

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

The Inspector General of the Social Security Administration,

v.

Cassandra Ballew,

Respondent.

Docket No. C-13-258

Decision No. CR3275

Date: June 27, 2014

DECISION

The Inspector General (I.G.) of the Social Security Administration (SSA) proposed to impose on Respondent, Cassandra Ballew, a civil monetary penalty (CMP) and assessment in lieu of damages totaling \$171,478. The I.G. alleged that Respondent, while serving as a representative payee for a beneficiary receiving Social Security Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI), converted a “substantial portion” of those payments. The I.G. proposed to impose the maximum CMP and assessment permitted under law. Respondent disputed the I.G.’s allegations and filed a request for hearing before an administrative law judge. Because I conclude that Respondent converted benefit payments that she should have known were for the use and benefit of the beneficiary for whom she was serving as representative payee, Respondent is liable for a CMP and an assessment. However, for the reasons explained below, I reduce the CMP to \$45,000 and assessment to \$40,739.

I. Background and Procedural History

Brenda M. Gustke received DIB and SSI benefit payments. January 14-15, 2014 Hearing Transcript (Tr.) 140. However, SSA decided that Ms. Gustke should receive her benefit payments through a representative payee. Tr. 140-41, 149.

On February 5, 2010, Respondent applied to serve as Ms. Gustke's representative payee. SSA Exhibit (Ex.) 1. Respondent indicated on the application the following information: Respondent is Ms. Gustke's cousin; Ms. Gustke lives with Respondent; Ms. Gustke does not owe Respondent any money; and Respondent does not expect Ms. Gustke to owe her any money in the future. SSA Ex. 1, at 1. On April 5, 2010, SSA designated Respondent as Ms. Gustke's representative payee. SSA Ex. 2. In notices issued on June 14 and 16, 2011, SSA informed Respondent that she would no longer be Ms. Gustke's representative payee and that any money saved from the benefit payments must be returned to SSA. SSA Ex. 7.

In December 2011, Ms. Gustke filed a complaint with the I.G. fraud hotline asserting that Respondent took Ms. Gustke's benefit payments and used that money to pay for home repairs and appliances for Respondent's house. Tr. 121-22; SSA Ex. 6, at 2. An I.G. special agent conducted a criminal investigation into Ms. Gustke's complaint, which included interviewing Respondent. Tr. 122-24; SSA Exs. 6, at 5-8; 8; 9. As part of the investigation, the local SSA office reviewed the information obtained during the investigation to determine whether, under SSA rules, Respondent had misused any funds entrusted to her as a representative payee. Tr. 124.

A technical expert at SSA's office in Kalamazoo, Michigan, reviewed the evidence and information provided by the I.G. special agent and, on June 26, 2012, issued a determination that Respondent misused \$40,738.70 of the \$52,806.64 paid to her on behalf of Ms. Gustke. Tr. 144; SSA Ex. 3, at 1-2. On June 28, 2012, SSA issued a notice to Respondent that she needed to return \$40,738.70 to SSA because she failed to spend that money on Ms. Gustke. SSA Ex. 12, at 1-2. In a July 10, 2012 notice, SSA informed Respondent that because she had failed to return the money, SSA was allowed to institute measures to collect \$40,738.70 from her. SSA Ex. 12, at 3-4. Respondent disputed SSA's determination on July 19, 2012; however, the record does not include any information as to the outcome of that administrative appeal. Tr. 145; SSA Ex. 13.

On September 27, 2012, the I.G. sent a letter to Respondent indicating that the I.G. intended to initiate a CMP action against Respondent based on Respondent's alleged conversion of Ms. Gustke's DIB and SSI benefit payments. SSA Ex. 14, at 1. The I.G. offered Respondent an opportunity to submit a written statement or other information, including information about Respondent's ability to pay a CMP, to consider before commencing the CMP action. SSA Ex. 14, at 2.

In a November 20, 2012 CMP notice, the I.G. proposed to impose on Respondent a \$90,000 CMP and an assessment in lieu of damages of \$81,478. The I.G. indicated that a CMP is authorized under 42 U.S.C. § 1320a-8. The I.G. specifically alleged:

This proposal is based on [the I.G.'s] determination that while acting as the representative payee for [Respondent's] cousin, Brenda Gustke, [Respondent] converted a substantial portion of the benefits paid to [Respondent] for Ms. Gustke's care. Between April 2010 and June 2011, [Respondent] used Ms. Gustke's Social Security benefits to, among other things, repair [Respondent's] garage, take [Respondent's] family on vacation, repair [Respondent's] vehicle, buy household appliances, and dine out multiple times a day with [Respondent's] husband and children. When [Respondent] applied to be Ms. Gustke's representative payee, SSA informed [Respondent] that all benefits should be used for Ms. Gustke's care or saved. [Respondent] [was] also notified that if [Respondent] used the benefits for any other purpose, [Respondent] would be required to return that money. As a result of [Respondent's] misconduct, [Respondent] received and spent \$40,739.00 in SSA benefits to which [Respondent] [was] not entitled. In fact, [Respondent] continued to spend Ms. Gustke's benefits even after SSA notified [Respondent] that [Respondent] [was] no longer Ms. Gustke's representative payee

SSA Ex. 15, at 1. After considering various aggravating and mitigating factors, the I.G. concluded:

I have decided that the maximum [CMP] of \$171,478.00 is appropriate. That represents a penalty of \$90,000.00, which is \$5,000.00 for each of the 18 monthly payments that [Respondent] converted, plus an assessment in lieu of damages of \$81,478.00, which is twice the amount of the overpayment [Respondent] received.

