. Substantial gainful activity is defined as work that results in earnings exceeding an amount set in regulations ($700 per month, as of July 1, 1999). Continuing disability reviews (CDRs) are conducted by the Social Security Administration (SSA) to determine whether an individual remains disabled and thus eligible for continued benefits. CDRs may be triggered by evidence of recovery from disability, including return to work. SSA is also required to conduct periodic CDRs every 3 years for beneficiaries with a nonpermanent disability, and at times determined by the Commissioner for beneficiaries with a permanent disability.
>
> Explanation of provision
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> The Committee bill establishes the standard that CDRs for long-term SSDI [DIB] beneficiaries (i.e., those receiving disability benefits for at least 24 months) would be limited to periodic CDRs. SSA would continue to evaluate work activity to determine whether eligibility for cash benefits continued, but a return to work would not trigger a review of the beneficiary's impairment to determine whether it continued to be disabling.
>
> Reason for change
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> The provision is intended to encourage long-term SSDI [DIB] beneficiaries to return to work by ensuring that work activity would not trigger an unscheduled medical review of their eligibility. However, like all beneficiaries, long-term beneficiaries would have benefits suspended if earnings exceeded the substantial gainful activity level, and would be subject to periodic continuing disability reviews.

H.R. Rep. 106-393(1), at 45. This legislative history shows that Congress specifically intended to prohibit the Commissioner from considering a 24-month DIB beneficiary's work activity as a basis for conducting a CDR and terminating benefits. Congress

only authorized consideration of earnings from work activity as a basis for suspension of a 24-month DIB beneficiary's DIB payments.

Under the Act and regulations a material fact is a fact the Commissioner may consider in evaluating whether an applicant is entitled to benefits or payments under the Act. Act § 1129(a)(2); 20 C.F.R. § 498.101. For the 24-month DIB beneficiary, Congress has specifically limited the Commissioner to considering earnings and substantial gainful activity in evaluating continuing entitlement and payments. Congress has specifically prohibited consideration of work activity to encourage long-term beneficiaries to attempt work activity. Thus, earnings and substantial gainful activity are material facts while "work activity" is not as a matter of law. Because work activity is not a material fact for a 24-month DIB beneficiary, which Respondent was, her failure to report work activity cannot be the basis for imposition of a CMP or assessment under section 1129(a)(1) of the Act. It is important to recognize that the SSA IG did not charge Respondent with failure to report earnings or failure to report substantial gainful activity, both of which are material facts. The SSA IG cited failure to report work activity as the basis for the CMP and assessment. SSA Ex. 4; Tr. 361-63.

The SSA IG argument that earnings and substantial gainful activity both refer to work activity and therefore work activity remains a material fact flies in the face of the carefully drafted language of section 221(m) of the Act and fails to give meaning to both subsections of section 221(m). In section 221(m) the drafters used all three terms, "work activity," "earnings," and "substantial gainful activity." The use of the three specific terms clearly reflects that the terms have different meanings and the drafter's intend those specific meanings be accorded those specific terms. The drafter's specifically prohibited consideration of "work activity" but equally clearly preserved consideration of "earnings" and "substantial gainful activity."

SSA IG argued to the Board and the Board seemed to attach some significance to the fact that I blind-sided the parties with my legal ruling based on section 221(m) of the Act. The Board noted that neither party cited section 221(m) and I did not request that the parties brief the issue. *Valent*, DAB No. 2604 at 9. I am not sure what the Board suggests by its comment but the Board cited no authority for the proposition that an ALJ need give notice to the parties before resolving a case on an issue of law; or that an ALJ must assist counsel, particularly government counsel, by giving notice of the particular sections of the statute that the government counsel are charged with enforcing or by suggesting theories for counsel to explore. Certainly, specifying issues for counsel to brief may be helpful in some cases. However, in this case Respondent was not represented by an attorney and requesting that the non-attorney representative brief the legal impact of a provision of the Act would not be beneficial to me as the decision-maker. The SSA IG was represented by competent counsel who I am entitled to presume knows the law they are responsible to discharge. Furthermore, I specifically inquired of Mr. Bungard during the hearing about the difference between work activity and

substantial gainful activity in the context of this case. Tr. 354-55; 364-66. The SSA IG counsel apparently did not successfully determine why that inquiry from the judge regarding the difference between work activity and substantial gainful activity was significant. But certainly counsel for the SSA IG should have been aware of section 221(m) of the Act and its potential application to this Respondent, who clearly had been a DIB recipient for more than 24 months.

To be clear, I do not mean to suggest that the SSA IG cannot consider work activity as evidence of earnings or substantial gainful activity that may affect the suspension or termination of benefits. But the law is clear that, in the case of a 24-month DIB beneficiary, Congress specifically prohibited the Commissioner from considering work activity as a basis for determining continuing entitlement to receive benefits. Therefore, work activity cannot be a material fact under the definitions found in the Act and regulations. Because work activity of a 24-month DIB beneficiary is not a material fact, failure of the 24-month DIB beneficiary to report the work activity cannot be the basis for the imposition of a CMP or assessment. I also do not suggest that the 24-month DIB beneficiary is relieved of the regulatory obligation to report work activity, only that the failure to report work activity is not the basis for a CMP or assessment authorized by section 1129(a)(1) of the Act.

Anticipating that the Board will not reconsider its prior ruling and decide this case on the narrowest possible grounds, I proceed to address the issues specified by the Board treating the prior ruling regarding section 221(m) as the law of the case. The following conclusions of law in bold, followed by the discussion of pertinent facts, address the specific issues identified by the Board. I begin numbering my conclusions of law on remand with the next number in sequence following the conclusions of law from my prior decision for ease of reference in the event the Board should chose to revisit the prior conclusions.

> **6. Respondent did not know and could not have known that her failure to report work activity to SSA was a material fact and that failure to report was misleading.**
>
> **7. Respondent engaged in reportable work activity in September 2009 that she failed to report for 41 months as alleged by the SSA IG.**
>
> **8. Based upon de novo review of the factors required by the Act and regulations, no CMP or assessment is reasonable in this case.**

Set forth here is the section from my first decision titled “Facts.” *Valent*, DAB CR3261 at 7-13. The section is set forth here, with some modifications, to avoid the need for the reader to refer back to my prior decision.

a. Facts

The SSA IG evidence shows that Respondent filed for DIB on October 29, 2003. She was determined disabled and entitled to DIB payments with a disability onset date of March 25, 2003, based on the primary diagnosis of affective disorders, which refers to a set of psychiatric diseases including depression, bipolar disorder, and anxiety disorder. Her prior work was as a receptionist or administrative assistant from 1988 to March 2003. A CDR completed on March 31, 2010, resulted in continuation of her entitlement to DIB. Respondent was entitled and received DIB benefits for more than 24 months.

In January 2012, the SSA IG received an allegation that Respondent had been working as a customer service representative for War Era Veterans Alliance, LLC since 2009. Respondent was interviewed by a SSA Claims Representative on April 20, 2012. During the interview, Respondent completed forms and statements in which she stated that she had not worked since 2004 and listed no work since 2004. SSA Ex. 9 at 7; SSA Ex. 12 at 1-2. Respondent's maiden name was Michelle L. McCauley. SSA Ex. 12 at 2.

On September 12, 2013, an SSA Technical Expert, Deborah Buchholz, completed a special work determination report. SSA Ex. 12. The Technical Expert determined that Respondent started working for War Era Veterans Alliance, owned by Respondent's brother and sister-in-law, Mark and Marianne McCauley, on September 1, 2008.[5] The Technical Expert concluded that Respondent's brother paid her $400 per week, an average of $1733.33 gross pay per month. SSA determined that Respondent's earnings were substantial gainful activity; Respondent's trial work period was September 2008 through May 2009; her entitlement to DIB ended with June 2009; and the last check to which she was entitled was issued for August 2009. SSA determined that Respondent was overpaid $49,795.90 in benefits for herself and $15,608.00 for her daughter. SSA Ex. 12 at 8; SSA Ex. 1 at 22. The amount of the overpayment to Respondent is different in this document than the amount stated in SSA Ex. 1 at 21-22, and SSA Ex. 3 at 12 but whether or not Respondent was overpaid is not a matter within my jurisdiction.

SSA notified Respondent by letter dated December 5, 2012 that based on review of her work and earnings for March 2003 through December 2012, she may not be eligible for DIB payments beginning with September 2009 and continuing thereafter. Respondent was invited to send in information within ten days. SSA Ex. 3 at 1. SSA advised Respondent that SSA records show that Respondent worked from January 2003 to December 2004 for Hanover Grove Consumer Housing and from September 2008 and

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[5] The registered agent for War Era Veterans Alliance, LLC is Marianne McCauley. SSA Ex. 14; R. Ex. 1 at 1; R. Ex. 3.

continuing for War Era Veterans Alliance. SSA Ex. 3 at 2. The SSA letter advised Respondent that her trial work period was September 2008 through May 2009, with continuing entitlement to DIB during that period. SSA Ex. 3 at 3. SSA notified Respondent by letter dated January 14, 2013, that her entitlement to DIB payments ended beginning September 2009. SSA Ex. 3 at 6. The SSA notice advised Respondent that because her checks were not stopped until January 2013, she was overpaid $52,938.90. SSA Ex. 3 at 7. Respondent was also advised by a letter from SSA dated January 14, 2013, that her daughter was no longer eligible to receive payments, and that her daughter was overpaid $15,608 in benefits. SSA Ex. 3 at 12.

