

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the case of:)	
)	
Social Security Administration,)	Date: July2, 2009
)	
- v. -)	Docket No. C-08-382
)	Decision No. CR1972
Diane L. Reyes,)	
)	
Respondent.)	
_____)	

RECOMMENDED DECISION

I recommend that the Commissioner of the Social Security Administration impose a civil money penalty of \$12,000 against Respondent, Diane L. Reyes.

I. Background

The Social Security Administration Inspector General (SSA I.G.) determined to impose civil money penalties of \$12,000 against Respondent, alleging that she had violated section 1129 of the Social Security Act (Act) by knowingly making false and/or misleading statements of material facts to SSA regarding her work activities and income. Respondent requested a hearing and the case was assigned to me for a hearing and a recommended decision.

I held a hearing in Detroit, Michigan on April 16, 2009. At the hearing I received into evidence exhibits from the SSA I.G. that are identified as SSA I.G. Ex. 1 – SSA I.G. Ex. 26 and from Respondent that are identified as R. Ex. 1 – R. Ex. 17. I also heard the cross-examination and redirect testimony of several witnesses whose written direct testimony is in evidence as exhibits.

II. Issues, findings of fact and conclusions of law

A. Issues

The issues in this case are whether:

1. Respondent violated section 1129 of the Act by knowingly making false and/or misleading statements to SSA concerning her work activities and income; and
2. A civil money penalty of \$12,000 is a reasonable remedy.

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law (Findings) to support my recommended decision. I set forth each Finding below as a separate heading.

1. ***Respondent violated section 1129 of the Act by knowingly making false and/or misleading statements to SSA concerning her work activities and income.***

Section 1129 of the Act provides in relevant part for the imposition of civil money penalties against any person who:

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 [of the Act] or benefits or payments under title VIII or XVI [of the Act], that the person knows or should know is false or misleading, . . .

Act, section 1129(a)(1)(A).

The SSA I.G. contends that Respondent violated this section by knowingly testifying in a false or misleading manner in two hearings before a SSA administrative law judge, and in answers to interrogatories that the judge sent to Respondent after the second hearing, concerning applications that she filed for Social Security disability benefits and Supplemental Security Income. These are benefits that are paid pursuant to titles II and XVI of the Act to qualified disabled beneficiaries. Specifically, the I.G. asserts that Respondent knowingly misrepresented both her work activities and her income in these hearings and in answers to interrogatories.

The evidence unequivocally substantiates the SSA I.G.'s contentions. It proves that, at administrative hearings conducted on May 5, 2005 (2005 hearing) and on September 14, 2006 (2006 hearing), Respondent deliberately failed to identify income that she had earned from her ownership and operation of a commercial trucking business when asked specifically by the administrative law judge about her income and work activities. Respondent also failed to identify work activities that she had performed in the course of managing the business. Respondent repeated her falsehoods in answers to interrogatories that the SSA administrative law judge directed her to answer.

By concealing her income and work activity Respondent withheld from the administrative law judge information that was relevant to the ultimate issues of whether and when, if at all, she became disabled. One of the matters of inquiry in each of the disability hearings was whether Respondent had engaged in, or was capable of engaging in, substantial gainful activity during the period when she claimed to have been disabled. Performance by an individual of substantial gainful activity during a period when that individual claims to be entitled to disability benefits will disqualify that individual from entitlement during that period regardless of his or her medical condition. Any evidence of work or work-related activity is relevant to deciding whether a disability claimant engaged in substantial gainful activity.

There is also overwhelming evidence supporting my conclusion that Respondent's omissions of material facts were knowing and intentional. She consistently failed to identify the income she had earned from her trucking business at the two administrative hearings notwithstanding the administrative law judge's pointed questions. Such consistent failure to identify a major source of income could only have been deliberate. Respondent also consistently failed to identify the considerable work activity she engaged in while managing her trucking business. I find that omission, too, to have been deliberate. Her protestation that she was merely a passive investor and not a manager is belied by a mass of evidence showing that she routinely completed documents that were necessary to operate the business.

At the 2005 hearing the administrative law judge asked Respondent to describe the sources of her income.¹ Respondent testified that her income consisted of Family

¹ Hearings conducted before SSA administrative law judges are tape recorded and a recording was made of the 2005 hearing. However, SSA lost the tape and neither it nor a transcript of the hearing are in evidence. Petitioner objected to my receiving the testimony of the administrative law judge who presided over the 2005 and 2006 hearings, her notes, and the notes made by the judge's hearing monitor as evidence of what transpired at that hearing in the absence of the tape or a transcript. I denied Petitioner's objection and I do so again here. A transcription of the hearing might be the most precise record of what transpired. But, the testimony of the administrative law judge as to what she asked and how Respondent answered is credible and that testimony is supported by

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Independence Agency assistance and food stamps. She mentioned no other sources of income. SSA I.G. Ex. 3, at 3; SSA I.G. Ex. 4, at 1; SSA I.G. Ex. 26, at 2.

