Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Social Security Administration,
Inspector General,

Petitioner,

v.

JACC,[1]

Respondent.

Docket No. C-15-3534

Decision No. CR4632

Date: June 15, 2016

DECISION

A total civil money penalty (CMP) of $12,500.00 is imposed against Respondent, pursuant to section 1129(a)(1) of the Social Security Act (the Act) (42 U.S.C. § 1320a-8(a)(1)), for withholding information for seven months from February 2013 through August 2013, that his condition had improved.

I. Background

On October 21, 2014, the Inspector General (I.G.), Social Security Administration (SSA), personally served Respondent a notice alleging that the I.G. had received information that Respondent had made or caused to be made false statements, misrepresentations, and omissions of material fact in an effort to receive Social Security benefits. The I.G. also alleged that Respondent failed to notify SSA that his condition had improved and his abilities and activities were no longer consistent with the statements Respondent made

[1] Respondent's name is withheld from the published decision due to the sensitive health and financial information discussed.

when applying for benefits. The I.G. alleged that Respondent improperly received approximately $62,323.50 in Social Security benefits between August 2010 and August 2013. The I.G. alleged that he could commence a civil action against Petitioner and impose a CMP and assessment. SSA I.G. Exhibit (Ex.) 2 at 1-3 (English), 4-5 (Spanish).[2]

On June 1, 2015, the I.G. personally served Respondent a notice that he proposed to impose a CMP of $18,500.00 and an assessment in lieu of damages of $50,500.50. The notice advised Respondent that the CMP and assessment were based on the determination that Respondent failed to notify SSA about his medical improvement; therefore, Respondent wrongfully received $62,323.50 of Social Security Disability Insurance benefits (SSDI) for 37 months between August 2010 and August 2013. The notice stated that the $11,823.00 that Respondent paid as restitution ordered as part of his sentence for his related criminal conviction was deducted from the amount of the assessment. SSA Ex. 3 at 1-5 (English), 6-9 (Spanish).

Respondent requested a hearing by an administrative law judge (ALJ) on July 17, 2015, pursuant to 20 C.F.R. § 498.202.[3] Petitioner acknowledged in his request for hearing that he was personally served on July 1, 2015 with the I.G. notice of imposition of the CMP and assessment. The request for hearing was received at the Civil Remedies Division (CRD) of the Departmental Appeals Board (DAB) on July 22, 2015, and assigned to me for hearing and decision on August 21, 2015. On September 14, 2015, I convened a telephonic prehearing conference to discuss and establish the schedule to hearing in this case. The substance of the prehearing conference is set forth in my Scheduling Order and Notice of Hearing dated September 21, 2015. A final prehearing conference was convened by telephone on January 20, 2016, the substance of which is reflected in my Order Following Final Prehearing Conference and Notice of Hearing Location dated January 21, 2016. The I.G. clarified during the final prehearing conference that the proposed CMP was reduced to $12,500.00, that is $500.00 per month for the 25-month period from August 2011 through August 2013, and the assessment in lieu of damages was reduced to $47,122.70.

On January 27, 2016, a hearing was convened by video teleconference with the SSA I.G. appearing from sites in San Juan, Puerto Rico and Dallas, Texas; Respondent appearing

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[2] Respondent, a resident of Puerto Rico, does not speak the English language so translation of all documents into Spanish was required until such time as Respondent engaged a representative who was fluent in English.

[3] References are to the version of the Code of Federal Regulations (C.F.R.) in effect at the time of the SSA I.G. action, unless otherwise indicated.

