

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

The Inspector General of the Social Security Administration,

v.

Walter Jeczen,

Respondent.

Docket No. C-13-28

Decision No. CR3206

Date: April 18, 2014

**DECISION**

The Inspector General (I.G.) of the Social Security Administration (SSA) proposed to impose on Respondent, Walter Jeczen, a civil monetary penalty (CMP) and assessment totaling \$75,455. The I.G. alleged that Respondent withheld disclosure of his work activity while receiving adult Social Security Child Insurance Benefits (CIB). Respondent disputed the I.G.'s allegations and filed a request for hearing before an administrative law judge. Because I conclude that Respondent withheld disclosure of material facts that Respondent knew or should have known SSA could use in determining Respondent's initial and/or continued entitlement to CIB, I conclude that Respondent is liable for a CMP and an assessment. Further, I affirm the I.G.'s proposed CMP and assessment totaling \$75,455 because it is both permissible and reasonable.

**I. Background and Procedural History**

On October 17, 2006, Respondent filed an application for CIB with SSA (CIB application). Respondent indicated on the application that he: had been disabled since 1969; had not been employed from 2001 to October 17, 2006, agreed to "promptly notify" SSA if he "goes to work"; and affirmed that all the information he gave in connection with the claim for CIB was true. SSA Exhibit (Ex.) 1; Respondent (R.) Ex 1.

In February 2007, Respondent met with an SSA representative and submitted a Disability Report in support of his CIB application in which Respondent indicated that he most recently worked in 2000. SSA Ex. 2, at 7. On September 12, 2007, SSA awarded Respondent CIB beginning in April 2006.<sup>1</sup> SSA Ex. 3; R. Ex. 3.

In 2010, an anonymous individual reported to the I.G. that Respondent owned a business named Capac Resale and that he rented apartments and houses. The referral also indicated that Respondent collected more than \$200,000 based on a fraudulent claim filed with State Farm Insurance Company (State Farm). SSA Ex. 4.

On March 2, 2011, I.G. special agents, accompanied by state and local law enforcement officers, executed search warrants of Capac Resale at 108 South Main, Capac, Michigan, and Respondent's apartment. SSA Ex. 5, at 1-2. During the search, Respondent consented to answering questions from I.G. Special Agent Judith Amaro. Respondent told Agent Amaro that he was the sole owner of Capac Resale, which he started in and has continuously operated since late 2005. Respondent indicated that he previously had employees, he handled the cash register at the store, and the store was open about six hours a day. Respondent stated that he had a car accident in December 2006, and that he had to hire three employees to run the store. Respondent asserted that his business lost money every year and the employees' wages were paid by State Farm due to a loss of wages as a result of the December 2006 accident. Respondent said that he informed SSA of the store by calling SSA's 1-800 number and that SSA representatives told him that he could continue to run his store as long as the store did not earn a profit. SSA Ex. 5, at 3.

On March 22, 2011, Respondent filed a Form SSA-820-F4 Work Activity Report with SSA in which he formally disclosed his ownership of Capac Resale to SSA. SSA Ex. 7; R. Ex. 18. Based on the information SSA received about Respondent's store, SSA decided to reopen and revise its decision to award CIB to Respondent. SSA Ex. 9; R. Ex. 5. In a May 12, 2011 Notice of Proposed Decision, SSA indicated that "it appears we will decide that you are not qualified for disability benefits under our rules . . . because you began doing substantial gainful work in January 2006." SSA Ex. 10, at 1; R. Ex. 4, at 1. Respondent filed a response to the proposed decision, and on August 20, 2011, SSA determined that Respondent was not entitled to CIB from April 2006 through July 2011 because he engaged in substantial gainful activity, and received \$58,455.50 in benefit payments for which Respondent was not entitled. SSA Exs. 6, at 1-2; 11 at 1; R. Ex. 7, at

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<sup>1</sup> Before his 2006 CIB application, SSA previously awarded Respondent payments under the Supplemental Security Income (SSI) program. SSA Ex. 2, at 1. However, SSA suspended such payments three times between 1987 and 2004 during periods when Respondent was imprisoned. SSA Ex. 2, at 4. Further, SSA denied a previous CIB application. SSA Ex. 2, at 13.

1; *see also* R. Ex. 10. Respondent requested reconsideration of SSA's determination. SSA Ex. 6, at 3-21; R. Ex. 8. Respondent requested a hearing before an SSA administrative law judge on October 9, 2012. R. Ex. 11; *see also* SSA Ex. 5, at 10. The record does not reflect the outcome of that appeal.

On March 28, 2012, the I.G. sent a letter indicating that the I.G. intended to initiate a CMP action against Respondent based on alleged false statements Respondent made to SSA concerning his ability to work in connection with the CIB application. SSA Ex. 12, at 1. The I.G. offered Respondent an opportunity to submit a written statement or other information for the I.G. to consider before commencing the CMP action. SSA Ex. 12, at 2. In an April 10, 2012 letter, Respondent's counsel requested additional information from the I.G. before responding to the I.G. SSA Ex. 13. In a May 3, 2012 letter, counsel for the I.G. stated that she attempted to contact Respondent's counsel, but had not heard back from him. SSA Ex. 14. It appears that Respondent's counsel did not file a response to the I.G.'s March 28, 2012 letter. *See* SSA Ex. 15, at 2.