Respondent's testimony was palpably untrue. Respondent failed to disclose that she had a trucking business which produced a gross profit in 2004 of \$26,195 and a net profit, after deduction of expenses, of \$6093 and which was continuing to generate revenue and income as of the 2005 hearing. SSA I.G. Ex. 17, at 7; SSA I.G. Ex. 18, at 3. Admission by Respondent at the 2005 hearing of income in the amount she had actually earned would have had a bearing on her contention that she had not engaged in substantial gainful activity.

At the 2005 hearing the administrative law judge asked Respondent to describe all of her work activity. Respondent testified that she had last worked for Hitachi as a furnace operator and that this employment ended on July 11, 2002. SSA I.G. Ex. 3, at 3; SSA I.G. Ex. 4, at 2; SSA Ex. 26, at 2. Respondent's testimony about her work history was highly relevant to the issue of whether she was disabled. The lynchpin of her disability application was that she was unable to work and had been unable to work in the years prior to the hearing.

Respondent's testimony at the 2005 hearing about her work history was false. Respondent omitted to testify that she owned a commercial truck which she ran as a business. Nor did Respondent testify about the considerable activities she engaged in to operate that business prior to the 2005 hearing. Respondent incorporated her business in July 2004 by filing and signing articles of incorporation to form a corporation called "D & B Trucking, Inc." SSA I.G. Ex. 16, at 1-3. On July 12, 2004, Respondent and D & B Trucking received an employer identification number from the United States Department of the Treasury Internal Revenue Service. *Id.* at 8. On September 17, 2004, D & B Trucking and Respondent obtained a permit from the United States Department of Transportation to engage in transportation as an interstate contract carrier. *Id.* at 5. On September 20 of that year the corporation received a license from the State of Kentucky enabling it to operate a commercial truck in that State. *Id.* at 3. Throughout 2004 and 2005 Respondent maintained business records recording the expenses that were incurred by her trucking business and she signed various invoices for services and fuel. SSA I.G. Ex. 23; SSA I.G. Ex. 24.

¹(...continued)

her notes and the notes made by the hearing monitor. SSA I.G. Ex. 3; SSA I.G. Ex. 4; SSA I.G. Ex. 26, at 2; Tr. 12-24.

Moreover, Respondent had comported herself in 2004 and 2005 as being self-employed, notwithstanding her testimony at the 2005 hearing that she had ceased all work activity in July 2002. In her 2004 and 2005 income tax returns Respondent listed herself as “self-employed.” SSA I.G. Ex. 17, at 3; SSA I.G. Ex. 18, at 6. Respondent also filed a 2004 self-employment profit and loss statement with the State of Michigan Family Independence Agency. SSA I.G. Ex. 21.

After the 2005 hearing the SSA administrative law judge issued a decision that was unfavorable to Respondent. SSA I.G. Ex. 5. The unfavorable decision was based on Respondent’s functional limitations and not on her work history or her income. On the issue of work activity the administrative law judge evidently relied on Respondent’s testimony at the 2005 hearing and held:

There is no evidence of any other work activities since the alleged disability onset date.

Id. at 5.

The decision was remanded to the administrative law judge by the Social Security Administration Appeals Council for a hearing to develop further Respondent’s subjective complaints. SSA I.G. Ex. 6. At the 2006 hearing, which was held in compliance with the remand order, the SSA administrative law judge once again asked Respondent about her most recent work. Respondent testified that she had no source of income. SSA I.G. Ex. 7, at 8. Respondent also testified that she had done neither work for pay nor volunteer work since September 11, 2002. *Id.* at 11.

This testimony was as false as was the testimony given by Respondent at the 2005 hearing. First, in denying that she had worked for pay since 2002 Respondent once again misstated her 2004 and 2005 income and work activities which I have described above. Additionally, Respondent omitted relevant facts about her income and work activities in 2005 after the 2005 hearing and in 2006.