at a site in San Juan, Puerto Rico; and the ALJ, court reporter and translators participating from Kansas City, Missouri. Transcript (Tr.) 5. Clara Soto-Isaac, Esquire, and Erin Justice, Esquire, represented the SSA I.G. Respondent appeared represented by Louis A. de Mier Leblanc, Esquire. Petitioner waived translation during the oral hearing except for questions directed to him and his responses. Tr. 16. The parties filed in advance of the hearing a joint stipulation of facts (Jt. Stip.) that was accepted and is treated as binding on both parties. Tr. 16-18. The I.G. offered and I admitted SSA Exs. 1 through 7, 7.1, 7.2, 7.3 and 8 through 21. Tr. 18-22. Respondent offered no documentary evidence. Tr. 23. Respondent waived calling any witnesses. Tr. 24. The SSA I.G. presented the declarations of four witnesses: Joseph E. Gangloff (SSA Ex. 18); Rachel Garner (SSA Ex. 19); Manual Rivera (SSA Ex. 20); and Karen Velez (SSA Ex. 21) and Respondent did not object to admission of the declarations as evidence without cross-examination. A transcript of the hearing was prepared and provided to the parties. SSA filed its post-hearing brief (SSA Br.) and proposed findings of fact and conclusions of law on March 16, 2016, and on April 18, 2016 waived a reply brief. Respondent filed his post-hearing brief (R. Br.) on March 17, 2016. Respondent filed no reply brief.

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 referred to as SSDI. 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 I.G. 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 for each month he or she fails to disclose to SSA a material fact. 20 C.F.R. § 498.103(a). 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. § 498.104.

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 I.G. may request a hearing before an 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 I.G. has the burden of going forward as well as the burden of persuasion with respect to all other issues. 20 C.F.R. § 498.215(b)(2). The burdens of persuasion are to be judged by a preponderance of the evidence. 20 C.F.R. § 498.215(c).

The ALJ decision becomes final and binding on the parties 30 days after the decision is served. Either party may appeal the ALJ decision by filing with the DAB a notice of appeal within 30 days of the date of service of the initial decision. 20 C.F.R. §§ 498.220-.221.

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).

C. 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 discuss the credible evidence given the greatest weight in my decision-making.[4] I also discuss any evidence that I find is not credible or worthy of weight. The fact that evidence is not specifically discussed should not be considered sufficient to rebut the presumption that I considered all the evidence and assigned such weight or probative value to the credible evidence that I determined appropriate within my discretion as an ALJ. There is no requirement for me to discuss the weight given every piece of evidence considered in this case, nor would it be consistent with notions of judicial economy to do so. Charles H. Koch, Jr., *Admin. L. and Prac.* § 5:64 (3d ed. 2013).

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[4] "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.

1. There is a basis for imposing a CMP against Respondent pursuant to section 1129(a)(1) of the Act for failure to report his improved condition.

2. For seven months from February 2013 through August 2013, while he received benefits, Respondent failed to report that his physical condition had improved in violation of his duty to report improved condition under 20 C.F.R. § 404.1588.

3. A CMP of $12,500 (approximately $1,785.71 per month for seven months from February 2013 through August 2013) and no assessment is appropriate considering the factors established by section 1129(c) of the Act and 20 C.F.R. § 498.106.

a. Facts

On or about August 4, 2011, Respondent applied for SSDI. SSA Exs. 6 at 1, 8 at 2. Respondent claimed that his disability began on January 10, 2010. SSA Ex. 8 at 2. Respondent agreed to notify SSA "of all events explained to me" but the form does not list the events explained to Respondent. SSA Ex. 8 at 3. The record of the application for SSDI warned Respondent about making a false statement or representation of material fact and perjury; and the need to report changes including returning to work and medical improvement. SSA Ex. 8 at 3, 4, and 6-7. The document is addressed to Respondent and is entirely in English. Respondent does not speak or understand English (SSA Ex. 4 at 2), therefore I cannot infer that he received any notice of his reporting obligations based on SSA Ex. 8. An electronic "Disability Report – Adult – Form SSA-3368" was completed on August 9, 2011. The form was completed by Respondent's representative at that time. The form indicates that Respondent can neither read nor understand English. SSA Ex. 4 at 1-2. Respondent listed the following impairments: depression, back problems, cervical condition, pain, carpal tunnel, and numbness in both arms and legs. The form states Respondent stopped working January 10, 2010 due to his conditions. SSA Ex. 4 at 3. Respondent listed a history of full-time employment on a production line, with a single employer from July 1988 to January 2010. SSA Ex. 4 at 4. The form also shows treatment for anxiety. SSA Ex. 4 at 6. The form reflects complaints of pain, numbness, falling, and loss of strength in both hands that limit Respondent's ability to do work. SSA Ex. 4. An electronic "Function Report – Adult (3373SP)" was completed on about October 19, 2011. SSA Ex. 5. No translation of the document was provided by the I.G., and it is not considered as evidence.

