

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

The Inspector General of the Social Security Administration,

v.

Aretha Harris,

Respondent.

Docket No. C-14-1659

Decision No. CR4542

Date: March 4, 2016

DECISION

The Inspector General (IG) of the Social Security Administration (SSA) notified Aretha Harris (Ms. Harris or Respondent) that he proposed to impose a civil monetary penalty (CMP) on her because she made false statements and misrepresentations to SSA regarding her functional ability. Specifically, the SSA IG alleged that “on June 19, 2013 and June 26, 2013, [Respondent] attended Consultative Examinations and stated that [she] could not walk without a walker. However, an [SSA IG] investigation . . . revealed that [she] can walk without assistance.” SSA Exhibit (Ex.) 10 at 1. Respondent requested a hearing to dispute the SSA IG’s allegations.

As explained below, I conclude that the SSA IG proved by a preponderance of the evidence that Respondent knowingly made a misleading statement to SSA consultative examiner Hasan Assaf, M.D., when she told him that she *always* uses a walker. However, I also conclude that the SSA IG did not prove by a preponderance of the evidence that Respondent made a second false or misleading statement when she told another SSA consultative examiner, Michael Faust, Ph.D., that she uses a walker, because she does use a walker some portion of the time. The very difficult nature of this case arises from the fact that SSA has alleged violations based on statements that Respondent made to others as recorded in written reports that were not necessarily meant to be a

word-for-word transcription of Respondent's statements. Further, this is not a case in which Respondent never uses a walker. Rather, she undisputedly used a walker in the past and did use one at times relevant to her statements to Drs. Assaf and Faust. None of the medical personnel who have treated or examined Respondent have described her as a malingerer. However, the central issue in this case is how she described her need for a walker to the consultative examiners. While Respondent characterized her need for a walker to Dr. Assaf as being constant or always, which was inaccurate, she merely reported to Dr. Faust that she did use a walker, which was accurate. Because I find that Respondent's culpability in this matter is not absolute and because she undisputedly has extremely limited financial resources, I reduce the CMP for one misleading statement from the proposed statutory maximum amount of \$5,000 to \$1,000.

I. Background and Procedural History

Respondent has a long history of health problems, some of which may date as far back as 1998. SSA Ex. 6 at 3; SSA Ex. 12 at 6-13; Respondent Exhibits (R. Exs.) 1-3, 6-13, 18-26. Her reported ailments have, at various points, included the following: lumbosacral spondylosis, degenerative disc disease and neuritis, severe fibromyalgia, chronic pain syndrome, urinary incontinence, musculoskeletal back pain, severe depression, asthma, hypertension, disc extrusion at the L5-S1 vertebrae causing moderate left lateral recess stenosis and contacting the S1 nerve root stem, herniated disc, obesity, lumbar facet arthropathy, thoracic back pain, type II diabetes, polycystic ovarian syndrome, and floppy lid syndrome in both eyes; and abdominal/pelvic pain. SSA Ex. 11 at 13; SSA Ex. 12 at 6-13; SSA Ex. 18 at 11.

Respondent applied for disability benefits under Titles II and XVI of the Social Security Act (Act) on January 21, 2010. She stated that her disability began December 31, 2008. SSA denied her applications initially and on reconsideration. She requested a hearing and an SSA administrative law judge (ALJ) held a video hearing on December 13, 2011. SSA Ex. 12 at 4. In a January 9, 2012 decision, the ALJ found that while Respondent had a number of severe impairments (i.e., degenerative disc disease of the lumbar spine, fibromyalgia, obesity, and elective left nephrectomy), Respondent was not disabled within the meaning of sections 216(i), 223(d) or 1614(a)(3)(A) of the Act. SSA Ex. 12 at 6, 17-18.

Respondent submitted a new application for disability benefits under Titles II and XVI of the Act on April 15, 2013. SSA Ex. 5. The Ohio Department of Disability Determination Service, acting on SSA's behalf, sent Respondent for two consultative examinations in conjunction with her application. On June 19, 2013, Dr. Assaf performed a physical examination of Respondent. SSA Ex. 6 at 2. Dr. Assaf observed that Respondent "uses a walker for pain, weightbearing [sic], and for balance. She uses it always. It was prescribed three years ago by her doctor. In my opinion, the use of the walker is necessary for standing and walking, even for a few steps." SSA Ex. 6 at 4. On

June 26, 2013, Dr. Faust performed a psychological consultative examination of Respondent. SSA Ex. 7 at 2. In his report following the examination, Dr. Faust noted that Respondent “walks with the use of a walker and had difficulty ambulating in that she shows a significant limp.” SSA Ex. 7 at 5.

