Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Social Security Administration,
Inspector General,

Petitioner,

v.

Bruce Patton,

Respondent.

Docket No. C-12-246

Decision No. CR2673

Date November 30, 2012

DECISION

The Social Security Administration Inspector General (SSA I.G.) has failed to establish that there is a basis for the imposition of a civil money penalty (CMP) or assessment pursuant to section 1129(a)(1) of the Social Security Act (the Act) (42 U.S.C. § 1320a-8(a)(1)) against Respondent, Bruce Patton.

I. Background

Respondent timely requested a hearing by an administrative law judge (ALJ), pursuant to 20 C.F.R. § 498.202.[1] Respondent requested review of the proposal of the SSA I.G., of which Respondent was notified by letter dated November 28, 2011, to impose against Respondent a CMP of $25,000 and an assessment in lieu of damages of $20,000, pursuant to section 1129 of the Act. SSA I.G. Exhibit (SSA Ex.) 13. The request for

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[1] 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.

hearing was received at the Civil Remedies Division (CRD) of the Departmental Appeals Board (DAB) and assigned to me for hearing and decision on January 6, 2012. On February 6, 2012, 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 February 6, 2012. An additional prehearing conference was convened by telephone on June 20, 2012, to discuss final procedural details and the issuance of subpoenas. Transcript (Tr.) 7.

On June 27, 2012, a hearing was convened by video teleconference with the SSA I.G. appearing at a site in Baltimore, Maryland; Respondent appearing at a site in Oakbrook, Illinois; witnesses testifying at a site in Chicago, Illinois; and me sitting in Kansas City, Missouri. Tr. 4. Joscelyn Funnié, Esquire, represented the SSA I.G. Respondent appeared represented by Ellen C. Hanson, Esquire. The I.G. offered and I admitted SSA Exs. 1 through 20. Tr. 19-20. Respondent offered and I admitted Respondent's exhibits (R. Exs.) 1 through 8. Tr. 20-21. The SSA I.G. called the following witnesses: Bruce Patton; Special Agent Rodney Haymon; Jeri DeGroot; Mary Forness; and Chad Bungard, Counsel to the I.G. Respondent called the following witnesses: Mark Patton and Bruce Patton. A 369-page transcript of the hearing was prepared and provided to the parties. SSA filed its post-hearing brief (SSA Br.) on August 31, 2012, and its post-hearing reply brief (SSA Reply) on October 1, 2012.[2] Respondent filed his post-hearing

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[2] The SSA I.G. attached a photocopy of a check marked SSA Ex. 21, which reflects on its face that: it was dated January 1, 2008; "Jeri Degrot" was the payee; the check is for the amount of $365; the memo-line indicates it is for "Mark;" and the check bears a signature "Bruce Patton." The SSA I.G. states in its reply brief that this document is offered as rebuttal evidence. The SSA I.G. failed to comply with 20 C.F.R. § 498.213, which requires that an application to the ALJ for an order or ruling will be by motion. The SSA I.G. did not file a motion to reopen the taking of evidence and for leave to file rebuttal evidence. I explained to the parties at hearing that it would be necessary to explain why I should allow the presentation of rebuttal evidence. Tr. 9. The SSA I.G. failed to offer an explanation for why rebuttal was necessary. Because the SSA I.G. failed to file a motion, Respondent had no opportunity to challenge this evidence or request reopening of the hearing to offer testimony regarding the evidence or to present additional evidence in surrebuttal. SSA Ex. 21 is not admitted and considered as evidence. I conclude that exclusion of this evidence causes no prejudice to SSA because, if it was admitted, it would not impact my decision in this case.

brief (R. Br.) on August 31, 2012, and his post-hearing reply brief (R. Reply) on October 1, 2012.[3]

II. Discussion

A. Applicable Law

Title II of the Act provides for old-age and survivor benefits and disability insurance benefits for those who meet eligibility requirements. 42 U.S.C. §§ 402, 423;[4] 20 C.F.R. pt. 404, subpt. D. Title II also provides that every child of an individual entitled to old-age and survivor benefits or disability insurance benefits, is entitled to child's insurance benefits if:

> 1. An application for child's benefits is filed;
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> 2. At the time of application the child was unmarried and was not 18, or was a full-time elementary or secondary school student under 19, or disabled and under 22; and,
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> 3. The child was dependent upon the individual entitled to old-age or disability insurance benefits, at the time the application for child's benefits was filed or at the time of death of the Title II beneficiary.

