Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Social Security Administration, Inspector General,
Petitioner,

v.

Salvatore Cappetta,
Respondent.

Docket No. C-15-714 (On Remand)

Decision No. CR4112

Date: August 10, 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, Salvatore Cappetta.

I. Procedural History

The Counsel for the Inspector General (IG) of the Social Security Administration (SSA) notified Respondent, Salvatore Cappetta, by letter dated July 26, 2012, that the SSA IG proposed imposition of a CMP of $106,000 and an assessment of $95,167.20 against Respondent, pursuant to section 1129 of the Act (42 U.S.C. § 1320a-8).[1] The SSA IG cited as the basis for the CMP and assessment that Respondent failed to report to SSA that he worked while he received Social Security Disability Insurance Benefits (DIB) and

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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 Code (U.S.C.) cited in this decision are available at http://www.gpo.gov/fdsys/.

while his children received children's benefits (CIB) from November 2002 through April 2011. SSA IG Exhibit (SSA Ex.) 17.

Respondent requested a hearing pursuant to 20 C.F.R. § 498.202,[2] through counsel, Charles J. Riether, by letter dated September 18, 2012. The case was assigned to me for hearing and decision.

A prehearing conference was convened by telephone on November 5, 2012, at 11:00 a.m. ET. Counsel for the SSA IG participated but neither Respondent nor his attorney appeared. The substance of the prehearing conference is memorialized in my Scheduling Order & Notice of Hearing issued on November 5, 2012 (Scheduling Order), which also set the case for hearing on March 5 and 6, 2013. A more detailed statement of the procedural history of this case between the November 5, 2012 prehearing conference and the hearing may be found in my prior decision in this case. *Salvatore Cappetta,* DAB CR3260 at 2-6 (2014).

On September 25 and November 20, 2013, a hearing was convened by video teleconference (VTC). The SSA IG appeared by VTC from Baltimore, MD; Respondent appeared by VTC from New Haven, CT; I participated by VTC from Kansas City, MO; with the court reporter and Attorney Advisor Whitney Fisler participating from my office in Washington, DC. Joscelyn Funnié, Esquire, appeared on behalf of Petitioner, the SSA IG. Respondent was represented by Charles Riether. A transcript of the proceedings was prepared. The SSA IG offered SSA exhibits (SSA. Exs.) 1 through 19. Tr. 22. SSA Exs. 1 through 12; SSA Ex. 13 pages 1 through 3, and 9 through 12; SSA Exs. 14-15; and SSA Ex. 17 were admitted. Tr. 32, 50-51, 71, 89, 95, 107, 109-110, 115. No exhibits offered by Respondent were admitted as substantive evidence as a sanction but any documentary evidence submitted by Respondent remains with the record for any subsequent review. Tr. 34-42; *Cappetta*, DAB CR3260 at 2-5 (detailing grounds for sanction). The SSA IG called the following witnesses: Chad Bungard, counsel to the SSA IG; Respondent, Salvatore Cappetta; Elisabetta Cappetta, Respondent's wife; Peter Cameron, Respondent's purported employer; Gulrukh Niazi, SSA Claims Representative; and SSA IG Special Agent (SA) Sarah Hanson.

The SSA IG filed a post-hearing brief (SSA Br.) on February 25, 2014. Respondent also filed his post-hearing brief (R. Br.) on February 25, 2014. The SSA IG filed a post-hearing reply brief on March 21, 2014 (SSA Reply). Respondent failed to timely file a reply brief. After inquiry by my staff, Respondent's counsel advised staff by email on

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[2] References are to the 2011 revision of the C.F.R. unless otherwise stated.

April 17, 2014 that further reply was waived. The record was then considered closed and ready for decision.

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. *Cappetta*, DAB CR3260 at 1. The SSA IG requested review by the Departmental Appeals Board (the Board). An appellate panel of the Board issued a decision on December 10, 2014. *Salvatore Cappetta*, DAB No. 2606 (2014). The Board reversed my legal conclusion that Respondent's work activity was not a material fact as a matter of law due to application of section 221(m)(1) of the Act. The Board remanded the case 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 he 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 reasonableness of the CMP and assessment proposed. *Cappetta*, DAB No. 2606 at 1-2, 14-16.

The record was returned to me on January 30, 2015. On March 3, 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, Respondent filed a brief and a proposed finding. The SSA IG also filed proposed findings of fact and conclusions of law on March 24, 2015, but no brief in support thereof (SSA IG Remand Br.). Respondent filed its amended brief and finding on March 26, 2015 (R. Remand Br.). On June 6, 2015, the SSA IG waived the right to file a reply and Respondent waived his right to reply on June 10, 2015.

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 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).

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).

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;

Whether, if Respondent is liable, the SSA IG has established the months for which a CMP and assessment may be imposed; and

Whether the proposed CMP is reasonable.

Whether an assessment is reasonable based on the amount of benefits Respondent and his children received during the period he failed to report work activity.

Cappetta, DAB No. 2606 at 1-2, 14-16.

Respondent mischaracterizes the issues before me as including the issue of whether Respondent's DIB should have been terminated and whether his DIB should be reinstated. R. Remand Br. at 1, 3-4, 6. Whether or not Respondent may be liable for an overpayment of Social Security benefits and whether or not he continued to meet the requirements for payment of Social Security benefits are not issues before me. 20 C.F.R. Part 404, subpart J.

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. & Prac.* § 5:64 (3d ed. 2013).

Following are my conclusions of law from my first decision in this case. *Cappetta*, DAB CR3260 at 10-11.

> **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 he received DIB for at least 24 months is not a fact that the Commissioner was permitted to evaluate**

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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.

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.

4. Although Respondent failed to report work activity in violation of the regulation, the fact he 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.

5. The SSA IG failed to show by a preponderance of the evidence that Respondent knew or should have known that his work activity was a material fact that he failed to report because pursuant to section 221(m) of the Act his 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. *Cappetta*, DAB No. 2606 at 10-12. 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 to consider the legal issue as the agency head responsible for implementing section 221(m) of the Act.

The kernel of my legal analysis is simply stated. All DIB beneficiaries are required to report work activity. Normally, the Commissioner may consider work activity as evidence of whether one is entitled or continues to be entitled to DIB. However, in the case of a DIB beneficiary who has been receiving benefits for 24 months or more (24-month DIB beneficiary), Congress has specifically prohibited the Commissioner from considering work activity as a basis for determining continuing entitlement to receive benefits. Because the Commissioner is prohibited from considering work activity when determining continuing entitlement for a 24-month DIB beneficiary, work activity is not a material fact under the definition of material fact established by 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 under section 1129(a) of the Act. Substantial gainful activity determined based on earnings may be considered in determining continuing entitlement of a 24-month DIB beneficiary and is a material fact, but not the work activity that yielded the earnings. The SSA IG cannot avoid the limitation imposed by Congress in the case of 24-month DIB beneficiaries by arguing that work activity is a material fact because work activity is required for there to be earnings.