Following the examinations, the Ohio Department of Disability Determination Service referred Respondent’s disability applications to SSA’s Cleveland Cooperative Disability Investigations Unit to investigate potential fraud because there were “areas of conflict in the medical evidence of record in comparison to [Respondent’s] statements regarding her limitations.” SSA Ex. 1 at 3. The referral for an investigation asked investigators to determine, among other things, Respondent’s: “ability to stand, walk, and move about”; “Does she use a walker or any other type of ambulatory aid?”; “Information such as the length of time she was observed doing something, such as distance walked or length of time standing would be helpful.” SSA Ex. 1 at 3. As part of the investigation, Detectives James Falb and Mitch Kelly interviewed Respondent on January 15, 2014. SSA Ex. 1 at 5-6. Detective Falb later testified that Respondent was able to “ambulate throughout her apartment without the use of a walker or cane.” Hearing Transcript (Tr.) 162-63. SSA denied Respondent’s applications for benefits on February 11, 2014. SSA Ex. 4. SSA informed Respondent that “[b]ased on a preponderance of the evidence, there is reason to believe that [she] knowingly ha[s] concealed and incorrectly provided information about [her] ability to complete daily activities, hobbies and work related activities.” SSA Ex. 4 at 2.

On February 21, 2014, the SSA IG attempted to notify Respondent that he intended to commence an administrative sanction action against her pursuant to section 1129 of the Act based on alleged false statements and misrepresentations that Petitioner made to SSA. The SSA IG specifically identified statements that Respondent allegedly made to Drs. Assaf and Faust during the consultative examinations the doctors performed on Respondent. SSA Ex. 9. Respondent apparently did not receive the February 21, 2014 letter because the SSA IG incorrectly addressed it. SSA Prehearing Brief at 6. Nonetheless, on June 5, 2014, the SSA IG issued a notice proposing the imposition of a CMP on Respondent. SSA Ex. 10. Specifically, the SSA IG proposed imposing a \$10,000 CMP on Respondent based upon his determination that Respondent made two false or misleading statements or representations of a material fact for the SSA’s use in determining her initial right to, or the amount of, monthly insurance benefits under Title II of the Act or benefits or payments under Title XVI of the Act. SSA Ex. 10 at 1.

In response to the June 5, 2014 CMP notice, Respondent, through counsel, requested a hearing before an ALJ and filed an “Answer.” SSA Ex. 11 at 1-2. Respondent’s Answer stated that the SSA IG was taking Respondent’s statements out of context and inaccurately, and that Respondent has severe health limitations that require her to “use a walker or cane a vast majority of the time.” SSA Ex. 11 at 2.

I issued an Acknowledgment and Prehearing Order on August 19, 2014. The SSA IG filed a prehearing brief (SSA Br.) and a reply brief (SSA Reply). The SSA IG proposed calling five witnesses (including Respondent) and offered SSA Exs. 1-19 into evidence. Respondent filed a prehearing brief (R. Br.), proposed calling four witnesses, and offered R. Exs. 1-28 into evidence.¹ The SSA IG requested to cross-examine only Respondent. Respondent requested to cross-examine Drs. Assaf and Faust, as well as SSA's other witnesses.

On April 8, 2015, I held a prehearing conference with counsel, the substance of which is summarized in my April 13, 2015 Order Following Prehearing Conference. In that order, I granted the SSA IG's motion to withdraw one of its proposed witnesses (Chad Bungard), denied Respondent's request to cross-examine Mr. Bungard because the SSA IG withdrew him, and withheld ruling on the SSA IG's objections to R. Exs. 1, 3, 4, 11, 20, 23, and 24. I denied the SSA IG's motion to strike SSA Ex. 10 for the reasons stated therein. Order Following Prehearing Conference at 2.

Prior to the prehearing conference, Respondent requested subpoenas to compel the testimony of Drs. Faust and Assaf and requested that she be allowed to examine them as if on cross-examination. Despite relying on the doctors' reports as evidence of Respondent's alleged false statements, the SSA IG did not list the doctors as witnesses. The SSA IG opposed the requests for subpoena on the basis that Respondent had conceded the alleged false statements, therefore rendering the doctors' testimony unnecessary. Further, the SSA IG argued it would be inappropriate for Respondent to be permitted to cross-examine the witnesses (should I grant the subpoenas) because Respondent was offering the doctors as her witnesses. January 30, 2015 SSA IG Objections at 1-2. At the prehearing conference, I granted Respondent's request for subpoenas. Order Following Prehearing Conference at 4. Later, I limited Respondent to asking questions on direct (i.e., no leading questions) to Drs. Assaf and Faust unless voir dire at the hearing showed them to be adverse witnesses or they otherwise proved to be hostile witnesses. *Aretha Harris*, ALJ Ruling 2015-14, at 4 (HHS CRD July 22, 2015).

I held a hearing in this case on August 3, 2015, and September 2, 2015. On August 3, I heard testimony from Respondent, Patrick Olexa, Detective James Falb, Dr. Michael Faust, and Special Agent James Altman. I admitted SSA Exs. 1-14 and 16-19, and R. Exs. 1-28. Tr. 20-21, 26-27. On September 2, I heard testimony from Dr. Hasan Assaf. Following the hearing, the parties submitted post-hearing briefs (R. Post-Hrg. Br., SSA Post-Hrg. Br.), and Respondent submitted a reply brief (R. Reply). SSA notified my office on December 3, 2015, that it would not file a reply brief.

¹ Respondent offered 26 numbered exhibits and written direct testimony for two of her witnesses, Latasha Harris and Respondent herself. I subsequently marked the declaration of Latasha Harris as R. Ex. 27 and Respondent's declaration as R. Ex. 28. *See* Order Following Prehearing Conference at 3.