42 U.S.C. § 402(d); 20 C.F.R. § 404.350-.368. A child is deemed dependent upon his or her father, adopting father, mother, or adopting mother at the pertinent time (application or death), unless the child was not living with the Title II beneficiary or the Title II beneficiary was not contributing to the support of the child and, either the child is not the legitimate or adopted child of the Title II beneficiary or the child has been adopted by another. 42 U.S.C. § 402(d)(3); 20 C.F.R. § 404.361-.362.

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[3] Respondent attached two documents to his post-hearing brief marked as Resp. Ex. 1 and 2. Respondent also failed to comply with 20 C.F.R. § 498.213, which requires that an application to the ALJ for an order or ruling will be by motion. Respondent did not file a motion to reopen the taking of evidence and for leave to file additional evidence. Resp. Ex. 1 and 2 attached to Respondent's post-hearing brief are not admitted and considered as evidence. Petitioner suffers no prejudice by this ruling given my decision in this case.

[4] Sections 202 and 223 of the Act.

Section 1129(a)(1) of the Act (42 U.S.C. § 1320a-8(a)(1)) 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 subchapter 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 subchapter 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 . . . .

A material fact is a fact that the Commissioner of the Social Security Administration (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) (42 U.S.C. § 1320a-8(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 such false or misleading statement or representation, or for each receipt of benefits or payments while failing to disclose a material fact. Violators are also subject to an assessment in lieu of damages of not more than twice the amount of the benefits or payments made as a result of the statements, representations, or failures to disclose. Act § 1129(a)(1); 20 C.F.R. § 498.100(b)(1).

The Commissioner has delegated enforcement authority to the SSA I.G. as authorized by section 1129(i)(2) of the Act. 20 C.F.R. §§ 498.102-.104. In determining the amount of a CMP, the I.G. must consider: (1) the nature of the subject statements, representations, actions, or failure to disclose, 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.

Section 1129(b)(2) 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 I.G. may request a hearing before an ALJ. 20 C.F.R. § 498.202. The ALJ has jurisdiction to determine whether the person should be found liable for a CMP and/or an assessment. 20 C.F.R. § 498.215(a). The person requesting the hearing, that is, 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 I.G. has the burden of going forward as well as the burden of persuasion with respect to all other issues. The burden of persuasion is to be judged by a preponderance of the evidence. 20 C.F.R. § 498.215(c). The ALJ has the authority to affirm, deny, increase, or reduce the penalties or assessments proposed by the SSA I.G. 20 C.F.R. § 498.220(b).

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. The procedures for appealing to the DAB are set forth at http://www.hhs.gov/dab/divisions/appellate/guidelines/ssa.html.

B. Issues

Whether there is a basis for the imposition of a CMP and an assessment pursuant to section 1129(a)(1) of the Social Security Act.

Whether the CMP and assessment proposed are reasonable considering the factors specified by section 1129(c) of the Act.

C. Analysis

My conclusions of law are set forth in bold followed by the statement of pertinent facts and my analysis.

1. The residence address of the child's insurance benefits (CIB) beneficiary is not material to a determination of initial or continuing entitlement or to the amount of CIB in this case.

2. Whether or not the CIB beneficiary lived with Respondent is not material to a determination of the CIB beneficiary's initial or continuing entitlement or to the amount of benefits in this case.

3. Respondent made no false statement of material fact.

4. Respondent did not fail to report a material fact.

5. There is no basis for the imposition of a CMP or an assessment in this case and no CMP or assessment is reasonable.

a. Facts

The following statement of pertinent facts is based upon the documents admitted as evidence and the testimony received during the hearing in this case.