Respondent was notified by letter from SSA dated January 14, 2012, that he was determined to have become disabled on January 10, 2010. Based on the determination that he was disabled beginning January 10, 2010 and the August 4, 2011 filing date of his application, he was determined to be eligible to begin receiving SSDI effective August

2010. The payment for back benefits to August 2010 amounted to $21,164.00 with a continuing monthly benefit of $1,661.00 beginning in January 2012. SSA Ex. 6 at 1, SSA Ex. 8 at 1. The notice letter advised Respondent that he had to notify SSA right away if there was any change in his condition or work activity and reference was made to an enclosed pamphlet titled "What You Need To Know When You Get Social Security Disability Benefits." SSA Ex. 6 at 3. The pamphlet clearly states that Respondent should notify SSA if there was any change in his ability to work, he returned to work, or his medical condition improves. SSA Ex. 6 at 11. The letter was addressed to Respondent and not his representative. Unfortunately, both the letter and the pamphlet are in English, which Respondent clearly notified SSA that he can neither speak nor understand. SSA Ex. 4 at 2. Accordingly, I cannot infer that SSA Ex. 6 gave Respondent any notice he could understand about his reporting responsibilities.

Respondent was targeted for investigation by the I.G. because Dr. Jose Hernandez was one of his treating sources. Dr. Hernandez was indicted for assisting individuals file for disability benefits based on fraudulent medical records. SSA Ex. 20 at 2 ¶ 4. Respondent was indicted on August 9, 2013. He subsequently pleaded guilty to one count of theft of government property, admitting that he filed an application for SSDI that contained false information. He was convicted pursuant to his plea and was sentenced to one year of probation and to pay restitution of $11,823.00. SSA Ex. 20 at 2 ¶ 6. Following the conviction, the matter was referred back to the I.G. for consideration of a possible CMP and assessment. SSA Ex. 20 at 3 ¶ 7.

SSA stopped paying Respondent SSDI in August 2013 due to the I.G. investigation.[5] SSA Ex. 21 at 3. From August 2010 until August 2013, Respondent was paid a total of

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[5] SSA offered as evidence a video of a surveillance of Respondent conducted on February 1, 2013 (SSA Ex. 10), an investigator's summary of the surveillance (SSA Ex. 9), and the declaration of Federal Bureau of Investigation, Special Agent (SA) Rachel Garner who participated in the surveillance (SSA Ex. 19). The investigators noted physical activity and made assumptions about mental activity and acuity based on their observations of Respondent's physical activity and his responses to their verbal interaction. SSA Exs. 9, 19. There is no evidence that the investigators are qualified to assess Respondent's residual functional capacity, physical or mental, based on their observations or to render medical opinions. SSA Exs. 9, 10. More significantly, Respondent was granted SSDI based on an affective disorder only, which is a mental disorder not a physical disorder. SSA Ex. 8 at 1. Accordingly, I give the investigators opinions and the declaration of SA Garner little probative value. The video shows physical functional ability on February 1, 2013 only, and its probative value is minimal at most on the issue of Respondent's mental capacity at the time of the surveillance.

$58,945.70 in SSDI, as follows: $45,434.50 in 2012 including $6,296.00 for 2010 and $19,207.00 for 2011; and $13,511.20 in 2013. SSA Ex. 11; SSA Ex. 21 at 3.

On November 15, 2014, Respondent responded to the October 21, 2014 I.G. notice imposing the CMP and assessment. Respondent submitted a document titled "Personal Declaration" dated November 15, 2014. SSA Ex. 7.2. Petitioner acknowledged receipt of the October 21, 2014 notice and provided a new mailing address. Respondent discussed his family situation. He asserted that his health deteriorated and he sought psychological help as early as 2005 with continuing psychiatric treatment. He states he also developed back pain related to his cervical spine and he began seeing Dr. Hernandez who encouraged him to seek disability. On January 10, 2010, Respondent states he was fired from his job. He admitted successfully completing a refrigeration course sometime between January 2010 and the summer of 2011. Dr. Hernandez subsequently convinced him to meet a representative and file for SSDI. Contrary to his plea agreement and guilty plea, Respondent denies that any of his statements made during the application process were false and, rather, asserts they were accurate when made. He points out that he was approved for SSDI based on his mental condition not his physical condition. SSA Ex. 7.2 at 1-8. He admits that at some unspecified time he began to feel physically better than he did when he filed for SSDI; he admits he should have reported the improvement; and he admits he did not report. SSA Ex. 7.2 at 7. He asserts that there was no improvement in his mental condition. SSA Ex. 7.2 at 8. He states he should have reported that his health condition had changed in February 2013. SSA Ex. 7.2 at 9. Respondent also submitted a financial disclosure showing assets of $214,910.97, including a savings account with a balance of $92,900.97 and his personal residence; liabilities of $11,618.00 (the restitution owed to SSA); monthly family income of $764.90 and monthly expenses of $1,827.21. SSA Ex. 7.3.

