

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Inspector General, Social Security Administration
Petitioner,

v.

Gibson McCarty,
Respondent.

Docket No. C-12-137

Decision No. CR2701

Date: January 31, 2013

DECISION

Pursuant to section 1129(a)(1) of the Social Security Act (the Act) (42 U.S.C. § 1320a-8(a)(1)) a total civil money penalty (CMP) of \$140,000 for withholding information regarding residence address and assets for 22 months, including December 2006 through September 2008; and for 6 false statements regarding residence address and assets and resources; and an assessment of \$7,658, twice the amount of the overpayment of Supplemental Security Income (SSI) benefits received from December 2006 through September 2008; are imposed against Respondent, Gibson McCarty.

I. Background

Respondent timely requested a hearing by an administrative law judge (ALJ) pursuant to 20 C.F.R. § 498.202, by letter dated November 11, 2011.¹ Respondent requests a hearing before an ALJ based on the notice of the Social Security Administration (SSA) Inspector

¹ References are to the version of the Code of Federal Regulations (C.F.R.) in effect at the time of the SSA I.G. action, unless otherwise indicated.

General (I.G.) that proposes imposition of a CMP of \$140,000 and an assessment in lieu of damages in the amount of \$7,658 pursuant to section 1129 of the Act (42 U.S.C. § 1320a-8).

The request for hearing was received at the Civil Remedies Division (CRD) of the Departmental Appeals Board (DAB) and assigned to me for hearing and decision on November 23, 2011. On December 20, 2011, I convened a telephonic prehearing conference to discuss and establish the schedule to hearing in this case. The substance of the prehearing conference is set forth in my Scheduling Order and Notice of Hearing dated December 22, 2011. The Order was amended on January 27, 2012. On April 13, 2012, a second prehearing conference was conducted, the substance of which is reflected in my Order Following Prehearing Conference dated April 16, 2012. On May 17, 2012, a third and final prehearing conference was convened, the substance of which is reflected in my Order Following Prehearing Conference dated May 18, 2012.

On May 24 and 25, 2012 a hearing was convened by video teleconference (VTC). The SSA I.G. appeared by VTC from Baltimore; Respondent appeared by VTC from Honolulu; I participated by VTC from Kansas City; and some witnesses testified by VTC from Baltimore, Honolulu, and Santa Ana, California. Joscelyn Funnié, Esquire, appeared on behalf of Petitioner, the SSA I.G. Respondent appeared pro se after being advised of his right to counsel and waiving the right. Transcript (Tr.) 5. The I.G. offered, and I admitted, SSA exhibits (SSA. Ex.) 1 through 13, subject to the limitations discussed on the record at hearing. Tr. 25-38. Respondent offered, and I admitted Respondent's exhibit (R. Ex.) 1. Tr. 20. The SSA I.G. called the following witnesses: Chad Bungard, Counsel to the Inspector General, SSA I.G.; Investigator Dixon Chow, Hawaii Department of Human Services; David Rodriguez, a staff attorney in the Office of Counsel for the SSA I.G.; Kim Matsuoka-Chun, SSA Operations Supervisor; and Special Agent Yolanda Campos, SSA I.G. Respondent did not testify and called no witnesses. Tr. 251-52.

A 261-page transcript of the hearing was prepared and provided to the parties. The SSA I.G. filed a post-hearing brief (SSA Br.) on August 6, 2012. Respondent filed his post-hearing brief (R. Br.) on November 30, 2012. The SSA I.G. filed a post-hearing reply brief on January 23, 2013, arguing the Respondent's post-hearing brief should be stricken because it was untimely and not properly served. The I.G. motion to strike is denied.