The Counsel to the SSA I.G., B. Chad Bungard, notified Respondent by letter dated November 28, 2011, that the I.G. proposed to impose a CMP of $45,000 against Respondent. The I.G. cited as the bases for the CMP that:

> (1) On about March 11, 2005, Respondent falsely claimed in the application for CIB for his son Mark, that Mark lived with him, but, Mark had not lived with him since October 2004;
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> (2) Respondent failed, on an unspecified date, to notify SSA that Respondent's son, Mark, was not in Respondent's custody for the period November 2005 through February 2008;
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> (3) Respondent received his son's CIB benefits during the period November 2005 through February 2008 and wrongfully converted those funds to his own use;
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> (4) On about April 16, 2007, Respondent completed a Representative Payee Report in which he falsely stated that his son, Mark, lived with him from May 1, 2006 through April 30, 2007.
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> (5) On about April 16, 2007, Respondent falsely stated that $9,022 was spent for the care and support of his son, Mark; and,

> (6) Respondents' false statements, misrepresentations, and omissions of material facts to SSA related to Mark resulted in Respondent receiving $10,977 in CIB to which Respondent was not entitled.

SSA Ex. 13 at 1.

Mr. Bungard testified that he made the determination to impose the CMP in this case. Mr. Bungard testified that Respondent was notified by the SSA I.G. brief filed on June 11, 2012,[5] that the bases for the CMP were changed or modified to allege that Respondent withheld material information from SSA regarding Mark's living arrangements from December 2006 through March 2008 and made a false statement regarding Mark's living arrangement in the representative payee report in April 2007. Tr. 278-82. Mr. Bungard testified that the SSA brief filed June 11, 2012 reflected his decision that Petitioner only improperly received $6,493 of CIB, during the period December 2006 through March 2008. Mr. Bungard's testimony and the SSA brief filed on June 11, 2012, reflect Mr. Bungard's revised determination to impose a CMP of $2,000 for each of 16 months from December 2006 through March 2008 when Respondent allegedly failed to disclose Mark's "true living arrangements," $2,000 for the false statement on the representative payee form dated April 16, 2007, a total CMP of $34,000, plus an assessment in lieu of damages of $6,493. Tr. 281-83; SSA Br. at 1-2.

The SSA I.G.'s evidence shows that on February 11, 2005, Respondent was notified by SSA that he was found to be disabled as of October 29, 2004, and entitled to benefits under Title II of the Act. SSA Ex. 1. On about March 11, 2005, Respondent applied for CIB for his children, David W. Patton and Mark J. Patton. SSA Ex. 2. On April 2, 2005, SSA notified Respondent that Mark was entitled to CIB beginning in April 2005, and that Respondent was chosen to be Mark's representative payee. SSA Ex. 3. The SSA I.G. introduced as evidence a Representative Payee Report, which Respondent does not dispute he signed and dated on April 16, 2007. Respondent also does not dispute that he checked the yes block for item 2, which questions whether or not Mark lived with Respondent from May 1, 2006 through April 30, 2007. Respondent also completed the

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[5] The SSA I.G.'s brief is titled "Petitioner's Brief In Support of the Inspector General's Decision To Impose A Civil Monetary Penalty." The brief was filed and served on June 11, 2012. The notice requirements of 20 C.F.R. § 498.109 are very specific and do not appear to be fully satisfied by the SSA I.G. Brief dated June 11, 2012. However, Respondent has made no specific objection and I find no prejudice if the notice is adequate given the facts that Respondent exercised his right to request a hearing, Petitioner was advised of the revised bases prior to hearing, and the Respondent had an opportunity to challenge the revised bases in the proceedings before me.

form to indicate that he used $9,022 of benefits received by him during the period May 1, 2006 to April 30, 2007 on Mark's behalf for the care and support of Mark. SSA Ex. 4.