In an August 14, 2012 notice, the I.G. proposed to impose on Respondent a \$20,000 CMP and an assessment in lieu of damages of \$55,455. The I.G. alleged that a CMP is warranted because Respondent withheld material information from SSA in violation of 42 U.S.C. § 1320a-8. The I.G. specifically alleged:

An [I.G.] investigation reveals that [Respondent] owned and operated Capac Resale Outlet, a thrift store; however, [Respondent] failed to notify SSA of this work activity. [Respondent's] work activity and earnings would have disqualified [him] from receiving SSA benefits. [Respondent's] failure to report [his] work activity and earnings caused SSA to pay [Respondent] \$55,455.00 in benefits from April 2006 through July 2011 to which [Respondent was] not entitled. . . . [42 U.S.C. § 1320a-8] provides that if, any month after November 27, 2006, an individual withholds disclosure of a material fact, such omission is considered a false statement and/or misrepresentation. Therefore, [Respondent's] failure to report [his] work activity from December 2006 through July 2011 constitutes 56 separate violations.

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

I have determined that a reduced civil monetary penalty of \$20,000 and an assessment in lieu of damages of \$55,455.00, for a total of \$75,455.00, would be appropriate. Although [Respondent] could be subject to an assessment of

\$97,326.00, I have limited the assessment to the amount of the overpayment you received. Similarly, even though I could have proposed a penalty of \$280,000.00, I limited the penalty to \$20,000.00 after considering [Respondent's] health and what limited information I know about your resources.

SSA Ex. 15, at 2. In response to the CMP notice, Respondent, through counsel, timely filed with the Departmental Appeals Board, Civil Remedies Division (CRD), a request for a hearing by an administrative law judge. SSA Ex. 16. The Director of CRD assigned this case to me for hearing and decision.

On November 7, 2012, I held a telephonic prehearing conference with the parties' counsel at which I set dates for the parties' prehearing exchanges. I summarized the substance of that conference in an Order Scheduling Submissions of Briefs and Documents of that same date. The I.G. timely submitted its prehearing exchange, which included a brief (SSA Br.), a list of proposed witnesses, and 16 exhibits (SSA Exs. 1-16). However, on May 1, 2013, I had to issue an Order to Show Cause to Respondent because Respondent failed to timely file his prehearing exchange. Respondent's counsel responded on May 15, 2013, stating that he is involved in a high-volume trial practice, that his long-time partner passed away in 2012, and that he had to handle his partner's cases as well as his own. Respondent's counsel also filed his prehearing brief (R. Br.) on May 15, 2013. The I.G. filed a reply brief (SSA Reply Br.) on June 12, 2013, in which the I.G. requested that I dismiss Respondent's hearing request for abandonment or otherwise sanction Respondent for failing to submit his proposed exhibits and witness list. CRD received Respondent's witness list and 23 proposed exhibits (R. Exs. 1-23) on June 19, 2013.

On July 31, 2013, I held another telephonic prehearing conference with the parties' counsel, the substance of which I summarized in an August 1, 2013 Order Summarizing Results of Prehearing Conference (August 1, 2013 Order). At the conference I declined to dismiss Respondent's hearing request; however, I verbally admonished Respondent's counsel to adhere to all future deadlines and, if a deadline could not be met, to request an extension of time as soon as possible. August 1, 2013 Order ¶ 1. I also admitted, without objection, SSA Exs. 1-16 and R. Exs. 1-23 into the record. August 1, 2013 Order ¶ 2. Further, I ordered the parties to submit written direct testimony for their proposed witnesses by September 30, 2013. August 1, 2013 Order ¶ 4. The parties were given until October 15, 2013, to request to cross-examine any witness for whom the opposing party submitted written direct testimony. August 1, 2013 Order ¶ 6; *see* 20 C.F.R. § 498.216(b)-(c).

## II. Decision on the Record

On October 21, 2013, the I.G. filed written direct testimony for three witnesses and informed me that she was filing this late “[d]ue to the preparation for and pending [October 1, 2013] government shutdown.” I mark the written direct testimonies of Agent Judith Amaro, Daniel Bowman, and B. Chad Bungard, as SSA Exs. 17, 18, and 19, respectively.

Respondent did not submit any written direct testimony for its proposed witnesses. August 1, 2013 Order ¶ 4. Further, Respondent has not objected to the I.G.’s late filing of the written direct testimony for the I.G.’s witnesses and has not requested to cross-examine those witnesses. *See* August 1, 2013 Order ¶ 6. Because Petitioner has not objected to the I.G.’s written direct testimony, I admit SSA Exs. 17-19 into the record. Further, because Respondent has not requested to cross-examine the I.G.’s witnesses and the Respondent did not offer any testimony from its list of proposed witnesses that the I.G. could request to cross-examine, I conclude that an in-person hearing is unnecessary and I issue this decision based on the written record in this case. August 1, 2013 Order ¶ 8 (“The hearing is only for the testimony of the witnesses . . .”); *see also* 20 C.F.R. § 498.216(b)-(c).