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 against a 24-month DIB beneficiary.

Counsel to the SSA IG, B. Chad Bungard, notified Respondent by letter dated July 26, 2012, that the SSA IG proposed to impose against Respondent a CMP of $106,000 and an assessment in the amount of $95,167.20, a total penalty of $201,167.20. The SSA IG notice stated that the CMP was based on Respondent's failure to disclose that during the period November 2002 through April 2011, he worked for Cameron Construction, Inc. The SSA IG notice states that the IG determined that Respondent committed 53 separate violations, one violation for each of the 53 months beginning December 2006 and continuing through April 2011, that he failed to report that he worked for Cameron Construction, Inc. The notice explains that there may be no CMP or assessment for withholding or failure to report material facts prior to December 2006, as the effective date of section 1129 of the Act and 20 C.F.R. § 498.102(a)(3) was November 26, 2006. 71 Fed. Reg. 28574, 28575 (May 17, 2006). The SSA IG notice states that the assessment was calculated as twice the $47,583.60 in DIB payments received by Respondent and his children during the period December 2006 through April 2011. SSA Ex. 17 at 1.

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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> * * * *
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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 July 26, 2012 SSA IG notice to Respondent, the CMP and assessment in this case are based on Respondent's failure to report that he "worked" at Cameron Construction, Inc. and that he failed to report the work for 53 months, from December 2006 through April 2011. SSA Ex. 17 at 1; Tr. 396-97, 401-02, 406-08. The SSA IG notice did not charge Respondent with failure to report earnings or failure to report substantial gainful activity. SSA Ex. 17. Mr. Bungard testified in response to my questioning that his determination was based on Respondent's failure to report work activity not failure to report earnings or substantial gainful activity. Tr. 401-03, 406-08.

Understanding the meaning of the terms "work," "earnings," and "substantial gainful activity" is important for 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. *Cappetta*, DAB No. 2606 at 3. Earnings as used in the regulations for purposes 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 imposing 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. *Cappetta*, DAB No. CR3260 at 18.

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.

> (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 <u>solely as a result of the individual's work activity</u>;**
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> > **(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.
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> (2) An individual to which paragraph (1) applies shall continue to be subject to—
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> > (A) continuing disability reviews on a regularly scheduled basis that is **not triggered by work**; and

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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.

> (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. *Cappetta*, DAB No. 2606 at 10. 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. 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 may 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 of subsection 221(m)(1) 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. 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).

Cappetta, DAB No. 2606 at 12. 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 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.
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> 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
>
> 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.[5] Congress has specifically prohibited consideration of work activity to encourage long-term beneficiaries to attempt work activity. *Cf. Reed v. Astrue*, No. 03-CV-6235T, 2008 WL 1902431, at 15 (W.D. N.Y. Apr. 28, 2008) (discusses DIB entitlement during a reentitlement period and that work activity of a 24-month DIB beneficiary may not be used as evidence that the plaintiff is no longer disabled, citing 42 U.S.C. § 421(m)(1)(B).) 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, his failure to report work activity cannot be the basis for imposition of a CMP or assessment under section 1129(a)(1) of the Act. In this case, 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. 17 at 1; Tr. 396-97, 401-02, 406-08.

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[5] Of course, the Commissioner may also consider medical improvement, evidenced by activities or medical evidence, as a basis for terminating entitlement.

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 intended that 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."

The 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. *Cappetta*, DAB No. 2606 at 10. 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. 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. I also specifically directed counsel for the parties to address whether substantial gainful activity was the material fact that needed to be proved rather than work activity. Tr. 398-402, 421-23. The SSA IG counsel apparently failed to grasp the cause for my concern about the important difference between work activity and substantial gainful activity or how it might impaction this case. 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 prior to the alleged date he began engaging in work activity.

To be clear, I do not mean to suggest that the SSA IG cannot consider work activity as evidence leading to the discovery of earnings or substantial gainful activity, which 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 his 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 as early as November 2001, which he failed to report for 53 months between December 2007 and April 2011 as alleged by the SSA IG.**
>
> **8. Respondent has not contested the amount of benefits that the SSA IG alleges Respondent and his children received during the period December 2006 through April 2011.**
>
> **10. 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." *Cappetta*, DAB CR3260 at 11-16. 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

SSA records reflect that SSA determined that Respondent was disabled and entitled to DIB with an onset of disability on January 15, 1997, due to rheumatoid arthritis, heart condition, and headaches. He reported being self-employed doing construction in 1996, 1997, 1998, and 1999, with net income over $400 only in 1997 and 1996. On October 26, 1998, Respondent was contacted and reported owning a construction business; he reported that he no longer ran the business; a former employee ran the business; and he went to the job less than 15 hours per month just to see how it was going. SSA Ex. 1 at 1-2, 6.

The SSA IG does not dispute before me that Respondent is medically eligible for benefits and the SSA IG stipulated to his disability based on medical factors. Tr. 37-40. The SSA IG evidence shows that SSA initiated and completed a medical CDR that found Respondent was no longer disabled as of November 1, 2010, due to medical improvement with his last DIB payment to be January 1, 2011. SSA Ex. 13 at 4-12. Subsequently, on January 11, 2012, it was determined that Respondent met the medical requirements for DIB entitlement. Upon learning that Respondent was medically approved, SA Hanson protested and Respondent was not reinstated. SA Hanson's notes show that as of March 15, 2012, Respondent's entitlement was terminated due to work activity and not medical improvement. SSA Ex. 14 at 2-4.

On June 16, 2009, an anonymous concerned citizen contacted SSA and reported that the lifestyle of Respondent's family was questionable because: Respondent was in the process of completing a large home renovation, including an apartment and an above ground pool; Respondent received disability benefits and both he and his wife earned wages; Respondent bragged about the money he earned working for Peter Cameron Construction for the last 10 years, money that was paid under-the-table; and Respondent worked daily from 7:30 a.m. to 4:30 p.m. Erica N. Durham of the SSA received the anonymous call and issued a report of conversation (SSA Ex. 2). This report of conversation is given no weight for reasons discussed hereafter.