Because the Departmental Appeals Board's operations were disrupted in November and December 2015 due to a change in offices, on January 7, 2016, I notified the parties that I would issue a decision on this matter no later than March 7, 2016. *See* 20 C.F.R. § 498.220(c).

II. Issues

- 1) Whether Respondent violated 42 U.S.C. § 1320a-8 by knowingly making two false or misleading statements of material fact regarding her use of a walker during consultative examinations performed by Drs. Assaf and Faust.
- 2) If so, whether the SSA IG's proposed CMP of \$10,000 is appropriate under the provisions of 42 U.S.C. § 1320a-8(c).

IV. Jurisdiction

Individuals against whom the SSA IG 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 ALJ hearing. 20 C.F.R. § 498.202. ALJs 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 ALJ must "determine whether the respondent should be found liable" for a CMP 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.

V. Findings of Fact, Conclusions of Law, and Analysis²

The Act establishes a number of programs for which qualified individuals may receive benefits. Under titles II and XVI of the Act, SSA will pay benefits to individuals who are unable to work based on disability. 42 U.S.C. §§ 423, 1611. For purposes of the Act, a disability is the "inability to engage in substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." *Id.* §§ 423(d)(1)(A), 1614(a)(3)(A).

Under the Act, a person is subject to a CMP if he or she:

- (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

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

insurance benefits under title II or benefits or payments under title VIII or XVI, that the person knows or should know is false or misleading,

(B) makes such a statement or representation for such use with knowing disregard for the truth, or

(C) omits from a statement or representation for such use, or otherwise withholds disclosure of, a fact which the person knows or should know is material to the determination of any initial or continuing right to or the amount of monthly insurance benefits under title II or benefits or payments under title VIII or XVI, if the person knows, or should know, that the statement or representation with such omission is false or misleading or that the withholding of such disclosure is misleading.

Id. § 1320a-8(a)(1). For purposes of this CMP statute, “a material fact is one which the Commissioner of Social Security may consider in evaluating whether an applicant is entitled to benefits under title II or title VIII, or eligible for payments under title XVI [of the Social Security Act.]” *Id.* § 1320a-8(a)(2).

In the present case, the SSA IG has proposed the imposition of a CMP on Respondent, an applicant for title II and XVI benefits based on disability. Therefore, in order to prevail, the SSA IG must prove by a preponderance of the evidence that Respondent: 1) made a false or misleading statement or representation of a material fact; 2) for use in determining her initial right to benefits under titles II and XVI of the Social Security Act; and 3) she knew or should have known that the statement was false or misleading or she made the statement in knowing disregard of its truth. 20 C.F.R. §§ 498.102(a); 498.215(b)(2), (c).

A. Respondent made a misleading statement when she told Dr. Assaf, during his consultative examination, that she requires a walker to walk at all times because she only requires a walker at some times.

Respondent undoubtedly has a number of health problems. *See, e.g.*, Tr. 60-68; R. Exs. 6-13, 18-26. The issue is whether she made misleading statements relevant to SSA’s determination that she was or was not disabled during the June 19, 2013 examination that Dr. Assaf performed. Tr. 6-7. I find that she did.

In his consultative examination report, Dr. Assaf indicated that Respondent “uses [a] walker for pain, weightbearing, and for balance. She uses it always. In my opinion, the use of the walker is necessary for standing and walking, even for a few steps.” SSA Ex. 6 at 4. Respondent testified that she told Dr. Assaf that she “uses a walker all the time, 24/7” during Dr. Assaf’s examination of her. Tr. 42. She made consistent statements in

her written application for disability benefits. SSA Ex. 8 (“She is using a walker all the time now”); R. Ex. 26 at 2091 (“Walker to walk with all the time”). Dr. Assaf testified that he relied on Respondent’s statements during the consultative examination and gave her the benefit of the doubt during his examination. Tr. 262, 269, 272. Dr. Assaf’s testimony demonstrates that he relied on Respondent’s characterization of her condition in reaching his conclusion. Tr. 272. As a result of the consultative examination, Dr. Assaf concluded that Respondent had “marked limitations in activities requiring standing, walking, bending, and lifting.” SSA Ex. 6 at 6.

During the hearing, Respondent explained what she meant by “all the time, 24/7.” She testified:

And what I meant by that was that I do have a prescribed walker that I have been prescribed, and I use it all the time. What I meant by all the time, like 24/7, is that I depend on it and use it every day practically throughout the day. I obviously do not use it 24 hours a day, such as when I am sleeping or sitting down or when I am taking pictures . . . But I do use it. It’s always three feet away from me.

Tr. 42-43.