## III. Issues

- 1) Whether Respondent violated 42 U.S.C. § 1320a-8(a)(1)(C) by withholding disclosure of material facts for use in determining an initial or continuing right to Social Security benefits, which Respondent knew or should have known was material for such use and that such withholding was misleading.
- 2) Whether the I.G.’s proposed CMP and assessment of \$75,455.00 is reasonable and appropriate under the provisions of 42 U.S.C. § 1320a-8(a)(1), (c).

## IV. 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 adjudicate SSA CMP cases. *See* 20 C.F.R. § 498.201 (definition of *ALJ*); *see also* 20 C.F.R. §§ 498.202-498.220. Therefore, I have jurisdiction to hear and decide this case.

## V. Findings of Fact, Conclusions of Law, and Analysis<sup>2</sup>

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

omits from a statement or representation . . . 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 [a Social Security program] . . . 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.

42 U.S.C. § 1320a-8(a)(1)(C).

The I.G. has the burden of proving all facts in an SSA CMP case with the exception of the affirmative defenses and mitigating circumstances raised by a respondent. 20 C.F.R. § 498.215(b). The standard of proof is a preponderance of the evidence. 20 C.F.R. § 498.215(c). An administrative law judge must ultimately “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).

### ***A. Respondent owned and operated a store called Capac Resale Outlet and Capac Resale, LLC, from late 2005 through March 2011.***

In the middle of 2005, Respondent began “trash-picking” and found that “very nice items [were] simply put out to end up in a landfill.” SSA Ex. 6, at 1. At that time, Respondent did not have definite plans to open Capac Retail Outlet (SSA Ex. 6, at 1); however, after approximately seven months of gathering discarded items, he finally had sufficient inventory to open a store. R. Ex. 19 ¶ 15. In late 2005, Respondent rented a store front at 102 S. Main, Capac, Michigan, and established Capac Retail Outlet; Respondent continuously operated that business as the sole owner through March 2011. SSA Exs. 7, at 1; 17 ¶¶ 18a, 25; R. Exs. 18, at 1; 19 ¶ 18.

Although Respondent did not have a written lease, he paid \$800.00 a month in rent for the store front at 102 S. Main. R. Ex. 19 ¶ 19. Respondent set up the inside of the store and paid \$450.00 for “a huge sign to hang up outside the building.” R. Ex. 19 ¶ 19-20. In April 2006, Respondent applied for an Employer Identification Number (EIN) for Capac Resale Outlet. SSA Ex. 6, at 10. On May 5, 2006, Respondent entered into a “Service and Monitor Agreement” with Thumb Alarm Systems, Inc. for the 102 S. Main

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<sup>2</sup> My findings of fact and conclusions of law are set forth in italics and bold font.

store front. R. Ex. 15. In May or June 2006, Respondent was forced to relocate his business to 127 N. Main, Capac, Michigan, which is a building where Respondent paid rent until his father purchased it around December 31, 2009. SSA Ex. 7, at 1; R. Exs. 18, at 1; 19 ¶¶ 20-21. By October 2006, Respondent was even engaging in collection of a debt owed to Capac Resale Outlet. R. Ex. 16. Because Respondent was hit by a car at the end of 2006, he hired employees to work at Capac Resale Outlet from 2006-2010; Respondent paid these employees with funds provided by State Farm due to the wages lost by Respondent following the car accident. SSA Ex. 6, at 14. Significantly, Respondent submitted payroll records to State Farm claiming lost wages/income in the amount of approximately \$1,000.00 to \$1,100.00 bi-weekly. R. Ex. 17.

According to Respondent's federal tax returns for 2006, Capac Resale Outlet generated \$24,970 in gross income during its first full year of operation, but incurred \$36,140 in expenses. SSA Ex. 8, at 1; R. Ex. 20, at 3. In 2007, Respondent registered a modest profit when Capac Resale Outlet generated \$63,885 in gross income and \$63,514 in expenses. SSA Ex. 8, at 4; R. Ex. 21, at 3. In 2008 and 2009, Respondent reported modest losses when Capac Resale Outlet earned gross incomes of \$63,145 and \$48,978 in those years, but incurred expenses of \$63,197 and \$50,530. R. Exs. 22, at 3; 23, at 3.

In 2009, Respondent's attorney filed an application with the State of Michigan to turn Capac Retain Outlet into a limited liability company (LLC) and Respondent filed for a new EIN for Capac Resale LLC. SSA Exs. 6, at 10; 17 ¶ 14. From 2006 through 2011, Respondent filed forms with the IRS using the EINs assigned to Capac Resale Outlet and later Capac Resale LLC, filed for a state tax license, and paid both federal and state income tax withholding for his employees, as well as "Social Security Taxes" and "Federal and State Unemployment tax on employees." SSA Exs. 6, at 10; 8, at 6-9; 17 ¶¶ 11, 20, 23. Respondent also "tried to promote my small business under both my name and business name in Newspapers, Business Cards, Radio Stations, Yellow Pages, School Yearbooks, Charitable Events, Internet Forums, etc.," which included youtube.com. SSA Exs. 6, at 11; 17 ¶¶ 10, 13.