The SSA I.G.'s evidence shows that Mark's mother, Jeri Patton (DeGroot at the time of hearing), reported to SSA on March 6, 2008, that Mark never lived with Respondent during the period April 2005 through March 2008 and that Mark lived with her during that period. She reported that she never received benefits for Mark until March 2008. SSA Ex. 5. SSA notified Respondent by letter dated March 17, 2008, that Mark's CIB would be sent to a different representative payee and that Respondent should refund to SSA any benefits he retained from payments he received on behalf of Mark. SSA Ex. 6. The I.G. presented two reports of investigation that concluded that Respondent received benefits from April 2005 to September 2008, apparently Mark's CIB, that he was not entitled to receive. SSA Exs. 7 and 8. The I.G. submitted the report of Mary Ann Forness, a Title II Claims Representative (Tr. 216) that reflects her conclusion that Respondent received CIB benefits for Mark during the period November 2005 through February 2008, and that he appropriated $10,977 to his own use. SSA Ex. 9. SSA notified Respondent by letter dated May 4, 2011, that he had to return $10,977 that he received on behalf of Mark. SSA Ex. 10. SSA also offered as evidence a "Joint Parenting Agreement" executed on February 7, 2006, which provides that the Respondent and his wife, Jerri Patton, were to have joint legal and physical custody of Mark, that Mark was to reside with her on a daily basis, and that Respondent was to have reasonable and liberal visitation as Respondent and Jerri Patton agreed. SSA Ex. 20 at 1, 5; R. Ex. 8 at 7. A marital settlement agreement, also dated February 7, 2006, provided that Respondent was to pay Jerri Patton $365 per month, and stated that was the entire amount of Social Security benefits Respondent received on behalf of Mark. SSA Ex. 20 at 12; R. Ex. 8 at 7. Respondent and Jeri R. Patton were divorced on February 7, 2006. R. Ex. 8 at 1-3.

SSA sent Respondent a notice dated November 14, 2011, that SSA would withhold $305 per month from Respondent's monthly benefits through November 2014, to recover the alleged $10,977 overpayment of Mark's CIB benefits to Respondent. R. Ex. 2 at 10; SSA Exs. 10, 15; Tr. 135-36, 233.

The SSA I.G. called Respondent to testify. Respondent testified that when he applied for CIB for Mark, he told SSA that Mark lived with him. Tr. 48. Respondent testified that between April 2005 and March 2008, he would pick-up Mark after school, Mark lived at his house during the weekend, and he took Mark to his mother's house Sunday night or he delivered him to school Monday morning. He testified that Mark stayed at his house during summer vacations and school holidays. Tr. 69. Respondent testified that he did not notify SSA that Marked lived with his mother during the week and with Respondent on weekends and holidays. He testified that he did not know he should report. Tr. 71-72. Respondent testified that he bought Mark some clothing; and he gave him spending money. Tr. 76, Respondent testified that while he was Mark's representative payee,

Mark's $721 CIB payment was made by direct deposit to Respondent's account, and $365 was automatically transferred to Mark's mother pursuant to the divorce settlement agreement. Tr. 80-81. Respondent testified that he used the remainder of the CIB payment for Mark's benefit. Tr. 83-84.

Agent Haymon testified that he understood based upon his interview with Jeri DeGroot that she received $365 of child support from Respondent each month and that Mark stayed with Respondent on weekends, but he did not recall discussing with her where Mark stayed during vacations, school holidays or when he was sick and stayed out of school. Tr. 129-31. Agent Haymon testified that he did not investigate the amount of money that Respondent spent on Mark and he did not investigate the number of days that Mark lived with Respondent. Agent Haymon testified that Respondent told him that Mark had a room in Respondent's house and that Mark told him that he kept clothes at Respondent's house. Tr. 166-67.

Jeri DeGroot testified that she and Respondent were divorced in February 2006 but they separated in 2004. She testified that when they separated, Mark lived with her weekdays during school, on Friday after school he went to Respondent's, and Mark returned to her house on Sunday evening for school on Monday. Mark went to Respondent's house on holidays if she was working and sometimes when she was not working. She testified that during the summer Mark stayed with his dad as she worked and Mark was too young to be home alone. Tr. 176-79. She testified that she regularly received the $365 from Respondent. Tr. 211. She testified that Respondent did not pay her more than the $365 per month child support established by the court with jurisdiction over the divorce. Tr. 186. She testified that she paid for Mark's school activities and lunch, and purchased his food and clothing. Tr. 186-87. She testified that she and Respondent agreed to claim Mark as dependent for income tax purposes alternating years. Tr. 187-88. She testified that she provided Mark transportation when he needed to go places. Tr. 189. She testified that she paid the $40 monthly premium for health insurance for Mark. Tr. 192-93. She testified in response to my questioning that Mark's school break was June 1 to September 1 each year, a period of 92 days. She agreed with me that there are 52 weeks in the year with two weekend days, totaling 104 days. Tr. 189-90. She testified that she never sent Respondent money for caring for Mark. Tr. 193. She testified that several weeks Mark took enough food for a couple meals for himself to Respondent's house but she put a stop to that as she believed Respondent should be providing Mark food when Mark stayed with Respondent. Tr. 194. She testified that Respondent took Mark on hunting trips, at least until she objected. Tr. 195.