SA Kathryn Krieg prepared an initial report of investigation for the period February 13, 2012 to June 8, 2012. The case was assigned to her by RAC Lowder on February 13, 2012. Subsequently, she obtained a copy of Respondent's Michigan driver's license photograph and her address information from the license. She determined that Respondent was receiving DIB payments, and that Respondent had no reported wages since 2004. On or about March 14, 2012, she conducted surveillance of Respondent's home in Macomb, Michigan and the War Era Veterans Alliance office in Chesterfield Township, Michigan, where she was reportedly working. Her report does not indicate that she saw Respondent or established her presence at either location. SSA Ex. 1 at 2-3. SA Krieg opined that Respondent may have been working from home. On April 2, 2012, she referred the allegations against Respondent to SSA for a CDR and more development. Tr. 124-25; SSA 1 at 3. On or about May 9, 2012, SA Krieg received a copy of a letter from Alan Watt to the SSA IG with other documents. On May 10, 2012, SA Krieg conducted more surveillance at Respondent's residence and the War Era Veterans Alliance. Her report fails to show that she saw Respondent or established her presence at either location. On May 23, 2012, she interviewed Alan Watt about his allegations that Respondent was working for War Era Veterans Alliance. Watt told her that Respondent either worked at the office or at home. Watt stated that Respondent's brother, Mark McCauley owns War Era Veterans Alliance and that it was common knowledge that Respondent was collecting Social Security. Watt told SA Krieg that probably half the employees are paid under the table. He told SA Krieg that he believed Respondent was paid $10 to $15 per hour and worked full-time or close to full-time. He told SA Krieg that he believed that Respondent was already working for War Era Veterans Alliance when he started in May 2009. He quit working for War Era Veterans Alliance on April 18, 2011, and that was his last contact with Respondent. SSA Ex. 1 at 1-6.

Alan Watt testified consistent with the statements recorded by SA Krieg. He admitted in response to my questions at hearing that he was only present in the Michigan office one or two days a month from June 2009 through August 2010, for one to four hours at a time. He estimated that Respondent was at the office 50 to 75 percent of the time that he was present. Tr. 191-93. He also testified that he had contact with Respondent when he called in and she answered the phone on roughly a daily basis until August 2010 and then

about 30 percent of the time when he called later in the day from August 2010 until he left the company in April 2011. Tr. 193-95. I find that Mr. Watt's credibility regarding his assertions as to Respondents work activity is significantly limited by his limited opportunity to observe Respondent and her activities.

SA Brian Reitz prepared a Status Report for the period June 8, 2012, in which he recorded an interview with Aimee Konal who worked at War Era Veterans Alliance. Ms. Konal told SA Reitz and his partner, SA Judith Amaro, that she was not an official employee but worked there off and on for two years and was paid under the table. Ms. Konal told the agents that Respondent answered the telephone for War Era Veterans Alliance from her home. Ms. Konal told the agents that when she started at War Era Veterans Alliance, Respondent worked in the office answering the telephone about 32 hours or more each week, earning $8 to $10 per hour, but for the past year she had been working from home. However, Ms. Konal admitted that she did not know how much Respondent earned or how many hours she worked, but she believed she worked a lot based on work-related messages she received from Respondent. SSA Ex. 1 at 9-10. Aimee Konal completed a written sworn statement which is consistent with the agent's summary. SSA Ex. 7.

SA Krieg completed a status report for the period June 8, 2012 to June 12, 2012, in which she records interviews with Respondent and others. On June 8, 2012, SA Krieg, RAC Lowder, SA Amaro, and SA Reitz interviewed Jacquie Scalet, an employee of War Era Veterans Alliance at the War Era Veterans Alliance office. Scalet told the agents that Respondent helped War Era Veterans Alliance by answering the phone from her home. Ms. Scalet denied knowing Respondent's hours or pay. Scalet stated that Respondent used to work in the office but that had ended in the spring of 2011 when Respondent started working from her home. Ms. Scalet stated that she started working for War Era Veterans Alliance in 2010 and that Respondent worked there prior to that. Ms. Scalet provided contact information for Mark McCauley. SSA Ex. 1 at 11-13; Tr. 53, 106-07.

SA Krieg and RAC Lowder interviewed Respondent at her residence on June 8, 2012. Respondent denied working for War Era Veterans Alliance but stated that a year prior she had trained some people and that she answered the phones a few times for the business. Respondent denied knowledge of her photograph, biography, or a description of her work on the War Era Veterans Alliance website. She stated that her voice is on the War Era Veterans Alliance telephone recording. Respondent told the agents that she will answer the telephone for War Era Veterans Alliance when an employee is sick and that she does so from the office. Respondent denied having an email associated with War Era Veterans Alliance. Respondent admitted that she had a specific phone for answering War Era Veterans Alliance phone calls at home. Respondent stated that Mark McCauley has paid some bills for her. She denied working for War Era Veterans Alliance except for here and there and she denied receiving cash payments for work or money from Mark McCauley. Respondent stated that she was last at the War Era Veteran Alliance office in

2010 when she filled-in for Adrianne Watt and that she would fill in approximately two to three times a week. She stated that she did tell neighbors that she worked. SSA Ex. 1 at 13-15; Tr. 54-59, 109-15, 146-48.

SA Krieg and RAC Lowder interviewed Respondent's husband on June 8, 2012. He denied that Respondent worked for War Era Veterans Alliance for pay. SSA Ex. 1 at 15.

SA Krieg and SA Amaro interviewed Mark McCauley on June 8, 2012. Mr. McCauley told them that Respondent is his sister and he does not consider her an employee of War Era Veterans Alliance. He stated that he gives Respondent money as he promised his dad to take care of her. Mr. McCauley stated that Respondent had no schedule or set hours; he gave her a phone that she could answer if she chose to; and that she could not work in an office environment. He stated that he gifts her $12,000 per year whether or not she answers a phone; but he subsequently stated that he gives her $400 per week, which would amount to $20,800 per year. Mr. McCauley referred to Respondent as Missy. He agreed that Respondent was listed on the War Era Veterans Alliance website as "Vale." McCauley admitted that Respondent did answer phones for the business and scheduled people to attend the financial classes he taught but he denied knowing how much she actually worked. SSA Ex. 1 at 15-17; Tr. 98, 115-21.

SA Krieg prepared a status report for the period October 10, 2012 to January 14, 2013. SA Krieg reported that Deborah Buchholz, an SSA employee, determined that Respondent was overpaid $68,546.90, which included an overpayment of DIB of $52,938.90 and an overpayment of CIB to her child in the amount of $15,608. SSA Ex. 1 at 21-22. The SSA IG has offered no evidence of the actual amount of monthly DIB and CIB benefits Respondent and her child received during the pertinent period.

SA Krieg referred the matter to the US Attorney but criminal prosecution was declined because the evidence was insufficient to show that the money given to Respondent was earnings rather than a gift. SSA Ex. 1 at 21-22; SSA Ex. 2. SA Krieg referred the matter to the SSA IG and closed her investigation on February 12, 2013. SSA Ex. 1 at 23. RAC Lowder sent a letter dated January 11, 2013, to the US Attorney, Detroit Michigan to confirm that the US Attorney declined to prosecute Respondent. RAC Lowder summarized in his letter some of the investigative findings, including that DIB payments to Respondent were terminated in January 2013, resulting in an overpayment of $68,546. SSA Ex. 2 at 1.[6]

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[6] SA Krieg provided a declaration dated December 10, 2013, which is consistent with her investigative reports. SSA Ex. 16. RAC Lowder also submitted a declaration that is consistent with SA Krieg's investigative reports. SSA Ex. 17.

Respondent does not dispute that she signed a statement on April 20, 2012, in which she stated "I have not worked since 2004." SSA Ex. 8. Respondent also does not dispute that on April 20, 2012, she completed a "Work Activity Report – Employee" on which she wrote "I have not worked since 2004." SSA Ex. 9 at 7. She also checked the "no" box in response to the question of whether she had any "employment income or wages" since her disability onset date. SSA Ex. 9 at 1. Mr. Bungard testified that the checked "no" box and the statement on the "Work Activity Report – Employee" were not a basis for the CMP proposed. He testified that the only basis for the CMP was the 41 months from September 2009 through January 2013 that Respondent failed to report that she worked for War Era Veterans Alliance. Tr. 361-62.

Respondent does not dispute that on June 7, 2012, she was listed on the War Era Veterans Alliance website as Michelle Vale and described as the "voice of War Era Veterans" who had been "taking calls and managing all War Era Veterans Alliance calendars for over four years." SSA Ex. 13 at 58.

Mark McCauley submitted a letter in which he stated that he gifted money to Respondent and he asked that she do little things for War Era Veterans Alliance to help her sense of self-worth. R. Ex. 2. Mr. McCauley testified that he and his wife worked together to form War Era Veterans Alliance but his wife is the owner. Tr. 254-55. He admitted that it was possible that he told SA Krieg that Respondent answered phones and scheduled classes for him. He admitted that he gave Respondent a phone, albeit for her personal use. He also admitted that calls for War Era Veterans Alliance would ring on the phone that he provided Respondent and she could answer if she chose to. Tr. 257-59, 282-83. He explained that he gave her a phone that was billed to him with all the other phones he used for his homes and offices. Tr. 284-85. He testified that he never paid Respondent but gifted her about $12,000 per year, which he understood to be the Internal Revenue Service limit at the time. Tr. 262-63, 277. He agreed that the "Michelle Vale" listed on the website (SSA Ex. 13 at 58) was his sister, Michelle Valent, but he testified that he had nothing to do with creating or maintaining the website. Tr. 264-64. He testified that War Era Veterans Alliance was not his company and he had nothing to do with paying staff, but he did not deny that he may have stated to SA Krieg that one War Era Veterans Alliance employee may have been paid in cash and that he would ensure that they were being paid legally in the future. Tr. 268-69. He testified that he was told by an SSA representative that it was permissible to give his sister money. Tr. 270. When asked about whether he gave his sister $400 per week or $12,000 per year, which would have been less than $400 per week, he testified that he may have been referring to giving Respondent $400 one week but he could not recall with certainty. Tr. 271-73, 278-79.

Respondent testified that she did not work for War Era Veterans Alliance and that she only trained one person on how to operate the telephones. She testified that she was given a phone to use at home by War Era Veterans Alliance but it was so she could reach

the McCauley's. She testified that she only answered as War Era Veterans Alliance when told to do so by Marianne McCauley, her sister-in-law and the owner. She testified that she did record the stories of some veterans that called. She denied that Mark McCauley gave her money but testified that he did pay some of her bills. She admitted that she did airport runs for the McCauley's. Tr. 206-52.

c. Analysis

The Board remanded to me to "make findings on factual issues necessary to resolve the case." *Valent*, DAB No. 2604 at 12. The Board directed:

> On remand, [I] should evaluate the evidence, including the testimony, to determine whether Respondent knew or should have known that the information she withheld from SSA was material to SSA's determination of her right to receive benefits or to the amount of benefits she received and that the withholding of the information was misleading.