II. Discussion

A. Applicable Law

Pursuant to title II of the Act, an individual who has worked in jobs covered by Social Security for the required period of time, who has a medical condition that meets the definition of disability under the Act, and who is unable to work for a year or more

because of the disability, may be entitled to monthly cash disability benefits. 20 C.F.R. §§ 404.315-404.373. Pursuant to title XVI of the Act, certain eligible individuals are entitled to the payment of Supplemental Security Income (SSI) on a needs basis. To be eligible for SSI payments, a person must meet U.S. residency requirements and must be: (1) 65 years of age or older; (2) blind; or (3) disabled. Disability under both programs is determined based on the existence of one or more impairments that will result in death or that prevent an individual from doing his or her past work or other work that exists in substantial numbers in the economy for at least one year. 20 C.F.R. §§ 416.202, 416.905, 416.906. Additionally, a person must have limited income and resources to be eligible for SSI. 20 C.F.R. §§ 416.202(c) and (d), 416.1100-.1182, 416.1201-.1266. All assets, other than a car and a primary residence, are considered resources when determining whether an individual has “limited” resources. 20 C.F.R. § 416.1210. The income and resources of a spouse or other individuals in a household are also subject to being considered. 20 C.F.R. §§ 416.1201-.1204; 416.1802.

Section 1129(a)(1) of the Act authorizes the imposition of a CMP or an assessment against:

(a)(1) Any person . . . who –

(A) makes, or causes to be made, a statement or representation of a material fact, for use in determining any initial or continuing right to or the amount of monthly insurance benefits under title II or benefits or payments under 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

The authority to impose CMPs and assessments is delegated to the I.G. 20 C.F.R. § 498.102. A material fact is a fact that the Commissioner of the Social Security Administration (the Commissioner) may consider in evaluating whether an applicant is

entitled to benefits or payments under titles II, VIII, or XVI of the Act. Act § 1129(a)(2); 20 C.F.R. § 498.101. Individuals who violate section 1129 are subject to a CMP of not more than \$5,000 for each false or misleading statement or representation of material fact or failure to disclose a material fact. Violators are also subject to an assessment in lieu of damages, of not more than twice the amount of the benefits or payments made as a result of the statements, representations, or omissions. Act § 1129(a)(1).

The Commissioner has delegated enforcement authority to the SSA I.G. as authorized by section 1129(i) of the Act. In determining the amount of a CMP, the I.G. must consider: (1) the nature of the subject statements and representations and circumstances under which they occurred; (2) the degree of culpability of the person committing the offense; (3) the person's history of prior offenses; (4) the person's financial condition; and (5) such other matters as justice requires. Act § 1129(c); 20 C.F.R. §498.106.

Section 1129(b)(2) specifies that the Commissioner shall not decide to impose a CMP or assessment against a person until that person is given written notice and an opportunity for the determination to be made on the record after a hearing at which the person is allowed to participate. The Commissioner has provided by regulations at 20 C.F.R. Part 498 that a person against whom a CMP is proposed by the I.G. may request a hearing before an ALJ of the DAB. The ALJ has jurisdiction to determine whether the person should be found liable for a CMP and/or an assessment and the amount of each. 20 C.F.R. §§ 498.215(a) and 498.220. The person requesting the hearing, the Respondent, has the burden of going forward and the burden of persuasion with respect to any affirmative defenses and any mitigating circumstances. 20 C.F.R. § 498.215(b)(1). The I.G. has the burden of going forward as well as the burden of persuasion with respect to all other issues. 20 C.F.R. § 498.215(b)(2). The burdens of persuasion are to be judged by a preponderance of the evidence. 20 C.F.R. § 498.215(c).

B. Issues

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

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

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold followed by the statement of pertinent facts and my analysis. I have carefully considered all the evidence and the arguments of both parties, although not all may be specifically discussed in this decision. I discuss the credible evidence given the greatest weight in my decision-making.² I also discuss any evidence that I find is not credible or worthy of weight. The fact that evidence is not specifically discussed should not be considered sufficient to rebut the presumption that I considered all the evidence and assigned such weight or probative value to the credible evidence that I determined appropriate within my discretion as an ALJ. There is no requirement for me to discuss the weight given every piece of evidence considered in this case, nor would it be consistent with notions of judicial economy to do so.