As to her income, Respondent continued to conceal from the the SSA administrative law judge the profits she had earned from D & B Trucking . Her concealment now extended to include income and profits earned after the 2005 hearing. In 2005 D & B Trucking had gross income of \$55,148. SSA I.G. Ex. 18, at 3. After subtracting business expenses, Respondent earned a profit on that business of \$13,547. *Id.* In 2006, D & B Trucking had gross income of \$72,460 and Respondent reported a net profit from that business of \$13,048. SSA I.G. Ex. 19, at 3.²

² The 2006 hearing was held on September 14 of that year, more than halfway into the calendar year. There is no evidence breaking down D & B Trucking’s income and profits on a month by month basis so I cannot make a finding as to the exact percentage of that

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I do not find that the facts that Respondent omitted about her business income are items that Respondent could have innocently failed to remember. She filed federal income tax returns in 2004, 2005, and 2006 in which she stated this income. SSA I.G. Ex. 17; SSA I.G. Ex. 18; SSA I.G. Ex. 19. Moreover, her testimony at the 2006 hearing contains a statement which could not possibly have been an innocent misstatement.

Notwithstanding the substantial income and profits that D & B Trucking earned in 2005 and 2006, Respondent averred that:

I had bought a semi . . . and they done that, and the semi hasn't been working in the past year.

SSA I.G. Ex. 7, at 8. This statement was false because her trucking business had generated considerable revenues in 2005 and 2006. It could only have been intended to mislead the SSA administrative law judge into believing that Respondent had no source of income when, in fact, her trucking business was continuing to generate income.

There is also considerable evidence to show that Respondent continued to actively manage D & B Trucking after the 2005 hearing. On July 18, 2005 Respondent signed an invoice for fuel purchase from the Alpine Auto/Truck Plaza, Inc. in Bridgeport, Michigan. SSA I.G. Ex. 23, at 12. On July 22, 2005, she signed another invoice for the Pilot Travel Centers, LLC in Ionia, Michigan. *Id.* at 13. She declared herself to be self-employed on both her 2005 and 2006 federal income tax returns. SSA I.G. Ex. 18; SSA I.G. Ex. 19.

After the 2006 hearing the SSA administrative law judge discovered that Respondent had earned income from her trucking business.³ She then sent interrogatories to Respondent

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business's 2006 income and profits had accrued as of the date of the hearing. I infer, however, that it was substantial and probably more than 50% of the total for the year.

³ After the 2006 hearing the SSA administrative law judge issued a decision that was partially favorable to Respondent. SSA I.G. Ex. 8. The administrative law judge found that Respondent had not engaged in substantial gainful activity since July 11, 2002, her alleged onset date of disability. *Id.* at 8. This finding was clearly influenced by the false and misleading testimony that Respondent gave at the 2005 and 2006 hearings. After subsequently learning about Respondent's income from her trucking business the administrative law judge served on Respondent the interrogatories that I discuss above. Then, on August 30, 2007, the SSA administrative law judge issued a reopened and revised decision in which she denied benefits to Respondent, concluding that Respondent

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which asked specific questions about that business. SSA I.G. Ex. 10. At Interrogatory No. 15(G), the SSA administrative law judge specifically asked Respondent:

Do you do the paperwork [for the business], i.e., preparing taxes, payroll, payroll deductions, sign checks, etc.? Explain.

Id. at 4. Respondent's answer to this interrogatory was:

My accountant does this about quarterly.

Id. at 5. This answer was, at best, misleading. It was misleading in the sense that it might have caused a person reading her response to conclude that Respondent did not perform paperwork on behalf of her business. In fact, and as I have discussed, Respondent personally filled out and filed documents on behalf of her business, paid bills, and maintained records. That activity was highly relevant to the issue of Respondent's work and I find that Respondent deliberately misstated it in order to mislead the SSA administrative law judge.

Respondent answered another interrogatory falsely. At Interrogatory No. 5, the SSA administrative law judge asked Respondent whether her business was incorporated. SSA I.G. Ex. 10, at 2. Respondent answered that question by stating, "No." *Id.* That answer was not only false but it was material because the act of incorporating a business is work activity. It is material also because an incorporated and operating business may arguably be very different from a passive investment, such as ownership of an asset or of stock or bonds. The SSA administrative law judge was entitled to know whether the business was incorporated and, on the basis of that information, pursue her investigation wherever it led her.

Respondent asserts that she made no deliberate or intentional false statements. First, she denies being asked during the 2005 hearing about her sources of income. As support for this contention Respondent relies on testimony that the Social Security administrative law judge gave in the hearing before me in which she acknowledged that a question about sources of income is not part of the standardized questions that the judge put into a questionnaire that she used as a guide for conducting SSA disability hearings in 2005. Respondent's post-hearing brief at 2-3; Tr. 15-17.

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had engaged in substantial gainful activity since the alleged onset date of disability. SSA I.G. Ex. 11.