Mary Ann Forness, a Title II Claims Representative, with the Elgin, Illinois Social Security Field Office was called as a witness by the SSA IG. Tr. 215. She testified that she reviewed Respondent's Title II claims record. Tr. 217. She testified that Respondent was removed as the representative payee and Jeri DeGroot was designated the representative payee in March 2008, based on Ms. DeGroot's claim that she was the

custodial parent of Mark. She testified that there was nothing in the file that showed that Ms. DeGroot's claim was investigated at the time. Tr. 220-22. Ms. Forness testified that she made the determination that Respondent misused $10,977 of CIB benefits he received for Mark, which Ms. Forness testified was the amount of CIB received by Respondent in excess of the $365 per month he sent to Ms. DeGroot. Tr. 227-28. Ms. Forness testified that her determination that Respondent misused funds was based upon her interview of Respondent and his statements that he spent the money on taking Mark to dinner and for activities. She admitted that spending the money on dinner and activities including hunting, is not misuse of the funds so long as Mark's basic needs were being met. She testified that she did not recall specifically asking Respondent how many days each year Mark lived with Respondent. Ms. Forness did not recall asking Respondent if Mark had a room in Respondent's house. Ms. Forness did not determine how much of the CIB benefits that Respondent received as Mark's representative payee were spent for Mark's benefit. Tr. 230-32, 270. Ms. Forness agreed that there was never an issue regarding Mark's eligibility and that the only issue was a question of who was the correct representative payee for Mark. Tr. 236. She also agreed that where the child lives has no impact on the child's eligibility for CIB, but may impact the determination of the appropriate representative payee. Tr. 238-39. Ms. Forness testified that a natural child is deemed dependent upon the natural parent and no determination of actual dependence is required. Tr. 242. She testified that the determination of which parent would be the preferred representative payee could turn on the issue of whether the child lived over half the time with one parent. She agreed that the determination of who should be representative payee has no impact on the child's entitlement to benefits. Tr. 244-45. On cross-examination, Ms. Forness testified that she never located a form completed by Respondent requesting to be representative payee. Tr. 252.

Mark Patton testified that he went to Respondent's house on weekends and anytime he was not in school because his friends were in that area, his dogs were at Respondent's house, and he had more to do there. He testified he felt his home was with his dad because he lived there longer. He testified it was more common for him to see friends at his dad's house than at his mom's house. He testified that during the school year on Monday, Tuesday, Wednesday, and Thursday night he ate his meals and slept at his mom's house, and used her telephone and bathroom. He testified that he did not drive his mom's car. He testified that he had his own room at his dad's house, he had possessions at his dad's, and he slept and ate at his dad's house. He testified that his mom took him to the doctor, but when he was out of school due to illness he usually stayed with his dad. He stayed with his dad on holidays, except that he spent time at both his dad's and mom's at Christmas. He had two vacations with his mother but otherwise was with his Dad. When he stayed with his dad he ate food his dad bought unless they went to a restaurant. His dad gave him money for a movie. His dad bought him pants once, but his mom bought most of his clothing. He testified that he took food to his dad's a couple of times but his mother told him she did not appreciate that. His mother did not give him money to take to his dad and he did not give his dad money. He testified that Respondent bought

him a gun and an off-road motorcycle prior to 2008. Tr. 315-31; R. Ex. 7 at 1. On cross-examination he explained he went to Respondent's when he was sick because his dad was home and he would have supervision. Tr. 332. He testified that he believed his mom paid for school activities and that his dad did tell him to ask his mom for shoes and clothes. Tr. 334. Mark Patton stated in his affidavit that he spent all summer with his dad, except that he would probably see his mom once a week. He stated that at Easter he went to church with his dad and had lunch with his mom, but then went back to Respondent's. He stated that Respondent usually picked him up after school on Friday and returned him to his mom's before school the next school day. R. Ex. 7 at 1.