- 1. Respondent made three false statements of material fact on about August 16, 2007, on a “Statement for Determining Continuing Eligibility for Supplemental Security Income Payments,” statements that he knew or should have known were false.**
- 2. Respondent caused an individual to make a false statement on about August 22, 2007, in connection with the determination of Respondent’s continuing eligibility for SSI benefits, a statement that Respondent knew or should have known to be false.**
- 3. Respondent made a false statement of material fact in his application for SSI on about October 1, 2010, which he knew or should have known to be false.**
- 4. Respondent made a false statement of material fact in his application for SSI on November 18, 2010, which he knew or should have known to be false.**
- 5. Respondent knowingly failed to report material facts between December 2006 and September 2008, and he knew or should have know that the failure to report was misleading.**

² “Credible evidence” is evidence that is worthy of belief. *Black’s Law Dictionary* 596 (18th ed. 2004). The “weight of evidence” is the persuasiveness of some evidence compared to other evidence. *Id.* at 1625.

a. Allegations

The I.G. notified Respondent by letter dated July 1, 2011, that he was considering imposing a CMP and an assessment. SSA Ex. 7; Tr. 53-54. The I.G. notified Respondent by letter dated October 11, 2011, that the I.G. proposed to impose a CMP of \$140,000 and an assessment in lieu of damages of \$7,658 pursuant to section 1129 of the Act. The notice stated that the action was based upon Respondent's failure between January 1999 and September 2008, to notify SSA that Respondent owned real property, bank accounts, stock, and that Respondent lived in several different locations. The I.G. cited in its notice the following false statements to SSA:

- (i.) Respondent falsely reported that he lived at 350 Ward Avenue, #106, Honolulu, Hawaii since June 15, 2007 in a Statement for Determining Continuing Eligibility for Supplemental Security Income Payments (August 16, 2007 Continuing Eligibility Statement) completed on August 16, 2007.
- (ii.) Respondent falsely reported that he had one bank account with the Bank of Hawaii with an average daily balance of \$200 since June 2005, in the August 16, 2007 Continuing Eligibility Statement.
- (iii.) Respondent falsely reported that all his assets were listed on the August 16, 2007 Continuing Eligibility Statement.
- (iv.) Respondent caused Jean Campbell to falsely report to SSA that she rented Respondent a room at 350 Ward Avenue, #106, Honolulu, Hawaii for \$395 per month, in a Statement of Claimant or Other Person completed on August 22, 2007.
- (v.) Respondent falsely reported that he lived at 350 Ward Avenue, #106, Honolulu, Hawaii in a reapplication for SSI benefits that he filed on October 1, 2010.
- (vi.) Respondent falsely reported that he lived at 350 Ward Avenue, #106, Honolulu, Hawaii in a reapplication for SSI benefits that he filed on November 18, 2010.

SSA Ex. 8; Tr. 55. The I.G. stated in footnotes in the notice that the \$140,000 CMP was calculated as \$5,000 for each of the 22 months that Respondent failed to report or withheld information and \$5,000 for each of the six false statements. The \$7,658 assessment was twice the amount of SSI benefits Respondent received during the six years prior to the notice and within the statute of limitations. SSA Ex. 8.