Id. at 13. The Board said:

> In any event, the ALJ found that Respondent had notice she should report her work. ALJ Decision at 14. Notice of the requirement to report work is relevant in determining whether Respondent knew or should have known that her work was material and that withholding information about her work would be misleading, but such notice is not determinative of these issues.

Id. at 12. The Board directed that if I conclude that Respondent knew or should have known that the information she failed to report, i.e. her work activity for War Era Veterans Alliance, was material to the determination of her right to continue to receive benefits or the amount of benefits and that her withholding of the information from SSA was misleading, the Board directed that I consider:

> - *Whether the SSA IG has established the duration of the period for which CMPs and assessments may be imposed.*
>
> - *Whether the SSA IG has shown that the CMP amount is reasonable based on the factors in the regulations.*

Id. at 13-14.

In my prior decision I concluded that, despite Respondent's protestations to the contrary, she did work for War Era Veterans Alliance. Respondent and Mark McCauley admitted in testimony that Respondent answered the phone for War Era Veterans Alliance and she did some scheduling, at least occasionally. Therefore, I concluded that Respondent did engage in some work activity for the benefit of War Era Veterans Alliance. I further concluded that the preponderance of the evidence does not show whether Respondent was actually paid for her work or that she only received gifts from her brother, Mark McCauley unrelated to work at War Era Veterans Alliance. I concluded that the evidence also does not show that Respondent's work rose to the level of "substantial gainful activity;" or when and how frequently gainful work activity was actually performed by Respondent. I stated "[i]t is not necessary to resolve these specific fact issues given the decision in this case." *Valent*, DAB CR3261 at 14. Perhaps my choice of the term "resolve" created confusion. My intent was to convey that I did not need to resolve the case against the SSA IG on these fact issues, i.e. decide the case, based on the conclusions that the preponderance of the evidence did not show substantial gainful activity; when substantial gainful activity was actually performed; and whether Respondent had earnings based on work activity or whether she received gifts. In my prior decision, I concluded that the SSA IG was proposing a CMP and assessment based on unreported work activity. However, work activity could not be a material fact because in section 221(m)(1) of the Act Congress prohibited the Commissioner from considering work activity in the case of a 24-month DIB beneficiary, which Respondent was. I noted that section 221(m)(2)(B) of the Act permitted the Commissioner to consider earnings and substantial gainful activity in the case of a 24-month DIB beneficiary. *Valent*, DAB CR3261 at 17 n.6. My opinion in that regard is not changed – earnings and substantial gainful activity are arguably material facts in the case of a 24-month DIB beneficiary and failure to report earnings and substantial gainful activity could be a basis for the imposition of a CMP and assessment under section 1129(a) of the Act. However, the fact remains that the SSA IG did not notify Respondent as required by 20 C.F.R. § 498.109, or allege before me that failure to report substantial gainful activity and/or earnings was the basis for the proposed CMP and assessment. Because the Board concluded that work activity can be a material fact in the case of a 24-DIB beneficiary and the SSA IG did not notify Respondent that earnings or substantial gainful activity were the material facts not reported, whether or not Respondent had earnings or engaged in substantial gainful activity (with or without earnings) are not relevant to the issue of liability for a CMP and assessment.

The issues specified by the Board are considered in the order they appear in the Board's remand decision.

- *Whether Respondent knew that failure to report work activity was failure to report a material fact and that failure to report was misleading.*

The SSA IG bears the burden to show by a preponderance of the evidence the statutory or regulatory basis for the imposition of a CMP and assessment. 20 C.F.R. § 498.215(b)(2), (c). The elements the SSA IG must prove under section 1129(a)(1)(C) of the Act are:

> 1. Respondent omitted from a statement or representation, or otherwise withheld disclosure of a fact or facts;
>
> 2. Respondent knew or should have known that the fact or facts omitted or withheld were material to the determination of any initial or continuing right to or the amount of monthly insurance benefits under title II or benefits or payments under title VIII or XVI; and
>
> 3. Respondent knew or should have known that the statement or representation with such omission was false or misleading or that the withholding of such disclosure was misleading.

The wording of 20 C.F.R. § 498.102(a)(3) is slightly different than that of section 1129(a)(1)(C) of the Act, but the elements the SSA IG must prove are the same.

Regarding the first element, the evidence shows that Respondent did engage in work activity for War Era Veterans Alliance. There is no dispute that Respondent did not disclose her work activity for War Era Veterans Alliance to SSA. My prior findings were not disturbed by the Board. *Valent*, DAB CR3261 at 7, 14, 16; *Valent*, DAB No. 2604 at 7. The period or periods of such work activity will be discussed in more detail later.

The second element is whether Respondent knew or should have known that the fact she did work activity for War Era Veterans Alliance was material to any initial or continuing right to or the amount of DIB benefits. Respondent was a 24-month DIB beneficiary, a fact that is not subject to dispute and only Respondent's continuing right to benefits is at issue. The second element requires proof by a preponderance of the evidence that Respondent knew when she failed to report her work activity to SSA that that work activity was material, that is that it could be considered by the Commissioner with regard to Respondent's continuing entitlement to benefits. In my prior decision, I concluded that, as a matter of law, Respondent could not know and should not have known her work activity was material because it was not a fact the Commissioner could consider in determining continuing entitlement by virtue of section 221(m)(1) of the Act. Based on the Board's contrary conclusion it is necessary to look at the law and evidence to determine whether Respondent either knew or should have known that her work activity was material.

I had no trouble concluding that Respondent had at least constructive knowledge of her obligation to report her work activity to SSA. The applicable regulation provides:

> (a) Your responsibility to report changes to us. If you are entitled to cash benefits or to a period of disability because you are disabled, you should promptly tell us if—
>
> (1) Your condition improves;
>
> (2) You return to work;
>
> (3) You increase the amount of your work; or
>
> (4) Your earnings increase.
>
> (b) Our responsibility when you report your work to us. When you or your representative report changes in your work activity to us under paragraphs (a)(2), (a)(3), and (a)(4) of this section, we will issue a receipt to you or your representative at least until a centralized computer file that records the information that you give us and the date that you make your report is in place. Once the centralized computer file is in place, we will continue to issue receipts to you or your representative if you request us to do so.

20 C.F.R. § 404.1588.

The Act defines "material fact" as a fact "which the Commissioner of Social Security may consider in evaluating whether an applicant is entitled to benefits under title II or title VIII, or eligible for benefits or payments under title XVI." Act § 1129(a)(2). The regulation defines a "material fact" as a fact that "the Commissioner of Social Security may consider in evaluating whether an applicant is entitled to benefits under title II or eligible for benefits or payments under titles VIII or XVI of the Act." 20 C.F.R. § 498.101. Title VIII provides special benefits for certain World War II Veterans. Title XVI provides for SSI. Neither titles VIII or XVI apply in this case. Based on the statute and regulation, I also conclude that Respondent had constructive knowledge that a material fact is a fact the Commissioner may consider in evaluating whether an applicant is entitled to benefits. However, neither the definition in the Act or the regulation states that a material fact is a fact the Commissioner may consider in evaluating whether a beneficiary continues to be entitled to benefits. Accordingly, I cannot conclude that Respondent had constructive knowledge that a material fact would be a fact that may be considered related to her continuing eligibility for DIB benefits.

The Administrative Procedure Act requires publication of legislative rules adopted by federal agencies and, based on that publication the public has at least constructive, if not

actual knowledge of the requirements of the regulations. 5 U.S.C. §§ 552(a)(1), 553(d); 2 Am. Jur. 2d Administrative Law § 166 (2015). "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." 5 U.S.C. § 552(a)(1). Therefore, if the Commissioner properly published a regulation that stated that work activity is material to a determination of continuing entitlement, the conclusion that Respondent had constructive notice that work activity was material would be supported. However, there is no regulation in 20 C.F.R. pts. 404 or 498 that states that work activity is material. The SSA IG has provided me no citation to a regulation on which I could base a conclusion that Respondent had constructive notice that work activity was material to a determination of her continuing entitlement.[7] Therefore it is necessary to consider whether the SSA IG has presented evidence to show it is more likely than not that Respondent had actual and timely notice that her work activity for War Era Veterans Alliance was material to the issue of her continuing entitlement to DIB benefits.

The SSA IG offered copies of no documents created by, signed by, or allegedly received by Respondent related to Respondent's initial application for benefits in 2003 or her continuing disability review in March 2010. The documents the SSA IG did offer as evidence are signed and dated by Respondent on April 20, 2012, specifically SSA IG Exs. 8, 9, and 10. The documents admitted as SSA IG Exs. 8, 9, and 10, that were signed by Respondent on April 20, 2012, were executed by Respondent after the SSA IG had begun its investigation based on the allegation received in January 2012 from Alan Watt. The SSA IG arranged for Respondent to be interviewed by a SSA Claims Representative who had Respondent complete the forms. SSA Ex. 12 at 1. There is no evidence that Respondent was advised she was under suspicion for fraud during the interview by the SSA Claims Representative or that she was advised regarding the meaning of material or the potential for a CMP and assessment being imposed. I understand that advising Respondent that she was under suspicion may have been counterproductive from an investigator's perspective and in the administrative context arguably protections in the Bill of Rights against self-incrimination do not apply. The SSA documents show that the I.G. referred the matter to SSA for a CDR. SSA Ex. 1 at 3; SSA Ex. 12 at 1. As already

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[7] Of course, as already discussed, at least I was convinced that section 221(m)(1) of the Act actually provides to the contrary, i.e. that the Commissioner cannot consider the work activity of a 24-month DIB beneficiary as evidence of continuing entitlement.

discussed in detail, because Respondent was a 24-month DIB beneficiary a CDR based on work activity was prohibited by section 221(m)(1)(A) of the Act.[8]

The forms Respondent executed during the CDR did not give her actual notice that failure to report work activity was a "material" omission and misleading. The Form SSA-795 titled "Statement of Claimant or Other Person" that Respondent signed on April 20, 2012 states on the second page under "Privacy Act Statement"

> **Collection and Use of Personal Information**
>
> Section 205a of the Social Security Act (42 U.S.C. § 405a), as amended, authorizes us to collect the information on this form. We will use this information to determine your potential eligibility for benefit payments.
>
> Furnishing us this information is voluntary. However, failing to provide us with all or part of the requested information may affect our ability to evaluate the decision on your claim. We rarely use the information you provide for any purpose other than for determining entitlement to benefit payments. However, we may use the information you give us for the administration and integrity of our programs. We may also disclose information to another person or to another agency in accordance with approved routine uses, which include, but are not limited to, the following:
>
> 1. To enable a third party or an agency to assist us in establishing rights to Social Security benefits and/or coverage;
> 2. To comply with Federal laws requiring the release of information from our records (e.g., to the Government Accountability Office and the Department of Veterans' Affairs);
> 3. To make determinations for eligibility in similar health and income maintenance programs at the Federal, State, and local level; and,

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[8] Even if one viewed the CDR as being triggered by a failure to report work activity, arguably the CDR was based on work activity and transgresses the prohibition of section 221(m)(1)(A).