SSA Ex. 15, at 2.

In a letter dated December 14, 2012, Respondent, acting pro se, timely filed a request for hearing with the Departmental Appeals Board (DAB), Civil Remedies Division (CRD) to dispute the proposed CMP and assessment. SSA Ex. 10. Although Respondent denied "all of the civil penalty against me," she admitted "culpability to garage repair and household appliances," but asserted that a day trip to an amusement park and dining were gifts from Ms. Gustke. SSA Ex. 10, at 2. Respondent also stated that she paid many of Ms. Gustke's necessary expenses, such as medical bills, money owed to the local court, clothes, and personal items. Respondent indicated that she had allowed Ms. Gustke to live at her home before Respondent became Ms. Gustke's representative payee and, following Ms. Gustke's period of incarceration and a period of time when Ms. Gustke

was living in an apartment, she again permitted Ms. Gustke to live at Respondent's home. However, because Respondent's "daughter refused to share her room again [with Ms. Gustke]," Ms. Gustke "decided she wanted a trailer, to sleep in only, [Ms. Gustke] had fulltime access to [Respondent's] house at all times." SSA Ex. 10, at 3. Respondent admitted that she charged Ms. Gustke \$570 per month for rent, food, internet, and toiletries, and that it was her idea for Ms. Gustke to pay to repair Respondent's garage roof, but points out that she did so in order to store Ms. Gustke's possessions that were located in a rental storage unit. Respondent asserted other items Ms. Gustke paid for, such as appliances and dinners for Respondent and her family were at Ms. Gustke's urging. Respondent avers that Ms. Gustke had a permanent home with Respondent and was surprised when Ms. Gustke moved away, not taking the trailer that Ms. Gustke had purchased. SSA Ex. 10, at 3.

The CRD Director administratively assigned this case to me for hearing and decision. On January 30, 2013, I convened a telephone prehearing conference; however, after Ms. Ballew requested additional time to obtain counsel, I rescheduled the prehearing conference for March 6, 2013, which was later rescheduled again to March 20, 2013. On March 20, 2013, I held a telephone prehearing conference with the I.G.'s counsel and Respondent, who decided to proceed pro se. At the conference, I set dates for the parties' prehearing exchanges. I summarized the substance of that conference in a March 26, 2013 Order Scheduling Submission of Briefs and Documents (Order). The I.G. submitted its prehearing exchange, which included a brief (SSA Br.), a list of proposed witnesses, and 17 exhibits (SSA Exs. 1-17). Respondent also filed her brief (R. Br.), list of proposed witnesses, seven exhibits (R. Exs. 1-7), and an objection to two of SSA's proposed witnesses and to SSA Ex. 6. Finally, SSA filed an objection to R. Exs. 1-5 because they were not authenticated and R. Ex. 7 because that document was not a certified copy of the document it purported to be. Respondent subsequently submitted a revised R. Ex. 7.

On October 30, 2013, I held another telephonic prehearing conference, the substance of which I summarized in a November 1, 2013 Order Following Prehearing Conference. At the conference I overruled Respondent's objections concerning SSA's proposed witnesses and SSA Ex. 6. I also admitted SSA Exs. 1-17 into the record. Further, I admitted R. Exs. 6 and 7 into the record, but reserved ruling on R. Exs. 1-5 until Respondent could authenticate those exhibits during the hearing.

On January 14-15, 2014, I held a hearing at which I heard testimony from 12 witnesses. Following testimony from the Respondent, I admitted R. Exs. 1-5 into the record. Tr. at 71, 74, 76, 77, 79-80. On February 12, 2014, CRD forwarded a copy of the hearing transcript with a notice to the parties that post-hearing briefs were due 30 days after the parties received the transcript and that reply briefs were due no later than 60 days after receipt of the transcript. CRD informed the parties that there could be no extension of time to file reply briefs.