The I.G. alleged at hearing and in his post-hearing brief the same six false statements included in the I.G.'s October 11, 2011 notice and that Petitioner withheld and failed to report material facts for the 22 months from December 2006 through September 2008. SSA Br. at 2. Counsel for the SSA I.G. agreed at hearing that no action may be maintained based on Respondent's conduct prior to October 11, 2005, due to the application of the statute of limitations. Tr. 21-23, 52; Act § 1129(b)(1) (Commissioner may not initiate an action later than 6 years after the date the violation was committed); 20 C.F.R. § 498.132(b) (I.G. may initiate action within six years from the date on which the violation was committed). Counsel for the SSA I.G. also explained at hearing that there were no charges for withholding or failure to report material information prior to December 2006, as the effective date of 20 C.F.R. § 498.102(a)(3) was November 26, 2006. Tr. 23-25, 33, 51; 71 Fed. Reg. 28574, 28575 (May 17, 2006). The I.G. seeks approval of a CMP of \$110,000 for Respondent's failure to disclose or report material facts for the 22 months from December 2006 through September 2008 calculated at the maximum authorized CMP of \$5,000 for each of the 22 months. The I.G. seeks approval of a \$5,000 CMP for each of the six false statements. The I.G. also seeks approval of the assessment of \$7,658, which is twice the amount of SSI benefits Respondent received for the months December 2006 through September 2008. Tr. 26-27; SSA Br. at 2. There is no issue in this case of Respondent's entitlement to benefits under Title II of the Act, which he continued to receive monthly at the time of hearing. Tr. 24, 218.

b. Facts

(i.) August 16, 2007 Continuing Eligibility Statement – False Address

On August 16, 2007, Respondent signed a "Statement for Determining Continuing Eligibility for Supplemental Security Income Payments (August 16, 2007 Continuing Eligibility Statement). SSA Ex. 1 at 5. Under "Living Arrangements," the document signed states, among other things, that "I began living at 350 Ward Ave Apt 106, Honolulu, HI 96814 on June 14, 2007." SSA Ex. 1, at 3; Tr. 118-20. The form states above Respondent's signature that he understands that knowingly lying or misrepresenting the truth or causing someone to do so is a crime that may be punished under federal law. The form also states that the person who signs attests that "[e]verything on this document is the truth as best I know it." SSA Ex. 1, at 5.

Investigator Dixon Chow, Hawaii Department of Human Services, testified that the 350 Ward Avenue #106 address was actually a "small mailbox" at a business located at that address that provided photocopy and shipping services as well as providing mailboxes. Tr. 197-98. It is clear from the testimony of Investigator Chow that he visited the address and personally observed the location and his testimony is given significant weight.

SSA Ex. 4, at 696 is a rental application that Respondent signed on October 17, 2006. Tr. 187. The signatures on SSA Ex. 4, at 696 and the signatures on SSA Ex. 1, at 5 and the Request for Hearing, which are indisputably Respondent's signatures, are all enough alike to permit the inference they were all made by Respondent. Respondent states on the rental application that his employer is Hawaii Physically Fit at 350 Ward Avenue, Suite 106, Honolulu, Hawaii. SSA Ex. 4, at 696. Respondent also stated on the rental application dated October 17, 2006, that his current residence address was 1448 Young Street, Honolulu, Hawaii with a monthly rental of \$1,750 and that he had lived there since January or February 1, 2006. SSA Ex. 4, at 696.

Respondent's distinctive signature also appears on a Mercedes Benz Financial Credit Application related to the lease of a 2007 Mercedes Benz E350 with 25 miles with a total capitalized cost of \$57,395 and a monthly lease payment of \$902.31. Respondent states on the form that his employer is Hawaii Physically Fit, located at 350 Ward Avenue #106, Honolulu, Hawaii. SSA Ex. 4, at 684-86. The credit application is undated. However, the certificate of title issued in Respondent's name is dated December 1, 2006, which permits me to infer that it is more likely than not that the credit application was completed sometime in November 2006. SSA Ex. 4, at 689.

The evidence supports a finding that the address 305 Ward Avenue # 106, Honolulu, Hawaii, was not a residential address for Respondent. I also find as facts that Respondent did not begin living at 305 Ward Avenue #106, Honolulu, Hawaii on June 14, 2007 and that he never resided or lived at that address. I find as fact, based upon Respondent's statements in the October 17, 2006 rental application, that his residence address from January or February 2006 to October 17, 2006, was 1448 Young Street, Honolulu, Hawaii with a monthly rental of \$1,750. SSA Ex. 4, at 696; Tr. 187. I further find as fact, based upon the rental agreement dated October 20, 2006, that Respondent leased an apartment as a tenant at 1221 Victoria Street, Apartment 1702, Honolulu, Hawaii for the period October 23, 2006 to October 23, 2007, at the rate of \$1,800 per month. SSA Ex. 4, at 695. The testimony of Investigator Chow (Tr. 187) and Special Agent Campos support a finding that Respondent resided at the 1221 Victoria Street address in September 2008 and December 2010 (Tr. 229-31). I infer that, except for possible brief absences, Respondent resided at 1221 Victoria Street from October 23, 2006 to December 2010.