> 4. To facilitate statistical research, audit, or investigative activities necessary to assure the integrity and improvement of Social Security programs.
>
> We may also use the information you provide in computer matching programs. Matching programs compare our records with records kept by other Federal, State, or local government agencies. We use the information from these programs to establish or verify a person's eligibility for federally-funded or administered benefit programs and for repayment or incorrect payments or delinquent debts under these programs.

Above Respondent's signature on page 2 is the following declaration in bold as it appears here:

> **I declare under penalty of perjury that I have examined all the information on this form, and on any accompanying statements or forms, and it is true and correct to the best of my knowledge. I understand that anyone who knowingly gives a false or misleading statement about a material fact in this information, or causes someone else to do so, commits a crime and may be sent to prison, or may face other penalties, or both.**

SSA Ex. 8 at 2. The Privacy Act Statement does not mention or define the term "material fact." The Privacy Act Statement clearly states only one effect of failure to provide information, that is, failure to provide information may delay a timely decision regarding benefits. The Privacy Act Statement also states that the information used on the form is rarely used for any purpose other than determining entitlement to benefit payments. The statement "we may use the information you give us for the administration and integrity of our programs" may be recognized by one employed by SSA, an attorney, or law enforcement as a threat to use the information provided or not provided against the person who completes the form in the interest of program integrity. But a reasonable lay person exercising reasonable diligence in reading and understanding the form is unlikely to get that vague reference. Similarly, the statement in item 4 of the Privacy Act Statement states that routine uses of the information provided is investigative activities necessary to assure the integrity and improvement of Social Security programs. The statement in item 4 is another vailed reference to the fact that SSA intends to use false information or omitted information for criminal prosecution or as the basis for imposing a CMP or assessment to ensure program integrity. The declaration statement does not include the words "and complete" and does not mention omission of a material fact. Therefore the form does not give one notice that omitted facts may be the basis for criminal action or administrative penalties. The declaration statement does use the term

"material fact" but it does not define or describe what constitutes a material fact. I conclude that a person of reasonable intelligence exercising reasonable diligence in reading and attempting to understand the warnings on this form could not determine what is "a material fact" or that the omission or failure to report a material fact could result in the imposition of administrative penalties. Therefore, this form did not provide Respondent actual notice of what constituted a material fact or that omission of a material fact could result in criminal or administrative penalties.

Respondent completed a Form SSA-821-BK titled "Work Activity Report – Employee" on April 20, 2012. SSA Ex. 9. The copy of the form offered by SSA as evidence does not include the Privacy Act Statement such as that printed on the Form SSA-795. The SSA-821 does include the same declaration statement that appears on the Form SSA-795 (SSA Ex. 8). SSA Ex. 9 at 7. For the reasons already discussed, the declaration statement does not provide Respondent actual notice of what constituted a material fact or that omission of a material fact could result in criminal or administrative penalties.

Respondent completed a Form SSA-464-BK titled "Continuing Disability Review Report" on April 20, 2012. The copy of this form placed in evidence does not have a printed Privacy Act Statement, a declaration statement, or a signature line for the disabled person. The word material does not appear on the form. SSA Ex. 10. Because material fact is not a term used, it is not explained. Therefore the form does not provide Respondent actual notice of what constituted a material fact or that omission of a material fact could result in criminal or administrative penalties.

The three forms could have and should have explained to the beneficiary or claimant in plain language that is easy for even a cognitively impaired person or a representative payee to understand, the following:

- What is considered to be work activity;
- That a change in medical condition, any work activity or change in work activity, earnings of any amount or a change in earnings must all be reported to SSA as required by the regulation (20 C.F.R. § 404.1588);
- The method for reporting and how quickly reporting must occur;
- That these facts are all considered to be material because they may be considered by SSA in determining entitlement or continued entitlement to benefits; and
- That failure to report these facts, incorrectly reporting these facts, or falsely reporting these facts may result in criminal prosecution or the imposition of civil penalties including a CMP for each false statement of fact or for each month in which the claimant or beneficiary failed to report the facts or an assessment of twice the amount of any benefits received.

I am confident that the SSA regulation and form drafters can be even more precise than I and create text that gives claimants and beneficiaries actual notice of what is required and what sanctions they are subject to for false, incomplete, and erroneous responses. The Form SSA-795 (SSA Ex. 8 at 2) for example includes more than half a page setting forth the Privacy Act Statement but similar care was not exercised to ensure that claimants and beneficiaries completing the form understood exactly what information was required, e.g., work or work activity and what is included, earnings as defined by the regulations, substantial and gainful activity compensated or uncompensated; the ramifications, including criminal and administrative sanctions, of making errors, intentional or not, in completing the information requested by the form or failure to disclose all requested information. The oversight in providing adequate notice is inexcusable and unjust particularly when the SSA IG then attempts to rely upon those unclear and confusing forms to attempt to impose large CMPs and assessments against beneficiaries for their erroneous and incomplete responses. The oversight also fails to ensure protection of the Social Security Trust Fund because the SSA Commissioner is not receiving all the information from beneficiaries needed to ensure benefits are not inappropriately paid.

The SSA IG also provided copies of notices to Respondent dated December 5, 2012 and January 14, 2013. SSA Ex. 3. The December 5, 2012 notice advised Respondent that SSA had reviewed her work record to determine whether she continued to be eligible for disability payments. This is a clear statement that SSA was conducting a CDR based on reported work activity, arguably a violation of the prohibition of section 221(m)(1)(A) of the Act. The letter invited Respondent to provide more information about her work activity. The letter gave Respondent ten days to respond and advised that SSA may suspend her disability payments based on information SSA had at that time. The letter falsely states that SSA records of Respondent's earnings showed she started working for War Era Veterans Alliance in September 2008 and that Respondent continued to work there. SSA Ex. 3 at 2. In fact, there is no evidence in the record of any reported earnings for Respondent from September 2008 through the date of the letter. The letter did not state that the only evidence of earnings was collected by the SSA IG investigators in interviews with various witnesses. The letter did not mention the investigation or provide an explanation of the term "material fact" or the potential ramifications of failure to report a material fact. SSA Ex. 3 at 1-5.

The January 14, 2013 letter advised Respondent that SSA decided that Respondent was no longer disabled and not entitled to DIB benefit payments beginning September 2009. The letter further advised that SSA had determined that because Respondent had substantial earnings during her extended period of eligibility from September 2009 through May 2012, she was not entitled to any benefit payment for any month during that period. The letter advised Respondent that she was overpaid benefits in the amount of $52,938.90. SSA Ex. 3 at 6-11. SSA IG sent Respondent a similar letter dated January 14, 2013, regarding to an overpayment of benefits to her daughter. SSA Ex. 3 at 12-16.

Neither letter dated January 14, 2013, discussed the term "material fact" or the potential ramifications of failure to report material facts.

I conclude that letters from SSA to Respondent dated December 5, 2012 and January 14, 2013, did not give Respondent actual notice of what constituted a material fact or that omission of a material fact could result in criminal or administrative penalties.

Respondent does not concede that she knew what work had to be reported, what was a material fact, or that she was subject to criminal or administrative penalties for failure to report a material fact.

In his prehearing brief, the SSA IG sets forth the elements that the SSA IG must prove by a preponderance of the evidence to impose a CMP or assessment under section 1129(a)(1). The SSA IG included the element that the person who withheld or omitted to report information either knew or should have known that the omitted fact was material and that its omission was misleading. SSA Prehearing Brief (SSA PHB) at 11. The SSA IG alleges that Respondent knowingly withheld material information, but fails to address how Respondent knew the information withheld was material. The SSA IG argues that Respondent knew of her duty to report work, which is not at issue because the regulation gave at least constructive knowledge of the duty even absent evidence that Respondent had actual knowledge based on various publications or documents which SSA mentions in briefing but did not offer as evidence. [9] The SSA IG argues that Respondent's work activity for War Era Veterans Alliance was material, but does not point to any evidence that Respondent had actual or constructive knowledge that her work activity was material. SSA PHB at 11-15.