The SSA IG presented for my consideration Reports of Investigation prepared by SA Hanson that reflect that an investigation of Respondent was initiated on June 24, 2009, officially opened and assigned to her on July 1, 2009, and continued until November 21, 2011. SSA Exs. 3, 5-14. SA Hanson determined based on SSA records that Respondent was found disabled due to erythematous conditions (includes discoid lupus), based on an application filed September 15, 1998, with a date of entitlement of September 1997; and that he had no reported earnings for 1999 through 2008. On July 16, 2009, she had Respondent's record flagged to reflect that there was an open SSA IG investigation assigned to her and that no action was to be taken on the case, including no notices and no contacts with the Respondent. SSA Ex. 3 at 2-3. SA Hanson located records for Peter Cameron and his businesses, which included Cameron Construction and Remodeling. SA Hanson determined that Respondent's wife and children received benefits on his account at one time but none were in pay status on July 17, 2009, when she inquired. SSA Ex. 3 at 4-5. SA Hanson learned that no review of Respondent's work had been done since his initial application; SSA had not sent Respondent any notices regarding work or request for work history and Respondent had reported no work activity; and no continuing disability review had been done. SSA Ex. 3 at 7. SA Hanson determined that Respondent's wife, Elisabetta Cappetta, received $253 in benefits from 1997 through 2005. She determined that the following children of Respondent received benefits during the periods indicated but she did not state the amount of benefits paid each child: Rosanna Cappetta, September 1997 to November 2007; Daniela Cappetta, September

1997 to June 2005; Aniello Cappetta, September 1997 to November 2003; Salvatore Cappetta, Jr., September 1997 to June 2001. SSA Ex. 3 at 7-8.

On July 27, 2009, SA Hanson received photographs of Respondent and his wife, and Peter Cameron and his wife from the Connecticut Department of Motor Vehicles (DMV). She also obtained information from the DMV regarding the vehicles owned by Respondent and his wife, the Cameron's, and Cameron Construction. SSA Ex. 5 at 2.

On August 26, 2009, SA Hanson conducted surveillance of Respondent while SA Kevin Rogers conducted surveillance of Peter Cameron. SA Hanson began her surveillance at Respondent's home at about 6:30 a.m. She noted that the home had no siding but rather a house-wrap material like Tyvek® and appeared to be under a remodel or construction; she noted an above ground pool; and she observed a three car garage with a room above that appeared to be under construction. She saw Respondent water the lawn. She observed Respondent move a red Chevy Avalanche pickup to a different location on the property. When a small black sedan left Respondent's driveway, she drove her surveillance vehicle around the block and when she returned the pickup was gone. Approximately 16 minutes later the pickup returned driven by Respondent with either a large white window or a bathtub on the back. Subsequently, she saw Respondent measuring the large white item in the bed of the pickup. She ended the simultaneous surveillances at 8:30 a.m. At 9:57 a.m. she drove by Respondent's residence and saw him leaning out of a window in the garage and the large white item was still on the pickup. SSA Ex. 6.

SA Hanson and SA Stephen Brown interviewed Peter Cameron on November 6, 2009. SA Hanson's Report of Investigation reflects that Peter Cameron identified Respondent from a photograph. Peter Cameron told SA Hanson that: Respondent worked for him for approximately the past eight years; Respondent was paid by the job; Respondent worked three to five hours per day when he worked; the amount of pay depended upon the job and could be $50, $100, or $500 per job; Respondent would do any type of work; Respondent could work several weeks in a month and make $700 to $800 or more; he paid Respondent cash; he paid Respondent from $150 to $1,500 per week depending upon the job but that he did not pay Respondent $20,000 or $30,000 in a year. SSA Ex. 7 at 1-3; Tr. 122-25. On February 23, 2010, SA Hanson and SA Brown interviewed Peter Cameron again. SA Hanson reported that Peter Cameron said that Respondent's work for him included tiling backsplashes, walls, and floors; hanging doors; trim work, framing, and taping sheetrock. Peter Cameron also stated that he no longer heard from Respondent, who did no work for him after the investigators first came around on November 6, 2009. SSA Ex. 9 at 2.

SA Hanson and SA Brown interviewed Respondent on November 6, 2009. SA Hanson's report reflects that Respondent told her that he suffers from rheumatoid arthritis and lupus and he had a stroke the prior year. Respondent stated that he works once in a while

doing little things and, if there is heavy work, he has friends who help. Respondent stated that he would make a couple hundred dollars and maybe he could work a few hours. SA Hanson reported that Respondent told her that he worked for Peter Cameron once in a while, doing little things and he had done so for years. SSA Ex. 7 at 4-6; Tr. 116-22. SA Hanson and SA Brown continued their interview of Respondent on November 9, 2009. SA Hanson reported that during this second interview, Respondent stated that his business dissolved in 1998; he did not work after 1998; he never went back to work; but he recently started helping out a friend; he denied being paid cash for work except he might be given $10 or $20 to buy cigarettes. An attorney, Vincent Gallo, entered the interview room and a designation of representation was executed. Respondent made a sworn statement. SSA Ex. 8 at 1-4; Tr. 86-87. In his sworn statement, Respondent stated that he had not been employed from 1998 to November 9, 2009, the date of the statement. SSA Ex. 8 at 6. In response to questions by SA Hanson, Respondent stated that he helped out Peter Cameron because Cameron helped him with his house; he was never paid by Cameron but he did receive a gift certificate for a couple hundred dollars from Cameron. Respondent also stated that Peter Cameron lied. SSA Ex. 8 at 4; Tr. 125-30.

SSA determined that Respondent's disability ceased effective November 1, 2010, with the last payment of DIB on January 1, 2011. SSA Ex. 13 at 9-11. SSA determined that Respondent was overpaid DIB in the amount of $85,325.10 for the period November 2002 through April 2011, based on the determination that Respondent was paid $1,500 per month during an eight year period that began on November 2001. SSA Ex. 11; SSA Ex 12 at 10. SSA also determined that Respondent's children were overpaid child benefits in the amount of $24,377.00. SSA Ex. 12 at 10.

SA Hanson testified in response to my questions that she asked Peter Cameron general questions. SA Hanson surmised based on Cameron's responses to general questions that Respondent had worked for him on and off for eight years, he paid Respondent cash, and the amount paid depended upon the job and varied from $150 to $1,500 per week. Mr. Cameron was not asked and did not disclose how much he paid Respondent over the course of a year. But he denied paying Respondent $20,000 to $30,000 per year. SA Hanson admitted in response to questions from Respondent's counsel that she definitely did not know how much Respondent was paid by Mr. Cameron. Tr. 154-58. In response to my questioning, SA Hanson indicated that an analysis of Respondent's and his family's reported income, resources, liabilities, and expenses did not reflect that Respondent was receiving significant amounts of unreported cash income. Tr. 178-83.