(ii.) August 16, 2007 Continuing Eligibility Statement – False Bank Account Information

The August 16, 2007 Continuing Eligibility Statement that Respondent signed states, under "Resources," that from June 1, 2005 and continuing, Respondent owned one bank account in the Bank of Hawaii with a value of \$200. SSA Ex. 1, at 3; Tr. 119.

Respondent does not deny that the evidence shows that from June 2005 through January 2007, he was listed as the owner of a savings account with the American Savings Bank, with monthly balances ranging from a low of \$1,348.29 to a high of \$65,366.06 during that period. SSA Ex. 12, at 1-2; Tr. 91.

Respondent does not deny that the evidence shows that from June 2005 through January 2007, he was listed as an owner of a “Value Checking” account with American Savings Bank, with monthly balances ranging from a low of \$0 to a high of \$387,156.82, during that period. SSA Ex. 12, at 3-4; Tr. 91-92.

Respondent does not deny that from June 2005 to January 2007, he was listed as the owner of a “Self Service Checking” account with the Bank of Hawaii, with monthly balances ranging from a low of \$23 to a high of \$4,340.38, during the period. SSA Ex. 12, at 8, Tr. 92.

(iii.) August 16, 2007 Continuing Eligibility Statement – False Reporting of Assets

The August 16, 2007 Continuing Eligibility Statement that Respondent signed states that he owned no other resources from June 1, 2005 and continuing except the one bank account in the Bank of Hawaii with a value of \$200. SSA Ex. 1, at 3. The form also states that Respondent had not received income from any source other than Social Security. SSA Ex. 1, at 4.

Respondent does not dispute that state records show that on June 29, 2007, Respondent sold real property for \$260,000, property that he had purchased on July 20, 2005. SSA Ex. 11, at 1; Tr. 85-86. Respondent does not dispute that on about July 27, 2005, a sale of an interest in real property was recorded with him listed as seller and that he received a payment from an escrow service in the amount of \$408,998.64 that he deposited in a checking account with American Savings Bank. SSA Ex. 11, at 4-6; SSA Ex. 4, at 604, 636-41, 652-54, 660, 667; Tr. 88-89.

Respondent does not dispute that he did not report in the August 16, 2007 Continuing Eligibility Statement assets and resources available to him from June 1, 2005 to August 16, 2007, specifically the sale of the property on June 29, 2007, the ownership of that property from July 20, 2005 to June 29, 2007, or the receipt of funds represented by the check from the escrow service on or about July 27, 2005.

Respondent does not dispute that he did not disclose the two American Savings Bank checking accounts and the American Savings Bank savings account for which he was listed as owner. SSA Ex. 12, at 1-4.

Respondent stated in a rental application dated October 17, 2006, that he received a monthly salary of \$4,000 from Hawaii Physically Fit. He also reported bank accounts at the American Savings Bank and the Bank of Hawaii. SSA Ex. 4, at 696; Tr. 187. In the Mercedes Benz Financial Credit Application from November 2006, Respondent stated that he was the owner of Hawaii Physically Fit with a gross monthly income of \$10,000. SSA Ex. 4, at 684-89. Respondent does not deny that he failed to report his ownership and income from Hawaii Physically Fit in the August 16, 2007 Continuing Eligibility Statement.