In his post hearing briefing the SSA IG again assured me that Respondent was told she must report work activity. SSA called my attention to the SSA policy, Program Operations Manual System (POMS), which directs SSA staff in the receipt and

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[9] SSA failed to offer as evidence the various publications discussed in its briefs and did not request judicial notice (see e.g. Fed. R. Evid 201). Because the publications to which the SSA IG referred were not promulgated as regulations, they are not law and the publications must be offered so that Respondent may review and object or present conflicting evidence. I note that in some cases the SSA IG refers to publications implying that they apply or were delivered to Respondent without any evidence that those publications even existed when Respondent was granted benefits in 2003, in 2010 when she was subject to a CDR, or during the period when she failed to report work activity, September 2009 through January 2013.

processing of disability claims. SSA Br. at 2-3; SSA Reply at 3-4. The POMS provisions cited and described by the SSA IG and the presumption that such provisions are routinely implemented by SSA staff, is some evidence that Respondent was given actual notice of her duty to report work activity. The SSA IG also pointed to 20 C.F.R. §§ 404.1571, 404.1572, and 404.1573 to show that Respondent had at least constructive knowledge of her duty to report work – a legal conclusion with which I agree. The SSA IG also argues that Respondent was given a certain publication explaining her duty to report work activity when she was notified of the award of benefits in 2003. SSA makes this assertion without citing any evidence in support of the assertion and no copy of the publication has been placed in evidence. SSA argues that Respondent admitted in her testimony that she was aware of the requirement to report work activity. Respondent admitted that every year she received forms from SSA to complete and that every three or four years she had to go to the SSA office, but she did not state that the forms required reporting work activity or that she understood from the forms that she was required to report work activity. SSA has presented no evidence of what forms were actually sent to Respondent on an annual basis. Of course, I have concluded that Respondent had at least constructive notice of the obligation to report work activity so the failure to present the additional evidence did not prejudice the SSA IG. The SSA IG also points to the forms completed by Respondent on April 20, 2012, which I have already analyzed in detail. SSA Exs. 8, 9, 10; SSA Br. at 2-6; SSA Reply at 4-6. None of the evidence on which the SSA IG relies shows that Respondent had actual or constructive knowledge that work activity is a material fact or the ramifications of failure to report such a material fact. The SSA IG argues that Respondent knowingly withheld material information and that she knew or should have known that withholding the material information was misleading. SSA Br. at 10-11. I found in my first decision that Respondent did work activity for War Era Veterans Alliance based on the evidence summarized above. Respondent certainly did not report that work activity on SSA Exs. 8, 9, and 10 during the continuing disability review completed in April 2012. The SSA IG failed in his post hearing brief to point to evidence or regulations to show that Respondent had actual or constructive knowledge that her work activity for War Era Veterans Alliance was a material fact that she was required to report and the ramifications of failure to report that work activity.

In his brief on appeal (SSA App.), the SSA IG also refers to the "SSA Red Book" from 2014 as evidence of Respondent's obligation to report work activity. The SSA IG has not offered the 2014 "SSA Red Book" as evidence, and the relevance of that particular document is subject to question given that Respondent was granted disability in 2003, her first CDR was in 2010, her second CDR was in 2012, and her entitlement ended in 2012. Because the "SSA Red Book" is not promulgated as a regulation it does not have the force of law under the Administrative Procedure Act. Furthermore, SSA does not argue that Respondent was provided a copy of any version of the "SSA Red Book" or that it provided Respondent actual knowledge that work activity is a material fact or the ramifications of failure to report that material fact. SSA App. at 3. SSA argued on appeal that Respondent's work activity was material, but does not explain how

Respondent had actual or constructive knowledge that her work activity was a material fact that required reporting or the ramifications of omission of that material fact. SSA App. at 4-5.

Following remand I requested the parties to submit proposed findings of fact, conclusions of law, and briefs addressing the issues raised by the Board. The SSA IG filed proposed findings of fact and conclusions of law on March 24, 2015 and, on June 1, 2015, waived the right to file a reply to Respondent's submissions. The SSA IG proposed that I conclude that "Respondent received notice of her reporting responsibilities regarding work activity which is relevant in determining whether Respondent knew or should have known that her work was material." The SSA IG cites to the pages of its briefings that I have already discussed. Therefore, the SSA IG's proposed findings of fact and conclusions of law provide no further enlightenment on the issue of whether Respondent had actual or constructive knowledge that work activity is a material fact the omission of which is misleading subjecting her to administrative penalties.

The SSA IG bears the burden to show by a preponderance of the evidence the statutory or regulatory basis for the imposition of a CMP and assessment. 20 C.F.R. § 498.215(b)(2), (c). The elements the SSA IG must prove under section 1129(a)(1)(C) of the Act include the requirement to show that Respondent knew or should have known that her failure to report that she engaged in work activity for War Era Veterans Alliance was the omission or withholding of a fact that was material to the determination of her continuing right receive DIB benefit payments. The SSA IG failed to meet its burden to show this element.

The SSA IG also failed to establish the third element by a preponderance of the evidence, that is:

> Respondent knew or should have known that the statement or representation with such omission was false or misleading or that the withholding of such disclosure was misleading.

Under section 1129(a)(1)(C) it is not enough for the failure to report a fact to be misleading, the person who omitted to report the fact must have known, or should have known, that the omission of the information from a statement or representation or the failure to disclose was misleading. Respondent has not conceded that she knew that failure to report her work activity for War Era Veterans Alliance was misleading. The SSA IG has not pointed to evidence that Respondent knew or should have known that the failure to report her work activity for War Era Veterans Alliance was misleading with regard to a possible determination as to her continuing entitlement to her DIB payments or with regard to any other determination by SSA.

There are at least two possible explanations, pertinent to this case, for why Respondent did not report her work activity for War Era Veterans Alliance when she completed the documents marked SSA Exs. 8, 9 and 10 during the continuing disability review on April 20, 2012, or at any other time between September 2009 and January 2013, either:

> 1. Respondent did not actually know that her work activity met some definition of work activity that had to be reported either on those forms or in another fashion such as by telephone or in person; and thus, she would not have known, and it cannot be concluded she should have known, that failure to report that work activity was misleading; or
>
> 2. She actually knew that her work activity should be reported on those forms, by telephone, in person or in some other fashion, but she did not report, from which fact I could infer that she knew or should have known that the omission of the information was misleading.

The SSA IG must prove the second explanation or a similar explanation by a preponderance of the evidence, that is, the evidence must show it was the more likely explanation of the two. Respondent cannot argue that she did not have at least constructive or imputed knowledge that work activity should be reported, for as already discussed in detail publication of the requirement to report work in the regulations constitutes constructive knowledge for the public.

However, Respondent also argues that she did not recognize that her efforts for War Era Veterans Alliance was actually work activity that was required to be reported. Respondent's assertion that she did not understand that her activities constituted work activity that was required to be reported has an air of credibility. Respondent testified at hearing. My assessment of Respondent was that she displayed above average intelligence, though she may have been distractible and her attention span was clearly limited. Her mental impairments and psychotropic medications might have some impact upon her ability to understand or comprehend as Respondent argues (R. Br.; R. Exs. 1, 2; R. Remand Br.; R. Remand Reply; R. Exs. 1, 2, 3 on Remand). The impact of medications was not readily apparent at hearing. Further, I have no medical evidence and no expert medical opinion on which to base a finding that her mental impairments and medication either did or did not affect her ability to understand.

There is no dispute that the SSA regulations do not provide a definition of work of which Respondent may be presumed to have constructive knowledge and against which Respondent could be required to compare her activities for War Era Veterans Alliance. *Valent*, DAB No. 2604 at 3. The regulations state that any work, whether legal or not, may show that one is able to work at the substantial gainful activity level, in which case it may be determined that a person is not disabled. 20 C.F.R. §404.1571. The regulation does not explain what activity constitutes work, though it does provide an explanation for

how work is considered by SSA. The regulation also indicates that criminal activity may be work activity. The regulation creates some confusion as to whether all work activity needs to be reported. For example, 20 C.F.R. § 404.1572(a) and (b) provide the following definitions:

- "Substantial gainful activity" is work activity that is both substantial and gainful.
- "Substantial work activity" is work involving significant physical or mental activity.
- "Gainful work activity" is work of the kind that is usually done for pay or profit whether or not there is actual pay or profit.

The regulation provides that not all work activity need be reported, even if it could be characterized as substantial and gainful. The regulation states that, generally hobbies, activities of daily living, household tasks, club activities, school attendance, and social programs are not considered substantial gainful activity. 20 C.F.R. § 404.1572(c); Social Security Ruling 83-33: *Titles II and XVI: Determining Whether Work Is Substantial Gainful Activity –Employees.* Under these regulations tying flies for your brother to use for fishing might be a hobby that need not be reported as work activity. But, if you tie lots of flies that your brother uses in his professional guide business or that you give or sell to tourists during fishing season, even if as part of your medically prescribed therapy, SSA may consider it work activity that needs to be reported, even if you do not receive any money for the flies or your labor and even if you are stealing the parts or killing protected species to obtain the materials.

The forms Respondent completed on April 20, 2012, also do not clearly state what she was to report. SSA Exs. 8, 9, 10. SSA Ex. 8 is a statement of Respondent that she has not worked since 2004. The statement does not elaborate on what Respondent intended. The Work Activity Report (SSA Ex. 9) asks that Respondent describe her work activity since March 25, 2003. SSA Ex. 9 at 1. Question 1 on the form asks whether Respondent had any employment income or wages since March 25, 2003. Question 2 asks Respondent if she did not work, what other income she may have had. Question 3 asks Respondent to tell about work but then asks questions about her employer which presumes her work activity was as an employee. Question 4 asks about payments or benefits from an employer. Question 5 asks about special conditions related to jobs done with the employers listed under question 3. Question 6 also asks about employers listed in question 3. Question 7 asks about unreimbursed work related expenses. The form includes no definition of "work" or "work activity" or asks questions about work activity other than that done as an employee. SSA Ex. 9. The Continuing Disability Review Report, section 4, asked Respondent whether she had worked since her last medical disability decision. No definition or explanation of what constitutes work is provided. SSA Ex. 10 at 2. Section 9 of the form asked questions about vocational rehabilitation,

employment, or other support services, but it does not define work or other terms that would not be familiar to people not regularly involved with the SSA disability program. SSA Ex. 10 at 9-10.

SSA is required to show it is more likely than not that Respondent knew or should have known that her failure to report her work activity for War Era Veterans Alliance was misleading. Based on my review of the regulations and the forms Respondent completed on April 20, 2012, I conclude that it was more likely than not that Respondent did not understand that her failure to report her work activity with War Era Veterans Alliance was misleading. The forms that Respondent completed do not specifically describe what activity is considered to be work activity and must be reported as such. The Work Activity Report form is confusing in that it requests employer information rather than a listing and description of work activity. SSA Ex. 9. The regulations seem to require the reporting of all work activity, but then provide that some work activity need not be reported even if it is activity that is both substantial and gainful. In light of the lack of clarity in the regulations and the form, in the absence of some evidence that Respondent was actually told to report all work activity, whether legal or illegal, for pay, profit, with or without benefits; I will not infer that Respondent knew that her failure to report her work activity with War Era Veterans Alliance was misleading.