Agent Amaro testified that on February 7, 2011, she went to Capac Resale's address and noted that the store was closed, but that she could see that it was "filled with merchandise." SSA Ex. 17 ¶ 8. She returned to Capac Resale on February 16, 2011, and was able to enter the store and observed Respondent directing another man where to move merchandise around the store and quoting prices of items to a customer and the man whom Respondent had been directing. SSA Ex. 17 ¶ 15.

Agent Amaro also testified that on February 7, 2011, the Post Master in Capac, Michigan, said that Respondent opened Post Office Box 472 in November 2005 under the name of Capac Resale and Respondent picks up the mail from that box. SSA Ex. 17 ¶ 8. The Post Master "stated that [Respondent] 'runs the thrift store.'" SSA Ex. 17 ¶ 8. Also on February 7, 2011, the Chief of the Police in Capac told Agent Amaro that since he

became Chief of Police in July 2009, he has known Respondent to own and operate Capac Resale and that Respondent “is at the store all of the time and runs the business.” SSA Ex. 17 ¶ 9. The Chief of Police stated that Respondent had “excellent surveillance equipment” at the store. SSA Ex. 17 ¶ 9. On February 16, 2011, Agent Amaro spoke to a Capac police officer who told her that Respondent “was running Capac Resale . . . and that [the police officer] observed [Respondent] conduct business-related matters both in the store and in his apartment.” SSA Ex. 17 ¶ 16.

On March 2, 2011, Agent Amaro interviewed Respondent during the execution of a search warrant of Capac Resale. Agent Amaro testified that Respondent told her that he started Capac Resale in late 2005 and has continuously operated the business as the sole owner since that time. SSA Ex. 17 ¶ 18. Respondent stated to her that: he operated the cash register at the business; he hired and fired employees; he no longer had any employees working for him; Capac Resale was open six hours a day; and Capac Resale made less than \$100 a day. SSA Ex. 17 ¶ 18.

Respondent ceased operating Capac Resale, LLC, on March 26, 2011, following the March 2, 2011 search of Respondent’s store and apartment. R. Br. at 6; SSA Exs. 5, at 7, 8; 17 ¶ 25a. Respondent sold the merchandise in his store for \$8,000 and receives rental income for leasing the store front and apartments located in his building at 127 N. Main, Capac, Michigan. SSA Ex. 5, at 7. Respondent then moved to Chesterfield, Michigan to a home he purchased for \$36,000. SSA Ex. 5, at 7.

Based on the record in this case, I find that Respondent owned and operated a store called Capac Resale Outlet and Capac Resale, LLC, from late 2005 through March 2011.

***B. Respondent did not inform SSA of his ownership in and work related to Capac Resale Outlet and Capac Resale, LLC, in his 2006 CIB application or at any other time prior to March 2011.***

Respondent established Capac Resale Outlet in late 2005, and continuously operated that business and Capac Resale, LLC, as the sole owner through at least March 2011. However, Respondent indicated on his October 17, 2006 CIB application that, “I was not employed from . . . 2001 to present.” SSA Ex. 1, at 2. Further, in a Disability Report that Respondent completed with the assistance of an SSA representative in February 2007 (R. Ex. 19 ¶ 26, *see also* SSA Ex. 2, at 1-4), Respondent indicated that the last job he held was in 2000 and stated he was “[u]nable to maintain any type of job.” SSA Ex. 2, at 6-7. SSA did not know of Respondent’s activities related to Capac Resale Outlet or Capac Resale, LLC, until the I.G. received an anonymous fraud report. SSA Ex. 4. This resulted in an I.G. investigation that commenced in January 2011. SSA Ex. 17 ¶ 3.



It was not until I.G. agents executed a search warrant of Respondent's store and apartment on March 2, 2011, that Respondent told an SSA employee (i.e., Agent Amaro) about Capac Resale and his work activities. SSA Exs. 5, at 2-3; 17 ¶¶ 17-18. The first time Respondent formally informed SSA of his work activities was when he filed a Work Activity Report (Form SSA-820-F4) with SSA on March 22, 2011. SSA Ex. 7; R. Ex. 18.

Respondent asserted that he notified SSA of his business and work activity. Specifically, Respondent states that he had a conversation in 2005 with manager of the local SSA office in which Respondent informed the manager that “[Respondent] was ‘trash picking’ and stockpiling items with the intent to start a small retail store.” R. Br. at 4; R. Ex. 19 ¶ 9. The manager is reported to have responded that unless Respondent made a profit after expenses, Respondent did not need to inform SSA of the activity. R. Br. at 4; R. Ex. 19 ¶¶ 9-10; *see also* SSA Ex. 6, at 9. The result of this communication was that Respondent “took him [i.e., the manager] at his word that I had no obligation to call his office until I could establish a profit from this so-called self-employment effort.” R. Ex. 19 ¶ 10.