(iv.) August 22, 2007 Statement of Claimant or Other Person –
False Report of Rental by Jean Campbell

On August 22, 2007, a person listed as Jean Campbell completed a “Statement of Claimant or Other Person” on which it is stated that she rented a room to Respondent for \$395 per month and had done so since June 2007. The form advises that one who makes or causes to be made a false statement or representation of material fact in an application or for use in determining eligibility under the Act is subject to criminal prosecution under federal law. The form also states that the person who signs affirms that all information in the form is true. SSA Ex. 2; Tr. 120-21.

I have found, based upon the rental agreement dated October 20, 2006, that Respondent leased an apartment as a tenant at 1221 Victoria Street (referred to as the Admiral Thomas), Apartment 1702, Honolulu, Hawaii for the period October 23, 2006 to October 23, 2007. SSA Ex. 4, at 695. The testimony of Investigator Chow (Tr. 187) and Special Agent Campos support a finding that Respondent resided at the 1221 Victoria Street address in September 2008 and December 2010 (Tr. 229-31). Respondent states in his request for hearing that he rented the property for the four years prior to filing his request for hearing on November 11, 2011. I infer that, except for possible brief absences, Respondent resided at 1221 Victoria Street from October 23, 2006 to December 2010.

I find that the statement that bears the name of Jean Campbell is, therefore, false. I infer absent evidence to the contrary that the statement was for the benefit of Respondent and thus induced or caused by him.

(v.) October 1, 2010 SSI Application – False Address

Respondent does not deny that on October 1, 2010, he filed an application for SSI and at that time reported that his address was 350 Ward Avenue, Apartment 106, Honolulu, Hawaii 96814. SSA Ex. 3, at 11; Tr. 144. 211-12. I have found for reasons already discussed, that Respondent did not reside at the address he reported in his application to be his residential address.

(vi.) November 18, 2010 SSI Application – False Address

Respondent does not deny that on November 18, 2010, he filed an application for SSI and at that time reported that his address was 350 Ward Avenue, Apartment 106, Honolulu, Hawaii 96814. SSA Ex. 3, at 69; Tr. 215. I have found for reasons already discussed, that Respondent did not reside at the address he reported in his application to be his residential address.

(vii.) December 2006 through September 2008 – 22 Months Failure to Report

Based upon the foregoing findings of fact, I find that Respondent omitted or failed to report the following material facts from December 2006 through September 2008:

- During the 22 months from December 2006 through September 2008, Respondent lived at 1221 Victoria Street, Apartment 1702 in December 2006 and continued to do so through September 2008, with a monthly rental expense of \$1,800.
- In December 2006, Respondent held a lease on a 2007 Mercedes Benz E350, with a monthly lease payment of \$902.31.
- In December 2006 and January 2007, Respondent had bank accounts with both the American Savings Bank and the Bank of Hawaii. The ending balance for his American Savings Bank savings account was \$37,442.67 in December 2006 and \$35,438.45 in January 2007. SSA Ex. 12, at 2. The ending balance for one of his American Savings Bank checking accounts (Value Checking Account) was \$0 in December 2006 and \$9,918.41 in January 2007. SSA Ex. 12, at 4. The ending balance for his Bank of Hawaii “Self Service Checking” account was \$23 in December 2006 and \$466 in January 2007. SSA Ex. 12, at 8.
- On June 29, 2007, Respondent sold real property for \$260,000. SSA Ex. 11, at 1-3; Tr. 85-86.

(viii.) Overpayment Amount from December 2006 through September 2008.

In December 2006, Respondent received a payment of \$168 as his SSI benefit. For January 2007 through October 2007, Respondent received SSI benefits of \$173 per month. For November and December 2007, Respondent received SSI benefit payments of \$173.50 per month. Respondent received payments of \$176 per month for January 2008 through September 2008. Respondent received SSI benefit payments totaling \$3,829 for the period December 2006 through September 2008. SSA Ex. 6; Tr. 123-26.

c. Analysis

Congress specified in the Act that the Commissioner shall not make a determination adverse to any person under section 1129 until the person has been given written notice and an opportunity for a hearing. Act § 1129(b)(2); 20 C.F.R. § 498.109(a)(2). Respondent received the required notice and exercised his right to a hearing before an ALJ. A hearing was conducted as required by 20 C.F.R. §§ 498.202-.219. This decision is issued in accordance with 42 C.F.R. § 498.220.