Respondent did not require a walker “all the time” even as she defines it. Both several months before Dr. Assaf’s examination and as little as three weeks after his examination, Respondent did not require a walker at all. Over a period of roughly a year, including the six months before the consultative examinations and six months after them, Respondent made a number of conflicting statements regarding her use of a walker to various healthcare providers or demonstrated that she could walk without a walker. In a January 20, 2013 examination, Respondent was able to walk without an assistance device. R. Ex. 26 at 922-23. On February 12, 2013, Respondent reported that she was able to “work out 3 times per week,” an effort she began because she had put on some weight. R. Ex. 26 at 1439. Throughout the spring of 2013, Respondent attended community college, though it is true that it was reportedly hard for her to get around. R. Ex. 26 at 1435, 1581. On March 26, 2013, Respondent went to the emergency room for a condition unrelated to her back and spine, during which the physician who examined her noted that she had “full range of [musculoskeletal] motion. She exhibits no edema or tenderness.” R. Ex. 26 at 1749. The week after Respondent’s appointment with Dr. Assaf, Respondent discussed Dr. Assaf’s examination with another healthcare provider and noted that she had been using her walker “lately,” connoting a change in her condition and suggesting that she had not previously needed to use her walker as much. R. Ex. 26 at 1586. This qualification is absent from her examination with Dr. Assaf, in which she did not explain to Dr. Assaf, and he did not believe, that her condition varied but was particularly bad around the time of the consultative examination. Tr. 273. Approximately two weeks after Dr. Assaf’s examination, Respondent “was able to ambulate with none [sic]

assistant device.” R. Ex. 26 at 906. On October 2, 2013, one of Respondent’s health care providers noted that her use of her walker was “limited by embarrassment.” R. Ex. 26 at 768. By December of 2013, Respondent had a treadmill at home and was using it every other day. R. Ex. 26 at 710.

Detective Falb testified that he observed Respondent walk in her apartment as part of his January 15, 2014 investigatory interview. Tr. 149; SSA Ex. 3 at 1-2. He noted that she seemed to walk “without any type of pain or any type of ailment that [he] could determine.” Tr. 149. Further, he testified that he observed Respondent “ambulate throughout her apartment without the use of a walker or a cane” and without holding on to any furniture or anything else as she walked. Tr. 162-63, 179. I give Detective Falb’s testimony little weight, however. His statements were at times ambiguous and contained assumptions, while at other times he conceded that he left information out of the report he prepared. Tr. 149, 158, 159, 160, 161, 162, 164. He did not take any notes when interviewing Respondent, even though doing so would have been natural and expected for a detective investigating a potential crime. Tr. 140-41. He never asked Respondent whether she had a walker. Tr. 148. Inexplicably, even though he believed Respondent to be preparing to leave after he concluded the interview, he did not wait outside Respondent’s residence to observe her as she left her apartment, apparently satisfied that a 30-minute conversation during which Respondent was primarily seated sufficed for his investigation. Tr. 162-63.

Finally, Detective Falb gained entrance to Respondent’s home and interviewed Respondent under false pretenses, by telling her that she may have been the victim of identity theft and that she was not the subject of an investigation. Tr. 144-45, 182-83. Although when ruling on an objection during testimony, I gave Detective Falb the benefit of the doubt that he had acted using proper police technique (Tr. at 145-46), I came to realize as questioning continued that Detective Falb interrogated the subject of his investigation, in her home, after assuring her that she was not the subject of his investigation, but rather a potential victim of a non-existent crime. Tr. 182-83. Detective Falb’s false pretense is particularly disconcerting because Respondent *had* been a victim of identity theft in the past (R. Ex. 26 at 1423, 1589), information that would have been available to him before deciding on his ruse. Therefore, I conclude that Detective Falb’s actions negatively affect his credibility in this case.

SSA introduced evidence showing Respondent standing in high-heeled shoes to prove that she did not require a walker all the time. SSA Ex. 17 at 1-2. I give this evidence minimal weight. Respondent credibly testified that when she was photographed, she placed her walker outside the picture because it embarrassed her. Tr. 43. A statement she made to at least one other healthcare provider regarding her embarrassment at using a walker corroborates her testimony. R. Ex. 26 at 768. Respondent’s sister testified that Respondent “temporarily puts [the walker] aside . . . when she is in photos, due to humiliation and embarrassment . . .” R. Ex. 27 at 1. The SSA IG did not offer evidence

to rebut either Respondent's statements or her sister's, other than to vaguely attack her sister's testimony as biased. SSA Reply at 3. Further, the SSA IG did not request to cross-examine Respondent's sister to demonstrate her purported biases.

Respondent argues that her statements must be understood in context. She argues that "her conditions wax and wane and some days she is better." R. Post-Hrg. Br. at 6. I accept Respondent's assertions that her condition is variable. But it is the very nature of her condition juxtaposed with what she told Dr. Assaf that makes her statements to him misleading. While Respondent now readily admits after the fact that her condition varies and that some days are better than others, she did not provide this context to Dr. Assaf, who was responsible for assessing her physical condition on behalf of SSA. *See* 20 C.F.R. § 404.1519. Although Respondent testified that she told him she had good and bad days (Tr. 43), Dr. Assaf testified that she did not do so. Tr. 273. She did not tell Dr. Assaf that she could sometimes drive, as she testified. Tr. 36, 273. Dr. Assaf testified that had he known that, his opinion of Respondent's condition would have been different. Tr. 275 ("I think the fact that she's able to drive makes it more likely that she's able to stand and walk more freely."). She did not tell Dr. Assaf that she could wear high-heeled shoes, even briefly, in order to pose for a picture. SSA Ex. 17. Dr. Assaf testified that had he known that, his opinion would have been different. Tr. 275. I credit Dr. Assaf's testimony over Respondent's regarding these matters. Dr. Assaf testified freely at the hearing and without any apparent bias. By the time of the hearing in this case, Dr. Assaf was no longer working as a consultative examiner in SSA cases, but rather seeking employment in the field of his specialty, pathology. Tr. at 251-52.