In addition to this 2005 conversation, Respondent asserted that “I called and spoke with various SSA agents at the toll free call center, Local SSA Office in which each call was specifically routed to the office manager . . . I [s]poke with Ticket to Work; and attempted to communicate both my intended and/or failing unsuccessful self-employment activities at various points in time between 2005 and 2011.” SSA Ex. 6, at 9. In addition, Respondent purports to have informed the Michigan Department of Human Services, Michigan Department of Insurance Regulation, and Michigan Department of Economic Labor and Business Development (Disability Service Unit) that he was starting a business and was receiving CIB. SSA Ex. 6, at 9, 11.

Despite Respondent's claims of informing SSA and state agencies of his business and work activity, Respondent did not submit any evidence of this communication, and his alleged contact with various Michigan government departments is not relevant.<sup>3</sup> *Latoshia Walker-Mays*, Docket No. A-11-13, at 6-7 (HHS DAB Feb. 17, 2011) (“Respondent has submitted no evidence to corroborate her claim that she ever specifically informed SSA about . . . her living arrangements. . . . Respondent also asserts that she informed a State agency . . . about her living arrangements. . . . Even if true, this would not have satisfied her obligation to provide full and accurate information about her living arrangements to SSA.”).<sup>4</sup> Further, even if Respondent discussed his business idea

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<sup>3</sup> Respondent alleged that he had in his possession letters from SSA addressed to Respondent at Capac Retail Outlet (SSA Ex. 6, at 10, 12), which prove that SSA knew about his store; however, Respondent did not submit copies of any of these letters.

<sup>4</sup> Administrative decisions cited in this decision are accessible on the internet at: <http://www.hhs.gov/dab/decisions/index.html>.

with the local SSA manager in 2005, I cannot credit Respondent's conversation in 2005 with the local office manager as providing notice of his work activities because Respondent had not yet applied for CIB. R. Ex. 19 ¶ 9.

Therefore, based on the record, I find that Respondent did not inform SSA of his ownership in and work related to Capac Resale Outlet and Capac Resale, LLC, in his 2006 CIB application or at any other time prior to March 2011.

***C. Respondent omitted from his CIB application and a disability report, and otherwise withheld disclosure of, his ownership in and work related to Capac Resale Outlet and Capac Resale LLC, facts which were material to the determination of Respondent's initial entitlement and continued entitlement to CIB, and Respondent knew or should have known that those facts were material to his entitlement to such benefits and that the omission was false and misleading, in violation of 42 U.S.C. § 1320a-8(a)(1)(C).***

As found above, the evidence of record shows that Respondent owned and operated Capac Resale Outlet and later Capac Resale, LLC.<sup>5</sup> Further, Respondent did not inform SSA of his ownership in or work activities related to his business when he applied for CIB in 2006 or while receiving CIB payments until March 2011. Respondent argues in this case that despite these facts, he did not violate 42 U.S.C. § 1320a-8(a)(1)(C).

Respondent argues that his ownership and work activity related to Capac Resale Outlet and Capac Resale, LLC, was never substantial gainful activity (SGA) because Respondent allegedly never earned a profit from 2005 through March 2011. R. Br. at 6-7. Respondent further argues that due to a lack of profit and because Respondent's activity was a "scavenging enterprise," his ownership of a business and his work activity were not material facts under 42 U.S.C. § 1320a-8. R. Br. at 8. Respondent also avers that the 2006 CIB application asked whether he was "employed" and that his negative response was proper because his business activities at the time of the CIB application were not "employment" that would disqualify him from obtaining benefits. R. Br. at 8. Further, shortly after filing the CIB application, Respondent asserts that he was struck by

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<sup>5</sup> According to Agent Amaro, she obtained "nine boxes of evidence from the search warrant" that she provided to SSA as part of its review of Respondent's benefits. SSA Exs. 5, at 4-6; 17 ¶ 23. However, with the exception of nine pages of tax return documents from 2006 through 2009, the I.G. did not submit documentary evidence from Agent Amaro's detailed investigation concerning Respondent's work activities, save statements from Respondent himself. It is unclear why the I.G. did not submit the documentary evidence SSA used to make its fraud or similar fault determination. SSA Exs. 9; 18; R. Exs. 5; 6; 10. Instead, it was Respondent who submitted several documents concerning Respondent's business. R. Exs. 14-17; 20-23.

an automobile in December 2006, and “thereafter, [he] had limited involvement in the business.” R. Br. at 8. Finally, Respondent argues that he “had previously been advised” by SSA that his activities were not material to his application, resulting in the failure to disclose. R. Br. at 9.

Although Respondent attempts to minimize his business and work activities, both based on his business’ modest beginnings and his later injuries from an automobile accident, Respondent’s arguments are insufficient for me to conclude that information about his business and work activities were not material facts related to his CIB claim. In order for a fact to be “material” for purposes of 42 U.S.C. § 1320a-8(a)(1)(C), that fact must be “one which the Commissioner of Social Security may consider in evaluating whether an applicant is entitled to benefits under [a Social Security program].” 42 U.S.C. § 1320a-8(a)(2) (emphasis added). Although Respondent argues in this case that his activity was not SGA and, therefore, not material to his CIB application or subsequent receipt of benefit payments, this argument fails to address whether SSA may have considered that information when awarding CIB or continuing to allow Respondent to receive CIB payments. Based on both the law and the record in this case, I conclude that Respondent’s ownership of Capac Resale Outlet/Capac Resale, LLC, as well as his work activities related to that business, were material facts because SSA would have considered them in evaluating Respondent’s initial and continuing eligibility for CIB.