In his criminal case, Respondent entered a plea agreement on February 11, 2014, and thereby agreed to be bound by the statement of facts that was part of the agreement, in exchange for a sentence limitation and dismissal of any additional counts to which he did not plead guilty. SSA Ex. 1. Respondent admitted in the statement of facts that on August 4, 2011 he filed a claim for SSDI which contained false information; the claim was approved, and, as of February 4, 2014, he had received $11,823 in fraudulent benefits. SSA Ex. 1 at 9. There is no admission as to which specific information was false.

Respondent and the I.G. agreed to stipulations of fact that are signed by counsel but undated, that were filed on January 19, 2016. The parties agreed to be bound by the stipulations at hearing and they were accepted. Tr. 16-18. Respondent stipulated that he:

1. Applied for SSDI in August 2011;
2. Submitted two forms, a Disability Report – Adult on August 9, 2011 and a Function Report – Adult dated October 19, 2011;

3. Was notified he was approved for SSDI on January 14, 2012 with an onset date of January 10, 2010, entitlement to benefits beginning in August 2010, and the diagnosis on which disability was based was an affective disorder;
4. Received benefits from August 2010 through August 2013, totaling $58,954.70, including retroactive benefits received in January 2012 for the period August 2010 through December 2011 and monthly benefits thereafter;
5. Pleaded guilty to theft of government property pursuant to a plea agreement he entered on February 11, 2014;
6. Admitted as part of his plea agreement that his SSDI application contained false information; and
7. Cannot deny the facts on which he was convicted.

b. Analysis

The first challenge in this case is to identify the false statement, representation, or omission of material fact that is the basis for the imposition of the proposed CMP.

The initial notice personally served on Petitioner on October 21, 2014, alleged that Respondent made false statements or representations of material fact at the time of application and that he omitted to report the material fact that he had experienced medical improvement. The I.G. alleged he "received information indicating that [Respondent] made, or caused to be made, false statements and/or omissions of material fact to SSA, which [Respondent] knew or should have known were false or misleading." SSA Ex. 2 at 2. The I.G. alleged that Respondent improperly received approximately $62,323.50 in SSDI between August 2010 and 2013. SSA Ex. 2 at 2. The I.G. alleged that the false statements and/or misrepresentations or omissions of material facts were related to Respondent's effort to receive SSDI. The I.G. did not specify what the false statements or representations were, whether they were on the application or forms submitted during the application process, or whether they were given during an interview by SSA staff. The I.G. also alleged that Respondent failed to notify SSA that his "condition had improved and [his] abilities and activities were no longer consistent with the statements" Respondent made when applying for SSDI. SSA Ex. 2 at 2. The I.G. invited Respondent to submit information for the I.G. to consider prior to imposing a CMP. SSA Ex. 2 at 3.

Respondent submitted a response to the I.G.'s initial notice that has been placed in evidence by the I.G. SSA Exs. 7.1, 7.2, 7.3.

The I.G. letter proposing a CMP and assessment in lieu of damages was personally served on Respondent on June 1, 2015. The letter cited only Respondent's failure to report his medical improvement as the basis for imposing a CMP and assessment. In that letter, the I.G. advised Respondent that a CMP and assessment in lieu of damages was proposed for the following reason:

> This proposal is based upon my determination that you failed to notify SSA that your medical condition improved. Due to your failure to notify SSA about your medical improvement, you wrongfully received $62,323.50 in Social Security Disability Insurance (SSDI) between August 2010 and August 2013.