Therefore, while Respondent's description of needing a walker was *sometimes* true, she described her need for a walker as much more acute than she now concedes it to be. As a result of Dr. Assaf's testimony, Respondent's testimony, and my review of record, I find that Respondent made a misleading statement to Dr. Assaf during the consultative examination that she always needed a walker. In so doing, Respondent led Dr. Assaf to believe that her physical condition on the day of the examination was generally representative of her physical condition, which as the evidence demonstrates, is not the case. While Respondent has good days and bad days, Tr. 43, she essentially only reported the bad days to Dr. Assaf, and thus misled him regarding her condition.

B. Respondent's statement regarding her use of a walker at all times was material to SSA's determination of her right to disability benefits and she knew or should have known that the statement was misleading.

Respondent made a misleading statement to Dr. Assaf. However, in order for a statement to be one of "material fact," subjecting Respondent to a CMP, it must be "one which the Commissioner of Social Security may consider in evaluating whether an applicant is entitled to benefits under title II or title VIII, or eligible for payments under title XVI [of the Social Security Act.]" 42 U.S.C. § 1320a-8(a)(2).

When reviewing a claim for disability benefits, SSA must ascertain the residual functional capacity of the claimant, which is an assessment as to the capabilities of the claimant when considering the claimant's physical and mental impairments. SSA "will assess [the applicant's] residual functional capacity based on all the relevant evidence in [the applicant's] case record. 20 C.F.R. §§ 404.1545 (a)(1), 416.945(a)(1).

SSA sent Respondent to Dr. Assaf so that he could evaluate her physical condition. SSA Exs. 4 at 1; 6 at 2. Consultative examinations are "physical or mental examination[s] or test[s] purchased for [a claimant] at [SSA's] request and expense, from a treating source or another medical source." 20 C.F.R. §§ 404.1519, 416.919. Statements as to a claimant's abilities from consultative examiners are evidence that SSA can use in making a disability determination. 20 C.F.R. §§ 404.1513(c), 416.913(c). As discussed, Dr. Assaf based his report on Respondent's description of her physical ability, including her need for a walker at all times or always. Dr. Assaf was sufficiently persuaded by Respondent that her condition necessitated a walker for her to ambulate,³ he stated in his report: "In my opinion, the use of the walker is necessary for standing and walking, even

³ Although Dr. Assaf conducted many consultative examinations for SSA during the two years he worked for Industrial Medicine Associates, he recalled Respondent's examination in part because of her extreme physical limitations. As Dr. Assaf testified:

I worked in that clinic for more than two years, and I've seen many claimants who walked in with back pain and also with fibromyalgia, like the claimant said that she was diagnosed with. But none of them had the severity of symptoms like she did. So that by itself also registered in my mind.

....

The unusual thing is that, like I mentioned in my report, she was saying that she was in so much pain that she will not carry many of the instructions that I was asking her to do, which I thought was unusual. I will give you an example. For example, one of the things that I'm supposed to do is test for the range of motion of the joints, which I asked her to do, and she didn't wish to do any of it because she said that it was a pain. I even asked her to make a fist just to see how her hand functions, and even making a fist, she said she cannot do it because of the pain, which is quite unusual. I mean, I've seen many fibromyalgia people, and none of them was unable to make a fist.

Tr. 253-54. Dr. Assaf's report is consistent with this testimony. SSA Ex. 6 at 7-10.

a few steps.” SSA Ex. 6 at 4. This opinion is “evidence” that SSA must consider when rendering a disability decision. 20 C.F.R. §§ 404.1512(b)(2); 416.912(b)(2). In fact, when SSA ultimately determined that Respondent was not disabled, it specifically relied on her visit to Dr. Assaf and the fact that she reported that she “must use a walker at all times.” SSA Ex. 4 at 1. Therefore, Respondent’s statement regarding her need to use a walker at all times was not only a statement the Commissioner of Social Security *could* rely on, it was a statement that he *did* rely on in considering whether Respondent was eligible for disability benefits.

The Function Report that SSA asked Respondent to complete further demonstrates the materiality of her ability to ambulate to SSA’s decision regarding her disability. The Function Report asked Respondent to check boxes to indicate whether her condition affected her ability to squat, bend, stand, walk, sit, kneel and climb stairs. It asked her to explain how her condition impacted these abilities. It asked how far she could walk without needing to stop. It asked whether she needed crutches, a walker, a wheelchair, or a cane. It asked whether a doctor had prescribed these assistive devices, when, and how often she needs to use them. SSA Ex. 18 at 8-9. In the SSA ALJ’s decision ultimately finding that Respondent was not disabled, he discussed Respondent’s ability to walk extensively. SSA Ex. 12 at 10, 11, 12, 13. Respondent specifically questioned the need for her to participate in the consultative examination and SSA told her that they needed an updated examination. R. Ex. 26 at 49. Respondent’s ability to ambulate was plainly a fact that the Commissioner of SSA could consider and considered in evaluating Respondent’s eligibility for benefits.