Respondent mailed her post-hearing brief on March 10, 2014, and the I.G. mailed its post-hearing brief on March 20, 2014. On April 7, 2014, the I.G.'s counsel sent an e-mail to Respondent and the CRD attorney assigned to this case inquiring whether Respondent submitted a post-hearing brief. CRD forwarded a copy of Respondent's post-hearing brief by e-mail to the I.G.'s counsel. On April 9, 2014, the I.G. filed a motion requesting that I strike Respondent's post-hearing brief because there was no certificate of service indicating that Respondent mailed the brief to the I.G. In the alternative, I.G. counsel requested an extension of time to file the reply brief. Petitioner responded that she mailed a copy of her post-hearing brief to I.G. counsel at the time she mailed, by "two-day air mail" the post-hearing brief to CRD. I was precluded by the regulatory deadline for briefs in 20 C.F.R. § 498.219(c) from granting an extension of time to the I.G. Neither party filed reply briefs. Because Respondent provided a closing argument at the hearing (Tr. 264-68), I believe that I.G. counsel was on notice of Respondent's arguments and could fully provide its position in its post-hearing brief. Therefore, I will not strike Petitioner's post-hearing brief because including it in the record will not prejudice the I.G.

This matter is now ready for decision. 20 C.F.R. § 498.220(c).

II. Issues

- 1) Whether Respondent violated 42 U.S.C. § 1320a-8(a)(3) by converting DIB and SSI benefit payments made to her as representative payee for a beneficiary that Respondent knew or should have known was not for the use and benefit of the beneficiary.
- 2) Whether the I.G.'s proposed CMP of \$90,000 and assessment of \$81,478 is reasonable and appropriate under the provisions of 42 U.S.C. § 1320a-8(a)(1), (c).

III. Jurisdiction

Individuals against whom the I.G. proposes to impose a CMP have a right to a formal hearing on the record before the CMP is imposed. 42 U.S.C. § 1320a-8(b)(2). Respondent filed a timely request for an administrative law judge hearing. 20 C.F.R. § 498.202. Administrative law judges at the Departmental Appeals Board (DAB) adjudicate SSA CMP cases. *See* 20 C.F.R. § 498.201 (definition of *ALJ*); *see also* 20 C.F.R. §§ 498.202-220. The administrative law judge must "determine whether the respondent should be found liable" for a CMP and/or assessment, and issue a decision in which he "may affirm, deny, increase, or reduce the penalties or assessments proposed by the Inspector General." 20 C.F.R. §§ 498.215(a), 498.220(b). Therefore, I have jurisdiction to hear and decide this case.

IV. Findings of Fact, Conclusions of Law, and Analysis¹

A person is subject to a CMP and assessment if he:

having received, while acting in the capacity of a representative payee pursuant to section 405(j), 1007, 1383(a)(2) of this title, a payment under subchapter II, VIII, or XVI of this chapter for the use and benefit of another individual, converts such payment, or any part thereof, to a use that such person knows or should know is other than for the use and benefit of such other individual shall be subject to, in addition to any other penalties that may be prescribed by law, a civil money penalty of not more than \$5,000 for each such conversion. Such person shall also be subject to an assessment, in lieu of damages sustained by the United States resulting from the conversion, of not more than twice the amount of any payments so converted.

42 U.S.C. § 1320a-8(a)(3).

A. Respondent violated 42 U.S.C. § 1320a-8(a)(3) and is subject to a CMP and assessment in lieu of damages because, while serving as Ms. Gustke's representative payee from April 2010 until June 2011, Respondent converted portions of 18 of Ms. Gustke's DIB and SSI benefit payments using those funds in a way that she should have known was for a purpose other than the use and benefit of Ms. Gustke.

Respondent and Ms. Gustke were cousins. SSA Ex. 1, at 1. In June 2009, Ms. Gustke moved into Respondent's house following the death of her mother. Tr. 83, 157. Ms. Gustke had no money and Respondent allowed Ms. Gustke to live there rent free. Tr. 23. When Ms. Gustke was approved to receive DIB and SSI benefit payments, SSA determined that Ms. Gustke had to receive her benefits through a representative payee. Tr. 140-41, 149; SSA Ex. 3, at 3. In February 2010, Respondent submitted an application to SSA to serve as Ms. Gustke's representative payee, and on April 5, 2010, SSA appointed Respondent as Ms. Gustke's representative payee. SSA Exs. 1; 2, at 1-2. This appointment is consistent with SSA's preference for choosing a relative who "demonstrates strong concern for the personal welfare of the beneficiary." 20 C.F.R. § 404.2021(a)(1). Further, Respondent represented to SSA that Ms. Gustke "does not owe me any money and I do not expect her to in the future." SSA Ex. 1, at 1. However, even if she did, SSA may have permitted the appointment because Respondent indicated

¹ My findings of fact and conclusions of law are set forth in italics and bold font.

that Ms. Gustke was living with Respondent and they were related. SSA Ex. 1, at 1; 20 C.F.R. § 404.2022(e).