I conclude that the preponderance of the evidence does not show that Respondent knew or should have known that the withholding of the information about her work activity for War Era Veterans was misleading.

Accordingly, I conclude that the SSA IG has failed to establish a basis for the imposition of a CMP or assessment.

- *Whether the SSA IG has established the duration of the period for which CMPs and assessments may be imposed.*

Although the Board may resolve this case on the basis that work activity for a 24-month DIB beneficiary is not material and, therefore, not a basis for the imposition of a CMP and assessment; or that the SSA IG failed to prove that Respondent knew that work activity was a material fact she omitted to report; or that the Respondent did not know her failure to report was misleading; I address the additional two issues directed by the Board in its remand decision.

It is important to note that the September 12, 2013, report of Deborah Buchholz is Ms. Buchholz's summary and view of the evidence. SSA Ex. 12. Ms. Buchholz's report is not based on her direct observations or discussions with witnesses, but her report suggests that she reviewed many if not all the same documents presented to me as evidence. Ms. Buchholz did not testify at hearing. Her interpretations of the facts, factual findings, and conclusions are not binding upon me as my review is de novo.

However, Ms. Buchholz' determination and the evidence upon which she relied is clearly the basis for the SSA IG's determination to impose the CMP and assessment in this case. Ms. Buchholz determined that Respondent began working for War Era Veterans Alliance on September 1, 2008; that Respondent received pay of $400 per week, an average of $1,733.33 gross pay per month; and that the Respondent's earnings were substantial gainful activity. Ms. Buchholz determined that Respondent was entitled to a Trial Work Period of nine months beginning September 2008 and continuing through May 2009. Entitlement to DIB benefit payments ceased in June 2009, with Respondent's last check in August 2009. SSA Ex. 12 at 8. Ms. Buchholz relied upon the January 2012 allegation of Alan Watt that Respondent was working. Ms. Buchholz also considered the documents Alan Watt submitted that include a picture and a biography for Respondent that indicated she worked for War Era Veterans Alliance for four years, both of which were printed from the War Era Veterans Alliance website; and email purportedly from Respondent while working for War Era Veterans Alliance. Ms. Buchholz indicates in her Special Determination that Alan Watt reported to the SSA IG that Respondent made $10 to $15 per hour; she worked full-time or close to full-time, either from the office in Michigan or from home; Respondent was paid in cash; Mr. Watt started working for War Era Veterans Alliance in May 2009 and Respondent was already working there; he reported that another employee told him he or she started around September 2008, which was when Respondent was hired; and his last contact with Respondent was around April 18, 2011 when he quit. SSA Ex. 8 at 2-3. Ms. Buchholz states she considered statements and forms collected from Respondent on April 20, 2012; and the report of contact by Ms. Moua that records her telephone call to War Era Veterans Alliance on April 30, 2012, and her conversation with Bridgette in which Bridgette indicated that Respondent was on the phone with a customer at the time; that Respondent worked every day from open to close and that Respondent was referred to as "Ms. Dependable." SSA Ex. 8 at 1-2. Ms. Buchholz relied on the reports of the SSA IG agents regarding their interviews. The SSA IG agents interviewed Jacquie Scalet at the office of War Era Veterans Alliance and June 8, 2012, who told them Respondent answered the phone from her residence; she did not know how many hours Respondent worked; Respondent had not worked in the office since spring 2011; and Respondent worked for War Era Veterans Alliance prior to 2010. Ms. Buchholz also relied on the statement of Aimee Konal, another employee of War Era Veterans Alliance obtained by SSA IG investigators on June 8, 2012, in which Ms. Konal stated she worked for War Era Veterans Alliance off and on for over two years; Respondent worked with her in the beginning; she did not know how many hours Respondent worked or her pay but believed in the beginning it was up to 32 hours per week at $8 to $10 per hour; and Respondent worked at home since possibly June 2011. SSA Ex. 8 at 8. Apparently, Ms. Buchholz did not treat as credible the statements of Respondent to the SSA IG agents that she did not work for War Era Veterans Alliance; she only did some training a year prior; answered the phone a few times; and she filled-in for another employee two or three times per week for a couple hours in 2010.

Ms. Buchholz also did not credit the statements of Mark McCauley that Respondent was not an employee; Respondent had no set hours; answered the phone when she wanted; she scheduled people for his financial class but he was unsure how often she answered the phone or actually worked; and that he gave her gifts of money because she was his sister and he was taking care of her. SSA Ex. 8 at 3-7. The SSA IG report included printed copies of webpages with the web address wareravet.com, printed on June 7, 2012. A biography for "Michelle Vale" on the webpage, that Respondent "has been taking calls and managing all War Era Veterans Alliance calendars for over four years." SSA Ex. 13 at 58; Tr. 146-48. The evidence does not show who wrote the biography for Respondent or who posted to the website. Respondent denies that the biography is accurate. Tr. 222. I give the statement from the website no weight as the author is not known and was not subject to cross-examination to test the accuracy of the statement. It is well-known in our society that almost anything can be posted on a website, and the mere fact that something can be found on the internet does not weigh in favor of credibility.

The SSA IG presented printed copies of a LexisNexis report dated March 12, 2012. SSA Ex. 6. The report shows that as of February 2012, Respondent shared an address with Scott Valent (Respondent's husband) and Pauline Brooks at 47066 Sanborn Drive, Macomb, Michigan. Respondent was listed as the sole occupant of the same address in April 2006. Deed records show that Respondent purchased 47066 Sanborn Drive in May 1999. According to the report Respondent was residing at 49795 Julia Drive, Macomb, Michigan in November 2011, with Chadd Valent and Scott Valent. Michigan Deed records show that Respondent purchased the property at 49795 Julia Drive with Scott Valent in July 2004. Respondent was listed as residing at a different address in September 2003, when she was reported to reside with Pauline Brooks and Scott Valent. Respondent had a valid vehicle operator's license issued by the State of Michigan. According to the March 2012 LexisNexis report, Respondent owned a 20-year-old Cadillac Deville, which she titled with Chadd Valent in September 2009. In 2008, Respondent was the registered owner of a 1993 Dodge pickup truck. In 2001, she was registered as co-owner with Scott Valent of a 2000 Grand Caravan minivan. In 2009 and 2003, there is a record of civil judgments being filed in the amounts of $1,941 and $3,667, respectively, by creditors. SSA Ex. 6. Respondent's registered vehicles show she was not spending excessively for new lavish vehicles. I can discern nothing from the registered real estate ownership without some evidence of the mortgage, tax, and other payments associated with those properties; and in the case of the co-ownership with Scott of 49795 Julia Drive, his contributions. The SSA IG offered no bank and investment records, no credit records, no tax records, or other financial records for Respondent from which I might be able determine when Respondent had earnings or income, even unreported income.

The SSA IG presented the sworn statement of Aimee Konal to SA Amaro. SSA Ex. 7. Neither Aimee Konal nor SA Amaro were called to testify by the SSA IG and they were

not subject to cross-examination.[10] The SSA IG did elicit testimony from SA Krieg about the interview of Ms. Konal by SA Amaro, but SA Krieg was not present at that interview and she had no detail beyond the written statement, so her testimony added nothing to the probative value of the statement. Tr. 107-08. Ms. Konal stated that she began working for War Era Veterans Alliance two years prior to her statement which was taken on June 8, 2012. Ms. Konal stated that Respondent worked with her in the office in the beginning. Ms. Konal initially stated that she believed Respondent worked at least part-time and she did not know Respondent's rate of pay. At the end of the statement however, Ms. Konal speculated that Respondent may have been earning $8 to $10 per hour for up to 32 hours per week. Ms. Konal stated that Respondent had been working from home for the past year, possibly since June 2011. SSA Ex. 7. I have no reason to doubt that Ms. Konal is a credible person. However, her statement is clearly speculation regarding the rate of pay for Respondent and the hours she worked. Ms. Konal's statement also lacks detailed facts upon which I could base findings about which months Respondent actually worked between 2010, when Ms. Konal was first employed, and 2012, when her statement was taken. Ms. Konal's statement really only supports my finding from my prior decision that Respondent engaged in some work activity for War Era Veterans alliance. SA Brian Reitz's Report of Investigation for June 8, 2012, reports on the taking of the statement of Aimee Konal, and raises significant concern about the credibility of her statement. For example SA Reitz reports that Aimee Konal told him and SA Amaro that she only worked for War Era Veterans Alliance off and on for two years, a couple days per week and only four and one-half hours per day. SSA Ex. 1 at 10. These facts, which were omitted from Ms. Konal's statement, are significant because they reflect Ms. Konal's very limited ability to actually witness Respondent's work activity and her knowledge of the number of hours Respondent worked and her rate of pay. Accordingly I give little weight to Ms. Konal's sworn statement or the investigator's report regarding the taking of that incomplete statement, which also taints the reliability of the investigator's report.

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[10] Fact and expert witnesses are called to testify, not only to permit the opposing party an opportunity to cross-examine, but to permit the fact finder to judge the credibility of the witness in responding to both direct and cross-examination. The fact finder's opportunity to judge credibility is greatly impaired when a witness is not called and a party attempts to rely upon an affidavit or declaration, or in this case the testimony of an individual who did not even witness the out-of-court statements. Calling witnesses to testify before the fact finder is no less important in the context of administrative hearings than it is in criminal and civil proceedings, only the quantum of credible evidence required is different. Failure to call witnesses whose direct observations and perceptions are necessary to establish an element of a party's prima facie case is a serious error.