Respondent testified that he answered correctly when he stated on the SSA form that Mark lived with him. Tr. 342. Respondent testified that Mark stayed with him on the weekends and during the summer, and that some holidays were shared. He testified that sometimes Mark spent Sunday night with him but other times he took him home on Sunday night. Tr. 345. He testified that he did not notify SSA of a change of address for Mark as he believed that Mark continued to live with him. Tr. 346.

b. Analysis

The SSA I.G. has failed to establish any bases for the imposition of a CMP and assessment in this case because the facts the SSA I.G. alleges were material and false, are neither material nor false.

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
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> (d) the person knows or should know the statement or representation of material fact is false or misleading; or

> (e) made such a statement or representation with knowing disregard for the truth; or
>
> (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
>
> (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 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 approved, the evidence must show that the allegedly false or misleading fact or facts were material and that the fact or facts were false or misleading as reported or by virtue of their omission or withholding.

(i) The residence address of Mark Patton and where Mark Patton lived are not material facts that affect his initial or continuing entitlement to CIB or the amount of such benefits.

The SSA I.G.'s proposal to impose a CMP and assessment against Respondent must fail because Mark Patton's residence address and where Mark lived are not material to his entitlement to CIB or the amount of such benefits.[6]

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[6] Obvious examples of residence address and the address where one lives being different include individuals away from home more than half the year to attend elementary and secondary boarding school, college, and military service.

Every child of an individual entitled to old-age and survivor benefits or disability insurance benefits is entitled to CIB if: (1) an application for CIB for the child is filed; (2) at the time the application is filed the child is unmarried and was not 18, or was an elementary or secondary school student under 19, or was disabled and under 22; and (3) the child was dependent upon the individual entitled to Title II benefits when the application for CIB was filed. 42 U.S.C. § 402(d); 20 C.F.R. § 404.350-.368. A child is deemed dependent upon his or her father, adopting father, mother, or adopting mother when the application is filed, unless the child was not living with the Title II beneficiary or the Title II beneficiary was not contributing to the support of the child and, either the child is not the legitimate or adopted child of the Title II beneficiary or the child has been adopted by another. 42 U.S.C. § 402(d)(3); 20 C.F.R. §§ 404.361-.362. The monthly CIB amount is equal to one-half of the amount of the Title II beneficiary's primary insurance amount if that person is living. 42 C.F.R. § 404.353(a).

There is no dispute in this case that Respondent has been entitled to Title II disability benefits throughout the period March 11, 2005, when the application for CIB was filed for Mark, through March 2008, the last month when the SSA I.G. alleges Respondent failed to report where Mark lived. The material facts are not disputed. There is no dispute that Mark is the natural child of Respondent or that Mark has not been adopted by another. The SSA I.G. has not alleged that Mark was not entitled to CIB throughout the period March 11, 2005 through March 2008, and there is no dispute that he was entitled.

The Act and implementing regulations do not require that Mark, as the natural child of Respondent who has not been adopted by another, live with Respondent or receive more than one-half of his support from Respondent. Rather, Mark is deemed to be dependent for purposes of initial and continuing entitlement. 42 U.S.C. § 402(d); 20 C.F.R. §§ 404.360-.361; Tr. 238-39, 242; SSA Br. at 4. Mark's residential address and who he lived with are not material facts affecting his initial and continuing entitlement to CIB.[7]

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[7] Ms. Forness agreed that where the child lives does not matter, unless the child is incarcerated which might result in a suspension of benefits. There is no allegation that Mark was in prison in this case. She testified that Mark's eligibility was not affected at all in this case. Tr. 235-36. Mr. Bungard was not certain as to the materiality of where Mark lived or his residence address or whether the agency actually made a determination in that regard. Tr. 286-87. In response to my question, Mr. Bungard did not explain how Respondent's alleged failure to report Mark's "true living arrangements" was material to a determination of Mark's entitlement to benefits. Tr. 287. Mr. Bungard testified that his determination would have been different if he discovered that Mark spent the majority of the time living with Respondent, but he testified he would not change his determination
(*Footnote continues next page*)

Furthermore, the amount of the CIB benefit to which Mark was entitled was not affected by the address of his residence or where he lived. 20 C.F.R. §§ 404.304-.305; 404.353(a).[8]