In order for Respondent to have been awarded adult CIB, Respondent needed to meet certain criteria, one of which was being “disabled” as that term is defined in Social Security’s Disability Insurance Benefit (DIB) program. 42 U.S.C. § 402(d)(1)(B); *see also* 20 C.F.R. § 404.351(b). To be found “disabled,” a claimant must not be able to engage in SGA, as that term is defined in SSA’s regulations. 42 U.S.C. § 423(d)(1)(A), (d)(4)(A); 20 C.F.R. § 404.1505. Under the regulations, SGA “means work that . . . [i]nvolves doing significant and productive physical or mental duties . . . and . . . is done (or intended) for pay or profit. 20 C.F.R. § 404.1510. However, work activity may be considered gainful “whether or not a profit is realized,” and work activity may be substantial “even if it is done on a part-time basis or if you do less, get paid less, or have less responsibility than when you worked before.” 20 C.F.R. § 404.1572(a)-(b). This is why, “[e]ven if the work you have done was not [SGA], it may show that you are able to do more work than you actually did. [SSA] will consider all of the medical and vocational evidence . . . to decide whether or not you have the ability to engage in [SGA].” 20 C.F.R. § 404.1571 (emphasis added). Further, for self-employed claimants, SSA has established a complex three-part test to determine SGA, which takes into account the fact that an owner of a new business may not have profits or income. 20 C.F.R. § 404.1575.

As described earlier, Respondent established a business that had a physical location, was organized as an LLC, existed for more than five years, generated gross revenues in the thousands of dollars, employed staff, was advertised in traditional and internet media, and

even made a modest profit in 2007. Respondent did not have the right to determine for SSA whether SSA needed to know about his business activities when he applied for CIB, or later when he received CIB payments while the business grew. Rather, Respondent was obligated to disclose this information to SSA so that it could apply its rules regarding SGA. *Walker-Mays*, Docket No. A-11-13, at 10 (“It was incumbent on Respondent to provide SSA with full, complete information about her living arrangements so that SSA could determine to what extent to which her husband’s income and resources would affect her daughter’s eligibility for SSI benefits.”). Therefore, I conclude that the information about Respondent’s business and work activities was material to claim and continued entitlement to CIB.

I also conclude that Respondent knew or should have known that the existence of his business and his work activity were material to his entitlement to CIB, and that the omission and withholding was misleading to SSA. In his 2006 CIB application, Respondent expressly stated that he was not employed from 2001 to present. SSA Ex. 1, at 2. Although Respondent argues that the term “employed” did not include running a business that he had started nearly a year earlier (R. Br. at 8), as noted above, the regulations undermine such a narrow interpretation of that term. *See Anthony Koutsogiannis*, Docket No. A-07-81, at 11 (HHS DAB June 20, 2007). Further, Respondent’s explanation why he did not inform SSA of his work activity on his 2006 CIB application makes it clear that he understood his business activity was work. His view was that he “had unpaid help volunteering to keep the store open” after his mother had passed away in October 2006, and, since Respondent “was NOT in fact working” at the store when he completed the CIB application, Respondent indicated to SSA that he was not working. SSA Ex. 6, at 7. As Respondent clarified, “I answered the question based on the facts and circumstances that existed at that specific timeframe.” SSA Ex. 6, at 7. Such a narrow answer must have been calculated to mislead SSA concerning his business activities.

Even if Respondent answered in good faith the questions posed to him when he applied for CIB in October 2006, this does not explain why Respondent failed to list his business activities as a job in his February 22, 2007 Disability Report. SSA Ex. 2, at 7. Respondent went to the SSA office and met with an SSA representative to file this report. The SSA employee’s notes from the meeting do not indicate that Respondent asked whether he should disclose his business (now more than a year old) and Respondent could not recall doing so. SSA Ex. 2; 1-4; R. Ex. 19 ¶ 24. Instead Respondent stated that at the time of the meeting with the SSA representative, he could not work due to his automobile accident. R. Ex. 19 ¶ 24.

As part of his defense in this case, Respondent asserted that he was hit by a car at the end of 2006 and was only able to keep his business because he hired employees from 2006-2010, with money provided by State Farm; Respondent claims that the employees performed 99 percent of the work at the store. SSA Ex. 6, at 14-15. Respondent also

asserted that multiple physicians determined that Respondent was unable to work following the car accident in 2006, and that was the reason he did not report work activity from 2006-2010 to SSA. SSA Ex. 6, at 16. However, despite this alleged significant medical event in Respondent's life, he failed to submit any evidence to corroborate its existence. Further, Respondent's eight-page Disability Report, which he completed while wearing a cast and crutches (R. Ex. 19 ¶ 24), makes no mention of his physical ailments resulting from the automobile accident. SSA Ex. 2, at 5-13. Except for the SSA representative indicating in her notes that Respondent had difficulty walking, there is nothing to corroborate the extent of Respondent's injuries. SSA Ex. 2, at 3. It is significant that in the section of the notes for observations about Respondent's appearance, there is no mention of his crutches and cast. SSA Ex. 2, at 3.