SSA Ex. 3 at 2. The letter states that Respondent was subject to a CMP of up to $5,000 per month for each of the 37 months from August 2010 to August 2013 and an assessment in lieu of damages of twice the amount of benefits he received during that period, because he did not report his medical improvement. The letter goes on to explain that the I.G. proposed a substantially reduced CMP of $500 per month for 37 months and an assessment of $50,500.50. SSA Ex. 3 at 2. The I.G. letter served June 1, 2015, does not identify what medical improvement Respondent experienced; cite to any evidence in support of that allegation; or state when the I.G. concluded that Respondent's duty to report medical improvement occurred.[6] However, the fact that the I.G. proposed to impose a CMP for each of the 37 months from the date of entitlement, August 2010, through termination in August 2013, suggests that the I.G. concluded that medical improvement had occurred and Respondent's duty to report arose about the time he was found entitled. The I.G. letter served on June 1, 2015, makes no reference to any false statements, misrepresentation, or omissions related to the application process. I conclude that, despite the fact that Respondent had been convicted of making false statements in the application process, the I.G. did not propose a CMP or assessment on that basis.

During the hearing in this case, counsel for the I.G. asserted that the basis for the CMP was the false information that Respondent provided at the time of his application, conduct admitted by Respondent when he pleaded guilty to theft of government property. Counsel for the I.G. argued that Respondent gave the false information and then failed to report to SSA that his medical condition was improved compared to his initial report. SSA Ex. 1 at 9; Tr. 35-46. There is no evidence that Respondent ever admitted to what specific false information he provided with his application that he admitted as part of his plea agreement, whether it related to work activity, physical capacity, mental capacity, or some other information. The I.G. has also argued that SSA Exs. 4 and 5, documents submitted at the time of application, contain false information, but Respondent never conceded which if any information in those forms is false and the I.G. has presented no

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[6] The required contents of the I.G. notice of a proposal to impose a CMP and assessment are established by 20 C.F.R. § 498.109. Section 498.109(2) of 20 C.F.R. requires that the I.G. describe the false statements, representations, or other actions and incidents that are the bases for proposing the penalties. Respondent did not challenge the sufficiency of the notice and I treat the issue as waived.

evidence that shows which if any statements on those forms were false when made. SSA Br. at 5. The surveillance of Respondent on February 1, 2013 (SSA Exs. 9, 10, 19) provides some evidence as to his physical capacity on that date, which was 18 months after the application. The evidence does not show that the investigators examined any medical or other evidence related to Respondent's physical or mental capacity from the onset date to the date of application and compared it with Respondent's mental or functional capacity they observed on February 1, 2013. The evidence also does not show what qualifications the investigators had to credibly opine that there was improvement in Respondent's physical or mental condition. SSA offered no evidence that it had Respondent examined on about February 1, 2013 or at any other time to competently determine his mental and physical functional capacity.

In his post-hearing brief, the I.G. clarifies that he now proposes only a CMP not an assessment, and the basis for the CMP is Respondent's admitted failure to report his improved condition from February 2013 through August 2013. The SSA I.G. states in his post-hearing brief that the CMP has been reduced from "a maximum penalty of $35,000 ($5,000.00 for each of the 7 months he failed to notify SSA about his medial improvement . . . between February 2013 and August 2013), plus an assessment of $23,646 (which is two times the overpayment Respondent fraudulently received) . . ." The I.G. has "instead determined that a total CMP of $12,500.00 would be more appropriate." SSA Br. at 9. The I.G. states that because Respondent is in the process of repaying the overpayment, the I.G. is not pursing an assessment in lieu of damages. SSA Br. at 9-10.

Therefore, I conclude that the I.G. proposes only a CMP of $12,500 and no assessment. The basis for the CMP proposed by the I.G. is Respondent's failure to report his improved condition during the seven-month period February 2013 through August 2013.