After being appointed as the representative payee, Respondent established a “Payee Checking Account” at Kellogg Community Federal Credit Union. SSA Exs. 4, at 1, 18-19. Respondent controlled this payee account, into which Ms. Gustke’s benefits payments were deposited. Tr. 63. The debit card for this account was in Respondent’s name,² and in her possession. Tr. 163; SSA Ex. 8, at 14. In addition to having control of the debit card, Respondent admitted that she made the decisions on how Ms. Gustke’s benefits were spent and saved. Tr. 42-43; SSA Ex. 16.

From April 7, 2010, until April 1, 2011, Respondent received 16 physical United States Treasury checks paid to the order of “Cassandra Ballew for Brenda M Gustke,” and Respondent endorsed those checks for deposit.³ Tr. 41-42; SSA Ex. 4, at 2-17. On May 3 and June 3, 2011, SSA directly deposited Ms. Gustke’s benefits into the account Respondent established for Ms. Gustke. SSA Ex. 4, at 1, 18-19. These 18 payments totaled \$52,806.64. SSA Ex. 3, at 1; 4, at 1; 12, at 1, 3.

After SSA approved Ms. Gustke for DIB and SSI, Ms. Gustke moved to an apartment. Tr. 158. However, following several weeks in jail, from April to May 2010, Ms. Gustke moved back to Respondent’s residence in May 2010; however, this time Ms. Gustke slept in a camper in Respondent’s backyard. Tr. 19-20, 84. Also in May 2010, Respondent moved Ms. Gustke’s possessions from the apartment into a storage unit in preparation for her move back to Respondent’s house. Tr. 20-21, 61; SSA Ex. 11, at 2.

The camper that Ms. Gustke moved into was purchased with Ms. Gustke’s money. Tr. 38-39. The camper presents an issue of misuse in this case. Although Respondent indicates that Ms. Gustke had title to the camper (a claim that Ms. Gustke asserted was not true (SSA Ex. 6, at 5), the record reflects that after the camper was purchased, the title was not transferred from the seller into Ms. Gustke’s name and Ms. Gustke left the

² Ms. Gustke had a personal bank account that Respondent asserts was solely controlled by Ms. Gustke. However, Respondent admitted that while Ms. Gustke was in jail in 2010, she used the debit card from Ms. Gustke’s account to pay for costs associated with moving her possessions into storage. Tr. 59-61.

³ All except for the first check were sent to Respondent’s home address as represented on her application to be Ms. Gustke’s representative payee. *Compare* SSA Ex. 1, at 1 *with* SSA Ex. 4, at 3-17. The initial check was sent to the apartment that Ms. Gustke was renting in April 2010 (SSA Ex. 4, at 2); however, Respondent admitted that despite the fact that the check was misdirected, she obtained control of that check and deposited it in the account Respondent established for Ms. Gustke. Tr. 28-30.

camper (and the title document showing the previous owner's name) in Respondent's backyard when she obtained a new representative payee. Tr. 38-39; R. Ex. 1, at 2-3. Although Respondent does not appear to have retitled the camper in her name, Respondent failed to properly title this significant purchase in Ms. Gustke's name, which is a failing on Respondent's part to ensure Ms. Gustke had ownership of the camper, especially since the camper is in Respondent's possession. *Nancy Whitehead*, Docket No. A-13-53, at 5 (HHS DAB June 25, 2013).

The situation related to the purchase and titling of the camper became more problematic in August 2010 because Respondent began accepting from Ms. Gustke \$450 a month in rent and \$100 a month for meals provided by Respondent. Tr. 21-22. Ms. Gustke also provided Respondent with \$25 a month in food stamps that she received and later paid an additional \$20 a month to share internet access with Respondent's household. Tr. 24-25. According to Respondent, these charges covered all of Ms. Gustke's "living expenses," such as toiletries, electrical usage, detergents for laundry, etc., and entitled Ms. Gustke to use Respondent's house when not sleeping. Tr. 22, 46, 66. Even so, this amount of rent was approximately the same as for the apartment that Ms. Gustke briefly rented following her approval for DIB and SSI benefits; however, the difference in these two living situations is that Ms. Gustke had purchased her principal place to sleep herself, i.e., the camper. Tr. 24. Further, the camper did not have water and the heat was provided with a space heater. Tr. 91.

Respondent's mortgages on her husband's house amount to \$950 per month, and her family's (husband and two children) household expenses equal \$600 a month. SSA Ex. 17. However, comparing this \$1,550 per month expense to Ms. Gustke's financial contributions to Respondent's household, she was paying nearly \$600 a month to sleep in her own camper. The disparity in costs charged to Ms. Gustke in comparison to the costs incurred by Respondent is exemplified by the fact that the household internet service cost \$42 a month; however, Ms. Gustke paid \$20, which is nearly half that expense. Tr. at 24.