Based on the evidence of record, it is more likely than not that Respondent knew, or at least should have known, that he needed to disclose his business and work activities to SSA. The 2006 CIB application expressly made Respondent agree "to promptly notify [SSA] if any of the following events occur . . . a disabled child, age 18 or over, goes to work . . . ." SSA Ex. 1, at 2. Further, when Respondent received his benefit award notice from SSA in September 2007, SSA informed him that the decision SSA made to grant benefits was "based on the information you gave us" and changes in that information "could affect your benefits." SSA Ex. 3, at 2. The award notice told Respondent to read the parts of an enclosed pamphlet "which explain what to do if you go to work. . . ." SSA Ex. 2, at 3. It is crucial to note that at the time Respondent applied for and received CIB, he had received SSI benefits from SSA since 1985, with the exception of several periods of lengthy incarceration. SSA Ex. 2, at 1, 4. Respondent was not a neophyte regarding his reporting obligations to SSA when he applied for CIB in 2006. Respondent knew he needed to report his work activities to SSA and that by failing to do so, knew that he was misleading SSA.

***D. The I.G.'s proposed CMP and assessment is permissible and reasonable.***

The I.G. proposed the imposition of a \$20,000 CMP based on 56 months (i.e., December 2006 through July 2011) in which Respondent did not notify SSA of work activity related to Capac Resale Outlet and Capac Resale, LLC. The I.G. also proposed an assessment of \$55,455 based on the total benefits paid to Respondent based on his October 2006 CIB application (i.e. April 2006 through July 2011).<sup>6</sup> SSA Ex. 15, at 1-2. I must consider the reasonableness of this proposal based on applicable statutory requirements.

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<sup>6</sup> In the first paragraph of that CMP notice, the I.G. indicated that the assessment in lieu of damages was \$58,455; however, in the rest of the CMP notice, the figure of \$55,455 appears instead. The I.G. clarified that it is seeking an assessment of \$55,455. SSA Ex. 19 ¶ 8; *see also* SSA Br. at 2 n.2.

As a general parameter, a CMP may not be more than \$5,000 for “each receipt of [Social Security] benefits or payments while withholding disclosure of [a material] fact.” 42 U.S.C. § 1320a-8(a)(1). However, CMPs can only be applied to a “failure to disclose [that] occurred after November 27, 2006.” 72 Fed. Reg. 27,424, 27,425 (May 16, 2007). Therefore, even though Respondent received benefit payments retroactive to April 2006, the first benefit payment Respondent received after November 27, 2006, in which he failed to disclose his work activity, was December 2006. Further, the last payment Respondent received in which he failed to disclose his work activity was March 2011. SSA Ex. 7; R. Ex 18. This is a total of 52 benefits payments/months. Therefore, Respondent is potentially subject to a maximum CMP amount of \$260,000.

In addition to a CMP an individual “also shall be subject to an assessment, in lieu of damages sustained by the United States because of . . . such withholding of disclosure of a material fact, of not more than twice the amount of benefits or payments paid as a result of such a statement or representation or such a withholding of disclosure.” 42 U.S.C. § 1320a-8(a). In the present matter, Respondent received a total of \$51,663.50 in benefit payments between December 2006 and July 2011.<sup>7</sup> See SSA Ex. 11, at 1. Therefore, Respondent is subject to a potential maximum assessment of \$103,327.

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 and 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).

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<sup>7</sup> The I.G. stated in the CMP notice that Respondent was overpaid \$48,663. However, it is unclear how the I.G. determined this amount. I have decided to use the official benefit payment figures that SSA provided when it informed Respondent that he was overpaid. See SSA Ex. 11, at 1. Further, although the Respondent is subject to a CMP for each monthly benefit payment through March 2011, Respondent is subject to an assessment through July 2011 because SSA continued to pay Respondent benefits until it completed its review of Respondent’s case. See SSA Ex. 11; R. Ex. 7; *see also* R. Ex. 9 (Respondent objecting to the cessation of his benefit payments in an October 2011 letter).

### **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 Respondent's initial denials of his work activity to investigators to be an aggravating factor. SSA Ex. 15, at 2. The I.G. also argued that SSA informed Respondent of his obligation to report to SSA a return to work, but that Respondent did not believe that owning a business was work. SSA Br. at 12.

Respondent appears to respond that he did not communicate as thoroughly with the I.G. agents because the search of his business and house left him with the fear that he would be criminally prosecuted. R. Br. at 10.

I agree with the I.G. that Respondent withheld information of his work activity from SSA over a prolonged period of time when he had been placed on notice that he needed to report it. As indicated previously, Respondent has received benefits from SSA for the majority of his adult life and knew that his work activity was important information to SSA. It is difficult to believe that Respondent did not purposefully mislead SSA about his business activities.