The SSA I.G. argues that there are events that may result in the suspension or termination of CIB benefits, such as incarceration for more than 30 days or marriage. The SSA I.G. argues that "living arrangements," such as incarceration and marriage, may be material facts that the Commissioner may consider in determining initial and continuing entitlement to CIB or the amount of CIB benefits. SSA Br. at 2-3. The SSA I.G.'s reasoning is faulty. Even if the SSA I.G. is correct that incarceration and marriage are events that could affect initial or continuing entitlement to CIB or the amount of the CIB, the incarceration and the marriage are the material facts not the address of the prison or the address of the marital residence. The SSA I.G.'s position in this case is, in effect, that a fact is material if it could lead to discovery of a fact that may affect initial or continuing eligibility for CIB or the amount of CIB benefits. The definition of "material fact" under the Act and regulation is not as broad as the SSA I.G. construes it. Act § 1129(a)(2); 20 C.F.R. § 498.101. Furthermore, the SSA I.G. concedes that Mark was not married and he was not incarcerated in this case, so incarceration and marriage are not material facts in this case. SSA Br. at 2-3.

The SSA I.G. also argues that the definition of the phrase "living with" found in 20 C.F.R. § 404.366, is not pertinent to this case because SSA does not use this regulatory provision to determine eligibility of a natural child.[9] SSA Br. at 4. The Act provides that a child is deemed dependent upon a natural father or mother, unless the child was not "living with" the natural father or mother or the father or mother was not contributing to the child's support and the child is neither the legitimate or adopted child of the father or mother or the child has been adopted by some other. 42 U.S.C. § 402(d)(3). Thus, the

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(Footnote continued.)

in this case because he continued to believe, based on SSA Ex. 20, that Mark's primary residence was with his mother. Tr. 291-93.

[8] The true focus of the SSA I.G. in this case is whether or not Respondent made false statements or omissions of material fact related to his selection and continuation as a representative payee for Mark. Section 1129(a)(1) of the Act and 20 C.F.R. § 498.102(a) do not grant the SSA I.G. authority to impose a CMP or assessment based on false statements or omissions of material fact in connection with the application to be designated a representative payee or for continuation of representative payee status.

[9] The SSA I.G.'s interpretation appears to be in error based upon the plain language of the regulation, but this is not an issue before me that I need to resolve.

Act requires consideration of whether a child is "living with" the natural parent after adoption by another for purposes of entitlement. The regulation implementing 42 U.S.C. § 402(d)(3) also requires consideration of whether a natural child is "living with" a natural parent after adoption by another. 20 C.F.R. § 404.361(b). Therefore, whether or not a natural child is living with a natural parent may be a material fact related to entitlement for CIB in limited circumstances. However, the SSA I.G. concedes by its argument that whether or not Mark lived with Respondent is not a material fact related to Mark's initial or continuing entitlement or benefit amount in this case. SSA Br. at 4.

Whether or not Mark was "living with" Respondent is not a material fact in this case. But, one of the bases for the CMP cited by the SSA I.G. is that Respondent falsely reported that Mark lived with him. The only definition of the phrase "living with" possibly applicable to CIB entitlement is that found in 20 C.F.R. § 404.366. I conclude that the definition in 20 C.F.R. § 404.366, is applicable and controlling in this case and it is pertinent to the discussion that follows regarding whether or not it was true that Mark "lived with" Respondent.

(ii) Respondent made no false or misleading statement of material fact and no omissions or withholding of fact that was misleading.

The SSA I.G. alleges that Respondent made a false statement of material fact on a "Representative Payee Report" that he completed on April 16, 2007, by responding yes to the question "[d]id all the children named below live with you from 05/01/2006 to 04/30/2007?" SSA Ex. 4. The SSA I.G. also alleges that for each of 16 months from December 2006 through March 2008, Respondent failed to report Mark's true living arrangements and that the omission or failure to report was false or misleading. SSA Br. at 1, 5-7. Even if one concluded that where Mark Patton lived or the address of his residence is material to his entitlement, the SSA I.G.'s proposal to impose a CMP and assessment against Respondent cannot be upheld because Respondent made no false statement and did not knowingly fail to report any material fact.