Pursuant to section 1129(a)(1) of the Act and 20 C.F.R. § 498.102(a), the SSA I.G. is authorized to impose a CMP and an assessment against a person when the I.G. determines the following elements are met. The I.G. may impose a CMP or assessment against a person who:

> (1) (a) made or caused to be made;
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> (b) a statement or representation of a material fact;
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> (c) the statement or representation of material fact was for use in determining any initial or continuing right to monthly insurance benefits or the amount of monthly insurance benefits under Title II (Federal Old-Age, Survivors, and Disability Insurance Benefits), or benefits or payments under Title VIII (Special Benefits for Certain World War II Veterans) or Title XVI (Supplemental Security Income for Aged, Blind, and Disabled); and

> (d) the person knows or should know the statement or representation of material fact is false or misleading; or
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> (e) made such a statement or representation with knowing disregard for the truth; or
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> (2) (a) omits from a statement or representation or otherwise withholds disclosure of;
>
> (b) 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 Titles VIII or XVI; and
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> (c) 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 . . . .

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. I interpret this provision broadly to include facts the Commissioner may consider in evaluating initial eligibility and continuing eligibility and the amount to which an applicant or beneficiary may be entitled. My interpretation is based upon the language of section 1129(a)(1) of the Act and 20 C.F.R. § 498.102(a), which specifically refer to determinations of initial or continuing entitlement or the amount of monthly insurance benefits. Thus, in order for a CMP and assessment to be imposed, the evidence must show that the allegedly false or misleading fact or facts were material and that the fact or facts were either false or misleading as reported or false or misleading by virtue of their omission or withholding. I conclude that the elements necessary to establish a violation by a knowing omission or failure to report a material fact are satisfied in this case and there is a basis for the imposition of a CMP.

Respondent admitted in his response to the I.G.'s initial notice that at some unspecified time he began to feel physically better than he did when he filed for SSDI; he admits he should have reported the improvement to SSA; and he admits that he did not report. SSA Ex. 7.2 at 7. Respondent asserts that there was no improvement in his mental condition, which was the reason he was granted SSDI. SSA Ex. 7.2 at 7-8. However, Respondent admitted that he should have reported that his physical condition had changed in February 2013. SSA Ex. 7.2 at 9. Respondent also conceded at hearing (Tr. 33) that he did experience improvement in his condition sometime on or before February 2013, that

he omitted to report to the SSA I.G. that there was improvement in his condition; and that he should have reported his improved condition by February 2013.[7] Therefore, there is no dispute that Respondent admits that he omitted to report a change in his physical condition to SSA as early as February 2013, or that he continued to receive benefits paid from February through August 2013. Based on Respondent's admissions, I conclude that Respondent either knew or should have known that his failure to report his improved physical condition was misleading to the extent that the omission to disclose prevented a review of whether or not he continued to be entitled to SSDI.

I also conclude that the element of materiality has been satisfied in this case, that is, Respondent's failure to report his improved physical condition on or about February 2013 was a material fact. 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, an applicant's continuing eligibility, and the amount to which the applicant or beneficiary may be entitled under section 1129(a) and 20 C.F.R. § 498.101.

The regulations are clear that medical improvement is one basis on which the Commissioner may determine that disability and entitlement to continued benefits has ended. 20 C.F.R. § 404.1594.

> Medical improvement is any decrease in the medical severity of your impairment(s) which was present at the time of the most recent favorable medical decision that you were disabled or continued to be disabled. A determination that there has been a decrease in medical severity must be based on changes (improvement) in the symptoms, signs and/or laboratory findings associated with your impairment(s) (see § 404.1528).

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[7] Respondent does not speak or understand English. The evidence does not show he was informed of any reporting requirements in a language he understands. SSA Ex. 6 and 8. However, Respondent concedes that he knew he should have reported the change in his physical condition. SSA Ex. 7.2. The concession is significant. Respondent's legal obligation to report certain matters to SSA that might affect his entitlement, including medical improvement, is established by 20 C.F.R. § 404.1588. Normally, I would conclude, in the absence of an admission of actual knowledge as in this case, that publication in the C.F.R. constitutes constructive notice to Respondent of his reporting responsibilities under the law, but it does not appear that the C.F.R. is published in Spanish by the federal government.
https://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR

20 C.F.R. § 404.1594(b)(1). Respondent's conceded that he sensed an improvement in his physical condition that he should have reported in February 2013. Tr. 33. Although Respondent did not concede medical improvement in his mental condition, 20 C.F.R. § 404.1588(a)(1) requires reporting any improvement in condition, whether or not related to the disabling condition. Improvement in medical condition is material because medical improvement may be considered by the Commissioner in determining whether or not one is entitled to continued SSDI payments. Respondent's concession that he knew that he should have reported that he felt physically improved, shows that he knew or should have known, that the fact he felt better was a material fact that might affect his continued entitlement.