Even if the situation involving the camper and the monthly rent/expenses could be considered reasonable, Respondent's further actions make it clear that she misused Ms. Gustke's benefit payments. Respondent purchased a clothes washer, clothes dryer, soft water system, hot water heater, and dishwasher with Ms. Gustke's money. Tr. 44-46, 57-58; SSA Ex. 9, at 10 (debit card record of a \$2,000 purchase at Lowes on March 14, 2011); SSA Ex. 11, at 19-22. These appliances were installed in Respondent's house, which Respondent asserts Ms. Gustke had full access to use. Tr. 46, 66. Respondent asserts that Ms. Gustke was present at the time of the purchases and requested new equipment so that she could better do her laundry. Tr. 44-47. Ms. Gustke did not take the appliances with her when she moved from Respondent's house and did not request payment for them. Tr. 46. The appliances are still in Respondent's house. Tr. 48.

Further, significant money from Ms. Gustke's benefits was used for Respondent's daughter's benefit. According to Respondent, Ms. Gustke decided to buy a laptop computer. At the same time, Respondent allowed Respondent's daughter to accept, as a gift from Ms. Gustke, a laptop computer as well. Tr. 48-49; SSA Ex. 9, at 6 (debit card record of a \$1,183.34 purchase at Best Buy on August 21, 2010). Further, Respondent used Ms. Gustke's money to purchase tickets, through Ticketmaster, for Ms. Gustke and Respondent's daughter to go to a Selena Gomez concert. Tr. 58; SSA Ex. 9, at 11 (debit card record of a \$121.35 purchase through Ticketmaster on April 1, 2011, and a debit card record of a \$14.00 "Event Ticket Insurance" charge on April 2, 2014). Respondent said Ms. Gustke wanted to take her daughter. Tr. 58.

In addition to the computer and concert tickets purchased for Respondent's daughter, Respondent also allowed Ms. Gustke to use her money in a way that benefited Respondent's family. Ms. Gustke paid for a trip for herself and Respondent's whole family to Michigan Adventure, an amusement park. See Tr. 73-74; 147-49, 171-72; R. Ex. 2. Further, Ms. Gustke's money was used to pay for repairs to Respondent's truck, which Respondent used to transport Ms. Gustke to various appointments and places. Tr. 50, 55-56; SSA Ex. 9, at 12 (debit records of \$285.10 and \$366.27 in charges at Autozone on April 9 and May 2, 2011, respectively). Respondent also admitted that Ms. Gustke's benefit payments were used to take her family out to eat dinner multiple times a week. Tr. 53-55; SSA Ex. 9, at 2-13 (numerous debit records from restaurants from May 2010 to June 2011). Respondent testified that despite this, Ms. Gustke still ate enough food at Respondent's house to justify the \$100 per month food payment that Ms. Gustke made to Respondent each month. Tr. 66.

Further, in April 2011, less than two months before Ms. Gustke obtained a new representative payee, Respondent paid for repairs on her garage's roof with Ms. Gustke's benefit payments so that Ms. Gustke could move her possessions from storage to the garage. Tr. 43; SSA Ex. 11, at 1. This would allow Ms. Gustke to have access to those possessions and would provide for the possibility that Respondent could convert the garage into a place where Ms. Gustke could live. Tr. 43. I.G. witness Jeffrey Bell confirmed that Ms. Gustke told him that was the reason the garage roof was repaired. Tr. 115. Further, Respondent submitted a photograph of her garage filled with items that another witness who testified thought looked like the items Ms. Gustke inherited from her mother. R. Ex. 3; Tr. 75, 106. However, Ms. Gustke had a garage sale and sold these possessions. Tr. at 252. Ms. Gustke alleged that she sold them before the garage roof was repaired. SSA Ex. 8, at 10. In any event, Respondent should not have used Ms. Gustke's benefit payments to pay for a permanent repair to Respondent's garage to temporarily store Ms. Gustke's possessions

When Ms. Gustke informed Respondent that Ms. Gustke's father would be her new representative payee, Respondent testified that instead of returning the balance of any benefits remaining in the representative payee account to SSA, as SSA instructed in its

letter to Respondent, Respondent took Ms. Gustke shopping to spend down the balance. Tr. 67. Although Respondent indicated that she was unaware of SSA's notices and that she took Ms. Gustke shopping, the debit records from the payee bank account show sporadic purchases, rather than a day of shopping, through July 1, 2011. SSA Ex. 9, at 13-14. SSA sent the notices in mid-June 2011. SSA Ex. 7.

The Social Security Act provides that SSA may appointment representative payees for beneficiaries as follows:

If the Commissioner of Social Security determines that the interest of any individual under this subchapter would be served thereby, certification of payment of such individual's benefit under this subchapter may be made, regardless of the legal competency or incompetency of the individual, either for direct payment to the individual, or for his or her use and benefit, to another individual, or an organization, with respect to whom the requirements of paragraph (2) have been met (hereinafter in this subsection referred to as the individual's "representative payee").