Respondent knew or should have known that her statement was misleading. The evidence shows that Respondent’s condition varied and that, within a relatively short time period before and after Dr. Assaf examined her, Respondent’s condition was less severe than on the day he examined her. Respondent now acknowledges that her condition waxed and waned, but she made no effort to explain to Dr. Assaf that her condition on the day of the consultative examination was particularly bad. Given the extreme nature of her pain that day, and the fact that her condition that day represented a departure from her recent condition, I can only conclude that Respondent appreciated the difference in her condition that day and knowingly misled Dr. Assaf when she told him she always needed a walker.

Respondent argues that she did not knowingly make a false or misleading statement to Dr. Assaf because she suffers from a somatoform disorder that somehow led her to overstate her use of a walker. R. Post-Hrg. Br. at 11-12. Respondent argues that such a disorder leads a sufferer to “genuinely believe[] in the severity of [her] symptoms” such that the individual would not be exaggerating severe symptoms. R. Post-Hrg. Br. at 11. Respondent’s argument does not persuade me. Dr. Faust, who diagnosed Respondent with this disorder, testified that she was not suffering from it when he performed his consultative examination in 2013. Tr. 195 (“I didn’t diagnose the somatic pain disorder

in June 2013 . . . I didn't think it was present at that time.”). Further, Respondent has not explained why she would genuinely believe she needed a walker to walk at all times when Dr. Assaf examined her, but she would not believe she needed one to walk in the period several months before Dr. Assaf's examination or the period several months after the examination. Respondent has offered neither evidence nor argument that her disorder, even if present in 2013, would cause her to only exaggerate her need for a walker to Dr. Assaf and not to other medical professionals to whom she spoke in the months before and after Dr. Assaf examined her. Therefore, I reject Respondent's assertion that she could not have knowingly made her statement to Dr. Assaf or that she somehow did not know or should not have known that her statement to Dr. Assaf was misleading.

C. Respondent did not make a false or misleading statement when she told Dr. Faust during his consultative examination that she uses a walker because she does use a walker some of the time.

Dr. Faust performed a psychological evaluation of Respondent on behalf of SSA. The purpose of Dr. Faust's evaluation was “to assess her mental status and the existence of any psychological condition that would impair her ability to function on a daily basis in an employment setting.” SSA Ex. 7 at 2. SSA identified statements on two particular pages of Dr. Faust's report as constituting false or misleading statements. SSA Br. at 8 (citing “SSA Ex. 7, p. 5 and 7”). SSA Ex. 7 is Dr. Faust's “Disability Assessment Report.” Page five of that report mentions Respondent using a walker only once, in a section in which he described Respondent's “Appearance and Behavior.” SSA Ex. 7 at 5 (“She walks with the use of a walker and had difficulty ambulating in that she shows a significant limp.”). It is undisputed that Respondent walked with a walker on the day Dr. Faust examined her. Page seven of Dr. Faust's report also mentions Respondent using a walker only once, in which Dr. Faust quoted Respondent as saying “No one would want me when they see the walker.” SSA Ex. 7 at 7. Counsel for the SSA IG specifically identified these statements when she cross-examined Dr. Faust. Tr. 204. Notwithstanding SSA's assertions regarding which statements were allegedly false or misleading, Dr. Faust reported that Respondent mentioned using a walker in two other portions of his report. Dr. Faust indicated that Respondent said she “ha[s] a lot of problems with [her] spine and walking with a walker.” SSA Ex. 7 at 2. Dr. Faust also reported that Respondent told him “I'm on a walker and have a lot of spine problems and other problems.” SSA Ex. 7 at 3. None of Respondent's statements to Dr. Faust about needing a walker are false or misleading.

Respondent undisputedly does use a walker at times. As far back as March 2012, a doctor assessed her “able to ambulate with a wheeled assistant device.” R. Ex. 8 at 1. In November 2012, Respondent reported that she “has been in so much pain that she has had to use her walker.” R. Ex. 26 at 1455. In April 2013, Respondent told one healthcare provider that “she has a walker, was trying to walk without it and has fallen about four

times since January.” R. Ex. 26 at 912. On June 11, 2013, very shortly before the consultative examinations, Respondent reported that “her back continues to hurt a lot.” R. Ex. 26 at 1431. The day before Dr. Faust examined her, Respondent reported to another provider that “she has been using her walker lately because she has been in a lot of pain.” R. Ex. 26 at 1586. In July 2013, several weeks after Dr. Faust examined her, Respondent reported that she “[h]as been using her walker frequently and para-transit system.” R. Ex. 26 at 904. In a December 20, 2013 evaluation, a doctor noted that Respondent reported she “must use a walker at home because it is hard for her to ambulate.” R. Ex. 10 at 3. On February 20, 2014, she later reported to a different doctor that she had been using a walker for two years. R. Ex. 25 at 12. That physician prescribed a “Rollator walker with seat (hand brakes and basket)” for her. R. Ex. 1 at 1. The physician prescribed the walker to Respondent the day before the SSA IG attempted to notify Respondent of his intent to impose a CMP, showing that, even at that late date (relative to the consultative examinations), Respondent’s motivation for a prescription had nothing to do with this case.