Having determined that Respondent made or caused to be made false statements and that he omitted to report facts, it is necessary to determine whether the false statements and omitted facts were material to determining whether Respondent was entitled to continuing payment of SSI benefits or the amount of those benefits; and Respondent knew or should have known the facts he reported, caused to be reported, and omitted to report were false or misleading or that he made the false statements with knowing disregard for the truth. Act § 1129(a)(1).

A material fact is a fact that the Commissioner may consider in evaluating whether an applicant is entitled to benefits or payments under titles II, VIII, or XVI of the Act. Act § 1129(a)(2); 20 C.F.R. § 498.101. I conclude that the facts Respondent reported that were false and the facts that he failed to report were material to a determination by SSA regarding Respondent's right to continue to receive payment of SSI benefits and the amount of those benefits.

Eligibility for SSI benefits and the amount of those benefits is clearly dependent upon the beneficiary's income and resources. 20 C.F.R. § 416.203-.262. Pursuant to 20 C.F.R. § 416.704(a)(1), as a recipient of SSI payments, Respondent was responsible to make reports to SSA. The regulations specifically state that it is important for the beneficiary to report because continuing eligibility for SSA benefits or the amount of the benefits may be affected. 20 C.F.R. § 416.701(a). Pursuant to 20 C.F.R. § 416.708, Respondent was required to report a change of address, a change in living arrangements, a change in income, and a change in resources, among other things. The regulatory requirement to report the specified events is consistent with a conclusion that the facts of these events

are material to a determination of initial and continuing eligibility. The testimony of Kim Matsuoka-Chun, Operations Supervisor, SSA, supports my conclusion that the false facts Respondent reported or caused to be reported and the facts he failed to report are material within the meaning of the Act and regulation. Tr. 103, 105, 108, 110, 201-10.

I also conclude that Respondent knew or should have known that the facts he reported or caused to be reported and omitted to report were false or misleading and that he made the false statements with knowing disregard for the truth. Respondent knew or should have known exactly where he resided at the time he made his false statements or representations regarding his residence address. The evidence shows that he bought and sold real estate and entered into lease agreements. The evidence shows that he executed a lease for a Mercedes Benz. The evidence also shows that he maintained more than one active bank account in two different banks. Respondent argues in his request for hearing that he had diminished mental capacity at the time the false statements were made or caused to be made and when he failed to report. However, that assertion is inconsistent with his financial activities at the time the false statements were made and his failure to report as reflected in the evidence.

I conclude that the elements of section 1129(a)(1) of the Act are satisfied in this case and a CMP and assessment are authorized.

6. A \$140,000 CMP and an assessment of \$7,658 are reasonable in this case.

A maximum CMP of \$5,000 for each false statement or representation of material fact and for each month of withholding or failure to report a material fact is authorized by section 1129(a)(1) of the Act and 20 C.F.R. §§ 498.102(a) and 498.103(a). Also authorized is an assessment of not more than twice the amount of benefits or payments received as a result of the false statements, representations, omissions or failure to report material facts. Act 1129(a)(1); 20 C.F.R. § 498.104.

Pursuant to 20 C.F.R. § 498.220(b), I have the authority to affirm, deny, increase, or reduce the penalties or assessment proposed by the SSA I.G. In determining the amount of penalties or assessment, my review is *de novo*, and, just as the I.G. did when proposing penalties, I must consider the factors specified by section 1129(c) of the Act:

- (1) the nature of the statements, representations . . . 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.

Act § 1129(c).

(a) Nature of the statements and representations and the circumstances under which they occurred.