42 U.S.C. § 405(j)(1)(A); *see also* 42 U.S.C. § 1383(a)(2).

A representative payee has the responsibility to make certain that money from SSA is for the "use and benefit" of the beneficiary and that it is spent in the beneficiary's "best interests." 20 C.F.R. §§ 404.2035(a), 416.635(a). For this reason, creditors of the beneficiary are precluded from serving as a representative payee unless "the creditor . . . poses no risk to [the beneficiary] and whose financial relationship with [the beneficiary] presents no substantial conflict of interest, and who is . . . [a] relative living in the same household as [the beneficiary]." *Id.* §§ 404.2022(e), 416.622(e); *see also* 42 U.S.C. §§ 405(j)(2)(C)(i)(III), (iii)(I), 1383(a)(2)(B)(iii)(III), (v)(I).

Benefit payments are considered to "have been used for the use and benefit of the beneficiary if they are used for the beneficiary's current maintenance . . . [which] includes costs incurred in obtaining food, shelter, clothing, medical care, and personal comfort items." 20 C.F.R. §§ 404.2040(a)(1), 416.640(a)(1). SSA exercises oversight of representative payees and representative payees must submit on SSA's request "a written report accounting for the benefits received on [the beneficiary's] behalf, and make all supporting records available for review if requested by [SSA]." *Id.* §§ 404.2035(e), 416.635(e); *see also* 20 C.F.R. §§ 404.2025, 416.625. A representative payee who misuses benefit payments is responsible for paying those funds back. 20 C.F.R. §§ 404.2041(a), 416.641(a).

The evidence of record in this case supports the finding and conclusion that Respondent did not fulfill her responsibilities as a representative payee and converted portions of all of the 18 DIB and SSI payments made to her for Ms. Gustke's use and benefit to a purpose that was for other than Ms. Gustke's use and benefit. The actions of Respondent with regard to Ms. Gustke's funds, as detailed above, are not generally disputed. Respondent's primary defense is that Ms. Gustke allegedly either asked to make all of these purchases or agreed to make them. However, this is not an appropriate defense. As stated by SSA's technical expert who testified at the hearing in response to a question from Respondent concerning Ms. Gustke's alleged approval of the trip to Michigan Adventure: "Ms. Gustke had a payee for a reason. You are the payee. You should not have allowed her to make that decision And the fact that she approved that choice or that was the mitigating circumstances that were, that was in your statement regarding that, she wasn't capable of making that kind of decision. That's why we had you appointed as payee." Tr. 147, 149.

Based on the evidence of record, I also conclude that Respondent should have known that she should not have allowed Ms. Gustke's benefit payments to be used for high rent, the purchase of permanent appliances in Respondent's house, repairs to the garage roof or Respondent's car. As an initial matter, Respondent signed an application to be a representative payee in which she was on notice that the benefit payments must be used for Ms. Gustke's "current needs." SSA Ex. 1. Further, when SSA appointed Respondent to be the representative payee, it provided her with a detailed pamphlet that gave guidance as to the use of the funds entrusted to her. SSA Ex. 2; *see also* Tr. 138-39. Finally, Respondent was an experienced representative payee, for she is the payee for her daughter. Tr. 15-16, 126, 146. However, despite SSA's intention not to appoint a person to be a representative payee who had a conflict of interest (20 C.F.R. § 404.2022(e)), based in part on Respondent's assurance that Ms. Gustke was not expected to owe Respondent a debt in the future (SSA Ex. 1, at 1), Respondent ultimately became her landlady and provider of various services, for which Respondent took compensation. This was not a relationship that Respondent could consider what was in Ms. Gustke's best interests without potentially adversely affecting her own or her family's interests. *See Nancy Whitehead*, DAB CR2718, at 12 (2013), *aff'd*, Docket No. A-13-53, at 5 (HHS DAB June 25, 2013). ("Respondent probably should not have set herself up as the beneficiary's landlord and/or mortgage holder, but, having done so, she was obligated to operate at arm's length and was not entitled to profit from the arrangement. [Footnote omitted]. Her conduct was plainly improper and subjects her to penalty under [section 1320a-8].").

B. Based on the factors in 42 U.S.C. § 1320a-8(c), I reduce the I.G.'s proposed CMP to \$45,000 or half of the proposed amount.

The I.G. proposed the imposition of a \$90,000 CMP based on 18 monthly benefit payments (i.e., April 2010 through June 2011) of which Respondent converted all or part.

SSA Ex. 15, at 2. I must consider the reasonableness of this proposal based on applicable statutory requirements.

As a general parameter, a CMP may not be more than \$5,000 for each payment that is converted and misused. 42 U.S.C. § 1320a-8(a)(3). Therefore, Respondent is potentially subject to a maximum CMP amount of \$90,000, as proposed by the I.G.

In addition to establishing the maximum CMP and assessment amounts, the statute requires that the following factors be taken into account when determining the amount of a CMP or assessment:

- (1) the nature of the statements, representations, or actions referred to in [42 U.S.C. § 1320a-8(a)] 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.