The SSA IG presented an unsworn and unsigned statement of Ms. Moua on a Report of Contact Form SSA-5002 dated April 30, 2012. Ms. Moua recorded that she called War Era Veterans Alliance on April 30, 2012 and spoke with Bridgette. Ms. Moua states that when she asked to speak with Respondent, Bridgette stated that Respondent was on the phone with a customer and Ms. Moua would need to leave a message on Respondent's answering machine. Ms. Moua recorded that Bridgette stated that Respondent worked every day from open to close. Ms. Moua concluded on this limited information that Respondent was working for her brother Mark McCauley. SSA Ex. 11. SA Krieg testified about a conversation she had with Ms. Moua in which Ms. Moua told SA Krieg about her telephone conversation with Bridgette. Tr. 91-92, 94-95. Ms. Moua and Bridgette were not called to testify as witnesses by the SSA IG, which has a significant negative impact upon the weight to be given this triple hearsay. If called to testify as witnesses Ms. Moua and Bridgette could only testify under oath or affirmation. 20 C.F.R. § 498.216(a). Ms. Moua and Bridgette were not called to testify, their statements in SSA Ex. 11 are unsworn, and they were not subject to cross-examination. I conclude that their unsworn statements are entitled to no weight. Although 20 C.F.R. § 498.216(b) permits me to receive witness testimony in writing, that section does not create an exception to the requirement of 20 C.F.R. § 498.216(a) that testimony be under oath or affirmation. Accepting and giving weight to unsworn statements in lieu of live testimony under oath, would violate the clear purpose of requiring that testimony be given under oath or affirmation. Furthermore, the fact that SA Krieg relied on information about the communication between Ms. Moua and Bridgette and then SA Krieg testified about the conversation between Ms. Moua and Bridgette lends no credibility to the hearsay, as SA Krieg did not witness the conversation and is merely relying upon the unsworn statement of Ms. Moua.

The SSA IG presented as evidence the affidavits of RAC Lowder (SSA Ex. 17) and SA Krieg (SSA Ex. 16). Neither affidavit states findings as to when Respondent began working for War Era Veterans Alliance or what months if any the investigators determined Respondent worked between September 2009 and January 2013, how many hours she worked, or how much she was paid. Similarly, the Reports of Investigations by SA Krieg placed in evidence by the SSA IG reflect no findings by the investigators as to when Respondent began working for War Era Veterans Alliance, what months Respondent worked, or how much she earned between September 2009 and January 2013. SSA Ex. 1 at 1-8, 11-26. RAC Lowder and SA Krieg testified consistent with the IG investigative reports. Tr. 45, 86. RAC Lowder admitted that the SSA IG failed to enforce the I.G. subpoena issued to obtain records of War Era Veterans Alliance, if any, related to Respondent. SA Krieg admitted that the SSA IG did not attempt to subpoena any bank records and did not seek enforcement of the subpoena served on War Era Veterans Alliance. Tr. 64-68, 106, 121, 143.

SA Krieg and RAC Lowder both testified about their June 8, 2012 visit to the War Era Veterans Alliance office where they met Jacquie Scalet, upon whom they served the

subpoena and who told them that Respondent used to work in the office answering phones but for the past year, starting in the spring 2011, Respondent worked from home. Ms. Scalet told them she started working for War Era Veterans Alliance in 2010 and Respondent already worked there. Ms. Scalet declined to answer further questions. Tr. 52-54, 106-07. The agents' testimony and reports do not show that Ms. Scalet told them how often or how much Respondent worked. Ms. Scalet's statements to the agents support a finding that Respondent was doing some work for War Era Veterans Alliance, which I find credible because it is consistent with other evidence.

RAC Lowder and SA Krieg interviewed Respondent on June 8, 2012 at 11:23 a.m. During the interview Respondent admitted to training some people and answering the phone a few times for the business a year ago (June 2011). She admitted that she filled-in answering phones when employees were sick. Respondent also admitted training Adrianne Watt approximately two years prior (June 2010) or maybe 2011. Respondent told the agents that she had been at the War Era Veterans Alliance office in 2010 when she filled in for Adrianne Watt for approximately two or three times a week for a couple hours at a time. But that she had not been at the War Era Veterans Alliance since she filled in for Ms. Watt in 2010. SSA Ex. 1 at 13; Tr. 54-59, 110-15; SSA Ex. 1 at 14-15. Mark McCauley told SA Krieg during his interview that Respondent did answer the phone and do some scheduling for War Era Veterans Alliance, he gave her $400 per week, but she did not work for War Era Veterans Alliance. Tr. 116-17; SSA Ex. 1 at 15-17.

Alan Watt filed the complaint alleging Respondent was committing fraud. The SSA IG presented his unsworn letter and attachments. Mr. Watt alleges no specific date when Respondent began working for War Era Veterans Alliance in his letter. SSA Ex. 15. He attached to his letter a copy of the webpage with Respondent's biography which states she had been with War Era Veterans Alliance for over four years. SSA Ex. 15 at 5. The web page has no more credibility as an enclosure to Mr. Watt's letter and is given no weight for the reasons already discussed. Mr. Watt did attach copies of email from Respondent with the email address michelle@wareravet.com to him dated September 8, 2009, September 10, 2010, and October 13, 2010. SSA Ex. 15 at 7-9. The email dated September 8, 2009 is from michelle@wareravet.com to Alan@wareravet.com. SSA Ex. 15 at 9. Two of the three emails appear on their face to be related to business activity of War Era Veterans Alliance and Mr. Watt. SSA Ex. 15 at 7, 9. Mr. Watt also testified at hearing. Tr. 157. He testified that he recalled having contact with Respondent at War Era Veterans Alliance in late August or early September 2009. He stopped working for War Era Veterans Alliance on April 13, 2011. Tr. 158. He testified that Respondent did customer service, answering calls, booking appointments, forwarding messages. He believed she answered all calls to the toll free number. Tr. 158-59. Mr. Watt testified that Respondent worked full-time, 40 hours per week, and that he believed she had the same hourly rate of $10 as other employees. He believed that Respondent would have been paid by check initially and later by electronic funds transfer or direct deposit. Tr. 167-68. On cross-examination Mr. Watt admitted he was in the Michigan office one

day to three or four days per month, a couple hours at a time. His ex-wife worked in the Michigan office. Tr. 170. He admitted on cross-examination that there were actually six or seven people who answered the telephone for War Era Veterans Alliance. Tr. 172. He testified that he knew Respondent answered the telephone because she answered when he called. He also testified that Respondent was listed on the organizational chart for War Era Veterans Alliance as vice president of customer service. Tr. 173. In response to my questioning, he testified he began at War Era Veterans Alliance in May 2009 and only did a couple weeks orientation in Michigan before going to California in June 2009. He testified that he essentially commuted from Detroit to California spending eight or nine days in Detroit and then two weeks in California but then he changed to working two weeks in California then a three day weekend in Michigan. He agreed he was only in the Michigan office a couple of days each month for one to four hours each day. He estimated that he saw Respondent in the office only 50 to 75 percent of the time he was in the office, which I calculate is roughly four to six hours per month on the high-side. In August 2010, he stopped commuting and spent full-time in California and only visited Michigan a couple times but not the Michigan office. He testified that he called the toll-free number about four days per week until April 2011. He testified that until August 2010 Respondent answered about 75 percent of his calls and after August 2010, she answered about 30 percent of the time. Tr. 187-95.

Respondent testified that she did not work for War Era Veterans Alliance. She testified she only trained Adrianne Watt on how to use the telephones. She admitted she did send some emails to agents such as Alan Watt regarding meetings but she stated that was only when she was with the president of the company a couple days per week. She testified that two or three days per week, a couple hours each day, 10:00 a.m. to 1:00 p.m., she would be in the Michigan office. She admitted that she answered the War Era Veterans Alliance telephone but only when instructed to do so by the president and then only certain callers. She also admitted to writing down stories related by veterans and posting some to the War Era Veterans Alliance website. Tr. 206-11, 230-31.

Mark McCauley testified that it is possible that Respondent answered phones for War Era Veterans Alliance and scheduled people to attend his financial advice classes. He agreed that the telephone he gave Respondent was a telephone that could receive calls intended for War Era Veterans Alliance. Tr. 257-58, 282. He explained that his wife, the president of War Era Veterans Alliance, gave Respondent things to do to help Respondent feel she had a sense of purpose. He testified that Respondent had no schedule and no formal duties. Tr. 282-83. He also testified that he gave Respondent a phone because he wanted her to have reliable phone service and the phone had the War Era Veterans Alliance number so he could treat the cost of the phone as a business expense. Tr. 284-86. He testified that he gave Respondent about $12,000 a year as a gift, which he believed was the limit set by the Internal Revenue Service at the time. He testified that he had helped Respondent, his sister, financially throughout her life. Tr. 262-63, 269-70, 277. He testified that he had nothing to do with paying employees

for War Era Veterans Alliance because it was not his company. Tr. 268, 279-80. He admitted that he may have given Respondent as much as $400 per week but he does not recall when that was. Tr. 271-73, 278. He also testified that he did not always give Respondent money. Tr. 278.

The SSA IG proposes that a CMP and assessment be imposed against Respondent because she failed to report to SSA that she worked at War Era Veterans Alliance during the period September 2009 through January 2013. SSA Ex. 4 at 1; Tr. 361-63. The SSA IG does not propose to impose a CMP and assessment against Respondent based on failure to report earnings from work activity or substantial gainful activity. The basis cited by the SSA IG does not require that I find that Respondent had any earnings from her work activity, or that the work activity was substantial and gainful. Whether or not Respondent's work activity may have been accommodated, less than full time, not substantial, or not gainful are not issues that I need to resolve. Further, under that Board's interpretation and application of section 221(m) of the Act in the case of a 24-month DIB beneficiary, whether or not Respondent had earnings that rose to the level of substantial gainful activity is not an issue that affects whether the SSA IG has a basis for imposition of a CMP and assessment in this case. The dispositive facts are that Respondent engaged in work activity that she failed to report.