Respondent’s statements to Dr. Faust were neither misleading nor false. Unlike her statement to Dr. Assaf, Respondent did not attempt to characterize how often she needs a walker. She stated that she uses one, and she does. The difference between an individual stating that she uses a walker “always” and stating that she uses a walker is important because the former reflects a constant impairment, whereas the latter conveys a less pervasive, though still present, impairment. The SSA IG has not explained *why* he believes Respondent’s statements to Dr. Faust are false or misleading. He argues that “during both exams, [Respondent] stated and or presented that she always needed a walker.” SSA Br. at 8. In his reply brief, the SSA IG again argues that “during two different Consultative Examinations, the Respondent falsely stated (and misrepresented) that she needs a walker at all times.” SSA Reply at 2. There is no such evidence, at least regarding Respondent’s statements to Dr. Faust. Respondent simply did not use the same words in describing her condition to Dr. Faust that she used in describing it to Dr. Assaf. The SSA IG also asserts that during the hearing, Respondent admitted that she told Dr. Faust that she needed the walker all of the time. However, I find Respondent’s ambiguous and qualified answer insufficient to draw a definitive conclusion. Tr. 45. Therefore, this statement is insufficient for the SSA IG to meet its burden in this case.

In a close case such as this one, I find that the difference between Respondent’s statements to Drs. Assaf and Faust is sufficient to render her statements to the former misleading, while her statements to the latter are not so. The SSA IG has not met its burden to prove by a preponderance of the evidence that Respondent’s statements to Dr. Faust regarding her using a walker were either false or misleading.

D. Based on the factors in 42 U.S.C. § 1320a-8(c), I reduce the SSA IG's proposed CMP to \$1,000.

The SSA IG proposed imposing a \$10,000 CMP based on Respondent's alleged false or misleading statements to Drs. Assaf and Faust during their examinations of Respondent. SSA Ex. 10. I have found that Respondent did not make a false or misleading statement to Dr. Faust during his examination. Therefore, I deny the SSA IG's proposed CMP for that alleged offense. However, I must consider the appropriateness of the SSA IG's proposed \$5,000 CMP based on Respondent's misleading statement to Dr. Assaf.

As an initial matter, \$5,000 is the maximum CMP the SSA IG can impose for a single false or misleading statement of a material fact for SSA's use in determining an individual's eligibility for initial or continuing benefits. 42 U.S.C. § 1320a-8(a)(1). Therefore, Respondent is potentially subject to a maximum CMP amount of \$5,000, as proposed by the SSA IG.

In addition to establishing this maximum CMP amount, the statute requires that I take the following factors into account when determining the appropriate amount of the CMP:

- (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;
- (3) such other matters as justice may require.

42 U.S.C. § 1320a-8(c).

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

With respect to the first factor, the SSA IG stated in his CMP notice that he determined aggravating factors to be present in Respondent's case. SSA Ex. 10 at 1. The SSA IG believed that Respondent intentionally misrepresented her functional abilities on two occasions, and "feigned a mental disability while attending college." SSA Ex. 10 at 1. The SSA IG repeated this accusation in his opening brief. SSA Br. at 12. Further, the SSA IG considered the fact that Respondent had previously submitted three applications for disability benefits and was "suspected of providing false information in the past." SSA Ex. 10 at 1.

As discussed, I have determined that Respondent misrepresented her functional abilities on one occasion, i.e., during her consultative examination with Dr. Assaf, so I depart

from the SSA IG in that regard. The SSA IG does not cite in his notice letter and has not provided any evidence that Respondent feigned a mental disability while attending college or otherwise. Quite to the contrary, SSA's own ALJ acknowledged that Respondent "tested positive for depression." SSA Ex. 12 at 11. SSA's own consultative examiner, Dr. Faust, has twice diagnosed Respondent with having substantial mental and emotional impairments, including major depressive disorder. SSA Ex. 7 at 7; R. Ex. 4 at 7. The SSA IG's reliance on Respondent's purported "feigning" a mental disability is unsupported.

I share the SSA IG's concern, however, regarding Respondent's multiple applications for disability benefits. It would be hard to believe, given the experience that Respondent has with SSA's disability system, that she was confused by the role Drs. Assaf and Faust played in SSA's determination and, therefore, how important it was that she be forthright with those doctors. It further concerns me that Respondent twice questioned the need for the consultative examinations and emphasized that she sees her own doctors often. R. Ex. 26 at 49.

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

The second factor includes three parts. The SSA IG considered each of these in its CMP notice.

a. Culpability

The SSA IG considered Respondent to bear "substantial" culpability. SSA Ex. 10 at 2. The basis for his opinion was that Respondent was "warned and, then, reminded, of [her] duty to be truthful regarding the information that [she] report[ed] to SSA." SSA Ex. 10 at 2. Respondent does not consider herself very culpable, however, and believes that the SSA IG's decision to pursue this case is significantly misplaced. R. Br. at 1-2; R. Reply at 3; R. Post-Hrg. Br. at 16. She concedes, at most, "perhaps some loose language." R. Post-Hrg. Br. at 3.

I do not share the SSA IG's view as to Respondent's culpability. The SSA IG is at pains to concede that Respondent truly does possess significant, documented health problems. Tr. 66 ("We're not disputing whether or arguing either if she's disabled or not"). As I discussed at the outset, this case is fundamentally different from other cases that the SSA IG often brings, in that Respondent has undeniable health problems. While she made a misleading statement to Dr. Assaf, she did not mislead Dr. Faust. At the hearing, she readily testified that she told Dr. Assaf she always needs a walker, so, though she disagrees with the legal consequences of that statement, she accepts responsibility for her words.