42 U.S.C. § 1320a-8(c); *see also* 20 C.F.R. § 498.106(a).

1. The nature and circumstances of Respondent's misconduct.

In regard to the first factor, the I.G. stated in his CMP notice that he considered the fact that when Respondent applied to be Ms. Gustke's representative payee, she agreed to use all benefits for Ms. Gustke's care, save unused benefits, and return any money SSA determined that Respondent misused. SSA Ex. 15, at 1. The I.G. also considered that SSA provided Respondent with information on how to handle Ms. Gustke's benefits, but that Respondent converted money from Ms. Gustke's initial payment and continued to convert funds even after SSA notified Respondent that she was no longer Ms. Gustke's representative payee.

I share the I.G.'s concerns related to Respondent's handling of Ms. Gustke's benefit payments. Respondent had a fiduciary duty to Ms. Gustke to make certain that all money was used for her benefit. Unfortunately, Respondent came to view Ms. Gustke's benefit payments as part of the household income. It would be hard to believe that Respondent would expect an individual living in a camper in her backyard to purchase multiple appliances, fix the roof on the garage, and take her family to dinner multiple times a week as well as on a vacation. I understand that Ms. Gustke was a cousin and not a stranger who simply rented space. However, therein lies the problem.

Respondent was charging Ms. Gustke significant rent. This more than covered the costs to Respondent of Ms. Gustke's presence at her house during the day and the camper on her property. However, Respondent failed to maintain an objective view of Ms. Gustke's benefits and she used those benefit payments to improve her house.

2. Respondent's level of culpability, prior offenses, and financial condition.

The second factor includes three parts. The I.G. considered each of these in its CMP notice.

a. Culpability

The I.G. considered Respondent very culpable because Respondent had been notified of her duties as a representative payee and agreed to comply with those duties. However, Respondent still converted over \$40,000 in benefit payments, which included money that was misused after Respondent was informed that she was no longer representative payee for Ms. Gustke. SSA Ex. 15, at 2. Respondent did not consider herself very culpable because she asserts that Ms. Gustke authorized all of the purchases that Respondent made and agreed to the rent paid. I agree with the I.G. that Respondent is culpable because she continually misused Ms. Gustke's money on Respondent's home or children. However, I do not think that she is as culpable as the I.G. indicates. The I.G. appears to completely believe Ms. Gustke as to what happened.

I do not fully believe Ms. Gustke's version of events, as provided in her written statement and the notes of her interview with an I.G. special agent. Respondent established that Ms. Gustke was a felon, significant drug abuser, and reputed liar. Tr. 104, 115, 239, 246; *see also* R. Ex. 6. Ms. Gustke admitted to the I.G. special agent that when she received her first DIB/SSI check in April 2010, "she went on a crack binge." SSA Ex. 8, at 10. In fact, the reason that Ms. Gustke did not testify (and thus, was not cross-examined) in this case is because she died from an overdose of prescription medication that she apparently stole from her roommate. R. Ex. 7, at 2-3 (autopsy report). Ms. Gustke's aunt testified, I believe credibly, about Ms. Gustke's history of drug abuse and stealing from her mother to finance that habit. Tr. 244-53. For this reason, Ms. Gustke's motivation in filing a complaint of dire treatment by Respondent could be an effort to obtain additional funds from SSA by asserting representative payee misuse. SSA Ex. 6, at 2 ("I would like to know where all the money went_ Can I get it back").

Although Respondent would have an obvious motive for dissembling in this case, she has generally admitted the purchases that she made with Ms. Gustke's money and has consistently stated the basis for those purchases. I believe that Respondent wanted to

help her cousin, Ms. Gustke, as she did in 2009 when Respondent provided housing to Ms. Gustke without charging rent. Tr. at 159-60. However, Respondent allowed herself to believe that she was entitled to use of Ms. Gustke's benefit payments to improve her home, eat regularly at restaurants, and provide her daughter with gifts. Respondent is culpable because she ultimately took for her own use, and that of her family, most of Ms. Gustke's benefit payments. This is egregious. However, I do not believe that she is as culpable as stated by the I.G. in the CMP notice. The I.G.'s view appears to take Ms. Gustke's statements as true. Because I also credit some of Respondent's assertions, I view her conduct as less culpable than the I.G.

b. Prior Offenses

The I.G. also considered that Respondent has no prior offenses involving SSA. SSA Ex. 15, at 2. I agree that there is no evidence in the record to suggest that Respondent has a prior offense related to Social Security programs.

c. Financial Condition

The I.G. considered Respondent's financial condition and concluded that the proposed CMP and assessment would not jeopardize her financial situation. The I.G. based this on Respondent's failure to provide financial information to the I.G. before it issued the CMP notice. SSA Ex. 15, at 2. The I.G. urges that I adopt the same position because Respondent has not submitted financial records in this proceeding. I agree with the I.G. that Respondent has failed to provide significant documentation concerning her financial situation. However, she provided a November 29, 2012 Discharge of Debtor issued by the United States Bankruptcy Court for the Western District of Michigan. SSA Ex. 17. Further, Respondent testified that she does not work due to health issues and taking care of a special needs child who SSA has determined is disabled. Tr. 13-15. Respondent also testified that her husband has an annual salary of about \$32,000 a year, and the child who receives Social Security benefits, also receives state benefits. Tr. 14-16. Based on this information, I do not believe that Respondent has the financial ability to pay the penalty proposed by the I.G.