Respondent's conduct was egregious. He clearly lied on the August 16, 2007 Continuing Eligibility Statement about where he lived and his assets and resources. He also clearly failed to report facts related to his income and resources during the period December 2006 through September 2008. There can be no doubt that Respondent misrepresented and omitted to report material facts to ensure that he continued to receive his SSI payments that ranged from \$168 to \$176 per month, while he drove a new Mercedes during at least part of the pertinent period. Respondent alleges in his request for hearing that he suffered from diminished mental capacity due to medication at the time. However, his activities during the period show that his actions were knowing and deliberate, including obtaining a false statement of another to support his false statements. Egregious conduct of this nature is not acceptable and cannot be tolerated due to the risk it poses to the limited resources of Social Security that must be allocated among the truly eligible. Deterrence of Respondent and others may also be furthered by imposition of the maximum CMP and assessment in egregious cases such as this.

(b) Degree of culpability, history of prior offenses, and financial condition of Respondent.

The simple definition for culpability is blameworthiness. *Black's Law Dictionary* 406 (18th ed. 2004). Respondent is clearly culpable for his false statements and his failure to report material facts. He has offered no medical evidence from the period when the false statements and omissions were made that support a finding of diminished mental capacity and reduced culpability. R. Ex. 1. There is evidence that Respondent pled no contest and was convicted in state court of one count of second degree theft and six counts of medical assistance fraud in February 2010. Tr. 74; SSA Ex. 13. However, it is not clear from the testimony of Investigator Chow or the record of the conviction that the charges were based upon the same conduct of Respondent that is before me for consideration. I have no other evidence of the specifics of the charges to which Respondent pled no contest. Thus, I give no weight to the prior state court conviction. Respondent has presented no current financial data upon which to judge his ability to pay and I find his unsworn statements that he is destitute an inadequate basis to reduce the CMP or the assessments from the maximum authorized.

Accordingly, I conclude that the maximum CMP permitted under the Act of \$5,000 for each of the 6 false statements and each of the 22 months of failure to report material facts as well as an assessment of twice the amount of benefits received due to the false statements and failure to report are appropriate in this case.

III. Conclusion

For the foregoing reasons, I conclude that a CMP of \$140,000 and an assessment of \$7,658, are appropriate in this case.

/s/
Keith W. Sickendick
Administrative Law Judge

STATEMENT OF APPEAL RIGHTS PURSUANT TO 20 C.F.R. § 498.221

(a) Any party may appeal the decision of the ALJ to the DAB by filing a notice of appeal with the DAB within 30 days of the date of service of the initial decision. The DAB may extend the initial 30-day period for a period of time not to exceed 30 days if a party files with the DAB a request for an extension within the initial 30-day period and shows good cause.

* * * *

(c) A notice of appeal will be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions, and identifying which finding of fact and conclusions of law the party is taking exception to. Any party may file a brief in opposition to exceptions, which may raise any relevant issue not addressed in the exceptions, within 30 days of receiving the notice of appeal and accompanying brief. The DAB may permit the parties to file reply briefs.

(d) There is no right to appear personally before the DAB, or to appeal to the DAB any interlocutory ruling by the ALJ.

(e) No party or person (except employees of the DAB) will communicate in any way with members of the DAB on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

(f) The DAB will not consider any issue not raised in the parties' briefs, nor any issue in the briefs that could have been, but was not, raised before the ALJ.

(g) If any party demonstrates to the satisfaction of the DAB that additional evidence not presented at such hearing is relevant and material and that there were reasonable grounds for the failure to adduce such evidence at such hearing, the DAB may remand the matter to the ALJ for consideration of such additional evidence.

* * * *

(i) When the DAB reviews a case, it will limit its review to whether the ALJ's initial decision is supported by substantial evidence on the whole record or contained error of law.(j) Within 60 days after the time for submission of briefs or, if permitted, reply briefs has expired, the DAB will issue to each party to the appeal and to the Commissioner a copy of the DAB's recommended decision and a statement describing the right of any respondent who is found liable to seek judicial review upon a final decision.

Respondent's request for review by the DAB automatically stays the effective date of this decision. 20 C.F.R. § 498.223.