In order to impose a CMP and an assessment against Respondent, section 1129(a)(1) of the Act and 20 C.F.R. § 498.102(a) require that the SSA I.G. show that Respondent knew or should have known that his statement that Mark lived with him from May 1, 2006 to April 30, 2007 was false or misleading or that he made such statements with knowing disregard for the truth. In order to impose a CMP or assessment on grounds that Respondent omitted to report the true facts related to Mark's living arrangements from

December 2006 through March 2008,[10] the SSA I.G. must show that Respondent knew or should have known that the omission or withholding, in this case while receiving monthly benefits, was false or misleading. The act and regulation do not provide a definition of residence or establish residence as a material fact related to the initial or continuing entitlement to CIB or the amount of such benefits. The regulation does define the phrase "living with" and makes it a material fact related to entitlement to CIB benefits. 20 C.F.R. § 404.366. Respondent may be presumed to know and be subject to a substantive rule of general applicability adopted as authorized by law that is properly published and those rules of which he has actual and timely notice. 5 U.S.C. § 552. The evidence in this case does not suggest, and the SSA I.G. does not argue, that the evidence shows that Respondent had actual and timely notice that Mark's residential address was a material fact, for which he could be subject to sanction for failure to report. Thus, it is the phrase "living with" that is pertinent in this case. In fact, the question on the SSA "Representative Payee Report" form that Respondent completed on April 16, 2007, was whether or not Mark lived with him from May 1, 2006 through April 30, 2007.

"Living with" is defined by 20 C.F.R. § 404.366(c) as follows:

> (c) *"Living with" the insured.* You are living with the insured if you ordinarily live in the same home with the insured and he or she is exercising, or has the right to exercise, parental control and authority over your activities. You are living with the insured during temporary separations if you and the insured expect to live together in the same place after the separation. Temporary separations may include the insured's absence because of active military service or imprisonment if he or she still exercises parental control and authority. However, you are not considered to be living with the insured if you are in active military service or in prison. If *living with* is used to establish dependency for your eligibility to child's benefits and the date your application is filed is used for establishing the point for determining dependency, you must have been living with the

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[10] The Act and regulation authorize the imposition of a CMP or assessment for the omission or failure to report a fact that the person knows or should know is material to the determination of any initial or continuing right to benefits or the amount of benefits. Act §1129(a)(1); 20 C.F.R. § 498.102(a). For reasons already discussed, Mark's residence address and where he lived were not material facts and, therefore, Respondent is not subject to a CMP or assessment for failure to report those facts on grounds that they were material.

> insured throughout the month your application is filed in order to be entitled to benefits for that month.

Evaluating the facts of this case using the regulatory definition of "living with," it is clear that Mark was living with Respondent throughout the period May 1, 2006 through March 2008. Mark had a room in Respondent's home. He kept personal property at Respondent's home. Mark spent weekends, most weeks of the school summer break, days when he was too sick to attend school, and part or all of holidays at Respondent's home. The evidence shows that Mark clearly had the intention to return to Respondent's home after spending time at his mothers. Ms. DeGroot's testimony shows that Mark lived with Respondent as many as 196 days each year. Tr. 189-90. The evidence shows that Mark lived with Respondent at least half the days of the year or more, which supports a conclusion that he ordinarily resided with Respondent. The joint parenting agreement supports a finding that Respondent had the right to joint legal and physical custody of Mark and expresses the intent of the parties to that agreement that Respondent was to have "frequent and continuing contact" and "input into the decisions affecting the upbringing and raising of" Mark. SSA Ex. 20 at 1. The fact that the joint parenting agreement provided that Jeri DeGroot would be the "residential parent with whom [Mark] shall reside on a daily basis" (SSA Ex. 20 at 1) is not controlling and is insufficient to support an inference that Mark did not "live with" Respondent in this case. Even if one construed the joint parenting agreement as establishing a presumption that Mark "lived with" Jeri DeGroot, that presumption is rebutted by the evidence in this case. Furthermore, considering all the facts in this case, it is not reasonable to conclude that Respondent knew or should have known that Mark was not living with him during the period May 1, 2006 through March 2008, or that Respondent acted with knowing disregard for the truth with regard to Mark's living arrangements.

I conclude that the elements necessary to impose a CMP or assessment against Respondent are not satisfied in this case. Accordingly, I conclude that there is no basis for the imposition of a CMP or assessment and none is reasonable.

III. Conclusion

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

/s/
Keith W. Sickendick
Administrative Law Judge