Respondent testified that he met Peter Cameron in 2000, and they became friends. Tr. 248. He testified that he never worked for Peter Cameron but he gave him construction related advice. Tr. 250-51. He testified that he did do little things such as going to get coffee and cigarettes. He denied telling SA Hanson that he used to do things for Cameron or that he worked for Cameron and that if heavy work was involved friends

helped. He admitted that he received $50 to $100 when doing things for Cameron but stated the money was a gift. He testified that Peter Cameron gave him a gift at Christmas and also when Respondent went to Italy. Tr. 253-55. Respondent denied that he worked but agreed that he knew that if he worked he had to report the work to SSA. Tr. 301-02. On cross-examination Respondent denied working for Peter Cameron but admitted that he received minimal gifts from him. Tr. 315.

Elisabetta Cappetta, Respondent's wife, testified that Respondent did not work for Peter Cameron. Tr. 322-23, 333.

Peter Cameron testified that he has known Respondent for 15 years, having met him through a mutual friend. Tr. 344. Cameron testified that he and Respondent were friends but that they have not spoken due to the investigation by SSA. Tr. 344-455. At hearing he denied that Respondent ever worked for him but testified that Respondent would show-up at job sites and run to the store for him if he needed materials. Tr. 345-47. He denied paying Respondent wages but by running errands for him Respondent was paying back for work Cameron did on his house. Tr. 350. Peter Cameron testified that sometimes he called Respondent and requested his help and sometimes Respondent just showed-up. Tr. 350-51. He testified that he gave Respondent gifts at Christmas; he gave him money for his kids' birthdays; and he gave him a couple hundred bucks when he went to Italy. Tr. 352. He also gave Respondent money to go get coffee and donuts and for the gas Respondent used going to the store. Tr. 352. He denied telling SA Hanson that Respondent did tiling, taping, sheetrock, backsplashes, grout or mortar work. Tr. 353-54. On cross-examination, Mr. Cameron testified that he did not pay Respondent wages, by check or otherwise. Tr. 355.

Gulrukh Niazi, an SSA Claims Representative, testified that she determined that Respondent had worked based on the investigator reports, and therefore, she stopped Respondent's benefits. Tr. 365, 370-74. She also determined that Respondent was engaged in substantial gainful activity. She testified that to qualify as substantial gainful activity pay for work had to be $940 per month in 2008 and $980 per month in 2009, and that was the limit on how much an individual could earn per month and still be entitled to receive DIB payments. She testified that she determined the amount of Respondent's earnings based on the statements of Peter Cameron to the investigators. Tr. 375-77. Her opinion that Respondent engaged in substantial activity is not credible as the evidence of record, including the statements of Cameron as recorded by the investigators, does not support a finding that Respondent actually earned more than the substantial gainful activity amount or an equivalent in any month. The evidence is also insufficient to show that Respondent's work for Cameron was substantial gainful activity based on either earnings or level of activity.

The SSA IG failed to offer any admissible evidence of the calculation of the monthly and total amount of DIB payments to Respondent and the CIB payments for his children for

the period at issue: December 2006 to November 6, 2009. SSA IG offered copies of an email marked as SSA Ex. 16. However, Respondent's objection to the document for lack of authentication was sustained subject to the document being reoffered with a proper foundation. Tr. 28-33. The SSA IG failed to reoffer the document. The SSA IG alleges in the July 26, 2012 notice of proposed CMP and assessment that Respondent and his children improperly received $47,583.60 in DIB and CIB from December 2006 through April 2011. SSA Ex. 17. The amount alleged by the SSA IG is consistent with other evidence. SSA Exs. 11 at 5; 12 at 5; 14 at 5. Respondent does not concede that either his DIB or the CIB payments were improper nor has he contested that the amount alleged by the SSA IG is inaccurate.

There is no dispute that there is no evidence of work activity after November 2009. Tr. 104.

c. Analysis

The Board remanded to me to clarify my findings "and make findings on factual issues necessary to resolve the case." *Cappetta*, DAB No. 2606 at 13. The Board provided some additional guidance. I stated in my initial decision that failure to report work activity subjects one to a CMP and assessment. The Board stated:

> Respondent would be subject to a CMP and assessment, however, only if he knew or should have known that the withheld fact was material and that such withholding was misleading for purposes of determining eligibility or benefit amount. Act § 1129(a)(l)(C); 20 C.F.R. § 498.102(a)(3).

Id. (footnote omitted). I agree with the Board's conclusion that the SSA IG has the burden to show by a preponderance of the evidence that Respondent knew or should have known that his work activity was a "material fact" and that failure to report his work activity was misleading for purposes of continuing eligibility for DIB. As already noted, the amount of DIB payments is not generally affected by earnings during a period of disability, unless the earnings are at or above the level of substantial gainful activity.

The Board noted that I concluded that Respondent knew he was supposed to report work activity to SSA. Respondent had both constructive knowledge based on the publication of that requirement in the regulations at 20 C.F.R. § 404.1588(a); and he admitted at the hearing that he had actual knowledge of the requirement to report work activity to SSA. *Cappetta*, DAB CR3260 at 16-17; Tr. 301-02. The Board stated:

> Notice of the requirement to report work is relevant in determining whether Respondent knew or should have known that his work was material and that withholding information

> about his work would be misleading, but such notice is not necessarily determinative of these issues.

Cappetta, DAB 2606 at 13. The Board directed that if I conclude that Respondent knew or should have known that the information he failed to report, i.e. his work activity for Peter Cameron or Cameron Construction, was material to the determination of his right to continue to receive benefits or the amount of benefits and that his 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.
>
> • Whether the SSA IG has shown that the assessment is reasonable based on the amount of benefits Respondent received during the period in which he withheld information about his work.

Id. at 14-16.

In my prior decision I concluded that, despite Respondent's protestations to the contrary, he did work for Cameron Construction or Peter Cameron. Respondent admitted that he ran errands for Peter Cameron and that he received money, items of value, or in kind labor on his house from Peter Cameron. Tr. 253-55, 315. Peter Cameron testified that Respondent never worked for him but admitted that Respondent would show-up at job sites and run to the store for him if he needed material, or for donuts and coffee. Tr. 345-47, 352. Peter Cameron denied that he paid Respondent wages but by running errands for him Respondent was paying back for work Cameron did on his house. Tr. 350-51. Mr. Cameron testified that he gave Respondent money to go get coffee and donuts and for the gas Respondent used going to the store. He also testified that he gave gifts of money to Respondent and his children. Tr. 352. Therefore, I concluded in my prior decision that Respondent did engage in some work activity for the benefit of Cameron Construction and Peter Cameron. I further concluded that the preponderance of the evidence does not show whether Respondent's work activity rose to the level of substantial gainful activity or when and how frequently gainful work activity was performed. The SSA IG agreed that no gainful activity was performed after November 6, 2009. Tr. 104. I concluded it was not necessary to resolve specific fact issues related to whether Respondent's work activity amounted to substantial gainful activity or how frequently substantial and gainful activity may have been performed. *Cappetta*, DAB CR3260 at 17. The SSA IG proposed a CMP and assessment based on Respondent's failure to report work activity, not substantial gainful activity. SSA Ex. 17 at 1. I concluded that Congress had, by enacting section 221(m)(1) of the Act, barred the