On the other hand, Respondent is not without culpability. SSA warned Respondent on both her applications that making a false statement for use in determining her right to disability benefits constituted a crime and was punishable by fine, imprisonment or both. SSA Ex. 5 at 2, 10. Further, Respondent had applied for disability benefits on multiple occasions and so should have been familiar with such warnings. Respondent argues that her culpability is limited by her somatoform pain disorder. R. Post-Hrg. Br. at 11-12, 17. I disagree with Respondent's argument that her psychological impairments somehow caused her to mislead Dr. Assaf. R. Br. at 8. While Dr. Faust did diagnose Respondent with recurrent, severe, major depressive disorder (SSA Ex. 7 at 7), Dr. Faust did not testify that her disorder would have caused her to mislead a healthcare provider about her use of a walker at the time of his 2013 evaluation. At most, he testified that he believed she was not exaggerating her symptoms. Tr. 201. Dr. Faust did not diagnose Respondent with this somatoform disorder until May 2014, and he specifically testified that it was not present in June 2013. Tr. 195, 197.

Taking all the relevant facts into consideration, Respondent's characterization of her statements to Dr. Assaf ("loose language") is closer to my weighing of the evidence than the SSA IG's view that Respondent bears "substantial" culpability.

b. Prior Offenses

The SSA IG also considered that Respondent has no prior offenses involving SSA. SSA Ex. 10 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. *See* Tr. 62.

c. Financial Condition

The SSA IG considered Respondent's financial condition and determined that Respondent has the ability to pay the proposed penalty. However, he also acknowledged that he had limited information to consider. SSA Ex. 10 at 2. After considering evidence of Respondent's financial condition, the SSA IG recognized that she has "limited resources," but still believed she could pay the penalty in time. SSA Post-Hrg. Br. at 6. Respondent submitted several documents to demonstrate her limited financial condition. She submitted bank statements showing monthly ending account balances ranging from \$10.93 to \$102, with one outlier month of \$1,687. R. Ex. 14. She submitted her transaction history that shows purchases from January 2014 to November 2014. R. Ex. 15. This purchase history is particularly instructive. It shows that Respondent made no more than a few purchases a month, most of which were for her cellular phone. R. Ex. 15 at 1-2. The history also shows that, with two exceptions that Respondent does not

explain, the deposits into her account were also for very small amounts, all under \$100.⁴ Respondent's running balance over this period of months very rarely exceeded \$100. So, for nearly a year, Respondent received a very small sum, spent a very small sum, and made purchases that appear to be for necessities, including a cellular phone. Respondent receives food stamp benefits of \$194 a month. Tr. 35; R. Ex. 16 at 2. Her rent expenses are \$25 a month, which Respondent's brother pays. Tr. 34; R. Ex. 16 at 3. She does have one moderate-sized asset, a 2004 Buick Rendezvous, that as of April 2013 had 141,405 miles on it. Tr. 35; R. Ex. 17. She has not worked since 2010. Tr. 33-34; R. Ex. 26 at 233. The record, therefore, indicates that Respondent is indigent. Based on this information, I do not believe that Respondent has the financial ability to pay the penalty the SSA IG proposes.

3. Others matters as justice may require.

In the CMP notice, the SSA IG did not identify any matters that the interests of justice require him to consider. SSA Ex. 10 at 2. Respondent argues that the SSA IG's actions in even bringing this case risk "chill[ing] the rights of an American citizen to file for disability benefits" R. Br. at 2. While I would not go so far as Respondent, I agree the SSA IG's decision to pursue this case raises legitimate concerns about how it might impact other claimants. I have found that Respondent made a misleading statement, but I did so by the narrowest of margins. I have also found the SSA IG's other charged statement not to be misleading. Although I believe the law dictates this result, I am concerned about the negative effect this case could have on claimants legitimately seeking benefits. However, this concern is not sufficient to result in a reduction of the CMP amount.

4. I reduce the SSA IG's proposed penalty to \$1,000.

As discussed above, Respondent is subject to a potential CMP of \$5,000. I agree that a penalty is necessary to ensure that Respondent does not misstate her conditions in future applications for disability benefits and to ensure the integrity of the disability payment system. However, my evaluation of the factors above involving Respondent's culpability and financial condition, as well as the narrow basis on which this penalty rests, necessitates a significant reduction in the penalty amount. Based on those factors, a penalty of \$1,000 is appropriate.

⁴ Even these two exceptions appear to be money deposited into her account for a specific purpose, since there are corresponding withdrawals of basically the same amounts very shortly thereafter in both cases.

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) to pay a CMP based on one misleading statement of material fact;
2. The SSA IG's proposed CMP is **REDUCED** to \$1,000;
3. Respondent is directed to pay a total of \$1,000 in the manner specified by the SSA IG in his CMP notice (SSA Ex. 10 at 2-3) or in any other manner prescribed by the SSA IG following the issuance of this decision.

/s/

Scott Anderson
Administrative Law Judge