The most convincing and credible evidence that Respondent engaged in work activity for War Era Veterans Alliance are the printed copies of email provided by Alan Watt to the SSA IG on February 9, 2012, shortly after filing his complaint. SSA Ex. 15 at 1. Two of the three printed copies of email appear on their face to be work activity. The earliest email dated September 8, 2009 at 12:45 p.m., from "Michelle Valent [michell@wareravet.com]" to "Alan@wareravet.com" advised that an individual had called regarding benefits. The email also includes in the body Respondent's name, "War Era Veterans Alliance," the web address for War Era Veterans Alliance, and a toll free telephone number. SSA Ex. 15 at 9. The printed copy of the email dated September 22, 2010 at 10:36 a.m., from "Michelle Valent [michelle@wareravet.com]" to "Alan Watt" advised that an individual was going to be late for an appointment. The email also includes in the body Respondent's name, "War Era Veterans Alliance," the web address for War Era Veterans Alliance, and a toll free telephone number. SSA Ex. 15 at 7. Respondent admitted that she did send some email though under supervision. Respondent has not disputed the authenticity of either email or provided evidence rebutting the emails or otherwise showing that the emails should not be considered probative. Respondent has not rebutted this convincing evidence that she did some work for War Era Veterans Alliance as early as September 8, 2009 and again in September 22, 2010. Respondent's denials that she engaged in any work activity fly in the face of the emails. There is no evidence that Respondent reported to SSA the work activity in

which she engaged on September 8, 2009 and September 22, 2010. SSA Ex. 4 at 1; Tr. 361-63. Accordingly, I conclude that the SSA IG did establish that Respondent engaged in work activity as early as September 8, 2009 and Respondent failed to report that work activity during the 41 months from September 2009 through January 2013.

The SSA IG's evidence also supports a finding that Respondent engaged in some other activity at War Era Veterans Alliance during the period September 2009 through January 2013, which she also failed to report. However, when exactly the work activity occurred, over what period, and for how many hours work activity was performed cannot be determined based on the record before me. The credibility of Alan Watt and the information he purportedly received from his wife, and the statement of Aimee Konal all lack credibility, not because Mr. Watt was a jilted employee and Ms. Konal was his relative, but because of their inability to observe how much work Respondent actually did and their willingness to suggest that there was far more work by Respondent than they could have actually witnessed. Adrienne Watt; Bridgett the individual to whom Ms. Moua spoke on April 30, 2012 (SSA Ex. 11); and Jacquie Scalet (the individual at War Era Veterans Alliance to whom the investigators spoke on June 8, 2012 (SSA Ex. 1 at 12-13)) were not called as witnesses and their hearsay statements are simply too unreliable to be considered credible and probative.

- *Whether the SSA IG has shown that the CMP amount is reasonable based on the factors in the regulations.*[11]

A maximum CMP of $5,000 for each false statement or representation of material fact and for each month of withholding or failure to report a material fact is authorized by section 1129(a)(1) of the Act and 20 C.F.R. §§ 498.102(a) and 498.103(a). Also authorized is an assessment of not more than twice the amount of benefits or payments received as a result of the false statements, representations, omissions or failure to report material facts. Act 1129(a)(1); 20 C.F.R. § 498.104.

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[11] Pursuant to 20 C.F.R. § 498.220(b), I may affirm, deny, increase, or reduce the penalties or assessments proposed by the IG. In determining the CMP or assessment to impose, I am bound to follow the guidance of 20 C.F.R. §§ 498.102 through 498.106. The regulations do not provide that I am limited to reviewing whether the CMP or assessment proposed by the IG is "reasonable." *Cassandra Ballew*, Recommended Decision, App. Div. Docket No. A-14-98 at 9-10 (2014) (ALJ evaluated and applied regulatory factors and determined a lesser assessment that the Board recommend the Commissioner approved).

Pursuant to 20 C.F.R. § 498.220(b), I have the authority to affirm, deny, increase, or reduce the penalties or assessment proposed by the SSA IG. In determining the amount of penalties or assessment, my review is de novo, and, just as the I.G. did when proposing penalties, I must consider the factors specified by section 1129(c) of the Act:

> (1) the nature of the statements, representations . . . and the circumstances under which they occurred; (2) the degree of culpability, history of prior offenses, and financial condition of the person committing the offense; and (3) such other matters as justice may require.

Act § 1129(c); 20 C.F.R. § 498.106.

The SSA IG proposes a CMP of $100,000 and an assessment in lieu of damages of $68,547. SSA Ex. 4 at 1. The SSA IG advised Respondent that after considering the required factors he determined not to impose the maximum CMP of $5,000 for each of the 41 months Respondent did not report her work activity. SSA Ex. 4 at 1. He also advised her that rather than an assessment of twice the amount of overpaid benefits Respondent received during the period September 2009 through January 2012, he was only imposing the actual amount of the overpayment. SSA Ex. 4 at 2.

Mr. Bungard considered the following facts. He considered that during the period September 2009 through January 2013, Respondent worked as a customer service representative for War Era Veterans Alliance earning $400 per week while collecting disability benefits. As I have discussed, the SSA IG's evidence does not show how much Respondent actually worked, whether part or full-time, whether the work was accommodated, and whether the work was actually substantial and gainful. I give Mr. Bungard's factual findings no weight as he did no personal investigation and apparently relied upon the same evidence presented to me. Mr. Bungard also found that Respondent was paid $400 per week by Mr. McCauley, which is also not supported by the evidence. There is no question that Mr. McCauley gave Respondent some money. The testimony of Mr. McCauley that the money he gave Respondent is not connected to her work at War Era Veterans Alliance is unrebutted. His testimony is also consistent with the fact that he was not the owner of War Era Veterans Alliance and he had no role in paying staff. Although the SSA IG would have me conclude that there are inconsistencies in Mr. McCauley's statements to investigators and at hearing, the fact is he was consistent in his assertions that he only gave money to his sister to help her, not to compensate her for her work. There is no question that Mr. McCauley gave Respondent a phone that rang when the business number was dialed, but the evidence does not show that he paid Respondent any money for answering that phone. Therefore, I find that

Mr. Bungard's finding that Respondent was paid $400 per week for her work activity is unsupported by the evidence. I note that if Respondent was receiving $400 per week from her brother as a gift that would have no impact on her entitlement to DIB benefits or the amount of those benefits.

Mr. Bungard found Respondent highly culpable because he concluded she intended to defraud SSA. He cites no evidence that would support such a conclusion. The mere allegations of the investigators are insufficient to support a finding of fraudulent intent. He considered that Respondent had no prior offenses. Mr. Bungard also purported to consider Respondent's financial consideration, but that is inaccurate. What Mr. Bungard did consider is that he reduced the proposed CMP and assessment from the maximum he was authorized to impose, and Respondent did not provide any financial disclosure that he could consider. SSA Ex. 4 at 1-2.

I evaluate the required factors as follows:

(a) Nature of the statements and representations and the circumstances under which they occurred.

Respondent failed to report work activity in September 2009 and September 2010. As discussed in detail earlier in this decision, the Social Security regulations clearly require reporting of work. Respondent had at least constructive knowledge of the requirement to report work. However, the regulations do not clearly describe what activity is work activity that must be reported. The SSA IG has failed to present any evidence that Respondent had actual knowledge of what activity constituted work activity that she was obliged to report. The evidence does not show it was more likely than not that Respondent intended to defraud SSA. The evidence does not show it was more likely than not that Respondent engaged in any more than sporadic work activity for War Era Veterans Alliance. The evidence does not show it was more likely than not that Respondent received any compensation for her work activity. The evidence does not show it was more likely than not that Respondent's work activity was substantial and gainful.

(b) Degree of culpability, history of prior offenses, financial condition of Respondent, and such other matters as justice may require.

There is no evidence of any prior offenses by Respondent. There is no evidence that Respondent is unable to pay a CMP and assessment in the amount proposed by the SSA IG.

The simple definition for culpability is blameworthiness. *Black's Law Dictionary* 406 (18th ed. 2004). In this case, Respondent failed to report that she did some work for War

Era Veterans Alliance. I do not find Respondent's failure to report to be blameworthy. The SSA regulations are not clear enough for a person of reasonable intelligence to know what activity is reportable as work activity. The SSA IG has also acknowledged that Respondent's medical condition met the requirements for disability, while maintaining that Respondent engaged in disqualifying work activity. SSA App. Br. at 3, n.1. Respondent testified and argued that her mental impairments and medication side effects limit her ability to engage in activities of daily living, including managing her checkbook and bill paying. Tr. at 235-41; P. Br. Respondent's testimony is unrebutted by any qualified medical evidence and I treat her complaints of limitation as credible. The fact that Respondent does not have a representative payee may reflect that no representative payee was determined necessary by SSA, though there is no affirmative evidence that a review and determination were made. The absence of a representative payee does not make Respondent's complaints of limitations incredible or show that the complaints are exaggerated.

I conclude that no CMP or assessment should be imposed against Respondent on the facts of this case.

III. Conclusion

For the foregoing reasons, I conclude that there is no basis for the imposition of a CMP or assessment in this case.

/s/
Keith W. Sickendick
Administrative Law Judge

STATEMENT OF APPEAL RIGHTS PURSUANT TO 20 C.F.R. § 498.221

> (a) Any party may appeal the decision of the ALJ to the DAB by filing a notice of appeal with the DAB within 30 days of the date of service of the initial decision. The DAB may extend the initial 30-day period for a period of time not to exceed 30 days if a party files with the DAB a request for an extension within the initial 30-day period and shows good cause.
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> (c) A notice of appeal will be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions, and identifying which finding of fact and conclusions of law the party is taking exception to.

> Any party may file a brief in opposition to exceptions, which may raise any relevant issue not addressed in the exceptions, within 30 days of receiving the notice of appeal and accompanying brief. The DAB may permit the parties to file reply briefs.
> (d) There is no right to appear personally before the DAB, or to appeal to the DAB any interlocutory ruling by the ALJ.
> (e) No party or person (except employees of the DAB) will communicate in any way with members of the DAB on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.
> (f) The DAB will not consider any issue not raised in the parties' briefs, nor any issue in the briefs that could have been, but was not, raised before the ALJ.
> (g) If any party demonstrates to the satisfaction of the DAB that additional evidence not presented at such hearing is relevant and material and that there were reasonable grounds for the failure to adduce such evidence at such hearing, the DAB may remand the matter to the ALJ for consideration of such additional evidence.
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> (i) When the DAB reviews a case, it will limit its review to whether the ALJ's initial decision is supported by substantial evidence on the whole record or contained error of law.(j) Within 60 days after the time for submission of briefs or, if permitted, reply briefs has expired, the DAB will issue to each party to the appeal and to the Commissioner a copy of the DAB's recommended decision and a statement describing the right of any respondent who is found liable to seek judicial review upon a final decision.

Respondent’s request for review by the DAB automatically stays the effective date of this decision. 20 C.F.R. § 498.223.