Commissioner from considering work activity of a 24-month DIB beneficiary for purposes of determining continuing entitlement, thus, work activity could not be a material fact. C*appetta*, DAB CR3260 at 17. My opinion in that regard is not changed. Earnings and substantial gainful activity fit the definition of 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. But the SSA IG did not notify Respondent pursuant to 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. The SSA IG notified Respondent, who is a 24-month DIB beneficiary, that the CMP and assessment were based on his unreported work activity. However, for a 24-month DIB beneficiary, work activity is not standing alone a material fact within the meaning of Act § 1129(a)(2) and 20 C.F.R. § 498.101, because section 221(m) of the Act limits the Commissioner to considering whether a 24-month DIB beneficiary has engaged in substantial gainful activity and bars consideration of work activity that does not rise to the level of substantial gainful activity.

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 Board commented that "[t]he amount of Respondent's earnings might bear on determining whether Respondent knew or should have known that his work was material, but is also not necessarily dispositive on that question." *Cappetta*, DAB No. 2606 at 14. The regulations give Respondent constructive notice that earnings at or above the amount that creates a presumption of substantial gainful activity may cause the Commissioner to determine that his entitlement to DIB must end. Indeed, as I already mentioned there is no question that earnings at or above the level of substantial gainful activity is material. 20 C.F.R. §§ 404.316(d), 404.401a, 404.456, 404.1511, 404.1572, 404.1574. However, I do not see that earnings below the level of substantial gainful activity may impact or be relevant to the issue of whether or not Respondent knew or should have known that his work activity was material.

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 Cameron Construction and Peter Cameron. There is no dispute that Respondent did not disclose his work activity for Cameron Construction to SSA. My prior findings were not disturbed by the Board. *Cappetta*, DAB CR3260 at 17; *Cappetta*, DAB No. 2606 at 14.

The second element is whether Respondent knew or should have known that the fact he did work activity for Cameron Construction 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 he failed to report his work activity to SSA that his 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 his 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 his work activity was material.

I had no trouble concluding that Respondent had at least constructive knowledge of his obligation to report his 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. Respondent also admitted that he knew he was to report work activity. However, Respondent has not conceded that he understood that work activity for Cameron Construction was a material fact or that failure to disclose that work activity was misleading.

The SSA IG's argument throughout has been that Respondent knew he was supposed to report work activity and, therefore, Respondent must have known work activity was material and that not reporting it was misleading. SSA IG's Brief in Support of Imposing a Civil Money Penalty (SSA Prehearing Br.) at 11-12; SSA Br. at 8-9; SSA Reply at 3-4. In his prehearing brief, the SSA IG argued that because SSA asks about work and income, Respondent was on notice that his work and income were material facts. The SSA IG further asserted that Respondent minimized the amount of work he did and subsequently denied working at all in interviews because he knew that work and earnings were material facts. SSA Prehearing Br. at 11-12. There is no question that Respondent had actual and constructive knowledge that he was to report work activity. However, I am unwilling to infer based on the facts that Respondent knew he was supposed to report work activity and that SSA asked about work activity, that Respondent knew or should have known that work activity was material, that is, it could be considered by the Commissioner related to Respondent's continuing entitlement, or that it was potentially misleading not to report work activity. The SSA IG concedes that its regulations are complex and beneficiaries are told to report any changes in health or work activity that might affect their entitlement. Beneficiaries are expected to report every change and not attempt to determine whether or not their entitlement may be affected. SSA Br. at 5-6. In fact, the SSA regulations are complicated and voluminous and they do not give a reasonable beneficiary notice in language that may be understood by the beneficiary that

work activity is a material fact that may be considered by the Commissioner or that failure to disclose work activity is misleading.

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 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, the definition in the Act and the regulation do not state that a material fact is a fact the Commissioner may consider in evaluating whether a beneficiary continues to be entitled to benefits, as in the case of Respondent. Accordingly, I cannot conclude that Respondent had constructive knowledge that a material fact would be a fact that may be considered related to whether he continued to be eligible 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 a material fact for determining continued entitlement. The SSA IG has provided me no citation to a regulation on which I could base a conclusion that Respondent had constructive notice that his work activity was material to a determination of his continuing entitlement.[6] Therefore it is necessary to consider whether the SSA IG has presented evidence to show

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[6] 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.

it is more likely than not that Respondent had actual and timely notice that his work activity for Cameron Construction was material to the issue of his continuing entitlement to DIB benefits.

The SSA IG offered as evidence copies of documents printed from a computer database that contain information related to Respondent's initial application for benefits in 1998. SSA Ex. 1. The documents in SSA Ex. 1 do not reflect that Respondent was advised that work activity was a material fact or that failure to report work activity was misleading. The SSA IG offered copies of no other documents created by, signed by, or allegedly received by Respondent related to Respondent's initial application for benefits in 1998.

On November 9, 2009, SA Hanson and SA Brown interviewed Respondent with his wife present. Claims Representatives Jennifer Ortiz and Gilda Agosto participated, apparently as part of the CDR process.[7] Respondent, with the assistance of his wife, completed multiple forms. The forms Respondent completed during the interview and as part of the CDR did not give him actual notice that failure to report work activity was a "material" omission and misleading. SSA Ex. 8 at 6-31.

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[7] As already 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. Even if one viewed the CDR as being triggered by a failure to report work activity, the CDR would still be triggered by and based on work activity and would transgress the prohibition of section 221(m)(1)(A). In this case the evidence is clear that SSA received an anonymous tip that Respondent was working for Cameron Construction. An investigation was triggered. SSA conducted a CDR based on the reported work activity but characterized the CDR as a medical CDR and terminated Respondent not because of work activity, but due to purported medical improvement. Respondent was subsequently found to be medically eligible on January 11, 2012, but SA Hanson successfully stopped any DIB payments to Respondent. SA Hanson's notes state that Respondent was then found not entitled based on work activity. SSA Ex. 14 at 2-4. The SSA IG's stipulation that Respondent continues to be medically eligible for DIB (Tr. 37-40) and the January 11, 2012 determination, strongly suggest that the characterization of the CDR as a medical CDR with termination based on medical improvement (SSA Ex. 13 at 4-12) was an overt effort to avoid the application of section 221(m) of the Act. However, whether or not SSA correctly characterized the CDR for Respondent as a medical CDR with termination of entitlement based on medical improvement is not an issue that I need to resolve as it does not affect my decision except to the extent that the inconsistency between the SSA IG's position before me, the January 11, 2012 determination, and the SSA action on the CDR reflects negatively upon the credibility of the SSA IG's interpretation and application of section 221(m) of the Act.