3. Other matters as justice may require.

In the CMP notice, the I.G. indicated that he considered that Respondent took a vacation using Ms. Gustke's benefit payments and purchased with that money several appliances that Respondent still possesses. The I.G. considered these to be aggravating factors. SSA Ex. 15, at 2. I agree and also consider aggravating that Respondent also possesses Ms. Gustke's camper.

4. I reduce the I.G.'s proposed CMP to \$45,000.

As discussed above, Respondent is subject to a potential CMP of \$90,000. I agree that a substantial penalty is necessary to ensure that Respondent does not misuse other beneficiary funds (Respondent serves as her daughter's representative payee (Tr. 15)). However, I am also mindful that my evaluation of the factors above involving Respondent's culpability and financial condition necessitates reduction in the penalty amount. Based on those factors, a penalty of \$2,500 per benefit payment that was subject to conversion is reasonable, for a total CMP of \$45,000.

D. I reduce the I.G.'s proposed assessment based on the factors in 42 U.S.C. § 1320a-8(c), and the amount of actual damages incurred by the United States, which is \$40,739.

The I.G. proposed to impose an assessment of \$81,478 on Respondent, which constitutes double the amount of benefit payments that SSA determined that Respondent misused. SSA Ex. 15, at 2. However, SSA has only proven that Respondent has misused \$40,739 and has not otherwise alleged damages.

SSA's technical expert reviewed the documentation that Respondent provided SSA to account for the use of Ms. Gastke's benefits. See Tr. 144; SSA Ex. 11. SSA also obtained bank records from the payee account set up for Ms. Gustke. SSA Ex. 9. The technical expert provided a detailed examination of that documentation. SSA Ex. 3. Respondent did not submit any additional documentation during this proceeding to account for the money she spent. Further, Respondent did not testify in detail about the money she spent on Ms. Gustke; Respondent merely made generalizations.

SSA's technical expert testified, on cross-examination, the following: "I can't determine how it [the benefit payments] was spent. I can just show that it was not - there was no proof to indicate it was on [Ms. Gastke], on [Ms. Gastke's] current needs or that it was spent properly." Tr. 147. It is the obligation of a representative payee to keep records and be able to account, with documentation, for how the money paid to a beneficiary was spent. 20 C.F.R. §§ 404.2025, 404.2035(e), 416.625, 416.635(e). As a result, I find that the technical expert's computation of the money misused is accurate based on the information in the record. I cannot consider Respondent's generalized assertions about money spent on Ms. Gustke. A representative payee must be able to show documentation of how the money was spent.

In determining the assessment, I considered the factors from 42 U.S.C. § 1320a-8(c) already addressed above, and the relevant provision regarding an assessment, which states:

Such person shall also be subject to an assessment, in lieu of damages sustained by the United States resulting from the conversion, of not more than twice the amount of any payments so converted.

42 U.S.C. § 1320a-8(a)(3). The regulations on this subject do not provide additional explanation as to what this provision means. *See* 20 C.F.R. § 498.104. Therefore, I will interpret this statute by a plain reading of the text.

The assessment is to be made in place of damages sustained by the United States resulting from a representative payee's conversion of benefit payments intended for a beneficiary. However, Congress capped the potential liability for damages at double the amount of benefit payments converted. While an assessment may be as much as double the amount of the converted payments, in order for such an assessment to be made, the I.G. must prove that damages exist to support such an assessment.

In the present case, the I.G. has not asserted the existence of damages in excess of the amount of money that the I.G. alleged was converted by Respondent. In such a situation, there is no basis for imposing an assessment that is more than the actual amount of benefit payments that were converted. I do not believe that the factors I considered above from 42 U.S.C. § 1320a-7b(c) require a further adjustment to the assessment in this matter. Therefore, I reduce the I.G.'s proposed assessment to \$40,739.

Order

Based on the evidence of record, and consistent with my findings of fact and conclusions of law, I hereby order the following:

1. Respondent is **LIABLE** under 42 U.S.C. § 1320a-8(a)(3) to pay a CMP and assessment;
2. The I.G.'s proposed CMP is **REDUCED** to \$45,000;
3. The I.G.'s proposed assessment is **REDUCED** to \$40,739; and
4. Respondent is directed to pay a total of \$85,739 in the manner specified by the I.G. in his CMP notice (SSA Ex. 15, at 3) or in any other manner prescribed by the I.G. following the issuance of this decision.

/s/
Scott Anderson
Administrative Law Judge