But, the fact that a question is not in a standardized questionnaire does not mean that it wasn't asked. The SSA administrative law judge testified credibly that she asked Respondent about her sources of income at the 2005 hearing. SSA I.G. Ex. 26, at 2. The administrative law judge's testimony is corroborated by the notes that she made at the 2005 hearing and by the notes made by the hearing monitor. SSA I.G. Ex. 3, at 3; SSA I.G. Ex. 4, at 1. Both sets of notes show Respondent as asserting that her income consisted of food stamps and Family Independence Agency assistance. *Id.* Neither set of notes refers to any other source of income.

As to her testimony about her income at the 2006 hearing Respondent contends that she told the literal truth to the SSA administrative law judge when she testified at the 2006 hearing that she had purchased a truck but that it hadn't been working in the past year. Respondent's post-hearing brief at 4-5; SSA I.G. Ex. 7, at 8. At worst, according to Respondent, her testimony was inarticulate.

But, that testimony was not inarticulate, it was patently false. Even if Respondent's truck was inoperative as of the date of the hearing (and Respondent has offered no evidence to prove that) it was clearly operating and generating considerable revenue in the previous year. During the "past year" before the 2006 hearing Respondent's trucking business had earned many thousands of dollars in gross income and tens of thousands of dollars in profit for Respondent.

Respondent also asserts that she was not misleading in her testimony because she truthfully filed income tax returns showing her income from her trucking business and these returns were ultimately provided to SSA by the Internal Revenue Service. But, the fact that SSA may have learned about Respondent's sources of income from another entity does not excuse Respondent's dishonest testimony in 2005 and 2006.⁴ Section 1129 of the Act imposed on Respondent the duty to tell the truth. Nothing excused Respondent from that duty.

Respondent's asserted defense to her failure to disclose work activity after 2002, including her management of her trucking business, is that she did not believe that owning the trucking business constituted work. She contends, essentially, that she was a passive investor in the business, performing neither physical work nor management. Respondent's post-hearing brief at 6-7; *see* Tr. 47.

⁴ Respondent goes so far as to suggest that it was the SSA administrative law judge's fault that Respondent did not fully disclose her sources of income at the 2005 and 2006 hearings. Respondent's post-hearing brief at 5. But, in fact, the SSA administrative law judge asked Respondent to disclose her sources of income at both of the hearings. It was Respondent's dishonesty, and not the judge's questions, that caused Respondent to give deliberately false testimony.

There is no evidence that Respondent engaged in physical work in operating her trucking business. But, her protestations to the contrary, there is overwhelming evidence that she actively managed the business. As I have discussed, Respondent:

- Incorporated her business and filed for and obtained various necessary licenses and permits;
- Paid bills and performed paperwork in connection with managing the business;
- Kept records of her transactions; and
- Signed income tax returns in which she listed herself as self-employed.

Respondent contends that her assertion that she did not manage her trucking business was corroborated by a witness, Mr. Bennie Parker. Respondent relies on Mr. Parker's testimony that Respondent never accompanied him while he drove on trips and that he never saw her sign invoices or other documents related to the business. Tr. 57, 59. But, assuming the truth of this testimony, it fails to prove that Respondent did not manage her business. Going on trips with a professional driver was hardly a necessary element of management. And, the unequivocal documentary evidence establishes that Respondent filled out forms, made applications, and signed numerous other documents on behalf of her business. Whether or not Mr. Parker saw Respondent executing these documents is irrelevant.

Respondent asserts that she was naïve and that her relative lack of education and real-world experience led her to believe that what she was doing to manage her trucking business was not work. I do not find this assertion to be credible. Her involvement in the management of her business was extensive and I find that any person of ordinary intelligence would have found it to be work. It was management and intellectual activity intended to produce profit and that satisfies all common and ordinary definitions of work. Moreover, Respondent is not the simple, uneducated person she portrays herself as being. She has a high school education, which, I conclude, is more than enough education to enable her to understand that her management of her trucking business constituted work activity.

Additionally, Respondent argues that, in any event, her management of her trucking business did not constitute substantial gainful activity under SSA regulations. Therefore, according to Respondent, the income she received from her trucking business would not affect her eligibility for SSA disability benefits. Respondent's post-hearing brief at 8-9; *see* 20 C.F.R. § 404.1574.

This argument is simply incorrect. It does not matter to my decision whether Respondent's undisclosed work activity would have qualified as substantial gainful activity. That work activity was material to Respondent's disability case for two reasons even if it did not ultimately establish substantial gainful activity.