Accordingly, I conclude that Respondent is liable under section 1129(a)(1)(C) of the Act and 20 C.F.R. § 498.102(a)(2), and subject to a CMP for his omission to report during the period February 2013 through August 2013, the material fact that he perceived an improvement in his physical condition that may have impacted a decision of the Commission regarding Respondent's continued entitlement to SSDI.

The remaining issue is the appropriate penalty to be imposed against Respondent. The I.G. proposes a CMP of $12,500 and no assessment in lieu of damages because Respondent is already making restitution of benefits paid him. In determining a reasonable CMP, I consider the basis for imposing the CMP already discussed. I also consider that a $12,500 CMP divided by seven months shows that the I.G. proposes to impose a CMP of approximately $1,785.71 for each month Respondent failed to report – an amount well under the maximum of $5,000 that the I.G. is authorized to impose for each month that an omission to report continues. Act § 1129(a)(1); 20 C.F.R. § 498.103.

Pursuant to 20 C.F.R. § 498.220(b), I may affirm, deny, increase, or reduce the CMP proposed by the I.G. In determining the CMP or assessment to impose, I am bound to follow the guidance of 20 C.F.R. §§ 498.102 through 498.106. The regulations do not provide that I am limited to reviewing whether the CMP or assessment proposed by the I.G. is "reasonable." *Cassandra Ballew*, Recommended Decision, App. Div. Docket No. A-14-98 at 9-10 (2014) (ALJ evaluated and applied regulatory factors and determined a lesser assessment that the Board recommend the Commissioner approve). In determining the amount of penalties or assessment, my review is de novo, and, just as the I.G. did when proposing penalties, I must consider the factors specified by section 1129(c) of the Act:

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

Act § 1129(c); 20 C.F.R. § 498.106.

I evaluate the required factors as follows:

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

The CMP I impose is based on Respondent's failure to report his improved condition between February and August 2013. The CMP is not based on Respondent's admission that he made false statements when applying for SSDI. The information Respondent failed to report was not related to the diagnosis for which he was granted SSDI. He was granted based on a mental impairment only and the information he failed to report related to his physical condition. However, Respondent admits that he knew he should have reported and he failed to do so. Respondent's improved physical condition may have impacted a decision to further investigate Respondent's disabling condition and his continuing entitlement to SSDI. Therefore, Respondent's failure to report was both material and significant.

(2) Degree of culpability, history of prior offenses, and financial condition of Respondent.

The simple definition for culpability is blameworthiness. *Black's Law Dictionary* 406 (18th ed. 2004). Respondent is culpable. He admits that he knew he should have reported his improved physical condition but he failed to do so. Respondent also admitted and he was convicted for providing false information in connection with his initial application for SSDI. Respondent agreed, as part of his plea agreement, to make restitution to SSA for part, but not all, of the SSDI benefits he received and there is no evidence he is not paying as required. Considering Respondent's net assets, the payment of a $12,500 CMP will not deprive Respondent of all of his family's available financial resources nor pose a significant threat to Respondent's ability to meet living expenses.

(3) Other matters as justice may require.

A $12,500 CMP is a significant penalty for one in Respondent's position. The CMP will serve the purpose of deterrence both for Respondent and others. The CMP is also just in that it is not excessive and will not place Respondent in financial risk or make him totally dependent upon the social-welfare system. The penalty also recognizes that Respondent confessed to his initial crime and also admitted that he was wrong by failing to report his improved condition to the Commissioner. Respondent's admissions minimized, to some extent, the cost to the government in imposing an appropriate penalty.

Based on my consideration of the statutory and regulatory factors, I conclude that a total CMP of $12,500 is appropriate in this case.

III. Conclusion

For the foregoing reasons, I conclude Respondent is liable to pay a CMP and that a CMP in the amount of $12,500 is reasonable.

/s/
Carolyn Cozad Hughes
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.