Respondent gave a sworn statement during his interview by SA Hanson on November 9, 2009. During the interview, Respondent explained that he could read a little English but he could not write in English. During the hearing it was apparent that English is not Respondent's first language and he had some difficulty understanding more than simple sentences. There is no evidence that Respondent was advised he was under suspicion for fraud during the interview by SA Hanson or that he was advised regarding the meaning of material fact or that withholding a material fact is potentially misleading. There is no evidence Respondent was advised that he was under suspicion or that he might be punished with a CMP or assessment. SSA Ex. 8 at 4. I understand that advising Respondent that he 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. During the interview and before his written statement, counsel did appear to represent Respondent. Respondent's counsel wrote the statement as Respondent dictated. Respondent stated "[t]o the best of my knowledge I have not been employed during the time periods of 1998 to the present day." SSA Ex. 8 at 6. Respondent did not deny he engaged in some work activity, he denied that he was an employee. There is no reference in the statement to Peter Cameron or Cameron Construction. Respondent explained in his statement that in 1996 and 1997, prior to being found disabled, his ability to work declined and he had to rely on others to complete work until he finally ceased his business when his license expired. He also explained to SA Hanson who witnessed the statement that a stroke in 2008 made it difficult for him to concentrate and he was forgetful. SSA IG Ex. 8 at 6-7.

Respondent completed two Forms SSA-820-F4 (2-1991), "Work Activity Report – (Self Employed Person)" during the interview on November 9, 2009. Both contained the following Privacy Act notice:

> The information requested on this form is authorized by Section 223 and Section 1632 of the Social Security Act. The information provided will be used in making a decision on your claim. While completion of this form is voluntary, failure to provide all or part of the requested information could prevent an accurate and timely decision on your claim and could result in the loss of benefits. Information you furnish on this form may be disclosed by the Social Security Administration to another person or governmental agency only with respect to Social Security programs and to comply with Federal law requiring the exchange of information between Social Security and another agency. We may also use the information you give us when we match records by computer. Matching programs compare our records with those of other Federal, State or local government agencies.

> Many agencies may use matching programs to find or prove that a person qualifies for benefits paid by the Federal government. The law allows us to do this even if you do not agree to it. Explanations about these and other reasons why information you provide us may be used or given out are available in Social Security Offices. If you want to learn more about this, contact any Social Security Office.

SSA Ex. 8 at 8, 17. 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 does not state or imply that failure to report subjects one to sanctions for failure to report. No reasonable lay person exercising reasonable diligence in reading would understand based on the statement that work activity is a material fact or that failure to report may be misleading. SSA Ex. 8 at 8, 17. The forms asked Respondent to report all work activity since January 1997. However, the form in block 2 requests a "name and address of business" and description of primary product or service. Block 2 does not request a description of work activity. Respondent listed his business "Cappetta Construction," which there is no question he ended in 1998. SSA Ex. 8 at 8, 17. Blocks 3 and 4 request further information about the business not work activity. Block 5 requested a description of "present work activities" and any change in the business. Respondent responded that he had not worked at all since 1998. The SSA IG did not charge Respondent for this response. SSA Ex. 18 at 8, 17. Blocks 6, 7, and 8 ask questions related to a business. Block 9 asks about any assistance required in operating the business due to illness or injury. Block 10 is the overflow space for the preceding blocks. Block 11 requires that the person completing the form indicate whether or not they receive DIB or SSI. SSA Ex. 18 at 9-10, 18-19. Block 11 includes the statement in the area to be checked by one receiving benefits that he or she "understands that the information provided above may result in my benefits being stopped." SSA Ex. 18 at 10, 19. Respondent did not check the box on either form indicating he was receiving DIB or that he understood his responses could result in suspension or termination. Block 11 did not explain the term "material fact" or that failure to report could be misleading or permit a sanction including a CMP and assessment. SSA Ex. 8 at 10, 19. The forms including the following attestation:

> Knowing that anyone who makes a false statement or misrepresentation of a material fact for use in determining a right to payment under the Social Security Act commits a crime punishable under Federal law, I affirm that the answers to questions on this form are true.

SSA Ex. 18 at 10, 19. The attestation statement 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 statement uses 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.

Respondent also completed a form SSA-821-BK "Work Activity Report – Employee," that he did not sign and which states he did not work since January 15, 1997. SSA Ex. 8 at 12-16. Respondent was not charged for making a false statement on this form. The copy of the form in evidence has no attestation block or block for Respondent to sign. The form includes the following Privacy Act Statement:

> Sections 205(a), 223(d), 1612, 1613 and 1633(a) of the Social Security Act, as amended, authorize us to collect this information. The information is needed to make a determination on your claim. The information you furnish on this form is voluntary. However, failure to provide all or part of the information could prevent an accurate and timely decision on your benefit eligibility.
>
> We rarely use the information you supply for any purpose other than for making a determination on your disability claim. However, we may use it for the administration and integrity of Social Security 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: (1) to enable a third party or an agency to assist Social Security in establishing rights to Social Security benefits and/or coverage; (2) to comply with Federal laws requiring the release of information from Social Security records (e.g., to the Government Accountability Office and Department of Veteran Affairs); (3) to make determinations for eligibility in similar health and income maintenance programs at the Federal, State, and local level; (4) to State agencies or other agencies providing services to disabled children; (5) to contractors for the purpose of assisting SSA in the administration of the Ticket to Work and Self Sufficiency Program; and (6) to facilitate statistical research, audit or investigative activities necessary to assure the integrity 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. Information from these matching programs can be used to establish or verify a person's eligibility for Federally funded and administered benefit programs and for repayment of payments or delinquent debts under these programs.

SSA Ex. 8 at 15. 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 veiled 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. 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.

Respondent completed a Form SSA-454-BK titled "Continuing Disability Review Report" on November 9, 2009. He indicated on the form, apparently with the assistance of his wife that he speaks English, but he reads only a little and can do no more than write his name. SSA Ex. 8 at 22. 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. 18 at 22-28. 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.

Respondent also filled out a Form SSA-795 titled "Statement of Claimant or Other Person" that Respondent and his wife both signed but failed to date. On the second page of the form is the following 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,
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 30-31. 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 veiled 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.