First, the SSA administrative law judge was required by law to decide whether any work or work-related activity engaged in by Respondent constituted substantial gainful activity. *See* 20 C.F.R. §§ 404.1508; 1510; 1574. Respondent was therefore obligated to answer truthfully any question that the administrative law judge asked her about her past work. It was not up to Respondent to decide what she would admit to the administrative law judge and what she would withhold from her. Second, even if Respondent's work activity did not constitute substantial gainful activity under SSA's regulations, it was evidence that the SSA administrative law judge might have relied on in deciding what were Respondent's functional limitations. The nature and extent of those limitations, if they are present, are highly relevant to deciding Respondent's residual functional capacity and the ultimate issue of entitlement to disability benefits.⁵

2. A civil money penalty of \$12,000 is reasonable.

Section 1129 of the Act authorizes the imposition of a civil money penalty of up to \$5000 for each deliberately false or misleading statement. Act, section 1129(a)(1). Here, Respondent made multiple deliberately false or misleading statements. They include at least the following:

- Her testimony at the 2005 hearing that her only source of income came from Family Independence Agency assistance and food stamps;
- Respondent's testimony at the 2005 hearing that she had last worked for Hitachi in July 2002;
- Her failure to disclose at the 2006 hearing her income from her trucking business;

⁵ In support of her argument that she did not engage in substantial gainful activity Respondent avers that the SSA administrative law judge's reopened and revised August 30, 2007 decision finding that Respondent had engaged in disqualifying substantial gainful activity has been reversed and remanded by the SSA Appeal Council and assigned to another SSA administrative law judge for a hearing as to that issue. Assuming that to be true, it is irrelevant. As I have stated the issue here is not whether Respondent engaged in substantial gainful activity but whether she dishonestly failed to report income and work activity that was both relevant to the issue of substantial gainful activity and her residual functional capacity for work.

- Her failure to disclose at the 2006 hearing her management activities in connection with her trucking business;
- Her assertion at the 2006 hearing that she bought a truck but that the truck had not been working in the previous year;
- Respondent's misleading answer to the SSA administrative law judge's Interrogatory No. 15(G) in which she failed to disclose the paperwork that she had performed on behalf of her trucking business; and
- Her false answer to the SSA administrative law judge's Interrogatory No. 5, in which she denied having incorporated her business.

These false and misleading statements, when considered in the aggregate, could potentially justify the imposition of civil money penalties in amounts that greatly exceed the \$12,000 that the SSA I.G. determined to impose.

I find that the \$12,000 penalty is amply justified by the facts of this case. First, I conclude that it constitutes reasonable compensation to SSA for the damage caused by Respondent's falsehoods. There are both actual and inchoate costs to SSA and to the disability program resulting from Respondent's deliberately false and misleading statements.

Addressing Respondent's dishonesty has been financially costly to SSA. Respondent's false and misleading testimony has directly or indirectly led to multiple decisions in her disability case. It has taken time away from the SSA administrative law judge's other cases and that, in turn, has resulted in at least potential delays of payment of benefits to other claimants besides Respondent. The SSA I.G. has had to expend resources investigating this case, preparing the case for hearing, and trying it. The hearing itself cost the taxpayers substantially for travel and for transcript preparation.

Moreover, Respondent's dishonesty has at least potentially damaged the integrity of the disability benefits program. Respondent attempted to exploit the program's vulnerability in order to obtain benefits.

The disability program is highly vulnerable to fraud and false claims. SSA lacks the resources to thoroughly investigate every benefit claimant's allegations of disability and inability to work. In order to function at all the program must depend on the honesty of those who seek benefits. When individuals such as Respondent make false or misleading statements in order to obtain benefits that not only potentially defrauds taxpayers but it substantially damages the integrity of the program. If dishonest claimants succeed in obtaining benefits based on their falsehoods and misleading statements that potentially encourages others to do likewise.

The penalty is also justified by the seriousness of the falsehoods and Respondent's culpability for them. These were not simple errors or omissions of fact. There is a pattern of deception evident in this case. Respondent systematically, and over a period of years, withheld highly relevant information from the SSA administrative law judge. It is evident that Respondent withheld this information because she knew that its disclosure would very likely affect adversely her benefits claim.

Respondent has offered neither evidence nor argument that would support a reduced penalty amount. She has not offered any evidence showing that she lacks the wherewithal to pay the penalty. Her principal argument against the imposition of the penalty is to repeat her assertion that she did not intentionally make false or misleading statements. I have found that assertion to be without merit and will not revisit it here. Respondent also and once again attempts to shift blame to the SSA administrative law judge for allegedly not investigating fully Respondent's income and work activities. But, the SSA administrative law judge's conduct is not at all at issue here. Nothing that the judge did excuses Respondent's obvious and willful dishonesty.

/s/

Steven T. Kessel
Administrative Law Judge