### **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. The I.G. considered Respondent very culpable because Respondent indicated on his October 2006 CIB application that he had not worked since 2001, even though he commenced a business in late 2005. The I.G. concluded that Respondent "purposely misled SSA as to [Respondent's] work activities in order to receive [CIB]." SSA Exs. 15, at 2; 19 ¶ 10. The I.G. also pointed out that Respondent asserted in a February 22, 2007 Disability Report that he was "unable to maintain a job" when he owned a business at that time. SSA Br. at 12. The I.G. acknowledged that Respondent did not have a history of prior offenses with SSA's programs. The I.G. also considered that Respondent "may have limited income and resources." SSA Ex. 15, at 2.

Respondent responded that his culpability was low because his business was just starting at the time of his application for CIB and that the business did not earn a profit. R. Br. at 11. Respondent agreed with the I.G. that he did not have prior offenses related to SSA programs. Finally, Respondent indicated that his sole source of income "was SSI as well as rental income from a home." R. Br. at 11.

I agree with the I.G. that Respondent has a high degree of culpability in this case. Respondent not only failed to inform SSA during his 2006 CIB application that he was starting a business, but never informed SSA about the business as it grew over the years and increasingly was generating gross revenues. Respondent withheld information about

business and work activities for over four and a half years. This significantly weighs against Respondent. *Walker-Mays*, Docket No. A-11-13 (“the fact that Respondent knowingly withheld material information from SSA over an extended period of time demonstrates that she was highly culpable.”).

I agree with the parties that there is no evidence in the record that Respondent committed a previous offense related to SSA programs.

I generally agree with the parties that Respondent appears to have some limitations on his financial condition. Although Respondent submitted his tax returns for 2006-2009 (R. Exs. 20-23), these are too distant from which to draw conclusions of his financial condition at this time. However, Respondent had the burden of demonstrating an inability to pay, something that he failed to do. *Id.*; *Koutsogiannis*, Docket No. A-07-81, at 19. In fact, the I.G. noted that he gave Respondent an opportunity to provide information about his financial condition before the I.G. determined the CMP and assessment amounts, but Respondent did not. SSA Exs. 12, at 2; 14; 15, at 2.

There is evidence in the record that Respondent disclosed some of his financial condition in a May 2011 telephone call with an I.G. agent. Respondent stated that he closed Capac Resale, LLC and sold the goods in the store for \$8,000.00. Further, he owned the building the store was located in and rented the store front and apartments in the building, thus providing rental income. Respondent indicated that by sometime in 2013, he might sell the building for \$150,000.00. Respondent also owned houses in Chesterfield, Michigan and Emmett, Michigan. Further, Respondent initially received a \$35,000 insurance award (presumably from State Farm for the car accident) and additional monthly payments from the insurance company of \$388. SSA Ex. 5, at 7.

Based on this evidence, I find that Respondent’s financial condition will permit him to pay the proposed CMP and assessment.

### **3. Other matters as justice may require.**

In the CMP notice, the I.G. indicated that he also considered the age and health of Respondent when determining the CMP and assessment. SSA Ex. 15, at 2. Respondent asserts that the fact Respondent did not earn any income from his business should also be considered. R. Br at 11. I have considered these matters.

### **4. A CMP of \$20,000 and an assessment of \$55,455 is permissible and reasonable.**

As discussed above, Respondent is subject to a potential CMP of \$260,000. The I.G. proposed a CMP of \$20,000 or less than 8 percent of the maximum permitted under law. Although the I.G. mistakenly thought that Respondent failed to inform SSA of his work



activity for 56 monthly payments rather than 52, a \$20,000 CMP is still less than ten percent of the maximum permitted. Therefore, the I.G.'s minor error concerning the number of months for which a CMP could be imposed does not provide a basis for reducing the CMP. *See Walker-Mays*, Docket No. A-11-13, at 11.

The I.G. proposed to impose an assessment of \$55,455.00 on Respondent. SSA Ex. 16, at 1. This amount constitutes all of the money paid to Respondent based on his October 2006 CIB application. The proposed assessment of \$55,455.00 constitutes less than 54 percent of the \$103,327.00 maximum assessment permitted in this case. There is no justification in the record to reduce an assessment that is only about half of the maximum assessment permitted under law. *Koutsogiannis*, Docket No. A-07-81, at 19. In fact, due to a typographical error in the CMP notice, the I.G.'s proposed assessment does not constitute the entire amount of money improperly paid to Respondent based on the October 2006 CIB application. I.G. Br. at 2 n.2.

### **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)(1)(C) to pay a CMP and assessment;
2. The I.G.'s proposed CMP and assessment is **AFFIRMED**; and
3. Respondent is directed to pay a total of \$75,455.00 in the manner specified by the I.G. in his CMP notice (SSA Ex. 15, at 2-3) or in any other manner prescribed by the I.G. following the issuance of this decision.

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/s/  
Scott Anderson  
Administrative Law Judge