On November 28, 2010, Respondent's daughter, Rosanna Cappetta, completed a Form SSA-3441-BK, which is titled "Disability Report – Appeal." The form does not use or define the term "material fact." SSA Ex. 10 at 5-12.

The forms completed by Respondent with the assistance of his wife and daughter 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 31) 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 improperly paid.

SSA sent Respondent a demand for payment of $85,352.10 on July 18, 2011. A demand for payment of $24,377.00 was sent to Respondent's wife on July 18, 2011. Neither demand for payment defined the term "material fact." However, both forms included detailed Privacy Act Statements. SSA Ex. 12 at 5-12.

Respondent conceded that he knew that he was supposed to report work activity. But he did not concede that he had actual knowledge of what fact is considered to be a material fact that had to be reported, or that he knew he was subject to criminal or administrative

penalties for failure to report a material fact. None of the evidence presented by the SSA IG 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.

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 8, 2015, waived the right to file a reply to Respondent's submissions. The SSA IG proposed that I conclude that Respondent knew or should have known that work activity was a material fact and his failure to report that material fact was misleading. But the SSA IG points to no support for that conclusion other than my prior decision and his prior brief. 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 Respondent 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 his failure to report that he engaged in work activity for Cameron Construction was the omission or withholding of a fact that was material to the determination of his 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 he knew that failure to report his work activity for Cameron Construction was misleading. The SSA IG has not pointed to evidence that Respondent knew or should have known that the failure to report his work activity was misleading with regard to a possible determination as to his continuing entitlement to his 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 his work activity for Cameron Construction, either:

> 1. Respondent did not actually know that his work activity met some definition of work activity that had to be reported either on the forms he completed on November 9, 2009 (SSA Ex. 8 at 5-31), or in another fashion such as by telephone or in person; and thus, he would not have known, and it cannot be concluded he should have known, that failure to report that work activity was misleading; or
>
> 2. He actually knew that his work activity should be reported on those forms, by telephone, in person or in some other fashion, but he did not report, from which fact I could infer that he 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 he did not have actual and constructive knowledge that work activity should be reported. However, Respondent argues that he did not recognize that his efforts for Peter Cameron and Cameron Construction were actually work activity that was required to be reported. Respondent's assertion that he did not understand that his 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 he was of average or higher intelligence but English is not his first language and he had difficulty understanding more than simple sentences.

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 his activities at Cameron Construction. *Cappetta*, DAB No. 2606 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 November 9, 2011, also do not clearly require that Respondent report "work activity" nor contain any notice that work activity is considered a "material fact" and that failure to report work activity is misleading and may result in penalties for failure to report. SSA Ex. 8 at 6-31.

SSA is required to show it is more likely than not that Respondent knew or should have known that his failure to report work activity for Cameron Construction was misleading. Based on my review of the regulations and the forms Respondent completed on November 9, 2011, I conclude that it was more likely than not that Respondent did not understand that his failure to report work activity for Peter Cameron and Cameron Construction 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 business information rather than a listing and description of work activity. SSA Ex. 8 at 8-11, 17-20. 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 forms and absent some evidence that Respondent was actually told to report all work activity (whether legal or illegal, for pay, profit, with or without benefits) and that any failure to report is misleading; I will not infer that Respondent knew that his failure to report work activity for Peter Cameron or Cameron Construction 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 his work activity for Peter Cameron or Cameron Construction 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 he omitted to report; or that the Respondent did not know his failure to report was misleading; I address the additional two issues directed by the Board in its remand decision.

The SSA IG notified Respondent that he determined Respondent failed to report work activity from November 2002 through April 2011. However, only the failure to report from December 2006 through April 2011 was actionable. SSA Ex. 17. There is no dispute that there is no evidence of work activity after November 2009. Tr. 104. However, there is also no dispute that Respondent did not report to SSA any work activity for Cameron Construction or Peter Cameron through April 2011. The fact issue to be resolved is when was the earliest date Respondent engaged in work activity for Peter Cameron or his company.

SSA's Erica Durham received an anonymous call on June 16, 2009 at about 11:45 a.m. The caller alleged that Respondent was paid for work for Cameron Construction for at least the past ten years. SSA Ex. 2. Ms. Durham's statement is unsigned and unsworn. The anonymous caller is not identified. Neither Ms. Durham nor the anonymous caller were called to testify and subjected to cross-examination. Although 20 C.F.R. § 498.216(b) permits me to receive witness testimony in writing, that section does not create an exception to of 20 C.F.R. § 498.216(a) requiring 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.[8]

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[8] 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 to testify and a party attempts to rely upon an affidavit or declaration, or in this case and an unsworn and unsigned statement. 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.

Although SA Hanson conducted surveillance of Respondent for a few hours in August 2009, she never saw him doing any work at Cameron Construction. SSA Ex. 6.

SA Hanson and SA Brown interviewed Peter Cameron on November 6, 2009. Peter Cameron told SA Hanson that: Respondent worked for him for approximately the past eight years, which I calculate to be approximately November 2001. Peter Cameron testified that Respondent was paid by the job; Respondent worked three to five hours per day when he worked; the amount of pay depended upon the job and could be $50, $100, or $500 per job; Respondent would do any type of work; Respondent could work several weeks in a month and make $700 to $800 or more; he paid Respondent cash; he paid Respondent from $150 to $1,500 per week depending upon the job. He denied that he paid Respondent $20,000 or $30,000 in a year. SSA Ex. 7 at 1-3; Tr. 122-25. On February 23, 2010, SA Hanson and SA Brown interviewed Peter Cameron again. SA Hanson reported that Peter Cameron said that Respondent's work for him included tiling backsplashes, walls, and floors; hanging doors; trim work, framing, and taping sheetrock. Peter Cameron also stated that he no longer heard from Respondent, who did no work for him after the investigators first came around on November 6, 2009. SSA Ex. 9 at 2. Peter Cameron testified at hearing that he had known Respondent for 15 years, having met him through a mutual friend. Tr. 344. Cameron testified that he and Respondent were friends but that they have not spoken due to the investigation by SSA. Tr. 344-455. At hearing he denied that Respondent ever worked for him but testified that Respondent would show-up at job sites and run to the store for him if he needed materials. Tr. 345-47. He denied paying Respondent wages but by running errands for him Respondent was paying back for work Cameron did on his house. Tr. 350. Peter Cameron testified that sometimes he called Respondent and requested his help and sometimes Respondent just showed-up. Tr. 350-51. He testified that he gave Respondent gifts at Christmas; he gave him money for his kids' birthdays; and he gave him a couple hundred dollars when he went to Italy. Tr. 352. He also gave Respondent money to go get coffee and donuts and for the gas Respondent used going to the store. Tr. 352. He denied telling SA Hanson that Respondent did tiling, taping, sheetrock, backsplashes, grout or mortar work. Tr. 353-54. On cross-examination, Mr. Cameron testified that he did not pay Respondent wages, by check or otherwise. Tr. 355.

SA Hanson testified in response to my questions that she asked Peter Cameron general questions. SA Hanson surmised based on Cameron's responses to general questions that Respondent had worked for him on and off for eight years, he paid Respondent cash, and the amount paid depended upon the job and varied from $150 to $1,500 per week. Mr. Cameron was not asked and did not disclose how much he paid Respondent over the course of a year. But he denied paying Respondent $20,000 to $30,000 per year. SA Hanson admitted in response to questions from Respondent's counsel that she definitely did not know how much Respondent was paid by Mr. Cameron. Tr. 154-58. In response to my questioning, SA Hanson indicated that an analysis of Respondent's and his

family's reported income, resources, liabilities, and expenses did not reflect that Respondent was receiving significant amounts of unreported cash income. Tr. 178-83.

It is problematic that SA Hanson and SA Brown did not obtain a written and sworn statement from Peter Cameron when they interviewed him on November 6, 2009. SA Hanson's clarification of the technique she used to question Mr. Cameron and to record his responses convinces me not to give significant weight to the report of the November 6, 2009 interview. As SA Hanson testified, she asked general questions and drew inferences based on Mr. Cameron's responses that she then recorded. Thus, SA Hanson admitted that her investigative report contains her inferences rather than the actual statements of Peter Cameron. Accordingly, Peter Cameron's sworn hearing testimony that was subject to cross-examination must be accorded more weight in resolving conflicts between the report of investigation and his testimony. My findings that Respondent engaged in some work activity for Peter Cameron or Cameron Construction, including running errands, is unchanged. Peter Cameron's statement that Respondent had been doing some work for him for about the last eight years is not inconsistent with his testimony or otherwise rebutted and I treat that statement as credible. The statement is consistent with Respondents testimony that he had known Peter Cameron since 2000; they were friends; and though Respondent denied working for Peter Cameron, he admitted to giving construction related advice, doing little things such as going to get coffee and cigarettes. Tr. 248, 250-51, 253-55. Respondent's admission that he ran errands is consistent with Mr. Cameron's testimony. Tr. 345-47, 350-51. I do not treat SA Hanson's interpretation of Peter Cameron's statements regarding more significant work activity as more credible or probative than Mr. Cameron's hearing testimony which was under oath and subject to cross-examination. No evidence was elicited tending to show a motive for Mr. Cameron to provide false testimony, and I will not speculate that the past friendship between Mr. Cameron and Respondent was a motive to commit perjury. There is no evidence that Mr. Cameron or Cameron Construction was subject to any punitive legal action related to Respondent's work activity or any payments made by Mr. Cameron to Respondent. SA Hanson's report of investigation denotes that the United States Attorney declined to prosecute Respondent (SSA Ex. 12 at 3); and there is no suggestion that any prosecution was contemplated against Mr. Cameron based on his relationship with Respondent.

Accordingly, I conclude that it is more likely than not that Respondent engaged in work activity, including running errands, for Peter Cameron or Cameron Construction as early as November 2001. There is no evidence and no allegation that Respondent reported his work activity to SSA through April 2011.

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

> • *Whether the SSA IG has shown that the assessment is reasonable based on the amount of benefits Respondent received during the period in which he withheld information about his work.*[9]

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.

Pursuant to 20 C.F.R. § 498.220(b), I may affirm, deny, increase, or reduce the penalties or assessments proposed by the SSA 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 proposed CMP or assessment are "reasonable." *Cassandra Ballew*, Recommended Decision, App. Div. Docket No. A-14-98 at 9-10. Just as the SSA IG 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 $106,000 and an assessment in lieu of damages of $95,167.20. SSA Ex. 17 at 1. The SSA IG advised Respondent he considered that Respondent failed to report his work activity from at least December 2006 through April 2011, a period of 53 months. The maximum CMP of $5,000 per month for 53 months would amount to $265,000 but the SSA IG only proposed a CMP of $106,000, $2,000

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[9] I stated in my initial decision that the SSA IG failed to offer any admissible evidence of the monthly or total amount of DIB and CIB payments to Respondent and his children (actually his daughter) during the period December 2006 through April 2011, to support the amount of $47,583.60 alleged in the SSA IG notice to Respondent dated July 26, 2012. *Cappetta*, DAB CR3260 at 15-16. While that statement is correct, I agree that despite many opportunities to do so, Respondent has not disputed that the amount of benefits received from December 2006 through April 2011, amounted to $47,583.60.

per month, based on his assessment of the regulatory factors. The SSA IG advised Respondent that it was determined that from December 2006 through April 2011, Respondent and his children were paid benefits totaling $47,583.60. The SSA IG proposed the maximum assessment of twice the benefits received, in this case $95,167.20. SSA Ex. 17 at 1.

Mr. Bungard considered the following facts. Respondent knew he was supposed to report work but failed to do so. On November 9, 2011, Respondent made a false statement to investigators that he had done no work since 1998. Respondent was culpable because he failed to report work activity and Respondent and his children received more than $100,000 in benefits over a period or more than eight years. Mr. Bungard considered that the mitigating factor of no prior offenses was outweighed by the long-term nature of Respondent's misconduct. He concluded that the CMP and assessment would not jeopardize Respondent's financial condition, because Respondent failed to file a financial disclosure form. Mr. Bungard also considered in the interest of justice that Respondent had a long history of work in construction; Respondent made substantial additions and modifications to his home while receiving DIB to which he was not entitled; Respondent had several minor children; and that he met the medical requirements for disability even though he did work. SSA Ex. 17 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 as early as November 2001. Respondent knew he was supposed to report work activity. 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 he 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 Peter Cameron or Peter Cameron Construction. The evidence does not show it was more likely than not that Respondent received any earnings for his work activity. The evidence does show that Respondent received gifts from Peter Cameron and that Peter Cameron believed that some of Respondent's work activity was in exchange for work Peter Cameron did on Respondent's house. The value of Respondent's work activity and the amount of any gifts or other compensation is not established by the evidence. Indeed, SA Hanson testified that an analysis of Respondent's and his family's reported income, resources, liabilities, and expenses did not reflect that Respondent was receiving significant amounts of unreported cash income. Tr. 178-83. 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 he did some work for Peter Cameron and Cameron Construction as early as November 2001. 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. It is undisputed that Respondent's command of English is significantly limited.

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.